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FOREIGN RIGHTS AND INTERESTS IN CHINA

BY
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CHAPTER XXII

Extraterritoriality in China

A thorough understanding of the extraterritorial rights enjoyed by foreigners resident, trading, or travelling in China is a prerequisite to an understanding of the domestic conditions in that country as well as of its international relations. It is a subject, therefore, which will be considered with some degree of particularity. In pursuing this inquiry we are fortunate in having the aid of such works as those of Koo, Tyau, Morse, Piggott, Hinckley, and Liu.[1]

Trade Conditions Prior to 1842. In 1842, when the Treaty of Nanking was signed, for the first time formal treaty relations between China and the other Powers were established.[2]

[1] V. K. Wellington Koo, *The Status of Aliens in China*, 1912; M. T. Z. Tyau, *The Legal Obligations Arising Out of Treaty Relations Between China and Other States*, 1917; H. B. Morse, *The Trade and Administration of China*, 1913; and *The International Relations of the Chinese Empire*, 3 vols., 1910-1918; F. E. Hinckley, *American Consular Jurisdiction in the Orient*, 1906; Sir Francis Piggott, *Extraterritoriality*, 1907; and Liu Shih-shun, *Extraterritoriality, Its Rise and Its Decline*, 1925.

For references to all extraterritorial provisions in treaties between China and the Powers, see Appendix 1 to the Report on Extraterritoriality in China.

[2] This statement, perhaps, needs qualifications as regards certain early trade agreements in the seventeenth and eighteenth centuries

There has been a rather general impression that, throughout her history, China has looked with disfavor upon foreigners and upon foreign intercourse. This, however, is not correct. As we shall presently see, the Chinese did, in earlier times, view foreigners and their civilizations with contempt, but that contempt was a tolerant one, and a reasonably liberal policy with regard to foreigners was pursued. It was not until the sixteenth and seventeenth centuries, when China had suffered from acts of violence of Portuguese, the Spaniards, the British, and Dutch, that she assumed a more exclusive and illiberal attitude.[8]

During centuries of her history China had been in direct contact only with peoples whose civilizations were distinctly inferior to her own, and, as she was well aware, such culture as these other peoples came to have was, to a considerable degree, obtained by borrowing from and imitating her own. It is thus understandable

between Russia and China. These early treaties, however, made no provision for placing international relations with China upon a formal or systematic basis. It was not until the Treaties of Tientsin, in 1858, that provision was made for the stationing of regular diplomatic representatives at Peking. Not until 1860 did the Chinese create a Foreign Office—the Tsungli Yamen, now known as the Waichiaopu. Before this time the Chinese Government dealt with the representatives of foreign Powers as agents of States inferior to, or dependent upon, itself.

[8] S. Wells Williams, in his standard treatise, *The Middle Kingdom* (Chapter XXI, "Foreign Intercourse with China") says: "The ill conduct of the foreign traders themselves, however, must be regarded as the chief cause of the jealousy and seclusion with which they were treated. 'Their early conduct,' says Davis [an early writer on China], speaking of the Portuguese, 'was not calculated to impress the Chinese with any favorable idea of the Europeans: and when, in the course of time, they came to be competitors with the Dutch and the English, the contests of mercantile avarice tended to place them in a still worse point of view.' To this day, the character of Europeans is represented as that of a race of men intent alone on the gains of commercial traffic, and regardless altogether of the means of attainment."

that she should have felt that, as compared with herself, other peoples of the world were barbarians and worthy of treatment as such. An excellent illustration of the view held of foreign Powers by the Chinese high official class is the Mandate of the Chinese Emperor Ch'ien Lung to George III of England who, in 1793, had sent to China an embassy, headed by Earl Macartney, with a view to improving commercial relations between the two countries. The Mandate is too long for quotation entire, but the following extract will reveal its general tone:

You [George III], O King, live beyond the confines of many seas, nevertheless, impelled by your humble desire to partake of the benefits of our civilization, you have dispatched a mission respectfully bearing your memorial . . . I have perused your memorial: the earnest terms in which it is couched reveal a respectful humility on your part, which is highly praiseworthy. In consideration of the fact that your Ambassador and his deputy have come a long way with your memorial and tribute, I have shown them high favor and have allowed them to be introduced into my presence. To manifest my indulgence, I have entertained them at a banquet and made them numerous gifts. . . As to your entreaty to send one of your nationals to be accredited to my Celestial Court and to be in control of your country's trade with China, this request is contrary to all usage of my dynasty and cannot possibly be entertained. . . If you assert that your reverence for Our Celestial dynasty fills you with a desire to acquire our civilization, our ceremonies and code of laws differ so completely from your own that, even if your Envoy were able to acquire the rudiments of our civilization, you could not possibly transplant our manners and customs to your alien soil. Therefore, however adept the Envoy might become, nothing would be gained thereby. Swaying the wide world, I have but one aim in view, namely, to maintain a perfect governance and to fulfill the duties of the State: strange and costly objects do not interest me. If I have commanded that the tribute offerings sent by you, O King, are to be accepted, this was solely in consideration for

the spirit which prompted you to despatch them from afar. Our dynasty's majestic virtue has penetrated into every country under Heaven, and Kings of all nations have offered their costly tribute by land and sea. As your Ambassador can see for himself, we possess all things. I set no value on objects strange or ingenious, and have no use for your country's manufactures.

In a second Mandate to King George, the Chinese Emperor said: "But as the tea, silks and porcelain which our Celestial Empire produces are absolute necessities to European nations and to yourselves, we have permitted, as a signal mark of favor, that foreign hongs should be established at Canton, so that your wants might be supplied and your country thus participate in our beneficence."[4]

Prior to 1842, foreign sea-borne trade with China was almost wholly through the port of Canton. The unsatisfactory character of the conditions under which this trade was carried on appears in the following description given by Dennett in his volume *Americans in Eastern Asia*:[5]

All foreigners in China were strictly confined to three localities: Macao, the old Portuguese leasehold under the simultaneous government of both the Portuguese and the Chinese; Whampoa, the anchorage in the Canton River, twelve miles below the city, where the foreign vessels were required to anchor and from which they were not permitted to depart until the issuance of the final "grand chop," indicating that every requirement of the Chinese authorities had been complied with; and, the "factories" or "hongs" outside the city wall at Canton.

Macao had three functions in trade. It was the base from which the Portuguese conducted their commercial operations, and also the base for a large part of the smuggling operations in

[4] For the fuller texts of these Mandates see MacNair, *Modern Chinese History: Selected Readings*, Chapter I.

[5] P. 46, *et seq.*

which all of the foreign merchants joined impartially. The city was an outpost of the Chinese Government where, exclusively, the permits to the foreign ships to go to Whampoa were issued. Every foreign vessel had to approach Canton through Macao. The third function of Macao was to afford a resort to the foreigners from Canton in the summer months, in times of illness, or whenever their conduct at Canton was obnoxious to the Chinese.

Whampoa was the second barrier to Canton. The river was not navigable to large vessels above the anchorage, and the factories could not have accommodated either all the foreign population or all the trade. The sailors, of whom there were at the height of the season from two to three thousand, lived on the ships at Whampoa and visited Canton only in small groups; they were, however, allowed to go ashore at the anchorage where settlements had grown up which doubtless merited the reputation which Roberts assigned to Macao. Provision was also made at Whampoa for the repair and refitting of the foreign vessels.

The first stage of the commercial operations began at Whampoa. The vessel paid its port charges—which in the case of the American vessels was usually about $4000—a sum which fell heavily upon the smaller craft, for the payments were not graduated to vessels below 400 tons. A linguist and a comprador, if not already obtained at Macao, must be taken at Whampoa. The hong merchant who was to transact the business of the vessel at Canton was also secured. He immediately had the cargo transferred to smaller craft and taken to Canton where it was sold or bartered for the return cargo. The hong merchant paid all the inward and outward duties. The master of the vessel was thus relieved of all responsibility except the care of his ship and the control of his crew, and the supercargo had only to follow his goods to Canton, indicate his choices of commodities for the return voyage and then watch carefully that he did not get cheated. Trading with China thus became the simplest of transactions in which the comfort of the trader was disturbed only by the thought that it was quite impossible for him to know the extent to which his payments for governmental dues and services rendered were extortions unwarranted by law or evaded by his competitor.

The factories were long, narrow buildings of two or three stories in height and extending back towards the city wall. Goods were landed at small docks and carried across a park or parade ground to the front of the factories which were divided into sections perpendicularly with storage rooms, offices on the lower floor and living quarters above for the commission agents, supercargoes and guests. Factory and residence space was rented from the merchants who owned the hong. Every foreigner coming to Canton had to be guaranteed by some one of the hong merchants, usually the one who transacted the business of the voyage. Foreigners were not permitted to enter the city nor were they allowed to leave the factory grounds either by land or water except under very limited conditions. They could not walk in the country; they were, theoretically, denied the use of boats; but on occasion, with a suitable Chinese guide and protector, they might visit the flower-gardens at Fati on the other side of the river. The foreigners were, in fact, voluntary prisoners.

By the Chinese Government the trade was limited to the hong merchants, usually about a dozen in number, who paid highly for their privilege and in turn became surety for the good conduct of the foreigners. These merchants were organized into a "co-hong" for concerted action in fixing prices, for mutual protection, and for the management of the trade. Some of the hong merchants became very wealthy; others experienced frequent financial reverses due either to the enmity of the governmental officials who levied tribute or to their own native instinct for speculation and gambling.

Back of the co-hong stood the provincial officials, the chief of whom was the Viceroy, representing the Emperor. Each official had purchased his way to the position he occupied and then recouped himself from the trade. The Imperial Government had only two concerns: that an ever-increasing amount of revenue be forwarded to Peking, and that the foreigner be so "soothed" and controlled that foreign nations would have no opportunity of acquiring any foothold in the Empire, or of advancing a mile further in the direction of the capital. The obligation resting upon the provincial government therefore was to keep Peking satisfied and at the same time to levy from the trade as much

tribute as it would bear. The powers of the Viceroy were very broad. His method of governing the foreigner was through the co-hong. He could make or break the Chinese merchant, fining, removing, even banishing him. The foreigner, in turn, as already indicated, was absolutely in the hands of the hong merchant from the day his vessel came to anchor at Whampoa until he had his return cargo on board. From the point of view of the Chinese Government the system was nearly nigh perfect. The Government in no way officially recognized the presence of the foreigner and admitted him to no direct intercourse, and yet the Government controlled the trader as only despots can. The ruination of the hong merchant involved the ruination of the foreigner to whom the hong was always in debt until the return cargo was safely on board at Whampoa. The foreigner had little choice but to submit.

There was, on the other hand, a recognition of the fact that injustice to the foreigner and encroachments upon such of his rights as he had not voluntarily surrendered would lead to irritation and trouble. The keynote therefore of the relationship between the Chinese and the foreigners was accommodation. This word occurs with great frequency in the literature of the time. It became of obvious advantage to everyone concerned that all relationships be managed in such a way as to insure harmony, which is another favorite Chinese word.

The last resorts of the Imperial officials for the enforcement of their will upon the foreigners were to stop the trade and then, if necessary, to cut off communications with Whampoa and Macao, thus effecting the complete imprisonment of the traders. Since the Government recognized no distinction between nations and might visit the sins of one merchant upon the entire body of traders by stopping the trade, a certain solidarity of public opinion developed which imposed upon each individual trader the obligation to accept the decisions of the majority.

"The whole history of the foreign trade with China, up to 1840," says Williams,[6] "is a melancholy and curious

[6] *The Middle Kingdom*, Chapter XXI (vol. II, p. 453, ed. 1871).

Chapter in national intercourse; for it is, after all, the daily and constant concerns of traffic, and not treaties or embassies, which constitute national dealings with such a people. The grievances, complained of, were delay in loading ships, and plunder of goods on their transit to Canton; the injurious proclamations annually put up by the Government, accusing foreigners of horrible crimes; the extortions of the underlings of office; and the difficulty of access to the high authorities. The hong-merchants, from their position as sole traders and interpreters between the parties, were able to delude both to a considerable extent; though, being responsible for the acts and payments of the foreigners, over whom they could exercise only a partial surveillance, rendered their situation by no means pleasant. The rule on which the Chinese Government proceeded in its dealings with foreigners has been thus translated by Premane: 'The barbarians are like beasts, and not to be ruled on the same principle as citizens. Were any one to attempt controlling them by great maxims of reason, it would tend to nothing but confusion. The ancient kings well understood this, and accordingly ruled barbarians by misrule: therefore, to rule barbarians by misrule is the true and best way of ruling them.'"[1]

Williams, however, goes on to point out that this same rule was the one applied to foreign traders during the reign of Henry VII of England, and it was not unlike the general practice of Europeans prior to the Reformation. Williams continues: "The Chinese at first feared and respected those who came to their shores, and whom they saw to be their superiors in the art of war and spirit of enterprise; and if means and conduct befitting the superior knowledge and civilization of their visitors had been

[1] This was a translation of the Confucian commentator, Su Tung-po.

taken to enlighten them, such efforts, it cannot be supposed, would have been useless or unappreciated. By degrees the respectful fear of the Chinese passed into haughty contempt; and the resolution taken to exact as much as possible from those who were determined to trade, and of whose real condition and power little or nothing was known."

Jurisdictional Disputes Prior to 1842. The situation being such as has been described, it is not surprising that there should have been frequent occasions for friction between the foreigners and the local Chinese officials. The Chinese were insistent that the foreigners should conform to the regulations prescribed by the Chinese Government, and that they should respect China's territorial jurisdiction. The foreigners, on the other hand, were unwilling to yield themselves to the control of laws which they deemed, in some important respects, cruel and unreasonable, or to courts in the uprightness and fairness of whose administration they had little confidence.

Especially the foreigners objected to the severity and cruelty of certain of the punishments prescribed by Chinese criminal law; to the bad condition of the Chinese prisons; to the toleration of the use of torture in the examination of persons accused of crime; to the extent to which the Chinese applied the doctrine of vicarious responsibility; and, in general, to the indefiniteness of the Chinese law and the mode of its administration.

Space will not permit an account of the various jurisdictional disputes which arose, prior to 1842, between the Chinese authorities and foreign traders and their respective Governments. It is sufficient to say that, though China was not able, in all cases, to exercise, in fact, the full powers belonging to her as the territorial sovereign, she did not abandon such rights, but, upon the

contrary, insisted upon them, and, in some cases, in a most energetic manner.[8]

Dr. Koo's analysis of the situation prior to 1842 is as follows:

A want of regard for Chinese laws characterized the foreigners who went to China in the seventeenth and eighteenth centuries. They were either adventurers or desperate characters, and, with the exception of a few missionaries, they were all animated by the sole desire to seek fortunes in a new land. It mattered little what the territorial laws required and what they prohibited; they came on a mission to replenish their purses and were prepared to leave as soon as their object was accomplished; in their opinion, it would have been disloyal to themselves to allow their conduct to be shackled by laws of which they knew nothing, and about which they did not care to know anything. A small number of them, endowed with an inquiring mind, indeed manifested an interest in Chinese laws and acquired a knowledge of them; but then, they observed, China was such a different country from their

[8] As, for example, in the celebrated Terranova Case. Terranova, an Italian by birth, while serving on an American ship in the harbor of Canton, was accused by the Chinese of having caused the death of a Chinese woman by negligently or deliberately dropping upon her head from the deck of the ship an earthenware jar. After some negotiations, Terranova was tried on board the American ship by a Chinese magistrate, and found guilty. According to American ideas, however, the mode of conducting the trial had been unfair to the accused, and his surrender to the Chinese authorities for execution was refused; whereupon the Canton authorities ordered American trade with the port stopped, and provisions be not supplied to the ship; and seized the security merchant and linguist of the American ship and held him in confinement. Terranova was then surrendered, and, after a second trial on shore, at which no foreigners were present, was again found guilty, and strangled to death immediately thereafter.

A writer in the *North American Review*, vol. XL, p. 66, who was an eye-witness at the first trial, reported that, at the time, the Americans said: "We are bound to submit to your laws while we are in your waters, be they ever so unjust. We will not resist them." See also the *Chinese Repository*, IX, p. 281, and Dennett, *Americans in Eastern Asia*, p. 86.

own, particularly in religion, that they considered it impossible to obey her laws without at the same time humiliating themselves and disgracing their own country. To govern themselves by laws with which they were familiar was equally impossible; there was no common organization in existence over them, nor could they recognize any one of their own class assuming to restrain their conduct in China and regulate their intercourse with the Chinese people. Under these circumstances it is not surprising that they considered themselves as exempt from all laws.[9]

As a presentation of the situation from another point of view, we may quote from the elaborate communication sent September 29, 1844, by Caleb Cushing to John C. Calhoun, Secretary of State, in support of the doctrine that American citizens in China should not be subjected to the laws and courts of the territorial sovereign:[10]

Nothing, it would seem, correspondent to our law of nations, is recognized or understood in China. I had some evidence of this in the progress of my own intercourse with the Chinese authorities; and there is abundance of public facts to the same effect. When, for example, Commodore Anson visited China, in 1841, the Chinese claimed to apply the municipal law to the *Centurion*, as they have repeatedly, since then, sought to do in case of other ships-of-war, those of the United States as well as of Europe. In the progress of the late events, we have seen the Chinese Government subject a diplomatic agent of Great Britain to personal restraint, and undertake to restrain the consuls of *all* foreign Powers in order to enforce the submission of the subjects of *one* Power. Subsequently, during the prosecution of hostilities, the Chinese paid no regard to flags of truce, and treated prisoners of war of both sexes as common felons. These things evince utter ignorance, or at least disregard of the law of nations, as understood in Europe. Similar inferences are deducible from

[9] *Op. cit.*, p. 64.

[10] *Sen. Ex. Doc.* 58, 28th Cong., 2nd sess. In 1844, while in China, Mr. Cushing negotiated the first Sino-American treaty.

the fact that formerly all ministers of European States in China (except perhaps those of Russia) were compelled to admit, either directly or indirectly, the sovereignty of China; for the several Dutch and Portuguese ministers who visited Peking did homage to the Ta Howang Tei, and even Lord Macartney and Lord Amherst, though the former peremptorily refused to do homage and the latter was reluctantly persuaded by Sir George Staunton to refuse it, yet went to Peking, both of them, knowingly and with tacit acquiescence designated as tribute bearers.

"With such extravagant political pretences," Mr. Cushing continues, "it is to be supposed, of course, that the Chinese Government would assert a complete and exclusive municipal jurisdiction over all the persons within the territory and waters of the empire."

Yet Mr. Cushing admitted, as perforce he was obliged to do, that the Chinese were at that time a highly civilized people. He said: "It is impossible to deny to China a high degree of civilization, though that civilization is, in many respects, different from ours; yet the magnitude of the Empire, the stability of its political institutions, the great advancement which the Chinese have made in the arts of life, the sedulous cultivation of letters, as well as the other useful and ornamental objects of intellectual pursuit, are such as to give China as complete a title to the appellation of civilized as many if not most of the States of Christendom can claim."

Basis of Extraterritoriality in China. Despite the admission which has been quoted, Mr. Cushing went on to contend that the American Government should demand extraterritorial rights in China for American citizens, not as a matter of concession upon the part of China, but as a principle of established international law;—that is, that such a nation as China then was, was not entitled to assert the general principle of territorial sovereignty

in order to retain jurisdiction over foreigners within her borders. In substantiation of this doctrine Mr. Cushing relied upon what had been the practice among European nations prior to the development of the comparatively modern idea of exclusive territorial sovereignty, and what had continued to be the practice with reference to status of nationals of the Western Powers residing in the Levant.

It is quite clear, however, that Mr. Cushing was in error in founding the claim to extraterritorial rights in China upon the same basis as that supporting them in the Mohammedan countries of the Near East, or in finding for them a homologue in the conceptions of personal sovereignty which prevailed in Europe prior to the fifteenth and sixteenth centuries.

As regards this latter point, Mr. Cushing himself states that China insisted upon the doctrine of territorial jurisdiction, though she was not always successful in securing its application.[11] As contrasted with this, the Mohammedan States were, as a rule, more than willing that the foreigners—and unbelievers—should remain under their own national laws, and, out of this willingness, developed a custom, extending over many years, and recognized by many "capitulations" which supported the system of extraterritoriality which existed in Turkey and other Mohammedan countries. This was not felt by those countries as in derogation of their sovereignty or national dignity.

[11] Morse calls attention to the fact that the early treaties between China and Russia in the seventeenth and eighteenth centuries contained mutual provisions for the handing over to their own officials for punishment nationals committing offenses in the other's country. But no arrangement was made for the appointment by Russia of consuls or other officials who might exercise jurisdiction in China. *Trade and Administration in China*, Chap. VII.

In fine, then, upon this rather important point we would hold that Dr. Koo is well justified in the extended criticism which he makes of Mr. Cushing's argument and agree with him that the whole body of extraterritorial rights which have existed in China for three-quarters of a century owe their legal existence to concessions made by China in her treaties with Western Powers; in short, that these treaties created rights and did not simply recognize rights which had another origin.[12]

Origin of Extraterritoriality in China. This situation in which the foreigners were unwilling to yield obedience to, and the Chinese insisted upon subjection to, the local

[12] "The assertion and exercise by Great Britain of jurisdiction over her subjects in China," says Dr. Koo (p. 63), "were commenced nearly a decade before China's consent to such questionable procedure was obtained. . . . What Great Britain succeeded, therefore, in wringing from China at the end of the expensive and ignoble war in 1842, in respect of the question of jurisdiction over British subjects in China, was merely an official recognition of what had already been brought into being and engrafted on her, in practice, without her consent or countenance."

Mr. Hinckley in his *American Consular Jurisdiction in the Orient*, takes the same position as that of Dr. Koo. He says (p. 15):

"Between the treaties with Turkey and those with China there is this fundamental difference, that the treaties with China contain no reference to privileges resting upon customs and usages. With the exception of the restricted privileges enjoyed by the Russian caravans in extreme northwestern China many years before the western European treaties with China were made, these treaties marked the very beginning of extraterritorial jurisdiction in that country. The earlier practice had, in fact, been just the opposite of that stipulated in the treaties. But the customary rights of foreigners in Turkey were so considerable and of so long standing that no attempt was made to reduce all of them to explicit written statement."

And on page 16, Hinckley adds: "Another fundamental distinction is that in the Mohammedan states foreigners of whatever Christian nation, whether subjects of the treaty powers or not, are by immemorial custom permitted to enjoy extraterritorial privileges through the system of consular protection."

law and local authorities, inevitably led to constant disputes and became still more unendurable when the matter of the control of the importation of Indian opium into China became involved. The so-called Opium War between China and Great Britain, which was the result of this friction, was terminated by the Treaty of Nanking in 1842, which marks not only the legalized beginning of the system of extraterritorial rights in China, but also of formal treaty relations between China and the Western Powers. Elsewhere we shall have occasion to speak of the provisions of this Treaty of Nanking with reference to foreign trade with China. Here we shall be concerned only with its bearing upon the matter of extraterritoriality.

Extraterritorial rights were not expressly granted in the treaty, but that instrument made provision for the functioning of British Consular officials in China, and it is clear that it was the understanding of those who negotiated the treaty that extraterritorial rights should be enjoyed by British traders resident in China. This understanding was given expression to in the so-called "General Resolutions" issued in pursuance of the Treaty. Article XIII of these Resolutions read as follows:

> Whenever a British subject has reason to complain of a Chinese he must first proceed to the Consulate and state his grievance. The consul will thereupon inquire into the merits of the case, and do his utmost to arrange it amicably. In like manner, if a Chinese have reason to complain of a British subject, he shall no less listen to his complaint and endeavor to settle it in a friendly manner. . . . If, unfortunately, any disputes take place of such a nature that the Consul cannot arrange them amicably, then he shall request the assistance of a Chinese officer, that they may together examine into the merits of the case, and decide it equitably. Regarding the punishment of English criminals, the English Government will enact the laws necessary to

attain that end, and the Consul will be empowered to put them in force; and regarding the punishment of Chinese criminals, these will be tried and punished by their own laws, in the way provided for by the correspondence which took place at Nanking, after the concluding of the peace.[13]

It will be noted that, as correlative to the granting of this special status to resident merchants, the Chinese Government, in the Supplementary Treaty of 1843, took care to have it expressly stated that the merchants should not have the right to repair to, or trade at, any but the five specified ports, and that even as to those ports, the foreign merchants were not to go into the surrounding country beyond certain short distances to be named by the local authorities in concert with the British Consul.[14]

American Treaty of 1844. The right to exercise extraterritorial rights received still more explicit statement in

[13] *Customs Treaties*, I, p. 388.

[14] Dennett, in his *Americans in Eastern Asia* (p. 162), says: "From the phrasing of this Article (13) it is clear, even though there were no other proof, that the doctrine in substance, even though not included in the treaty, had been one of the concessions obtained by Sir Henry Pottinger as a fruit of the English victory." In a footnote, Dennett adds: "In the final instructions issued by Lord Palmerston to Charles Elliot, the concession of extraterritoriality was outlined in Art. VII of the substitute Articles which were to be inserted in the proposed treaty with China in case the British representatives were unable to secure the cession to Great Britain of any islands. From the facts of the final settlement it may, therefore, be inferred that in 1842 the Chinese Government preferred to cede Hongkong rather than to grant extraterritoriality. It would also appear as though Lord Palmerston regarded the possession of a military and administrative base in the coast of China as, at least in part, a substitute for the concession of extraterritorial privileges."

For an account of British Statutes and Orders in Council, making provision for the exercise in China of British consular and other jurisdiction, see Koo, *op. cit.*, pp. 138 ff. It may be observed that some of these British provisions antedated the grant to Great Britain by China of extraterritorial rights.

Articles XVI, XIX, XXI, XXIV and XXV of the treaty of 1844 between the United States and China. Article XXI, governing criminal matters, read:

> Subjects of China who may be guilty of any criminal act towards citizens of the United States shall be arrested and punished by the Chinese authorities according to the laws of China, and citizens of the United States who may commit any crime in China shall be subject to be tried and punished only by the Consul or other public functionary of the United States thereto authorized according to the laws of the United States; and in order to secure the prevention of all controversy and disaffection, justice shall be equitably and impartially administered on both sides.[15]

This article, it will be observed, related only to criminal cases. In Article XXIV, however, there was the provision that "if controversies arise between citizens of the United States and subjects of China which cannot be settled amicably otherwise, the same shall be examined and decided conformably to justice and equity by the public officers of the two nations acting in conjunction." And in Article XXV it was declared:

> All questions in regard to rights, whether of property or person, arising between citizens of the United States in China, shall be subject to the jurisdiction of, and regulated by the authorities of their own Government. And all controversies occurring in China between citizens of the United States and subjects of any other Government shall be regulated by the treaties existing between the United States and such Governments, respectively, without interference on the part of China.[16]

And, furthermore, by Article XVI, there was the following specific provision with regard to the procedure for the collection of debts:

[15] *Customs Treaties*, I, p. 685.
[16] *Customs Treaties*, I, p. 687.

The Chinese Government will not hold itself responsible for any debts which may happen to be due from subjects of China to citizens of the United States, or for frauds committed by them; but citizens of the United States may seek redress in law; and on suitable representation being made to the Chinese local authorities through the Consul, they will cause due examination in the premises, and take all proper steps to compel satisfaction. But in case the debtor be dead, or without property, or have absconded, the creditor cannot be indemnified according to the old system of the co-hong, so-called. And if citizens of the United States be indebted to subjects of China, the latter may seek redress in the same way through the Consul, but without any responsibility for the debt on the part of the United States.[17]

Treaty of 1844 with France, and Treaty of 1847 with Norway and Sweden. By these treaties France and Norway and Sweden received substantially the same extraterritorial right as had been granted to Great Britain and the United States.

Sino-American Treaty of Tientsin of 1858. In the Sino-American Treaty of June 18, 1858, we find extraterritoriality provided for in the following language:

ARTICLE XI. . . . Subjects of China guilty of any criminal act towards citizens of the United States shall be punished by the Chinese authorities according to the laws of China; and citizens of the United States, either on shore or in any merchant vessel, who may insult, trouble, or wound the persons or injure the property of Chinese, or commit any other improper act in China, shall be punished only by the Consul or other public functionary thereto authorized, according to the laws of the United States. Arrests in order to trial may be made by either the Chinese or the United States authorities.[18]

[17] *Ibid.* I, p. 683. In connection with this treaty see the dispatch of Cushing, earlier referred to, Sen. Ex. Doc. 58, 28th. Cong. 2d. Sess. Dispatch 97.

[18] *Customs Treaties*, I, p. 717.

Article XXIV of this treaty substantially reproduced Article XVI of the Treaty of 1844, earlier quoted.

Article XXVII of this treaty read:

All questions in regard to rights, whether of property or person, arising between citizens of the United States in China shall be submitted to the jurisdiction and regulated by the authorities of their own Government, and all controversies occurring in China between citizens of the United States and the subjects of any other Government shall be regulated by treaties existing between the United States and such Governments, respectively, without interference on the part of China.

Article XXVIII contained the following provision:

. . . If controversies arise between citizens of the United States and subjects of China which cannot be amicably settled otherwise, the same shall be decided conformably to justice and equity by the public officers of the two nations, acting in conjunction. The extortion of illegal fees is expressly prohibited. Any peaceable persons are allowed to enter the court in order to interpret, lest injustice be done.

Sino-British Treaty of Tientsin, 1858. This treaty contained the following provisions regarding extraterritoriality:

ARTICLE IX. If he [a British subject] be without a passport [while travelling in the interior] or if he commit any offense against the law, he shall be handed over to the nearest Consul for punishment, but he must not be subjected to any ill-usage in excess of necessary restraint.

ARTICLE XV. All questions in regard to rights, whether of property or person, arising between British subjects, shall be subject to the jurisdiction of the British authorities.

ARTICLE XVI. Chinese subjects who may be guilty of any criminal act towards British subjects, shall be arrested and punished by the Chinese authorities, according to the laws of China.

British subjects who may commit any crime in China shall be tried and punished by the Consul, or other public functionary authorized thereto, according to the laws of Great Britain. Justice shall be equitably and impartially administered on both sides.

ARTICLE XVII. A British subject having reason to complain of a Chinese, must proceed to the Consulate, and state his grievance. The Consul will inquire into the merits of the case, and do his utmost to arrange it amicably. In like manner, if a Chinese has reason to complain of a British subject, the Consul shall no less listen to his complaint, and endeavor to settle it in a friendly manner. If disputes take place of such a nature that the Consul cannot arrange them amicably, then he shall request the assistance of the Chinese authorities, that they may together examine into the merits of the case, and decide equitably.

ARTICLE XVIII. The Chinese authorities shall at all times afford the fullest protection to the persons and property of British subjects, whenever these shall have been subjected to insult or violence. In all cases of incendiarism or robbery, the local authorities shall at once take the necessary steps for the recovery of the stolen property, the suppression of disorder, and the arrest of the guilty parties, whom they will punish according to the law.

ARTICLE XIX. If any British merchant vessel, while within Chinese waters, be plundered by robbers or pirates, it shall be the duty of the Chinese authorities to use every endeavor to capture and punish the said robbers or pirates, and to recover the stolen property, that it may be handed over to the Consul for restoration to the owner.

ARTICLE XXI. If criminals, subjects of China shall take refuge in Hongkong, or on board the British ships there, they shall upon due requisition by the Chinese authorities, be searched for, and, on proof of their guilt, be delivered up.

In like manner, if Chinese offenders take refuge in the houses or on board the vessels of British subjects at the open ports, they shall not be harbored or concealed, but shall be delivered up, on due requisition by the Chinese authorities, addressed to the British Consul.

ARTICLE XXII. Should any Chinese subject fail to discharge debts incurred to a British subject, or should he fraudulently abscond, the Chinese authorities will do their utmost to effect his arrest, and enforce the recovery of the debts. The British authorities will likewise do their utmost to bring to justice any British subject fraudulently absconding or failing to discharge debts incurred by him to a Chinese subject.

ARTICLE XXIII. "Should any natives of China who may repair to Hongkong to trade and incur debts there, the recovery of such debts must be arranged for by the English courts of justice on the spot; but should the Chinese debtor abscond, and be known to have property, real or personal, within the Chinese territory, it should be the duty of the Chinese authorities, on application by, and in concert with, the British Consul, to do their utmost to see justice done between the parties.

Sino-French Tientsin Treaty of 1858. It is not necessary to reproduce the extraterritorial provisions of this treaty, as they do not differ substantially from those of the British and American treaties.

Chefoo Agreement of 1876 With Great Britain. Section II of this Agreement, after referring to the extraterritorial provisions of the Treaty of 1858, and to the failure of the Mixed Court at Shanghai to secure enforcement of its judgments, went on to declare:

It is agreed that, whenever a crime is committed affecting the person or property of a British subject, whether in the interior or at open ports, the British Minister shall be free to send officers to the spot to be present at the investigation. . . . It is further understood that, so long as the laws of the two countries differ from each other, there can be but one principle to guide the judicial proceedings in mixed cases in China, namely, that the case is tried by the official of the defendant's nationality, the official of the plaintiff's nationality merely attending to watch the proceedings in the interests of justice. If the officer so attending be dissatisfied with the proceedings, it will be in his

power to protest against them in detail. The law administered will be the law of the nationality of the officer trying the case.[19]

Sino-American Treaty of 1880. By Article IV of this treaty the extraterritorial principle found specific statement in the following words:

When controversies arise in the Chinese Empire between citizens of the United States and subjects of His Imperial Majesty which need to be examined and decided by the public officers of the two nations, it is agreed between the Governments of the United States and China that such cases shall be tried by the proper officials of the nationality of the defendant. The properly authorized official of the plaintiff's nationality shall be freely permitted to attend the trial, and shall be treated with the courtesy due his position. He shall be granted all proper facilities for watching the proceedings in the interests of justice. If he so desires, he shall have the right to present, to examine, and to cross-examine witnesses. If he is dissatisfied with the proceedings, he shall be permitted to protest against them in detail. The law administered will be the law of the nationality of the officer trying the case.[20]

China's Appreciation of the Significance of the Extraterritorial Rights Conceded by Her. It has sometimes been said that China, when she agreed to permit foreign Powers to exercise jurisdiction over their nationals residing in China, did not fully appreciate the seriousness of the concessions she was making. Thus, for example, we find S. Wells Williams, in his *Middle Kingdom*,[21] saying:

[19] *Hertslets China Treaties*, I, p. 76.

[20] *Customs Treaties*, I, p. 738.

[21] Vol. II, p. 657. Quoted by Mr. Charles Denby in his article "Extraterritoriality in China," in the *American Journal of International Law*, October, 1924.

A similar statement is made by Sir Robert Hart in his *Proposals for the Better Regulation of International Relations*. He says: "When

The year 1858 was fraught with great events, involving the welfare of the people of China and Japan and their future position and progress. Much against their will they had been forced into political relations with Europe and America, and in a measure deprived of their independence under the guise of treaties which created an *imperium in imperio* in their borders. Their rulers, ignorant of the real meaning of these principles of ex-territoriality, were tied down to observe them, and found themselves within a few years humbled before those of their own subjects who had begun to look to foreigners for protection.

It would seem pretty clear that the Chinese did not foresee the time when there would be so many thousands of foreigners living in the many Treaty Ports or other places in China opened to foreign trade or traveling or residing in the interior that the matter of their extra-territorial status would be so serious [22] a matter as it

China acquiesced in various treaty stipulations, it never occurred to her that what she was conceding was what now goes to constitute what is now termed extraterritoriality."

[22] The Report on Extraterritoriality in China, p. VII, gives the following statistics compiled by the Chinese Maritime Customs regarding the foreign population in China in 1925: 254,006 persons and 6,473 firms enjoying extraterritorial privileges, as against 83,235 persons and 1,270 firms not enjoying extraterritorial privileges. Of the total number of persons enjoying extraterritorial privileges, 98.4 per cent. are Japanese, British, American, Portuguese and French. The remaining 1.6 per cent. consist of nationals of all the other Powers. Of the five Powers above mentioned, 87.4 per cent. are Japanese, most of them in Manchuria.

It may be noted that His Excellency, Dr. Sze, Chinese Minister to the United States, in an address given by him February 21, 1926, said: "With reference to the treaties granting to various of the Powers extraterritorial rights within China, it might be argued that, at the time they were originally entered into, the number of foreigners was so small that the concession was not of vital moment to the Chinese, but that, with the growth in numbers of the nationals of these Powers living in China, the situation has so changed that the rule of *rebus sic stantibus* properly applies [with regard to the denunciation of treaties] should China desire to employ it." Sze, *Addresses*, p. 128.

now is; but that China did not appreciate that the grants were in derogation of her territorial rights as a sovereign State can hardly be maintained. As has been earlier pointed out, whereas, in the Levant, the local authorities had been more than willing that foreigners within their borders should not have what they conceived to be the advantage of the local law, the Chinese had, from the beginning, insisted upon, though not with uniform success, their sovereign territorial rights of jurisdiction, and had only yielded to the demands for extraterritorial rights when compelled to do so. However, this much, upon the other side, may be said, namely, that, as to disputes between the foreigners—that is, those in which no Chinese subjects were directly concerned—China probably did not feel strongly the desirability of asserting her jurisdiction as the territorial sovereign. She favored in her own practice the settlement of disputes between her own subjects without the intervention of the courts, and, therefore, it may be assumed, saw no serious objection to permitting the foreigners to settle their disputes *inter se,* in any way, and according to any rules of right which they might see fit to adopt or accept.

Extraterritorial Rights of the Different Treaty Powers Distinguished. An examination of the extraterritorial rights which China has granted in her various treaties, some of which have not been quoted, shows that these rights are not exactly the same for all the Powers. The variations which exist relate for the most part to the use of "assessors" in the mixed cases—that is, the cases between Chinese and foreigners. As to this quotation may be made from a valuable article by Professor Quigley.[28]

[28] "Extraterritoriality in China," in the *American Journal of International Law,* January, 1926 (vol. XX, pp. 46-68).

One group may be constituted of Brazil, Mexico, and Japan. The treaties of these countries place the nationals of the contracting parties exclusively under the jurisdiction of their own courts.[24] The rule of exclusive jurisdiction is fully applied, so that no foreign assessor or arbiter is entitled to appear in a Chinese court before which a Brazilian, Mexican or Japanese is a plaintiff, and *vice versa*. All three of these countries have made their treaties with China subsequently to those of Great Britain and the United States; consequently it may be assumed that they do not regard the Most-Favored-Nation clause as applicable in the matter of extraterritoriality.[25]

The second group is composed of two States, Great Britain and the United States, which alone possess by specific treaty clauses and as the result of common practice the right of being represented by assessors at trials in Chinese courts in which their nationals are plaintiffs. This right is reciprocal, but has not been exercised by the Chinese.

The last group is the largest, as it includes all the other States enjoying extraterritorial rights. The provisions followed by these countries are those copied from the Treaty of Wanghia (1844) and subsequently discarded or, rather, separately interpreted by the United States and Great Britain. According to them, criminal cases are heard without assessors, while civil matters are dealt with according to justice and equity by the

[24] *Hertslet's China Treaties*, I, pp. 237-8; 404-5.

[25] In a footnote, Professor Quigley says: "This (Most-Favored-Nation) clause is applicable, apparently to the extent of conferring the right. This was attested by the treaty of 1919 between China and Bolivia which contained a Most-Favored-Nation clause. It was necessary for Bolivia to waive extraterritorial rights in a subsequent exchange of notes. *China Year Book*, 1925, p. 608. But the Most-Favored-Nation clause does not carry a definition of extraterritorial procedure. And the case of the Sino-Chilian treaty furnishes a rather weak evidence against the first statement in this note. The treaty, entered into in 1915, contained a Most-Favored-Nation clause, but no grant of extraterritorial rights. The honorary Chilian consul in Shanghai attempted to take jurisdiction over a Chinese claiming Chilian citizenship, but his right to do so was denied by the Chinese Government and failed to be sustained by the diplomatic body, whence his failure."

foreign consul and the Chinese official jointly. The settlement is one by mediation or arbitration, a method more in line with Chinese practice than that of the strict application of law by a regularly constituted court.[26]

Extraterritorial Jurisdiction Summarized: Classes of Controversies. An examination of the extraterritorial rights accorded to certain foreign Powers in China shows that, as determined by the character of the parties to them, the following classes of controversies or suits are involved, and the following provisions made for their adjudication:[27]

1. As regards controversies in which no foreigners are involved, the jurisdiction is wholly in the hands of the Chinese authorities, and Chinese law and procedure are applied. The only exception to this is with regard to the Mixed Courts at Shanghai, Amoy and Hankow, whose status and activities are elsewhere specifically treated.[28]

2. As regards controversies between two or more nationals of the same foreign Power, the jurisdiction is exclusively in the consular or other courts which that Power has been permitted by China to establish and operate in China; and the law applied is that of the Power concerned. As to this branch of extraterritorial jurisdiction, it scarcely needs be said that each Power which is entitled to exercise it has found it necessary, by its own municipal legislation, to provide the courts and to declare which of its laws shall be deemed applicable to its nationals in China.

3. Over controversies between nationals of different Powers the Chinese authorities exercise no jurisdiction,

[26] China does not permit assessors to sit in her "Modern" Courts. Cf. *Report on Extraterritoriality in China*, p. 14.

[27] What follows has, of course, no application to the nationals of Powers which do not possess extraterritorial rights.

[28] See Chapter XXI.

except when both or all the parties are nationals of Powers not enjoying extraterritorial rights, in which case the Chinese jurisdiction is complete.

4. In cases in which one of the parties is a national of a Power not enjoying extraterritorial rights, and the other party is a national of a Power enjoying such rights, the jurisdiction is still in the Chinese courts and subject to Chinese law if nationals of Powers not enjoying extraterritorial rights are defendants. China is not, of course, concerned as to how the Powers exercise their jurisdictional rights in controversies between their respective nationals. These controversies, therefore, are adjudicated in such a way and by such rules of law or justice as the Powers concerned have agreed among themselves shall be employed.[29]

5. Controversies in which the plaintiffs are nationals of foreign Powers, whether or not these Powers are entitled to extraterritorial rights, and the defendants are Chinese, are adjudicated in the Chinese courts and according to Chinese law.

6. Controversies in which the plaintiffs are Chinese and the defendants are nationals of Powers entitled to extraterritorial rights are adjucated in the courts of the respective foreign Powers concerned, and according to the laws of such Powers.

It is, of course, with this class of cases in which Chinese are plaintiffs and foreigners defendants that the régime of extraterritoriality is of most importance to the foreign Powers. And, in this connection, it is important to

[29] Koo, in his *Status of Aliens in China*, p. 179, says of civil controversies between aliens in China: "The general practice is that they are arranged officially by the consuls of both parties without resort to litigation; but where amicable settlement is impossible, the principle of jurisdiction followed is the same as in those between China and a foreign Power, namely, the plaintiff follows the defendant into the court of the latter's nation."

be remembered that, generally speaking, extraterritorial rights in China apply not only in the Treaty Ports where foreigners are permitted to reside, lease lands, erect houses, and carry on trade and manufacturing, but also throughout all China—that is, to missionaries stationed in the interior and to other foreigners traveling there on business or pleasure.[80]

Protégés. The rights of extraterritoriality have been much abused by the practice of some of the Powers enjoying such rights of claiming as their own nationals the citizens or subjects of other foreign Powers not enjoying extraterritorial rights, and thus removing them, as defendants, from the jurisdiction of the Chinese courts; or, where they are plaintiffs, of providing assessors at the trials of the cases. Also, where these parties are not claimed as naturalized subjects, certain of the Powers have asserted the right to intervene in their behalf on the ground that they are their Protégés.

This system of Protégés, which has found considerable application in the Levant, has never been accepted by China, and certain of the Treaty Powers, and among them the United States and Great Britain, have sustained China in this position. Thus, in 1873 the United States Government refused to permit its consul at Canton to take jurisdiction in the case of a criminal charge against a citizen of a Non-Treaty Power (New Granada), even though he had consented thereto, and the Chinese authorities had waived their jurisdiction. Secretary of State Fish wrote as follows:

> Mr. Jewell had no authority whatever to entertain jurisdiction of the case. . . . Under the laws of the United States, jurisdic-

[80] Passports granted by the Foreign authorities and viséd by the Chinese authorities, are needed for travel in the interior of China except for very short distances from the Treaty Ports.

tion in a criminal case cannot be conferred by consent even in one of the established courts of record of the country. Much less is this the case with the consular court, which is a tribunal of limited and inferior jurisdiction, possessing only such powers as are expressly conferred by acts of Congress in conformity with the provisions of existing treaties. The waiver of their authority in the matter by the Chinese officials invested the consul with no new or additional powers.

In Oriental countries where, in order to preserve to citizens of the United States, as far as possible, the personal rights recognized as belonging to them in their own country, it is found necessary to have these rights and the privileges that pertain to them precisely defined by treaty stipulation, it becomes all the more necessary that officers of the United States resident in those countries should, in the exercise of their functions, confine themselves strictly within the powers guaranteed by treaty stipulation and regulated by settled principles of public law. Such a course on their part will not only tend to prevent unpleasant complications, but do much to secure from the people of those countries respect for the rights of American citizens resident therein.[31]

Great Britain has taken substantially the same position regarding Protégés. This was declared in 1864 in circular instructions sent by the British Minister at Peking to British consuls in China, and has not since been departed from. In these instructions the Minister said:

According to the laws of most countries a man cannot, without the permission of his Government, withdraw himself from his national and submit to a foreign authority, and the attempts by the consul to exercise any such foreign jurisdiction might lead to serious protests on the part of other Governments; moreover, Her Majesty's Government has not empowered her agents in China to accept any such jurisdiction over foreigners or Chinese, and it is not expedient or politic to advance any such claim.[32]

[31] *U. S. For. Rels.*, 1873, vol. I, p. 139.
[32] Quoted by Koo, *Op. cit.*, p. 207.

Dr. Koo, with reference to this matter of Protégés, says:

> Except as regards foreign members of the crew of a national ship, the jurisdiction of a consular court in China cannot under the treaties extend over persons other than the subjects of the nation to which it itself belongs. The doctrine of assimilation, which prevails in Mohammedan countries whereby an alien, whether his own Government has treaty relations with the territorial sovereign or not, is considered to be entitled, as against the exercise over him by the local authorities, to the protection of the consulate in whose registry he has made an entry, is not recognized at all in China. Nor does the system of Protégés exist there.[33]

With regard to the attempts of certain Powers to extend the protection of their extraterritorial powers over persons not their own nationals, China has had no difficulty in meeting them upon legal grounds. When, however, these Powers have claimed other than their own natural-born nationals as their naturalized citizens, and, therefore, as entitled to their consular and other protection, the case is not simple, for such a claim can be met only by impeaching the fact or the *bona fides* of such naturalization.[34]

[33] *Op. cit.*, p. 205.

[34] With regard to the abuse of their extraterritorial rights by certain Powers through extending their protection over persons not their own citizens by birth or even by *bona fide* naturalization, Mr. H. G. W. Woodhead, an Englishman, and well known as the editor of the *Peking and Tientsin Times* has recently said: "The main objection to its [the extraterritorial system's] perpetuation, and the one most difficult to answer, is its abuse—chiefly by governments which have infinitesimal or at least insignificant interests in China."

The foregoing is taken from one of the lectures delivered by Mr. Woodhead at the University of Chicago, in 1925, on the Harris Foundation, and later published in a volume entitled *Occidental Interpretations of the Far Eastern Problem.*

Closely connected with the abuse of the extraterritorial rights by extending their application to Protégés and naturalized subjects is the fact that many Chinese from Formosa claim immunity from Chinese jurisdiction on the ground that they are Japanese subjects. The same is true of Chinese from the Philippines, who, though not American citizens in a full constitutional sense under American law, nevertheless, as Philippine citizens, owe allegiance to, and are under the protection of, the United States. It should, however, be said that the policy of the United States Government has been that it is not called upon to exert its protecting rights over Chinese, whether residents of the Philippine Islands or native-born American citizens, who go to China and take up the ordinary life of the native Chinese.

It has been held that a foreigner, by accepting employment under the Chinese Government, does not waive his extraterritorial rights. However, it would appear that, in the Chinese Maritime Customs, at least, a foreign employé charged with a serious criminal offense is expected to resign and report to his consul, but, if acquitted before him, is allowed to resume his office with full pay for the period of his resignation.[85]

Arrests by Chinese Officials. Foreigners throughout China are subject to arrest by Chinese officials, but must, after arrest, be taken at once for trial before their respective Consuls. In the foreign Concessions or Settlements at the various Treaty Ports, the Powers maintain their own constabularies for preventing crime and apprehending offenders. As regards, then, the arrest of nationals of the Treaty Powers, there has not been any consider-

[85] See Letter of Acting Secretary of State Hill to Minister Angell at Peking, August 16, 1881; *U. S. For. Rels.*, 1881-2, p. 286.

able dispute concerning the rights and immunities involved. Controversies, at times very acute, have, however, arisen with reference to the right of Chinese officials to arrest Chinese employed by nationals of the Treaty Powers.

Chinese Employed by Foreigners. In general it has been held that Chinese officers may not go upon premises occupied by Treaty Power nationals in order to make arrests or seize goods or papers without first obtaining the approval of the consular official of the Power concerned. By treaty provisions the Chinese Government has agreed not to interfere with the employment of Chinese by foreigners. Based upon this engagement, the general practice upon the part of the Powers has been to insist that when the Chinese employé of a Treaty Power national is arrested, immediate notice shall be given to his employer. However, the American Government appears to have asserted a principle broader than this, and, in a case arising in 1914 and involving a Chinese named C. C. Li, to have declared that an employé of an American firm should not be arrested at all, on or off the American premises, without notice being first given to the American employer or his Consul.

In this case the American Minister had held that it was sufficient, in case of an arrest of a Chinese employé outside the premises of his American employer, if notice were immediately given that the arrest had been made, and opportunity given the employer, upon the trial, to show his interest in the matter. This holding was, however, overruled by the authorities at Washington, who held that the arrest should not have been made at all—that is, without previous notice. In support of this holding, reference was made to a case, occurring in 1899, in

Chinkiang,[86] the essential facts of which were as follows: The Chinese Chief of Police sent to the office of a Mr. Emery, an American, without any request of or reference to the American Consul, and arrested a Chinese in Mr. Emery's employ. Mr. Emery, when he learned this, sent another one of his Chinese employés to the police yamen with his card to demand the man's release and to tell the official that when he wanted to arrest his employés he must apply to the American Consul. For thus coming into his presence upon such an errand, this second employé was seized and so severely beaten that his life was endangered, the official himself taking a hand in the beating. The local American Consul at once demanded that the two employés be released and the official concerned severely punished, which demands the American Government later held had been properly made. It would seem, however, that this Chinkiang case hardly constituted a precedent to support the American contention in the Li case. Li was arrested outside foreign premises;[87] the first employé arrested in the Chinkiang case had been apprehended upon American premises and punished without even notifying the American Consul and requesting him to have the employé turned over to the Chinese authorities. And, of course, there was no ethical justification whatever for the punishment of the second employé who had been sent to the police yamen.

With regard to the arrest in foreign "Settlements" of resident Chinese, whether employed by foreigners or not, the practice is to require the Chinese authorities to have the warrants countersigned by the Senior Consul and the actual arrests made by the foreign police. Also,

[86] *U. S. For. Rels.*, 1900, p. 394 *et seq.*

[87] Li was arrested upon the charge that he had stolen or become possessed of a stolen blank check of an American firm, and, upon it, forged the name of an American missionary.

the accused is given the right to a preliminary hearing before the Mixed Court before being removed from the precincts of the Settlements.

Foreign Banks and Extraterritoriality. All the foreign banks operating in China are situated either in Treaty Ports or in the Legation Quarter at Peking. As foreign corporations, they enjoy extraterritorial rights, and thus have held themselves freed from any control by the Chinese Government with reference to the issue of circulating notes, as well as from the control of other Chinese rules and regulations concerning banking.[88]

States Entitled to Extraterritorial Rights. Fifteen States are now entitled to extraterritorial rights in China. These are: Great Britain, the United States, France, the Netherlands, Spain, Italy, Denmark, Norway, Sweden, Brazil, Peru, Portugal, Japan, Mexico, and Switzerland. Switzerland is the last State to obtain the right, which she did in 1918. With this exception, China has granted no extraterritorial rights since 1899, and her statesmen have, during recent years, repeatedly declared that, henceforth, no such rights will be granted; but that, upon the contrary, the policy will be to reduce as rapidly as possible the number of States which now have extraterritorial rights.

States Not Entitled to Extraterritorial Rights: Germany, Austria and Hungary. When, in 1917, China declared war against Germany and Austria-Hungary, she declared that "in consequence thereof, agreements and conventions heretofore concluded between China and Germany, and

[88] In certain of the Treaty Ports, e. g., Changsha and Harbin, which were voluntarily opened by the Chinese and not as the result of treaty obligation, some claim has been set up that foreign banks located there should be subject to Chinese regulation. Cf. Lee, *Currency Banking, and Finance in China*, p. 102.

between China and Austria-Hungary, as well as such parts of the international protocols and international agreements as concern only the relations between China and Germany and between China and Austria-Hungary are, in conformity with the law of Nations and international practice, hereby abrogated."[39]

This abrogation was formally acquiesced in by the two countries in the peace treaties of Versailles and St. Germain and Trianon; and, of course, though there was no explicit statement to that effect, this brought to an end the extraterritorial rights in China of the two countries.

In the Sino-German Agreement of May 20, 1921, reestablishing friendly and commercial relations between Germany and China, it was expressly provided by Article III that—

> The citizens of either Republic, residing in the territory of the other, shall, in conformity with the laws and regulations of the country, have the right to travel, to settle down and to carry on commerce or industry in all places where the citizens of another nation are allowed to do so. They are placed, both their persons and properties, under the jurisdiction of the local courts; they shall respect the laws of the country wherein they reside. They shall not pay higher imposts, taxes, or contributions than the nationals of the country.[40]

In correspondence attached to and explaining the foregoing Agreement, the Chinese Minister of Foreign Affairs gave the following assurances:

> The Chinese Government promises to give full protection to the peaceful undertakings of Germans in China, and agrees not

[39] For text of this Declaration, see *China Year Book*, 1921-22, p. 698.

[40] For the text of this Agreement see the *Chinese Social and Political Science Review*, October, 1924; and also the *China Year Book*, 1925, p. 783.

to further sequestrate their properties except in accordance with the generally recognized principles of International Law and the provisions of the laws of China; provided that the German Government will treat the Chinese residents in Germany in like manner.

Law suits of Germans in China shall be tried in the modern courts, according to the modern codes,[41] with the right to appeal, and in accordance with the regular legal procedure. During the period of litigation, the assistance of German lawyers and interpreters who have been duly recognized by the Court, is permitted.

In regard to the law suits in the Mixed Court in which Germans are involved either as one or both of the parties, the Chinese Government will in the future try to find a solution so as to insure justice and fairness to all parties concerned.[42]

Russia. When, in 1917, through the revolution placing the Soviets in power, Russia no longer had a government recognized by China, Russia lost her extraterritorial rights in China, if, for no other reason, because she no longer had in China Consuls whose authority was recognized by China through whom the extraterritorial rights might be exercised. In a Presidential Mandate of September 23, 1920, the Chinese Government declared: "China, while now ceasing to recognize the Russian Minister and Consuls, nevertheless preserves, with regard to Russian citizens, the same friendly feelings as before. Therefore, efficient measures toward the safeguarding of the persons and property of peaceful Russian citizens residing in China must be taken as before."

In response to this Mandate, the erstwhile Russian Minister, under date of September 24, 1920, transmitted a note to the Chinese Minister of Foreign Affairs, in the course of which he said:

[41] As to these courts and codes, see *infra*, p. 679.

[42] For text, see preceding note.

Russian citizens in China remain henceforth deprived of any official Russian protection, and I beg to express the hope that the Chinese Government will be careful to have the order of the President, embodied in the Decree above mentioned, thoroughly executed in regard to efficient measures toward the safeguarding of the persons and property of peaceful Russian citizens. On this occasion I beg to affirm that this safeguarding must be based on the exact application of the *status quo* of the Russo-Chinese treaties, because, as I on several occasions warned the Chinese Government, all infringements which have been made in the last few years of the Russo-Chinese treaties can only become lawful when they shall have been agreed to by a regular All-Russian Government recognized by the Chinese Government.[43]

It is estimated that, at this time, there were from two to three hundred thousand Russians living in China.

It is important to observe that the other Treaty Powers regarded with considerable concern the foregoing acts upon the part of China, not only as involving fundamental principles governing the continuing force of treaty obligations, under the given circumstances, and, therefore, as tending to establish precedents that might, at some later time, be objectionable to themselves, but as touching directly and immediately the interests of their own nationals in their dealings with the Russians in China. The correspondence upon these points that ensued between the Representatives of the Treaty Powers and China is of sufficient importance to warrant an abstract of it, even though the status of Russians in China has since been placed upon a definite basis by the Russo-Chinese Treaty of May 31, 1924.

[43] The Russian Minister then went on to specify a number of acts upon the part of the Chinese Government which, in his opinion, had constituted infringements of the Russo-Chinese treaties. Among these infringements he included the failure of the Chinese Government to continue the payment of the Boxer Indemnities.

On October 11, 1920, the Dean of the Diplomatic Body at Peking sent a note to the Chinese Minister of Foreign Affairs, in which, speaking in behalf of all the Representatives of Foreign Powers accredited to China, the expectation was expressed that the action of the Chinese Government with regard to the status of Russians in China would be regarded by China as "purely provisional and subject to the agreement of the future officially recognized Russian Government." The Note concluded:

> Desirous, on the other hand, of removing obstacles which the Chinese Government will meet as soon as these measures are put into execution, the Representatives have the honor to suggest that a provisional *modus vivendi* for the administration of Russian interests shall be elaborated by agreement between the Chinese Government and the Diplomatic Body.

To this Note the Chinese Minister of Foreign Affairs replied, under date of October 22, 1920, that the arrangements made were naturally of a temporary nature and would have to be reconsidered as soon as Russia should have a constituted Government recognized by China; that Russian citizens residing in China would continue to enjoy the rights secured to them by treaties; but that the Chinese Government would take over, temporarily and without introducing any changes, the management of administrative affairs within the limits of the Russian Concessions, but that, if circumstances should make necessary, the Chinese Government might make improvements in such administration, as required by the circumstances; that Russian consular jurisdiction would, of course, be considered as at an end; that "in the trying of cases in which foreigners are plaintiffs and Russian defendants, the Chinese courts may apply Russian laws, but only those which do not conflict with Chinese legal

rights"; and that, possibly, special persons well versed in Russian law might be employed as advisers to the Chinese law courts. In conclusion, the Chinese Note declared:

> The Foreign Diplomatic Representatives must admit that in making these arrangements the Chinese Government is exerting itself in every way to preserve the fundamental rights of Russian citizens and there is, therefore, naturally, no need to negotiate with the Diplomatic Body a provisional method for governing Russians. Should any foreign interests in China be affected by the suspension of the official recognition of the Russian Minister and Consuls, this Ministry is quite ready to negotiate in good time with every Minister in order to obviate all difficulties.

To this Note the Diplomatic Body, under date of November 29, 1920, replied that, the assurances given by the Chinese Government in its rules had not, in fact, been fulfilled by that Government, and, as to this, instanced the provision that had been made by the Presidential Mandate of October 31 with regard to the new organization of the judiciary on the territory of the Chinese Eastern Railway, and also certain changes that had been made in the management of the Russian Concession in Tientsin. The reply pointed out that in many respects the essential interests of all foreigners who had business relations with the numerous Russians in China were directly affected by the action which China had taken.

In general, in this reply, the Diplomatic Body took the position that the treaty rights of Russians in China with regard to extraterritoriality were being unduly denied, and suggested that China should retain, as far as possible, the former Russian law courts which should apply Russian law, but which should function in the name of China—"These law courts to deal with cases between Russians, and, eventually, between Russians and for-

eigners. Disputes between Russians and Chinese may be examined either by Mixed Courts, to be composed locally of Chinese and Russian judges, in those cases where the plaintiff is of Russian nationality, or, should he be Chinese, by the national court of the plaintiff or the defendant." "This procedure," the Note continued, "aiming at the solution of practical difficulties, will naturally be of a purely temporary character, allowing the principle of the observation of treaty rights and extraterritorial jurisdiction to be maintained unimpaired."

To this Communication on behalf of the Diplomatic Body at Peking the Chinese Minister of Foreign Affairs replied, under date of November 29, 1920, that both civil and criminal cases in which Russians are involved, coming by treaty under the jurisdiction of consular courts, and these courts no longer being able to function, it necessarily resulted that the Chinese courts would have to take jurisdiction of them. As to the former Russian courts in the territory of the Chinese Eastern Railway, the Chinese Minister pointed out that their establishment had been based neither on the contract for the construction of the railway nor on treaties relating to consular jurisdiction. "They were established by the Russians in an arbitrary way, and the consent of the Chinese Government has never been obtained to them. Such an encroachment on treaty stipulations was, properly speaking, an infringement of the sovereign rights of China. Both the President of the Chinese Eastern Railway Company and the local authorities had, even before the withdrawal of the official recognition of the Russian Minister and Consuls, repeatedly raised the question of the closing of these law courts with the (local) Russian Consul. Thus a decision with regard to this question had been arrived at long ago, and the corresponding measures are in no wise a result of the withdrawal of recognition.

Their measures and the withdrawal of recognition are two entirely separate questions and their motives are quite clear."

However, in this communication, the Chinese Minister went on to say that, although the legal status of the formerly existing Russian law courts had never been recognized by China, the new Chinese law courts which were being established in the Special Manchurian Region would, for the convenience of the Russians, be modeled on the former courts with regard to both their organization and the places where they would sit. Furthermore, that the former Russian notaries public had already been allowed to continue to function. Also, that a Commission for the consideration of Russian affairs had been created, and Russians engaged as advisers in the offices of the Commissioners for Foreign Affairs in such places as Hankow and Hailar, where there were numerous Russian residents. " The appointment of advisers and investigators in the law courts comes within the sphere of the judiciary. Such persons must be appointed, according to law, by the Ministry of Justice, in accordance with the principle of the independence of the judiciary." [44]

Sino-Russian Agreement of May 31, 1924: Russia Recognized by China. The re-establishment of diplomatic relations between China and Russia was delayed by disputes, the most important of which related to the status and operation of the Chinese Eastern Railway and the rela-

[44] The foregoing correspondence is to be found in the *China Year Book*, 1921-22. The texts there given are not official, but are unofficial translations made for the *Year Book*. For further correspondence with reference to the cases and the courts in which the Russian law would be applied by the Chinese courts, and comment thereon, see *China Year Book*, 1921-22, pp. 634-637. See *idem*, pp. 638-654, for an account of the actual operation of the Chinese courts in cases in which Russians were concerned.

tions of Mongolia to Russia and to China. Agreement, in principle, upon these points having been reached, two Agreements between the countries were signed on May 31, 1924. The first of these instruments was entitled "Agreement on General Principles for the Settlement of the Question between the Republic of China and the Union of Soviet Socialist Republics." The second instrument, with which we are not here concerned, related to the provisional management of the Chinese Eastern Railway.

In the Agreement on General Principles it was declared that normal diplomatic and consular relations should be at once re-established. However, this recognition by China of the Russian Government was not to operate to revive the former Sino-Russian treaties, nor again to endow Russians living in China with extraterritorial rights. Articles III, IV, and XII of the Agreement read:

ARTICLE III. The Governments of the two Contracting Parties agree to annul at the Conference as provided in the preceding Article,[45] all conventions, treaties, agreements, protocols, contracts, et cetera, concluded between the Government of China and the Soviet Government and to replace them with new treaties, agreements, et cetera, on the basis of equality, reciprocity and justice, as well as the spirit of the Declarations of the Soviet Government of the years 1919 and 1920.

ARTICLE IV. The Government of the Union of the Soviet Socialist Republics, in accordance with its policy and Declarations of 1919 and 1920, declares that all treaties, agreements, et cetera, concluded between the former Tsarist Government and

[45] This Conference, to be convened within one month, was to conclude detailed agreements, in accordance with the principles of the Agreement, with regard to the pending controversies between China and Russia. For various reasons this Conference did not convene until August 26, 1925, but, at the date of the present writing (December, 1926) no definite results have been reached with the exception of the drafting of two treaties relating to extradition and the rendering of judicial aid. See *China Year Book*, 1926, p. 1098.

any third party or parties affecting the sovereign rights or interests of China, are null and void.

The Governments of both Contracting Parties declare that in future neither Government will conclude any treaties or agreements which prejudice the sovereign rights or interests of either Contracting Party.

ARTICLE XII. The Government of the Union of Soviet Socialist Republics argrees to relinquish the rights of extraterritoriality and consular jurisdiction.

By a Declaration (No. VI) annexed to and made a part of the Agreements of May 31, 1924, the Governments of the two countries agreed, at the Conference provided for in Article II of the Agreement on General Principles, to establish " equitable provisions . . . . for the regulation of the situation created for the citizens of the Government of the Union of Soviet Socialist Republics by the relinquishment of the rights of extraterritoriality and consular jurisdiction under Article XII of the aforementioned Agreement, it being understood, however, that the nationals of the Government of the Union of Soviet Socialist Republics shall be entirely amenable to Chinese jurisdiction."

Persia. The Sino-Persian treaty of June 1, 1920, provides (Article IV):

Subjects or citizens of either of the two High Contracting Parties residing or travelling in the country of the other Party shall be subject to the jurisdiction of the country—Persia or China as the case may be—in which they are residing or travelling, as regards legal proceedings, disputes, law-suits, or as regards crimes and offenses which they may commit.[46]

Belgium. By the Note of April 16, 1926, the Chinese Government informed the Belgium Government that, by

[46] League of Nations, *Treaty Series*, IX, p. 21.

Article XLVI of the General Treaty of Friendship, Commerce, and Navigation between the two countries, the treaty was subject to revision or abrogation at regular intervals, and, therefore, that, if the treaty was not, by October 27, 1926, replaced by one of complete equality and reciprocity (which would involve the abrogation of Belgian extraterritorial rights in China), the entire treaty would be considered as abrogated. There followed some correspondence as to the possibility of bringing into force a *modus vivendi,* pending the negotiation of a new treaty, and also as to a proposal upon the part of Belgium to submit to the International Court of Justice, under Article XXXVI, paragraph 2, of the Statute of that tribunal, the question as to the right of China (which the Chinese Government had asserted, and the Belgium Government had denied) to demand a revision or abrogation of the treaty under its Article XLVI. No agreement was reached regarding a *modus vivendi,* and the Chinese Government withheld its consent to refer the matter to the International Court, with the result that as from date of October 27, the Treaty has been declared abrogated by the Chinese Government. The result is that Belgium must be classed among the Powers which do not possess extraterritorial rights in China.

Koreans in Chientao, Special Status of. By an agreement of 1909 between China and Japan a rather special status is given to Koreans taking up residence in Chinese territory north of the Tumen River. This agreement provides that Koreans established in this area, engaged in cultivating the land, shall be permitted to remain there and be subject to the jurisdiction of the local Chinese officials. These " shall treat the Koreans and Chinese with equality as regards payment of taxes and in the enforcement of the laws. Chinese officials shall administer

Chinese law in all civil and criminal cases where Koreans are concerned. A Japanese consular official may at all times attend the court proceedings. In cases where capital punishment may be adjudged, the Japanese Consul must be notified. If the Japanese Consul can point out any irregularities in the proceedings, he may request that another official be appointed to hold a rehearing of the case, so that justice may be obtained." It is also expressly provided that Koreans shall have the same protection for their property as is accorded to the Chinese; that moorings for their boats shall be provided; and that they may pass at will from place to place, but shall not be permitted to cross the frontier with arms except with a special pass. They are also, except in times of special stress, to be allowed to send out of the country their grain, straw, and fuel.[47]

Japanese "Police Boxes" in China. In connection with the extraterritorial privileges enjoyed by them in China, the Japanese have claimed a right which has not been put forward by any of the other Powers and which has been strenuously objected to by the Chinese, though they have not succeeded in preventing its actual exercise in Fukien, in Manchuria and in some other parts of China. This right, which the Japanese have claimed and exercised, has been to maintain police officials and police stations and jails or houses of detention in connection with their consulates. This right they have attempted to found upon the treaty provisions which grant to them the rights of residence and trade in the Treaty Ports and, since 1915, throughout Manchuria.

In 1916 the establishment of these "police boxes," as they are termed, in the city of Amoy was protested

[47] *Customs Treaties*, II, p. 768; MacMurray, p. 796.

against by the Provincial Assembly of the Province of Fukien, which sent to the national Parliament at Peking a memorial from which the following may be quoted as descriptive not only of what had been done but of the grounds upon which the Japanese had attempted to justify their action:

On account of the geographical contiguity of Amoy to Formosa and the Peng-hu Islands, a large number of Japanese naturalized subjects have settled in Amoy. Countenanced by the Japanese, these aliens have often disturbed the peace and created disorder in various forms. Under the ægis of the Japanese consulate, such law-breakers have been immune from the interference of the Chinese police authorities who are quite powerless to deal with them. Seeing an opportunity for them to advance further in their aggression, the Japanese, under the pretext of controlling their nationals, settled in that part, rented a house at Chien-tao-kow in Amoy in the tenth month of last year. Over the door of the House a notification was posted in which words to the following effect were written: "The sub-Police Station of the Consulate of Great Japan at Amoy." Later on the notification was replaced by a wooden signboard with the same words painted on. Within the sub-police station was a house of detention. At the same time police barracks were erected at Ssu Tsi Shih. Upon protest of the Commissioner of Foreign Affairs at the port the Japanese Consul stated in reply that the said sub-police station was merely an extension of the Japanese Consulate. In defending his position, he further cited the provision of Article 3 of the Chino-Japanese Commercial Treaty and distorted the principle of the provision in such a manner as to construe that in every Japanese consulate there should be a police station attached to it in order to enable the Japanese consular authorities to exercise control over Japanese nationals. After repeated protests lodged with the Japanese consulate by the Commissioner of Foreign Affairs under the order of the Acting Governor of Fukien, the Japanese finally removed the signboard from the door and hung the same inside the house. But notwithstanding

this, the Japanese are still exercising police jurisdiction there. Since the eleventh month of last year, the Japanese have illegally arrested many naturalized Japanese subjects and Chinese subjects in scores of different cases. The attitude of the Japanese Consul towards the protests of the Foreign Commissioner has been unyielding. The only subterfuge the Japanese Consul relies upon in answer to the protests of the Chinese authorities is the misinterpretation of the provisions of the treaties.

It does not appear that Japan in her treaties with China has in so many words, or even by reasonable implication, obtained any police rights in the Province of Fukien or in the city of Amoy. She has only those extraterritorial and other consular rights which the other Treaty Powers have.

The matter of Japanese police boxes in Manchuria and Eastern Inner Mongolia has been a more serious matter to the Chinese than it was even in Fukien. In these regions, as is elsewhere more particularly discussed, Japan was able in 1915, as one of the results of her Twenty-one Demands, to obtain special privileges. In these demands Japan at first asked that her nationals should be free to travel, reside and engage in all kinds of business and manufacture throughout South Manchuria and Eastern Inner Mongolia, and (in Group V) that police departments in important places in China should be jointly administered by Japanese and Chinese or that the police departments of those places should employ numerous Japanese. Japan did not succeed in obtaining all of these demands, but, as to South Manchuria, secured for her nationals freedom of trade, business, travel and residence. It was, however, expressly provided that the Japanese availing themselves of these rights should be required to register with the local authorities, and that they should submit themselves "to the police laws and ordinances and taxation of China."

Civil and criminal cases in which the defendants might be Japanese were to be tried in Japanese consular courts, and those in which Chinese were defendants, in the Chinese courts. Civil cases relating to land between Chinese and Japanese were to be adjudicated by delegates of both countries acting conjointly but in accordance with Chinese law and local usage.

On October 18, 1916, the Japanese Minister handed to the Chinese Minister of Foreign Affairs the following *aide mémoire* in which, as will be seen, a general right was claimed upon the part of Japan to station police officers in any places in Manchuria or Eastern Inner Mongolia where Japan might deem it desirable:

According to the new treaty concluded last year respecting South Manchuria and Eastern Inner Mongolia, Japanese subjects shall have the right of residence, travel and commercial and industrial trade in South Manchuria, and the right to undertake agricultural enterprises and industries incidental thereto in the eastern part of Inner Mongolia jointly with Chinese subjects. The number of Japanese subjects in South Manchuria and Eastern Inner Mongolia will, therefore, inevitably increase gradually. The Imperial Government of Japan considers it necessary to station Japanese police officers in these regions for the purpose of controlling and protecting their own subjects. It is a fact that a number of Japanese police officers have already been stationed in the interior of South Manchuria and they have been recognized by the local officials of the localities concerned since intercourse has been conducted between them. The Imperial Government of Japan proposes gradually to establish additional stations for Japanese police officers in the interior of South Manchuria and Eastern Inner Mongolia wherever and whenever necessary. The localities where such stations for police officers are to be established will of course depend upon the number of Japanese subjects residing thereat and therefore cannot be specified in advance. Since this will involve great expense, it is unlikely that many police stations will be established at once. The

organization of such stations for police officers will also depend upon the existing conditions of the localities selected and the number of Japanese subjects residing at such places. There will be only a few Japanese police officers at each station as established. The more important duties of such police officers are as follows:

1. To prevent Japanese subjects from committing crimes;
2. To protect Japanese subjects when attacked;
3. To search, arrest and escort Japanese prisoners under the jurisdiction of a Japanese consulate;
4. To attend to the enforcement of consular orders in connection with civil cases, such as the duties of the registrar;
5. Investigation and supervision of the personal standing of Japanese subjects;
6. Control and discipline of Japanese subjects, who violate the provisions of treaties between Japan and China; and
7. To see that Japanese subjects abide by the provisions of Chinese police regulations when the agreement between Japan and China respecting the same should actually come into force.

In short, the establishment of stations for Japanese police officers in South Manchuria and Eastern Inner Mongolia is based on consular jurisdiction, and its aim is efficiently to protect and discipline Japanese subjects, to bring about a completely satisfactory relationship between the officials and people of the two countries, and gradually to develop the financial relations between Japan and China. The Chinese Government is requested speedily to recognize the demands precisely as it has the establishment of consulates and consular agents in the interior of South Manchuria in pursuance of the policy to maintain the friendly relations between China and Japan.[48]

In a *Note Verbale* handed to the Chinese Minister of Foreign Affairs by the Japanese Minister on January 5, 1917, the foregoing *Aide Mémoire* was recited and again called to the attention of the Chinese Government. The action at this time was in connection with the demands

[48] For the text of this *Aide Mémoire*, see MacMurray, p. 1347.

which Japan was then making upon China based upon the Chengchiatun Affair.[49] The *Note Verbale* declared:

> The Imperial Government consider that the said demand, in the event of its withdrawal, will expose the Japanese subjects, visiting and residing at those places [in Manchuria and Mongolia] to danger, thus causing trouble and giving rise to serious complications with Chinese officials and citizens. Inasmuch as it is the duty of the Imperial [Japanese] Government to protect Japanese subjects and its right to control them, not only it cannot view such occurrences with indifference, but in view of the friendly relations between the two nations, it also deems it its duty to take precautionary measures. As the stationing of Japanese police officers is but a corollary of the rights of extraterritoriality, not to speak of the fact that it does not in the least prejudice Chinese sovereignty, it will help to improve the relations of the officials and peoples of the two countries and bring about the development of economic interests to no small degree. Therefore the Imperial [Japanese] Government is convinced that the Chinese Government will, without doubt, give its consent, and the Imperial Government has to add that while the Chinese Government is making up its mind and withholding its consent the Imperial Government will nevertheless be constrained to carry it into effect in case of necessity.

Replying to this note, the Chinese Minister of Foreign Affairs called attention to the fact that Japanese subjects in the regions named were obligated by the treaty to submit to Chinese police laws and ordinances and that there was, therefore, no necessity for the presence of Japanese police officers. The question of police, the Minister declared, could not be associated with extraterritoriality, and the Chinese Government could not recognize the stationing of foreign police as a corollary of extraterritorial jurisdiction. The Chinese Minister continued:

[49] See p. 206.

Although the Japanese Minister has repeatedly declared that the said police would not interfere with Chinese local administration and police rights, yet after serious consideration by the Chinese Government, the stationing of foreign police within the confines of Chinese territory, no matter under whatever circumstances, is prejudicial to the spirit and form of Chinese sovereignty tending to cause misunderstanding on the part of the people, thus placing an impediment to the friendship of the two nations. As regards the Japanese police stations already established, the Chinese Government and the local authorities have repeatedly lodged their protests and have not accorded them recognition, nor is the Chinese Government able to admit the reasons for the stationing of Japanese police officers as stated in the Note Verbale.

In result, the Chinese Government was, upon this occasion, able to avoid making the formal concession which Japan demanded, but she has never been able, in fact, to prevent the Japanese from maintaining troops and police officers at various points in Manchuria and Eastern Inner Mongolia, nor, for that matter, in other parts of China, as for example, at Hankow where a considerable detachment of soldiers was for some years maintained. Also, Japan has claimed and exercised the right to keep considerable bodies of troops at various points in Manchuria as " Railway Guards " for the South Manchuria Railway.

It would seem beyond argument that Japan, in the position which she has thus taken in the matter of police boxes, has acted not only without express treaty authority, but has claimed a right which is not involved in the general principles of extraterritoriality as it exists in China,—indeed, one that is in absolute contradiction to it. Dr. C. C. Wu, a trained barrister, and former Counsellor of the Chinese Foreign Office, writing upon this matter, in 1917, said:

From actual experience we know that the activities of these foreign police will not be confined to their countrymen; in a dispute between a Chinese and a Japanese, both will be taken to the Japanese station by the Japanese policeman. This existence of an *imperium in imperio,* so far from accomplishing its avowed right of improving the relations of the countries and bringing about the development of economic interests, to no small degree, will, it is feared, be the cause of continual friction between the officials and peoples of the two countries.

As to the legal contention that the right of police control is a natural corollary to the right of extraterritoriality, it must be said that even since the grant of consular jurisdiction to foreigners by China in her first treaties, this is the first time that such a claim has been seriously put forward. We can only say that if this interpretation of extraterritoriality is correct, the other nations have been very neglectful in the assertion of their just rights.[50]

Police Boxes in the Washington Conference. This subject is treated in connection with the stationing of foreign troops in China.[51]

Extraterritorial Rights in Leased Areas. This subject is discussed in the Chapter dealing with Leased Areas.[52]

Scope of Extraterritorial Rights Discussed. It will have appeared from what has already been said that the extraterritorial rights enjoyed by foreigners relate to exemption, in certain cases, from the processes of Chinese courts and Chinese law. In a considerable number of cases, however, the proposition has been advanced that

[50] These two paragraphs are taken from a paper prepared by Dr. Wu in which he described the "Outstanding Cases between China and the Foreign Powers." The paper is published by Mr. Putnam Weale among the Appendices to his *The Fight for the Republic.*

[51] See Chapter XXXIII.

[52] See Chapter XVII.

the rights go much further than this and give to the foreigners a status which takes them wholly, or almost wholly, outside of Chinese jurisdiction so that the Chinese Government may not, for example, tax them, or otherwise insist that they render obedience to Chinese law. It seems clear, however, that this is an undue extension of the doctrine of extraterritorial rights.

As to this proposition it is first of all to be observed that these rights are wholly treaty creations, and, according to the principles of construction which have been earlier discussed,[53] must be strictly construed. The rights granted are in derogation of the legitimate territorial jurisdiction of China, and nothing can be justly claimed except what has been expressly granted, and, this being so, it is seen that all that China has conceded in the premises relates to the tribunals in which certain classes of civil and criminal suits may be prosecuted and to the law which is to be applied in their adjudication. Thus Piggott properly describes the situation when he says: "The exact position involved in an extraterritoriality may be shortly stated thus: Such powers alone as are surrendered by the sovereign of the Oriental country can be exercised by the sovereign of the Treaty Power. All those powers which are not surrendered are retained; and to the exercise of such powers by the sovereign of the Oriental country, the subjects of the Treaty Powers are bound to submit."[54]

The objection upon the part of the Chinese Government to an unduly wide interpretation by the foreigners of their extraterritorial rights found expression in the Circular Letter of March, 1878, sent by the Chinese Government to its Ministers abroad giving its views re-

[53] *Ante*, p. 32.

[54] *Extraterritoriality*, ed. 1907, p. 8.

garding most-favored-nation treatment, missionaries, likin, etc.[55] As to extraterritoriality the Circular declared:

By the treaties foreigners in China are not amenable to the jurisdiction of the Chinese authorities—*i. e.*, they are extraterritorialized. If they have disputes among themselves, their own authorities are to settle them; if they commit an offense, their own authorities are to punish them according to their own national laws. But foreigners claim much more than this; they interpret the extraterritorial privilege as meaning not only that Chinese officials are not to control them, but that they may disregard and violate Chinese regulations with impunity. To this we can not assent. China has not by any means given foreigners permission to disregard or violate the laws of China; while residing in China they are as much bound to observe them as Chinese are; what has been conceded in the treaties in this connection is merely that offenders shall be punished by their own national officials in accordance with their own national laws. For example, if Chinese law prohibits Chinese subjects from going through a certain passage, foreigners can not claim to go through that forbidden passage in virtue of extraterritoriality. If they go through it and thereby break a Chinese law, their own national officials are to punish them in accordance with such laws as provide for analogous cases in their own country. In a word, the true meaning of the extraterritoriality clause is not that a foreigner is at liberty to break Chinese laws, but that if he offends, he shall be punished by his own national officials.

Again, seeing that China has agreed that these judicial powers shall be exercised by foreign consuls within Chinese territory, foreign governments should on their side take care that none but good and reliable men are appointed to these posts. Several States, however, appoint merchant consuls. Now, in so far as concerns that part of a consul's duty which comprises the report-

[55] This Circular is to be found in *U. S. For. Rels.*, 1880-1881, p. 177; and also as Appendix I to Sir Robert Hart's *These from the Land of Sinim.*

ing and clearing of ship and the shipping and discharging of sailors, China does not object to its being discharged by merchant consuls. But in China a consul's duties comprise judicial functions as well; and the importance of these functions is such as to seem to demand the appointment of *bona fide* officials to consular posts. Moreover, where cases requiring joint investigation occur, it is neither convenient nor dignified for a Chinese official to sit on the bench with a merchant consul, who may have been fined for smuggling the day before, or who, in his mercantile capacity, may perhaps be personally interested in the case at issue.

Foreigners and Chinese Taxes. A special and important respect in which the issue as to the exemption of foreigners enjoying extraterritorial rights from Chinese laws and regulations has arisen is with reference to their obligation to pay taxes levied by the Chinese Government or by its local governmental agencies. This question, so far as American citizens are concerned, was discussed by the American Minister at Peking in a communication to his Government under date of March 10, 1914.[56] In the course of this communication Dr. Reinsch said:

The tendency to interpret extraterritoriality of foreigners in China as implying entire exemption from all duties ordinarily imposed by sovereign Governments upon persons residing within their territory is certainly not in accord with equity nor with sound policy. Were the position taken by the Government of the United States in the Treaty of 1903 to be generally accepted by the Powers, it would be possible for the Chinese Government gradually, in a measure as its efficiency increased, to develop its just powers of sovereignty throughout the Republic.[57] But by

[56] *U. S. For. Rels.*, 1914, p. 119.

[57] Article IV of this Treaty contained the following clause: "Nothing in this Article is intended to interfere with the inherent right of China to levy such other taxes as are not in conflict with its provisions."

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construing extraterritoriality as implying an absolute exemption, the current international practice stands in the way of the development of an efficient and adequate government.

On the other hand, it is unquestionably true that were the rights of foreigners not carefully guarded, they would often be subjected to burdens of impositions, unjust and intolerable. As long as the whole question is dealt with on the basis of the outside nations trying to enforce absolute immunity of their nationals, the Chinese, on the other hand, will not be free from a desire to take advantage of every opportunity offered, regardless of principle, to get the better of the foreigner. This situation can be remedied only if due recognition, under severe tests of efficiency, is given to the efforts of the Chinese Government to reform and improve the methods of governmental business. Such recognition can come only by allowing the exercise of the sovereign powers of China, where such exercise seems reasonable and just according to the general principles of Government practiced by the nations of the world.

In one of the meetings of one of the sub-committees of the Peking Tariff Conference of 1925-1926, Dr. Wang Chung-hui, speaking in behalf of the Chinese Delegation, made the following formal statement which deserves to be quoted *in extenso:*

Declaration of the Chinese Government regarding the levying of duties and taxes on foreigners residing in China.

The right of levying duties and taxes is inherent to the right of administration of a State. In a State which is entirely sovereign this right of administration is exercised without restriction whatsoever, and therefore its right of levying duties and taxes is also subject to no limitation.

As far as China is concerned ever since she entered into trade relations with foreign countries, in no treaty of any sort is there to be found any provisions which concede to foreigners living in or outside settlements in China an exemption from taxation. But in recent years, when China commenced to enforce her revenue laws, foreigners declined to perform their obligations on

the pretext that they reside in the settlement, or that they had not received instructions from their governments. Besides those residing outside the settlements or within the railway zones putting a different interpretation to the treaties have adopted the same attitude. These examples unfortunately have become precedents for even the Chinese living in the settlements and railway zones, and they too have been encouraged to refrain from paying their taxes. Although various steps had been taken by the Chinese Government to put an end to this state of things, yet no satisfactory rule has been obtained and the Chinese Government has been obliged to establish provisional barriers around the settlements and railway zones in order to collect taxes and duties. Such an abnormal situation is detrimental not only to the administrative authority of the Chinese Government, but also to the trade between China and foreign countries.

It is indeed inadmissible in the enforcement of a fiscal régime to make any discrimination either between citizens on account of their nationality or residence or between different parts of a territory subject to the jurisdiction of the same State. This would violate the principle in international law of equal treatment for the citizens of a State and run contrary to the spirit of the Washington Conference, which was designated to respect the territorial and administrative integrity of China. The Chinese Government therefore proposes that these impediments should be removed so that it may be enabled to exercise completely its right of taxation.

Let us examine the foreign settlements in China from the historical point of view. On April 8, 1863, Earl Russell, then His Britannic Majesty's Secretary of State for Foreign Affairs, wrote to Sir Frederick Bruce, British Minister in Peking, as follows:

"The Lands situated within the limits of the British settlement are without doubt Chinese territory, and it cannot reasonably be held that the mere fact of a residence within those limits exempts Chinese subjects from fulfilling their natural obligations."

In the same year the foreign representatives in Peking met in conference and agreed to a number of principles for the reorganization of the foreign settlement in Shanghai as follows:

1. That whatever territorial authority is established shall be derived directly from the Imperial Government through a Minister.

2. That such shall not extend beyond simple municipal matters, roads, police and taxes for municipal objects.

The aforementioned two articles show that the Powers possess over the Shanghai settlement only an authority in purely municipal matters and are competent to levy taxes only for municipal purposes. It is therefore quite clear that the national taxes are to be paid without exception by the residents of the settlements, whether they be Chinese or foreign citizens. Moreover, the payment of a land tax in respect of all landed property possessed by foreigners in China, proves sufficiently that foreigners and Chinese alike have to perform their fiscal duties towards the Chinese Government.

In recent years, however, the Chinese Government has met with difficulties in the collection of such new taxes as the stamp duties, the income tax, the wine and tobacco taxes, etc.

The foreigners residing within or outside the settlement have refused to pay, on the plea that they had received no instructions from their Governments, while the Chinese followed their example and pointed out that the payment of taxes should be general and uniform.

The financial difficulties at present confronting the Chinese Government are really due to the insufficiency of the old taxes to meet the requirements of the new régime. Therefore, as soon as the likin system is abolished the Chinese Government will be compelled to devise new and reasonable taxes in substitution of the old. If, however, China should continue to be fettered by the existing restrictions, then she will never be able to find a satisfactory solution to the question of taxation. Consequently, the Chinese Government declares that foreigners in China, whether residents within or outside the settlements or within the railway zones, as well as other localities, shall discharge equally with the Chinese their fiscal obligations towards the Chinese Government in conformity with the provisions of the fiscal laws promulgated by China. It is hoped that the plenipotentiary delegates of the Powers will appreciate the reasonableness of this declaration by the Chinese Government.

CHAPTER XXIII

Extraterritorial Courts in China

By far the best account of the tribunals maintained in China for the exercise of their extraterritorial rights by those Powers which are, by treaty, possessed of such rights is that given in the elaborate memorandum which appears as Appendix III to the Report of the Commission on Extraterritoriality in China. The present chapter was prepared before that report became available, but from it the author has been able to obtain additional information which he has inserted in the appropriate places.

The extraterritorial jurisdiction possessed by the Treaty Powers in China is exercised, in the main, by consular officials, by diplomatic officials at Peking (upon appeal from the consular courts) and, in the case of Great Britain, by the British Supreme Court for China, and, in the case of the United States, by the United States Court for China. Of the jurisdiction and operation of these tribunals the following is a brief description:

American Courts in China. By the treaty of July 3, 1844, negotiated and drafted by Caleb Cushing, the United States, following the example set by Great Britain in 1842, demanded and obtained an extraterritorial status for American citizens in China. The rights thus obtained were broadened in the treaty of 1858 and later treaties.

In order to give the necessary statutory authority to American consuls to exercise the judicial functions permitted by the treaty of 1844, Congress passed the act of August 11, 1848.[1] It will not be necessary, however, to consider the provisions of this act, since they were soon replaced by those of the act of June 22, 1860.[2] This act was again modified by the acts of July 28, 1866,[3] and of July 1, 1870;[4] and the substance of these laws is now to be found in Sections 4083-4120 of the Revised Statutes. Since the enactment of the Revised Statutes the only important acts of Congress relating to the exercise of extraterritorial rights in China have been those of June, 1906, establishing the United States Court for China;[5] a provision, in the Diplomatic and Consular Appropriation Act of March 2, 1909, according to which the judicial power vested in the Consul-General at Shanghai is vested in the Vice-Consul General; another provision in the Diplomatic and Consular Appropriation Act of March 4, 1915, vesting the same power in the Vice-Consul at Shanghai; the Act of February 13, 1925, providing for appeals from the United States Court for China to the Circuit Courts of Appeal; and the Act of June 14, 1920, making provision for a United States Commissioner at Shanghai.

In the paragraphs which follow we shall speak first of the judicial powers exercised generally by American consuls in China, and then consider the reasons leading to the establishment, in 1906, of the United States Court for China. The law applied by the United States tribunals in China is considered in the next Chapter.

[1] IX *Statutes at Large*, p. 276.
[2] XII *Statutes at Large*, p. 72.
[3] XIV *Statutes at Large*, p. 322.
[4] XVI *Statutes at Large*, p. 184.
[5] XXXIV *Statutes at Large*, p. 814.

American Consular Courts: Statutory Provisions. Under the laws of 1860, 1866, and 1870 now embodied in the Revised Statutes, the American consuls and the American Minister at Peking were authorized to exercise the jurisdiction permitted by the treaties with China.

They were authorized to arraign and try all citizens of the United States charged with offenses against the law and to issue all the necessary writs and processes.

In civil cases they were invested " with all the judicial authority necessary to execute the provisions of such treaties, respectively, in regard to civil rights whether of property or person."

By Section 4106 of the Revised Statutes it is provided that the consul, whenever he is of opinion that, by reason of the legal questions which may arise, assistance will be useful to him, or whenever he is of opinion that severe punishments will be required, shall summon to sit with him on the trial, one or more American citizens, not exceeding four, and, in capital cases, not less than four, who shall be taken by lot from a list previously prepared by him and approved by the American Minister. The consul, in such cases, gives the judgment, but the associates are required to record their several judgments and opinions. If the consul and his associates concur, the decision rendered is final, except as to cases in which, by other sections of the law, a right of appeal is given. If any of the associates differ in opinion from the consul, the case, without further proceedings, together with the evidence and opinions, is referred to the Minister for his adjudication.

Further sections from the Revised Statutes which cannot be satisfactorily summarized are given *in extenso* in an Appendix to this chapter.

The United States Court for China. In 1906, without touching the system of extraterritoriality itself, Congress

endeavored to correct, in part at least, certain of the evils which were not ineradicably inherent in the system. These corrigible evils were those connected with the diversities of practice and doctrines of the different consular courts; with the fact that these courts are held by officials untrained in the law; and with the matter of appeals to the Minister at Peking and to the Federal Circuit Court for the District of California. These improvements in the system were embodied in the Act of June 30, 1906, entitled "An Act Creating a United States Court and Prescribing the Jurisdiction thereof." The more important portions of this statute will be quoted or summarized.[6]

Be it enacted, etc. . . . That a court is hereby established, to be called the United States Court for China, which shall have exclusive jurisdiction in all cases and judicial proceedings whereof jurisdiction may now be exercised by United States consuls and ministers by law and by virtue of treaties between the United States and China, except so far as the said jurisdiction is qualified by Section 2 of this Act. The said court will hold sessions at Shanghai, China, and shall also hold sessions at the cities of Canton, Tientsin, and Hankow at stated periods, the dates of such sessions at each city to be announced in such manner as the court shall direct, and a session of the court shall be held in each of these cities at least once annually. It shall be within the power of the judge, upon due notice to the parties in litigation, to open and hold court for the hearing of a special cause at any place permitted by the treaties, and where there is a United States consulate, when, in his judgment, it shall be required for the convenience of witnesses, or by some public interest. The place of sitting of the court shall be in the United States Consulate at each of the cities respectively.

Section 2 of the Act, which qualifies the exclusive jurisdiction vested by the first section in the United States

[6] XXXIV *Statutes at Large*, Pt. I, p. 814.

Court, provides that the consuls in China shall have the same jurisdiction they had previously possessed in civil cases not involving more than $500 of money or property, and in criminal cases where the punishment for the offense charged cannot exceed $100 fine or sixty days' imprisonment, or both; and that they shall have the power to arrest, examine and discharge accused persons or commit them to the United States Court.

From the final judgments of the consular courts either party may appeal to the United States Court.

To the United States Court is also given " supervisory control over the discharge by consuls and vice-consuls of the duties prescribed by the laws of the United States relating to the estates of decedents in China." In order that this supervisory control may be effectively exercised, the Act of 1906 goes on to provide that inventories of estates shall be filed by the consuls and vice-consuls with the Clerk of the Court, together with schedules of debts of the decedents; and that no payments of claims against these estates or sales of property belonging thereto shall be made without the approval of the judge of the Court. Other provisions of the act relate to the rendering of reports, the giving of special bond, etc.

Section 3 of the act relates to appeals from the United States Court and reads, in part, as follows:

> That appeals shall lie from all final judgments or decrees of the said court to the United States Circuit Court of Appeals of the ninth judicial circuit, and thence appeals and writs of error may be taken from the judgments or decrees of the said Circuit Court of Appeals to the Supreme Court of the United States in the same class of cases as those in which appeals and writs of error are permitted to judgments of said Court of Appeals in cases coming from district and circuit courts of the United States.[7]

[7] By the Act of February 13, 1925, amending the United States Judicial Code (43 Stat. at L. 936) judgments and decrees of the

By Section 5 of the act it is provided that the procedure of the court shall be in conformity with existing rules governing the consular courts in China, but that "the judge of the said United States Court for China shall have authority from time to time to modify and supplement said rules of procedure."

The act, in its remaining sections, makes provision for a district attorney, a marshal, and a clerk of the court, and for their salaries. The tenure of the judge is fixed at ten years. The judge and district attorney must be lawyers of good standing and experience and are to be appointed by the President by and with the consent of the Senate.

With regard generally to the jurisdiction of the court, it may be observed that, territorially, it extends throughout China; and that, as regards parties, while anyone may be a plaintiff, the defendant must be of American nationality. It is also to be observed that the jurisdiction of the United States Court does not begin where the limited jurisdiction of the consuls ends, but that, with reference to petty cases, the United States Court and the consular Courts have concurrent jurisdiction.

In the opinion rendered by the Supreme Court of the United States in the case *In re Ross* (also sometimes cited as *Ross vs. McIntyre*)[8] the constitutional powers of Congress, legislating for the enforcement of treaty rights, to vest judicial powers in consuls or other officials stationed in foreign countries, was carefully considered. In that case one of the questions was as to whether the

Circuit Courts of Appeals may be reviewed by the Supreme Court of the United States only by certiorari, which is discretionary by the Supreme Court, or by way of appeal or writ of error when the decision of the Court of Appeals is against the validity of a law of a State or of the Union as tested by the National Constitution.

[8] 140 U. S. 453 (1881).

accused, who was charged with murder committed on board of an American ship in the harbor of Yokohama, Japan, had the right to claim the guarantees of the United States Constitution with regard to indictment by a grand jury and trial by a petit jury. The denial that he had the right to claim these privileges the Supreme Court based upon the assertion that, " By the Constitution a government is ordained and established ' for the United States of America,' and not for countries outside their limits. The guaranties it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury, when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad.

"The Constitution can have no operation in another country. When, therefore, the representatives or officers of one Government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other."

As at present constituted the United States judicial establishment in China consists, beside the Judge of the United States Court for China and the United States Commissioner, of a district attorney, a marshall and a clerk who hold office at the pleasure of the President of the United States.

By a decision rendered in 1919 in the case of *In re Estate of A. C. K. Fitch*,[9] it was held that the United States Court for China has concurrent jurisdiction over even those minor cases over which the Consular Courts have jurisdiction.

[9] *Extraterritorial Cases*, p. 869.

There are now seventeen American consular courts in China,—one in each of the eighteen consular districts except that of Shanghai, where, as has been said, the United States Commission functions in the place of the Consul General. As has been earlier pointed out, they have jurisdiction in civil cases where the amount does not involve more than five hundred dollars gold, and in criminal cases where the punishment cannot by law exceed a fine of one hundred dollars gold or sixty days' imprisonment, or both. They also have jurisdiction to arrest, to examine and discharge persons accused of crime or bind them over for a hearing before the United States Court for China, and, in probate matters, to control estates of value of less than five hundred dollars gold.

Persons sentenced to imprisonment are, in minor cases, usually kept in the United States jail at Shanghai. When the term of imprisonment is more than three months, the prisoners are sent either to Bilibid prison in Manila, P. I., or to the United States.

During the three years 1923, 1924, 1925, the total number of cases, civil, criminal and police, tried in all the American courts in China was 1,006, of which 945 were tried at Shanghai. Approximately four hundred of these cases were for infractions of the by-laws of the Shanghai municipality.

The American population in China is about twelve thousand.

United States Commissioner for China. By the Act of Congress of June 4, 1920, making appropriations for the Diplomatic and Consular Service for 1921, provision was made for a United States Commissioner at Shanghai.[10]

[10] 41 Stat. at L. 746.

The statute reads:

The judge of the United States Court for China is authorized to appoint, as in the District Courts of the United States and with similar powers and tenure of office,[11] a United States Commissioner who shall be an attorney regularly admitted to practice before the said United States Court for China, and who, when appointed, shall be in addition *ex officio* judge of the Consular Court for the district of Shanghai, with all the authority and jurisdiction now exercised by the vice-consul acting by virtue of the Act of Congress of March 4, 1915,[12] which authority and jurisdiction are hereby transferred: Provided, That at the discretion of the judge of said court, he may appoint the clerk of the court to perform the duties of Commissioner without additional compensation therefor. In the event that it is not practicable or desirable so to appoint the clerk to act as Commissioner, the judge may, with the approval of the Secretary of State, appoint some qualified attorney to act as Commissioner who shall, if not an officer of the court, receive such compensation as may be fixed by the Secretary of State not exceeding $5 for each day of service actually rendered.

The Commissioner appointed under the foregoing statutory provision now handles much of the judicial business formerly exercised by the American Consul General at Shanghai.

British Courts in China. The exercise by Great Britain of the jurisdiction which, by treaties, she is permitted to exercise outside of her own realms is governed, in general, by the Foreign Jurisdiction Act of Parliament of 1890. By the China Order in Council of 1925, the various orders in Council with regard to China issued in pursuance of this Act were revised and supplemented.

[11] For powers and tenure of United States Commissioners, see the *Judicial Code*, 36 Stat. at L. 1087-1169.

[12] 38 Stat. at L. 1122.

British extraterritorial jurisdiction in China is now exercised by a Supreme Court and Consular Courts known as Provincial Courts. All of these tribunals are courts of record.

His Britannic Majesty's Supreme Court in China. This court was originally established by an Order in Council of October 24, 1904. This Order, as well as the Order of 1925 which has replaced it, provides not only for the courts which are to exercise Great Britain's extraterritorial jurisdiction in China, but also the law, substantive and procedural, which is to be applied.

The Supreme Court, which ordinarily sits at Shanghai, but which may sit anywhere else in China, is composed of a judge and as many assistant judges as may be from time to time required, which judges are to be appointed by the King, to hold office during his pleasure, and must be members of the Bar of England, Scotland, or Ireland, of not less than seven years standing. Two judges constitute a quorum.

To the Supreme Court is given exclusive original jurisdiction, civil as well as criminal, for the district of the consulate of Shanghai, and concurrent jurisdiction, civil and criminal, with the Provincial Consular Courts in other parts of China. It has also exclusive jurisdiction in all cases of divorce and of trials for murder.

British Provincial Courts. These courts sit in each of the British consular districts in China, and are presided over by the consular officials in charge of such districts. They have jurisdiction of civil cases without regard to the amounts involved, but are required to report to the Supreme Court all cases involving more than £500 and which raise difficult questions of law. Also, the Supreme Court can itself order any case brought before it which

it deems desirable to try. In criminal cases the jurisdiction is limited to cases in which a sentence of not more than one year's imprisonment and a fine of £100 can be inflicted; but here also the Supreme Court can order before itself for trial any case that it sees fit.

British Police Court at Shanghai. Great Britain maintains at Shanghai a Police Court to which have been transferred the judicial powers formerly exercised by the British Consulate General.

Appeals. Provision has been made for appeals from the Provincial Courts in both civil and criminal cases to a court composed of three judges which sits at Shanghai.[18] In some civil cases this appeal is one of right; in other civil cases it may be granted by the Provincial Court or by the Court of Appeal. In criminal cases there is a right of appeal in all cases in which questions of law are involved.

In civil cases involving £500 or more, and in all other cases in which questions are involved which are considered to be of general or public importance, a final appeal lies to the Judicial Committee of the Privy Council at London. In criminal cases there is no absolute right of appeal, but one may be granted at the discretion of the Court of Appeals or of the Privy Council.

Death sentences in China are not executed until confirmed by the British Minister at Peking. Sentences may be remitted or lessened by the British Secretary of State or the British Minister at Peking on report made by the Judge of the Supreme Court.

The law administered by the British courts in China is the law of England as modified or supplemented by

[18] In urgent cases the court can be composed of two or even of only one judge.

Orders in Council. These Orders in Council have provided that, in certain cases, Chinese laws and local regulations may be enforced against British subjects.

Tribunals of Other Extraterritorial Powers. Great Britain and the United States are the only Powers which have provided special courts for the exercise of their extraterritorial jurisdictional rights in China. However, France and Italy have provided a number of special judges to assist their Consuls in the trial of cases in China; Japan assigns specially trained consular officials to act as consular judges in Mukden, Tsingtao and Tientsin; and Norway has a specially trained consular judge at Shanghai. For details regarding the modes of exercising their extraterritorial jurisdictional rights by these other Powers, the reader is referred to Appendix III of the Report of the Commission on Extraterritoriality in China.

CHAPTER XXIV

The Law Applied in Extraterritorial Courts

The question as to the substantive law to be enforced in the consular and other extraterritorial courts in China has been by no means a simple one. Upon the part of the Chinese it has been argued that, in certain cases at least, this law should be that of China, thus limiting the extraterritorial privilege of foreign defendants to the right to have his rights or obligations, as determined by the local law, adjudicated upon by officials of, and according to judicial procedures sanctioned by, the laws of their own respective countries. Upon the part of foreigners it has been argued that their own laws, substantive as well as procedural, should be applied by the extraterritorial tribunals; qualified, however, by the admission that there is, to a certain extent, an obligation upon the part of these tribunals to enforce local police and other laws, especially laws regarding real property, so far as these laws are reasonable and are not inconsistent with the laws of the defendant's country.

The problem thus presented was stated, and a reasonable line of action to be taken by foreigners was suggested, in an able memorandum, prepared in 1879, by George F. Seward, American Minister at Peking, and sent to the Secretary of State at Washington.[1] Mr. Seward said:

[1] *U. S. For. Rels.*, 1880, p. 146.

It is true that of late the Chinese Government has advanced the proposition that the extraterritorial privileges of foreigners extend only so far as to give them the right of being tried in their own courts, and of being condemned according to the remedies to be found in their own laws; but that the laws of the [Chinese] Empire are, nevertheless, supreme, and that foreigners are as much bound to respect them as natives.

While it may be admitted at once that justice and fair dealing require that foreigners offending against laws rendered necessary in China, as well as elsewhere, by a right regard to the safety and convenience of the communities in which they reside and of the government upon whose soil they stand, should be punished for their offenses, it appears difficult to admit the broad proposition that they are amenable to Chinese law in the same sense as natives of China are, or in point of fact, in any sense which would allow us to assent to the Chinese proposition.

The case indicated in the Chinese circular of March, 1878, will illustrate the point.[2] It is argued that if a given street or pas-

[2] In this Circular sent by the Chinese Foreign Office (Tsung-li Yamen) to Chinese ministers abroad, the following is the paragraph referred to:

"As regards jurisdiction, *i. e.*, extraterritoriality, by the treaties, foreigners in China are not amenable to the jurisdiction of the Chinese authorities, *i. e.*, they are extraterritorialized. As they have disputes among themselves, their own authorities are to settle them; if they commit an offense, their own authorities are to punish them according to their own national laws. But foreigners claim much more than this; they interpret this extraterritorial privilege as meaning not only that Chinese officials are not to control them, but that they may disregard and violate Chinese regulations with impunity. To this we cannot assent. China has not by any treaty given foreigners permission to disregard or violate the laws of China; while residing in China they are as much bound to observe them as Chinese are. What has been conceded in the treaties in this connection is merely that offenders shall be punished by their own national officials and in accordance with their own national laws. For example, if Chinese law prohibits Chinese from going through a certain passage, foreigners cannot claim to go through that forbidden passage in virtue of extraterritoriality. If they go through it, they thereby break a Chinese law; their own national officials are to punish them in accordance with such laws as

sage is closed to the Chinese, and they may be punished for entering it, foreigners must be subject to the same restriction.

It will be admitted at once on the foreign side that it is not lawful for the foreigner to use the given street, and that he may be proceeded against in case he does so. But there is a great divergence between the treatment that he may expect and that which would be meted out against Chinese, for the prosecution in the one place would take the form probably of a civil action for damages, while the Chinese offending would be dealt with criminally. Or, if it should happen that the laws of the country of the given foreigner would permit of a criminal prosecution, it is quite certain that the punishment inflicted would be wholly different in kind and in degree from that to which the native is subject.

There is, of course, very much in the Chinese code which is barbarous in the eyes of Western people. There is also very much that is singular and which is founded upon different conceptions of right or obligation from those prevailing in the West. Chinese law gives to parents, for instance, far broader authority over their children than is usual with us. The father may, it is said, take the life, even, of a worthless or depraved son. And having such authority a corresponding responsibility is sought to be imposed upon him. He may be punished not only for the offenses of his child, but also because he has not so instructed him that he would not offend. So, a person who has lost property by theft may be punished for not having kept such a watch over his property as to prevent its loss.

