THE LEGAL STATUS OF THE CHINESE ABROAD

Thesis submitted for the Degree of Ph.D. (internal) in Economics

by

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ABSTRACT

The thesis is confined to the discussion of the position of the Chinese either as immigrants, when they seek admission to foreign lands, as resident aliens after being admitted, as naturalised aliens where they are eligible for naturalisation, or as descendants of any of these in their country of domicile.

The countries chosen for illustration comprise (1) the United States of America. (2) the British Dominions of Canada, Australia, New Zealand and South Africa, and (3) the Asiatic countries of the Straits Settlements, the Malay States, Siam, French Indo-China and the Dutch East Indies.

The work is divided into six Parts. Part I deals with the constitutional provisions of the respective countries with the object of showing how far the various law-making organs may enact legislation affecting the position of aliens or of persons belonging to a particular racial group. The general historical survey will reveal the important facts and problems of Chinese immigration. Part II is devoted to the discussion of immigration laws and restrictions under which the Chinese may enter, travel or reside in the countries concerned. Special attention has been paid to the constantly changing position under successive enactments and judicial interpretations thereof. Part III deals with problems of nationality and naturalisation, showing the conditions under which Chinese may acquire foreign nationality, and the consequences of such acquisition. Legislation in restraint of trade and occupation is discussed in Part IV, which presents the economic aspect of the Chinese problem. Part V concerns restrictions of other civil and political rights of the Chinese either as aliens or as citizens in their country of adoption. In Part VI is considered the special jurisdictional régime to which the Chinese are subject. It expounds the status of Chinese as affected by consular jurisdiction in Siam and their status of native assimilation in other Asiatic countries.

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USED IN THE CITATION OF LAW REPORTS AND OTHER WORKS

A.C.	=	British Appeal Cases in the House of Lords and Judicial Committee of the Privy Council.
A.D.	=	South African Law Reports, Appellate Division.
A.J.	=	American Journal of International Law.
Annuaire	=	Annuaire de Documentation Coloniale Comparée, Institut Colonial International, Brussels.
Annual Digest	=	Annual Digest of Public International Law Cases.
B.C.	=	British Columbia Reports, Canada.
B.Y.	=	British Year Book of International Law.
C.L.J.	=	Cape Law Journal.
C.L.R.	=	Commonwealth Law Reports of Cases determined in the High Court of Australia.
C.P.D.	=	South African Law Reports, Cape Provincial Division.
D.L.R.	=	Dominion Law Reports.
E.D.C.	=	Reports of Eastern Districts' Court, Cape (from 1880).
E.L.R.	=	The Eastern Law Reporter, Canada.
Fed.	=	The Federal Reporter, Reports of Cases determined in the District Courts of the United States.
F.M.S.	=	Federated Malay States, Law Reports (from 1897).

Foreign Relations	=	Papers relating to Foreign Relations of the United States.
Girault	=	Principes de Colonisation et de Législation Coloniale: vol. I (1927), vol. II (1929), vol. III (1930), vol. IV (1933), vol. V (1928).
Hodgins	=	Correspondence, Reports of the Ministers of Justice, etc., upon the subject of Dominion and Provincial legislation, 1867-1895, 1896-1898, 1899-1900, 1901-1903, 1904-1906.
J.I.	=	Journal du Droit international.
J.O.I.	=	Journal officiel de l'Indochine Français.
Kyshe	=	Kyshe, Reports of Cases in the Supreme Court of the Straits Settlements (1808-1890).
Moore, Digest	=	Moore, A Digest of International Law (1905).
N.L.R.	=	Natal Law Reports.
N.S.W.	=	New South Wales Law Reports.
N.Z.L.R.	=	New Zealand Law Reports.
O.W.R.	=	Ontario Weekly Reports, Canada.
R.D.I.	=	Revue de Droit international public.
Sawyer	=	Reports of Cases decided in the Circuit Court for the District of California (1873-1891).
S.A.R.	=	Law Reports of the South African Republic (1877-1899).
Sirey	=	Recueil Général des Lois et des Arrêts.
S.L.R.	=	Saskatchewan Law Reports, Canada.
S.S.L.R.	=	Straits Settlements Law Reports (from 1893).
S.T. or State Papers	=	British and Foreign State Papers.

Toynbee, Survey	=	Toynbee, Survey of International Affairs.
T.P.D.	=	South African Law Reports, Transvaal Provincial Division.
T.S.	=	Reports of the Supreme Court of the Transvaal Colony (1902-1909).
U.S.	=	United States Supreme Court Reports.
V.L.R.	=	Victorian Law Reports, Australia.
W.A.L.R.	=	Western Australia Law Reports.
W.L.D.	=	South African Law Reports, Witwatersrand Local Division.
W.W.R.	=	Western Weekly Reports, Canada.

INTRODUCTION

The present study is an exposition of the legal status of the Chinese abroad. It treats of the disabilities of, and discriminations against, Chinese as a particular race, either as immigrants when they seek admission to foreign lands, as resident aliens after being admitted, as naturalised aliens where they are eligible for naturalisation, or as the descendants of any of these in the country of their domicile. It covers such disabilities or discriminations as are established by national, dominion, state or provincial legislation or executive decrees, by municipal ordinances or regulations, by judicial or administrative action, or by the enforcement of any of these. The disabilities or discriminations are personal, social, political or economic in effect.

The omnipresence of Chinese colonies throughout the world makes it difficult to attempt a comprehensive treatment covering all countries. Moreover, it is not in every country that the Chinese are given a special legal status. What is intended here is to deal as far as possible with the different types of Chinese immigration by reference to some of the principal features of a legal nature in the most important countries concerned.

In view of the immensity of the Chinese population, it is striking to note that their colonies all over the world are

constituted almost exclusively of natives of two provinces only, Fukien and Kwangtung, out of the six coastal provinces or of the eighteen provinces of China proper. Nor are they drawn from all parts of these two, but are recruited from a few districts near and around the City of Canton in Kwangtung, and Amoy in Fukien. Early migration was motivated by the pursuit of trade and confined mainly to the south-eastern Asiatic islands. Later, through the agency of European merchants with oriental possessions, it extended to more remote lands. Modern migration, which was made possible by the opening up of China, began in the 'forties of the nineteenth century, and helped much to develop the young colonies, which at first welcomed Chinese labour but later discouraged it, alleging "unjustified competition". This attitude may perhaps be attributed to the large, indeed excessive, numbers of the emigrants, with which the Chinese Government were bound by treaty not to interfere. It is much to be regretted that the modern exodus of a teeming population has resulted in failure and disgrace.

The beginning of Chinese emigration can be traced back to the travels of Fa-Hien from 399 to 414 A.D., and of Yi-Tsing from 671 to 695 A.D., around the south-western Pacific Islands.[1] The fact that China had long emerged as the "big brother" in the Continent of Asia undoubtedly expedited Chinese emigration,

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(1) Schrinke, The Effect of Western Influence on Native Civilisation in the Malay Archipelago (1929), 35.

which spread to the southern and eastern countries before European pioneers ever set foot on oriental soil. Many of the Asiatic States were at least nominally under Chinese suzerainty, and racial similarity between the Chinese and the natives also facilitated their peaceful penetration. Commercial intercourse with Western nations accelerated the migratory movement away from the mainland. Chuanchow and Changchow in Fukien were much resorted to by the Portuguese ships during the later part of the Sung Dynasty (960-1276 A.D.) and throughout the Mongol Dynasty (1277-1367 A.D.).(1) The Portuguese were soon followed by the Spanish and the Dutch. The Chinese expeditions to the "Western Ocean" (up to the Gulf of Aden) at the beginning of the fifteenth century greatly encouraged mercantile adventures. In 1511, Malacca was taken by the Portuguese, who also occupied Macao in 1517, where forty years later they were permitted by the Chinese authorities to stay. Spain, then the most powerful nation in Europe, had in 1565 discovered and annexed Luzon and the neighbouring islands, to which was given the collective name of the Philippines, and a large volume of trade sprang up between Manila and Changchow. The Dutch established themselves in Java in 1619, and five years later, took possession of Formosa, which is separated by a

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(1) For early Portuguese trade in Fukien, see the learned article by Phillip in China Review, XIX (1891), 42-51. Cf. also Douglas, Europe and the Far East (1913), Ch. I.

narrow strait only from the Fukien mainland. The people of Fukien, who traded in these foreign possessions, were eventually introduced via the neighbouring Philippines to Mexico and Latin-America.(1) From the Dutch East Indies they were introduced to Cape Colony in South Africa, which was annexed to Great Britain in 1806. From the fact that the Cape from 1652 to 1803 either made its own statutes relating to Chinese or took the ready-made statutes from Batavia,(2) it is evident that there were Chinese and a Chinese problem in the Colony from quite early times. The territorial continuity of Annam with the southern provinces of China also made it a base for early Chinese colonisation and southward movement.

The City of Canton had been since the later Tang Dynasty (618-907 A.D.) a port of international trade, and it was here that the East met the West for the first time. Thus the Kwangtung people and the people of Fukien were the first to do business with Westerners.(3) In an early survey of Chinese emigration, a British agent in China reported as follows: "Emigration from this province [Kwangtung]and the adjoining one of Fukien dates from a very early period, and it is

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(1) Bonaparte, Le Mexique au début du XX^e^ Siècle (1906), I, 117.

(2) Cf. South African Law Journal, XXIII (1906), 245.

(3) Ningpo in the province of Chekiang had also been chosen as an emporium with a flourishing Portuguese settlement in 1542; but the relations were so shortlived that in 1545 the settlement was destroyed by the provincial authorities: Phillip, loc. cit., 46.

these provinces alone which have reclaimed the Islands of Formosa and Hainan; introduced industry and various of the most useful arts into the countries of Cochin-China, Cambodia and Siam, settled many of the islands of the Indian Archipelago; and contributed more than any other race to the rise and prosperity of the European settlements in Java, the Philippines and the Malay Peninsula. The districts which have furnished the largest amount of emigration are those of Chaonchow and Keaying in Kwangtung and Changchow and Chuanchow in Fukien."(1)

The modern phase of Chinese emigration may be said to begin with the opening up of the Five Ports for foreign trade by the first Anglo-Chinese Treaty of 1842. It contrasted with the emigration of the early period in several manifestly different aspects. While the early migration had for its purpose the pursuit of trade, the later emigrants started in most cases as manual labourers. The early colonists did not venture beyond the southern and western Asiatic Islands, but their successors in the middle of the nineteenth century proceeded as far as America, the West Indies, Australia and New Zealand. The former were mostly men from Fukien, but now it is the Cantonese who form the bulk of the emigrants. The first pioneers, in so far as they proceeded to tropical colonies only, did not create or experience racial antagonism. On the

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(1) British Parliamentary Papers, 1852-3, 263, 23.

one hand, Europeans could not work with success in these places, largely owing to the hot climate, and so there is no competition between them and the Chinese. On the other hand, the tropical islands had already a dense native population, which precluded a wholesale white settlement such as was possible in temperate regions. Further, the white men who settled there found the collaboration of an "intermediate race" in business dealings with the natives to be almost indispensable. Lastly, the settlement of Chinese in these countries had begun long before European colonisation took place. Generation after generation, they have survived in the land of their adoption and have acquired considerable interests. Their number has grown so overwhelmingly large that any attempt to oust them is practically impossible.

Quite different was the fortune of the later emigrants, who in temperate countries found themselves competing with white settlers. In Australia, New Zealand and North America where young communities of European origin had established themselves, the energy, efficiency and adaptability of the Chinese caused them to be feared as formidable competitors for ultimate possession of the land.(1) In these countries the would-be Chinese immigrant is either refused admission by more or less drastic measures, or discriminated against so as to

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(1) Cf. Toynbee, Survey, 1926, 457.

prevent him from earning a livelihood. A vast mass of legislation has been directed against him, and many laws have been passed with the object of making the existence of the Chinese in the lands more and more difficult, or of restricting to the point of prohibition any further immigration. So universal is this type of legislation that it may be wondered whether the entire disappearance of the Chinese immigrant as a class is not unlikely.

The total number of Chinese abroad was estimated in January, 1934, to be about 11½ million persons,(1) of whom an overwhelming majority were to be found in the Malay Archipelago, with which the Chinese had their first intercourse, and Formosa, which was a Chinese province until 1895. Roughly speaking, there are about two millions in British Malaya and Borneo, more than one million in the Dutch East Indies, and three and a half millions in Formosa. The remainder, scarcely more than a tenth of a million, is found scattered throughout certain "white" countries; and it is this fraction which has been the subject of the legislation which is the chief concern of the present study.

The countries dealt with in this thesis fall into three groups. First, the United States of America, between which and China intimate relations have long existed, and in which

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(1) The Statesman's Year Book, 1934, 249. The figure is given as 11,393,636.

the Chinese have vast interests. Their entry into the country is strictly controlled, however, and their residence there is governed by a complicated system of legislation. Secondly, the British Dominions of Canada, Australia, New Zealand and South Africa, which have also had long and difficult experience of the Chinese. The Chinese, indeed, commenced their modern emigration in response to invitations from these countries, which soon legislated with the object of according them a special status. The British Dominions and the United States, however, pursue different objects in legislating with regard to the Chinese, and no analogy can be drawn between the positions of Chinese immigrants in the one and the other, on account of the wide divergence between the public law of the two groups of States.

In the British Dominions, the enactments against Chinese have not been uniform either in kind or in purpose. The reason for the differences is to be found in the varying historical development of the different parts of the Empire. Although the Treaty of 1842 between Great Britain and China promised "full security and protection" to the person and property of their respective subjects within the territory of the other Party, the British Government has never deemed it necessary to interfere on grounds of international polity with legislation in the Dominions affecting Chinese immigration. This was considered a matter of internal administration, and each Dominion has been left to take such action as it has

a Dominion, or of a State or province of a Dominion, is of the same force and authority as an Act of the American Congress, so far as it is not ultra vires the Federal compact, which usually provides ample latitude for local action, nor disallowed on political grounds, the exercise of which power is now practically obsolete. It is even superior to an Act of Congress in that it is subject to no other constitutional limitations. Indeed, many of the Dominion statutes, had they been enacted within the political fabric of the United States, would have been null and void, although the American States have gradually learnt the technique of discriminative legislation on a federal basis.

The third group dealt with in this Thesis comprises the Asiatic countries where, from the point of view of numbers and wealth, the real strength of the Chinese abroad lies. The Straits Settlements, the Malay States, Federated and Unfederated, Siam, French Indo-China and the Dutch East Indies are all reviewed in some detail. Early Chinese colonisation in these countries, without imperialistic and cultural aspirations, has made the acceptance of the native rule by the newcomers a matter of course. In a few instances only have they sought to preserve their own domestic usage and custom, although in one case, Annam, they have transformed into a Chinese legal system that of a colonised vassal State. Generally, their treatment by the territorial potentate has been the same as that accorded to the natives. Later, the coming of the Europeans with their own laws and institutions tended to complicate

the oriental systems, and the inauguration of judicial dualism soon began to reflect the inferiority of the native status to which the Chinese have so freely been assimilated. In Siam the institution of consular jurisdiction by the Treaty Powers has also affected in no small measure the legal position of the resident Chinese.

Naturally, the various aspects of Chinese immigration have given rise to many questions of law and diplomacy. Special legislation in certain countries has attempted to put the Chinese outside the pale of the general law and to govern them by a separate corpus juris involving inferiority of status. But by international law deviation from general practice in the treatment of citizens of an independent nation by the territorial State is subject to certain restraints. The network of international agreements by which modern nations promise to receive each other's nationals in a standardised manner has tended to assimilate the position of an alien with that of the native. Except for certain disabilities, the imposition of which upon aliens may be dictated by the special circumstances of a country, the treatment of a particular class of aliens differently from natives or from another class of aliens necessarily gives rise to international controversy. The present study is mainly descriptive, and no special attempt will be made to suggest a solution of these controversies.

