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AMERICAN EXTRATERRITORIALITY IN CHINA

BY CHARLES LORING*

There appears to be some confusion in the minds of the public in regard to the extraterritorial rights of foreigners in China. Usually the term seems to carry to the layman some vague connection with the "concessions" of territory and the presence of foreign troops in the Republic. The professional lawyer who has familiarized himself with the treaties and laws controlling these rights, of course, understands that extraterritoriality is only incidentally connected with the concessions of territorial control and that Americans, whose government has accepted no concession, have as complete extraterritorial rights as those foreigners whose governments have acquired such rights in numerous cases.

The concessions of small areas in the open ports are merely leases of real estate over which China reserves her sovereignty and in which foreigners have no greater extraterritorial rights than elsewhere in China. In them, her own nationals have the right to trial in their own courts and as a matter of fact far outnumber the foreigners. Take the British Concession in Tientsin for an example. In that area there are less than eight hundred British but over thirty thousand Chinese and in the French and Japanese Concessions the native population appears to be much larger. The Concessions have local self-government, under the consul, for police control and fire protection and for public improvements. In other words, they are like American municipalities minus any delegation of sovereignty. The Chinese, especially those who are political refugees, recognize the Concessions as the most desirable place of residence. In time of civil war the protection of the Concessions and of foreign troops is sought by the native inhabitants of surrounding territory. The Chinese fear the looting that is always done by their own retreating soldiers and there now stands in the American Compound at Tientsin a monument erected in honor of the officers and men of the Fifteenth United States Infantry commemorating the protection given in 1924 by that organization to certain Chinese villages which otherwise would have been looted by Chinese soldiers.

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The Concessions are an ever present object lesson in municipal government and sanitation which ought ultimately to have some effect in the improvement of Chinese cities. They are, of course, to be distinguished from leased territory, such as Liaotung, Kuang Chou Wan, Kowloon and Weihaiwei to which China has for the period of her lease transferred her jurisdiction but not her sovereignty. There the laws of the lessees prevail except where China has herself reserved a right of extraterritoriality as she did in the lease of Liaotung to the Russians. Hong Kong is ceded outright to the British and Macao to the Portuguese.

Aside from the legation guards the presence of foreign troops in China is occasioned by the agreement following the Boxer trouble, that communication from Peking to the sea be kept open and that the Powers might at their option keep troops in Chinese territory to insure this freedom of access. This is obviously to prevent a repetition of a siege of the legations at Peking. The Japanese also keep troops in South Manchuria for the protection of the railroad which they took over from the Russians.

The American who travels in China or comes here to live finds that extraterritoriality gives him the right of being sued and of being tried in the United States Court for China or in the American Consular Courts. When he gets into court he finds that for his protection the laws of the United States have been extended over American citizens in China so far as they are "adapted to the object" or furnish "suitable remedies." He finds, however, that when he becomes a plaintiff he must go into a Chinese court, or in Shanghai into the Mixed Court, and have his rights adjudicated according to Chinese law.

Prior to the establishment of the United States Court for China, the jurisdiction of proceedings in which Americans were defendants rested exclusively in the American Consular Courts. To those who have been long familiar with the commercial functions of our consuls it seems a bit strange that these officers in addition to their other duties should be burdened with judicial functions, but consular officers when, some centuries in advance of ambassadors and ministers, they originally appeared in the intercourse of nations, were largely and perhaps principally judicial in character.¹

¹Foster, *The Practice of Diplomacy*, 216. *Dainese v. Hale*, (1875) 91 U. S. 13, 15, 23, L. Ed. 190.