It would be idle to say that in such and similar cases foreigners offend against the native law, and that it is the duty of the foreign court to punish them. The simple truth is that when foreigners are tried in their own courts and by their own laws no indictments against them can be sustained which do not describe offenses which would be punishable by law if committed

provide for analogous cases in their own country. In a word, the true meaning of the extraterritorial clause is not that a foreigner is at liberty to break Chinese laws, but that if he offends, he shall be punished by his own national officials." *U. S. For. Rels.*, 1880, p. 177.

at home, or which have been made punishable by some provision of the given treaty or enactment made in pursuance of the treaty.

It is not meant by this to assert that the only obligation of foreigners in China is to regard the laws of their own country. In actual practice it comes to this: that foreigners are bound to observe the laws of the [Chinese] Empire so far as they conform to the laws of their own country. It is an offense against China to commit a murder on Chinese soil. It would not be an offense against China if it was not against the law in China to do murder. The person so offending may be arrested by the Chinese, and they have the right to demand that he shall be tried and punished; in the words of the treaty, "impartial justice shall be done in the premises."

This principle may be carried further, and it may be said that we are bound to provide remedies in cases where the Chinese Government declares unlawful certain acts which are not themselves criminal but which become so in consequence of enactments made for the public advantage. It cannot be said that throwing ballast overboard in a stream is in itself an offense against law, but the throwing overboard of ballast in a stream when it is prohibited by Chinese law must be considered an improper act, an offense against the nation, and, as such, we are under obligation to provide a remedy, either by acknowledging the validity of the law, adopting it, so to speak, for ourselves, or by enacting a law of our own to meet the case. . . .

It does not seem necessary or possible to abandon the simple proposition that our people may be dealt with only in our own courts and according to our own laws. But so far as we can hold language to the Chinese which will indicate that we stand upon their soil in an attitude of respect and with a determination to sustain the government in the essential attributes of sovereignty, I think—and in so holding I maintain only the views of my government—that we ought not to withhold such language nor fail to sustain it in practice by appropriate action whenever the occasion may arise.

In a later communication, Minister Seward expressed himself upon the point under discussion as follows:

My own view is that we cannot deny the right of the Chinese Government to make rules and regulations affecting all matters within their sovereignty, but that we may scrutinize all rules and regulations made or proposed by them which affect our nationals and object to them if we find them in contravention of treaty stipulations, or suggest their withdrawal or modification if they appear burdensome or unnecessary. Holding to this view, I think also that we may, without offense, endeavor to lead the Chinese to communicate to us in advance all such rules and regulations, in order that we may examine them and state in advance of their publication whether we should be likely to complain of them as in contravention of our treaties.[3]

Dr. Koo's position with reference to this subject, which may be said to be the Chinese position, is as follows:[4]

With reference to the Treaty Powers themselves, it may be said that extraterritoriality entitles them to exercise so much authority over their nationals in China as is necessary to enforce effectively, by judicial methods, the laws declared to be in force by the Emperor of China. What the content of this authority consists of may easily be comprehended; it includes only the power to regulate, for the purpose of enforcing territorial laws upon their own subjects or citizens in China, questions concerning the machinery of their courts, the law of procedure, the mode of trial, the rules of evidence, the incidence of responsibility, the measure, degree, kind, and manner of punishment, and other kindred matters. The sovereign power of legislation, on the other hand, remains in the Emperor of China unimpaired. He may make any law that he sees fit for the purpose of maintaining the public peace and order, of preserving the decency and morals of the people, of promoting the welfare of his country, or for any other legitimate purpose.

The Law of Real Estate in Extraterritorial Courts. With reference to matters of land law there are peculiar rea-

[3] *U. S. For. Rels.*, p. 239.
[4] *The Status of Aliens in China*, p. 217.

sons why the extraterritorial courts should pay deference to the local law, for it is a fundamental principle of all systems of jurisprudence that rights of realty should be determined according to the *lex situs*. The considerations involved in this matter are so well set forth in an opinion rendered by the British Supreme Court for China that they will be here quoted.[5] Justice Bourne, speaking for the Court, said:

I hold that the law of China ought to be applied to the facts of this case. The court administers the law of England (1863 Order in Council, Article 5), but what is the law of England in regard to immovable property situated within the dominions of the Emperor of China? Undoubtedly that rights in respect of such property shall be governed by the *lex situs*, that is, by the law of China.

To apply the law of English realty to land under the sovereignty of China is to disregard the distinction between the real and personal statutes—a fundamental principle of Private International Law which can be traced back through the legal history of the Western world to the time of the Roman Republic, and which is as necessary today as ever. It is true that our extraterritorial rights in China are not rooted in the history of Western law, as are those in the Levant, for they are the creatures of the treaties with China, the earliest of which was ratified in 1842; but I think there is no doubt that the Order-in-Council from which the court derives its jurisdiction was framed on the long established lines of an extraterritorial personal law. . . . The principle that land and its incidents are subject to the *lex situs* is not arbitrary, but founded upon cogent considerations of justice and expediency—one of the most obvious is that contiguous plots of land should be subject to the same law in regard to such incidents as prescription and servitudes. The land of British subjects at Tientsin is often coterminous with that owned

[5] *Macdonald* v. *Anderson*, Tientsin, January 16, 1904. The opinion is reproduced in Hinckley's *American Consular Jurisdiction in the Orient*, pp. 250-253.

by Frenchmen, Germans and subjects of other Treaty Powers. If the home law of each proprietor is to apply to his land at Tientsin there will be different periods of limitation, prescription for servitudes, etc., according to the nationality of the owner for the time being. . . . The same reasoning excludes the law of the owner's domicile.

Having thus declared that the land law of China should be applied, Justice Bourne turned to a consideration of the problem of determining what that law might be. Referring to a judgment rendered in 1901 by the Privy Council in the case of *Secretary of State vs. Charlesworth Polling & Co.* (a case relating to extraterritorial jurisdiction in Zanzibar), Justice Bourne said:

That case seems by analogy to establish two propositions, that Chinese law ought to be applied by His Majesty's Courts in China to the incidents of land in China, and that His Majesty's judges in China ought to take judicial notice of Chinese law [that is, without formal proof offered in court]. In regard to the first, the greater part of Chinese written law would be void and inoperative in an English court as inconsistent with the policy of English law. . . . Further, Chinese land law consists almost entirely of local custom. A great deal of English law has been uniformly followed for half a century by his Majesty's subjects in China, and has thus acquired the force of Chinese law, e. g., testamentary disposition of land in China according to the English form, and English forms of conveyancing. Where there is no custom, the duty of the Chinese judge is to decide according to good conscience. The British Court would, I conceive, in such cases draw on the civil law as developed by modern continental codes and text writers, including our own law of personal property, which comes in some respects from the same source, cf. Maine's *Ancient Law,* page 283. If a land law so derived is thought too uncertain to support the large commercial interests now centered in Shanghai and Tientsin, legislation alone can supply the remedy. Rights of limitation and servitudes might be

governed by Land Regulations approved by the Treaty Powers, and succession *ab intestato* by Order-in-Council.

In regard to judicial notice, there is in fact no Chinese written civil law. Judicial notice might be taken of the Penal Code of the present dynasty, translated by Staunton, London, 1810, but custom would have to be proved by evidence.

Sources of Law for American Courts in China.[5a] If we accept, as in the main extraterritorial courts have accepted, the principles stated by Mr. Seward, and quoted above, there still remains the difficulty, in the case of the courts of each of the Treaty Powers, of determining what laws of the countries concerned have been made operative outside of the borders of the countries by whose legislative bodies they have been enacted. As to this it will clearly not be practicable to consider, even generally, the practice of each of the Treaty Powers, but it will be advisable to examine into the matter from the American standpoint.[6]

By the Act of August 11, 1848,[7] Congress, after vesting the necessary jurisdiction in American consuls to carry into full effect the Treaty of 1844, went on to provide:

That such jurisdiction in criminal and civil matters shall in all cases, be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as is necessary to

[5a] Upon this subject the author has made liberal use of the article "American Extraterritorial Jurisdiction in China," by Mr. Crawford M. Bishop, in the *American Journal of International Law*, April, 1926, and, as will later be noted, he has, with the consent of Mr. Bishop, reproduced several pages from that article.

[6] In this examination we were fortunate in having the assistance of a series of recent articles by His Honor, Judge Charles S. Lobingier, Judge of the United States Court for China. *Millard's Review*, Oct. 26, Nov. 9, Dec. 14 and Dec. 28, 1918, "American Courts in China."

[7] 9 Stat. at L., 276, Sec. 4.

execute said treaty, extended over all citizens of the United States in China (and over all others to the extent that the terms of the treaty justify or require) so far as such laws are suitable to carry said treaty into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law shall be extended in like manner over such citizens and others in China; and if defects still remain to be supplied, and neither the common law nor the statutes of the United States furnish appropriate and suitable remedies, the commissioner shall, by decrees and regulations which shall have the force of law, supply such defects and deficiencies.[8]

It thus appears that American officials exercising judicial power in China are obliged to look to a number of different sources for the law which they are to apply. These sources may be enumerated as follows:

1. Acts of Congress.
2. The Common Law.
3. Special Decrees and Regulations.
4. Chinese Law.

Acts of Congress. Those familiar with federal legislation in the United States will know that there is in the Acts of Congress very little substantive law applicable to the ordinary affairs of private life, and, therefore, if we except such comprehensive measures as the so-called Criminal Code enacted a few years ago, not much remains for the guidance of the United States Court for China.

In some cases the American Congress has supplied bodies of statute law for special areas subject to its full and exclusive legislative authority. Thus, in 1801, it enacted that the laws of the State of Virginia should be considered as in force in the District of Columbia; and,

[8] This section is repeated in the Act of 1860, and carried into the Revised Statutes, Section 4086. The term Commissioner referred to the representative of the United States in China.

in 1884, that the laws of the State of Oregon should apply in the Territory of Alaska. However, Congress has made no attempt to supply a general body of laws for the United States Court for China or for the Consular Courts in China. However, the United States Court for China has held in a number of cases that statutes enacted by Congress for the District of Columbia and the Territories of the United States might be availed of in China.

The leading case upon this point is *Biddle vs. United States,* decided in 1907 by the United States Circuit Court of Appeals on appeal from a judgment of the United States Court for China.[9] In this case it was held that the Criminal Codes of Alaska and the District of Columbia, being Federal statutes, were applicable in China. In its opinion the court said:

> The object of the treaty and the intention of Congress, in creating the United States Court for China, in so far as that court is given jurisdiction, was to throw around American citizens residing or sojourning in China, and there charged with crime, the beneficent principles of the laws of the United States relating to the trial of persons charged with crime, the rules of evidence, the presumption of innocence, the degree of proof necessary to convict, the right of the accused to be confronted with witnesses against him, exemption from being compelled to incriminate himself, etc. But, while securing to them these privileges, the statute at the same time made them subject to punishment for acts made criminal by any law of the United States or for acts recognized as crimes under the common law.

The court then pointed out that the offense charged against Biddle had been declared to be a crime by laws enacted by Congress for the District of Columbia and for

[9] *Extraterritorial Cases,* p. 120. This is a volume of cases from various sources, but mostly American, compiled and edited by Judge Lobingier, and published in 1920 (Manila: Bureau of Printing).

the Territory of Alaska, and, therefore, that he could be punished for such offense by the United States Court for China.

This very important holding has been consistently followed in later cases by the United States Court for China. Thus, in the case of *United States vs. Allen,*[10] the court held that, although statutes by Congress enacted for the special areas under the exclusive jurisdiction of Congress might, by their very terms, be limited in their application to such areas, they nevertheless could be applied in China by the American tribunals in pursuance of the Act of 1860.[11] However, it has been held that a general act of Congress, as, for example, the Federal Criminal Code, will be applied in preference to a statute intended for a particular area.[12]

The Common Law. With reference to the Common Law (as that term is used in English and American jurisprudence) as a source of law for American tribunals in China, it is to be observed that, inasmuch as there is no national or federal common law in the United States, and inasmuch as the bodies of common law in the different States of the American Union are by no means the same, the Common Law referred to in the Acts of Congress of 1848 and 1860 must be that of England as it existed at the time of the separation of the American colonies from the mother country. This was the opinion of the first judge of the United States Court for China, as declared in *United States vs. Biddle,*[13] and that opinion

[10] *Extraterritorial Cases,* p. 308.

[11] 12 U. S. Stat. at L. 72. The doctrine has been applied to civil as well as criminal cases. Ex. rel. Raven v. McRae, *Extraterritorial Cases,* p. 655.

[12] United States v. Diaz, *Extraterritorial Cases,* p. 784. See United States v. Thompson, *Extraterritorial Cases,* p. 261, for a decision holding the U. S. White Slave Traffic Act applicable in China.

[13] *Extraterritorial Cases,* p. 84.

has been followed in subsequent cases and affirmed by the Circuit Court of Appeals of the United States.[14]

The law of the American courts in China as regards "equity" and admiralty has not been so undetermined as in the case of the common law proper, for the reason that, in the case of equity, the American courts have had the guidance of the body of equity jurisprudence which the federal, that is, the national, courts of the United States have built up as distinct from that of the individual States, and, of course, American admiralty jurisprudence has been wholly a federal product.[15]

Special Decrees and Regulations. As regards Special Decrees and Regulations as a source of law for American tribunals in China, the Act of 1848 provided that the Commissioner from the United States (provided for in the Treaty of 1844) and the Consuls might prescribe the forms of processes and the modes of executing them, the manner in which trials should be conducted, the fixing of fees, the giving of bail and other security, etc.—such rules and regulations to go into immediate effect but to be transmitted to the President of the United States and by him to be laid before Congress for possible revision or annulment.

When, later, the Commissioner was replaced by the American Minister to China, the rule-making authority was transferred to him, where it remained until 1906, when it was placed in the United States Court. The provision of the Act of 1906 upon this point is as follows:

[14] *Extraterritorial Cases*, p. 120.

[15] Space cannot be here spared to explain the peculiar principles of American constitutional jurisprudence which have permitted the development of these systems of national equity and admiralty law as distinguished from the bodies of common law of the constitutive States of the American Union.

The procedure of the said Court shall be in accordance, as far as practicable, with existing procedure prescribed for consular courts in China in accordance with the Revised Statutes of the United States: Provided, however, That the judge of the said United States Court for China shall have authority from time to time to modify and supplement said rules of procedure.

Judge Lobingier, concluding his article in *Millard's Review,* to which reference has been earlier made, says: "Acting under this authority the writer has already promulgated Rules for Admission to Practice in all of these courts,[16] and has sent out for comment and suggestion before promulgation a draft of proposed Rules of Evidence which aim to cover that subject in brief space. So far as the growing business of the Court will permit, it is the writer's intention to follow these with successive drafts of rules on various procedural subjects until the whole field of remedial law is completed."[17]

The Law Governing American Corporations in China.[18] American corporations, like natural persons of American citizenship, have been subject to the jurisdiction of the consular courts and of the United States Court, even though represented in the jurisdiction only by an agent, and the latter not an American citizen.[19]

In 1917 it was held by Judge Lobingier [20] that the Corporation Act of Congress of March 2, 1903, a general in-

[16] These rules were published in *Millard's Review,* vol. IV, p. 68.

[17] This task Judge Lobingier did not complete before his retirement from the bench of the Court.

[18] This and the following six sections of this Chapter are taken *verbatim,* with Mr. Bishop's permission, and that of the *American Journal of International Law,* from the article by Mr. Bishop in the April, 1926, issue of the *Journal,* to which reference has been earlier made.

[19] Schnabel & Gaumer v. Garland S. S. Co., *Extraterritorial Cases,* 636; Everett v. Swayne & Hoyt, *Extraterritorial Cases,* 600.

[20] U. S. *ex rel.* Raven v. McRae, *Extraterritorial Cases,* 655.

corporation law for the territory of Alaska, and at that time the latest expression of Congress on the subject of incorporation, was suitable to the conditions in China and necessary to execute the treaties, and consequently in force in the extraterritorial jurisdiction. Thus was provided for the first time a law for incorporating in China, and it has since been availed of to a considerable extent.

Congress has, however, since then passed a special corporation act called the "China Trade Act"[21] providing the law and administrative machinery for organizing corporations in China. This being the latest expression of Congress on the subject of incorporation, it will presumably be held to supersede the Act above cited as prevailing in the extraterritorial jurisdiction.

In the case above cited, the court declined to pass upon the question whether, under the Act of March 21, 1903, banking corporations may be organized. But in the opinion rendered in another case,[22] an Act of Congress of July 1, 1826, was cited which provides "that no act of the Territorial legislature of any of the Territories of the United States incorporating any bank or any institution with banking powers or privileges, hereafter to be passed, shall have any force or effect whatever until approved and confirmed by Congress."

It would seem that the Edge Law,[23] being an Act of Congress, would be in effect in the extraterritorial jurisdiction, and afford an appropriate Federal statute for incorporating banking corporations for transacting banking business in China. Moreover, being the latest expression of Congress on the subject, and having been passed for the express purpose of providing a means of incorporation for corporations to engage in foreign banking

[21] 68th Cong., 2d Sess. Ch. 345.
[22] Chinese-American Co. v. Tenney, *Extraterritorial Cases*, 759.
[23] Act of Dec. 24, 1919, amending Federal Reserve Act, Sect. 25a.

or financial operations, with special reference to the territories and insular possessions of the United States, to which the extraterritorial jurisdiction is assimilated, it would seem all the more appropriate for that purpose.

Procedure in Extraterritorial Courts. The Consular Court Regulations of 1864 govern the procedure of all American courts in China, except as modified and supplemented by judges of the United States Court. These regulations prevail even over inconsistent acts of Congress not expressly relating to the China jurisdiction. Thus the period of limitations provided by the Consular Court Regulations of six years for "heinous offenses, not capital," is in effect and not that of three years as provided in the Revised Statutes (Sec. 1044).[24] Similarly the rate of 12% interest on judgments of extraterritorial courts prevails over that of 6% provided in the Act of Congress of March 31, 1901 (District of Columbia Code).

In the case of *United States vs. Engelbracht,* above cited, it was held that the Act of 1906 constituted an "affirmative recognition and confirmation of such of these (Consular Court) regulations at least as relate to procedure."

Where local regulations or rules are lacking, the Federal Judicial Code, and the Codes of Alaska and the District of Columbia are applicable.

It is evident from the foregoing that in matters of procedure as well as of substantive law, there is available to American courts in China a well-developed body of law for the adjudication of all classes of actions.

Extraterritorial Domicil. In a decision[25] rendered in 1907, Judge Wilfley, of the United States Court for China,

[24] U. S. v. Engelbracht, *Extraterritorial Cases,* 169. Bennet v. Brooks, *Extraterritorial Cases,* 222.

[25] *In re* Allen's Will, *Extraterritorial Cases,* 92.

held " that there is nothing in the theory or practical operation of the law of extraterritoriality inconsistent with or repugnant to the application of the American law of domicil to American citizens residing in countries with which the United States has treaties of extraterritoriality." Therefore, given the fact of residence and the intention of remaining, an " extraterritorial domicil may be acquired in China." This decision was quoted and followed by the Supreme Court of Maine.[26] The Maine court held that there was nothing to prevent the acquisition of a domicil in China by an American. Since China has by treaty conceded to the United States the application of American laws to its citizens residing there, the law governing the distribution of estates will be American law.

It is quite evident from the reasoning of the Maine court, that were extraterritoriality abolished, Chinese law would be applied in the given case.

These cases have been followed by the British House of Lords,[27] which overruled the dicta of Chitty, J., in the case of *In re* Tootal's Trusts, and Abd-ul-Messih, which had been the leading British cases theretofore, and which held the contrary view. The dictum of Justice Chitty in regard to an Englishman acquiring a Chinese domicil was, " The difference between the religion, laws, manners and customs of the Chinese and of Englishmen is so great as to raise every presumption against such a domicil." The House of Lords, in taking a different position, by following the American decisions, are now in accord with the views of Sir Francis Piggott, Chief Justice of Hong-

[26] Mather v. Cunningham, 105 Me. 392; 74 Atl. 809; *Extraterritorial Cases*, 136.

[27] Casdagli v. Casdagli, A. C. (1919) 145; *Extraterritorial Cases*, 104.

kong, who says:[28] "The law which regulates a man's personal status must be that of the governing power in whose dominions his intention is permanently to reside, or must be so recognized and established by that governing power as to be in fact the law of the land." Hall,[29] another British authority, holds the same views.

The rule thus established that an American citizen may have a domicil, whether of origin or of choice, in the extraterritorial jurisdiction of China, has important consequences, for in all questions of personal status, where the domicil determines the law to be appiled, that domicil is now fixed and certain.

Law Governing Wills and Administration of Estates. This rule is invoked in connection with the probate of wills and the administration of estates. In 1907 Judge Wilfley held[30] that the United States Court had jurisdiction to probate wills and administer estates of Americans decedent in China. Under the treaties and the Acts of Congress, China, in so far as the administration of the estates of Americans decedent therein is concerned, is a separate, distinct and complete jurisdiction, similar to that of an unorganized territory belonging to the United States. American citizens may become domiciled there and their estates administered in the consular courts and the United States Court.

Since the decision in the Biddle case referred to above, the court has held that it is authorized to apply any suitable Act of Congress. In the distribution of personalty of an intestate, the court applied the Act of 1901, in-

[28] *Extraterritoriality*, p. 232.

[29] Hall, *Foreign Jurisdiction of the British Crown, passim.*

[30] *Re* Probate of the Will of John Pratt Roberts, *Am. Journal of Int. Law*, vol. II, p. 233.

tended for the District of Columbia, as being the latest expression of Congress.[31]

The Consular Court Regulations of 1864 recognized the authority of the consular courts to probate wills and in matters concerning the administration of estates by providing that consuls should continue to exercise their former lawful jurisdiction and authority. The United States Court held that this authority was embraced in the extension of the " common law " by Act of Congress to the extraterritorial jurisdiction.[32]

Certain provisions of the laws of the United States [33] charge American consuls with administrative powers and duties relative to the estates of American citizens dying in foreign countries. The later laws conferring judicial powers on consuls in China contain no specific provision of repeal or amendment of these earlier laws. Judge Thayer of the United States Court held [34] that consular officers in China, having been given full power of probate jurisdiction, such powers as were previously exercised under these earlier statutes as partake of a judicial character must be assumed to have been merged in the probate jurisdiction conferred by the later laws. But the purely administrative duties therein charged upon them may still be exercised.

As these administrative powers are exercised in non-extraterritorial countries, they would survive the abolition of extraterritoriality in China.

In 1907 the then Consul General at Shanghai was sued by the administrator of the estate of an American decedent, appointed by the courts of the State of Maine, because he had administered the estate of the deceased,

[31] *In re* Will of Thacher, *Extraterritorial Cases*, 524.
[32] *In re* Robert's Will, *Extraterritorial Cases*, 106.
[33] Rev. Stats. Secs. 1709-1711.
[34] *In re* Cons. Gen's. Report, *Extraterritorial Cases*, 292.

who died at Shanghai, in his judicial and not in his administrative capacity under Sections 1709-1711 of the Revised Statutes. The question was not then settled as the case went off on a plea in abatement, the plaintiff being held to be without capacity to sue as administrator, since he had not taken out letters in the China jurisdiction.[35] But there can be no doubt that a similar suit would now be decided adversely on the merits.

Even if a decedent had no domicil in China, but left part of his estate there, an ancillary administration could be had there of his realty and personalty in the jurisdiction.[36]

Prior to the decision *In Re* Probate of the Will of Young John Allen, holding that an American extraterritorial domicil may be acquired in China, it seems to have been the official view of the United States State Department [37] that the China administration was a mere ancillary one, the principal one being in the courts of the home State of the deceased.

Supervision of Consular Administration of Estates. By Section 2 of the Act of June 30, 1906, the judge of the United States Court is given supervisory control over the discharge by consuls of their duties relating to the estates of decedents in China. This is in addition to the ordinary appellate jurisdiction of the United States Court over estate actions originating in the consular courts, and includes supervision over both administrative and judicial acts of the consuls. Thus, a consul may not pay any claims against the estate, or make sale of any of the assets of the estate, without first obtaining the written approval of the judge of the United States Court.

[35] *Extraterritorial Cases*, 109; Wash. L. Rep. XLVIII, 216.
[36] *Extraterritorial Cases*, note, p. 296.
[37] See letter from Secy. Evarts to Mr. Woodward, Moore, II, p. 626.

The latter is furthermore empowered to require reports from consuls in respect to all their acts relating to a decedent's estate.

In pursuance of this authority, Judge Lobingier, in a circular dated June 1, 1917, addressed to consular officers in China, on the subject of consular court rules, advised them that under the decision of the appellate court in the Biddle case, treating as extended to China all applicable Acts of Congress regardless of the locality for which they were first intended, it seemed probable that certain procedural provisions enacted by Congress for Alaska and the District of Columbia were in force in China, particularly those concerning probate and administration proceedings, concerning which the Consular Court Regulations had little to say.

In addition to the supervision exercised by the Judge of the United States Court, the Consular Regulations (Art. 20, par. 60) provide: "that a consular officer, charged with judicial functions, will make a semi-annual report to the Department of State in the case of each estate of deceased American citizens that has come within their probate jurisdiction."

Where a residue of an estate is left, and no heirs are known to the court to whom the same may be lawfully distributed, said residue is required to be remitted to the Treasury of the United States.

Prior to the creation of the United States Court, consuls were required to report and render accounts of the assets of any deceased seamen which might come into their hands to the proper District Judge in the United States.[38] But the United States Court for China has since held that the effect of the passage of the Act of 1906 creating the court was to confer upon it the authority

[38] Rev. Stats. Secs. 4541, 4545.

as regards the settlement of the estates of American seamen dying in China previously exercised by courts in the United States, although in other respects the procedure prescribed by the Act of June 7, 1872, remains in force. [39]

Extraterritoriality and Citizenship. It has been stated above that the United States Court has held that the extraterritoriality jurisdiction is similar to that of an unorganized territory of the United States. This has important consequences in connection with the Act of 1907 regarding citizenship and expatriation.[40] In two cases which have been decided in the United States Court,[41] it has used language that would indicate that, for purposes of citizenship, residence in a country over which the United States retains extraterritorial jurisdiction will be considered as residence in the United States. The Act of 1907, Section 4, provides:

> That any foreign woman who acquires American citizenship by marriage to an American shall be assumed to retain the same after the termination of the marital relation if she continue to reside in the United States, unless she makes formal renunciation thereof before a court having jurisdiction to naturalize aliens; or, if she resides abroad, she may retain her citizenship by registering as such before a United States consul within one year after the termination of such marital relation.

The United States Court held, in a case where she is residing in a territory in which, though foreign, she is still subject to the laws and jurisdiction of the United States, the requirement of registration is logically not necessary. This is in accord with the ruling of the Depart-

[39] *In re* Corrigan's Estate, *Extraterritorial Cases*, 717.

[40] 34 U. S. Stats. at Large, Sess. II, Pt. I, Ch. 2534.

[41] *In re* Lee's Will, *Extraterritorial Cases*, 710, and *In re* McGhee's Estate, *Extraterritorial Cases*, 423.

ment of State that the limitations of permitted residence abroad do not apply to countries in which extraterritoriality prevails.[42]

The treaty of 1868 between the United States and China while recognizing the right of expatriation, also provides[43] "that nothing herein contained shall be held to confer naturalization upon citizens of the United States in China nor upon the subjects of China in the United States." Consequently an American citizen is practically precluded from changing his allegience by mere residence in China. Whether residing temporarily or permanently, he remains as much under the jurisdiction of his government as if he were residing at home. Hence no amount of residence in China, even though accompanied by the intention of remaining permanently in China and never returning to the United States, can work a forfeiture of American citizenship, or create any presumption of an intention to abandon it.

As to whether residence in China could be counted toward the period required for naturalization by United States Courts of aliens, or whether the United States Court for China has power to naturalize, has not been passed upon.

While a Chinese citizen who goes to the United States to reside retains his citizenship and cannot expatriate himself, or become an American citizen by naturalization,[44] yet a Chinese minor may become an American citizen by adoption, and the United States Court for China has jurisdiction to issue a decree of adoption in such a case.[45]

[42] *Extraterritorial Cases*, 423; Moore, III, 459.
[43] *Extraterritorial Cases*, 711.
[44] Estate of Ben Hope Lee, *Extraterritorial Cases*, 701.
[45] *In re* adoption of Wu, *Extraterritorial Cases*, 753.

Law Governing Marriage and Divorce of Americans in China. The general rule that the *lex loci celebrationis,* governs with respect to the validity of a marriage so far as the ceremonies are concerned, requires the application of extraterritorial law to marriages celebrated in China. In 1800 Congress authorized the solemnization of marriages and the attendance of consular officers as witnesses, and provided that if valid according to the laws of the District of Columbia, such marriages would be recognized as valid in territory over which the United States has jurisdiction.[46] The attendance and certificate of the consul are of evidential value only and not requisite to the legal validity of the marriage.

The United States Court has held [47] that the laws relating to the validity of a marriage and the grounds for annulment are contained in the laws passed by Congress for the District of Columbia. This follows from the decision of the Court of Appeals in the Biddle case heretofore cited.

That consular courts had jurisdiction in divorce cases is evident from the language of Attorney General Cushing. He stated in an opinion [48] in 1855 that "matters of .... divorces, etc., and other matters of equity, admiralty and ecclesiastical law are for the most part of local nature, and requiring prompt interlocutory action of judicial authority; and therefore seem to be fit subjects for the original jurisdiction of the consuls, with proper regulations for appeal to the Commissioner."

The Consular Court Regulations of 1864 contained provisions relating to procedure and relief in divorce actions, but did not prescribe the grounds of divorce. Although consular courts had not infrequently exercised jurisdic-

[46] Rev. Stats. 4082.
[47] Cavanagh v. Worden, *Extraterritorial Cases,* 321.
[48] Op. Atty. Gen. 503, *et seq.*

tion in divorce actions,[49] it was held in the first action to come before the United States Court for China [50] by Wilfley, that that court was without authority to grant such relief, the Minister to China not having issued regulations prescribing grounds on which divorce or judicial separation might be granted. In later cases, however, coming before Judge Lobingier, jurisdiction both in cases of annulment and divorce, *a mensa et thoro* and *a vinculo* was taken.[51] But it was held that the consular courts would no longer have jurisdiction since their civil jurisdiction was limited to cases where the amount involved does not exceed $500, while divorce cases involve a status whose pecuniary value cannot be estimated.

As a result of the decision of the United States Court, the Act of Congress of March 3, 1901, being the latest expression of Congress,[52] is held in force as fixing the grounds for divorce. But the consular court regulations prescribe the penalty. These provide that " divorce releases both parties and they shall not remarry." These latter prevail, and consequently an absolute divorce will be granted, even though the District of Columbia Code only allows a legal separation for certain causes.[53]

Legislation for the Extraterritorial Jurisdiction. Since the Act of 1906 creating the United States Court for China, no Act of Congress has been passed specifically intended for the extraterritorial jurisdiction, with the exception of the China Trade Act. Prior to the creation of that court the American Minister had power to decree rules and regulations for consular courts. This power,

[49] *Extraterritorial Cases*, 369, and instances there cited.

[50] McDermid v. McDermid, *Extraterritorial Cases*, 369; *Am. Journal of Int. Law*, vol. II, p. 225.

[51] Cavanagh v. Worden, *Extraterritorial Cases*, 317, 365.

[52] U. S. Stats. at Large, Sess. II, Ch. 854.

[53] Roberts v. Roberts, *Extraterritorial Cases*, 918.

in the view of both the State Department and the United States Court, was limited to regulations governing procedure and did not include the power to enact substantive law.[54] Section 5 of the above Act provided that the procedure of the court was to be in accordance with the existing procedure provided for the consular courts in China, with authority in the Judge to modify and supplement the said rules. This authority has since been exercised by Judge Lobingier, who promulgated rules for the court.[55] In 1917 the State Department, in an instruction to the United States Minister to China, announced " that the Department is clearly of the opinion that Section 5 should be construed as effecting a transfer of the authority to modify and supplement existing rules of procedure from the Minister to the United States Court for China."

With respect to legislation in matters of substantive law, the court is authorized to apply any Act of Congress, whether a general law or a special act intended for a particular territory, which is " suitable " and " necessary to execute the treaties."[56] As to whether a given law fulfills those conditions is for the judge in each case to decide. Thus, the Federal Bankruptcy Act of July 1, 1898, has been held[57] in force in China, even though other courts were given exclusive jurisdiction elsewhere. Likewise the voluntary assignment Act of Congress of March 3, 1901.[58] These cases, decided by Judge Lobingier, were contrary to decisions by his predecessors, Judges Wilfley[59] and Thayer,[60] but in view of the decisions of the

[54] Moore, Int. Law Digest, II, 617; U. S. v. Engelbracht, *Extraterritorial Cases*, 169; McDermid v. McDermid, *Extraterritorial Cases*, 369.

[55] Extraterritorial Remedial Code, *Extraterritorial Cases*, 180.

[56] *Extraterritorial Cases*, 638.

[57] *In re* Bankruptcy Petition, *Extraterritorial Cases*, 897.

[58] *In re* Assignment of Fobes, *Extraterritorial Cases*, 950.

[59] *Ex parte* C. A. Biddle (1907).

[60] *In re* S. H. Comstock, Insolvent.

Circuit Court of Appeals in the Biddle case, there can be no doubt as to the applicability of the Act in question.

There is, therefore, now available to American citizens in China a more definite and more extensive body of law than was the case in Japan at the time of the abolition of extraterritoriality in that country. The commercial and financial interests of Americans in China are also greater. The system of extraterritoriality in China, which had its origin at about the same time as that in Japan, has now had a quarter of a century of development since the latter was abolished. The system of jurisprudence as developed under the Act of 1906 and the decisions of the United States Court in the past 20 years of its existence is more complete than that of any body of extraterritorial law. An American citizen in China has all the rights and remedies that a citizen of the District of Columbia, for example, would have. For all legal purposes his position is the same as though he were in the Federal District.

Extradition. China has entered into no treaty engagements with reference to the extradition of fugitives from justice, and thus, as Mr. Hinckley has pointed out,[61] "China is the greatest and most accessible area in the world not yet protected against the coming and going of criminals. . . . . A British offender in China can be returned from any British jurisdiction because extradition acts are extended to British jurisdiction in China. But it has been ruled that the British and American extradition acts do not reciprocally extend to their extraterritorial jurisdictions—a ruling which on the principles of law involved appears too narrow. It is a surprising and

[61] In an article entitled "Extraterritoriality in China," in the *Annals of the American Academy of Political and Social Science*, vol. XXXIX (1912), p. 97.

embarrassing fact," Mr. Hinckley continues, "that an American offender cannot be extradited to or from the United States from or to China, though the United States jurisdiction is as absolute over him in one place as the other." [62]

Other Jurisdictional Matters. It has been held of American extraterritorial courts in general that they have jurisdiction over crimes committed on the high seas; [63] and also over seamen, whatever their nationality, serving on board American vessels.[64]

It has also been held that the jurisdiction of American extraterritorial courts is not dependent upon the residence of the parties in China. It is only necessary that the cause of action should have arisen in China.[65]

[62] It would appear that this last statement is not certainly true. At least, the newspapers report that an effort is to be made to have returned to China from the United States a former clerk of the United States Court for China who is charged with having embezzled funds of that Court.

[63] *In re* Ross, 140 U. S. Reports, p. 479.

[64] U. S. Consular Regulations, 1896. Cited in *In re Ross*. Cf. Moore, *Digest of Int. Law*, vol. II, p. 610.

[65] Swayne and Hoyt v. Everett, *Extraterritorial Cases*, p. 600, at p. 617.

APPENDIX A

United States Revised Statutes Relating to Consular Jurisdiction

Sec. 4083. To carry into full effect the provisions of the treaties of the United States with China, Japan, Siam, Egypt, and Madagascar, respectively, the minister and the consuls of the United States duly appointed to reside in each of those countries, shall, in addition to other powers and duties imposed upon them, respectively, by the provisions of such treaties respectively, be invested with the judicial authority herein described, which shall appertain to the office and minister and consul, and be a part of the duties belonging thereto, wherein, and so far as the same is allowed by treaty.

Sec. 4084. The officers mentioned in the preceding section are fully empowered to arraign and try, in the manner herein provided, all citizens of the United States charged with offenses against law, committed in such countries, respectively, and to sentence such offenders in the manner herein authorized; and each of them is authorized to issue all such processes as are suitable and necessary to carry this authority into execution.

Sec. 4085. Such officers are also invested with all the judicial authority necessary to execute the provisions of such treaties, respectively, in regard to civil rights, whether of property or person; and they shall entertain jurisdiction in matters of contract, at the port where, or nearest to which, the contract was made, or at the port at which, or nearest to which, it was to be executed, and in all other matters at the port where, or nearest to which, the cause of controversy arose, or at the port where, or nearest to which, the damage complained of was sustained, provided such port be one of the ports at which the United States

are represented by consuls. Such jurisdiction shall embrace all controversies between citizens of the United States, or others, provided for by such treaties, respectively.

SEC. 4086. Jurisdiction in both civil and criminal matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as is necessary to execute such treaties, respectively, and as far as they are suitable to carry the same into effect, extended over all citizens of the United States in those countries, and over all others to the extent that the terms of the treaties, respectively, justify or require. But in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law and the law of equity and admiralty shall be extended in like manner over such citizens and others in those countries; and if neither the common law, nor the law of equity or admiralty, nor the statutes of the United States furnish appropriate and sufficient remedies, the ministers in those countries, respectively, shall, by decrees and regulations which shall have the force of law, supply such defects and deficiencies.

SEC. 4087. Each of the consuls mentioned in Section 4283, at the port for which he is appointed, is authorized upon facts within his own knowledge, or which he has good reason to believe true, or upon complaint made or information filed in writing and authenticated in such way as shall be prescribed by the minister, to issue his warrant for the arrest of any citizen of the United States charged with committing in the country an offense against law; and to arraign and try such offender; and to sentence him to punishment in the manner herein prescribed.

[Sec. 4088 refers to consular jurisdiction in countries not inhabited by civilized peoples or recognized by any treaty with the United States.]

SEC. 4089. Any consul when sitting alone may also decide all cases in which the fine imposed does not exceed five hundred dollars, or the term of imprisonment does not exceed ninety days; but in all such cases, if the fine exceeds one hundred dollars, or the term of imprisonment for misdemeanor exceeds sixty days, the defendants or any of them, if there be more than one, may take the case, by appeal, before the minister, if allowed jurisdic-

tion, either upon errors of law or matters of fact, under such rules as may be prescribed by the minister for the prosecution of appeals in such cases.

SEC. 4090. Capital cases for murder or insurrection against the government of either of the countries hereinbefore mentioned, by citizens of the United States, or for offenses against the public peace amounting to felony under the laws of the United States, may be tried before the minister of the United States in the country where the offense is committed if allowed jurisdiction; and every such minister may issue all manner of writs, to prevent the citizens of the United States from enlisting in the military or naval service of either of the said countries, to make war upon any foreign power with whom the United States are at peace, or in the service of one portion of the people against any other portion of the same people; and he may carry out this power by a resort to such force belonging to the United States, as may at the time be within his reach.

SEC. 4091. Each of the ministers mentioned in section forty hundred and eighty-three shall, in the country to which he is appointed, be fully authorized to hear and decide all cases, criminal and civil, which may come before him, by appeal, under the provisions of this Title, and to issue all processes necessary to execute the power conferred upon him; and he is fully empowered to decide finally any case upon the evidence which comes up with it, or to hear the parties further, if he thinks justice will be promoted thereby; and he may also prescribe the rules upon which new trials may be granted, either by the consuls or by himself, if asked for upon sufficient grounds.

SEC. 4092. On any final judgment in a consular court of China or Japan, where the matter in dispute exceeds five hundred dollars and does not exceed two thousand five hundred dollars, exclusive of costs, an appeal shall be allowed to the minister in such country, as the case may be. But the appellant shall comply with the conditions established by general regulations. And the ministers are hereby authorized and required to receive, hear and determine such appeals.

SEC. 4093. On any final judgment in any consular court of China or Japan, where the matter in dispute, exclusive of costs,

exceeds the sum of two thousand five hundred dollars, an appeal shall be allowed to the circuit court for the district of California, and upon such appeal a transcript of the libel, bill, answer, depositions, and all other proceedings shall be transmitted to the circuit court, and no new evidence shall be received on the hearing of the appeal; and the appeal shall be subject to the rules, regulations, and restrictions prescribed in law for writs of error from district courts to circuit courts.

SEC. 4094. On any final judgment of the minister to China, or to Japan, given in the exercise of original jurisdiction, where the matter in dispute, exclusive of costs, exceeds two thousand five hundred dollars, an appeal shall be allowed to the circuit court, as provided in the preceding section.

SEC. 4095. When any final judgment of the minister to China, or to Japan, is given in the exercise of original or of appellate criminal jurisdiction, the person charged with the crime or offense, if he considers the judgment erroneous in point of law, may appeal therefrom to the circuit court for the district of California; but such appeal shall not operate as a stay of proceedings, unless the minister certifies that there is probable cause to grant the same, when the stay shall be such as the interests of justice may require.

SEC. 4096. The circuit court for the district of California is authorized and required to receive, hear, and determine the appeals provided for in this Title, and its decisions shall be final.

SEC. 4097. In all cases, criminal and civil, the evidence shall be taken down in writing in open court, under such regulations as may be made for that purpose; and all objections to the competency or character of testimony shall be noted, with the ruling in all such cases, and the evidence shall be part of the case.

SEC. 4098. It shall be the duty of the ministers and the consuls in the countries mentioned in section forty hundred and eighty-three, to encourage the settlement of controversies of a civil character, by mutual agreement, or to submit them to the decision of referees agreed upon by the parties; and the minister in each country shall prepare a form of submission for such cases, to be signed by the parties, and acknowledged before the consul. When the parties have so agreed to refer, the referees may, after

suitable notice of the time and place of meeting for the trial, proceed to hear the case, and a majority of them shall have power to decide the matter. If either party refuses or neglects to appear, the referees may proceed *ex parte*. After hearing any case such referees may deliver their award, sealed, to the consul, who, in court, shall open the same; and if he accepts it, he shall indorse the fact, and judgment shall be rendered thereon, and execution issued in compliance with the terms thereof. The parties, however, may always settle the same before return thereof is made to the consul.

SEC. 4099. In all criminal cases which are not of a heinous character, it shall be lawful for the parties aggrieved or concerned therein, with the assent of the minister in the country, or consul, to adjust and settle the same among themselves, upon pecuniary or other considerations.

SEC. 4100. The ministers and consuls shall be fully authorized to call upon the local authorities to sustain and support them in the execution of the powers confided to them by treaty, and on their part to do and perform whatever is necessary to carry the provisions of the treaties into full effect, so far as they are to be executed in the countries, respectively.

SEC. 4101. In all cases, except as herein otherwise provided, the punishment of crime provided for by this Title shall be by fine or imprisonment, or both, at the discretion of the officer who decides the case, but subject to the regulations herein contained, and such as may hereafter be made. It shall, however, be the duty of such officer to award punishment according to the magnitude and aggravation of the offense. Every person who refuses or neglects to comply with the sentence passed upon him shall stand committed until he does comply, or is discharged by order of the consul, with the consent of the minister in the country.

SEC. 4102. Insurrection or rebellion against the government of either of those countries, with intent to subvert the same, and murder, shall be capital offenses, punishable with death; but no person shall be convicted of either of those crimes, unless the consul and his associates in the trial all concur in opinion, and the minister also approves of the conviction. But it shall be lawful to convict one put upon trial for either of these crimes,

of a less offense of a similar character, if the evidence justifies it, and to punish, as for other offenses, by fine or imprisonment, or both.

SEC. 4103. Whenever any person is convicted of either of the crimes punishable with death, in either of those countries, it shall be the duty of the minister to issue his warrant for the execution of the convict, appointing the time, place, and manner; but if the minister is satisfied that the ends of public justice demand it, he may from time to time postpone such execution; and if he finds mitigating circumstances which authorize it, he may submit the case to the President for pardon.

SEC. 4104. No fine imposed by a consul for a contempt committed in presence of the court, or for failing to obey a summons from the same, shall exceed fifty dollars; nor shall the imprisonment exceed twenty-four hours for the same contempt.

SEC. 4105. Any consul, when sitting alone for the trial of offenses or misdemeanors, shall decide finally all cases where the fine imposed does not exceed one hundred dollars, or the term of imprisonment does not exceed sixty days.

SEC. 4106. Whenever, in any case, the consul is of opinion that, by reason of the legal questions which may arise therein, assistance will be useful to him, or whenever he is of opinion that severer punishments than those specified in the preceding sections will be required, he shall summon, to sit with him on the trial, one or more citizens of the United States, not exceeding four, and in capital cases not less than four, who shall be taken by lot from a list which had previously been submitted to and approved by the minister, and shall be persons of good repute and competent for the duty. Every such associate shall enter upon the record his judgment and opinion, and shall sign the same; but the consul shall give judgment in the case. If the consul and associates concur in opinion, the decision shall, in all cases, except of capital offenses and except as provided in the preceding section, be final. If any of the associates differ in opinion from the consul, the case, without further proceedings, together with the evidence and opinions, shall be referred to the minister for his adjudication, either by entering up judgment therein, or by remitting the same to the consul with instructions how to proceed therewith.

SEC. 4107. Each of the consuls mentioned in section four thousand and eighty-three shall have, at the port for which he is appointed, jurisdiction as herein provided in all civil cases arising under such treaties, respectively, wherein the damages demanded do not exceed the sum of five hundred dollars; and, if he sees fit to decide the same without aid, his decision thereon shall be final. But whenever he is of the opinion that any such case involves legal perplexities, and that assistance will be useful to him, or whenever the damages demanded exceed five hundred dollars, he shall summon, to sit with him on the hearing of the case, not less than two nor more than three citizens of the United States, if such are residing at the port, who shall be taken from a list which had previously been submitted to and approved by the minister, and shall be of good repute and competent for the duty. Every such associate shall note upon the record his opinion, and also, in case he dissents from the consul, such reasons therefor as he thinks proper to assign; but the consul shall give judgment in the case. If the consul and his associates concur in opinion, the judgment shall be final. If any of the associates differ in opinion from the consul, either party may appeal to the minister, under such regulations as may exist; but if no appeal is lawfully claimed, the decision of the consul shall be final.

SEC. 4108. The jurisdiction allowed by treaty to the ministers, respectively, in the countries named in section four thousand and eighty-three shall be exercised by them in those countries, respectively, wherever they may be.

SEC. 4109. The jurisdiction of such ministers in all matters of civil redress, or of crimes, except in capital cases for murder or insurrection against the governments of such countries, respectively, or for offenses against the public peace amounting to felony under the laws of the United States, shall be appellate only: *Provided*, That in cases where a consular officer is interested, either as party or witness, such minister shall have original jurisdiction.

SEC. 4110. All such officers shall be responsible for their conduct to the United States, and to the laws thereof, not only as diplomatic or consular officers, but as judicial officers, when they

perform judicial duties, and shall be held liable for all negligence and misconduct as public officers.

SEC. 4111. The President is authorized to appoint marshals for such of the consular courts in those countries as he may think proper, not to exceed seven in number, namely: one in Japan, four in China, one in Siam, and one in Turkey, each of whom shall receive a salary of one thousand dollars a year, in addition to the fees allowed by the regulations of the ministers, respectively, in those countries.

[Sections 4112-4116 relate to the duties and liabilities of the marshals.]

SEC. 4117. In order to organize and carry into effect the system of jurisprudence demanded by such treaties, respectively, the ministers, with the advice of the several consuls in each of the countries, respectively, or of so many of them as can be conveniently assembled, shall prescribe the forms of all processes to be issued by any of the consuls; the mode of executing and the time of returning the same; the manner in which trials shall be conducted, and how the records thereof shall be kept; the form of oaths for Christian witnesses, and the mode of examining all other witnesses; the costs to be allowed to the prevailing party, and the fees to be paid for judicial services; the manner in which all officers and agents to execute process, and to carry this Title into effect, shall be appointed and compensated; the form of bail-bonds, and the security which shall be required of the party who appeals from the decision of the consul; and shall make all such further decrees and regulations from time to time, under the provisions of this Title, as the exigency may demand.

SEC. 4118. All such regulations, decrees, and orders shall be plainly drawn up in writing, and submitted, as hereinbefore provided, for the advice of the consuls, or as many of them as can be consulted without prejudicial delay or inconvenience, and such consul shall signify his assent or dissent in writing, with his name subscribed thereto. After taking such advice, and considering the same, the minister in each of those countries may, nevertheless, by causing the decree, order, or regulation to be published with his signature thereto, and the opinions of his advisers inscribed thereon, make it binding and obligatory, until

annulled or modified by Congress; and it shall take effect from the publication or any subsequent day thereto named in the act.

SEC. 4119. All such regulations, orders, and decrees shall, as speedily as may be after publication, be transmitted by the ministers, with the opinions of their advisers, as drawn up by them severally, to the Secretary of State, to be laid before Congress for revision.

SEC. 4120. It shall be the duty of the minister in each of those countries to establish a tariff of fees for judicial services, which shall be paid by such parties, and to such persons, as the minister shall direct; and the proceeds shall, as far as is necessary, be applied to defray the expenses incident to the execution of this Title; and regular accounts, both of receipts and expenditures, shall be kept by the minister and consuls and transmitted annually to the Secretary of State.

APPENDIX B

Act Establishing the United States Court for China

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a court is hereby established, to be called the United States Court for China, which shall have exclusive jurisdiction in all cases and judicial proceedings whereof jurisdiction may now be exercised by United States consuls and ministers by law and by virtue of treaties between the United States and China, except in so far as the said jurisdiction is qualified by section two of this Act. The said court shall hold sessions at Shanghai, China, and shall also hold sessions at the cities of Canton, Tientsin, and Hankau at stated periods, the dates of such sessions at each city to be announced in such manner as the court shall direct, and a session of the court shall be held in each of these cities at least once annually. It shall be within the power of the judge, upon due notice to the parties in litigation, to open and hold court for the hearing of a special cause at any place permitted by the treaties, and where there is a United States consulate, when, in his judgment, it shall be required by the convenience of witnesses, or by some public interest. The place of sitting of the court shall be in the United States consulate at each of the cities, respectively.

That the seal of the said United States Court for China shall be the arms of the United States, engraved on a circular piece of steel of the size of a half dollar, with these words on the margin: "The Seal of the United States Court for China."

The seal of said court shall be provided at the expense of the United States.

All writs and processes issuing from the said court, and all transcripts, records, copies, jurats, acknowledgments, and other papers requiring certification or to be under seal, may be authenticated by said seal, and shall be signed by the clerk of said court. All processes issued from the said court shall bear test from the day of such issue.

SEC. 2. The consuls of the United States in the cities of China to which they are respectively accredited shall have the same jurisdiction as they now possess in civil cases where the sum or value of the property involved in the controversy does not exceed five hundred dollars United States money and in criminal cases where the punishment for the offense charged can not exceed by law one hundred dollars' fine or sixty days' imprisonment, or both, and shall have power to arrest, examine, and discharge accused persons or commit them to the said court. From all final judgments of the consular court either party shall have the right of appeal to the United States Court for China: *Provided, also,* That appeal may be taken to the United States Court for China from any final judgment of the consular courts of the United States in Korea so long as the rights of extraterritoriality shall obtain in favor of the United States. The said United States Court for China shall have and exercise supervisory control over the discharge by consuls and vice-consuls of the duties prescribed by the laws of the United States relating to the estates of decedents in China. Within sixty days after the death in China of any citizen of the United States, or any citizen of any territory belonging to the United States, the consul or vice-consul whose duty it becomes to take possession of the effects of such deceased person under the laws of the United States shall file with the clerk of said court a sworn inventory of such effects, and shall as additional effects come from time to time into his possession immediately file a supplemental inventory or inventories of the same. He shall also file with the clerk of said court within said sixty days a schedule under oath of the debts of said decedent, so far as known, and a schedule or statement of all additional debts thereafter discovered. Such consul or vice-consul shall pay no claims against the estate without the written approval of the judge of said court, nor shall he make sale of any of the assets

of said estate without first reporting the same to said judge and obtaining a written approval of said sale, and he shall likewise within ten days after any such sale report the fact of such sale to said court, and the amount derived therefrom. The said judge shall have power to require at any time reports from consuls or vice-consuls in respect of all their acts and doings relating to the estate of any such deceased person. The said court shall have power to require where it may be necessary a special bond for the faithful performance of his duty to be given by any consul or vice-consul into whose possession the estate of any such deceased citizen shall have come in such amount and with such sureties as may be deemed necessary, and for failure to give such bond when required, or for failure to properly perform his duties in the premises, the court may appoint some other person to take charge of said estate, such person having at first given bond as aforesaid. A record shall be kept by the clerk of said court of all proceedings in respect of any such estate under the provisions hereof.

SEC. 3. That appeals shall lie from all final judgments or decrees of said court to the United States circuit court of appeals of the ninth judicial circuit, and thence appeals and writs of error may be taken from the judgments or decrees of the said circuit court of appeals to the Supreme Court of the United States in the same class of cases as those in which appeals and writs of error are permitted to judgments of said court of appeals in cases coming from district and circuit courts of the United States. Said appeals or writs of error shall be regulated by the procedure governing appeals within the United States from the district courts to the circuit courts of appeal, and from the circuit courts of appeal to the Supreme Court of the United States, respectively, so far as the same shall be applicable; and said courts are hereby empowered to hear and determine appeals and writs of error so taken.

SEC. 4. The jurisdiction of said United States court, both original and on appeal, in civil and criminal matters, and also the jurisdiction of the consular courts in China, shall in all cases be exercised in conformity with said treaties and the laws of the United States now in force in reference to the American consular

courts in China, and all judgments and decisions of said consular courts, and all decisions, judgments, and decrees of said United States court, shall be enforced in accordance with said treaties and laws. But in all such cases when such laws are deficient in the provisions necessary to give jurisdiction or to furnish suitable remedies, the common law and the law as established by the decisions of the courts of the United States shall be applied by said court in its decisions and shall govern the same subject to the terms of any treaties between the United States and China.

SEC 5. That the procedure of the said court shall be in accordance, so far as practicable, with the existing procedure prescribed for consular courts in China in accordance with the Revised Statutes of the United States: *Provided, however,* That the judge of the said United States court for China shall have authority from time to time, to modify and supplement said rules of procedure. The provisions of sections forty-one hundred and six and forty-one hundred and seven of the Revised Statutes of the United States allowing consuls in certain cases to summon associates shall have no application to said court.

SEC. 6. There shall be a district attorney, a marshal, and a clerk of said court, with authority possessed by the corresponding officers of the district courts in the United States as far as may be consistent with the conditions of the laws of the United States and said treaties. The judge of said court and the district attorney, who shall be lawyers of good standing and experience, marshal, and clerk shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive as salary, respectively, the sums of eight thousand dollars per annum for said judge, four thousand dollars per annum for said district attorney, three thousand dollars per annum for said marshal, and three thousand dollars per annum for said clerk. The judge of the said court and the district attorney shall, when the sessions of the court are held at other cities than Shanghai, receive in addition to their salaries their necessary expenses during such sessions not to exceed ten dollars per day for the judge and five dollars per day for the district attorney.

SEC. 7. The tenure of office of the judge of said court shall be ten years, unless sooner removed by the President for cause;

the tenure of office of the other officials of the court shall be at the pleasure of the President.

SEC. 8. The marshal and the clerk of said court shall be required to furnish bond for the faithful performance of their duties, in sums and with sureties to be fixed and approved by the judge of the court. They shall each appoint, with the written approval of said judge, deputies at Canton and Tientsin, who shall also be required to furnish bonds for the faithful performance of their duties, which bonds shall be subject, both as to form and sufficiency of the sureties, to the approval of the said judge. Such deputies shall receive compensation at the rate of five dollars for each day the sessions of the court are held at their respective cities. The office of marshal in China now existing in pursuance of section forty-one hundred and eleven of the Revised Statutes is hereby abolished.

SEC. 9. The tariff of fees of said officers of the court shall be the same as the tariff already fixed for the consular courts in China, subject to amendment from time to time by order of the President, and all fees taxed and received shall be paid into the Treasury of the United States.

Approved, June 30, 1906.

MacMurray (Appendix D) adds the following note:

In reference to the effect of the Act establishing the United States Court for China upon previous legislation regarding the exercise of extraterritorial jurisdiction by American Consular Officers acting under regulations and rules of procedure prescribed by the American Minister, the Department of State had occasion to instruct the Legation at Peking, under the date of March 2, 1917, as follows:

"You are informed that in the opinion of the Department, the provisions of sections 4106 and 4107 of the Revised Statutes, giving authority to the Minister to approve the list of associates summoned by consuls to sit with them in the trial of certain cases, are not abrogated by later legislation, including the Act of Congress of June 30, 1906, creating the United States Court for China and prescribing the jurisdiction thereof.

"With respect to the provisions of the Statutes giving authority to the Minister to make regulations regarding the rules of procedure applicable to the consular courts, you are advised that the Department is clearly of the opinion that Section 5 of the Act of June 30, 1906, should be construed as effecting a transfer of the authority to modify and supplement existing rules of procedure from the Minister to the United States Court for China.

"You are further informed that the Department considers that the power conferred upon the Minister by Section 4086 of the Revised Statutes, to make regulations concerning remedial rights, is not revoked or transferred by the provisions of the Act creating the United States Court or by other legislation. However, in view of the fact that, according to the Department's information, under the holdings and decisions of the United States Court for China in construction of the authority vested in it and in the consular courts, American citizens in China are supplied with remedial rights to an extent apparently quite ample and in view also of the narrow construction which has heretofore been placed upon the authority of the Minister, derived from the provisions of Section 4086 of the Revised Statutes, with respect to the making of regulations concerning remedial rights, it would seem that there would be little, if any, occasion for the Minister to exercise such authority."

CHAPTER XXV

Chinese Courts and "Mixed" Cases

Thus far in the Chapters dealing with extraterritorial rights we have had to deal with the jurisdiction and jurisprudence of the foreign courts operating in China. We have now to consider the practice pursued in cases where Chinese are defendants, and which, therefore, are tried in Chinese courts.[1] Here the jurisdiction of the Chinese courts is complete and exclusive, but, in order that the rights of foreign plaintiffs in them may be protected, the treaties provide, as to certain of the Powers, that an "assessor" of the plaintiff's nationality shall have the right to be present.[2] As thus constituted the courts have come to be known as "Mixed Courts"—a somewhat misleading title, for they are not to be confused with the "mixed courts" that exist in the Levant, the assessor having

[1] Except in the Shanghai Mixed Court.

[2] As to the treaty right of the assessor to be present, the following provision from the Sino-American Treaty of November 17, 1880, may be quoted:

"The properly authorized official of the plaintiff's nationality shall be freely permitted to attend the trial and shall be treated with the courtesy due to his position. He shall be granted all proper facilities for watching the proceedings in the interests of justice. If he so desires, he shall have the right to present, to examine, and to cross-examine witnesses. If he is dissatisfied with the proceedings, he shall be permitted to protest against them in detail. The law administered will be the law of the nationality of the officer trying the case." *Customs Treaties*, I, p. 738.

no right to participate in the judgment or to dictate to the Chinese magistrate what his decision shall be. He is there merely to see that the elements of a fair trial are accorded to the plaintiff. If the assessor is convinced that the decision rendered constitutes a flagrant miscarriage of justice, he may protest at the time, and, if, notwithstanding this protest, the decision is not changed, the matter may be referred to the plaintiff's legation at Peking for it to take such action as it may deem best.

In an interesting article contributed to the *Law Quarterly Review*,[8] entitled "The Government of Foreigners in China," the author, Mr. Latter, a British barrister at law of Shanghai, has the following to say of the Mixed Courts of China:

> Here we no longer have an extraterritorial court or the limitations or defects of extraterritoriality. The Chinese magistrate has complete jurisdiction over all persons in his district who are not exempted therefrom by treaty, and a Nicaraguan is as much under his jurisdiction as a Chinaman. The defects of the Mixed Court (viewed on its civil side) are limited to a complete absence of any system of law and a tribunal competent to administer justice. Chinese law has not yet distinguished between civil and criminal cases. What we should regard as purely civil cases, such as mercantile disputes, when they occur among the Chinese themselves, rarely come into court: they adjust themselves either by reason of the extreme spirit of compromise inherent in the Chinese character, or by the appearance of the "peace maker" beloved of Chinese society, or by the intervention of the guild of that particular trade. Should they come into court, the unsuccessful party is usually punished in some way or another, for the magistrate is administering good morals to his people, and one party will usually in some way have offended against his conception of them. Chinese law is, in short, aimed entirely at a maintenance of general good principles among the people, and

[8] Vol. XIX (1903), pp. 316-325.

its science consists in a diversity of punishments for offenses against them. In other words, it does not deal with the rights of persons among themselves so much as with a general conception of their duties to the State at large and the penalties for the infraction of such duties; that is to say, in Western language, it is purely penal. The value of such a system of law in settling the disputes of the purely commercial communities of the treaty ports is difficult to discover.

The result of this is that in the Mixed Court there is no system or code of law whatsoever. A case is decided according to a general idea of what the court considers fair. The court is not bound by precedent; it has no fixed procedure; it may decide one thing one day and another the next. It sometimes refers cases to the arbitration of another merchant in the trade, in order that he may decide it according to the custom of the port. But the privacy of such arbitration prevents such customs from crystallizing, and it is a fair generalization to say that in any case when a Chinaman is defendant the result is purely hypothetical, and depends on the relative strength of the Chinese magistrate and foreign assessor concerned.

The evils of the consular jurisdiction of the Western powers are fully felt in the Mixed Court. The magistrate is a Chinese official of a humble grade; even if he were of a higher rank his knowledge of commercial disputes would not be of much value. The assessor is a junior of his consular service; he is not a member of the legal profession; he can never be a practiced lawyer, and is chosen for his knowledge of Chinese rather than for any legal or judicial qualifications. His duty as a consul is to protect the interests of his nationals, and the Chinese magistrate is fully aware of it. Too often do the proceedings in this court develop into a mere wrangle between the assessor and magistrate, each advocating the cause of his own sovereign's subject. Sometimes the court adjourns in high disagreement. At other times, weary of its civil strife, it tosses the ball back to the litigants and bids them see to it themselves. The writer has personal knowledge of an instance of this latter sort, when the decision of the court was as follows: "This case involves many difficult points, and the parties must settle the matter among themselves and not cause any further litigation."

Mr. Latter, the author we have been quoting, goes on to show that, under the present system of consular jurisdiction in China, the consuls are obliged to spend much of the time which they should give to their respective governments in the adjudication of cases in which their own nationals have no real substantial interest. This arises by reason of the fact that the Chinese, in order to avoid local assessments and " squeezes," put their property and businesses in the names of foreigners (for a consideration). It is Mr. Latter's estimate that fully one-half of the lands standing in the names of foreigners in Shanghai are beneficially owned by Chinese, and that one-half of the civil suits brought in the Mixed Court sitting in that city likewise involve no real interests of foreigners. And yet, in these cases, the consuls of the nominal plaintiffs have to be present and exert their influence.

The foregoing characterization by Mr. Latter of Chinese courts and Chinese jurisprudence is by no means fully justified at the present time, for, since he wrote, China has made great advances in the matters of providing modern courts, trained lawyers and judges, and scientifically-drafted codes of laws. These advances in the law and its administration will be more specifically described in the next chapter which deals with the general movement for the modification or abrogation of extraterritorial rights in China.

CHAPTER XXVI

The Movement for the Abrogation of Extraterritorial Rights in China

Whatever advantages, real or conceived, the foreigner may receive from his extraterritorial rights in China, it is clear that, besides being highly objectionable to the Chinese, these rights are necessarily exercised under conditions which make impossible a satisfactory administration of justice. If we group these inherent defects of the extraterritorial system along with the objections to it made by the Chinese, we find the following situation:

1. The whole system is in serious derogation of the dignity and sovereignty of the Chinese State. As to this it is sufficient to say that this feature of extraterritoriality was placed in the very forefront of China's argument for the abolition of the system both at the Paris Peace Conference of 1919 and at the Washington Conference of 1921-1922.

2. Because it is in derogation of China's sovereignty and dignity, the continued existence of the system operates powerfully to create and maintain in China an anti-foreign feeling. Whether or not one believes this feeling to be justified, in all respects, its existence will be admitted by all to be a highly undesirable fact.

3. The system deters China from opening up her entire territory to full foreign residence and unrestricted com-

mercial intercourse. As long as foreigners are thus removed from Chinese control, and constant opportunity thus offered for local friction it cannot be expected that the Chinese central Government will be willing to increase its responsibilities by permitting foreign trade and residence away from the Treaty Ports where its supervision cannot, from the nature of the case, be easily and effectively exercised. It does not need to be pointed out that, in this respect, the foreign nations which desire to increase their commerce and other intercourse with China pay a heavy price for the extraterritorial privileges they enjoy.

4. The system necessitates a multiplicity of courts; that is, each Power has to provide tribunals for its nationals wherever they reside in any considerable numbers. This is not only burdensome to the foreign Powers but perplexing to the Chinese.

5. The system necessitates the application of diverse systems of laws, since each Power applies its own laws in its own tribunals. At the best this is obviously objectionable, and it becomes almost absurd when persons of different nationalities are engaged in the same transactions. In such cases there cannot be a single suit, since the parties, if defendants, must be proceeded against in their own respective courts, and their rights must be determined by different systems of law.

6. Not infrequently it is found, especially in criminal cases, that there is no law for the extraterritorial courts to apply. This results from the fact that these courts are competent to enforce only those laws which their respective Governments have provided shall be applicable in China. As will have appeared in an earlier chapter, some Powers, among them Great Britain and the United States, have acted efficiently in this respect, but in other cases wide legal vacuums exist.

7. The system being not only a complex but a foreign one, many of the Chinese, (and this is especially true away from the Treaty Ports) do not understand it, that is, they do not know their rights under it. All that they know is that they cannot prosecute their claims against the foreigners in the Chinese courts, and, even if they know that they may have recourse to the foreign courts, they do not understand the modes of bringing and prosecuting their suits. The result is that, in very many cases, they simply make no effort to obtain legal redress for the wrongs they have, or conceive themselves to have, suffered. And, even in those cases in which they institute proceedings in the extraterritorial courts they often find themselves confronted with legal defenses which are valid according to the systems of law which those courts apply, but which are unknown to the Chinese law, and the reasons for which, whether in equity or expediency, they cannot appreciate. In result, then, the system means that, in many cases, the Chinese plaintiffs do not seek the relief to which, in law, they are entitled; or, if they seek it, find their rights determined by rules the justification for which they cannot understand. Furthermore, it not infrequently happens that the inconvenience and expense of prosecuting the foreign defendants before courts which sit at long distances from their places of residence, and of producing there the necessary witnesses and other evidence, make it practically impossible for the Chinese who have been injured by the acts of foreigners to take the necessary action to obtain redress. As to this practical denial of justice to the Chinese, whatever may be in theory their legal rights under the extraterritorial system, the following may be quoted from a recent volume by a highly educated Chinese scholar, Dr. Hsia Ching-lin. In his *Studies in Chinese Diplomatic History,* Dr. Hsia says:[1]

[1] P. 41.

It is universally known that a Chinese is not in the habit of seeking justice in the law courts, and least of all in foreign institutions of which he knows nothing. Therefore it is not to be expected that a Chinese would bring any ordinary complaints against any British [or other foreign] subject to the "nearest consul," whose consulate may be situated at a distance of one, two, or five hundred miles away from the place where the civil [or criminal] injury took place, even if he could be sure that justice was on his side and he could afford the necessary expense and trouble to undertake the required journey thither to receive his scanty justice. . . . Few Chinese know anything about treaties and fewer still understand the working of them. . . . In China there exist no such professional lawyers who can explain this complicated system to an intending plaintiff and furnish him such information as to enable him to proceed confidently to the particular consulate of the district. . . . Thus, in theory, a Chinese may always have redress against an alien in his consular court; in practice, however, there are many difficulties in the way of language, difference in court procedure, disparity of punishments of the two systems, and the complexities of western law. The natural result is that the Chinese would decide to swallow his grievance without recourse to law, and he would console himself with a bitter determination that never again would he have any more dealings with foreigners.[2]

From the very nature of this authority the extraterritorial courts have little or no authority over the plaintiffs in the suit brought before them. From this lack of authority it results that these plaintiffs cannot be pun-

[2] With regard to the defect of the extraterritorial system due to the inconvenience of resorting to distant courts, it is, perhaps, fair to quote the following from a letter to the author from a person of considerable practical experience in China: "Few foreigners reside outside the seaports other than missionaries. Missionaries are, generally, a law-abiding people. Consular Courts exist in nearly all the seaports and I believe that as a general rule it is little less convenient for the Chinese to get to a Consular Court than it would be to reach a county tribunal in, say, the State of Maryland."

ished for perjuries or contempts committed by them in the course of the proceedings. Furthermore, these courts are not competent to consider legitimate set-offs or counterclaims which may be brought forward, the validity of such set-offs or counterclaims being determinable only in the Chinese courts since they are in the nature of actions in which the Chinese appear as defendants.

As regards the lack of adequate jurisdiction of the Chinese and extraterritorial courts in mixed cases over the plaintiff, the following may be quoted from the article by Mr. Latter to which reference has earlier been made:[3]

In its administration of justice the system fails from two causes: first, from the fact that justice is administered by consular, not judicial officers; secondly, from the inherent limitations of the extraterritorial court having merely personal jurisdiction. The British Court in China, for instance, has power only over British subjects in China. It is the sole tribunal in which cases against a British subject in China can be tried, but it must be noticed its powers are limited to and extend only over that British subject. If, therefore, a Chinaman sues a British subject, the court has no control over that Chinaman. If he perjures himself the court cannot punish him, or again, it cannot commit him for contempt of court. The Chinaman can only be prosecuted or punished in a Chinese court and according to Chinese law. . . . The only means that foreign courts have of obtaining control over a Chinese plaintiff is to require him to make a deposit of money as security for costs. . . . From the same want of control over a plaintiff of another nationality arises another grave flaw in the extraterritorial system. If the defendant has no defense against the plaintiff but has a counterclaim of equal or great amount, the court cannot entertain the counterclaim, however obvious the validity of the counterclaim may be. The counterclaim is a claim against a man of another nationality,

[3] "The Government of Foreigners in China," *Law Quarterly Review*, vol. XIX (1903), p. 316.

and can be heard only in the court of that nationality, and tried according to the law of that nationality. . . . Another great weakness of the system, also arising from the fact that the jurisdiction of the foreign courts is entirely personal, appears in all questions relating to land. . . . Does the fact that a British subject owns land in China vest that land with all the characteristics of land in England? It has been tacitly assumed that it does, and lawyers employ the English form of conveyance in transferring land. But the assumption is contrary to the theory of English law, which is that the law which governs land is the *lex loci rei sitae,* that is, in this case, the law of China, and is completely at variance with a recent decision of the Privy Council on an appeal from the court of Zanzibar, where a similar system of extraterritoriality prevails. . . . The fact is that the lawyers in Shanghai and other treaty ports in China do not really know what the law applicable to land held by British subjects and other foreigners really is.[4]

So far as punishment for contempt of court or for perjury is concerned, it should, however, be said that, in Shanghai, and perhaps elsewhere (though as to this the author has no information) there is an agreement between the foreign courts according to which a person guilty of these offenses in one court may be proceeded against in the court of his own nationality if he be not of the nationality of the court in which the contempt or perjury is committed. Thus, for example, an Englishman committing perjury or being guilty of contempt in the American court in Shanghai may be punished therefor in the British court.

8. In general, the extraterritorial courts, being held by consuls, are administered by persons who usually are not technically trained in the law. Yet, in many cases, there is no right of appeal from consular decisions for the cor-

[4] Though the British form is used, all land transfers from Chinese to foreigners are recorded in the proper Chinese land offices.

rection of legal errors, and, when there is a right of appeal, the costs, in most cases, are sufficient to deter the Chinese plaintiffs from exercising the right.

How serious this feature of extraterritorial jurisdiction is, it is difficult to say, but it is probably not as serious as, upon its face, it would appear to be, for the fact is that the great majority of cases tried in the consular courts are for petty offenses such as disorderly conduct, drunkenness, minor personal assaults, failure to pay small tradesmen's bills, etc., for the proper adjudication of which no considerable technical knowledge of the law is required.

It is, furthermore, to be observed that Great Britain, by the establishment of the Supreme Court for China, the United States, by the establishment of the United States Court for China, and France, Italy, Japan and Norway by providing some specially trained officials, have done much to correct the evils arising out of the decision of extraterritorial cases by persons without legal training.

9. The system necessarily arouses doubts upon the part of the Chinese as to the impartiality with which the law is applied by the extraterritorial courts, which intensifies the opinion which many of them have that the law itself is not just. Furthermore, the Chinese injured by the criminal acts of the nationals of the foreign Powers have no ready and direct way of knowing whether the sentences imposed by the extraterritorial courts are actually and fully carried out. And, it may be added, the foreigners do not know in many cases whether the sentences imposed by the Chinese courts upon Chinese are effectively executed.

As to this last matter it is to be observed that the extraterritorial system is not directly involved since the ignorance referred to would of course exist if the jurisdiction of the Chinese courts over foreigners were complete, but

the system is responsible for much of the suspicion on the part of the Chinese with regard to the operations of the foreign courts. In other words, as long as there exists in any country a system of courts not established or controlled by the Government and people of that country, and administering bodies of law widely differing in their provisions and presumptions from the native law there will be suspicion upon the part of the people and authorities of that country as to the intrinsic merits of the foreign law, as to the fairness with which it is applied, and as to the efficiency with which the judgments based upon it are enforced. The situation which is thus necessarily created is well expressed, so far as China is concerned, by Sir Robert Hart in his "Proposals for the Better Regulation of International Relations," which, though drawn up in 1876, still have pertinency. He said:

> Where questions affecting persons have arisen, foreigners have complained that their Chinese assailants have not been arrested, or, if arrested, have either not been punished, or have been insufficiently punished, or that the real criminals have been allowed to escape and other friendless wretches substituted, or that, where several ought to have been alike punished, only one has been dealt with, etc.
>
> On the other hand, Chinese in turn complain that foreigners assault Chinese with impunity; that what China calls murder is invariably excused or made manslaughter by foreign courts; that where Chinese law prescribes death the offending foreigner is sentenced to only a short imprisonment; and that, while the foreigner insists that Chinese shall be punished with death where foreign life has been lost, he, on his side, expects China to accept a small sum of money in lieu of a death punishment where Chinese life is lost, etc.
>
> The foreigner charges the Chinese official with accepting bribes, and urges that Chinese torture will make any innocent person admit he is the guilty criminal; similarly, the Chinese are not convinced that consuls do not take bribes, and point out that the

foreign mode of examining witnesses does not invariably elicit the whole truth, and that trial by jury does not always do justice. Moreover, while the foreigner protects the accused by throwing the onus of proof on the accusers, Chinese will not condemn or punish till the offender has himself confessed his guilt.

When these complaints are carefully looked into, it becomes evident that what gives common offense to both sides is not that crime is not considered crime, but that there is no common and uniform procedure.

10. One cannot shut his eyes to the fact that there is usually a strong bias in favor of his own nationals upon the part of the consul or other foreign official who tries the cases in which the Chinese are plaintiffs or petitioners. As a comparatively recent writer has truly said:

> The first duty of a consul is to protect the interests of his sovereign's subjects; it is scarcely consistent to add to that duty the task of administering justice when a complaint is brought against that subject; and the duties of protection of a class and the administration of impartial justice between that class and others cannot but clash. Only too often is the verdict of the extraterritorial court a formula as of course "judgment for the defendant," and the defendant has then every reason to be satisfied that he has an efficient consular service.[5]

That, in fact, the Chinese have had legitimate grounds for criticizing the operation at least of certain of the extraterritorial consular courts in China because of their bias in favor of their own nationals, there would seem to be little question.[6]

11. Finally, there is the important question whether the existence of foreign extraterritorial rights in China

[5] Mr. Latter, "The Government of Foreigners in China, *Law Quarterly Review*, vol. XIX (1903), p. 316.

[6] See especially the article by B. H. Williams, "The Protection of American Citizens in China: Extraterritoriality," in the *American Journal of International Law*, October, 1922 (vol. XVI, p. 43).

does not hinder the Chinese in the great task which confronts them of establishing a government and administration which will command the respect and obedience of its own citizens throughout China. The Chinese believe that it does, and, in support of this belief point not merely to the difficulty which they have in enforcing certain of their own laws, but also, and more especially to the fact that so long as their own people see that their Government has not the full powers within its own territories which other Governments have within their several territories, it cannot be expected that they, the Chinese people, will have that loyalty to and respect for commands of their Government which must exist if a strong and efficient public administration is to be established and maintained.

With disadvantages and evils such as have been enumerated, it is not surprising that the Chinese should be anxious to have the extraterritorial system abolished from their country, or that this desire should have met with a certain amount of support from foreigners as well.

In the so-called Mackay Treaty of 1902 with Great Britain, Article XII reads:

> China having expressed a strong desire to reform her judicial system, and to bring it into accord with that of Western nations, Great Britain agrees to give every assistance to such reform, and she will also be prepared to relinquish her extraterritorial rights when she is satisfied that the state of the Chinese laws, the arrangement for their administration, and other conditions warrant her in so doing.

This provision also appears in almost identical terms in the Treaties of 1903 of Japan and of the United States, and in that of 1908 of Sweden with China.

Argument of the Chinese Delegation at the Paris Peace Conference of 1919. Among the provisions urged by the Chinese Delegation at the Paris Conference for insertion in the treaties of peace with the Central Powers was one for the immediate modification and early abolition of extraterritorial rights in China. This action, it was contended, was one of the things which needed to be done if a satisfactory peace basis for the world was to be secured. In its memorandum on the subject, the Delegation, speaking generally of the hindrances of an international character which had retarded China's free development, said:

> Their maintenance would perpetuate the causes of difficulties, frictions and discords. As the Peace Conference seeks to base the structure of a new world upon principles of justice, equality and respect for the sovereignty of nations, as embodied in President Wilson's Fourteen Points and accepted by all the Allied and Associated Powers, its work would remain incomplete if it should allow the germs of future conflicts to subsist in the Far East.

Speaking specifically of the abolition of extraterritorial rights in China, the Delegation, in its memorandum, declared that while it was not claimed that the Chinese laws and their administration had reached a state such as that which had been attained by the most advanced nations of the world, it could, nevertheless, be confidently asserted that China had made very considerable progress in the administration of justice since the signing of the treaties of 1903. Among the improvements evidencing such a progress the following were enumerated: (1) The adoption of a constitution providing for a separation of governmental powers, assuring to the people their inviolable fundamental rights of life, liberty and property, and guaranteeing the complete protection of judicial offi-

cers and their freedom from executive and legislative interference in the execution of their official duties; (2) the preparation of five codes (criminal, civil, commercial, civil procedure, and criminal procedure), some of these being already in provisional force; (3) the establishment of three grades of new courts (district, courts of appeal, and a supreme court); (4) the separation of civil and criminal cases, the reform of rules of evidence, provision for publicity of trials, the prohibition of corporal punishments to compel confessions, and the promulgation of rules for the creation of a legal profession, entrance to which is made dependent upon the passing of regular examinations; (5) the requirement that the judicial officers of all courts, high and low, shall have legal training, and, in some cases, shall have studied at foreign universities; and (6) improvements in the prison and police systems.

The defects in the present extraterritorial system emphasized by the Paris Delegation were the following: (1) What constitutes an offense or a legal cause of action as determined in the consular courts of one of the Powers is often not so held in the courts of the other Powers: thus inequality of rights and legal confusion results; (2) There is a lack of effective control over witnesses or plaintiffs of a nationality other than that of the court. " Where the testimony of a foreign witness of a nationality different from that of the defendant is required, the court is dependent upon his voluntary action, and if, after he has voluntarily appeared, he should decline to answer questions, he could not be fined or committed for contempt of court, nor could he be punished by that court if he should commit perjury. So also a foreign plaintiff cannot be punished by that court for perjury or contempt of court. . . . .[1] If the defendant has no defense against

[1] An American lawyer was recently suspended from practice by the United States Court for China because of unprofessional conduct in a case before a British court.

the plaintiff but has a counter-claim, the court cannot entertain the counter-claim, however obvious the validity of that counter-claim may be "; (3) There is difficulty in obtaining evidence when the crime is committed far in the interior; (4) There is a conflict between the consular and judicial functions of the persons holding the courts. " When a complaint is brought against his nationals, the duty of protection of a class and the administration of justice between that class and others cannot but clash."

Upon these grounds the Chinese Delegation at Paris asked that the Powers should agree to the abolition of the entire system of extraterritoriality as soon as China should put into force the five codes that have been mentioned, and complete the establishment of new courts in all the districts where foreigners reside. This, the Delegation declared, she would be able to do by the end of the year 1924.

The Delegation furthermore asked that the Powers agree that the following changes in the present system be immediately made:

" (a) That every mixed case, civil or criminal, where the defendant or accused is a Chinese, be tried and adjudicated by Chinese courts without the presence or interference of any consular officer or representative in the procedure or judgment.

" (b) That the warrants issued or judgments delivered by Chinese courts may be executed within the concessions or within the precincts of any building belonging to a foreigner, without preliminary examination by any consular or foreign judicial officer."

As is, of course, well known, the Chinese obtained at Paris no favorable action with regard to these requests.

Extraterritoriality in the Washington Conference. China's wishes with regard to the ultimate abolition of extraterri-

torial rights within her borders was presented to the Washington Conference by Dr. Wang Chung-hui at the sixth meeting of the Committee on Pacific and Far Eastern Questions. After referring to the various inherent defects of the extraterritorial system, and especially to the fact that, under its cover, foreigners in China claimed immunity from local taxes and excises which the Chinese themselves were required to pay, he quoted the statement of Sir Robert Hart (in his *These From the Land of Sinim*) that " The extraterritorial system may have relieved the native official of some troublesome duties, but it has always been felt to be offensive and humiliating, and has ever a disintegrating effect, leading the (Chinese) people, on the one hand, to despise their own Government and officials, and, on the other, to envy and dislike the foreigner withdrawn from native control."

Until the system is abolished or substantially modified, Dr. Wang continued, it would be inexpedient for China to open her entire territory to foreign trade and commerce. The evils of the existing system had been so obvious that Great Britain in 1902, Japan and the United States in 1903, and Sweden in 1908 agreed, subject to certain conditions, to relinquish their extraterritorial rights. Twenty years had elapsed since the conclusion of these treaties, and while it is a matter of opinion as to whether or not the state of China's laws has attained the standard to which she is expected to conform, it is impossible to deny that she has made great progress on the path of legal reform. A few facts would suffice for the present. A law codification mission for the compilation and revision of laws had been sitting since 1904. Five codes had been prepared, some of which had already been put into force: (a) The Civil Code was still in course of revision; (b) the Criminal Code had been in force since 1912; (c) the Code of Civil Procedure and (d) the Code of Criminal

Procedure had been promulgated; and (e) the Commercial Code, part of which had been put into force.

These codes, Dr. Wang said, had been prepared with the assistance of foreign experts, and were based on the principles of modern jurisprudence. Among the numerous supplementary laws especial mention might also be made of a law of 1918, called "Rules for the Application of Foreign Laws," which deals with matters relating to private international law. Under these rules, foreign law was given ample application. Furthermore, a new system of law courts had been established in 1910. The judges were all modern, trained lawyers, and no one could be appointed a judge unless he had attained the requisite legal training. These were some of the reforms which had been carried out in China.

Dr. Wang said he had made these observations, not for the purpose of asking for an immediate and complete abolition of extraterritoriality, but for the purpose of inviting the Powers to co-operate with China in taking initial steps toward improving and eventually abolishing the existing system, which was admitted on all hands to be unsatisfactory both to foreigners and Chinese.

In concluding, Dr. Wang asked, in the name of the Chinese Delegation, that the Powers now represented in this Conference agree to relinquish their extraterritorial rights in China at the end of a definite period. In the meanwhile he proposed that the above-mentioned Powers should, at a date to be agreed upon, designate representatives to enter into negotiations with China for the adoption of a plan for a progressive modification and ultimate abolition of the system of extraterritoriality in China, the carrying out of which plan should be distributed over the period agreed upon.

The Chairman of the Committee, Secretary Hughes, opening the discussion of Dr. Wang's proposal, said that,

so far as the United States was concerned, it had already formulated an expression of its desire to give all possible assistance to China's project for reform, and that he had no doubt that the other Powers were equally in favor of furthering a more complete juridical integrity for China. The question at issue was, however, he said, one of fact rather than of principle, for the principle had already been conceded in the treaties to which Dr. Wang had referred. The question of fact was as to the state of the administration of justice in China. Whatever steps were to be taken, he said, should be preceded by an inquiry into existing conditions in China, and this was a difficult matter.

For the more particular consideration of the proposals thus presented by China, a sub-committee was appointed composed of one member nominated by each Delegation.

At the ninth meeting of the Committee of the Whole this sub-committee submitted the following draft resolutions, which were unanimously adopted by the Committee without further discussion, and later approved, also without further discussion, by the Conference at its fourth plenary session, held December 10, 1921:

The representatives of the Powers hereinafter named, participating in the discussion of Pacific and Far Eastern questions in the Conference on the Limitation of Armament—to wit, the United States of America, Belgium, the British Empire, France, Italy, Japan, the Netherlands and Portugal—

Having taken note of the fact that in the Treaty between Great Britain and China dated September 5, 1902, in the Treaty between the United States of America and China dated October 8, 1903, and in the Treaty between Japan and China dated October 8, 1903, these several Powers have agreed to give every assistance towards the attainment by the Chinese Government of its expressed desire to reform its judicial system and to bring it into accord with that of Western nations, and have declared that they

are also "prepared to relinquish extraterritorial rights when satisfied that the state of the Chinese laws, the arrangements for their administration, and other considerations warrant" them in so doing;

Being sympathetically disposed towards furthering in this regard the aspiration to which the Chinese Delegation gave expression on November 16, 1921, to the effect that "immediately, or as soon as circumstances will permit, existing limitations upon China's political, jurisdictional and administrative freedom of action are to be removed";

Considering that any determination in regard to such actions as might be appropriate to this end must depend upon the ascertainment and appreciation of complicated states of fact in regard to the laws and the judicial system and the methods of judicial administration of China, which this Conference is not in a position to determine;

Have resolved—

That the Governments of the Powers above named shall establish a Commission (to which each of such Governments shall appoint one member) to inquire into the present practice of extraterritorial jurisdiction in China, and into the laws and the judicial system and the methods of judicial administration of China, with a view to reporting to the Governments of the several Powers above named their findings of fact in regard to these matters, and their recommendations as to such means as they may find suitable to improve the existing conditions of the administration of justice in China, and to assist and further the efforts of the Chinese Government to effect such legislation and judicial reforms as would warrant the several Powers in relinquishing, either progressively or otherwise, their respective rights of extraterritoriality;

That the Commission herein contemplated shall be constituted within three months after the adjournment of the Conference in accordance with detailed arrangements to be hereafter agreed upon by the Governments of the Powers above named, and shall be instructed to submit its report and recommendations within one year after the first meeting of the commission;

That each of the Powers above named shall be deemed free to accept or to reject all or any portion of the recommendations of the Commission herein contemplated, but that in no case shall any of the said Powers make its acceptance of all or any portion of such recommendations either directly or indirectly dependent on the granting by China of any special concession, favor, benefit, or immunity, whether political or economic.

And the further resolution:

That the non-signatory Powers having by treaty extraterritorial rights in China may accede to the resolution affecting extraterritoriality and the administration of justice in China by depositing within three months after the adjournment of the Conference a written notice of accession with the Government of the United States for communication by it to each of the signatory Powers.

And the further resolution:

That China, having taken note of the resolutions affecting the establishment of a Commission to investigate and report upon extraterritoriality and the administration of justice in China, expresses its satisfaction with the sympathetic disposition of the Powers hereinbefore named in regard to the aspiration of the Chinese Government to secure the abolition of extraterritoriality in China, and declares its intention to appoint a representative who shall have the right to sit as a member of the said Commission, it being understood that China shall be deemed free to accept or to reject any or all of the recommendations of the Commission. Furthermore, China is prepared to co-operate in the work of this Commission and to afford to it every possible facility for the successful accomplishment of its tasks.

The Peking Extraterritorial Commission of 1926. The Commission provided for by the Resolution of the Washington Conference should have met at Peking on or before May 6, 1922, since the Washington Conference ad-

journed on February 6 of that year. However, for various reasons, the Commission did not assemble until January 12, 1926.[8]

The Powers represented in the Commission were the United States, Belgium, the British Empire, France, Italy, Japan, the Netherlands, Portugal, China, Denmark, Peru, Spain, and Sweden.[9]

Twenty-one sessions were held by the Commission, the

[8] The blame for this delay has been quite generally laid upon China, but, it would appear, not with entire justice. In April, 1922, it is true, the Chinese Government asked for a delay until 1923 in order to enable the Commission which had been appointed by the Chinese Government to complete the translation of all the Chinese codes, to gather statistical information regarding judicial administration, etc., in preparation for the meeting of the international Commission, but all further delay in the meeting of that body would seem to have been due to the other Powers, and especially to France. In May, 1923, the Chinese Government formally notified the United States Government that it was ready to have the Commission meet on November 1, 1923, in Peking. To this notification the United States replied that it found that date satisfactory, but that "certain of the Powers did not consider it feasible to begin the work of the Commission at that time." The American Government then suggested that the Commission meet on November 1, 1924, to which suggestion China gave its assent. However, the other Powers did not agree, and we have the statement of Dr. Sze, Chinese Minister to the United States, that "it is not a disclosure of a diplomatic secret to say that the Chinese Government was informed by the French Minister at Peking that the French Government had informed the American Ambassador at Paris that the consent of the French Government to proceed in the matter of the meeting of the Extraterritoriality Commission would be dependent upon the settlement of the so-called 'Gold Franc' question—a question wholly extraneous to the matters to be discussed by the Extraterritoriality Commission." Sze, *Addresses*, p. 82.

[9] The last four were Powers which had adhered to the Washington Resolution. It will be remembered that the Washington Resolution provided that the Commission should be composed of one member to be appointed by each of the Signatory Powers, and by each of such Powers having extraterritorial rights in China as might adhere to the Resolution.

last one on September 16, 1926, and a unanimous report made.[10]

The report was divided into four parts, dealing, respectively, with (1) the present practice of extraterritoriality, (2) the laws and judicial and prison system of China, (3) the administration of justice in China, and (4) recommendations. It will not be necessary here to deal with the findings of fact contained in the first three of these parts, valuable as they are, except to say, in general, that, though the Commission found that China had made very considerable advances in the matter of establishing modern courts, codifying her laws, improving her prisons, etc., there were still many subjects not covered by specific and ascertainable laws, and the operation of the courts was far from efficient. Especially was this unsatisfactory condition of judicial administration found to be due to the disregard of civil rights by the military officials, and to the fact that many of the laws supposed to be in force have never been formally enacted in accordance with the methods prescribed by the Constitutions of China, but, upon the contrary, are nothing more than executive mandates—that is, orders of the President or Ministry of Justice, and, therefore, subject to change at any time by similar executive action.

Recommendations of the Commission. The Recommendations made by the Commission were, *verbatim,* as follows:

I.

The administration of justice with respect to the civilian population in China must be entrusted to a judiciary,

[10] The Chinese representative, Dr. Wang Chung-hui, however, attached to his signature the statement that, by signing, he was not to be regarded as approving all the statements in the first three parts of report.

which shall be effectively protected against any unwarranted interference by the executive or other branches of the Government, whether civil or military.

II.

The Chinese Government should adopt the following program for the improvement of the existing legal, judicial and prison systems of China:

1. It should consider Parts II and III of this report relating to the laws and to the judicial, police, and prison systems, with a view to making such amendments and taking such action as may be necessary to meet the observations there made.

2. It should complete and put into force the following laws:

(1) Civil code.
(2) Commercial code (including negotiable instruments law, maritime law and insurance law).
(3) Revised criminal code.
(4) Banking law.
(5) Bankruptcy law.
(6) Patent law.
(7) Land expropriation law.
(8) Law concerning notaries public.

3. It should establish and maintain a uniform system for the regular enactment, promulgation, and rescission of laws, so that there may be no uncertainty as to the laws of China.

4. It should extend the system of modern courts, modern prisons and modern detention-houses, with a view to the elimination of the magistrates' courts and of the old-style prisons and detention-houses.

5. It should make adequate financial provision for the maintenance of courts, detention-houses and prisons and their personnel.

III.

It is suggested that, prior to the reasonable compliance with all the recommendations above mentioned, but after the principal items thereof have been carried out, the Powers concerned, if so desired by the Chinese Government, might consider the abolition of extraterritoriality according to such progressive scheme (whether geographical, partial, or otherwise) as may be agreed upon.

IV.

Pending the abolition of extraterritoriality, the Governments of the Powers concerned should consider Part I of this report, with a view to meeting the observations there made, and, with the co-operation of the Chinese Government wherever necessary, should make certain modifications in the existing systems and practice of extraterritoriality as follows:

1. Application of Chinese laws.

The powers concerned should administer, so far as practicable, in their extraterritorial or consular courts such laws and regulations of China as they may deem it proper to adopt.

2. Mixed cases and mixed courts.

As a general rule mixed cases between nationals of the Powers concerned as plaintiffs and persons under Chinese jurisdiction as defendants should be tried before the modern Chinese courts (Shen P'an T'ing) without the presence of a foreign assessor to watch the proceedings or otherwise participate. With regard to the existing special mixed courts, their organization and procedure should, as far as the special conditions in the settlements and concessions warrant, be brought more into accord with the organization and procedure of the modern Chinese judicial system. Lawyers who are nationals of

extraterritorial Powers and who are qualified to appear before the extraterritorial or consular courts should be permitted, subject to the laws and regulations governing Chinese lawyers, to represent clients, foreign or Chinese, in all mixed cases. No examination should be required as a qualification for practice in such cases.

3. Nationals of extraterritorial Powers.

(a) The extraterritorial Powers should correct certain abuses which have arisen through the extension of foreign protection to Chinese as well as to business and shipping interests, the actual ownership of which is wholly or mainly Chinese.

(b) The extraterritorial Powers which do not now require compulsory periodical registration of their nationals in China should make provision for such registration at definite intervals.

4. Judicial assistance.

Necessary arrangements should be made in regard to judicial assistance (including *commissions rogatoires*) between the Chinese authorities and the authorities of the extraterritorial Powers and between the authorities of the extraterritorial Powers themselves, e. g.:

(a) All agreements between foreigners and persons under Chinese jurisdiction which provide for the settlement of civil matters by arbitration should be recognized, and awards made in pursuance thereof should be enforced, by the extraterritorial or consular courts in the case of persons under their jurisdiction and by the Chinese courts in the case of persons under their jurisdiction, except when, in the opinion of the competent court, the decision is contrary to public order or good morals.

(b) Satisfactory arrangements should be made between the Chinese Government and the Powers concerned for the prompt execution of judgments, summonses and warrants of arrest or search, concerning persons under Chi-

nese jurisdiction, duly issued by the Chinese courts and certified by the competent Chinese authorities and *vice versa.*

5. Taxation.

Pending the abolition of extraterritoriality, the nationals of the Powers concerned should be required to pay such taxes as may be prescribed in laws and regulations duly promulgated by the competent authorities of the Chinese Government and recognized by the Powers concerned as applicable to their nationals.

The Commission prefaced the foregoing recommendations with the following statement:

> The Commission is of the opinion that, when these recommendations shall have been reasonably complied with, the several Powers would be warranted in relinquishing their respective rights of extraterritoriality.
>
> It is understood that, upon the relinquishment of extraterritoriality, the nationals of the Powers concerned will enjoy freedom of residence and trade and civil rights in all parts of China in accordance and with the general practice in intercourse among nations upon a fair and equitable basis.

Suggestions That Have Been Made for the Gradual Relinquishment of Extraterritorial Rights. The author is not sure of the value of this section, as the probability appears to be that, when she feels herself in a position to do so, China will denounce *in toto* the treaty provisions granting extraterritorial rights within her borders, as did Turkey with regard to the foreign rights based upon the so-called Capitulations. However, even in such a case, it is likely that China, as did Turkey, will give to the Powers certain unilateral assurances, not of a contractual character, with regard to the manner in which the personal and property rights of foreigners will be safeguarded.

Though the foregoing is what will most likely be the course of events, space will be spared to refer to at least one or two suggestions which have been made in the past with regard to a program in accordance with which the transition from the régime of extraterritorial rights to one of complete territorial jurisdiction may be bridged over.

In an address delivered before the Anglo-American Association in Peking, on January 20, 1925, Dr. Schurman, then American Minister to China, proposed that the surrender of extraterritorial rights might be according to the following plan: First, the completion by the Chinese of the codification of their laws; second, when this is done, that the foreign courts in China shall apply the law of these Chinese codes, which shall have been previously examined, and, with or without amendment, approved by the Powers; third, China to establish tribunals presided over by two or more judges, of whom one, at least, shall be a foreigner with judicial qualifications, and that these tribunals shall be permitted by the Powers to try cases in which foreigners are parties either as defendants or plaintiffs. The judges of these courts, Dr. Schurman said, should be selected by the Chinese Government and at its untrammeled discretion. The courts would thus be, without qualification, Chinese tribunals, but provision could be made for appeals from them to some suitably constituted superior tribunal in cases in which the judgments of the trial court are not approved by the foreign judge. "As soon," said Dr. Schurman, "as this modern system of laws and tribunals and practical judicial administration had been put into successful operation and had established itself by the character of its results, the participation of the foreign judges might be lessened and ultimately withdrawn. This would be the last step in the gradual process of the abolition of extra-

territoriality." Dr. Schurman then added: "It is not essential that the relinquishment of extraterritorial jurisdiction should take place in all parts of the Republic of China at the same time. On the contrary, as the scheme involves a progressive development in respect of laws and tribunals, it would be natural, also, to expect a gradual extension of the territory to which they should be applied. The obvious places to start with are the areas within which large numbers of foreigners reside—places like Shanghai, Tientsin, Hankow, Canton, Mukden, and Harbin."

In the first edition of the present treatise the author ventured to suggest that the most promising mode by which the Chinese could be aided in bringing about a situation under which it would be expedient to abolish extraterritoriality would be for the Powers to permit the Chinese, as a first step, to establish courts for the trial of cases in which foreigners are parties either as defendants or plaintiffs which should be truly "mixed" in character—that is, tribunals presided over by two or more judges, of whom one, at least, should be a foreigner learned in the law and experienced in its administration. These courts, it was pointed out, would be Chinese courts and the judges would be Chinese officials, but the foreigners serving as judges should be appointed upon the nomination of, or, at least, with the approval of, the Foreign Offices of the Treaty Powers. The suggestion was also made that in those cases in which the judgments rendered in the trial courts were not approved by the foreign judge, an appeal might lie to a superior court and the cases there heard before a panel of judges, of whom a majority should be of foreign nationality. If, the suggestion continued, it should be found that the Chinese authorities and Chinese judges were disposed to give whole-hearted co-operation in the scheme, and satisfac-

tory results were obtained, the participation of the foreign judges could be gradually lessened until the Chinese judicial system would be entirely freed from extraterritorial elements.

These suggestions appeared to the author, at the time they were made, to be feasible. Since then, however, the nationalistic movement in China has made such progress that, as the author has come to recognize, they are not practicable. This change of view the author declared at the Conference on Chinese-American Relations, held in September, 1925, at the Johns Hopkins University. At that time the author said: [11]

Some years ago, in a book I published, I ventured to express an opinion with regard to extraterritoriality and the possibility of its abrogation. I must now say that my views have progressed very considerably beyond those that I stated in that book. I there made the suggestion that there might be established what may truly be termed Mixed Courts, that is, courts in which there should be foreigners sitting as judges alongside Chinese judges, and that these foreigners might be suggested or nominated to the Chinese Government by the foreign Powers.

Doctor Schurman, former Minister to China, approved that proposition except he thought that China should be free and untrammeled in the selection of these foreign judges. But in the face of the situation that we now have in China, I think we would be wise to go even beyond that. Dr. Schurman wanted to go further than that and provide that the Chinese laws should be applied in the courts in which foreigners were accused or defended.

There have been a great variety of propositions made as to the progressive steps by which extraterritoriality might be gradually abandoned—whether China should agree to provide modern courts in the more important ports of China, even though she was not yet prepared to provide fully equipped and trained judges throughout the whole realm of China.

[11] *Report of the Conference* (Johns Hopkins Press) p. 60.

There also has been the question of evocation which is represented in the treaty between Siam and the United States according to which cases are tried in the Siamese courts or the local courts, and then, if there is any question as to the justice which has been provided or about to be provided, the cases may, by a written evocation on the part of the American Government, be removed from those courts to an American court.

There has also been the suggestion that the lower Chinese courts should have complete jurisdiction over all cases, but that there should be an appeal to a superior court, and that upon that superior court there should be a certain amount of foreign representation.

These are details and possibilities which, it seems to me, this meeting is hardly competent to consider, and which will probably be taken up when the matter is dealt with in Peking, or in some other conference which has power to consider the matter.

The point that I have wanted to make and which I repeat is that these are conditions which I have no doubt the Chinese would be willing to meet, and which they should themselves establish.[12]

[12] As an adjunct to, but not part of the treaty of Lausanne, of July 24, 1923, between Turkey and the Allied Powers, and which recognized that the capitulations which Turkey had previously denounced should remain abolished, Turkey made the following "Declaration Relating to the Administration of Justice":

"The Turkish Delegation has already had occasion to state that the Government of the Grand National Assembly of Turkey is in a position to insure to foreigners before the Turkish courts all the safeguards of a good judicial system and to provide therefor in the full exercise of its sovereignty and without any kind of foreign interference. It is, nevertheless, disposed to institute investigations and studies in order to introduce such reforms as may be justified by the progress of manners and civilization.

"In this spirit, the undersigned, acting in virtue of their full powers, desire to make the following declaration:

"1. The Turkish Government proposes to take immediately into its service, for such period as it may consider necessary, not being less than five years, a number of European legal counsellors whom it will select from a list prepared by the Permanent Court of International Justice of The Hague from among jurists nationals of countries which

Evocation in Siam. The method of "evocation" referred to in the foregoing remarks is that embodied in the "Protocol Concerning Jurisdiction Applicable in the Kingdom of Siam to American Citizens and Others Entitled to the Protection of the United States" annexed to the Treaty between Siam and the United States, signed at Washington, December 16, 1920. This Protocol is of sufficient interest to warrant its reproduction here. It reads:

At the moment of proceeding this day to the signature of the new Treaty of Friendship, Commerce and Navigation between the United States and the Kingdom of Siam, the Plenipotentiaries of the two High Contracting Parties have agreed as follows:

Article I

The system of jurisdiction heretofore established in Siam for citizens of the United States and the privileges, exemptions and immunities now enjoyed by the citizens of the United States in Siam as a part of or appurtenant to said system shall absolutely cease and determine on the date of the exchange of ratifications of the above-mentioned Treaty, and thereafter all citizens of the United States, and persons, corporations, companies and associations entitled to its protection in Siam shall be subject to the jurisdiction of the Siamese Courts.

did not take part in the war of 1914-1918, and who will be engaged as Turkish officials.

"2. These legal counsellors will serve under the minister of justice; some will be posted in the City of Constantinople and others in the city of Smyrna. They will take part in the work of the legislative commissions. It will be their duty to observe, without interfering in the performance by the magistrates of their duties, the working of the Turkish civil, commercial and criminal courts, and to forward to the minister of justice such reports as they may consider necessary; they will be competent to receive all complaints which may arise from the administration of justice in civil, commercial or criminal matters, the execution of sentences, or the application of the laws, with a view to bringing such complaints to the notice of the minister of justice in order to insure the strict observance of the provisions of Turkish law.

Article II

Until the promulgation and putting into force of all the Siamese Codes, namely, the Penal Code, the Civil and Commercial Codes, the Codes of Procedure and the Law for Organization of Courts and for a period of five years thereafter, but no longer, the United States, through its Diplomatic and Consular Officials in Siam, whenever in its discretion it deems it proper so to do in the interests of justice, by means of a written requisition, addressed to the judge or judges of the court in which such case is pending, may invoke any case pending in any Siamese Court, except the Supreme or Dika Court, in which an American citizen or a person, corporation, company or association entitled to the protection of the United States is defendant or accused.

Such case shall then be transferred to said Diplomatic or Consular Official for adjudication, and the jurisdiction of the Siamese Court over such case shall thereupon cease. Any case so evoked shall be disposed of by said Diplomatic or Consular official in accordance with the laws of the United States properly applicable, except that as to all matters coming within the scope of Codes or Laws of the Kingdom of Siam regularly promulgated and in force, the texts of which have been communicated to the

"Similarly, they will be competent to receive such complaints as may be caused by domiciliary visits, perquisitions or arrests; moreover, these measures shall, in the judicial districts of Constantinople and of Smyrna, be brought, immediately after their execution, to the notice of the legal counsellor by the local representative of the minister of justice; this official shall in such cases be competent to correspond directly with the legal counsellor.

"3. In cases of minor offenses release on bail shall always be ordered, unless such provisional release entails danger to public safety or impedes the investigation of the case.

"4. In civil or commercial matters all references to arbitration and clauses in agreements providing therefor are allowed, and the arbitral decisions rendered in pursuance thereof shall be executed on being indorsed by the president of the Court of First Instance, who can not refuse his indorsement unless the decision should be contrary to public order.

"5. The present declaration shall remain in force for a period of five years."

American Legation in Bangkok, the rights and liabilities of the parties shall be determined by Siamese law.

For the purpose of trying such cases and of executing any judgments which may be rendered therein, the jurisdiction of the American Diplomatic and Consular officials in Siam is continued.

Should the United States perceive, within a reasonable time after the promulgation of said Codes, any objection to said Codes, namely, the Penal Code, the Civil and Commercial Codes, the Codes of Procedure and the Law for Organization of Courts, the Siamese Government will endeavor to meet such objections.

Article III

Appeals by citizens of the United States or by persons, corporations, companies or/and associations entitled to its protection, from judgments of Courts of First Instance in cases to which they may be parties, shall be adjudged by the Court of Appeal at Bangkok.

An appeal on a question of law shall lie from the Court of Appeal at Bangkok to the Supreme or Dika Court.

A citizen of the United States or a person, corporation, company or association entitled to its protection, who is defendant or accused in any case arising in the Provinces, may apply for a change of venue, and should the Court consider such change desirable, the trial shall take place either at Bangkok or before the judge in whose Court the case would be tried at Bangkok.

Article IV

In order to prevent difficulties which may arise from the transfer of jurisdiction contemplated by the present Protocol, it is agreed:

(a) All cases in which action shall be taken subsequently to the date of the exchange of ratifications of the above-mentioned Treaty, shall be entered and decided in the Siamese Courts, whether the cause of action arose before or after the date of said exchange of ratifications.

(b) All cases pending before the American Diplomatic and

Consular officials in Siam on said date shall take their usual course before such officials until such cases have been finally disposed of, and the jurisdiction of the American Diplomatic and Consular officials shall remain in full force for this purpose.