It is proposed to deal in Part I with the constitutional provisions of the respective countries with the object of

showing especially how far the various law-making organs may enact legislation affecting the position of aliens or of persons belonging to a particular racial group within their territory. The general historical survey which follows this will reveal the important facts and problems of the various phases of Chinese immigration. Part II is devoted to the discussion of immigration laws and restrictions under which the Chinese may enter, travel or reside in the countries concerned. Special attention has been paid to the constantly changing position under successive enactments and judicial interpretations thereof. Part III deals with problems of nationality and naturalisation, showing the conditions under which Chinese may acquire foreign nationality, and the consequences which follow such acquisition. Legislation in restraint of trade and occupation is discussed in Part IV, which presents the economic aspect of the Chinese problem. Part V concerns restrictions of other civil and political rights of the Chinese either as aliens or as citizens in their country of adoption. In Part VI is considered the special jurisdictional régime to which the Chinese are subject in certain Asiatic countries. Just as the economic laws are the product of Western communities, so judicial dualism is a peculiar institution of the orient. This Part will begin with the legal status of the Chinese in Siam either as non-treaty foreigners, or as subjects of a Power which enjoys extraterritoriality. Then come the origin and extent of the assimilation of the Chinese to the natives, and

its effects. Recent legal developments of the Chinese community in certain Asiatic countries which, coupled with the gradual retrocession of the consular jurisdiction in Siam tending to neutralise the position of the Chinese residents, will probably bring amelioration to their juridical status.

PART I.

CONSTITUTIONAL AND GENERAL HISTORICAL SURVEY

Chapter I.

THE CONSTITUTIONAL POWER AND THE ALIEN

1. Aliens in the United States and their Charters of Rights.- The rights and disabilities of aliens are generally discussed from the point of view of their political and civil character. Aliens are generally denied the political rights, involving the control of and participation in State affairs. The civil rights of aliens are found to be dealt with in three different ways by the various countries of the world, that is, there are three categories of State legislation affecting aliens: the first is characterised by no definite principle but merely imposes certain grave disabilities on aliens. The second type is based on the principle of reciprocity, granting to aliens the same rights as are accorded by their country to nationals of the law-making State. The third system is that of assimilation to a State's own nationals, and is the one which is to-day being most commonly adopted.(1) The practice of the United States with regard to aliens, while adhering to the first type above mentioned, retaining grave disabilities, differentiates between citizens, white aliens, and aliens ineligible for American citizenship.

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(1) Borchard, Diplomatic Protection of Citizens Abroad (1916), 72.

Distinction is even made between citizens of the white and coloured races. It may be fully conceded that perfect uniformity of treatment of all persons is never practicable nor even desirable. The rights and duties of aliens differ widely from those of citizens, and those of alien declarants differ substantially from those of non-declarants. But a further classification, of non-declarants, exists in the United States, of persons eligible and ineligible for citizenship, which seems to be arbitrary. Moreover, better facilities and privileged treatment is accorded by law to persons of a class and denied to those of the same class but of different racial origin, and this is not justifiable.

Aliens in the United States nevertheless possess certain charters of rights.

(i) Treaty, the Supreme Law of the Land

The rights of aliens are guaranteed first by the treaty between the United States and the country of which the aliens are citizens. Article VI, section 2, of the Federal Constitution stipulates that "this Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitutions or laws of any state to the contrary notwithstanding." It is apparent that the Constitution, laws and treaties are not only as much a part of the

law of every State as its own local laws and constitution, but are indeed superior to these, and to their authority the State laws and constitution must yield. The treaties stand on a level with the provisions of the Federal laws and Constitution. They "operate of themselves without the aid of any legislation state or national, and will be applied and given authoritative effect by the Courts."(1) In American jurisprudence, however, they are by no means superior to the Acts of Congress; they are of equal force. A later inconsistent provision in either repeals the earlier one in the other.(2) "To the Courts, it is simply the case of conflicting laws, the last modifying or superseding the earlier." But it should be noted that if the provisions of a treaty are abrogated by Federal legislation, the treaty remains nevertheless internationally binding upon the United States.(3) Of such a denunciation it was once said that it was "confessedly only justified by reasons both of the highest justice and the highest necessity" and would incur international delinquencies.(4)

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(1) Chew Heong v. U. S., 112 U.S. 536.

(2) Chae Chan Ping v. U. S., 130 U.S. 681.

(3) Willoughby, Constitutional Law of the United States (1929), I, 579.

(4) Veto message of President Hayes of the Fifteen Passengers Act, 45th Cong., 3d Sess. 1879, H.D. 102, ser. no. 1838.

The first diplomatic mission sent by China to foreign countries, headed by Anson Burlingame, resulted in the signature of a "liberal and auspicious" treaty[1] with the United States in 1868. By Article V the parties recognised the inherent and inalienable right of man to change his home and allegiance, and the mutual advantage of the free migration and emigration of their citizens from the one country to the other for the purpose of curiosity or trade or as permanent residents. Article VI granted to Chinese visiting or residing in the United States the same privileges, immunities and exemptions in respect of travel or residence as may be enjoyed by the citizens of the most-favoured-nation. The right of free immigration was specially mentioned, although it had begun long before 1868. The most-favoured-nation clause, which was repeated in all the subsequent treaties, bestowed upon Chinese a standing equal, except in regard to naturalisation, to that of the nationals of other powers. It is of general application, and has the advantage over similar clauses of qualified and conditional validity. The position of the Chinese therefore is, in principle, more secure than that of other aliens in America, for instance the Japanese, whose most-favoured-nation privilege is confined to specific and enumerated subjects.[2] Discriminatory legislation when

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(1) 16 U.S. Statutes 740.

(2) Articles I and XIV of the Treaty of 4 April, 1911, 37 U.S. Statutes 1504.

enacted must give way to this clause, and many State laws, although enacted within the State's exclusive jurisdiction, have been nullified by the Courts on account of their contravening the assured guarantee. As will be seen hereafter, the Pacific States were the first to enact laws discriminating against the Chinese, which laws were constantly so treated by the Courts. Finally, these States appealed to Congress for action, and the treaty appears to have constituted a source of embarrassment to the American Government. It was first thought that the power of modifying an existing treaty did not belong to Congress: it was part of the treaty-making power which the Constitution had given to the Senate and the Executive. Congress passed legislation in the sense required, but it was vetoed by the Executive. But later, by a process of the strictest judicial construction of its terms and a constant reliance upon the prerogatives of sovereignty, the authority of the treaty was reduced to a minimum. The free immigration clause was abrogated as against Chinese labourers by a new treaty, and the exempt persons, though retaining the status as originally granted, had to be content with the residue of incomplete rights left them by the restrictive interpretations of the Courts.

(ii) The Federal Constitution

The Constitution of the United States does not define expressly the status of an alien. Nevertheless, certain provisions, as interpreted, have been held to extend to him.

Whenever the Constitution uses the broad terms "persons" or "people", the Courts have generally held that these provisions apply to resident aliens as well as to citizens, and to aliens eligible for citizenship as well as to those ineligible.(1)

The great citadel of constitutional protection against unjust action on the part of any State or subdivision is the Fourteenth Amendment to the Constitution. It provides, inter alia, that no State shall deprive any person of life, liberty or property without due process of law, or deny to any person in its jurisdiction the equal protection of the laws. Aliens in the United States are within this clause of the Amendment and are as fully protected as citizens. Many of the anti-Chinese laws enacted by State legislatures have been held void as contrary to this supreme guarantee. But as the expressions "due process" and "equal protection" are vague, there has been no uniformity of interpretation. It is not remarkable that when Federal laws contrary to treaty obligations are sustained, other legislation hostile to or discriminating against persons of a certain class, sect, creed or nation, may be defended and adjudged to be within the constitutional limitations. Under the Federal Compact the States reserve all powers not delegated to the Union nor denied to the States. Hence, and also by virtue of the general

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(1) See Note on "Provisions of the Federal Constitution invocable by Aliens independently of Treaty", 263 U.S. 255 (1923).

police power to protect the public health, morals, safety and general welfare, State legislatures and local authorities enjoy ample latitude to enact laws which may substantially affect the rights of aliens. The weakness of the Federal system in protecting the treaty rights also frequently places the Union Government in an invidious position, as it finds the performance of its international duties left at the mercy of individual States which are in no way responsible to a foreign power.

2. The British Empire

(1) Anglo-Chinese Treaties and the Dominions

Whether Chinese citizens possess any treaty right to enter the British Dominions has been a much mooted question. The first treaties between Great Britain and China implicitly alleged that the right to trade and protection is necessarily reciprocal.(1) Early judicial decisions and diplomatic correspondence also alluded to the existence of such rights. Since no document has been signed which excludes the Chinese from British territory, such right seems to continue to exist, in spite of the fact that the self-governing Dominions have legislated to prevent Chinese immigration.

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(1) Cf. Tyau, Legal Obligations arising out of Treaty Relations between China and Other States (1917), 121.

The Treaty of Nanking, 1842, which concluded the first Anglo-Chinese war, provides in Article 1 that there shall be peace and friendship between the Queen of the United Kingdom and the Emperor of China, and between their respective subjects, who shall enjoy full security and protection for their persons and property within the dominions of the other.(1) Full protection must imply equal protection of the laws, and the terms are reciprocal. Article 5 of the Convention of Peking, 1860, stipulates that "Chinese choosing to take service in the British Colonies or other parts beyond sea, are at perfect liberty to enter into engagement with British subjects for that purpose, and to ship themselves and their families on board any British vessel at any of the open ports of China."(2) It further provides that the high authorities should frame, in concert with the British representative in China, regulations for the protection of Chinese emigrating as above. A convention to that effect was signed in 1866, though not ratified, by the British and French Governments.(3) The declaration of Prince Kung, attached to the convention, and stating that the Chinese Government would throw no obstacle in the way of free emigration, that is to say, to the

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(1) Hertslet, China Treaties (1896), I, 7.

(2) Ibid., I, 50.

(3) Ibid., I, 52.

departure of Chinese subjects embarking of their own free will and at their own expense for foreign countries, strongly suggests that such emigration was much to be desired by the other contracting parties, and consequently the right of migration had been voluntarily accorded. To pretend that it applied to Chinese contracted coolie emigration only does not exclude the right of other free labourers "to ship" "at perfect liberty" to the "British Colonies".

In the case of Tai Sing v. Maguire,(1) the Supreme Court of British Columbia affirmed that Chinese had the right to reside and trade in the British Dominions. "As a matter of history", said Mr. Justice Gray, "it is well-known that these treaties were forced upon China by Great Britain, and on the part of the former most reluctantly accepted. As stated by a later writer on the subject in a popular magazine, the terms of treaty between Great Britain and China permitted the subject of Great Britain to trade in China and reside there, and it gave in turn full permission for the Chinese to trade and reside in the British dominions everywhere. Many had already gone there and their actions were fully legalized by the treaty. It is said this permission was not asked by the Chinese but was inserted by the English envoy to give it an appearance of fairness. An examination

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(1) 1. B.C., Pt. 1, 101,(1878).

of the last treaty in 1858 and the subsequent convention of 1860 shows that the Emperor of China actually undertakes to withdraw the ban hitherto preventing his subjects from going abroad, and to give them permission to go and trade and reside and take service in the British colonies and to enter into engagements with British subjects for that purpose." The same conviction was expressed in the judgment in the case of Rex v. Wing Chong,[1] rendered seven years later. "In the case of Chinese treaties", ruled the Court, "they were forced at the point of the bayonet on China, to obtain a right for us to enter China, and in return for a similar permission to us, full permission was given for the Chinese to trade and reside in British dominions everywhere."

When New South Wales passed in 1861 a Bill to restrict Chinese immigration, the British authorities were much embarrassed[2] since the legislation might be at variance with its treaty obligations, the Convention of Peking having been signed in the previous year; the Act was however allowed for political reasons.

When again in 1876 a Queensland Act, imposing heavier taxes on Chinese than on Europeans for the right to mine or carry on business, was reserved, the British Government obviously admitted that the Article did contemplate that all

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(1) 1. B.C., Pt. 11, 150,(1885).

(2) Willard, History of the White Australia Policy (1923), 34-35.

Chinese should have full freedom to enter the British Dominions without restriction or impediment.(1) The Chinese Minister in London also upheld firmly the rights of Chinese subjects to enter British colonies in his repeated protests(2) against the anti-Chinese laws in Canada and Australia. The rights so asserted seemed to have been tacitly recognised by the British authorities, who afterwards instructed their Minister in Peking to obtain from the Chinese Government an agreement consenting to a restriction of Chinese immigration.(3) The negotiation had for its model the Sino-American treaty which limited the right of admission of Chinese into the United States, granted by the Burlingame Treaty of 1868, only to specified classes. The Inter-Colonial Conference of Australia in 1888 was fully alive to the expediency of securing the desired restriction by imperial diplomacy. On account, however, of the restrictive legislation of the Colonies themselves, no document for the regulation of Chinese immigration was signed.

It appears that the right of resident Chinese in the British colonies to be immune from discriminative legislation

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(1) Despatch, Queensland, No. 12, 1877, cited in Campbell, Chinese Coolie Emigration to Countries within the British Empire (1923), 62; also in Queensland Votes and Proceedings, 1877, 1, 815, cited in Willard, op. cit., 43.

(2) C. 5448, 1888, Enclosure in No. 1 and Appendix 1.

(3) Ibid., No. 85.

may also be advanced. The full security and protection clause could not place the Chinese in a position inferior to that enjoyed by the nationals of other powers. In the cases mentioned above, the discriminative laws were indeed held null and void on the ground that they were an infraction of the existing treaties between the Imperial Government and China. In his despatch of 1886 the Chinese Minister strongly protested against the invidious position in which Chinese subjects, who had entered the colony on the faith of treaties, were placed. He asked for an enquiry with a view to the elimination of the laws found to be at variance with treaty obligations and international usage, but no steps were taken in this direction. The fact of inability to enforce treaty provisions cannot therefore be taken to mean that no such rights exist.(1)

(ii) The British North America Act, 1867

It must be borne in mind that apart from the Crown Colonies, whose legislation is directly controlled by Downing Street, the responsible governments of the Dominions possess different powers in relation to legislation concerning aliens. The reasons for this differentiation lie in the different history and nature of the Dominions, and it is proposed now to deal with the constituent Acts of each.

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(1) Cf. Keith, Responsible Government in the Dominions (1928), II, 809.

The British North America Act, 1867, comprised a four-fold classification of legislative powers: (1) subjects assigned exclusively to the Dominion Parliament; (2) those assigned exclusively to the provincial legislatures; (3) those enjoyed concurrently by the Dominion and provincial legislatures; and (4) particular subjects for special legislation.(1) The powers assigned to Parliament with which we are concerned include Regulation of Trade and Commerce, and Naturalisation and Aliens.(2) The provincial legislatures have exclusive powers to deal with Constitution, Direct Taxation, Management and Sale of Public Lands, Municipal Institutions, Shop and Saloon Licences, and Property and Civil Rights in the province.(3) In each province the legislature may make laws in relation to immigration into the province; Parliament may also from time to time make immigration laws; any law relative to immigration shall have effect in and for the province as long and so far only as it is not repugnant to any Act of the Parliament of Canada (s. 95). Any Act of the province encroaching upon the allotted sphere of the Dominion will be ultra vires. As will be shown more fully in later chapters, the interpretation of legislative powers

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(1) Lefroy, Canada's Federal System (1913), xlix.

(2) S. 91 (2), (25).

(3) S. 92 (1), (2), (5), (8), (9), (13).

is not free from ambiguity.(1) Some of the constructions may be here mentioned. A provincial Act, depriving persons of Chinese nationality of the capacity to take municipal trade licences, has been held a "very wide interference with trade and commerce".(2) A fee collected for wash-house or laundry licences is indirect and not direct taxation.(3) The Coal Mines Regulation Act of British Columbia, which prohibits Chinese from employment in underground coal workings, is ultra vires because it affects aliens or naturalised subjects, and therefore trenches upon the exclusive authority of Parliament.(4) But an Act prohibiting Chinese, naturalised or not, from voting in the provincial elections has nothing to do with the subject of "naturalisation and aliens": the provincial legislature is competent under s. 92(1) to regulate the electoral laws of the province.(5) When the Chinese is forbidden to employ any white women in his business premises, the Act is upheld as touching only civil rights and not affecting him as an alien.(6) When licences were granted to

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(1) Cf. Keith, The Constitutional Law of the British Dominions (1933), 332.

(2) R. v. City of Victoria (1888), 1. B.C., Pt. II, 331.

(3) R. v. Mee Wah (1886), 3 B.C. 403.

(4) Union Colliery Co. v. Bryden (1899), A.C. 580.

(5) Cunningham v. Homma (1903), A.C. 151.

(6) Quong Wing v. R. (1914), 18 D.L.R. 121.

cut timber on certain land of a province on the condition that no Chinese were to be employed in connection therewith, the Privy Council upheld the provincial legislature by ruling that, although by s. 91(25) of the British North America Act the Dominion Parliament has exclusive authority as to naturalisation and aliens, the function of regulating the management of the property of a province is assigned by s. 92(5) and s. 109 to the legislature of the province.(1)

It is evident that provincial legislation may affect aliens, and if carefully framed it may in practice impose disabilities on them. The province is gradually learning the technique by making distinction on the ground of race rather than on that of nationality, which implies alienage. Therefore the position of a British subject of the Chinese race in Canada is far less secure than that of a foreigner of the white or black races. Further, a disability imposed on Chinese affects equally all men and women of the Chinese race whether they are by nationality Chinese, British or American, and does not affect a Chinese national of the African race.

