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Legal Phases of the Shantung Question

Harold Scott Quigley

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By HAROLD SCOTT QUIGLEY*

THE Versailles Peace Conference awarded the German rights, title and privileges in Shantung Province to Japan.[1] This award was the climax of nearly five years of military and diplomatic effort through which Japan had captured Tsingtao, taken possession of the German and Sino-German properties, both public and private, throughout Shantung, and made "gentlemen's agreements" with Great Britain, France, Russia and Italy, recognizing her right to retain what she had won.[2] To this award China refused to become a signatory, resting her refusal upon legal and ethical grounds.[3] To examine the former, some phases of which have received scant attention, is the purpose of this article.

The legal argument of the Chinese Government for the direct restitution of the leased territory of Kiaochao, together with the railway and mining rights which Germany possessed in Shantung before the war, advanced one principal and two secondary points. If this presentation of alternatives is prejudicial to China's case the ambiguity of international law as applied to certain elements of the problem justly counterbalances prejudice. Even in courts of municipal law, furthermore, the parties are reluctant to rest a case upon a single legal principle or line of reasoning.

The principal legal proposition put forward by Mr. Lu Cheng-hsiang and his associates at Versailles and maintained consistently by the Chinese Government since, is that, in consequence of China's declaration of war on the Central Powers and accompanying declaration of abrogation concerning " agreements and conventions heretofore concluded between China and Germany, and between China and Austria-Hungary, as well as such parts of the international protocols and international agreements as

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[1]Treaty of Peace, Articles 156, 157, 158.

[2]2 MacMurray, J. V. A., Treaties and Agreements with and concerning China, 1894-1919, 1919-21, 1488. Also in China Year Book, 1921-2, 707-711.

[3]China Year Book, 1921-2, 711-713.

concern only the relations between China and Germany and between China and Austria-Hungary,"[4] the lease convention of 1898 under which Germany had administered Kiaochao and enjoyed other specified privileges had been abrogated.[5] Anticipatory of the necessity of meeting the argument that in ratifying in 1915 a treaty with Japan by which "the Chinese Government agrees to give full assent to all matters upon which the Japanese Government may hereafter agree with the German Government relating to the disposition of all rights, interests and concessions which Germany, by virtue of treaties or otherwise, possesses in relation to the Province of Shantung,"[6] China's argument distinguishes the position of China after her declaration from that which she occupied at the time the Sino-Japanese treaty of May 25, 1915 was concluded. At the latter date China was neutral and her ratification was "clearly subject . . . to the implied condition that China remained neutral throughout the war, and therefore, would be unable to participate in the final Peace Conference . . ." China's entry into the war so vitally changed the situation contemplated in the treaty, that, on the principle of rebus sic stantibus, it ceases to be applicable.[7]

Regarding this argument as sound the Chinese Government nevertheless included in its brief two alternative propositions; both of these contemplate the contention that the abrogation declaration was ineffective against a prior treaty guaranteeing that of which the abrogation would operate as a deprivation; the first sets up the alternative that the treaty was void ab initio because imposed with force majeure;[8] the second alleges the incompetency of Germany to transfer the leased territory to a third power.[9] This allegation is based upon the fifth article of section 1, Lease of Kiaochao, by which "Germany engages at no time to sublet the territory leased from China to another Power."[10]

Since the Chinese Government has relied rather upon the former than the two latter lines of argument, the latter will be dealt with first. That which rests the incompetency of the Sino-

[4]Ministry of Foreign Affairs, Official Documents relating to War (for 1917), 14.
[5]China Year Book, 1921-2, 667-8.
[6]Same, 667.
[7]China Year Book, 1921-2, 667.
[8]Chinese White Book, cited in 10 New York Times Current History Magazine, ii, 550.
[9]China Year Book, 1921-2, 667-8.
[10]Same, 669.

