

JAPAN'S OCCUPATION OF SHANTUNG, CHINA A QUESTION OF RIGHT

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If the Japanese government ultimately takes possession of all property which Germany acquired in Shantung, by treaty, by agreement, or by contract, and whether as a lease or as a concession, and if foreign powers enter no protest to such action on the part of Japan, I for one would urge the Chinese government to fight shy of making foreign loans, granting concessions for mines and railways, leasing ports, or assenting to settlement extensions, whoever the foreign power or powers to ask the favor or demand the right.

Suppose, for instance, that Americans or the American government, which plainly wants no more territory, should seek any of these political and commercial privileges. I would advise China to negative the proposition, that is, if Japan, in her new day of opportunity, actually claims possession of property owned by China but leased to Germany. "But why," it may be asked, "should China fear America? Are not all Americans altruistic?" But suppose they are, does that end the matter? By no means, at this present time, in this year of grace, 1916. Suppose that an American syndicate puts up \$100,000,000 for a big mining concession, or takes over the Han Yeh Ping works at Hanyang in the centre of China, and with it various iron and coal mines. And then suppose that Japan goes to war with my defenseless country. According to precedent, through military necessity, the Japanese fleet would have perfect right to sail up the Yangtze, and to occupy the works at Hanyang and despatch troops to the mines in Hupeh, Kiangse and Hunan; Japan would defeat the residue of Americans, and would impart the information that all this was no concern of China.

"Possession is nine points of law," is an old saying. *A temporary occupation casts its shadow ahead.*

Let me imagine a simpler illustration. I am by appointment Director-in-Chief of the International Institute of China. Suppose that some keen-minded men, talking business before the Shanghai Club Bar, light on the happy thought of ejecting me from my position in the Institute, owing to past misbehavior on my part. Mr. Smith of Manchester and his doughty son undertake to do the job. Coming out to the Institute, they find me taking my constitutional on the grounds. Father and son come marching in, and as they draw near, I am greeted,

"Get out of this place."

"Not till you knock me out," I reply, bravely enough, but rashly. Though I look as if I might put up a good fight, standing as I do good six feet and one, yet Sam. Smith weighs 220 odd pounds to my 132. His son even reaches 160. So with one blow, I am laid sprawling, and with a black eye and bleeding nose I am dragged out to the street, and handed over to an Annamite policeman, who is told:

"Take him down in front of the club and duck him in the Whang-poo River."

And when I disappear beneath the waters, that is the last of me in the goodly town of Shanghai.

Meanwhile Smith and son enter the house, which through arrangement with the trustees I rent on the favorable terms of £1 a month. These two gentlemen strike terror into the Reid family, who escape out of the back door. The Chinese cook, who comes from Tsingtao, and thinks he cooks German fashion, is knocked out through the window. The new master goes to the telephone, and says:

"Wife, is that you?"

"Yes, Samie, dear."

"Well, come around at once to our new house, and bring all the relatives, and don't forget the Japanese maid and the Sikh watchman."

No sooner said, than done. This accomplished, old man Smith goes over to the Institute, turns out all the men in my employ, puts in a better lot, and grabs for the cheque-

book. He writes \$1000 straight, and signs, "Samuel Smith, Director-in-chief."

Now the question is, "Will the committee let Smith rent the house for £1; will it recognize him as Director-in-chief, and will the bank cash the cheque before it is thus authorized? Has Smith and his gang legally got possession of the Institute property?"

Now, let us back to business, and think a little of Japanese possession of Chinese property in Shantung, which was handed over to Germany by deed of lease. Have China and Germany any legal rights, or does the Might of Japan make Right for herself and all concerned?

Baron Kato is reported in a Japanese paper as using these words:

The future of Tsingtao and various questions in connection therewith, will be solved at the Peace Conference to follow war, and the present is by no means a fitting occasion to discuss them. The Shantung Railway is, needless to say, a private enterprise, and Japan is simply in temporary possession. Various mines in the province have also been duly investigated by the Japanese authorities, but none have been found promising as business schemes. The question as to whether Japan will return to the original owners what she now occupies in Shantung province is one that must be left for future consideration.

Japan may retire because the business is not a paying concern, but what I am anxious to know, is whether her permanent possession, without the consent of both Germany and China, would be morally or legally right. I think I know what most people would say, but I prefer to base the decision on a few recognized business principles, in harmony with law. Japan has already forced a treaty on China, as if she had legally come into possession, and nothing more need be said.

