

GUNBOAT JUSTICE

British and American Law Courts
in China and Japan (1842-1943)

Volume 2: Destruction, Disorder and Defiance
(1900-1927)



Douglas Clark

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In memory of my maternal grandfather

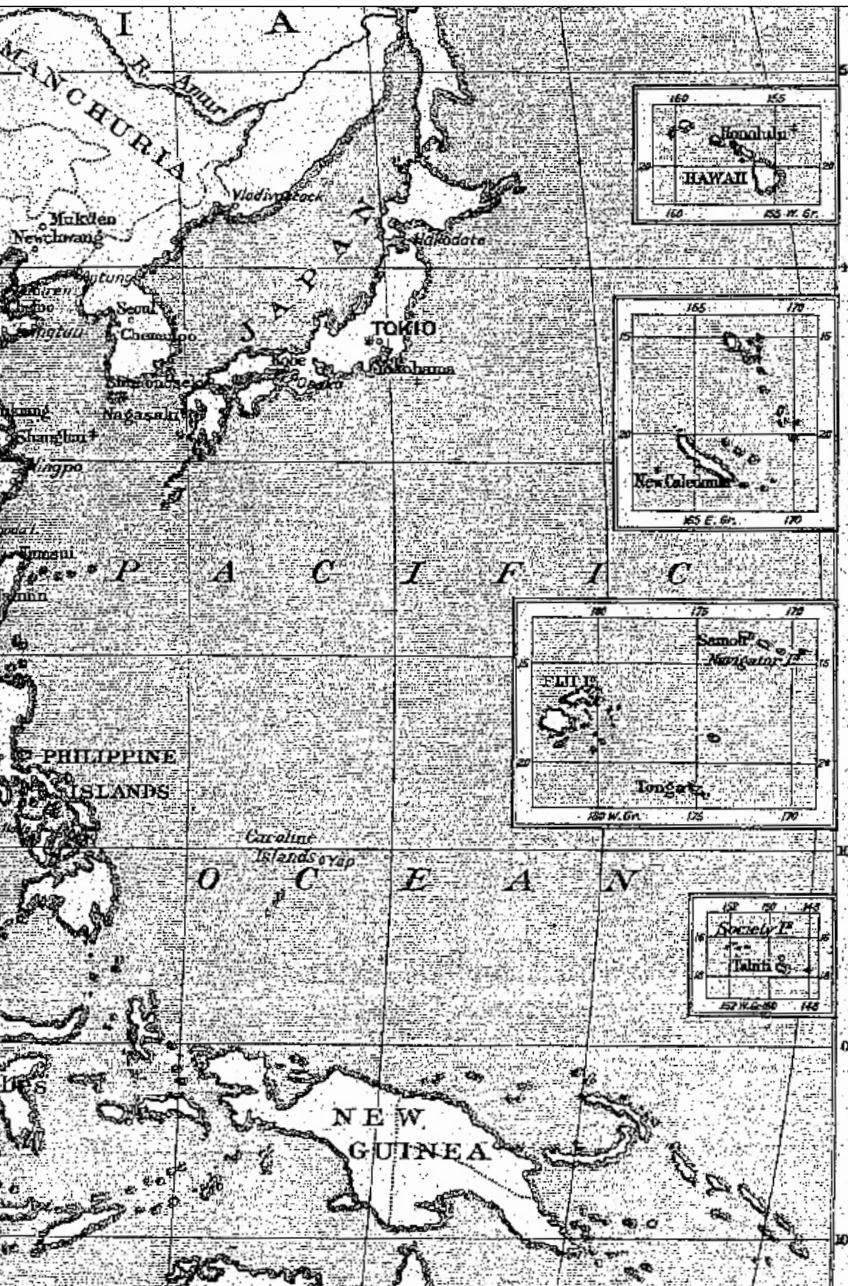
The Honourable Mr Justice Russell Skerman

Supreme Court of Queensland

Foreign Office Map Of The Main



Treaty Ports In East Asia, 1925



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Romanisation and place names

I have used transliterations of Chinese personal and place names in accordance with the transliterations used during the period covered by this book. Where someone is now much better known by a different transliteration, I have used this.

For place names in China, for any reference prior to the Communist Revolution in 1949, I have generally used the contemporaneous English names, such as Canton and Amoy. Beijing is referred to as Peking for the most part but also as Peiping for the period that was its official name. This is the way the names appear in the documents of the time and would have been spoken in English.

For street names in Shanghai, I have used the pre-World War II street names. Where appropriate I give the current street name in parentheses.

For references to places and personal names in China after the Communist Revolution, I have used Hanyu Pinyin, except where a person is much better known by a different transliteration.

For Japanese names, I have used modern romanisations. For Korean names I have used contemporaneous transliterations.

For all quotations or names of publications I have kept the original spelling.