Japanese treaty of 1915 upon Japan's use of force majeure appears to be without adequate basis in international law. No statement could be clearer than the following from a recent revision of Oppenheim's treatise: "It must, however, be understood that circumstances of urgent distress, such as either defeat in war, or the menace of a strong state to a weak state, are, according to the rules of international law, not regarded as excluding the freedom of action of a party consenting to the terms of a treaty. The phrase 'freedom of action' applies only to the *representatives* of the contracting states."[11] John Bassett Moore points out that: "Coercion, while invalidating a contract produced by it, does not invalidate a treaty so produced."[12] He also quotes Bernard to the same effect: "It is commonly laid down that neither the plea of duress nor that of laesio enormis, [a degree of hardship, that is, so plain and gross that the sufferer cannot be supposed to have contemplated what he was undertaking]—pleas recognized, directly or circuitously, in one form or another, by municipal law both ancient and modern, can be allowed to justify the nonfulfilment of a treaty."[13] Vattel takes the same view: "On ne peut se dégager d'un traité de paix en alléguant qu'il a été extorqué par la crainte ou arraché de force."[14] Phillipson, writing in 1916, qualifies his statement of the law: "In the case of conventions established during peaceful relationships, duress may generally be deemed a ground for repudiation; but in a treaty of peace, force and compulsion cannot be so held."[15] He does not, however, cite any cases in support of this distinction. Hall attaches to his general statement that international law "regards all compacts as valid, notwithstanding the use of force and intimidation" the condition that these compacts "do not destroy the independence of the State which has been obliged to enter into them."[16] Westlake and Lawrence do not qualify the rule.[17] The practical unanimity of these authorities is sufficient warrant for rejecting the argument from force majeure on legal, however strong it may be on moral, grounds.

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[11] 1 International Law, 3rd ed., 660.
[12] 5 International Law Digest, 183.
[13] Lectures on Diplomacy, 184; quoted in I. L. D. V. 184.
[14] Droit des gens, liv. IV, chap. iv., sec. 37.
[15] Phillipson, Coleman, Termination of War and Treaties of Peace, 162.
[16] International Law, 6th ed., 319.
[17] 1 Westlake International Law 290; Lawrence Principles of International Law, 6th ed., 327.

The second alternative proposition advanced by the Chinese Government is that Germany was estopped from the transfer of her lease to Japan by a term of the lease itself.[18] This provision is peculiar to the Kiaochao lease; those of Port Arthur, Wei-Hai-Wei, Kowloon and Kuang-Chow-Wan have no explicit statement; an argument that the latter are non-transferable may, however, be made on the basis of the general nature of such leases. Involving, as they do, a temporary grant of administrative jurisdiction as well as the possession of territory, the consent of the transferor has been "overborne by superior force, and the argument is concluded under duress . . . If the lessor is unwilling, though he is by force of circumstances constrained, to make the conveyance, it is inconceivable that he should consent to its transfer to a third party."[19] It is difficult to see the logic of Dr. Tyau's inference; if a forced lease is legal ab initio, its legality would appear to be unaffected by a continuance of the application of force majeure such as a transfer of lease would imply. In 1905, it is true, Russia transferred the Liaotung peninsula to Japan "with the consent of the Government of China" but that the consent was ex post facto is revealed by the paragraph following that of the transfer, in which "the two High Contracting Parties mutually engage to obtain the consent of the Chinese Government mentioned in the foregoing stipulation."[20] The consent, given by that government in the Komura treaty, was given under duress and to the transferee, not the transferor.[21] The two treaties of transfer, like the original treaty of lease, recognize the ultimate sovereignty of China over the leased area. In neither situation does there appear to be apprehension that such recognition would operate against transfer.

Where, however, an express agreement not to transfer has been incorporated in the treaty of lease, the issue becomes twofold. That Germany was bound not to make a voluntary assignment of Kiaochao is evident; to that extent the special stipulation was of importance since it guaranteed the Chinese Government against any exchange which Germany might regard as ad-

[18]"Germany engages at no time to sublet the territory leased from China to another Power." Art. 5, sec. 2; 1 MacMurray 1898-4 114.

[19]Tyau, Treaty Obligations between China and other States, 69.

[20]Treaty of Portsmouth, Art. V.; 1 MacMurray, 1905-8, 523. Also in Takahashi, International Law applied to the Russo-Japanese War, Appendix IV.

[21]1 MacMurray, 1905-18, 550.

vantageous. The probability of such voluntary transfer was, however, extremely remote. On the other hand there was the possibility, later to become reality, that Germany would be compelled by force majeure to surrender her lease to another Power. In that contingency the obligation of Germany would be dissolved under the doctrine of rebus sic stantibus[22] or become void through impossibility of performance.[23] Since the transfer of the Kiaochao lease took place under conditions of force majeure, the necessary reply to the second alternative proposition of the Chinese Government is a denial of its legal effectiveness.