(iii) The Australia Constitution Act, 1900

The Act assigns specific subject matters to the Federal Parliament and the residue of possible subject matters to the State parliaments. The States reserve a mass of exclusive

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(1) Brooks-Bidlake and Whittall, Ltd. v. Attorney-General for British Columbia (1923), A.C. 450.

powers which cannot be invaded or interfered with by federal authority, and, in addition, certain concurrent powers, as to matters within the federal sphere, to pass laws not inconsistent with federal laws.(1) By s. 51 the Federal Parliament shall have power to make laws for the peace, order and good government of the Commonwealth with respect to (i) trade and commerce, (xix) naturalisation and aliens, (xxvi) the people of any race other than the aboriginal race in any State, for whom it is deemed necessary to make special laws, and (xxvii) immigration and emigration. But the powers exclusively vested in the Federal Parliament by s. 52 are confined to (i) the seat of government of the Commonwealth, (ii) matters relating to any department of the public service, and (iii) other matters declared by the Constitution to be within the exclusive power of Parliament. Of the concurrent powers, the only restriction on the competence of the State to legislate is that when a State law is inconsistent with a law of the Commonwealth, the latter shall prevail and the former shall to the extent of the inconsistency be invalid (s. 109). The State is to retain every power unless it is expressly vested in the Federal Parliament or withdrawn from the State (s. 107). Thus both the States and the Commonwealth of Australia are competent to pass any Act discriminating against

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(1) Quick, Legislative Powers of the Commonwealth and the States of Australia (1919), 269.

Chinese without any question of its being ultra vires, unless the Act is disallowed by the Crown on political grounds.(1)

(iv) The South Africa Act, 1909

The tradition of the Boer Republics in South Africa had been that there should be no equality either in State or in Church between the white people and the coloured natives. As far back as 1799 the Dutch East India Company solemnly recorded that the doctrines of égalité and fraternité of the French Revolution were not applicable to the relations of whites and blacks.(2) The Constitutions of the Transvaal and Orange Free State vigorously repudiated the idea of such toleration.(3) This doctrine of racial inferiority was applied to the treatment of Asiatics when the Indian people were introduced into the Dark Continent. Being comprehended in the categories of "Asiatics" and "coloured people", the Chinese are subject to the same discrimination.

The position of natives, however, differs fundamentally in the Cape from the rest of South Africa. In the Constitution of 1852 the principle was adopted that natives should have the same political rights as the white men. The Cape

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(1) The power of the Crown to disallow an Act of a self-governing Dominion has long been obsolete: Keith, The Constitutional Law of the British Dominions (1933), 22.

(2) South African Law Journal, XXIII (1906), 251.

(3) Keith, Responsible Government in the Dominions (1928), II, 299. For the text of the Constitutions see Eybers, South African History, 1795-1910 (1918).

Colony therefore has been the least affected by colour prejudice.(1)

Under the South Africa Act, 1909, the four provinces surrendered most of their powers. Parliament shall have full power to make laws for the peace, order and good government of the Union (s. 59). The Provincial Councils retain the power to make ordinances on a few specified subjects and on all other matters which, in the opinion of the Governor-General in Council, are of a merely local or private nature in the province (s. 85). They may also recommend to Parliament the passing of any law relating to any matter in respect of which they are not competent to make ordinances (s. 87). The ordinance shall have effect in and for the province as long and as far only as it is not repugnant to any Act of Parliament (s. 86). But all laws in force in the several colonies at the establishment of the Union shall continue in force until repealed or amended by Parliament, or by the Provincial Councils in matters in respect of which the power to make ordinances is reserved or delegated to them (s. 135). The control and administration of native affairs and of matters specially or differentially affecting Asiatics throughout the Union shall vest in the Governor-General in Council

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(1) "The Cape was the motherland of the Malays. Dutch was their mother tongue. They had been living with the Dutch from the very first and largely initiated them in their ways of life. How could the Government of the Cape Colony legislate against the Malays?" Gandhi, Satyagraha in South Africa (1928), 60.

(s. 147). No special guarantee or protection is given to any person on grounds of nationality or race, and the provisions of s. 147 have been held not to preclude the legislatures from passing laws affecting the Asiatics because "it deals only with executive power and not legislative action."(1) It is quite possible for an Asiatic to find that he has no redress against what seems to him very unfair treatment. The only relief in the Act is the provision that in the nomination of the eight senators by the Governor-General, one-half of their number shall be selected mainly on the ground of their thorough acquaintance with the reasonable wants and wishes of the coloured races in South Africa (s. 24). The Cape of Good Hope is able to protect the political rights of its coloured people by the insertion in the Act of a section which provides that although Parliament may prescribe the qualifications of voters for the election of members of the House of Assembly, no such law shall disqualify any person who, under the laws existing at the establishment of the Union, is capable of being registered as a voter, from being so registered in the said province by reason of his race or colour only. Such a Bill can only be passed by both Houses of Parliament sitting together and by a vote of not less than two-thirds of the total number of both Houses (s. 35(1)). Since the Cape occupies more than one-third of the seats in

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(1) Minister of Posts and Telegraphs v. Rasool (1934) A.D. 167.

Parliament, no such Bill can be passed without its express consent.(1) The coloured races are further protected by the provision that no person who, at the passing of such law (prescribing qualifications of voters for the election of members of the House of Assembly), is registered as a voter in any province, shall be disqualified by reason only of race or colour (s. 35(2)).

(v) Dominion Legislation and the Statute of Westminster, 1931

The constitution of the British Empire underwent fundamental changes by the enactment of this Statute, under which the Parliament of the United Kingdom is reduced to a position of equality with that of the Dominions. No Act of the former will now extend to any of the Dominions unless by its request and consent (s. 4). The Colonial Laws Validity Act, 1865, shall no longer apply to any law made by the Dominions after the commencement of the Statute. Nor shall any such law be void or inoperative on the ground that it is repugnant to the laws of England (s. 2).

But the constitutional position as between the Dominion and its constituent units is not changed. It is expressly provided that powers conferred by the British North America

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(1) Eight senators each shall be nominated by the Governor-General and elected by the four provinces respectively, making a total of 40 (s. 24). In the House of Assembly, the Cape is allotted 51 seats, Natal 17, Transvaal 36, and the Orange Free State 17, totalling 121 (s. 33).

Act upon the Parliament of Canada or upon the provincial legislatures shall be restricted to the enactment of laws in relation to matters within the competence of Parliament or any of the legislatures of the provinces (s. 7). Nor does the Statute authorise the Parliament of Australia to make laws on any matter within the authority of the States not being a matter within the authority of the Parliament or Government of the Commonwealth (s. 9). Although there is no clause safeguarding the Constitution of the Union of South Africa, it is understood that the legislation "will in no way derogate from the entrenched provisions of the South Africa Act."(1)

3. The French Colonial Constitution.- In the study of the French colonial system two problems will present themselves at the outset. First, where the seat of legislative authority in colonial government actually lies, and secondly, how far the validity and applicability of metropolitan laws extends to the colonies. The Constitution of 1852 had, by Article 26, empowered the Senate to regulate by Senatus consult the whole colonial organisation. Accordingly, two Senatus consults(2) were passed, on 3 May, 1854, and 4 July, 1866, forming the

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(1) Cf. Wheare, The Statute of Westminster, 1931 (1933), Ch. VI, "The Particular Application of the Statute to each Dominion".

(2) Institut Colonial International, Lois organiques des Colonies (1906), II, 137.

basis of the colonial constitution, the essentials of which are still in force. The Senatus consult of 1854 divided the colonies into two classes - the "old colonies" of Martinique, Guadeloupe and Réunion, and the "other colonies", the former being placed under a more privileged régime. In principle, the old colonies were governed by simple decree of the executive authority, but for the more important matters the Council of State, the Senate and the Legislature would respectively intervene. Subject matters were enumerated under different categories which had to be dealt with either by decrees of the Council, or by Senatus consults, or by laws. To these may be added administrative orders issued by the local governor for the execution of the principal legislation and the regulation of administration and police. The bulk of legislation in these colonies being by laws in one form or another, they were known as colonies under the law régime. For the other colonies, the Senatus consult of 1854 had provided by Article 18 that legislation should be in the form of imperial decrees. Hence they were termed colonies under the decree régime. The classification was made under the Third Empire, when the acquisition of the more developed colonies was not anticipated. The division of power to be exercised by the different authorities was also arbitrary.(1) But in view of the constitutional

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(1) Cf. Roberts, History of French Colonial Policy, 1870-1925 (1929), I, 150.

and organic character of the Senatus consult, the spheres allotted by it to the legislature could not be touched by the executive, and vice versa. It was not until the establishment of the third Republic that the French Parliament resumed full power in matters of colonial legislation.

The downfall of the Constitution of 1852 would have been accompanied by the abrogation of the Senatus consults, from which had been derived the authority of delegated legislation. But the Republicans, having failed to provide for the colonies in their Constitution, had to apply the old laws in regard to this subject. However, they were "deconstitutionalised" and reduced to the position occupied by an ordinary law before 1870. Naturally, an Act of the Imperial Senate could not be taken to have any binding force upon a Republican assembly. The Chambers to-day may legislate on all points which were not ascribed to the legislative power by the Senatus consult of 1854. All matters for which a Senatus consult would be necessary as stipulated in Article 3 are regulated by law.(1) A law can also do what formerly was done by a decree. This power also extends to colonies under the decree régime. By means of an express provision in the text, certain laws will be made applicable in these colonies,(2)

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(1) François and Mariol, Législation coloniale (1929), 91.

(2) Girault, Principes de Colonisation, et de Législation coloniale, II (1929), 11.

although generally they shall continue to be governed by executive decrees.(1)

The extension of the domain of laws will limit the field of application of the decrees, the Executive having no right to regulate any matter upon which the Legislature has once pronounced.(2) The Legislature may also provide that certain laws shall not be applied to certain colonies, and thus tie the hands of the Executive. But as a matter of practice, the Chambers interfere on very rare occasions only with colonial matters. Legislation by executive decree is the commonest method. Its authority will also cover the legislation of countries under French protection, which are assimilated to colonies under the decree régime in spite of the fundamental discrepancy between an annexed territory and a protectorate. The legality of this has been judicially approved because the Executive, having been authorised to ratify and carry out the different treaties of protection, has thereby acquired sufficient power to legislate by decree for these countries.(3) A decree is paramount, subject to the Senatus consult of 1854. It must not touch matters concerning State

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(1) Petit, Organisation des Colonies françaises (1894-5), I, 105.

(2) Girault, Principes de Colonisation et de Législation coloniale, II (1929), 12.

(3) Ibid., I (1922), 193.

finances, and the constitutions must also be observed. The present position of colonial jurisprudence in theory is that the French Parliament can and does legislate for the colonies on all matters. In reality, all colonial legislation not falling within the specific field which requires the sanction of the Chambers is vested in the executive power. The actual legislator for a French colony is therefore not Parliament but the President of the Republic.

The validity and applicability in the colony of metropolitan laws and decrees presents an anomalous position. In spite of the highest authority, they are not enforceable in the colonial empire. A special promulgation by the local authorities is always required. Three cases may be distinguished. For laws not expressly declared to be applicable to the colonies, a double promulgation is necessary. A decree, in the first place, is required to render the law applicable to the colony, and this is followed by an Order of the colonial governor promulgating the law and the decree. For laws specially made for, or expressly declared applicable to, the colonies, an Order of the governor will suffice. In the case of decrees, an order of promulgation constitutes the formality required for their operation.(1)

Since laws and decrees cannot come into force in default

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(1) François and Mariol, Législation coloniale (1929), 94.

of a promulgation order, a colonial governor enjoys great latitude, and no time limit being fixed, he may delay indefinitely the operation of such laws and decrees. The remedy lies, however, with the Colonial Minister, who may give orders to the governor to which he must accede. The governor cannot promulgate any law or decree in the colony except upon the direction of the Head of the State or of the Legislature, and, like the Head of the State himself, he may not modify the text. The Executive may declare any law applicable to the colony, or withdraw it by another decree, in the absence of a special provision in the statute. The modification of any law which has been made applicable to a colony shall not come into force of its own accord. The original text, though abrogated in the home land, remains in full vigour in the colonies.(1) But a promulgated law referring explicitly to certain articles of a former law which had not been promulgated, will render them applicable in the colony.(2)

How far French legislation will extend to a colony newly annexed to the colonial domain is obscure. In general, if it is annexed out of a portion of territory adjacent to a French colony by the mere removal of the frontier, the legislation in force in the colony will be applicable. If the

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(1) Girault, Principes de Colonisation et de Législation coloniale, II (1929), 13.

(2) François and Mariol, Législation coloniale (1929), 95.

annexation is so extensive as to amount to the creation of a new colony, the taking possession of the land does not automatically bring French legislation into force.(1) The case of Madagascar is hardly reconcilable with this principle. By the law of 1896 the island was declared a French colony, and the Courts ruled that all French laws were applicable to it without special promulgation.(2) This is incompatible with the fundamental principle of French colonial legislation, and furnishes a basis for criticism of the veritable anarchy of the legislative status.

4. The Constitution of the Dutch East Indies.- In the Constitution of the Netherlands of 1815, the supreme government of the colonies and possessions was vested exclusively in the sovereign.(3) This provision was interpreted as connoting entire freedom from legislative interference, and the executive had enjoyed unlimited authority in colonial affairs. The interpretation was afterwards attacked and this exercise of power alleged to be ultra vires, it being argued that the Constitution conferred upon the King exclusive power over

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(1) François and Mariol, Législation coloniale (1929), 95.

(2) Girault, Principes de Colonisation et de Législation coloniale, II (1929), 26.

(3) For provisions of the early Dutch Constitutions in respect to the colonies see Furnivall, An Introduction to the History of Netherlands India, 1602-1836 (1934), 60.

administration only, and not over legislation.(1) But it was not until the adoption of the Constitution of 1848 that the power to enact fundamental laws for the colonies was conceded to the Legislature. In pursuance of this power the Government Act for Netherlands India, commonly known as the Dutch East Indies, was passed in 1854 by the States-General, which left, however, the regulation of most subjects to the Crown and gave itself the right to legislate only in exceptional cases.(2) Colonial enactments were to be either in the form of law, or royal decree, or ordinance. The Governor-General could regulate any question which had not been or might not be dealt with by law, or which had not been settled by royal decree, or which was not reserved to the Crown (Article 20).

Significant changes in the colonial system were made by the new Dutch Constitution of 1922.(3) The East Indian Colony is elevated to the status of integral territory of the Netherlands, the expression "colonies and possessions" being deleted from the Constitution. Over it, the King shall have supreme power, but the distinction between administration and legislation is maintained. The Governor-General acquires an

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(1) Vandenbosch, The Dutch East Indies (1933), 61.

(2) See the Government Act (Regeerings-Reglement or R. R.) of 2 September, 1854: Bibliothèque Coloniale Internationale, Lois organiques des Colonies (1906), III, 147.

(3) State Papers, 116, 863.

independent sphere of authority, while the Crown is vested with specified powers (Article 60). Legislative autonomy to a large extent is also granted to the Indies. The framework of the Constitution shall be established by law; other subjects shall be regulated by law as soon as such regulation appears to be required. Save on matters excluded from their competence by law, the local representative body shall be consulted, in a manner to be regulated by law (Article 61). Further, the regulation of internal affairs shall be left entirely to the local legislature, except certain special matters reserved to the King. Finally, laws enacted at The Hague shall not be binding for Netherlands India except in so far as may be expressly provided (Article 123).

It should not be taken, however, that under the new Constitution Netherlands India has attained the so-called responsible government or Dominion status in the British constitution. The reins of general administration are in the hands of the Governor-General, whose tenure of office depends upon the royal pleasure. The States-General retains a permanent supremacy in the power to make laws for the constitution of the colony and the distribution of powers to be exercised by the local or by the metropolitan authority. It may likewise legislate whenever expediency demands. Even in the field of internal affairs, ordinances made by the local organ or the Volksraad of the East Indies may be suspended by the Crown. They are also liable to be annulled by an Act of the States-

Generalon the ground of their being contrary to the Constitution, to law, or to the public interest (Article 62). But in view of the direct administrative control under which the Indies had previously been placed, an amendment to this effect is certainly a remarkable step in the direction of decentralisation in the Dutch colonial system.