Before we study the question as to whether Japan can take over legally the property rights of Germany in Shantung, we must understand how Germany first secured them from China, and what is the difference between the ownership of China and Germany.

The first arrangement made between China and Germany was in 1898. The contract was in the form of a

treaty or convention made by two governments. The contract was, therefore, a formal contract of a most binding character. Being so, it is enforceable without the presence of consideration, and thus differs from what is known as a simple contract. By this sealed contract, the Chinese government "cedes to Germany on lease, provisionally for ninety-nine years," a zone around Kiaochow Bay of 100 Chinese miles. Within this ceded territory, Germany makes certain promises to China. One is that "all rights of sovereignty" are retained by the Chinese government. Another is that the building of fortifications is "to increase the military readiness of the Chinese Empire." A third is that the territory thus leased may, at Germany's wish, be returned to China "before the expiration of the lease," except that China will "refund to Germany the expenditure she has incurred at Kiaochow," and will "cede to Germany a more suitable place." A fourth is that "Germany engages at no time to sublet the territory leased from China to another power."

This last provision is most vital to China's interests, for while she may see an advantage in making the lease to Germany, she may well object to Japan, or any other power, securing the lease in an indirect way. From a political point of view this stipulation is wise. With a strong power like Germany in Shantung, there was originally a *buffer* between Great Britain and Russia, and later between Great Britain and Japan, two close allies.

The matter of getting back the fortifications, built by Germany, is also most important. China can be content, so long as these military preparations are for China's defense. Otherwise, with Port Arthur, Weihaiwei, and then the Taku forts, all taken away, China would be placed in a weak naval position for defense against an enemy.

A second contract, likewise a treaty or agreement signed and sealed by the two governments, was made the same year and related to railway and mining concessions in the same province of Shantung. China gave sanction for "the construction by Germany of two lines of railway." A Chino-German Company was to be formed, and "both

German and Chinese subjects shall be at liberty to invest money as they so chose." China gave the right to no one else, Japanese or British. Politically she was wise to make such a discrimination. In a similar way, when China who had given a certain concession to an American company, and then learned that it was being sold out to Belgians, protested, threatened to make the contract null and void, and finally compelled the company to give it back to China.

The mining concessions, to Germany and no one else, were to be "for a distance of 30 li from each side of these railways and along the whole extent of the lines." China had her own reason for making such concessions, and the result has proved to the industrial advantage of China.

In the same contract the Chinese government agrees or "binds itself in all cases when foreign assistance, in persons, capital or material, may be needed for any purpose whatever within the province of Shantung," the first offer must go to Germans. China had no thought or intention that, in making terms with Germans, she was to deal finally with Japanese.

In accordance with the above contract or agreement, such a German-Chinese Company was organized and incorporated in Germany in 1899, and in the corporation, as in the agreement, the intention to ward off other nations appears: "The transfer of the concession itself or parts thereof to another company, not German or German-Chinese, is prohibited."

The next year, in 1900, when Yuan Shih-K'ai was Governor of Shantung, he signed for the government a special agreement with the new Chino-German Company concerning railways in Shantung. In this agreement the stipulation is made that if military protection is needed for the railway, "the governor of Shantung shall detail such soldiers, and foreign soldiers cannot be used." This is to show that the Chinese government still retains its sovereignty, and that that railway concession has no political significance, but is only a commercial undertaking of a business company. Not only German, but Japanese soldiers are prohibited from occupying the railway.

We have here sufficient data for the further study of Japanese legality or illegality in taking possession of various properties held in the name of Germans by contract with China.

It is plain that Japan of herself has no legal right to set aside these contracts made between China and Germany. She cannot as spoils of war decide to take for herself that which belongs either to China or Germany or both. If she desires compensation for her military expenditure in attacking Germany in Shantung, she should approach Great Britain who first sought her aid. So far as Kiaochou Wan, and the railways and mines in Shantung are concerned, Japan is bound to get the consent of both Germany and China to annul the contract between them, and to hand it all over to Japan. Without their consent, possession by Japan would be illegal. Is such consent likely or desirable?

First, then, can Japan get the consent of Germany? For Germany to agree to the transfer of property, without China's conjoint action, would be to break the solemn and formal contract made with China. As to the leased territory of Kiaochou, Germany is forbidden to sublet to any other country. If subletting is distinctly prohibited, still more would an out-and-out assignment be objectionable to China.