Currencies in Shanghai

There were four major currencies in use in Shanghai during the period covered by this book. For almost the entire period, the Pound Sterling to United States Dollar exchange rate was £1 = US\$5. For a time, the US dollar was also referred to as the Gold Dollar (G\$). The other two currencies in use were Mexican silver dollars and the Chinese Tael (based on the price of silver). The value of these currencies fluctuated wildly. In 1930, US\$1 was equal to about 3 taels and \$3.5 Mex. However, at other times the Mexican dollar was equivalent to or worth more than the US\$.

I have not attempted to give any conversions of currency in the book.

File References

Unless indicated otherwise, all file references are to the UK National Archive file reference for a document. PRONI files refers to the Wilkinson Papers kept at the Public Records Office of Northern Ireland. Where possible full file references have been given for the PRONI papers. However, these were not always available.

Cartoons and Illustrations

All cartoons and illustrations accompanying the text, with two exceptions, are contemporaneous drawings published at the time. The exceptions are the sketches of the Supreme Court and George French's grave which have been made from photographs.

INTRODUCTION TO VOL II

Destruction, Disorder and Defiance

BELOW IS A SHORT INTRODUCTION for Volume II of this book. For readers who do not have or have not read Volume I, the Introduction to Volume I is reproduced as an appendix. This should be read first before reading the following.

Volume I of the book described the development and practice of extraterritoriality in Japan and China in the 19th century. We have seen how consular jurisdiction developed, followed by the opening of the British Supreme Court for China and Japan. Over the years, through case law, new Orders in Council and new treaties, a workable system of jurisprudence was built up in the British Courts in both China and Japan, and later, Korea. America did not establish any formal court systems in China, Japan or Korea, relying instead on consular courts. In the Ross case, the US Supreme Court confirmed the constitutionality of the consular court system and that there was no right to trial by jury.

Japan responded to its forced opening and the imposition of extraterritoriality by engaging in a massive program of political, economic and legal reform. Through this it was able to bring an end to extraterritoriality and become a power in its own right, including defeating China in a war in 1895. China, on the other hand, failed to respond to the challenge posed by foreign countries and continued a long decline as the Manchus hold on power became weaker and weaker. By the end of the 19th century, the Manchus appreciated the need for reform but were not yet willing to implement it. That would take another major defeat, which was to come very soon, in

1900, with the failed Boxer Rebellion and the almost complete destruction of Peking by the foreign powers.

The end of extraterritoriality in Japan also did not mean the end of Japan as a player in our story. The Japan that had just joined the “family of nations” wanted to become a great power and was increasingly asserting itself. First, it took control of Korea without, at first, annexing it, bringing extraterritoriality back to a Japanese-controlled territory. This led to the British authorities being forced to bring cases against one of their own nationals to defend Japanese interests.

The beginning of the 20th century marked a new era in the British courts. All but one of the judges and lawyers who had played important roles in China and Japan in the 19th century had retired or died. The one remaining judge, H.S. Wilkinson, was about to achieve his long-held ambition to be Chief Justice of the Supreme Court. Once H.S. Wilkinson retired, the British court also saw major changes in the way it was staffed. Instead of local appointments, judges were for many years brought in from outside China.

America also set out about reforming its practice of extraterritoriality in China and Korea, finally establishing a United States Court for China. This court went through a number of teething pains with poorly drafted legislation and an unsatisfactory appointment for the first judge. Eventually a judge, Charles Lobingier, was appointed who, very much in the mold of Edmund Hornby, the first British Chief Judge, set the court on a solid foundation for the rest of its life.

The arrival of a “sister” court (as they referred to each other) and the increase in international trade and business brought new challenges to the British Court. New jurisdictional and legal issues arose including how to deal with witnesses who perjured themselves in each other’s courts. In one major case, the British brought a criminal prosecution against an Irish newspaper editor for defaming the new judge of the United States Court.

The new century was not all bad news for China. The Republican Revolution in 1911 brought hope for change with the introduction of democracy and serious legal reform. But this hope was soon snuffed out by a failed attempt to restore the monarchy which caused the country to collapse into a civil war and almost total disorder that continued for more than a decade.

War was, throughout the 20th Century, a constant theme for both British and American courts. World War I brought a variety of cases before the courts. Japan also increased its demands on China, taking over German concessions and territory during World War I. The civil war in China from 1916 up to the Nationalist Party's victory in 1927 generated numerous cases involving smuggling, sedition and gun-running to name just a few.

The Chinese people did however start to defy foreign power, launching national protest movements in 1919 - against the terms of the Treaty of Versailles at the end of WWI - and in 1925 - against the killing by Shanghai police of protestors. In one case, the Ningpo Guild brought a prosecution in the British Supreme Court against British policemen for torture. Indians in China also started to agitate for freedom resulting in a number of prosecutions for sedition. Still in 1926, the foreign powers still felt comfortable enough to issue a report by the long-awaited Extraterritoriality Commission putting off the end of extraterritoriality way into the future.

China had not been able to properly assert itself because it had been weakened by constant domestic and foreign wars and the need to pay indemnities to foreign powers.

