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International Law Situations with Solutions and Notes

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SITUATION III.

At a port in China which is held under lease by a European state and at which there is no consul of the United States, a near-by American consul accredited to China attempts to exercise his ordinary extraterritorial jurisdiction. His authority is denied by a representative of the European state, and he appeals to the commander of an American war vessel in port to support him in the exercise of his authority.

What position should the commander take?

SOLUTION.

The commander should take the position that he could not support the consul accredited to China in the exercise of authority within territory thus held under lease by a European power.

The commander can assume that he is himself authorized to exercise those consular functions which are under such circumstances specifically delegated to naval officers by his government.¹

NOTES ON SITUATION III.

STATUS OF LEASED TERRITORY.

The actual status of the territory acquired by lease from China to European powers has not been determined. By the treaties of the United States with China, United States consuls have certain rights over and above those ordinarily exercised in European countries. In the strictly Chinese portions of the Empire these rights still exist. The existence of these powers or of any right to exercise consular jurisdiction of any kind within the portions of China leased to various European states depends upon the effect of the lease of territory by one state to another. This must be decided by reference to fundamental principles and by the terms of the contract.

¹ U. S. N. Regs., art. 517.

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In regard to the terms of the contract the Tsung-li Yamén in setting forth the terms and conditions arrived at with the German minister in the matter of the lease of Kiaochow, which was one of the incidental items in the reparation made by China for the murder of two missionaries in Shantung province, made the following statement to the Emperor, after detailing the other demands of China:

"Considering that there has never been any disagreement existing between China and Germany and that the German Government came to the assistance of China in securing the evacuation of Liaotung Peninsula by the Japanese for which she has never been compensated; and further, as England, France, and Russia have taken maritime ports in the East, and as Germany has no port as a rendezvous for her vessels and for a coaling station, her position is not equal to the other great powers. Your memorialists have on several occasions received notes and telegrams from Hsu Ching Cheng, Chinese minister to Germany, stating that Kiaochow is the place that Germany has been longing for, hence in February of last year your memorialists asked the sanction of Your Majesty to the building of a dock there. The question of devising some arrangements was therefore taken in hand. He (the German minister) finally stated that Germany wished to lease Kiaochow and territory inland, extending 100 li, upon the same conditions as the settlements and concessions at the ports, the rent to be paid annually; that the territory should be self-governing, i.e., under Germany, but still belong to China." ¹

The lease stated that, "This port was occupied by Germany on November 14, 1897, and the following agreement, though not officially proclaimed, is given in the directory referred to as a correct translation from the Chinese:

"His Majesty the Emperor of China, being desirous of preserving the existing good relations with His Majesty the Emperor of Germany, and of promoting an increase of German power and influence in the far east,

sanctions the acquirement, under lease, by Germany of the land extending for 100 li at high tide (at Kiaochow).

"His Majesty the Emperor of China is willing that German troops should take possession of the above-mentioned territory at any time the Emperor of Germany chooses. China retains her sovereignty over this territory, and should she at any time wish to enact laws or carry out plans within the leased area she shall be at liberty to enter into negotiations with Germany with reference thereto: Provided, always, That such laws or plans shall not be prejudicial to German interests. Germany may engage in works for the public benefit, such as waterworks, within the territory covered by the lease without reference to China. Should China wish to march troops or establish garrisons therein, she can only do so after negotiating with and obtaining the express permission of Germany.

"II. His Majesty the Emperor of Germany being desirous, like the rulers of certain other countries, of establishing a naval and coaling station and constructing dockyards on the coast of China, the Emperor of China agrees to lease to him for the purpose all the land on the southern and northern sides of Kiaochow Bay for a term of ninety-nine years. Germany is to be at liberty to erect forts on this land for the defense of her possessions therein.