In connection with any case coming before the American Diplomatic or Consular officials under clause (b) of Article IV, or which may be evoked by said officials under Article II, the Siamese authorities shall, upon request by such Diplomatic or Consular officials, lend their assistance in all matters pertaining to the cases.

CHAPTER XXVII

Landholding by Foreigners in China

The rights of foreigners to lease or acquire title to land in China have, incidentally, been set forth in the treaty provisions which have been elsewhere quoted in connection with the larger subjects of extraterritoriality and the rights of commerce and trade. It will be worth while, however, even at the risk of some repetition, to consider this subject specifically, although briefly.

The special rights possessed or enjoyed by missionaries with respect to landholding will receive consideration in the next chapter.

Landholding in the foreign " settlements " or " concessions " has received consideration in the section dealing with the legal status and administration of those areas.

By Article XII of the American Treaty of 1858 it was provided that:

> Citizens of the United States, residing or sojourning at any of the ports open to foreign commerce, shall be permitted to rent houses and places of business, or hire sites on which they can themselves build houses or hospitals, churches and cemeteries. The parties interested can fix the rent by mutual and equitable agreement; the proprietors shall not demand an exorbitant price, nor shall the local authorities interfere, unless there be some objections offered on the part of the inhabitants respecting the

place. The legal fees to the officers for applying their seal shall be paid. The citizens of the United States shall not unreasonably insist on particular spots, but each party shall conduct himself with justice and moderation. Any desecration of the cemeteries by natives of China shall be severely punished according to law.

By Article XII of the Sino-British Treaty of 1858 it was provided that:

British subjects, whether at the Ports *or at other places*, desiring to build or open houses, warehouses, churches, hospitals or burial grounds, shall make their agreement for land or buildings they require at the rate prevailing among the people, equitably and without exaction on either side.

The italicized words " or at other places " the British have construed as meaning only places near the open ports.

At times some trouble has arisen by reason of the resistance of local authorities to the acquiring of lands by foreigners, missionaries and others, at places where they have had, under treaty, the right to acquire lands. In general it has been recognized by foreigners, and especially by the missionaries, that deference should be paid to local objections that have any reasonable basis. At times the Chinese authorities have argued that the objection of a single person in a community furnishes adequate grounds for refusing permission to a foreigner to acquire land and to build thereupon. This position has been deemed an unreasonable one and as working a virtual nullification of the treaty right.[1]

[1] See, for example, *U. S. For. Rels.*, 1893, pp. 230-231. In this case the Chinese Bureau of Foreign Affairs at Nanking had served notice upon the American Consul that "henceforth, when missionaries or other citizens of the United States desire to acquire land or houses, no matter where, they must first meet the gentry and elders of the place and agree with them and then report to the Bureau and local

In 1911 the American Chargé wrote to the Consul-General at Tientsin that, in his opinion, foreigners might legally lease lands in the immediate vicinity of Tientsin or of other open ports, even though such lands were outside the bounds of the foreign "Concessions," provided the Chinese local authorities gave their permission and were willing to register the deeds. Attention was called to the fact that, in this respect, the provisions of the Sino-American Treaty of 1903 were not as liberal as those of the treaties with Great Britain, which do not specifically restrict the leasing of lands by Britishers to places set apart in the ports for use and occupation by foreigners; but that, of course, under the Most-Favored-Nation principle, Americans were entitled to the same rights as those granted to the subjects of Great Britain. It was declared that the practice was general upon the part of the Chinese to permit the leasing of lands outside the "Concessions." This holding of the legation having been submitted to the authorities at Washington, the following ruling was issued: "Where the acquisition of land by foreigners outside of the several treaty ports is a matter

officials for an official survey of the ground. On it being found that the *feng shui* (geomantic requirement) of the neighborhood is not prejudiced, the execution of the conveyance will be ordered, and the official tax receipt and title deed will be sealed and forwarded through this Bureau to your consulate for delivery." To this the American minister objected, declaring, as he wrote to his government at Washington: "This clause introduces a new element in the mode of acquiring land. Article XII of the Treaty of 1858 does not require that citizens of the United States desiring to purchase land shall submit the question to the decision of the gentry and elders. . . . The clause above quoted from the communication of the Taotai is so distinctly antagonistic to the above quoted article of the Treaty that I have directed Mr. Charles to notify the Taotai that it will not be acquiesced in or acted on by this legation."

With regard to unreasonable difficulties placed by the Chinese in the way of the sale or transfer of real estate owned by foreigners, see also *U. S. For. Rels.*, 1889, p. 72.

of permission and usage, fortified by long observance and generally claimed for and conceded to the citizens or subjects of other nations, this Government would be, also, disposed to hold that deeds for such lands presented by American citizens might properly be registered at the respective consulates."[2]

Modes of Acquiring Titles. The formalities and modes of acquiring titles to real estate by foreigners were considered in a letter of American Minister Denby in reply to a series of questions that had been propounded to him by the Treasurer of the Central China Mission.[3]

From this letter we quote the following:

British consuls issue title deeds only for land situated within the limits of British Concessions. All title deeds to property situated outside of these Concessions are issued by the Chinese authorities. The consuls of the United States have no authority to issue title deeds to real estate in China. Printed forms of deeds with an English translation, such as are issued by the Taotai at Shanghai, are obtained at the consulate-general, but they are only available for property within the jurisdiction of the said Taotai. . . .

The twelfth article of the treaty of 1858 provides certain conditions which may be held to be conditions precedent to the acquisitions of land. Among them is this: That the legal fees to the officers for applying their seals shall be paid. In the United States a deed would be good *inter partes,* at least by estoppel, without acknowledgment witnessed by a notarial seal. . . . Whether, under certain circumstances, a court might hold that title passed without the deed being sealed and stamped by the Chinese authorities I cannot undertake to say. But it may be said with positiveness, . . . that the want of a seal would create difficulty and confusion. *Prima facie,* there is no consummated legal transfer until the seal has been affixed. . . .

[2] *U. S. For. Rels.,* 1911, pp. 82-83.
[3] *U. S. For. Rels.,* 1888, Pt. I, p. 272.

undertaking, but that Japan was insistent that, out of this increase, provision should be made for the payment of outstanding debts to foreign financial interests which had already matured, and that Great Britain desired that this increase should be devoted to specific productive enterprises. There was also some discussion in the sub-committee as to whether the increased customs revenues which China might receive might be divided into allotments—certain percentages to be devoted to debt payments, education and productive enterprises, and the remainder to be available for the current administrative expenses of the Chinese Government. This plan, however, came to nought when it was finally decided that China was not to be given the immediate treaty right to levy more than an effective five per cent. upon imports.

It should further be said that, even when it was proposed that the immediate increase of import duties should be limited to 7½ per cent., the Japanese Delegation protested that this would have such serious effects upon Japanese industries that it could not give its assent. The matter was referred to the Japanese Government at Tokyo and this position of its Delegation affirmed.

From the very beginning it appeared certain that, the domestic conditions of China being what they were, no promise would be given by the Powers of a definite date at which China was to obtain complete tariff autonomy.

At the second meeting of the sub-committee, Sir Robert Borden, in behalf of the British Delegation, definitely proposed that the present tariff of China should be immediately increased so as to make it an effective five per cent., and that, after a general revision of the valuations of imports into China had been obtained, the rate should be raised to 7½ per cent.

Japanese Statement. Mr. Odagiri, in behalf of the Japanese Delegation, submitted the following statement:

Taking into consideration the views and suggestions made by our colleagues at yesterday's meeting, as well as of the commercial relations between Japan and China, the Japanese subcommittee states its views regarding the increase of tariff as follows:

As the Japanese trade with China covers more than 30 per cent. of China's foreign trade and represents the same percentage of Japan's oversea trade, the country which would suffer most by the revised tariff would be Japan.

Japan supplies those articles which are mostly sold to the lower class of people in China to satisfy their daily need. Those goods imported from Japan represent the production of a large number of comparatively small Japanese manufacturers.

Therefore, this sudden and big increase of tariff would mean on the one hand forcing high prices, to the purchasers in China—the majority of the common people—causing a higher cost of living, and, on the other hand, would mean a serious effect upon the industry of Japan. In consequence it is very important that the tariff revision should follow a gradual process, allowing enough time to enable the people of the countries concerned to adjust their economic life accordingly.

In the foregoing circumstances the Japanese sub-committee declares, much to its regret, that in its opinion the abrupt increase of tariff to an effective 7½ rate—more than doubling duties of the present 3½ per cent. tariff—is impossible to put into practice, and as to a 12½ per cent. tariff, it is absolutely impractical.

The revision which the Japanese sub-committee believes proper is an increase of the present tariff to an effective 5 per cent. in accordance with the agreement between the Chinese Government and the diplomatic bodies in Peking.

But in order to avoid the delay of 6 months to one year required for the establishment of the aforesaid conversion, the Japanese sub-committee would propose the alternative measure which will avoid unnecessary delay and will result in greater advantage to the Chinese Government.

As an alternative measure, it is proposed to levy a surtax, of say 30 per cent., upon export, import and coastwise trade, which

should bring in to the Chinese Government an additional revenue of approximately silver $20,000,000.

The fruit of raising the tariff to an effective 5 per cent., on imports would be an increase of revenue of about silver $16,000,000.

This suggested surtax is not an entirely new idea, for this year all the Powers agreed to the imposition of a surtax of 10 per cent., levied on all customs due for one year, as a measure of temporary famine relief, and it was estimated by the customs authorities that this surtax would produce about taels 5,000,000.

Of course, the Japanese sub-committee would not mean absolutely and permanently to refuse its assent to the proposal to increase the tariff. On the contrary it would say that Japan is ready to assist the Chinese in revising the tariff as is shown in the supplementary Treaty of Commerce and Navigation which was concluded during the year 1903.

There is no objection whatever on the part of Japan to the suggestion to appoint an international committee to proceed to China and study the condition of tariff, the likin, and related matters, in order to solve this difficult question and present to the respective Governments any workable scheme for increasing the tariff.

Discussion. Dr. Koo, replying to Sir Robert Borden and M. Odagiri, pointed out that an increase of the Chinese tariff rates to 7½ per cent. would be but a slight one, and that, assuming that Japan's share of China's foreign trade was 30 per cent., such an increase would mean scarcely more than six million dollars gold to be spread annually throughout all parts of the Japanese Empire, and should, therefore, not be a cause of anxiety to Japanese traders and manufacturers.

Dr. Koo also presented statistical tables showing: (1) The Actual Percentages of Import Duties Collected in Comparison with the Value of Imports; and (2) The Average Percentage which the Import Duties Collected by Certain Countries Bear to the Value of Their Imports;

and (3) The Average Percentage which the Import Duties Collected by Japan Bear to the Value of Her Imports. These tables showed, as Dr. Koo pointed out, that, because of a discrepancy between the actual valuations and those used for the purpose of assessing tariff duties, there had been an annual net loss of revenue to China approximating 27,000,000 Chinese dollars, and that this fact should be taken into consideration in determining the relief which China in the future should obtain.

After some discussion, Dr. Koo, on behalf of the Chinese Delegation, expressed his willingness to accept Sir Robert Borden's proposals with an amendment to the effect that, pending the revision of the import tariff to 7½ per cent. effective, a surtax should be immediately applied which would yield a revenue equivalent to 7½ per cent. effective. Dr. Koo also accepted Sir Robert's corollary proposition that a higher rate, say a maximum of 12½ per cent., might be levied on articles that might be fairly denominated luxuries.

Further discussion showed some objection upon the part of the French Delegation to the higher charge upon luxuries, since, M. Sarraut said, it would be difficult to draw a line of demarkation between necessities and luxuries; also, objection upon the part of Sir Robert Borden to the proposition of levying forthwith a surtax until there had been a revaluation of commodities and an effective 7½ per cent. rate established. But all the Delegations, Japan alone excepted, gave their approval to the proposition that China should be given the right to levy 7½ per cent. tariff duties. The Japanese Delegation said that, before giving its approval to this, they would have to communicate with their Government at Tokyo.

Draft Agreement. At the third meeting of the sub-committee, Sir Robert Borden submitted a draft of agree-

the controlling force of Chinese ethical, social and political rules of conduct.

(3) That the schools and colleges maintained and operated by the missions have for their primary purpose religious propaganda rather than pure learning.

(4) That, in many instances, these schools, as regards the subjects taught by them and the technical qualifications of their teachers, do not meet the requirements of the Chinese educational system as established by Chinese law.

(5) That the control of missionary churches, schools and other establishments is, to an undue extent, retained in the hands of foreign missionaries or of the foreign corporate bodies under whose direction the missionaries work.

(6) That, in some cases, the missionaries, without any treaty right, engage in the interior in pursuits of a non-religious and commercial character.

(7) That, in many cases, missionaries, also without treaty right, interfere with Chinese judicial and other political officials in the effort to obtain for their Chinese converts exemption from the operation of the laws and regulations to which non-converts are subject.

(8) That, as experience has repeatedly shown, the presence of missionaries in the interior of China—that is, away from the Treaty Ports—leads to attacks upon them by lawless Chinese, which attacks lead to constant diplomatic controversies, and, not seldom, to the demand by the foreign Powers concerned that heavy pecuniary reparations and punitive damages be paid by the Chinese Government. In the past, also, injuries to missionaries have, at times, led to demands by their Governments for important political concessions. A conspicuous instance of this was the exaction by Germany of the Lease of Kiaochow because of the killing by Chinese bandits of two German Jesuit priests.

(9) And, finally, the mere fact of the attempt of foreigners to supplant Chinese religious beliefs and the codes of conduct based upon them by western religious dogmas which are declared alone to be true, enlightened and divinely sanctioned, has been held by some Chinese to be insulting to the Chinese people. Thus we find Sir Robert Hart, in one of his essays on *The Chinese Question,* declaring: "As for the missionary class, their devotion, zeal and good works are recognized by all; and yet while this is so, their presence has been felt to be a standing insult, for does it not tell the Chinese their conduct is bad and requires change, and their cult inadequate and wants addition, their gods despicable and to be cast into the gutter, their forefathers lost and themselves to be saved by accepting the missionary's teaching?" [1]

[1] T. J. Jernigan, who quotes this statement in his *China's Business Methods and Policy,* p. 269, (published in 1904) is inclined to think that the ill-feeling upon the part of the Chinese towards missionary work is rather to the missionaries as foreigners than to the religious doctrines taught by them. Jernigan says: "Sir Robert Hart has been the efficient head of the Imperial Maritime Customs of China for many years, and probably knows the inner mind of the Chinese better than any other foreigners now living, and whatever he writes on Chinese questions will always merit the most careful attention. If the Chinese do regard the presence of Christian missionaries as a standing insult to both their gods and conduct, it is doubtful if they are really half as much concerned about the religious features as they are about the presence in their country of the foreigners who represent that feature; it is suspected that therein is their opposition."

There has been much discussion by missionaries and by missionary authorities and difference of opinion as to whether the ancestor worship which constitutes so fundamental a feature of Chinese religious and social life is essentially inconsistent with Christianity. If it is so held, it does not need to be said that the acceptance of Christianity by a Chinese cannot but work a veritable *bouleversement* in his former social and ethical ideals. As to this controversy, see Giles' scholarly treatise *Confucianism and Its Rivals.* The following paragraph from that work (p. 262), in which he speaks of the three real obstacles to the spread of Christianity in China may be quoted: "These are, first of all, the Confucian dogma that man is born good; secondly, the prac-

Treaty Rights. Christian missionary work was carried on for many years before there were express treaty provisions regarding the manner in which it might be prosecuted.

The treaties of 1842 and 1844 gave to missionaries, in common with other nationals of the Treaty Powers, the right to reside in the Treaty Ports, and there was express

tice of ancestral worship, which, as has already been shown, is incompatible with Christian doctrine; and thirdly, the rules and practice of filial piety, due directly to the patriarchal system which still obtains in China. It has, indeed, been seriously urged that the unparalleled continuity of the Chinese nation is a reward for their faithful observance of the fifth commandment. In the face of this deeply implanted sentiment of reverence for parents, it is easy to see what a shock it must give to be told, as in Mark 7:29, 30, that a man shall leave his father and mother to cleave to his wife; also, that if a man leaves his father and mother for Christ's sake and the Gospel's, he will receive an hundredfold now in this time, and in the world to come eternal life."

It is worth while to quote also the following views of one of China's most distinguished educators, Dr. P. W. Kuo, former President of the National Southeastern University at Nanking, with regard to the reasons for the recent popular agitation of the Chinese against Christian missionary work in their country. Dr. Kuo says: "Why is it that there has been an anti-Christian education movement in China? Does it mean that the Chinese people fail to appreciate the good motive that is behind the missionary enterprise and the valuable service it has rendered to China? It is hardly that . . . It means simply that the Chinese people are becoming concerned over the kind of education that is being received by more than half a million of their children now enrolled in mission schools. It means that they are anxious to see that the education offered is wholly Chinese and that it is consistent with the ideals of the growing spirit of nationalism. . . . But what is the cause of the anti-Christian movement? There are people who honestly believe that any religion, including Christianity, is not good for China. There are others who are afraid of what is called 'Cultural exploitation,' the influences which tend to denationalize and to undermine the foundation of Chinese civilization. But most of those who take interest in the anti-Christian movement do so because of the political implications of Christianity, because Christianity was introduced into China under protection of the unequal treaties which the Chinese people now resent, because the nations whence come the missionaries fail to practice the principles of the

provision that, in these Ports, churches might be erected. It is reasonably clear, however, that this last permission had for its purpose simply the granting to the foreigners of the opportunity to have houses in which they might conduct Christian worship. No mention was made as to the right to proselytize among the Chinese, or, indeed, to travel, reside or acquire real estate in the interior. However, in 1844, by an Imperial Edict which was at first made applicable only to Roman Catholics, but the next year was interpreted to include all Christians, toleration of Chinese Christians was ordered; but missionaries were prohibited from entering the interior of China for purposes of religious propaganda.[2]

In the treaties of 1858-60 this principle of toleration, thus voluntarily declared, was made a treaty obligation. In addition, the right to proselytize was granted.

Article VIII of the Sino-Russian Treaty of 1858 provided:

Le Gouvernement Chinois ayant reconnu que la doctrine Chrétienne facilite l'établissement de l'ordre et de la concorde entre les hommes, promet de ne pas persécuter ses sujets Chrétiens pour l'exercise des devoirs de leur religion; ils jouiront de la

Golden Rule taught by their missionary representatives, and because not all missionaries have taken due recognition of the growing spirit of nationalism and have readjusted their work to meet the new situation. It is a singular fact, however, that in the midst of all the unfavorable criticisms uttered against Christianity we find very little, if any, that is directed against the person of Jesus Christ or His teaching. The objection raised then is not so much against the essence of Christianity, the real religion, as against the way in which it is organized and preached." Article, "The Present Situation in China and Its Significance for Missionary Administration" in the *International Review of Missions*, January, 1926.

[2] For the text of the memorial of the imperial commissioner, and governor-general of Kwangtung and Kwangsi upon which this Edict was based, see Dennett, *Americans in Eastern Asia*, p. 560, footnote. See also Morse, *Int. Rels. of the Chinese Empire*, vol. I, p. 691.

protection accordée à tous ceux qui professent les autres croyances tolérées dans l'Empire.

Le Gouvernement Chinois considérant les missionnaires Chrétiens comme des hommes de bien que ne cherchent pas d'avantages matériels, leur permettra de propager le Christianisme parmi ses sujets, et ne leur empêchera pas de circuler dans l'intérieur de l'Empire.

Un nombre fixé de missionnaires partant des villes ou ports ouverts sera muni de passeports signés par les autorités Russes.[3]

Article XXIX of the Sino-American Treaty of 1858 read:

The principles of the Christian religion, as professed by the Protestant and Roman Catholic Churches, are recognized as teaching men to do good, and to do to others as they would have others do to them. Hereafter, those who quietly profess and teach these doctrines shall not be harassed or persecuted on account of their faith. Any persons, whether citizens of the United States or Chinese converts, who, according to these tenets, teach and practice the principles of Christianity, shall in no case be interfered with or molested.[4]

This article is repeated in Article XIV of the Sino-American Treaty of 1903.[5]

The corresponding provision in the British Treaty of 1858, ratified in 1860, is to the same effect. Article VIII reads:

The Christian religion, as professed by Protestants or Roman Catholics, inculcates the practice of virtue, and teaches man to do as he would be done by. Persons teaching or professing it, therefore, shall alike be entitled to the protection of the Chinese

[3] Hertslet's *China Treaties*, I, p. 459.

[4] Hertslet's *China Treaties*, I, p. 551.

[5] MacMurray, p. 430.

authorities, nor shall any such, peacefully pursuing their calling, and not offending against law, be persecuted or interfered with.[6]

The corresponding provision of the French Treaty of 1858, ratified in 1860 (Article XIII), was as follows:

La religion Chrétienne ayant pour objet essentiel de porter les hommes à la vertu, les membres de toutes les communions Chrétiennes, jouiront d'une entière sécurité pour leurs personnes, leurs propriétés et le libre exercice de leurs pratiques religieuses, et une protection efficace sera donnée aux missionnaires qui se rendront pacifiquement dans l'intérieur du pays, munis des passeports réguliers dont il est parlé dans l'Article VIII.

Aucune entrave ne sera apportée par les autorités de l'Empire Chinois au droit qui est reconnu à tout individu en Chine d'embrasser s'il le veut, le Christianisme, et d'en suivre les pratiques sans être passible d'aucune peine infligée pour ce fait.

Tout ce qui a été précédemment écrit, proclamé ou publié en Chine par ordre du Gouvernement, contre le culte Chrétien, est complétement abrogé et reste sans valeur dans toutes les provinces de l'Empire.[7]

In 1860 an Imperial Edict was issued by the Chinese Government commanding local officials throughout the empire in every case affecting Christians to investigate thoroughly and decide justly. In 1862 a more comprehensive order, accompanied by explanations, was issued by Prince Kung, the Chief Minister for Foreign Affairs, in which he gave instructions that, though Christians (converts) were, in general, to pay the same taxes as non-Christians, they were not to be compelled to contribute for the building and repair of temples, for idol processions, plays, etc.

In the Burlingame Treaty of 1868 with the United States, Article IV provided:

[6] Hertslet's *China Treaties*, I, p. 22.
[7] Hertslet's *China Treaties*, I, p. 274.

The twenty-ninth article of the treaty of the eighteenth of June, 1858, having stipulated for the exemption of Christian citizens of the United States and Chinese converts from persecutions in China on account of their faith, it is further agreed that citizens of the United States in China of every religious persuasion, and Chinese subjects in the United States shall enjoy entire liberty of conscience, and shall be exempt from all disability or persecution on account of their religious faith or worship in either country. Cemeteries for sepulture of the dead, of whatever nativity or nationality, shall be held in respect and free from disturbance or profanation.[8]

Missionaries in the Interior. In the Sino-French Treaty of 1860, the French text of which is declared authoritative, Article VI reads:[9]

Conformément à l'édit impérial rendu le 20 Mars, 1846, par l'auguste Empereur Tao-Kouong, les établissements religieux et de bienfaisance qui ont été confisqués aux Chrétiens pendant les persécutions dont ils ont été les victimes, seront rendus à leurs propriétaires par l'entremise de son Excellence le Ministre de France en Chine auquel le Gouvernement Impérial les fera délivrer avec les cimetières et les autres édifices qui en dépendaient.

The Chinese text of this Article, however, was made to read quite differently. Translated into English, this Chinese text reads:

"It shall be promulgated throughout the length and breadth of the land in terms of the Imperial Edict of the 20th February, 1846, that it is permitted to all peoples in all parts of China to propagate and practice the 'teachings of the Lord of Heaven,' to meet together for the preaching of the doctrine, to build churches and to worship; further, all such as indiscriminately arrest (Christians) shall be duly punished; and such churches,

[8] Hertslet's *China Treaties*, I, p. 557.
[9] Hertslet's *China Treaties*, I, p. 289.

schools, cemeteries, lands, and buildings, as were owned on former occasions by persecuted Christians, shall be paid for, and the money handed to the French Representative at Peking, for transmission to the Christians in the localities concerned. It is, in addition, permitted to French missionaries to rent and purchase land in all the Provinces, and to erect buildings thereon at pleasure."

It will be admitted that this was a very liberal translation of the French text, but the most significant fact regarding this purporting translation was the addition of the entirely new sentence which gave to the missionaries the right to rent or purchase land in the interior to erect buildings thereon.[10]

Of this added sentence, Dr. Wellington Koo, in his *Status of Aliens in China*,[11] says that for nearly a decade the added sentence was understood and viewed in the same light as the remaining provisions of the compact, without the least suspicion as to its authenticity, and that it was only in 1869 that its spuriousness was discovered. However, it would appear that, in 1865, by the so-called Berthemy Convention, the Chinese, at least in part, gave their assent to the provision.

The text of this Berthemy Convention has never been officially published or, indeed, its existence explicitly and formally announced, and, it is to be noted, that it is not mentioned in the list furnished by France to the Secretary-General of the Washington Conference in pursuance of the Resolution of that Conference, which provided that the Powers concerned should file "a list of all treaties, conventions, exchange of notes, or other inter-

[10] For the terms of an "Arrangement between China and France" as to the terms upon which French missionaries might obtain lands or houses in the interior, see Hertslet's *China Treaties*, I, p. 320.

[11] P. 816.

national agreements which they may have with China, or with any other Power or Powers in relation to China, which they deem to be still in force and upon which they may desire to rely." The existence of the convention, however, would not appear to be in doubt, for it has, upon a number of occasions, been referred to in diplomatic correspondence between the French Minister at Peking and his Government.[12] When, in 1897 the American Minister at Peking asked that an imperial decree be issued recognizing the right of American missionaries to acquire land and reside in the interior, the Chinese Government replied that as to the right to reside this was already provided for by treaty and that decrees to that effect had been issued; and that as to obtaining title to lands, " while the treaties between the United States and China do not provide for this, still the American missionaries shall be treated in this matter the same as French missionaries."[13]

The directions sent by the Chinese Foreign Office to the Viceroys and Governors of all the Provinces, in October, 1894, read as follows:

" Hereafter, if French missionaries go to the interior of the country to purchase land and dwellings, the seller (insert the name) shall specify in the drawing up of the deed of sale that his property was sold to become part of the collective property of the Catholic mission of the place. It will be unnecessary to record the names of the missionary or of the Christians. The Catholic mission,

[12] See *Archives Diplomatiques*, LXVI, 305. Cf. article by L. W. Richards, "The Rights of Foreigners to Reside and Hold Land in China," in the *Harvard Law Review*, XV (1901-2), 191-207. See also Cordier, *Histoire des Relations de la* Chine avec les Puissances Occidentales, vol. I, p. 75, where a definitive text of the convention is given.

[13] *U. S. For. Rels.*, 1897, p. 62.

after the execution of the deed, will pay the registration fee assessed by the law of China on the deeds of sale and at the same rate. The seller will not be bound to give notice to the local authorities of his intention to sell or to apply for a previous permit."

With reference to the phrase " the collective property of the Catholic mission," as used above, it is of interest to observe that the Chinese have sought to have the doctrine established that the title to the lands sold becomes vested in the collectivity of the Chinese converts, rather than in the legal entity of the foreign mission.

This point is covered by the terms of Article XIV of the Sino-American treaty of 1903, the meaning of which is interpreted in a letter of the Chinese Foreign Office which is given in *United States Foreign Relations* for 1907 (p. 207).

Despite the absence of express treaty permission, Christian missionaries of all nationalities were permitted by the Chinese authorities to establish themselves in many places throughout the Empire far from treaty ports and there to acquire lands and construct buildings for use as residences, hospitals, schools, churches, etc. Thus not only were vested property rights created, but the question raised whether there had not been created a custom which might be appealed to under the Most-Favored-Nation clause when permission was sought of the Chinese authorities to establish a new missionary station.

Upon this point we can do no better than to quote the view of American Minister Denby.[14] Writing in 1888, he said:

> Leaving the treaties out of consideration, what, then, is a fair conclusion from the actual condition of things in China?

[14] *U. S. For. Rels.*, 1888, Pt. I, p. 271.

It would seem to be this: The Imperial Government leaves the question of permanent residence to be solved by the local authorities and the people. If the foreigner can procure toleration in any locality, and is suffered without objection to locate therein, he, by degrees, may acquire vested rights, which his own government and the Imperial Government also are bound to secure to him if attacked. If the foreigner is unable by tact and prudence to conciliate the natives so as to secure a permanent residence, he is not strictly entitled to demand either of his own government or the Imperial Government insistence on a claim which has no treaty basis.

It is claimed, however, that the rights granted under the treaties have been enlarged by the usage and tolerance of the Chinese Government, and by special acts, whereby peculiar rights and privileges in certain localities have inured to certain foreigners, and under the Favored-Nation clause, similar rights will be claimed for citizens of the United States.

The Government of the United States does not undertake to control its citizens in their selection of residences at home or abroad. They have the right to go where they please. They will, while traveling in foreign countries, be protected by the Government.

Should citizens of the United States locate in the interior of China, the Government of the United States could not, as a matter of treaty stipulation, insist that they have the right to acquire real property, except in localities where this right has been accorded to citizens or subjects of other foreign powers. In this last case, under the Favored-Nation clause, exact equality should be insisted upon. . . .

It follows from what has been written that the citizens of the United States who undertake to settle in the interior must understand that they do so without positive treaty sanction. While governmental protection as to their persons would follow them the world over, the Government does not hold itself bound to assist them in the prosecution of any business or employment whose exercise in the given locality contravenes the usages or laws of China.

Treaty of 1903. At last, in 1903, in the Sino-American treaty of that year, an express treaty right was granted, not to individuals, but to "Missionary societies" to rent or lease in perpetuity lands and buildings for their missionary purposes in all parts of the Empire. Article XIV of that treaty, after repeating substantially the provision of Article XXIX of the Treaty of 1858, provides:

> No restrictions shall be placed on Chinese joining Christian churches. Converts and non-converts, being Chinese subjects, shall alike conform to the laws of China, and shall pay due respect to those in authority, living together in peace and amity; and the fact of being converts shall not protect them from the consequences of any offense they may have committed or may commit after their admission into the church, or exempt them from paying legal taxes levied on Chinese subjects generally, except taxes levied and contributions for the support of religious customs and practices contrary to their faith. Missionaries shall not interfere with the exercise by the native authorities of their jurisdiction over Chinese subjects; nor shall the native authorities make any distinction between converts and non-converts, but shall administer the laws without partiality so that both classes can live together in peace. Missionary societies of the United States shall be permitted to rent and to lease in perpetuity, as the property of such societies, buildings or lands in all parts of the Empire for missionary purposes and, after the title deeds have been found in order and duly stamped by the local authorities, to erect such suitable buildings as may be required for carrying on their good work.

"The new stipulations," says Hinckley, "cover the principal missionary difficulties that have arisen since 1850. . . . . It will be observed that the right of missionaries to reside in the interior is not included in this treaty. The omission may be ascribed to the fact that the privilege has long existed, the only restrictions upon it being made by the authorities in remote commun-

ities."[15] It may further be observed that the right regarding the acquiring of interests in land extends to the obtaining of leases in perpetuity and to fee simple titles thereto.

A fairly common custom among missionaries in the interior has been to take the legal title to lands in the name of Chinese converts, who hold them in trust for the missionary society. As regards the legality as well as the expediency of this custom, the American Minister in 1888 wrote:

"The subject of trusts is one of the most difficult. In China it seems to be usual with foreigners, in the interior at least, to have property conveyed to a trustee who executes, as a precaution, a declaration of trust to the *cestui qui trust*, which is not recorded. The plan is probably legal. But the better plan would, in my opinion, be to have the deed made to the head of the mission in trust for his society, or to the society direct."[16]

The foregoing was written prior to the Sino-American treaty of 1903. Since then the Department of State at Washington, under date of March 22, 1905, has issued the following instructions to its Minister at Peking:

The department has considered the history of the question of the right which American missionaries as individuals possess to acquire and hold property in the interior of China. This right must be sought in the various treaties of the United States with China, or it must be obtained indirectly by an application of the Favored-Nation clause. An examination of these treaties clearly shows such a right to be legally nonexistant; but with respect to certain localities in China there is, nevertheless,

[15] *American Consular Jurisdiction in the Orient*, p. 120.

[16] *U. S. For. Rels.*, 1888, p. 274. Quoted by L. N. Richards in his article, "The Rights of Foreigners to Reside and Hold Land in China," *Harvard Law Review*, vol. XV (1901-02), pp. 191-207.

an equitable or quasi legal right based upon custom. As to the rights which American missionaries possess to acquire and hold property for the purposes of their mission, the department holds that such rights are legally, and therefore legitimately, based solely upon Article XIV of the treaty of 1903.

Notwithstanding its adverse opinion on the question of the legal rights of our missionaries, as individuals, under our treaties with China, the department desires to recognize, and does not wish to weaken, any equitable or quasi legal rights which may have arisen from the custom. The fact appears to be that in practice foreigners, non-members as well as members of missionary bodies, have purchased land in many instances in all parts of China, and that the Chinese authorities have connived at, acquiesced in, and actually ratified so many such transactions that there is great force in the contention, often made by foreigners in China, that the treaty prohibition against foreigners buying land can no longer be urged in China. These purchases have been made by various railway, mining, and other enterprises; by foreign firms in the interior, for business purposes; and by foreign residents of all nationalities and occupations, for summer homes and for various other purposes.

In meritorious cases, in which the circumstances were such as to give rise to no objection on other grounds than the unwillingness of China to consent to sales of land to Americans in the interior, this department would find great force in the argument that inasmuch as China, through her officials, has in numerous instances permitted the subjects of other nationalities to purchase land in certain localities in the interior, this Government may, with good reason, consider such purchases as precedents establishing the right of Americans, whether members or non-members of a missionary body, to make similar purchases.[16a]

Status of Chinese Converts to Christianity. The legal status of Chinese converts to Christianity is a very simple one, though it has, in practice, given rise to a great deal of controversy owing to attempts made by the converts to

[16a] *U. S. For. Rels.*, 1906, Pt. I, p. 227.

obtain for themselves special protection or immunity from local law and authorities, and, at times, to a similar effort in their behalf upon the part of the foreign missionaries.

As a matter of treaty provision and of Chinese law, a convert to Christianity has no extraterritorial rights whatsoever. He has exactly the same status and rights as his unconverted fellow nationals.[17] He is, however, guaranteed immunity from discrimination or oppression by the Chinese authorities on account of his religion. And yet, as an almost unavoidable result of human nature, the missionaries in earlier years were led to interpose in behalf of their converts. Morse puts this very well when he says:

> With the reservation of the case of persecution most missionaries, certainly most Protestant missionaries, generally accept this position; but they cannot always be trusted to temper zeal with discretion and to distinguish what is right from what is lawful. In this lies an element of danger to the missionary and to his cause. . . . When the missionary, many miles from the observing eyes of his Consul, transfers a corner of his protecting cloak to his poor Chinese convert, he may be doing what is right, but it is not lawful; and this is the naked fact underlying many an episode leading to a riot. You cannot eradicate from a missionary's mind the belief that a convert is entitled to justice of a quality superior to that doled out to his unconverted brother; it could not be got out of your mind, or out of mine in a similar case. None of us could endure that a protégé of ours should be

[17] By Article V of the German treaty of 1861 it is provided that:
"Die Bekenner und Lehrer der christlichen Religion sollen in China volle Sicherheit für ihre Personen, ihr Eigenthum und die Ausübung ihrer Religions-Gebräuche geniessen."
Morse, however, points out, that this very broad language was not intended to remove, and has not been construed as removing, converts from the jurisdiction of their own laws and courts. *Trade and Administration of China*, p. 197.

haled away to a filthy prison for a debt he did not owe, and kept there until he had satisfied, not perhaps the fictitious creditor, but at least his custodians who were responsible for his safe keeping. The case is particularly hard when the claim is not for a debt, but for a contribution to the upkeep of the village temple—the throne of heathendom—or of the recurring friendly village feasts held in connection with the temple—counterparts of Feast Day and Thanksgiving; and when conversion drives its subject to break off all his family ties by refusing to contribute to the maintenance of family ancestral worship and the ancestral shrine, the hardship is felt on all sides—by the missionary who cannot decline to support his weaker brother in his struggle against the snares of the devil; by the convert, who is divided between his allegiance to his new faith and the old beliefs which made all that was holy in his former life; by the family, who not only regard their recreant member as an apostate but are also compelled to maintain the old worship with reduced assessments from reduced members; and by the people and governors of the land, who may find in such a situation a spark to initiate a great conflagration. . . .

. . . There are, however, two sides to this question. There are numerous cases, susceptible of proof to the man on the spot but of which it would be difficult to carry conviction to the minds of those at a distance, where the missionary undoubtedly intervenes to make capital for his mission and to secure for his followers some tangible advantage from their acceptance of his propaganda. At the other extremity there is the manifest tendency, clearly recognized by all, even the most impartial, but quite incapable of legal demonstration, for the judges of the land in cases where the right is not obviously on one side or the other, to decide *ex motu suo* against the convert; ostensibly such decisions are given on as good legal grounds as any case in China is ever decided, but practically the underlying reason is the convert's religion—not the judge's antipathy to the religion itself, but his ingrained feeling that the convert has become less Chinese than the non-convert.[18]

[18] *Trade and Administration of China*, p. 198. In an Appendix (c) Morse gives the text of a circular which the British Minister at Peking

Secular Work by Missionaries. At times the question has been raised as to the right of missionaries to engage in secular occupations incidentally connected with their religious work. As to the rights here involved we may quote from the letter of American Minister Denby of February 3, 1897. Writing to the Secretary of State, he said:

Under the Berthemy convention the right to reside in the interior and to buy land for residential purposes was secured to missionaries. In no convention or treaty is anything said about the right to carry on by foreigners residing there any regular employment in the interior. In practice, however, it is a common thing for missionaries all over China to engage in many species of employments which are considered as aids or adjuncts to their religious and charitable work. They have printing establishments, book-binderies, industrial schools, workshops, stores, dis-

found it necessary to issue in 1903 calling missionaries' attention to the fact that it was improper for them to address Chinese officials, either verbally or in writing, in behalf of their converts, and that, if representations were needed, the matter should be brought before the nearest consul through whom, if deemed proper, representations might be made to the Chinese authorities. "The fact that a missionary or the convert on whose behalf a complaint is made resides at a distance from one of H. M. Consuls is not sufficient reason for the missionary taking upon himself the duty of the consul, and his intervention could only be justified when there was imminent danger of an extreme character threatening the safety of converts."

In March, 1878, in a Circular Letter to Chinese Ministers abroad, advising them as to its general policies, the Chinese Foreign Office with reference to missionaries, said:

"Over and above the four points commented on, there is the missionary question. China, recognizing that the object of all religious systems is to teach men to do good, has, by treaty, assented to missionaries coming to teach their doctrines in China, and has also guaranteed protection to them and to their converts. But among the missionaries are some who, exalting the importance of their office, arrogate to themselves an official status, and interfere so far as to transact business that ought properly to be dealt with by the Chinese local authorities; while among their converts are some who look upon their being Christians as protecting them from the consequences of

pensaries. They are doctors, colporteurs, newspaper correspondents; one of them living here lodges and boards strangers. All kinds of furniture is manufactured here and publicly sold by missionaries. Washing and sewing are done by the Catholic missionaries. In fact, there is complete tolerance of all kinds of work. It is understood, of course, that the profits of these various enterprises go to the general fund of the mission, and are used to promote religious purposes. In answering Mr. Simpson (who had made inquiry) I have not been able to draw the line between pursuits thus permitted and agriculture, stock raising, or trading. Of course, much would depend on the manner that such pursuits were carried on. The question of the right to engage in trade or commerce seems to depend entirely on tolerance. If the particular enterprise engaged in in any locality is not prohibited by the officials and is allowed to be prosecuted without objection, it would finally be sanctioned by usage, and might be entitled to protection of the Treaty Powers."[19]

In 1911 the Chinese foreign office, in consultation with the Legations at Peking, promulgated a new set of rules governing the holding of property by foreigners in the interior, which rules Dr. Koo summarizes as follows:

(1) That the property owners shall be free to sell their property and the missions desiring to buy shall not coerce them to

breaking the laws of their own country, and refuse to observe the rules which are binding on their neighbors. This state of things China cannot tolerate or submit to. Under the extraterritoriality clause foreigners are to be dealt with by their own national authorities, but as regards Chinese subjects on Chinese soil, it is only the Chinese authorities who can deal with them, and Chinese subjects, whether Christian or not, to be accounted good subjects, must render an exact obedience to the laws of China. If any offend against those laws, they must, one and all, Christians or not Christians, alike, submit to be dealt with by their own native authorities, and the foreign missionary cannot be permitted to usurp the right of shielding them from the consequences of their acts." Quoted by Jernigan, *China's Business Methods and Policy*, p. 271. See *post*, p. 725.

[19] *U. S. For. Rels.*, 1897, p. 105.

sell; (2) that the missions shall, before purchasing any property, consult the local officials and request them to make an official survey of the grounds and ascertain the records; (3) that, after the purchase is made, they shall apply to the authorities for a tax deed; (4) that the property purchased shall always remain the property of the mission, and a tablet shall be erected to record its ownership; (5) that, if the mission, after purchasing a property, should sell it to Chinese, they are prohibited clandestinely to sell it to foreigners; (6) that the local authorities shall forbid the purchase of property in all cases where the property is purchased in the name of a mission, but not to be used for the purposes of the mission, or where it is to be used for foreign merchants for trading purposes.[20]

Other Than Christian Missionaries. The rights which have been discussed in the preceding paragraph have been construed to apply only to Christian missionaries,—Protestant or Roman Catholic. This limitation has been declared upon several occasions by the Chinese Government when the Japanese have sought to obtain these or similar rights for Japanese Buddhist missionaries. Thus, in 1905, the Japanese Minister in Peking represented to the Chinese Foreign Office that there were many such missionaries in fact in China exhorting men to do good, and asked that they be protected to the same extent as the Christian missionaries. This the Chinese Foreign Office declined to do, stating that the rights of the Christian missionaries rested upon specific treaty engagements, and that they did not come within the operation of the Most-Favored-Nation clause.[21] And, as is elsewhere pointed out, one of the "Twenty-one Demands" made in 1915 by Japan to China included one which China was able to refuse, that Japanese hospitals, schools

[20] *Status of Aliens in China*, p. 333. Dr. Koo refers, for the text of the rules themselves, to the *Shanghai Eastern Times* of April 19, 1911.

[21] Cf. Koo, *Status of Aliens in China*, 288, note I.

and temples might own land in the interior of China and that Japanese subjects should have the right to carry on religious propaganda in China.[22]

Attitude of the Missionaries with Regard to the Movement for the Abolition of Extraterritorial and Other Special Rights of Foreigners in China. Upon the whole, the attitude of Christian missionary bodies, as well as of individual missionaries has been highly sympathetic towards the movement for the abolition of those special foreign rights which, under the stimulus of the new nationalistic movement, the Chinese feel to be oppressive to themselves and in derogation of the dignity and sovereignty of their State. It is not feasible to reproduce the various resolutions which certain of the missionary bodies have passed, but, as typical of the more liberal of the missionary views, reference may be made to the article by Dr. A. L. Warnshuis, Secretary of the International Missionary Council, entitled "Treaties and Missions," which appeared in the January, 1926, issue of the *International Review of Missions.*

Dr. Warnshuis points out that the advantages and disadvantages of the so-called "toleration clauses" of the treaties between China and the Treaty Powers have been debated from the time they were exacted of China.[23] Upon the one hand, these clauses have exempted the missionaries from persecution by the Chinese Govern-

[22] For the dignified reply of China to this demand, see *ante*, p. 343.

[23] So far as Chinese converts are concerned these treaty clauses are now without significance since the principle of religious toleration has found embodiment in the various recent constitutions of China. See Articles 5 and 6 of the Provisional Constitution, promulgated at Nanking, March 11, 1912; Articles 4 and 5 (g) of the Revised Provisional Constitution—(Constitutional Compact) promulgated May 1, 1914; and Articles 5 and 12 of the Permanent Constitution promulgated October 10, 1923.

ment, should it have desired to do so; but, on the other hand, they have placed the missions in the light of foreign agencies, supported by their respective Governments, and, so far as their religious beliefs have been concerned, have placed the Chinese Christian converts under the protection of these foreign Powers. "To be sure," says Dr. Warnshuis, "it was only as protectors of the faith of the converts that a foreign Power could legally intervene, but in practice the result was to separate the Christian Chinese from the mass of their fellow-countrymen, and to make of them an enclave under the defense of the aliens. So much was this the case, that, until comparatively recent years, the Chinese authorities unwisely but persistently made a sharp distinction in the terms used to describe Christian and other Chinese subjects. Moreover, because of this protection, there were brought into the churches those with unworthy motives who feigned conversion. These clauses were a serious blow to the prestige and sovereignty of the Chinese State, as they practically removed Chinese Christians from its jurisdiction. Under them the missionary came as part of the aggressive West, depending on agreements wrested from the Chinese Government by superior military power. His message, accordingly, could not but be compromised, and his Lord often misunderstood."

In conferences, held in October, 1925, in the United States and in Great Britain, of representatives of the missionary societies operating in China resolutions were adopted which urged that the existing treaties with China be brought into consonance with the principles declared in the Washington treaties of 1922; that extraterritoriality should be abolished, and other methods of judicial administration substituted for it to be agreed upon in an equal conference with China; and that, henceforth, the rights of Christian missions in China should

not depend upon treaty toleration clauses, but upon privileges freely granted by the Chinese.

With regard to the schools conducted by the Christian missions in China, there needs to be considered the energetic efforts upon the part of the Chinese Government to build up and control an efficient national educational system and, therefore, its unwillingness to have large numbers of the youth of China trained in institutions the curricula and modes of instruction of which are not under its control. In an address of Dr. Y. P. Tsai, Chancellor of the National University at Peking, reported in the *China Express* of August 20, 1925, we find the following statement:

> . . . whenever a missionary school is founded, religious instruction of some sort is propagated, bringing about new effects and influences, thereby contradicting the traditional education. While neglecting Chinese history, literature, and other important subjects, missions in China are now organizing different sets of educational systems of their own, parallel to the Chinese Government system, which might prove in time irreconcilable elements in the Chinese national education. Moreover, the genuine belief, though not usually the professed precepts, of Chinese educators, is almost wholly against the teaching of religion to young children, who are merely so much material to be recruited and manufactured by their elders. If we respected the right of our children, whose tradition and environment are non-religious, we should educate them in such a way as to give them knowledge and the mental habits required for forming independent opinion.

Regulations Governing Educational Institutions Supported by Foreign Fund. On November 16, 1925, the Chinese Ministry of Education promulgated the following revised regulations:[24]

[24] The translation of these regulations is one made by the China Christian Educational Association.

I. Official Promulgation

Regarding the educational institutions established by funds contributed from foreigners the Ministry has taken the position that such institutions should receive the same treatment as other private institutions established in the country. This Ministry has taken several actions in the years past. In the sixth year of the Republic (1917), we promulgated Official Notice No. 8, in which was set forth the regulations governing the standards and treatment of the institutions with the rank of "technical and professional schools and above" established by Chinese and foreigners. Again in Official Notice No. 11, published in the ninth year of the Republic (1920), it was once more stated that educational institutions of the rank of professional and technical schools and above, if established by foreigners, should be permitted to report to the Ministry and to be treated according to the various regulations governing technical and professional schools or colleges and universities. Again, in April of the tenth year of the Republic (1921), the Ministry published regulations governing the registration of middle schools established by Christian Churches. Such regulations have been officially sent to the educational authorities of each province of the Republic. Recently there has been an increasing number of such schools applying to the local educational authorities for registration. This Ministry deems it necessary that there should be a revision of the former regulations and the promulgation of a uniform set of regulations for observance. We hereby officially set forth six regulations governing the application for recognition by educational institutions established by funds contributed from foreigners. These regulations are now explicitly promulgated. From now on all the regulations which have been promulgated by this Ministry in the past regarding this matter are hereby declared void. . . .

II. Regulations Governing the Procedure of Recognition

1. Any institution of whatever grade established by funds contributed from foreigners, if it carries on its work according to the regulations governing various grades of institutions as pro-

mulgated by the Ministry of Education, will be allowed to make application for recognition at the office of the proper educational authorities of the Government according to the regulations as promulgated by the Ministry of Education concerning the application for recognition on the part of all educational institutions.

2. Such an institution should prefix to its official name the term "szu lih" (privately established).

3. The president or principal of such an institution should be a Chinese. If such president or principal has hitherto been a foreigner then there must be a Chinese vice-president, who shall represent the institution in applying for recognition.

4. If the institution has a board of managers, more than half of the board must be Chinese.

5. The institution shall not have as its purpose the propagation of religion.[25]

6. The curriculum of such an institution should conform to the standards set by the Ministry of Education. It shall not include religious courses among the required subjects.

Some missionaries who have felt that the possession by them of extraterritorial rights has been a hindrance rather than a help in the prosecuting of their work of

[25] The following official interpretation of this requirement has been given by the Minister of Education under date of July 6, 1926: "In answering your petition for an interpretation of Clause 5 . . . as to whether the clause emphasizes the aim of the school or whether it is inconsistent with the freedom of religious faith and of the propagation of religion, etc., our official answer is hereby given that Clause 5 of the said regulations as promulgated means that when an educational institution is established it should have as its aim the educational aim which is formulated and proclaimed by the ministry. It means that in the institution there should be no compulsion on any student to accept any religious faith or to attend any religious rites and ceremonies. It sets no limitations whatever upon liberty of religious faith and liberty of propagating religion."

It should, perhaps, be added that the authorities in the South have issued regulations regarding foreign educational institutions which are, in some respects, more drastic than those issued by the Peking Government, and that these regulations have been enforced when the southern authorities have been in control.

evangelization have raised the question whether they might not by their own acts free themselves from such rights. This is possible to only a slight extent. They can, of course, refrain from asking consular or diplomatic protection, when they or their property are endangered, or, after injuries received, may decline to ask for the punishment of the offenders or for indemnities, but they cannot prevent their respective Governments from using their discretion as to what protection they will extend to them or what action they will take in case of offenses committed by the Chinese or of derelictions upon the part of the Chinese Government. For these Governments have taken the very proper view that their dignity and interests are involved when their own nationals are injured. Thus, in 1888, we find the American Secretary of State advising one of the American Ministers: "This Government cannot admit that its citizens can, merely by making contracts with foreign Powers, or by other methods not amounting to an act of expatriation or a deliberate abandonment of American citizenship, destroy their dependence upon it or its obligations to protect them in case of a denial of justice."[26] And, again, in the same year, the Secretary of State, Mr. Bayard, writing to the American Minister at Constantinople, said:

> The legislation of various countries of Spanish-America, such as Mexico, Venezuela, and Peru, has sought to establish that a foreigner, while continuing to be a subject or citizen of the country of his allegiance, may, by his own act, waive or forego the right to invoke the diplomatic protection of that Government in case of alleged injury. This position, whenever taken up, has been consistently opposed by the United States. . . . The duty is always incumbent upon a Government to exercise a just and

[26] Moore, *Digest of International Law*, VI, p. 294.

proper guardianship over its citizens whether at home or abroad. . . . It is not competent to a citizen to divest himself of any part of his inherent right to protection or to impair the duty of his Government to protect him. He may conclude his rights in such regard by ceasing to be a citizen, for that is the accepted doctrine of expatriation, but he may not remain a citizen and withdraw himself or be withdrawn under the operation of the municipal law of another country from the rights and duties of citizenship.[27]

It would appear that Great Britain has provided, by an Order in Council, that a British subject who neglects to register as such, in the manner provided by the order, forfeits his right to claim protection or recognition as a British subject in China. Even in this case, however, such unregistered persons remain subject to the jurisdiction of the British courts in China.[28]

Addendum. On March 16, 1899, the Chinese Government issued a Rescript, which was emphatically rejected by the Protestant missionaries, ascribing certain official ranks to missionary workers. This Rescript was cancelled by the Chinese Government by another Rescript issued March 12, 1908.[29]

[27] *U. S. Foreign Relations*, 1888, Pt. II, p. 1599. As to this matter of attempted renunciation of rights, see Borchard, *Diplomatic Protection of Citizens Abroad*, pp. 792-816.

[28] Cf. article "Missionaries and Governments," by J. F. Heeren, in Supplement to the *China Weekly Review*, June 19, 1926. This valuable Supplement is devoted exclusively to the discussion of the various phases of the problem of Extraterritoriality in China.

[29] MacMurray, pp. 717 and 718.

CHAPTER XXIX

Foreign Commerce and the Rights of Foreign Merchants in China

Foreign trade with China, both by sea and over land, dates from very early days, but, as we have already seen, not until 1842 was any agreement obtained from the Government at Peking placing this trade upon a definite basis, fixing the customs charges, export and import, which might be exacted, and defining the legal or treaty rights which foreign merchants should enjoy in the ports at which they were permitted to trade.[1]

As early as 1793 Great Britain had sent to China the Lord MacCartney mission to secure, if possible, better trading relations between the two countries; and again, in 1816, for the same purpose sent Lord Amherst. Both missions, however, failed to realize their aim. Indeed, Lord Amherst failed even to obtain an audience with the Emperor. In 1842, however, in the Treaty of Nanking, which concluded the so-called Opium War, the Chinese Government was compelled, for the first time, to give express sanction to foreign trade at certain ports, to fix the conditions under which this trade should be carried on, and to give to British traders certain rights of resi-

[1] Prior to this time China had entered into treaties with Russia dealing with boundaries and overland trade, but these agreements had been limited in scope and had made no attempt to give to traders a definite legal status in the ports of the Empire.

dence in the Empire—all of which regulations and rights were immediately made applicable to the traders of the other "Treaty Powers," that is, of those Powers with which China then or later had treaty relations.

Treaty of Nanking, 1842. This treaty of August 29, 1842, signed at Nanking, is of importance not simply as a commercial agreement, but as containing features which, since that time, have characterized the general rights of foreigners resident in China — the establishment of "treaty ports," the creation of residential "settlements" or "concessions" at these ports, the granting of extraterritorial rights to foreigners, and the imposition by treaties of limitations upon the freedom of China to fix customs dues according to her own fiscal needs or domestic commercial policy.[2] It will therefore be appropriate to consider this treaty with some degree of particularity.

By the treaty of Nanking the island of Hongkong was ceded to Great Britain and the five ports of Canton, Amoy, Foochow, Ningpo, and Shanghai were formally opened to foreign trade. There are now sixty-nine Treaty Ports, opened in pursuance of treaties, besides eleven other ports voluntarily opened by China. At forty-seven of the sixty-nine Treaty Ports the Chinese Maritime Customs has offices.

In these "Treaty Ports" it was provided by the Nanking Treaty that merchants might reside and carry on trade, and for these purposes build dwellings and warehouses, and it was agreed that consular officials should be appointed to act as the medium of communication between the foreign merchants and the Chinese authorities.

[2] The era of railway and other concessions, and the establishment of spheres of interest did not come until forty or fifty years later. See *ante*, Chapter VI.

It was also provided that the Chinese Government should establish and publish a schedule of customs duties to take the place of the previously uncertain amounts that had been levied upon imports and exports. And, in connection with this last undertaking, the important fact is to be noted that it was understood that the customs duties thus fixed should not be increased beyond the amounts then agreed upon. This principle was continued in later treaties, and thus, improvidently—for the Chinese Government did not then see the seriousness of the step nor obtain any real *quid pro quo* for the engagement upon her part—China has since been unable to exercise the right of determining the rates of her own export and import dues. In this respect China is unique among the great Powers of the world.[3] It is true that the Western Powers have been accustomed to enter into special commercial treaties regulating trade between the contracting parties, but in few, if any, cases have these treaties fixed the absolute rates that might be charged upon all exports or imports. Their purpose has been to grant certain reciprocal privileges as regards maximum and minimum rates in general, or to determine the conditions under which specific articles may be exported or imported. The fiscal limitations under which China has suffered since 1842 have thus differed from those created by commercial treaties between the Western Powers in the two important respects that, first, they have fixed a very low rate which has applied to *all* articles of export or import,[4] and second, these limitations having been granted to all the Treaty Powers, China finds herself in the situation that she cannot get rid of them or lessen their severity unless

[3] Japan long suffered under the same treaty restriction. She, in turn, imposed the same restrictions upon Korea.

[4] There has also been a free list of commodities upon which no duties can be levied.

she can obtain the unanimous consent of all these Treaty Powers, and this, up to the present time, she has been unable to obtain. Indeed, as will later be pointed out, China has not been able to levy during the recent years even the effective 5 per cent. *ad valorem* duties which her treaties profess to allow her to do.

The following provisions of the Nanking Treaty are of sufficient importance to warrant their textual reproduction:

ARTICLE II. His Majesty, the Emperor of China, agrees that British subjects, with their families and establishments, shall be allowed to reside, for the purpose of carrying on their mercantile pursuits, without molestation or restraint, at the cities and towns of Canton, Amoy Foochowfoo, Ningpo, and Shanghai; and Her Majesty, the Queen of Great Britain, etc., will appoint superintendents, or consular officers, to reside at each of the above named cities or towns, to be the medium of communication between the Chinese authorities and the said merchants, and to see that just duties and other dues of the Chinese Government, as hereafter provided for, are duly discharged by Her Britannic Majesty's subjects.

ARTICLE V. The Government of China having compelled the British merchants trading at Canton to deal exclusively with certain Chinese merchants called Hong Merchants (or Co-Hong) who had been licensed by the Chinese Government for that purpose, the Emperor of China agrees to abolish that practice in future at all ports where British merchants may reside, and to permit them to carry on their mercantile transactions with whatever persons they please.

ARTICLE X. His Majesty, the Emperor of China, agrees to establish at the ports which are by the second Article of the Treaty to be thrown open for the resort of British merchants, a fair and regular tariff of export and import customs and other dues, which tariff shall be publicly notified and promulgated for general information; and the Emperor further engages, that when British merchandise shall have once paid at any of the said

ports the regulated customs and dues agreeable to the tariff, to be hereafter fixed, such merchandise may be conveyed by Chinese merchants to any province or city in the interior of the Empire of China, on paying a further amount as transit duties, which shall not exceed ——— per cent. on the tariff value of such goods.[5]

It will be seen from the provisions thus given that the Treaty of 1842 did not itself fix the duties that the Chinese Government might collect. This was done by a "Declaration" issued by the Chinese Government June 26, 1843.

By a supplementary treaty with Great Britain, signed October 8, 1843, the rights of foreign traders were further defined. The more important of the provisions of this agreement were as follows:

ARTICLE IV. After the five ports of Canton, Foochowfoo, Amoy, Ningpo, and Shanghai, shall be thrown open, English merchants shall be allowed to trade only at those five ports. Neither shall they repair to any other ports or places, nor will the Chinese people at any other ports or places be permitted to trade with them.

ARTICLE VI. It is agreed that English merchants and others residing at, or resorting to, the five ports to be opened, shall not go into the surrounding country beyond certain short distances to be named by the local authorities, in concert with the British consul, and on no pretense for purposes of traffic.

ARTICLE VIII. The Emperor of China having been graciously pleased to grant to all foreign countries whose subjects or citizens have hitherto traded at Canton the privilege of resorting for purposes of trade to the other four ports of Foochowfoo, Amoy, Ningpo, and Shanghai, on the same terms as the English, it is further agreed, that should the Emperor hereafter, from any cause whatever, be pleased to grant additional privileges, or immunities, to any of the subjects or citizens of such foreign

[5] *Customs Treaties*, I, p. 352.

countries, the same privileges and immunities will be extended to, and enjoyed by, British subjects; but it is to be understood, that demands or requests are not, on this plea, to be unnecessarily brought forward.

This last article is, of course, the familiar Most-Favored-Nation clause. It is to be noted that the provision is unilateral in its effect—that is, not China, but only Great Britain is to benefit by it.

The Treaty of Nanking gave to foreign trade a definite legal standing in China, but by no means marked an end to the conflicts which had previously existed between foreign traders and the Chinese authorities. Since that time questions concerning foreign commerce have related to the following matters: (*a*) the opening up of new "Treaty Ports"; (*b*) the revision of tariff schedules; (*c*) the regulation of transit and other charges upon commodities after importation, or upon commodities proceeding to the ports for exportation; (*d*) the granting of additional rights and privileges to traders resident in China; (*e*) the creation of an efficient maritime customs administrative service; and (*f*) the maintenance of the so-called "Open Door" policy, according to which, subject to certain exceptions later to be mentioned, no Treaty Power is to enjoy commercial rights not granted by the Government of China to the citizens of the other Treaty Powers. It will not be feasible to give a wholly separate consideration to each of these subjects, but they need to be borne in mind.

Tientsin Treaties of 1858. The year 1858 marks a second definite stage in the development of the relations of China with the other Powers. As a result of military operations upon the part of the Powers, and a good deal of negotiating, there were signed in that year substantially similar treaties—the so-called Tientsin Treaties—

with Great Britain, the United States, France and Russia. By these agreements the older treaties were revised, the trade in opium subjected to new regulations, the Yangtze River opened up to navigation by foreign vessels, new treaty ports created, travel and trade in the interior made more secure by a system of passports, a new schedule of customs duties agreed upon, Christian missionaries in China given wider rights of residence and of propaganda, and the right granted by the Chinese Government to the diplomatic agents of the Treaty Powers to come and reside in Peking. This last privilege the foreign nations had been seeking to obtain since 1842. It was also expressly provided that foreign diplomatic officials should be treated with courtesy and consideration, that they should not be compelled to perform any ceremonies of an undignified or humiliating character, that their correspondence should not be interfered with, and that they should have direct relations with a high minister of state at Peking. These diplomatic rights were made effective in the treaties of 1860 which concluded the war with China caused by the obstruction which the Chinese Government had interposed to the ratification at Peking of the Tientsin treaties.

Treaties of 1902 and 1903. In 1902 and 1903 one more effort was made by China, co-operating with Great Britain, the United States and Japan, to place upon a more satisfactory basis many of the existing conditions relating to trade, finance, currency, mining, joint-stock enterprises, trade-marks, patents, inland navigation, reform of the Chinese judiciary and law as a preparation for the abolition of extraterritoriality, the status of missionaries, etc. The reciprocal undertakings were embodied in the so-called Mackay Treaty of 1902 between China and Great Britain and the treaties of 1903 between China

and the United States and Japan, respectively. Many of the provisions of these treaties have never come into force. This has been due in part to the failure to secure for them the necessary consent of the Treaty Powers; and in part to the failure of China to effect the reforms which were called for.[6] Notwithstanding this fact it is important to consider the provisions of these treaties since they indicate, in a very clear manner, the lines along which, in the future, it was deemed practicable for foreign nations to co-operate with China for the improvement of present commercial, financial, and administrative conditions in China.

Specific Rights of Foreign Merchants in China. By the Nanking Treaty, as will be remembered, foreign merchants were given the right to reside and carry on trade

[6] Sections 14 and 15 of Article VIII of the Mackay Treaty provided as follows:

"Section 14. The condition on which the Chinese Government enter into the present engagement is that all Powers entitled to Most-Favored-Nation treatment in China enter into the same engagements as Great Britain with regard to the payment of surtaxes and other obligations imposed by this article on His Britannic Majesty's Government and subjects.

"The conditions on which His Britannic Majesty's Government enter into the present engagement are:

"(1) That all Powers who are now or who may hereafter become entitled to Most-Favored-Nation treatment in China enter into the same engagements;

"(2) And that their assent is neither directly nor indirectly made dependent on the granting by China of any political concessions, or of any exclusive commercial concession.

"Section 15. Should the Powers entitled to Most-Favored-Nation treatment by China have failed to agree to enter into the engagements undertaken by Great Britain under this article by the 1st of January, 1904, then the provisions of the article shall only come into force when all the Powers have signified their acceptance of these engagements" [*i. e.*, all the Treaty Powers, whether entitled to Most-Favored-Nation treatment or not]. *Customs Treaties*, I, p. 554. MacMurray, p. 342.

at the designated Treaty Ports, and for these purposes to build dwellings and warehouses. By the Supplementary Treaty of the next year it was expressly declared that these merchants might not trade at or resort to any other places, nor even go beyond certain distances, to be agreed upon, outside of these ports.

By Article XIII of the "General Regulations" issued in 1843 in pursuance of the Nanking Treaty, it was further provided, in rather general and unprecise language, that foreign merchants in the Ports should enjoy extraterritorial rights.[7] By the Treaty of Tientsin of 1858 the rights of aliens in China were further broadened by the provision that they might be "permitted to travel for pleasure or trade to all parts of the interior, under passports issued by their consuls and countersigned by local authorities."[8]

By the Shimonoseki Treaty of 1895, dictated to China by victorious Japan at the end of the Sino-Japanese War, not only were new Treaty Ports opened up to trade, and steam navigation for vessels for the conveyance of passengers and cargoes in the upper Yangtze, on the Woosung River and the Grand Canal from Shanghai to Soochow and Hangchow permitted, but the general rights of trading in China considerably broadened. Thus, among its other provisions, the Treaty, by Article VI, declared:[9]

[7] See *ante*, Chapter, "Extraterritoriality."

[8] The rights enjoyed by traders as well as other aliens resident in the so-called "Settlements" or "Concessions" created in certain of the Treaty Ports have received some consideration in connection with the general subject of Extraterritoriality. They have been also discussed in the sections dealing with "Settlements" and "Concessions."

[9] The rights granted to the Japanese by operation of the Most-Favored-Nation clause, contained in the treaties between China and the other Powers, became immediately available to the nationals of those Powers.

Japanese subjects purchasing goods or produce in the interior of China or transporting imported merchandise into the interior of China, shall have the right temporarily to rent or hire warehouses for the storage of the articles so purchased or transported, without the payment of any taxes or exactions whatever.

Japanese subjects shall be free to engage in all kinds of manufacturing industries in all the open cities, towns, and ports of China, and shall be at liberty to import into China all kinds of machinery, paying only the stipulated duties thereon.

All articles manufactured by Japanese subjects in China shall, in respect of inland transit and internal taxes, duties, charges and exactions of all kinds, and also in respect of warehousing and storage facilities in the interior of China, stand upon the same footing and enjoy the same privileges and exemptions as merchandise imported by Japanese subjects into China.

In the event additional rules and regulations are necessary in connection with these concessions, they shall be embodied in the Treaty of Commerce and Navigation provided for by this Article.[10]

In accordance with the undertaking contained in the Treaty of Shimonoseki, China signed with Japan the next year (1896) a treaty in which the rights of Japanese traders in the matter of commerce and navigation were set forth in detail.

The treaty of Shimonoseki is also of importance with regard to matters of finance, since the indemnity of two hundred million taels, later increased by thirty million taels when the Liaotung peninsula was retroceded, which China undertook to pay to her victorious foe, necessitated several foreign loans and among them two Anglo-German loans of £16,000,000 each in 1896 and 1898, loans for which a lien upon the proceeds of the Imperial Maritime Customs, under the control of the Inspector-General of Maritime Customs, had to be given as security. For

[10] *Customs Treaties*, II, p. 594, MacMurray, p. 18.

the second of these loans, certain likin and salt taxes were also pledged; and in both loans China gave the understanding that, during their currency, the administration of the maritime customs would not be disturbed.

As a result of the huge indemnities which she was called upon to pay under the Boxer Protocol of 1901, China was obliged still further to mortgage her ordinary and regular revenues. As security for interest charges and periodical payments thus undertaken to be made, the balance of the maritime customs together with the native customs,[11] and the salt tax or " gabelle " were pledged, in so far as these revenues were not already pledged for the payment of other foreign loans.

Treaty Ports. It still remains true that goods may be exported from or imported into China only from or to such places as have been designated for the purpose by the Chinese Government. These places now number some seventy-five and are known as " Open " or " Treaty Ports." The latter term is, however, somewhat misleading since, in the case of a number of them, the opening has been by imperial decree, voluntary upon the part of China and not required as a matter of treaty obligation. Furthermore, in a considerable number of cases the " Ports " are not upon the seaboard or even upon rivers navigable by ocean-going steamers, but are located far in the interior of China. Since the Sino-Japanese Treaty of 1915, foreigners have throughout South Manchuria many of the rights which elsewhere in China they have only in the Treaty Ports. Article 3 of that agreement reads: " Japanese subjects shall be free to reside and travel in South Manchuria and to engage in business and manufacture of any kind whatsoever."

[11] To be administered in the Treaty Ports by the Maritime Customs Service.

These rights of course have attached to the nationals of all the other Treaty Powers by operation of the Most-Favored-Nation clause.

As to the significance of Treaty Ports, the following quotation from Morse is illuminating:[12]

> At these ports foreign nations are privileged to establish consulates, foreign merchants are permitted to live and trade, and on the trade at these ports are levied dues and duties according to a tariff settled by both parties by treaty. At some ports are national concessions, as at Tientsin, in which municipal and police administration is under the control of the consul of the lessee power; at others are settlements or reserved areas for residence, as at Shanghai, with municipal organization but at which the power which issues the title deeds is China; at others, including most of the newer ports, there is neither concession nor reserved area, excepting "International settlements" established at a few places by the Chinese authorities. At all the treaty ports, however, there is one common right, the privilege of exempting goods by one payment from all further taxation on movement. On a bale of sheetings imported at Shanghai, a treaty port, the importer will pay once duty at the tariff rate; it may then, perhaps a year later, be shipped to Hankow, a treaty port, without further payment; it may then be shipped to Ichang, a treaty port, without further payment; it may then be shipped to Chung-king, having the privileges of a treaty port, without further payment; but if it then goes on fifty miles further, or if, instead of taking the journey of 1,400 miles in three stages to Chung-king, it goes "inland" to a place which is not a treaty port, thirty miles from Shanghai, the bale is liable to the taxation which is levied in China on all movement of commodities not exempted by special privilege. A treaty port may be miles away from the nearest navigable water, it may be the most inland of inland marts, but in matters of taxation and of privilege a broad distinction is drawn between these forty ports and all the rest of China, which, even on the coast, is "inland." This is the one

[12] *Trade and Administration of China*, p. 208.

reason underlying the constant demand for the opening of new treaty ports, with all the expense for administration and preventive work imposed on China, and for the enforcement of extraterritorial rights imposed on the foreign Powers.

As regards the ports voluntarily opened by China it is to be observed that resident traders in them do not necessarily enjoy all the rights and privileges which, by treaty, they have been given in the other strictly so-called "Treaty Ports." The Chinese Government indeed has attempted to exercise the right to levy customs dues at these voluntarily opened ports differing from those which she is compelled to levy at the ports opened in pursuance of treaty engagements. This right has, however, been successfully resisted by the Treaty Powers.[13]

The status and methods of governing the foreign "Settlements" or "Concessions" at the Treaty Ports, *i. e.*, the areas marked off in which foreigners may reside and do business, are discussed elsewhere. It may be here observed, however, that the chief political characteristic which distinguishes these voluntarily opened ports from those treaty ports in which foreign "concessions" or "settlements" exist is that municipal administration and police control remain exclusively in the hands of the local Chinese officials.[14]

[13] See Koo, *The Status of Aliens in China*, pp. 250-252.

[14] Cf. Tyau, *op. cit.*, p. 98. By Section 12 of the Sino-British Mackay Treaty of 1902 it is expressly provided with reference to the ports of Changsha, Wanshien, Nanking, Waichow and Kongmoon, that "foreigners residing in these open ports are to observe the municipal and police regulations on the same footing as Chinese residents, and they are not to be entitled to establish municipalities and police of their own within the limits of these treaty ports, except with the consent of the Chinese authorities." This provision is repeated in the Sino-Japanese Treaty of 1903 (Article 10) with reference, however, only to the Port of Changsha.

Ports of Call. In addition to the Treaty Ports there are in China a number of places known as "ports of call," at which foreign steamers are permitted to stop for the purpose of landing or taking on passengers, and, under certain restrictions, of goods as well. For example, the Chefoo convention of 1876 with Great Britain designates six places on the Yangtze River at which, though not Treaty Ports, "steamers shall be allowed to touch for the purpose of landing or shipping passengers or goods; but in all cases by means of native boats only, and subject to the regulations in force affecting native trade." It is also provided that "produce accompanied by a half-duty certificate may be shipped at such points by the steamers, but may not be landed by them for sale." Also it is expressly stated that "foreign merchants will not be authorized to reside or open houses of business or warehouses at the places enumerated as ports of call."

Limits of Treaty Ports. With regard to the territorial limits of Treaty Ports, none of the treaties is definite, and this has led to not a little controversy—the foreigners naturally giving a liberal, and the Chinese a narrow, construction to the term. Upon this point Dr. Tyau has the following to say:

> Here we have two contrary views as regards the proper limits of a Treaty Port. On the face of it the foreign view certainly seems more reasonable. Upon closer examination, however, it does not seem so convincing. For we are once more face to face with the rule of interpretation, already cited, respecting international servitudes. Now the object of designating a particular city or port as an open port is to reserve a particular area for the residence of foreigners within which they may carry on their legitimate trade and be amenable to their own consular officers. Over this area the territorial sovereign has delegated his right of control and jurisdiction. And, therefore, he has also waived his

right to tax foreign property therein. But such a waiver operates to diminish the amount of his revenue, and this diminution is a loss to his treasury. If the area of the locality to be exempt from the levy of likin is increased, then the loss of the territorial sovereign will also increase, since under the treaty tariff he can levy duties on foreign imports, to the extent of only five per cent. *ad valorem*. This loss must not be allowed to increase, if the national exchequer is not to suffer further depletion. Therefore, it is within the prerogative of the territorial sovereign to say precisely what part of his territory is to be exempt from the likin levy. The likin exemption area is a species of international servitudes, and, therefore, all doubts in this connection must also be solved in the grantor's favor.[15]

However, in a joint communication sent in 1908 by the Ministers of The Netherlands, Great Britain and the United States to the Chinese authorities, it was declared:

That the foreign powers, in negotiating the treaties, intended that a fairly liberal area should be comprised by the term "treaty port" or "port open to foreign trade" is evidenced by the use of the terms "cities and towns" in the English text of the British treaties and "ports et villes" in the French treaties; also by the rules regarding the issue of passports for traveling in the interior, where no passport is called for within 100 li of the treaty port. . . . The position of the treaty powers in this questions is well known. . . . They contend as they always have done, that the term treaty port includes the city and its approaches by land or water, and further that no matter whether a place has been opened to foreign trade and under treaty or by the spontaneous act of the Chines Government the same principle must apply for the sake of uniformity.[16]

Peking Not a Treaty Port. Peking has never been made by treaty or spontaneous act of the Chinese Government

[15] *Op. cit.*, p. 97.
[16] *U. S. For. Rels.*, 1908, p. 145.

an Open Port. However, without formal legal basis, nor with the acquiescence of the Chinese, a number of stores are operated by foreigners in the capital city, and other trading done. The status of foreigners and of the Legation Quarter in Peking is elsewhere treated.[17]

Tariff Rates. The tariff rate fixed at the time of the Nanking Treaty was approximately five per cent. *ad valorem* for both exports and imports. By the Tientsin Treaties of 1858 this rate was retained but converted into schedules of specific duties, and the free list somewhat lengthened.

The next tariff revision did not take place until 1902 (effective in 1903). At this time the specific duties on imports were based upon the current prices prevailing in 1897-1899, the five per cent. *ad valorem* ratio being still retained.[18]

[17] See *ante*, p. 506.

[18] Article VI of the Final Boxer Protocol of 1901 provided:

"The raising of the present tariff on imports to five per cent. effective [*i. e.*, as determined by market prices] is agreed to on the conditions mentioned below. It shall be put in force two months after the signing of the present protocol, and no exceptions shall be made except for merchandise shipped not more than ten days after the said signing.

"All duties levied on imports *ad valorem* shall be converted as far as possible and as soon as may be into specific duties. This conversion shall be made in the following manner: The average value of merchandise at the time of their landing during the three years of 1897, 1898, and 1899, that is to say, the market price less the amount of import duties and incidental expenses shall be taken as the basis for the valuation of merchandise. Pending the result of the work of revision duties shall be levied *ad valorem*." MacMurray, p. 282.

It may be observed that this revision was dictated not so much by a desire upon the part of the Powers to do justice to China as it was to obtain a better security for the payment of the Boxer Indemnities.

It should also be noted that the revision of 1902 applied only to imports and not to exports, and that the duties upon most articles were made specific, the *ad valorem* tax being retained only for the less important commodities.

It was not long before this revision of 1902 again became unjust to China because of the continued rise of prices, the result being that for many years the nominal five per cent. which China was permitted by the Powers to levy, amounted to scarcely more than three per cent., as tested by the market value of the commodities exported and imported. China in vain attempted to have this injustice corrected, but in 1917, after her entrance into the Great War upon the side of the Allies, she was able to obtain, among other concessions, the promise that her tariff should be raised to an effective five per cent.

As a result of the undertaking thus entered into there was convened at Shanghai, early in January, 1918, a Tariff Revision Commission composed of representatives from fifteen of the Treaty Powers. The Commission found great difficulty in agreeing upon a basis upon which to estimate the market values of commodities, as it was felt that the then prevailing market prices, owing to the war, were abnormally inflated. It was finally agreed that the average prices prevailing at Shanghai during the years from 1912 to 1916 inclusive should be accepted. It was also agreed that the rates thus adopted should remain for a period of at least two years after the end of the war, and that then another revision should be made. Estimated by the prevailing prices in 1918 the new tariff, which became effective in August, 1919, did not give to China much more than a four per cent. effective tariff. The valuations for determining export duties still remained those fixed by the Tientsin Treaties of 1858. As will be later pointed out, in 1922 there was another revision of values for tariff dues, which was had in pursuance of the Customs Treaty of the Washington Conference.

Free List for Importations. To the treaties of commerce with China are appended schedules which attempt to enumerate all the articles or classes of articles likely to be imported into China together with the valuations to be placed upon them. Articles unenumerated pay an *ad valorem* duty of 5 per cent. upon the market value of the goods in local currency.

Foreign rice, cereals and flour, gold and silver, both bullion and coin, Legation supplies, commercial samples, supplies for foreign military and naval forces in China, materials for railways (these under special arrangements) and the personal baggage of travellers, are declared not liable to duty. Further articles were enumerated as duty free in the Rules attached to the treaties, but, by an exchange of notes, these further articles were taken from the list, as necessarily non-dutiable, and the understanding declared that, as to them, the Inspector-General of the Imperial Maritime Customs might deal at discretion according to the instructions issued by him subsequent to the signing of the Final Protocol of September 7, 1901, which concluded the Boxer Troubles.[19]

Prohibited Imports of Arms and Ammunition and of Salt. By Rules appended to the Customs Tariff Schedules annexed to the various treaties it is provided as follows:

"Except at the requisition of the Chinese Government or for sale to Chinese duly authorized to purchase them, import trade is prohibited in all Arms, Ammunition, and Munitions of War of every description. No permit to land them will be issued until the Customs have proof that the necessary authority has been given to the importer. Infraction of this rule will be punishable by confiscation of all the goods concerned. The import of salt, fire-arms (except with special permits) and morphia

[19] MacMurray, p. 423.

and opium (except for medicinal purposes) is prohibited."[20]

Prohibited Exports. The export of arms and munitions, of salt, copper cash and of rice and other grains, pulse and bean-cake (from certain ports) is prohibited.

Russian Frontier Trade. By certain regulations attached to the St. Petersburg Treaty of 1881, between China and Russia, it was provided that no duties should be levied on the frontier of the two countries within a limit of one hundred li (thirty-three miles). This zone was abolished in 1912 to take effect on January 1, 1913. By regulations agreed upon by the two countries, under date of July 8, 1907, it was provided that China was to establish customs stations on the frontier, but was to collect no duties upon goods shipped by rail to stations within this former zone. Also that certain areas were to be fixed within which goods shipped by rail should be required to pay but two-thirds of the regular Chinese import duty. Thus at Harbin the two-thirds duty area was to extend to all points within a radius of ten li from the station. At other designated stations the radius was to be five li. For all its smaller stations on the Eastern Railway the radius was to be three li. Goods shipped out of these areas were to pay the full duty. It was further provided that while this was a special arrangement between China and Russia, not only Russia but all foreign merchandise shipped to China over the Chinese Eastern Railway should enjoy the same treatment.

Russia on her part agreed to a reduction of one-third on goods imported across her frontier from China.

[20] This last is because the production of salt in China is strictly regulated, and the taxes upon its sale constitute one of the most important of the sources of revenue of the Central Government.

According to Article 10 of the Regulations for trade between China and Russia by Railway promulgated September 8, 1896,[21] goods carried by rail were to pay one-third less than the regular customs dues. A little later (July 8, 1907, and May 30, 1908) it was agreed that in determining the duties to be paid at the ports of Manchuli and Suifenho there should be the same reduction.[22]

Frontier Trade with Burma and Indo-China. By Article III of the amended Trade Regulations for Trade between China and France of 1887 it was provided that with a view to developing as rapidly as possible the commerce between China and Tonkin the rights of exportation and importation stipulated in Articles VI and VII of the treaty of April 23, 1886, should be provisionally modified so that all foreign goods entering the Chinese provinces of Yunnan, Kwangtung and Kwangsi (the Kwang Provinces) across the frontier should pay three-tenths less duties than the regular tariff, and that the goods from China across the frontier should pay four-tenths less than the regular rate.[23] It has since been further agreed that the rates fixed by the Revised Tariff of 1903 should not be followed, but those of 1858.[24] This agreement is still in force.

According to Article IX of the Regulations of 1894 for trade between Yunnan and Burma,[25] it is provided that imports to China from Burma across the frontier shall be allowed a three-tenths reduction from the regular tariff; and that exports to Burma from Yunnan shall enjoy a four-tenths reduction.

[21] MacMurray, p. 74.
[22] MacMurray, p. 650, *et seq.*
[23] *Customs Treaties*, I, p. 927.
[24] See MacMurray, p. 432, for the rates fixed in 1903.
[25] MacMurray, p. 1.

China Desires Abolition of Special Frontier Trade Regulations. It has been estimated by the Government of China that it annually loses something like 800,000 taels by reason of the special rates given to frontier trade as described in the preceding sections. At the time that the general customs valuations were revised in 1918 it was urged upon the Powers represented at the Shanghai Conference that these special frontier trade provisions be abolished and the regular tariff rates applied. In support of this request it was argued that the special rates had been originally given in order that a frontier trade might be built up, and that this result having been obtained, there was no longer sufficient ground for special treatment. Attention was called to the fact that in the Ili Convention of 1881 (Article XVI) with Russia it was expressly provided that after the overland trade should have been built up the customs dues should be fixed upon the regular five per cent. *ad valorem* basis. Also that Article XV of that Convention had provided that the Overland Trade Regulations should remain in force for ten years, at the end of which period they might be changed by mutual agreement. The demand for the reduction of duties levied at Antung had been based by the Japanese upon the Russian treaties, and, therefore, if the concessions to Russia were abolished the basis for a continuance of the concessions to Japanese frontier trade would disappear. As for the frontier trade with Burma it was contended that Great Britain in the Mackay treaty of 1902 had agreed that duties on the Burma-Yunnan frontier should conform to the general regulations concerning overland trade, and, therefore, that she could not properly object if the customs rates for the frontier trade with which she is concerned should be raised in common with other frontier rates.[26] As to the Annam

frontier trade, by Article VII of the Franco-Chinese Agreement for Annam the French have agreed that they will accept the same frontier arrangements as are provided for the trade of the Southwest frontier with other countries.[27] Furthermore, the duties on the Annam frontier had been based upon the concessions made by China with regard to Russian frontier trade, and, therefore, if those concessions should be surrendered the basis for the Annam frontier trade would be removed.

Finally, as regards the cancellation of the frontier trade concessions to Russia, it is pertinent to refer to the language of the original Russian Land Trade Regulations of 1869, Article V of which provided that,

> Russian merchants transporting Russian merchandise shall on their arrival at Tientsin pay import duty at the rate of one-third less than that specified in the general foreign tariff. This shall be paid at Tientsin. Merchandise left at Kalgan shall pay import duty at the place according to the general foreign tariff.[28]

It is clear that this provision was intended to have a very limited application, and aimed merely to give encouragement to trade in goods which, at that time, had to be carried a long distance on camel or donkey back in order to be sold in the Tientsin market.[29]

In Chapter XXXI there is an account of the discussions had in the Washington Conference with regard to these frontier trade regulations.

Special Arrangement Regarding Trade Between Korea and Manchuria. Japan has with China a special arrangement

[27] *Customs Treaties*, I, p. 918.

[28] *Customs Treaties*, I, p. 155.

[29] It may be noted that at the time of the revision of the valuations for customs purposes in 1918, the Russian Minister objected to even a *pro rata* increase of the frontier tariff and made a reservation upon this point when accepting the revision.

whereby she secures a reduction in customs dues on goods imported into Manchuria from or through Korea (Chosen) and exported from Manchuria to or through Chosen by rail *via* Antung. On dutiable goods leaving Manchuria by rail for places beyond that point, only a two-thirds customs rate is charged. The "transit" charges on these goods are one-half of the customs charges, that is, one-half of the two-thirds normal rate. Goods from Manchuria for local consumption in Hsin Wiju, or which within two years are carried by rail beyond that point, pay the full rate, but obtain a rebate of one-third.[80]

Likin and Other Transit Taxes upon Exports and Imports. At the time the Nanking Treaty was entered into with its provisions regarding the fixed duties that might be levied upon exports and imports, it was undoubtedly the idea of the foreign Powers that the goods thus entering into the China trade would be exempted from all other taxes levied by or with the acquiescence of the Government at Peking. This, however, was apparently not the understanding of the Chinese, or, if it was, it was one soon departed from by them. As a result of this conflict of interpretation there has been a controversy, which has now lasted three-quarters of a century, between the Chinese authorities and the Treaty Powers,—the Chinese seeking to justify, under the Treaties, the imposition of all sorts of taxes upon goods on their way to the Treaty Ports for exportation, and upon imported goods after they have entered China.

The most important of these additional charges has been the transit tax known as "Likin." Morse gives the following account of the origin and character of this tax

[80] For a proclamation based on this agreement, and dated May 29, 1913, see MacMurray, p. 1041.

upon commodities carried from one place to another in China:

The exigencies of the government during the Taiping rebellion drove the authorities to devise new forms of taxation, and likin ("contribution of a thousandth") was instituted. It was first heard of in 1853; and about 1861 when the active suppression of the rebellion called for largely increased expenditure, it was applied generally to all the provinces then under the control of the Imperial authorities. The original theory of the levy, one-tenth of one per cent. on the value, imposed no great burden on trade, a tax of the same amount levied as wharfage dues for the maintenance of the foreign municipalities at Shanghai, Tientsin, Hankow, and elsewhere, being scarcely felt; but practice soon parted company with the theory, and the official rates were much increased. Nor is the tax uniform in its incidence in all the provinces. Hunan is proud of its independence and freedom from non-customary exactions, and in this province the payment once of the full tariff rate of likin exempts goods from further payment within the provincial limits, while the accretions and irregular exactions are less than elsewhere in China; Hunan is, however, exceptional. Kwangtung is more nearly typical of the Empire; here between Canton and Wuchow, a distance of about two hundred miles on the West River, there are six likin "barriers," each constituting a barrier to the free movement of traffic, and each involving delay, vexation, and payment. Along the Grand Canal between Hangchow and Chinkiang, likin stations, alternately collecting and preventive, are established at distances averaging ten miles one from the other; and in that part of Kiangsu lying south of the Yangtze there are over 250 stations collecting or preventive. . . . To get at the amount paid by the people is more difficult in the case of likin than of other taxes. The land tax and the grain tribute are assessed according to registers very strictly kept, and both are under the control of the Hsien (District Magistrate), the "Father and Mother of the People," and yet, as we have seen, the regular legal accretion is, at the very lowest estimate, from 100 per cent. up to almost anything in reason. The Salt Administration is an old-

established organization; and yet the actual receipts are threefold the reported collection, while the people pay fivefold that amount.[31] Likin is a new levy with its own administration independent of all other taxing agencies, and the collection is much more in the hands of the officer in charge of each barrier and his subordinates than is possible with other taxes.[32]

A Chinese scholar, Dr. Chin Chu, speaking of likin, says:

Likin stations exist at all large towns and along the main routes of trade—both by land and by river. The rate of likin is not uniform in the country. But, as a rule, the tax collected is three per cent. at the station of departure and two per cent. at each inspection station. The amount collected within a province, however, does not perhaps exceed ten per cent., but when goods are transported through several provinces it may amount to fifteen or twenty per cent.[33]

Discussing the evils of this tax, Dr. Chin Chu says:

In the first place, it has no definite rule and is subject to arbitrary arrangements of the officials in charge. Secondly, it is generally collected in transit instead of at the place of consumption, thus constituting an effective bar to trade. Thirdly, it taxes, in large part, daily necessaries and inflicts a heavy burden on the poor. Fourthly, the cost of collection is extremely high, and finally, it is honeycombed with corruption on account of the officials in charge being underpaid.

Describing the manner in which likin is levied and collected, Mr. Gerald King, in an article in the *Far Eastern Review*,[34] says:

[31] This statement was made by Mr. Morse before the placing of the collection of the salt tax under the administrative direction and control of a foreigner.

[32] *Trade and Administration of China*, p. 103.

[33] *The Tariff Problem in China*, p. 103.

[34] February, 1919, p. 70, "China's Taxation of Imports and Exports."

It is not any fixed amount; it is what the merchant will stand. First there is the likin itself, a different rate at every station, for there is no likin tariff. Then there is the dispute as to fare. Then the bribe for non-examination. Then there is the contribution to the repair of a neighboring temple. And so on to the end of the merchant's patience. The ordinary merchant would not, of course, trouble his head with how the bill was made up. He would immediately bargain with the likin people for a fixed sum to cover all his goods. These detailed charges are only to give an air of verisimilitude to an otherwise bold and unconvincing statement.

Likin is not of much direct benefit to the Government. It is usually farmed out and the farmer makes as much as he can. If it is not, it makes little difference whether the money is taken by the farmer or by the government's own servant, for the latter simply omits or reduces the entries in his books to cover what he pockets. Then the merchant connives at a fraud? Of course, he must. He can never expose it, for even if there were an honest Governor, and he could get access to him without the matter being suppressed or delayed on the way, the man who would replace the man dismissed would be t'other instead of which.

It is to be understood that this vexatious and oppressive charge upon goods in transit in China is one that is levied upon all goods and is not one made especially applicable to goods imported from abroad or upon those intended for exportation. But that foreign traders should have sought to escape from its burdens has been but natural. In general the compromise has been accepted and embodied in treaties between China and the Treaty Powers, that upon the payment of a reasonable fixed sum, foreign goods shall be secure from all other transit charges.

By the Treaty of Nanking it was provided that merchandise upon which the maritime duties had been paid might " be conveyed by Chinese merchants to any prov-

ince or city in the interior of the Empire of China, on paying a further amount as transit duties," this amount being fixed by an agreement of the next year at a rate not to exceed the then rates which were declared to be moderate.[35]

By the time of the Treaty of Tientsin (1858), likin had already begun to make its appearance, and it was evident that some better arrangement than that of the Nanking agreement would have to be arrived at. It was, therefore, provided by Rule 7 appended to the Tientsin Treaty that, in addition to the maritime duty, a fixed sum might be paid at the port or at the first likin station, whereupon a certificate should be given which could be presented at all other likin stations and exemption from further transit dues thus obtained. This rule was made applicable to native products intended for export as well as to foreign commodities imported and carried to the interior.

The amount of transit duty thus agreed upon was fixed at one-half of the export or import duty. If the goods were duty free the transit charge was to be two and one-half per cent. *ad valorem.*

This arrangement, simple and satisfactory as it appeared to be, did not, however, put an end to friction between foreign traders and the Chinese authorities. In the first place, in the administration of the transit pass system there was an opportunity for hindrance and exactions upon the part of the Chinese officials which it has been found practically impossible to remove. In the second place, the Chinese have found it possible to levy charges which, though not nominally transit dues, have nevertheless had substantially the same incidence. Upon

[35] This, of course, was before the development of the likin system, the charges referred to being what were known as Lo-ti-shui, or Lo-ti-chuan, which were destination or consumption and production, as well as transit taxes.

the first point we may again quote the words of Mr. King:[36]

The transit pass is, of course, a great deal better than nothing. The main difficulties are, that in order to see that the goods being conveyed are those covered by the pass, the authorities at the various barriers must have the right of examination. This is just, as, did they not, the dishonest merchant would be able to profit by it. But the power of examination gives them the chance of making additional squeezes, for they can always demand a *pour boire* for not examining: threatening to examine if it is refused, and so causing a delay of three or four days at each of the barriers to be passed. These difficulties will only cease with the total abolition of the barriers. . . .

. . . If the merchant elects to move his goods without a transit pass, he must make his own arrangements with the authorities. This is usually done by large Chinese firms on the basis of a fixed monthly payment, or fixed sum for each movement of goods. The government is doubly defrauded by this system, since the merchant pays on less goods than he moves, and the official reports less duty than the merchant paid. . . .

. . . It sometimes happens that likin officials will compete with the Transit Pass system, by offering a rate which is just cheaper than the cost of the pass, and of course arranging to the merchant's satisfaction that there will be no delays, disputes, or attempts to avoid the bargain. This can only be done where the goods have not far to go, or they would pass other barriers than those under the control of the man with whom the original bargain was made.

As regards the defect of the transit pass system that it does not prevent the Chinese from imposing other charges which, though not nominally transit dues, nevertheless impose a serious burden upon foreign export and import trade, we may quote the statement of Dr. Chu. He says:

[36] *Far Eastern Review*, February, 1919. "China's Taxation of Imports and Exports."

On the part of the Chinese it has been claimed that duty-paid goods are liable to likin or other taxation if in the hands of a Chinese dealer; that goods accompanied by a transit-duty certificate are free only of dues at the barriers at which transit dues are collected, and that on arrival at the inland center to which the imports are to be carried, they are subject to any taxation that may be imposed upon them. In other words, the Chinese officials take the "inland charges" to mean transit dues and transit dues only.[37] British merchants, on the other hand, have maintained that by treaty the payment of the tariff duty should protect their goods from all further taxation until the passage of a barrier renders necessary either the payment of the transit dues, or the production of a customs certificate showing payment of the half-duty commutation. They further claim that the imports having paid both tariff and transit dues—7.5 per cent. in all—should thereafter be free from all taxation whatsoever.[38]

In 1876, by the Chefoo Convention, another attempt was made to place the matter upon a more satisfactory basis, but again without success.

In 1896, by the Sino-Japanese Treaty, the problem was dealt with in the following language—the rights granted to the Japanese becoming, of course, immediately available to the nationals of the other Treaty Powers:[39]

ARTICLE X. All articles duly imported into China by Japanese subjects or from Japan shall, while being transported, subject to the existing regulations, from one open port to another,

[37] In some cases the Chinese authorities, finding that transit taxes could not be collected, have imposed a so-called destination tax equal in amount to the likin and required to be paid after the transit pass is surrendered. It is to be noted that in many cases of this sort there is involved a conflict between the local and central governments in China. The former being deprived of the opportunity of collecting the likin and devoting its proceeds to local purposes have sought to recoup themselves by imposing destination or consumption taxes and thus obtaining the revenue to which they have believed themselves entitled.

[38] Chin Chu, *The Tariff Problem in China*, p. 107.

[39] MacMurray, p. 68.

be wholly exempt from all taxes, imposts, duties, likin, charges and exactions of every nature and kind whatsoever, irrespective of the nationality of the owner or possessor of the articles, or the nationality of the conveyance or vessel in which transportation is made.

ARTICLE XI. It shall be the option of any Japanese subject desiring to convey duly imported articles to an inland market to clear his goods of all transit duties by payment of a commutation transit tax or duty, equal to one-half of the import duty in respect of dutiable articles, and two and one-half per cent. upon all the value in respect of duty free articles; and on payment thereof a certificate shall be issued, which shall exempt the goods from all further inland charges whatsoever. It is understood that this Article does not apply to imported opium.

ARTICLE XII. All Chinese goods and produce purchased by Japanese subjects in China, elsewhere than at an Open Port thereof and intended for export abroad, shall in every port of China be freed from all taxes, imposts, duties, likin, charges and exactions of every nature and kind whatsoever, saving only export duties when exported, upon the payment of a commutation transit tax or duty calculated at the rate mentioned in the last preceding Article, substituting export duty for import duty, provided such goods and produce are actually exported to a foreign country within the period of twelve months from the date of the payment of the transit tax; all Chinese goods and produce purchased by Japanese subjects at the open ports of China and of which export to foreign countries is not prohibited, shall be exempt from all internal taxes, imposts, duties, likin, charges, and exactions of every nature and kind whatsoever, saving only export duties upon exportations; and all articles purchased by Japanese subjects in any part of China, may also, for the purpose of export abroad, be transported from open port to open port, subject to the existing Rules and Regulations.

Article XIII makes provision regarding the re-exportation of foreign goods imported into China.[40]

[40] Article XL of the French treaty of Tientsin, 1858, contains the following provision which, upon its face, would seem to give to foreign

It might seem to one unacquainted with conditions in China and with the attitude of the Chinese authorities towards the whole question, that language as comprehensive and as explicit as that which has just been quoted, would have freed exports and imports from all burdens except those expressly provided for. As a matter of fact, disputes have continued up to the present time, due to the fact that the Chinese have attempted to do by indirection what they are not permitted to do directly. Further transit dues, *eo nomine,* are no longer imposed upon goods which have once commuted for them, but there exist a variety of charges in the nature of consumption taxes, licenses, etc., the incidence of which is finally upon the goods imported or to be exported. This is the complaint of the foreign traders. Upon the part of the Chinese authorities the claim is that the transit pass system is greatly abused: that foreigners sell their names to dishonest Chinese so that transit passes are obtained to cover goods in which the foreigners have no interest whatever. Thus, it is asserted, not only is the revenue defrauded, but honest Chinese merchants placed at a disadvantage in the markets.

It may further be observed that the Chinese have contended and acted upon the contention that they have the right to exact likin charges, or their equivalent in the form of transit passes, upon imports as soon as they pass outside the restricted areas within the treaty ports set apart for foreign residence and trade. This construc-

goods greater protection against taxation by the Chinese than is afforded by any other treaty provision. It reads: "It is understood that any obligations not admitted expressly in the present convention shall not be imposed upon [French] consuls or consular agents nor upon their nationals." This provision, however, is not now appealed to by the Powers, that is, since the commercial treaties of 1902 and 1903 which are regarded as defining the extent of China's undertakings with regard to foreign commerce.

tion of their treaty rights the Powers have resisted so far as they have been able.

Destination and Consumption Taxes. The Chinese have contended that the transit pass exempts goods only from likin charges to the point of destination, and that once that point is reached, the goods lose all their foreign character, and that, therefore, any further transshipment is not governed by treaty exemptions from taxation.

Also the Chinese have levied taxes termed "Boat Taxes," which have really amounted to, and been intended to amount to, a charge on the goods carried in the boat to or from the ports for export or import. These taxes the Treaty Powers have strenuously, though not always successfully, resisted.

Especially, however, has controversy raged with reference to certain consumption or destination taxes termed Lo-ti-chuan or Lo-ti-shui, which the Chinese in several provinces have sought to impose on foreign imports. In Chekiang, Anhui, and Kiangsu these charges were levied specifically upon foreign goods brought into the interior, and their amounts were determined upon the basis of the likin which had been commuted for by the purchase of transit passes. To this the Powers have objected. For example, writing with reference to this matter to its Consul-General at Shanghai (March 22, 1915) the American Legation at Peking declared that the taxes were opposed to treaty provisions because they established a form of taxation which was special in its application to foreign goods covered by transit passes, thus discriminating against such goods; and second, because they, in effect, amounted to taxes which were expressly to be foregone in return for the payment of the transit tax.

In a communication from the American Legation to the Chinese Government, dated July 15, 1915, it was declared:

The American Government has never recognized the propriety of levying a destination tax upon goods which have paid the import duty and the transit pass duty entitling them under the treaties to exemption from "all further charges whatsoever." The levy of such a destination tax could be justified, if at all, only on the theory that transit-pass goods, having completed their transit under protection of the treaties, are thereby merged into the trade of the country so as to be indistinguishable from native goods. It is not consistent with that theory, that a destination tax should be made particularly applicable specifically to foreign goods.

Chinese Stamp Tax on Bills of Lading, Etc. In October, 1913, the Chinese Government levied a stamp tax becoming effective March 1, 1914, on bills of lading, shipping companies' receipts, consignees' receipts and other documents relating to exports and imports. The question having been raised whether the charges thus authorized did not operate as a tax on the exports or imports covered by these documents, and therefore in violation of China's treaties with the Powers, the American Government indicated the view that this construction need not necessarily be attached to the tax; that, in other words, this new charge did not violate the treaty provision that goods should be exempt from all further inland charges whatsoever, or the provision that exports having paid transit tax should be exempt from all internal taxes, import duties, likin, charges and exactions of every nature and kind whatsoever, saving only export duties. However, under date of February 28, 1914, the representatives of the other Treaty Powers at Peking sent to the Chinese Government a Diplomatic Note, in which it was declared that the Powers could not give their assent to the application of the stamp tax to their nationals. The United States argues that these taxes are admissible since the limitations upon China's taxing powers, under

the treaties, are specific and not general or absolute. However, as long as the other Powers decline to submit to these taxes, the United States cannot well insist that its own nationals should pay them. The Chinese Government nevertheless continues to insist upon its right to levy the tax and, in fact, in many cases, it is collected.

Mackay Treaty with Great Britain, 1902. With reference to foreign trade and its hindrances by the imposition of likin and other inland charges upon articles imported from abroad and upon domestic goods intended for export, Article VIII of the Sino-British Mackay Treaty of 1902 is of especial interest. This Article presented a plan which was substantially accepted in the Japanese and American treaties of 1903, whereby in exchange for the right to increase her import duties to a total of 12½ per cent. *ad valorem* and her export duties to 7½ per cent. China was wholly to abandon likin charges upon articles of import or export. It was, however, expressly provided that, before becoming effective, this arrangement should receive the approval of all the other Powers who might be entitled to Most-Favored-Nation treatment—an approval which has never been given except by Japan and the United States.[41]

The Preamble of Article VIII of the Mackay Treaty reads as follows:

> The Chinese Government, recognizing that the system of levying likin and other dues on goods at the place of production, in transit, and at destination, impedes the free circulation of commodities and injures the interests of trade, hereby undertake to discard completely those means of raising revenue with the limitation mentioned in Section 8 [*i. e.*, on goods not imported or intended for foreign export].

[41] This approval, subject to the same proviso, was given by Japan and the United States in their treaties of 1908.

The British Government, in return, consents to allow a surtax in excess of the tariff rates for the time being in force to be imposed on foreign goods imported by British subjects, and a surtax in addition to the export duty on Chinese produce destined for export abroad or coastwise.

It is clearly understood that, after likin barriers and other stations for taxing goods in transit have been removed, no attempt shall be made to revive them in any form or under any pretext whatsoever; that in no case shall the surtax on foreign imports exceed the equivalent of one and a half times the import duty leviable in terms of the Final Protocol signed by China and the Powers on the 7th day of September, 1900;[42] that payment of the import duty and surtax shall secure for foreign imports, whether in the hands of the Chinese or non-Chinese subjects, in original packages or otherwise, complete immunity from all other taxation, examination, or delay; that the total amount of taxation leviable on native produce for export abroad shall, under no circumstances, exceed 7½ per cent. *ad valorem.*

Conclusion. Without going further into historical or descriptive details of the rights enjoyed by foreign traders in China, we may, by way of generalization, give the following quotations:

Dr. Chin Chu, in his "*The Tariff Problem in China,*"[43] summarizes these rights as follows:

They may import foreign goods into, and export native products from China through each one of the open ports, on payment of a tariff duty amounting to what was five per cent. on the average values of 1897-8-9, in the case of imports, and on the values of 1860, in the case of exports. The foreigner again may take foreign goods to, and bring native products from any inland place, on payment of an additional half tariff duty, in the shape

[42] That is, a surtax of one and a half times the 5 per cent. allowed by the final Protocol of 1901 would permit the total import tax to be 12½ per cent. *ad valorem.* MacMurray, p. 310.

[43] P. 16.

of transit dues. They may also convey Chinese produce from port to port, paying the full export duty on shipment and a half duty on landing. At the treaty ports where they reside, they are free from all taxation, and before 1903 they were even allowed to bring in whatever was required for their personal and household use, duty-free.

What is most important to them is the fact that since the Shimonoseki treaty in 1895 they have been given the right of manufacturing any kind of goods in the treaty ports, subject only to the same conditions as the producers of native manufactured goods in China. Everywhere they are withdrawn from Chinese control, and placed under their own consuls. But their merchandise can be moved only in accordance with Chinese customs regulations, and ships must anchor in accordance with harbor rules and directions of the Chinese harbor master.

Mr. Morse writes as follows:

He (the merchant) is privileged to rent or build his own premises, subject only to the condition that they shall be at one of the treaty ports . . . usually within a circumscribed area at those ports. . . .

The tax (on his goods) is strictly limited to the rates, based on a uniform five per cent. levy, specified in a revenue (non-protective) tariff, which forms an integral part of the treaty under which he lives and trades. From the inland taxation, too, which presses so heavily on Chinese traders who are subject to the levy of likin, his goods are exempted by payment of "transit dues," not exceeding a nominal two and one-half per cent. *ad valorem.*

No Chinese authority has a right to claim any municipal taxes from foreign premises; and within the "areas reserved for foreign residence and trade," all taxes levied are solely for the benefit of such reserved area. The foreign resident is equally free from the incidence of benevolence, or from the necessity of contributing to public charities and patriotic funds, or from inducement to buy official honours and titles, to all of which the Chinese merchant is liable.

No capitation tax may be imposed, or right of deportation exercised on foreigners by the Chinese officials, as was the case in the old days.

No foreign merchant is now liable for any but his own criminal offenses, and for those with which he may be charged he is judged according to the provisions of his own laws.

In civil cases he is held accountable for the requirements of the commercial code of his own country; and in suits against Chinese he is aided by the advocacy of his own official representative, the Consul.

Finally, in at least ten of the Treaty Ports, the foreign merchants collectively are privileged to form their own municipal government, subject only to the oversight of the Consuls, to tax themselves and administer the proceeds of the taxes, to construct their own roads, and to control their own measures of police and sanitation.

Others could be added, but these constitute a formidable list of exceptional privileges, enjoyed by the foreigner and denied to the Chinese.[44]

In 1914 (July 25) Mr. MacMurray, then American Chargé at Peking, wrote to the American Consul-General at Peking the following general statement of the American view with regard to the right of China to levy other than the treaty-stipulated customs dues upon imports:[45]

Subject, always, of course, to the proviso that such charges must not be so levied as to discriminate against foreign goods in general or against the products of any particular nationality, or impair the value of the treaty arrangements for exemption certificates and transit passes, the Legation concurs with the view of the Consulate General that the determination of the amount of likin leviable upon goods properly subject thereto rests with the Chinese authorities, and that the foreign Powers can, therefore, at the most, point out the injury to trade resulting from too heavy taxation of this sort. . . .

[44] *Trade and Administration of China*, p. 190.
[45] *U. S. For. Rels.*, 1915, p. 218.

The Legation has not abandoned the contention that the whole of any opened port, and not a merely restricted area of it, is open to foreign trade with all the privileges conferred by the treaties. It nevertheless appears to be the fact that in spite of this contention the Chinese Government has continuously acted upon the contrary view and has succeeded in collecting likin in the region beyond a restricted area in each of the open ports. . . .