The biggest and most crippling indemnity was that owed as a result of the destruction wrought by the Boxer Rebellion in 1900, to which we now turn.

PART SIX

CHINA BOXED IN
(1900 TO 1905)

CHAPTER 28

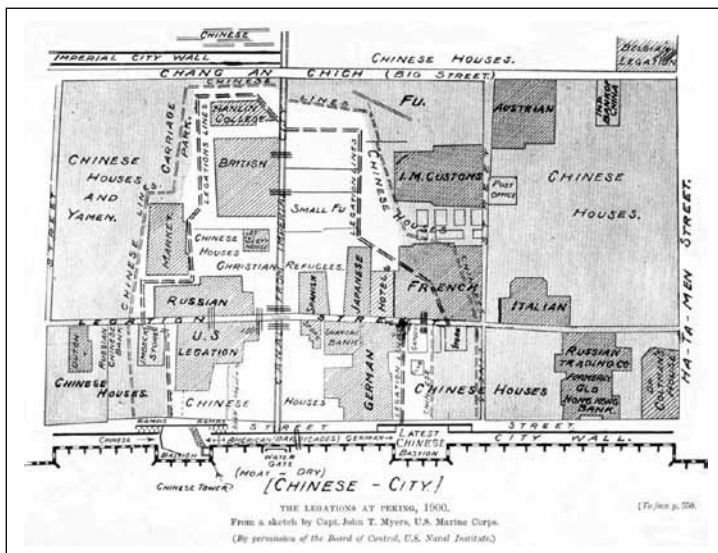
The Boxer Rebellion

THE 20TH CENTURY STARTED very badly for China and the Qing Dynasty. Things got so bad that British Judge Frederick Bourne thought that there may be full out war in China between the foreign powers which if won by one of Britian's rivals could result in the "Chinese being exported as industrial slaves."¹

While there was no full out war, the disturbances did lead to three major cases - all involving journalists - coming before Bourne in the British Supreme Court for China and Corea. In the first, a newspaper editor was sued for defamation by another editor for alleging reports of a massacre of foreigners in Peking were faked. In the second, the plaintiff in the first case was prosecuted for criminal defamation of the Judge of the newly-established United States Court for China. In the third, Bourne travelled to Korea to try a British journalist for sedition against the Japanese-controlled government of Korea.

Starting in the late 1890s, a rebellion begun by the Boxers, a religious group that claimed to be immune to foreign bullets and weapons, swept Northern China. The Boxers were particularly ferocious in Shantung and Manchuria, driving most foreigners out from remote areas or killing them. The Chinese government supported attacks on foreigners. In June 1900, the Boxers descended on Peking with the slogan "Support the

1 Royal Botanic Gardens, Directors Correspondence, Directors' Correspondence 150/40-41, Letter from Bourne to Sir William Thiselton-Dyer, 10 Septemeber, 1900



A contemporaneous map shows the small legation area surrounded by Chinese troops

Qing, exterminate the foreigners.” The battles resulted in June 1900 in the killing of senior German and Japanese officials.²

China declared war on all eight major foreign powers: Great Britain, France, Germany, the United States, Russia, Austria-Hungary, Italy and Japan. From June 1900, Chinese troops laid siege to the foreign legations in Peking where most foreigners had retreated. Given that five years before China had not been able to defend themselves against the Japanese alone, this was foolishness of the greatest degree. The dowager Empress, Cixi, in one of the war councils justified the support of the Boxers on the need to retain the support of the people. She said:

“China has been extremely weak; the only thing we can rely upon is the hearts of the people. If we lose them,

² For an account of the Boxer Rebellion, see, I Hsu, *The Rise of Modern China* (4th ed.), p390 to 406; For an account of the Boxer Rebellion in Manchuria, see M. O’Neill, *Frederick: The Life of My Missionary Grandfather in Manchuria*, pp61-67.

how can we maintain our country?"

Kang-I, another high-ranking official, emphasized the anti-foreign feeling by saying:

"When the legations are taken, the barbarians will have no more roots. The country will then have peace."

Needless to say, many other high Chinese officials did not support attacks on foreigners. Provincial governors, including Li Hongzhang in Canton and Yuan Shikai in Shandong as well as the governors in Nanking and Wuhan, all refused to recognise the declaration of war. They reached agreements with the foreign powers that there would be no fighting between their troops and foreigners in areas they controlled. More importantly, Rong Lu the commander in chief of the Beiyang forces in Peking and in charge of the siege of the legations, only attacked half-heartedly. He ordered that blanks be fired and refused to bring up larger caliber cannon.