"III. During the continuance of the lease, China shall have no voice in the government or administration of the leased territory. It will be governed and administered during the whole term of ninety-nine years solely by Germany, so that the possibility of friction between the two powers may be reduced to the smallest magnitude. The lease covers the following districts: * * *

"Chinese ships of war and merchant ships, and ships of war and merchant ships of countries having treaties and in a state of amity with China, shall receive equal treatment with German ships of war and merchant ships in Kiaochow Bay during the continuance of the lease. Germany is at liberty to enact any regulation she desires for the government of the territory and harbor,
provided such regulations apply impartially to the ships of all nations, Germany and China included.

"IV. Germany shall be at liberty to erect whatever lighthouses, beacons, and other aids to navigation she chooses within the territory leased, and along the islands and coasts approaching the entrance to the harbor. Vessels of China and vessels of other countries entering the harbor shall be liable to special duties for the repair and maintenance of all lighthouses, beacons, and other aids to navigation which Germany may erect and establish. Chinese vessels shall be exempt from other special duties.

"V. Should Germany desire to give up her interest in the leased territory before the expiration of ninety-nine years, China shall take over the whole area, and pay Germany for whatever German property may at the time of surrender be there situated. In case of such surrender taking place, Germany shall be at liberty to lease some other point along the coast. Germany shall not cede the territory leased to any other power than China. Chinese subjects shall be allowed to live in the territory leased, under the protection of the German authorities, and there carry on their avocations and business as long they conduct themselves as peaceable and law-abiding citizens. * * * Fugitive Chinese criminals taking refuge in the leased territory shall be arrested and surrendered to the Chinese authorities for trial and punishment upon application to the German authorities, but the Chinese authorities shall not be at liberty to send agents into the leased territory to make arrests. The German authorities shall not interfere with the likin stations outside but adjacent to the territory."!

"The Japanese claim that sovereignty is too important a matter to pass thus with a lease, and say that China can, if she wishes, surrender jurisdiction over her own people, but they do not agree that these lessee governments shall or can exercise jurisdiction over other foreigners in the leased territory. However, no case has yet arisen for them to test the matter."*
The Japanese claim that sovereignty has not passed to the leasing power is supported by the terms of the other cession agreements, as in the Russian agreement, which states in Article I that:

"The Emperor of China agrees to lease to Russia Port Arthur and Talienwan, together with the adjacent seas, but on the understanding that such lease shall not prejudice China's sovereignty over this territory."

The British position is quite similar to the Russian. The lease is for "so long a period as Port Arthur shall remain in the occupation of Russia."

The general position 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.

It is generally the case that the right of sovereignty carries with it all other rights and obligations. As Hall (p. 51) says:

"In principle, then, the rights of sovereignty give jurisdiction in respect of all acts done by subjects or foreigners within the limits of the state, of all property situated there, to whomsoever it may belong, and of those acts done by members of the community outside the state territory of which the state may choose to take cognizance.

"In practice, however, jurisdiction is not exercised in all these directions to an equal extent."

Sovereignty is the "supreme political power beyond and above which there is no political power. It is not inconsistent with sovereignty that a state should voluntarily take upon itself obligations to other states, even though the obligations be assumed under the stress of war or fear of evil," and—

"The right of jurisdiction is the right to exercise state authority. The right of jurisdiction is in general coextensive with the dominion of the state." 1

As Judge Story says, it may be "laid down as a general proposition that all persons and property within the territorial jurisdiction of a sovereign are amenable to the

1 Wilson & Tucker, p. 40.
jurisdiction of himself or his courts; and that the exceptions to this rule are such only as by common usage and public policy have been allowed in order to preserve the peace and harmony of nations, and to regulate their intercourse in a manner best suited to their dignity and rights."