Nor is there any novelty in the existence of districts where foreigners may separately reside under the municipal jurisdiction of the consuls, since this usage prevailed in the Middle Ages in certain parts of the territory bordering on the Mediterranean and on the Baltic.² The reasons for the appearance of the right of extraterritoriality in international relations are well stated by Justice Field in *In re Ross*, where he says:³

"The practice of European governments to send officers to reside in foreign countries, authorized to exercise a limited jurisdiction over vessels and seamen of their country, to watch the interests of their countrymen, and to assist in adjusting their disputes and protecting their commerce, goes back to a very early period, even preceding what are termed the Middle Ages. During those ages these commercial magistrates, generally designated as consuls, possessed to some extent a representative character, sometimes discharging judicial and diplomatic functions. In other than Christian countries they were, by treaty stipulations, usually clothed with authority to hear complaints against their countrymen and to sit in judgment upon them when charged with public offenses. After the rise of Islamism, and the spread of its followers over eastern Asia and other countries bordering on the Mediterranean, the exercise of this judicial authority became a matter of great concern. The intense hostility of the people of Moslem faith to all other sects, and particularly to Christians, affected their intercourse, and all proceedings had in their tribunals. Even the rules of evidence adopted by them placed those of different faith on unequal ground in any controversy with them. For this cause, and by reason of the barbarous and cruel punishments inflicted in those countries, and the frequent use of torture to enforce confession from parties accused, it was a matter of deep interest to Christian governments to withdraw the trial of their subjects when charged with the commission of a public offense, from the arbitrary and despotic action of the local officials. Treaties conferring such jurisdiction upon these consuls were essential to the peaceful residence of Christians within those countries and the successful prosecution of commerce with their people."

With the development of political institutions and the establishment of civil order consuls lost their judicial functions and now have no such powers except where treaties give the rights of extraterritoriality.⁴ Prior to 1858 the Chinese Government did not accept diplomatic representatives and the Empire dealt with all foreign representatives as agents of inferior or dependent

²Van Dyck, *Capitulations Ottoman Empire*, 34.

³(1891) 140 U. S. 453, 35 L. Ed. 581, 11 Sup. Ct. 897.

⁴*Dainese v. Hale*, (1875) 91 U. S. 13, 23, L. Ed. 190.

states. Nevertheless, Great Britain asserted, and without the consent of China, exercised jurisdiction over her subjects in China for some years prior to the Treaty of 1842 in which she obtained from China the rights of extraterritoriality for her citizens. With the exception of certain trade agreements with Russia covering the entrance of caravans into northwestern China, this British treaty was the first legal establishment of extraterritorial rights in the Empire. The United States soon followed with the Treaty of Wangheia in 1844, article xxi of which provided:

“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.”

This article applied to crimes only and did not include civil controversies which by article xxiv were to be “examined and decided conformably to justice and equity by the public officers of the two nations acting in conjunction.”

Controversies between American citizens were to be settled by the American authorities and controversies between Americans and other foreigners according to treaties between the United States and their respective governments.

Article xvi provided that Americans through their consul might seek redress in law against Chinese debtors and promised that the Chinese local authorities should “take all proper steps to compel satisfaction.” . . . “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.”

The Treaty of Tientsin (June 18, 1858) somewhat more fully covered the matter of criminal cases and article iv of the Supplemental Treaty of Peking in 1880 provided:

“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 Government of the United States and China that *such cases shall be tried by the proper official 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 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 officers trying the case.*⁵

Congress by the Acts of August 11, 1848, June 22, 1860, July 28, 1866 and July 1, 1870 which now appear in the Revised Statutes as Sections 4083 et seq., invested ministers and consuls with judicial authority to carry out the rights obtained for our nationals by treaties with China, Japan, Siam, Egypt, and Madagascar.

Revised Statutes Section 4086 provides:

"Jurisdiction in both 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 execute the treaties, respectively, and so 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 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 and 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."

Due no doubt to the magnitude of the cases arising in the Consular Courts in the Empire; Congress by the Act of June 30, 1906, established the United States Court for China⁶ which supercedes the Consular courts in all civil cases where the amount involved exceeds \$500 and in all criminal cases where the penalty may exceed \$100 fine or sixty days imprisonment or both, and which has concurrent jurisdiction with the consuls in cases involving less than the stated limits.

Sections four and five of the act provide:

"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 decrees of said United

⁵Italics supplied.

⁶The United States Court for China is now ably presided over by Judge Milton D. Purdy of the Minnesota bar.

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.”