During the siege, London newspapers, particularly the *Daily Mail* and *Daily Express* published lurid accounts of a massacre of the foreigners in the legations. The *Daily Mail* published a "Massacre Telegram" from its Shanghai correspondents recounting a heroic last stand:

"Towards the end of the third watch, about 5 a.m., the allies had practically defeated the besiegers, who were wavering and were gradually withdrawing when General Tung-fua-siang arrived from the vicinity of Tdien with a large force of Kansu braves. By this time the walls of the Legation had been battered down, and most of the buildings were in ruins from the Chinese artillery fire. Many of the allies had fallen at their posts, and the remaining small band who were still alive took

refuge in the wrecked buildings, which they endeavoured to hastily fortify. Upon them the fire of the Chinese artillery was now directed. Towards sunrise it was evident that the ammunition of the allies was running out, and at 7 o'clock, as the advances of the Chinese in force failed to draw a response, it was at once clear that it was at length completely exhausted. A rush was determined upon. Thus standing together, as the Sun rose fully, the little remaining band, all Europeans, met death stubbornly. There was a desperate hand-to-hand encounter. The Chinese lost heavily, but as one man fell others advanced, and finally, overcome by overwhelming odds, every one of the Europeans remaining was put to the sword in a most atrocious manner."³

The *Daily Express* followed with an even more lurid account of a massacre sourced from its correspondent, Henry O'Shea, who was also publisher and editor of the *China Gazette* in Shanghai.

"The end has come, and the worst horrors have been but too terribly accomplished. Every European in Peking has been massacred by the savage, bloodthirsty miscreants who now represent the supreme authority in China.

"..... The central figure and ringleader in the atrocity was Prince Tuan, who overruled the more moderate party and declared for extermination. It was by his order that the Legations were surrounded and supplies cut off, that they were decimated by incessant fire, bombarded and eventually massacred on the night of June 30 and morning of July 1, the dates originally given by our respondent.

³ Reproduced in the *Times*, July 16, 1900.

“A last desperate sortie was made by the doomed victims. It is a picture that will live for all time. The horror square led by soldiers and civilians, the hapless women and children in the centre, the last murderous attack by the infuriated Boxers. ‘Then the foreigners went mad,’ said the courier who brought the story to Sheng. ‘They killed the women and children, shooting them with their revolvers instead of using them on the Boxers.’ Upon this awful climax, the true inwardness of which we realise with a shudder of fiercest indignation, the curtain went down on a worse tragedy than Cawnpore.”⁴

In Cawnpore, India in 1857, the British had been under siege and brutally massacred by Indian troops. As it would



The Daily Express reports on the “Peking Massacre”
Robert Hart, Inspector-General of Chinese Customs was one of those reported killed.

4 Extracted from the case report for O’Shea v Cowen, North China Herald, June 25, 1902, p1255 et seq.



*Troops of the eight nation alliance that occupied (and then looted) Peking in 1900.
Note the British soldier is a Sikh. Sikhs underpinned British military power in
China*

turn out, this was no Cawnpore and no tragedy, at least, not for the foreigners. Both stories were complete tissues of lies. Thanks mainly to Rong Lu's lackluster attacks, the legations were able to hold out until they were relieved.

While not a tragedy for foreigners, it was a tragedy for the people of Peking and the people of China.

Peking's position inland meant that gunboats could not come to the rescue of the legations. But on August 4, 1900, a foreign army of over 18,000 men, made up of 8,000 Japanese, 4,800 Russian, 3,000 British, 2,100 American, 800 French, 58 Austrian, and 53 Italian troops set out from Tientsin and made their way very quickly to Peking in 10 days. They arrived on August 14, 1900 to relieve the legations. German troops were also sent to join the attack but did not arrive in time.

After taking Peking, the troops looted the city and massacred the Chinese population. The looting went on for many months, leaving behind a devastated city. Ernest Satow, previously British Minister in Japan who had just been appointed British Minister in China, described his arrival in Peking in October 1900:



Li Hongzhang in 1900. Called on, yet again, to negotiate an unequal treaty

“So through the Hatamen and along legation street, which showed terrible marks of devastation. A feeling of profound melancholy took possession of me, such as I have never experienced. It was like entering a city of the dead where the tombs had been thrown down and enveloped in dust.”⁵

During the war, the Emperor, Empress Dowager and all other officials fled Peking. Li Hongzhang was called upon to negotiate with the foreigners. While the capture of Peking could have led to the end of the Qing Dynasty, this did not suit the foreign powers who were more content to continue to carve up China while leaving a weak government in power.

The negotiations for a peace settlement resulted in yet

⁵ I. Ruxton (ed), *Sir Ernest Satow's Peking Diary (Vol 1, 1900-1903)*, p34.

more onerous terms being imposed on China. This included a massive indemnity of 450 million taels (£67.5 million pounds at the time) to be paid over 39 years. The “Boxer Indemnity” was divided up between the foreign powers with Russia and Germany receiving 49% between them. Japan, despite having contributed the largest number of troops and also having seen one of its officials killed, only received 7.7%.⁶ Russia, which had occupied Manchuria during the fighting, stayed there despite promises to leave. The result of these negotiations were seen as a great failure in Japan and were one of the principal drivers of Japan’s attack on Russia three years later. Payment of the Boxer Indemnity crippled China economically for years to come.