If, then, by understanding and treaty statement of both China and the leasing powers, it is jurisdiction and not sovereignty that has passed to the leasing powers, it remains only to consider what jurisdiction involves. As already defined, jurisdiction "is the right to exercise state authority." It is necessary for administrative officers of the United States to know who are the persons authorized to exercise state authority. In the case under consideration it is without doubt the agents of the leasing powers of the several ports. As Mr. Conger reports to Secretary Hay:

"I have conferred with the English, German, Russian, French, Spanish, Netherlands, and Japanese ministers upon the subject, and all of them except the Japanese, agree that the control over all of these leased ports has, during the existence of the lease, passed as absolutely away from the Chinese Government as if the territory had been sold outright, and that they are as thoroughly under jurisdiction of the lessee governments as any portion of their home territory, and their consuls, accredited to China, would not attempt to exercise jurisdiction in any of said ports."

Secretary Hay's opinion as to the relation to the leased territory of near-by consuls accredited to China shows the position of the United States, which is fully sustained by general principles and treaty agreements. He gives the conclusion that:

"The intention and effect of China's foreign leases, having apparently been the relinquishment by China during the term of the leases and the conferment upon the foreign power of all jurisdiction over the territory, such relinquishment and transfer of all jurisdiction would seem also to involve the loss by the United States of its right to exercise extraterritorial consular jurisdiction in the territories so leased, while, as you remark, as

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1 "Santissima Trinidad," 7 Wheat., 354.
these territories have practically passed into the control of peoples whose jurisprudence and methods are akin to our own, there would seem to be no substantial reason for claiming the continuance of such jurisdiction during the foreign occupancy or tenure of the leased territory.

"As a corollary to this view, which from your statement appears to be held by all the powers, with the exception of Japan, the ordinary consular functions prescribed and defined in the intercourse of the Christian powers among themselves could obviously not be exercised within the leased territory by a consul of the United States stationed in neighboring Chinese territory without some express recognition of his official character, by exequatur or otherwise, on the part of the sovereign into whose control the territory has passed by lease for the time being."¹

In the case cited, the representative of the European state presumably would be acting in accordance with orders from his government and would be supported by it.

"Its administrative officers (of a state) and its naval and military commanders are engaged in carrying out the policy and the particular orders of the government, and they are under the immediate and disciplinary control of the executive. Presumably, therefore, acts done by them are acts sanctioned by the state, and until such acts are disavowed and until, if they are of sufficient importance, their authors are punished, the state may fairly be supposed to have identified itself with them."²

A commander of an American man-of-war can only exercise the functions of a consul in relation to mariners of the United States.³

"He has, when in a foreign port where there is no United States consul, or upon the high seas when senior officer, the authority of law to exercise the powers of a consul in regard to mariners of the United States."⁴

Conclusions.—Pending the agreement between the United States and the leasing powers there would be no

person authorized other than by such regulations to exercise consular jurisdiction.

The denial of consular jurisdiction by the authority of the leasing state is justifiable and necessary as it could have no legality if allowed.

The commander of the American war vessel should therefore take the position that he could not support the consul in the exercise of any authority under the circumstances.

It is now probable that in nearly all cases the near-by consuls will also be authorized to perform, in the leased ports, the usual functions permitted under similar circumstances in the European countries, but in every instance this will require special authorization.

It must be understood that this solution applies only to places leased under definite agreements over which European states have assumed responsible jurisdiction and not to regions considered under spheres of influence and similar indefinite terms.

Of this Secretary Hay says:

"It remains to be determined in what manner the interests of American citizens in such leased territories are to be watched over and, in case of need, protected by the agencies common in the intercourse of civilized powers. Those interests, often situated in the interior, remain for the most part under the same Chinese surroundings as heretofore, the superior control of the lessee power being manifested through native agencies and by way of influence rather than by direct administration. Under such circumstances, the United States can not be expected to forego the use of all the customary agencies of intercourse in behalf of its citizens and their property and commerce. It is presumed the other governments represented in China feel in the same way their responsibility to watch over their own citizens or subjects found within any leased territory not under their own national flag."

The action of the commander in case submitted would not merely be to decline to support consul but to himself assume consular functions to extent allowed and prescribed by regulations of his service.