Throughout the argument upon this proposition the word "transfer" has been used as equivalent to the German words "weiter verpachten" which are properly translated "sublet" in English texts of the treaty.[24] The broader words *"jang," "chuan jang,"* and *"chuan,"*[25] all meaning transfer, have been used interchangeably with the narrower word *"chuan ch'u,"* which appears in the Chinese text of the original lease,[26] by the spokesmen of the Chinese Government at the Peace Conference and subsequently. To this wider interpretation of the terms of Article V the Japanese Government appears to have taken no exception. To sublet is to set up a relationship between the lessee and a new tenant, clearly a different proceeding from that involved in the Japanese conquest of Kiaochao. The translation "sublet," therefore, would be still less advantageous to the argument of the Chinese Government than that of "transfer" though it may be argued that an agreement not to sublet would imply the obligation to refrain from transfer.

The principal legal proposition advanced by China does not depend upon either of the propositions discussed above. It rests upon the "general rule that war abrogates the treaties existing between the belligerents . . ."[27] In accordance with this principle, in declaring a state of war to exist between China and the two

[22]See 1 Oppenheim 688-693; 1 Westlake 295-297; Foster, Practice of Diplomacy 299-300.

[23]1 Oppenheim 694.

[24]"Deutschland verpflichtet sich, das von China gepachtete Gebiet niemals an eine andere Macht weiter zu verpachten." Second paragraph of Article V., "Convention for the Lease of Kiaochow, 1898;" in Treaties, Conventions, etc. between China and Foreign States, 3 Imperial Maritime Customs, 30 Miscellaneous Series II, 946.

[25]Memorandum concerning Shantung (prepared for the use of the Chinese delegates to the Peace Conference) 4, 15.

[26]Customs, Treaties, etc. 947.

[27]2 Westlake 32.

principal Central Powers, the Chinese Government declared the consequent abrogation of its treaties and other agreements with them. At Versailles and in the recent interchange of correspondence with Japan, the position of China has been that the "lease of Kiaochao Bay expired immediately on China's declaration of war with Germany."[28]

To the general rule that war abrogates all inter-belligerent treaties international law admits exceptions. Arrangements to regulate war, transitory or dispositive treaties, and conventions including signatory third powers are the exceptions usually recognized.[29] Whether the treaty for the lease of Kiaochao is to be included under the general rule or under an exception depends upon the nature of the lease.

The leases of territory which have been embodied in conventions are of two principal types, the lease in perpetuity and the lease for a term of years. In the first category are the lease of the Panama Canal Zone held by the United States,[30] the lease by the Sultan of Zanzibar of his mainland possessions to the British East Africa Company, made perpetual in 1891 and later annexed to the Crown,[31] and the leases of "concessions" for foreign settlement at Tientsin, Hankow, Kiukiang, Newchwang, Canton and other Chinese ports;[32] in the second the group of leases secured by four of the powers from China in 1898, in each of which a term of years was specified.[33] Agreement is unanimous that the lease in perpetuity is equivalent to cession. The rescission of the German concessions at Hankow and Tientsin and the Austro-Hungarian concession at Tientsin, which resulted from the Great War, was not a product of the declaration of abrogation but of the defeat of Germany. There is excellent authority to support the contention that leases for a term of years are "disguised" cessions. Writers who take this view make no distinction between leases in perpetuity and leases for a term of years and none on the basis of length of term. They regard the reservation of sovereignty, express or implied, as a disguise for a situation amounting to annexation and contemplated as leading to annexa-

[28]"Chinese Memorandum to Japan," Oct. 5, 1921, Peking and Tientsin Times, Oct. 7, 1921.
[29]2 Westlake 32-34; 2 Oppenheim, 2nd ed, 129-131; Lawrence 360-365.
[30]Malloy's Treaties.
[31]1 Westlake 135.
[32]Morse, Trade Administration of China, Chap. VIII.
[33]1 MacMurray (Liaotung) 1898-5, 119-121; (Wei-Hai-Wei) 1898-14

tion. It is somewhat surprising that this view is frequent in the French treatises since the French school of international law is notable rather for its emphasis upon the letter of the law than the practice which often evades it. Among others Ernest Nys,[34] A. Rivier,[35] Perrinjaquet,[36] and Louis Gerard[37] may be cited as liberal constructionists upon the issue in question. Lawrence,[38] Westlake,[39] who quotes Despagnet, and, following him, Pitt-Cobbett[40] also emphasize the "disguise" to be detected in what purport to be leases for a term of years only. Hershey classifies the lease for a term of years as a "disguised or indirect" cession.[41]