Liar, Liar, the legations were not on fire!

On January 18, 1902, the *Shanghai Times* published an article reporting on an expose by the *Chinese Times* in Tientsin of how the famous “Massacre Telegram” came about. The report said that the two temporary correspondents for the *Daily Mail*, W. Sutterle alias Sylvester, in conjunction with Chesney Duncan had made the story up and sent it to the *Daily Mail*. “The *Daily Express* determined to do as well as the *Mail* or better wired to its Shanghai Correspondent H. D. O’Shea to get a move on or words to that effect.”

Then, coming to the crux, the *Shanghai Times* said:

“So O’Shea then wired as much blood and thunder as his conscience permitted and the *Express* came out next day with a bigger pack of lies than the *Mail*.”

The *Shanghai Times* added the caveat that the *Daily Mail* had published the original telegram it received to show it had been misled. The *Express* did not do so, so therefore “part or

6 I.Hsu, , *The Rise of Modern China* 4th Ed, p401-2.



Henry O'Shea, Plaintiff in the Shanghai Liar case; Defendant in R v O'Shea for defaming Judge Wilfley of the US Court for China



The offices of O'Shea's Newspaper, the China Gazette

all of lies therefore may be not O'Shea's." The next paragraph all but destroyed this caveat by adding:

"But he is a man who can lie when he tries and he certainly had in this case a chance to 'tell the truth and shame the devil' by wiring a flat contradiction of the massacre or some reassuring message discounting the story instead of which he or his London accomplices told a lie big enough to put the devil in the amateur class."

This was clearly intended to attract a defamation suit. The article ended:

"Now watch for the Shanghai libel case."

O'Shea and Duncan took the bait. Each sued the editor

of the *Shanghai Times*, Mr T.C. Cowen, for defamation. Duncan soon dropped his claim but O'Shea proceeded claiming 15,000 taels in damages.

The trial was heard by Frederick Bourne as Acting Chief Justice and a jury of five. It commenced on June 19, 1902 and lasted four days.⁷ Duncan McNeill and F. Ellis appeared for O'Shea and Vernon Drummond and A.M. Latter for Cowen. Cowen's defence was that what had been said about O'Shea was true. There was no doubt that the massacre stories were false. The foreigners had not been massacred. The question to be answered was: had O'Shea sent telegrams to the *Daily Express* knowing them to be false?

In court, O'Shea said that the *Daily Express* had used his and other correspondents' materials to prepare their reports and what he had sent, he believed to be true based on information that he had received. He added that "he considered it was the duty of a correspondent to send home what rumours he heard; but at the same time it was his duty to warn his papers at home that these rumours were not to be accepted as news." He suggested that the defendant had published the article about him out of spite because, at the time Cowen had also been a correspondent for the *Daily Express* and O'Shea had rejected some of his articles.

O'Shea recovered from the archives of the Chinese Telegraph Office 86 telegrams that he had sent. A key problem for the defence was that none of these were a telegram detailing the massacre as reported in the *Daily Express* on July 16. O'Shea swore that these were all of the telegrams he sent. He added, in cross-examination, that on July 16, he had been informed that the Japanese Consulate in Tientsin had received a telegraph from Baron Onishi that the legation was safe. He had sent a telegram to London to that effect.

In order to deal with the lack of a "smoking gun," the

⁷ *O'Shea v Cowen*, *North China Herald*, June 25, 1902, p1255. The jury members were F. Large, J.E. Judah, R. Viccajee, J. Valentine and T. Cock.

defence called James Ballard, a director and editor of the *Shanghai Mercury*. Ballard said that he had seen O'Shea at the telegraph office on July 15 writing a long telegram at a desk reserved for correspondents. Ballard said that O'Shea had told him that the report confirmed the massacre in Peking and that Ballard was free to use it. Ballard told O'Shea that he did not believe the report was accurate and did not use it. Not bad evidence, but Ballard had a problem with credibility himself: he was not a member of the Shanghai Club. That may not have been so telling to the jury, but, worse, he had once been a member of the club but had been expelled some years before due to a defamatory article he had written.

In another report, O'Shea reported that the British Consul-General, Sir Pelham Warren, had officially told him he believed that all in the Peking legations had been killed. Given his position, Warren was not expected to give evidence at the trial. Instead, Sir Pelham gave a deposition at a separate hearing. Sir Pelham denied he had ever made such a statement officially, although there had been times when he felt the legations had fallen. He added, interestingly, that he had been in direct telegraphic contact with Yuan Shikai who had been providing him and other Consuls with information about the siege. Yuan had never told him the legation had fallen.

Cowen gave evidence and denied that he had written the article out of ill will to the defendant, but rather that "because I thought it a matter of duty for anyone able to go into it, that this massacre telegram should be sifted and exposed if possible. I thought it would be for the public good." He conceded that at the time, there had been many rumours as to what was occurring in Peking. He said, however, that as a journalist it was necessary to be as accurate as possible.