It seems doubtful whether [the levying of likin by private organizations to which the authorities have farmed out the collection of such taxes] would in itself give cause for a valid and tenable protest, inasmuch as the treaties contain no restriction upon the power of the Chinese Government to delegate its authority in the matter of the collection of taxes. It would appear, however, that such a method of collecting likin taxes might constitute an important consideration tending to establish, in any particular case, the existence of an element of discrimination. . . .

In the view of the Legation the mere fact of specifying, in any tariff of charges, goods of any nationality, manufacture or brand would in itself constitute a discrimination—even though the actual charge should not exceed that levied upon other like products—in that it would constitute the assertion of a right to impose special taxation at discretion upon the products of the particular nationality, manufacture or brand.

It may also be contended, though perhaps with somewhat less force, that a likin tax, where leviable at all, must be assessed upon a uniform *ad valorem* rate, or upon a specific commutation of such a rate; and that the levying of a higher proportionate assessment upon any particular trade would constitute a discrimination warranting a protest in behalf of the trade affected. . . .

The Legation adheres to the view that goods covered by transit pass are properly subject to no further inland taxation, either in transit or after arrival at their destination, whether in foreign or Chinese hands. In this matter, however, . . . the contrary practice has long prevailed in spite of the contention of our Government. The British, moreover, upon whose Tientsin Treaty of 1858 the claim to the exemption of transit-pass goods from all charges whatsoever was originally based, have conceded

the Chinese claim to a right of further taxation after the goods have completed the transit and have passed into Chinese hands. It is therefore to be feared that protests against the levy of consumption or destination taxes will in all probability continue to be futile. . . .

Quite apart from the general question of the legality of destination taxes or other inland charges upon goods covered by transit pass, the Loti Chuan Regulations put in force in Chekiang during October last and understood to have been extended to Anhwei and Kiangsu on the 1st instant, are particularly repugnant to the provisions of the treaties in that—

(a) They seek to establish a form of taxation which is not general in its application but is specifically imposed upon foreign goods covered by transit passes, thereby discriminating against such goods as have sought to avail themselves of the protection of the treaties; and that

(b) Whereas, the treaty arrangements for covering goods by transit passes were designed to relieve them from the incidence of transit taxes in any form, the levying upon them of the so-called destination tax—which is in fact calculated on the basis of the inland taxes that would otherwise have been chargeable upon them—is, in effect, to subject them to a portion, at least, of the very charges for complete exemption from which they have already paid the 2½ per cent. *ad valorem* stipulated by the treaties. . . . It is understood that in practice the amount of the T'ung Chuan is at present so adjusted as not actually to impose a heavier taxation upon transit-pass goods as delivered at their original destination in the interior. But even in the absence of such concrete discrimination in cases of that sort, the Regulations are objectionable in that, by imposing a special tax upon transit-pass goods, as such, they destroy the safeguard against excessive internal taxation which the option of using the transit pass was designed to secure.

With regard to the imposition of an increased likin tax specifically upon foreign goods arriving at an open port under exemption certificate, upon their re-shipment into the interior, Mr. MacMurray said:

It is believed that the Chinese Government would not undertake, in any case indisputably involving no complication with other more contentious questions, to defend so manifest a subversion of the rights granted by the treaties in respect to the shipment of imports to open ports under exemption certificates.

Recent Events. During the last few years, when the control of the Central Government at Peking over the provinces has been so slight, and when the financial needs of the provinces have been so pressing, domestic taxes of a great variety of character, and many of them only locally enforced, have been imposed. In a considerable number of cases foreigners and foreign trade have been affected. It is not feasible, in such a treatise as the present one, to attempt a description of those taxes or to give an account of the foreign protests that have been made with regard to them. It is, however, worth while to reproduce the text of the following notification sent by the authorities of the " Peoples' Party " with their headquarters at Canton to the local representatives of the Foreign Powers having trading relations with Kwangtung and Kwangsi Provinces:

I have the honour to communicate to you following translation of the mandate issued by my Government on October 4 (1926):

(1) The Ministry of Finance is hereby instructed to levy a temporary internal tax on the consumption or the production of such articles as are the subject of trade between the Liang Kwang provinces and the other provinces in China and foreign countries.

(2) The rate of taxation shall be equivalent to half the usual maritime or native customs tariff (as the case may be) on general articles, and to a full tariff on articles of luxury, such as silk, silk stuff, toilet articles, fur and leather, articles of decoration, gems and precious stones and similar goods. Cigars, cigarettes, imported wines, kerosene and gasoline, which are the subject of other special taxes are exempt from this tax.

(3) The Ministry of Finance, for purposes of convenience,

may collect such taxes at or near the various maritime and native Customs Barriers, and is instructed to make detailed regulations governing the collection of the said tax.

(4) Any person selling or buying or otherwise dealing with articles on which the said tax has not been paid, shall be liable to a term of imprisonment not exceeding three years, and/or a fine equivalent to ten times the value of the article or articles which shall also be confiscated.

(5) This mandate shall come into effect on the 11th of October, 1926.

The levy thus directed to be made was declared to be an internal tax and, as such, to be distinguished from the customs levied by the Chinese Maritime Customs in accordance with the treaties with the Western Powers.[46]

[46] The following correspondence is not without interest:

The Portuguese Consul General at Canton, on November 8, 1926, sent the following communication to the Acting Minister for Foreign Affairs of the "Canton Government":

"YOUR EXCELLENCY:

"In connection with Your Excellency's dispatch of October 6th, 1926, I have the honor to inform you that as Senior Consul at Canton, I have been directed by Senior Minister of interested Powers represented at Peking, to communicate to your Excellency the following protest:

"In view of levying by Canton Authorities of certain taxes on foreign trade, the Diplomatic representatives at Peking, of the Powers concerned, declare that they cannot recognize the legality of this measure which is in direct violation of Treaties.

(Signed) "DOCTOR FELIX B. M. DA HORTA,
"Consul General for Portugal and Senior Consul."

In reply to this letter the Acting Minister wrote:

"SIR:

"In order to avoid misunderstanding, and to assist to a right perception of the new realities of the national situation resulting from the extension of Nationalist authority over the greater part of China, I have the honor to return the enclosed letter, dated November 5th, and transmitted through the post, which purports to be a protest communicated by 'The Senior Consul at Canton,' by direction of the 'Senior Minister of the interested powers represented at Peking' who declare that they cannot recognize the legality of the internal taxes

authorized by 'the Canton Authorities' on consumption and production of goods within the Liangkwang Provinces on the ground that same are 'in direct violation of the Treaties.'

"My Government does not recognize the existence of the 'Senior Minister of the interested Powers represented at Peking'—who lacks juridical sanction—nor are the status and the relations of the same Powers *vis à vis* my Government regulated on a basis which can properly entitle them to raise the question of a 'direct violation of Treaties.'

"I have the honor to add that my Government is ready to discuss this and other questions as and when all or any of the Powers represented at Peking realize that national power and authority has long ceased to be exercised in Peking, and that the revolutionary and constructive forces of Nationalistic China have now transferred this national power and authority to my Government.

"CHEN YU JEN,
"Acting Minister for Foreign Affairs."

CHAPTER XXX

The Chinese Maritime Customs Administration

Maritime Customs Administration.[1] The term "Maritime Customs" has come into official and general use to distinguish the customs levied on foreign exports and imports from the native customs levied on purely domestic trade. However, as will presently be seen, to a certain extent these native customs are now administered in connection with the maritime or foreign customs.

It has already been pointed out that in 1842 by the Treaty of Nanking the duties leviable upon foreign exports and imports were placed upon a fairly definite basis. The levying and collection of these duties, thus agreed upon, remained, of course, in the hands of the Chinese local officials.[2] Owing, however, to the incom-

[1] This description of the maritime customs is based upon the accounts given by Morse in his *Trade and Administration of China*, by Chin Chu in his *Tariff Problem in China*, and by Mr. Gerald King in his excellent article in the *Far Eastern Review*, for February, 1919, pp. 67 *et seq.* Considerable interesting information regarding the early history of the maritime customs will also be found in Dennett's *Americans in Eastern Asia*.

[2] By the Nanking Treaty of 1842 Great Britain exacted of China an indemnity of Tls. 21,000,000, the payment of which was to be secured by the customs. To see that this agreement was carried out the British Government at the five ports opened by the treaty appointed officials to collect the duties paid by British merchants, and this practice was soon followed by other governments. This practice was, however, soon abandoned.

petency and still more to the venality of these officials many evils arose. Smuggling was carried on in a wholesale manner, and corrupt bargains between the Chinese officials and merchants as to the amounts of duties to be paid became common. Finally, in 1853, the whole system of collection at Shanghai broke down when the Taiping rebels occupied the city.

In the absence of customs officials, thus brought about, the foreign merchants agreed among themselves to declare their goods before their respective consuls and to pay to them, or to give bond for their payment, the five per cent. duties, the amounts thus paid to be accounted for to the Chinese Government.

This plan, however, did not work very satisfactorily, throwing as it did a very considerable amount of extra work upon the consuls, and the result was that in 1854 an agreement was entered into between the local official, the " Taotai " of Shanghai, and the British, French and American consuls, according to which the whole matter of administering the maritime customs at Shanghai was to be handled by three foreigners, to be appointed by the Taotai and to be termed Inspectors of Customs.

The first appointees under this arrangement were Captain Thomas Wade (British), Mr. L. Carr (American), and Mr. Arthur Smith (French). After a year Mr. Wade resigned and was succeeded by Mr. H. N. Lay, who later received the title Inspector-General, and was also given by the Chinese Government supervision over the system of lights and buoys.[3]

[3] By the tenth "Rule of Trade," it was agreed that a British subject should receive this appointment as Inspector-General. Mr. Lay continued to be a member of the British Consular Service. These Rules of Trade were drawn up by the Tariff Commission, authorized by the Tientsin Treaty of 1858. Rule 10 read as follows:

"It being by Treaty, at the option of the Chinese Government to adopt what means appear to be best suited to protect its revenues,

In 1863 Mr. Lay quarreled with the Chinese Government about a matter not connected with the customs, and was dismissed by that Government and Mr. Robert Hart appointed in his place—a position which he held until 1908.[4] Since then Mr. (now Sir) F. A. Aglen has been the Inspector-General. Replying to a letter from the British Minister, the Chinese Foreign Office in May, 1908, gave assurance that as long as British trade should predominate in China a British subject would be appointed to the Inspectorate General.

This promise had been previously made by China in a letter dated February 10, 1898, from the Tsung-li Yamen to the British Minister.[5]

For the purpose of this volume it will not be necessary to trace the development of the administrative system

accruing on British trade, it is agreed that one uniform system shall be enforced at every port.

"The High Officer appointed by the Chinese Government to superintend foreign trade will accordingly, from time to time, either himself visit, or will send a deputy to visit, the different ports. The said High Officer will be at liberty, of his own choice, and independently of the suggestion or nomination of any British authority, to select any British subject he may see fit to aid him in the administration of the customs revenue; in the prevention of smuggling; in the definition of port boundaries; or in discharging the duties of harbor master; also in the distribution of lights, buoys, beacons, and the like, the maintenance of which shall be provided for out of the tonnage dues."

By the Convention of Peking of 1860 (*Hertslet's China Treaties*, Vol. I, p. 48), provision was made for the payment of certain indemnities out of the customs receipts. This led to the organization, on the part of China, of a consolidated customs service under the direct control of the Central Government. As a result of this the British Assistant to the Chinese Superintendent of Foreign Trade was given the title of Inspector-General of Customs, and was authorized to exercise general supervision over all things pertaining to the customs revenues and foreign trade.

[4] Mr. Hart had been actually in charge since 1861, Mr. Lay having returned to England on sick leave.

[5] MacMurray, p. 105.

which Sir [6] Robert Hart built up. A description of its present organization and mode of operation will be sufficient.

This system now applies to the collection of duties on foreign goods, exported and imported, at all the Treaty Ports of China, and also, as will later be shown, embraces the control of some of the "native customs." For a time also, 1896 to 1911, the Chinese Post Office was within its jurisdiction.

The essential fact is to be born in mind that, though under the control of a foreigner with almost autocratic administrative powers, the Maritime Customs Service remains a branch of the Chinese Government. That Government has never attempted to interfere with appointments in the service, nor to dictate its administrative policies. But in form, the orders issued by the Inspector-General are in conformity with commands of the Chinese Government, and all receipts go immediately into the custody of banks designated for the purpose, until 1912, by the Chinese Government, and do not pass through the hands of the Inspector-General or even of the Commissioners in charge of the customs houses at the several Treaty Ports. These commissioners simply receive the certificates that the proper amounts have been paid by the importer or exporter into the banks designated for their receipt. The sums thus received constitute a fund pledged for the payment of certain of China's foreign debts, and therefore not until these obligations have been met can the customs receipts be drawn upon by the Chinese Government.

To forestall seizure by the revolutionary party, the Peking Government arranged, soon after the outbreak of the Revolution of 1911, to have the customs receipts,

[6] He was knighted in 1882 by the British Government; and later made a Baronet. Sir Robert died in England in 1911.

for greater safety, deposited in three of the foreign banks —the Hongkong and Shanghai Banking Corporation, the Russo-Asiatic Bank, and the Deutsch-Asiatische Bank. The funds thus deposited could not be drawn upon except under the signature of the Inspector-General or his representative.

Present Customs Administration. For a description of the present organization of the system we cannot do better than quote Mr. King's article in the *Far Eastern Review:*

The Inspector-General is the representative of the Chinese Government, who employs the remainder of the service. His will is law, and from his decisions there is no appeal. His staff is divided into three branches, the Revenue Department, the Marine Department, and the Works Department.[7] The first is the only one dealing with customs matters: the two latter exist owing to the peculiar conditions under which the first functions.

The Revenue Department employs about one thousand foreigners, including Japanese, and nearly five thousand Chinese.

The Marine Department consists of about one hundred foreigners and twelve hundred Chinese, and the Works Department of fourteen foreigners and fifteen Chinese.

The foreigners serving the Revenue Department are divided into two classes, the Indoor and Outdoor Staffs. The Indoor Staff may be said to be the administrative and bookkeeping side,

[7] There was for a time an Educational Department which in 1902 was merged in the Peking Government University. It had, however, only a slight connection with the Service. "It was supplied with funds through the Customs, and the Inspector-General nominated to vacant chairs in Peking College, and frequently 'lent' men from the Customs for temporary instructing duty; but the College was built up and directed for many years by the venerable Dr. W. A. P. Martin, educator and sinologue. The College at Canton, which still survives, is small, and is under the direct control of the Commissioner, as quasi colleague of the Tartar General, appointments to its staff being made by the Inspector-General." Morse, *Trade and Administration of China*, p. 384.

while the Outdoor Staff do the examination work. Commissioners, Deputy Commissioners, and Assistants make up the Foreign Indoor Staff, and various grades of tide surveyors, appraisers, examiners, and tide waiters the Foreign Outdoor Staff. This staff is recruited from all the nations having treaty relations with China, the representation being roughly equivalent to the trade interests involved. Some important countries with small trades have insisted on a somewhat larger representation than their trade requires.

The Indoor Staff is, for European nations, recruited either through the customs office in London or by direct nomination, while the Outdoor Staff is taken on locally. It is impossible with so many nationalities that there should be any fixed standard of qualifications. The question of promotion and selection for commissionerships are dealt with solely by the Inspector-General.[8] He decides the staffing of the ports, an important matter to members of a service operating over so many degrees of latitude, where the northern ports are generally considered superior climatically to the southern. Service in some of the Treaty Ports which have proved trade failures, but which must be kept open, means exile from European society and the conveniences of life for a number of years.

. . . The Chinese staff of the Revenue Department is recruited by competitive examination and is liable to serve in any port in China. All these Chinese are required to speak English.

Little provision is made for retiring. The better paid indoor men receive an extra year's pay every seven years, which is called a Retiring Allowance, and is intended to be put aside as provision for that eventuality; the less well paid Outdoor Staff men only receive a year's pay every ten years, and the Chinese staff only get theirs every twelve years. Leave is granted to the Indoor Staff after the first six years of service for one year on full pay, or two years, the second without pay, and after that

[8] At each Treaty Port there is a commissioner in charge of the customs house. He is assisted by a deputy commissioner and four grades of assistants—all appointed by the Inspector General, the appointments being reported to the Chinese authorities.

every five years on the same terms, while the Outdoor Staff have to serve for ten years before they are given a six months' leave. No passages are paid home, but half the return passage is paid for the man and his family.

Two characteristics of the administration of the Maritime Customs deserve especial mention—the one for approval and the other for disapproval.

The absolute powers of appointment and dismissal possessed by the Inspector-General make the system a highly integrated and centralized one. This feature is an excellent one since it makes for efficiency. But not commendable is the exclusion of Chinese from all the higher branches of the system. It is true that more Chinese than foreigners are employed, but only since 1907 did it become possible for a Chinese to hold even a full assistantship. This discrimination against the Chinese was undoubtedly necessary during the early years after the service was taken over by Sir Robert Hart, but it would seem that he might have made much greater effort than he did to develop a staff of Chinese employees qualified for the higher positions in the service which, after all, is not a foreign one, but a branch of their own Government.

It has been common to praise highly the administration of the Maritime Customs. It would appear, however, that fifteen per cent. of the gross revenue is retained for operating the revenue side of the service—an exceedingly high amount as compared with the cost of operating similar services in other countries. Furthermore, the Chinese Government does not get the benefit of the amounts received in the form of fines—a considerable yearly amount. In connection with these facts, it is worthy of note that the Customs Administration has never published a detailed account of the manner in

which it has expended the fifteen per cent. of the gross revenues retained by itself, or published an account of the receipts and expenditures with regard to the Customs' share of the tonnage dues and fines.

Dairen, Customs Administration of. By an agreement entered into between the Governments of China and Japan in 1907 (May 30), the following regulations regarding the establishment of a maritime customs office at Dairen were adopted:[9]

The commissioner or chief of the office is to be a Japanese, and for his successors the Inspector-General is to come to an understanding with the Japanese Legation at Peking. The members of the staff at Dairen are, also, as a rule, to be of Japanese nationality, although, in cases of suddenly occurring vacancies or to meet temporary requirements, members of other nationalities may be provisionally appointed. The Inspector-General is to inform the Governor-General of the leased area when a change of the Commissioner is contemplated. All correspondence between the office and Japanese authorities or Japanese merchants is to be in the Japanese language, but merchants of other nations residing at Dairen may correspond in English or in Chinese. No import duty is to be levied on merchandise brought by sea to Dairen, but the regular duty shall be paid on all goods passing the Japanese frontier of the leased territory into the interior of China. The regular export duties are to be paid on goods from the interior brought to Dairen for export, but " produce raised in, and merchandise manufactured from produce raised in or imported by sea into, the Japanese leased territory shall pay no export duty.

[9] MacMurray, p. 634.

The duty to be paid on articles manufactured in the Japanese leased territory from materials brought there from the interior of China will be the same as at present paid on articles in similar circumstances in the German leased territory of Kiaochow." " Chinese merchandise or products brought from Chinese treaty ports to Dairen shall pay no duty as long as they remain inside Japanese territory; but if these Chinese merchandise or products pass the Japanese frontier into the interior of China, they shall pay according to existing treaties." " Chinese merchandise shipped from Dairen, and having paid accordingly export duty, shall be provided with a receipt, on producing which it shall pay, on being landed at a Chinese treaty port, a coast trade duty according to existing treaties." " For Japanese and other non-Chinese merchandise, on being shipped to Dairen from a Chinese treaty port, the import duty paid at the latter port shall be refunded by drawback according to treaty stipulation. On being imported to Dairen, such merchandise shall pay no duty so long as it does not pass the Japanese frontier into the interior of China. On being re-exported from Dairen to other places outside China, such merchandise shall pay no export duty." " Chinese merchandise or products having been shipped from a Chinese treaty port to Dairen and reshipped from there to places outside China shall on this occasion pay no export duty, in case that documentary evidence is produced of their having paid export duty at the treaty port from which they came."

The Customs Office at Dairen is to take no part in the collection or administration of tonnage dues, lighthouse dues, or port dues.

In general, the customs tariff in vigor in the Chinese treaty ports is to be applied by the customs office at Dairen. This office is to have exclusive charge of issuing

transit passes for merchandise going into the interior of China as well as for goods from the interior to Dairen; " and this office will be charged as well with all and every function, right, or capacity which appertain in the treaty ports to the so-called Chinese customs Taotai." For transit passes, one-half of the import or export dues shall be charged. " The procedure to be observed in case of frauds or contraventions committed by merchants against the Maritime Customs rules shall be settled hereafter by a separate agreement, but it is understood in principle that all judicial procedure rests with the Japanese tribunals."

At the same time that these matters were determined, another agreement relating to inland steam navigation from Dairen to inland places was entered into, the enforcement of the regulation being placed in charge of the Customs Office. In general, this agreement provided that the rules and regulations of July and September, 1898, and the additional rules of October, 1903, should be applied. A few special rules were also laid down. Opium and contraband goods were not to be carried inwards or outwards; the Japanese authorities at Dairen were to assist in suppressing smuggling, especially of opium; the transmission of Chinese closed mails between Dairen and inland ports was to be free of charge.[10]

Antung and Newchwang. At Antung the Commissioner of Customs is a Japanese. At Newchwang, where the Commissioner is at present an Englishman, the Japanese have for several years sought to have one of their own nationals appointed on the ground that the trade at that port is predominantly Japanese. There is no general rule in the Maritime Customs that the nation which has

[10] For texts of these customs and inland steam navigation agreements, see MacMurray, p, 634; and *Customs Treaties*, II, pp. 740-743.

the predominant trade at a port should have there one of its nationals as the commissioner—indeed, there are good reasons why this rule should not be adopted—and the arrangements that have been made with reference to Dairen and Tsingtao cannot properly be quoted as precedents, since both ports are within leased areas.

Enforcement of Customs Regulations. With regard to the enforcement of the customs regulations upon foreigners, difficulty is presented by reason of the fact that, as regards the imposition of fines, the Chinese are obliged to resort to the foreign consuls, and, as is elsewhere shown, the authority of these officials being only over the persons of the offenders, their powers of enforcing the collection of the fines, when imposed, are by no means adequate. The result is that, in almost all cases, proceedings are had only against the offending ship or its cargo. For unauthorized trading along the coast, the vessel can be excluded from that trade for the future, a penalty, however, which is never applied; for false "declarations," the goods may be confiscated. To fine the merchant concerned in addition, while legally possible, is, for the reasons that have been stated, seldom attempted.

> This [failure to fine] arises partly from the very considerable degree of protection accorded to foreign merchants by treaty, and partly from the fact that there is no competent tribunal before which a revenue case can be carried; the Chinese territorial courts are ruled out, the Consul is necessarily the advocate of his national, and the Commissioner of Customs is party to the case.[11]

When a dispute arises between the customs and the importer regarding the value or classification of goods, the case is referred to a Board of Arbitration composed as follows: an official of the customs; a merchant selected by the consul of the importer; and

[11] Morse, *Trade and Administration of China*, p. 379.

a merchant, differing in nationality from the importer, selected by the senior consul. The final finding of the majority of the board is binding upon both parties and their decision must be announced within fifteen days of the reference. . . .

In case of confiscation and fine by the customs authorities, there are special rules for joint investigation between the Commissioner of Customs and the consul of the importer. When a ship or goods belonging to a foreign merchant is seized for confiscation, the superintendent of customs notifies those interested, who may, through the consul, demand a public investigation. On the consul's request, the superintendent holds a court at which the consul is present, for the investigation and settlement of the case. When the consul and superintendent agree to confiscate, the merchant has no appeal; when the consul dissents from the superintendent's views, the case is referred to the superior authorities at Peking—the Minister of the nation on the one side, and the Chinese Foreign Office on the other.

When the act of which a foreign merchant is accused is one which is punishable by fine, the Commissioner of Customs enters a complaint at the consulate, and the consul will hold a court, the commissioner being present, for the investigation and settlement of the case. When the commissioner dissents from the consul's views, the case will be referred to the superior authorities at Peking.[12]

Native Customs. Distinct from the Maritime Customs to which the preceding discussion has been devoted are the native or " regular " customs, which have existed in China since early times. These have always been controlled by the Central Government at Peking, and their proceeds covered, in theory at least, into its treasury.

These native customs now fall into three classes: (1) the inland customs; (2) the maritime customs at places further distant than fifty li—*i. e.*, about sixteen miles—from a treaty port; and (3) maritime customs at ports

[12] Chin Chu, *The Tariff Problem in China*, p. 176. See Hertslet's *China Treaties*, II, p. 655, for Rules agreed upon in 1868 for joint investigation in cases of confiscation and fines by the customs authorities.

within fifty li of a treaty port and since 1901 controlled by the Maritime Customs Service.[13]

With regard to native customs, Mr. Gerald King, in the article from which we have earlier had occasion to quote, has the following to say:[14]

These native customs are the relics of the old Chinese system which was superseded, for cargo borne in foreign bottoms, by the Maritime Customs. They also deal with the junk-borne cargo from unopened port to unopened port. By the Peace Protocol of 1901, these within a 50 li radius of the Treaty Ports were

[13] The Final Boxer Protocol, enumerating the Chinese revenues assigned as security for the payment of the indemnities, included "the revenues of Native Customs, administered in the open ports by the Imperial Maritime Customs."

The Sino-British (Mackay) Treaty of 1902 provides (Article VIII, Sections 10 and 11): "A member or members of the Imperial Maritime Customs Foreign Staff shall be selected by each of the Governors-General and Governors, and appointed, in consultation with the Inspector-General of Imperial Maritime Customs to each province for duty in connection with native customs affairs, consumption tax and native opium taxes. These officers shall exercise an efficient supervision of the working of these departments, and in the event of their reporting any cases of abuse, illegal exaction, obstruction to the movements of goods, or other cause of complaint, the Governor-General or Governor concerned will take immediate steps to put an end to the same.

"Cases where illegal action as described in this Article is complained of shall be promptly investigated by an officer of the Chinese Government of sufficiently high rank in conjunction with a British officer and an officer of the Imperial Customs, each of sufficient standing; and in the event of its being found by a majority of the investigating officers that the complaint is well founded and loss has been incurred due compensation is to be at once paid from the surtax funds, through the Imperial Maritime Customs at the nearest open port. The high Provincial officials are to be held responsible that the officer guilty of the illegal action shall be severely punished and removed from his post. If the complaint turns out to be without foundation, complainant shall be held responsible for the expenses of the investigation." Similar provisions are to be found in the Sino-American treaty of 1903.

[14] *Far Eastern Review*, February, 1919, p. 72.

placed under the control of the Commissioner of Customs. More difficulty was experienced in enforcing this stipulation, as the Chinese policy of patient unvarying obstruction came into its own once the armed forces of the allied Powers were withdrawn. No one tariff exists for the native customs. Each group has a different one, and in many cases each office in each group has a tariff of its own. These are usually based on tariffs of the Ming dynasty, and deal with a trade that has long ceased to be troubled with taxes. As in all cases of Chinese rules or regulations, the rules are not so objectionable as the exceptions, which are in the majority. Every compradore can supply instances of the curious extra charges which these stations levy, and the exceptions made in favor of certain classes of goods, or of goods borne in junks belonging to certain guilds, etc. The Maritime Customs have tabulated the tariffs of those native customs under their control, and increased the efficiency of the working. All traffic in native-owned junks must pass through the native customs, and the payment of native customs charges does not free them from further taxation: it is the first step on the ladder. They have then to pay all the likin and other charges in force on the route over which they have to pass. The native customs are not as vexatious as likin. But they are in general ill-administered, and, as in all things under purely Chinese management, there are many complaints of squeezes and delays. Their whole policy is now out of date. Before there were other customs to deal with goods coming from other countries, it was right that China should charge goods coming for sale in her marts. But now there is a properly equipped service dealing with foreign imports and exports, it is obviously against China's own interests to tax her inter-port trade. Their abolition, though impracticable today, would be a benefit to the community.

No estimate can be made of the trade passing through the native customs, and the revenue derived from them. No statistics are published, and, as has already been said, there is no tariff or set of rules. The figures must be large, but there is no way of arriving at any estimate of the number of junks engaged in the trade, the value or kind of goods they carry, or the amount of duties they pay. Their working is entirely separate from that of the Maritime Customs.

The Chinese Post Office. Until 1911 the Chinese Postal Service, created by an imperial decree of March 20, 1896, was under the direction and control of the Maritime Customs, and for its development great credit is due to Sir Robert Hart. In 1911 the service was divorced from the customs and placed under the ministry of Ports and Communications. On March 1, 1914, China announced her adherence to the International Postal Union. For some time prior to that date, however, China had had working relations with the Union, conforming to its requirements, and, in effect, getting the benefits of membership.[15]

By a provision inserted in an Exchange of Notes of April 9, 1898, between China and France relative to the railway from Tonkin to Yunnanfu and the lease of Kuangchouwan it was agreed by the Chinese Government that when it should organize a definite postal system, with a high functionary at its head, it would give consideration to the recommendations of the French Government concerning the choice of foreign officials to be appointed.

At the present time the postal service in China is one for which the Government deserves great credit. Generally speaking, the service is efficiently operated, and with reasonable financial success, notwithstanding the fact that until recently China has been obliged to acquiesce in the operation within her borders of some sixty or more foreign post offices—British, French, Japanese, German (until 1917), Russian and American.[16]

[15] For an account of the development of the Chinese postal system, see Vol. III, Chap. 3 of Morse's *International Relations of the Chinese Empire*. See also MacMurray, p. 585, with notes attached thereto for correspondence and negotiations connected with the admission of China to the International Postal Union.

[16] America had but one such office—that at Shanghai.

The matter of the abolition of the foreign post offices in China is considered elsewhere.[17]

Maintenance of the Existing Customs Administration. At the seventeenth meeting of the Committee on Pacific and Far Eastern Questions of the Washington Conference the Chinese Delegation informed the Committee "that the Chinese Government has no intention to effect any change which may disturb the present administration of the Chinese Maritime Customs." The question was raised at the thirty-first meeting of the committee whether this declaration should be signed by the Chinese representatives and made an annex to the treaty relating to customs which was then under consideration. Dr. Koo pointed out that the declaration was a voluntary one on the part of the Chinese Government; that there was no international treaty or convention in which it had been stipulated; that it occcurred only in two loan contracts to which the Chinese Government was a party; and that, therefore, there was no reason why China should now be called upon to put the declaration into treaty form—that is, have it included in the body of or as an annex to a treaty which the Powers at the Conference, including China, were to sign. This view was strongly supported by Senator Underwood. He even intimated that if the declaration were made a part of the treaty, he might find it difficult to defend the treaty before the American people, since there were many good people in the United States who were strongly opposed to having China coerced into an obligation that was not entirely satisfactory to her, especially as to a matter relating to the administration of her local affairs. At this time Dr. Koo also said: "This declaration of intention not to dis-

[17] See *post*, Chapter XXXIV.

turb the present customs administration could not reasonably be construed to preclude the Chinese people from realizing their legitimate aspiration to make the Chinese Maritime Customs Service an institution more national in character."

It was then agreed that the declaration should simply be placed upon the records of the Conference at the plenary session.

Banks for Deposit of Customs Receipts. In connection with the question of China's customs tariff there was brought up by Mr. Underwood, at the twenty-ninth meeting of the Committee of the Whole, the matter of the deposit in the banks of China of the moneys collected.

It had been originally provided that certain portions of the Chinese customs receipts should be set apart for meeting the interest and amortization charges on the bonds issued in payment of the Boxer Indemnities. These had been deposited entirely, or almost entirely, in the Hongkong and Shanghai Bank and the Russo-Asiatic Bank. This, of course, had been of great advantage to those institutions, as compared with the other banks in China which had received no such deposits. In this connection the following statement was submitted to the sub-committee by Mr. Odagiri in behalf of the Japanese Government:

Japan not only has no objection to, but welcomes, the proposal that the existing customs system of China should not be disturbed. In the meantime she must express the hope, in view of the important position which her Chinese trade occupies in the entire foreign trade of China and Japan's resulting large contribution to the Chinese customs revenues, that a fair and suitable adjustment may be effected with the above fact in view in regard to the future operations of the customs system; that is to say,

concerning such matters as the custodian banks and the proportion of foreign nationals to be employed in the customs staff. We desire to make it clear, however, that this is not proposed as a condition of our acceptance of this agreement, but only as a frank expression of our desire. It is hoped that such special conference as is mentioned above in its deliberations upon the conditions involving questions such as custody and supervision of tariff revenue should take into consideration the above expressed desire of Japan.

The delegates of France, Italy, Belgium, and Holland associated themselves in this matter with the Japanese Delegation.

Senator Underwood said that the deposit of the revenues that had already been allocated to the Chinese debts could not be changed, since that was a part of the contract, but that the surplus revenues were free to be deposited in such banks as might be determined upon. Providing for the additional surtax of 2½ per cent., the Special Conference which was to be convened at Shanghai would have the right, with, of course, the consent of China, to a reallocation of these funds to the various solvent banks in China. The Conference at Washington, he thought, was not in a position to settle the matter.

Dr. Koo upon this point spoke as follows:

Prior to the revolution of 1911 the customs revenue that was collected in the ports was all deposited in the so-called Chinese Customs Bank, under the supervision of Chinese authorities, and the customs administration itself did not have the handling of the money. They issued receipts and clearance only on the production by the merchant of the receipts issued by the Customs Bank certifying that the customs duties had been paid. As the time arrived, from month to month, for the payment and discharge of obligations incurred for the Boxer indemnity and also for the foreign debts, the money was paid over. That arrangement proved very satisfactory, and there was the testimony of

the inspector general of the customs on record that that arrangement would work very satisfactorily, and that there never was a single instance in which there was any difficulty in meeting the foreign obligations promptly and on the day they were due.

In the course of the revolution of 1911 various disturbances broke out in various parts of China, and lest there might be delays or interference with the discharging of the foreign obligations, it was proposed that the customs revenues should be deposited temporarily in certain foreign banks to which Senator Underwood made reference a little while ago. While that arrangement was intended to be merely provisional, however, the practice of depositing customs revenues in those designated foreign banks continued. It had this effect on the commercial and financial situation in the various cities of importance, that, prior to the revolution, when money was deposited in the Chinese Customs Bank, of course it flowed into the various channels of the market to meet commercial and industrial needs in each community, and in that way the money market was always more or less easy and there were very few occasions when crises of a financial character arose. Since the new arrangement was introduced, however, of course all the customs revenue went into the foreign banks, and the money was now no longer quickly accessible to Chinese customers for legitimate purposes of commerce and trade as it had been heretofore with the result that from time to time constant anxiety prevailed in the Chinese commerce and trading communities because money was scarce and tight. Therefore, the Chinese bankers had made the suggestion more than once, and had drawn the attention of the Chinese Government to the fact, that some steps should be taken to modify the present provisional arrangement. He, therefore, wished not only to associate himself with Senator Underwood in his suggestion but to add that when the time came for considering the question on the reallocation, if in the opinion of the representatives at that time conditions were not yet such as to permit a complete reversion to the former practice, at least a part of the deposits should be allocated to those Chinese banks which were generally recognized as being sound and solvent.

Since the Washington Conference the condition as regards the deposit of customs receipts has become still more one-sided by reason of the failure of the Russo-Asiatic Bank, with the result that now the Hongkong and Shanghai Banking Corporation is the sole bank of deposit.

CHAPTER XXXI

The Movement for Tariff Autonomy

Chinese Statement. The matter of obtaining for China a fuller control of her own maritime customs as regards the rates to be charged and their apportionment among different classes of articles was first raised at the Washington Conference at the fourth meeting of the Committee on Pacific and Far Eastern Questions, but China's proposals with regard to this subject were not formally presented to the Committee until its fifth meeting, when Dr. Koo made, in substance, the following statement:[1]

Prior to the year 1842, China had enjoyed the full right of fixing her customs duties. But in that year and in the subsequent years, she had made treaties with Great Britain, France and the United States, in which for the first time a limitation was imposed on this full right. The rule of 5 per cent. *ad valorem* was thereby established, and later a schedule was fixed upon the basis of the current prices then prevailing. In the years preceding 1858, prices began to drop, and the 5 per cent. customs duty collected appeared consequently to be in excess of the 5 per cent. prescribed. A revision was therefore asked for by the Treaty Powers and was effected in 1858. From that time until 1902, however, as prices mounted and the Chinese Government had been receiv-

[1] See "Conference on the Limitation of Armament," published by the American Government as Senate Document No. 126, 67th Congress, 2d session, pp. 469-473.

ing less than the 5 per cent. rate, no request was made on the part of the Treaty Powers for a revision. If the Chinese Government did not at that time press for a revision, it was only because the needs of the Government were then comparatively few and the revenues collected, small as they were, were not inadequate to meet the requirements.

It was only in 1902, as a result of the Boxer uprising, that another revision was made with a view to raising sufficient revenue to meet the newly imposed obligations arising out of the protocol in 1901. In that tariff, however, the rates were calculated on the basis of the average prices of 1897-1899, the then prevailing prices not being taken into account. But the revenue collected according to this increased tariff was hardly sufficient to meet the obligations of the indemnity. In 1912, another attempt was made to revise the tariff in order to bring it more in accord with actual prices. It proved to be a failure, as the unanimous consent of some 16 or 17 Powers was not obtained. It was only after six years of protracted negotiation that another revision was effected in 1918. The purpose of this revision was to increase the rate to an effective 5 per cent., but the resulting tariff, which was now in force, yielded only 3½ per cent. in comparison with the prices of commodities actually prevailing.

Dr. Koo asked on behalf of the Chinese Delegation for the recovery by China of the right to tariff autonomy. He said that in the first place the existing regime in China constituted an infringement of the Chinese sovereign right to fix the tariff rate at her own discretion—a right enjoyed by the States throughout the world.

Again, it deprived China of her power to make reciprocity arrangements with the Powers and ran counter to the principle of equality and mutuality. While foreign goods imported into China had to pay only 5 per cent. of import tax, goods of Chinese origin imported into foreign countries had to pay customs duties of maximum rate. For instance, Chinese tea imported to the United Kingdom had to pay 1 shilling per pound, which meant 25 per cent., as the price there was about 4 shillings per pound; Chinese tobacco on importation into Japan had to pay 350 per cent.; raw silk into Japan, 30 per cent.; and manufactured silk

into the United States, 35 to 60 per cent. Such a régime constituted a serious impediment to the Chinese export trade and to China's economic development.

Moreover, a uniform rate for all kinds of commodities without latitude to differentiate rates between luxuries and necessaries had obvious disadvantages. For example, it was evident that machinery and similar merchandise so much needed by China ought to pay a low rate, while on the other hand luxuries, such as cigars and cigarettes, should be more heavily taxed, as much for mitigating or preventing the injurious effects on the morals and social habits of the people from the use of these luxuries as for raising more revenue. The Chinese tariff was therefore not a scientific one, as it failed to take into consideration the economic and social as well as the fiscal needs of the Chinese people.

Continuing, Dr. Koo said that the present tariff caused a serious loss of revenue to the Chinese exchequer. Customs duties formed one of the most important sources of revenue of a country. Great Britain, for example, received 12 per cent. out of her total revenue; France, 15 per cent.; United States, 35 per cent. (In giving these figures, he said he would be glad to hear his colleagues correct him, if they were not accurate to date.) The Chinese customs revenue, on the other hand, played, for nearly 100 years, a comparatively insignificant part in the national revenue. Besides, a large part of China's customs revenue was pledged to meet various foreign loans secured thereon, and this fact again reduced the amount available for the needs of the Government.

Furthermore, under the existing customs régime it was exceedingly difficult to revise the tariff, even for the modest purpose of raising it to an effective 5 per cent. The revision of 1902 was the first revision in 44 years, and the resulting tariff yielded only 2½ per cent. in comparison with the market value of the imports, *i. e.*, 2½ per cent. less than what could have been collected if the tariff schedule had been revised to date. The revision of 1918, as was pointed out, was effected only after six years of negotiation, and being based on the average prices of 1912-1916, the new tariff of 1918 was yielding only 3½ per cent. But even an effective 5 per cent. import tariff, which would probably produce an

additional revenue of nearly 15,000,000 taels, might, however, still prove inadequate to meet the manifold needs of the Chinese Government, such as those for education, road building, sanitation, and public welfare.

In view of the foregoing reasons, Dr. Koo asked the Powers to agree to the restoration to China of her tariff autonomy. In making this request, the Chinese Government entertained no desire to interfere with the present administration of the maritime customs, which was generally considered to be efficient and satisfactory, nor to interfere with the devotion of the funds of the maritime customs to the liquidation of foreign loans secured thereon. What he had uppermost in mind in asking for the recognition of China's tariff autonomy was the right to fix and differentiate the tariff rates. As the establishment of such a new régime would require time, it should come into force only after a period to be agreed upon. Before that period, a maximum rate should be agreed to, and within that maximum rate China should enjoy full freedom of differentiating rates, for example between luxuries and necessaries. But negotiation for the purpose of fixing a maximum rate might take months, and as the present Chinese financial condition needed some immediate relief, it was proposed that on and from January 1, 1922, the Chinese import tariff should be raised to 12½ per cent., a rate mentioned in the Chinese treaties with Great Britain, the United States, and Japan.

Discussion. Mr. Root stated that the treaty of 1903 between the United States and China contained a provision concerning the abolition of likin and proceeded to read Article IV of the treaty, as follows:

The Chinese Government, recognizing that the existing system of levying dues on goods in transit, and especially the system of taxation known as likin, impedes the free circulation of commodities to the general injury of trade, hereby undertakes to abandon the levy of likin and all other transit dues throughout the Empire and to abolish the offices, stations, and barriers maintained for their collection and not to establish other offices for

levying dues on goods in transit. It is clearly understood that after the offices, stations, and barriers for taxing goods in transit have been abolished no attempt shall be made to re-establish them in any form or under any pretext whatsoever.

Continuing, Mr. Root stated that the treaties of 1902 and 1903 between China and Great Britain and Japan, respectively, contained provisions of similar effect, and that the increase in customs duties to 12½ per cent., as proposed in those treaties, was clearly intended as a consideration for the abolition of likin, and inquired of Mr. Koo what proposal, if any, he was ready to make with regard to "likin."

Mr. Koo, answering, said that likin was a handicap to the internal as well as the external trade of China, and that the substantial classes in China favored its abolition. He added that the Government would be prepared to abolish likin if tariff autonomy were granted, and if it were possible to agree on an increase in customs duties, which would compensate for its abolition. He considered the original proposition of an increase to 12½ per cent. as hardly sufficient today, in view of the great increase in public expenses.

Senator Underwood called attention to the fact that stable conditions in China would be for the benefit of all those nations who did business with China and that such conditions were desirable. Pointing out that it was recognized as axiomatic that no government can function effectively without revenue, he said that the committee, in working to secure ample revenue for China, was laying the cornerstone for stabilization in that country. He remarked that he did not consider the transportation tax as a tax on imports, and added that the United States had had a similar tax. Continuing, Senator Underwood pointed out the necessity of refraining, as far as possible,

from disturbing existing trade conditions: readjustment and revision should be made with a view to avoiding any disturbance of established channels of trade. It seemed advisable, in view of the efficiency of the present system of administration, that it should not be disturbed. In his opinion, no arbitrary rates, such as 12½ per cent., should be decided upon, but rather such changes should be made as to assure a revenue sufficient to keep China out of debt. It was important that every cent collected should go to meet the expenses of government. He added that Mr. Koo's suggestion that China should have the right to charge more duty on luxuries than on necessities was a reasonable one, but argued that a simple and not a complicated tariff was desired. Finally, the needs of the Government should be clearly known and the customs levies changed to meet them.

Sub-Committee Discussions. The matter of Tariff Autonomy for China having thus been presented and discussed in general terms by the Committee, it was decided that, for its further and detailed consideration, a sub-committee [2] should be appointed.

Six meetings of this sub-committee were held.

At the first meeting, Dr. Koo presented the following specific proposals on behalf of China:

1. The present import duty of 5 per cent. shall be forthwith increased to 12½ per cent.

2. China agrees to abolish likin on January 1, 1924, and the

[2] Upon this sub-committee the following were appointed by the Chairman of the Committee: Senator Underwood (Chairman) for the United States; Baron de Cartier, with M. Cattier as alternate, for Belgium; Sir Robert Borden, with Sir John Jordan as alternate, for the British Empire; Dr. Koo, for China; M. Serraut, for France; Senator Albertini, with Signor Fileti as alternate, for Italy; M. Hanihara, for Japan; Jonkheer Beelaerts van Blokland, for the Netherlands; Captain Vasconcellos, for Portugal.

Powers agree to put in force on the same day the levy of certain surtaxes on import and export duties provided for in the Treaty of 1902 with Great Britain and in that of 1903 with the United States and that of 1903 with Japan; and the Powers further agree to the levy of an additional surtax to be put in force on the same day for articles of luxury over and above the import tariff rate of 12½ effective. In all other respects, the undertakings of China and the Powers herein stipulated are to be carried out in accordance with the terms of the Treaties above mentioned.

3. Within five years from the date of agreement, a new customs régime shall be negotiated and concluded by treaty on the basis of a maximum rate of 25 per cent. *ad valorem* for any article imported into China, within which rate China is to be free to regulate and arrange the import tariff schedule. This new régime is to be in force until the end of the period referred to in paragraph 5 below.

4. The reductions now applicable to the customs duty collected on goods imported into and exported from China by land shall be abolished.

5. The treaty provisions between China and the Powers by which the levy of customs duties, transit dues and other imposts is regulated shall be abrogated at the end of 10 years from date of agreement.

6. China voluntarily declares that she is not contemplating to effect any fundamental changes in the present administration of customs administration, or to disturb the devotion of the customs revenue to the services of the foreign loans secured thereon.

In support of the propositions which he had presented, Dr. Koo called attention to the fact that the significance to China of a competency upon her part to control her import customs rates was peculiarly great since Chinese industries were as yet largely undeveloped, that Chinese communities were still largely agricultural in character, and that, therefore, China, for a considerable time, could not depend to any considerable extent upon sources of

revenue other than maritime customs. Also, he pointed out that the facts should not be overlooked that already a large portion of her present receipts from impost duties was pledged for the payment of the interest upon foreign loans and that the Chinese Government had imperative need for increasing her present revenues in order to meet the legitimately increased expenses for education, public health, and provision for additional public utilities.

The discussion of specific forms of relief to be granted to China with regard to her tariff almost immediately revealed certain of the peculiar conditions of fact which were to render impossible the obtaining by China, in the immediate future, of her desire with respect to a considerable increase in her customs rates. The matter of this increase it was seen was bound up with the abolition by China of likin charges upon imported and exported commodities, and doubt was expressed whether, so long as present political conditions should persist in China, the Chinese Government at Peking would be able to take effective action throughout the provinces with regard to this matter. Doubt was also felt by some of the representatives of the other Powers whether, aside from this, it would be advantageous to China to give to her an increased revenue which might find its way into the hands of the various military commanders, or Tuchuns, in China and thus tend to strengthen these leaders who, as yet, had not been brought into due subordination to the civil authorities. Thus, even those delegations which were desirous of enabling China to increase her customs revenues, were inclined to impose the condition that China should give the undertaking that the increased revenue to be derived by her should be devoted to certain specific purposes. There is reason for believing that the American Government was not disposed to require such an

undertaking, but that Japan was insistent that, out of this increase, provision should be made for the payment of outstanding debts to foreign financial interests which had already matured, and that Great Britain desired that this increase should be devoted to specific productive enterprises. There was also some discussion in the sub-committee as to whether the increased customs revenues which China might receive might be divided into allotments—certain percentages to be devoted to debt payments, education and productive enterprises, and the remainder to be available for the current administrative expenses of the Chinese Government. This plan, however, came to nought when it was finally decided that China was not to be given the immediate treaty right to levy more than an effective five per cent. upon imports.

It should further be said that, even when it was proposed that the immediate increase of import duties should be limited to 7½ per cent., the Japanese Delegation protested that this would have such serious effects upon Japanese industries that it could not give its assent. The matter was referred to the Japanese Government at Tokyo and this position of its Delegation affirmed.

From the very beginning it appeared certain that, the domestic conditions of China being what they were, no promise would be given by the Powers of a definite date at which China was to obtain complete tariff autonomy.

At the second meeting of the sub-committee, Sir Robert Borden, in behalf of the British Delegation, definitely proposed that the present tariff of China should be immediately increased so as to make it an effective five per cent., and that, after a general revision of the valuations of imports into China had been obtained, the rate should be raised to 7½ per cent.

Japanese Statement. Mr. Odagiri, in behalf of the Japanese Delegation, submitted the following statement:

Taking into consideration the views and suggestions made by our colleagues at yesterday's meeting, as well as of the commercial relations between Japan and China, the Japanese subcommittee states its views regarding the increase of tariff as follows:

As the Japanese trade with China covers more than 30 per cent. of China's foreign trade and represents the same percentage of Japan's oversea trade, the country which would suffer most by the revised tariff would be Japan.

Japan supplies those articles which are mostly sold to the lower class of people in China to satisfy their daily need. Those goods imported from Japan represent the production of a large number of comparatively small Japanese manufacturers.

Therefore, this sudden and big increase of tariff would mean on the one hand forcing high prices, to the purchasers in China—the majority of the common people—causing a higher cost of living, and, on the other hand, would mean a serious effect upon the industry of Japan. In consequence it is very important that the tariff revision should follow a gradual process, allowing enough time to enable the people of the countries concerned to adjust their economic life accordingly.

In the foregoing circumstances the Japanese sub-committee declares, much to its regret, that in its opinion the abrupt increase of tariff to an effective 7½ rate—more than doubling duties of the present 3½ per cent. tariff—is impossible to put into practice, and as to a 12½ per cent. tariff, it is absolutely impractical.

The revision which the Japanese sub-committee believes proper is an increase of the present tariff to an effective 5 per cent. in accordance with the agreement between the Chinese Government and the diplomatic bodies in Peking.

But in order to avoid the delay of 6 months to one year required for the establishment of the aforesaid conversion, the Japanese sub-committee would propose the alternative measure which will avoid unnecessary delay and will result in greater advantage to the Chinese Government.

As an alternative measure, it is proposed to levy a surtax, of say 30 per cent., upon export, import and coastwise trade, which

should bring in to the Chinese Government an additional revenue of approximately silver $20,000,000.

The fruit of raising the tariff to an effective 5 per cent., on imports would be an increase of revenue of about silver $16,000,000.

This suggested surtax is not an entirely new idea, for this year all the Powers agreed to the imposition of a surtax of 10 per cent., levied on all customs due for one year, as a measure of temporary famine relief, and it was estimated by the customs authorities that this surtax would produce about taels 5,000,000.

Of course, the Japanese sub-committee would not mean absolutely and permanently to refuse its assent to the proposal to increase the tariff. On the contrary it would say that Japan is ready to assist the Chinese in revising the tariff as is shown in the supplementary Treaty of Commerce and Navigation which was concluded during the year 1903.

There is no objection whatever on the part of Japan to the suggestion to appoint an international committee to proceed to China and study the condition of tariff, the likin, and related matters, in order to solve this difficult question and present to the respective Governments any workable scheme for increasing the tariff.

Discussion. Dr. Koo, replying to Sir Robert Borden and M. Odagiri, pointed out that an increase of the Chinese tariff rates to 7½ per cent. would be but a slight one, and that, assuming that Japan's share of China's foreign trade was 30 per cent., such an increase would mean scarcely more than six million dollars gold to be spread annually throughout all parts of the Japanese Empire, and should, therefore, not be a cause of anxiety to Japanese traders and manufacturers.

Dr. Koo also presented statistical tables showing: (1) The Actual Percentages of Import Duties Collected in Comparison with the Value of Imports; and (2) The Average Percentage which the Import Duties Collected by Certain Countries Bear to the Value of Their Imports;

and (3) The Average Percentage which the Import Duties Collected by Japan Bear to the Value of Her Imports. These tables showed, as Dr. Koo pointed out, that, because of a discrepancy between the actual valuations and those used for the purpose of assessing tariff duties, there had been an annual net loss of revenue to China approximating 27,000,000 Chinese dollars, and that this fact should be taken into consideration in determining the relief which China in the future should obtain.

After some discussion, Dr. Koo, on behalf of the Chinese Delegation, expressed his willingness to accept Sir Robert Borden's proposals with an amendment to the effect that, pending the revision of the import tariff to 7½ per cent. effective, a surtax should be immediately applied which would yield a revenue equivalent to 7½ per cent. effective. Dr. Koo also accepted Sir Robert's corollary proposition that a higher rate, say a maximum of 12½ per cent., might be levied on articles that might be fairly denominated luxuries.

Further discussion showed some objection upon the part of the French Delegation to the higher charge upon luxuries, since, M. Sarraut said, it would be difficult to draw a line of demarkation between necessities and luxuries; also, objection upon the part of Sir Robert Borden to the proposition of levying forthwith a surtax until there had been a revaluation of commodities and an effective 7½ per cent. rate established. But all the Delegations, Japan alone excepted, gave their approval to the proposition that China should be given the right to levy 7½ per cent. tariff duties. The Japanese Delegation said that, before giving its approval to this, they would have to communicate with their Government at Tokyo.

Draft Agreement. At the third meeting of the sub-committee, Sir Robert Borden submitted a draft of agree-

ment upon the Chinese tariff which he hoped would bring together the conflicting viewpoints and especially those of the Chinese and Japanese Delegations. It is not necessary to quote this tentative draft, which was discussed at the fourth meeting of the sub-committee, it being sufficient to give the text of the report prepared by Senator Underwood based upon that draft and the discussion that was had upon it. This report, submitted at the fifth meeting of the sub-committee, was as follows:

The Powers attending this Conference agree:

I. That immediate steps be taken through a Special Conference representing China and the Powers which accept this agreement to prepare the way for the speedy abolition of likin and the fulfillment of the other conditions laid down in Article VIII of the Anglo-Chinese Commercial Treaty of September 5, 1902, and the corresponding Articles of the United States and Japanese Treaties, with a view to the levying of the surtax as provided in those Articles.

II. That the present tariff on importation shall be forthwith revised and raised to a basis of 5 per cent. effective.

That this revision shall be carried forthwith by a Revision Committee at Shanghai on the general lines of the last revision. The revision shall proceed as rapidly as possible with a view to its completion within four months from the conclusion of the present Conference, and the revised tariff shall become effective two months after publication without awaiting ratification.

III. That the interim provisions to be applied until the Articles referred to in paragraph I come into operation be considered by the aforesaid Special Conference which shall authorize the levying of a surtax on dutiable imports as from such date, for such purposes, and subject to such conditions as they may determine. The surtax shall be at a uniform rate of 2½ per cent *ad valorem* except in the case of certain articles of luxury which in the opinion of the Conference can bear a greater increase without unduly impeding trade, and upon which the total surtax shall not exceed 5 per cent.

IV. (1) That there shall be a further revision of the tariff to take effect at the expiration of four years following the completion of the immediate revision herein authorized, in order to ensure that the rates shall correspond to the *ad valorem* rates fixed.

(2) That following this revision there shall be periodical revisions of the tariff every seven years for the same purpose.

(3) That in order to prevent delay such periodical revisions shall be effected in accordance with rules to be settled by the Special Conference provided in paragraph I.

V. That in all matters relating to customs duties there shall be effective equality of treatment and of opportunity for all nations parties to this Agreement.

VI. That reductions now applicable to the customs duties collected on goods imported into and exported from China by land shall be abolished.

VII. That the charge for transit passes shall be at the rate of 2½ per cent. *ad valorem* except when the arrangements contemplated in paragraph I are in force.

VIII. That the Treaty Powers not here represented shall be invited to accept the present Agreement.

IX. That this Agreement shall over-ride all provisions of Treaties between China and the Powers which accept it which are inconsistent with its terms.

The Delegate for China submitted the following communication which it was unanimously agreed should form a part of the foregoing Agreement as an Appendix thereto:

The Chinese Delegation has the honor to inform the Committee on the Far Eastern Questions of the Conference on the Limitation of Armament that the Chinese Government have no intention to effect any change which may disturb the present administration of the Chinese Maritime Customs.

Land Frontier Duties. Discussion of these proposals revealed the fact that the French Delegation was unwilling

to accept Section VI, which provided for the abolition of the reductions provided for by existing treaties on goods imported by land into China, and that the American Delegation was equally insistent upon the retention of this provision in order that the principle of equality of treatment might have full application to all of China's imports.

The French Delegate took strongly the view that the special terms which China had given to imports from Indo-China were correlative to the considerable special personal, civil and commercial privileges which France had given to Chinese nationals residing in Tongkin—some 400,000 in number.

The British Delegation indicated that, while India was prepared to accept the principle that the rates of customs duties levied on all land frontiers should be the same as the maritime customs, it was expected that, if this was done, arrangements would be made to restore to India the right to impose import duties on Chinese goods entering Burmah, and export duties on Burmese products and British manufactures exported by land to China.

In order to meet these views of France and Great Britain, the following provision, drafted by Sir Robert Borden to replace Article VI of the draft of agreement previously reported by Senator Underwood, was proposed at the sixth meeting of the sub-committee.

That the principle of uniformity in the rates of customs duties levied on all the frontiers, land and maritime, of China, be recognized, and that it be referred to the Special Conference mentioned in paragraph I [of the Draft Heads of Agreement of December 28], to make arrangements to give practical effect to this principle, with power to authorize any adjustments which may appear equitable in cases in which the customs privilege to be abolished was granted in return for some local economic favor. In the meantime, any increase in the rates of customs duties or

surtax imposed in pursuance of the present agreement shall be levied at a uniform rate *ad valorem* on all frontiers, land and maritime.

Discussion in Committee of the Whole: Statement by Senator Underwood. This proposal received the unanimous approval of all the members of the sub-committee, which thereupon terminated its work upon the Chinese tariff, and submitted its conclusions to the Committee of the Whole.

Thereupon, at the seventeenth meeting of the Committee on Pacific and Far Eastern Questions, the consideration of the conclusions of the sub-committee which have been above given was taken up. In submitting them to the Committee, Senator Underwood said, in part:[3]

The importance of this Agreement in reference to trade conditions in China, which to a large extent were controlled by the duties levied at the customs house, went, Senator Underwood thought, much further than the mere question of the money involved. As he had stated some time ago, he thought one of the principal causes of irritation and difference between the nations of the world arose from their trade conditions, and when one nation felt that it was not standing on an equality with another nation it was likely to bring about conditions of unrest and might lead in the end to war; and the great purpose of this convention was to eliminate the causes of war. Therefore Senator Underwood thought that the members of the committee could congratulate themselves at this time that they had reached, in the report that he would present, an understanding to wipe out the discriminations on the border of China in reference to customs duties and that would make all the countries of the world feel they would hereafter have an open door that meant equal opportunity of trade.

[3] What follows is quoted or paraphrased from the report given in U. S. Senate Document No. 126, 67th Congress, 2d session, p. 589 ff.

The agreement in its present form, Senator Underwood said, contained provisions relating to two distinct phases of tariff readjustment, namely, those which might become immediately applicable without taking treaty form requiring ratification and those which must be embraced in a treaty and which would require ratification. The first of these related to the immediate revision of the present tariff to a basis of 5 per cent. effective and the second related to subjects to be dealt with in a special conference which would be charged with taking measures looking to the speedy abolition of likin and the application of surtaxes, together with the realization of the principle of uniformity in the rates of customs duties on all frontiers whether land or maritime.

The stages, therefore, of applying the terms of the agreement were as follows:

1. A committee of revision would meet forthwith at Shanghai to revise the present tariff to a basis of 5 per cent. effective. This revision would become effective two months after publication without awaiting ratification. It would provide an additional revenue amounting to about $17,000,000 silver.

2. Immediate steps would be taken for a special conference representing China and the Powers charged with the duty of preparing the way for the speedy abolition of the likin and the bringing into effect of the surtaxes provided for in the treaties between China and Great Britain of 1902 and China and the United States and Japan of 1903. The Special Conference would likewise put into effect a surtax of 2½ per cent. *ad valorem*, which would secure additional revenue amounting to approximately $27,000,000 silver, and a special surtax on luxuries, not exceeding 5 per cent. *ad valorem*, which would provide a still further revenue amounting to $2,167,000 silver. The additional revenue from customs duties provided in the present agreement would fall into four categories, as follows:

1. Increase to 5 per cent. effective, $17,000,000 silver.

2. Surtax of 2½ per cent., $27,000,000 silver.

3. Surtax not exceeding 5 per cent. on luxuries, $2,167,000 silver.

4. Total additional revenue, $46,167,000 silver.

With the completion of the work of the Special Conference carrying into effect the abolition of likin and the application of the surtaxes provided in the treaties with Great Britain, Japan, and the United States, the additional revenue provided should amount to $156,000,000 silver. The present tariff produced revenue at the rate of $64,000,000 silver for 1920. If to this were added the additional revenue provided for in the agreement, the total yield from customs duties would amount to $110,167,000 silver. Aside from these measures, there were important provisions in the agreement relating to future revisions of the tariff with a view to maintaining it on a correct basis of valuation so that it might produce revenue at the effective rates to which China was entitled. Following the immediate revision there would be a second revision in four years and subsequent revisions every seven years.

Heretofore there had been some difficulty encountered in securing revisions regularly. The special conference was charged with the duty of providing means whereby future delays in revision might be avoided. Carrying into effect the general agreement already adopted by this Conference, there was a provision in the present agreement for effective equality of treatment and of opportunity. This provision carried with it an important recognition of the principle of uniformity in the rates of customs duties levied on all frontiers, which meant the abolition of discriminatory practices in relation to goods imported by land.

Senator Underwood said he felt that for the first time measures had been taken which effectually removed the highly unjust and controversial preferences with which the foreign trade of China had heretofore been encumbered. Those nations which had enjoyed the advantages of preferential treatment across their land frontiers had acted with commendable foresight and altruism in surrendering those minor advantages in trade to the broader principles of equality of treatment and the general betterment of the conditions of friendly trade competition. This appeared to him to represent a signal achievement, not only in the interest of China and of each of the Treaty Powers, but also in the interest of trade in general and of peace itself.

Chinese Statement. Dr. Koo, responding to the remarks and report of Senator Underwood, took the opportunity of making the following formal statement, in behalf of the Chinese Government, regarding the re-establishment of China's tariff autonomy—a matter to which, he said, the Chinese people attached great importance:

On November 23 last, I had the honor, in behalf of the Chinese Delegation, to lay the tariff question of China before the committee. Three propositions were submitted. The principal one of them was for the restoration to China of her tariff autonomy: the other two being intended merely as provisional measures to prepare the ground for the early consummation of the main object. At the same time I stated that it was not the intention of the Chinese Government to effect any change that might disturb the present administration of the Chinese maritime customs, though this statement obviously could not be reasonably construed to preclude China's legitimate aspirations gradually to make this important branch of the Chinese Government more national in character.

I explained the reasons why China was desirous of recovering her freedom of action in respect to the matter of levying customs duties. The committee, after some discussion, referred the whole question to a sub-committee, of which Senator Underwood has been the distinguished chairman. The results of the discussions in the sub-committee are embodied in an agreement which has just been laid before you. It is a valuable agreement, embodying, as it does, a number of important points connected with the effective application of the present régime of treaty tariff. But it will be noted that question of the restoration of tariff autonomy to China is not included, it being the opinion of some members of the sub-committee that it would not be practicable to fix at present a definite period within which the existing treaty provisions on tariff were to be brought to an end, and that the question should be decided in the light of conditions that might arise in the future.

The Chinese Delegation, however, cannot but wish that a

different view had prevailed. Tariff autonomy is a sovereign right enjoyed by all independent States. Its free exercise is essential to the well-being of the State. The existing treaty provisions, by which the levy of customs duties, transit dues, and other imports is regulated, constitute not only a restriction on China's freedom of action, but an infringement on her sovereignty. Restoration to her of tariff autonomy would only be recognition of a right which is hers and which she relinquished against her will.

The maintenance of the present tariff régime means, moreover, a continued loss of revenue to the Chinese Government. The customs import duty under this régime is limited to the very low rate of 5 per cent. *ad valorem* for all classes of dutiable goods, compared with the average rate of 15 per cent. to 60 per cent. levied by other countries. In fact, because the duties are levied on the basis of a previously fixed schedule, the actual collections amount to only 3½ per cent. effective. The customs revenue, therefore, constitutes only about 7½ per cent. of China's total revenue, while the average for the principal countries in the west ranges from 12 per cent. to 15 per cent. at present, and still higher before the war. When the proposed surtax of 2½ per cent. for ordinary articles and of 5 per cent. on certain luxuries eventually goes into effect, more revenue will be produced, but even then it will hardly be commensurate with the rapidly growing needs of the Chinese Government. Much of the elasticity of the fiscal systems of other States depends upon their freedom to regulate their customs duties. To provide the fullest and most unembarrassed opportunity to China to develop and maintain for herself an effective and stable government, it is necessary to restore tariff autonomy to her at an early date.

The necessity to levy a uniform low duty has encouraged a disproportionate increase in the import of luxuries such as wine and tobacco; and apart from the loss of revenue consequent upon giving these things the same rate as is levied on the necessaries of life, the effect on the social and moral habits of the Chinese people has been altogether deleterious. A beginning has been made in the agreement before the committee in authorizing a levy of an additional surtax of 2½ per cent. on certain articles

of luxury, but it is apparent that a greater increase is needed if a restraining influence is to be exercised in the use of these articles of luxury.

Nor is it to be overlooked that the present treaty tariff régime is an impediment to China's economic development. Under this régime China enjoys no reciprocity from any of the Powers with which she stands in treaty relations. Though every Treaty Power enjoys the advantage of having its wares imported into China at the exceptionally low rate of 5 per cent. *ad valorem*, the Chinese produce and merchandise, on entering into any of these countries, is subjected to the maximum rates leviable, which are in some cases 60 or 70 times the rate which she herself levies on foreign imports. The necessity of levying uniform duties on all articles imported into China, on the other hand, makes these duties on such articles as machinery and raw materials for Chinese industries a handicap to China's industrial development. At present there are more than 1,000 Chinese factories employing foreign machinery and methods and engaged in over 30 different kinds of important industries. To enable them to live and develop and thereby contribute to the growth of China's foreign trade in which all nations are deeply interested, some latitude is necessary in the regulation of the customs duties.

Besides, regulation of China's tariff by treaty must inevitably, in the nature of things, work unjustly and to her great detriment. Thus, whenever China makes a proposal, be it for revision of the tariff to bring it more into harmony with the prevailing prices or for an increase of the customs duty to meet her increased needs, the unanimous consent of more than a dozen Treaty Powers is necessary. As each country naturally desires to protect and promote its own commercial interests in China, and as the industries of these Treaty Powers vary in character and export different kinds of merchandise, they all seek to avoid the burden of the new revision or increased rate falling upon the industries of their own countries. With this end in view, different conditions are not infrequently attached by different Powers to their consent to revise the customs tariff or increase the rate.

Thus, though this matter of custom tariff is intimately connected with the well-being of the Chinese State, the interests of

the Treaty Powers appear to be placed at times before the legitimate interests of China. Under such circumstances the difficulty of effecting any adjustment or arrangement favorable to China can easily be conceived, and it has at times been well nigh insurmountable. On one occasion or another there is always some Power who considers its own interest in the matter of Chinese customs tariff more important than the supreme interests of China. The experience of the Chinese Delegation in the subcommittee on tariff, much as it has accomplished, has not altogether removed the ground for this opinion. But as unanimity is required, the dissent of one Power is sufficient to defeat and upset a general arrangement agreed to by all the others, while by virtue of the Most-Favored-Nation clause, a concession or privilege granted by China to one nation for a specific consideration is at once claimed by all without regard to the *quid pro quo*.

In view of the inherent difficulty and injustice of the present régime, and of the wholesome and desirable effect which restoration of tariff autonomy is sure to have upon the trade and economic development of China, as well as upon the evolution of her fiscal system, the Chinese Delegation feel in duty bound to declare that though this committee does not see its way to consider China's claim for the restoration of her tariff autonomy, it is not their desire, in assenting to the agreement now before you, to relinquish their claim; on the contrary, it is their intention to bring the question up again for consideration on all appropriate occasions in the future.

Senator Underwood, with reference to what Dr. Koo had said, declared that he did not desire to discuss the pending resolution further than he had already done, but he wished to make one statement before the committee adjourned that morning. He had listened with much interest to the statement read by Mr. Koo in reference to the desire of China for tariff autonomy, which was a very natural and proper desire. Any great government naturally wished the time might come when she might control her own finances, notwithstanding that she yielded the

control herself. So far as he was concerned, he gladly welcomed an opportunity, when it could be done, of restoring to China her entire fiscal autonomy; but he thought it was fair to the sub-committee and to the members of this committee to say this—and it was in line with the resolution pending—that he was sure this sub-committee and the committee to which he was now addressing himself would gladly do very much more for China along all lines if conditions in China were such that the outside Powers felt they could do so with justice to China herself. He did not think there was any doubt in the minds of the men on the sub-committee as to the question that if China at present had the unlimited control of levying taxes at the customs house, in view of the unsettled conditions now existing in China, it would probably work, in the end, to China's detriment and to the injury of the world; and he thought that had more to do with the sub-committee's not making a full and direct response to Mr. Koo's request than anything else. He was sure there was no desire on the part of the other Powers to be selfish, or not to recognize the full sovereignty of China, and he only arose to say this, that if he was a judge of the situation, a judge of the temper of conditions in the balance of the world, he felt sure that when China herself established a parliamentary government of all the provinces of China and dispensed with the military control that now existed in many of the Provinces of China, so that the outside Powers might feel that they were dealing with a government that had entire and absolute and free control of the situation, China could expect to realize the great ideals of sovereignty that she asked for at this table.

Senator Underwood, in behalf of the sub-committee, then recommended that, as the agreements which had been reported related to two different matters, namely, (1) the immediate revision of the present tariff in accord-

ance with existing treaties, and (2) other matters involving the modification of existing treaties, they should be referred to the Drafting Committee with a view to putting the agreement into final form and separating the principles which could go into immediate force from those which would require treaty ratification by the Powers.

Drafting Committee: Report from. This suggestion was adopted and the resolutions referred to the Drafting Committee, which reported them back to the eighteenth session of the Committee of the Whole.

Mr. Root, who made the report in behalf of the Drafting Committee, said that the sub-committee on Chinese Revenue had suggested that those of its recommendations which were declaratory in nature should be separated from those which modified existing treaties and would, therefore, need to be put into treaty form. As to the first, the Drafting Committee reported as follows:

Agreement on the Revision of the Chinese Tariff.

With a view to providing additional revenue to meet the needs of the Chinese Government, the Powers represented at this Conference, namely, the United States of America, Belgium, the British Empire, China, France, Italy, Japan, the Netherlands, and Portugal, agree:

That the customs schedule of duties on imports into China adopted by the tariff revision commission at Shanghai on December 19, 1918, shall forthwith be revised so that the rates of duty shall be equivalent to 5 per cent. effective as provided for in the several commercial treaties to which China is a party.

A revision commission shall meet at Shanghai, at the earliest practicable date, to effect this revision forthwith and on the general lines of the last revision.

This commission shall be composed of representatives of the Powers above named and of representatives of any additional Powers who have treaties with China providing for a tariff on

imports and exports not to exceed 5 per cent. *ad valorem* and who desire to participate therein.

The revision shall proceed as rapidly as possible with a view to its completion within four months from the date of the adoption of this resolution by the Conference on the Limitation of Armament and Pacific and Far Eastern Questions.

The revised tariff shall become effective as soon as possible, but not earlier than two months after its publication by the revision commission.

The Government of the United States, as convener of the present Conference, is requested forthwith to communicate the terms of this resolution to the Governments of Powers not represented at this Conference, but who participated in the revision of 1918, aforesaid.

Discussion as to Russia. Mr. Root said[4] that, since the above agreement had been authorized by the Sub-committee on Drafting, the suggestion had been made that the terms of the clause which provided that the revision commission should be composed of representatives of the Powers present, and of representatives of any additional Powers who had treaties with China providing for a tariff on imports and exports not to exceed 5 per cent., would include Russia, but that it would be impossible to send notice to Russia or to collaborate with Russia in such a commission because Russia had no government which had been recognized by any of the Powers here present. In conversation upon this subject with several members of the Sub-committee on Drafting, the suggestion had been made that an amendment should be added to the resolution inserting after the words " additional powers," the words " having governments at present recognized by the Powers represented at this Conference " ; and, if that met the views of the members of this

[4] The report of the discussion that follows is that given in Senate Document No. 126, 67th Cong., 2d. sess.

committee, it would hardly be worth while to call the Subcommittee on Drafting together again, as all its members were present. Mr. Root, therefore, suggested that the committee amend the report by the inclusion of these words.

Grand Duchy of Luxemburg. Baron de Cartier said he wished to raise the question of the position in which the Grand Duchy of Luxemburg would be placed by the resolution just read by Mr. Root. On September 2, 1861, a treaty of commerce and navigation was concluded between China and the King of Prussia, the latter acting in his own name as well as in the name of other members of the Zollverein, among which was the Grand Duchy of Luxemburg. When war had been declared between China and Germany, the Netherlands minister in Peking, Jonkheer Beelaerts van Blokland, in charge of the interests of the Grand Duchy in Peking, made representations to the Chinese Government, in order to protect Luxemburg interests, as the Grand Duchy did not go to war with China. It was Baron de Cartier's impression that the Grand Duchy was embraced in the "additional governments" mentioned in the resolution; but this should be made clear.

The chairman, Secretary Hughes, said that, subject to any observation to the contrary which might be made, he supposed that the Grand Duchy would be embraced within this clause and would be adequately represented. If there was no objection, the committee would so assume.

Finland and Poland. Sir Robert Borden inquired whether the Drafting Committee had considered the effect of the wording of paragraph 4 on States which were formerly part of the Russian Empire, but which were now independent Powers whose governments had

been recognized. He presumed that it was intended that these Powers should have the right to be represented on the Revision Commission and at the Special Conference, if they so desired.

Mr. Balfour remarked that Finland and Poland had both been recognized.

Non-Treaty Powers. Senator Underwood said that he was not sure that his viewpoint was the correct one, but, as he understood the situation, China was sovereign as to her right to levy taxes except in so far as she had given away that right by treaty. Now it was proposed to change the treaty right by which the power of the Republic of China was at present limited and to offer an increase in taxation at the customs house. No country that had not treaty relations with China and obligations from China growing out of those treaties had any right to make any complaint whatever as to what China did in reference to taxes at the customs house. Her only binding obligation was in respect to the Governments with whom she had signed treaties. As to the other Governments, who would not be represented, they could not complain as a matter of right, because they had no established right in regard to China (any more than in regard to the United States or Japan) to control the customs taxation of China.

On the other hand, they could not complain of any undue advantage being taken of them, because these two papers, this resolution and the treaty that was to follow, prescribed everything to their advantage in providing that the " open door " into China should in the future mean equal opportunity to all, whether Treaty Powers or Non-treaty Powers, whether they sat at the table to reform this tariff or not. Every one of them would go into China under the same conditions, and, therefore,

he could not see that any power that was not represented at the table could have any right to complain, especially as to this resolution, since in it the Treaty Powers were only complying with their contract with China heretofore made.

The chairman said that he supposed this clause of the resolution defined those who were to be represented in the proposed commission. They were the Governments who were at present recognized by the Powers represented at this Conference and who had treaties with China providing for a tariff.

Mr. Koo said he wished to add a few words in regard to the actual situation in China with reference to Non-treaty Powers. According to the paragraph under discussion, for a country to have a representative on the commission mentioned therein it was necessary for several conditions to be present at the same time. One of these conditions was that the Power in question should have a treaty with China in regard to import customs duties. Other Powers (*i. e.*, those not having such treaties) were necessarily precluded. As a matter of fact, the Chinese Government had already promulgated and put in force some time before a special tariff for Non-treaty Powers. If a lower rate than the 5 per cent. authorized by the existing treaties had been granted to one of these Non-treaty Powers, such a reduction would probably have to be made applicable to all under the Most-Favored-Nation Clause. But the present rate of import duties on the goods of the Non-treaty Powers was higher than 5 per cent. In that respect the principle of the "open door," under the present Chinese law, could not be invoked to include Non-treaty Powers.

Sir Robert Borden reverted to the point which he had already raised. He said that if the Government of Russia were recognized, Russia would obviously be en-

titled under paragraph IV of the resolution to be invited to send representatives to the proposed conference. But the present Russian Government was not recognized. On the other hand, two States whose territories were formerly part of the Russian Empire—namely, Finland and Poland—were recognized, and the question the committee had to decide was whether the convening Power would be bound to ask these two States to send representatives to the conference. The question might be taken into consideration afterward, but in his opinion it would be necessary at some stage to determine whether or not Poland and Finland had succeeded to Russia's rights in respect of treaties which the former Russian Empire had concluded with China.

The delegations being polled, each voted affirmatively, and the chairman announced that the resolution had been unanimously adopted.

Draft of Treaty. With regard to matters that would require a treaty or convention between the Powers, Mr. Root, on behalf of the Drafting Committee, then submitted the following resolutions regarding revision of Chinese customs duties:

With a view to increasing the revenues of the Chinese Government, the United States of America, Belgium, the British Empire, China, France, Italy, Japan, the Netherlands, and Portugal agree:

I. That immediate steps be taken through a special conference, to be composed of representatives of the contracting Powers and other Powers which adhere to this convention, to prepare the way for the speedy abolition of likin and for the fulfillment of the other conditions laid down in Article VIII of the Treaty of September 5, 1902, between Great Britain and China, in Articles IV and V of the Treaty of October 8, 1903, between the United States and China, and in Article I of the Supplementary Treaty

of October 8, 1903, between Japan and China, with a view of levying the surtaxes provided in those articles.

The special conference shall meet in China within three months after the date of the ratification of this convention on a day and at a place to be designated by the Chinese Government.

II. The special conference shall consider the interim provisions to be applied prior to the abolition of likin and the fulfillment of the other conditions laid down in the articles of the treaties above mentioned; and it shall authorize the levying of a surtax on dutiable imports as from such date for such purposes and subject to such conditions as it may determine.

The surtax shall be at a uniform rate of 2½ per cent. *ad valorem,* except in the case of certain articles of luxury, which, in the opinion of the special conference, can bear a greater increase without unduly impeding trade, and upon which the total surtax shall not exceed 5 per cent.

III. That following the immediate revision of the customs schedule of duties on imports into China as provided for in a resolution adopted by the representatives of all powers signatory to this convention at a plenary session of the Conference on the Limitation of Armament held in the City of Washington on the — day of January, 1922, there shall be a further revision to take effect at the expiration of four years following the completion of the aforesaid revision in order to insure that the customs duties shall correspond to the *ad valorem* rates fixed by the special conference herein provided for.

That following this revision there shall be periodical revisions of the customs schedule of duties on imports into China every seven years for the same purpose in lieu of the decennial revision authorized by existing treaties with China.

That in order to prevent delay such periodical revisions shall be effected in accordance with rules to be settled by the special conference mentioned in Article 1 herein.

IV. That in all matters relating to customs duties there shall be effective equality of treatment and of opportunity for all Powers parties to this convention.

V. That the principle of uniformity in the rate of customs duties levied at all the land and maritime frontiers of China is

hereby recognized; that the special conference above provided for shall make arrangements to give practical effect to this principle; and it is authorized to make equitable adjustments in those cases in which the customs privilege to be abolished was granted in return for some local economic advantage.

In the meantime, any increase in the rates of customs duties resulting from tariff revision or any surtax hereafter imposed, in pursuance of the present convention, shall be levied at a uniform rate *ad valorem* at all land and maritime frontiers of China.

VI. That the charge for transit passes shall be at the rate of 2½ per cent. *ad valorem,* until the arrangements contemplated in Article I herein come into force.

VII. That the powers not signatory to this convention, but whose present treaties with China provide for a tariff on imports and exports not to exceed 5 per cent. *ad valorem,* shall be invited to adhere to the present convention, and upon such adherence by all of them this convention shall override all provisions of treaties between China and the respective contracting powers which are inconsistent with its terms.

That the United States Government, as convener of the present conference, undertake to make the necessary communications for this purpose and to inform the Governments of the contracting powers of the replies received.

VIII. Ratification clause of usual form.

Mr. Root said that, in accordance with the resolution already adopted, there should be inserted some words in Article VII, so that it would read:

That the powers not signatory to this convention having Governments at present recognized by the powers represented at this conference, but whose present treaties with China provide for a tariff on imports and exports not to exceed 5 per cent. *ad valorem,* shall be invited to adhere to the present convention, and upon such adherence by all of them this convention shall override all provisions of treaties between China and the respective contracting powers which are inconsistent with its terms.

Mr. Root said, with reference to the first paragraph of Article III, that the sense of the paragraph was that, following the immediate revision of the schedules or duties which the commission would raise under the resolution that had been adopted, there should be a further revision, to take effect at the expiration of four years following the completion of the aforesaid revision in order to insure that the customs duties should correspond to the *ad valorem* rates fixed by the Special Conference as in the treaty. It was not to make the customs duties correspond to the *ad valorem* rates in force, but to the *ad valorem* rates fixed by the Special Conference, and to make the customs duties correspond to the new *ad valorem* rates, if there should be any, not the *ad valorem* rates already in force.

Mr. Sarraut said that he would ask to be enlightened with respect to Article I, especially with respect to the phrase " and other Powers which adhere to this convention to prepare the way for the speedy abolition of likin and for the fulfillment of the other conditions laid down in Article VIII of the treaty of September 5, 1902, between Great Britain and China, in Articles IV and V of the treaty of October 8, 1903, between the United States and China, and in Article I of the supplementary treaty of October 8, 1903, between Japan and China, with a view to levying the surtaxes provided in those articles."

Mr. Sarraut said he believed that there had been certain changes from the first text prepared by Mr. Kammerer in which special reference had been made to " Articles IV and VIII of the treaties between the United States and China and to Article I of the supplementary treaty of October 8 between Japan and China." These references had not been made in the original text. Referring to the text of these treaties, Mr. Sarraut said he would like to ask the following questions: Was it the

intention of the articles as drafted to oblige all nations to bind themselves by the terms of the Most-Favored-Nation Clause, or was this done by error? If an automatic application of the Most-Favored-Nation Clause was intended, he must make a reservation, as his own Government might not agree. He believed that it would be better to omit the clauses referring to the Most-Favored-Nation Clause or to say that it was not desired to apply them automatically.

Mr. Root said the treaties referred to in Article I were the same treaties which were referred to in the original report of the Committee on Chinese Revenue. The only difference was that this draft specified the particular articles of those treaties which were supposed to be relevant to the subject matter of this instrument. It was rather to limit than to enlarge the reference in the original report, and the conditions which were referred to in Article I were the conditions upon which the Powers entering into these treaties with China undertook to consent to the increase of duties; *i. e.*, they agreed to consent to an increase of duties on condition that China did thus and so. No conditions were imposed upon any other Power, so that no obligation whatsoever could be found in this article upon any of the Powers other than China in respect of the Most-Favored-Nation clauses. That was his understanding of it.

Mr. Sarraut said that he took note of Mr. Root's statements, and would refer to them, if necessary. He felt he must point out, however, that if the text of the resolutions alone was considered, it did not directly appear that the Most-Favored-Nation Clause did not automatically apply. In view of Mr. Root's explanation, however, he would not insist further upon the matter.

Sir Auckland Geddes said he assumed that it was quite clear—this was the way in which he read this paragraph

—that, so far as the treaties in question bound countries other than China at the present time, they would bind only those countries afterward, and that the provisions, for instance, of the Chinese-American Treaty would not be extended to the Chinese-British? Mr. Root said he had no doubt of that.

A vote being taken, the draft agreements and resolutions were then unanimously approved by the Committee of the Whole. However, before being reported to the Conference in plenary session, these agreements were further discussed and amended in the last session of the Committee when they were brought before it in what was then expected to be their final form.

Mr. Balfour at that time raised the point that, as then drafted, the reform of the Chinese tariff which all the Delegations desired would not come into effect until every Power that had a treaty with China providing for an export and import tariff of not greater than 5 per cent. had given its adherence to the agreements then before the committee. He suggested, therefore, that there should be inserted in the draft the words "the provisions of the present treaty shall override all stipulations of treaties between China and the respective Powers which are inconsistent therewith, other than stipulations according Most-Favored-Nation treatment." The effect of this provision would, of course, be that so long as any Power, not party to the proposed treaty, should refuse adherence to it, and, therefore, under its treaties with China, be entitled to claim of China that imports from itself to China or exports from China to itself should not bear a tariff higher than 5 per cent., the other Powers signatory to the treaty would themselves be entitled to make the same claim upon China.

Senator Underwood's View as to Power of China to Denounce Tariff Treaties. This proposal gave to Senator

Underwood an opportunity, in supporting Mr. Balfour's amendment, to make an argument with regard to China's obligations under her tariff treaties that is of sufficient interest to deserve quotation. As reported in the Minutes of the Committee, Senator Underwood said:

He might be wrong in this matter, but he believed this treaty was not on the same basis as many other treaties involving great national rights. This was a trade agreement, a trade contract, which China had made with the other nations of the world, and he thought China had a right to denounce these treaties when she thought proper. He thought this was clearly her right, because no question of national right was involved; it was merely a question of trade agreements, and agreements of that kind had been made in the past to extend over a period of time, or an indefinite period of time, and when conditions changed so that they worked a great disadvantage to one or others of the contracting parties it had been recognized in the past that such trade conventions might be eliminated.

This might not meet with the approval of all, and he did not say it for that purpose; he was only stating his own viewpoint. China must have this money if she was going to function as a government. She had asked the powers at this table to grant her the right to raise these taxes. The nine powers had agreed with China on a plan which increased taxes. It seemed to him that if one nation in the world stood out alone against the sentiment and the concensus of opinion of the nations sitting at the table and tried to prevent China from getting this additional money—this revenue which was necessary for her national life—the Chinese Government would be entirely justified in denouncing that treaty or that agreement.

He said this because this question might arise; one of the contracting parties might say that China must stand for the future on her 5 per cent. tariff, which would endanger the life of the Chinese Government.

His opinion was that no one power in the world had the right, as against the sentiments expressed by the nine powers at the table and against the desires of China, to take such a position.

and he believed that in the high courts of national morality such a position could well be maintained. If it were not, all the work of the committee was futile; if it were not, it meant that, simply because a nation 60 years before, when she did not feel that she needed more than 5 per cent. revenue, had had her customs houses enter into an agreement, that nation must be bound for the years, for the decades and the centuries to come, unable to maintain her governmental life.

He did not feel, however, that the matter was so serious, since under this agreement the opportunity would be given (for example) to Spain and to Sweden to become parties to it, and he thought they would accept; but if they did not become parties to it or stood as dogs in the manger preventing China from having the opportunity of life to which she was entitled, then he thought the way to carry out this agreement would be to denounce it.

But the nations represented on the committee were entitled to protect their rights to equal terms, and if China did not denounce her treaties and allowed imports from Spain and Sweden to enter China under a 5 per cent. duty—if these countries did not give their adherence—then China must recognize her duty to the nations represented at the table and let them continue their imports into China under the 5 per cent. duty.[5]

As a result of this discussion, the following Article, numbered IX, was inserted in the draft treaty:

The provisions of the present treaty shall override all stipulations of treaties between China and the respective Contracting Powers which are inconsistent therewith, other than stipulations according most-favored-nation treatment.

The various resolutions relating to China's customs revenues were reported to the Conference at its sixth plenary session. Senator Underwood, who made the re-

[5] Senator Underwood repeated these views in the United States Senate when the treaty was before that body for approval.

port, introduced it with the following explanatory statements which are worthy of reproduction as an admirable historical summary of the facts leading to the situation which the proposed treaty was intended to improve, if not wholly to correct:

It may seem an anomaly to the people of the world who have not studied this question that this Conference, after declaring that it recognized the sovereignty and territorial integrity of China, should engage with China in a compact about a domestic matter which is a part of her sovereignty. To announce the treaty without an explanation may lead to misunderstanding, and therefore I ask the patience of the Conference for a few minutes that I may put in the record a statement of the historic facts leading up to present conditions, which makes it necessary that this Conference should enter into this agreement.

The conclusions which have been reached with respect to the Chinese maritime customs tariff are two in number, the first being in the form of an agreement for an immediate revision of existing schedules, so as to bring the rate of duty up to a basis of 5 per cent. effective. The second is in the form of a treaty, and provides for a special conference which shall be empowered to levy surtaxes and to make other arrangements for increasing the customs schedules above the rate of 5 per cent. effective.

In order to understand the nature and the reasons for these agreements, it is well to bear in mind the historical background of the present treaty adjustment, which places such a large control of the Chinese customs in the hands of foreign powers.

The origin of the Chinese customs tariff dates back to the fourteenth century, but the administrative system was of such a nature that constant friction arose with foreign merchants engaged in trade with that country, and culminated in an acute controversy relating to the smuggling of opium, sometimes known as the Opium War of 1839-1842.

This controversy ended in 1842 with the Treaty of Nanking, between China and Great Britain. The Treaty of Nanking marked the beginning of Chinese relations on a recognized legal

basis with the countries of the Western World, and is likewise the beginning of the history of China's present tariff system.

By the Treaty of Nanking it was agreed that five ports should be opened for foreign trade, and that a fair and regular tariff of export and import customs and other duties should be published.

In a subsequent treaty of October 8, 1843, a tariff schedule was adopted for both imports and exports, based on the general rate of 5 per cent. *ad valorem.*

In 1844 the first treaty between China and the United States was concluded. In this treaty the tariff upon which China had agreed with Great Britain was made an integral part of its provisions, and most-favored-nation treatment was secured for the United States in the following terms:

Citizens of the United States resorting to China shall in no case be subject to other or higher duties than are or shall be required of the people of any other nation whatever, and if additional advantages or privileges of whatever description be conceded hereafter by China to any other nation, the United States and the citizens thereof shall be entitled thereupon to a complete, equal, and impartial partictipation in the same.

In the same year a similar treaty between China and France was concluded, and in 1847 a like treaty was entered into with Sweden and Norway.

After an interval of a little over a decade, friction again developed and a war ensued.

In 1851, when negotiations were again resumed, silk had fallen in value, prices of foreign commodities had changed, and the former schedule of duties no longer represented the rate of 5 per cent. *ad valorem.*

In 1858, China concluded what was known as the Tientsin Treaties with the United States, Russia, Great Britain, and France.

The British treaty, which was the most comprehensive, being completed by an agreement as to the tariff and rules of trade, was signed at Shanghai on November 8, 1858. By this agreement a schedule of duties was provided to take the place of the schedule previously in force. Most of the duties were specific, calculated on the basis of 5 per cent. of the then prevailing values of articles.

The tariff schedule thus adopted in 1858 underwent no revision, except in reference to opium, until 1902.

The beginning of foreign administrative supervision of the Chinese maritime customs dates back to the time of the Taiping Rebellion, when, in September, 1853, the city of Shanghai was captured by the Taiping rebels. As a consequence the Chinese customs was closed and foreign merchants had no offices to collect customs duties.

In order to meet the emergency, the foreign consuls collected the duties until June 29, 1854, when an agreement was entered into with the British, American, and French consuls for the establishment of a foreign board of inspectors. Under this agreement a board of foreign inspectors was appointed, and continued in office until 1858, when the tariff commission met and agreed to rules of trade, of which Article X provided that a uniform customs system should be enforced at every port, and that a high officer should be appointed by the Chinese Government to superintend the foreign trade, and that this officer might select any British subject whom he might see fit to aid him in the administration of the customs revenue, and in a number of other matters connected with commerce and navigation. In 1914, just as the Great War was breaking, there were 1,357 foreigners in the Chinese customs service, representing 20 nationalities among a total of 7,441 employees.

It is appropriate to observe that the present administrative system has given very great satisfaction in the matter of its efficiency and its fairness to the interests of all concerned, and in that connection I desire to say that, when the consideration of this tariff treaty was before the sub-committee that prepared it, there was a general, and, I may say, universal sentiment about the table from the delegates representing the nine Powers, that on account of the disturbed conditions of China to-day, unsettled governmental conditions, it was desirable, if it met with the approval of China, that there should be no disturbance at this time of the present administration of the customs system. In response to that sentiment, which was discussed at the table, Dr. Koo, speaking for the Chinese Government, made a statement

which I have been directed by the full committee to report to this plenary session, which is as follows:

"The Chinese Delegation has the honor to inform the Committee on the Far Eastern Questions of the Conference on the Limitation of Armament that the Chinese Government have no intention to effect any change which may disturb the present administration of the Chinese maritime customs."

Speaking only for myself, I hope that the day may not be far distant when China will have established a parliamentary government representing her people, and that thus an opportunity will be given her to exercise in every respect her full sovereignty and regulate her own customs tariffs.

But for the present, on account of the disturbed conditions in China, it is manifest that there must be an agreement and understanding between China and the other nations involved in her trade, and I want to say that this agreement, as it is presented to the Conference to-day, meets the approbation of the representatives of the Chinese Government.

Between the period of 1869 and 1901 a series of agreements were entered into which established special tariff privileges with various Powers respecting movements of trade. This period culminated in a greatly involved state of affairs which led to the Boxer Revolution, out of which grew the doctrine of the open door.

In 1902, in accordance with the terms of the Boxer protocol, a commission met at Shanghai to revise the tariff schedule. This revision applied only to the import duties and to the free list. Most of the duties were specific in character, and the remainder were at 5 per cent. *ad valorem.* Non-enumerated goods were to pay 5 per cent. *ad valorem.* All the duties remained subject to the restrictions of the earlier treaties, and those of the export duties which are still in force are the specific duties contained in the schedule of 1858.

In 1902 a treaty was concluded between China and Great Britain which laid a basis for the subsequent treaties between China and the United States and China and Japan in 1903, along similar lines. In the preamble of the British treaty the Chinese Government undertakes to discard completely the system of levy-

ing likin and other dues on goods at the place of production, in transit, and at destination.

The British Government in turn consents to allow a surtax on foreign goods imported by the British subjects, the amount of this surtax on imports not to exceed the equivalent of one and one-half times the existing import duty. The levy of this additional surtax being contingent upon the abolition of the likin has never gone into effect, but remains, nevertheless, the broad basis upon which the general schedules of Chinese tariff duties may be increased.

It is clear from the foregoing brief summary that two measures were necessary in dealing with the Chinese customs, the first being that of the revising of the tariff schedules, as they exist, so as to make them conform to the rate of 5 per cent. effective, as provided by the treaty.

Second, to pave the way for the abolition of the likin, which constitutes the basis of higher rates. In the meantime, however, it is recognized that the Chinese Government requires additional revenue, and, in order that this may be supplied, a special conference is charged with the levying of a surtax of 2½ per cent. on ordinary duties, and a surtax of 5 per cent. on the luxuries, in addition to the established rate of 5 per cent. effective.

In 1896 an agreement was made between Russia and China for the construction of the Chinese Eastern Railway, and as a part of this agreement, merchandise entering China from Russia was allowed to pass the border at one-third less than the conventional customs duties. Afterwards, similar reductions were granted to France, Japan, and Great Britain, where the merchandise entered China across her land frontiers and not by sea.

This discrimination was unfair to the other nations, and not the least important paragraph in the proposed treaty is the one which abolishes this discrimination entirely.

Chinese Statements. After the proposed treaty had been read, Mr. Sze, in behalf of the Chinese Delegation, said:

As the views of the Chinese Delegation on the various aspects of this question have been fully set forth in the various state-

ments made by my colleague, Dr. Koo, at several meetings of the Committee on Far Eastern Questions, I shall content myself, Mr. Chairman, with a request that the following statements be spread upon the records of this session, namely: the statement of January 5, 1922; the statement of January 16, 1922; and the statement of February 3, 1922.

Dr. Koo's statement of January 5 has been earlier quoted. His statement of January 16 was as follows:

I wish to add a few words concerning the actual situation in China with reference to the non-treaty Powers.

According to the draft resolution it was evident that many conditions were required to qualify a Power to participate in the proposed revision, and one of the conditions was that such a Power should have a treaty tariff with China on imports and exports. If a Power did not possess such a qualification, then she would naturally be precluded from taking part in the revision. The Chinese Government had promulgated a national tariff for the non-treaty Powers. If the rates in the national tariff were lower than those prescribed in the treaty tariff, then all the treaty Powers could immediately enjoy the benefit of the lower rates through the operation of the Most-Favored-Nation clause. Generally, however, the rates in the national tariff were higher than the rates in the treaty tariff. Therefore, the doctrine of the open door could not be invoked to reduce the application of the Chinese national tariff with reference to the non-treaty Powers.

Dr. Koo's statement for the Chinese Delegation, made in the Committee on Pacific and Far Eastern Questions on February 3, 1922, was with reference to the declaration by China that it had no intention of disturbing the present system of maritime customs administration. Dr. Koo said that this declaration was a voluntary declaration of policy on the part of the Chinese Government, and his colleagues around the table would no doubt recall that

when he had had the honor, on behalf of his delegation, to present the Chinese viewpoint on the tariff question, he had made that declaration without any suggestion or request from any quarter. He had made it because it represented the policy of the Chinese Government—as that policy had been pursued for many decades in the past; no departure from this policy was contemplated at the present time. So far as he was aware, there was no international treaty or convention in which this policy had been stipulated. It occurred only in two loan contracts which the Chinese Government had made in 1896 and in 1898, with two groups of foreign bankers. Of course, those contracts were still in force and their terms were still binding. He therefore desired to say that, when this subject had been brought up in the sub-committee, he did not recall that any question of signature had been raised. If he remembered correctly, the form in which it was reported to this committee by the chairman of the sub-committee some time before was exactly the form which the members of the sub-committee had accepted. He felt certain that his colleagues around the table would not wish to make a treaty obligation, an international obligation, out of a matter which fell within the domestic policy of the Chinese Government. He felt certain that, thus explained, his colleagues would be perfectly satisfied with this declaration of policy, which was made voluntarily in the original instance and made in all good faith, and, therefore, he wished to say that, so far as the Chinese Delegation were concerned, they did not feel quite the necessity of putting it in just the form in which it had been suggested.

Mr. Koo said that he also wished to remind the members of the committee, who had sat on Senator Underwood's Sub-committee on Chinese Tariff, of the statement which he (Mr. Koo) had made in the sub-committee

that that declaration of intention not to disturb the present administration could not be reasonably construed to preclude the Chinese people from realizing a legitimate aspiration to make the Chinese Maritime Customs Service an institution more national in character. Though the present system of administration had been in existence for nearly 60 years, very few Chinese had been trained by that service. Out of 44 Commissioners of Customs, distributed among the treaty ports, he was not aware of a single post being at present occupied by a Chinese. He had no desire to make any particular comment on this state of affairs, but he merely wished to throw some light on the subject in order to make clear the point he had in mind. The services of the present Maritime Customs administration had been valuable and efficient, as had been often testified to by Chinese officials in many ways, but there was nevertheless a very general feeling on the part of the Chinese people that more Chinese should be trained to assume the functions of the more responsible posts in the service. Mr. Koo felt confident, however, that in suggesting to give the Declaration of the Chinese Delegation the solemnity of a public announcement at a plenary session of the Conference, his friend and colleague, Mr. Balfour, had no desire to see the policy, embodied in the declaration, invested with the character of permanency. Senator Underwood's statement that the present customs treaty was drawn up to meet only the present temporary conditions in China coincided with the understanding of the Chinese Delegation and the aspirations of the Chinese people, who looked eagerly toward the earliest restoration of full tariff autonomy.

Upon being put to vote, the treaty relating to China's

tariff was unanimously adopted by the Conference on February 6, 1922.[6]

The Tariff Revision Commission of 1922 at Shanghai. The Customs Treaty drawn up by the Washington Conference provided in an Annex to Article I that, " with a view to providing additional revenue to meet the needs of the Chinese Government," the schedule of duties on imports into China which had been fixed by the Tariff Revision Commission, which sat at Shanghai in 1918, should " forthwith be revised so that the rates of duty shall be equivalent to 5 per cent. effective, as provided in the several commercial treaties to which China is a party." The revised schedule to be thus drawn up was to be made effective as soon as possible, but not earlier than two months after its publication by the Commission.

The Tariff Revision Commission duly met at Shanghai in 1922 with Admiral Tsi Ting-kan as chairman. Some discussion was had as to the period to be selected during which the prevailing prices were to be accepted as the valuations to be adopted by the Commission. It was finally agreed to accept the Chinese proposal that this period should be six months, from October, 1921, to March, 1922, with, however, the reservation proposed by the British Delegation that a system of index numbers should be used in the case of piece goods.[7]

[6] It is possible that some misunderstanding may arise from certain remarks made by Senator Underwood in the United States Senate at the time the Tariff Treaty was under consideration by that body. Senator Underwood at the time, defending the treaty, said that it had met the wishes of the Chinese Delegation. It is true that the Chinese Delegation preferred that the Conference should adopt the treaty rather than that no agreement should be reached and thus China obtain no relief whatever in the matter of its maritime customs. But, as the foregoing account has shown, the Chinese Delegation never departed from its desire that China should obtain complete tariff autonomy at as early a date as the Powers might be willing to agree to it.

[7] As to this mode of determining values, and as to other more or

The Peking Tariff Conference of 1926. Because this Conference adjourned without reaching any final agreements, and, therefore, without making any changes whatsoever in the tariff situation in China as it has been described in the preceding pages, it is not necessary to refer except in a most general and brief manner to the work of that body.

The Conference was called in pursuance of Articles II and III of the Washington Nine Power Treaty Relating to the Chinese Customs Tariff which became effective on August 5, 1925. These Articles provided:

ARTICLE II. Immediate steps shall be taken through a Special Conference, to prepare the way for the speedy abolition of likin and for the fulfillment of the other conditions laid down in Article VIII of the Treaty of September 5, 1902, between Great Britain and China, in Articles IV and V of the Treaty of October 8, 1903, between the United States and China, and in Article I of the Supplementary Treaty of October 8, 1902, between Japan and China, with a view to levying the surtaxes provided for in those Articles.

The Special Conference shall be composed of representatives of the Signatory Powers, and of such other Powers as may desire to participate and may adhere to the present Treaty, in accordance with the Provisions of Article VIII, in sufficient time to allow their representatives to take part. It shall meet in China within three months after the coming into force of the present Treaty, on a day and at a place to be designated by the Chinese Government.

ARTICLE III. The Special Conference provided for in Article II shall consider in the interim provisions to be applied prior to the abolition of likin and the fulfillment of the other conditions

less technical details, see the article "Revision of the Chinese Treaty Tariff in 1922," by Clarence S. K. Chow, in the *Chinese Social and Political Science Review*, January, 1923. This article is reproduced in the *China Year Book*, 1925, pp. 460-467, together with the full text of the Chinese Import Tariff as revised by the Commission.

laid down in the Articles of the Treaties mentioned in Article II; and it shall authorize the levying of a surtax on dutiable imports as from such date, for such purposes, and subject to such conditions as it may determine.

The surtax shall be at a uniform rate of 2½ per cent. *ad valorem,* provided, that in case of certain articles of luxury which, in the opinion of the Special Conference, can bear a greater increase without unduly impeding trade, the total surtax may be increased but may not exceed 5 per cent. *ad valorem.*[8]

The provisions in the Sino-British, Sino-American and Sino-Japanese Treaties referred to in the foregoing Articles, it will be remembered, provide that when the Chinese Government shall have discarded completely as a means of raising revenue the levying of likin and other dues on goods at the place of production, in transit or at destination, that Government shall be permitted to levy a surtax on imports and exports, which surtax on imports in no case shall exceed the equivalent of 1½ times the import duties leviable under the Final Protocol of September 7, 1901; and on exports shall not exceed 7½ per cent. *ad valorem.*

It will be seen that, according to the treaty agreement under which it was assembled, the scope of the Conference was to be a very limited one, namely, to prepare the way for the abolition by China of likin taxes and the imposition of surtaxes of a limited amount when that abolition is achieved, and also to adopt interim provi-

[8] It will be remembered that, by the Resolution of the Washington Conference Regarding a Board of Reference for Far Eastern Questions, it was provided that the Special Tariff Conference provided for by the Customs Treaty was also to "formulate for the approval of the Powers concerned a detailed plan for the constitution of the Board." As has been earlier pointed out, because of the objection upon the part of the Chinese to the establishment and functioning of such a Board, the matter of its composition was not brought before the Special Conference.

sions to be applied prior to such abolition. However, the Chinese Government made it known that it was its desire that the scope of the Conference should be broadened so as to make it competent to consider the granting of complete tariff autonomy to China. This desire the Chinese Government made known in the invitation which it issued to the Powers to meet in Conference in Peking, in which invitation it noted the fact that, in the Washington Conference, the Chinese Delegation had expressly reserved the right of its Government to bring forward upon a proper occasion the matter of obtaining that complete tariff autonomy which the Washington Conference had not seen its way to grant.

This expressed desire upon the part of the Chinese Government met with a sympathetic response from the American Government which, in its reply to the Chinese Note, dated September 3, 1925, and circulated to the other Powers concerned, said:

> The United States is ready to appoint its delegates to the Special Conference on Chinese tariff matters provided for in the Treaty of February 6, 1922, and is furthermore willing, either at that Conference or at a subsequent time, to consider and discuss any reasonable proposal that may be made by the Chinese Government for a revision of the treaties on the subject of the tariff.

The British position with reference to the matter of China's tariff autonomy was stated in a more guarded manner. In the official instructions to the British delegates to the Conference, dated September 18, 1925, after calling attention to the terms of the Washington Treaty under which the Conference was to meet, the British Minister of Foreign Affairs, Mr. Austen Chamberlain, said:

While the specific tasks of the Special Conference are thus defined, His Majesty's Government look to it as affording an opportunity for the Treaty Powers to show their real friendship for China and their practical sympathy with the desire of the Chinese to reform their fiscal system, and on such lines as will give reasonable security and encouragement to international trade, and thus make possible the progressive growth of China's liberty of action in this sphere.

It is furthermore to be observed that, in these instructions it was declared:

His Majesty's Government recognize that the consolidation of the unsecured debts [of China] is one of the tasks which confront the Conference, but they consider that this task should be regarded only as a secondary part of the function of the Conference.

Here made its entrance a matter which, though not specified in the Washington Treaty, received considerable discussion in the Conference but resulted in no common agreement.

The Conference met in its first and only plenary session on October 26, 1925, the following Powers being represented: China, United States, Belgium, Denmark, France, Great Britain, Italy, Japan, The Netherlands, Norway, Portugal, Spain, and Sweden.

At this plenary session the desire of China that she should obtain complete tariff autonomy was expressed by the Chief Executive of the Chinese Republic in his welcoming address, in the statement of His Excellency Shen Jui-lin at the time of his selection as Chairman of the Conference, and in the opening presentation of China's desires by Dr. C. T. Wang, who asked that the Powers should formally declare to the Chinese Government their respect for its tariff autonomy and their intention to remove all the tariff restrictions contained

in existing treaties. Simultaneously Dr. Wang declared, China would abolish likin, which abolition would take effect not later than January 1, 1929.

Prior to the convening of the Conference China had put into force a so-called "National Tariff" which was applicable to the nationals and commodities of those Powers which were not entitled by treaties to the conventional or treaty tariff of China. Previously to the application to all the Powers of this National Tariff, Dr. Wang, in behalf of China, asked that provision be made for an interim surtax of 5 per cent. on ordinary goods, of 30 per cent. on wine and tobacco (constituting what were termed Grade A luxuries) and 20 per cent. on Grade B luxuries, that is, commodities fairly describable as luxuries but not so dominantly so as wine and tobacco.