The qualifying terms, such as "unlikely," "practical," "matter of fact," etc., which modify the views of these writers indicate their hesitation to support the establishment of a principle by reading between the lines when the lines of the lease themselves clearly favor the lessor state by the reservation of sovereignty during the existence of the lease and by prescribing a definite duration of its existence:

"His Majesty the Emperor of China . . . engages, while reserving to himself all rights of sovereignty in a zone of 50 kilometres (100 Chinese li) surrounding the Bay of Kiaochow at high water . . ."[42] His Majesty the Emperor of China leases to

152-3; (Kiaochao) 1898-4, 112-116; (Kwangchouwan) 1898-7, 124.

[34]"L'acquisition du territoire et le droit international," in Revue de Droit International 36, 1904, 376.

[35]1 Principles du Droit des gens 180.

[36]Revue generale de Droit international public 16, 1909, 349-367.

[37]Des cessions deguises de territoires en Droit international public 286.

[38]Principles 176-177.

[39]1, 135-136.

[40]1 Leading Cases 110.

[41]Essentials of International Public Law 184.

[42]Article 1; The respective German and Chinese words used in this sentence are rechte der Souveränität and chu chüan, both meaning sovereignty; in article III. (II. 946) where some English translations, e. g. that used by Professor Hershey in 13 American Journal of International Law 533, read, "in virtue of rights of sovereignty over the whole of the water area of the bay . . .," while others read rights of administration, the respective German and Chinese words are hoheitsrechte and kuan shih, meaning respectively rights of sovereignty and rights of administration. From the Chinese point of view no distinction was intended between the status of the water area and the land area involved in the lease; over both China's sovereignty was reserved. The official announcement of the German Government made no distinction between the status of the land and the water area: "the Imperial Chinese Government has transferred to the German Government, for the period of the lease, all its sovereign rights in the territory in question." (1 Westlake 136). Since this statement recognizes that the lease is for a period of years it recognizes by inference the reservation of China's sovereignty; hence the terms rights of sovereignty and rights of administration are

Germany, provisionally for ninety-nine years, both sides of the entrance to the Bay of Kiaochow."[43]

Westlake recognizes that "when property is leased, the lessor retains a proprietary right which runs concurrently with the lessee's right of enjoyment. If therefore the analogy were closely pressed, the state which grants a lease of territory would be held to retain all the time some sort of sovereignty over it."[44] Pitt-Cobbett prefaces the conclusion stated above with premises that hardly lead him logically to his conclusion:

"As to the effect of such international leases, it would seem strictly that, whilst conferring rights of user and enjoyment on the lessee, yet the territory remains subject to the sovereignty of the lessor, and subject also to any prior obligations specifically attached thereto. The reservation of sovereignty, moreover, might also be said to imply the obligation on the part of the lessee not to use the territory to the prejudice of the lessor."[45]

Oppenheim points out that while "such cases comprise, for all practical purposes, cessions of pieces of territory . . . in strict law they remain the property of the leasing state."[46] His position is directly contradictory to that taken by writers cited above:

"And such property is not a mere fiction, as some writers maintain, for it is possible for the lease to come to an end by expiration of time or by rescission. Thus the lease of the so-called Lado Enclave, granted in 1894 by Great Britain to the former Congo Free State, [which an anonymous writer in I, R. G. D. I. P., 380, cited by Westlake, I, 136 , n. 1, declared to be 'not a true letting but an alienation'] was rescinded in 1906."[47]

Hall takes an even more definite stand for strict interpretation:

"These and such like privileges or disabilities are the creatures, not of law, but of compact . . . They conform to the universal rule applicable to jura in re aliena. Whether they be customary or contractual in their origin, they must be construed strictly. If, therefore, a dispute occurs between a territorial sovereign and a foreign power as to the extent or nature of rights enjoyed by the latter within the territory of the former, the presumption is against the foreign state, and upon it lies the burden of proving its claim beyond doubt or question."[48]

The Naval War College concluded that: "the general position

practically identical. See 2 Customs, Treaties, etc., 944, also 1 MacMurray, 1898-4 113.

[43]Article II.

[44]I, 135-136.

[45]1 Leading Cases 110.

[46]I, 310.

[47]Same.