In the same way, the railways and mines are commercial enterprises, and private property, of Germans and Chinese alone. Japan cannot of her own free will *confiscate private property* of Germans, still less of Chinese; neither has she the power to nullify or abrogate a contract made by other parties, in this case Germany and China.

Japan may be able in the final Peace Conference to compel Germany to pay an indemnity; she cannot compel Germany to give up property held by contract with China, when such contract forbids this very transfer. Germany is the tenant, and China the landlord. Complete assignment by the tenant requires the consent of the landlord.

A good deal has been written about the "mailed fist" compulsion brought to bear on China in making the treaties

of 1898. But Germany showed no more force than Russia, Great Britain or France. If the contract between China and Germany can be made voidable, because of duress, the same would apply to most of the treaties made by China, more particularly the Protocol of 1901. As a matter of fact duress means "actual or threatened violence offered to a man, in order to force him to enter into a contract." Such a condition did not exist, when China and Germany made their treaties, and if China has not cared to declare voidable any of these treaties, still less has Japan, an outside party, power to do so.

. Under the same legal principles, China no more than Germany can allow Japan to take possession of property acquired by Germany through contract, when the contract clearly states that no third party can have any share in the property or in any way acquire the property. It is illegal for China to consent to the transfer from Germany to Japan, and it is illegal for Japan to force the transfer without China's consent. China has, indeed, consented to let Japan and Germany decide it themselves, but this was under duress.

It is not necessary to inquire into all the reasons which led China to desire a contract with Germany alone. The political reason is transparent, and a political reason always enters into contracts made between governments, that is, into treaties. *China's self-preservation depends on a nice balance of powers*; for Germany to be in Shantung is safer than to have Japan.

Legally Kiaochow, and the railways and mines must either be retained by Germany or revert to China. Japan has no right thereto. "Third persons may render themselves liable in tort by interfering with contracts, or by inducing one party to a contract to commit a breach of it." This liability falls on Japan, if she persist in bringing about a breach of contract by either Germany or China. Japan would do herself more honor, if she taught China the inviolability of treaties, rather than the way to break them.

Compensation to Japan for going into the war, when neither Germany nor China wanted the war on Chinese

territory, cannot legally be met through the aid of any of these contracts. It will hardly be granted by Germany and certainly ought not to be forced from China.

China, therefore, whatever the demands of Japan, ought not to comply with any of these demands or threats, to the violation of a contract or treaty. If the war has forcibly and under protest been brought into China, China, though a neutral nation, has as much right at the peace negotiations as Belgium, once another neutral nation, or Japan, who should have remained neutral.

It certainly is absurd as well as wrong to make China suffer, because on the other side of the globe different nations want to fight. If from a war in Europe there comes the right to confiscate Chinese property, we have indeed learned a law which before had no existence.

The only argument which I have heard advanced in support of Japanese military occupation, to be succeeded by appropriation, of property belonging to China the sovereign, but temporarily transferred or ceded to Germany, is that everything is right in war. But what Germany has the right in war to do in Belgium, or what Japan and Australia have the right to do in German colonies in the Pacific, or Great Britain in Egypt, is a very different question from Japan's right of occupation and appropriation in China, which is not one of the belligerents. Kiaochow is not a German colony such as Hongkong is a British colony. Still less is the province of Shantung German. China has never relinquished her sovereignty. Even when occupying an enemy's territory, the invader is *forbidden to suspend laws affecting property. Land and buildings may not be alienated.*

If the object of Japan in going to war was simply to defeat the German garrison at Tsingtao and eliminate Germany therefrom, her purpose works no great harm to China; but if she went into the war to occupy and appropriate Shantung as she has done Port Arthur and southern Manchuria, then the war was unjustifiable and ought to be condemned by civilized nations. It is just because I feared this ultimate sequence that at the outset I strongly dep-

recated *the bringing of Japan into the war and the war into China.*

I therefore revert to the statement with which I began, that China hereafter had better fight shy of all loans, concessions, leased territories or settlement extensions, if through war in Europe and then through war between Germany and Japan, the latter country can occupy permanently in China all that Germany holds in lease by contract or by concession from China. Favors to foreigners may turn in time of war to be China's calamity.