The East Indian Government Act was consequently brought into conformity with the revised Constitution. A new Constitution Act,[1] promulgated on 13 July, 1925, is now the organic law of the Indies. The Governor-General has all power except that reserved to the Crown, whose authority to legislate is now confined to such subjects and in such cases as the law specially delegates to it, and he may issue government regulations containing general rules for the execution of laws, general administrative measures, and ordinances (s. 81). He shall seek the advice or consent of the Council of India on all matters of general or special interest (s. 22). Acting in agreement with the Volksraad, he may issue ordinances to regulate (a) matters concerning internal affairs of Netherlands India, and (b) other matters which, in accordance with a law or general administrative measure, are to be regulated by ordinance (s. 82). A general administrative measure may regulate, inter alia, all matters that concern (a) treaties and agreements concluded with foreign powers and the

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(1) For the Dutch and French texts of the Constitution (Indische Staatsregeling or I. S.) see Lois organiques des Colonies (1927), 241. An English translation is to be found in State Papers, 123, 949.

rights and obligations in general resulting from international law, and (b) the defence of the territory of Netherlands India (s. 91). An ordinance may, in urgent circumstances, not only supplement what ought to be but has not been dealt with by law or administrative measure, but may also suspend or modify these wholly or in part, subject to later ratification either by law or by administrative measure as the case may be (ss. 92, 93).

It will readily be seen from the provisions of the Dutch Constitution and the East Indian Act that the centre of gravity of Dutch colonial jurisprudence is at The Hague rather than at Batavia. The Volksraad, though it has outgrown the merely consultative function first accorded to it by the Act of 1916, confines its activity to purely internal affairs, the exact scope of which it is difficult to define, and will only become manifest by gradual evolution and after long experience.

Chapter II.

CHINESE IMMIGRATION IN THE UNITED STATES

5. Chinese Migration to America.- The fifth decade of the nineteenth century saw Western nations battering at the doors of Asia and attempting to gain admission in order to carry on trade and commerce. The right of expatriation was solemnly declared by America to be a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty and the pursuit of happiness. The long-confined peoples of the Asiatic mainland were persuaded to migrate beyond the seas. To-day, the situation is reversed. The same white nations are trying to bolt their own doors against the Oriental strangers who are endeavouring to return the call.

The Sino-American relation, which had been one of the most peaceful and cordial in modern history, has, for its last fifty years, to be recorded with mingled gratitude and regret. The United States was as zealous to exclude the Chinese as she had been to invite them. After a brief period of favour, and almost as soon as the Burlingame Treaty had been concluded, anti-Chinese feeling began to make itself felt on the Pacific coast.(1) After years of agitation, and

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(1) See Coolidge, Chinese Immigration (1910).

when the situation was much aggravated by political exploiting of the problem, Congress finally took action and in 1876 appointed a Joint Congressional Committee to investigate Chinese immigration. After hearing a vast amount of testimony which was confused and conflicting, the Committee submitted the recommendation that "measures be taken by the executive looking toward a modification of the existing treaty with China, confining it to strictly commercial purposes; and that Congress legislate to restrain the great influx of Asiatics to this country", because it thought "a duty is owing to the Pacific states and territories which are suffering under the terrible scourge."(1)

But it was not until the Presidential veto of the Fifteen Passengers Act, forbidding any vessel to bring more than fifteen Chinese to the country at one time, that China was asked to accede to the limitations.

The years that followed the treaty of 1880 were marked by the enactment of a series of laws designed to exclude Chinese. In pursuance of the treaty, the prohibition of Chinese immigrants was confined to labourers, but by successive Acts and as the result of administrative and judicial interpretation over a long period, all Chinese aliens outside a few specific classes are now held inadmissible. The exclusion laws have been enforced to such an extent that the

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(1) Senate Report, No. 689, 44th Cong., 2d. Sess. 1877.

Chinese are not treated as citizens of a friendly power, seeking the benefit of treaty rights, but as suspected criminals, while the exempt classes clearly entitled to residence in the country do not receive the courtesy and consideration due to them but are looked upon as offenders and suspects and treated as such. On one occasion the Chinese Minister Plenipotentiary accredited to Washington was asked to show his credentials before being admitted. In 1904 the Exclusion Acts were declared to be in force indefinitely; this was contrary to the immigration treaty, in which temporary prohibition only was contemplated. The high prerogative of sovereignty is no defence to a clear breach of international faith on the part of the United States. To this Exclusion Law the Act of 1924 has added still more restrictions. The Chinese as a nation begin to resent not so much the principle of exclusion as the manner and method of enforcement of the law, as well as the invidious discrimination which their brethren experience in the very "land of the free and the home of the brave".

6. Early Anti-Chinese Legislation in the Pacific States.-

(i) State Legislation

Chinese immigration into the United States began with the discovery of gold in California in 1847. For the first four years the number of immigrants is estimated to have reached ten thousand. The census for 1880 records that there were

105,465 Chinese in the country, the majority being concentrated on the Pacific coast.(1) At first, the Chinese were welcomed, praised, and considered as indispensable to the development of the inhospitable and barren lands. Race antipathy was subordinated to industrial necessity, and they were treated in all respects as equals. When the Chinese gained strength in number and proved successful in mining and other industries, the white workers began to complain of their "invincible competition". Economic motive coupled with colour prejudice has been the chief cause of the Chinese exclusion movement. The Pacific States and municipalities strove to oust the Chinese, either by heavy taxation to their disadvantage or by a starvation policy, denying them the right to work. Lastly, came their attempts to discourage or diminish immigration. Laws were enacted with this end, only to be nullified by the Courts, State or Federal. But to-day, the most radical resolutions of the famous sand-lot agitations(2) have become realised, furnishing a sharp contrast with early laws and judicial constructions.

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(1) The census for 1930 shows that there were 74,954 Chinese in the United States. The production of the decennial data will furnish an interesting comparison: 1860 - 34,933; 1870 - 63,199; 1890 - 107,488; 1900 - 89,863; 1910 - 71,531; 1920 - 61,639.

(2) So called from the waste sand plots in San Francisco where the mob used to gather and pass violent anti-Chinese resolutions. See Bryce, The American Commonwealth (1910): II, "Kearneyism in California".

(a) The Miners' Licence Tax

The Foreign Miners' Tax Law of California, first passed in 1850, required those who were not native-born citizens and who had not acquired citizenship to take out a licence before commencing work in the mines. First naturalised foreigners, and later those who declared their intention to become naturalised, were exempt from the application of the Law, until the only ones remaining subject to the tax were the Chinese. The Court held[1] that such a tax was not in violation of the Constitution, as in levying it the State exercised a power not expressly conferred upon the Federal Government, and that after foreigners had landed and mingled with citizens, they became subject to taxation by the State for police purposes or to pay for the government which gave them protection. It also asserted that the Law was not in conflict with the State Constitution which provided that taxation shall be equal and uniform throughout the State, "as it referred only to the property tax and not to the aggregate tax." Since the adoption of the Fourteenth Amendment to the Federal Constitution and the assurance of the most-favoured-nation treatment, such a statute would doubtless be held unconstitutional.[2] It is of little practical importance to-day, however, and, not having been so declared, still stands on the statute books.

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(1) People v. Naglee, 1 Cal. 232 (1850).

(2) Mears, Resident Orientals on the Pacific Coast (1927), 213.

In Chapman v. Toy Long,[1] certain clauses in the Constitution of Oregon and a mining regulation authorised by the State, prohibiting Chinese from working in a mining claim for themselves or for others, were held void as in direct conflict with the most-favoured-nation clause.

(b) The Fishermen's Licence

In 1860 Chinese fishermen were required to pay a monthly licence fee of four dollars, but this was repealed four years later.[2] The Californian statute then prohibited all aliens incapable of becoming electors of the State from fishing in the waters of the State. This was held to violate the provisions of the treaty with China and the Fourteenth Amendment to the Constitution.[3] The Court admitted that citizens of other States, having no property right enabling them to fish against the will of the State, a fortiori, the alien, from whatever country he may come, has no right whatever in the waters or fisheries of the State. As with the other privileges which he enjoys as an alien, by permission of the State, he can only enjoy so much as the State vouchsafes to him as a special privilege. In his case it is not a property right, but in the strictest sense a privilege or favour. "But",

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(1) 4 Sawyer 28 (1876).

(2) Statutes 1860, 307; 1864, 493.

(3) In re Ah Chong, 6 Sawyer 451 (1880).

the Court reiterated, "to exclude the Chinamen from fishing in the waters of the state while the Germans, Italians, Englishmen and Irishmen who otherwise stand upon the same footing are permitted to fish ad libitum, without price charge let or hindrance, is to prevent him from enjoying the same privileges as are enjoyed by the citizens or subjects of the most-favoured-nation." The Act violated the equal protection clause and was therefore void.(1)

(c) The Commutation Fee and the Capitation Tax

The fee was first imposed on every Chinese immigrant in 1852. The statute(2) enacted that each owner or master of a vessel bringing passengers to California should furnish a bond of five hundred dollars for every alien landed, or pay a commutation fee of five dollars to the State Hospital Fund. It was not declared void by the Court until after it had been in operation for twenty years.(3) Another Act,(4) of 1855, "to discourage the immigration to this state of persons who cannot become citizens thereof", required the master, owner or consignee of the vessel to pay a tax of fifty dollars each for

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(1) Although the legislation may not discriminate among the aliens, it was held that an alien cannot claim the same right to fish as a native citizen: Leong Mow v. Board of Commissioners, 185 Fed. 223 (1911).

(2) Statutes 1852, 79.

(3) People v. S. S. Constitution, 42 Cal. 578 (1872).

(4) Statutes 1855, 194.

all the passengers. As it was an attempt to regulate commerce, a power delegated to the general government, the capitation tax was declared unconstitutional.(1)

(d) The State Exclusion Act

California enacted its first exclusion law(2) in 1858, providing that after October, 1858, no Chinese or Mongolians were to be allowed to enter the State. For the further discouragement of Chinese immigration a police tax of $2.50 per month was also levied in 1862 on all Chinese who were not paying for licences.(3) The Law was declared ultra vires. In the famous case of Lin Sing v. Washburn(4) the Court held that immigration whether temporary or permanent was an essential ingredient of intercourse and traffic, and the power to regulate commerce lodged by the Constitution in the general government implied the power to regulate both as to persons and as to goods, and its exercise could not be interfered with by any state. "The laws of Congress," it added, "allowing foreigners to come to this country, necessarily allow them to remain here, and any state law, preventing either their coming to or residing in the state is unconstutional and void."

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(1) People v. Downer, 6 Cal. 170 (1855).

(2) Statutes, 1858, 295.

(3) Statutes, 1862, 486.

(4) 20 Cal. 534 (1862).

Another statute,[1] which prohibited Chinese immigrants arriving by vessel from landing until a bond was given by the master that they would not become a public charge, was also rendered void on account of its "discriminating against the citizens of a treaty power as a class."[2] It was held that the immigration of foreigners to this country and residence therein is exclusively within the jurisdiction of the general government and is not subject to State control and interference. This opinion was confirmed by the Supreme Court of the United States.[3] Another Act[4] of the legislature intending to prohibit Chinese from coming into the State and prescribing terms on which those residing in the State may remain or travel, was invalidated on the same ground.[5]

(e) Prohibition of Employment in Public Works

Article XIX of the Constitution of California of 1879 provided that no corporation should employ directly or indirectly in any capacity any Chinese or Mongolian, and that the legislature should pass laws to enforce this provision. It also stipulated that no Chinese should be employed in any State,

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(1) Statutes, 1870, 330.

(2) In re Ah Fong, 3 Sawyer 144 (1874).

(3) Chy Lung v. Freeman, 92 U.S. 275 (1876).

(4) Statutes, 1891, 186.

(5) Ex parte Ah Cue, 101 Cal. 197 (1894).

municipal or other public works except as a punishment for crime. The legislature soon enacted a law which made it a misdemeanour punishable with fine or imprisonment for any corporation to employ Chinese. One Parrott was arrested for violating the statute, but was acquitted on habeas corpus. The Court declared,(1) per Mr. Justice Sawyer, that the right to labour for a living is as inviolable as the right of property, for property is the offspring of labour. It is as sacred as the right to life, for life is taken if the means whereby we live be taken. Any legislation or constitutional provision of the State, the Court added, which limits or restricts that right to labour to any extent or in any manner not applicable to citizens of other foreign nations visiting or residing in California, is in conflict with the provisions of the treaty with China and the Fourteenth Amendment.

In nullifying an Act of Oregon which designed solely to prohibit the employment of Chinese labourers on public works, the supremacy of the treaty obligations over inconsistent State legislation was again asserted in unequivocal language. The Court(2) construed that the treaty with China, by its most-favoured-nation clause, secured to the Chinese residents the same right to be employed and to labour for a living as

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(1) In re Tibercio Parrott, 6 Sawyer 349 (1880).

(2) Baker v. City of Portland, 5 Sawyer 566 (1879).

the subjects of any other nation, and that the State could not legislate to interfere with its operation or limit or deny the privileges or immunities granted by it.

(ii) Municipal Orders and Ordinances

(a) The Laundry Ordinance

San Francisco passed the first Laundry Ordinance in 1873 imposing a licence fee of two dollars per quarter on laundries using a one-horse vehicle, four dollars on a two-horse vehicle, and fifteen dollars on laundries using no vehicle.(1) The Chinese laundries commonly used no vehicle and had to pay heavily and unjustly. The Ordinance was enforced until 1876, when the District Court ruled that it was "unreasonable, oppressive and void." Another Ordinance, which prohibited the conduct of a laundry business within certain sections of the city and required the recommendation of twelve citizens and tax payers in the block where the laundry was to be maintained in order to secure a licence to operate it, was also declared unconstitutional as in derogation both of the Fourteenth Amendment and of the treaty with China.(2)

A third laundry case arose thus: by an Order of the City Board in 1880, no person should engage in laundry business, except in a brick or stone building, without a permit

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(1) For similar municipal enactments see Eaves, History of California Labour Legislation (1910), 144.

(2) In re Quong Woo, 13 Fed. 229 (1882).

of the Board. A number of Chinese laundrymen were then imprisoned for non-payment of fines for continuing their business in wooden houses, while launderers of other races who were conducting their laundries under similar conditions were left unmolested. The prisoners were refused a writ of habeas corpus. The case of Yick Wo was taken to the Supreme Court of the United States, where it was decided that the discrimination was illegal, and that the public administration which enforced it was a denial of the equal protection of the laws and a violation of the Fourteenth Amendment.(1) The Court ruled, per Mr. Justice Matthews, that the provisions of the Amendment were universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of colour or of nationality, and that the equal protection of the laws was a pledge of the protection of equal laws. "Though the law itself be fair on its face and impartial in appearance," the Court concluded, "yet if it is applied and administered by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

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(1) Yick Wo v. Hopkins, 118 U.S. 356 (1886).

(b) The Cubic Air Ordinance

This Ordinance was enforced in 1873, requiring that no person should let or hire any tenement house where the capacity of rooms was less than five hundred cubic feet for every person. Violation of the Ordinance was heavily punished. It was aimed against the Chinese, and many arrests having been made, the jails were soon overcrowded, rendering the city guilty of gross violations of its own Ordinance. As it was "unequal in its operation and dealt in odious and unjust discriminations", the County Court soon invalidated it on that ground.(1)

(c) The Queue Ordinance

The Ordinance provided that every person convicted for any criminal offence should have his hair cut to a length of an inch from his head. It was specially designated for the Chinese who remained in the jail for the violation of the Cubic Air Law, and to whom the loss of a queue was a lasting disgrace. It was so "hostile and spiteful" that it was declared void in consequence.(2)

(d) The Chinese Removal Ordinance

The Ordinance made it unlawful for any Chinese to locate, reside, or carry on business within the limits of the city and

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(1) Eaves, op. cit., 149.

(2) How Ah Kow v. Nunan, 5 Sawyer 552 (1879).

county of San Francisco except in a certain prescribed district, and required all Chinese inhabitants located outside the prescribed district to remove within a specified time. The Ordinance was clearly in violation of the treaty pledge and was declared invalid.(1)

(1) In re Lee Sing, 43 Fed. 359 (1890).

Chapter III.