Bourne summed up for the jury. He told them they needed to be satisfied that what Cowen had written was not true. If so, they could consider how much Cowen should pay in damages. The jury went out "for some considerable time."

Upon their return they said they considered the words were untrue, but that the damages should only be a very small amount of 100 taels or, less than 6% of the 15,000 taels O'Shea had claimed. O'Shea was thus partially vindicated by the verdict, but the small award of damages suggests strongly that the jury were not impressed by him. Despite the small award of damages, Bourne ordered Cowen to pay the costs O'Shea had incurred in bringing the action. These costs were later assessed at \$1,080.

Bourne thanked the jury for "the careful attention they had given to this long and tiresome case. They had done their duty most thoroughly, and he should be happy to exempt them from serving on a jury for the next three years."

It appears the costs and damages were never paid because one year later O'Shea and Cowen were back before Bourne with O'Shea seeking his money. Cowen was cross-examined as to income and assets. He said that the *China Times* had been transferred to his brother before the libel case and that he had no property and a small income of only \$200 per month. O'Shea then asked for payment by installments. Bourne cannot have been too impressed with O'Shea because he did not order Cowen to pay anything. Instead he ruled that "he did not see how the defendant could pay installments, if his salary was \$200 a month. There was nothing for the plaintiff to do but wait for the money until the defendant could pay it."⁸

Mr Cawnpore O'Shady defends

It appears that many others were not impressed by O'Shea and the result of the case. A couple of years later, the *North China Herald* published a spoof article parodying the trial.⁹ The article reported on a case in the "International Court of Journalists" of *The Public vs Le Maire Emile* before Mr Robert Doyen (President) with Mr Orlando Ryte prosecuting and Mr

⁸ *North China Herald*, January 27, 1903, p188.

⁹ *North China Herald*, March 25, 1904, p621.

Cawnpore O'Shady defending. The allegation was that the Defendant had failed to report the fall of Port Arthur, during the Russo-Japanese war. As we shall see later, the Japanese army had captured Port Arthur before Russia's Baltic fleet could arrive, sailing via the Cape of Good Hope to relieve the Pacific Fleet, which was blockaded in the harbour.

The prosecution alleged, "the first essential in an editor was a knowledge of a proper use of the word 'alleged,' in conjunction with a vivid imagination," and further:

"By the Statute of Mania (2nd Rsvlt. cap. 1, s.c. 01) it was definitely laid down that 'in any war between the Imperial Government of the Bear and the Imperial Government of the Rising Sun, it shall be lawful to surmise not more than three victories per diem, to suit the susceptibility of readers, and any paper neglecting to record the sinking of a battleship at least once a week shall be subject to summary extinction.'"

A Baron Munchausen was called for the prosecution who said "he had searched through the file of defendant's paper since the beginning of the century and found no mention of the annihilation of St. Petersburg." In cross-examination he said, "he had just arrived from ten years holiday at the North Pole and met a Baltic squadron under full steam in the Arctic Ocean." The report concluded with the following unmistakable dig at the Shanghai Liar case:

"Mr. O'Shady said that after the unanswerable evidence put in by the prosecution, he had advised his client to plead guilty and to throw himself on the clemency of the Court. There were extenuating circumstances, which the jury could not fail to discover.

"The jury, without leaving the box, returned a unani-

mous verdict, honourably acquitting the accused. "The President thanked the jury for the close attention they had given to a particularly simple case and excused them from reading defendant's paper for a month of Sundays."

Beginning of Legal Reform in China

The Boxer Rebellion and its aftermath acted as a catalyst for reform in China. The Chinese now appreciated that Japan had been able to abolish extraterritoriality because it had made significant improvements in its legal system.

In a Commercial Treaty made between China and Britain in September 1902, the abolition of extraterritoriality was explicitly tied to improvements in the Chinese legal system. Article XII of the Treaty provided:

"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 of their administration and other considerations warrant her so doing."¹⁰

The United States and Japan made similar promises in treaties signed at the same time.

A commission was formed to draft civil, criminal, commercial and procedural codes. The commission, logically given Japan had just completed the process of adapting European laws to Asian circumstances, appointed a number of Japanese experts and borrowed from the Japanese codes. The Chairman of the Chinese Civil Codification Commission, Foo

10 G. Keeton, *The Development of Extraterritoriality in China*, Vol II. Keeton describes this process in detail at pp2-11.