[48]International Law 158-159.

assumed by the powers is not that sovereignty has passed, but that the jurisdiction to the extent named in the treaty of cession has passed to the leasing power."[49] John Bassett Moore does not admit political considerations into the interpretation of a lease. In a letter responding to an inquiry from a friend of the writer he wrote:

"The English versions that have been published . . . are not accurate. They are even more favorable to Germany than the German text of the agreement, while the Chinese text is distinctly less favorable to Germany than is the German text . . . From this it is easy to infer that, in the case of those who have sought to treat the Chinese leases as 'disguised cessions,' the wish has been father to the thought. Personally I am not inclined to accord to governments, any more than to individuals, the benefit of the doubt in the interpretation of instruments the acceptance of which they impose upon others by force."[50]

As would be anticipated, Chinese writers are strict constructionists. M. T. Z. Tyau regards the leases granted by China as "a species of international servitudes" to be "construed strictly against the beneficiary states."[51] Wen Sze King takes the same view.[52]

From the foregoing summary of opinion regarding the nature of the leases of which that of Kiaochao is typical, the necessary conclusion from the legal standpoint is that they are what they are entitled, leases for a definite term of years, to be surrendered at the expiration of the term. Thus the Sino-German lease treaty of 1898 was not a pactum transitorium, setting up a permanent state of things such as would be done by a peace treaty in determining a boundary. Since there can be no argument that it belonged to either of the other excepted categories it fell necessarily within one of those susceptible of abrogation by war or by declaration upon the outbreak of war. In view of its clauses providing for administrative powers, the better conclusion would seem to be that it was a political treaty not contemplated as establishing a permanent condition of things.

The question now arises: did China forfeit her right of abro-

[49]Naval War College 1902, p. 32.
[50]Letter of Mar. 25, 1921.
[51]Treaty Obligations 68.
[52]"The Lease Conventions between China and the Foreign Powers," in 1 Chinese Social and Political Science Review, 25-26. He quotes Bluntschli, Le Droit international 209, 1 Phillimore International Law 391, and Wilson, International Law 153, in support of strict construction of international servitudes.

gation by consenting to the Shantung clauses of the Twenty One Demands quoted above? As already stated China's argument invokes the principle of rebus sic stantibus. The status of a co-belligerent and participant in the peace treaty, she has contended, is vitally different from that of a neutral. As a neutral she had no right to abrogate treaties and as such she submitted to the Japanese ultimatum. It would hardly be argued that the ultimatum would have been served upon China had she been associated with the Allies at that time. In logic, the difference in her circumstances upon becoming a belligerent was entitled to the same respect as it would have received two years previously; a vital difference in 1915, it was equally so in 1917. In view of all the circumstances her argument is sound.[53]

It might have been argued by the Chinese Government that the word "possesses," used in the first article of the 1915 treaty with Japan, was contemplated as to become applicable at the date when China actually was to "give full assent," i. e., at the date of the treaty of peace. Until then, Japan's title could be one of conquest only. If, in the meantime, Germany's possessions in Shantung province should be brought under the title of China, the "rights, interests and concessions which Germany, by virtue of treaties or otherwise, possesses in relation to the Province of Shantung" would be nil. Hence there would be nothing for the German Government to transfer to Japan and nothing for China to agree to. Under this interpretation the question of the estoppel of the right of abrogation would not arise.

China did not request Japan to release her from the Shantung agreement, nor did she declare herself no longer bound by it. In her mind, release from that engagement was implied in the declaration of abrogation of German privileges in Shantung which accompanied her declaration of war. By that declaration China resumed the leasehold and other concessions, subject to

[53]According to Dr. Ferguson's testimony, quoted by Willoughby, Foreign Rights and Interests in China 392, n. 13, in reaching her conclusion in China "took the advice of two eminent French international lawyers, of the most eminent Russian jurist who was known to the President of the Board of Foreign Affairs, who formerly had been Minister in St. Petersburg; of an eminent Dutch jurist of Holland and of an eminent international jurist from Belgium, and based her claim on the advice which was given her by the jurists, that is, that her declaration of war against Germany, notwithstanding her contract which had already been made in 1915 with Japan, of itself vitiated not only the German lease but also the treaty with Japan." Dr. Ferguson stated that this was the unanimous opinion of these jurists.

such private claims as international law would allow. Her resumption did not wait upon the peace conference but was legally complete immediately. Thereupon Japanese possession should have come to an end.[54]