CHINESE IMMIGRATION IN CANADA

7. The Beginning of Immigration and the Anti-Chinese Acts.- Chinese immigration to the American Continent began in 1848,[1] in which year about ten Chinese emigrated from Canton to California, and the first Chinese to go to Canada came in 1858, not from China, but from the United States.[2] The discovery of gold in the mines of Carsiar and Caribou between 1858 and 1864 attracted a heterogeneous crowd of adventurers to British Columbia, including large numbers of Chinese. The construction of the Canadian Pacific Railway in the early eighties further absorbed Chinese immigrants. During the four years from 1881 to 1884, 15,701 Chinese arrived in British Columbia, either from the United States or direct from China.[3] There was a constant increase of the pouplation, and nearly all of them were resident in British

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(1) Parliamentary Papers, 263, 1852-3, 7.

(2) Cheng, Oriental Immigration in Canada (1931), 35.

(3) Ibid. 45; Campbell, op. cit. 37.

Columbia, one of the nine provinces of the Dominion.(1) This increase and concentration roused the British Columbian people to a determined agitation against the Chinese. As early as 1872 a motion for the imposition of an annual per capita tax of £50 upon all Chinese within the province had been put to the Provincial Assembly but was not carried. Another Bill introduced two days later "for the purpose of preventing the employment of Chinese labour upon the public works of the province or upon any federal works within the same", met with the same fate. In 1876 a further attempt to impose a tax of £10 per capita on every male of eighteen years who wears long hair in the shape of a tail or a queue residing in the province of British Columbia, also failed.(2)

The Legislature of British Columbia succeeded at last in passing the Chinese Tax Act, 1878, which provided that every Chinese over 12 years of age should take out a licence every three months, for which he was to pay the sum of £10. Although the Act did away with the application of the Assessment Act and the School Tax Act to Chinese, it substituted a tax which was considered to be more oppressive as the tax was

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(1) The number of Chinese enumerated at the decennial census rose from 4,383 in 1881 to 9,129 in 1891; to 17,312 in 1901; to 27,774 in 1911; to 39,587 in 1921; and to 46,519 in 1931. Out of the total population in 1881, 4,350 were credited to British Columbia; in 1891, 7,910; in 1901, 18,885; in 1911, 19,568; in 1921, 23,533; in 1931, 27,139.

(2) Cheng, op. cit., 38.

payable by children over 12, payable by rich and poor alike, and applied to Chinese alone, many of whom were British subjects. The local European merchants were also opposed to the Act. In a petition[1] to the Government they pointed out that the Act was at variance with the British Constitution in that it imposed a tax upon persons simply on account of nationality; that it conflicted with existing treaties; and that in many instances it would tax persons who were British subjects, simply because they were Chinese. They assured the Government that the number of Chinese who were then in the colony was not so great as to interfere with white men or to crowd them out of employment. The popular cry against the Chinese proceeded from a class who had nothing at stake in the country, and the petitioners believed that it was not in accordance with the opinion of the most intelligent and better class of their population. As it was in reality intended to restrict Chinese immigration, an action was commenced in the Supreme Court of British Columbia to test its validity. The Act was declared ultra vires because it was at variance with the treaty obligations of Great Britain and China and affected the power to regulate trade and commerce, which belonged to the Dominion Parliament.[2]

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(1) Hodgins, Dominion and Provincial Legislation, 1867-1895 ( ), 1063.

(2) Tai Sing v. Maguire (1878), 1. B.C., Pt. 1, 101.

British Columbia passed anti-Chinese laws with praiseworthy persistence. The Chinese Regulation Act of 1884 compelled (s. 3) every Chinese in British Columbia over 14 years of age to pay £10 every year for a licence to live in the province, under a penalty. The cost of a free miner's certificate was fixed at £15, as against the £5 paid by Europeans. The preamble[1] of the Act recites that: "The coming of Chinese to British Columbia largely exceeds that of any other class of immigration, and the population so introduced are fast becoming superior in number to our own race; are not disposed to be governed by our laws; are dissimilar in habits and occupation from our people; evade the payments of taxes justly due to government; are governed by pestilential habits; are useless in instances of emergency; habitually desecrate graveyards by the removal of bodies therefrom; and generally the law governing the whites is found to be inapplicable to Chinese, and such Chinese are inclined to habits subversive of the comfort and well-being of the community". When the Act went to the Dominion Government for approval, the Minister reported[2] that the question might arise as to whether or not an Act applying only to a portion and not to the whole of the population of the province was constitutional, but this was

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(1) C. 5448, 1888, 67.

(2) Hodgins, op. cit., 1094.

thought to be a question which could be rather dealt with by the Courts. A further question might be raised as to whether or not the legislature, in the exercise of its powers to impose direct taxation, could so impose it as to limit or restrict that intercourse among people of different nations which constituted one of the elements of commerce, but the question was also deemed one which could best be considered and dealt with by a judicial tribunal. The Act was left in operation. The Law, however, was declared eventually ultra vires.(1)

At the same time, a strong protest was lodged(2) by the Chinese Minister in London with the Earl of Rosebery, declaring that the Act was "at variance with the treaties, opposed to the law of nations, hostile to the benevolent spirit of British legislation, unjust in its operation and highly prejudicial to the interests of Chinese subjects residing in those parts of Her Majesty's Dominions." He contended that even if the Act contained no provisions inimical to the rights of Chinese subjects in the colony, the preamble, constituting as it did a breach of international courtesy, would in itself afford a very sufficient reason for its being rescinded." "Here we have a whole race accused of a series of the gravest and most revolting charges that could be possibly brought

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(1) R. v. Wing Chong (1885), 1. B.C., Pt. II, 150.

(2) 13 July, 1886, C. 5448, 57.

against the people of any country." He protested against its being applied to Chinese subjects residing in British Columbia and to their being made the subject of discriminative legislation for which these charges were the pretext. He finally reminded the British Government of the right of Chinese subjects under Article 1 of the Treaty of Nanking to "full security and protection for their persons and property" throughout the whole extent of the British Dominions; and of Article V of the Peking Convention of 1860 which provides that Chinese subjects "who may wish to take service in British Colonies" or to "enter into engagements with British subjects for that purpose" may do so without either leave or licence.

Another Act, passed by British Columbia in 1884 to prevent the immigration of Chinese, was disallowed on the ground that the subject was one involving Dominion and possibly imperial interests. But the Dominion view was not supported by the British Government. In his reply to the Governor-General of Canada, the Earl of Derby informed him[1] that the Queen had not been advised to disallow Acts passed in the Australian Colonies restricting in very severe terms the immigration or introduction of Chinese. The relations between Great Britain and China had not been such as required the former to interfere with the Australian legislation on grounds of international polity, and it had been treated as a matter

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(1) Hodgins, op. cit., 1903.

of internal administration with which a responsible colonial government was competent to deal. The Governor was led to understand that the question did not involve imperial interests and that he should deal with it as a Canadian question.

British Columbia passed again in 1885 the Chinese Immigration Act, which was again disallowed, this time on legal and not political grounds.(1) In 1900 it passed an Act on the Natal model, prohibiting the immigration into British Columbia of any persons who should fail in a language test. The Act, together with other Acts passed in subsequent years, was repeatedly disallowed(2) because it seemed inconsistent with the general policy of law. The legal points involved are dealt with in a later chapter.(3)

8. The Royal Commissions and the Enactment of the Immigration Laws.- Three important reports of Royal Commissions on Chinese immigration into Canada were issued. In the 1879 Report(4) the Committee were of the opinion that Chinese immigration ought not to be encouraged and that Chinese labour should not be employed on Dominion public works. They did

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(1) See below, § 59(iv).

(2) Keith, Responsible Government in the Dominions (1928), II, 812.

(3) Ch. XII.

(4) Sessional Papers, 1879: Report of the Special Committee on Chinese Emigration.

not, however, advocate restriction. The 1884 Commission[1] admitted the efficiency of Chinese labour in the development of a country. As a railway navvy the Chinese was found to have no superior, and his presence in California had given that State many years start in its progress, and added incalculably to its national prosperity; while in British Columbia Chinese labour had been attended by great advantages to the province and the same excellent results would follow for many years from its utilisation. Nevertheless, they conceived that the Chinese were a non-assimilable race clearly marked off from white people by colour and national and race characteristics, and that their presence was not unattended with disadvantages. The Commission viewed with some apprehension the tendency of certain industries to pass completely into the hands of Chinese, and since these were able to subsist on much less than white men, the result would be to lower the level of wages. But they denied the allegation as to the bad moral effect of the Chinese on the community. Their morality was stated to be not lower than that of the same classes of other nationalities. They were found not to burden public charities, nor unduly to swell the calendar of crime. The Commission finally exposed the genuine view of the public in the statement that "in British Columbia those who are not dependent in one way or other on the support of

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(1) Sessional Papers, 1885, No. 54A: Report of the Royal Commission on Chinese Immigration, CXXX.

the labouring classes are as a rule unfavourable to anti-Chinese legislation. Everywhere the railway men and the mine owners, the manufacturers and the housekeepers, the merchants and shopkeepers are against absolute exclusion, but the very best friends of the Chinese think that their immigration should be regulated." They recommended the passing of an Act by the Dominion Parliament to impose a duty of £10 per head on each and every Chinese man and woman, every Chinese boy and girl, landing in the province of British Columbia, and the establishment of an efficient system of registration of all Chinese resident in the province. As a result, an Act was passed in 1885 to restrict the number of Chinese immigrants imposing a poll tax of £50 and certain tonnage limitations, and immigration fell away rapidly.

From 1886 to 1889 only 2,674 Chinese entered Canada, averaging less than 700 a year.(1) The average number during the years 1891 to 1900 rose again, however, to 2,600 yearly, which alarmed the residents of British Columbia. In 1898 and 1899 the province made repeated requests to the Dominion Government to increase the per capita tax to £500, but the latter deemed it sufficient merely to double it, and the admission duty was increased to £100 by the Act C. 32 of 1900. The province protested against the new Act as being ineffective. Another Royal Commission was appointed in September,

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(1) Cheng, op. cit., 61.

1900, and reported in terms contrasting sharply with the Report of the 1884 Commission. They recommended[1] that further immigration of Chinese labourers into Canada ought to be prohibited, that the effective means to attain this end was by treaty, supported by suitable legislation, and that in the meantime and until this could be obtained, the capitation tax should be raised to £500. Consequently, Act C. 8. 1903 was passed, with effect from January, 1904, raising the tax to an exorbitant sum.

The average entry from 1901 to 1922 was 2,554 a year, and was deemed excessive, although Canada, with one-sixteenth of the world's area and one two-hundredth of the world's population, has still plenty of room for immigrants.[2] The Chinese Immigration Act, C. 38, 1923, restricts the entry to and landing in Canada of persons of Chinese origin and descent, irrespective of allegiance or citizenship, other than government officials, Chinese born in Canada, merchants, and students.[3]

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(1) Sessional Papers, 1902, No. 54, 279.

(2) Gregory, The Menace of Color (1928), 133, 141.

(3) From 1886 to 1900, 28,637 Chinese labourers paid the £50 tax; from 1901 to 1903, 11,287 paid £100; while from 1904 onwards, 42,447 paid £500. The total revenue, including capitation tax and registration fees, from 1886 to 1932 amounted to £23,010,996. Persons exempt from the tax totalled 7,961 in fifty years. (The Canada Year Book, 1933, 198; Cheng, op. cit., 273).

Chapter IV.

CHINESE IMMIGRATION IN AUSTRALIA

9. The First Stage, 1855-1867.- Although the Chinese had some knowledge of the Continent as far back as the thirteenth century,[1] immigration did not begin until the opening up of the five ports to foreign trade. Three stages appear in the history of Chinese immigration to Australia. The years 1855 to 1867 saw the first immigration laws against the Chinese. Then follows, from 1867 to 1877, a period of non-restriction. The second stage, covering twenty-five years from 1877 to 1901, witnessed the evolution and accomplishment of the most drastic measures against Chinese immigration. The Inter-Colonial Conferences of 1880, 1888 and 1896 produced concerted and unified action by the Colonies. The last of these and the Conference of 1897 mark the beginning of the extension of Chinese restriction laws to other Asiatic peoples and the prelude to the provisions of the Federal Act. In the third stage, from 1901 to the present day, the law is seen to be severely administered and continually amended, with the purpose of making it more stringent and definite; these amendments will be dealt with under separate headings.

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(1) Coghlan and Ewing, Progress of Australia (1903), 1; Colwell, A Century in the Pacific (1914), 18.

New South Wales was the first of the Australian colonies to receive Chinese immigrants. In 1848, 120 Chinese coolies went to Sydney from Amoy. The numbers in subsequent years to 1852 were reported to be 280, 422, 1,438 and 478 respectively. In 1851 the vessel "Regina" took some 30 from Shanghai to Australia.(1) But it is Victoria which was first confronted with the "Chinese question". The discovery of gold fields in the early fifties attracted an enormous number of gold-seekers. During the ten years 1850 to 1860, the population of Australia almost trebled itself, while that of Victoria during the same period increased by 750 per cent.(2) By 1855 there were as many people in Victoria as there had been in the whole of Australia in the year before the discoveries of gold. During the gold rushes, the immigrants into Melbourne averaged 2,000 a week.(3)

The Chinese naturally lost no time in grasping the opportunity presented by their geographical proximity. In 1854 there were 2,341 Chinese on the gold fields of Victoria. As European and Chinese miners could rarely agree upon mining fields, quarrels constantly arose between them. The dispute

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(1) Parliamentary Papers, 263, 1852-3, 16 and 19.

(2) Atkinson, Australia, Economic and Political Studies (1920), 189.

(3) Ibid.

was purely a racial one; as an Australian author has put it, there were no charges that could be made against the Chinese which could not with justice be made against an equal number of Europeans.(1) At a public meeting held in June, 1854, it was moved that "a general unanimous rising should take place in the various gullies of Bendigo on 4 July, [the anniversary of the American Day of Independence] for the purpose of driving the Chinese population off the gold-fields".(2) The disturbance was prevented by the prompt action of the authorities. A Royal Commission was soon appointed to enquire into the matter and make recommendations in order to avoid further complication. Their suggestions resulted in the passing of an Act in 1855 to make provision for "certain immigrants".

The Act(3) imposed a passenger limitation of one for every ten tons of every ship, and a poll tax of £10 on each immigrant. The word "immigrant" was to mean any male adult native of China and its dependencies or of any islands in the Chinese seas or any person born of Chinese parents. The Act came into operation on 1 November, 1855. But its principal terms

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(1) Coghlan and Ewing, op. cit., 57.

(2) Lyng, Non-Britishers in Australia (1927), 158.

(3) For early Chinese immigration laws see the digest by Lewin in the Journal of the Royal Society of Arts, VI (1907-1908), 585-604; C. 5448, 1888, Appendix II.

were evaded by the Chinese, who landed in South Australia and walked overland to the Victoria Fields.[1] A riot against Chinese miners at last occurred on the Buckland River Goldfield in 1857, the American Day of Independence being again chosen as the most suitable for hoisting the flag of revolt. Despite the fact that "so deplorable was the havoc and so disgraceful the pillage", the ringleaders of the riot were found "not guilty" by the juries.[2] The Government now attempted to secure uniform restrictions in the adjoining colonies, and more drastic measures in Victoria. South Australia legislated accordingly in 1857 upon the Victoria model, but withdrew the Act in 1861. Victoria passed its own Act to "regulate the residence of the Chinese population" in the same year, imposing a tax of £6 per annum on the residence licence. Chinese residing in the colony without such a licence were unable to sue, but natural-born or naturalised British subjects were exempt from the tax. The number of Chinese, which reached 42,000 in 1859, decreased to 20,000 in 1863.[3] In 1859 an Act was passed "to consolidate and amend the laws affecting Chinese emigrating to or resident in Victoria", and repealing the Acts of

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(1) Campbell, op. cit., 58. In 1856, 4,300, and in 1857, 10,325 Chinese landed in South Australia en route to Victoria.

(2) Willard, op. cit., 25, 26.

(3) Campbell, op. cit., 60; Willard, op. cit., 22.

1855 and 1857. The tonnage limitation and the poll tax remained the same. The residence fee was reduced to £4, but Chinese entering Victoria by any other means than by ship were to pay £40 for admission. The Act was amended in 1862, when the residence fees were repealed, and again amended in 1863, when entrance and residence fees were suspended for a period of two years. The Chinese Immigration Statute of 1864, which re-imposed the entrance fees both by sea and by land, was soon repealed by the Act of 1865, relaxing all restrictive measures against the Chinese.