From the foregoing a practicing lawyer will at once see that it may be something of a problem to determine just what kind of law applies to a particular state of facts and in some cases what that law is. The tactical advantage of being defendant instead of plaintiff may become important where others than Americans are parties. In the United States Court “the defendants may offset petitioner’s claims by a counterclaim.”⁸ But in such cases the counterclaim may be offset only to the extent of plaintiff’s claim because the United States Court has no jurisdiction to enter an affirmative judgment against a non-American.⁹ Where an American is a plaintiff the court may render an affirmative judgment for the defendant. All final judgments of the Consular Courts are appealable by either party to the United States Court for China from whose final judgments an appeal lies to the circuit court of appeals of the ninth circuit. Review by the Supreme Court by certiorari and certificate is obtainable in the same cases as other decisions of the circuit court of appeals.

The laws administered by the United States Court under the statutes are: *First*, Acts of Congress; *Second*, the Common Law; *Third*, rules and regulations for the control of procedure made by the court itself or by the preceding Consular authorities; *Fourth*, The Chinese Law. The general Acts of Congress contain very little which applies to the ordinary affairs of life, but following an early opinion of Chief Justice Marshall, the United States circuit court of appeals for the ninth circuit has held that statutes governing the District of Columbia and Alaska are “Laws of the

⁷Italics supplied.

⁸Ring Mow Zu v. Wilkins, 2 Extraterritorial Cases 3.

⁹King Ping Kee v. American Food Manufacturing Co. (1918) 1 Extraterritorial Cases 735.

United States."¹⁰ This holding provides the court with a substantial, though it cannot be said to be the most enlightened, body of laws. Numerous criminal statutes which read "Whoever in the District," etc, have been held applicable in China.¹¹ On the other hand the District usury law has been held not to apply here.¹² If the statutory law does not cover the case, the court may resort to the common law and by that is meant the common law as it existed at the time of the separation of the colonies from Great Britain.¹³ The court has divorce and probate jurisdiction, the latter exercised by way of supervision over the consuls and vice-consuls. In its equity and admiralty jurisdiction, there is a body of federal law and decisions for the court to follow. The constitution, however, has not been extended over Americans in China so that, for instance, there are no jury trials in that jurisdiction.¹⁴

The most puzzling question appears to be that of what law applies to real estate. The British Supreme Court for China has taken the position that the law of China controls. Its reasoning is that by the English law realty is controlled by the *lex loci rei sitae*. The great difficulty with this rule is that Chinese law is to a great extent a matter of local custom, much of it inconsistent with the policy of the English law, though English methods of conveyance and testamentary disposition have become customary among the British in China.¹⁵ The United States Court also takes the view that the Chinese law should be applied to real estate.¹⁶

It may seem strange that the Chinese have not developed a system of land and other laws during the long period covered by their national existence. It is a fact that on paper they have a criminal code. Civil codes and Codes of Procedure have been formulated but not yet adopted. It may be that these codes have been prepared in the hope of abolishing extraterritoriality, but at any rate it seems to be generally conceded that ancient Chinese

¹⁰*Biddle v. United States*, (1907) 1 Extraterritorial Cases 120, 84 C. C. A., 415, 156 Fed. 759.

¹¹*United States v. Hadley*, (1910) 1 Extraterritorial Cases 207-210.

¹²*International Banking Corporation v. Barnes*, (Not yet officially reported).

¹³*Biddle v. United States*, (1907) 84 C. C. A. 415, 156 Fed. 159.

¹⁴*United States v. Furbush*, 2 Extraterritorial Cases 81; *Downes v. Bidwell*, (1901) 182 U. S. 244, 45 L. Ed. 1088, 21 Sup. Ct. 770; *In Re Ross*, (1891) 140 U. S. 453, 35 L. Ed. 581, 11 Sup. Ct. 897.

¹⁵*Tam Wa v. Atkinson*, 2 Extraterritorial Cases 17; *MacDonald v. Anderson*, (1904), 1 Extraterritorial Cases 77; See also *Secretary v. Charlesworth*, [1901] A. C. 373.