The Chinese Government has not questioned the legality of Japan's conquest of the leased territory, though, as above noted, it has denied the validity of the transfer by Germany; its claims of violated neutrality have been concerned with the use of Chinese territory not under lease. In 1904 Secretary Hay, after consulting with the representatives of other interested powers, requested Russia and Japan to respect the neutrality of China. His note suggested that this could be done by localizing and limiting the area of hostilities as much as possible. Both the belligerents acquiesced in this policy, with the explicit reservation by Japan, of "the regions occupied by Russia" and by Russia, of Manchuria; the United States accepted both constructions of neutrality as satisfactory.[55] The Japanese limitation, narrower than the Russian, was put into force by the Chinese Government, which made no protest against the use of the Liaotung peninsula, east of the Liao river, as an area of war; inter alia Prince Ch'ing wrote thus to Minister Conger:

"But at such places in Manchuria as are still in charge of a foreign power and from which its troops have not yet withdrawn, China's strength is insufficient, and it will be perhaps difficult to strictly observe the laws of neutrality there."[56]

Lawrence concluded that "the experience of the Russo-Japanese struggle of 1904-1905 shows conclusively that for all purposes of war and neutrality leased territory must be regarded as a part of the dominion of the power that exercises full control over it."[57] During the joint attack of the Japanese and British forces upon Tsingtao the Chinese Government was concerned, not with protesting against the carrying of war into a leased territory, nor even against the use of adjacent territory for the movement of Japanese troops, but with the delimitation of a military zone extending about 100 miles west of Tsingtao, beyond which she would maintain neutrality.[58] When the German Government pro-

[54]Japan raised no protest against the abrogation declaration until the peace conference.

[55]Foreign Relations of the United States, 1904, 2-3.

[56]Same 121-2.

[57]Principles 176-7.

[58]Declaration of Sept. 3 (5), 1914; in China Year Book, 1921-2, 662.

tested against the military zone, China replied that while desirous of preventing belligerent operations upon her territory, she had been unable to do so and refused to be held responsible for the enforcement of strict neutrality within the zone.[59] Logically there seems to be no reason for denying to a belligerent the right to attack the possessions as well as the property of his enemy, nor is the failure to deny the right an admission that a lease is merely a cession in disguise, since the restrictions upon the former tenant continue upon the new. The consideration shown to the lessor is indeed cavalier but no less so than at the original demand for the lease. As stated by Prince Ch'ing in 1904: "No matter which of the two powers may be victorious or defeated the sovereignty of the frontier territory of Manchuria will still revert to China as an independent government."[60] China held the same view regarding Kiaochao in 1914.

This argument does not resolve the question whether Japan was legally capable of occupying the Shantung Railway throughout its length. Since China is her own sole guarantor of neutrality, Japan's right to disregard her proclamation of neutrality is clear, provided that no arrangement had been made, as in the Russo-Japanese War, to respect it. No such arrangement has been published though the Chinese Government has asserted that an "understanding" was reached with the Japanese Government according to which Japanese troops were not to encroach westward of the Weihsien station.[61] Japan argued however that her occupation of the railway was not a violation of Chinese neutrality, since the road was German property and a menace to her position in Kiaochao; she justified her conquest of the railway by assimilating its status with that of the leased territory.[62] As the concession for the railway was a term of the lease and in view of the control exercised over it by the German Government, the railway in fact was a projection of the leased area.

Account must be taken of two subsequent agreements, one of September 24, 1918, between China and Japan, the other of May 20, 1921, between China and Germany.

The secret agreement of 1918 was secured by Japan as an "adjustment of Questions concerning Shantung;" it contemplates

[59]Phillipson, International Law and the Great War 276.
[60]United States Foreign Relations 1904, 122.
[61]China Year Book 1921-2, 662.
[62]China Year Book 1921-2, 680.

the continuance in force of the 1915 agreement and disregards the intervening abrogation declaration; except for the last article, in which Japan promises to abolish the civil administration established by her in Shantung, it deals entirely with the Kiaochao-Tsinan or, as it is usually called, the Shantung Railway, providing for its policing under Japanese regulation and for the employment of Chinese citizens on its administrative staff. Article 6 states that "The Kiaochao-Tsinan Railway, after its ownership is definitely determined, is to be made a Chino-Japanese joint enterprise."[63] China's signature to this arrangement raises the question whether it is an admission by her Government of the ineffectiveness of the declaration of abrogation as applied to the Shantung concessions.