New South Wales took no action to restrict Chinese immigration until 1858, and then only on the request of Victoria. A Bill was introduced to impose a passenger limitation of one for every two tons, and an entrance tax of £4, but was rejected by the Council.(1) The Chinese numbered 1,806 in 1856, and increased to 12,988 in 1861. Many of them had streamed into New South Wales from Victoria after having been much harassed in the latter colony.(2) The goldfield opened up at Burrangong proved extraordinarily rich; a great rush to that place set in, and crowds of Chinese also flocked to the diggings. The white miners received this influx with very bad grace, and convened a public meeting for the purpose of deciding whether

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(1) Willard, op. cit., 28.

(2) Coghlan and Ewing, op. cit., 378. Cf. Willard, op. cit., 31, 36, note 74.

"Burrangong was a European or a Chinese territory". The agitation resulted in continuous rioting. In September, 1861, the Government passed an Act "to regulate and restrict the immigration of Chinese" on the lines of the Victorian Act of 1855. The Act withheld the right of naturalisation from the Chinese. Now the Convention of Peking had been signed in the previous year which, besides conferring on the subjects of the contracting parties certain treaty rights, included a special article on immigration inserted at the instance of Great Britain. It was thought that the legislation might be at variance with British treaty obligations. The Duke of Newcastle, Secretary of State for the Colonies, stated in a letter to the Governor of New South Wales that "exceptional legislation intended to exclude from any part of Her Majesty's dominions the subjects of a state at peace with the Queen is highly objectionable in principle", and that the denial of naturalisation to Chinese was "impolitic and unnecessary."(1) The Act, however, was allowed by the Crown because of "the exceptional nature of Chinese immigration". The inflow was effectively checked, and the Government found it possible and opportune in 1867 to repeal it.

10. The Second Stage, 1877-1901.- The Chinese question did not excite public interest again until the rich goldfields

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(1) Cf. Willard, op. cit., 34-35.

of Northern Queensland were opened up in 1875. At the end of 1875, 7,000 Chinese had been working on the Palmer diggings.(1) In 1876 the Goldfields Amendment Act was passed by the Queensland Legislature, providing for the imposition on Asiatic and African aliens of a heavier fee for leave to mine or carry on business at the goldfields than was imposed on Europeans. Governor Cairns considered that this attempt to restrict immigration by discrimination against men already resident in the colony infringed the treaty rights of the Chinese.(2) He reserved the Bill, and the British Government upheld his action on the ground that "although the fifth article of the Peking Convention referred only to the Chinese emigrating under contracts of service, the article contemplates that all Chinese subjects should have full freedom of entry into British dominions without special restrictions or impediments."(3) The assent of the Crown was therefore deferred. But in 1877 the imposition of a £10 poll tax was allowed, while £3 for miner's right and £10 for a business licence were charged the Asiatic, as against ten shillings and £4 respectively paid by white aliens. The repatriation of the Chinese was encouraged by refunding the entrance money if they went back to China within

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(1) Campbell, op. cit., 61.

(2) Quick and Garran, The Annotated Constitution of the Australian Commonwealth (1901), 625.

(3) Campbell, op. cit., 62; Willard, op. cit., 23, 24.

three years after arrival. The Chinese was forbidden to work on a goldfield for three years after the proclamation unless he was the original finder. The Acts proved effective. From 1877 to 1881, only 500 Chinese arrived in Queensland.(1)

(i) The First Inter-Colonial Conference, 1880-1881

The legislation against Chinese immigration in the Australian colonies entered on a new stage after the Conference. The Conference aimed at the regulation of concerted action on uniform lines and the adoption of more drastic measures. New South Wales was the first to act (in 1881), by raising the passenger limitation to one per hundred tons, but retaining the £10 poll tax. Victoria passed the Chinese Act, 1881, with similar provisions, operative from 1 April, 1882. South Australia was only prepared to follow the 1885 Victorian model in 1881, imposing the ten tons passenger limitation and the £10 poll tax. Queensland distinguished itself by amending the Act of 1877, raising the tax to £30 and the passenger limitation to one per 50 tons (1884). Western Australia first acted in 1886, adopting the 50 tons passenger limitation and the £10 tax. The first Act of Tasmania, of 1887, limited Chinese immigration in the same way as those of Victoria and New South Wales. All these Acts, except that of South Australia, exempted native-born or naturalised British subjects from their pro-

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(1) Willard, op. cit., 51.

visions.[1] The South Australian Law, on the other hand, did not apply to the Northern Territory.

In May, 1887, the Chinese Investigation Commission visited the Australian colonies to enquire into the condition of their countrymen. They found that Chinese who came to Australia had to pay an entrance tax from which the subjects of other powers were exempt. On learning this, the Chinese Minister in London sent a formal protest against the discriminative legislation in December, 1887, to the Marquis of Salisbury, the British Premier and Foreign Secretary. He took the stand that the Chinese Government was convinced that where colonial legislatures had enacted regulations inimical to the Chinese, and incompatible with Britain's international agreements, the omission of the Crown to exercise its right of veto was not to be taken as showing that the British Government had approved them. He pointed out that it had never been alleged that the Chinese immigrants were unruly. For not only in Hong Kong and the Straits Settlements but also in Australia, the colonial governors were said to have repeatedly borne testimony to the orderly conduct of the Chinese population and to their value in developing the colonial resources. The Minister therefore saw no reason for their being deprived of the immunities accorded to

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(1) New South Wales, No. 11, 1881, s. 10; Victoria, No. 723, 1881, s. 5; Queensland, No. 13, 1884, s. ; Western Australia, No. 13, 1886, s. 11; Tasmania, No. 9, 1887, s. 12. By an Act of 1891, continuing Act 439 of 1888 in force in South Australia, it was provided that the Act would not apply to Chinese naturalised before 1 October, 1891.

them by the treaties and the law of nations, or for their being treated differently from the subjects of other powers. He concluded that "the Imperial Government sees with regret the existence of the exceptional and exceptionable laws which some of the Colonial legislatures of Australia and Dominion enacted against Chinese subjects," and suggested that with a view to the elimination of any part of them which may be found to be at variance with treaty obligations and international usage, the British Government "will be pleased to institute an inquiry into their nature and how far they are compatible with the increasing growth of the friendly relations which now happily exist between the two countries."(1)

(ii) The "Afghan" Case

The letter was transmitted to the Governors of the colony for explanation and comment, which only served to make the position more serious. The number of Chinese in 1881 in the whole of Australia totalled 38,553.(2) In 1891 it dropped to 35,821 including half-castes. But the apprehension of the possibility of a continued influx led to a demand for further restrictive measures and a closer application of the existing law. In New South Wales a constant watch was kept on vessels coming to Newcastle and Sydney with Chinese on board, and one of the results was that the master of S.S. Chelydra was fined

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(1) C. 5448, 1888, No. 1, Enclosure.

(2) Australia Official Year Book, 1925, 956.

£1,000 for having on his vessel more Chinese than the law allowed him to carry.(1) The arrival of the "Afghan" in April, 1888, again caused great consternation in Victoria. The ship, of 1,435 tons burden, was carrying 268 Chinese passengers - 254 more than it should lawfully have brought, although many of them, holding naturalisation papers, were exempt. The master was given the alternatives either of paying heavy fines(2) or of taking the passengers away. The "Afghan" then made for Sydney where, as in Melbourne, an indignant mob was ready to take the law into its own hands. The Government forbade all the Chinese to land and kept them in custody.(3) An application for a writ of habeas corpus was commenced in both Victoria and New South Wales. The Supreme Court of New South Wales held, in Ex parte Woo Tin,(4) that a Chinese was entitled to

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(1) Coghlan and Ewing, op. cit., 96.

(2) S. 2 of the Victorian Act of 1881 provides that the owner or master having on board a greater number of Chinese immigrants than one to every hundred tons shall be liable to a penalty of £100 for each Chinese carried in excess.

(3) The Government hurriedly passed a Bill to legalise its action. In introducing it into the Assembly Sir Henry Parkes, the Premier, declared: "Neither for H.M. ships of war, nor for H.M.'s representative on the spot, nor for the Secretary of the Colonies, do we intend to turn aside from our purpose, which is to terminate the landing of Chinese on these shores for ever except under the restrictions imposed by the bill, which will amount and which are intended to amount to practical prohibition": Coghlan, Labour and Industry in Australia (1918), III, 1342.

(4) 9. N.S.W. 493 (1888).

land on payment of the £10 poll tax. Any detention of such Chinese by authority of the Government after such tender was an illegal imprisonment. It further held, in Ex parte Lo Pak,[1] that a Chinese subject holding a certificate of exemption must be discharged from detention. The police, in acting "under the authority and by the orders of the government of the Colony", were depriving the applicant of his liberty, which could not be justified. The Court of Victoria gave the same verdict. In Chun Teeong Toy v. Musgrove,[2] it ruled that a Chinese immigrant was entitled to land upon duly tendering the poll tax, although such Chinese formed one of the passengers of the ship having on board a number of such passengers greatly in excess of such ship's tonnage. "Prevention cannot be justified or ratified by the Government of Victoria either as an act of state or as an exercise of the royal prerogative, so as to relieve the collector from the legal consequences of such an act." The Victorian Government, however, obtained leave to appeal to the Privy Council, which reversed the colonial decision and ruled that an alien had no legal right enforceable by action to enter British territory.[3]

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(1) 9. N.S.W. 221, (1888).

(2) 14, v, L.R. 349, (1888).

(3) Musgrove v. Chun Teeong Toy, [1891] A.C. 272. And see infra, §44.

When the news that the Chinese were being restrained from landing reached England, the Chinese Minister again protested.[1] He demanded that the prohibition should be cancelled and compensation paid for any losses sustained by the immigrants, and intimated that in its international and conventional aspects the British Government could not deny the illegality of the action of the colonial authorities in this matter.

(iii) The Second Inter-Colonial Conference, 1888.

A conference was convened in June, 1888, to discuss the subject of Chinese immigration with a view to arriving at an "Australian" decision as to future policy. Resolutions[2] were adopted embodying the views of the majority[3] of the colonies. In the opinion of the Conference, the restriction of Chinese immigration, which was essential to the welfare of the people of Australia, could best be secured through diplomatic action on the part of the Imperial Government and by uniform Australian legislation. The delegates agreed that the proposed uniform legislation should contain the following provisions: it should apply to all Chinese, with specified exceptions; the method of restriction should be passenger limitation only - one Chinese passenger to every 500 tons of

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(1) C. 5448, Enclosure in No. 51.

(2) Quick and Garran, op. cit., 626.

(3) Tasmania dissented, and Western Australia did not vote.

the ship's burden; Chinese from any one colony could not enter another without the latter's consent.

A joint representation was sent to the mother country requesting a treaty with China to exclude all Chinese except students, officials, travellers, merchants and similar classes. Accordingly, the Foreign Office instructed[1] the British Ambassador at Peking to enter at once into negotiations with the Tsungli Yamen. It was pointed out that the several colonies, considering that the length of time which might be occupied in negotiation was uncertain, and having reason to dread a large influx of labourers from China, had felt themselves compelled to legislate immediately to protect their citizens against the invasion. As a matter of fact, the legislatures had passed further restrictive measures without awaiting the possible result of the diplomatic action. This amounted to an announcement that discriminative legislation of a given character was going to be adopted whatever might be arranged in a treaty. By Act 1005 of 1888, Victoria raised the passenger limitation to one for every 500 tons, abolishing the landing tax. New South Wales provided for a limitation of 300 tons and a poll tax of £100 for immigrants either by sea or by land (No. 4, 1888). Queensland (No. 22, 1888) and South Australia (No. 439, 1888) followed the Victorian model, but the latter extended the period of operation till 1892 and the Act did not apply to

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(1) C. 5448, No. 85.

Chinese naturalised before 1 October, 1891. Western Australia copied the Victorian Act in 1889, while Tasmania did not act.

The influx of Chinese immigrants was effectively checked and the problem was considered by the Australian colonists to have been settled. Now with 2,974,581 square miles of territory and a population of 3,159,085 in 1891, Australia had 1·06 people to the square mile,(1) there being much room left vacant. The Indians and the Japanese availed themselves of the opportunity during the early nineties and caused a more complex problem both of imperial and of international embarrassment. On the one hand the Indians were British subjects, and on the other, the rise of Japan to power was a fact which Great Britain could not ignore.

A third international Conference met at Sydney in March, 1896. A resolution(2) was adopted to the effect that, in order to exclude the Indians, a distinction between immigrant British subjects was to be established. The Conference further resolved not to adhere to the Anglo-Japanese Treaty of 1894,(3) which granted full liberty to the subjects of either Empire to enter, travel or live in any part of the other signatory's

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(1) Cf. Jenks and Lauck, The Immigration Problem (1926), 277; Coghlan and Ewing, op. cit., 444.

(2) Willard, op. cit., 109; Campbell, op. cit., 78.

(3) State Papers, 86, 39. Queensland adhered to the Treaty in 1897, but the adherence was denounced by the Imperial Government in 1908.

territory, and which provided that the Treaty was not to apply to the British self-governing Dominions unless they so wished. The provision of the Chinese immigration restriction Acts would have been extended to all coloured races if Great Britain had not intervened on imperial grounds.

(iv) The Imperial Conference, 1897

The Conference was held in London. Joseph Chamberlain, addressing the Premiers from the Colonies, reminded them[1] of the traditions of the Empire, which made no distinctions of race or colour, and pointed out that the exclusion of all Her Majesty's Indian subjects, or even of all Asiatics, would be so offensive to those peoples that it would be most painful to Her Majesty to sanction it. He therefore urged them to base their prohibitive legislation, not upon race or colour, but upon the real objectionable characteristics of the immigrants against whom the legislation was directed. He submitted for the consideration of the Australian Colonies an Act recently passed in Natal, which embodied the principle of restriction by means of an educational test. It provided that any person who failed to write out and sign in a European language an application for admission, would be declared a prohibited immigrant. The Act, not being discriminative in form, had been allowed by the Crown. Western Australia (No. 13, 1897), Tasmania (No. 69, 1898), and New South Wales (No. 3, 1898) readily

(1) Cmd. 8596 (1897), 13.

adopted the language test. It is evident that the new Acts were not aimed at Chinese immigration, which had already been checked by the 1888 Acts. The Tasmanian Law expressly stipulated that nothing in the Act shall repeal the Chinese Immigration Act of 1887. Victoria, Queensland and South Australia, being content with the anti-Chinese clauses, attempted no further action. The test formed the basis of the federal Act, which applies to all Asiatics and not to Chinese immigrants only.(1)

By the Constitutional Act of the Commonwealth, the Federal Government is vested with the power to make laws on immigration and emigration. The Immigration Restriction Act, first passed in 1901, substituted a dictation test for the written application. It excluded a prohibited immigrant from entering Australia who fails to write out at dictation a passage of 50 words in length in a European language.

(v) The Causes of Chinese Exclusion

After the discovery of gold and until 1870, the chief objection to the Chinese came from the miners. After that year, the most strenuous opposition to their presence came from

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(1) The Chinese population in Australia as enumerated at the decennial census has varied as follows: 38,258 in 1861; 27,676 in 1871; 38,533 in 1881; 35,821 in 1891; 32,717 in 1901; 25,772 in 1911; and 20,812 in 1921. Cf. Australia Year Book, 1925, 951-956. Owing to the economic crisis, the 1931 census was deferred to 1933 and is not available at the time of writing.

the workers in capital cities. The question of the alleged competition of Chinese labour led to the formation and amalgamation of trade unions whose activity was largely responsible for the enacting of the increasingly severe laws.(1) Nevertheless the Chinese in no sense competed with the city workers. Sir T. A. Coghlan in his great work Labour and Industry in Australia, made an effort to analyse(2) the industries which afforded the Chinese most employment. He began with market gardening, of which, he said, the Chinese had almost a monopoly; the allied trade of greengrocery was in the possession of Europeans and Chinese in about equal proportions; while in the fruit trade Chinese held about one-fifth. Tobacco-growing the Chinese had entirely in their own hands, not two growers in a hundred being Europeans. A large number of Chinese still clung to the search for metals, but their employment in no sense interfered with the whites and they confined themselves to working alluvial tin deposits or searching little rivers or streams and the abandoned diggings for gold. In the great pastoral industry, few Chinese found employment. Taking employment as a whole, he concluded that it was not in any sense true that the presence of Chinese in Australia tended to depress wages or cause unemployment amongst the European

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(1) Sutcliffe, History of Trade Unionism in Australia (1921), 34, 35.

(2) Coghlan, Labour and Industry in Australia (1918), III, 1331-1333.

workmen. Their numbers in the later period were too few, and the callings they followed were not those particularly favoured by the whites; the growing antipathy to them was therefore due to some other cause, examination of which does not fall within the present scope.