It will not be necessary to state *seriatim* the replies made by the other Delegations in the Conference to these proposals of China. It is sufficient to say that, without considerable difficulty, the Powers were persuaded in the sub-committee on Tariff Autonomy to agree, "in principle," that China should obtain complete tariff autonomy, and that this autonomy should become effective on January 1, 1929, provided that, in the meantime, China should have succeeded in abolishing likin, and agreements were reached with regard to certain other matters.

After the plenary session which has been spoken of, the Conference worked in various sub-committees,—on Program and Procedure, on Tariff Autonomy, on Provisional Measures, on Purposes to which the Proceeds of the Surtaxes are to be Devoted, on Likin, on Rates of Surtaxes, on Luxury Surtaxes, on the Levying of Interim Surtaxes, etc.—the intention being that the conclusions of these sub-committees should be reported for final action thereupon to the Conference in plenary session. In fact, however, as has been already said, no other such plenary

session was held. Early in April, 1926, all of the Chinese delegates and commissioners with the exception of His Excellency W. W. Yen and Admiral Tsai Ting-kan left Peking, so that, from that time until July 3, when the Conference adjourned, it was not possible for the other Delegations to do more than have informal meetings with one another. At the time of that adjournment the following statement was made to the press:

> The delegates of the Foreign Powers to the Chinese Customs Tariff Conference met at the Netherlands Legation this morning. They expressed a unanimous desire to proceed with the work of the Conference at the earliest possible moment when the delegates of the Chinese Government are in a position to resume discussion with the foreign delegates of the problems before the Conference.

Since the adjournment or, rather, since the informal termination of the sessions of the Conference, various statements, emanating more or less directly from the Governments of the different Powers, have been made with regard to the apportionment of the blame for the failure of the Conference to reach agreement before the continuation of its meetings became impossible by reason of the absence of the Chinese Delegates. Into the merits of this controversy it is not necessary for the present treatise to enter, but it may be worth while to indicate some of the points that were discussed in the sub-committee meetings, and regarding which complete agreement of opinion could not be reached.

Apparently, Japan was willing that China should obtain complete tariff autonomy only upon condition that she should at once again tie her hands, so far as certain imports from Japan were concerned, by signing a treaty with Japan according to which China would agree that the duties upon these imports would not, for a term of years, be higher than certain specified *ad valorem* per-

centages. This position upon the part of Japan was explainable, even if not defensible, by reason of the fact that, beyond doubt, Japan's commercial and industrial interests stand in greater danger of being prejudicially affected by increased import duties on Chinese imports than do the interests of the other Powers. It is, however, to be said that Great Britain's interest in having low rates maintained upon the imports of high grade piece goods, sugar, and woolens is very considerable. The United States, by reason of the character of its exports to China is, perhaps, the one among the Greater Powers which stands to lose the least, materially speaking, by granting full tariff autonomy to China.[9]

Considerable discussion was had in the sub-committees as to what commodities should be classed as luxuries, and as to the amount of surtax that China should be permitted to levy upon such as were determined to be luxuries.

There was also a great deal of discussion as to the purposes to which China should pledge herself to devote the increased revenues which she would obtain if and when she was permitted to levy the surtaxes. It was agreed that some of these proceeds should be earmarked for the payment by China of some of the foreign loans upon which she is in default, but there was no agreement as to what loans should receive the benefit of this pledge. For example, Japan desired, but could not obtain the agreement to this of the other Powers, that the so-called Nishihara loans should be included in the consolidation

[9] As to this see the valuable memorandum entitled "Chinese Trade and Customs Control," prepared by Mr. F. R. Eldridge, Chief of the Far Eastern Division of the United States Department of Commerce, for the Conference on American Relations, held September 17-20, 1925, at the Johns Hopkins University, and included in the Report of that Conference (Johns Hopkins Press, 1925).

and refunding of China's debts which all agreed should be effected.[10] In this connection it should be said that the British delegation strongly urged that a considerable portion of the increased revenues that would result from the surtaxes should be devoted to constructive public works, and especially to railway development in China.

A further point of difference which developed in the Conference was as to whether the undertaking upon the part of China to abolish likin should be regarded as integrally related to the undertakings upon the part of the foreign Powers to surrender their treaty rights of control over China's customs, so that one promise should be regarded as the reciprocal of the other, or whether the two undertakings were to be regarded as independent of each other. The second was the point of view insisted upon by the Chinese, though this position was not made as plain as it might have been at the time the proposition to abolish likin was first presented. It does not need to be said that an acceptance of the first point of view would mean that the failure upon the part of China to abolish, in fact, the collection of likin by the local Chinese authorities would furnish ground for the Treaty Powers to continue to insist upon their old treaty rights with reference to the Chinese customs.[11]

[10] There seemed to be a general opinion, informally expressed, that, in order to put China again in a satisfactory financial situation, it would be necessary to include her domestic as well as her foreign debts in any consolidation and refunding scheme that might be agreed upon.

[11] As agreed upon in sub-committee, the declarations regarding tariff autonomy and the abolition of Likin read as follows:

"The Delegates of the Powers assembled at this Conference resolve to adopt the following proposed articles relating to tariff autonomy with a view to incorporating it together with other matters to be hereafter agreed upon in the treaty which is to be signed at this Conference.

"The Contracting Powers other than China hereby recognize China's right to enjoy tariff autonomy, agree to remove the tariff restrictions

With regard to this matter of the abolition by China of likin and of similar transit or destination taxes, it was generally believed that the Central Government of China would, in fact, find it impossible, as a practical proposition, at least within the immediate future, to prevent the local authorities from levying and collecting such taxes, or, at any rate, that the Central Government would not be able to do so, unless it were able to compensate the local authorities for the revenues which they would surrender by foregoing to levy and collect likin and other taxes which, whatever their name or purporting character, amount to transit taxes. Therefore, various schemes were discussed at the Conference, formally and informally, which involved setting aside a certain percentage of the increased revenues which China would receive from the surtaxes in order to constitute a fund from which the provincial and other local Chinese authorities could be reimbursed for the losses of revenues sustained by them from abandoning likin and similar taxes, or for reimbursing merchants who, in fact, might be compelled to pay these transit charges. Thus, for example, at the meeting of the Sub-committee on Tariff Autonomy and Abolition of Likin, held on November 3, 1925, the following formulated proposal was presented by the American Delegation.[12]

(a) The Chinese Delegation have asked, in Dr. Wang's speech at the opening session of this Conference on October 26th, that

which are contained in existing treaties between themselves respectively and China, and consent to the going into effect of the Chinese National Tariff Law January 1, 1929.

"The Government of the Republic of China declares that likin shall be abolished simultaneously with the enforcement of the Chinese National Tariff Law, and further declares that the abolition of likin shall be effectively carried out by the first month of the eighteenth year of the Republic of China (January 1, 1929)."

[12] The text of this proposal is that given in the "Press Release" of the American Department of State of November 4, 1925.

the Powers declare their respect for the principle of China's tariff autonomy and agree to the removal of tariff restrictions contained in existing treaties. They have affirmed that it is the intention of the Chinese Government to abolish likin. They have asked that interim surtaxes be levied and that agreements which may be concluded at this Conference shall be made effective at an early date.

(b) Desiring to follow out as closely and as far as possible the program which has been proposed by the Chinese Delegation, and hoping that this Conference may arrive at agreements which will make possible the realization of China's aspirations and at the same time properly safeguard the legitimate interests of all Powers and peoples who will be affected—

(c) We are prepared in accordance with the provisions of the Washington Treaty to authorize at once the levying of the surtax of two and one-half per cent. and as soon as the requisite schedules can be prepared to authorize the levying of a surtax of five per cent. on luxuries.

(d) We are prepared to proceed at once with the negotiation of such an agreement or agreements as may be necessary for making effective other provisions of the Washington Treaties of February 6, 1922.

(e) We affirm the principle of respect for China's tariff autonomy and are prepared to negotiate a new treaty that shall give effect to that principle, and which shall make provision for the abolition of likin, for the removal of tariff restrictions contained in existing treaties, and for putting into effect of the Chinese national tariff law.

To carry out the provisions of the Washington Treaty and at the same time proceed with the larger program contemplated, we suggest:

(1) That the Powers other than China authorize the levying of a surtax of two and one-half per cent. to be effective on all goods on February 1, 1926, and that there be prepared immediately a schedule of luxuries upon which a rate of five per cent. shall be authorized, to be effective not later than July 1, 1926. The increased revenues thus derived shall be held by the customs

administration subject to such disposition as may be agreed upon by this Conference.

(2) That provision shall be made for the levying of the full amount of these surtaxes at the land frontiers.

(3) That a new treaty be made which shall provide:

(1) Three months after the treaty here concluded shall come into force the Chinese shall be at liberty as an interim measure and until tariff autonomy shall become effective to impose a new and uniformly enforced schedule of duties at rates from five per cent., the present rate, to twelve and one-half per cent. on imports and from five per cent., the present rate, to seven and one-half per cent. on exports.

(2) That from the same date the rates of duty levied at all land frontiers shall be the same as those levied at the maritime frontiers.

(3) That the increase of the customs revenues derived from putting into effect these provisions shall be accumulated by the customs administration and applied for the purposes hereinafter specified.

(4) That likin and related internal taxes which may be agreed upon shall be abolished.

(5) That for the purpose of abolishing likin, funds from the custom revenues shall be apportioned among the provinces in lieu of likin.

(6) That if likin be collected anywhere in violation of agreements entered into for its abolition, the taxpayer shall be entitled to a refund from the customs administration of the full amount which he paid as likin.

(7) That the increase in the customs revenues derived from the increase in rates of duty shall be devoted to the following purposes:

(a) Compensation to the provinces in lieu of likin.

(b) Payment of rebate charges.

(c) Refunding of the unsecured debts.

(d) Administrative expenses of the Central Government.

(8) That subject to the fulfillment of the provisions of the Articles 4, 5, 6, and 7 above, the present treaty restric-

tions on the Chinese tariff shall cease to be effective and the Chinese national tariff shall come into force on January 1, 1929, as suggested by the Chinese Delegates.

(9) That an effort be made to devise a plan whereby it may be reasonably expected that this treaty will go into effect at an early date after signature.

(10) That if not ratified by a majority of the contracting parties before January 1, 1928, there shall convene on May 1, 1928, a conference of representatives of the contracting parties for the purpose of deciding whether likin has been abolished and of negotiating any further agreements that may need to be arrived at with regard to the subject-matter of this Treaty.

Before the same sub-committee the Japanese presented the following proposal:

(1) The contracting Powers, other than China, hereby solemnly declare their recognition of the principle that, as an inherent right of a sovereign State, China is to enjoy full autonomy with respect to customs tariff.

(2) That China shall recover the exercise of her tariff autonomy in the manner indicated in the following paragraphs.

(3) China shall establish immediately a national tariff law with a schedule appertaining thereto, to be put into force within a period of three years and upon the abolition of the likin by China, as declared by her.

(4) During the interim period recommended in the preceding paragraph, China may levy on articles of import a surtax as authorized in paragraph two of the Washington Treaty.

(5) During the same interim period, China, on the one hand, and the other contracting Powers, on the other, shall conclude severally treaties, which may incorporate reciprocal conventional tariffs to be applied on certain special articles if so desired by both parties. The new treaties so concluded shall continue in force for a certain definite period.

(6) The National Tariff Law mentioned in paragraph 3 shall become operative, so far as the Treaty Powers are concerned,

simultaneously with the enforcement of the treaties above mentioned.

(7) The new treaties to be concluded shall supersede the existing treaties of other contracting Powers in matters relating to customs tariff.

CHAPTER XXXII

Inland Navigation

In most of the developed countries of the world the rights of inland navigation are reserved for citizens or subjects of those countries, or, at the most, granted to foreigners only under special conditions and under severe restrictions. In China, however, by treaties beginning with the Sino-British treaty of 1858, the principal of the inland waterways have been made navigable for trade by foreigners.

Article X of the Sino-British treaty of 1858 reads:

> British ships shall have authority to trade upon the Great River (Yangtze). The Upper and Lower Valley being, however, disturbed by outlaws, no port shall be, for the present, open to trade, with the exception of Chenkiang, which shall be opened in a year from the date of the signing of the Treaty.
>
> As soon as peace shall have been restored, British vessels shall also be admitted to trade at such ports as far as Hankow, not exceeding three in number, as the British Minister, after consultation with the Chinese Secretary of State, may determine shall be ports of entry and discharge.[1]

The precedent thus set of granting to foreign vessels the right to navigate inland waters of China has, as will presently be pointed out, been extended to other of the great rivers of China, and, of course, such rights granted to vessels of a particular nationality became available to

[1] Hertslet's *China Treaties*, I, 22.

the vessels of all the other Powers entitled to Most-Favored-Nation treatment. Before referring to these other extensions it is, however, worth noting that an effort was made at one time by several of the Powers to sustain the thesis that China had, by what can be spoken of as a " blanket " concession, opened up all of her inland waters to navigation for trade by the foreign vessels of the Treaty Powers.

In support of this contention reference was made to the provisions of the Sino-British treaty of 1858 which granted to British subjects the right to travel in all parts of the interior of China (Article II), that is, outside the limits of the " Treaty Ports," and which provided that British merchants might " hire whatever boats they please for the transport of goods or passengers " (Article XIV). Thus, in 1866, we find the Shanghai General Chamber of Commerce taking this ground, which was strongly contested by the Chinese authorities. This Chinese contest was supported by the American Minister to China, who, writing to the American Consul General at Shanghai, said:

The whole tenor of Article IX (of the Sino-British treaty) limits travelling in the interior of China by such native agencies and appliances as are obtainable on the spot; and the two expressions "hiring persons" and "hiring vessels" must be understood by this intention, and be held to mean native coolies and cartmen and boats. I confirm the opinion of Sir Frederick Bruce, referred to by you, as being that which was the understanding when the treaty was made. To allege that these expressions can include a foreign steamer and her foreign captain and engineer, even if the crew are natives, involves an interpretation contrary to Article XLVIII, which limits the ports of trade for British vessels to those previously mentioned. . . .I cannot, therefore, admit the inference that permission given to travel in the interior by Article IX involves the use of all or any vessels that the traveller pleases; much less can I assent to

the remark that the connivance or consent of the Chinese local authorities during the past few years [*i. e.*, during the Tai Ping Rebellion] precludes them from all discussion as to the true meaning of this article. . . .If no Western Power allows foreign-owned and foreign-manned vessels to navigate their inland streams at pleasure, even when the rights of extraterritoriality do not exist to prevent the local authorities summarily punishing misdeeds, how much more should the weakness of Chinese magistrates not be put to this strain, and they be forced to adopt a practice fraught to themselves, and foreigners too, with the greatest hazards, merely to save a few merchants on the seaboard from suffering loss on their steamers.[2]

This position was approved by the American Secretary of State in his letter of August 7, 1866, to the American Minister at Peking.[3]

The position of the American Government has since been acquiesced in by the other Powers. However, by specific grants, China has opened other of her rivers to navigation for trade by foreign vessels. Thus, by a special Article of the Sino-British treaty of February 4, 1897, it was agreed that Wuchow-fu, in Kwangsi, and Samshui City and Kong Kun Market, in Kwangtung, should be opened as Treaty Ports and Consular Stations, " with freedom of navigation for steamers between Samshui and Wuchow and Hongkong and Canton, by a route from each of these latter places to be selected and notified in advance by the Imperial Maritime Customs, and that the following four places shall be established as ports of call for goods and passengers, under the same Regulations as the ports of call on the Yangtze River, namely, Kongmoon, Komchuk, Shiuhing and Takhing.[4]

It is not feasible to set forth the many specific engage-

[2] *U. S. Diplomatic Correspondence*, 1866-1867, I, 513.
[3] *Id.*, 536.
[4] MacMurray, p. 97.

ments into which China has entered with the Treaty Powers with regard to the particular inland waters which are to be open to navigation by foreign vessels, and with regard, also, to the improvement of the navigability of such waters and the maintenance of aids to navigation, such as lights, buoys, etc. It is desirable, however, to consider certain general Regulations which have been issued with regard to navigation.

Inland Steam Navigation Regulations of 1898. By amended regulations issued by the Commissioner of Customs, July 28, 1898, the rules relating to inland steam navigation were revised and amended. The more important of the rules thus fixed were as follows:

The expression "inland waters" was declared to have a meaning similar to that attached to places in the interior, according to the Chefoo Convention.[5]

These waters are declared to be open to all such steamers, native or foreign, as are specially registered at the Treaty Ports for that trade, but they are required to confine their trade to the inland waters and not to proceed to places outside of China. Such registered steamers may ply freely within the waters of the ports without reporting their movements to the Customs officials, but are obliged to report their departure from and return to the port. No unregistered vessel is to be allowed to ply inland.

Dutiable cargo shipped under these Regulations at any Treaty Port on a registered steamer for conveyance to the interior must

[5] "The words 'nei-ti,' inland, in the clause of Article VII of the Rules appended to the Tariff regarding carriage of imports inland, and of native produce purchased inland, apply as much to places on the sea-coasts and river shores as to places in the interior not open to foreign trade; the Chinese Government having the right to make arrangements for the prevention of abuses thereat." Par. 4, Section III. In the Regulations the reference is wrongly given to Article IV.

be declared at the Custom House and pay on export such duties as the Customs decide to be leviable. Dutiable cargo brought from inland to a Treaty Port is to be in like manner dealt with by the Custom House there. As to duties to be paid by vessels belonging to foreign merchants, they are to be in accordance with the treaty tariff.

Cargo landed or shipped inland is to pay at the place of landing or shipment whatever duty and likin local regulations call for.

Offenses inland, whether against revenue laws or affecting person or property, are to be dealt with by the local authorities of the district in the same way as if they were committed by their own people; but if the vessel concerned is foreign-owned or the Chinese implicated is a Chinese employed on board such foreign-owned vessel, the local authorities are to communicate with the nearest Commissioner of Customs, and the Commissioner, in turn, with the Consul, who may send a deputy to watch the proceedings. If the foreigner claims the status of a foreigner, he is to be treated in the manner prescribed in the treaties where foreigners without passports are arrested, and sent to the proper Consul through the Commissioner of Customs at the nearby port.

If any such steamer passes any inland station or likin barrier that ought to be stopped at without stopping, or if any of the passengers, crew, etc., create trouble inland, the vessel may be fined or punished according to the station regulations, and the Customs may cancel the ship's papers and refuse permission for her to trade inland again.

In cases where foreign-owned vessels are concerned, the merchants interested may elect to bring the whole case and the question of fine before a Joint Investigation Court, to be dealt with according to the regulations for cases of fine and imprisonment in the year 1868.[6]

By Supplementary Rules promulgated in September, 1898, the following was declared:[7]

[6] MacMurray, p. 159.
[7] MacMurray, p. 163.

All inland-going steamers are to pay tonnage dues once in four months at the treaty tariff rate at the port where registered.

Steamers are not permitted to land cargoes except at places ordinarily recognized as places of trade for native vessels.

The customs authorities at the Treaty Ports are required to give certificates detailing the cargoes shipped there under their cognizance, which certificates are to form the basis for duty payments at way stations, and the vessels, unless suspected of smuggling, are not to be detained for rigid examination.

The provincial authorities are to appoint at each Treaty Port a responsible officer, who is to collect on provincial account the prescribed duties on goods coming from or going inland. He is to receive in one lump sum all the dues and duties that a vessel lading for a given destination is bound to pay at the various stations it will pass on its way. Upon presentation of the receipt for this payment the goods covered are to be exempt from levy of duty or vexatious examination.

Yangtze Regulations of 1898. For trade on the Yangtze special regulations were issued in August, 1898, by the Commissioner of Customs.[8]

The merchant vessels of the Treaty Powers were authorized to trade at certain specified Treaty Ports and to land and ship goods in accordance with special regulations at certain enumerated non-treaty ports. Shipment or discharge of cargo at other points on the river was prohibited. However, it was provided that passengers and their baggage might be landed or shipped at any of the regular passenger stations—the baggage, however, upon pain of confiscation, not to contain articles subject to duty.

[8] MacMurray, p. 159.

Merchant vessels trading on the river were divided into three classes: (1) sea-going vessels for voyage up river beyond Chinkiang; (2) river steamers running regularly between any of the river ports to Shanghai and any river port; and (3) small craft—lorchas, junks, etc. These vessels to be dealt with according to treaty provisions, the rules of the ports traded at, and the special provisions of the Yangtze Regulations thereinafter contained.

Revision of Rules in 1902. Article X of the Sino-British Treaty of 1902 provided that the rules relating to inland navigation should be revised and added to, and such revision and addition was attached to the treaty as Annex C. By these new regulations, British (and, therefore, other foreign) steamship owners are to have the right to lease warehouses and jetties on the banks of waterways for terms not exceeding twenty-five years, with option of renewal on terms to be mutually agreed upon. Such jetties, however, are not to be erected in such position as to obstruct the inland waterway or interfere with navigation. The sanction of the nearest Commissioner of Customs is to be obtained, which sanction is not to be arbitrarily withheld.

Foreign merchants are to pay taxes and contributions on these warehouses and jetties on the same footing as Chinese owners of similar properties.

Only Chinese are to be employed to reside in the warehouses so leased, but the foreign merchants may visit such places from time to time to look after their affairs. The jurisdiction of the Chinese authorities over the Chinese in foreign employment is not to be diminished or interfered with in any way.

Steam vessels are declared liable for any loss caused to riparian proprietors by damage done to the banks or works on them or for losses caused by such damage. If

it is thought necessary to prohibit the use of shallow waterways by foreign launches, as likely to cause injury to the banks, this shall be proper provided a similar prohibition applies to Chinese launches.

"The main object of the British Government," it is declared, "in desiring to see the inland waterways of China opened to steam navigation being to afford facilities for the rapid transport of both foreign and native merchandise, they undertake to offer no impediment to the transfer to a Chinese company and the Chinese flag of any British steamer which may now or hereafter be employed on the inland waters of China, should the owner be willing to make the transfer. In the event of a Chinese company registered under Chinese law being formed to run steamers on the inland waters of China, the fact of British subjects holding shares in such company shall not entitle the steamers to fly the British flag."

Registered steamers and their tows are forbidden to carry contraband.

A registered steamer may ply within the waters of a port, or from one open port to another open port or ports, or from one open port or ports to places inland, and thence back to such port or ports. She may, on making due report to the Customs, land or ship passengers or cargo at any recognized places of trade passed in the course of the voyage; but may not ply between inland places exclusively except with the consent of the Chinese Government.

Any cargo and passenger boats may be towed by steamers. The helmsmen and crew of any boat towed shall be Chinese. All boats, irrespective of ownership, must be registered before they can proceed inland.[9]

[9] Article VIII of the Sino-Japanese Treaty of 1903 also provided for a revision of the Inland Steam Navigation Regulations, and this revision, practically identical with that attached to the British treaty, is contained in Annexes 1 and 2 to the Japanese treaty.

Foreign Warships on Inland Waters. Some differences of opinion have arisen between the Chinese authorities and the Treaty Powers with regard to the right of the warships of the latter to visit inland ports in China. This right has been insisted upon by the Powers, but in order to sustain their contention they have been obliged to give very liberal interpretations to the single treaty stipulation to which they have been able to refer. This stipulation is found in Article LII of the Sino-British Treaty of 1858, which reads as follows:

"British ships of war coming for no hostile purpose, or being engaged in the pursuit of pirates, shall be at liberty to visit all ports within the dominions of the Emperor of China, and shall receive every facility for the purchase of provisions, procuring water, and, if occasion require, for the making of repairs. The commanders of such ships shall hold intercourse with the Chinese authorities on terms of equality and courtesy."

This treaty provision was appealed to by the American authorities in 1903, when the American gunboat *Villalobos* was sent to certain places on the upper Yangtze and protest thereto filed by the local Taotai. The correspondence that then ensued having been sent to Washington, the Secretary of State wrote to the Secretary of the Navy:

> The Department is inclined to the opinion that Rear-Admiral Evans [then in command of the Asiatic Fleet] is right in his contention that our gunboats may visit the inland ports of China, including those which are not treaty ports. Even if this right were not granted us by treaty, Rear-Admiral Evans is unquestionably right in using it when like ships of other Powers are constantly doing so. . . . This Department thinks, however, that Article LII of the British Treaty of 1858 with China which is reproduced in Article XXXIV of the Austro-Hungarian Treaty of 1869, gives full authority for his course.[10]

[10] *U. S. For. Rels.*, 1903, pp. 81

Foreign Surveys of Chinese Ports. In 1890 the question arose as to the right of foreign war vessels to make surveys and soundings in Chinese closed ports without first obtaining the consent of the Chinese authorities. The right to do so was insisted upon and based upon the provision of Article IX of the Sino-American Treaty of 1858, which declares:

> Whenever national vessels of the United States of America, in cruising along the coast and among the ports opened for trade for the protection of the commerce of their country, or for the advancement of science, shall arrive at any of the ports of China, the commanders of said ships and the superior local authorities shall, if it be necessary, hold intercourse on terms of equality and courtesy in token of the friendly relations of their respective nations; and the said vessels shall enjoy all suitable facilities on the part of the Chinese Government in procuring provisions or other supplies and making necessary repairs. And the . . . national vessels of the United States shall pursue . . . pirates, and if captured deliver them over for trial and punishment.

Writing to the Chinese Foreign Office on August 4, 1890, the American Minister argued that the coasts of China, if uncharted, are very dangerous to navigation; that the Chinese authorities had failed to chart them, place buoys, or erect lighthouses; that ships have the right to seek refuge in Chinese ports in case of accident or dangerous weather, or to pursue pirates; that they cannot do so unless those ports have been surveyed and marked with buoys and lighthouses; and that, therefore, no objection should be raised by the Chinese officials to the exercise of a right on the part of foreign scientific officers to continue and complete the hydrography of all the ports of China.[11]

[11] *U. S. For. Rels.*, 1890, p. 194.

CHAPTER XXXIII

Foreign Troops in China

A respect in which China's sovereignty has been seriously limited and violated has been with regard to the stationing within her borders of foreign troops and police guards. In some cases there has been no treaty basis for the stationing of these troops or police agents; in other cases, the right so to do has been attempted to be founded upon agreements made by China, as, for example, with regard to the maintenance of railway guards; in still other cases, as, for example, with regard to guards for the Legations at Peking, and troops at points upon the railways between Peking and the Sea, there has been expressly given consent upon the part of China, namely, in the "Boxer Protocol of 1901."[1] In all cases, however, China has felt aggrieved that these armed bodies of men should be within her borders, and, as we shall see, this grievance was one the correction of which was strongly urged by the Chinese Delegation at the Washington Conference. Especially did China object to the maintenance of Japanese troops in Manchuria and at Hankow. A quite distinct, but allied, matter has been

[1] And, of course, in the various foreign "Settlements" or "Concessions" in various of the larger Treaty Ports, there have been, and are, bodies of municipal police organized and controlled by the governing bodies of the Settlements or Concessions.

the stationing within Chinese territorial and inland waters of foreign gunboats and other ships of war.[2]

At the eighth meeting of the Committee on Far Eastern Questions of the Washington Conference the Chinese Delegation brought forward a number of grievances which it asked should be considered with a view to correcting them in accordance with the general principles[3] which the Conference had already approved. Among the grievances thus cited were the maintenance upon Chinese territory, without China's consent, and against her protests, of foreign troops, railway guards, so-called "police boxes," and electrical wire and wireless installations.[4]

In the course of the statement which he made upon this occasion, Mr. Sze, speaking for his Delegation, said:

> The proposition surely stands self-evident that, if a nation asserts a right to maintain troops, or guards, or police, or to erect and operate systems of communication upon the soil of another State, whose sovereignty and independence and territorial and administrative integrity it has just solemnly affirmed and obligated itself to respect, upon that State should lie a heavy burden of proof to justify so grievous an infringement of the rights of exclusive territorial jurisdiction which international law as well as a general sense of international comity and justice, recognize as attaching to the status of sovereignty and independence.
>
> In behalf of my Government and the people whom I represent, I therefore ask that the Conference give its approval to the following proposition:
>
> "Each of the Powers attending this Conference hereinafter

[2] For an estimate of the injury done to China by the presence of Japanese troops in Manchuria, see Millard, *Democracy and the Far-Eastern Question*, p. 217 *et seq.*

[3] The four principles based upon the "Root Resolutions" which later became Article I of the Nine Power Treaty "Relating to Principles and Policies to be Followed in Matters Concerning China."

[4] The matter of wireless installations is considered in Chapter XXXVIII.

mentioned, to wit, the United States of America, Belgium, the British Empire, France, Italy, Japan, the Netherlands, and Portugal, severally declare that, without the consent of the Government of China, expressly and specifically given in each case, it will not station troops, or railway guards or establish and maintain police boxes, or erect or operate electrical communication installations, upon the soil of China; and that if there now exist upon the soil of China such troops or railway guards or police boxes or electrical installations without China's express consent, they will be at once withdrawn."

Upon request of the Committee, the Chinese Delegation, at the ninth meeting, submitted a Memorandum showing, according to its information, the foreign troops, police, "railway guards" and electrical installations upon the soil of China without the consent of the Chinese Government.

This information [the Memorandum declared] is furnished simply in order to show the extent to which China's territorial and administrative integrity is now being violated, and not as implying that the Chinese Government will be contented with the abatement of these specific violations of her sovereign rights; for China, as declared in the resolution which it has proposed, desires that there should be a general or comprehensive declaration upon the part of the powers represented in this conference that, without China's consent, expressly and specifically given in each case, they will not maintain troops or police boxes, or railway guards or electrical installations upon China's soil, with the result that upon the powers will lie the burden of establishing their right to do so in each case in which they may assert a right or claim to maintain upon China's soil such troops, police boxes, railway guards, or electrical installations.

The resolution proposed by the Chinese delegation will not affect the rights of the Powers obtained under the protocol agreement of 1901, nor their right to maintain police forces in their various municipal settlements and concessions. If, as to these matters, any revision should be desired, separate discussion or negotiation may be had.

Japanese Statement. To this statement upon the part of the Chinese Delegation, the Japanese Delegation submitted a rejoinder, which said that it was "persuaded that the withdrawal or abolition of the foregoing troops, railway guards, police stations, and telegraph and wireless installations should not be immediately decided simply because the authorities have not given them their express consent. There are specific reasons for the existence of such institutions in each special case. We are prepared to explain these specific reasons which have brought about the existing conditions in the cases in which Japan is concerned."

Mr. Sze replying, in behalf of the Chinese Delegation, said that the Chinese Delegation would be glad to have the Japanese Delegation furnish the data which it claimed to have in substantiation of its view that immediate withdrawal should not be provided for. Mr. Hanihara, of the Japanese Delegation, then read the following statement:

The Japanese Delegation wishes to explain, as succinctly as possible, why and how the Japanese garrisons in various parts of China have come to be stationed there. At the outset, however, I desire to disclaim most emphatically that Japan has ever entertained any aggressive purposes or any desire to encroach illegitimately upon Chinese sovereignty in sending or maintaining these garrisons in China.

(1) Japanese railway guards are actually maintained along the South Manchuria Railway and the Shantung Railway.

With regard to the Shantung Railway guards, Japan believes that she has on more than one occasion made her position sufficiently clear. She has declared and now reaffirms her intention of withdrawing such guards as soon as China shall have notified her that a Chinese police force has been duly organized and is ready to take over the charge of the railway protection.

The maintenance of troops along the South Manchuria Railway stands on a different footing. This is conceded and recog-

nized by China under the Treaty of Peking of 1905. (Additional Agreement, Art. II.) It is a measure of absolute necessity under the existing state of affairs in Manchuria—a region which has been made notorious by the activity of mounted bandits. Even in the presence of Japanese troops, those bandits have made repeated attempts to raid the railway zone. In a large number of cases they have cut telegraph lines and committed other acts of ravage. Their lawless activity on an extended scale has, however, been effectively checked by Japanese railway guards, and general security has been maintained for civilian residents in and around the railway zone. The efficiency of such guards will be made all the more significant by a comparison of the conditions prevailing in the railway zone with those prevailing in the districts remote from the railway. The withdrawal of railway guards from the zone of the South Manchuria Railway will no doubt leave those districts at the mercy of bandits, and the same conditions of unrest will there prevail as in remote corners of Manchuria. In such a situation it is not possible for Japan to forego the right, or rather the duty, of maintaining railway guards in Manchuria, whose presence is duly recognized by treaty.

(2) Towards the end of 1911 the first Revolution broke out in China, and there was complete disorder in the Hupeh district which formed the base of the revolutionary operations. As the lives and property of foreigners were exposed to danger, Japan together with Great Britain, Russia, Germany, and other principal Powers, dispatched troops to Hankow for the protection of her people. This is how a small number of troops have come to be stationed at Hankow. The region has since been the scene of frequent disturbances; there were recently a clash between the North and South at Changsha, pillage by troops at Ichang, and a mutiny of soldiers at Hankow. Such conditions of unrest have naturally retarded the withdrawal of Japanese troops from Hankow.

It has never been intended that these troops should remain permanently at Hankow, and the Japanese Government have been looking forward to an early opportunity of effecting complete withdrawal of the Hankow garrison. They must be assured, however, that China will immediately take effective measures for

the maintenance of peace and order and for the protection of foreigners, and that she will fully assume the responsibility for the damage that may be or may have been done to foreigners.

(3) The stationing of the garrisons of foreign countries in North China is recognized by the Chinese Government under the protocol relating to the Boxer revolution of 1900. Provided there is no objection from the other countries concerned, Japan will be ready, acting in unison with them, to withdraw her garrison as soon as the actual conditions warrant it.

(4) The Japanese troops scattered along the lines of the Chinese Eastern Railway have been stationed in connection with an inter-allied agreement concluded at Vladivostok in 1919. Their duties are to establish communication between the Japanese contingents in Siberia and South Manchuria. It goes without saying, therefore, that these troops will be withdrawn as soon as the evacuation of Siberia by the Japanese troops is effected.

The Chairman of the Committee, Secretary Hughes, asked Mr. Hanihara if his Delegation relied upon Article II of the Additional Agreement to the Sino-Japanese Treaty of December 22, 1905. Mr. Hanihara said that it did.[5]

With regard to Police or "Police Boxes," as distinguished from Troops, Mr. Hanihara, in behalf of the Japanese Delegation, made the following statements:

[5] This Article is as follows:

"Article II. In view of the earnest desire expressed by the Imperial Chinese Government to have the Japanese and Russian troops and railway guards in Manchuria withdrawn as soon as possible, and in order to meet this desire, the Imperial Japanese Government, in the event of Russia agreeing to the withdrawal of her railway guards, or in case other proper measures are agreed to between China and Russia, consent to take similar steps accordingly. When tranquillity shall have been re-established in Manchuria, and China shall have become herself capable of affording full protection to the lives and property of foreigners, Japan will withdraw her railway guards simultaneously with Russia."

In considering the question of Japanese consular police in China, two points must be taken in account.

(1) Such police do not interfere with Chinese or other foreign nationals. Their functions are strictly confined to the protection and control of Japanese subjects.

(2) The most important duties with which the Japanese police are charged are, first, to prevent the commission of crimes by Japanese, and second, to find and prosecute Japanese criminals when crimes are committed.

In view of the geographical proximity of the two countries, it is natural that certain disorderly elements in Japan should move to China, and, taking advantage of the present conditions in that country, should there undertake unlawful activities. When these lawless persons are caught in the act of crime by the Chinese police, it is not difficult for that police force to deal with the case. The culprits are handed over as early as possible to the Japanese authorities for prosecution and trial. But when the criminals flee from the scene of their acts, it is in many cases hard to discover who committed the crimes and what were the causes and circumstances that led up to their commission. This is more difficult for the Chinese authorities, as they have no power to make domiciliary visits to the homes of foreigners, who enjoy extraterritorial rights, or to obtain judicial testimony in due form from such foreigners.

Without the full cooperation of the Japanese police, therefore, the punishment of crime is, in a great many cases, an impossibility, and those who are responsible for lawbreaking escape trial and punishment.

This tendency is especially evident in Manchuria, in which region hundreds of thousands of Japanese are resident. In places where the Japanese police are stationed, there are far fewer criminal cases among Japanese than in places without Japanese police. Lawless elements constantly move to districts beyond the reach of Japanese police supervision.

Apart from the theoretical side of the question, it will thus be observed that the stationing of Japanese police in the interior of China has proved to be of much practical usefulness in the prevention of crimes among Japanese residents, without interfering

with the daily life of Chinese or of other foreign nationals. The Japanese policing provides a protection for the Chinese communities which at present their own organization fails to provide.

The Japanese Delegation is in possession of knowledge and information as to the actual conditions prevailing in China and especially in Manchuria. However, it is unnecessary to go into details at the present stage.

Chinese Reply. Mr. Sze, replying to these Japanese views, said that both the stationing of troops and the maintenance of " police boxes " constituted serious invasions of China's sovereignty and integrity, and that there was nothing in international law permitting one country to station troops or police upon the soil of another, especially over the protest of the latter. While expressing admiration for the efficiency of the Japanese police system and thanking Mr. Hanihara for his explanation of conditions, he could not accept that as justifying the presence of Japanese police, and he hoped that Japan would be able to check Japanese law-breakers at the source and to prevent their coming to China.

At the tenth meeting of the Committee the Chinese Delegation submitted an elaborate statement, which, in part, read:

The Chinese Delegation wishes to make it clear that its proposal is advanced not only because China has not given its consent to these breaches of its sovereign rights, but also because the breaches were deliberately made and insistently continued even in the face of the formal protests of the Chinese Government and the unanimous opposition of the Chinese people. In view of the fact that the infringements in question are of many years standing, it is believed the Conference will agree that China has not unduly pressed for the termination of them.

As to the withdrawal of Japanese troops from the Shantung Railway, the Japanese Delegation states that "she has on more than one occasion made her position sufficiently clear. She has

declared and now reaffirms her intention of withdrawing such guards as soon as China shall have notified her that a Chinese police force has been duly organized and is ready to take over the charge of the railway protection."

It should be noted that China has repeatedly sent notice to Japan that her police forces are well organized and prepared to assume the protection of the railway; and the Chinese Delegation, on behalf of the Chinese Government, hereby again offers to take charge of the Shantung Railway with a well organized police force of its own and to protect the same.

As to the grounds for stationing Japanese troops along the South Manchuria Railway, Japan appears to rely on the additional agreement to the treaty of December 22, 1905, between Japan and China, and on the disturbed conditions in Manchuria. The treaty of December 22, 1905, provides:

"ARTICLE I. The Imperial Chinese Government consents to all the transfers and assignments made by Russia to Japan by Articles V and VI of the treaty of peace above mentioned." The pertinent article of the treaty of peace of September 5, 1905, between Russia and Japan, is Article VI which provides for the transfer by Russia to Japan, with the consent of China (which was procured as above stated), of the South Manchurian Railway, "together with all rights, privileges and properties appertaining thereto in that region."

Article III of the same treaty provides:

"1. To evacuate completely and simultaneously Manchuria except the territory affected by the lease of the Liao-tung Peninsula, in conformity with provisions of additional Article I, annexed to this treaty; and

"2. To restore entirely and completely to the exclusive administration of China all portions of Manchuria now in occupation or under the control of the Japanese or Russian troops, with the exception of the territory above mentioned.

"The Imperial Government of Russia declares that they have not in Manchuria any territorial advantages or preferential or exclusive concessions in impairment of Chinese sovereignty or inconsistent with the principle of equal opportunity."

Article II of the additional agreement referred to provides:

"ARTICLE II. In view of the earnest desire expressed by the Imperial Chinese Government to have the Japanese and Russian troops and railway guards in Manchuria withdrawn as soon as possible, and in order to meet this desire, the Imperial Japanese Government, in the event of Russia's agreeing to the withdrawal of her railway guards, or in case other proper measures are agreed to between China and Russia, consent to take similar steps. Accordingly, when tranquillity shall have been re-established in Manchuria and China shall have become herself capable of affording full protection to the lives and property of foreigners, Japan will withdraw her railway guards simultaneously with Russia."

Russia has withdrawn her troops from Manchuria, but Japan has retained hers, as she states, under Article II of the additional agreement quoted. China has time and again offered to take over the protection of the South Manchuria Railway and requested Japan to withdraw her troops. If Japan continues to maintain that the alleged existing state of banditry in Manchuria requires the presence of Japanese troops as a "measure of absolute necessity," China may never have an opportunity to show that she is capable of affording protection to the lives and property of foreigners. Moreover, the mere presence of Japanese troops themselves makes for friction with the natives and arouses rather than allays disorders throughout the adjacent districts. The Japanese delegation refers to a "large number of cases" of cutting "telegraph lines" and committing "other acts of ravage." These cases do not appear to be serious ones. Similar cases occur every day even in the best regulated States. But in China especially many cases of disturbance may be traced directly to the presence or activities of Japanese troops along the railway.

Consequently China asks to be given an opportunity to show that she can maintain order along the South Manchuria Railway. The opportunity can only be granted if Japan will withdraw her forces, which China asks be done for the reasons given. The present conditions of Japanese military control have continued for over 15 years and on the present contentions of the Japanese Delegation may be prolonged indefinitely at the will of Japan. China can not continue to submit to these infractions of its terri-

torial and administrative integrity and asks the conference to take definite measures to bring these irritating controversies to a close.

The Japanese delegation refers to the presence of Japanese troops at Hankow and gives as a reason the revolution of 1911 and subsequent disorders. It should be pointed out, however, that Great Britain, Russia, Germany, and the other Powers forthwith withdrew their troops and that Japan is the only country that insists on their continuance. This insistence is based on continued disorders, but it will be noted that the other Powers have not felt constrained to again introduce troops into that region. The disorders, therefore, must be of minor importance, as compared with those of 1911, which caused the entry of foreign military forces. The only special reason that Japan can advance therefor is the presence of larger numbers of Japanese in that region than subjects of any other Power. But this has never been a valid reason for quartering troops on the soil of a friendly country for an indefinite period. It is said that at Hankow the Japanese forces have erected substantial barracks of a more or less permanent character.

The Japanese Delegation declares that Japan is looking forward to an early opportunity of effecting the complete withdrawal of the Hankow garrison. China now offers Japan this opportunity by undertaking to maintain peace and order and the protection of foreigners.

Japan further asks that China will fully assume the responsibility for damage that may be or may have been done to foreigners. This is an unusual condition and one which it is believed no sovereign power would give in advance. The question of damages already sustained, if any, by Japanese subjects is a matter which may readily be settled by a mixed board or commission and need not, therefore, be made a condition for the withdrawal of Japanese troops. No government can absolutely guarantee the protection of foreigners any more than it can absolutely guarantee the protection of its own nationals. Moreover, every violation of that degree of protection which international law assumes that a government shall give is not a ground for military intervention or the dispatching of troops to the district

in disorder. If the rule were the contrary every country would have garrisons of foreign troops stationed at various quarters within its territory. The normal procedure is for a foreign government, whose nationals are threatened on account of disorders in a friendly country to call upon the government of that country to accord them adequate protection. If, nevertheless, loss of life or damages to property is sustained, the usual course is to have an investigation of the facts, and, if they warrant it, to request amends by way of pecuniary compensation. It is well known that the Chinese Government has in the past made every effort to satisfy demands in the most liberal manner.

As to the stationing of garrisons of foreign countries in North China, under the protocol of 1901, China admits that such troops are quartered in China with her express and formal approval. While China is desirous eventually of having these troops removed, it wishes to defer the consideration of this question at the present conference, limiting itself now to the request for the cessation of violations of its territorial and administrative integrity which have taken place without her free consent.

It is said that Japanese troops along the Chinese Eastern Railway are maintained in connection with an inter-allied agreement concluded in Vladivostok in 1919, and for the purpose of establishing communication between the Japanese contingents in Siberia and South Manchuria.

The inter-allied agreement of 1919 was concluded as a result of negotiations extending through the summer and autumn of 1918 with reference to the allied military control of the Trans-Siberian Railway, and this agreement, approved by all of the allied representatives at Vladivostok and by certain Russian authorties, expressly provided for supervision by international or Russian control and not by any one power. Moreover, the purpose of this agreement was to keep the Siberian Railway opened as a line of communication for the Czecho-Slovak troops which were operating in Siberia. The object of inter-allied control of the railroad was to avoid control by a single country which might arouse suspicion as to the political intentions of any such country. However, it appears that under this agreement Japan sent such a large number of troops as to indicate a departure on its

part from the purposes of the agreement. As the objects and purposes of the allied agreement have long since disappeared, the other allied troops have long ago been withdrawn from Siberia and the Chinese Eastern Railway, but the Japanese troops still remain in both localities without any apparent vestige of authority. As to the necessity for maintaining troops along the Chinese Eastern Railway to establish communication between the Japanese contingents in Siberia and South Manchuria, it need only be pointed out that this argument might be made the excuse for placing additional troops in Chinese territory in order to establish communication with garrisons already quartered at various points. As the general question of the Chinese Eastern Railway is a special subject on the American agenda, it is though fit to postpone further discussion of matters relating to it until that point of the agenda is taken up.

To endeavor to defend the maintenance of Japanese police in Manchuria by saying that they do not interfere with Chinese or other foreign nationals, that their functions are restricted to the protection and control of Japanese subjects, and that their duties are to prevent the commissions of crime by Japanese and to apprehend Japanese criminals is to lead the conference far afield from the point at issue, namely, the illegal and unwarranted infraction of Chinese territorial and administrative integrity. The reasons advanced have never been regarded in international law and practice as sufficient to justify the institution of police administration in a foreign friendly country.

The Chinese Delegation questions the statement that the Japanese police do not interfere with Chinese. It can present numerous instances in which Japanese police have arrested Chinese and otherwise molested them on Chinese soil. The argument that under the system of extraterritoriality inconveniences occur in the arrest of Japanese offenders or in procuring evidence for use in trial are only arguments in favor of the surrender of extraterritorial rights. Other powers enjoying these rights in China do not pretend that they carry with them the right of police. The ground of extraterritoriality being disposed of, it may be said that mere numbers of Japanese residents in Manchuria is not a sufficient or proper ground for the establishment of a police administration.

In conclusion it may be pointed out that the extension of Japanese military or police control over Chinese districts has been gradually expanding from very small beginnings in about 1900 and spreading out in various directions wherever an opportunity offered itself. China asks the conference to take appropriate measures to prevent further aggressions of this character and to relieve China of these impositions under which it is laboring to maintain its independence and integrity.

Japanese Reply. At the thirteenth meeting of the Committee of the Whole, Mr. Hanihara, in behalf of the Japanese Delegation, submitted a reply to the Chinese statement that has been given. The essential portions of this reply were as follows:

With reference to the Shantung Railway Guards, China has declared her intention to send a suitable force of Chinese police for the protection of the Railway. She has, however, so far failed to send any such police force to whom the Japanese troops can actually hand over the duties.

The fact pointed out by the Chinese Delegation that Russia has withdrawn her troops from Manchuria apparently refers to the condition of things created by the existing anomalous situation in Russia. It does not prove that Russia has definitely agreed to the withdrawal of her troops as is contemplated in the Sino-Japanese Agreement of 1905.

That Agreement also provides that when tranquillity shall have been re-established in Manchuria and when China shall have become herself capable of affording full protection to the lives and property of foreigners, Japan will withdraw her railway guards simultaneously with Russia. Referring to that provision I would like to invite the attention of the Committee to the actual conditions described in the written statement which I shall presently lay before you.

As for the contention that China should be given an opportunity of proving her ability to maintain peace and order in Manchuria, the reply is obvious: Japanese interests and Japanese

security are matters of such importance that she cannot afford to take obvious risks.

With regard to the stationing of Japanese troops at Hankow, I believe that I have made our position sufficiently clear at a previous meeting of the Committee, and I shall not attempt to repeat it. I would only add that in many cases of local disturbances in and around Hankow, the menace to the security of foreign communities in general assumed so serious a proportion that those various communities organized volunteer corps for their self-protection, and that the Japanese garrison was called upon to extend active assistance and cooperation to the foreign volunteer corps.

In connection with the subject of Japanese troops stationed along the Chinese Eastern Railway, criticisms have been made by the Chinese Delegation of the continued presence of Japanese expeditionary forces in Siberia. The Japanese Delegation desires to reserve the discussion of this question for a suitable opportunity which will later on be afforded by the Conference. For the present, I shall content myself by pointing out that the stationing of Japanese troops along the Chinese Eastern Railway is due to the Inter-Allied Agreement of 1918, in which China participated, and that those troops will be withdrawn immediately upon the evacuation of Maritime Province by Japanese forces.

In connection with this reply, Mr. Hanihara filed with the Committee Appendices giving facts, as the Japanese Delegation conceived them to be, regarding conditions of law and order or disorder in Manchuria and elsewhere in China.[6]

[6] The Chinese Delegation was rather surprised to find these appendices published in the report of the Conference (Senate Document No. 126), since these documents, while circulated by the Japanese Delegation, were never discussed in the Conference, or, as the Chinese Delegation supposed, released for publication. The Chinese Delegation itself circulated statements of facts showing the extent to which the Japanese troops in China had caused, rather than prevented, disorder, and that, indeed, in a considerable number of cases, they had even cooperated, under the direction of the Japanese General Staff, with lawless elements in China.

Commission of Inquiry Proposed. In the discussion which followed the presentation of these statements, M. Viviani, of the French Delegation, suggested that, since a commission of jurists had already been provided for, charged with the function of investigating upon the spot the question of extraterritoriality, it should also be authorized to examine as to the necessity for the continued maintenance of foreign troops upon Chinese soil.

Mr. Sze said that his Delegation did not deem it wise that a commission of inquiry of such a nature should be sent to China; that there was no analogy between the question of foreign troops in China which was based upon no treaty right, and the maintenance of extraterritorial jurisdiction which was supported by treaties to which China was a party. He feared that the sending of such a commission would tend to aggravate rather than to relieve the feeling which the Chinese had upon the subject.

After some further discussion it was agreed that the whole matter should be referred to the Drafting Committee.

Chinese Objection. In this Committee considerable discussion was had as to the agency through which an inquiry was to be made as to whether conditions in China were such as to justify the continued stationing of foreign troops in China. That respect for China's sovereignty required that these troops should be removed as soon as conditions would possibly justify was conceded by the representatives of all the Powers. At the same time it developed that the Chinese Delegation was unwilling, and quite properly so, that, without the consent and cooperation of the Chinese Government, the foreign Powers should assume and exercise the function of making an inquiry into China's domestic affairs. At the fifth

meeting of the Committee Dr. Koo made the following statement:

Whatever may be the practice of nations under international law as to the sending of troops into a foreign State for the protection of their nationals, it is recognized by the civilized world that the sending of such troops is, and rightfully can be, only a temporary measure in order to meet emergencies that threaten imminent danger to the lives and property of the nationals of the State taking such action, and, upon the passing of such emergency, the troops sent should be immediately withdrawn. It is furthermore recognized that the obligation to make such withdrawal should not, as a general principle, be made dependent upon an inquiry into the domestic conditions of the country into which such troops are sent, but, in every case, their retention should depend upon clearly evident conditions of disorder in the localities where such troops are stationed such as to make demonstrable the inability or indisposition of the local territorial sovereignty to afford adequate protection to the lives and property of the nationals of the State sending troops.

Resolution Adopted. The following resolution, adopted by the Drafting Committee, was reported to the Committee of the Whole at its seventeenth session.

Whereas the Powers have from time to time stationed armed forces, including police, in China to protect the lives and property of foreigners lawfully in China;

And whereas it appears that certain of these armed forces are maintained in China without the authority of any treaty or agreement;

And whereas the Powers have declared their intention to withdraw their armed forces now on duty in China without the authority of any treaty or agreement, whenever China shall assure the protection of the lives and property of foreigners in China;

And whereas China has declared her intention and capacity to assure the protection of the lives and property of foreigners in China;

Now to the end that there may be a clear understanding of the conditions upon which in each case the practical execution of those intentions must depend;

It is resolved that the diplomatic representatives in Peking of the powers now in conference at Washington, to wit: the United States of America, Belgium, the British Empire, France, Italy, Japan, the Netherlands, and Portugal, will be instructed by their respective Governments, whenever China shall so request, to associate themselves with three representatives of the Chinese Government to conduct collectively a full and impartial inquiry into the issues raised by the foregoing declarations of intention made by the powers and by China and shall thereafter prepare a full and comprehensive report setting out without reservation their findings of fact and their opinions with regard to the matter hereby referred for inquiry, and shall furnish a copy of their report to each of the nine Governments concerned which shall severally make public the report with such comment as each may deem appropriate. The representatives of any of the powers may make or join in minority reports stating their differences, if any, from the majority report.

That each of the Powers above named shall be deemed free to accept or reject all or any of the findings of fact or opinions expressed in the report, but that in no case shall any of the said Powers make its acceptance of all or any of the findings of fact or opinions either directly or indirectly dependent on the granting by China of any special concession, favor, benefit, or immunity, whether political or economic.

Chinese Statement. Mr. Sze at this time, in behalf of the Chinese Delegation, made the following statement (which was later repeated in the fifth plenary session of the Conference):

The Chinese Delegation takes note of the Resolution with regard to the withdrawal of foreign troops from China and ex-

presses its appreciation of the offer of the eight Powers approving this Resolution to instruct their respective diplomatic representatives at Peking to associate themselves with representatives of the Chinese Government, when that Government shall so request, in order to conduct collectively a full and impartial inquiry as to the necessity for continuing to maintain foreign armed forces in China. The Chinese Delegation will assume, unless now notified to the contrary, that, should their Government at any future time desire to avail itself of the foregoing offer inquiries and resulting recommendations may be asked for with reference to the presence of foreign armed forces at particular places or in particular localities in China.

The Chinese Delegation desires further to say with reference to the general matter of maintaining armed forces by a nation or nations within the borders of other States which have not given their express consent thereto, that it is its understanding that, according to accepted principles of international law, the sending or stationing of such forces can rightfully be only a temporary measure in order to meet emergencies that threaten imminent danger to the lives and property of the nationals of the States taking such action, and that, upon the passing of such emergency, the forces sent should be immediately withdrawn. It is also the understanding of the Chinese Delegation that the obligation to make such withdrawal cannot, as a general principle, be rightfully postponed until the Government of the State where they are located has consented to an inquiry by the representatives of other Powers into its own domestic conditions as regards the maintenance of law and order, and a report has been made declaring that there is no necessity for the presence of such foreign armed forces. In other words, it is the understanding of the Chinese Delegation that accepted international law recognizes the basic right of every sovereign State to refuse its consent to the sending into or the stationing within its borders of armed forces, and that while it may, by the exercise of its own will, consent that an inquiry shall be made as to the necessity in fact of the continuance within its borders of such foreign armed forces as may be therein, such action upon its part, or a Resolution by other Powers offering their cooperation in such an in-

quiry, is not to be deemed in derogation or limitation of the inherent right of a sovereign State to refuse entrance to, or further continuance within its borders, of foreign armed forces.

Mr. Sze asked whether "railway guards" were included within the armed forces referred to in the resolution. Mr. Root said that they should be included, and, therefore, asked that the first paragraph of the resolution be amended by inserting the words "and railway guards" after the words "including police." As to this, he said "it was not a matter of terms. It was not a question of the name that happened to be given to the person who was employed in a public capacity with arms to preserve order. He might be called a policeman, or he might be called a guard, or what not."

These amendments were accepted, and, as thus amended, the resolution was unanimously adopted (China not voting) by the Committee, and later approved by the Conference in its fifth plenary session, held February 1, 1922.

Since the Washington Conference Japan has withdrawn her troops from Hankow, and, of course, from the province of Shantung.

Since the Washington Conference Japan has continued to maintain troops in Manchuria along the South Manchuria Railway Zone. On December 15, 1925, the Japanese Ministry of War issued a statement in which it said:

> The Japanese forces in Manchuria have strictly refrained from any manner of interference in the present (Civil) warfare, their whole effort being confined to the protection of our nationals and Japan's rights and interests. With the latter end in view, the commander of the Japanese garrisons has given both sides an understandable warning.

It scarcely needs be pointed out that international law does not sanction the stationing of troops by one country

within the territories of another country, even if their operations are limited to those stated in this declaration. In fact, however, the Chinese are convinced that Japan has, upon occasion, used her troops and other powers and influence in Manchuria in order to give support to Marshall Chang Tso-lin. Especially did they make this charge with reference to the recent time (1925-6) when Marshal Chang was hard-pressed by the army of General Kuo Sung-lin, who had been Marshall Chang's chief subordinate, but had rebelled against him. This charge Japan energetically denied, but it is to be noted that, later, at a banquet given to Marshall Chang by General Kodama, Governor of the leased area of Kuantung, Marshall Chang publicly thanked the Japanese for the aid he had received from the Japanese.[7]

Foreign Garrisons in China Under the Boxer Protocol. In addition to being permitted to maintain Legation guards at Peking, the Treaty Powers, by Article IX of the Final Boxer Protocol of 1901, have the right to maintain garrisons at certain points between Peking and the sea, of which Tientsin is one, the purpose being to avoid the danger in the future of having communications between the capital and the sea cut by forces hostile to the Powers. The forts at Taku and other fortifications that might interfere with free communication between Peking and the sea were also to be demolished, and the Chinese required to undertake that such communications should never be closed.

By Identic Notes of July 15, 1902,[8] the five Powers

[7] *Cf. The China Weekly Review*, August 21, 1926, p. 289, and the *Japan Chronicle*, July 29, 1926.

[8] For correspondence in 1912 in regard to this arrangement and the foreign military control of the railway from Peking to Shanhaikuan, see the note to Article IX of the Boxer Protocol as printed in MacMurray, p. 318.

maintaining at that time a Provisional Government over Tientsin —that is, France, Germany, Great Britain, Italy and Japan—proposed that the Chinese Government should undertake not to station or march troops within twenty Chinese li (*i. e.*, between 6 and 7 miles) of the city or of the foreign troops stationed at Tientsin, and, furthermore, that the jurisdiction of the commanders of the foreign troops should continue to extend to a distance of two miles on either side of the railway; but that the Viceroy should have the right to maintain a personal bodyguard in the city of Tientsin, not exceeding 300 men, and also to maintain an efficient body of river police along the lines of the river even where it might run within two miles of the railway. The right of the foreign troops to occupy summer quarters was also to be recognized by the Chinese.

These proposals were accepted by the Chinese Government with the interpretative reservation that the military control along the railway should relate only to offenses against the railroad or telegraph lines, or against the allies or their property.

During the revolutionary troubles of 1911-1912 the Treaty Powers deemed it necessary to institute military control over the Peking-Mukden Railway as far as Shanhaikuan. This control is still maintained. At the time the road was taken under control by the Powers different sections of it were allocated to the different Powers, each of which was to be responsible for guarding the section thus assigned to it. These allocations, roughly speaking, were as follows: Peking (Fengtai Junction) to Tientsin, to Great Britain; Tientsin and a small section eastward, to France; the branch line to Taku, to Italy; the Tientsin-Shanhaikuan section to the Germans, Americans and Japanese. During the Great War the French section was turned over to the Japanese, and the German section to

the Americans. The control now exercised by the British over their section is represented by only a few small posts.

During the last two or three years, when civil war has raged to such an extent in China, military operations by the various Chinese military forces have frequently taken place at or near Tientsin and between that city and Peking and thus, in fact, free communication between Peking and the sea has, upon a number of occasions, been prevented. This interruption to free communication became so serious in the early part of 1926 that, at the direction of the representatives of the Protocol Powers at Peking, the American Minister, on March 10, sent a note to the Chinese Minister of Foreign Affairs, in which, after referring to mines which had been placed by the Chinese in the Taku channel, and to the notification which had been sent to pilots that shipping would not be allowed to go in or out, continued:

> In the circumstances the communication between Peking and the sea is entirely interrupted in violation of the provisions of the Protocol of 1901, and the diplomatic representatives aforementioned protest most urgently against this state of affairs and demand that the Government of China bring about the immediate cessation by both of the mutually hostile factions of the armed forces of China of these acts of obstruction to open communication to the sea through Taku channel, reserving to themselves to collaborate for the protection of foreign shipping and for the maintenance of free access to the port of Tientsin should the Chinese Government fail to take forthwith action to that end in fulfillment of the purposes of the Proctocol of 1901.

Whether the provisions of the Protocol were applicable to military operations upon the part of contending Chinese factions as well as to national Chinese forces which might be conceived to be hostile to the foreigners, such as were the Boxers, is a question upon which there is, apparently, opportunity for argument.

CHAPTER XXXIV

Foreign Post Offices in China

At the eighth meeting of the Committee of the Whole of the Washington Conference, Mr. Sze, in behalf of the Chinese Delegation, made the following statement:

At the session held on November 21, the Conference declared that it was the firm intention of the Powers represented to respect the sovereignty, the independence, and the territorial and administrative integrity of China; and to provide the fullest and most unembarrassed opportunity to China to develop and maintain for herself an effective and stable government.

It will have already appeared that, in application of these two principles, China is asking not merely that existing treaty or conventional limitations upon the autonomous and unembarrassed exercise by her of her territorial and administrative powers, should be removed as rapidly and as completely as circumstances will justify, but that conditions shall be corrected which now constitute a continuing violation of her rights as an independent State. . . .

. . . A specific illustration of a *violation* of China's sovereignty and territorial and administrative integrity, as distinguished from *limitations* based upon agreements to which China has been a party, was presented to the Conference for correction last week and had to do with the maintenance of foreign postal services upon Chinese soil.

At an earlier meeting of the Committee (the sixth) Mr. Sze had said:

China requests that the powers assembled in the conference agree at once to abolish all postal services now maintained by them in China. She bases her request upon the following propositions:

1. China has organized and is now conducting a postal system covering the entire country, and maintaining relations with all foreign countries adequate to meet all requirements. The transmission of postal matter is a government monopoly, the first paragraph of the postal statutes of October 12, 1921, reading: "The postal business is exclusively conducted by the Government."

2. The existence of foreign post offices interferes with and makes more difficult the development of this system, and deprives it of a revenue which legally and equitably should belong to it.

3. The maintenance by foreign Governments of post offices in China is in direct violation of the latter's territorial and administrative integrity, and rests upon no treaty or other legal right.

Early in the sixties of the last century foreign post offices began to open branches and agencies in the particular treaty ports of China. The opening of these offices was not based on any treaty provision or concession. Their existence and gradual increase was merely tolerated by the Chinese Government.

About the same time a regular service for the carriage of mails was established on foreign lines in connection with the customs, operating chiefly between the numerous ports on the coast of China and those far up the Yangtze River. This service continued to work and to improve its machinery year by year. By Imperial decree of March 20, 1896, this system was developed into a distinct Chinese postal system and placed under the general direction of the inspector general of customs. Finally, by Imperial decree of May 28, 1911, the system was taken from under the administration of the inspector general of customs and developed into an independent system operating directly under the minister of posts and communications. Since that date the system has operated wholly as one of the administrative services of the Chinese Government.

On March 1, 1914, China gave her adherence to the Universal Postal Convention, and since September 1 of that year she has

continued as a member in good standing of the Universal Postal Union.

As the Universal Postal Union does not recognize the right of any country to maintain post offices in another country which is a member of the postal union, the Chinese Delegation brought up the question of alien establishments in China at the Universal Postal Congress opened at Madrid, on October 1, 1920. The question of their withdrawal was regarded as within the purview of their respective foreign offices and no definite decision was reached. A measure was passed, however, to the effect that only such foreign postal agencies could be considered as within the union as were established in a foreign country not itself within the Universal Postal Union, of which China has been a member since September 1, 1914.

The Chinese post office maintains the cheapest general service in the world. . . .

In spite of these very cheap rates and the very high transportation costs in maintaining long courier lines where no modern facilities are available, the surplus of receipts over expenditures has been steadily increasing. All profits are being put into improvements in the service to the smaller villages inland. Its income in 1920 was $12,679,121.98 and its expenditures $10,467,-053.07, thus leaving a surplus for the year's operation of $2,212,068.91.

Senders of registered articles, parcels, insured letters, and express articles are entitled to claim indemnity in case of loss by the post office. Although in 1920 over 37,000,000 such articles were posted, less than 400 claims for indemnity were made, the percentage being about 1 in 90,000.

There has been a decrease of 30 per cent. in the number of insured letters posted in the past four years, though other mail matter has increased by 50 per cent. in the same time. This is considered as indicating a growing public confidence in the other non-insured services.

The Chinese post office has over 3,000 interpreter employes, and every office serving places of foreign residence in China is amply supplied from this large number of interpreters to cope with all foreign correspondence.

The efficiency of the Chinese postal service is further guaranteed by strictly civil service methods in appointments of staff. Employes enter only after a fair examination, both mental and physical. Postmasters, even in the larger cities, are selected from the most efficient of the employes; never from outside the service. The penalty for invoking political aid is dismissal, and in practice is never done.

The post office functions under the same central administration over the entire country. In time of local disturbances and revolution the revolutionists have recognized the post office as a necessity to the welfare of the community and have always permitted it to continue its functions without change of staff or control.

Notwithstanding the disturbed condition of affairs in China during recent years, the system has been steadily developed since it was placed wholly under the direction and control of Chinese authorities. Mail matter posted has increased approximately 300 per cent. since 1911 (from 126,539,228 to 400,886,935 in 1920). Parcels posted have increased from 954,740 in 1911 to 4,216,200 in 1920, the increase being over 300 per cent.

There is now scarcely a Chinese village which is not served either by a post office, postal agency, or minor postal establishment. Major establishments (offices and agencies) have increased from 9,103 in 1917 to 10,469 in 1920. Minor establishments (town box offices and rural stations) have increased from 4,890 in 1917 to 20,806 in 1920. This makes a total of 31,275 places now provided with postal facilities, more than double the number of places served four years ago.

During and immediately following the war the Chinese post office transmitted through its money-order service over $10,000,000 for the British and French Governments, which were making payments to the families of over 100,000 Chinese laborers employed for work in connection with the war in France and Belgium. The Chinese post office was made use of by the Government bureaus concerned in tracing and locating relatives of deceased laborers and in determining the identity and other particulars of claimants. In this work the Chinese post office used its large force of very efficient inspectors and made no charge for investigations and reports.

An international money-order department is now functioning, conventions for the exchange of money orders being in successful operation between China and Great Britain, the Dutch East Indies, and Hongkong. It is hoped that it may soon be extended to other countries.

That this system is giving efficient and satisfactory service has been abundantly attested to by foreign observers. To quote from the Commercial Hand-Book of China, published by the United States Department of Commerce in 1920 (vol. 2, p. 106):

"The Chinese postal service has extended its facilities to every district in the country, including in many of the outlying districts extensive courier lines. In spite of unsafe conditions that have prevailed in certain sections of the country during the past few years, and notwithstanding the great difficulty of transportation in other sections, the Chinese postal service has been remarkably efficient, and one hears but little criticism in connection with its organization and general work. It reports that very few complaints concerning loss of mail or stolen mail are made, and, on the whole, it is rendering a very satisfactory postal service."

Notwithstanding the fact that China now has an efficient postal system, certain foreign Governments continue to maintain post offices in China. At the present time Great Britain, France, America, and Japan are maintaining and operating offices of this kind at a large number of places. The alien postal establishments in China as they stand at present are as follows: Great Britain, 12; France, 13; Japan, 124; United States, 1.

The Japanese establishments are classed as follows: First-class offices, 7; second-class offices, 23; third-class offices, 4; unclassified offices, 10; sub-offices, 3; box offices, 1; agencies, 33; letter boxes, 33; field post offices, 10.

Those post offices have their own postage stamps, and operate in every respect in direct competition with the Chinese System. It is to be noted, moreover, that these foreign offices are located at the chief centers of population, industry, and commerce. They are thus in a position where they can, so to speak, skim the cream of the postal business, since they are under no obligation to maintain offices at unimportant points, and, in fact, do not do so.

Parcels and mail matter entering China from abroad should pass a customs examination. With the exception of parcels from Shanghai and one or two other ports, however, it is a notorious fact that but few parcels or other articles transmitted by foreign post offices are ever examined. Cooperation between foreign postal establishments and the Chinese customs is extremely difficult and in practice has proven almost impossible. Thus the customs revenues are very materially affected, and foreign post offices become an efficient aid to smugglers of contraband, particularly of morphia, cocaine, and opium. On the other hand, parcels handled by the Chinese post offices are subject to rigid customs examination, duties being collected, in most cases, by the post office on behalf of the customs administration. The Chinese post office is thus working under a handicap in competition with those of other nations within its own territories.

It is submitted that if the necessity ever existed for the maintenance of foreign post offices in China, this necessity has now passed away. As early as April 20, 1902, the American minister at Peking reported to his Government (*United States Foreign Rels.*, 1902, p. 225):

"I have given such investigation as I have been able, and report that, in my judgment, foreign post offices in China, except at Shanghai, are not a necessity, because the Chinese postal service, under the imperial maritime customs, is everywhere giving satisfactory service, and is rapidly and effectively increasing and extending into the interior."

More recently the *Commercial Handbook of China,* from which we have already quoted, says:

"The developments of the Chinese postal service during the past decade have been so extensive and so favorable that there is in reality no longer any need for a continuance of the foreign post offices operated in that country."

It is to be noted, moreover, that the maintenance of these foreign offices rests upon no treaty or other legal right. Regarding this point, the American minister, in his communication to his country, of April 20, 1902, to which reference has already been made, said:

"The foreign post offices are being established principally for political reasons, either in view of their future designs upon the Empire, to strengthen their own footing, or because jealous of that of others. They are not established with the consent of China, but in spite of her. They will not be profitable. Their establishment materially interferes with and embarrasses the development of the Chinese postal service, is an interference with China's sovereignty, is inconsistent with our well-known policy toward the Empire, and I can not find any good reason for their establishment by the United States."

That China has never recognized any such right is evidenced by a communication that their postmaster general addressed to the postal union on March 18, 1915. After referring to pertinent provisions of the Universal Postal Convention and of the Règlement d'Exécution, the communication continued:

"Relying upon the principles inscribed in the Universal Postal Convention and in agreement on this point with the jurists in international law of all countries, China considers that by virtue of its entry into the union the offices maintained upon its territory by other countries of the union have ceased to have a legal existence. Although in consequence of the difficulties mentioned above and those that have their origin in the present events of the war, China has found herself obligated, in order not to impede the transmission of its mails, to continue temporarily for the purpose of its relations with other countries to have recourse to the intermediation of certain of the foreign post offices established upon its territory, or to accept this intermediation, it must declare that this course of action implies no recognition on its part of the legality of these offices, and, furthermore, that no status, in that respect, can be created by the written communications that have been or that may hereafter be exchanged in regard to them, either with those offices or with the administration to which they belong. China protests against the maintenance, by the majority of the foreign post offices operating upon its territory, of tariffs lower than those fixed by Article 5, of the Rome convention, for the payment of postage upon mails exchanged by those offices, either between themselves or with the countries to which they respectively belong.

"China, having adhered as from September 1 last to the Rome convention concerning the exchange of parcels post, must declare that what has been said above, in regard to the temporary continuation, necessitated by circumstances, of the intermediation of foreign post offices established upon its territory, applies likewise to the parcels post service. . . ."

In conclusion, China wishes to point out that, wholly apart from the financial loss suffered by her as a result of the existence of foreign post offices on her soil, and the obstacles placed thereby in the way of the development of her own postal system, the maintenance of such offices represents a most direct violation of her territorial and administrative integrity. It is one, moreover, that is peculiarly objectionable, since it is a constant, visible reminder to the Chinese people that they are not accorded the consideration given to other peoples. This necessarily has a tendency to lower the prestige of the Chinese Government in the eyes of her people, and to make more difficult the already difficult problem of maintaining a government that will command the respect and ready obedience of her population. From whatever standpoint it is viewed, the continuance of these foreign post offices upon Chinese soil should, therefore, be condemned.

At the seventh meeting of the Committee, the Chairman, Secretary Hughes, said that the United States was ready to give up its only post office in China (that at Shanghai) if the other governments maintaining postal establishments in China were willing to take similar action. The information possessed by the American Delegation, he said, was in accordance with the Chinese claims as to the efficiency of China's postal service.

Mr. Balfour suggested that the Chinese system had probably owed a good deal of its efficiency to the aid of the Frenchman who, as co-director general of the posts, had been at its head, and asked if it was the intention of China to continue to make use of his services.

M. Viviani said that France was willing to accede to China's desires if the other Powers would do the same.

if the present co-director were retained, and if the efficiency of the service were maintained.

Mr. Sze said that China had no intention of making any immediate radical changes in her postal administration.

Mr. Hanihara said that Japan had no desire to perpetuate the existing system of foreign post offices, but that actual conditions and necessities should be taken into consideration. "Information received by the Japanese Delegation," he said, "had convinced it that safety of communications in China was not assured, and on this ground there was some reason why the foreign post offices should not be withdrawn; as a practical measure it would be difficult to withdraw at once. The plain fact was that there were more Japanese in China, either as residents or travelers, than there were nationals of any other Power—possibly thirty or fifty times as many—and their activities were more varied. Japan had no objection to the withdrawal of the foreign post offices under the guarantees suggested by Mr. Balfour and M. Viviani (which the Japanese Delegation considered very necessary), but Japan asked that she be given time in order that it might be seen that no necessity or justification existed for the continued maintenance of the system; as it became evident that conditions warranted, Japan would be prepared to withdraw her post offices."

Mr. Sze asked of Mr. Hanihara whether he had in mind any period of time within which his country would withdraw its post offices, and if he had any suggestions to make as to the manner in which the Chinese postal service might be improved. As to his statement regarding the number of Japanese in China, Mr. Sze said that he knew of no principle of international law that recognized such a fact as a sufficient justification for the maintenance by one country of postal agencies upon the soil of another

country without that country's consent. He called attention to the fact that there were Chinese post offices at all the places where foreign offices were maintained.

To this Mr. Hanihara replied that he had not intended to state a principle, but only a fact. He suggested that the whole matter be referred for discussion to the Ministers of the various interested Powers at Peking who would be in a position to know when a withdrawal of the foreign post offices should be effected. This suggestion was not accepted by the Committee, and a sub-committee was appointed to draft resolution for withdrawal in accordance with the conditions which had been spoken of.

At the fifteenth meeting of the Committee of the Whole, held December 12, this sub-committee reported the following resolution as having been agreed upon:

A. Recognizing the justice of the desire expressed by the Chinese Government to secure the abolition of foreign postal agencies in China, save or except in leased territories or as otherwise specifically provided by treaty, it is resolved:

(1) The four powers having such postal agencies agree to their abandonment subject to the following conditions:

(a) That an efficient Chinese postal service is maintained;

(b) That an assurance is given by the Chinese Government that they contemplate no change in the present postal administration so far as the status of the foreign co-director general is concerned.

(2) To enable China and the Powers concerned to make the necessary dispositions, this arrangement shall come into force and effect not later than [the date January 1, 1923, was later inserted].

B. Pending the complete withdrawal of foreign postal agencies, the four Powers concerned severally undertake to afford full facilities to the Chinese customs authorities to examine in those agencies all postal matter (excepting ordinary letters, whether registered or not, which upon external examination appear plainly to contain only written matter) passing through them,

with a view to ascertaining whether they contain articles which are dutiable or contraband or which otherwise contravene the customs regulations or laws of China.

Japanese Statement. Senator Lodge stated that the above resolution had been read, amended, and approved in the full committee, but the date had been left open for consideration by the Japanese Delegates; and that he had since received a letter from Mr. Hanihara which he would now read:

December 9, 1921.

DEAR SIR: With regard to the proposed abolition of foreign postal agencies, I am happy to inform you that my Government have no objection to the initiation of the arrangement as from the date in the draft resolution—that is, not later than January 1, 1923.

In announcing this agreement of my Government, I am instructed to state before the committee their desire concerning the maintenance of efficient Chinese postal service substantially to the following effect:

Taking into account the fact that the proposed change in the postal régime in China can not fail practically to affect the Japanese to a much greater extent than any other nationals, the Japanese Government wish to place on record their desire that a suitable number of experienced Japanese postal officers be engaged by China, to promote the efficiency of the Chinese postal administration. The reasonableness of this desire will readily be appreciated, when it is considered that the Powers concerned have recognized the need of effective foreign assistance in the Chinese postal administration, and that no less than seventy British subjects and twenty Frenchmen are in that service, while Japan is there represented by only two experts.

(Signed) MR. HANIHARA.

The resolution reported by the sub-committee with the insertion of the date January 1, 1923, was thereupon put to vote and unanimously approved.

The resolution as approved by the Committee of the Whole was reported to the Conference in plenary session at the fifth session, held February 1, 1922, and adopted without amendment or debate.

At the fifteenth meeting of the Committee, Mr. Sze, in behalf of the Chinese Delegation, made the following statement, which he asked to be recorded:

> Since the establishment of her national postal service, China has at all times handled with efficiency all foreign mail. She appreciates that, with the withdrawal of foreign post offices from her soil, the amount of foreign mail to be handled by her own postal system will be increased. This increase she undertakes to handle with the same efficiency by making such additions to the personnel and equipment of her postal service as will be required. As soon as the Siberian route is re-opened for the transportation of foreign mail matter between Asia and Europe, steps will be taken to make arrangements for the transportation of such mail matter as was formerly transported by this route. As regards actual railway transportation of such mail China will hold herself responsible for uninterrupted service upon those railways or sections of railways within her jurisdiction which are under her own control and operation.

With reference to the maintenance of foreign post offices in China, it is worthy of note that, in the sub-committee dealing with the subject, the British representative, Sir Auckland Geddes, said that he understood that the proposed agreement would have no effect upon foreign post offices which were established in leased areas. The French representative said that this was a matter to be considered in connection with the more important question of "leased areas." The Japanese representative, Mr. Hanihara, said that he did not wish to see railway zones or leased areas included within the application of the proposed resolution. Sir Auckland, who had

drafted the resolution, said that it had not been his intention to have it apply to leased areas. Mr. Hanihara said that, according to his interpretation of the treaties between China and Japan, Japan had the right to establish post offices in the railway zones which were under her control. Asked by Mr Sze as to the treaty provisions to which he had reference, Mr. Hanihara said that the right was given by the Portsmouth Treaty of 1905, according to which Japan succeeded to the rights of Russia in the railway zones in South Manchuria, and that, both in the leased area and railway zones, Japan had every kind of authority, including that of taxation and postal administration.

This discussion led to the insertion in the first paragraph of the Resolution of the words " save or except in leased territories or as otherwise specifically provided by treaty." It was, however, apparent in the discussion which followed that Japan received no support from the other Powers for the proposition that her rights of administration in the Zones of the railways controlled by her carried with them the right to maintain in them post offices, or, indeed, to exercise any powers other than those of ordinary railway operation.

In this connection the fact is to be noted that the Resolution relating to Post Offices as finally framed and adopted exempted from its scope only rights " specifically " provided for by treaty, and it is clear that there is no *specific* right granted to Japan by the Portsmouth Treaty to establish post offices in her railway areas. In the Washington Conference the Japanese Delegation was asked to produce the treaty or article of a treaty giving Japan the right, and promised to do so, but, in fact, never did do so.

CHAPTER XXXV

Foreign Mining Interests in China

In the present chapter no attempt will be made to describe the extent of the probable mineral resources of China. The facts so far as they are known, or may be estimated, are summarized in the issues of the *China Year Book*.[1] Here the effort will be only to indicate, in general terms, the conditions under which, by Chinese law, or by treaties, mining rights may be acquired by foreign nationals, and the extent to which, especially with reference to coal and iron, the exploitation of China's mineral resources is controlled by foreign countries.

In theory, the original ownership of all minerals in the land is in the Chinese State, from which the right to undertake mining operations has to be obtained. In fact, however, this right of public ownership has not been strictly respected, and, in many instances, and especially in the case of small deposits, mining has been carried on without obtaining permission from the Peking Government. As regards iron, however, that Government has maintained its rights with comparative strictness, though it has granted many concessions to both foreigners and to natives.

[1] See also the references to authorities given by C. K. Leith in his article "The Mineral Resources of the Far East" in *Foreign Affairs* for April, 1926 (IV, pp. 432-442).

In 1914, by a series of laws or "Regulations," promulgated by presidential mandate, the Chinese Government sought to place upon a more definite and, to itself, a more satisfactory basis the conditions under which mining might be carried on in China. These laws have since been supplemented by other regulations.[2]

According to these laws, or "regulations" as they have been called, it is provided that mining rights are to be reserved to Chinese subjects, natural or naturalized, and to subjects of treaty nations "when doing joint business with subjects in China." "In such cases they (the subjects of treaty nations) must be subject to these regulations as well as other laws connected with them." There follows the important provision that "Foreigners will not be allowed to hold more than half of the total number of shares of the mining concern." (Article IV, par. 2.)

M. Julean Arnold in his *Commercial Handbook of China*[3] says that "prior to the promulgation of the regulations of 1914 a successful foreign form of investment in mining was the making of contracts with Chinese mining companies for the exclusive output of mines, or the exclusive selling agency of the output. This gave the foreign investor virtual control of the mine, and usually resulted in the sale by the foreign contractor to the company of the foreign mine machinery. This plan was adopted by the Japanese interests in the Han-Yeh-Ping Company, which in return for large loans to the company are entitled to a minimum amount of iron and steel annually, the minimum being at present more than the capacity of

[2] See the enumeration of these other laws and regulations given in the *China Year Book*, 1925, pp. 141-142. The text of the 111 articles of the Mining Law of 1914 appears in the *China Year Book* for 1921-1922, pp. 181-192.

[3] 1st ed., p. 230.

the works. The same policy has been followed in other instances, apparently with satisfactory results." Mr. Arnold adds: "There seems to be no reason why joint working of Chinese mines, as provided for in the 1914 regulations, should not be successful, with foreign supervision, especially of accounts."

The objections of the foreign Powers to the Chinese Mining Regulations of 1914 are set forth in a communication of the American Minister at Peking to his Government under date of March 24, 1914.[4] Dr. Reinsch wrote:

> The essential provisions of the regulations, with respect to the participation of foreigners in mining enterprise in China, are (Article 4) that foreigners will not be allowed to hold more than half of the total number of shares of the mining concern, and that they must, through a diplomatic officer or consul representing their respective nation, make a formal statement that they are ready to submit to the mining laws and regulations of Chinese Government; and (Article 93) that foreign partners re[illegible]inese mining enterprises must submit to having any dispute [illegible]onnection with mining affairs settled by the decision of the [illegible]ector of the Mining Supervision Office.
>
> [illegible]he Mining Regulations have, from the point of view of for[illegible]ners, been criticized in two respects: (a) in that they restrict [illegible]oreign participation to one-half of the interest in any concern; and (b) in that, in the administration of these detailed regulations and others that may follow, it may be possible for the local mining officials to exert a vexatious control over mining enterprises if the regulations are not strictly carried out in good faith.
>
> With regard to the first objection I would observe that while the regulations demand an equal share in the property rights in behalf of Chinese co-owners, they do not contain any provisions which would make it impossible for the foreign participants to secure administrative control of the enterprise: for instance, through having a majority on the board of directors.

[4] *U. S. For. Rels.*, 1914, p. 133.

With reference to the second objection it would seem that the position of the foreign participants who have placed themselves explicitly under Chinese law and regulations would not favor diplomatic interference in their behalf unless, indeed, there should be a gross disregard of their property rights, in which case it is conceived that even such an undertaking as is required would not disentitle them to the protection of their national representatives. It should, however, be noted that Article 93 is drawn in terms which would appear broad enough to confer upon the Director of the Mining Supervision Office jurisdiction to deal not only administratively but judicially with all cases involving mining affairs, even where a defendant may be a citizen of a country enjoying extraterritorial rights under the treaties. In this connection I would suggest that the right of jurisdiction is one granted in favor of the treaty nation, and not of individual citizens; and that in this view of the case, the individual taking up mining rights in China is not competent to waive, even by an explicit undertaking to acquiesce in the mining regulations, the right of his own government to exercise the jurisdiction conceded to it by treaty. I would, therefore, recommend that in accepting these regulations as applicable to its citizens, the United States should make explicit reservation of its established extraterritorial jurisdiction in the judicial determination of questions in which an American may be made defendant.

Replying to this communication, the American Government concurred in the main with the objections that had been stated by its Minister, especially with regard to the inconsistency of the Regulations with extraterritorial rights, and referred to the objection which the United States had made to the older Mining Regulations.[5]

In 1915, iron, which had been included within the scope of the law of 1914, was withdrawn from its operation,

[5] *U. S. For. Rels.*, 1908, pp. 152, 173, 175. See also *U. S. For. Rels.*, 1914, p. 136, for text of the draft note sent to the Chinese Foreign Office protesting against the Regulations of 1914.

and new regulations issued with regard to its mining. Among these regulations is one which provides that, when concessions are granted, the right of priority of application is not to apply, the Government reserving to itself the right to decide to whom the concession shall be granted, and to propose, if it sees fit, joint public and private operation; and to appoint a governmental supervisor. Furthermore, this regulation provides that no foreign capital shall be invested in the mining company, and that no foreigners, except upon the technical staff, shall be employed, and, as to the employment of these technicians, the approval of the Ministry of Agriculture and Commerce must be obtained; also, that no ore-selling contracts with foreigners shall be voted without the sanction of the same Ministry, which Ministry is also to have a first right, if it desires to exercise it, to purchase the output of the mines.

The validity of the foregoing provisions regarding iron mines has not been accepted by the foreign Powers. Among other objections to them it has been pointed out that the regulations have never received the approval of the Chinese Parliament as required by the Chinese Constitution. Especially has Japan opposed these regulations.

As regards the administration of the mining law, the *China Year Book* for 1925 says:[6]

> The administrative organization has gone through all kinds of changes. In 1914, when the Mines Law was first promulgated, eight mining districts were created, and in each district there was a supervisor directly responsible to the Bureau of Mines in Peking. The administration of the Mines Law was entrusted to these supervisors in the first instance. In April, 1915, these newly-created organizations were abolished and mining adminis-

[6] P. 144.

tration was then transferred into the hands of the Provincial Commissioner of Finance, but the technical staff was still directly appointed by the Central Government. In 1917, the post of Commissioner of Industry was created, and he was given charge of the mining administration. At present, therefore, the Commissioner of Industry represents the provincial unit to which all applications and petitions must be sent in the first instance, but the actual permits are still issued by the Bureau of Mines in the name of the Ministry of Agriculture and Commerce. The latter is the highest authority in mining administration, but its decisions, like all other administrative decisions, may be appealed against in the Administrative Court, whose findings are final.

Of coal, China has undoubtedly vast deposits. The total amount mined it is difficult to determine, as much of it is produced in numerous small mines operated by natives which are to be found in all the provinces. The amount of coal consumed in China is, however, small when measured by the total population, but its use is rapidly increasing. Of great importance, from the industrial point of view, is the fact that comparatively little of the coal is good for coking purposes.

The rapid increase in the production of coal has been largely due to the growth of a few large mines, and these mines are, in considerable measure, foreign owned and controlled.

The Chinese Geological Survey in 1924 published two large volumes and an atlas entitled "The Iron Resources and Industry of China." The more important of the facts disclosed in this comprehensive and authoritative survey are summarized in the *China Year Book* for 1925.[1]

As in the case of coal, a considerable amount of the available iron-ore has come under foreign control. The only steel plant in China is that at Hanyang, which is operated by the Hanyehping Company, over whose oper-

[1] Pp. 128 *et seq.*

ation and output the Japanese, through loans, have obtained control.

With regard to the extent of the Japanese interests in the coal and iron mines of China, the following may be quoted from the *Far Eastern Times* of Tientsin:[8]

It seems that the Hanyehping Coal and Iron Company is again in financial difficulties. As before, it resorts to another Japanese loan. Ever since the two loans agreement of 1913, involving the investment of fifteen million Japanese yen, the Company seems to have contracted the habit of falling periodically into debt, only to be cured by periodic Japanese loans.

Already all the large iron mines and iron works in China are entirely or partially controlled by Japan. If this state of affairs should continue, the day may come when all the iron of China, the most essential material in modern industry, shall pass into Japanese hands. The present difficulties of the Hanyehping Company are therefore a matter of national concern.

According to the statistics collected by the Geological Survey, the present annual production of iron ore in China totals 1,150,828 tons, of which 961,422 tons are produced by mines partially or entirely controlled by Japan. These mines with their annual production are as follows:

Hanyehping	486,641	tons
Yu-fan (Anhuei)	301,650	"
Chin-ling-chung (Shantung)	7,618	"
Penchihu (Mukden)	25,513	"
An-shan (Mukden)	140,000	"
Total	961,422	"

If we consider the quantity of iron ore smelted in China, the Japanese share is also preponderant. The maximum capacity of all furnaces in China is 984,000 tons a year, of which works controlled partially or entirely by the Japanese account for

[8] Republished in *The China Weekly*, June 5, 1926.

849,000 tons. Such Japanese-controlled works, with their annual capacities for production, are as follows:

Hanyang	234,000	tons
Ta-yeh	320,000	"
Pen-chi-hu	115,000	"
An-shan	180,000	"
Total	849,000	"

It is very true that Chinese coal mined by the Japanese is even of larger quantity than Chinese iron mined and worked by Japanese, but if we put the figures in percentages, the iron industry is more Nipponized than the coal industry. At present, the amounts of coal dug by companies of various nationalities are as follows:

Chinese companies	50,000,000	tons
Japanese companies	27,500,000	"
British companies	22,000,000	"
German companies	250,000	"

From these statistics, it can be seen that whereas Japan controls twenty-seven per cent. of the coal production, she controls nearly ninety per cent. of the iron production in China. It should also be noticed that in case of iron Japan is the only foreign country controlling large interests in China, whereas in the case of coal, Japan is rivalled by Great Britain.

Among other large foreign mining interests are the Fushun colleries in Manchuria, which are controlled by the South Manchuria Railway (which is controlled by the Japanese Government), the Peking Syndicate, and the Kailan Mining Administration, in both of which concerns British financial interests have been controlling.

The Peking Syndicate received its original mining grants from the Shansi Board of Trade and the Tse-feng Company in Honan. These concessions were later ratified by the Central Government at Peking. " In 1915 a new Anglo-Chinese corporation was formed, the Fu Chung

Corporation, to take over all the coal produced by the Peking Syndicate and by the Chung Yuan Mining Company, which embraced a number of native companies, and the new corporation was authorized to operate in areas outside those operated by the Peking Syndicate and the Chung Yuan Company. The selling end of the Peking Syndicate has thus become a joint English-Chinese enterprise to which Chinese and English have contributed capital in equal amounts, as provided for by the regulations of 1914." [9]

The Peking Syndicate, it should be observed, also acts as managers and administrators for the Chinese Government of the Taokou-Chinghua Railway.

The Kailan Mining Administration is the largest producer of coal in China. It was established in 1912 by a combination, but not a consolidation, of the Chinese Engineering and Mining Company, a British concern, and the Lanchow Coal Mining Company, a Chinese concern.[10]

The Fangtze, Tzuchuan and Chingling-Chen coal mines in Shantung were first opened by the Germans in 1902, taken over by the Japanese in 1915, and in 1923, under the Shantung Agreement reached at the Washington Conference between China and Japan, handed over by the latter to the Luta Company, especially chartered by the Chinese Government, in which Japanese capital is not to exceed Chinese capital.

Further details regarding foreign financial interests in the iron and coal mines of China, and the control of their operation and output based upon treaties and loans made are dealt with in the chapters of the present work devoted to China's "Foreign Debts and Financial Commitments" and to "Railway Loans and Foreign Control."

[9] Arnold's *Commercial Handbook of China*, p. 231.

[10] For further details and statistics regarding the Kailan Mining Administration, see the *Chinese Year Book* for 1925, p. 145.

It only needs here be said that, so closely is China's economic and, incidentally, her political and administrative freedom of action tied up with the control of her own natural resources, it behooves her to consider carefully the conditions under which she will permit these natural resources, and especially her coal and iron to be exploited by foreign capital or foreign management.

CHAPTER XXXVI

Foreign Patents, Trade-Marks and Copyrights in China

Treaty Provisions. The situation with regard to foreign patents, trade-marks and copyrights in China is not in a very satisfactory condition. The following are the pertinent provisions of treaties between China and the Powers. Article VII of the Anglo-Chinese (Mackay) Treaty of 1902 reads as follows:

Inasmuch as the British Government affords protection to Chinese trade-marks against infringement, imitation or colourable imitation by British subjects, the Chinese Government undertakes to afford protection to British trade-marks against infringement, imitation or colourable imitation by Chinese subjects.

The Chinese Government further undertake that the Superintendents of Northern and Southern Trade shall establish offices within their respective jurisdictions under control of the Imperial Maritime Customs where foreign trade-marks may be registered on payment of a reasonable fee.

Article V of the Sino-Japanese Treaty of 1903 reads:

The Chinese Government agree to make and faithfully enforce such regulations as are necessary for preventing Chinese subjects from infringing registered trade-marks held by Japanese subjects.

The Chinese Government likewise agree to make such regulations as are necessary for affording protection to registered copy-

rights held by Japanese subjects in the books, pamphlets, maps and charts written in the Chinese language and specially prepared for the use of the Chinese people.

It is further agreed that the Chinese Government shall establish registration offices where foreign trade-marks and copyrights, upon application for the protection of the Chinese Government, shall be registered in accordance with the provisions of the regulations to be hereafter framed by the Chinese Government for the purpose of protecting trade-marks and copyrights.

It is understood that Chinese trade-marks and copyrights properly registered according to the provisions and regulations of Japan will receive similar protection against infringement in Japan.

This Article shall not be to protect against due process of law any Japanese or Chinese subject who may be the author, proprietor or seller of any publication calculated to injure the well-being of China.

The provisions of Articles IX, X, and XI of the Sino-American Treaty of 1903 read as follows:

ARTICLE IX. Whereas, the United States undertakes to protect the citizens of any country in the exclusive use within the United States of any lawful trade-marks, provided that such country agrees by treaty or convention to give like protection to citizens of the United States:

Therefore the Government of China, in order to secure such protection in the United States for its subjects, now agrees to fully protect any citizen, firm or corporation of the United States in the exclusive use in the Empire of China of any lawful trademark to the exclusive use of which in the United States they are entitled, or which they have adopted and used, or intend to adopt and use as soon as registered, for exclusive use within the Empire of China. To this end the Chinese Government agrees to issue by its proper authorities proclamations, having the force of law, forbidding all subjects of China from infringing on, imitating, colorably imitating, or knowingly passing off any imitation of trade-marks belonging to citizens of the United States, which

shall have been registered by the proper authorities of the United States at such offices as the Chinese Government will establish for such purpose, on payment of a reasonable fee, after due investigation by the Chinese authorities and in compliance with reasonable regulations.[1]

ARTICLE X. The United States Government allows subjects of China to patent their inventions in the United States and protects them in the use and ownership of such patents. The Government of China now agrees that it will establish a Patent Office. After this office has been established and special laws with regard to inventions have been adopted it will thereupon, after the payment of the prescribed fees, issue certificates of protection, valid for a fixed term of years, to citizens of the United States on all their patents issued by the United States, in respect of articles the sale of which is lawful in China, which do not infringe on previous inventions of Chinese subjects, in the same manner as patents are to be issued to subjects of China.

ARTICLE XI. Whereas, the Government of the United States undertakes to give the benefits of its copyright laws to citizens of any foreign State which gives to the citizens of the United States the benefits of copyright on an equal basis with its own citizens:

Therefore, the Government of China, in order to secure such benefits in the United States for its subjects, now agrees to give full protection in the same way and manner and subject to the same conditions upon which it agrees to protect trade-marks, to all citizens of the United States who are authors, designers or proprietors of any book, map, print or engraving especially prepared for the use and education of the Chinese people, or translation into Chinese of any book, in the exclusive right to print and sell

[1] The United States has entered into a large number of agreements with other Powers for the reciprocal protection in China of the trade-marks of their respective citizens or subjects. These, with their dates, have been as follows: Great Britain, June 28, 1905; France, October 6, 1905; Netherlands, October 23, 1905; Belgium, November 27, 1905; Germany, December 6, 1905; Italy, December 18, 1905; Russia, June 28, 1906; Denmark, June 12, 1907; Sweden, March 7, 1913; Japan, May 19, 1908. All these agreements, except the Convention with Japan, were embodied in an "Exchange of Notes."

such book, map, print, engraving or translation in the Empire of China during ten years from the date of registration. With the exception of the books, maps, etc., specified above, which may not be reprinted in the same form, no work shall be entitled to copyright privileges under this article. It is understood that Chinese subjects shall be at liberty to make, print and sell original translations into Chinese of any works or of maps compiled by a citizen of the United States. This article shall not be held to protect against due process of law any citizen of the United States or Chinese subject who may be author, proprietor or seller of any publication calculated to injure the well-being of China.

Copyrights. Japan, Great Britain and the United States are the only countries which have sought to obtain from China treaty engagements with regard to copyright. The other countries, however, so far as they are entitled to Most-Favored-Nation treatment, enjoy the rights secured to Japan, Great Britain and the United States.

Experience has shown that the Article of the Sino-American Treaty relating to copyrights was so poorly drawn as to give little protection in China to the American author or publisher. This was shown in the suit brought by Ginn & Company, an American publishing firm, in the Shanghai Mixed Court in March, 1911, to restrain the publication and sale by the Commercial Press of Shanghai of the text-book, Myer's *General History*. In this case was shown a clear instance of "piracy" upon the part of the Shanghai firm, but inasmuch as it also appeared that the book in question was neither a republication of a volume originally issued in the Chinese text by the American firm, nor a volume which had been "especially prepared for the use and education of the Chinese people," it was held by the court that the case was not brought within the terms of the American treaty.[2]

[2] See also the case of J. & C. Merriam Co. v. Commercial Press, de-

In some instances the Chinese provincial authorities have issued orders prohibiting within their jurisdiction the republication and sale of foreign copyrighted books without regard to whether they were originally prepared for the use and education of the Chinese people; but where this has been done it has been an *ex gratia* matter rather than one of obligation.

Chinese Copyright Law. In 1912 China enacted a Copyright Law which purports to secure exclusive rights to Chinese authors, but it gives no such protection to foreigners, and, in fact, does not purport to carry out the provisions of the British, Japanese and American treaties which have been quoted above.[3]

Allman in his *Protection of Trade-Marks, Patents, Copyrights, and Trade Names in China,*[4] notes that some American publishers have filed their books with the Chinese Maritime Customs at Shanghai or with the Chinese Ministry of the Interior at Peking, and that the Customs have accepted these books for filing under the same conditions as trade-marks under the lapsed trade-mark regulation of 1904, but adds: " It is not very clear, however, just what benefits or privileges are to be expected from filing books as above. Perhaps it may be said that such filing establishes a public record of the claim to authorship, or ownership of the book. In the case of those books ' especially prepared for use and education of the Chinese people ' the filing as above also shows an attempt of the author to do all he can on his part to carry out

cided by the Shanghai Mixed Court, in which it was held that a Chinese firm might legally publish and sell a Chinese translation of Webster's International Dictionary.

[3] A text of this law is given in Allman's *Protection of Trade-marks, Patents, Copyright and Trade Names in China,* pp. 112-121.

[4] P. 107.

the above treaty provision and to thereafter claim the protection it promises."

Inter-Power Agreements. The only nations which, by agreements *inter se,* have sought to protect their own nationals against copyright piracy in China by the nationals of the other parties to the agreements have been the United States and Japan, the United States and France, and France and Japan. Thus, in the Convention of May 19, 1908, between Japan and the United States there are the following provisions:

ARTICLE II. The citizens or subjects of each of the two High Contracting Parties shall enjoy in China the protection of copyright for the works of literature and art as well as photographs to the same extent as they are protected in the dominions and possessions of the other Party.

ARTICLE III. In the case of infringement in China by a citizen or subject of one of the High Contracting Parties of any . . . copyright entitled to protection in virtue of this Convention the aggrieved party shall have in the competent territorial or consular courts of such Contracting Party the same rights and remedies as citizens or subjects of such Contracting Party.

ARTICLE V. Citizens of possessions belonging to the United States and subjects of Korea shall have in China the same treatment under the present Convention as citizens of the United States and subjects of Japan respectively.[5]

In the Convention of September 14, 1907, between France and Japan,[6] substantially similar provisions appear.

By an exchange of notes under date of December 26, 27, 1911,[7] between France and the United States the two

[5] MacMurray, I, p. 735.
[6] MacMurray, I, p. 798.
[7] MacMurray, I, p. 927.

countries have agreed reciprocally to protect in China, in their respective consular courts, the literary and artistic copyrights of each other's nationals.

Patents. From the treaty provisions which have been quoted at the beginning of this chapter it will be seen that China has promised to establish a patent office and to issue certificates having legal force adequate for the protection of foreign patent rights. This she has not done. From time to time she has issued regulations with regard to patents, but these have been only provisional in character and, moreover, relate only to the definition and protection of patents held by Chinese.[8]

The failure of the Chinese to issue patent regulations for the protection of foreign patent rights has been due in part to the fact that such regulations as she has from time to time proposed have met with the disapproval of the Treaty Powers, or, at least, some of them. However, as will presently appear, the Chinese have opened offices in Tientsin and Shanghai for the "registration" of trade-marks, and the practice has grown up of registering patents in the same office. Such registration is, strictly speaking, without legal significance, but it is possible that it will have some probative force as to priority of claim, and certainly some moral force when, a patent office having been opened, the inventions involved are presented for recognition.

Although, as yet, foreigners have no protection in China against Chinese who infringe foreign patent rights, a number of the Powers, as in the case of copyrights, have entered into reciprocal engagements with regard to the protection of the infringement in China by their nationals of the patent rights of the nationals of the

[8] For the text of these Regulations, issued in 1912 and revised in 1923, see Allman, *Op. cit.*, 98 *et seq.*

other agreeing Powers. Thus, in the Convention of May 19, 1908,[9] between Japan and the United States it is agreed by Article I that "Inventions, designs and trade-marks duly patented or registered by citizens or subjects of one High Contracting Party in the appropriate office of the other Contracting Party shall have in all parts of China the same protection against infringement by citizens or subjects of such other Contracting Party as in the dominions and possessions of such other Contracting Party." And by Article III that "In case of infringement in China by a citizen or subject of one of the two High Contracting Parties of any invention, design, trade-mark or copyright entitled to protection in virtue of this Convention, the aggrieved party shall have in the competent territorial or consular courts of such Contracting Party the same rights and remedies as citizens or subjects of such Contracting Party."

Substantially the same provisions appear in the Franco-Japanese Convention of September 14, 1909,[10] the Russo-Japanese Convention of June 10-23, 1913,[11] the Russo-Swedish Convention of January 11, 1913,[12] and in the Exchange of Notes of February 26 and March 7, 1913,[13] between the United States and Sweden.

Trade-Marks. In pursuance of the obligation assumed in the treaty provisions which have been quoted at the beginning of this chapter, China promulgated in 1904 an elaborate set of trade-mark regulations.[14] These, though they met with the approval of the American Government,

[9] MacMurray, I, p. 735.
[10] MacMurray, p. 798.
[11] MacMurray, p. 899.
[12] MacMurray, p. 997.
[13] MacMurray, p. 1002.
[14] For the text of these Regulations, see *U. S. For. Rels.*, 1906, Pt. I, 287.

were unsatisfactory to several of the other Powers, and, after being in force for a time, were withdrawn. In 1906 new Regulations were drafted by the Chinese Government, but, since they made hardly a pretense of meeting the wishes that had been expressed by the Powers, they were not approved by these Powers, and were not put into force. The result was that, until 1923, there was in China no law upon the subject emanating from the Central Government and, therefore, binding upon the Chinese Courts throughout China.

However, in some instances, local officials issued proclamations, or administrative notices, with a view to giving, within their respective jurisdictions, a certain amount of protection to foreigners against infringement of their trade-marks. Thus, in 1907, the Shanghai Taotai issued a proclamation warning against the infringement of the trade-marks of certain brands of cigarettes. And, a little later, upon request of the American Consul-General at Shanghai, another proclamation was issued by the Taotai with regard to American goods the trade-marks of which were being counterfeited in the Chinese markets.[15] It is the contention of the American Govern-

[15] *U. S. For. Rels.*, 1907, Pt. I, p. 262. In this proclamation the Taotai quoted the following from a letter which he had received from Mr. Denby, the American Consul-General:

"It has been reported to me by merchants of my country that recently unscrupulous Chinese are manufacturing imitations of well-known American brands of goods, such as kerosene oil, soap, Eagle brand of milk, stoves, stockings, etc., in order to make profit. . . . This is not right, and if allowed to continue will lead to friction between two friendly nations." Concluding his Proclamation, the Taotai said: "Besides having replied to the above letter and ordered all officials under my jurisdiction to forbid such imitations, I issue this Proclamation for the information of all classes that no one is hereafter allowed to imitate the Standard Oil Company's registered brands, and should such case be discovered, punishment and fine will be imposed upon the impostor."

ment that the Chinese are obligated to issue such proclamations whenever requested, and when patents or trade-marks are locally registered the Legation or Consulate asks that a protecting proclamation be issued.

Although, as has been said, there were no general trade-mark regulations in China which had been issued by the Central Government, the Commissioners of Customs at Tientsin and Shanghai were directed by the Peking authorities to open provisional offices for the registration of foreign trade-marks, and the practice has grown up of also registering patents there. It is conceded, however, that this registration gives no real legal protection to the trade-mark. It does, however, furnish evidence as to priority of use in the particular market; and this is an important matter since Chinese law recognizes as a property right entitled to legal protection the "chop" or sign or label under which a commodity is sold.[16]

One difficulty with regard to these Customs Registrations was that the Customs being with discriminatory powers in the premises, conflicting trade-marks were registered, and, in some cases the identical trade-mark

It was pointed out that by thus mentioning specifically the Standard Oil trade-marks, the general force of the prohibition was much weakened. The American Consul-General, however, took the ground that inasmuch as the Taotai had "ordered all officials under his jurisdiction to forbid such imitations," the prohibition could and should be construed to cover all American trade-marks.

[16] The procedure of registering trade-marks at Tientsin is not exactly the same as at Shanghai. At Shanghai the trade-mark is filed at the Customs House by the consul or official without formal application, a fee of five customs taels being paid; at Tientsin a formal application for registration, in English and Chinese, on a special form, has to be made by the applicant or his authorized attorney, six copies of the trade-mark furnished, a certified copy of an extract from the foreign register, if the trade-mark has been registered elsewhere, must be furnished, and a fee of five customs taels paid.

registered by two or more persons each claiming title thereto.

Vaseline Case.[17] In connection with the protection of American trade-marks in China a very interesting point of jurisdiction was raised in a case instituted in 1915 in the Mixed Court at Shanghai, by the Chesebrough Manufacturing Company, an American corporation, for redress against a Chinese firm for selling a Japanese product under the trade-mark "Vaseline," which trade-mark was the property of the American firm, and which it had duly registered in China.

When this case was about to come up for a hearing, the Japanese Consul-General at Shanghai requested that the Japanese Assessor be allowed to sit with the American and Chinese officials, and that, in all cases involving Japanese goods, even when covered by a trade-mark that was in imitation of an American trade-mark but where a certificate of registration had been granted by the Tokyo authorities, no further action should be taken by the Mixed Court, and that the parties conceiving themselves to be aggrieved should resort to the registration office in Japan. The Japanese Consul-General later withdrew his request to have his Assessor participate in the judgment, but continued his request that his Assessor be allowed to be present and observe the proceedings. To this last request there was no objection, for it is usual to permit the Assessor of any country to sit and merely watch proceedings in the Mixed Court when it is asserted that interests of his nationals are indirectly, if not directly, involved in the proceedings. But there was strong objection to the claim of the Japanese Consul-General that the Chinese Mixed Court was

[17] For lengthy correspondence with regard to this case, see *U. S. For. Rels.*, 1915, p. 231 *et seq.*

without jurisdiction in cases in which it was charged that Chinese were selling Japanese manufactured goods under trade-marks registered by the Japanese manufacturers with their own Government in Tokyo, and this without regard to the fact that the trade-mark might be a clear imitation of an American trade-mark.