Ping-Sheung, writing much later, explained the reason for relying on the Japanese experience:

“Since the new code was to be a complete departure from the general structure and principles of traditional Chinese law, it could not follow the distribution and phraseology of the Ta-Tsing Lu-li. Much therefore had to be imported from foreign jurisprudence, and the country from which the Codification Commission made their main borrowing was from Japan. Their reasons for this were obvious. Japan had just emerged from her old feudalism into a modern state. Her signal success in the process of modernization China was anxious to follow. It was quite natural for China to try to profit by her neighbour’s experience. Besides, since the reform movement had been on foot in China, hundreds of Chinese in search of modern knowledge had gone to Japanese universities, principally to the Japanese law schools, where their studies facilitated by the great similarity of the two languages. Japan at the time had completed her civil and commercial codification, which she had modeled after the German Codes. She had created a technical legal Japanese vocabulary, translated a number of the leading juridical textbooks of Europe, and produced a large Japanese legal literature. The Chinese could then find in Japan an adaptation to the Far Eastern mind, in a language closely relate to their own, of what represented at the time the most advanced stage of western scientific juridical science.”¹¹

By 1907, regulations providing for modern courts and a modern Criminal Code were promulgated. Sweeping reforms

11 Introduction to Chinese Laws: Civil Code of the Republic of China, China-America Council of Commerce and Industry, Legal Series 4, pp xi-xii.

were introduced, including the abolition of torture and the use of the cangue. The overthrow of the Qing dynasty in 1911 and World War I intervened, thereby putting legal reform and the abolition of extraterritoriality on the backburner. It was not until the 1920s that serious discussions on the end of extraterritoriality resumed.

In fact, in the 1900s one more British court was established in China, although it was not an extraterritorial court.

CHAPTER 29

The High Court of Weihaiwei

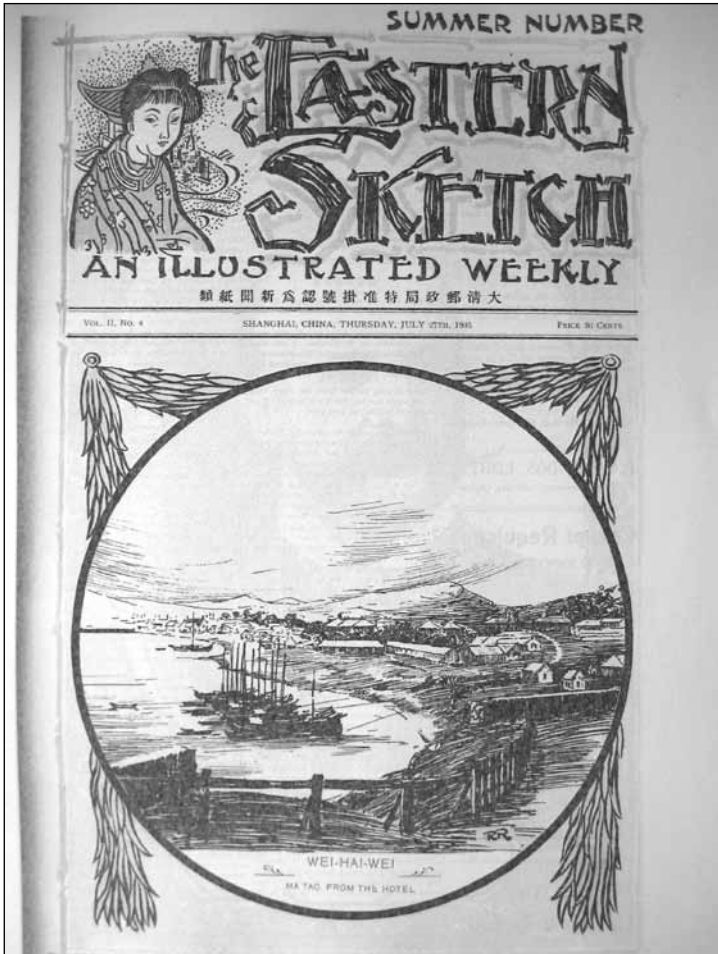
AS ONE BRITISH COURT in the Far East, the Court for Japan, was wound down at the end of the 19th century, a new one was established at the beginning of the 20th century, the High Court of Weihaiwei. This court, however, was not subordinate to the Supreme Court for China and Corea. Instead it exercised full jurisdiction in Weihaiwei in Shandong Province.¹

As part of the late 19th Century scramble by foreign powers for concessions in China, on July 1, 1898, British had signed a convention with China to take a lease of the city of Weihaiwei (now called Weihai) at the northeastern tip of the Shangtung Peninsula. Weihaiwei is about 130 kilometres directly south across the entrance to Bohai Bay from Port Arthur in Manchuria. In 1898 the Russians had occupied Port Arthur and the 1898 British-China convention explicitly stated in its preamble that the lease was to last "for so long a period as Port Arthur shall remain in the occupation of Russia."²

The Convention came into force on October 5, 1898 and Weihaiwei was established as a territory of the United Kingdom. As a territory, it was administered by the Colonial Office. In 1901, an Order in Council for Weihaiwei was issued to establish the government of Weihaiwei under a Commis-

1 For full details of British Justice in Weihaiwei, see C. Tan, *British Rule in China: Law and Justice in Weihaiwei 1898 to 1930*.

2 See Chapter 23 in 1898, The Germans had also obtained a 99-year lease for the Port of Kiaochow in Shangtung Province and the French a similar lease for the Port of Kwangchow. A number of railway concessions were also granted to foreign powers. See R. Akagi, *Japanese Foreign Relations, 1542-1936: A Short History*, pp181 to 183 for further details.