Chapter V.

CHINESE IMMIGRATION IN NEW ZEALAND

11. A History of Fifty Years.- The first Chinese in New Zealand came from Australia: when later immigration set in in large numbers, it was mostly direct from China.(1) Some of them went to New Zealand before the discovery of gold in the Otago fields in 1861, and then pressed on in the subsequent years with the streams of miners. The total number reached 4,215 in 1871, of whom 4,159 were in the province of Otago, 3,570 being employed in alluvial mining.(2) They formed less than 1·75 per cent. of the population of the Dominion, but represented 6 per cent. of that of the province. The concentration led to opposition in Otago against the Chinese immigration. A select Parliamentary Committee was appointed in August, 1871, to investigate the extent of the immigration and its probable result, not only in the goldfields but also on the social condition of the Colony as a whole. The Committee found(3) that the Chinese were industrious and frugal, and as orderly as Europeans; that there was no special risk

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(1) Scholefield and Hall, Asiatic Immigration in New Zealand (1927), 4.

(2) Campbell, op. cit., 79.

(3) Scholefield and Hall, op. cit., 4.

to morality or security from their presence, nor were they likely to introduce disease; that nearly all who came to New Zealand had come for goldmining, and, as a rule, occupied ground which would not pay European miners to work; that they returned to China with some £100 or upwards, and no considerable number was likely to settle; that the Chinese miners spent less per head than the European population; and that their presence did not entail additional police protection.

The majority of the Committee thought that no action was necessary. The Government therefore took no step to restrict the Chinese although the subject was under annual discussion after 1877 in the Dominion Parliament. The Attorney-General in 1878 once expressed the view that the Colony had no power to act in the matter without reference to the home authorities.(1)

The number of Chinese reached 5,004 in 1881.(2) New Zealand now shared with the Australian Colonies the scare of a "Chinese invasion" and was asked to send a representative to the first Inter-Colonial Conference. After the Conference similar steps were taken to those taken by the other Colonies, and New Zealand passed the Chinese Immigration Act in 1881.(3)

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(1) Scholefield and Hall, op. cit., 5.

(2) New Zealand Report of Census, 1916, 148.

(3) For a digest of the early Chinese Immigration Laws in New Zealand see Lewin in Journal of the Royal Society of Arts, LVI (1907-1908), 604.

The Act was reserved by the Governor for the signification of the Queen's pleasure, which was declared in December, assenting to the said Act.(1) It limited the entry of Chinese to one for every 10 tons of the ship's burden which brought him to New Zealand, and imposed a poll tax of £10 on every Chinese. The population decreased to 4,542 in 1886, and to 3,711 in 1896.(2) The Act was first amended in 1888, when the passenger limitation was raised to one for every 100 yons. But naturalised British subjects were excluded from its operation. A second Amendment Act was introduced in 1896. further raising carriage capacity to one for every 200 tons and the admission tax to £100.

During the early nineties other Asiatic people had come to New Zealand and, as in the Australian Colonies, tended to complicate the problem of coloured immigration. With the decline of alluvial mining, the Chinese were filtering through to the cities and towns. Mr. Seddon, in introducing the first Asiatic Restriction Bill in 1896, proposed restriction on coloured British subjects and the denial of naturalisation to any further Chinese. The Bill failed in the Legislative Council. A second Asiatic Restriction Act, though it passed the Colonial Legislature, was disallowed by the Crown. Then

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(1) State Papers, vol. 75, 1883-1884, 428.

(2) New Zealand Year Book, 1933, 64.

an Immigration Restriction Act was passed in 1899, adopting the language test on the Natal model, which required any person of other than British birth or parentage to write and sign in a European language a prescribed application for admission. But the Act did not apply to any person of a class for which immigration provisions had been made by law or by approved scheme. Chinese were therefore exempted from the test, but remained subject to the tonnage limitation and poll tax as provided in the Amendment Act of 1896.

In the Chinese Immigration Amendment Act of 1907 it was enacted that no Chinese shall land in New Zealand "unless such Chinese is able to read a printed passage of not less than 100 words of the English language." This was another barrier to Chinese immigrants in addition to the carriage limit and the £100 tax. The consolidated Immigration Act of 1908 retained the same provisions, and an appeal from the Chinese in the Dominion to the British Government was answered by insistence that the matter was one for the local government.(1) The 1920 Amendment repealed the education test for Chinese and other immigrants, but adopted the permit system. No person, who is not of British birth and parentage, is allowed to enter unless a permit to do so is obtained beforehand.

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(1) Keith, Responsible Government in the Dominions (1928), II, 811.

12. The White New Zealand.- It seems that Chinese in New Zealand are too few in number and economically too weak to endanger the material life and social well-being of the country. And since 1896, their number has continued to decrease.(1) The objection to the Chinese first started in the mining districts, and was viewed with much disfavour by the mercantile class. When the Chinese proved that they were not only successful miners, but good business men and agriculturists as well, to whose enterprise and initiative many important industries, including market gardening and dairying, owed their development, the town members of Parliament began to advocate Chinese exclusion.(2) Under the administration of Richard Seddon from 1893 to 1906, anti-Chinese Laws of ever-increasing severity were enacted. Seddon owed his rise to the support of a mining constituency, and when he first entered the House of Representatives, in 1879, had stood firmly against Chinese immigration.(3) In order to safeguard the racial purity of the people of New Zealand and to preserve British institutions for posterity, he was of the opinion that the Dominion must be kept white. Economic conditions were also responsible for

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(1) Campbell, op. cit., 83.

(2) Hall, "New Zealand and Asiatic Immigration", in New Zealand Affairs, 1929, 84.

(3) Drummond, The Life of Richard Seddon (1907), 32.

political action. From the earliest date of agitation for legislation until 1907, every Act passed was said to have been preceded by some economic crisis, causing unemployment and distress.(1) The realisation of the white New Zealand policy necessitated the tightening up of the control over immigration. The permit system was introduced, which avoids race or colour discrimination yet which is more effective in its purpose of exclusion.(2)

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(1) Hall, op. cit., 93.

(2) The decennial census of the Chinese population in New Zealand showed the following figures: 2,875 in 1901; 2,630 in 1911; 3,266 in 1921; and 2,854 in 1931: New Zealand Year Book, 1933, 64.

Chapter VI.

CHINESE IMMIGRATION IN SOUTH AFRICA

15. The Cape and Early Immigration.- Since the forties of the last century until the elimination of the contract-labour system in 1875, the Cape of Good Hope had served as a place of call for the oriental vessels carrying Chinese labourers to the plantations of South America and the West Indies. It lies at the middle of the journey between Macao or Hong Kong, where the labourers usually embarked, and their American destination. Sixty-five to eighty-five days were required for sailing vessels to make the port, and another ninety days to Peru or Havana.(1) The place was well known to Chinese. But Chinese appeared to have had recourse to the Cape in earlier centuries. When the Dutch founded their colony in the East Indies, intercourse and trade had existed between these islands and China. Chinese merchants might have adventured from there to the Dutch Colony in the Dark Continent.(2) The enactments

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(1) Parliamentary Papers, 1857-58, 481, 6.

(2) Native Malays were brought to the Cape in large numbers by the Dutch and remained the principal constituent of the Cape population, to be known later as the Cape Malays: Nathan, The South African Commonwealth (1919), 253.

relative to Chinese in the Cape plakaten revealed the presence of these people. Some of the statutes might have been copied from those of Batavia, the centre of the Chinese colony in the East Indies.(1) It is interesting to note that the plakaten forbade Chinese to wear European clothes. A high customs duty was also charged on the exportation of Chinese corpses to China. Chinese might have frequented the Colony in the seventeenth and eighteenth centuries.

Three years before the introduction of the first Indian immigrants to Natal in 1860, Chinese labourers were imported by a land company.(2) They began to come after the middle of last century, though never in large numbers.(3) In 1881 a batch of 250 came to the Cape for railway construction work, but soon abandoned it for the diamond diggings at Kimberley.

14. The Development of Anti-Asiatic Legislation in the Provinces.-

(i) The Transvaal

The first legislative enactment dealing with Asiatics was passed by the Transvaal Volksraad in 1885. It is known as Law 3 of 1885 with subsequent amendments, and is still in force

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(1) South African Law Journal, XXIII (1906), 246.

(2) Walker, A History of South Africa (1928), 305.

(3) Dawson, South Africa (1925), 35.

in the province. It is based on the principle laid down in the Grondwet of the Transvaal from time to time that no equality between the white and coloured races could be tolerated. Law 3 applies to persons belonging to any of the native races of Asia. Asiatic people who settled in the Republic for the purpose of trade or otherwise were bound to have their names registered. Such registration had to be effected within eight days after arrival and on the payment of a sum of £25, which was reduced to £3 in 1886.(1) They were compelled to live in certain streets, wards and locations indicated by the Government.

The first Volksraad passed another resolution,(2) in September, 1893, which provided that every Chinaman was bound to provide himself with a special pass on which a stamp of £25 was to be affixed and renewed annually. The enactment, which came into operation from 1 January, 1894, seems to have discouraged Chinese immigration, which since then has fallen to inconsiderable numbers.

After the Boer War, the development of the gold mines of the Transvaal called urgently for labour. The importation of Chinese coolies was proposed. The necessary steps were taken immediately. The Labour Importation Ordinance was passed by the Transvaal Assembly in 1904. A Convention respecting the

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(1) Laws of the Transvaal (translated by Barber and Macfayden, 1901), 1155.

(2) Ibid., 456.

Employment of Chinese Labour in British Colonies and Protectorates was signed in May of the same year. In view of the non-ratification of the Emigration Convention of 1866, this Convention is really an act carrying out the provisions of the Convention of Peking of 1860. The Transvaal was then a Crown Colony. Other Dominions, which were opposed to the proposition, complained to Downing Street. In a telegram[1] sent to Pretoria the Ministers of Australia and New Zealand urged that their experience with the Chinese showed that however stringent the conditions of their introduction and employment may be made, it was practically impossible to prevent many and serious evils arising. Moreover, the message continues, such introduction created vested interests on the part of employers which rendered it very difficult to terminate the practice once it had been sanctioned. The Governor-General of Australia notified the Colonial Office[2] that "this House records its grave objection to the introduction of Chinese labour into the Transvaal until a referendum of the white population of the Colony has been taken on the subject, or responsible government is granted." New Zealand[3] also advised that "after years of experience in New Zealand my Ministers

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(1) Cmd. 1941, 1904, Enclosure, No. 26.

(2) Cmd. 2104, 1904.

(3) Cmd. 1895, 1904.

agree prohibitions of Chinese immigration imperative in the best interests of British Communities."

The protests did not seem to have any influence on the decisions in this matter, which was considered as local to the Transvaal. Great stress was, however, laid in the Ordinance on the repatriation of Chinese labourers upon the expiration of their contract. They were not to pursue occupations other than mining, and were to be confined within the mining compounds. A Foreign Labour Department was established(1) in March, 1904, for the purpose of carrying out the provisions of the Ordinance and the obligations of the Transvaal Government under the articles of the labour conventions. The first party arrived on 22 June, 1904, and was assigned to work in the Witwatersrand Gold Mines.(2) The labourers were repatriated as soon as their contracts expired, beginning in June, 1907. The last Chinese departed in March, 1910, leaving the African community as tranquil and integral as it was before the experiment.(3)

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(1) Cmd. 3025, 1906, 149.

(2) The numbers of Chinese employed in the Witwatersrand mines were as follows: 1904 (7 months) - 9,668; 1905 - 39,952; 1906 - 51,427; 1907 - 49,302; 1908 - 21,027; 1909 - 6,516; 1910 - 305 (Annual Report of the Transvaal Chamber of Mines, 1932, 116).

(3) Walker, op. cit., 519.

After the Boer War, the restrictions placed upon the entrance of "undesirable persons" were carried out by means of the permit system of the Peace Preservation Ordinance, 1903, which had long been deemed inadequate in view of the existing conditions of the Colony. The Asiatic Law Amendment Ordinance of 1906 providing for the compulsory registration of all Asiatics and their identification by means of finger prints did not receive the assent of the Crown. But as soon as responsible government was granted, the Transvaal Assembly passed the Registration Act in 1907 (No. 2), which contained similar provisions. The free Chinese population numbered over eleven hundred in the Transvaal. A special representation had been sent to London to plead their cause before the Chinese Minister when the 1906 Amendment was introduced. Upon the passing of the new Act the Chinese Association in the Transvaal again petitioned[1] the Legation, stating that the measure failed to recognise their ancient civilisation and the fact of their being an independent sovereign nation. The petition continued to reiterate that the Act placed Chinese subjects on the same level as British subjects coming from India. While it might be proper for the British Government to treat its Indian subjects as it pleased, "your petitioner respectfully submits that

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(1) Cmd. 3887, 1908, 55, 56, containing also the protests of the Chinese Minister and correspondence between the Chinese Consul-General in South Africa and the Transvaal Government.

subjects of the Chinese Empire should not be treated in a manner derogatory to the dignity of the Empire, especially in view of the fact that the subjects of Great Britain receive the most-favoured-nation treatment in China." It then went on to denounce the Asiatic Act which required, under heavy and insulting penalties, every Chinaman resident in the Transvaal to take out a new registration certificate in place of the documents already held by him. "It subjects Chinese to a system of inspection which is utterly degrading. It requires even children under 16 to be registered by their parents in a most humiliating manner. It requires adult male Chinese and their children to give 18 finger prints, a requirement which is insisted upon only in connection with habitual criminals. It reduces Chinese to a level lower than that of the natives of South Africa and other coloured people."

The Chinese Association admitted that the immigration should be regulated and that an effective check should be placed upon illicit entry into the Transvaal Colony, and offered voluntary registration. The compulsion in a matter of this kind was what it resented. It finally suggested that if the offer of voluntary registration could not be accepted and substantial relief could not be granted, strong representations would be made to the British Government that every Chinese should be sent back to China subject to full compensation being paid to him for deprivation of vested rights as to trade, residence, etc.

A passive resistance movement was initiated under M. K. Gandhi. The Asiatic population, including both Indians and Chinese, resolved as a body not to register, and courted arrest when the time for registration prescribed by the Act had expired.(1) A large number of arrests was eventually made, but the Government found itself powerless to compel and unable to induce the community to comply with the terms of the Act. Recourse was had to a settlement, which was not agreed until January, 1908, when the Transvaal Government consented(2) to accept the offer of voluntary registration. Signatures only were accepted from the educated, propertied or well-known Asiatics, while finger prints of the rest were taken. Sentences of all Asiatics in prison for non-compliance with the conditions of the Act were altogether remitted.

The Immigrants Restriction Act of 1907 adopted the dictation test of a European language. Those who fail to pass the test are declared to be prohibited immigrants. But Asiatics not entitled to a certificate of registration are prohibited immigrants even though they might have passed the test. This certificate is required of every male Asiatic above 16 years of age under penalty of removal from the Colony, and is issued only to Asiatics(3) lawfully resident there, defined as persons

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(1) For a detailed account see Gandhi, Satyagraha in South Africa (1928).

(2) Cmd. 3892, 1908.

(3) S. 3(2) of Act No. 2. of 1907.

authorised under the Indemnity and Peace Preservation Ordinance of 1902, or actually resident in the Colony or in the Orange River Colony on 31 May, 1902, or born in the Colony since that date, not being the child of any labourer introduced under the Labour Importation Ordinance of 1904.

The agitation revived when the Government passed an Act in August, 1908, "to validate the voluntary registration of certain Asiatics who failed to comply with the provisions of Act No. 2 of 1907 and to make further provision for the registration of Asiatics", instead of repealing the 1907 Act which the Asiatic community alleged that the Government had promised to do in the Gandhi-Smuts Compromise. There were other promises on the part of the Government which they failed to fulfil.(1) The struggle resulted in the deportation of large numbers of Indians and Chinese, power to do which the Government now possessed under the new Act. The expulsions began in March, 1910, and included Mr. Leung Quinn, the leader of the Chinese community in the Transvaal, who had assisted the Government in the matter of the voluntary registration of 1908.(2) The agitation continued, however, over many years until April, 1911, when a provisional settlement was reached. An assurance was given that legislation would be passed repealing Act No. 2 of 1907, subject to the reservation of the rights

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(1) Cmd. 4327, 1908, 42-45.

(2) Cmd. 5363, 1910.

of minor children, restoring legal equality in regard to the immigration of Asiatics into the Transvaal, and maintaining existing rights.(1) The number of Chinese registered in the Transvaal between July, 1907, and April, 1914, was 1,240;(2) it fell to 987 in the third census of 1921.