By the treaty of May 19, 1908, between Japan and the United States it had been provided that "The subjects or citizens of each of the high contracting parties shall enjoy the same protection, as in the territories of the other, against the infringement, at any point in China by the subjects or citizens of the other, of a patent granted, or design or trade-mark registered at the proper office of the other." But in the Chesebrough case, the American company had not registered its trade-mark in Japan. The question therefore resolved itself into this: could the fact that a trade-mark had been registered in Japan by the Japanese manufacturer protect Chinese defendants in China against suits brought against them in the Chinese courts charging them with violating rights secured to the American complainants by Chinese laws and treaties?

In an official communication of the Japanese Consul-General to the American Consul-General at Shanghai, dated February 17, 1915, it was declared:

> I have received an instruction from our Government which runs substantially as follows:
>
> Although the present [Vaseline] case is one which relates apparently to the Americans and Chinese, it is in fact nothing but a dispute between like trade-marks possessed by our both nationals. As the trade-mark of the above named American is not registered in Japan, it is not a case coming within the terms of the treaty between Japan and the United States, relating to the mutual protection of Patents, Trade-marks, etc. Moreover, by virtue of Article V of the Supplementary Treaty of Commerce

and Navigation of 1904 concluded between China and Japan, China takes upon herself an obligation to protect our registered trade-marks. It will consequently constitute a violation of the treaty if the Mixed Courts will prohibit the sale by Chinese of any merchandise by sole reason of bearing the trade-mark possessed by Matsumoto.

To this contention on the part of the Japanese Government, the American Government entered a strong protest, the point being made that what was asked was, in effect, that the operation of Japanese domestic regulations should be extended into Chinese territory with the result that Americans would, or might, be deprived of the right to enforce in the courts of China and against Chinese nationals rights secured to Americans by the Sino-American Treaty of 1903. In other words, that thus a matter of Chinese law should be relegated to the determination of Japanese tribunals in Japan.

In a communication sent by the American Minister at Peking to the American Consul-General at Shanghai, it was said:

> In view of the Legation, the question of the ownership of any trade-mark in China is one of fact as to priority of use and adoption for the trade in China; the essential facts in such cases are determinable in accordance with the legal system and institutions applicable by the jurisdiction to which appeal must be made in order to establish and protect these rights in this country.

Attention was also called to Article IX of the Treaty of 1903, which has been earlier quoted. Under the provisions of this Article, it was declared, the Chesebrough Company was clearly entitled to have its trade-mark rights protected. "The Legation considers," the communication continued, "that the duty of the Chinese authorities to protect the Vaseline trade-mark as against

their own nationals is a matter of treaty obligation by China to the United States: and it fails to understand on what grounds a third party can claim to intervene against the enforcement of that obligation."

The Japanese Government had referred, in support of its position, to Article V of the Sino-Japanese Treaty of 1903, which reads:

> The Chinese Government agree to make and faithfully enforce such regulations as are necessary for preventing Chinese subjects from infringing registered trade-marks held by Japanese subjects.

To the argument based upon this provision, the American Minister in the communication referred to replied:

> But this provision would sustain his [the Japanese Consul-General's] contention only if it were assumed that the phrase "registered trade-marks held by Japanese subjects" refers to registration in Japan rather than in China. That such is not the true meaning of the provision, however, is to be inferred from the terms of mutuality in which the fourth paragraph of the same article provides for the protection by the Japanese Government of the trade-marks "properly registered according to the provisions of the laws and regulations of Japan." But even if the terms of the Japanese treaty did not so manifestly contemplate registration in China as a condition precedent to the protection of Japanese (as of American) trade-marks, I should find it impossible to reconcile myself to the assumption that registration in Japan—a unilateral domestic act involving no consent or even cognizance on the part of either Chinese or Americans—could have the effect of nullifying rights accruing to Americans in China and protected by treaty between China and the United States, or could make the right to protection in such cases subject to determination by judicial processes in Japan. . . . The fundamental error in the position taken by the Japanese Government in the present case seems to lie in the assumption that registration of trade-marks in Japan does not merely constitute a basis for judicial procedure in Japanese domestic and extraterritorial

courts, but that it creates in favor of its nationals an abstract and absolute property right enforceable even under Chinese jurisdiction without regard to the requirements of Chinese law. The Legation considers that if this contention were conceded it would render potentially subject to Japanese law and jurisdiction the claim of Japanese subjects to use in China any American trade-mark which they might find it expedient to adopt by registration at home, and would effectually annul the only protection for American industrial property rights which now exist in China.

In result, after considerable delay, the Mixed Court rendered a judgment in which the American contention was substantially upheld.

It is impossible to deny the correctness of the contentions of the American Government in this important case. Of course the case would have presented a different aspect had the trade-mark borne by the goods in question been registered in China by the Japanese manufacturer. There would have then been a question as to which of the two registrations in China—the American and the Japanese—was entitled to recognition and protection.

Similar to the Vaseline case was one involving a German manufactured product sold by Chinese merchants which was an imitation of the American Eagle Brand of Condensed Milk, of prior use in Chinese markets. In this case it was suggested that the matter be referred to the Legations at Peking of the interested parties. The American Government refused to assent to this and asserted: "It is the view of our Government that the judicial protection of American trade-marks in China, against the infringement or dealing in infringements by Chinese vendors, is an absolute treaty obligation undertaken by the Chinese Government which cannot be suffered to be questioned and made subject to the veto of the Chinese executive authorities and in which the consular or diplo-

matic representatives of a third Power can have no *locus standi* by reason of the fact that the infringements originated in their country .... and that the Consulate General should therefore use all proper endeavors to bring about the decision of the case by the Mixed Court." [18]

Such, then, was the situation in China with reference to trade-marks until the enactment by the Chinese Parliament of the Trade-Mark Law of 1923, and how far this law has improved the situation will presently be considered. During this period, as Allman points out, all that a foreigner could do, if misuse of his trade-mark was made, was to obtain a protest from his consul. "All that this protest had behind it were the general promises in the treaties to afford protections to trade-marks and the general rule that it is certainly morally wrong to use another's trade-mark. The treaty promises are plain enough, but, as already stated, they are not self-executing and presuppose the enactment of rules or laws to put these provisions into practical effect. Assuming the Chinese officials really wanted to stamp out the imitation, on receiving a protest from a consul, all the administrative officials could do was to issue a notice or warning to the offender to stop putting out the infringing article or matter. If the pirate took no notice of this warning, that just about ended the matter. The injured party might of course take the matter into a Chinese court, but there he could find no law under which to proceed. Sometimes the courts would, on their own authority, so to speak, stop the infringement, law or no law." [19] However, as Mr. Allman goes on to point out, courts can not go very far without law to support them, and mere re-

[18] Letter of the American Minister at Peking of June 16, 1915, to the American Consul-General at Shanghai.

[19] Allman, *Op. cit.*, 11.

straining orders, in default of fines or awards of heavy damages, have but slight deterrent force.[20]

Chinese Trade-Mark Law of 1923. In 1923 there was enacted by the Chinese Parliament and promulgated by the President a Trade-Mark Law together with a set of Trade-Mark Regulations.[21]

This law and the regulations for its enforcement, though comprehensive and detailed in character, have not met with approval by all the Foreign Powers. The dissatisfaction of these Powers has been especially with regard to its administration and enforcement which seems to involve an impairment of extraterritorial rights.[22]

As directed by the Law, the Chinese Government has established a Trade-Mark Bureau under the Ministry of Agriculture and Commerce, and, in order that foreigners may obtain the benefit of the Law, they must register in this Bureau. The Law further provides that disputes as to registration shall be decided by three examiners appointed by the President of this Bureau and that appeals from the decisions of these examiners are to lie to the Ministry of Agriculture and Commerce, and, in final resort, from that Ministry to the Chinese Administrative

[20] In the foregoing respects the Chinese themselves had little protection against their own fellow-citizens, although a proprietary right in a trade-mark or "chop" is recognized by Chinese law. Cf. Allman, *Op. cit.*, p. 12.

[21] For the texts of this law and these Regulations, in English translations, see Allman, *Op. cit.*, pp. 32-46, and 47-68. An English translation of the text of the Law by Mr. R. T. Bryan, of Shanghai, was published in the *China Weekly Review*, November 24, 1923. Mr. Bryan is also the author of two articles on American Trade-Marks, Trade Names, Copyrights and Patents in China, which appeared in the *China Weekly Review* for December 8 and December 15, 1923.

[22] The United States agreed to make this law applicable to its citizens as from September 1, 1926, and the author is informed that Japan and Great Britain will soon do the same.

Court. In other words, the rights of foreigners in the premises are to be finally determined by Chinese law and in Chinese courts, and this is apparently to be true not only in cases in which the foreigner is defendant in a proceeding in which a Chinese is plaintiff, but in controversies in which both or all of the parties are nationals of Powers enjoying extraterritorial rights.

Allman also points out that another practical and serious aspect in the administration of the law arises from the fact that the staff of the Bureau, though called upon to make highly technical decisions, is composed of untrained and inexperienced persons, who, moreover, have no body of Chinese court decisions to guide them in their determinations.[23]

For the foregoing reasons the Diplomatic Corps at Peking has thus far refused to approve the Law. However, from the Chinese point of view, the Law is in full force, and is applicable when Chinese are sued in Chinese courts by foreigners.

The writer is informed that, though the Law of 1923 has not been officially approved by all the Treaty Powers, foreign merchants are, in many cases, registering under it. The Trade-Mark Bureau has, in fact, given formal notice that no protection will be given to trade-marks not registered in it, and Chinese courts have sustained the Bureau in this ruling.[24]

Infringement of Foreign Trade-Marks by Foreigners in China. As in the case of patents and copyrights, there exist a number of treaties or agreements between the

[23] *Op. cit.*, p. 17. For a criticism of the law, see the letter of March 6, 1924, from the National Chambers of Commerce to the Consular Body at Shanghai, reproduced in the *China Year Book*, 1924, p. 904.

[24] See the Price Candle Company Case, decided October 15, 1923, by the High Court of Manchuria, a translation of the judgment in which is given by Allman, *Op. cit.*, pp. 79-82.

Treaty Powers with reference to the reciprocal protection of the trade-marks of their respective nationals of the other Powers signatory or parties to the treaties or agreements.[25]

In all, or practically all, cases, in order to come within the operation of these agreements it is necessary that the trade-mark in question shall have been registered in the country which has promised to protect it against infringement by its own nationals in China.

As typical of these agreements of the Treaty Powers *inter se,* we may again refer to the earlier quoted Articles I and III of the Japanese-American Treaty of May 19, 1908.[26]

China Not a Member of the Union for the Protection of Industrial Property. China has not yet adhered to the International Convention for the Protection of Industrial Property of 1911, according to which the Contracting Parties constitute a Union for the protection of industrial property and, *inter alia,* agree, by Article III, that,

> The subjects or citizens of each of the contracting countries shall enjoy, in all the other countries of the Union, with regard to patents of invention, models of utility, industrial designs of models, trade-marks, trade names, the statements of place of origin, suppression of unfair competition, the advantages which the respective laws now grant or may hereafter grant to the citizens of that country.

[25] The Index to MacMurray's *Treaties and Agreements with and Concerning China,* shows that such treaties or conventions have been entered into between the following Powers: Belgium and the United States, Denmark and Great Britain, France and Great Britain, France and Japan, France and the United States, Germany and Great Britain, Germany and Russia, Germany and the United States, Great Britain and Belgium, Great Britain and Italy, Great Britain and Portugal, Great Britain and Russia, Great Britain and the United States, Italy and the United States, Japan and Russia, Japan and the United States, Netherlands and the United States, Russia and Belgium, Russia and France, Russia and Sweden, and Sweden and the United States.

[26] MacMurray, I, p. 785.

CHAPTER XXXVII

Foreign Corporations in China

Chinese Corporations. The Chinese law provides for the organization in China of business corporations, the general statute on the subject being that of January 13, 1914, revised on September 21 of the same year. The full text of this law of 251 Articles is given in the *China Year Book* of 1923.[1] Under European Continental influence, this law groups corporations under four classifications: sociétés en nom collectif sociétés en commandite, sociétés anonymes, and sociétés en commandite par actions. Unless registered under this law the limited liability of the stockholders of corporations is not recognized. Revised Regulations of the Ministry of Agriculture and Commerce for such registrations were issued May 7, 1923.[2]

Foreign business organizations may register as Chinese corporations, but they have not often done so for the reason that, by thus taking to themselves Chinese nationality they lose the extraterritorial rights to which they would be entitled if they secure charters from their own governments. It is interesting to note, however, that, in some instances, foreign industrial interests have

[1] Pp. 310-334.

[2] For the text in English translation of these Revised Regulations, see *The Chinese Social and Political Review*, April, 1924.

found it to their advantage to secure a status as Chinese corporations.[3]

The Chinese corporation law does not discriminate against foreigners except in the case of mining enterprises. It is required in these enterprises that at least one-half of the capital invested shall be of Chinese origin.[4]

[3] At the "Conference on American Relations with China," held at Johns Hopkins University, September 17-20, 1925, Mr. R. C. Patterson, Jr., representing certain important dye interests in America, said: "I was sent out [to China] to see if I could not gather together certain threads and organize a company with the Chinese as our partners. I left America with a strong idea that this company should be organized under the Delaware laws. However, I began to investigate. I went to the American Minister, Mr. Crane; consulted numerous bank managers, Chinese industrial leaders, and many others. Opinion favored an American company. . . . However, the Number One man of the British-American Tobacco Company in January, 1921, said to me: 'If British-American Tobacco could go back eighteen years and start over again, we would most certainly organize a partnership with the Chinese and with Chinese laws.' He further stated: 'By so doing you will accomplish more in a few years than you could accomplish in any other way in ten years.' So, after three months of thorough investigation, we did this very thing, by going to Peking and petitioning for a rescript, which was properly issued in due time by the Ministry of Agriculture and Commerce. . . . The organization of this company gave no trouble whatsoever, and the existence of extraterritoriality was of no assistance. This is example No. 1. Example No. 2 is of a little company organized under the laws of Delaware three years ago. Due to bad management on the part of Americans, the company has not made substantial progress. But, as of last April, we placed it under entire Chinese management, since which time the business has picked up and we now look for a profitable future. . . . I don't think for a minute, as far as these two companies are concerned, that retention of extraterritoriality would be of service; in fact, it might be detrimental. I am not speaking of other American companies, about which I have little knowledge. It is their own business under which laws they organize, and not mine. Generally speaking, I believe in Chinese management throughout, and consider it indispensable. Make the Chinese jointly responsible, but, of course, keep control if American money is over fifty per cent, and this can be done with both Chinese management and Chinese laws." *Report of the Conference*, p. 63.

[4] See p. 893.

Foreign Shareholders in Chinese Corporations. There would seem to be no restrictions in the Chinese law upon the holding by foreigners of shares in Chinese corporations,[5] or the holding by them of directorial or other managerial or administrative positions.

The American Government in practice has not been disposed to grant special protection to its nationals investing in the shares of Chinese companies—not even when they own the majority of such shares and there appears to be official action on the part of the Chinese discriminating against the companies concerned. In all cases, however, actual or vested property rights of Americans will be protected.

It may be observed that neither of the Chinese laws above referred to has been accepted by the Treaty Powers as applicable to their respective nationals. This is of no great significance as regards the law of corporations, but is important as regards the mining laws of China, since China has, by treaties, undertaken to enact suitable laws which make provision for mining development with the assistance of foreign capital. And, with reference to this matter of mining it is worthy of note that when foreign capital has been invested in Chinese corporations for mining or other purposes, a frequent practice has been to embody in contracts to which the Ministry of Agriculture and Commerce is a party the essential terms of operations of the corporation. These contracts thus form, as it were, special charters for the corporations.

The right of nationals of the Treaty Powers to hold stock in Chinese corporations is secured in the Anglo-Chinese Treaty of 1902, and the Sino-Japanese Treaty of 1903. Overruling the Viceroy of Kiangsu Province, the

[5] Except as already noted with reference to mining enterprises.

Chinese Board of Agriculture, Works and Commerce held, in 1906, that this right applied to Chinese companies outside of, as well as within the Treaty Ports.

The Chinese law recognizes the corporation as an entity, and, therefore, when a Chinese corporation is sued, the jurisdiction is in the Chinese courts. When it appears as plaintiff, the jurisdiction is in the foreign consular courts, but the Chinese law of corporations is often applied; not, however, in the sense that the foreign law is wholly replaced, but that, in some matters, there has been an implied contract to observe the Chinese law.

Article IV of the Anglo-Chinese Treaty of 1902 provides as follows:

> Whereas questions have arisen in the past concerning the right of Chinese subjects to invest money in non-Chinese enterprises and companies, and whereas it is a matter of common knowledge that large sums of Chinese capital are so invested, China hereby agrees to recognize the legality of all such investments past, present, and future.
>
> It being, moreover, of the utmost importance that all shareholders in a joint-stock company should stand on a footing of perfect equality as far as mutual obligations are concerned, China further agrees that Chinese subjects who are or may become shareholders in any British joint-stock company shall be held to have accepted, by the very act of becoming share-holders, the charter of incorporation or memorandum and articles of association of such company and regulations framed thereunder as interpreted by British courts, and that Chinese courts shall enforce compliance therewith by such Chinese share-holders, if a suit to that effect be entered, provided always that their liability shall not be other or greater than that of British share-holders in the same company.
>
> Similarly the British Government agree that British subjects investing in Chinese companies shall be under the same obligation.[6]

[6] MacMurray, p. 342. See Borchard, *The Diplomatic Protection of*

Taxation of Chinese Corporations. The Chinese Government does not tax its corporations as such, but, by Article IV of the Sino-American Treaty of 1903 has reserved the right to levy a tax on foreign corporations doing business in China.[7] China imposes no income tax either on individuals or on corporations. However, outside of Treaty Ports, if foreign corporations maintain any establishments, a kind of tax or royalty, termed " pao-hao " is levied.

Foreign Corporations in China. Foreign chartered corporations enjoy no greater rights than natural persons as regards landholding and the carrying on of business outside of the Treaty Ports.

Hongkong Corporations. The British possession of Hongkong has its own corporation laws which have been greatly used for the organization and operation of companies doing business in China.[8]

In many of the companies which have obtained Hongkong charters the capital invested has been mainly Chinese, or of other non-British origin.

Revised Regulations of 1919 Affecting the British Companies Act. These new regulations adopted on October 9, 1919, provide that:

Citizens Abroad, 277-282 as to the international status of corporations chartered by one State in which a considerable portion of the financial interest is in citizens of other States.

[7] MacMurray, p. 423. This saving clause is as follows: "Nothing in this Article is intended to interfere with the inherent right of China to levy such other taxes as are not in conflict with its provisions."

[8] For the text of the "China (Companies) Order in Council," of November 30, 1915, of the British Government regulating the granting of Hongkong charters, especially with reference to foreign interests therein, see *China Year Book*, 1919, pp. 647-651.

1. No person other than a British subject resident within the limits of this Order, shall act as managing director or in any position similar to that of managing director, or shall otherwise exercise general or substantial control of the business of a China Company.

2. If default is made in compliance with this article the Company shall be liable to a fine not exceeding $50 for every day during which the default continues, and every director and every manager of the Company who knowingly authorizes or permits the default shall be liable to the like penalty.

3. Failure to comply with the provisions of this article shall be a ground upon which an order for winding up the Company may be made by the Court.

4. This article shall come into force sixty days after the publication of this order.

Millard's Review (January 3, 1920) after quoting this text has the following editorial comment which is worthy of reproduction:

It is well known that in the past a number of companies having a merely nominal, if indeed any British interest, were registered under the Hongkong Ordinances. From time to time the inconvenience of this was shown by the fact that while the British Court had jurisdiction over the company as such, it had none over its personnel, as in some cases where there were no British directors. Subsequently, when local registration of China Companies was permitted, it was enacted that the majority of the directors should be British, but this did not always meet the case in the least, as it was always possible to put in figureheads as directors, who had actually no control and little real interest. The present legislation makes it certain that in British companies, real British interests and control will predominate.

The Chief companies in Shanghai containing an American interest that are affected by this act are in the following lines; life insurance, real-estate, hotels, shipping, manufacturing and lumber. Although their number is not large, their business in China is extensive, in some cases the most extensive in China. In addi-

tion to companies having an American interest there are hundreds of Chinese companies that are affected, among them being large department stores, some banks, and other lines. From the standpoint of the Chinese companies it will be comparatively simple to comply with the law. They will either re-incorporate as purely Chinese corporations under the Ministry of Agriculture and Commerce at Peking, or will install a Chinese of British nationality as managing director. There are hundreds of Chinese business men who are British subjects through residence in Hongkong and it will not be difficult to find willing subjects to accept new positions created by this law. It is believed in many quarters that the British government had these Chinese Companies in mind when the enactment was passed. These Chinese firms are scattered all over the country and the problem of protecting them has been a difficult one for the British government. This has been especially true in the last few years because of the political troubles in China. Furthermore the very act of protecting these firms has caused the British government no little embarrassment, for the firms are practically all of pure Chinese capital and management. An example in hand is the present Chinese boycott against Japanese goods.

American Corporations in China. American corporations intending to do business in China are recommended to register with the nearest American consul. As a condition upon which such registration will be accorded, the applicants are required to show, to the satisfaction of the consul, that a substantial American financial interest is involved, that the corporation maintains an American officer or agent in China, and that a partnership is represented in China by an American partner or agent for the purpose of service of judicial process. It is also required that the applicant should furnish an authenticated copy of the articles of incorporation, and a statement under oath, showing the names, nationality, and residence of the officers, directors and stockholders, and the extent of their respective interests. In the case of a

partnership, the articles of partnership agreement are to be furnished, and a sworn statement of the names, nationality, residence and financial interests of the partners. It is recommended that this registration be annually renewed. This fact of registration does not operate as conclusive evidence that the corporation is an American chartered company, and does not carry with it the implication that the concern is necessarily entitled to diplomatic protection or intervention on the part of the American Government.

Acting under direction from the American Legation, American consuls have been directed to refuse registration in cases in which it does not appear that substantial American financial interests are involved or that an American officer of the company resides in China.

It is usual to file in the office of the American Legation the articles of incorporation of American chartered companies doing business in China. The American companies usually secure charters under the laws of one of the States of the Union. It has, however, been held by the United States Court for China that they may incorporate under the provisions of the Act of Congress of March 2, 1903, in amendment to the civil code of the Territory of Alaska, providing for the incorporation of companies.[9]

As regards the legal and diplomatic protection which the American Government will give to business companies possessing American charters and doing business in China, but which in fact represent foreign financial or commercial interests, we can, perhaps, do no better than make the following excerpts from a letter of instructions sent, April 15, 1910, by the American Secretary of State

[9] F. J. Raven et al. *v.* Paul McRae, *Millard's Review*, January 31, 1920.

to the American Legation at Peking to be sent to the various American consulates in China:[10]

> In the question of the status which would be given in China to American corporations whose stockholders are mainly foreigners there appear to be two distinct elements:
>
> (*a*) The right which such corporations might have to diplomatic protection or intervention of this Government.
>
> (*b*) The right which such corporations might have to the status of an American citizen in matters of litigation before the United States Consular Courts of China and before the United States Court for China.

As to the first point, the American Secretary said that no citizen had an absolute and inherent right enforceable in the courts to the protection or the intervention of his Government and that, therefore, the Department of State might make such rules and regulations as it might see fit with regard to the status of American corporations in foreign countries and the intervention in their behalf by the American Government. However, in framing such rules it might be found to be to the advantage of the United States fully to recognize and protect in China all corporations organized under American law irrespective of the question as to whether the stockholders or a majority of them were or were not citizens of the United States.

As to the second point, it appears, as a legal proposition, that all corporations possessing an American charter are citizens of the United States and therefore subject to be sued only in the American courts in China—and this without regard to the nationality of the stockholders. This holding would apply to companies organized under the laws of the Philippine Islands or other insular possessions of the United States.

[10] *U. S. For. Rels.*, 1910, p. 197.

The communication goes on to say that though all American chartered corporations are entitled to registration at the American consulate, such registration does not carry with it the implication that the United States will in all cases extend to them its diplomatic protection or intervention. This is determined, in each case, as a matter of policy and right, all the attendant circumstances being taken into consideration.

The United States-China Trade Act of September 19, 1922. Until 1922 American corporations operated in China under considerable disadvantages as compared with the corporations of others of the treaty Powers, and particularly, perhaps, those enjoying Hongkong charters. With regard to the conditions under which American corporations were obliged to operate, prior to 1922, Arnold, in the first edition of the *Commercial Handbook of China,* published in 1920,[11] had the following to say:

> Under present American laws there is no machinery for incorporating companies for the special purpose of foreign trade, and companies organized for this special purpose are compelled to incorporate under the laws of the various States, with their varying and often conflicting regulations. To quote the comment of one of the most widely circulated American periodicals, the Chinese do not know anything in particular about New Jersey, Delaware, New York, and so on. Their lawyers tell them that the United States has nothing in particularly to do with these corporations; that they are the creatures of the various States; that these States have different laws; that the provisions of a given charter may be lawful in one State and unlawful in another. The Chinese . . . turn to a company whose charter bears the seal of a great nation.

Concerning the need for legislation upon the part of the American Congress in order that American corpora-

[11] Vol. II, p. 75.

tions might operate under more advantageous conditions, Arnold quoted the following from the *New York Journal of Commerce:*

As commercial conditions exist in China the Chinese are much inclined to invest their money in companies under foreign charters, but it has been found that a country which can bring under its charters the investment of large sums of Chinese money gains a status in the Chinese community not held by countries whose charters are less acceptable to the Chinese community. Hence a great field of commercial development would unquestionably be open to the United States if we could offer such a charter to the American merchant in China as would appeal to the Chinese investor. Great Britain has perceived the importance of this and has in its Hongkong "companies ordinance" provided a very suitable charter for business in China. It happens that this charter is almost universally used, and it is not uncommon to find incorporated under the Hongkong ordinance a variety of companies for an equal variety of purposes, in which the capital is mainly Chinese and that of other nations, even of British subjects themselves, is proportionately small. As a matter of fact, Americans who wish to invite the capital of Chinese and other nationalities are compelled to resort to the laws of England to do their business in a corporate capacity in China. They thus submit themselves to English jurisdiction and become, in their corporate capacity, British subjects, under the control of British courts and consular authorities. Their business, moreover, figures as an asset of Great Britain in the communities in which they may be established.

The movement for a law to correct the conditions which have been described was initiated by the American Chamber of Commerce of China, an organization composed of a large number of American organizations doing business in China. The draft of an Act, prepared by the Chamber, was introduced in Congress in 1918, but did not receive serious consideration by that body until 1920

when a group of American Congressmen made a visit to China for the purpose of investigating personally the situation. In December of the same year the American Chamber at Shanghai sent to Washington a delegation, composed of M. C. L. Seitz and M. J. B. Powell, editor of *The Weekly Review* of Shanghai and Honorary Secretary of the Chamber. Both of these gentlemen appeared in behalf of the proposed law before committees of the House and of the Senate, Mr. Powell remaining in Washington more than a year. The measure was especially sponsored in Congress by Representative L. C. Dyer of Missouri.

The following are the important provisions of the Act:[12]

The Act is entitled "An Act to Authorize the Creation of Corporations for the Purpose of Engaging in Business within China." It is provided that it may be cited as "China Trade Act, 1922."

The term China, as employed in the Act is declared to mean "(1) China including Manchuria, Thibet, Mongolia, and any territory leased by China to any foreign government, (2) the Crown Colony of Hongkong, and (3) the Province of Macao."

Five or more individuals, a majority of whom must be citizens of the United States, may form a District of Columbia corporation for the purpose of engaging in business in China.

The Articles of Incorporation adopted by these incorporators must be filed with the Secretary of Commerce of the United States with application for a certificate of incorporation. These Articles must state the name of the incorporation which shall end with the legend, "Federal Inc., U. S. A."; the location of the principal office of the

[12] 42 Stat. L. 849; 1925 Suppl. U. S. Compiled Stat. 599.

company, which shall be in the District of Columbia; the particular business in which the corporation intends to engage; the amount and classes of authorized capital stock, the terms upon which issued, etc.; the duration of the corporation, which may be for not more than twenty-five years, but which may, upon application to the Secretary and payment of the incorporation fee be successively extended by him for like periods; the names and addresses of individuals, a majority of whom must be citizens of the United States, and one of whom, at least, a resident of the District of Columbia, to be designated as temporary incorporators; and "the fact that an amount equal to 25 per centum of the authorized capital stock has been in good faith subscribed and paid in cash, or, ... in real or personal property which has been placed in the custody of the directors."

Corporations chartered under the Act are forbidden to engage in the business of discounting bills, notes or other evidences of debt, of receiving deposits, of buying and selling bills of exchange, or of issuing bills, notes, or other evidences of debt, for circulation as money; or to engage in any other form of banking business; or to engage in any form of insurance business.

The corporations are to have the usual powers of corporations, as regards having a corporate seal, suing and being sued, holding property, real or personal, issuing shares, adopting by-laws, etc., and may establish branch offices in China.

Shares of stock are to be issued at par only, and to be fully paid-up. Dividends must be derived wholly from surplus profits of the business carried on.

The Federal District Courts are given original jurisdiction of all suits (except as provided by the Act of June 30, 1906, creating the United States Court for China) to which a China Trade Act corporation, or

a stockholder, director, or officer thereof in his capacity as such, is a party. Suits against the corporation may be brought in the United States Court for China, or in the Supreme Court of the District of Columbia, or in the Federal District Court for any district in which the corporation has an agent and is engaged in doing business. (Sec. 20.)

The Act provides for the designation by the Secretary of Commerce of the United States of an officer of his Department as China Trade Act Registrar, who shall have his office at a place in China to be designated by the Secretary, and who shall exercise all the functions vested in him by the Act under the supervision of the Secretary, and from his determinations an appeal lies to the Secretary who may affirm, modify, or set aside, as he deems advisable, any action of the Registrar. To the Registrar the corporations must make annual reports of their business for each fiscal year and their financial condition at the end of such years.

The Registrar, in order to ascertain whether the affairs of a China Trade Act Corporation are being conducted in accordance with the law, may make investigations into the affairs of the corporation, and, if he deems them justifiable, institute legal proceedings for the revocation of the certificate of incorporation of the company; and for the efficient administration of his functions may issue subpœnas for the attendance of witnesses, production of evidence, etc.

The Secretary of Commerce is authorized to make such regulations as may be necessary to carry into effect the functions vested in him or in the Registrar by the Act. The Secretary is also authorized to prescribe and fix fees for services rendered by him or by the Registrar.[13]

[13] In 1922 the Secretary of Commerce appointed Acting Commercial Attaché Frank Rhea, at Peking, as Registrar, and Mr. F. R. Eldridge, Chief of the Far Eastern Division of the Department, as Assistant Registrar, at Washington.

Taxation by the United States of American Corporations in China. One of the difficulties under which American business corporations in China operate is the fact that they are obliged to pay the federal taxes levied upon corporations by the United States, a burden which was not laid upon the other foreign corporations by their respective countries. This competitive handicap is only in part removed by the Act of 1922 which exempts from Federal income taxation the stock of American companies directly engaged in Commerce in China [14] held by Chinese or Americans resident in China, provided the amounts of money, from the payment of which the companies are thus relieved, are distributed annually to such stockholders as special dividends. The provision applies only to corporations organized and registered under the Act.

Amendment of the China Trade Act. Experience proved that the China Trade Act did not effect the purpose for which it had been enacted, namely, to encourage American trade in China. The conditions imposed upon companies incorporating under it were so severe, and the exemption from Federal American taxation so incomplete, American traders in China still found it to their advantage to incorporate under British or other foreign law rather than under the American Act.

The lack of liberality of the Act of 1922 with reference to exemption from taxation is thus described by Mr. F. R. Eldridge, Chief of the Far Eastern Division of the United States Department of Commerce, in evidence given by him before the Committee on the Judiciary of the House of Representatives which had before it the proposal to amend the Act. Mr. Eldridge said:

[14] Including, as earlier pointed out, Manchuria, Thibet, Mongolia, territories leased by China, Hongkong, and Macao.

Stockholders, individual or corporate, of China trade act corporations residing in the United States now pay in full income taxes on their dividends received from such corporations and have not the right to deduct from their gross income in the case of corporate shareholders or credit their net income in the case of individual shareholders those dividends which have paid the 12½ per cent corporation tax at the source.

This is brought about by the operation of section 27 of the China trade act of 1922, which amends the revenue act of 1921 in those three places where, first, individuals in section 216; second, corporations in section 234; and third, insurance companies in section 245 are entitled to credit or deduct the amount received as dividends from China trade act corporations which are domestic corporations and which under a previous section (25), China trade act, corporations are specifically designated so to be. The law as amended by the China trade act therefore reads that individuals, corporations, and insurance companies shall be allowed the following credits from net income or deductions from gross income:

A. The amount received as dividends (1) from a domestic corporation other than a corporation entitled to the benefits of section 262 (defining gross income as only gross income from sources within the United States for certain classes of individuals and corporations) and other than a corporation organized under the China trade act of 1922.

Stockholders of domestic corporations doing business in the United States, when they pay their individual income tax, do have the right to credit their net income with the amount of dividend received which have paid the 12½ per cent corporation tax at the source. Citizens of the United States residing in China may, through the declaration of a special dividend, have paid to them the 12½ per cent corporation income tax which the China trade act corporation otherwise would pay the United States Government. There is no incentive, therefore, under the present law for American citizens residing in the United States to invest in China trade act corporations in preference to domestic corporations. The China trade act, however, was designed to encourage American investment in China. The amendment to section 264

proposed would extend the benefits of the special dividend to stockholders of China trade act corporations not only if they resided in China but also if they resided in the United States and possessions of the United States. Under the present law a stockholder with $10,000 invested in a China trade act corporation would not be entitled to a credit on his individual income tax return, provided he resided in the United States, of the amount of dividends received from a China trade act corporation which has already paid its 12½ per cent corporation tax to the United States Government. He would again pay to the United States Government 4 per cent or 8 per cent, as the case might be, on the dividends which he has received from the China trade act corporation, and the United States Government, therefore, imposes on stockholders in China trade act corporations, as long as they reside in the United States, a tax, first, of 12½ per cent on the corporation's net earnings, and second, an individual income tax on the dividend which is declared from those earnings. This is clearly repetitive taxation and certainly penalizes an investor living in the United States who would put his money into a China trade act corporation. The difference between the income to an investor in a domestic corporation and a China trade act corporation, therefore, is the 4 or 8 per cent on these dividends which the law does not permit him to deduct in case the income comes from the China trade act corporation.

That the companies doing business in China under Hongkong or British charters enjoyed greater immunities from taxation than were offered to American companies under the Act of 1922, and, therefore, had a decided competitive advantage, is very clear, and is brought out in the report of the Committee on the Judiciary of the House of Representatives of March 18, 1924, to which committee had been referred the proposal to amend the Act.[15] In that report appears the text of a letter from Mr. Cunningham, the American Consul-General at Shanghai, in the course of which he says:

[15] H. R. Report No. 321, 68th Cong., 1st Sess.

The act as passed by Congress is of great assistance to the American business man in China who is transacting business on his own, through a purely local concern, but it is deeply to be deplored that the Act does not go further and place the large American concerns on an equal footing with their British competitors. In brief, it appears that capital put into business in China by an American who resides outside of China does not receive any exemption, nor can exemption be obtained by placing the stock in trust with a resident of China. It was particularly desired that the Act should encourage American financial interests to invest capital here (in China) on an equal footing with that of competitors, particularly the British.

In the same report is quoted the answer given by Mr. Sydney Barton, Registrar of British Companies at Shanghai, to the question: "Are British stockholders in Hongkong companies and British-China companies exempt from individual income taxes when dividends are kept in China, also when dividends are sent to England?" Mr. Barton replied:

(*a*) A British-China company, not being resident or carrying on business in the United Kingdom is, as a company, not chargeable with income tax on the company's annual net profits.

(*b*) British subjects, shareholders in British-China companies, not resident in the United Kingdom, are not chargeable with income tax on dividends paid by such companies.

(*c*) British subjects resident in the United Kingdom are chargeable with income tax on dividends paid to them as shareholders in China companies irrespective of whether such dividends be remitted to the United Kingdom or kept elsewhere.

In result there was secured an Act of Congress, approved February 26, 1925,[16] which made, among other amendments which do not need to be here enumerated, the following amendments to the Act of 1922:

[16] 43 Stat. L., p. 996.

The requirement that there should be five incorporators, a majority of whom should be citizens of the United States, was changed to three.

The temporary directors named in the Articles of Incorporation are to be at least three in number, a majority of whom " at the time of designation and during their term of office, shall be citizens of the United States."

To the limitations of the Act of 1922 with reference to the kinds of business that might be carried on by companies organized under it was added the prohibition of being engaged in, or organized to engage in the business of owning or operating any vessel, unless the controlling interest in such corporation is owned by citizens of the United States within the meaning of section two of the Shipping Act, 1916, as amended. This restriction was added in order that the corporations should conform to other Federal laws and regulations with reference to registry of vessels, and especially those applying to vessels engaged in Chinese coastal and inland waters.

Section 4 of the original Act was amended by adding the following provision:

No certificate of incorporation shall be delivered to a China Trade Act corporation and no incorporation shall be complete until at least twenty-five per centum of its authorized capital stock has been paid in in cash, or, in accordance with the provisions of section 8, in real or personal property which has been placed in the custody of the directors, and such corporation has filed a statement to this effect under oath with the Registrar within six months after the issuance of its certificate of incorporation, except that the Registrar may grant additional time for the filing of such statement upon application made prior to the expiration of such six months. If any such corporation transacts business in violation of this subdivision or fails to file such statement within six months, or within such time as the registrar prescribes upon such application, the registrar shall institute proceeds under section 14 for the revocation of the certificate.

Section 7 of the Act was amended to read as follows:

Each share of the original or any subsequent issue of stock of a China Trade corporation shall be issued at not less than par value, and shall be paid for in cash, or in accordance with the provisions of section 8, in real or personal property which has been placed in the custody of the directors. No such share shall be issued until the amount of the par value thereof has been paid the corporation; and when issued, each share shall be held to be full paid and nonassessable: except that if any share is, in violation of this section, issued without the amount of the par value thereof having been paid to the corporation, the holder of such share shall be liable in suits by creditors for the difference between the amount paid for such share and the value thereof.

Subdivision (b) of Section 9 of the Act, which relates to the by-laws which may be adopted by the corporations, was made to read:

The number, qualifications, and manner of choosing and fixing the tenure of office and compensation of all directors; but the number of such directors shall be not less than three, and a majority of the directors, and the president and the treasurer, or each officer holding a corresponding office, shall, during their tenure of office, be citizens of the United States resident in China.

Section 20 of the Act was amended so as to provide that every China Trade corporation must maintain in the District of Columbia an accredited agent upon whom legal processes may be served in any suits brought in the Supreme Court of the District of Columbia, and who shall be authorized to enter an appearance in its behalf.

A new section was added to the Act (Section 29) which provides that "Hereafter no corporation for the purpose of engaging in business within China shall be created under any law of the United States other than the China Trade Act." The effect of this provision is to prevent

for the future the incorporation of American companies under the Alaska Code.

With regard to the matter of the United States taxes leviable upon the China Trade Act corporations or upon their stockholders, the Act was amended so as to read as follows:

SEC. 11. That subdivisions (a) and (b) of section 263 of the Revenue Act of 1924 are amended to read as follows:

SEC. 263. (a) That for the purpose only of the tax imposed by section 230 there shall be allowed, in the case of a corporation organized under the China Trade Act, 1922, a credit of an amount equal to the proportion of the net income derived from sources within China (determined in a similar manner to that provided in section 217) which the par value of the shares of stock of the corporation owned on the last day of the taxable year by (1) persons resident in China, the United States, or possessions of the United States, and (2) individual citizens of the United States or China wherever resident, bears to the par value of the whole number of shares of stock of the corporation outstanding on such date: *Provided,* That in no case shall the amount by which the tax imposed by section 230 is diminished by reason of such credit exceed the amount of the special dividend certified under subdivision (b) of this section.

(b) Such credit shall not be allowed unless the Secretary of Commerce has certified to the Commission (1) the amount which, during the year ending on the date fixed by law for filing the return, the corporation has distributed as a special dividend to or for the benefit of such persons as on the last day of the taxable year were resident in China, the United States, or possessions of the United States, or were individual citizens of the United States or China, and owned shares of stock of the corporation, (2) that such special dividend was in addition to all other amounts, payable or to be payable to such persons or for their benefit, by reason of their interest in the corporation, and (3) that such distribution has been made to or for the benefit of such persons in proportion to the par value of the shares of stock of the corpora-

tion owned by each; except that if the corporation has more than one class of stock, the certificates shall contain a statement that the articles of incorporation provide a method for the apportionment of such special dividend among such persons, and that the amount certified has been distributed in accordance with the method so provided.

SEC. 12. That paragraph (13) of subdivision (b) of section 213 the Revenue Act of 1924 is amended to read as follows:

(13) In the case of a person, amounts distributed as dividends to or for his benefit by a corporation organized under the China Trade Act, 1922, if, at the time of such distribution, he is a resident of China and the equitable right to the income of the shares of stock of the corporation is in good faith vested in him.

CHAPTER XXXVIII

Wireless, Cables and Telegraphs

The situation in China with regard to foreign interests in electrical communications—wireless, submarine cables, and telegraphs—is a complicated one, and at the present time (1926) in dispute not only as between China and the foreign Powers but as between the foreign Powers themselves.

Telegraph Lines. As regards land telegraph lines the situation is the least complicated, and, in fact, is not complicated at all except insofar as the lines are linked up with submarine cables.

Land telegraph lines have existed in China since 1881, and, since 1908, have been operated by the Central Government.

The *China Year Book* for 1925[1] gives the following facts regarding telegraph lines in China: "The Chinese telegraph system dates from December 24, 1881, when the line from Shanghai to Tientsin was officially opened. Prior to this two short lines—Shanghai to Woosung, and Tientsin to Taku—had been constructed under foreign and Chinese auspices respectively, and submarine cables were in operation at Shanghai and Hongkong. During 1882 the telegraph line was carried up the Yangtze Valley

[1] P. 412.

from Shanghai, at first to Chinkiang and Nanking, and by 1884 to Hankow. The Chinese Telegraph Administration, a commercial undertaking started by Sheng Kung-pao, was formed in April, 1882, under Government control, and took charge of all the Government lines. A second private company—the Wahop Company formed in May, 1882—built a line from Canton to Kowloon (July, 1883), and connection with Hongkong was made in January, 1884. In August, 1884, Peking was linked up with Tientsin. A line connecting Shanghai and Canton, built by the Government, was opened in October, 1884, and about the same time the Shanghai-Tientsin line was extended to Shanhaikwan and Paotingfu, with branches from Tsinanfu to Chefoo and Tsingtao. In 1897 a line across Mongolia from Kiachta to Peking gave China land-telegraphic communication with Europe.

"Telegraph connections have been made with the three cable companies operating in China: with Russia and Japan regarding the Manchurian telegraph system: with Japan regarding the cables between Dairen and Chefoo and between Shanghai and Nagasaki; and with India and France regarding the connection at the Burmese and Indo-Chinese frontiers. . . . .

"By an agreement, made in April, 1911, the Great Northern and Eastern Extension (Cable) Companies advanced to the Chinese Telegraph Administration the sum of £500,000 for the immediate development of telegraphs and telephones in China. The foreign companies make quarterly payments to the Chinese Telegraphs of a percentage of their revenue from foreign telegrams, and the advance was made against these payments for the next eighteen years, at five per cent. interest; repayment of the loan and interest to be effected by thirty-six half-yearly instalments. Until 1930 under the agreements with these Companies, China is debarred from allowing

any other land telegraph stations to communicate telegraphically with Europe or America."

MacMurray[2] says: "The situation of the Chinese Telegraph Administration in relation to the several cable companies is somewhat obscure by reason of the fact that some of the more important agreements have not been made public. It is understood that, by agreements of 1904 and 1905, the Commercial Pacific and German-Dutch Cable Companies were admitted to participation with the Eastern Extension and Great Northern Companies in their interest under the joint purse arrangement provided in Article 2 of this Convention; and that further agreements concluded between the Chinese Administration and the latter two companies were concluded in 1904, 1911, and 1913, in which provision was made for the modification of the joint purse arrangement, and the term of all telegraph agreements between the Chinese Administration and the Eastern Extension and Great Northern Companies was extended to December 31st, 1930."[3]

[2] P. 67.

[3] MacMurray annexes to the foregoing statement the text of an agreement printed in the *British and Foreign State Papers*, Vol. 107, p. 726, of an Additional Article to the Convention of July 11, 1896, signed at Peking, December 22, 1913, between the Imperial Chinese Telegraph Administration, on the one hand, and the Great Northern Telegraph Co. and the Eastern Extension Australasia and China Telegraph Co. on the other hand. The substance of this agreement reads: "In the interest of both parties to the Agreement, dated 11th July, 1896, and for the same term of years—that is, till the 31st December, 1930—no other party will be allowed, without the consent of both the said parties, to land telegraph cables on the coast of China and islands belonging thereto, or to work such cables in connection with the Chinese lines, or otherwise to establish telegraph connections which might create a competition with or injure the interests of the existing lines belonging to China or to the cable companies. This shall, however, not prevent the Chinese Government from establishing local internal cables where no competition can arise, neither shall it prevent the transmis-

Cables.[4] The chief cable companies operating in China: The Great Northern Telegraph Co., Ltd., a Danish corporation but largely British owned and controlled; the Eastern Extension, Australasia and China Telegraph Co., Ltd., a British company, British owned and controlled; the Commercial Pacific Cable Co., an American Company, but with three-fourths of its stock owned by foreign cable interests.

The Eastern Extension, Australasia and China Telegraph Co., Ltd., and the Great Northern Telegraph Co., Ltd., have, since an early date, cooperated with each other, and, as will presently be seen, claim concessions from China which, if acquiesced in by the other Powers, give them until 1931 a monopoly of China's communications—wireless as well as cable—with other countries.

The Eastern Company has a cable from Hongkong to Singapore at which latter city connections are made with Europe. This company has the right to lay a cable from Hongkong to Foochow and Shanghai.

The Great Northern Company has cables connecting Vladivostok, Nagasaki, Shanghai, Amoy and Hongkong. It also operates cables in north European waters, and operates land telegraphs across Russia and Siberia which connect its Eastern and Western cable systems.

China owns a short cable from Shanghai through Chefoo to Taku which, however, is jointly operated by the

sion of terminal Formosa traffic over the Foochow-Formosa cable not belonging to Japan, whilst other traffic must not be exchanged by this line except with the consent of China and of the cable companies."

[4] For information regarding the cable situation in China, the author is much indebted to a Memorandum prepared by Mr. Walter S. Rogers for the Conference on American Relations with China, held at the Johns Hopkins University, in Baltimore, Md., U. S. A., in September, 1925, and published in the Report of that Conference (Johns Hopkins Press, 1925).

Great Northern and Eastern Extension Australasia and China Cable Companies.[5]

The Commercial Pacific Company has a cable from San Francisco to Honolulu, Midway, Manila and Shanghai. There is also a cable from Guam to the Bonin Islands and thence to Japan. The Bonin-Japan section is operated by the Japanese Government, and the Guam-Bonin section by the Commercial Pacific Company.

Japan has a cable line from Nagasaki to Shanghai, another from Formosa to Foochow, and another from the Kwantung peninsula to a place a few miles north of Chefoo.

Before the War there were German cables from Tsingtao to Chefoo and from Tsingtao to Shanghai with landing rights granted by China. These rights have been cancelled by China, and the cables either cut, diverted, or taken possession of by Japan. The controversy between the United States and Japan with regard to the cable landing rights upon the Island of Yap is well known but cannot be here considered. The final disposition of the German cables is treated in the chapter dealing with the return of Shantung to China.

Joint Purse Agreement. By a Convention entered into July 11, 1896, often spoken of as the "Joint Purse" agreement, between the Imperial Chinese Telegraph Administration, the Great Northern Telegraph Co., and the Eastern Extension, Australasia and China Telegraph Co., an arrangement was entered into with regard to the rates of revenue to be charged and the division of receipts from messages passing over both cables and the land telegraphs in China; and, as earlier referred to in the paragraphs (and footnotes) dealing with land telegraphs in China, other agreements, entered into in 1904, 1905,

[5] MacMurray, 269.

1911 and 1913, made further provision for joint arrangements between the telegraph lines of China and the cable companies, in which could be discerned the purpose upon the part of the cable companies to obtain for themselves a monopolistic control of communications between China and other countries.

In further explanation of this movement for the establishment of a monopoly is to be cited, in particular, the agreement of March 6, 1899[6] between the Imperial Chinese Telegraph Administration and the Great Northern Telegraph Company, which contained the following provision:

That in the interest of both parties to the agreement dated 15th May, 1897, and for the same term of years, that is, till the 31st December, 1910, no other party will be allowed to land telegraph cables on the coast of China and islands belonging thereto, or to work such cables in connection with the Chinese lines or otherwise to establish telegraph connection which might create competition with or injure the interests of the existing lines belonging to China or to the Great Northern Telegraph Company of Copenhagen. This shall, however, not prevent the Chinese Government from establishing local internal cables where no competition can arise, nor from consenting to the junction by cable of Port Arthur with the Russian telegraph system for the exchange of limitrophe local traffic, neither shall it prevent the transmission of terminal Formosa traffic over the Foochow-Formosa cable now belonging to Japan whilst other traffic must not be exchanged by this line except with the consent of China and of the Great Northern Telegraph Company of Copenhagen.

Following this Agreement was that of December 22, 1913, which has already been quoted in the section dealing with Telegraphs.[7]

[6] MacMurray, 103. The Convention was an additional article to the Agreement of March 6, 1899.

[7] *Ante*, p. 945, note.

Describing the steps taken by the foreign cable companies to obtain a monopoly of China's communications with other countries, Mr. Rogers, in the Memorandum to which earlier reference has been made, says:

In 1900, the British cables went no farther north than Shanghai, communications with Peking being carried on over Chinese land lines. The events of the Boxer Rebellion made imperative (in the British view) an extension northward of the British cable system.

Under date of April 23, 1901, the British Government entered into an agreement with the "Eastern" for the provision of a cable between Chefoo and Weihaiwei. In this agreement, the substance is given of two agreements executed between the Chinese Telegraph Administration on the one part and the "Eastern" and "Great Northern" on the other part, bearing the dates respectively of August 4, and October 27, 1900. One paragraph reads:

"All existing agreements and concessions between the Administration and the companies, or either of them, are to be extended and shall continue in force until the 31st day of December, 1930." [8]

The monopoly agreement of 1899 and the agreements of 1900 were secretly obtained and were kept secret. The exact dates of the contracts of 1900 are significant. On the first date (August 4) the foreign legations in Peking were being besieged; on the second date (October 27) Peking was occupied by an Allied military force. China was in chaos; there was no responsible Chinese central government, and it is difficult to conceive of any Chinese official having authority to bind his government to so important an agreement as the extension of monopoly cable rights. The Allied Powers were presumably acting in good faith and committing themselves to the policy of the Open Door. . . .

An agreement of 1913 virtually reaffirms the 1900 agreements. This agreement likewise was obtained secretly.[9]

The agreement of 1899 carries an endorsement reading, "Vu

[8] MacMurray, p. 270.
[9] MacMurray, p. 67.

et approuvé: le Ministre de Russie et de Danemark," and the Russian Imperial family was financially interested in the "Great Northern."

In the course of a discussion in May, 1901, in the British Parliament, Sir Charles Dilke said:

"The effect of the agreement [that of April 23, 1901, between Great Britain and the 'Eastern'] would be that the Government were binding themselves to maintain for the two companies concerned—the Eastern Extension and the Great Northern Telegraph Companies—a monopoly in the work of all Chinese submarine lines, but the declared policy of the United States Government is to establish direct communication with China, and this agreement would bind the British Government to resist that." [10]

The United States had long been on record as opposing cable monopolies, and in 1899 and 1900 there was a definite movement in the United States looking toward the provision of a cable to connect the United States with Asia.

On the first point: As early as 1874, when the Danish Government sought the assistance of the treaty powers in obtaining from China protection for the lines of the Great Northern Telegraph Company, the then Secretary of State concluded a dispatch to the American Minister with the statement:

"While concurring, therefore, in the desire to afford assistance toward the protection and encouragement of telegraphic enterprises in China, I am of opinion that general advantages and general protections should be kept in view, and that a monopoly or exclusive grant is not to be desired." [11]

In 1881 there was an exchange of notes between the American Minister and the Chinese Government, in which the former vigorously insisted that no cable monopoly should be granted. In this stand he was fully supported by his government.[12] The subject was again up in 1887 and 1889.[13] American opposition

[10] MacMurray, p. 273.
[11] *U. S. For. Rels.*, 1875, p. 274.
[12] *U. S. For. Rels.*, 1881.
[13] *China Dispatches*, 1887, No. 470; 1889, No. 971.

was based on the grounds that a cable monopoly would be detrimental both to Chinese and to American interests and that a monopoly would be violative of American treaty rights.[14]

As to the second point: For many years there had been discussion in the United States with reference to a trans-Pacific cable. With the acquisition by the United States of the Hawaiian Islands and of the Philippines, such a cable became inevitable. In 1899, President McKinley directed the attention of Congress to the subject. Hearings were held, and two distinct plans took shape—one for a government owned cable, the other for a privately owned but governmentally subsidized cable.

Undoubtedly the cable companies through the monopoly concessions of 1899 and 1900 sought either to prevent the laying of a trans-Pacific cable or to determine the conditions under which such a cable could be landed in China. Only a few months before the outbreak of the Spanish-American war, the "Eastern" secured at Madrid a monopolistic cable concession covering the Philippines.

Certainly the British Government was apprehensive as to the part the United States in the future was likely to play in the Far East. The absence of a direct trans-Pacific cable, operated by American interests, would tend to minimize American influences.

In the course of Congressional hearings in 1902, a representative of the Postal-Commercial interests stated that plans were being carried out for a trans-Pacific cable, for which no subsidy would be asked. Congress, therefore, took no action. In 1921, an official of the Postal-Commercial stated that one-half of the stock of the Commercial Pacific Cable Company was owned by the "Eastern" and one-quarter by the "Great Northern."[15]

In 1904, the Commercial Pacific Cable Company entered into contracts with the "Eastern" and the "Great Northern." The company laid a cable from San Francisco to Guam via Honolulu and Midway, a cable from Guam to the Bonin Islands (Japan),

[14] Particularly of Article XIV of the French Treaty of June 27, 1858.

[15] *Hearings on Cable Landing Licenses*, U. S. Senate, S. 4301, 1921, p. 270.

a cable from Guam to Manila, and a cable from Manila to Shanghai. It remains the only cable system providing communication across the north Pacific. No competing cable has been laid, and, in view of the Chinese concessions and the power wielded in the telegraph world by the "Postal-Commercial," the "Eastern" and the "Great Northern," there has been no possibility of other private cable enterprises going into this field.

So far as the writer of this memorandum is concerned, he knows of no one, aside from officials of the Commercial Pacific Cable Company, who believes that the cable has adequately met the needs for trans-Pacific communication. Certainly this is true if the needs are envisaged as including assured service at rates sufficiently low to stimulate international commercial intercourse and to further a generous exchange of press matter.

Wireless (Radio). The matter of wireless or radio communication between China and other countries of the world is closely connected with the cable situation which has been described, and there is at present an active and unsettled dispute as to the rights in the premises granted by China which are possessed by various of the Treaty Powers, and especially by Japan, Great Britain and the United States.

Mitsui Agreement. By an agreement of February 21, 1918,[16] the Chinese Ministry of the Navy gave to the Japanese company of Mitsui Bussan Kaisha the right to construct for the Chinese Government at a place to be approved by that Government " a great radio-telegraphic station with transmitting power and special receiving apparatus capable of direct radio-telegraphic communication with Japan, America and Europe." The costs of this station, estimated at £536,267, which were to be advanced by the Mitsui Company, were to be repaid in thirty annual instalments, the Mitsui Company guaran-

[16] MacMurray, 1519.

teeing that these payments could be made from the net revenues of the station. In return for such guarantee the company was to have the full right to operate the station during the thirty years. However, the Chinese Government was to receive ten per cent. of the gross receipts derived from messages, to supervise all accounts, and to send students for training in radio-telegraphy at the station. Articles 8, 9 and 12 of the Agreement further provided:

8. The Government, in order that as large a revenue as possible may be obtained from the operation of the said station, shall permit the making of connections with all radio-telegraphic stations outside China and the securing of the greatest number of profitable communications (including all communications with ships at sea and in port). The Contractor [the Mitsui Company] may not undertake commercial communications with radio-telegraphic stations in China, provided, however, that this shall not apply to those for military use, in accordance with the orders of the military authorities. In the event of war between China and another nation, the said station shall be operated entirely in accordance with the instructions issued by the military authorities.

9. If the Government desires, for any reason, to take over the operation of the said station within the said thirty-year period, it shall, of course, have the right to take it over upon the liquidation in full of instalments and the interest to date at the rate of eight per cent. . . .

12. After the expiration of the said thirty-year period, the Government (in case it has not taken over the said station under the provisions of Article 9) regardless of whether the Contractor [Mitsui Company] has been able to repay the capital out of the operation of the said station shall have the right to take over the said station without paying the Contractor any compensation. In this event it shall give the Contractor notice six months in advance.

It will be seen that, by this agreement, the control and operation of the wireless station to be erected was to be in the hands of the Mitsui Company during the thirty-year period of the loan made by that company, unless China should use her option of purchase. However, by a "Supplementary Agreement" entered into on the same day, this provision was radically changed and the control and operation of the station placed immediately after construction in the hands of the Chinese Government. Furthermore, the receipts of the station were not made a security for the loan, and the Mitsui Company assumed no responsibility for the payment of the yearly instalments.[17] In effect, then, the agreement became this: The Chinese Government borrowed £536,267, and, for this amount, the Mitsui Company contracted to erect the station, which, as soon as completed and accepted, was to be taken over and operated by the Chinese Government. The Mitsui Company was thus not only not to operate the station but was to have no claim upon its receipts, or, indeed, to be interested in them, since they were not to be security for the loan.[18] However, in a Supplement to this Supplementary Agreement occurs the following statement addressed by the Mitsui Company to the Chinese Government: "If your Government cannot make the said station pay its expenses, interest, and annual instalments on the capital, our Company, in case your Government desires, will gladly undertake the operation of the said station under the supervision of your Government in the same way as our Company offered to do with respect to the patent agreement proposed in the

[17] Interest was to be paid by the Chinese Government for ten years, at the expiration of which period payments upon the capital were also to begin and run for thirty years.

[18] For text of this Supplementary Agreement see MacMurray, p. 1521.

first place, and we will pay interest and the annual instalments on the capital." [19]

By still later agreement, dated March 5, 1918, it was provided that: "During the period of thirty years mentioned in Article 4 of the Contract, the Government shall not permit any other person or firm to erect, nor shall it erect by itself, any wireless station in China for the purpose of communicating with any foreign country."

Here, it was evident, that a monopoly right was sought to be gained by the Japanese company.

Marconi Agreements. Under date of August 27, 1918, the Chinese Ministry of War entered into an agreement with the Marconi's Wireless Telegraph Company, Ltd., with regard to the purchase by the Chinese Government of a number of wireless telephone equipments. This agreement provided for a loan to the Chinese Government of £600,000 of which only £300,000 would be required for the payment of the equipment which was to be purchased. The agreement provided (Article 4) that "The balance of the said sum of £600,000 hereinabove provided for, viz., £300,000 shall be transferred to the credit of the Government without discount at the earliest possible date after the execution of this agreement." As security for the loan, Chinese Government negotiable treasury notes were to be issued and given to the Company.

Article 12 of the Agreement provided: "... the Government promises that in the event the Government decides to establish a repair shop or factory for the maintenance of wireless installations in China, or for the manufacture of wireless apparatus, the Government will first open discussions with the Company with the view of arranging joint operation of such factory by the Government and the Company." [20]

[19] MacMurray, p. 1522.
[20] MacMurray, p. 1442.

In pursuance of this provision under date of May 24, 1919, the Chinese Ministry of War entered into an agreement with the Marconi Company according to which a joint stock limited liability company, to be known as the Chinese National Wireless Telegraph Company, was created "to manufacture wireless telegraph and telephone apparatus, material and supplies, to deal in such apparatus, material and supplies, and to repair and maintain wireless installations now existing and hereafter established." Of the shares of this company, the Chinese Government and the Marconi Company were to own each half, but one-third of the profits of its operation was to be allocated to the Marconi Company before distributing the remainder in the form of dividends. The Chinese Government was, however, to have the right after twenty years to buy out the interests of the Marconi Company, or to dispose of its own interests.[21] The Government of China also undertook to purchase goods from the Company if its prices were not higher than, or its goods inferior in quality to, those offered by other companies. Also the Government was to entrust the Company with the repair and maintenance of all telegraph and telephone apparatus and equipment in China, provided no loss by the Government was thereby suffered.

On October 18, 1918, the Chinese Government entered into another agreement with the Marconi Company, according to which the Government, in order to establish reliable communication between Kashgar and Sianfu, was to erect three wireless telegraph stations and to purchase the equipment for them from the Marconi Company, the purchase price for them being £66,000. However, the Marconi Company was to lend the Government £200,000, and the £134,000 remaining over after the purchase of

[21] Should the offer of the Marconi Company for these interests be equal to that of other concerns, it is to have the option to purchase.

the wireless equipment was to be advanced in cash to the Government " when and as required to be expended for the transportation and erection " of the three wireless sets.[22]

Mr. Frederic G. Lee, in his valuable report on *Currency, Banking and Finance in China*,[23] with reference to the Marconi loan contract, makes the following comment: " The agreement calls for a loan of £200,000, only £66,000 of which is for the cost of equipment provided for in the contract, with £134,000 as an ' advance to the Government toward transportation and expenses.' It is realized, of course, that the cost of transportation of these wireless plants to the far interior points will be expensive, and costs of erection will be large, but it will be noted in the Ministry comment on this loan [24] that of the total drawings to the end of July, 1922, on this loan, amounting to £149,920, the expenditures under the first six drawings, totalling £67,000, are unknown to the Ministry of Communications, and that the drawing for the costs of the equipment was not made until the eleventh drawing."

On October 25, 1918, the Chinese Ministry of Communications entered into another loan agreement with the China-Japan Development Company, Ltd., with a view, it was declared, " of extending the 1916 short-term telephone loan and to effecting extensions and improvements

[22] The full text of this agreement is given in Mr. Lee's report referred to in the next paragraph, p. 213.

[23] Published in 1926 as No. 27 of its "Trade Promotion Series" by the U. S. Bureau of Foreign and Domestic Commerce.

[24] In August, 1922, the Chinese Ministry of Communications published, in the official organ of the Chinese Government a statement of the status of telegraph and telephone loans, and, in addition to comments thereon, included the texts of several agreements which were not elsewhere available. These texts are reproduced in Mr. Lee's report.

to the telephone business.[25] The loan provided for was Yen 10,000,000. The material to be purchased by the Chinese Government was to be furnished by two Japanese manufacturing concerns. As security for the loan, Article 4 of the Agreement provided that they should be—

(a) All the properties and revenues with operating rights of the various telephone exchanges and long-distance telephones under the administration of Party "A" (the Chinese Ministry of Communications) existing at present or developed in future.

(b) The six wireless stations now established at Woosung, Wuchang, Foochow, Canton, Kalgan, Peking, with their revenues.

(c) Treasury notes to the value of Yen 5,000,000.

Two Japanese technical experts and advisers were to be appointed to assist in the technical and accounting work and to investigate means of extension of wireless communications in China.

With a view to encouraging Chinese products, it was declared, the two parties to the Agreement were to jointly organize a manufacturing company for electrical materials such as wires and cables.

It was agreed that during the lifetime of the Agreement, the Chinese Ministry of Communications was not to conclude any similar agreement "with any other merchant in connection with the telephone business."

Of this loan agreement, the Chinese Ministry of Communications in its statement of August, 1922, earlier referred to, says: "This loan was contracted during the former Minister Tsao's régime. . . . . As to the detailed expenditure and whether or not the money was properly spent, strict investigations are now being made and a

[25] For text of the agreement, see Mr. Lee's *Report*, p. 216. The China-Japan Development Co., despite its hyphenated name, is essentially a Japanese concern.

further statement will be published as soon as the investigations are completed."

Of this loan agreement, Mr. Lee says:[26]

The Chiujitzu telephone loan agreement of October 25, 1918, for 10,000,000 Yen, . . . has apparently never been published before, and the terms of the 1916 short-term telephone loan to which it refers were likewise not made public. By piecing together various fragments of information certain foreign interests had been able to get together part of the terms of this agreement. But one very important clause had never been made public by the Chinese authorities before . . . the most significant statement in this clause is that all the properties and revenues, *with operating rights,* of the various telephone exchanges and long-distance telephones under the administration of the Ministry of Communications existing at the time of the contract or *developed in the future* shall become part of the securities of this loan. This clearly violates certain other contracts of the Ministry of Communications.

By an agreement of February 10, 1920, between the Chinese Ministry of Communications and the Eastern Asia Industrial Development Company,[27] an advance of Yen 15,000,000 by the Company to the Ministry for the purchase of materials for the improvement of wire telegraphs, as well as for "expenses for engineering and shipping purposes," was provided for.[28] Article 8 of this Agreement provided:

As to materials, machines, etc., required for the above work, which should be purchased from foreign countries, when the quality and price are not much different from those of Party "B" (the Japanese Company) then the same shall be purchased from Party "B."

[26] Report on *Currency, Banking and Finance in China*, p. 216.
[27] A Japanese concern.
[28] For text of this agreement see Mr. Lee's *Report*, p. 219.

Of this agreement, the Chinese Ministry of Communications in its statement of August, 1922, earlier referred to, said that investigation was being made as to whether or not the moneys received had been properly spent.

Mr. Lee in his Report says that, on August 9, 1922, the Director-General of Telegraphs gave out a circular telegram to the press stating that the debts of the telegraph department of the Ministry of Communications, consisted principally of Japanese loans and amounted to approximately $50,000,000 Mex., but that on one of these loans the principal of which is 15,000,000 Yen, 9,000,000 Yen had not been received and that the Japanese interests were urging him to take up this sum which he had refused to do. "Upon being questioned," says Mr. Lee, "whether or not the loans referred to in the statements were limited to the telephone loan of 10,000,000 Yen, the telegraph loan of 20,000,000 Yen, and the Wireless Telegraph Loan of 15,000,000 Yen, Mr. Woo replied that they were."[29]

Resumé as to Foreign Control and Monopolization. A consideration of the various telegraph, telephone, cable and wireless agreements which have been described in the preceding paragraphs shows the extent to which Chinese systems of communications, interior and with outside countries, have been brought under foreign influence or control, and especially they show the extent to which monopolistic rights, in violation of the general principle of the Open Door, have been sought for. The way has thus been prepared for an understanding of the controversy which has arisen and is still pending with regard to the contract of January 8, 1921, which was entered into between the Chinese Minister of Communications

[29] *Op. cit.*, p. 209.

and the American concern, the Federal Telegraph Company of California.

Federal Wireless Controversy. The contract with the American company looks to the establishment of radio services between the United States and China, for which the Federal Company is to furnish the necessary stations in America. In China, a station is to be erected of one thousand kilowatt power " which can directly send messages to and can receive them from various wireless stations in the world," and medium powered stations (600 kilowatts) at Peking, Canton, Hankow and Harbin, each able to send and to receive messages from wireless stations in Japan, the Philippines, San Francisco and Singapore.

The Federal Company is to furnish the sum of $4,630,000 gold for the establishment, transportation and setting up of these stations, the lease or purchase of the necessary lands, etc., and is to have full control of the stations for ten years, during which period the Chinese Government has the right, at its own expense, to supervise their operation, examine the accounts, send men to be trained in wireless telegraphy, etc.

During the period of control by it, the Federal Company is to pay to the Chinese Government annual royalties equivalent to ten per cent. of the gross receipts.

At any time during this period of control, the Chinese Government has the right, upon redeeming all the capital advanced, to take over the full control and operation of the stations.

Article 15 of the Agreement further provides:

If, after the expiration of ten years, the Chinese Government is unable to repay the cost of the wireless installations in order to take over the control, or the capital and interest thereto are not fully paid up, the Chinese Government shall issue bonds in

payment of the outstanding capital and interest thereto, and place the wireless installations erected by the Contractor (the Federal Co.) under Sino-American join control.

Protests against this arrangement with the Federal Company were immediately made by the Japanese, British and Danish Governments on the ground that it was in violation of the contracts already made by the Chinese Government with their respective nationals, as embodied in the various agreements which have been described in the preceding pages.

The British and Danish cable interests claimed that they had a monopoly of Chinese external communications until December 31, 1930.

The British Marconi Company also claimed that it had an exclusive arrangement, good until 1929, to furnish the Chinese Government with radio-telephonic apparatus; and, also, in behalf of the Chinese National Wireless Telegraph Company, a right to priority of opportunity to furnish radio apparatus used in China.

The Mitsui Company claimed that it had been granted a monopoly of high-powered radio communications between China and foreign countries until 1948. This claim was based upon a sentence contained in a letter from the Chinese Government confirming the contract with the Mitsui Company for the construction of the wireless plant near Peking.[80]

[80] Mr. T. F. Millard in a communication published in the *New York Times*, April 12, 1926, says of this claim: "That agreement [with the Mitsui Co.] was kept secret. It coincided with the period of greatest Japanese pressure and influence at Peking, with the orgy of graft that attended the notorious Nishihara loans."

It is to be observed that the Japanese, for some reason or other, have never been able to make their station near Peking operate satisfactorily. See the *Weekly Review* (Shanghai) of April 7, 1923, p. 190.

The claims put forward in these protests would appear to be in violation of the Open Door doctrine which the nations concerned had repeatedly declared their intention to observe.

With regard to the British Marconi Company, it is to be pointed out that by virtue of a contract of May 24, 1919, which established a joint enterprise between the Chinese Government and the Marconi Company known as the Chinese National Wireless Company, the Chinese Government had assumed an obligation to purchase from that Company for a period of twenty (20) years all its requirements for wireless purposes, provided the goods offered were " not lower in quality or higher in price " than those available from other sources. The agreement with the Federal Telegraph Company, the British Government claimed, was in violation of this undertaking.

As to the propriety of the grant of a preferential right to the Marconi Company to supply material, it was possible to urge that this was conducive to development and progress and not monopolistic in character, and, furthermore, that it was not dissimilar in character to rights which the Western Electric Company, an American corporation, had obtained from the Chinese Government by a contract of October 30, 1917, and which the British Government had not deemed objectionable.

In reply to this argument, it may be said that the Marconi contract was itself objectionable, not only as a violation of Article 15 of the Sino-American treaty of 1844, by which it was provided that American citizens in China should not be impeded in their business by monopolies or other injurious restrictions, but also as in violation of Article 30 of the Sino-American treaty which provides that if at any time China should " grant to any nation or the merchants or citizens of any nation,

any right, privilege, or favor connected either with navigation, commerce, political or other intercourse which is not conferred by this treaty, such right, privilege and favor shall at once inure to the benefit of the United States, its public officers, merchants and citizens."

Attention may be called to the circumstance that, notwithstanding the contention that there was no monopolistic element in the Marconi agreement, the Marconi Company had entered into a contract with another firm upon the basis that its subsidiary company, the Chinese National Wireless Company, had " a monopoly of radio devices in China," such as would enable the British Company to effect " exclusive traffic arrangements so far as concerns communications from, to and through the Chinese Republic and from, to and through the territory " in which the company might operate.

In the light of these facts, the American Government would seem to be justified in asserting that the claim of the Marconi Company is in violation of the Open Door Doctrine.

The Japanese Government it is understood, has sought to defend its claim to a monopolistic right upon the ground that the enterprise is, from its very nature, a monopolistic one, and as such is distinguishable from enterprises of the character of railways and mines.

The Danish Government protested against the Federal Telegraph Company contract upon the ground that by a contract entered into on December 22, 1913, the Chinese Government had agreed that no other party than the Great Northern Company, a Danish Corporation, should be permitted to establish or operate telegraphic communications with the coast of China without the consent of the Company. To this contention the American Government might reply that, by reason of the American Treaty of 1844 (Article 15), and by similar provisions of subse-

quent treaties, China has renounced the right to create in favor of itself or of any foreign interests a situation which would exclude American citizens from participating.

During this correspondence the American Secretary of State found occasion to send to the Chinese Minister at Washington the letter, dated July 1, 1921, and which is quoted in the Chapter of this treatise dealing with the Open Door Doctrine,[31] in which Secretary Hughes gave the most explicit and satisfactory definition of the doctrine which, up to that time, it had received.[32]

Furthermore, the American Government could take the position that, by Article XXX of the Sino-American treaty of 1858, the Chinese Government is estopped from granting such a monopoly as was claimed by the Mitsui Company.[33]

Still further, since the Washington Conference, the American Government can claim that the Powers have obligated themselves not to seek or support their

[31] P. 103.

[32] In September, 1922, it was announced that a new corporation to be known as the Federal Telegraph Company of Delaware, would take over the contract of the Chinese Government with the Federal Telegraph Company of California. R. P. Schwerin, President of the California Company, was to be President of the new company, and Owen Young, President of the General Electric Company, was to be Chairman of its Board of Directors. "The capitalization of the new company," states the *China Year Book*, 1923 (p. 442), will be $9,500,000, of which $3,500,000 will be preferred stock, and $6,000,000 common stock. The Radio Corporation of America will buy all the new preferred stock, and of the common stock the Federal Telegraph Company of California will own forty per cent. and the Radio Corporation of America sixty per cent."

[33] This Article reads: "The contracting parties hereby agree that should at any time the Ta Tsing Empire (China) grant to any nation, or the merchants or citizens of any nation, any right, privilege or favor, connected either with navigation, commerce, political or other intercourse, which is not conferred by this treaty, such right, privilege and favor shall at once freely inure to the benefit of the United States, its public officers, merchants and citizens."

nationals in seeking or maintaining a monopoly such as that claimed by the Mitsui Company. In this connection emphasis can be laid upon the word "necessary," which appears in a qualification contained in paragraph "b" of Article III of the Nine Power Treaty Relating to Principles and Policies to be Followed in Matters Concerning China.

Article III of this Treaty provides, it will be remembered, that, with a view to applying more effectually the principle of the Open Door or equality of opportunity in China for the trade and industry of all nations, the Contracting Powers (other than China) will not seek, or support their respective nationals in seeking,

> Any such monopoly or preference as would deprive the nationals of any other Power of the right of undertaking any legitimate trade or industry in China, or of participating with the Chinese Government, or with any local authority, in any category of public enterprise, or which by reason of its scope, duration or geographical extent is calculated to frustrate the practical application of the principle of equal opportunity.

There then follows, however, the following qualification or agreed-upon understanding:

> It is understood that the foregoing stipulations of this Article are not to be so construed as to prohibit the acquisition of such properties or rights as may be necessary to the conduct of a particular commercial, industrial, or financial undertaking or to the encouragement of invention and research.

It can thus be argued that it cannot be reasonably held that the prohibition of such wireless stations as are contemplated by the agreement of the Chinese Government with the Mitsui Company is necessary for the conduct of the wireless station near Peking provided for by the Mitsui contract, and, especially so, since the Mitsui

Company under that contract, as amended by the Supplementary Agreement, has no interest in the receipts from the Peking station.

To this possible contention of the American Government, the Japanese Government is reported to have replied that the Nine Power Treaty cannot properly be construed to effect any contractual rights existing at the time it was signed, and, furthermore, that the qualification to the Open Door principle which has been quoted above is, in fact, broad enough to cover the monopolistic features of the Mitsui Agreement.

Wireless at the Washington Conference. "Electrical Communications" appeared on the Agenda of the Conference as one of the subjects to be examined, and, under this heading, wireless installations in China received considerable discussion. However, the contest between the Federal and Mitsui Companies with regard to their respective wireless rights in China was not brought directly before the Conference. The discussion that was had in the Conference related to the possible "internationalization" of China's radio communications, and to the action to be taken with regard to certain wireless stations which several of the Powers were operating in China without her consent.

Internationalization of China's Wireless Stations. The possibility or desirability of bringing under joint-Power or international control all radio communications with China was raised in the Washington Conference by the presentation to the Committee on Pacific and Far Eastern Questions at its fifteenth meeting of the following draft motion by M. Viviani of the French Delegation:

Whereas competition in the establishment and operation of wireless stations in China, far from bringing about the creation

of the necessary radio communications between China and the other countries, has on the contrary, produced results the reverse of those aimed at, the powers represented at the Washington conference consider that this competition should give way to co-operation under the control of the Government of China.

Therefore, it is decided that a committee shall be formed, including representatives of the interested countries and of China, to draw up practical recommendations in accordance with which this co-operation shall be accomplished in conformity with the following principles:

(1) The purpose of the co-operation should not be to favor certain interests at the expense of others, but to enable China to obtain radio communications established and operated as much in its own interests as in that of the public of all countries and to avoid the waste of capital, of staff, of material, and of wave lengths.

(2) To this end China should be enabled to possess, as soon as posible, radio stations with all the latest technical improvements that can be contributed by the various companies of the countries which are concerned in the improvement of radio communications with China.

(3) Radio communications within the Chinese territory shall be subject to the Chinese laws and the external radio communications (between China and other countries) shall be regulated by the international conventions governing such matters.

(4) The Governments of the powers mentioned in the preamble shall give no support to any company or any person who does not conform to the above principles as well as to the practical rules prescribed in accordance with the recommendations of the committee.

(5) The rates charged for radio communications shall never be higher than the rates for communications by wire or by cable for equivalent distances, and Government and press messages shall benefit by a reduction of at least 50 per cent.

In explanation of this motion, Mr. Viviani said that its aim was to save China from being invaded by a swarm of little competing radio companies by strengthening the

present companies and enabling them to render efficient service. Its aim was not, however, to establish a monopoly in China upon the part of the existing companies.

Mr. Balfour, of the British Delegation, thought that it was proper that the Conference should seek to bring present and future radio concessions in China into harmony with one another and without infringement of China's sovereignty, and that Mr. Viviani's proposals might be taken as a starting point for that purpose. He was inclined to the opinion that future radio rights in China should be arranged upon the consortium principle.

No action upon Mr. Viviani's proposals was taken at that time, the matter being postponed so that the Delegations could have opportunity to consult their experts upon it. The matter of radio stations in China was not again brought up for discussion until the twenty-fifth meeting of the Committee. At that meeting Mr. Root, of the American Delegation, said that while he was, upon the whole, in agreement with the purposes of the motion of Mr. Viviani, the matter was "a grave question of policy which primarily and fundamentally should be determined by the Government of China. . . . . The question lay between building up an electrical wireless system in China upon the principle of free competition, or building it upon the principle of co-operation or consortium. . . . . One method, that of competition, was the method that existed in the United States today; another method, that of controlled co-operation, was the method that existed in many other countries. China ought to determine which she would follow; then the Powers represented ought to help her in that course, but he did not think that the committee was in a position to decide now. With that end in view he had prepared for submission to the Drafting Sub-Committee a resolution which corresponded to Mr. Viviani's motion for the appointment of

a committee or commission, but which, instead of undertaking to decide the fundamental question of policy in advance of the consideration of the commission, left that to be one of the things to be determined from the report of the commission."

At the twenty-sixth meeting of the Committee, Mr. Sze, speaking for the Chinese Delegation, in the course of an extended statement said that, while the nature of wireless communications made international co-operation highly desirable, and, therefore, a proper matter for international discussion, his Government held the view that the question was one that should be dealt with as a world problem, and not by taking China as a single unit for consideration. He continued: "As this Conference has been called . . . . for the purpose of assisting China by the removal of existing limitations on her sovereign rights, I am inclined to think that the public might have misapprehension should any such commission [as that suggested in M. Viviani's motion] be appointed to deal with, even if only to discuss and report on, such a subject which is manifestly China's own and sole problem." If, said Mr. Sze, a conference should be called to consider the general matter of international action in the matter of radio communications in a manner similar to that by which international postal interests are harmonized and promoted, China would be glad to co-operate.

In result, the Conference took no action, by way of resolutions or otherwise, with regard to this matter of bringing China's wireless stations under international control or regulation.

Wireless Stations in China Without China's Consent. Early in the Washington Conference the Chinese Delegation asked that the Conference take action which would lead to the immediate abolition or surrender to the Chi-

nese Government of all electrical means of communication, including wireless stations, maintained on Chinese soil without the consent of the Chinese Government, and submitted a tentative list of such stations. This list included the following: Japanese stations at the Japanese Legation in Peking, at Chinwantao, Tientsin, Dalny, Tsinan, Tsingtao, Hankow, and several places in Manchuria; French stations at Shanghai (in the French Settlement), Kwangchow-wan, Yunnanfu, and Tientsin; British stations at Kowloon and Kashgar; and American stations at the American Legation at Peking, at Tientsin and Tangshan.

In a formal statement made to the Committee on Pacific and Far Eastern Questions, the Chinese Delegation said:

All of the arguments that have been presented in favor of the immediate abolition of foreign postal stations apply with equal force to the abolition or surrender to the Chinese Government of these foreign electrical means of communication. Just as China has built up a highly efficient postal system capable of transporting with speed and safety written communications between China and foreign countries and between important points within China so she has developed a system of telegraph stations adequate for the transmission of communication by wire, or between different parts of China, and has entered into contracts for the installation of high powered wireless apparatus which will put her into communication with other countries. She already has a number of lower-powered wireless stations for wireless communication between points within China. There is thus no need for the maintenance in China by other countries of wire or wireless installations. Their operation not only seriously interferes with the continued development of the Chinese system by diverting from it business properly belonging to it but represents an indefensible infringement of China's territorial and administrative integrity. To the foreign powers maintaining them they can have no significance except as they may seem to serve their purely political aims. Since these powers have now affirmed their inten-

tion of doing nothing that will infringe upon the political, territorial, or administrative integrity of China, it is to be expected that they will discontinue the maintenance of the stations to which China has not given her consent.

Since certain of these stations represent the investment of considerable sums of money, China, though recognizing no legal obligation to do so, is willing to pay to the foreign governments owning them the fair value of such stations as are of such a character or are so located that they can be made effective parts of her own systems of electrical communications.

In the discussion which followed Secretary Hughes called attention to the stations maintained under the Boxer Protocol of 1901; Mr. Balfour said that he understood that the British Government had in China only one wireless station, namely, that at Kashgar, in Turkestan, which had been erected during the war for the purpose of obtaining information in regard to the Bolshevists; and M. Viviani raised, rather unnecessarily, the question as to the control of wave lengths which different stations should be permitted to use, and suggested the organization of a committee to investigate the technical sides of wireless telegraphy. It was then decided to refer the whole matter to a Drafting Committee.

At the first meeting of this committee its Chairman, Mr. Root, submitted a resolution which led to a discussion, in the course of which the French representative said that France had established a radio station in the French Concession in Shanghai and one in the leased territory of Kwangchow-wan. These stations, he said, France had the right to establish by virtue of its concessional rights at Shanghai and as lessee of Kwangchow-wan, and, therefore, they should be excluded from the operation of the Resolution. The British representative said that the radio station in the Kowloon-leased area should receive separate consideration, and the one at

Kashgar was there with China's consent.[34] The Japanese representative contended that the Japanese radio stations in the South Manchuria Railway zones were there by treaty right; that is, as ancillary to Japan's rights of railway control and operation. The station at

[34] In a letter from the British Empire Delegation, dated December 28, 1921, to the Chinese Delegation the following statement was made regarding the British radio station at Kashgar: "During the summer of 1918, the position in Hsinkiang gave rise to anxiety owing to the activities of Bolsheviks, and especially to the fact that enemy prisoners of war were being armed by the Russians and sent as garrison troops to the Russian Pamirs. Great Britain notified China of her wish to send some intelligence officers into Hsinkiang, and a guard of some 30 men to the Consulate-General at Kashgar. On August 19, 1918, the Chinese Government replied that they had telegraphed instructions to the Governor of Hsinkiang pointing out that Great Britain and China stood together as Allies and it was the duty of each to render assistance to the other when occasions arose, and that the guard should therefore be allowed to enter Hsinkiang for the purpose of guarding the Consulate.

"On October 26, 1918, Sir J. Jordan, then His Majesty's Minister at Peking, wrote to the Wai Chiao Pu stating that the operations of our intelligence officers in Hsinkiang had been greatly hampered by the difficulty of communicating with the British authorities in India. It was accordingly proposed to send to Kashgar a small wireless telegraphy receiving set which would enable the Consulate to receive messages transmitted from India. Owing to the difficult nature of the frontier roads, it has been found impossible to send a transmitter set, and messages from Kashgar would have to be sent as before by post or by the Chinese land lines, until the new Marconi installation at Kashgar should be set up. His Majesty's Government offered to use the Kashgar receiving installation for Chinese official messages, should the Chinese Government so desire; and they undertook to remove the installation so soon as the Chinese Government's own wireless station had been erected.

"On November 7, 1918, Sir John Jordan telegraphed that the Chinese Government had sent instructions to the Governor of Hsinkiang that the parties in charge of the wireless installation were to be admitted.

"From the above I think you will agree that it is evident that the wireless receiving set at His Majesty's Consulate-General at Kashgar is there with the concurrence of the Chinese Government."

Hankow, he said, would be withdrawn when the Japanese troops were withdrawn from that place and would be used only for military purposes; the stations at Tsingtao and Tsinan would be disposed of simultaneously with the settlement of the Shantung question.

In the Drafting Committee, Dr. Koo, in behalf of the Chinese Delegation, denied that the right to establish radio stations in the leased areas was included within the rights granted by China to the lessee states. He took the same position as to the maintenance of radio stations, without China's consent, in municipal " settlements " or "concessions " and within railway zones. The British representative agreed with Dr. Koo that the rights which foreign powers have in municipal concessions or settlements in China do not include, without specific consent of China, the rights of erecting and operating radio stations.

After some further discussion, Dr. Koo said that he understood the position of the French Delegation to be that a " concession " did not, as a matter of principle, carry with it the right to install a radio station, but that there was, in fact, such a station in the French settlement at Shanghai, and that its continuance there would be a matter for discussion between the French and Chinese Governments.

The Japanese representative said that the Japanese wireless station at Hankow was in the Japanese garrison there and was needed for military purposes; also, that the stations within the railway zones were for the use of the railway guards. Dr. Koo again affirmed that, in the railway zones, Japan had by treaty only ordinary business administrative rights for the operation of the railway, and that while Japan might have the right to erect and operate such telegraph lines as might be required for the working of the railway, this did not carry with it the right to erect and operate radio stations. As to wireless

stations, without China's consent in leased areas, he would make a reservation in behalf of his Government.

The following resolution and declarations were finally agreed to by the Drafting Committee, by the Committee on Pacific and Far Eastern Questions, and finally approved by the Conference in plenary session:

Resolution Regarding Radio Stations in China and Accompanying Declarations

The representatives of the Powers hereinafter named participating in the discussion of Pacific and Far Eastern questions in the Conference on the Limitation of Armament—to wit: The United States of America, Belgium, The British Empire, China, France, Italy, Japan, The Netherlands and Portugal,

Have resolved

1. That all radio stations in China whether maintained under the provisions of the international protocol of September 7, 1901, or in fact maintained in the grounds of any of the foreign legations in China, shall be limited in their use to sending and receiving government messages and shall not receive or send commercial or personal or unofficial messages, including press matter: Provided, however, that in case all other telegraphic communication is interrupted, then, upon official notification accompanied by proof of such interruption to the Chinese Ministry of Communications, such stations may afford temporary facilities for commercial, personal or unofficial messages, including press matter, until the Chinese Government has given notice of the termination of the interruption;

2. All radio stations operated within the territory of China by a foreign government or the citizens or subjects thereof under treaties or concessions of the Government of China, shall limit the messages sent and received by the terms of the treaties or concessions under which the respective stations are maintained;

3. In case there be any radio station maintained in the territory of China by a foreign government or citizens or subjects thereof without the authority of the Chinese Government, such station and all the plant, apparatus and material thereof shall

be transferred to and taken over by the Government of China, to be operated under the direction of the Chinese Ministry of Communications upon fair and full compensation to the owners for the value of the installation, as soon as the Chinese Ministry of Communications is prepared to operate the same effectively for the general public benefit;

4. If any questions shall arise as to the radio stations in leased territories, in the South Manchurian Railway Zone or in the French Concession at Shanghai, they shall be regarded as matters for discussion between the Chinese Government and the Government concerned.

5. The owners or managers of all radio stations maintained in the territory of China by foreign powers or citizens or subjects thereof shall confer with the Chinese Ministry of Communications for the purpose of seeking a common arrangement to avoid interference in the use of wave lengths by wireless stations in China, subject to such general arrangements as may be made by an international conference convened for the revision of the rules established by the International Radio Telegraph Convention signed at London, July 5, 1912.

DECLARATION CONCERNING THE RESOLUTION ON RADIO STATIONS IN CHINA OF DECEMBER 7, 1921

The Powers other than China declare that nothing in paragraphs 3 or 4 of the Resolutions of 7th December, 1921, is to be deemed to be an expression of opinion by the Conference as to whether the stations referred to therein are or are not authorized by China.

They further give notice that the result of any discussion arising under paragraph 4 must, if it is not to be subject to objection by them, conform with the principles of the Open Door or equality of opportunity approved by the Conference.

CHINESE DECLARATION CONCERNING RESOLUTION OF DECEMBER 7TH REGARDING RADIO STATIONS IN CHINA

The Chinese Delegation takes this occasion formally to declare that the Chinese Government does not recognize or concede the

right of any foreign Power or of the nationals thereof to install or operate, without its express consent, radio stations in legation grounds, settlements, concessions, leased territories, railway areas or other similar areas.

It will be seen that the Resolution is unsatisfactory, at least to China, in that it does not decide as to the status of radio stations, unauthorized by China, in the leased territories, in the South Manchuria Railway Zone, or in the French Settlement at Shanghai. The French still maintain their wireless station in their Settlement at Shanghai, and, since the Washington Conference, they have erected a powerful station at Saigon in Indo-China.

CHAPTER XXXIX

China's Foreign Debts and Financial Commitments

The attempt will be made in this chapter to discuss the present financial obligations of the Chinese Government only in so far as they concern China's relations to foreign Powers or to their banking groups.

Certain Features of Chinese Loans. Certain special features which have characterized the public loans of China have first to be mentioned in order that the significance of what follows may be clearly appreciated.

1. Although the potential financial resources of the Chinese people are very great, it has not as yet been practicable for the Government to utilize them except to a very slight extent. During recent years many new taxes have been authorized by the Peking Government, and, in some cases, fairly effectively collected, but it still remains true that the Chinese people are very lightly taxed.[1] The *per capita* accumulated wealth is very small, but none the less there are many great fortunes and a still greater number of moderately large ones in China, and, therefore, could the Chinese Government command the full confidence of its own subjects, it would be able to float large domestic loans. In fact, however, it has not been

[1] It is true that the Chinese people obtain comparatively little from their Government in return for the taxes they do pay.

able to command this confidence, and, therefore, has been obliged to resort to foreign money markets when funds in addition to those obtainable from taxation have been needed.[2]

2. The foreign loans to China, though made by private banking interests, have, in almost all cases, had back of them the approval and diplomatic support of their respective Governments, which have used almost every possible mode of international action to enforce the claims which their respective nationals have based upon their contracts with the Chinese Government. In fact, it has been practically impossible to distinguish between the public and private obligations of the Chinese Government. In this connection may be quoted the following illuminating paragraph from Mr. MacMurray's Introductory Note to his compilation of China's Treaties. After referring to the various periods of China's international relations, Mr. MacMurray says:

> Throughout these phases of development, financial, economic and industrial concessions have been made the objects of international policies; such advantages have been sought by Governments,—both directly, in the form of general conventional stipulations, and indirectly, in the form of special grants to particular banks or industrial organizations,—through all the means available to one State in its intercourse with another; the holders of such concessions have often spoken with the voice of their Governments in insisting upon their own construction of the rights granted to them; and such commitments to individuals of one

[2] Some domestic loans were floated, especially during the early years of the Republic. These loans though large in nominal amount, were greatly undersubscribed, and thus did not meet even the most pressing public needs. During the last few years, so great has been the administrative and political demoralization of the country, the successful flotation of a domestic loan of any considerable size has been very difficult. For lists of domestic loans see the *China Year Book*, and especially the issue for 1926, p. 490, *et seq.*

nationality, even when left unutilized and allowed to lapse by the terms of the concession, have now and again been claimed as a basis of protest against a grant to nationals of any other country. The result of this merging of individual with governmental interests has been that matters which would elsewhere be of merely commercial character, susceptible of judicial determination in cases of dispute, are in China matters of international political concern, for the settlement of which the ultimate recourse is to diplomatic action. It is thus in a sense true that the international status of the Chinese Government is determined and conditioned by its business contracts with individual firms or syndicates, scarcely if at all less than by its formal treaties with other Governments. It is at any rate seldom that any international situation relating to China can be fully undersood without reference to the intricate fabric of quasi-public as well as of public obligations which qualify the freedom of action of the Chinese Government.

3. The lending Powers, if we may speak of them as such, have operated in the main through particular banking or investment agencies, and have applied their chief diplomatic and official support to those agencies. Thus Japanese loans have been made, for the most part, through the Yokohama Specie Bank (the official representative of Japanese financial interests in the international Consortium for Chinese business), and a syndicate consisting of the Bank of Taiwan, the Bank of Chosen, and the Industrial Bank of Japan, which syndicate has enjoyed the support of the Japanese Government in transactions independent of the Consortium. The three banks in the syndicate have done business separately, but, in the main, their activities in China have been joint operations.[3]

[3] Also might be mentioned the Chinese Exchange Bank which, though nominally a Sino-Japanese concern, is actually controlled by the Japanese.

British financial interests have operated through the Hongkong and Shanghai Banking Corporation, and the British and Chinese Corporation, formed in 1908 by the Hongkong and Shanghai Banking Corporation and the trading firm of Jardine, Matheson and Company.

German financial interests have operated in China through the Deutsch-Asiatische Bank.

Russian financial interests have employed as their agency the Banque Russo-Asiatique, earlier known as the Banque Russo-Chinoise.

France has used the Banque de l'Indo-Chine, and, in association with it, the Crédit Lyonnais, the Comptoir National d'Escompte de Paris, and other banks.

Belgium has used the Société Belge d'Etudes de Chemius Fer en Chine.

American interests, for the most part, have acted through a banking group (originally constituted by J. P. Morgan & Co., Kuhn, Loeb & Co., the First National Bank of New York, and the National City Bank of New York), the International Banking Corporation, and Lee, Higginson & Co.[4]

4. A number of the loans have carried with them preferences or options with regard to future loans.

5. In very many cases the determination by China as to the parties from whom the loans were to be obtained was largely controlled by the "Spheres of Interest" claimed by the several Powers in China.

6. Some of the loans, especially those for general governmental expenses or for purposes of administrative reorganization, have carried with them specified amounts of "control" over certain of the revenue services of China as well as over the manner in which the proceeds of the loans were to be expended.

[4] But see *post* as to the new international Consortium.

7. And, finally, most of the railway and mining loans have carried with them rights of control, upon the part of the lending parties, alike over the construction and operation of the roads or mines and over their finances. These rights of coutrol will be more specifically described in the chapter which follows dealing with Railway Rights in China. The earliest of these loans were made directly by the Chinese Government, but the later ones, not so made, have been guaranteed by that Government as to interest and amortization payments, and, in some cases, certain public (provincial) revenues have been pledged as security.

China's Public Debts Classified. The public debts, as determined by the purposes for which they were contracted, may be divided into three classes: (1) War and Indemnity Loans, (2) General or Administrative Loans and (3) Industrial; that is, Railway and Mining Loans.[5]

War and Indemnity Debts. Until the Chinese-Japanese War of 1894, China had had practically no foreign debt. For the waging of that war and the payment of the indemnity exacted by victorious Japan, China was obliged to borrow large amounts from abroad.[6]

Franco-Russian Loan of 1895. By a contract signed July 6, 1895, China borrowed from a Franco-Russian syndicate 400,000,000 francs at four per cent., the issue price being 94½ (the Chinese receiving, however, 94⅛), the loan to be repaid in thirty-six years, amortization to begin in

[5] There are also provincial and so-called private and short-term loans, and also domestic loans, which, because they have no bearing upon foreign relations, are not considered in this volume.

[6] The indemnity to Japan, including the additional sum exacted because of the retrocession of the Liaotung Peninsula, amounted to Tls. 230,000,000.

1896, and secured by revenues from the Maritime Customs and the guarantee of the Russian Government.[1] Section 9 of the Articles of Agreement read: "The present loan is guaranteed by the duties levied by the Maritime Customs of China, and by the deposit of customs bonds. Furthermore, in the event that the service of the loan should for any reason whatsoever come to be suspended or delayed, the Imperial Government of Russia, by agreement with the Imperial Government of China, undertake, *vis à vis* the contracting banks and firms, the obligation to find, itself, and to place at their disposal in good time, as they fall due, whatever sums are necessary for the payment of the coupons and of the amortized bonds of the present loan."

This undertaking upon the part of the Russian Government was embodied in an exchange of declarations by the Russian and Chinese Governments.

In the protocol of these declarations it was declared that until the loan should be fully liquidated, "no other Chinese loan subsequently concluded shall be served out of the receipts of the Chinese Maritime Customs before full provision shall have been made for the service of the interest and amortization of the above-mentioned loan." It was also provided that should the Russian Government be called upon to make good its guarantee, the Chinese Government would furnish the Russian Government with additional security, the nature of which would be the subject of a special agreement to be negotiated between the plenipotentiaries of the two Powers at Peking. The protocol contained the following undertaking:

[1] For texts of this loan contract and of this declaration and accompanying protocol, and of the contract of guarantee given by the Russian Ministry of Finance to the lending syndicate, see MacMurray, pp. 85, 40.

In consideration of this loan the Chinese Government declares its resolution not to grant to any foreign Power any right or privilege under any name whatsoever concerning the supervision or administration of any of the revenues of the Chinese Empire. But in case the Chinese Government should grant to any one Power rights of this character, it is understood that from the mere fact of their being so granted, they should be extended to the Russian Government.

The declarations were stated to have the same force and value as a treaty.[8]

Anglo-German Loan of 1896. In 1896, by a contract signed on March 23,[9] China borrowed £16,000,000 from an Anglo-German syndicate composed of the Hongkong and Shanghai Banking Corporation and the Deutsch-Asiatische Bank. This loan was to bear five per cent. interest, to be issued at 98¾ and 99, the Chinese to secure 94, the term to be thirty-six years, redemption to be made, however, by yearly sinking-fund payments, and the entire loan "subject to previous loans charged on the same security and not yet redeemed," to be a lien upon the Imperial Maritime Customs and to have priority both as to principal and interest over all future loans, charges, and mortgages so long as the loan or any part of it should be unredeemed. "No loan, charge or mortgage," the agreement ran, "shall be raised or created which shall take precedence of or be on equality with this loan or which shall in any manner lessen or impair its security over the said Customs Revenue so far as required for the annual services of this loan and any future loan charge or mortgage charged on the said customs revenue shall be made subject to this loan, and it shall be so expressed in

[8] MacMurray, p. 41.
[9] For text, see MacMurray, p. 55.

every agreement for any such future loan charge or mortgage. In the event of the Imperial Maritime Customs Revenue of China at any time proving insufficient to support the service of the interest or repayment of the principal of this loan the Imperial Chinese Government will provide the funds required for the same from other sources. The administration of the Imperial Maritime Customs of China shall continue as at present constituted during the currency of this loan."

This last provision was important, since the loans of 1896 and 1898 not being redeemable by China before their expiring date, the result was to estop China from altering the existing system of foreign administrative control of her Maritime Customs.

A schedule of interest and sinking fund payments was attached to the loan agreement.

Of this loan there was outstanding and unpaid on September 30, 1922, £7,466,550.[10]

Anglo-German Loan of 1898. In 1898 (March 1) China was compelled again to make a foreign loan [11] in order to meet her obligations to Japan under the indemnity provisions of the treaty of Shimonoseki. This loan, like its predecessor, was obtained from the Hongkong and Shanghai Banking Corporation and the Deutsch-Asiatische Bank. Its principal was £16,000,000, with an interest rate of 4½ per cent., issue price of 90, yielding 83 to the Chinese, was to run for forty-five years, and to constitute a charge on the Maritime Customs, subject to previous charges thereon. In addition, the loan was to constitute a first charge, free from all incumbrances, upon the general likin tax of Soochow, Hung Hu, Kiukiang and Eastern Chekiang, and the Salt Likin of Ichang, Hupeh,

[10] *China Year Book*, 1925, p. 735.

[11] For the text of the loan contract, see MacMurray, p. 107.

and Anhui. The loan agreement expressly provided that the entire loan, principal and interest, should have priority over all future loans, charges, or mortgages that might be charged upon these likin revenues, and that the administration of the Chinese Imperial Customs should not be changed during the currency of the loan. In order that still greater security might be provided, the agreement provided:

> In the event of the Customs and Likin revenues specified and pledged by this clause being at any future time insufficient for the service of principal and interest of this loan, either owing to depreciation of silver, diminution of revenue or any other cause the Chinese Imperial Government hereby engage to appropriate, and forthwith place under the control of the Inspector General of Maritime Customs, further revenues sufficient to complete the amount required.
>
> In the event of the Chinese Government, during the currency of this loan, entering upon negotiations for a revision of Customs tariff accompanied by stipulations for decrease or abolition of Likin, it is hereby agreed, on the one hand, that such revision shall not be barred by the fact that this loan is secured by Likin, and, on the other hand, that whatever Likin is pledged for the service of this loan shall neither be decreased nor abolished except by arrangement with the Banks and then only upon the increase of Customs revenue consequent on such revision.

Boxer Indemnities.[12] As a result of the outrages committed in 1900 by the Boxers, more or less aided or sanctioned by the Imperial Chinese Government itself, indemnities to the Treaty Powers amounting to £67,500,000 (450,000,000 Haikwan taels) were levied by the final protocol of 1901 against China. This total was divided into

[12] For an account of the remission of the Boxer indemnities by certain of the Powers, and the use of the funds thus made available by the Chinese Government, see the next chapter.

five sums, bearing interest at 4 per cent., and made payable in instalments covering a period of thirty-nine years.[13]

As security for the payment by China of these indemnity payments, the following revenues of the Chinese Government were assigned:

1. The balance of the revenues of the Imperial Maritime Customs after payment of the interest and amortization of preceding loans secured on these revenues, plus the proceeds of the raising to five per cent. effective of the present tariff on maritime imports, including raw articles until now on the free list, but exempting foreign rice, cereals, and flour, gold and silver bullion and coin.
2. The revenues of the native customs, administered in the open ports by the Imperial Maritime Customs.
3. The total revenues of the Salt Gabelle, exclusive of the fraction previously set aside for other foreign loans.

General Governmental and Administrative Reorganization Loans. Not until about the time of the establishment of the Republic did China find herself compelled to make foreign loans for the purpose of meeting her ordinary running expenses or for effecting a reorganization of her administrative services and the reform of her currency.[14]

[13] Schedules were attached to the Final Protocol of 1901, for which see MacMurray, p. 278.

A loan of £1,000,000 for "Exchange Adjustment of Indemnity" was obtained from the Hongkong and Shanghai Banking Corporation and the Deutsch-Asiatsche Bank in 1905, but this loan has since been repaid.

The apportionment of the total indemnity among the several Powers was arranged by the Protocol of June 14, 1902, MacMurray, p. 311.

[14] It is, however, to be noted that many of the loans made by China during the last few years, and especially those obtained from Japan, though nominally for the construction of railways or other public enterprises, have, in fact, been made to secure funds for meeting current governmental expenses, and the proceeds have been spent without any construction work being even attempted.

Currency Loan of 1911. In 1911, by an agreement entered into April 15, between the Chinese Ministry of Finance and certain American, British, German, and French banking interests, a five per cent. sinking fund gold loan for £10,000,000 was contracted for.[15]

Of the proceeds expected to be derived from this loan, £8,500,000 was to be devoted to reforming China's currency.

Owing to the outbreak, near the close of the year, of the Revolution, this loan was never actually floated,[16] but the loan agreement itself has been continued in force, for periods of six months each, by successive agreements, as provided for in Article XVII of the agreement.[17]

[15] The banks represented in this agreement were the following: J. P. Morgan & Co., Kuhn, Loeb & Co., the First National and the National City Bank, all of New York City; the Hongkong and Shanghai Banking Corporation; the Deutsch-Asiatische Bank; the Banque de l'Indo-Chine. For the text of the loan contract, see MacMurray, p. 841.

[16] £400,000 was advanced under the agreement for plague relief and industrial expenses in Manchuria.

[17] Article XVII provided that extensions for a reasonable time might be asked for by the banks, and that, if the Chinese Government should refuse to grant such extension, the contract should become null and void "subject always to the repayment of advances."

On October 20, 1917, the American Legation at Peking communicated to the Chinese Government the following note in which it reserved its rights and interests in the Currency Loan notwithstanding the fact that the American Group of banks had withdrawn in 1913, from the International Consortium.

"Quite apart from any individual contractual interest accruing to 'The American Group' under the Currency Loan Agreement of April 15, 1911, the Government of the United States considers that the whole history of the currency loan project—notably the appeal made to it by the Chinese Government in January, 1904, the conferences with Dr. Jenks in 1903 and 1904, and the request for a loan for the purpose of monetary reform which in 1910 the Chinese Government addressed not to any individuals but directly to the American Government—constitutes in behalf of the Government of the United States such an interest in the project as entitles it to be considered in reference to any action which the Chinese Government

The agreement provided that the sums to be loaned should be made a first charge on the following revenues:

"(*a*) Duties on tobacco and spirits in the three Manchurian provinces, amounting to one million Kuping taels per annum.

"(*b*) Production tax in the three Manchurian provinces, amounting to seven hundred thousand Kuping taels per annum.

"(*c*) Consumption tax in the three Manchurian provinces, amounting to eight hundred thousand Kuping taels per annum.

"(*d*) Newly added surtax upon salt of all the provinces of China (authorized by imperial edict in the fifth moon of the thirty-fourth year of His Imperial Majesty Kuang Hsu), amounting to two million five hundred thousand Kuping taels."

These provincial revenues were declared to be free from all other loans, liens, charges or mortgages.

The loan agreement also provided that should the revenues which have been mentioned prove insufficient to meet interest or repayments of the principal, the Chinese Government would, first from the Manchurian, and then, if necessary, from other sources, supply the balance required to meet such payments. Also, that so long as the loan might remain unpaid, there should be no interference with the pledged revenues; and that if there should be any default in any of the payments when due, the pledged revenue should forthwith be transferred to, and administered by, the Imperial Maritime Customs for the account of and in the interests of the holders of the bonds representing the loan.

may contemplate with a view to carrying that project into effect. This interest has never been abandoned by the Government of the United States." (MacMurray, p. 852.)