¹⁶*Doong Ny v. Crew*, 2 Extraterritorial Cases 102.

custom still controls, especially in places remote from foreign influence, a very natural condition when we consider that the paper codes are borrowed in great measure either from the much more progressive Japanese or from Western nations whose habits of life differ materially from those of the Chinese. The absence in development may be explained in part by the fact that the Chinese are prone to compromise their differences either through their guilds or by private negotiation out of court, a very wise course where, as in China, justice appears to go to the highest bidder. The writer is informed by Europeans who appear to be perfectly reliable and who practice in Chinese courts that in Chinese litigation it is often necessary to negotiate with the judge through Chinese channels for the purchase of a favorable judgment. Under present conditions, judges' salaries are infrequently paid and doubtless they could not be honest according to our standards if they tried. Their courts officials would prevent it. This problem of official honesty is the most serious one in China. "Squeeze" or, as we would call it, graft permeates all business and official life as well as household matters and is looked upon as the normal state of affairs. During the recent siege of Tientsin native merchants contributed funds to provide for the relief of the wounded Chihli soldiers, but the Chinese doctor in charge reported that he could provide no comforts because he had to pay the foreign doctors and nurses high salaries. The foreigners had as a matter of fact contributed their services and paid their own expenses. It would not take a Sherlock Holmes to guess where the money went and it is doubtful if any Chinese believed the report. Lying is a perfectly legitimate means of saving "face" in China and being caught at it is not esteemed a disgrace. That is one reason the administration of justice seems hopeless here. Perjury, according to an eminent authority, "is to a Chinaman as venial an offense as punning to an Englishman." The Chinese recognize this and trust one another not at all either as to veracity or as to property. To illustrate the latter, the soldiers who were operated upon in the above mentioned incident took their entire equipment to the improvised operating room in order to prevent its being stolen from the ward in their absence. Human suffering appears to excite no pity and no consideration, and the victim of sickness or accident receives no help whatever from casual passers-by for fear that an obligation will be incurred for

his care or burial. In justice to the Chinese it must be said that suffering is borne stoically.

Defective as justice may be in Chinese courts, there are many disadvantages in an extraterritorial jurisdiction. Non-American witnesses cannot be punished for perjury by the United States Court, and indeed cannot be compelled to attend by that court. In practice when such witness is desired and he refuses to attend voluntarily, application is made by the court to the American Consul who, in turn, takes the matter up through diplomatic channels with the official representatives of the nation to which the witness belongs, in the case of the Chinese, with the Chinese foreign office and, by comity, attendance is compelled.

On the whole, the Chinese appear to feel confidence in the impartiality of justice as dispensed in the extraterritorial courts and resort to expedients, such as carrying their property in the name of some foreigner in order to have the protection afforded by those courts. The effect of justice fairly administered is thus apparently not wholly lost upon them. Perhaps if extraterritoriality must be abolished, a mixed court in which foreign judges would sit with natives might be substituted.

It must be admitted that some rather startling results sometimes have been obtained in the punishment of crime where extraterritoriality is involved. One authority cites a case where Chinese and foreigners conspired to commit a robbery which culminated in a murder. Of the conspirators, two Chinese were convicted and beheaded the day following the crime. An Englishman was turned over to the British authorities but the witnesses for the prosecution disappeared before the case came to trial, and the defendant was released. Two citizens of the United States got four years imprisonment and a Dane was released without trial because the Danish Government had made no provision for such trial.

However unusual may be some of the results of extraterritoriality, it gives the foreigners enjoying that privilege a sense of security which is very comforting. Judging by the treatment sometimes accorded the native population by their police and courts, it would be very unpleasant for foreigners should the privilege be withdrawn, for too often the ignorant policeman assumes to impose what he thinks to be suitable corporal punishment without the mandate of any court. Those nationals, such as the Russians and Germans, who, as the Chinese phrase it, "have no rights" have been known to suffer thus as well as to remain months

in prison without trial. Chinese prisons are not desirable places of residence. Even in the show prisons it is only recently that the prisoners have been provided with two meals instead of the traditional one a day.

While Chinese police may arrest foreigners who have extra-territorial rights they are bound to turn them over to their consular officers at once and the consequence is that such foreigners are seldom troubled, and it may be said for them they do not often abuse their privileges. The over-regulated American who, at home, can scarcely go to his office without hazarding arrest and incarceration at the hands of an arrogant policeman for some trifling infringement of a newly made regulation, feels a peculiar sense of freedom and relaxation in the Orient. Perhaps that is the chief charm of life here.