It is difficult to come to any other than an affirmative conclusion so far as the railway is concerned. It is significant that the Chinese Government, on the same day it entered into the agreement, signed another, also secret, by which, in return for a loan of 20,000,000 yen, it gave Japan the concession for building two branch lines for the Shantung Railway. The time of these agreements, within two months of the armistice, was not one likely to find the Powers anxious to assure themselves of continued Japanese aid by an open support of these new demands. Had China revealed them and requested the Powers to recognize her services as an ally by using their good offices to restrain Japan it would seem that public opinion would have compelled the Powers to do so. At least it might well have prevented Japan from pressing her demands. China's delegates at the Peace Conference would have been in a much stronger position, though it is doubtful whether the final decision would have been altered. As it happened, when the agreements of 1918 were published at Paris, the Chinese delegation felt that the ground had been cut from under them and the Chinese people united in bitter crimination of the corrupt officials who had signed the agreements. It seems altogether likely that the compelling cause back of their signature was not force but money.[64] Had it been force majeure,

[63]Same 702.

[64]"And to complete the chain of the work of consolidation she (Japan) induced China last year when Germany was collapsing to commit herself with regard to the disposal of the Shantung Railway and the Kaomei Line. Thus an open avowal was obtained from China as to her succession to Germany's rights and privileges in Shantung, in part and parcel . . . and what was the price of this cession on the part of those

the agreement to let the Peace Conference decide the status of the railway would still be valid.

The lease itself and the economic privileges not specified in the agreements of 1918 remained in the status secured by the declaration of abrogation. Although the Chinese repudiation of their own declaration in its bearing upon the railway, the principal asset of Shantung, might be construed as raising the issue of its validity in toto, strict interpretation would maintain it in all matters not specifically excepted.

The Chinese Government declined to sign the Treaty of Peace with Germany. The non-settlement of the Shantung Question prior to the Sino-German Commercial Agreement of May 20, 1921, led the Japanese Government, in a note of October 20, 1921, to assert that in it Germany took the Japanese view, that the Treaty of Versailles effected the transfer of the German rights and interests to Japan, and that China, as a party to the agreement, had declared herself cognizant of the transfer.[65] The Japanese assertion was based upon the article which "affirms that Germany has been obliged by the events of the war and by the Treaty of Versailles to renounce all the rights, interests and privileges which she acquired by virtue of the Treaty concluded by her on March 6, 1898 and otherActs concerning the Province of Shantung, and finds herself deprived of the possibility of restituting them to China."[66] The reply of the Chinese Government is an adequate rebuttal of the Japanese contention:

"As to the criticism directed to the declaration made by the German representatives to China, it is to be observed that at the time when they came to negotiate the Commercial Agreement with China, China still insisted on her demand for the restoration of Kiaochao. But, owing to the conditions of the war and the Treaty restraint, Germany lost, by force majeure, her power of returning Kiaochao to China, for which she expressed her regret to the Chinese Government. To this, it must be also noted, the Chinese Government has only declared its acknowledgment of Germany's explanation as such and no more."[67]

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who did the 'job' it might be asked? It was the paltry sum of twenty million Japanese yen which supplied the government with funds after August 10, 1918, when the new President was installed." From an article by Liang Chi-Chao on "The Causes of China's Defeat at the Peace Conference," in 9 Millard's Review, July 19, 1919, 262-3. The 20,000,000 yen were squandered in fruitless military operations; North China Herald, Feb. 8, 1919, 322.

[65]Peking and Tientsin Times, Oct. 21, 1921.

[66]China Year Book 1921-2, 738.

[67]Peking and Tientsin Times Nov. 5, 1921.

In other words the affirmation in the Commercial Agreement may be interpreted only as a mutual recognition by China and Germany of the *actual* dispossession of Germany and her consequent inability to make restitution, without prejudice to either country's judgment upon the legality of the Versailles decision.

In accordance with the introductory statement of intention this argument has refrained from reference to the considerations of international good will and good morals which might well have restrained Japan from the Shantung enterprise, which has brought her little more than obloquy and increased budgets. The degree to which Japanese activities in Shantung have been found legally justifiable is an indication of the gap that still separates law and ethics, revealed when a strong power deals with a weaker one. Nevertheless China's abrogation declaration is upheld, as it would, very probably, have been upheld at Versailles, had the Powers possessed freedom of action.