Other clauses of the agreement provided that the loan, interest and principal, should always have priority of lien on the revenues specified; and that in the event of a revision of the customs tariff, accompanied by stipulations for the abolition of Likin, the revenues required for security of the loan should not be abolished or diminished except by a previous arrangement with the banks, and then only so far as an equivalent satisfactory to the banks should be substituted in the shape of a first lien on the other revenues consequent upon such tariff revision.

The proceeds of the loan were to be kept in banks designated by the banks signatory to the agreement; they were to constitute separate funds to be known as "The Chinese Government Currency Reform Account" and "The Chinese Government Manchurian Development Account," and payments therefrom were to be made only in conformity with the Chinese Government's requirements as specified in statements submitted by the Chinese Government, which Government was also to submit quarterly reports showing the disbursements incident to the inauguration and operation of the program of currency reform and the development of Manchurian industry. These conditions are of interest as showing at least an effort upon the part of the lending interests to keep informed as to whether or not the sums advanced by them were being actually expended by the Chinese authorities for the purposes for which they were ostensibly borrowed.

Article XVI of the loan agreement is of special interest since it granted to the signatory banks an option upon future foreign loans relating to the same matters. This article reads:

> If the Imperial Government should desire to obtain from other than Chinese sources, funds in addition to the proceeds derived from this loan, to continue or complete the operations contem-

plated under this agreement, the Imperial Chinese Government shall first invite the [signatory] banks to undertake a loan to provide the funds required, but should the Imperial Chinese Government fail to agree with the banks as to the terms of such supplementary loan, then other financial groups may be invited to undertake the same; and should the Imperial Chinese Government decide to invite foreign capitalists to participate with Chinese interests in Manchurian business contemplated under this loan, or to be undertaken in connection therewith, the banks shall first be invited to so participate.

Crisp Loan of 1912. After the establishment of the Republic the financial necessities of the new Government at Peking became very urgent and negotiations, presently to be described, were entered into with a group of British, French, German and American banks—the so-called Quadruple Group—for a considerable loan. While these negotiations were pending, China entered into an agreement [18] with the London firm of C. Birch Crisp & Co. for a loan of £10,000,000, as security for which the salt revenues, subject to prior charges, were pledged, but with no control over Chinese financial administration except that, in case there was a default of payments due, the salt administration should be placed under the control of the Maritime Customs to the extent that might be necessary to meet the obligations accruing under the loan. The purposes of the loan were declared to be "to provide capital for the repayment of existing loans and for the reorganization of the Government and for productive works."

An interesting feature regarding this loan was that it represented an attempt upon the part of a British banking concern to float a Chinese loan without the affirmative

[18] For the text of this contract, see MacMurray, p. 967; for the agreement cancelling the contract save as to the £5,000,000 actually issued, see *idem.*, p. 1034.

approval and co-operation of the British Government which was then giving its support to the British banks included in the Quadruple Group. The result showed that this was not practicable, for but forty per cent. of the £5,000,000 of the loan offered in London was subscribed for by the public.

It may also be noted that it was claimed by the international "Consortium" of banks with which, as has been said, the Chinese Government was then negotiating, that the entering into this agreement with Crisp & Co. was in violation of the undertaking on the part of the Chinese Government that it would deal only with the Consortium. The Chinese Government, however, replied that, at that time, the Consortium had not been willing to meet the wishes of the Chinese Government, and that, therefore, it was at liberty to look elsewhere for funds. In result, however, the loan contract was cancelled except as to the amount that had been already advanced. Thus the second instalment of £5,000,000 of the Crisp loan has never been issued, and the amount of the loan now outstanding is £4,762,760.

The Six Power Consortium. After the conclusion of the Currency Loan of 1911 by the British, French, German, and American banking interests, the Russian and Japanese Governments asked that their respective banking interests be allowed to co-operate in future general loans to China. This was agreed to, and on June 18, 1912, a formal agreement was entered into between the following banks: the Hongkong and Shanghai Banking Corporation, the Deutsch-Asiatische Bank, the Banque de l'Indo Chine, J. P. Morgan & Co., Kuhn, Loeb & Co., the First National Bank and the National City Bank (these four

last-named constituting the "American group"), the Russo-Asiatic Bank, and the Yokohama Specie Bank.[19]

By this agreement these six foreign banks or groups of banks, acting not only for themselves, but for syndicates of financial interests in their respective countries, agreed that they would participate equally and upon equal terms with regard to the proposed Reorganization Loan or any other future administrative, as distinguished from industrial, loans or advances which might be made to the Chinese Government or to any of its provinces or to companies having Chinese Government or provincial guarantees, with the proviso that this should not be construed to include current banking business and small financial operations, nor loans that did not involve the issuance to the public of bonds or other securities. Should one or more of the parties decline to participate in a proposed loan, the other parties should be free to undertake the loan upon their part, but the bonds should be issued only in their respective markets. Russia and Japan, however, obtained the entrance upon the minutes of the meeting of the banks of the following reservations:

In the event of the Russian and or Japanese Groups disapproving of any object for which any advance or loan under the agreement shall be intended to be made, then, if such advance or loan shall be concluded by the other groups or any of them and the Russian Government or the Japanese Government shall notify the other Governments concerned that the business proposed is contrary to the interests of Russia or Japan as the case may be, the Russian Group or the Japanese Group as the case may be shall be entitled to withdraw from the agreement, but the retiring group will remain bound by all financial engagements which it shall have entered into prior to such withdrawal. The with-

[19] For the text of this Inter-Bank Agreement, see MacMurray, p. 1021.

drawal of the Russian or Japanese Group shall not affect the rights or liabilities of the other Groups under the Agreement.

In was understood that this reservation had reference to the "special interests" which Japan and Russia claimed in North China, Manchuria and Mongolia.

Withdrawal of American Banks from the Consortium. In 1913 the American banks withdrew from the consortium in consequence of the following announcement, made on March 18, 1913, by President Wilson:

We are informed that at the request of the last Administration a certain group of American bankers undertook to participate in the loan now desired by the Government of China (approximately $125,000,000). Our Government wished American bankers to participate along with the bankers of other nations because it desired that the good-will of the United States should be exhibited in this practical way, that American capital should have access to that great country, and that the United States should be in a position to share with the other Powers any political responsibilities that might be associated with the development of the foreign relations of China in connection with her industrial and commercial enterprises. The present Administration has been asked by this group of bankers whether it would also request them to participate in the loan. The representatives of the bankers through whom the Administration was approached declared that they would continue to seek their share of the loan under the proposed agreements only if expressly requested to do so by the Government. The Administration has declined to make such request, because it did not approve the conditions of the loan or the implications of responsibility on its own part, which it was plainly told would be involved in the request.

The conditions of the loan seem to us to touch very nearly the administrative independence of China itself, and this Administration does not feel that it ought, even by implication, to be a party to those conditions. The responsibility on its part which would be implied in requesting the bankers to undertake the loan

might conceivably go to the length in some unhappy contingency of forcible interference in the financial, and even the political, affairs of that great Oriental State, just now awakening to a consciousness of its power and of its obligations to its people. The conditions include not only the pledging of particular taxes, some of them antiquated and burdensome, to secure the loan but also the administration of those taxes by foreign agents. The responsibility on the part of our Government implied in the encouragement of a loan thus secured and administered is plain enough and is obnoxious to the principles upon which the Government of our people rests.

The Government of the United States is not only willing but earnestly desirous of aiding the great Chinese people in every way that is consistent with their untrammeled development and its own immemorial principles. The awakening of the people of China to a consciousness of their responsibilities under free Government is the most significant, if not the most momentous, event of our generation. With this movement and aspiration the American people are in profound sympathy. They certainly wish to participate and participate very generously in the opening to the Chinese and to the use of the world of the almost untouched and perhaps unrivaled resources of China.

The Government of the United States is earnestly desirous of promoting the most extended and intimate trade relationship between this country and the Chinese Republic. The present Administration will urge and support the legislative measures necessary to give American merchants, manufacturers, contractors and engineers the banking and other financial facilities which they now lack and without which they are at a serious disadvantage as compared with their industrial and commercial rivals. This is its duty. This is the main material interest of its citizens in the development of China. Our interests are those of the Open Door—a door of friendship and mutual advantage. This is the only door we care to enter.

With the outbreak of the Great War, German banking interests ceased to figure in the consortium; and since the downfall of the Czar's government, Russian interests

came also to play no part. This left in the consortium only the British, French and Japanese interests. The attempt upon the part of the United States to establish a new consortium will be described in a later chapter.

The Reorganization Loan of 1913. Early in 1912 the new Republican Government, through its representative, Tang Shao-Yi, approached the Consortium with a view to obtaining a loan of £60,000,000 for the reorganization of China's demoralized administrative services. This project was sympathetically received by the Consortium, and, pending a definite and final agreement as to the terms upon which the loan should be issued, an advance of taels 2,000,000 was made to meet the urgent needs of the Republican Government, then at Nanking. The final agreement with the five national banking interests—America having withdrawn, as has been said—was signed on April 26, 1913.[20] The significant provisions of this important loan agreement were as follows:

The loan was to be £25,000,000 and to be entitled "The Chinese Government Five Per Cent. Reorganization Gold Loan."

The net proceeds were to be used solely for the following purposes:

(*a*) Payment of indemnities due by the Chinese Government—a list of these being appended to the agreement.

(*b*) Redemption in full of outstanding provincial loans —a list of these being appended to the agreement.

(*c*) Payment at due date of certain other shortly maturing liabilities of the Chinese Government as shown in an appended list, including provision for foreign claims for damages and losses arising out of the Revolution.

[20] MacMurray, p. 1007.

(*d*) Disbandment of troops as detailed in an annex to the agreement.

(*e*) Current expenses of administration as estimated in an annex to the agreement.

(*f*) Reorganization of the Salt Administration, as set forth in an annex.

(*g*) Such other administrative purposes as might be mutually agreed upon between the banks and the Chinese Government.

The entire loan was made a direct liability of the Chinese Government, and was secured as to both principal and interest, " by a charge upon the entire revenues of the Salt Administration of China " subject to previous charges thereon. There was also the provision that if, at any future time, the revenues of the Maritime Customs should exceed the amounts necessary to provide the charges upon them, the surplus should be applied in the first instance to the security and service of the Reorganization Loan, the surplus of the salt revenue being thereby *pro tanto* increased and made available for the general purposes of the Chinese Government.

The Chinese Government undertook " to take immediate steps for the reorganization, with the assistance of foreigners, of the system of collection of the salt revenues of China assigned as security for this loan, according to a general plan which the loan agreement outlined." This included the establishment at Peking of a Central Salt Administration, under the control of the Minister of Finance, but administered by a Chinese chief inspector, who was to constitute the chief authority for the superintendence of the issue of licenses and the compilation of reports and returns of revenue. Revenues from salt dues were to be lodged with the banks or with depositories approved by them and placed to the Chinese Government Salt Revenue Account, which account was not to be drawn

upon except under the joint signatures of the Chief Inspectors, whose duty, it was declared, should be to protect the priority of the several obligations secured upon the salt revenues. Unless and until there should be default in the payments called for by the loan, the Salt Administration was not to be interfered with, but if default occurred, the administration was to be forthwith incorporated with the Maritime Customs and administered for the benefit of the bondholders representing the Reorganization Loan. By regulations issued for the administration of the salt revenue,[21] the foreign Associate Chief Inspector was designated as "Advisor of the Central Salt Administration," and his duties and authority defined.

The term of the loan was fixed at forty-seven years, repayments to begin, however, with the eleventh year according to a sinking fund arrangement. The issue price of the loan was to be in London not less than 90%, and to secure to China a net price of not less than 84%.

By Article XVII the following option upon future loans was given to the Consortium:

> In the event of the Chinese Government desiring to issue further loans secured upon the revenues of the Salt Administration or to issue supplementary loans for purposes of the nature of those specified in Article II of this Agreement, the Chinese Government will give to the [signatory] Banks the option of undertaking such loans on a commission basis of six per cent. (6%) of the nominal value of the bonds as provided for in Article XIII of this Agreement.[22]

[21] For text of these, see MacMurray, p. 1026. The very valuable work of Sir Richard Dane in connection with the re-organization and administration of the Salt Gabelle should be noted.

[22] With reference to this Reorganization Loan it is to be noted that according to its conditions a very considerable part of its proceeds did not actually become available for expenditure by the Chinese Government, being devoted to the payment of Provincial Loans, shortly maturing obligations of the Central Government, previous

The first instalment paid under the Reorganization Loan agreement amounted to £25,000,000. Since then there have been several instalments paid upon this loan, which, of course, has reduced the amount outstanding.

Japanese Advances on Reorganization Loan. In 1917 and 1918 the Yokohama Specie Bank advanced a total of yen 30,000,000, in three instalments, to the Chinese Government, which advances are sometimes spoken of as the Second Reorganization Loan. They are secured on revenues of the Salt Administration, and are to be redeemed out of a Second Reorganization Loan by the Consortium if, and when, made. Otherwise, the loans are to be deemed Japanese loans.[23]

Belgian Loan of 1912. While the Reorganization Loan of 1913 was being negotiated with the Four Power Banks[24] the Chinese Government obtained a loan[25] of £1,000,000 from the Banque Sino-Belge, which bank was given an option for further loans amounting in all to £10,000,000. Back of the signatory bank was a syndicate composed of Russian, French, Belgian and British interests. The loan was declared to be " for the payment of such expenses as will be deemed necessary to consolidate

advances by the banks, etc., as detailed in the Annexes to the Agreement.

It may also be observed that the signing of this Agreement by the Government of Yuan Shih-Kai, without the approval of the Parliament then sitting at Peking, caused vehement protests upon the part of those Republican leaders who were opposed to Yuan and fearful of the means thus placed at his disposal for consolidating his power. It will be remembered that it was very shortly after this that there broke out in the South the short-lived so-called Second Revolution against Yuan.

[23] MacMurray, pp. 1389, 1400.

[24] Russia and Japan at that time had not been admitted to the Consortium, and America had not then withdrawn.

[25] For the text of this loan contract, see MacMurray, p. 947.

the central and local governments, to assure the satisfactory administration of the State and province and/or to relieve the distress prevailing among the people and in commercial circles." The loan was declared to be a direct obligation of the Central Chinese Government and as security were pledged the net income and property of the Peking-Kalgan Railway.

This loan agreement, which was signed March 14, 1912, was regarded by the Consortium as in violation of the undertaking which Tang Shao-Yi, the representative of the Chinese Government, had made with it, and a protest against carrying out the agreement was filed on March 15.

It is not necessary here to discuss the questions of good faith thus raised, but it may be said that in result the agreement was cancelled by the Chinese Government except as to £250,000 that had already been advanced.

Austrian Loans of 1912. Hard pressed as it was for funds, the Chinese Republic early in 1913 contracted three loans of £2,000,000 and £1,200,000 and £500,000, respectively, from a group of Austrian interests, and also three loans from the firm of Arnhold Karberg & Co., representing Austrian and German financial interests.[26] These loans, nominally to obtain war material, were actually for the purpose of obtaining funds for current expenses of the Government and to be spent at its discretion.

Loans made in 1914 from the Hongkong and Shanghai Banking Corporation, the Chartered Bank of India (British) and Arnhold, Karberg & Co. (Austrian), aggregating £6,635,000, have been redeemed and, therefore, need not be further considered.

Lee, Higginson (American) Loan of 1916. By an agreement dated April 7, 1916, the American banking firm of

[26] For summaries of the provisions of these loans, see MacMurray, p. 1004.

Lee, Higginson & Co., of Boston, Massachusetts, contracted a loan to the Chinese Government of $5,000,000, payable in April, 1919.[27] The loan was floated in the form of three-year Chinese treasury gold notes, which notes have now all been redeemed.

Chicago Bank Loan. By an agreement dated November 16, 1916,[28] the Continental Trust and Savings Bank of Chicago, Illinois, contracted to loan to the Government of China $5,000,000 which the Government declared was needed " for industrial purposes, including the internal development of China, the strengthening of the reserves of the Bank of China and the Bank of Communications (both of which are official banks) and other similar purposes." The loan was thus placed outside of the scope of the option held by the member banks of the Consortium.

As security for the loan the Chinese Government pledged " the entire revenues derived and to be derived by the Chinese Government from the Tobacco and Wine Public Sales Tax," this security being declared to be " free from any other loan, pledge, lien, charge or mortgage whatsoever."

By a supplementary agreement, dated May 14, 1917, it was provided that whereas certain claims had been made by other parties that they had a prior lien on the Tobacco and Wine Public Sales Tax, the Chinese Government without admitting or passing upon the validity of such claims agreed that the loan of the Chicago bank should be further secured by a direct charge on " the Goods tax receipts from the Provinces of Honan, Anhui, Fukien, and Shensi, whether such receipts be in the nature of

[27] Text in MacMurray, p. 1279.

[28] Texts of loan contract and supplementary agreement in MacMurray, p. 1337.

Likin taxes, transportation taxes or other taxes or imposts of like nature." As long as the loan should remain unpaid, these taxes were to remain in force and not be diminished or repealed or released without the consent of the bank. Furthermore, the taxes were to be collected by officials directly commissioned by the Peking Government and to be deposited, when collected, in depositories selected by that Government and subject only to its orders.

The agreement of November 16, 1916, gave to the bank an option to provide the money in case the Chinese Government should thereafter determine to borrow in the United States additional sums up to $25,000,000; this option to endure for sixty days after information should be given to the bank by the Chinese Government that a loan was desired. The $5,000,000 orginally advanced has been repaid from proceeds of a loan contract dated October 11, 1919.

Japanese Loans of 1917-1920.[29] During these three years Japanese banking interests made numerous loans to the Chinese Government for various purposes which it is not feasible to describe here because in a considerable number of instances the terms of the loans have not been made public. The proceeds of many of these loans, ostensibly made for industrial purposes—railway building, mining exploitation, forestry, etc.—were spent by the Peking Government to carry on the military contest it was waging with the Southern Provinces. The fact that the loans, or many of them, had the approval of the Japanese Government was shown by the publication of an official report in which was described the manner in which

[29] These loans have been known as the "Nishihara Loans," from the name of the Japanese who arranged for most of them.

the Government had given to the banks additional powers in order that they might float the loans.

There was a very general feeling, not only in China but in foreign capitals as well, that it was unfortunate for China, if not for those in political power in Peking, that these loans should have been made without control as to the way in which their proceeds should be spent—that China was getting no real benefit from them, but, indeed, often injury, since they supplied the means whereby the devastating civil strife in the country was maintained. Yielding to this opinion, the Foreign Office of the Japanese Government in December, 1918, published the following statement:

In view of the far-reaching effect investments of Japanese capitalists in China and Siberia are likely to have on the diplomatic, financial and economic interests of the country, the Government has laid down the following line of policy to be pursued in the matter of investments:—

1. In case Japanese capitalists desire to open negotiations in future for the conclusion of loans or similar matters which may include the financing of the administrative expenditure of either the Central or local authorities in China and Siberia, they must first notify the Foreign Office or the Japanese Embassies, Legations or Consulates abroad of the fact without fail, so as to receive necessary directions. They are also called upon to report on the progress of such negotiations from time to time. When such a notification is received the Foreign Office will confer without delay with the Finance and other Departments concerned and give necessary directions to the applicant.

2. The Government may withhold its protection from capitalists who carry on negotiations without awaiting the instructions of the Foreign Office or contrary to the directions given.

3. Such directions may sometimes be given to the applicants by the Finance or other Departments direct when the step is deemed expedient in view of the nature of transactions involved and the stage of the negotiations reached.

The manner in which these " Nishihara Loans " were contracted and the results following from them had much to do with the establishment of the Banking Consortium of 1920 which is described in Chapter XLI.

Other Loans. The most important of the long term loans of the Chinese Imperial Government, which have not been already described, are the following:

Anglo-Chinese Loan of 1914. This loan, amounting to £375,000, was obtained from the British and Chinese Corporation under agreement of February 14, 1914.[80] It is secured by a lien upon the surplus revenues of the Peking-Mukden Railway, and was obtained to repay the Japanese firm of Okura & Co. a loan secured by a mortgage upon the Shanghai-Fengching Railway.

Industrial Loan of 1913. This loan, obtained from the Banque Industrielle de Chine, under agreement of October 9, 1913, was for 150,000,000 francs, but only 100,000,000 francs have been advanced. Its purpose was the improvement of the port of Pukow, the establishment of national industries and the construction of national public works. As security these national industries and public works were pledged, and if these should prove inadequate there were pledged the revenues from " all the municipal taxes of Peking which are now or may hereafter be levied, such as land tax, tax upon carriages and rickshaws, taxes upon water, gas, electricity "; also the revenues " from the imposts upon alcohol, which are now or may hereafter be imposed by the Central Government in all the provinces of the territory of the Chinese Republic situated to the north of the Yangtze River." [81]

[80] MacMurray, p. 702.

[81] As to these additional guarantees, see Annexes to the original agreement, dated March 2, 1914, MacMurray, p. 1064.

Banque Industrielle Loan of 1914. At the time that negotiations were being had with the Consortium for the Reorganization Loan, the Chinese Government also succeeded in obtaining an agreement,[32] signed January 21, 1914, with the Banque Industrielle de Chine [33] for a loan of 600,000,000 francs, bearing interest at 5%. Nominally, the proceeds were to be used for railway construction and the equipment of the port of Yamchow. In fact, however, there was not sufficient control provided to prevent the Chinese Government from using the funds thus to be obtained for current administrative expenses. As security were assigned the immovable property and railway stock and revenues of the Yamchow-Yunnanfu-Suifu-Chunking Railways, and the materials and appurtenances of the port of Yamchow.

As yet construction has not been begun upon the railways provided for under this agreement and MacMurray reports (in a note to his No. 1914/2) that it is understood that the loan has not been issued, although advances to the amount of 32,115,000 francs have been made to the Chinese Government.

Kirin Mining and Forest Loan. This loan made by a Japanese banking group composed of the Exchange Bank of China, the Industrial Bank of Japan, the Bank of Taiwan and the Bank of Chosen, under agreement of August 2, 1918,[34] was for yen 30,000,000, its ostensible purpose being the development of gold mining and forestry in the two Manchurian provinces of Heilungkiang and Kirin. As security were pledged the Govern-

[32] For text, see MacMurray, p. 1099.

[33] A French corporation which had back of it the Peking Syndicate, a British corporation whose shares, however, were largely held in France.

[34] For translation of this loan agreement see MacMurray, p. 1434.

ment's revenues from the gold mines and national forests. In case China should, during the operation of the loan, wish to make other loans in respect to the mines, national forests and their revenues or to dispose of them, the banks were first to be consulted.

By notes attached to the loan agreement it was provided that " for the purposes of enabling the gold mining and forestry offices to attain their object, and assuring a source from which to secure funds required for the redemption of the loan, Japanese experts shall be engaged to assist in and perform the business of the two offices."

War Participation Loan. By an agreement of September 28, 1918, with a Japanese banking group,[35] a loan of yen 20,000,000 was obtained by the Chinese Government, the preamble of the loan agreement reading as follows:

> In accordance with the Sino-Japanese military co-operation agreement, the Chinese Government . . . in view of the need of securing funds for organizing a defensive army so as to be able to fulfill its co-operative duties, and also because of the expenses in participating in the war, has entered into a loan contract with the Bank of Chosen, the Industrial Bank of Japan, and the Bank of Taiwan.

No security beyond Chinese Government treasury certificates was exacted or given in the body of the agreement, but in a note of even date the Chinese Minister at Tokyo, in behalf of his Government, promised " that the tax system in China shall be reformed in the future and the revenues therefrom shall be reserved as the sources for the fund for the redemption of the loan."

Upon this same date, September 28, 1918, were signed the preliminary agreement granting to Japan the right

[35] For translation of this agreement, see MacMurray, p. 1446.

to construct four additional railways in Manchuria, and the agreement with reference to the Tsinanfu-Shuntehfu and Kaomi-Hanchow extensions of the Shantung Railway.

Plague Prevention Loan. In 1918, by an agreement signed January 18,[36] with the Banque de l'Indo-Chine, Hongkong and Shanghai Banking Corporation, Russo-Asiatic Bank and the Yokohama Specie Bank, China borrowed $1,000,000 for expenses in connection with the combatting of the spread of the plague which had broken out in the month. This loan has since been repaid.

Telegraph, Telephone and Wireless Loans. These loans are described in Chapter XXXVIII.

Other Loans. The loans which have been described in the foregoing pages by no means sum up the extent of China's foreign debts. Supplementing them are many loans which have been made for special purposes, and also a great number of short term debts. And, of course, in addition, are the many railway loans, the more important of which are described in the next Chapter.

For elaborate statements and statistical tables regarding China's present foreign (and also domestic) debts, see the *China Year Book* for 1924,[37] and for 1925.[38]

American Note of August, 1926. As is well known, since 1921 China has been in default with reference to a considerable number of her foreign obligations. At the same time she has been increasing her domestic indebtedness by the issuance of domestic loans, and, in connection with these, the question has been raised as to her right to

[36] MacMurray, p. 1424.
[37] P. 736, *et seq.*
[38] Pp. 709, 735, *et seq.*

pledge revenues which foreigners have looked to as possible security for their loans in case the securities specifically pledged for their payment should prove inadequate. This situation led, in August, 1925, to the sending by the American Minister at Peking to the Chinese Minister for Foreign Affairs of the following communication: [39]

The American Legation presents its compliments to the Ministry of Foreign Affairs and has the honor to state that it has received information indicating an intention on the part of the Chinese authorities concerned to issue new domestic loan bonds to a par value of silver dollars twenty-five million for the purpose of meeting administrative expenses and for the redemption of certain short-term domestic debts. It is understood that the security for this loan is to be approximately silver dollars eleven million per year at present paid from the maritime customs revenues for the service of the ninth year domestic loan which allowing for the postponement of amortization dates is due to become extinguished in 1927.

In these circumstances the Legation finds it necessary to remind the Chinese authorities once again of the unfulfilled liabilities in respect of the arrears of service of the Chinese Governmental obligations due to American citizens and companies. The list is long and should be well known. It includes the American share in the Hu Kuang Railway loan; also loans made by the Continental and Commercial Trust and Savings Bank, the Pacific Development Corporation, the Riggs National Bank, and the Munsey Trust Company. Other accounts which are entirely in arrears are also due to the following American creditors: American International Corporation; American Locomotive Company; American Metals Company; American Trading Company; Anderson, Mayer and Company, Limited; Ault and Wiborg China Company; Baldwin Locomotive Works; China-American Trading Company; China Electric Company; Fearon Daniel and Company; Fowler and Company; W. W. Frazer and

[39] The text of this communication is taken from a "Press Release" of August 25, 1926, of the United States Department of State.

Company, E. W.; General American Car Company; Robert Dollar Company; United States Steel Products Company; Wilkinson and Company, T. M. These creditors whose claims are long past due have all either supplied materials to various departments of the Chinese Government or made advances to them. In addition to the above list there are also a large number of American firms and individuals to whom are owed various sums in compensation for looting outrages committed by military and bandits for damages to property and for loss of life.

The Legation would also remind the Chinese authorities that under the terms of the agreements for many of the American obligations the Chinese Government engaged, in the event of a default or of the specific security pledged becoming ineffective, to provide from other sources the sums necessary for payment of principal and interest. The Legation must, therefore, point out to the Chinese authorities that these debts to American citizens and organizations are thus entitled to an automatic priority over debts subsequently contracted respecting the use of any customs surplus funds which may become available as a result of the retirement of loans hitherto secured on customs revenues. The Chinese authorities having failed to make effective the guarantees provided in various loan agreements and contracts for the purchase of materials now rest under the manifest duty to make provision for the defaulted payments from any available excess of customs surplus resulting from the extinction of a consolidated loan charge such as the ninth year domestic loan.

The Legation specifically denies the justice of the position adopted by the Chinese Government to the effect that the consolidated domestic loans enjoy a preferential right to the use of customs surplus funds after services of the pre-Boxer loans, the Boxer indemnities and the reorganization loan of 1913 have been met.

The American Legation therefore insists that the Chinese authorities concerned have no right to utilize as the security for new domestic financing the amount of approximately eleven million dollars per annum to become available upon the extinction of the ninth year domestic loan and could only regard any such action taken by the Chinese authorities as a further failure

to observe good faith towards the American creditors of China. The American Legation, therefore, emphatically protests against the issuance of the reported twenty-five million dollar domestic loan bonds.

German Issues of Chinese Loans: Repudiation of, by China.[40] On June 1, 1919, the Chinese Government notified the Powers concerned that it had stopped payments on all the bonds of the German issue of the Tientsin-Pukow and Hukuang Railway loans which had not been presented for payment at the Hongkong and Shanghai Bank in London between August 14, 1917, when China entered the Great War, and April 2, 1919, when the Treaty of Peace was signed.

Before this, in 1917, the Chinese Government had given notice that it would pay no bonds or the coupons thereon of the Anglo-German bonds of 1896 and 1898, except such as were the *bona fide* property of the nationals of the Allied countries or of neutral States; and, on June 23, 1923, announced that the German issues would be treated as property of German or Austrian nationals, and, as such, neither the principal nor the interest on them would be paid.

The inexpediency of this action being pointed out to her, China established a procedure in accordance with which a holder of these bonds might appear and prove that the script certificate for which his bond was exchanged was Allied or neutral owned before China entered the War, and thereupon his bond validated for payment by the Chinese Government. This process of validation was discontinued on September 12, 1923, with regard to the Anglo-German loans, but not as to the Tientsin-Pukow and Hukuang Railway loans, the validation of which could still be effected.

[40] The facts in this section are taken from the *China Year Book*, 1924, p. 812.

With regard to the foregoing, the *China Year Book* for 1924,[41] has the following to say:

"'The Chinese Government's action has not been approved by the Group Banks who consider that the German Loan bonds remain a binding obligation of the Chinese Government which cannot be terminated except by agreement between the Governments concerned. The repudiation of the German-issued bonds has raised many a difficult issue. Contrary to treaty stipulations the Chinese Government has so far refused to honor bonds of the German issue held by holders of Alsace-Lorraine who have had their French nationality restored to them. This refusal has called forth protests from the French Government who, immediately after the war, had in similar circumstances resumed payment of French bonds held by former Austrian subjects of the Trent district who have had Italian nationality restored to them. Finding the restrictions imposed by the Chinese Government a great obstacle to the ready negotiation of bonds the London Stock Exchange finally decided to remove from their official list the Anglo-German Loan bonds of 1896 and 1898 and Hukuang Loan bonds, as from May 1, 1924, if the German issues of these loans are not recognized as valid by the Chinese Government, which may have a very damaging effect on China's credit abroad.'' [42]

[41] P. 813.

[42] The *China Year Book*, 1924, gives also the text of a Memorandum, dated April 16, 1920, by Mr. Lamont, the American banker, sent to the Chinese Premier pointing out the inexpediency of China's action with regard to the bonds mentioned above.

CHAPTER XL

Remission of the Boxer Indemnities

The United States. In 1908, by a Joint Resolution of Congress of May 25, 1908, the United States released China from the payment of a considerable portion of the indemnities due the United States under the terms of the Protocol of 1901. The share allotted to the United States under that Protocol had been $24,440,778.81, for which a bond dated December 15, 1906, had been given. However, on June 15, 1907, the American Secretary of State, Mr. Root, notified the Chinese Minister at Washington that it was the intention of the United States, when all the claims and expenses growing out of the Boxer troubles and the American participation in the expedition for the relief of the Legations at Peking had been presented and audited, "to revise the estimate and account against which these payments were to be made, and, as proof of sincere friendship for China, to voluntarily release that country from its legal liability for all payments in excess of the sum which should prove to be necessary for actual indemnity to the United States and its citizens."[1]

[1] *Foreign Relations*, 1907, Pt. I, p. 174. It would appear that throughout the discussions between the Powers as to the claims to be made by them upon China because of the Boxer troubles, the United States had used its influence to have these claims not excessive, indeed to have them limited to actual injuries received and expenses incurred. The records show that the United States endeavored to have the other

The revised estimates of the legitimate claims for American loans and expenses was found to be $11,655,492.69, and President Roosevelt thereupon, in his annual message to Congress of December 3, 1907, asked for authority to remit and cancel all claims upon China in excess of that amount. Pursuant to the request, Congress, by Joint Resolution of May 25, 1908,[2] authorized the reduction of the American Boxer Indemnity to $13,655,492.69, and the difference between that amount and the original sum allotted to the United States, which was $10,785,286.12, to be " remitted " to China.[3]

The result of this action upon the part of the United States did not release the Chinese Government from the obligation to pay to the United States the amounts called for by the Protocol, but it did provide that, to the extent indicated, these sums, when paid to the United States, should be " remitted," that is, handed back, to China.[4]

Powers make no claims for punitive indemnities since, as they themselves had declared, they had not been at war with China. Failing in this, the United States then tried to persuade the Powers to submit to The Hague Court the question of the amounts of indemnities to be paid. Failing also to obtain this consent the United States then instructed its Commissioner, Mr. W. W. Rockhill, to make every effort to have the Powers make their claims as small as possible, and to bear the lowest possible rate of interest. See *For. Rels.*, 1901, appendix.

[2] U. S. Statutes at Large, vol. 35, Pt. I, p. 577; MacMurray, p. 311.

[3] The difference between the $13,655,492.69 indemnity found by Congress to be justly due for losses, etc., and the estimate stated in the President's message, was due to the decision of Congress to await the result of certain private claims pending in the U. S. Court of Claims. These claims having been settled in 1914, and the awards thereunder amounting to $824,164.36, that amount was, in result, added to the estimate which the President had given, and the sum subtracted from the total amount payable to the United States under the Boxer Protocol, with the final result that the total amount claimed by the United States and its citizens was $12,479,657.05, with interest, and the amount remitted to China by the Resolution of 1908 was $11,961,121.76.

[4] Regarding the reasons for this procedure, Mr. MacMurray, testifying before a Congressional Committee in 1924, said: Let me say

This remission upon the part of the United States was an unconditional one, that is, it was not made dependent upon any formal undertaking upon the part of China to make certain uses of the moneys thus returned to her. However, prior to the final authorization by Congress of the remission and of the Executive Order making this remission effective, the Chinese Government had indicated that, if and when the remission was made, it was its intention, in appreciation of this generous act, to devote the moneys thus received to the sending of a considerable number of Chinese youths to America for education in American institutions. In order better to prepare such students for coming to America, the Tsing Hua College was founded in 1911, and is supported in large measure from the sums remitted by the United States under the Joint Resolution of Congress of 1908.[5]

that the State Department in its consideration of this matter has never considered that "remitting" could mean anything for our present purposes except to follow the practice we have followed hitherto in regard to the portion remitted in 1908; that is, that we would hold the Chinese Government to the payment into our hands of the installments as they come due and would thereupon give them back.

There are a number of reasons for that, quite apart from the question of the legal interpretation of the meaning of the word "remit" in the original bill. For one thing, I might just say in passing, we should not disinterest ourselves in this matter while other Powers retain an interest. We want to be in a position no less favorable than theirs if it comes to any question such as arises very often in China—though it does not generally arise in other countries—as to the rights of the Powers interested in the customs revenues of China and in the disposition of those revenues. If only for that reason, it would be, from the viewpoint of our dealings with current questions as they come up with China, an unfortunate thing if we were to lose our standing as one of the actual creditors who are to be paid month by month out of the customs revenues. (Hearings before the Committee on Foreign Affairs of the House of Representatives, 68th. Cong., 1st sess. on House Joint Resolution 201.)

[5] The Tsing Hua College maintains in Washington, D. C., an agency known as the "Chinese Educational Mission."

By a Joint Resolution of Congress of May 21, 1924, the balance of the Boxer Indemnities due to the United States was authorized to be remitted to China. This Resolution read:

Whereas, by authority of a joint resolution of Congress approved May 25, 1908, the President of the United States was authorized to remit unto China the sum of $11,961,121.76 of the Boxer indemnity fund accredited to the United States, which sum the President on December 28, 1908, duly remitted and which, at the request of China, was specified to be used for educational purposes; and

Whereas, it is deemed proper as a further act of friendship to remit the balance of said indemnity fund amounting to $6,137,552.90 in order further to develop the educational and other cultural activities of China: Now therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President is hereby authorized, in his discretion, to remit to China as an act of friendship any or all further payments of the annual installments of the Chinese indemnity due under the bond received from China pursuant to the protocol of September 7, 1901, as modified by Executive Order on the 28th day of December, 1908, pursuant to the authority of the joint resolution of Congress approved May 25, 1908, for indemnity against losses and expenses incurred by reason of the so-called Boxer disturbances in China during the year 1900, such remission to begin as from October 1, 1917, and to be at such times and in such manner as the President shall deem just.[6]

Pursuant to this authorization the President of the United States by Executive Order of July 16, 1925, after quoting the terms of the Joint Resolution of May 21, 1925, declared:

Whereas, the Minister of the Republic of China at Washington, to whom a copy of the said Joint Resolution was transmitted by

[6] U. S. Statutes at Large.

the Secretary of State, informed the Secretary of State on June 14, 1924, that his Government proposed to devote the funds thus made available to educational and cultural purposes, paying especial attention to scientific requirements, and to entrust the administration of the funds to a Board which should be composed of Chinese and American citizens as members; and

Whereas, the Minister of the Republic of China on September 16, 1924, forwarded to the Secretary of State a copy of the constitution of the Board referred to in his communication of June 14, 1924, above mentioned, which Board, he stated, had been designated "The China Foundation for the Promotion of Education and Culture"; and

Whereas, the Minister of the Republic of China on June 6, 1925, informed the Secretary of State (1) that the Board of Trustees of the China Foundation for the Promotion of Education and Culture was a corporate body instituted by a Mandate of the President of the Republic of China on September 17, 1924, for the custody and control of the remitted indemnity funds; (2) that on June 3, 1925, the said Board had unanimously adopted a resolution reading textually as follows: "Resolved, That the funds from the remitted portion of the indemnity due the United States be intrusted to the China Foundation for the Promotion of Education and Culture be devoted to the development of scientific knowledge and to the application of such knowledge to the conditions in China through the promotion of technical training of scientific research, experimentation, and demonstration, and training in science teaching, and to the advancement of cultural enterprises of a permanent character such as libraries and the like"; and (3) that, in order to carry out the intent of the Joint Resolution of Congress, the Board was ready to receive the remitted funds from the United States Government.

Now, therefore, I, Calvin Coolidge, President of the United States of America, acting under and by virtue of the authority conferred upon me by the said Joint Resolution of Congress, do hereby make the following determination, order, rule and regulation:

The Secretary of the Treasury is hereby authorized and directed to remit to the said Board of Trustees of the China

Foundation for the Promotion of Education and Culture, as the agent designated by the Chinese Government to receive the same, all payments of the annual installments of the Chinese indemnity made subsequent to October 1, 1917, under the bond received from China pursuant to the Protocol of September 7, 1901, as modified by Executive Order on the 28th day of December, 1908, pursuant to the authority of the Joint Resolution of Congress, approved May 25, 1908, together with such further payments as may be made from time to time under the said bond, the remission of the payments to be for the purpose of further developing the educational and other cultural activities of China.

The China Foundation for the Promotion of Education and Culture. As appears from the Executive Order of the President of the United States of July 16, 1925, which has just been quoted, it was understood by the American Government that the sums currently made available to the Chinese Government by the remission of the remaining sums due under the Protocol of 1901 would be devoted by that Government to the maintenance of an institution to be known as "The China Foundation for the Promotion of Education and Culture."

This Foundation had already been established by a mandate of the President of the Republic of China, dated September 17, 1924,—a mandate which named nine Chinese and five Americans as members of the Board of Trustees. Later, a tenth Chinese was added to the Board. On June 3, 1925, a meeting of this Board had been held at which the following Resolution had been adopted:

Resolved, That the funds from the remitted portion of the indemnity due the United States to be intrusted to the China Foundation for the Promotion of Education and Culture be devoted to the development of scientific knowledge and to the application of such knowledge to the conditions in China through the promotion of technical training of scientific research, experimentation, and demonstration, and training in science teaching,

and to the advancement of cultural enterprises of a permanent character such as libraries and the like.

Resolved, That a permanent endowment fund be established to consist of present accumulations, plus an annual addition, sufficient to provide at the end of twenty years a principal which will yield an annual income of about half a million gold dollars.

On June 6, 1925, the Chinese Minister at Washington communicated to the Secretary of State the text of these Resolutions.

Action of Other Powers Regarding the Boxer Indemnities. At the time China entered the Great War upon the side of the Allied and Associated Powers, these Powers agreed to a postponement, in whole or in part, for a period of five years, of the indemnities due to them under the Protocol of 1901.[7]

Germany and Austria. For the payment of the amounts due to Germany and Austria, China declared herself released from all obligations by reason of her declaration of war against those countries.[8]

Japan. Following the precedent set by the United States, Japan has unofficially indicated its intention to remit its share of the remaining Boxer Indemnities, but has not stated definitely and authoritatively the conditions under which this remission will be made.[9]

[7] Russia, to whom was due 30 per cent. of the entire indemnity, agreed to a postponement of approximately one-third of its share. Italy also agreed to the postponement not of all, but of a substantial amount of its share. The other Allied and Associated Powers agreed to the postponement of the entire amounts due them.

[8] This release was formally sanctioned in the final treaties of peace.

[9] The author finds the following statement by M. G. Tsurumi in his volume *Present Day Japan,* p. 27: "In 1922 Japan decided to fall in line with America and return the remaining part of the Boxer indemnity, accruing to her, to China. This amounts to seventy-three mil-

France. By a law promulgated March 26, 1922, the French Parliament authorized the remission to China of the Boxer Indemnities still due the French Government, and empowered that Government to enter into negotiations with the Chinese Government as to the purposes for which the sums thus to be remitted should be used. On June 24 of the same year, the French Minister at Peking notified the Chinese Foreign Office that he was authorized to make the remission and that the moneys thus made available would be used for the rehabilitation of the Banque Industrielle de Chine which had become bankrupt several years before, causing heavy losses to its creditors and damage to French financial prestige in the Far East.[10]

lion yen, or thirty-six and a half million dollars gold. In harmony with a program called 'Cultural Work in China,' the whole amount will be used to help advance the civilization of China. The first appropriation of 5,350,000 yen was granted by the July session of the [Japan] Parliament of 1924. This will be spent in six years for the creation of two institutes of research in Peking and Shanghai. The one in Peking will be devoted to research in the fields of philosophy, literature and social science, the one in Shanghai to research in the field of natural resources. These institutes are not to be confined to Chinese and Japanese scholars, but their doors will be wide open to all properly qualified foreigners; their findings are to be published in Western languages." It will be observed that nothing is here said as to the manner in which these institutes are to be controlled, that is, whether by the Chinese or by the Japanese authorities.

[10] Testifying before a Committee of the American House of Representatives in 1924 (Hearing before the Committee on Foreign Affairs, on House Joint Resolution 201, 68th. Cong. 1st. Sess.) Mr. McMurray, then Chief of the Division of Far Eastern Affairs in the Department of State at Washington, said: "Such sums as are necessary, of the French indemnity, are to be devoted to the rehabilitation of that bank and the payment of creditors who lost through its failure. It is, of course, entirely a matter of speculation whether there will be anything left over, but the arrangement with the Chinese Government and the bill passed in the French Chambers provide that any contingent balance that there may be shall be used for what the French call 'oeuvres'. That term is rather difficult to explain in

This communication led to considerable correspondence between the two Governments and eventually became complicated by reason of the dispute as to whether the Chinese Government was entitled to make the Protocol payments in the depreciated paper French francs, or was obligated to make these payments in gold. This, the so-called "Gold Franc Question," remained unsettled until France having declared that it would not ratify the Washington Conference treaties and thus enable them to become effective until its view of the dispute was accepted, China felt constrained to yield, although protesting that it was highly improper (as indeed it was) for the ratification of the Washington treaties to be made dependent upon a wholly extraneous matter.[11]

Italy and Belgium. It has been a matter of gossip in diplomatic circles that Italy and Belgium intend to remit the Boxer Indemnities due them respectively, but nothing is known as to the purposes to which they will wish the sums remitted—if made—to be devoted.

Russia. By a "Declaration" annexed to the Sino-Russian Agreement for the Provisional Management of the Chinese Eastern Railway, signed May 31, 1924, it is stated:

1. The Russian share of the Boxer Indemnity which the Government of the Union of Soviet Socialist Republics renounces,

English. I suppose 'cultural institutions' is the nearest one can come to give an idea of what is implied by it. In other words, it is primarily for the purpose of the rehabilitation of that bank, whose failure was very considerable, and secondarily for cultural purposes."

[11] For an excellent résumé of the arguments in this Gold Franc Question, see the pamphlet by "Veritas" published in 1925 by the *Peking Leader Press.*

For a collection of documents bearing upon the question, see the *Chinese Social and Political Science Review,* July, 1923 (vol. IX, pp. 557-588).

will after the satisfaction of all prior obligations secured thereon be entirely appropriated to create a fund for the promotion of education among the Chinese people.

2. A special Commission will be established to administer and allocate the said fund. The Commission will consist of three persons, two of whom will be appointed by the Government of the Republic of China and one by the Government of the Union of Soviet Socialist Republics. Decisions of the said Commission will be taken by unanimous vote.

3. The said fund will be deposited as it accrues from time to time in a Bank to be designated by the said Commission.

It is further understood that this expression of understanding has the same force and effect as a general declaration embodied in the said Agreement in General Principles.

With reference to the foregoing it should be said that, several years before, China had denounced all her treaties with Russia, including, so far as Russia was concerned, the Boxer Protocol. Hence, the Declaration which has been quoted amounted, upon the part of Russia, to an acquiescence in the termination of the Boxer Indemnities, and, upon the part of China, to an undertaking that the moneys thus made available to herself would be used for the purposes indicated and under the control of the Commission provided for.

Great Britain. On June 30, 1925, by an act styled the China Indemnity (Application) Act, the British Parliament provided that, for the future, the amounts received by Great Britain under the Boxer Protocol should be "applied to such educational or other purposes, being purposes which are, in the opinion of the Secretary of State for Foreign Affairs, beneficial to the mutual interests of His Majesty and of the Republic of China, as the said Secretary of State, after consultation with the Ad-

visory Committee to be established under this Act, may, from time to time, determine." [12]

The Advisory Committee thus provided for, as finally constituted, consisted of eleven persons, three of whom were Chinese—Professor Hu Shih, Dr. C. C. Wang, and Dr. V. K. Ting. Six of the members of this Committee were selected as a Delegation under the chairmanship of Lord Willingdon to visit China in order to obtain evidence locally and thus be in a position to judge of Chinese opinion and of the practicability of the various proposals that might be made as to the specific uses to which the remitted moneys should be put.

The Delegation reported on June 18, 1926, and the report of the Advisory Committee, which was made on October 18, 1926, took the form of approvals or modifications of the recommendations made by the Delegation.

As a basis for the report of the Delegation, a memorandum was drawn up by the Chairman in December, 1925, which was endorsed by the Chinese members, and later by the Advisory Committee, including its Chinese members. This Memorandum declared:

> It has to be borne in mind that the fundamental object in returning the Indemnity is thereby to improve the friendly relations between China and Great Britain, and to enable the two countries to know, respect and appreciate each other.
>
> In dealing, therefore, with the educational and other problems, it is not enough simply to do what may be held to be actually the best thing, it is equally important that what is proposed should be in accord with Chinese opinion. It is essential to make clear by the proposals that are made that there is no intention of utilizing the Indemnity for the purpose of exploiting China in the interests of British influence or trade or of British educational propaganda.
>
> The educational work would have to be carried out on lines

[12] For text of this Act see *Report of the Advisory Committee*, China, No. 2 (1926), Cmd. 2766.

adapted to the country and the scheme of education would have to be acceptable to Chinese educationalists and to the Chinese Government. Indeed, the aim of any educational scheme would appear to be to devolve the responsibility on the Chinese themselves; *i. e.*, Chinese education by Chinese under Chinese control.

In result, the Committee has recommended the establishment of a "Board of Trustees for the China Indemnity Fund," whose constitution and functions will be substantially similar to the constitution and functions of the China Foundation for the Promotion of Education and Culture which controls the expenditure of the Indemnities remitted by the United States. The Board is to consist of eleven members, six Chinese and five British, to be appointed in the first instance by the Chinese Government after consultation and in agreement with the British Government. Thereafter, vacancies are to be filled by the Board itself.

As regards the uses to which the moneys made available to the Board are to be devoted, it is recommended that, first of all, the total fund is to be divided into two parts: (a) annual income for current expenditures, and (b) capital for the foundation of an Investment Fund. This Investment Fund, it is recommended, shall be invested in Chinese Government or other governmental securities, with, however, the proviso that it shall be open to the Board of Trustees, if at any time they deem it safe and desirable to make investments in connection with railway or river conservancy schemes, probably by the purchase of bonds for the purposes of such reproductive undertakings. The nucleus of the Investment Fund is to be the unexpended instalments of the Indemnities from December, 1922, to December, 1926, with accumulated interest thereon (about £1,750,000), which will be added to by annual instalments, so that, by 1945, the Fund, it is estimated, will be considerably over £5,000,000.

With regard to the purposes for which immediate or current expenditures are to be made, it will not be feasible here to enter into details, but, in general, it is recommended that 30 per cent. of the amount available shall be devoted to agricultural education and improvement (including 5 per cent. for famine relief and rural credit), 23 per cent. to scientific research, 17 per cent. to medicine and public health, and 30 per cent. to other educational purposes. The Board, however, can, at their discretion, vary these percentages.

With regard to the specific investments to be made of moneys in the Investment Fund, the Advisory Committee unanimously declared its opinion that "the most profitable form of work of outstanding national importance, and an enterprise which could be counted upon to confer a real benefit on large numbers of Chinese people, would be the extension of railways," and especially the completion of the Hankow-Canton Railway.[13]

Since December 1922, when the British Government announced its intention to remit to China the Boxer Indemnities, the monthly instalments paid by the Inspector-General of the Chinese Maritime Customs to the credit of the British Government have not been paid, as was formerly the case, into the British Exchequer, but have been transferred to a "suspense account" with the Hongkong and Shanghai Banking Corporation. The amount of money that will be made available to China by the remission of the Indemnities from December, 1922, to December, 1945, when the payment of Indemnities to Great Britain by China will cease, will be, in round figures, £7,000,000 of principal, and £4,250,000 of interest, a total of £11,186,547.

[13] See especially as to railway development the memorandum of Dr. C. C. Wang, attached to the Delegation's report, and included in the Advisory Committee's report.

CHAPTER XLI

The Four Power Consortium [1]

The correspondence leading up to the establishment, in 1920, of what is known as the Four Power Consortium has already been reviewed in so far as the matter of Japan's claim to special interests in China, and particularly in South Manchuria and Eastern Inner Mongolia was involved. In the present chapter this new Consortium will be considered in its general financial aspects.

In June, 1918, the United States Government proposed to the Governments of Great Britain, France and Japan that a new Consortium be established to finance all future loans to China, industrial as well as administrative or political, and backed by a governmental guarantee, this Consortium to be composed of national groups of banks of the four participating Powers.

As outlined in a memorandum presented by the American Minister at Peking in July, 1919, to the Chinese Government, and based upon resolutions adopted at a meeting of bankers of the four Powers at Paris in May of that year, the scheme was as follows:

Each government was to form a national banking group according to its own judgment as to what financial

[1] The correspondence leading up to the creation of this Consortium, together with the text of the Agreement itself, has been published in a convenient pamphlet by the Carnegie Endowment for International Peace (Division of International Law, Pamphlet No. 40, 1921).

interests should be admitted, and upon what terms. As for America itself, however, the Government proposed that the banks to be admitted should be representative of the whole country and thus to include not only those institutions which already had interests in China, but such other banks as might desire to join. Thirty-one such banks, from different parts of the United States, it was said, had signified their wish and intention to participate as members of the American Group. The memorandum ran:

> It was considered by all to be a reasonable condition of membership in the American Group that all preferences and options for loans to China held by any members of this Group should be shared by the American Group as a whole and that all future loans to China which gave any governmental guarantee should be conducted in common as group business, whether it was for administrative or for industrial purposes.

The hope was expressed that the other three governments would form their groups upon similar terms. This being done, the memorandum continued, " if each of the four national groups would share with the other national groups any loans to China, including those to which that national group may have a preference, or on which it may have an option, and all such business arising in the future, it is felt that the best interests of China would be served."

Replying, under date of October 8, 1918, to certain inquiries that had been made by the other governments, the Government of the United States said that the plan proposed did not necessarily contemplate the dissolution of the old Consortium, but that it was hoped that the other governments would form their respective national groups upon such a comprehensive basis as to include not only all the members of the old Consortium, but also

other banking interests, not so associated, who had made or might in the future desire to make loans to China. "Nor," it was declared, "did the American Government in making its proposal, have any specified loan in mind, but was endeavoring to lay down some general rule for future activities which might, in a broad way, meet the financial needs and opportunities in China. It was for this reason that no specific reference was made to the amount of the loan or loans to be raised, the revenues to be pledged or to the precise objects of the proposed loan. It was contemplated that these questions would be determined in respect to each case as it might arise. The reference to a relinquishment by the members of the group either to China or the group, of any options to make loans which they now hold applied primarily to the American group alone and to an agreement between the [American] banks and the United States. Thereby all preferences and options for future loans in China, having any governmental guarantee, held by the individual members of the American group, should be relinquished to the group, which should, in turn, share them with the international group."

"Such relinquishment of options," the memorandum of October 8, went on to say, "was considered by this [American] Government to be a reasonable condition of membership in the American group, and while it recognized that each interested government must necessarily make its own arrangement with its own national group, it is submitted that it is possible properly to conduct the business of the international group only by similar relinquishment to the respective national groups by the individual banks forming those groups, without distinction as to the nature of the options held."

The proposal that industrial as well as administrative loans be included within the scope of the new Consortium

activities, it was declared, was based upon the reason that, in practice, it was often not easy to draw the line of distinction between the two. "Both alike should be removed from the sphere of unsound speculation and of destructive competition."

Finally, it was declared that the Russian and Belgian groups were, for the present, not included in the plan, merely upon practical grounds arising out of existing conditions of fact. The inclusion in the Consortium of these and other national groups would be a matter for future consideration when a desire for admittance might be expressed by them and when they might be in a position effectively to co-operate.

The Governments of Great Britain, France, and Japan gave their approval, in principle, to this general plan advanced by the American Government, but, when, four months later, a representative of one of the leading American banks visited Japan he was greatly surprised to find that the Japanese Government had not taken even the initial step of making known to its bankers that such a plan had been proposed by the American Government. And it soon developed that the Japanese Government was unwilling to co-operate in the plan unless loans relating to South Manchuria and Eastern Inner Mongolia should be wholly excluded from its scope.

This position implied a claim on the part of Japan of a "special interest" in the areas mentioned that carried with it a monopoly of rights of economic and political exploitation—a construction which the American Government was not willing to accept.[2]

[2] It would appear that Viscount Uchida, Minister of Foreign Affairs, was willing that Japan should give unconditional adherence to the plan, but that he could not carry with him his Cabinet, the majority of which were controlled by the opinion of General Tanaka, Minister of War, and of some of the so-called "Diplomatic Council." See *The Japan Advertiser*, August 16, 1919.

After discussions extending over some months, the other Powers gained the impression that Japan would be satisfied if she were permitted to enumerate the interests already held by her in Manchuria and Mongolia which, it should be specifically declared, were not to be prejudicially disturbed without her consent by the operations of the new Consortium; but when, at length, Japan made known the conditions under which she would enter, it was found that again was presented the condition that certain areas in Manchuria and Mongolia should be declared to fall outside the jurisdiction of the Consortium. In its communication of August 27, 1919, the Japanese Embassy at Washington declared that its acceptance of the resolution for the establishment of the Consortium should not be held or construed "to operate to the prejudice of the special rights and interest possessed by Japan in South Manchuria and Eastern Inner Mongolia."

This proviso the Government of the United States found unacceptable "as an intermixture of exclusive political pretensions in a project which all the other interested Governments and groups have treated in a liberal and self-denying spirit and with the purpose of eliminating as far as possible such disturbing and complicating political motives." To the same effect was the reply of the British Government.

There then followed further correspondence dealing with Japan's claim to "Special Interests" in China, some of which is summarized in an earlier chapter, and, therefore, need not be here repeated. It is sufficient to say that it was finally agreed that certain of the railways in Manchuria, constructed or projected, were to be

deemed outside of the scope of the Consortium,[3] and with this Japan had to be content.[4]

After the agreement was reached, but before the instrument of agreement was signed, a Joint Note by the Legations at Peking of the four participating Powers was sent to the Chinese Foreign Office stating in general terms the purpose of the Consortium that was about to come into being. At the same time was transmitted a collection of the documents and letters which had been exchanged between the four Powers in order, as the Note said, to " enable the Chinese Government to follow the course of the negotiations and understand the whole position."

The Consortium Agreement. The formal agreement establishing the Consortium was signed on October 15, 1920, the parties to it being the Hongkong and Shanghai Banking Corporation, the Banque L'Indo Chine, the Yokohama Specie Bank and a group of important American banks.

Government Support to the Consortium. The preamble of the Consortium Agreement of October 15, 1920, declares:

Whereas, their respective Governments have undertaken to give their complete support to their respective national Groups the parties hereto in all operations undertaken pursuant to the Agreement hereinafter contained and have further undertaken that in the event of competition in the obtaining of any specific contracts the collective support of the diplomatic representatives in Peking of the Four Governments will be assured to the parties hereto for the purpose of obtaining such control.

[3] It was expressly stated that the projected Tuanfu-Jehol Railway and the projected line connecting a point on that railway with a seaport were to be deemed included within the terms of the Consortium Agreement.

[4] See the reply of Mr. Lamont of May 11, 1920, to the letter of the President of the Yokohama Specie Bank of the same date.

In his letter of March 23, 1921, to the American Group the American Secretary of State, Charles E. Hughes, said: "I am happy to advise you that the principle of this co-operative effort for the assistance of China has the approval of this Government."

In its letter of March 17, 1919, to the American Government, the British Government, after referring to certain conditions (which have been met) said: "On these conditions His Majesty's Government have authorized the British Group to participate in the operations of the proposed International Consortium and have guaranteed to it exclusive official support as regards all future public loans to China which involve a Government guarantee and a public issue, whether for industrial, administrative or financial purposes."

Scope of the Consortium. The loans which are to come within the operation of the Consortium, as stated in Articles 2 and 3 of the final Agreement, are as follows:

2. This Agreement relates to existing and future loan agreements which involve the issue for subscription by the public of loans to the Chinese Government or the Chinese Government Departments or to Provinces of China or to Companies or corporations owned or controlled by or on behalf of the Chinese Government or any Chinese Provincial Government or to any party if the transaction in question is guaranteed by the Chinese Government or Chinese Provincial Governments, but does not relate to agreements for loans to be floated in China. Existing Agreements relating to industrial undertakings upon which it can be shown that substantial progress has been made may be omitted from the scope of this Agreement.

3. The existing Agreements and any further future loan agreements to which this Agreement relates and any business arising out of such agreements respectively shall be dealt with by the said groups in accordance with the provisions of this Agreement.

To an inquiry of the British Government as to whether the proposed Consortium would cover loans of an industrial as well as an administrative character, the American Government, in a memorandum of October 9, 1918, said:

The proposal of the Government of the United States contemplated industrial, as well as administrative, loans should be included in the new arrangement for the reason that, in practice, the line of demarkation between these various classes of loans often is not easy to draw. Both alike are essential fields for legitimate financial enterprises and both alike should be removed from the sphere of unsound speculation and of destructive competition.

The British Government, in its letter of March 17, 1919, with reference to industrial loans, said:

The acceptance of these proposals . . . involves a complete reversal of the policy adopted by his Majesty's Government in 1913 when it was decided to exclude industrial loans from the scope of the old Consortium's activities, but so convinced are His Majesty's Government of the urgency, in the interests not only of China herself, but also of foreign trade and finance, of adopting some system to ensure the proper control of loans to the Chinese Government, that they have determined to depart from their previous attitude and to authorize on certain conditions the participation of a British Group in a Consortium constituted on the lines suggested by the American Government.[5]

Existing Options. As regards options for future loans held by various Powers or their nationals, the American Government, in the same memorandum, said:

[5] These conditions related to the enlargement of the British Group and to the promise of governmental support to industrial loans should relate solely to the financial side of such loans, and that the activities of the Consortium should be restricted to the flotation of the loans, the contracts for the construction of the public works provided for by the loans, to be awarded on the basis of public tenders.

The reference [in an earlier communication] to "a relinquishment by the members of the Group either to China or to the Group of any options to make loans which they now hold," applied primarily to the American Group alone and to an agreement between the banks and the United States Government, whereby all preferences and options for future loans in China having any governmental guarantee and held by the individual members of the American Group should be relinquished to the American Group, which should, in turn, share them with the International Group. Such relinquishment of options was considered by this Government to be a reasonable condition of membership in the American Group; and while it is recognized that such interested Government must necessarily make its own arrangements with its own national group, it is submitted that it is possible properly to conduct the business of the International Group only by similar relinquishment to the respective national groups by the individual banks forming these groups, without distinction as to the nature of the options held.

As regards this matter of existing options it is to be observed that Article 2 of the Agreement provides that it shall relate " to existing and future loan agreements." It would seem, therefore, that, in the future, the Consortium was to be competent to handle loans relating to the Chinchow-Chengtu Railway, which is held by the French; the Nanking-Pinghsiang Railway and the Shasi-Hsing-I Railway, which is held by the British, and the various concessions including the Chuchow-Chinchow line.

Japan obtained from the United States and Great Britain an assurance that the Consortium would not give financial support to enterprises which would be directed against her own national defense and economic existence, and also, as earlier said, the definite promise that certain railway enterprises contemplated or actually begun in Manchuria and Mongolia should not come within the scope of the Consortium operations. These railways were:

1. The South Manchuria Railway and its present branches, together with the mines that are subsidiary thereto.

2. The Kirin-Huining, the Chengchiatun-Toananfu, the Changchun-Toananfu, the Kiayuan-Kirin (via Hailung), the Kirin-Changchun, the Sinminfu-Mukden, and the Ssuping-Kai-Chengchiatun Railways.

In other words, these enterprises were recognized to come within the provisions of Article 2 of the Agreement which declares that "Existing Agreements relating to industrial undertakings upon which it can be shown substantial progress has been made may be omitted from the scope of this Agreement."

The foregoing specific matters being determined, Japan came into the Consortium upon practically the same terms as other Powers. In other words, she wholly failed to receive recognition of her claim that throughout the specific area of Mongolia and Manchuria she had a special status or possessed special interests that would entitle her to preferential or exclusive rights with regard to loans. However, at about the time of the signing of the Agreement, and when its terms had been agreed upon, the Japanese issued an authoritative statement containing the following assertions:

> While, however, the other Powers concerned can afford to look upon the question of the New Consortium solely or mainly from the standpoint of business interests, it is otherwise with Japan, inasmuch as her vital national interests are apt to be involved. Being contiguous to China, Japan has to take into consideration the requirements of her national defense and economic existence in connection with an enterprise to be undertaken near her border.
>
> This special and peculiar position of Japan the other powers concerned have hitherto shown willingness to appreciate. The Japanese Government, however, in confirming the Paris Agree-

ment, considered it advisable to arrive at a more definite understanding on this point with the Governments concerned. Frank exchange of views with the American, British and French Governments led to a full appreciation on their part of the main purpose of the Japanese proposal which had in view the guaranteeing of the security of Japan's national defense and economic existence. The three governments expressly declared to the Japanese Government that they not only contemplated no activities inimical to the vital interests of Japan, but that they were ready to give a general assurance which would be deemed sufficient to safeguard those interests.

Seeing that the spirit of their proposal has met with the complete appreciation of the powers interested, the Japanese Government have decided finally to confirm the agreement of Paris, and the result is the understanding that has been reached between the representatives of the Japanese and American Banking Groups. A similar understanding is expected soon between the Japanese group and the British and French groups.

And in a carefully prepared statement to the press, and published by it on June 16, 1920, Premier Hara said:

As to the reservations made on our side in regard to Manchuria and Mongolia, it must be remembered that in the Japanese mind these two regions have certain historical associations. China and Japan are close neighbors—so close that parts of their respective territories touch each other. That fact has naturally created a situation peculiar to Japan, of what may be called an interest of a special kind which cannot be regarded in Japan in precisely the same light as by the other Powers more remotely situated, and whose interest is, therefore, of an indirect character. In other words, something vital to us as a nation is involved in the matter . . . . this is not a new phase of Japanese policy, since it was expressly recognized in the Ishii-Lansing Agreement.

This statement, Mr. Thomas W. Lamont, in a letter to the *New York Times,* under date of July 13, 1920, felt obliged to correct in the following words:

Premier Hara . . . must have been misquoted when he is apparently made to say, in regard to the Consortium, that Japan adhered to her reservations as to Manchuria and Mongolia. Quite the contrary is the case. . . . As the result of our discussions, banking, governmental and otherwise, the Japanese banking group, with the explicit approval of its Government, withdrew the original letter which had set up the reservations as to Manchuria and Mongolia and announced its entry into the Consortium on the same basis as the other Groups.

Purposes of the Consortium. The preamble of the Consortium Agreement declares:

And Whereas, The said national Groups are of the opinion that the interests of the Chinese people can in existing circumstances best be served by the co-operative action of the various banking Groups representing the investment interests of their respective countries in procuring for the Chinese Government the capital necessary for a programme of economic reconstruction and improved communications. . . .

And Whereas, With these objects in view the respective national Groups are prepared to participate on equal terms in such undertakings as may be calculated to assist China in the establishment of her great public utilities and to these ends to welcome the co-operation of Chinese capital.

In his Preliminary Report on the New Consortium, dated August 7, 1920, Mr. T. W. Lamont said:

The organization of this body will, it is believed, result in the stabilization of economic, financial and perhaps of political conditions in China; will bring the five Powers involved into closer harmony of interest and sympathy, and will thus be a substantial factor in contributing to the permanent peace of the Far East.

That one of the chief purposes of the Consortium was to preserve the sovereignty of China as well as to main-

tain the Open Door within its borders is shown by the following declarations:

In his letter of March 23, 1921, Secretary Hughes said:

> This Government . . . is hopeful that the Consortium . . . will be effective in assisting the Chinese people in their efforts towards a greater unity and stability and in affording to individual enterprises of all nationalities equality of commercial and industrial opportunity and a wider field of activity in the economic development of China.

Mr. Lamont in his Preliminary Report said:

> The Government of the United States undoubtedly had in mind this fact when it moved for a formula of joint action. If the Consortium is a success the possibility of war arising in the Far East will be greatly reduced, and China will have a better and fairer chance to work out her destiny as an independent State.

And, upon another page of the same report, Mr. Lamont said:

> The United States Government proposed that the New Consortium should have a wider scope than the old Consortium had possessed; that it should be in the nature of a free and full partnership among the banking groups named; that not only future options that might be granted but concessions already held by individual banking groups in which substantial progress had not been made, should, so far as feasible, be pooled with the Consortium; that working on these principles, the operations of the Consortium would serve to prevent for the future the setting up of special spheres of influence on the Continent of Asia. The United States Government laid great stress on this latter point, as being highly effective in doing away with international jealousies and helping to preserve the integrity and independence of China.
>
> These proposals make it clear that it was not to be the aim of the Consortium to concern itself with general enterprises in

banking, industry or commerce. Rather it was to include within its scope only those basic enterprises, such, for instance, as the development of transportation systems, highways, reorganization of the currency, etc., which would serve to establish sounder economic conditions throughout China and thus form a firmer foundation for its encouragement of private initiative and trade.

In a statement, dated December 2, 1921, published by the American Group of the Consortium, we find it declared:

To all those invited to become members of the Group it was made clear that the enterprise was of the character of a public service, entered upon at the request of the (American) Government to the end of assisting to maintain the Government's traditional policy of the "Open Door" for China; further, of attempting to substitute [for the international competition that at one time, by reason of the struggle for concessions, threatened the integrity of China] the great principle of international co-operation in the development of great public enterprises in China such as the construction of railways, canals and highways, and the reform of China's currency, the defects of which constituted a grave hindrance to the proper and natural expansion of her trade, domestic as well as foreign.

This statement went on to say that one of the first acts of the Consortium was to go on record as welcoming the formation of a local Chinese banking group that might act in co-operation with the Consortium; and, further, that the principle was laid down that, should China decide to ask for its assistance, the Consortium would be prepared to make loans to the central or provincial governments of China only for constructive purposes, and thus " to lend its support to those elements in China that were resisting efforts made to obtain, in return for valuable national concessions, large loans for quasi-military or administrative purposes, the proceeds being expended

apparently without permanent benefit to the Chinese as a whole."

Especially, in this statement, was it emphasized that it would not be the purpose of the Consortium to seek financial control of China, and, therefore, that the Consortium would seek to avoid any responsibility beyond that of being properly assured that the advances made by it would be repaid, and that they would be expended by the Chinese only for the constructive purposes for which they were made.

Furthermore, it was declared in this statement that the Consortium desired no monopoly of lending to China, but that, upon the contrary it would decline to consider any loans except such as the Chinese national and provincial governments might desire for constructive purposes, and that it "would welcome such developments in China as would enable the country to secure wholly from domestic bankers the funds that it required for the building up of its means of communication, and for the construction of such other public works as will serve to prevent the disastrous floods, droughts and famines with which China has been from time to time afflicted."

Chinese Fears as to the Consortium. Despite the representations of the Consortium as to its purposes, the Chinese people appear to have felt serious doubts as to whether China will be benefited by its operations. Their fears seem to have been with regard to the following points:

1. That a monopoly of possible foreign lenders of money to China is created with a result that, when China finds it necessary to obtain a foreign loan, she will be obliged, if she is to obtain it at all, to resort to the Consortium and accept its terms.

2. That, by means of the compulsion that it thus will

be able to exert, the Consortium will bring about an increased foreign control of the operations of the Chinese Government.

3. That additional classes of the revenue of the Chinese Government will be pledged as security for the Consortium loans. Especially has this fear related to the Land Tax.

4. That the Consortium, by lending money to one or the other of the contending factions or governments in China, will exercise a control of a purely domestic political problem.

In his Preliminary Report on the Consortium Mr. Lamont seemed of the opinion that some of this Chinese opposition to the Consortium was due to Japanese propaganda. He said:

> There began and continued throughout my stay in China an active propaganda against the Consortium, against America, against the American group and against myself as its representative.
>
> This propaganda was a powerful illustration of the necessity for joint action in China on the lines proposed by the Consortium. When such propaganda is conducted effectively it is bound to engender ill-will among the foreign residents and business men and distrust among the Chinese. Followed to its logical conclusion, it brings conflict in some form. But unite the chief foreign interests in China in a mutual plan of fair play, honestly entered upon, and there is no room for propaganda.
>
> This particular propaganda was conducted partly through circulars, also through the few English printed journals said to be in the control of the Japanese. It was chiefly apparent in the organs of the vernacular press conducted by Japanese interests. In these newspapers, scattered throughout all the leading cities in China, the most astonishing misstatements as to the Consortium were constantly repeated. Guild and parliamentary memorials, manufactured on the basis of these falsehoods were addressed to me and reprinted in the public press.

As regards the possibility of the Consortium functioning as an aid to one or the other of the contesting parties in China, Mr. Lamont, in his report said: "I took repeated occasions in China to make it clear that until effective reconciliation between the factions has been reached the Consortium will be unable to function upon any extensive scale."

As regards the fear lest the Consortium may prove to be an agency whereby increased foreign control of the operations of the Chinese Government may be brought about, the following considerations are pertinent:

American Attitude Towards Foreign Control in China. In 1913 the American Government formally announced that it would not give its official approval and support to the American banks then parties to the so-called Six Power Consortium with reference to the proposed Reorganization Loan to the Chinese Government, which carried with it what the American Government deemed to be an unwise foreign interference in the domestic administrative affairs of the Chinese Government.

It has been deemed important to refer again to this statement of President Wilson, which sets forth the general attitude of the American Government towards China, because it was while Mr. Wilson was still President that the new Consortium was promoted and with his full approval. A careful examination of the correspondence leading up to the establishment of this new international banking association, and of the statements issued in connection therewith, will indicate, it is believed, that Mr. Wilson and his Administration, during the seven years that have elapsed between the withdrawal of the American banking interests from the old Consortium and the creation of the new one to which these interests were to be party, have not changed their fundamental policy. In other words, the leading part which the United States

Government has taken in the establishment of the new Consortium is not to be taken as a change in opinion or policy upon its part as to the desirability of preserving the territorial integrity and administrative autonomy of the Chinese Republic. Upon the contrary, the view of the American Government would seem to be that by thus internationalizing the lending of money to China the danger will be avoided that specific loans by particular Powers will be made which will carry with them undertakings which will impair or tend to impair such integrity and autonomy.

In his letter of reply of July 9, 1918, the American Secretary of State said: "I think that I should say frankly that this Government would be opposed to any terms or conditions of a loan which sought to impair the political control of China or lessen the sovereign rights of that Republic."

The British Government, in its note of August 14, 1918, to the American Government, expressed some anxiety as to whether the American declaration which has been quoted was intended to apply to loan conditions already existing, as, for example, those relating to the Chinese Maritime Customs and the Salt Gabelle. Replying to this, in its note of October 8, 1918, and an accompanying memorandum, the American Government said:

> The expression "any terms or conditions of a loan which sought to impair the political control of China or lessen the sovereign rights of that Republic" had reference only to the future activities of the American Group [of banks] and was not intended to call in question the propriety of any specific arrangement in operation between the former Consortium and the Chinese. It can be definitely stated that the United States Government did not mean to imply that foreign control of the collection of revenues or other specific securities pledged by mutual consent would necessarily be objectionable nor would the appointment under

the terms of some specific loan of a foreign adviser,—as, for instance, to supervise the introduction of currency reform.

It cannot be said with certainty that this last sentence was intended to relate to future as well as to already existing loan conditions, but, granting that it does, it is clear that the American Government is pledged not to stand sponsor for, or to participate in, any loan arrangement that would involve more foreign control than would be necessary to make sure that the revenues, which might be pledged as security for the loan would be duly collected and accounted for. Also, though this precise matter is not covered in the American statement, it is not improbable that the American Government would give its approval to loan conditions involving foreign supervision of Chinese administration sufficient to make it certain that the proceeds of the loan would be actually and efficiently and economically expended by the Chinese Government for the purposes for the accomplishment of which the loan was negotiated. This, of course, would not involve the actual administration, by foreigners, of the revenue or other services of China. It would mean only a certain amount of oversight and audit with reference to the Acts of the Chinese administrative officials.

It will furthermore be noted that the American Government, in the statement which has been quoted, was careful to say that the foreign control of the collection of revenues or other specific security pledged by mutual consent would not *necessarily* be objectionable. In other words, the American Government could forsee that such a control might be provided for which would not, as stated in its letter of July 9, 1918, "impair the political control of China or lessen the sovereign rights of that Republic." This statement of policy the American Government did not, and has not since qualified.

The general advantage of the Consortium to China consists, then, in the fact, as the correspondence leading up to its establishment plainly shows, that it is a serious attempt, within the field to which it relates, to abolish "Spheres of Interests" and the "struggle for concessions" which has worked so much harm to herself and has aroused so much ill feeling among the Powers. Its disadvantage to China is that, by this combination of possible lenders of money, there disappears the opportunity, upon the part of China, to bargain among the Powers, to induce them to compete with one another, and thus to offer to China the most favorable terms possible in order to obtain the privilege of making the loans. It is, however, the personal opinion of the writer that the possible advantages to China of the Consortium greatly overbalance its disadvantages. It may be reasonably expected to prevent future ill-considered loans, to avoid the irritation of those Governments which feel that their offers or rights have not received due consideration or which are jealous of privileges granted to the Powers making the loans, and, in general to prevent the re-establishment of special interests or regional spheres of interests which, in the past, have done so much injury to China.

It is not unlikely that the Consortium, when making loans to China, will insist not only that adequate security for their repayment, principal and interest, is provided, but also that sufficient guarantees are offered by the Chinese Government that the proceeds of the loans will be actually and efficiently expended for the realization of the purposes for which they have been negotiated; and these guarantees, it may be insisted by the Consortium, will take the form of a right upon its part to appoint auditors and comptrollers for the supervision and control of the expenditures made by the Chinese administrative authorities. The necessity for such a supervision will

of course be regretted by the Chinese, but, in the light of past experiences, it cannot be denied that, in the interests of China herself, it may, in certain cases, be desirable that this degree of supervision should be accepted. It need not, and should not, be one which would take the actual operations of Government out of the hands of the Chinese authorities and, in no case, should it be continued beyond the period during which the expenditures of the proceeds of the loans are made.

It is reported that representatives of the Consortium have deprecated the idea that one of its purposes is to bring about a unification of the railways of China under international control. This, however, is a matter which, it would seem, needs to be watched by the Chinese Government, for there occurs the following significant paragraph in a letter of June 4, 1919, from the Hongkong and Shanghai Banking Corporation to the British Foreign Office:

> It may not be out of place to remark here, in parenthesis, that the arrangement suggested by the group is to be regarded in its industrial aspect as a transitory preliminary stage in the accomplishment of the main object, to be kept steadily in view, of the establishment at Peking of a central railway board to consist of representatives of the Chinese Government on the one hand, and of the international consortium on the other, which should be entrusted with the finance, the construction, the administration, and the control of the Chinese railway system as a whole; the consortium to act as financial and industrial agents to the central railway board for the issue of specific railway loans, until such time as it may be found possible to issue Chinese consolidated stock, and for the preparation, under the direction of the board, of specifications and tenders for the supply of railway material and equipment.[6]

[6] *British Blue Book*, Miscl. No. 9, 1921.

It does not appear that the British Foreign Office made any reply to or comment upon this view of the Bank.

The Chinese Banking Group. One effect of the organization of the Consortium has been to bring together certain of the banking interests of China and to elicit from them a memorandum to the Chinese Government in which they declare the following principles as essential with reference to future foreign loans.

1. The Chinese Banking Community may avail themselves of the opportunity of acting in a mutual spirit with the Banking Consortium on such occasions and in such matters as are considered proper or advantageous.

2. In financing undertakings the Government should investigate the ability of native financial circles and ascertain popular opinion, and if it should find it absolutely necessary to apply for financial assistance from foreign sources the Government may negotiate with the new Banking Consortium in such a manner as will not jeopardize China's sovereign rights or hamper China's own free development. The Chinese people will not recognize so-called "special interests" or "Spheres of interest."

With special reference to railway loans the Chinese Banking Group stipulated that the Government should retain the full right to decide the order in which the railways should be constructed, and that no foreigners " except technical experts " should be employed. Also that China should preserve her full right to determine all railway tariffs, and that " creditors shall have no interest in forests, mines, or other resources which may be close to or connected with railways financed by them."

CHAPTER XLII

Railway Loans and Foreign Control

Introductory. In an earlier chapter in which was traced the development of Spheres of Interest in China, an account was given of the circumstances under which the more important agreements with reference to the construction and operation of railways were entered into with the different Powers or with their respective financial groups. In the present chapter it is proposed to consider in a more systematic and chronological manner the development of railway enterprises in China, but with especial reference to the extent to which the foreign banks or syndicates of banks, which have made railway loans, have retained for themselves control over the construction and operation of the railway lines concerned.

As regards "control" it will be found that this extends, or has extended, to the following matters: the supervision of construction; the purchase of material for construction, rolling stock and other operating equipment; the audit or other supervision of expenditures, and receipts; and the actual operation of the roads.[1]

[1] Speaking of the control provided for in the railway "concessions," Mr. Kent, writing in 1907 (*Railway Enterprise in China*, p. 24) says: "In this connection the convenient term concession has been very generally, and perhaps somewhat loosely, applied. When we come to analyse them we find that primarily these arrangements are in the nature of underwriting contracts. The contracting syndicate under-

With regard to the purposes aimed at, a distinction is to be made between the control which is provided in order that security may exist for the repayment of the loans and their charges; and the control of the operation of the line for strategical or other political purposes. As examples of this latter class may be instanced the Russian and Japanese lines in Manchuria, the former German line in Shantung from Tsingtao to Tsinanfu, and the French system in Yunnan and Kwangsi.[2]

takes to provide 90 per cent., for example, of a loan so many millions of pounds or dollars, as the case may be, repayable at a certain specified time and bearing interest at the rate of 5 per cent. per annum; it takes its chance of being able to float the loan upon the public at a higher percentage of its nominal value. What has happened in most cases is that on every 100 bond, for example, issued by the Chinese Government the latter have received 90, while the syndicate have succeeded in getting them taken up at 97 or thereabouts, thus securing a respectable margin on the transaction. But under the recently concluded agreement in connection with the Canton-Kowloon Railway the Chinese Government have secured far more favorable terms.

"This is one aspect of the contract. There appear to be three others.

"Firstly, the syndicate is given the right to construct the line, and in return for its trouble in this connection it is in most cases allowed a sum equivalent to 5 per cent. on the total cost. It is this right which presumably gives rise to the idea of concession.

"Secondly, on completion of the line it is placed in some cases under a theoretically joint Chinese and foreign control, in which in practice the foreign element predominates. In other cases the Chinese have merely a consultative voice.

"Thirdly and lastly, at this stage, or rather from the time of the issue of the loan, the syndicate becomes trustees for the bondholders, and it is easy to see that, in the nature of things, the loan being secured by a first mortgage upon the railway, the position of the syndicate for all practical purposes must be that of mortgagees in possession.

"Such are the underlying principles of the agreements which confer these rights, which for want of a more precise term we call, and shall continue to call concessions. The details, of course, vary."

[2] The British line from Burma into Yunnan and Szechuan, when built, will fall within this class. As yet it has been only surveyed.

These lines owed their origin to concessions based upon treaties with the Powers concerned, and are, at the present time, actually, if not nominally, the public property of those Powers. The conditions under which they were built have already been sufficiently stated and, therefore, need not be rehearsed in this place.[3]

Shanghai-Woosung Railway. The first attempt to build and operate a steam railway in China was in 1876, when, under permission to a foreign concern to construct an "improved road" a line of rails was laid from Shanghai to Woosung. After being in operation but a few weeks, the local Taotai insisted upon buying out the company, after which he had the track torn up, the station at Shanghai destroyed, and the rolling stock sent out of the country.[4]

Peking-Mukden Line. The next line to be started was one which, though unambitious in its scope, became ultimately a part of the important line from Peking to Mukden.

In 1877 permission was obtained by the Chinese Engineering and Mining Company to build a railway from its mines at Kaiping to a canal at Hsukuchuang, a distance of six miles. It had not been the intention of the Government that the cars should be drawn by steam, but in fact the engineer in charge managed to construct and operate a steam locomotive which received the name "The Rocket of China." The use of this engine was acquiesced in, and, in 1886, permission was obtained to extend the line southward to Tientsin, which extension was com-

[3] They are nominally the property of, and operated by, specially chartered corporations.

[4] The proximate cause of this action was the killing of a Chinese on the track.

pleted in 1889. In 1891 the further extension of this line northward to Shanhaikuan was authorized. A few years later the ownership of the road was acquired by the Imperial Government and its operation placed in the hands of the Chinese Imperial Railways Administration.

In 1894 the line was again extended from Tientsin to Peking.[5]

After the Sino-Japanese War a loan of £2,300,000 (16,000,000 taels) was obtained from the British banks for extending the line to Mukden, the loan agreement bearing date of October 10, 1898.[6]

The conditions of this, one of the first of China's railway loans, need to be summarized, as they show the character of the "control" provided for, and also furnished a model for a number of later loans.

The loan was made "a first charge upon the security of the permanent way, rolling stock and entire property, with the freight and earnings of the existing lines between Peking and Shanhaikuan, and on the freights and earnings of the new lines when constructed." Undertaking was given by the Chinese Government that the roads, buildings, rolling stock, etc., would be kept in good condition. If the construction of branch lines or extensions connecting with the lines concerned should be later proposed, the British and Chinese Corporation was to be applied to for loans if foreign capital was needed.

The principal and interest of the loan was further de-

[5] To Fengtai a short distance from Peking.

[6] The lending party was the British and Chinese Corporation, which was a syndicate formed by the Hongkong and Shanghai Banking Corporation and Jardine Matheson & Co. In terms the loan was "for the construction of a railway line from Chung-hou-so to Hsin-ming-ting and a branch line to Ying-tzu, and for the redemption of existing loan made to the Tientsin-Shanhaikuan and Tientsin-Lukou-chiao Railway lines." For text of loan agreement, see MacMurray, p. 173.

cleared to be a direct obligation of the Imperial Government of China. In case of default, the railways were to be handed over to the Corporation to be managed by its representatives until the loan and interest charges were paid in full.

No further loan was to be charged upon the security named, until the loan was redeemed, nor were the roads to be parted with by the Chinese Government.

During the currency of the loan, the Chief Engineer of the road was to be a British subject; and the principal members of the railway staff to be capable and experienced Europeans, appointed by the Chinese Administrator-General of the railways, and subject to dismissal by him for misconduct or incompetency after consultation with the Chief Engineer. If Chinese with sufficient engineering or traffic experience could be found they were to be appointed as well as Europeans.

A capable and efficient European railway accountant was to be appointed "with full powers to organize and direct the keeping of the railway accounts, and to act with the Administrator-General and the Chief Engineer of the railway in the supervision of receipts and expenditures." Details were added as to the manner in which revenues were to be handled and disbursements made.[1]

During the Boxer troubles the operation of the Peking-Shanhaikuan line was taken over by the British troops,

[1] Commenting upon this agreement, Mr. Rea, in the *Far Eastern Review*, November, 1909, said:

"China voluntarily admitted the principle that her officials were incompetent to honestly administer the proceeds of a foreign loan to the satisfaction of the investor. And having once placed her financial probity in question, she has been forced through successive similar agreements to follow a practice which no other nation in the world tolerates for an instant. . . . In short, while China could give ample security and pay good interest, she could not be entrusted with the expenditure of the money."

and surrendered again to the Chinese Civil Administration by agreement of April 29, 1902.[8] By an "additional agreement" of the same date, the Chinese agreed that "for the better management of the railways after the British military authorities have handed them over to the Chinese Administration, in the interests of the Chinese public revenue and of the British bondholders," the following conditions regarding the future operation of the road should be observed:

The Board of Administration acting under the authority of the Administrator-General of the Northern Railways, should be composed of a managing director, a foreign director, and a British general manager, the last named "to control the work, foreign and native workmen, the inspection of materials, etc."

A representative of the British and Chinese Corporation to deliberate on important railway matters.

An English secretary and Chinese translator to be appointed to assist in the transaction of international business.

A competent European storekeeper to be appointed.

All appointments of officials and employés of the road to be subject to the approval of the board and of the Administrators-General.

The books to be audited annually by a qualified accountant not connected with the railways and selected by the representative of the British and Chinese Corporation; and results of the operations of the road to be published annually in the same manner as the Imperial Maritime Customs Reports.

All rolling stock, materials, etc., obtained from foreign countries for use of the railways as far as possible to be purchased by means of public tenders.

[8] For the texts of these agreements, see MacMurray, p. 331.

The line from the Chienmen [Gate] of Peking to Fengtai (the terminus of the Tientsin-Peking Branch) and from Peking to Tungchow, which had been constructed by the British Military Administration, to be added to form a part of the railways of North China pledged as security for the original loan of £2,300,000.

Finally, there was added the following provision with reference to future railways:

> Under clause III of the agreement of October 10, 1898, it is stipulated that the construction of branch lines or extensions shall be undertaken by the Northern Railways Administration, and the intent of this stipulation is hereby confirmed in order to secure the existing interests of the railways. It is therefore agreed that the construction of any new railway within a distance of eighty miles of any portion of the existing lines, for which concessions have not been signed previous to the date of this agreement, shall be undertaken by the Administrators-General of the Imperial Northern Railways. Such lines as the following: A northern line from Peking or Fengtai to the Great Wall; a chord line from Tungchow to Kuyeh or Tongshan; a line from Tientsin to Paotingfu; shall not, in view of the interests of the Imperial Northern Railways, be allowed to fall into other hands.

Anglo-Russian Understanding of 1898. The entrance of British financial interests into the north of China, as represented by the agreement of October 10, 1898, had aroused the apprehensions of the Russians, and, as stated earlier in this volume[9] had led to the Anglo-Russian exchange of notes of April 28, 1899, in which Great Britain had undertaken not to seek on her own account or on behalf of her nationals any railway concessions to the north of the Great Wall, that is, north of Shanhaikuan, or to obstruct, directly or indirectly, applications on the part of the Russian Government for railway con-

[9] *Ante*, p. 145.

cessions north of the wall. Russia reciprocally undertook not to seek railway concessions in the valley of the Yangtze or to obstruct the granting of railway concessions to British interests in that region.

The section of the line north to Hsinmintun, thirty-six miles from Mukden, was completed in 1903; the gap from Hsinmintun to Mukden was built by the Japanese during the Russo-Japanese War, and was sold in 1907 to the Chinese, who changed the temporary light line to the general standard of the Chinese Imperial Northern Railways.[10]

The branch line from Kirin to Changchun, eighty-seven miles in length, was built with a Japanese loan and opened to traffic in 1913. Under one of the more recent treaties with Japan, this line is eventually to be transferred to Japan to be operated in connection with her South Manchuria Railway system.

Peking-Kalgan (Peking-Suiyuan) Railway. This road of 124 miles, opened in 1909, and later extended in 1915 to Fengchen, 266 miles from Fengtai (where it connects with the Peking-Mukden and Peking-Hankow lines), was built from the earnings of the Peking-Mukden line, and is the only road in China built wholly with Chinese capital and by Chinese engineers. The Chinese plan, at some future time, to extend the line to Urga and Kiakhta, 750 miles from Kalgan, and thus connect it with the Trans-Siberian line.

There is a short branch of sixteen and a half miles from Peking to Mentoukow, which was opened to traffic in 1908.

The Peking-Kalgan line is wholly under Chinese control and administration.

[10] By an agreement of May 27, 1907, for which see MacMurray, p. 632.

In 1918 a loan was obtained by the Chinese Government from Japanese banks.[11] The administration of the road remains in Chinese hands, but the Japanese are to have preference in the matter of future purchases of supplies.

This line has recently been extended to Paotochen, the money for the extension having been obtained by a loan from Japan, and the construction made by the Chinese.

Shanghai-Nanking Railway. The construction of this important railway was arranged for under a loan agreement of July 9, 1903, between the Chinese Government and the British and Chinese Corporation.[12] This agreement provided for a fifty-year loan not exceeding £3,250,000 to be issued by the Corporation, which was itself to have control of the building and equipment of the line. In all matters relating to the construction and administration of the railway the Corporation was, however, to give particular heed to the "opinions, habits and ideas of the Chinese people," and, when practicable, Chinese were to be employed in positions of trust and responsibility.

The loan was secured by a mortgage "upon the railway not completed between Woosung[13] and Shanghai, and also on all lands, materials, rolling stock, buildings, property, and premises of every description purchased or to be purchased by the railways herein referred to, and on the last-mentioned railways themselves as and when constructed and on the revenue of all descriptions derivable therefrom." The bonds to be issued and represent-

[11] The banks took up the unsubscribed domestic loan of the Railway.

[12] This agreement superseded one for the building of the road which had been signed between the same parties on May 13, 1898. For the text, see MacMurray, p. 387.

[13] Woosung is ten miles from Shanghai nearer the mouth of the river where vessels of deep draught or great length are compelled to unload their cargoes intended for Shanghai.

ing the loan were to be Imperial Chinese Government bonds and therefore obligating that Government to their payment.

The Director-General was to appoint a board of five Commissioners for supervising the construction and operation of the road, two of whom were to be Chinese. The other three were to be British, including the Engineer-in-Chief, and appointed by the Corporation. The appointment, salaries and functions of all the employés of the railway, Chinese and foreigners (except the Engineer-in-Chief, who was to be nominated by the Corporation and approved by the Director-General), were to be made and fixed by this board. For the service of the railway any Chinese of official rank and competent for the work might be recommended by the board for employment, but for the important offices foreigners of ability and experience were to be selected. The board was at all times to have access to the receipts and disbursements of the road, and the Chief Accountant's department was to be composed of Chinese and foreigners. The lands needed by the road were to be purchased at a cost not to exceed £150,000. During the currency of the loan the road was not to be again mortgaged to any other party, Chinese or foreign. As remuneration for its superintendence and other services the Corporation was to receive five per cent. on the entire cost of all materials purchased for the road. Chinese materials purchased and products of the Hanyang Iron Works were to be preferred if price and quality were suitable.

The Board of Commissioners was authorized to maintain a railway police of Chinese for the protection of the line, to be paid for by the line. These police were not to interfere with matters outside the railway.

It was agreed that after deducting from the income of the road all working and other expenses, the Corporation

was to receive twenty per cent. of the net profits in the form of certificates to an amount equal to one-fifth of the cost of the line, which certificates the Chinese Administration was to have the right to redeem at their face value at the end of the fifty years' term.

Without the express consent in writing of the Director-General and the Corporation no other rival railway and no parallel line to the Shanghai-Nanking Railway was to be built " to the injury of the latter's interest within the area served by the Shanghai-Nanking line or branch lines."

The existing Shanghai-Woosung line was to be taken over, at a price agreed upon, as part of the Shanghai-Nanking system.[14]

The Shanghai-Nanking concession constituted one of the fruits of the " battle of concessions " (to use Lord Salisbury's phrase) waged in China, 1897 to 1899. An examination of its provisions shows that, to all intents and purposes, the operation as well as the construction of the road was taken out of the hands of the Chinese, and, at the present time, the amount of Chinese control over this line is very small indeed. In strong contrast with the Shanghai-Nanking terms stand those of the Tientsin-Pukow line, presently to be mentioned.

Peking-Hankow Railway. American financial interests were the first to become interested in the construction of this line, which has now become the most profitable of all the Chinese lines, and a survey was made under the authority of United States Senator Washburn. When, however, it came to the matter of a contract for the construction of the line, a Belgian company, the Société

[14] For further elaboration of the " control " to be exercised by the Corporation, see the " Working Agreement " of April 13, 1908. MacMurray, p. 405.

d'Etudes de Chemins de Fer en Chine, representing Belgian, French and Russian financial interests, obtained the contract. This it did, however, only by offering to the Chinese terms which afterwards the company found so liberal that it had to ask of the Chinese Government that they be modified—a request which, it may be observed, was backed by diplomatic pressure.[15] The agreement, signed June 26, 1898, by the Belgian Corporation with the Chinese Railway Company, a Chinese corporation,[16] provided for a loan of 112,500,500 francs to mature in twenty years, and payments of interest and refunding of bonds to be guaranteed by the gross revenues of the Imperial Chinese Government. Also there was specially assigned, preferentially, "all the net revenue of the line from Lukouchiao (Peking) to Hankow, after the regular payment of all expenses of administration and operation." Also there was given a prior special lien on the line itself together with stationary and rolling stock.

The construction of the entire line (not including the short section from Peking to Paotingfu) was to be under the direction of the Belgian company, which was to "make plans, surveys, estimates for the whole line, direct the execution of all the work and order the materials, machinery and furniture necessary to insure the regular operation of the line." The Chinese Director-General of the railway company was to have the right, however, to approve the building plans and contracts for supplies. With the exception of what could be supplied

[15] There is ground for believing that this Franco-Belgian-Russian project was but part of an ambitious scheme under which the Russian sphere in the north would be ultimately united to the French sphere in the south. In this connection, then, the line from Hankow to Canton was of especial significance.

[16] Preliminary contracts had been signed May 27, and July 21, 1897: for translations of the Loan Contract and Operating Contract, see MacMurray, p. 148.

by the Hanyang works, all materials and supplies necessary for the construction and operation of the road were to be obtained from the Belgian company, which obligated itself to fill all orders under the best possible terms. Upon such orders the Société was to receive a commission of five per cent.

Under an operating contract of even date, the Belgian company was given the right to take over the working of each section of the line as soon as completed; to hire and dismiss personnel; to fix salaries; and to make all purchases necessary for operating, maintaining or repairing the road; to fix rates, to collect revenues of all kinds and to pay the operating expenses—such measures being submitted " for consultative purposes " to the Chinese Director-General of the Chinese Railways. During the entire period of its operation of the line and as compensation therefor, the Belgian Company was to receive twenty per cent. of the net profits, that is, after payment of all operating expenses and bond interest.

The line was opened to traffic in 1905.

By Article V of the Loan Agreement the Chinese Government was given the right, after September 1, 1907, to pay off the entire loan and bring the contract to an end. Taking advantage of this right the Chinese Government issued two loans, dated October 8, 1908, secured by certain provincial revenues,[17] and on January 1, 1909, took over the line, the Société's interest in it thereupon wholly terminating. A considerable number of French and Belgian employés have, however, been retained in the service and the line is still spoken of as the French Railway.

The following are branches of the Peking-Hankow main line; Liangsiang-Tuli (12 miles to coal mines); Liuliho-Choweichwang (10 miles to coal mines); Kaoyi-

[17] MacMurray, pp. 747, 752.

hsien to Lincheng (10 miles to coal mines;) to Paotingfu (3 miles); Kaopeitien to Hsiling (26 miles).

Chengtingfu-Taiyuanfu Railway. This road is a branch of the Peking-Hankow Railway, and was built under a loan agreement of October 15, 1902, with the Russo-Chinese Bank.[18] The construction of the road was vested in the Belgian syndicate of the Peking-Hankow line, its administration, after completion, however, being taken over by the Imperial Chinese Railway Company. The line was opened to traffic in 1907.

Pienlo Railway. This line, 120 miles in length, crossing the Peking-Hankow Railway, runs from Kaifengfu to Loyang and was built under an agreement signed November 12, 1903,[19] with a representative of the Belgian Compagnie Générale de Chemins de Fer et de Tramways en Chine, under which a loan of 25,000,000 francs was obtained, secured by the receipts of the road and guaranteed by the Chinese Government. The conditions regarding the construction and management of the road followed those of the Peking-Hankow loan. An option was granted to the Belgian company to extend the line to Sianfu in Shensi.

Chinese Regulations of 1898 for Mines and Railways. In reaction against the inroads that foreigners were making upon its control of its own domestic affairs, the Chinese Government in the latter part of 1898 issued a set of mining and railway regulations which showed a determination upon their part to prevent in the future, if pos-

[18] For translations of this and of the accompanying operating contract, see MacMurray, p. 356.

[19] For translations of loan contract and operating contract, see MacMurray, p. 462.

sible, a further alienation to foreigners of rights of control over the mining and railway interests of the country.

These regulations declared that the best form of managing mines and railways was by merchants and that henceforth the leading idea should be to bring this about. Mining and railway matters in the three Manchurian Provinces, in Shantung and at Lungkow, it was stated, should not be invoked as precedents, as those concessions had been affected with international questions. Mines and railways were declared to be essentially separate undertakings and to be treated as such.

In securing capital, the Regulations ran, every effort must be made to get the largest proportion possible of Chinese. Regardless of the way the scheme is put on the market, the lump sum needed for the undertaking must be estimated, and then must be in the first place secured, as a basis of operations, three-tenths of this amount by Chinese. Only when this has been done may foreigners be invited to buy shares or foreign money be borrowed. If there is no proportion of the capital furnished by Chinese and if there is only stock bought by foreigners or foreign capital lent, no sanction will be given.

In order to protect the sovereign rights of China, it was declared that the administrative control of all mines and railways, irrespective of the foreign shares or the amount of foreign capital involved, should remain in the hands of Chinese merchants. These provisions, like the mining regulations based on the 1903 Treaties, have not been enforced.

Canton-Kowloon Railway. This railway from Canton to Kowloon is composed of two sections: one from Kowloon to Samchun, the border of British territory, twenty-two miles in length, built by the Hongkong Government and opened to traffic in 1910; and the other from

Samchun to Canton, a distance of approximately ninety miles, built by the Chinese Government with money loaned by the British and Chinese Corporation.[20]

The terms under which the loan of £1,500,000 was made by the Hongkong Government to China for the building of the railway from the boundary of the Kowloon leased territory to the city of Canton need to be set forth with some degree of particularity since they provided for a distinct type of foreign control, as distinguished, for example, from those of the Tientsin-Pukow Railway loan agreement, presently to be considered.

Chinese Government bonds, maturing in thirty years, were to be issued for the full amount of the loan, with the Railway as mortgage security,[21] the proceeds to be used for the construction and equipment of the road and for paying interest on the loan during construction. In all matters relating to construction particular heed was to be paid to the opinions and habits of the Chinese people and, when practicable, Chinese were to be employed in positions of trust and responsibility. There was to be established at Canton by the Viceroy of Canton a Head Office under the direction of a Chinese Managing Director

[20] For the text of the loan contract, dated March 7, 1907, see MacMurray, p. 615. The right to finance the building of this road was one of those demanded and obtained by Great Britain from China as an equivalent for granting to a Belgian syndicate the concession for the important line from Peking to Hankow—the Belgian syndicate being supposed to act as the agent of France and her ally Russia. A preliminary agreement for the building of the line had been signed in 1898, but nothing was done under it.

[21] "Art. 3. The loan shall be secured by mortgage declared to be now entered into in equity by virtue of this Agreement, and shall, as soon as possible hereafter, be secured by a specific and legal first mortgage in favor of the Corporation upon all lands, materials, rolling stock, buildings, property, and premises, of every description purchased or to be purchased for the Railway, and on the Railway itself, as and when constructed, and on the revenue of all description derivable therefrom."

(appointed by the Viceroy) with whom was to be associated a British Engineer-in-Chief, and a British Chief Accountant, recommended by the Corporation and approved by the Viceroy.

For all important technical appointments on the Railway staff, Europeans of experience and ability were to be engaged, but should competent Chinese be available they also were to be employed. All receipts and payments were to be certified by the Chief Accountant and authorized by the Managing Director.

As remuneration for all services to be rendered by it during construction, including superintendence of the purchase of materials, the Corporation was to receive £35,000. As compensation for acting as trustees of the bondholders, the Corporation was to receive annually a further sum of £1,000.

In case there should be default upon the part of the Chinese Government in the payment of interest or the principal of the loan in accordance with the amortization scheme that was annexed to the loan agreement, it was provided that the Railway with all its appurtenances should be handed over to the Corporation to be dealt with in such a manner as to protect the interests of the bondholders.

The severity of these terms is sufficiently evident, especially when contrasted with those obtained by the Chinese Government for the building of the Tientsin-Pukow line.

The British Government has, upon various occasions, sought to obtain the right to connect this road with the Hankow-Canton line. The political as well as the commercial significance of these efforts is sufficiently evident.

Tientsin-Pukow Railway. The final agreement for the construction of this line which brought Tientsin, and therefore Peking and the north, into connection with

Nanking (across the Yangtze from Pukow) and Shanghai, was the product of much discussion between British and German interests which has been somewhat considered earlier in this volume, in the chapters dealing with the development in China of Spheres of Interest. It will, however, be worth while to say a further word regarding this conflict of British and German interests in view of the fact that from it resulted the granting to the Chinese Government of terms for railway construction more favorable than it had previously been able to obtain, and which terms it was able to use as norms for later railway loan agreements.

It will be remembered that previous to 1898 the British and German financial interests operating in China had agreed to pool all Chinese loans. This agreement was abrogated in 1898, with regard at least to railway concessions, but, by a definite understanding arrived at in London, in September of that year, it had been agreed that the English "Sphere" should embrace: "The Yangtze Valley subject to the connection of the Shantung lines to the Yangtze at Chinkiang; the provinces south of the Yangtze; the Province of Shansi with connection to the Peking-Hankow line at a point south of Chengting and a connecting line to the Yangtze Valley crossing the Hoangho Valley." The German "Sphere" was to include; "The Province of Shantung and the Hoangho Valley with connection to Tientsin and Chengting, or other point of the Peking-Hankow line, in the south with connection to the Yangtze at Chingkiang or Nanking. The Hoangho Valley is understood to be subject to the connecting line to the Yangtze Valley, also belonging to the said sphere of interest."

Previously to entering into this understanding the German Minister at Peking had informed the British Minister that he had been instructed by his Government:

"Should the Chinese Government decide to grant a concession for the Tientsin-Chinkiang [22] Railway regardless of German claims, you are instructed to oppose such a decision, and, should it be necessary, you may inform the Chinese Government that the German Government would consider as *non avenu* any concession in that Province, and would reserve the right of making the Chinese Government responsible for any such concession in the event of its being granted by them." [23]

The first agreement relating to the construction of the Tientsin-Chinkiang (later changed to Pukow) line was entered into on May 18, 1899, between the Chinese Government and the Deutsch-Asiatische Bank, and the Hongkong and Shanghai Banking Corporation for themselves and on behalf of Jardine, Matheson and Co. as joint agents for the British and Chinese Corporation.[24] This contract, however, was not carried out at the time owing to the Boxer troubles of 1900, and the matter was not again discussed until 1906, by which time the Chinese had developed for themselves a new railway policy according to which, in the future, lines should be constructed under Chinese direction, although the funds needed might be obtained from foreign sources. In the new negotiations entered upon, the British strongly insisted that the Tientsin-Pukow terms should correspond to those embodied in the Canton-Kowloon agreement. The German interests, however, made this impossible by offering much more liberal conditions, with the final result that these terms were accepted by the British for the portion of the line which they were to finance as well as for the portion to be built under German auspices. In

[22] Chinkiang is a point on the Yangtze near Nanking and Pukow.

[23] British Pal. Papers, "China," No. 1, 1899 (vol. CIX, No. 305). Cf. Overlach, *Foreign Financial Control in China*, pp. 35-36.

[24] MacMurray, p. 694.

effect, as will be seen, the loan was to be secured by specified provincial revenues, and not by a mortgage upon the railway and its appurtenances, and the construction and control of the road was to be wholly in Chinese hands.

By the final agreement, signed January 13, 1908,[25] between the Imperial Chinese Government of the one part and the Deutsch-Asiatische Bank and the Chinese Central Railways, Ltd., representing British financial interests, of the other part (and thereafter referred to as the Syndicate) it was provided that the line from Tientsin to Pukow should be divided into two sections; the northern section from Tientsin to Hanchwang, 390 miles, to be built under German supervision; and the southern section from Hanchwang to Pukow to be built under British supervision,—the two sections after construction to be operated as a single line.

The Agreement authorized the issuance of a thirty-year loan of £5,000,000, the proceeds to provide capital for the construction of a government railway from Tientsin through Techow and Tsinanfu to Ihsien near the southern frontier of Shantung to be known as the northern section; and from Ihsien to Pukow, to be known as the southern section of the Tientsin-Pukow line.

For the payment of the loan and interest charges thereon, the Chinese Government assumed responsibility and engaged, should the revenues of the proposed railway prove insufficient, to take steps to make good the deficiency. As specific security the following revenues were pledged: (1) The likin and internal revenues of the Province of Chihli to the amount of 1,200,000 Haikuan taels a year; (2) the likin and internal revenues of the Province of Shantung to the amount of 1,600,000 Haikuan taels a year, and (3) the revenue of the Nanking likin col-

[25] For agreement, see MacMurray, p. 684.

lectorate to the amount of 900,000 Haikuan taels a year and of the Huai-an native customs in the Province of Kiangsu, to the amount of 100,000 Haikuan taels a year. These provincial revenues were declared to be free from all other loans, charges or mortgages. These revenues were not to be interfered with, however, so long as the principal and interest of the loan were regularly paid. If it became necessary to resort to them, they were to be transferred to and administered by the Imperial Maritime Customs in the interest of the bondholders. Until the loan should be redeemed the railway should, under no circumstances, be mortgaged or its receipts given as security to any other party. It was further provided that should the customs tariff be revised and in connection therewith the likin tax be decreased or abolished, the consent of the lending interests to such decrease or abolition should first be obtained and then only upon condition that an equivalent charge upon the increase in customs revenues were substituted.