The Eastern Sketch features Weihaiwei on its front cover

sioner who was responsible for administrative and legislative matters as well as a High Court of Weihaiwei to handle judicial matters. English law was to be applied in Weihaiwei, however, the Commissioner could also directly enact ordinances in Weihaiwei as well as to extend Hong Kong ordi-

nances to apply there.³

Before issuing the Order in Council, the Colonial Office had asked Sir Frank Sweetenham, then Resident General of the Federated States of Malaysia, to visit Weihaiwei and make recommendations on how the territory should be governed. Sweetenham made wide-ranging recommendations. With regards to law and order, he recommended the China and Japan Order in Council be extended to Weihaiwei and that a Supreme Court be established in Weihaiwei that had similar powers to a British Provincial Court in China. To limit the number of cases that would be sent to Shanghai he recommended the court's jurisdiction be increased to allow for more cases to be heard in Weihaiwei.⁴

This recommendation was not followed by the Colonial Office, most likely because it was considered there would be difficulties in applying an Order in Council designed for an extraterritorial court to a court with full jurisdiction.

Instead the 1901 Order in Council provided for the establishment of the High Court of Weihaiwei with full jurisdiction over all persons in Weihaiwei (that is, Chinese, British and all other foreigners). The only exception was for residents of the Weihaiwei walled city, who remained under Chinese jurisdiction except as necessary for "naval and military requirements of His Majesty or with the peace, order and good government of the said territories." This was the same exception that had been agreed in the lease of the New Territories in Hong Kong in relation to the Kowloon Walled City near the old Kai Tak Airport. After World War II when China was strong enough to assert its rights the Kowloon Walled City became an almost lawless enclave.

The Order in Council specifically ousted the jurisdiction of

³ The Administrative and Legislative Powers were granted to the Commissioner in S. 3 and Judicial Powers to the High Court in S. 12 of the Order in Council. The Power to proclaim Ordinances was granted by S.9.

⁴ C. Tan, *British Rule in China: Law and Justice in Weihaiwei 1898-1930*, p61-2.

the British Supreme Court for China and Corea in Weihaiwei by providing that the Orders in Council “relating to the exercise of Her Majesty’s jurisdiction in China shall cease to have effect in the territories within the limits of this order.”⁵

The High Court was to have one judge who was required to be a barrister of the High Court of England, Scotland or Ireland. The Commissioner was also granted judicial powers and he could sit alone or with the Judge. Appeals from the Court of Weihaiwei lay to the Supreme Court of Hong Kong (and not the Supreme Court for China and Corea) and then on to the Privy Council. It appears that no appeal was ever actually brought to Hong Kong. One writer at the time gave three reasons for this:

“[F]irstly, there are in Weihaiwei neither barristers nor solicitors by whom litigants might be advised to appeal. Every party to a Suit appears in court in his own person, and states his case either orally or by means of written pleadings called Petitions. If he loses his case the matter is at an end unless he can show just cause why a re-hearing should be granted. Secondly, the legal costs of an appeal to a Hongkong court would be prohibitive for all but a minute fraction of the people of Weihaiwei. It is questionable whether, outside Liukungtao and Port Edward, there are more than a dozen families that would not be totally ruined if called upon to pay the costs of such an appeal. Thirdly, there are probably not twenty Chinese in the Territory who are aware that an appeal is possible.”⁶

It was not completely true that parties were not repre-

5 Jurisdiction of the Court: Section 16; Judge’s qualifications: Section 13; Judicial Power of Commissioner: Section 12 para 2; Exemption of Weihaiwei Walled City, S.11; Civil Appeals S.68 to 80; Criminal Appeals, S.35; Ouster of SCCC jurisdiction: S.85 of the Weihaiwei Order in Council.

6 R.F. Johnston, *Lion and Dragon in North China*, pp 100-101.



The Weihaiwei Walled City.

sented by lawyers. For the vast majority of cases which were heard by magistrates this was true, however, for important cases lawyers (and judges) would come from Shanghai to represent clients.

Due to the limited number of court cases, there was no need for a full-time judge in Weihaiwei. A judge could have been sent from Hong Kong, which was also administered by the Colonial Office, but this was a long trip of at least five days sailing, most likely stopping in Shanghai anyway. An agreement was therefore reached between the Colonial Office and Foreign Office for the Judge of the Supreme Court in Shanghai, Frederick Bourne, to be appointed the first judge of the Weihaiwei High Court in October 1904. Harrie Wilkinson, the Crown Advocate for China, was also appointed Crown Advocate for Weihaiwei. This was convenient for everyone. The Judge or Crown Advocate of the Supreme Court for China and Corea were able to visit Weihaiwei when they were on circuit in other treaty ports in North China.

Bourne was on leave when the first major case came before the High Court for Weihaiwei in June 1905. John Douglas, the