The proceeds of the loan were to be paid to the credit of a separate account from which payments were to be made to meet construction expenditures. The accounts of the railway were to be kept in Chinese and English in accordance with accepted modern methods and supported by necessary vouchers.

The construction and control of the railway was to be entirely vested in the Imperial Chinese Government, but for the northern section a German Chief Engineer, and for the southern section a British Engineer, acceptable to the British and German syndicate, were to be appointed. These two Engineers were to be under the orders of the Managing Director. Technical employés on the railway staff were to be appointed and dismissed by the Managing Director but in consultation with the Chief Engineers, and, in case of disagreement, the mat-

ter was to be referred to the Director-General whose decision was to be final.

"After completion of construction," the Agreement ran, "the Imperial Chinese Government will administer both sections as one undivided Government railway and will appoint an Engineer-in-Chief, who, during the period of the loan, shall be a European—without reference to the Syndicate."

For the northern section the Deutsch-Asiatische Bank was to act as the purchasing agent during the construction of the line for all goods imported from abroad; and for the southern section the Chinese Central Railways, Ltd., was to act in a similar capacity. Upon such purchases, which were to be made in the open market and upon the best possible terms, a commission of five per cent. on the net cost was to be received, but no expenditures were to be incurred without the authorization of the Managing Director. At equal rates and qualities, goods of German and British manufacture were to be given preference over goods of other foreign countries; and Chinese goods when obtainable and of equal price and qualities were to be preferred to goods of British or German origin. No commission was to be paid on purchases of Chinese goods. After the completion of the construction of the line the Deutsch-Asiatische Bank and the Chinese Central Railways were, within their respective sections, to be given the preference, during the currency of the loan, of agency business for the purchase of foreign materials for the railway. Also, these companies were to have first option of supplying future loans, if foreign capital should be needed to build branch lines in connection with the main line.

Under the earlier preliminary agreement it had been provided that, in remuneration for their general responsibility and services, the Syndicate should receive twenty

per cent. of the net profits of the railway. In commutation of this, the Syndicate, in the final agreement, consented to retain £200,000 out of the first issue of the loan.

Under these conditions, for the first time in the history of foreign railway loans in China, the construction and operation of the financed line were placed wholly in Chinese hands. Furthermore, no mortgage was placed upon the line. Foreign Engineers-in-Chief were to be appointed and construction accounts were to be kept and rendered, but withdrawals from the railway credit created by the loan could not be stopped at the instance of the foreign financial interests concerned, as had been the case under earlier railway loan agreements.[26]

Shanghai-Hangchow-Ningpo Railway. Conditions similar to the "Pukow Terms" were secured by the Chinese Government by the agreement of March 6, 1908, under which the Shanghai-Hangchow-Ningpo Railway was constructed.[27]

This agreement was with the British and Chinese Corporation and provided for a thirty-year loan of £1,500,000, the purpose being declared to be the building Nanking line at or near Shanghai, through Fengchingchen to Kahsingfu, thence to Hashu and Hangchow, and thence from Chiangkow to Ningpo, on which latter line certain work had already been locally attempted. As security for the loan were pledged the revenues of the

[26] Considerable "graft" and extravagance upon the part of the Chinese resulted from the freedom from control thus permitted.

[27] This line is composed of two disconnected sections: one from Shanghai to Hangchow (Zahkao), 160 miles in length; and one from Ningpo to Shaoshing, 48 miles in length. There is an unbuilt gap from Shaoshing to Hangchow. There is a branch line of six miles from Hangchow to Konzenchiao. For text of loan agreement, see MacMurray, p. 702.

railway, together with the surplus earnings of the Imperial Railways of North China (excluding the section of the line to the east of the Liao River), and if these should prove insufficient, the Chinese Government was to provide other revenues. Similar to the Tientsin-Pukow arrangement, the construction and control of the railway was to be entirely in the Chinese Government, but with the proviso that a British Engineer-in-Chief should be appointed. In other respects, also, as, for example, the purchase of materials, etc., the Pukow terms were followed.

This Shanghai-Hanchow-Ningpo line has had a considerable history: "Nationalization" by the Provinces of Kiangsu and Chekiang; mortgage in part to the Japanese firm of Okura & Co. as security for a loan of Yen 3,000,000 to the Nanking Provisional Government; the mortgage redeemed by funds obtained from the British and Chinese Corporation; and, ultimately, provincial control resumed. The scope of the present chapter does not, however, make it necessary to give this history.[28]

Canton-Hankow Railway. The project of uniting Hankow to Canton by rail and thus giving a continuous rail route from the extreme north of China to its southern border has not yet been achieved, but considerable portions of the section between Hankow and Canton have been constructed and are now in operation. The history of the diplomatic negotiations with regard to this line is of sufficient interest to justify an outline statement of them.

The original concession for the line was granted by contracts signed April 14, 1898, and July 13, 1900, to an American syndicate—the American China Development Company—of which Mr. Calvin S. Brice was the leading

[28] See MacMurray, p. 711.

spirit. It seems clear that a considerable motive leading the Chinese to grant this concession was that it had no apprehensions regarding the political ambitions of America, and, therefore, in a subsidiary undertaking, it was agreed that the company should remain an American company. This undertaking, as given in Article XVII of the agreement of July 13, 1900, was that "the Americans cannot transfer the rights of these agreements to other nations or people of other nationality." However, in spite of this provision, the American company permitted a majority of its stock to get into Belgian hands by purchase in open market, with the result that the control of the company came into their hands, the American president of the company was deposed, and American engineers in China on the railway line were superseded by Belgians. Thereupon the Chinese Government served notice upon the American Government that the concession was annulled. This action was not acquiesced in by the American Government, and a long diplomatic controversy arose. In result, the banking firm of J. P. Morgan & Co., acting as agents of the American company, bought back the shares held by the Belgians, and the Chinese Government then bought out the American interests. The terms of this settlement were very onerous to the Chinese, for they were compelled to pay some $6,750,000, which was $3,750,000 in excess of what the Americans had spent. The agreement by which this repurchase was effected was dated August 29, 1905.[29]

Hukuang Loan. In June, 1906, the building of a road was turned over to merchants of the provinces through

[29] The original concession to the American company included the right to build a railway from Canton to Fatshan and Samshui. This short line of 12 miles was completed in 1904. Another branch of the line from Chuchou to Pinghsiang, 65 miles in length, was built and opened to traffic in 1902.

which it was to pass—Kwangtung, Hunan, and Hupeh. Under private auspices some 10,000,0000 taels was spent, with but thirty-five miles of poorly constructed and poorly equipped line to show for it. It became evident that the Imperial Government would have to reassume control of the project and again to solicit foreign financial aid. This the Peking Government did, and began negotiations with the French, German, and British banks, whereupon the American Government asserted that it possessed a right to participation in the proposed loan—a right based upon promises dating from 1903 and 1904, made by the Chinese Government.

In pressing this American claim to participation, the American President, Mr. Taft, took the step, extraordinary from the diplomatic point of view, of communicating personally and directly with the head of the Chinese Government, Prince Regent Chun. In a telegram, dated July 15, 1909, to Prince Chun, President Taft said:

I am disturbed at the report that there is certain prejudiced opposition to your Government's arranging for equal participation by American capital in the present railway loan. To your wise judgment it will of course be clear that the wishes of the United States are based not only upon China's promises of 1903 and 1904, confirmed last month, but also upon broad national and impersonal principles of equity and good policy in which a regard for the best interests of your country has a prominent part. I send this message not doubting that your reflection upon the broad phases of this subject will at once have results satisfactory to both countries. I have caused the Legation to give your minister for foreign affairs the fullest information on the subject. I have resorted to this somewhat unusually direct communication with Your Imperial Highness, because of the high importance that I attach to the successful result of our present negotiations. I have an intense personal interest in making the use of American capital in the development of China an instru-

ment for the promotion of the welfare of China, and an increase in her material prosperity without entanglements or creating embarrassments affecting the growth of her independent political power and the preservation of her territorial integrity.

In a statement given to the press on January 6, 1910, reviewing the general policy of the United States in China as indicated not only by the Hukuang loan, but by the Chinchow-Aigun project, and the Manchurian railways neutralization scheme, the American Secretary of State, referring especially to the direct message of President Taft to the Prince Regent of China, said:

The grounds for this energetic action on the part of the United States Government have not been generally understood. Railroad loans floated by China have in the past generally been given an imperial guaranty and secured by first mortgages on the lines constructed or by pledging provincial revenues as security. The proposed hypothecation of China's internal revenues for a loan [the Hukuang Loan] was therefore regarded as involving important political considerations. The fact that the loan was to carry an imperial guaranty and be secured on the internal revenues made it of the greatest importance that the United States should participate therein in order that this Government might be in a position as an interested party to exercise an influence equal to that of any of the other three Powers in any question arising through the pledging of China's national resources, and to enable the United States, moreover, at the proper time again to support China in urgent and desirable fiscal administrative reforms, such as the abolition of likin, the revision of the customs tariff and general fiscal and monetary rehabilitation.

The statement then went on to say, that there were still stronger reasons for the action that had been taken, namely, as "the first step in a new phase of the traditional policy of the United States in China and with special reference to Manchuria." The "neutralization"

scheme was then explained and the reasons for it outlined.

When the agreements or promises which China was alleged to have made to America were made public, they were shown to be by no means strong and unequivocal. It appeared that China had promised nothing more than to consult with American capitalists if foreign loans were solicited. Furthermore, that, on several occasions, when American financiers had been approached by the British bankers who were interested in the proposed loan, with a view to American participation, no reply had been returned.[80]

However, on May 23, 1910, an agreement was reached in a conference held at Paris between the representatives of the British, French, German, and American banks, for American participation in the Hukuang loan, and on May 20, 1911, the loan agreement with China was signed by the four banking groups.[81]

According to this agreement, the loan was to be for £6,000,000, to run for forty years, and the proceeds to be devoted to the payment of $2,222,000, American currency, of bonds that had been issued by the American-China Development Co. on behalf of the Chinese Government, and to the construction: (1) of a Chinese Government railway main line from Wuchang (across the Yangtze from Hankow), through Yochow and Changsha to a point on the southern boundary of the Province of Hunan, there connecting with the Kwangtung section of the Canton-Hankow Railway, an estimated distance of 900

[80] See *U. S. For. Rels.*, 1909.

[81] The Deutsch-Asiatische Bank, the Hongkong and Shanghai Banking Corporation, the Banque de l'Indo Chine, and the American group, consisting of J. P. Morgan & Co., Kuhn, Loeb & Co., the First National Bank and the National City Bank, all of New York City. For the text of the Hukuang loan agreement, see MacMurray, p. 866; the Inter-Bank agreement is therewith printed in a note.

kilometers; and (2) of a Government main line from a point at or near Kuangshui in the Province of Hupei, connecting with the Peking-Hankow line and passing through Hsiangyang and Chingmenchow to Ichang, an estimated distance of 600 kilometers; and (3) a line from Ichang to Kueichowfu in the Province of Szechuan, an estimated distance of 300 kilometers.[32] The first line was designated as the Hupei-Hunan section of the Canton-Hankow line, and the second line as the Hupei section of the Szechuan-Hankow line. The agreement provided that the lines of railway already constructed by the two Provinces of Hupei and Hunan should be taken over and incorporated in the Canton-Hankow and Szechuan-Hankow Government Railway Administration.

As security it was provided that the loan, principal and interest, should constitute a first charge upon: (1) the Hupei General Likin, (2) the Hupei Additional Salt Tax for River Defense, (3) the Hupei New Additional Two Cash Salt Tax of September, 1908, (4) the Hupei collection of the Hukwang inter-provincial tax on rice, (5) the Hunan General Likin, and (6) the Hunan Salt Commissioner's Treasury Regular Salt Likin. These provincial revenues were declared to amount to a total of 5,200,000 Haikwan taels a year, and to be free from all other loans, charges, or mortgages. These provincial revenues were, however, not to be levied upon unless necessary. Primarily, capital payments upon the loan and interest charges were to be met from the revenues of the railways, and the Chinese Government undertook, in case these should prove insufficient for the purpose, to make arrangements to ensure payment from other sources. If it should become necessary to resort to the provincial revenues,

[32] This latter section was in substitution for the branch line from Chingmenchow to Hanyang, originally agreed upon by the Chinese Government.

they were, to the extent required, to be transferred to and administered by the Imperial Maritime Customs.

The proceeds of the loan were to be placed to the credit of a "Hukuang Government Railway Account" in designated foreign banks, payments therefrom to be made in accordance with periodical construction accounts furnished by the Chinese Ministry of Posts and Communications, these accounts to be kept in Chinese and English in accordance with accepted modern methods, supported by all necessary vouchers, and open at all times to inspection by auditors appointed and paid by the banks, and obligated to satisfy the banks as to the due expenditure of the loan funds.

As regards "control," the agreement provided that the construction and control of the lines should be "entirely and exclusively vested in the Imperial Chinese Government," but that that Government should select for appointment a British Engineer-in-Chief for the Hupei-Hunan section from Wuchang to Yichang-hsien, a German Engineer-in-Chief for the Kuangshui-Ichang section of the Szechuan-Hankow line, and an American Engineer-in-Chief for the section from Ichang to Kueichoufu—these appointments to be approved by the banks. These engineers were to be under the orders of the Director-General and the Managing Director of the lines and were to carry out the wishes of the Ministry of Posts and Communications. Appointments and dismissals of technical members of the railway staffs were to be made by the Director-General and Managing Director in consultation with the Engineers-in-Chief. After completion of the construction, and during the currency of the loan, the Chinese Government was to continue to employ Europeans and/or Americans as Engineers-in-Chief.

For the Hupei-Hunan section of the Canton-Hankow line the British and Chinese Corporation, and for the

Hupei section of the Szechuan-Hankow line the Deutsch-Asiatische Bank, were to act as agents for the purchase of all materials, plant and goods required to be imported from abroad. Rails and other accessories were to be obtained from the Hanyang Iron Works. A commission of five per cent. was to be paid on all purchases made through the British and Chinese Corporation and the Deutsch-Asiatische Bank—these purchases to be made in open market at the lowest rates obtainable. However, "with a view to the encouragement of Chinese industries," preference was to be given, at equal prices and qualities, to Chinese materials and goods manufactured in China, over British, French, German, American or other foreign goods.

The following option for supplying additional funds, if needed, was given the contracting banks:

ARTICLE XIX. Should the Imperial Chinese Government itself hereafter consider it desirable to construct extensions in connection with the railway lines named in Article II of this agreement in order that the interests of the country may be better served, such extensions shall be built by the Imperial Chinese Government with funds at its disposal from Chinese sources, but if foreign capital is required, and the terms offered by the Banks are as favorable as those offered by others preference will be given to the Banks.

The four banking groups were to take the loan in equal shares and without responsibility for each other.

The Hupei-Hunan section of the roads covered by the Hukuang loan agreement has been built from Wuchang to Changsha, a distance of 286 miles, where it connects with the Pingsiang colliery line, taking the rails as far along as Chuchow on the way to connect with the Kwangtung Railway. This section is now being operated wholly by the Chinese. Its financial results have not been satis-

factory, but this has been largely due to the fact that it has no good southern terminal point.

Only foundation and masonry work has been done on the Hankow-Ichang section, which has been pushed from Hankow about 120 kilometers (75 M.). This is the so-called German section.

The Ichang-Kweichow section suspended operation after completing surveys of the original line and extensions to Chengtu, maintaining only an engineer-in-chief and a nominal staff for protecting the property. This is the so-called American section.

The so-called German section of this railway has been taken over by the Chinese Government and is under the supervision of an American Engineer-in-Chief.

The short branch of sixty-five miles from Chuchow to Pinghsiang was opened to traffic in 1902.

The Hukuang Loan and the Chinese Revolution of 1911. The following observations of Mr. Willard Straight, the representative of the American group of banks, party to the Hukuang loan, are of interest in connection with the statement that has often been made that the objection upon the part of the Chinese people to the " nationalization,"—that is, the assumption by the Central Government of control of the lines covered by the loan—constituted an important element in the dissatisfaction with the Peking Government which led to the revolutionary outbreak in the latter part of the year 1911. Mr. Straight says:

" There was an ever-increasing agitation in the provinces through which the Hukuang lines were to be constructed. Provincial railway companies were formed and secured from the vacillating Peking Government rights which violated the terms of the agreement initialed with the Tripartite Banks, and in which the Chinese had

agreed the American group should be given a participation."

In a note Straight adds: "Considerable sums, quite insufficient, however, to build the railways in question, were secured by popular subscription, and in Szechuan Province by taxation, also. Construction was commenced and abandoned, and in a number of well-authenticated cases the funds obtained by the companies were either lost by the directors thereof, who speculated heavily in the Shanghai 'Rubber Boom,' or stolen by more simple and direct methods. The demonstrated inability of the provincial companies to do the work they had undertaken was used by the Imperial Government to justify its very sound policy of railway 'nationalization.'"

In another place Mr. Straight says:

It has been generally stated that the disturbances in Szechuan Province in August and September last [1911] marked the beginning of the revolutionary movement. This is not the case except that the general unrest created thereby contributed to the rapid spread of the anti-Manchu sentiment. The Szechuan agitation was directed against the "nationalization" of railways, and the banking groups therefore have been accused of being the indirect cause of the revolt. This again is not true. The agitation was not against railway "nationalization" which the most intelligent leaders of Chinese public opinion recognized as desirable, but against the manner in which it was carried into effect. Sheng Kung Pao, the Minister of Communications, upon the signature of the Hukuang Loan Agreement took steps to repurchase the rights of the provincial companies in accordance with the "nationalization" plan. Incidentally, it is reported on the best authority, he bought up the major portion of some of the provincial bonds, and offered to redeem them at par. He did not acquire control of the Szechuan bonds, and therefore offered only 60 on their face value. Hence the riots.[33]

[33] Article "China's Loan Negotiations," contributed to *The Journal*

Tao-Ching or Peking Syndicate Railway. In 1898 the Peking Syndicate, a British-Italian syndicate, but now almost wholly British controlled, obtained the right to work coal and iron mines in several places in Shansi and in Honan, which carried, also, the privilege of building railways connecting the mines with water navigation or a main railway line.[34] In 1905, under this privilege, the syndicate built a line from Taokow to Poshan, a distance of some 90 miles. By an agreement of July 3, 1905, the Chinese Government purchased the road, giving thirty-year bonds in payment, but permitted the syndicate to

of Race Development, April, 1913 (vol. III, pp. 369-411). The quotations are from footnotes on pages 384 and 386.

The following comments of Mr. Straight with reference to the circumstances leading up to the loan are also of interest. He says: "There are different versions as to the exact course of events in China at this time. It is, however, sufficient to state that in conducting pourparlers with the Chinese authorities for a loan to construct the Canton-Hankow Railway (the British had a 'preference' for financing the building of this line), the representative of the British and Chinese Corporation at Peking refused to agree to 'Tientsin-Pukow' terms and insisted on more effective 'control.' The representative of the German group, however, accepted these conditions and secured the contract. The diplomatic protests and recriminations among the bankers which followed resulted in a compromise under which the British and Chinese Corporation was subordinated to the Hongkong and Shanghai Bank, which with its French associates, combined with the German group, to negotiate a loan to cover not only the Hankow-Canton but the Hankow-Szechuan Railways. The Agreement was initialled on the 6th of June, 1909, and the 'control' provisions accepted by the banks were similar to those embodied in the Tientsin-Pukow Agreement.

"The inclusion of the loan for the construction of the Hankow-Szechuan Railway in this operation entitled the American interests to the participation which the American group eventually secured.

"Rivalry between the British and German groups had enabled the Chinese in the original Hukuang agreement to secure Tientsin-Pukow terms despite the fact that the operation thereof had demonstrated that more stringent control provisions were needed."

[34] For the regulations establishing the syndicate's rights in Honan, see MacMurray, p. 131.

remain in control of the road until the bonds should be paid, and to receive twenty per cent. of the net profits. The bonds were to be redeemable after 1916.

Lung-Hai Railway. This railway now runs from Haichow on the Yellow Sea just south of the Shantung Peninsula to Shanchow in Honan Province, a distance of over five hundred miles. The last section of the road, that from Hsuchowfu on the Tientsin-Pukow line to Haichow was completed and open to traffic in 1925.[35] The line is a Chinese Government one, and is operated under the supervision of a Belgian engineer.

Shasi-Shingyi (Sha-Shing) Railway. After the failure in 1911 of the then pending international loan negotiations, the British Government gave its approval to a forty-year loan of £10,000,000 negotiated by the British contracting firm of Pauling & Co., Ltd., "for the construction and equipment of the railways from a point on the Yangtze opposite Shasi to Shingyi, in the Province of Kweichow, together with a branch line from Changteh to Changsha."[36]

The loan agreement, signed July 25, 1914,[37] provided that Pauling & Co. should issue on behalf of the Government of China a loan for £10,000,000, which should be in the form of Chinese Government bonds, the proceeds to be devoted to the construction of the lines of road that have been mentioned. The payment of the interest and the redemption of the bonds were, of course, to be guaranteed by the Chinese Government, and, in addition, the bonds were to constitute a first mortgage in favor of the contracting company upon the railway as and when con-

[35] See *China Weekly Review*, June 6, 1925.

[36] For the loan contract and operating contract for this railway, see MacMurray, p. 506.

[37] For text of final agreement, see MacMurray, p. 1130.

structed and on the revenues from it of all kinds and upon all materials, rolling stock, buildings, etc., purchased for the railway. There was to be established a head office under the direction of a Chinese Managing Director, and associated with him a Chief Accountant who should be an Englishman, and, after completion of construction, a British Engineer-in-Chief. For all technical appointments for the operation of the railway, Europeans of experience and ability were to be engaged, but if competent Chinese should be available for these positions, they were to be preferred. The accounts of receipts and disbursments of the railway's construction and operation were to be in the department of the Chief Accountant, who was to organize and supervise them and report upon them. He was to certify all receipts and payments, which latter were to be authorized by the Managing Director. A school for the education of Chinese in railway matters was to be established by the Managing Director, subject to the approval of the Chinese Government.

Subject to the approval of Pauling & Co., a British firm of consulting engineers was to be appointed by the Government, whose representative in China should be an Englishman and be entitled Engineer-in-Chief, who, during construction, should supervise the work in the interest of the Government and of the bondholders. The contracting company was to act as agents, during construction, for the purchase of all materials from abroad. For its services the company was to receive an amount equal to the sum actually expended, together with a further sum of five per cent. on the original net cost of all materials, plant and goods required to be imported from abroad. With a view to encouraging Chinese industries, rails manufactured at the Hanyang Steel and Iron Works, native cement, and other goods manufactured and produced in China were to be preferred at equal price and quality.

At equal rates and qualities, goods of British manufacture were to be given preference over goods of other foreign origin.

Siems-Carey Concessions. By a contract signed May 17, 1916, the Siems-Carey Co., an American concern, obtained the right to " locate, build and work " steam railroads in China to an aggregate of 1,500 miles.[88] The following five roads, making up this aggregate, were enumerated:

Hengchowfu, in Honan, to Nanning in Kwangsi.
Fengcheng, in Shansi, to Ninghsia in Kansu.
Ningsia, in Kansu, to Lanchowfu in Kansu.
Chungchow, in Kwangtung, to Lu Hwei in Kwangtung,
Hangchow in Chekiang, to Wenchow in Chekiang.

It was provided, however, that should, for any reason, it become undesirable to build any of these lines, the Government of China would grant concessions between other points to an equal amount of mileage. In conformity with this undertaking, the American company, in lieu of certain of the above lines, has been given the concession to construct the Chu-Chin Railway from Chuchou, in Honan near Changsha, to Chinhou in Kwangtung. This road, when constructed, will be approximately 700 miles in length. As part of the additional 400 miles which the company was to have the right to build, the Chinese Ministry of Communications, on February 7, 1917, suggested that a line be built from Chouchia-kou, in Honan, through Nanyang, to Hsiangyang, in Hupeh, a distance of 200 miles, and to be called the Chou-Hsiang Railway.

The agreement of May 17, 1916, with the American company, it is to be observed, was simply one for the construction of the proposed roads, the company to have

[88] By the Supplementary Agreement of September 29, 1916, this was changed to 1,100 miles. For texts of original agreement and supplements, see MacMurray, p. 1321.

no interest in them other than its compensation for its services as railway contractors. The financing of the projects was to be by bonds to be issued by the Chinese Government, the selling of which was to be undertaken by the company.[39]

The executive head of the roads was to be a Chinese Director-General, appointed by the Government, assisted by a Chief Engineer, a Traffic Manager, and an Auditor chosen and vouched for by the American company, and appointed by the Director-General. All plans and estimates of construction were to be submitted in advance to the Minister of Communications for his information and approval, and the Government was to have the right to employ inspectors to inspect all work as it progressed. The company was to have a five per cent. commission on all purchases made in behalf of the roads (excepting purchases of lands), and eight per cent. of all other moneys expended for construction. Further, for handling and selling the bonds by which the roads were to be financed, the company was to receive twenty-five per cent. of the net profits derived from operating the roads after paying all operating and bond charges, until all the bonds should be paid.[40]

None of these roads have been built, although a considerable number of routes have been surveyed.

The projected line from Chuchow to Yamchow was

[39] This was to be done through the American International Corporation.

[40] For constructing the section of the Chuchow-Chinchow line from Chuchow to Paoking in Hunan, and completing a survey of a route from the Peking-Hankow Railway through Hsiangyang (Hupeh) to Chengtu in Szechuan, an issue of $6,000,000 of five-year Treasury Bills was arranged for. By a supplementary agreement of September 29, 1916, the 25 per cent. of net profits was reduced to 20 per cent. At the time of the present writing only the amounts necessary for defraying the costs of surveys have been advanced by the bankers.

objected to by the French as in violation of a prior concession in the form of a note from a former Vice-Minister of one of the departments of the Chinese Government. A line from a point on the Peking-Suiyuan road, running northwestward, was protested by the Russian Legation as in violation of a prior promise which China had made not to build in that region without first obtaining Russia's consent. The lines in Hunan and Hupeh were objected to by the British, who claimed that they had preferential rights there under a letter from Viceroy Chang Chih-tung. None of these objections has been conceded by either the American or Chinese Government to be effective in excluding American enterprises in the designated localities.

The appearance in the Siems-Carey contracts of the twenty per cent. participation in the profits of the lines to be built has been somewhat commented on, because, in the first place, it would seem to be a return to the earlier practice of recognizing what amounted to a part ownership of foreigners in the roads—a concession which for years the Chinese had sought to avoid; [41] and, in the second place, because China's engagements (some of them secret) with foreign syndicates to grant to them, in the future, as favorable terms as might be given to any other party, might make it necessary to grant the profit-participating privilege to those "most favored" foreign interests.[42]

[41] The Chinese paid $1,000,000 to exclude the profit participation clause from the original Tientsin-Pukow agreement, and one of the purposes in converting the original Peking-Hankow loan had been the same.

[42] This point is especially stressed in a pamphlet entitled "The Breakdown of American Diplomacy in the Far East," printed (but not published) by George Bronson Rea. He says (p. 84): "The serious feature of reviving the profit-sharing clause in state-owned railways lies in the fact that due to China's secret understandings,

Shantung Canal Improvement Loan. By an agreement of April 19, 1916,[43] with the American International Corporation, the Chinese Government, in behalf of the Government of the Province of Shantung, contracted a loan not to exceed $3,000,000, to run thirty years, and to bear 7% interest, the proceeds to be employed for improving the South Grand Canal in Shantung Province and reclaiming certain land areas. As security were pledged the lands to be reclaimed owned by the Government of Shantung Province, revenues to be derived by the Government from the lands affected by the proposed work, and all machinery and tools purchased by the loan funds. If these revenues should prove insufficient, the Government undertook to make good the deficiency with other revenues provided in the budget of Shantung Province.

Detailed provisions were contained in the agreement as to the direction under which the public works provided

the American contract compels the revision of all China's outstanding and unexecuted railway agreements. . . . To understand this situation better, it must be explained that China has entered into railway contracts with foreign syndicates for the financing and construction of approximately ten thousand miles of new line (exclusive of the American contract for eleven hundred miles) the loans for which have yet to be floated. Under present conditions the total amount of loans required for the construction of these eleven thousand one hundred miles will approximate $80,000 per mile, or an aggregate of $900,000,000. (Projected lines in Yunnan and Szechuan will cost over $150,000 per mile.) If spread over a period of fifteen years, at least $60,000,000 will be required annually to finance the lines already contracted for. As matters stand, the British, French, Belgian and Russian concession holders cannot comply with their obligations under the old terms. It is now impossible to issue loans under the pre-war 'cheap money' conditions. As there is no time limit attached to these contracts or any penalty for failure to carry them out within a specified time, they will pass into cold storage unless better terms are conceded." As to this agreement, it may be observed that such better terms would, in any event, and aside from the criticized provision of the American contract, have been necessary.

[43] For the text of this agreement, see MacMurray, p. 1287.

for were to be carried out and disbursements made. The engineering work was to be done by a contracting firm, which was to receive as compensation 10% of the total cost of the work.

By an agreement of May 13, 1916, between the Government of China and the American International Corporation, a loan to the former of $3,000,000 was arranged for to be called the "Huai River Conservancy Grand Canal Improvement Seven Per Cent. Gold Loan of 1916," for carrying on the Huai River conservancy works.[44] As security for the loan were pledged all tolls and taxes exclusive of likin, then or thereafter to be levied on the Grand Canal in Kiangsu Province. The work was to be carried on by a contracting company upon a percentage basis under the direction of a Chinese Director-General, with whom were to be associated an American Chief Engineer and American Chief Accountant.

Under date of November 20, 1917, the American International Corporation concluded a further agreement[45] with the Chinese Government under which it was to loan $6,000,000 for the improvement of the Grand Canal in the Provinces of Chihli and Shantung. The terms of this loan were similar to those under the agreement of April 19, 1916, which it replaced, and, as said, applied to the Grand Canal in Chihli as well as in Shantung. It was understood that Japanese interests were to participate in the floatation of the loan to the extent of $2,500,000.

[44] Printed in MacMurray, p. 1304. By an agreement of January 30, 1914, the American Red Cross had succeeded in obtaining an option from the Republic of China to advance the sum of $20,000,000 for improvement of the water courses embraced in Huai River district. These rights of the American Red Cross were taken up by the American International Corporation under its agreements with the Chinese Government of April 19, 1916, and May 13, 1916.

[45] Printed in MacMurray, p. 1297.

With reference to the Grand Canal loan and the other Siems-Carey railway projects, it may be noted that a total of approximately $1,500,000 has been expended. This sum represents moneys advanced by the company on surveys and preliminary investigations. There have been no public subscriptions involved in either of these projects.

Railways Owned and Operated by Foreign Governments or Interests. The railways in China coming under this head include the Chinese Eastern Railway, the South Manchuria Railway system, the Shantung Railway from Tsingtau to Tsinanfu with its short branches, and the French Yunnan Railway. The circumstances under which these lines were built, and the almost complete extent to which they are operated by foreign governments, or corporations acting as the agents of such governments, have been so fully set forth in earlier chapters of this volume that a further discussion of them in this chapter will not be needed.

CHAPTER XLIII

Opium [1]

The use, or rather misuse, of opium became a matter of international concern during the first half of the nineteenth century when controversies arose between the Chinese authorities and foreign merchants trading with China. Out of these differences arose the first war between China and Great Britain—the "Opium War"—which was terminated in 1842 by the Treaty of Nanking.

China. The poppy plant appears to have been known in China since the eighth century, A. D. The medicinal value of its product, opium, had been known by the Chinese for several centuries, but the habit of smoking it was probably borrowed from abroad. Once introduced, the vice spread rapidly—so rapidly, indeed, that the Chinese political authorities became aroused and sought to prevent it by stringent prohibitory edicts.

The first of these edicts was issued in 1796, and four years later the importation of foreign opium was forbidden. At this time the importation of opium, almost wholly from India, had amounted to over four thousand chests annually.[2] However, notwithstanding this prohi-

[1] A considerable part of this chapter is taken from the author's volume, *Opium as an International Problem.*

[2] A chest contains a "picul" or 133 lbs.

bition, the amount of Indian opium annually introduced into China continued to increase, until, by 1838, it had reached the enormous quantity of over twenty thousand chests, and it was the drastic attempt of the Chinese authorities to deal with this grave situation that furnished the proximate as well as one of the most substantial of the causes of the war with Great Britain.

The Opium War. Attempt has been made by some writers to show that this war was not properly termed an "Opium War," but the evidence is overwhelming that it was with justice given that name. Not only was the outbreak of hostilities due to the seizure and destruction by the Chinese authorities of certain amounts of opium held by British merchants in Canton, which, in violation of Chinese law, had been brought into China, but one of the conditions imposed upon defeated China was that she should pay an indemnity of six million dollars for the opium thus seized and destroyed. If one has any doubts upon this subject, he need only read the impartial account of the events leading up to and the results following from this war as given by S. Wells Williams in his scholarly treatise, *The Middle Kingdom*. After hostilities had begun and the question was discussed in the British Parliament as to what action the British Government should take, the debate dealt almost wholly with the opium trade. At that time there seemed to be no question in England as to the causes of the war. Only later was the effort made by British historians and statesmen to show that the opium question was but an incidental, and not a dominating, factor in the situation.

Gladstone had no doubt as to the character of the war that Great Britain had waged. Of this war he said: "A war more unjust in its origin, a war more calculated to cover this country with permanent disgrace, I do not

know and have not read of. The British flag is hoisted to protect an infamous traffic; and if it was never hoisted except as it is now hoisted on the coast of China, we should recoil from its sight with horror." And Gladstone's biographer, Lord Morley, writing years later, summed up his understanding of the nature of the war in the following words: "The Chinese question was of the simplest. British subjects insisted on smuggling opium into China in the teeth of Chinese law. The British agent on the spot began war against China for protecting herself against these malpractices. There was no pretence that China was in the wrong, for, in part, the British Government had sent out orders that the opium smugglers should not be shielded; but the orders arrived too late, and, war having begun, Great Britain felt compelled to see it through, with the result that China was compelled to open four ports, to cede Hongkong, and to pay an indemnity of six hundred thousand pounds."[8]

Sir George Staunton an eminent Chinese scholar, in the British House of Commons, on April 14, 1843, said: "I have never denied that if there had been no opium smuggling, there would have been no war. Even if the opium habit had been permitted to run its natural course, if it had not received an extraordinary impulse from the measures taken by the East India Company to promote the growth, which almost quadrupled the supply, I believe it never would have created that extraordinary alarm in the Chinese authorities which betrayed them into the adoption of a sort of *coup d'état* for its suppression."

Importation of Opium Forced Upon China. No mention was made of opium in the Treaty of Nanking, and, therefore, the importation of the drug into China remained

[8] *Life of Gladstone*, vol. I, p. 225.

illegal under the Chinese law. By a treaty supplementary to that of Nanking, signed a year later, the British Government pledged itself to discourage the smuggling.[4] This pledge was, however, almost immediately broken, and Hongkong became a base of operations for the contraband trade in opium. The production and exportation of opium from India, prepared for the Chinese trade, continued to increase, and by 1858 arose to nearly 75,000 chests a year. As a further facilitation to this illegal trade, a British ordinance was passed which enabled Chinese boats, many of which were engaged in this trade, to fly the British flag, and out of this permission arose the "Arrow" incident which led to the second war between Great Britain and China.

During the years immediately following the Opium War the British Government made repeated efforts to induce the Chinese authorities to legitimize the importation of opium into its borders. Lord Palmerston, in 1843, instructed the British representative in China "to endeavor to make some arrangement with the Chinese Government for the admission of opium into China as an article of lawful commerce";[5] and advised Sir Henry Pottinger that he should "avail himself of every possible opportunity strongly to impress upon the Chinese plenipotentiary . . . . how much it would be for the interest of that Government to legalize the trade."

Despite the financial temptation to follow this advice, the Government of China for years refused to take this step. To one of the suggestions that he should do so the Chinese Emperor returned the following reply: "It is true that I cannot prevent the introduction of the poison; gain-seeking and corrupt men will, for profit and sensuality, defeat my wishes; but nothing will induce me to

[4] Article XII of Supplementary Treaty of Hoomun Chai, 1843.
[5] Parl. Papers, 1857.

derive a revenue from the vice and misery of my people." However, when it became clear that the smuggling of opium into China upon a large scale, with the real, if not acknowledged, support of the British authorities, could not be prevented, and there was certainty that China would become involved in further serious disputes with foreign traders should she continue her attempts to punish opium smugglers, the Chinese Government, in 1858, reluctantly abandoned its fight to exclude the drug. The official British report, giving an account of the negotiations that were in progress upon this point, said: "China still retains her objection to the use of the drug on moral grounds, but the present generation of smokers, at all events, must and will have opium. To deter the uninitiated from becoming smokers, China would propose a very high duty, but, as opposition was naturally to be expected from us in that case, it should be made as moderate as possible."[6] The British negotiator suggested a duty from 15 to 20 taels a chest; the Chinese desired that 60 taels should be imposed in order that the duty might have some prohibitive effect. It was finally agreed that 30 taels should be collected,[7] and thus as Roundtree says in his excellent volume *The Imperial Drug Trade* (p. 89), "the drug which the Chinese Government has objected to so tenaciously for so long a time, and at such a costly price, now had its admission legalized at a less duty than England then levied on Chinese silks and teas." The result, thus finally achieved, Roundtree describes in the following words: "Great Britain had at last accomplished its desire, so long worked for, so little avowed.

[6] *China Correspondence*, 1859, p. 401.

[7] In addition to the 30 taels of customs duty that might be levied it was provided that a likin tax of 80 taels might be imposed. In 1911 permission was granted to China to increase this total of 110 taels a chest to 350.

The Government of India was no longer to be the chief accomplice, the unsleeping partner of Chinese smugglers. The great drug trade was regularized by law. China had yielded to steady, continuous pressure, which it had not the strength to resist."[8]

The Sino-British Treaty of Tientsin of 1858, and the Rules of Trade established in pursuance of Articles 26 and 28 of that treaty, were negotiated by Lord Elgin. His *Letters and Journals* show Lord Elgin's strong disapproval of the opium traffic, and his view that the wars between China and Great Britain had been unjustifiable upon the part of Great Britain. In one place he says of the second war: " I have hardly alluded in my ultimatum to that wretched question of the *Arrow* which is a scandal to us, and is so considered, I have reason to know, by all except the few who are personally compromised." In another place he says: " I thought bitterly of those who for the most selfish objects are trampling under foot this ancient civilization." Of the Treaty of Tientsin itself he said: " The concessions obtained in the treaty from the Chinese Government have been extorted from its fears."[9] Sir Rutherford Alcock, who had served the British Government as Minister Plenipotentiary both at Tokyo and Peking, testifying before the East India Finance Committee of the House of Commons, in 1871, said: " We forced the Chinese Government to enter into a treaty to allow their subjects to take opium."

Years later, when the agitation in England against the continued sending of opium from India to China had reached considerable proportions, the attempt was made, despite the facts which have been stated, to show that the legalization of the importation of opium had been freely assented to by China. For further evidence of the impro-

[8] *Op. cit.*, p. 93.
[9] *China Correspondence*, 1859, p. 345.

priety, and even absurdity, of such a claim, the reader is referred to Roundtree's already cited volume.

The United States did not, under the Most-Favored-Nation right, take advantage of the permission granted to British subjects, and thus, for American citizens, the importation of opium into China continued to be illegal. In 1880 China and the United States entered into a treaty, according to the provisions of which the citizens or subjects of each country were prohibited from importing opium into the other country. In 1887 the American Congress passed a law to carry this treaty into effect.

Production and Consumption of Opium Prohibited by China. By 1906 the evil of opium smoking in China had become so great that it became recognized that it was practically a matter of life or death to the Chinese people that the practice should be checked, and, if possible, wholly suppressed. To this Herculean task the Chinese Government addressed itself, and, in that year, the Emperor issued the following edict:

> It is hereby commanded that within a period of ten years the evils arising from foreign and native opium be equally and completely eradicated. Let the Government Council frame such measures as may be suitable and necessary for strictly forbidding the consumption of the drug and the cultivation of the poppy.

In this crusade against the smoking of opium China asked the aid of Great Britain, from whose Indian possessions came almost all of the opium that was imported. In May of 1906 the persons in Great Britain who were opposed to the continuance of the Indian trade in opium secured the passage in the British House of Commons of a Resolution condemning in unqualified terms the opium traffic. This resolution, which was adopted by a unanimous vote on May 30, declared: " That this House

reaffirms its conviction that the Indo-Chinese opium traffic is morally indefensible, and requests His Majesty's Government to take such steps as may be necessary for bringing it to a speedy close."

In 1907 China succeeded in obtaining Great Britain's consent to an agreement, according to which the Government of India was to reduce each year the export of opium from India by an amount equal to 10 per cent of the then total amount exported, provided that China should reduce in equal proportion the amount of home-produced opium. The result of this agreement, if successfully carried out by both parties, would be to bring to an end in 1917 the consumption of opium in China, since there would then be no available supply of the drug.[10]

At this time there was little expectation upon the part of foreigners that China would be able to fulfill her part of the bargain. As to the difficulty of this task, Sir John Jordan, British Minister to China, who had taken an active interest in the problem, wrote: "It is true that the Chinese Government have in recent years effected some far-reaching changes, of which the abolition of the old examination system is, perhaps, the most striking instance; but to sweep away in a decade habits which have been the growth of at least a century, and which

[10] The British House of Commons on May 6, 1908, passed unanimously a Resolution which declared: "This House, having regard to the Resolution unanimously adopted on 30th May, 1906, that the Indo-Chinese opium trade is morally indefensible, welcomes this action of His Majesty's Government diminishing the sale of opium for export, and thus responding to the action of the Chinese Government in their arrangement for the suppression of the consumption of the drug in that Empire, and this House also urges His Majesty's Government to take steps to bring to a speedy close the system of licensing opium dens, now prevailing in some of the Crown Colonies, more particularly Hong Kong, the Straits Settlements, and Ceylon."

have gained a firm hold upon 8,000,000 of the adult population of the Empire, is a task which has, I imagine, been rarely attempted with success in the course of history; and the attempt, it must be remembered, is to be made at a time when the Central Government has largely lost the power to impose its will upon the provinces.'' [11]

By an additional agreement of May 8, 1911, the Agreement of 1907 was somewhat modified. Recognizing the sincerity with which China had carried on her efforts to suppress the cultivation of the poppy in China, Great Britain agreed that the export of opium from India should cease before 1917 if clear proof could be given of the complete suppression of the production of native opium in China; that Indian opium should not be carried into any province of China in which it appeared by clear evidence that the introduction of opium had been completely suppressed; that China, during the period of the agreement should permit Great Britain to make local investigation conducted by British officials, accompanied, if desired by China, by a Chinese official, of the extent to which the production of opium was being suppressed by China; that China might send to India an official to watch, but not to interfere with, opium sales; that the Chinese Government should levy a uniform tax on all opium produced in the Chinese Empire, and the British Government would consent to increase the then import duty on Indian opium to 350 taels per chest of 100 catties—such an increase to take effect as soon as the Chinese Government should levy an equivalent excise tax on all native opium; that, in order to assist China in the suppression of opium, the British Government would issue export permits consecutively numbered for all chests of Indian

[11] *China Papers*, No. I, 1908, No. 3. Quoted by W. T. Dunn, *The Opium Traffic in its International Aspects*, Columbia University, New York, 1920.

opium declared for shipment to, or consumption in, China; that, during the year 1916, these permits should not exceed 30,000, and should be progressively reduced annually by 5,100 during the remaining six years ending 1917, and that the chests for which such permits were issued should be sealed by an Indian Government official in the presence of the Chinese official if so requested.

To the surprise of nearly all foreigners, China was able to carry out her part of the agreement of 1907. The British Government carried out its part, and thus, in 1917, China found herself substantially freed from the curse which had so grievously afflicted her: opium production in China had come practically to an end, and she was no longer obliged to receive opium within her borders.[12]

The Philippine Opium Commission. While China was suppressing the production and use of opium within her territories, the United States was also seeking to secure the same result in the Philippine Islands.

[12] China's hands with regard to the prohibition of the importation of Turkish and Persian opium had not been tied by treaty provisions as had been the case with reference to Indian opium.

The failure of the Shanghai Municipal Council which is the governing body of the International Settlement in Shanghai, to cooperate with China in her struggle to eradicate the opium evil, is strikingly set forth in a pamphlet by Arnold Foster entitled *Municipal Ethics. Some Facts and Figures from the Municipal Gazette*, 1907-1914, published by Kelly and Walsh, Shanghai. Mr. Foster, who was for more than forty years a missionary to the Chinese, and a man who enjoyed the high esteem of all who knew him, points out in his pamphlet that, although the Council (the body representing the rate-payers of the International Settlement in Shanghai) had, in 1907, expressed to the Chinese authorities its sincere sympathy with their efforts to suppress the use of opium, and had assured them of the active cooperation of the authorities of the Settlement, in fact, within the six years from 1907 to 1913, the number of licensed opium shops in the Settlement increased from 87 to 560 and the revenue from licenses from 4,290 taels to 86,386 taels.

Prior to the annexation of the islands by the United States, in 1898, considerable public revenue had been obtained by "farming" out the right to sell opium. This practice was discontinued when the islands came under American control, but for several years thereafter opium figured among the imports upon which high customs duties were levied. In 1903 the official proposal was made that the system of opium farming should be re-established. The Insular Government was, however, deterred from taking this step by the opposition it aroused, especially among the Americans in the islands, and in order to have a firm foundation upon which to base its future policy regarding opium, a commission was appointed to visit other countries "in order to collect information that would be likely to aid the Commission in determining the best kind of law to be passed in the islands for reducing and restraining the use of opium by the inhabitants." [18]

The Commission visited Formosa, Japan, China, Hongkong, French Indo-China, the Straits Settlements, Upper and Lower Burma, and Java, and made various recommendations, including one for an immediate government monopoly.

The United States Congress did not adopt the recommendation for a government monopoly, but, by Act of 1905, imposed absolute prohibition of the use of the drug except for medicinal purposes, to take effect in March, 1908.

The Shanghai Opium Commission. The United States showed its concern at this time not only with its own opium problem as presented in its Philippine possessions,

[18] As to the work of this Commission, see the speech of the Right Reverend Charles H. Brent before the Opium Advisory Committee of the League of Nations, on May 29, 1923, and republished in House Document No. 380, 68th Cong., 1st Sess., p. 91. See also Senate Document 135, 58th Cong., 3rd Sess.

but also with the problem in its broader and international aspects. Especially were the efforts of China to rid herself from the opium curse watched with sympathy by the American people and their Government.

In 1906 the Right Rev. Charles H. Brent, then Bishop of the Philippine Islands, wrote a personal letter to President Roosevelt, in which he said: "From the earliest days of our diplomatic relation with the East, the course of the United States of America has been so manifestly high in relation to the traffic in opium that it seems to me almost the duty of our government, now that we have the responsibility of actually handling the matter in our possessions, to promote some movement that would gather in its embrace representatives from all countries where the traffic in and use of opium is a matter of moment."

This letter was referred to, and endorsed by, Mr. Taft, then Secretary of War, who sent it to the Department of State. Mr. Root, who was then Secretary of State, thereupon initiated a correspondence with the Powers having possessions in the Far East, with a view to the creation of an international commission to study the opium problem throughout the Far East, and to report upon the best methods for its solution.

Out of the movement thus initiated grew the International Opium Commission, which, at the instance of the United States, held its meetings at Shanghai, China, from February 1 to February 26, 1909.

Space does not permit an account of the work of this Commission. It is, however, to be said that, in its report, the seriousness of the situation was recognized, and the recommendation made that the Powers should take energetic action for its correction, not only by controlling and limiting the manufacture, sale and distribution of morphine, but by taking stronger action within their several

settlements or concessions in China, by applying to their nationals in China their several national pharmacy laws, and by entering into negotiations with China with a view to taking effective action.

The First Hague Opium Conference. It will have been seen that the Commission which held its meetings at Shanghai had had no further purpose than an exchange of views of the Governments represented as to the opium problem and the making of recommendations as to the future action to be taken by those Governments. However, the Resolutions adopted by the Commission led to the call, by President Taft, of a Conference, composed of delegates with plenipotentiary powers, which met at The Hague on December 1, 1911, and adopted on January 23, 1912, the agreement since known as The Hague International Opium Convention.

The following Powers participated in the Conference: United States of America, China, France, Germany, Great Britain, Italy, Japan, the Netherlands, Persia, Portugal, Russia, and Siam.[14]

Provisions of The Hague Opium Convention. Though, for the most part, the provisions of this Convention speak for themselves, it will not be without profit to call attention to some of their features.

Preamble. It will be noticed that, in the Preamble, it is expressly recognized that the Convention is an outgrowth from the work of the International Commission

[14] Austria-Hungary and Turkey were invited to attend, but found themselves unable to do so. Austria-Hungary declared, however, that she would watch with sympathy the proceedings of the Conference. Invitations to attend were limited to those Powers which had been invited to participate in the Shanghai Commission. Turkey had been asked to participate in this Commission but had been unable to do so because it had no diplomatic representative in the Far East.

which had met at Shanghai three years earlier. The purpose of the Convention is declared to be, not the immediate, but the gradual, suppression of the " abuse " not only of opium, but of " morphine and cocaine, as also of the drugs prepared or derived from these substances, which give rise or might give rise to similar abuses."

It is, of course, a principle of construction, applicable to all formal legal instruments, that rights or obligations cannot be derived directly from their Preambles, if they have any. Such introductory statements are, however, often of great value since they can be resorted to as a means of interpreting the scope and application of the substantive provisions of the instruments to which they are prefixed. It is, therefore, of significance that in the Preamble of The Hague Convention, the purpose of the Signatory Powers is declared to include the gradual suppression of all drugs which may give rise to abuses similar to those which are now recognized to attach themselves to the use of morphine and cocaine.

Chapter I—Raw Opium. The first five Articles of the Convention deal with what is known as " raw " opium. This is defined to be " the spontaneously coagulated juice obtained from the capsules of the *papaver somniferum* (the poppy plant), which has only been submitted to the necessary manipulations for packing and transport."

With regard to opium in this form the Signatory Powers enter into no definite obligations as to limiting the amount to be produced and distributed. All that they undertake to do is, unless they already have such in operation, to enact effective laws or regulations for controlling this matter. Apparently, this was intended to mean that, in the future, those countries producing opium should bring under direct governmental control or supervision, the cultivation of the poppy, and the distribution of its product opium.

Regarding international trade in opium, however, certain important and specific undertakings are entered into. Due regard being had to differences in commercial conditions, the Contracting Powers agree to limit the number of places through which the export or import of raw opium is to be permitted; to provide that this exportation and importation may be carried on only by duly authorized persons; that packages containing raw opium to an amount exceeding five kilograms and intended for export shall be marked in such a way as to indicate their contents; and, most important of all, that measures will be taken by each country to prevent the export of raw opium to such countries as may prohibit its entry, and to control such export to countries which restrict its import. The significance of this undertaking, and especially with reference to British India, will later appear.

Chapter II—Prepared Opium. Prepared opium has come to be the term applied to opium that is used for smoking. This mode of using the drug is employed by the Chinese in China and in the other territories of the Far East to which they have emigrated in large numbers. Since 1906 the consumption, as well as the production, of opium in China, has been forbidden by Chinese law, but, of recent years, due to the loss of effective control by the central Government over the Provinces, opium has been produced and smoked in China in large quantities. This phase of the opium problem will later receive further consideration. Though thus forbidden by law in China, the smoking of opium, that is, the use of prepared opium, continues to be legalized by the British Government in Hong Kong, Burma, Malaya, North Borneo, and in Ceylon; by the Portuguese Government in Macao; by the Netherlands Government in the Dutch East Indies; by the Japanese Government in Formosa; by the French Government in Indo-China; and by the Siamese Government

in Siam. It was to these Governments that Chapter II of The Hague Convention was primarily, though not exclusively, directed.

After defining " prepared opium " as " the product of raw opium obtained by dissolving, boiling, roasting, and fermentation, designed to transform it into an extract suitable for consumption " and declaring that, within this term are included " dross " and all other residues remaining when opium has been smoked, there follows Article 6 which is the heart of the Chapter, and which reads as follows:

> The Contracting Powers shall take measures for the gradual and effective suppression of the manufacture of, internal trade in, and use of, prepared opium, with due regard to the varying circumstances of each country concerned, unless regulations on the subject are already in existence.

In Article 7, the Powers agree to prohibit the import and export of prepared opium, but qualify this undertaking as to exportation by the proviso that " those Powers, however, which are not yet ready to prohibit immediately the export of prepared opium shall prohibit it as soon as possible," and that those Powers, which are thus not ready immediately to prohibit the export, shall (a) restrict the number of ports or places through which prepared opium may be exported, (b) prohibit the export to countries which forbid its importation, (c) prohibit the export to countries which desire to restrict its importation, unless the exporter complies with the regulations of the importing country, (d) take measures to ensure that every package exported shall bear a special mark indicating its contents, and (e) not permit the export of prepared opium except by specially authorized persons.

All of these provisions, it is to be observed, apply only to the export of prepared opium. The obligation to prohibit the importation of prepared opium is assumed in an unqualified manner by the Powers signing or adhering to the Convention.

Chapter III—Medicinal Opium, Morphine, Cocaine, Heroin, etc. Chapter III of The Hague Convention is concerned with the derivatives of opium, morphine, and heroin, and the derivative of the coca leaf, cocaine. After defining these drugs by their chemical formulæ, Article 9 of the Convention declares that:

> The Contracting Powers shall enact pharmacy laws or regulations to limit exclusively to medical and legitimate purposes the manufacture, sale and use of morphine, cocaine, and their respective salts unless laws or regulations on the subject are already in existence. They shall cooperate with one another to prevent the use of these drugs for any other purpose.

There then follow three Articles (Nos. 10, 11, and 12) which enumerate various specific measures which the contracting Powers agree to take for the purpose of carrying into effect the obligation assumed by them in Article 9. It is, however, to be observed that, except as to the prohibition regarding their internal trade, and the delivery of morphine, cocaine and their respective salts to any but authorized persons, the obligation assumed by the Powers as to these measures is stated, not in direct and absolute terms, but merely that they " shall use their best endeavors " so to do.

The specific measures indicated in Articles 10, 11, and 12 will be later spoken of when the whole matter of drug regulation is considered, and do not need to be here enumerated.

By Article 13, the Powers obligated themselves to " use their best endeavors to adopt, or cause to be adopted,

measures to ensure that morphine, cocaine, and their respective salts shall not be exported from their countries, possessions, colonies, and leased territories to the countries, possessions, colonies, and leased territories of the other Contracting Powers except when consigned to persons furnished with the licenses or permits provided for by the laws or regulations of the importing country."

By Article 14 the Powers agree to apply the laws respecting the manufacture, import, sale or export of morphine, cocaine, etc., to medicinal opium,[15] and to " all preparations (officinal and non-officinal, including the so-called anti-opium remedies) containing more than 0.2 per cent of morphine, or more than 0.1 per cent of cocaine; to heroin, its salts and preparations containing more than 0.1 per cent of heroin; to all new derivatives of morphine, of cocaine, or of their respective salts, and to every other alkaloid of opium, which may be shown by scientific research, generally recognized, to be liable to similar abuse and productive of like ill-effects."

Chapter IV.—Provisions Applicable to China. This chapter contains five Articles (Nos. 15 to 19) which obligate the Contracting Powers to take specific action in order to meet the special conditions prevailing in China by reason of the existence in that country of foreign settlements, concessions and leased areas, and of extra-territorial rights in general. The provisions of these Articles will be later considered in the section entitled " Chapter IV of The Hague Convention."

Chapter V. Chapter V of the Convention contains but two articles: one (No. 20) which provides that the Contracting Powers " shall examine the possibility of enact-

[15] Medicinal opium is defined in the preamble to Chapter III as " Raw Opium which has been heated to 60° centigrade and contains not less than 10 per cent. of morphine, whether or not it be powdered, granulated or mixed with indifferent materials."

ing laws or regulations making it a penal offense to be in illegal possession of raw opium, morphine, cocaine, and their respective salts, unless laws or regulations on the subject are already in existence ''; and the other (No. 21) which provides that the Contracting Powers shall communicate to one another through the Ministry of Foreign Affairs of the Netherlands, their several laws and statistics regarding the matters and substances dealt with in the Convention.

Chapter VI.—Final Provision. This Chapter deals with the manner in which the Convention is to be signed and ratified. The provisions here made are of a peculiar character, the necessity for the peculiarity, arising out of the special conditions of the problems dealt with by the Convention.

It was recognized by those who drafted the Convention that it would be futile for only a portion of the Powers of the world to attempt to regulate the problems dealt with, and it was therefore provided, by Article 22, that Powers not represented at the Conference were to be invited to sign the Convention, the Netherlands Government being asked to act as agent for obtaining these acceptances. Article 23 then goes on to provide that only after all the Powers, as well on their own behalf as on behalf of their possessions, colonies, protectorates, and leased territories, have signed the Convention, shall those Powers, as well as those represented in the Conference, be asked to ratify the Convention; and that, in the event that the signature of all the Powers invited [16] has not been obtained by December 31, 1912, the Government of the Netherlands shall invite the Powers which have signed by that date to appoint delegates to examine at

[16] Thirty-four Powers are enumerated in Article 22 as the ones to which invitations to sign are to be addressed.

The Hague the possibility of depositing their ratifications notwithstanding the fact that some Powers have not signed.

Article 24 provides that the Convention shall come into force three months after all the Signatory Powers have deposited their ratifications, and that, not later than six months thereafter, the Signatory Powers are to prepare the laws, regulations and other measures contemplated by the Convention, and submit them to their several legislative bodies within that period or in any case at the first session of such legislative bodies following the expiration of this period. Article 24 further provides:

"In the event of questions arising relative to the ratification of the present Convention, or to the enforcement either of the Convention or of the laws, regulations, or measures resulting therefrom, the Government of the Netherlands will, if these questions cannot be settled by other means, invite all the Contracting Parties to appoint delegates to meet at The Hague in order to arrive at an immediate agreement on the questions."

Article 25 provides that any one of the Contracting Powers may denounce the treaty by sending notification to that effect to the Government of the Netherlands, and that the denunciation thus made shall take effect only as regards the Power so notifying and one year after the notification has reached the government of the Netherlands.

Reservations. The following reservations to the Convention were made by the Powers participating in the Conference.

Persia and Siam made reservations with regard to Articles 15, 16, 17, 18, and 19, since, having no treaties with China, they were not concerned with the provisions embodied in them.

Persia also excepted to paragraph (a) of Article 3. This was a very important reservation since the paragraph referred to is one by which the Contracting Powers agree to take measures "to prevent the export of raw opium to countries which shall have prohibited its entry."

France signed with the reservation that a separate and special ratification or denunciation might be obtained from her protectorates.

Great Britain signed with the reservation embodied in the following declaration: "The articles of the present Convention, if ratified by His Britannic Majesty's Government, shall apply to the Government of British India, Ceylon, the Straits Settlements, Hongkong, and Weihaiwei in every respect in the same way as they shall apply to the United Kingdom of Great Britain and Ireland, but His Britannic Majesty's Government reserve the right of signing or denouncing separately the said Convention in the name of any dominion, colony, dependency, or protectorate of His Majesty other than those which have been specified."

The Protocol. In the Protocol annexed to the Convention the Powers expressed the following *voeux:*

"I. The Conference considers it desirable to direct the attention of the Universal Postal Union: (1) To the urgency of regulating the transmission through the post of raw opium; (2) to the urgency of regulating as far as possible the transmission through the post of morphine, cocaine, and their respective salts and other substances referred to in Article 14 of the Convention; (3) to the necessity of prohibiting the transmission of prepared opium through the post.

"II. The Conference considers it desirable to study the question of Indian hemp from the statistical and scientific point of view, with the object of regulating its

abuses, should the necessity thereof be felt, by legislation or by an international agreement."

The Second Hague Opium Conference Protocol. The adherence to the Convention drawn up by the First Opium Conference by all the nations mentioned in Article 22 of that instrument not having been obtained by December 31, 1912, the Government of the Netherlands, as provided for in Article 23, called a Conference at The Hague of the Powers that had signed in order that they might examine as to the possibility of depositing their ratifications even though there were some Powers which had not signified their intention of adhering to the Convention. As a result of this Second Opium Conference, which met July 1, 1913, a Protocol was signed on July 9, 1913, by the 24 participating Powers, according to which it was agreed that the deposit of ratifications might take place.

This Protocol also went on to make certain declarations which would serve as explanations to certain governments which, apparently, had not fully understood the four separate steps—signature, ratification, preparation of legislative measures and enforcement of the convention—that were to be taken. The Protocol also asked that the Government of the Netherlands should communicate to the Governments of Bulgaria, Greece, Montenegro, Peru, Roumania, Serbia, Turkey and Uruguay the following resolution:

"The Conference regrets that certain Governments have as yet declined or failed to sign the Convention. The Conference is of opinion that the abstention of those Powers would prejudice most seriously the humanitarian ends sought by the Convention. The Conference expresses the firm hope that these Powers will alter their negative or dilatory attitude."

By a separate resolution of the Protocol, the Swiss

Government was informed that it was mistaken in its belief that its co-operation would be almost valueless.

Finally, the Protocol provided that, should the signatures to the Convention of 1912 not have been obtained from the Governments which still had not signed by December 31, 1913, a third Conference should be convened.

The Third Hague Opium Conference. Signatures to the Convention of 1912 of all the remaining Governments not having been obtained by the end of the year 1913, a third Conference was convened at The Hague in June, 1914. The Powers there represented, in a Protocol signed June 25, 1914, expressed the opinion that the Convention of 1912 might be brought into force, as between the Powers ratifying it, notwithstanding that certain powers had not signed or given their adherence to it. Accordingly it was decided that a Protocol should be opened at The Hague which might be signed by Powers desirous of putting the Convention into force as between themselves.[17]

Treaty of Versailles: Article 295. Soon after the meeting of the Third Conference came the outbreak of the Great War. During the course of that struggle little progress could be made with regard to the ratification of the Convention. However, in the Treaty of Peace with Germany, signed June 28, 1919, the following Article (No. 295) was inserted, the effect of which was to secure the ratification of the Convention by all the Powers signatory to the treaty.

[17] For a list of the Powers which have ratified or adhered to the Hague Opium Convention, see Annex I to the report of the eighth session of the Opium Advisory Committee of the League of Nations, dated July 29, 1926.

Those of the High Contracting Parties who have not yet signed, or who have signed, but not yet ratified, the Opium Convention signed at The Hague on January 23, 1912, agree to bring the said Convention into force, and for this purpose to enact the necessary legislation without delay and in any case within a period of twelve months from the coming into force of the present Treaty.

Furthermore, they agree that ratification of the present Treaty should, in the case of Powers which have not yet ratified the Opium Convention, be deemed in all respects equivalent to the ratifications of that Convention and to the signature of the Special Protocol which was opened at The Hague in accordance with the resolutions adopted by the Third Opium Conference in 1914 for bringing the said Convention into force.

For this purpose the Government of the French Republic will communicate to the Government of the Netherlands a certified copy of the Protocol of the Deposit of Ratifications of the present Treaty, and will invite the Government of the Netherlands to accept and deposit the said certified copy as if it were a deposit of ratifications of the Opium Convention and a Signature of the Additional Protocol of 1914.[18]

The League of Nations and Opium. By Article 23 of the Covenant of the League of Nations it is provided:

Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League: . . . (c) Will entrust the League with the general supervision over the execution of agreements with regard to the traffic in women and children and the traffic in opium and other dangerous drugs.

[18] Article 247 of the Treaty of Peace with Austria of September 10, 1919; Article 174 of the Treaty of Peace with Bulgaria of November 27, 1919; Article 230 of the Treaty of Peace with Hungary of June 4, 1920; and Article 280 of the Treaty of Peace with Turkey of August 10, 1920, are to the same effect as Article 295 of the Treaty of Peace with Germany.

Under the operation of this provision the League has assumed that supervision over the execution of The Hague Convention of 1912 which had been previously the task of the Government of the Netherlands.

It was, of course, not competent for the Powers to make this transfer except as to themselves, that is, as to Members of the League. Thus, the United States, which has remained outside of the League, asserts that, without its consent, as signatory to The Hague Convention, the terms of that instrument cannot be changed, and that, therefore, it is still entitled, if it desires to do so, to look to the Netherlands Government for the performance of those administrative or supervisory duties with which it was invested by, and which it assumed under The Hague Convention.

The United States has, however, co-operated in a "consultative" capacity with the Advisory Committee on Traffic in opium which the League has established to aid it in the performance of the duties laid upon it by Article 23 of the Covenant.

The Advisory Committee. This Committee, entitled "Advisory Committee on Traffic in Opium," which, for the sake of brevity, will hereafter be referred to simply as the "Advisory Committee," was established in accordance with a vote of the Assembly of the League on December 15, 1920. The following countries were invited to nominate members for the Committee: China, France, Great Britain, Netherlands, India, Japan, Portugal and Siam. In addition to the eight members thus provided for, three Assessors—Sir John Jordan, Mrs. Hamilton Wright, and M. Brenier—were appointed because of their special knowledge of the subjects to be dealt with.

Later, representatives of the United States, Germany and Yugo-Slavia were added to the Committee.[19]

The Geneva Opium Conferences. Based upon recommendations made by the Advisory Committee, the League of Nations issued invitations for the assembling at Geneva in November, 1924, of two international conferences, the one (known as the First Conference), to deal with the matter of " prepared " or smoking opium; and the other (known as the Second Conference), to deal with the other matters covered by The Hague Opium Convention.[20]

[19] The work of this Committee has been summarized by the Information Section of the League of Nations in a small pamphlet entitled *Social and Humanitarian Work*, issued in March, 1924.

[20] The Resolutions of the Assembly of the League, adopted September 27, 1923, read:

V. The Assembly approves the proposal of the Advisory Committee that the Governments concerned should be invited immediately to enter into negotiations with a view to the conclusion of an agreement as to the measures for giving effective application in the Far Eastern territories to Part II of the Convention and as to the reduction of the amount of raw opium to be imported for the purpose of smoking in those territories where it is temporarily continued, and as to the measures which should be taken by the Government of the Republic of China to bring about the suppression of the illegal production and use of opium in China, and requests the Council to invite those Governments to send representatives with plenipotentiary powers to a conference for the purpose and to report to the Council at the earliest possible date.

VI. The Assembly, having noted with satisfaction that, in accordance with the hope expressed by the Assembly in 1922, the Advisory Committee has reported that the information now available makes it possible for the Governments concerned to examine, with a view to the conclusion of an agreement, the question of the limitation of the amount of morphine, heroin or cocaine and their respective salts to be manufactured; of the limitation of the amounts of raw opium and the coca leaf to be imported for that purpose and for other medicinal and scientific purposes, and of the limitation of the production of raw opium and the coca leaf for export to the amount required for such medicinal or scientific purpo

The First Geneva Opium Conference. Eight nations were represented in the First Conference—Great Britain, France, the Netherlands, Japan, Portugal, India, Siam and China.

China was invited to the First Opium Conference, not because the use of opium is legalized by her, for it is not, but because there are millions of Chinese living in the territories and possessions of the Powers which still maintain this traffic, and because it is mainly, and, in some cases, exclusively to these Chinese that the opium is sold and allowed to be consumed. It also appears from the official publications of these countries that a very considerable proportion of these Chinese acquire the vice after arriving in those countries and take it back with them when they return to their native soil, and thus increase the difficulty of China's task with regard to the enforcement of her policy of absolutely prohibiting the cultivation and consumption of opium for other than strictly medicinal and scientific purposes.

From the standpoint of the other Powers represented in the First Conference, the presence of China was desired because, notwithstanding the law forbidding it, there is, in fact, a considerable production of opium in China and considerable amounts of this opium escape from the country and are thus added to that contraband

cil, as a means of giving effect to the principles submitted by the representatives of the United States of America, and to the policy which the League, on the recommendation of the Advisory Committee, has adopted, to invite the Governments concerned to send representatives with plenipotentiary powers to a conference for this purpose, to be held, if possible, immediately after the conference mentioned in Resolution V.

The Assembly also suggests, for the consideration of the Council, the advisability of enlarging this conference so as to include within its scope all countries which are members of the League, or parties to the Convention of 1912, with a view to securing their adhesion to the principles that may be embodied in any agreement reached.

trade in the drug which, these other nations claim, is interfering with their efforts to regulate the use of prepared opium. Therefore it was that, in the call for the First Conference, it was provided that one of the subjects to be discussed should be the measures to be taken by the government of China "to bring about the suppression of the illegal production and use of opium in China."

In execution of its part of the programme of the Conference, the Chinese Delegation gave the assurance that the Chinese Government would not depart from its policy of absolutely forbidding the production and use of opium except for strictly medicinal and scientific purposes, and that it would use all the executive and administrative power that it possessed for the enforcement of this policy. The Chinese Delegation expressed the hope that the other Powers, by the action that they would take in their own territories and possessions, and by due exercise of their extra-territorial rights in China, would aid the Chinese Government in the performance of its own tasks with reference to opium. But it was made plain that the Chinese Government would strongly disapprove any effort, however friendly, upon the part of the other Powers, to interfere in any way, even by suggestions or representations, with the sovereign right of China to determine for itself what measures in the premises should be adopted by it. And it is proper to say that, though the Powers found occasion in the Conference several times to animadvert upon conditions in China, they made no attempt to point out to China, much less to urge, the measures that should be taken by the government of China to prevent the illegal production and use of opium in China. In this connection it should be said that the Chinese Delegation pointed out the remarkable anti-opium movement, headed by the National Anti-Opium Association of Shanghai, that is taking place in China,

and which supports the position assumed by the Chinese Delegation, that the present situation in China with regard to opium is a temporary one, and will be corrected as soon as the influence and power of this popular movement gains sufficient headway. In this part of its work, the Chinese Delegation was greatly aided, in the Second as well as in the First Conference, by Mr. T. Z. Koo, the representative of the National Anti-Opium Association.

So far then, as this part of its programme was concerned, the Chinese Delegation had no ground for dissatisfaction with the work of the Conference. When, however, one turns to the action to be taken by the other Powers for carrying out their engagement, embodied in The Hague Opium Convention of 1912, to bring about, by progressive steps, the effective suppression of the use of prepared opium within their territories or possessions, a different situation developed. It was found that, since 1912, not only had the Powers, with the exception of Japan, not substantially reduced the amounts of opium imported for the purpose of preparing smoking opium for sale, but that they were unwilling to agree to terminate the traffic within any specified period of time, or to establish systems of control which would automatically, if effectively enforced, bring the legalized smoking of opium substantially to an end within a reasonable number of years. The excuse which the Powers gave for this refusal upon their part was that such efforts upon their part would be defeated by the contraband trade in opium. The most that these Powers would agree to was to undertake to put an end to the legalized traffic in smoking opium within fifteen years after the countries producing opium, that is, Turkey, Persia, Egypt and Serbia, as well as China, have brought opium production and exportation under such effective control that the contraband trade

will no longer constitute a serious obstacle to the reduction of the legalized use of the drug in its prepared form.

It does not need to be pointed out that such an arrangement as this would postpone to an indefinite, and almost surely far distant, date that effective suppression of the use of prepared opium which had been promised in The Hague Convention, and also weakened that Convention by transforming the undertaking from an unqualified to a contingent and conditional one. When, therefore, it became clear that this was to be the result of the work of the First Conference, the Chinese Delegation, as a means of showing its dissatisfaction, withdrew from the Conference.

The Chinese Delegation gave every possible support to the American Delegation in its efforts to have the matter of prepared opium considered in the Second Conference. When, however, it became evident that the Delegations which represented the governments that had participated in the First Conference would not permit the Second Conference to deal in any direct way with the matter of prepared opium, the Chinese Delegation deemed that it had no option but to do what it had already decided to do with reference to the First Conference, namely, to withdraw from the Conference. In the memorandum which accompanied its letter of withdrawal the Chinese Delegation said:

> Inasmuch as it appears that those Powers within whose territories or possessions the use of prepared opium is still permitted by law are not prepared to agree to the inclusion within the convention to be adopted by this Conference of any undertakings whatsoever regarding the progressive suppression of such use, and inasmuch as it is the opinion of the Chinese Delegation that the adoption of such undertakings is essential in order fully to effect the purposes which, as declared in Resolution 6 of the Fourth Assembly of the League of Nations, this conference was assembled to achieve, the Chinese Delegation deems no good pur-

pose will be served by its further continuance in the Conference and it is therefore constrained to cease its participation therein.[21]

The Agreement, Protocol and Final Act of the First Conference. The discussions had in the First Conference resulted in the drafting and signing by the Powers (other, of course, than China) of an Agreement, a Protocol and a so-called Final Act. These instruments have been ratified by France, Great Britain and India, and as to these countries are presumably in force since it is provided that they shall become operative when ratified by two parties.

The essential provisions of the Protocol have already been quoted.

The Agreement itself provides that the sale of opium

[21] The following Articles (I, II and III) of the Protocol adopted by the First Conference state the essential part of the proposition which the Powers agreed to.

Article I. The States signatories of the present Protocol recognize that the provisions of the Agreement signed this day are supplementary to, and designed to facilitate the execution of the obligation assumed by the signatory States under Article VI of The Hague Convention of 1912, which obligation remains in full force and effect.

Article II. As soon as the poppy-growing countries have ensured the effective execution of the necessary measures to prevent the exportation of raw opium from their territories from constituting a serious obstacle to the reduction of consumption in the countries where the use of prepared opium is temporarily authorized, the State signatories of the present Protocol will strengthen the measures already taken in accordance with Article VI of The Hague Convention of 1912, and will take any further measures which may be necessary, in order to reduce consumption of prepared opium in the territories under their authority, so that such use may be completely suppressed within a period of not more than fifteen years from the date of the decision referred to in the following Article.

Article III. A Commission to be appointed at the proper time by the Council of the League of Nations shall decide when the effective execution of the measures, mentioned in the preceding Article, to be taken by the poppy-growing countries has reached the stage referred to in the Article. The decision of the Commission shall be final.

to minors shall be prohibited, and all possible efforts made to prevent the spread of the opium-smoking habit; that no minors shall be permitted to enter any smoking divan; that the number of smoking divans and retail shops for the sale of prepared opium shall be as limited as possible; that the purchase and sale of "dross," except to a monopoly, shall be prohibited; that, with certain exceptions, the importation, sale and distribution of opium shall be a government monopoly; that the right to import, sell or distribute opium shall not be "farmed out"; and that the export of opium, whether raw or prepared, from the possession or territory into which opium is imported for the purpose of smoking shall be prohibited. There are other provisions with regard to the transit and transhipment of opium, the propriety of anti-opium propaganda, the interchange of information, etc., which do not need to be here summarized.

There can be little question that the Agreement thus produced by the First Conference was a great disappointment to all persons who had been hoping for a decided advance upon the undertakings of The Hague Opium Conference. Indeed, there are many who think that it marked a retrograde step.[22] The attitude of the Chinese Delegation toward it was shown in the memorandum which it transmitted to the First Conference at the time of its withdrawal from that body. From that memorandum the following paragraphs may be quoted:

No such effective action is made obligatory upon the Powers by the draft Agreement that has resulted from the labors of the

[22] See, for example, Bishop Brent's "Appeal to My Colleagues," which was circulated to the members of the Second Conference. Bishop Brent was one of the American delegates to the Conference, and had long been prominently active in Anti-Opium work. He said: "The best I can hope for it [the Agreement] is that it will not be ratified or even signed as it stands."

Conference. Some few, but not important, unqualified obligations have been assumed by the Powers, as, for example, that the sale of opium to minors shall be prohibited; that minors shall not be allowed to enter smoking divans; that "dross" may be sold only to the State monopoly, where one exists; and that the Powers shall exchange information and views with one another regarding the suppression of illicit traffic and the number of smokers.

All of the undertakings of the Agreement, except the one providing for a review of the situation before the end of the year 1929, and Article VI later referred to, are so qualified as to render them in no sense imperative. The obligation to make the manufacture of prepared opium a Government monopoly is qualified by the phrase "as soon as circumstances permit"; the obligation to pay retail sellers of opium fixed salaries and without commission on sales is to be applied "experimentally in those districts where an effective supervision can be exercised by the administrative authorities," each Power having, of course, the right to determine for itself when this condition exists. Retail shops for the sale of opium, and divans for the smoking of opium are to be limited in number "as much as possible,"—there is not even an obligation not to increase the number of retail shops and smoking dens now existing. Educational and other efforts to discourage the use of prepared opium are to be exerted by only those Governments which consider such measures desirable under the conditions existing in their several territories. With regard to legislative measures for rendering punishable illegitimate transactions which are carried out in another country by persons residing within their own territories, the Contracting Parties obligate themselves to do nothing more than examine the possibility of such legislation in a most favorable spirit.

The foregoing undertakings furnish the substance of the draft Agreement that has been agreed upon with the exception of Article VI which prohibits the exportation of raw or prepared opium from the territories in which opium is imported for purposes of smoking, the transit through and trans-shipment of prepared opium in such territories, and regulates the transit through and trans-shipment of raw opium in those same territories.

The Chinese Delegation is aware of the practical difficulties that have confronted the Powers concerned in taking effective measures for the suppression of the use of prepared opium, but it is convinced that these difficulties are by no means insurmountable. Therefore, the Chinese Delegation is of the opinion that the time has come for these Powers to declare, in definite terms, either that legalized traffic in prepared opium within their several territories or possessions will be brought to an end within a fixed and reasonable period of time, or that they will at once establish and operate, to the extent of their administrative and executive power, systems of regulation and control which will necessarily bring about a yearly and progressive diminution in the amount of prepared opium legally used, and of the number of persons permitted by law to purchase and consume this opium—a diminution that will proceed at a rate that will bring to an end, within a reasonably brief period of time, this pernicious traffic.

It was suggested by the Chinese Delegations in this Conference that the public revenue derived from the opium traffic be applied to the prevention and cure of opium addiction, to the economic and moral betterment of the classes from which the consumers of opium are drawn, and to defraying the expenses of more drastic police and administrative measures for preventing that illicit traffic in opium, which, it is claimed, now interferes with the efficient operation of measures for bringing about the suppression of the use of prepared opium. But this suggestion (with the exception of Japan in Formosa), the Powers have declined to adopt.

As to the draft of the Protocol contained in the proposals of the British Delegation presented to the Joint Committee of Sixteen, and which, it is proposed, should be annexed to the Agreement to be adopted by this Conference, the Chinese Delegation would say that it is unable to subscribe to the unqualified assertion contained in the Preamble that "the effective prohibition of the use of prepared opium in their Far Eastern territories is dependent on effective measures being taken by the producing countries to restrict the production of opium and prevent its illicit export." As the Chinese Delegation has already said, it recognizes that the existence of contraband trade in opium constitutes an impediment to the effective operation of measures

for the total suppression of the legalized use of prepared opium, but it does not admit that this impediment is such as to prevent and excuse the Powers concerned from taking immediate steps to enforce measures that will, if allowed free play, lead, within a definite or reasonably brief period of time, to the total prohibition of the legalized smoking of opium. With such measures in existence, even though their operation be somewhat retarded by illicit trade, the Powers will be in a position to increase their efficiency in exact proportion as the retarding influences, of which contraband is but one, are lessened or wholly removed.

The Chinese Delegation is further unable to give its approval to the substance of the declarations or undertakings contained in the proposed Protocol for the reason that, instead of providing for the taking of immediate steps leading to the total suppression within a definite or reasonably brief period of time of the legalized use of prepared opium, they postpone the initiation of such measures to an indefinite and contingent date.

In view of the foregoing, the Chinese Delegation is constrained to say that it deems that no useful purpose will be served by its further participation in the work of the Conference. The Chinese Delegation is, however, convinced that in order successfully to cope with the problem of opium in all its phases, international co-operation is required. Whenever the Powers signatory to The Hague Convention of 1912 are prepared to conclude "an Agreement as to the measures for giving effective application in the Far Eastern territories to Part II of the (Hague) Convention and as to a reduction of the amount of raw opium to be imported for the purpose of smoking in those territories where it is temporarily continued," they will find China not only ready but eager to co-operate to the full extent of her power. In the meantime China will continue its policy of absolutely prohibiting the production of opium and its use for other than medicinal and scientific purposes. The present conditions in China which, unfortunately, make it impossible for the Government of China to secure an effective enforcement of this policy, are temporary in character. The Government of China gives the assurance that it will not depart from its policy with regard to opium, and that it will, at all times, exert all the executive and administrative power

possessed by it to enforce that policy. This the Government of China will continue to do, independently, and without regard to the action of other Powers. It is the hope of the Government and the people of China that, reciprocally with their independent effort to suppress the production and control the use of opium within the borders of China, the other Powers will upon their part make every effort to prevent illegal traffic in opium and narcotic drugs, and progressively to suppress the legalized use of prepared opium.

The Second Geneva Opium Conference. Forty-one nations, including four non-members of the League of Nations, were represented in this Conference. Efforts were made by certain of the delegations, especially the American and Chinese, to have prepared or smoking opium dealt with by this Conference, in view of the failure of the First Conference to deal satisfactorily with the matter. This effort failed, and, mainly because of this failure, the Chinese delegation withdrew from the Conference, and, in part, upon the same ground, the American delegation also withdrew.[23]

[23] The American Delegation had strongly emphasized the proposition that the Powers "shall enact effective laws or regulations for the control of the production and distribution of raw opium and coca leaves so that there will be no surplus available for purposes not strictly medicinal or scientific," and was greatly disappointed that no agreement as to this could be obtained. The utmost that the Powers would agree to do were the provisions contained in Articles I and II of the Protocol annexed to the Convention drafted by the Second Conference. These Articles read:

I. The States signatory to the present Protocol, recognizing that under Chapter I of The Hague Convention the duty rests upon them of establishing such a control over the production, distribution and exportation of raw opium as would prevent the illicit traffic, agree to take such measures required to prevent completely, within five years from the present date, the smuggling of opium from constituting a serious obstacle to the effective suppression of the use of prepared opium in those territories where such use is temporarily authorized.

II. The question whether the undertaking referred to in Article I

The Convention Drafted by the Second Conference. This instrument provides that it shall go into force ninety days after notification to the League of Nations of its ratification by ten Powers, including seven of the Powers represented in the Council of the League, of which seven two are permanent members. As yet (1926) only Great Britain, certain of her Dominions, the Sudan, Portugal and Salvador have deposited their ratifications, and, so severe has been the criticism which this agreement has received, it is practically certain that it will not receive ratification by a sufficient number of Powers to enable it to become operative. Therefore, since it is

has been completely executed shall be decided, at the end of the said period of five years, by a Commission to be appointed by the Council of the League of Nations.

In the Memorandum accompanying the letter of withdrawal from the Conference the American Delegation said:

"Despite more than two months of discussion and repeated adjournments it now clearly appears that the purpose for which the Conference was called cannot be accomplished. The reports of the various Committees of the Conference plainly indicate that there is no likelihood under present conditions that the production of raw opium and coca leaves will be restricted to the medicinal and scientific needs of the world. In fact, the nature of the reservations made shows that no appreciable reduction in raw opium may be expected.

"It was hoped that if the nations in whose territories the use of smoking opium is temporarily permitted would, in pursuance of the obligation undertaken under Chapter II of The Hague Convention, adopt measures restricting the importation of raw opium for the manufacture of smoking opium or would agree to suppress the traffic within a definite period, such action would materially reduce the market for raw opium and an extensive limitation of production would inevitably follow. Unfortunately, however, these nations, with the exception of Japan, are not prepared to reduce the consumption of smoking opium unless the producing nations agree to reduce production and prevent smuggling from their territories, and then only in the event of an adequate guarantee being given that the obligations undertaken by the producing nations would be effectively and promptly fulfilled. No restriction of the production of raw opium under such conditions can be expected."

highly improbable that the Convention will go into effect it will not be necessary here to do more than say that it contains provisions regarding the supplying of information by the several Powers to a "Permanent Central Board" the members of which are to be appointed by the Council of the League of Nations, and a considerable number of engagements upon the part of the ratifying Powers with regard to the control of the domestic and international traffic in manufactured narcotic drugs.

In does not need to be said that China is greatly interested in the matter of the production of and traffic in narcotic drugs because she, above all other Powers, is being deluged by these drugs smuggled into her borders.[24] In default of this convention of the Second Conference becoming operative, The Hague Opium Convention remains in full force, and China is entitled to ask that its provisions in the premises be conscientiously carried out by the Powers to the extent of their ability.

At the eighth session of the Advisory Committee held at Geneva, May 26 to June 8, 1926, it was made evident, by the information laid before the Committee, that the illicit international trade in narcotic drugs had not decreased in amount, but rather the reverse; and it was thus shown, beyond controversy, that some at least of the Powers signatory to The Hague Opium Convention were not carrying out, with any considerable degree of effectiveness, the undertakings they had entered into in that Convention with reference to the control of the manufacture of and traffic in morphine, cocaine and their respective salts. Thus, the Advisory Committee in the first of the Resolutions which it adopted, declared: "The

[24] See the Section below entitled "Chapter IV of The Hague Opium Convention."

Committee, after examining the information before it relating to illicit traffic, points out the gravity of the present situation. Considerable seizures of the manufactured drugs and of opium continue to be made, and there is no doubt that the drugs continue to be manufactured on a scale vastly in excess of the world's medical and scientific requirements."

In the ninth of the Resolutions adopted the Committee drew especial attention to the evidence it had received of the extensive use of the ports by illicit traffickers in morphine and the other drugs with the Far East, and asked that the matter be brought to the notice of all governments and of the Universal Postal Union.

India's New Export Policy. By a unanimous vote of both branches of the Indian Legislature, on March 18, 1926, it was recommended to the Governor-General in Council " that immediate steps should be taken to give effect to the policy of progressively reducing the exports of opium from India except for strictly medicinal or scientific purposes so as to extinguish them altogether within a definite period."

This definite period was later fixed at ten years beginning with 1926, so that the last exports will take place in 1935. Until then exports will be by direct sale to the governments of the importing countries, the sale of opium by public auction at Calcutta having been discontinued in April, 1926.

Chapter IV of The Hague Opium Convention. The Hague Convention of 1912 contains a special chapter—Chapter IV—dealing with the problem of opium and narcotic drugs as affected by the extraterritorial rights of certain Powers within China.

By Article XV of this Chapter the Powers having treaties with China agreed, in conjunction with the Chi-

nese Government, to take the necessary measures to prevent the smuggling into Chinese territory, as well as into their Far Eastern colonies and into the leased territories which they occupy the China, of raw and prepared opium, morphine, cocaine, and their respective salts, as well as of the substances referred to in Article XIV of The Hague Convention.

By Article XVI, the Chinese Government agreed to promulgate pharmacy laws for its subjects regulating the sale and distribution of narcotic drugs and to communicate these laws to the Diplomatic Representatives of the Powers at Peking. The Treaty Powers, upon their part, undertook to examine these laws, thus communicated to them, and, if found acceptable, to apply them to their own nationals residing in China.

By Article XVII, the Treaty Powers agreed to adopt the necessary measures to restrict and control the habit of smoking opium in their leased territories, settlements, and concessions in China, and, *pari passu* with the Chinese Government to suppress within such areas opium dens or similar establishments and to prohibit the use of opium in places of entertainment.

By Article XVIII the Treaty Powers agreed to take effective measures, *pari passu* with the efforts of the Chinese Government, directed to the same end, for the gradual reduction of the number of shops in which raw and prepared opium was sold in their leased territories, settlements, and concessions in China. They also agreed to adopt effective measures for the restriction and control of the retail trade in opium in such areas.

By Article XIX, the Contracting Powers having post-offices in China agreed to prohibit the illegal import into China in the form of postal packages, as well as the illegal transmission through these offices from one place to

another place in China, of opium, raw or prepared, and the other narcotic drugs referred to in the Convention.

Under date of August 2, 1924, the Chinese Government submitted to the Opium Advisory Committee of the League a copy of the " Provisional Regulations for the Registration of Chinese and Foreign Pharmacies." [25]

Previous to this, in 1912, the Chinese Government had promulgated a Provisional Criminal Code, Chapter XXI of which dealt with offenses relating to opium; and, as is well known, in 1917 the production as well as the use of opium for other than medicinal purposes was absolutely forbidden.

At the fifth meeting of the sixth session of the Advisory Committee, the Chinese representative, Mr. Chao-Hsin Chu, pointed out that if China was to be enabled to give full effect to the measures for suppressing the traffic in opium within her borders, its Government would have to possess full power to enforce its laws, and that he hoped to obtain the help of the Powers concerned in order that this end might be achieved. Sir John Jordan, the British representative upon the Committee, however, expressed the opinion that this raised a question which was not within the competence of the Committee, and that it was one to be dealt with by the Diplomatic Body at Peking. Sir Malcolm Delevingne said: " He believed that the traffic in drugs in China as carried on by nationals of Powers having extraterritorial rights was at present subject to regulation and control by the Powers," and that it would be useless for the Committee to deal with the subject. In the case of British nationals in China, he said that, British regulations were already in force. He added:

It would be of more immediate value to consider whether the regulations in force, with regard to the trade in drugs in China

[25] Document O. C. 196. Printed as Appendix IV of the Minutes of the Sixth Session of the Advisory Committee.

carried on by subjects of Powers having extraterritorial rights, were really adequate, that was to say, whether they were sufficient to control the trade in the same way as it was controlled in the territories of the Powers themselves. Recently the British regulations in China had been revised, and now dealt with the matter in a very effective manner.

Some time ago he had called the attention of the Secretariat to the position of Great Britain in this connection, and had suggested that information should be obtained regarding the steps taken by other Powers. He thought accordingly that the Committee might recommend that all Powers having extraterritorial rights in China should, if they had not already done so, introduce regulations, similar to those adopted in their own country, to govern the trade in these drugs by their subjects in China.

Replying to Sir Malcolm, Mr. Chu said that the question had been taken up by his Government with the diplomatic bodies in Peking, but that none of the governments were willing to waive their extraterritorial rights. " China did not expect a solution which would modify the treaty rights, but she wanted the support and co-operation of the members of the Committee and their Governments. It was an international question, and although many cases of smuggling had been discovered, some of them had eventually been found to be beyond the control of the Chinese authorities."

Sir Malcolm Delevingne pointed out that the provisions of Chapter IV—so far as foreign Powers were concerned—" referred only to leased territories, concessions and settlements, and that the regulations adopted by the British Government, and which he suggested should be recommended to the other Governments, related to the control of subjects of foreign Powers wherever they might be in China. . . . . The British Government was only waiting for its new regulations to be formally pro-

mulgated in Peking before sending them to the Secretariat (of the League).

The Advisory Committee thereupon adopted the following Resolution:

> The Advisory Committee recommends that Powers having extraterritorial rights in China should, if they have not already done so, make regulations, the breach of which shall be punishable by the adequate penalties, to control the carrying on by their nationals in China of any trade in the drugs to which Chapter III of The Hague Convention applies. The Advisory Committee further recommends that copies of such regulations should be sent to the Secretariat of the League.

At the thirteenth session of the Council of the League this recommendation of the Committee was approved, the rapporteur, Mr. Branting, saying: "This would appear to be a very fair proposal to which no justifiable objections can be raised, and I am sure that the Council as a whole will approve this recommendation exactly as it stands, and instruct the Secretary-General to communicate with the Governments in the manner proposed."

In March, 1923, the Chinese Government referred to the Doyen of the Diplomatic Body at Peking the proposal that the Chinese Government should establish at Shanghai a special Bureau for the control of the traffic in and use of dangerous drugs. More than a year later, in August, 1924, the answer was received from the Acting Doyen, Dr. Schurman, that some of the Ministers had not received instructions from their respective Governments and that a general decision was therefore not then possible.

Early in the Second Opium Conference at Geneva, the Chinese Delegation submitted the following memorandum and proposals with reference to Chapter IV of The Hague Convention:[26]

[26] League Document O. D. C. 39.

Above other nations, China is suffering by reason of the illicit trade in narcotic drugs. Besides the debasing effects of these drugs upon her people, there is the further circumstance that their widespread use enters as a discouraging element in the effort which the Government and the people are making to suppress the production and consumption of prepared opium which are illegal under Chinese law. It is, therefore, of special concern to China that the Governments of the countries where these drugs are manufactured should adopt common and effective regulations regarding their manufacture, export, re-export, transshipment, and transit with the view of confining traffic in them to their strictly medicinal and scientific uses.

China, which manufactures none of these drugs, will, upon her part, do all that is within her governmental power to control their importation into China, their transshipment and re-exportation, and will thus, in every possible way, co-operate with the other Powers in their efforts to solve the world-problem of confining the traffic in these drugs to strictly scientific and medical purposes.

And, as regards the trade in, and the use of these drugs within China, the Government of China will use all its powers, legislative and administrative, to prevent their use for other than the purposes which science and medicine approve. In most countries this is a task the performance of which is not directly dependent upon the co-operation of other Governments, but, in China, by reason of the existence of the extraterritorial rights of the nationals of a number of the other Powers, as well, also, as by reason of the existence within China of areas within which some of the Treaty Powers are permitted to exercise certain administrative powers, it is necessary that the Government of China should obtain the hearty co-operation of these Powers in order that it may efficiently control the narcotic problem.

For the control of her own citizens over whom she has full administrative jurisdiction, the Chinese Government has enacted comprehensive and stringent laws which it enforces to the extent of its powers, but with regard to those of her citizens who live within the above-mentioned areas, as well with regard to the nationals of those Powers within these areas and their nationals

outside these areas who enjoy extraterritorial privileges, China is largely, if not wholly, dependent upon the co-operation of the Powers for the effective control of the use of narcotics. This fact is recognized in Chapter IV of The Hague Convention of 1912, which provided for harmonious and co-operative action between the Signatory Powers and China.

China has sought loyally to fulfill the obligations thus assumed by her, but she has thus far failed to receive full co-operation upon the part of the other Powers as regards the action required to be taken under Article XVI; namely, that Diplomatic Representatives of those Powers at Peking should examine the pharmacy laws regulating the sale and distribution of morphine, cocaine, their respective salts and other substances referred to in Article XIV of the Convention, enacted by the Chinese Government and communicated to them, with a view, if found acceptable, to applying them to their own nationals residing in China, and, furthermore, the Chinese Delegation is constrained to say with reference to the laws of some of the Powers, for the control of their own nationals in China, that the penalties they impose seem scarcely severe enough efficiently to attain the purposes for which they have been enacted, nor are they, in all cases, vigorously and uniformly enforced by the officials of the Powers concerned. This observation applies also to laws for the punishment of smuggling of opium and narcotic drugs into China.

Therefore, in order that the present unsatisfactory conditions may be corrected, the Chinese Delegation requests that, in substance, the following provisions be included in the Convention which, it is to be hoped, will result from the labors of this Conference.

1. That the existing laws and regulations and administrative processes of the Signatory Powers shall be so strengthened and perfected as to prevent the exportation, importation, transshipment, transit and re-exportation of opium, except as provided for in Chapter II of The Hague Convention of 1912, and of morphine, heroin, cocaine and other narcotic drugs except in amounts needed for strictly medicinal and scientific purposes.

2. That prompt examination of, and action not later than April 1, 1925, with regard to the application to their own

nationals of the pharmacy laws of the Chinese Republic regulating the sale, possession, and distribution of narcotic drugs shall be made by the Powers enjoying extraterritorial rights in China, as provided for in Article XV of The Hague Convention.

3. That the Powers which enjoy extraterritorial rights in China shall either apply Chinese laws to their nationals for contraventions against Chinese laws prohibiting the cultivation, sale, transport or trade in opium and other narcotics, or enact adequate laws regulating these matters which shall provide that the violation of these laws by their nationals shall be punishable by fines whose amounts shall be multiples of the values at the places where the offenses are committed of the drugs concerned and, in addition, by terms of imprisonment, and, at the expiration of such terms, deportation of the party or parties concerned from China and prohibition thereafter to return to China.

4. That the Powers enjoying extraterritorial rights in China shall either apply to their own nationals in China the laws of China with regard to the smuggling or attempted smuggling into China of opium or narcotic drugs, or strengthen their own laws by attaching to them penalties for their violation which shall include fines the amounts of which shall be multiples of the values of the opium or drugs concerned, together with terms of imprisonment at the expiration of which terms the party or parties shall be deported from China and forbidden thereafter to return to China.

Reciprocally, China will adopt measures to prevent the smuggling out of China by her own nationals of opium or narcotic drugs into the territories and possessions of the Contracting Parties.

5. That, if the smuggling of opium or the aforesaid drugs into China or their sale in China or their attempted smuggling or sale, is by or with the connivance of the officers of a ship, the ship also shall be subject to a fine equal in amount to a multiple of the local value of the goods smuggled or sold or sought to be smuggled or sold.

6. That the trial of foreign nationals who enjoy extraterritorial rights in China for offenses referred to in the preceding para-

graphs shall be in open court, and that, at such trials, Chinese assessors may be present.

The only discussion by the Conference of the foregoing memorandum and proposals was that which took place at the fourth meeting of the Second General Committee.[27] Upon that occasion Dr. Sze said, in part:

I have been told that I was going to raise the question of extra-territoriality. Let me say at once that there is no such intention in my mind, although I have always felt, and still feel, that the extraterritoriality imposed on China is unjust and unfair, and should be removed as soon as possible. I do not, however, propose to raise that question here. . . .

I simply ask you (and everyone knows that something must be done) to tighten up the prevention of smuggling, not only in the interests of China, but in your own interests, and in the interest of humanity. . . . I ask you, therefore, either to adopt the Chinese laws on those questions, or if you find that inconvenient, to strengthen your own laws. . . . The United States, as far back as 1844, conceded to China rights much greater than anything in the proposals which I have put before you.[28]

[27] Document O. D. C./II/C. R. 4.

[28] Article XXXIII of the Sino-American Treaty of 1844, reads:

"Citizens of the United States who shall attempt to trade clandestinely with such of the ports of China as are not open to foreign commerce, or who shall trade in opium or any other contraband articles of merchandise shall be subject to be dealt with by the Chinese Government, without being entitled to any countenance or protection from that of the United States; and the United States will take measures to prevent their flag from being abused by the subjects of other nations as a cover for the violation of the Laws of the Empire."

This clause, imposing only a unilateral obligation upon the United States Government, was superseded by one of reciprocity by Article II of the Treaty of 1880, which reads:

"The Governments of China and the United States mutually agree and undertake that Chinese subjects shall not be permitted to import opium into any of the ports of the United States; and citizens of the United States shall not be permitted to import opium into any of the

Following Dr. Sze's remarks there was a discussion which dealt with the question whether or not the Treaty Powers had been unduly slow in passing upon the question whether the Chinese provisions were such as could be accepted by them for application to their own nationals residing in China, and also whether the whole subject was not one which could be best dealt with by negotiations between the Chinese Government and the Diplomatic Body at Peking. In result, it was decided that before the questions arising under the enforcement of Chapter IV of The Hague Convention should be further considered by the Conference it was desirable that they should be considered in a conference of the representatives of China and of those countries participating in the Conference which have extraterritorial rights in China.

open ports of China, to transport it from one open port to any other open port, or to buy and sell opium in any of the open ports of China. This absolute prohibition, which extends to vessels owned by the citizens or subjects of either Power, to foreign vessels employed by them, or to vessels owned by the citizens or subjects of either Power and employed by other persons for the transportation of opium, shall be enforced by appropriate legislation on the part of China and the United States; and the benefits of the 'favored nation' clause in existing treaties shall not be claimed by the citizens or subjects of either Power as against the Provisions of this Article."

This clause is still in force by virtue of Article XVII, the Treaty of 1903, the annex to which reads:

"As citizens of the United States are already forbidden by treaty to deal in or handle opium, no mention has been made in the Treaty of opium taxation."

This Treaty of 1903 also prohibits the importation into China of morphia and of instruments for its injection, excepting for medical purposes, provided the prohibition by the Chinese Government is made applicable to all nations and provided further that the Chinese Government undertakes to prevent the manufacture in China of morphia and of instruments for its injection.

On March 3, 1915, the United States enacted an elaborate law "to regulate the practice of pharmacy and the sale of poison in the consular districts of the United States in China."

"If," said Sir Malcolm Delevingne, who made this proposal, "as the result of such a conference, it appears that there are any definite recommendations which can usefully be made, then those recommendations can be presented for information and guidance of the Conference."

One meeting of this Conference was held at which the British Delegation circulated a copy of the British Order in Council promulgating regulations with regard to dealings in narcotics by British subjects in China, and the Chinese Delegation presented a revised draft of its proposals with reference to Chapter IV of The Hague Convention. These were as follows:

1. That the Powers will give prompt consideration to the matter of applying to their nationals in China the Pharmacy Laws of the Chinese Republic, if such laws be found acceptable, and, in particular, the Regulation for the Registration of Chinese and Foreign Pharmacies as stated in the Memorandum of the Chinese Government submitted to the Advisory Committee of the League of Nations on Traffic in Opium and Other Narcotics on August 2, 1924, and published as Annex 4 to the Minutes of the Sixth Session of said Advisory Committee. And that, at the latest, decision as to the foregoing shall be given before January 1, 1926.

2. That the Powers will take any and all such action as will permit the Republic of China to apply, to the extent needed, the system of export and import certificates as recommended by the League of Nations or any similar system adopted by any of the Signatory Power or Powers and China.

3. That the Powers will issue instructions to their nationals, pharmacies, hospitals and other establishments or companies in the Republic of China to furnish to the Chinese Government such statistics and other information as to opium and narcotic or habit-forming drugs imported by them into China or sold, used, or held in stock by them in China as will aid the Chinese Govern-

ment in determining its per capita medicinal and scientific needs for opium and the aforesaid drugs.

4. That the Powers will make every possible effort to cause their several laws and regulations regarding the smuggling of opium and narcotic or habit-forming drugs into China and the illegal possession, transportation, sale, dispensing and use of opium and the aforesaid drugs in China to be uniform in character, and especially to the penalties imposable for violation of them.

5. That the Powers will provide that the penalties imposable for violations of the laws and regulations referred to in Paragraph 4 of this Agreement shall be of sufficient severity to have a highly deterrent effect, and that, in any case, when one is convicted of second offense thereunder, he or she shall be sentenced to a term of imprisonment, and, at the expiration of such term, if he or she is in China, deported therefrom and forbidden under heavy penalties to return thereto.

6. That the Powers will make provision for the public trial of all persons accused of violating the aforesaid laws and regulations.

In witness whereof, the undersigned on behalf of their Governments have affixed their signatures to the present Agreement.

Done at Geneva, the day of in the year in a single copy which shall remain deposited in the Secretariat of the League of Nations and of which authenticated copies shall be transmitted to the Powers represented at the Conference.

The special conference or committee then adjourned in order to study these proposals, but for various reasons another meeting was postponed from time to time with the result that nothing had been done before the Chinese Delegation withdrew from the Conference. After this withdrawal, none of the other Powers appeared to deem that their own interests were sufficiently involved to make it worth while for them to make any proposals for a more effective application and enforcement of the obligations they had assumed under Chapter IV of The

Hague Convention. The whole matter was thus left in exactly the situation it was before the Geneva Conferences convened.

The result is an unfortunate one. The exercise by one State of jurisdictional authority within the territory of another sovereign State is a serious matter to the State within whose borders the jurisdiction is exercised. It is, therefore, justified only under very exceptional conditions, and international friendliness requires that the Powers to which the privilege is granted should exercise it with all possible consideration for the feelings and welfare of the people of the State which has been compelled to grant the privilege. With reference, therefore, to the prevention and punishment of the smuggling of opium and narcotic drugs into, and their sale within, China, there are the strongest possible reasons why the Powers enjoying extraterritorial rights should exercise them in a manner that will assist China in enforcing her own laws with regard to the same matters. There is thus every reason why these Powers should, when this is at all possible, adopt as their own laws, for application and enforcement within China, the laws of China, or, at least, to bring their own laws into the closest possible conformity to those of China. The propriety and desirability of this, as to pharmacy laws, is expressly recognized in The Hague Convention of 1912.

Still more important, and, indeed, almost imperative is it, that, in those cases in which they find it necessary to apply their own penal laws in an extraterritorial manner, the Powers should feel it incumbent upon themselves to make their own laws severe enough, and to apply them with sufficient vigor and impartiality to demonstrate to the people of the State within whose territories they are applied, that extraterritorial rights are not being employed in such a way as to release their own nationals

from full responsibility for their own misdeeds, and thus to create in the minds of the Chinese people not only a belief that there is unjust discrimination as between themselves and the nationals of the Treaty Powers, but also a feeling that those Powers have not a sufficient regard for the public policies and interests of the people of China.

As regards the prevention of the smuggling of opium and narcotic drugs into, and their illegal sale within China, all of the Powers represented in this Conference had a common interest. Those of these Powers which have Far Eastern possessions have emphasized upon every possible occasion the difficulty they have been under in enforcing their own laws within these possessions by reason of the extent to which contraband traffic exists. They must, therefore, recognize the difficulties that China encounters from the same source, and be willing to do whatever lies within their power to lessen those difficulties.

What China asked for in the proposals which her Delegation presented to the Conference, involved no concessions from those Powers which do not possess extraterritorial rights in China, and, from those who do possess such rights, no real sacrifice of interest or of principle. All that was asked was that, where the Chinese laws are found suitable, the Treaty Powers shall adopt them as their own, and that, in those cases in which they might deem it desirable to employ their own laws, they should attach to them penalties which may be expected to be strongly deterrent in character, and to enforce them with vigor, uniformity and impartiality. By adopting these proposals of the Chinese Delegation, the Nations represented at this Conference would have shown their determination to give full effect to the provisions of Chapter IV of The Hague Convention of 1912, and furthermore, would have given additional evidence of their desire to

co-operate internationally in a matter of common concern.[29]

[29] If one desires to learn something of the difficulties under which the Chinese Government labors by reason of the existence of extraterritorial rights in China in its efforts to control illicit trade in opium and narcotic drugs, an examination may be made of the case decided on February 27, 1925, by the International Mixed Court of Shanghai and described in *The China Weekly Review* for March 7, 1925 (vol. XXXII, p. 1). That the Kingdom of Siam suffers in the same way by reason of the existence of extraterritorial jurisdiction within her borders, is seen by the remarks of Prince Charoon at the First Geneva Conference. See Willoughby, *Opium as an International Problem*, p. 103.

Mr. K. K. Kawakami, the well-known Japanese writer, in an article contributed to the December, 1924, issue of *Japan*, says: "Not only is China surrounded by opium-using countries, but she has within her own territories several centers of the opium trade. Foremost of these centers is Shanghai, followed by Hongkong, Canton, Macao, Harbin and Dairen. The International Settlement in Shanghai is said to have at least 500 opium stores, and the French Settlement 140. In the Foreign Settlements the import and sale of opium is not forbidden, and it is but natural that they should become favorite rendezvous of opium addicts and the vantage-ground from which crafty smugglers, both foreign and native, make inroads into the interior of China." For an account of the illicit sale of opium in the French Concession at Shanghai, see *The China Weekly Review*, October 23, 1926.

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