(ii) The Cape

This province passed its first Immigration Act in 1902, adopting the education test of a European language. But the movements of Chinese were strictly controlled by the Chinese Exclusion Act of 1904, amended in 1906. They appear to be a diminishing factor, for while there were 1,321 adults on the Register in 1904, only 766 remained in 1911,(3) and 732 in the third census.

(iii) Natal

Natal enacted its Immigration Restriction Act in 1897, introducing the language test, which became a model to be largely followed by other Colonies in their efforts to restrict Asiatic immigration. But the Asiatic population in Natal consists almost entirely of the British Indians who since 1860 are mostly descendants of the contracted labourers. The Chinese numbered only 163 in the 1911 census, and 108 in 1921.

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(1) Cmd. 6283, 1912-1913, 3-4.

(2) Union of South Africa Year Book, 1910-1917, 192.

(3) Report of the Asiatic Inquiry Commission, 1921, 53.

(iv) The Orange Free State

The Colony prohibited Chinese from settling as early as 1890.(1) No Chinese or other Asiatics can remain in the Free State for longer than two months, and a Chinese community is practically non-existent.

Taking the Union as a whole, the "Asiatic question" means merely the Indian question. The Chinese population in South Africa is completely dying out, and was a negligible quantity even in earlier days. Asiatics as a class are declared to be prohibited immigrants under the Immigration Restriction Act of the Union of 1913, consolidating all provincial laws. The activities of the Indians in the endeavour to ameliorate their position had caused some trouble. An Asiatic Inquiry Commission was appointed in 1920 to inquire into matters affecting all Asiatics, but their investigations were directed mainly to those relating to the Indian races. They reported that scarcely any complaints had been heard from Europeans in regard to Chinese residents in the Union, of whom there were comparatively few. They refrained, however, from making any recommendation with regard to the position of the Chinese in any of the provinces. Now only the Indians are left to struggle for their "vested rights", and the Japanese, having

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(1) Laws of the Orange River Colony, Chapter XXXIII, 11 September, 1890.

signed an agreement[1] with the Union Government in 1931 concerning Japanese immigration into South Africa, have free access to the Continent.

(1) The agreement was bitterly denounced and evoked a storm of protest from the public bodies in the Union: Chilvers, Yellow Man Looks On (1933), 228.

Chapter VII.

CHINESE IMMIGRATION IN BRITISH MALAYA

15. Early Intercourse.- Chinese intercourse with the Malay Peninsula is of very long standing. Chinese annals dating back five hundred years contain the first recorded mention of Penang.(2) In 1409 Admiral Cheng Ho brought an order from the Emperor and bestowed on the Chief of Malacca a kingship. The Chief, grateful for the imperial favours, went with his wife to the Court of China to return thanks and to bring a tribute of products of his country. The Emperor sent them home with a Chinese fleet, and subsequently the place was visited by vessels of Chinese merchants.

An anthropological study of the Malacca Baba has reached the conclusion that the first immigrants were probably from Amoy, for nearly all the words of Chinese origin which have come into the Malayan language approached more closely to the sounds of Fukien than to those of any other dialect, and the Babas of all the old families claimed to be Fukiens.(2) The

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(1) Winstedt, Malaya (1923), 116. For records in Chinese annals of the various dynasties see Groeneveldt, Notes on the Malay Archipelago and Malacca (Miscellaneous Papers relating to Indo-China and the Indian Archipelago): Trubner's Oriental Series, 2nd series, vol. I (1887).

(2) Winstedt, op. cit., 116.

older portion of Malacca is especially the home of the Baba Chinese, but there are well-known families in Penang and Singapore also, and their descendants have spread to the Malay States.(1)

16. The Composition of the Chinese Population in British Malaya.- The Fukiens are to-day the most numerous of the Chinese race in Johore, Kelantan and the Straits Settlements. Taking British Malaya as a whole, there are 39 Chinese in every hundred of the population, while the percentage of Malays is 37·5 and of Europeans 0·4.(2) Throughout the Straits Settlements the Chinese outnumber the Malays. In the Federated States the Malays are in a minority. In only a few cases in the Unfederated States is the Malay in a majority.(3) The Chinese are the backbone of the population.(4) They own most of the tin mines,

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(1) Winstedt, op. cit., 118.

(2) Vlieland, British Malaya, A Report of the 1931 Census (1932), 36.

(3) Ibid. Cf. Bilainkin, Hail Penang (1932), 227.

(4) In the 1931 census the distribution of Chinese is as follows:

(1)	The Straits Settlements	663,518
	(a) Singapore	421,821
	(b) Penang	176,518
	(c) Malacca	65,179
(2)	The Federated Malay States	711,540
	(a) Perak	325,527
	(b) Selangor	241,351
	(c) Negri Sembilan	92,291
	(d) Pahang	52,291
(3)	The Unfederated States	330,857
	(a) Johore	215,076
	(b) Kedah	78,415
	(c) Perlis	6,500
	(d) Kelantan	17,614
	(e) Trengganu	13,254

(Report, 120, 121)

many rubber estates, coastal steamers, and house property in every town and village. Without the energy and brains of the Chinese population it is generally admitted that British Malaya would not have become what it is to-day.(1) Mr. Ormsby Gore, in his report(2) to the Colonial Office after a visit to Malaya, Ceylon and Java, praised highly the loyalty, hospitality and friendliness of the Straits-born Chinese. The increase of the number of Malay-born individuals in every hundred Chinese is suggestive of a tendency to permanent settlement of the population.(3)

Testimony of Europeans as well as of intelligent Malays bear witness to the fact that the immigration of Chinese did not arouse the hostility of the native Malays. The native people have no inclination whatever for the severe work of the tin mines or for that of the sugar or coffee plantations. They much prefer to get their livelihood by fishing or driving horses or selling the produce of their farms, and so on. The influx of Chinese is thought to have led to a much greater demand for the products of Malay labour than would otherwise have been the case. The universal opinion is that the immigration of Chinese, instead of depriving the Malays of labour,

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(1) Winstedt, op. cit., 121.

(2) Cmd. 3235, 1928, 12.

(3) The number in the Straits Settlements was 23 in 1911, 29 in 1921, and 38 in 1931; while that in the Federated Malay States was 8, 17 and 29 respectively: Report of the 1931 Census, 69.

has rather furnished them with a better market.(1) Mr. Ormsby Gore also observed after his tour of inspection that the outstanding feature in the welter of races in British Malaya is the absence of social antagonism.(2) "In that land of opportunity, the diversity of function and tradition is not found incompatible with mutual respect."

17. The Chinese Protectorate.- The Straits Settlement passed the Chinese Immigration Ordinance (No. XI) in 1877 to regulate Chinese immigration. It provided for the appointment of a Protector of Chinese in Singapore and an Assistant Protector in Penang; it regulated the arrival of vessels carrying Chinese passengers so as to ensure the inspection of the passengers by the Protector, with a special view to ascertain whether the 'unpaid passengers' were or were not voluntary immigrants; it authorised the establishment of depots for the reception of the Sinkhehs or newcomers and for their detention if the Protector deemed such a course necessary; it obliged the registration of all labour contracts made by the Chinese immigrants.(3) The Penang office of the Protectorate was

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(1) Jenks, Economic Questions in the English and Dutch Colonies (1902), 41.

(2) Cmd. 3235, 1928, 12.

(3) Campbell, op. cit., 11.

opened in 1881, and a Malacca office in 1911.(1) Similar protectorates had been established both in the Federated and in the Unfederated States. With a view to ensuring a uniform policy throughout Malaya in relation to Chinese immigration and the control of Chinese aliens, the High Commissioner has proposed the creation of a single appointment of Secretary for Chinese Affairs, making him the executive officer responsible for the control of the Protectors of Chinese throughout Malaya.(2)

Ordinance XI. was repealed by Ordinance IV. of 1880. After several amending and repealing Acts, the law is now contained in the Labour Ordinance of 1923, which has special provisions relating to Chinese immigrants.

In 1928 the Immigration Restriction Ordinance of the Straits Settlements was passed. Power is given to the Governor in Council to prohibit or regulate by proclamation the entry of labourers, which power was not used until July, 1930, when the immigration of adult male Chinese labourers was restricted. The Aliens Ordinance of 1932 goes further and regulates the immigration and residence of aliens other than labourers. The word alien in Malaya would mean in practice the Chinese, who form the bulk of the local population.

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(1) Straits Settlements Annual Departmental Report, 1931, 29.

(2) Cmd. 4276, 1933, 32-33.

18. The Orientation of British Policy.- A re-orientation of policy seems to have taken place in recent years. The cry of "Malaya for the Malays" is more heard than before. The decentralisation of government would transfer considerable powers from the Federal to the State Government, which may be able to discriminate against non-Malay elements unhindered. The inauguration of the restrictive immigration policy and the greater use of the Government's powers under the Malay Land Reservation Ordinance have led the Chinese to believe that their days are numbered. The Chinese community seem to adopt the view that preferential treatment as it has been accorded in the territories of the Malay rulers is not unreasonable. What they appear to object to is the extension of such treatment to immigrant Malays from the Dutch Archipelago who are Dutch subjects.(1)

When the Aliens Bill was introduced into the Legislative Council, some members expressed the view that there was plenty of room for immigrants in British Malaya. The lands used for agriculture and building in the Straits Settlements are stated to represent 77 per cent. of the total; in the Federated Malay States only 15 per cent., and in the Unfederated States 17 per cent. have been developed. The population of the whole of Malaya is four and a half millions, while that of Java is forty-

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(1) Cmd. 4276, 1933, 27.

five millions.[1] It is true that the Colony has no indigenous population able to take the place of the Chinese aliens. The position of the Colony is therefore not comparable with that of the countries in South-Eastern Asia where conditions are totally different and where the vast majority of the population is indigenous. The policy of the Government in relation to the Chinese seems, however, to accord full recognition to their status as British subjects in the case only of those born in the Colony, and as British protected persons in the case of those born in the Malay States. Subject to the policy of preferential employment in the civil services and the reservation of sufficient lands for Malay needs, Chinese born in the States are to be treated in the same way as those born in the Colony, and are to have the same professional and business opportunities as European British subjects.[2]

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(1) Proceedings of the Legislative Council, Straits Settlements, 1932, B. 148.

(2) Cmd. 4276, 1933, 28.

Chapter VIII.

CHINESE IMMIGRATION IN SIAM

19. Sino-Siamese Relations.- Trade relations between China and Siam date from very early times. There are in existence Chinese instructions to mariners sailing the coast of Siam that are thousands of years old.(1) Siamese tradition as to the origin of the kingdom also points to an exiled Chinese prince as the first King of Siam.(2) Nevertheless, there is every reason to believe from anthropological data that the Siamese are indeed descended from the Lao-Tai, a group which originated in South-Western China and migrated to Siam between the sixth and the thirteenth centuries.(3) The country is first referred to officially in the Chinese chronicles of the Sui Dynasty (589 - 618 A.D.) under the name of "Red Earth", which was applied on account of the soil being red at the spot where its capital was situated.(4) The earliest recorded relations between the two countries did in fact take place under

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(1) Graham, "Siam and her Relations with other Powers", Journal of the Royal Institute of International Affairs, 1928, 300.

(2) Bose, The Indian Colony of Siam (1927), 20.

(3) Morse and Macnair, Far Eastern International Relations (1931), 357.

(4) Gerini, "Siamese Intercourse with China", The Asiatic Quarterly Review, 1900, 365.

that dynasty. In 607 A.D. the first Chinese envoy was despatched to that country, which sent in return missions carrying as tributes various products of the land.(1) There are records of compliments being sent continuously to China during the Siamese dynasty which existed from 1281 to 1366, and this was kept up with more or less regularity triennially up to the end of the eighteenth century.(2) The tribute-bearing had also been specially mentioned in an early treaty. In the Convention of 1664 between Siam and the Dutch East Indian Company, it was provided that if the King resolved to send ambassadors to the Great Cham at Peking, he might appoint two Chinese from Canton to accompany the embassy as long as the friendly relations continued between that prince and the honourable company.(3) The intermittent tribute was discontinued by Siam as recently as 1882.(4) No steps have been taken by China to enforce the recognition of supremacy. Siam now repudiates any idea of submission, and claims that the tribute was intended as a token of the friendly relations between the two countries. Oriental historians, however, usually assume the propitiatory nature of such offerings, especially those made in the Middle

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(1) Gerini, loc. cit., 1901, 155.

(2) Records of the Relations between Siam and Foreign Countries, II (1920), 66.

(3) Thornely, The History of a Transition (1923), 17.

(4) Morse, International Relations of the Chinese Empire, II (1918), 341.

and later Middle Ages, with the object of securing the good will of an acknowledging power.(1) Some of the Siamese Kings who came to the throne not by legitimate means always sought, as it were, ratification of their accession by China, whose investiture would strengthen their position in the eyes of their own people.

An intimate, unofficial relationship was the result of centuries of commerce and communication. Then the situation changed upon the arrival of European powers who, concluding treaty after treaty with Siam, claimed more rights for their nationals. China alone found herself unrepresented by diplomatic and consular services, in spite of the fact that she was the first Asiatic nation to have intercourse with Siam, and had exercised great influence economically and culturally upon that State. At first Chinese traders found the non-existence of a convention not unprofitable, because having no treaty they were bound by no obligations.(2) But the disappearance of all the the restrictions upon Europeans in the course of time placed the Chinese in an inferior position. To ensure a more favourable and consistent treatment, negotiations for a treaty were initiated. An abortive mission was also sent by China in 1929. Siam pretended that China lacking national unity and possessing no strongly centralised government, it was inopportune for her

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(1) Graham, Siam, I (1924), 213.

(2) Ibid., II, 96.

to propose a treaty.[1] A compromise, however, cannot long be deferred in view of the urgency of the problems between the two Governments with regard to the position and protection of Chinese nationals resident in Siam. The large volume of trade carried on, representing considerable Siamese capital, also demands an adequate regulation by mutual consent.[2]

20. The Privileged Position of the Chinese.- The special position enjoyed by Chinese residents in Siam finds its interpretation in history. The Siamese, being averse to manual labour, confined themselves only to the cultivation of rice-fields, leaving all other labour to the Chinese, who would do everything but the purely agricultural work. Their retail shops are as much in evidence as in other oriental countries to which they have migrated. They also conducted a large portion of the wholesale import and export trade, and own and operate rice mills. The tin industry of Siam also owed its origin to the initiative of Chinese, who had that industry entirely in their hands until the recent appearance of European enterprise.

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(1) L'Asie Francaise, 1933, February, 81.

(2) In her international relations, and especially with Asiatic neighbours, Siam is unable to extricate herself from Japanese influence. When the League of Nations assembled in 1933 to condemn Japanese invasion of the three Eastern Chinese Provinces Siam alone abstained from voting: Toynbee, Survey of International Affairs, 1933, 509.

They first established colonies throughout the tin-bearing provinces and raised themselves to a position of wealth and power.(1) In the early part of the seventeenth century rice trade with China began to flourish, and a colony of Chinese merchants was admitted to reside at Ayuthia, the then capital of Siam.(2) Although Western Powers succeeded in making treaties with Siam, it was said that all through the eighteenth century there was no foreign commerce but that of China. Owing to the opposition of the Chinese, the treaties of 1826 with Great Britain and of 1833 with the United States respectively, also bore little commercial fruit.(3) The position of the Chinese was so enviable that they usually formed a special subject in the treaties concluded in those days.(4) Special facilities were accorded to Chinese merchants in the British possessions to come freely to the Siamese provinces. The treaty of 1826,(5) while denying to British merchants the right to stay in Siam, provided that Asiatic merchants of the English territories of Prince of Wales' Island, Malacca and Singapore should be allowed to trade freely overland or by means of the

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(1) Graham, op. cit., II, 72.

(2) Ibid., I, 214.

(3) Graham in Journal of the Royal Institute of International Affairs, 1928, 303.

(4) Anderson, English Intercourse with Siam (1890), 99.

(5) Martens, N.R.G., XVII, 59, Articles X and XIII.

rivers. Such merchants desiring to enter into and trade with the Siamese dominions should also be allowed to do so freely upon the English furnishing them with proper certificates. In the original Siamese, it was Khek and Chāen or Chinese only who were allowed to travel into the interior of Siamese territory.(1) Other rights and privileges enjoyed by Chinese to the exclusion of Englishmen were the exemption from measurement duty, permission to build, use or charter vessels, to purchase houses or lands, to hold farms, the exclusive sale of many articles, to grow and manufacture sugar, to cultivate rice and other produce, and to proceed to any distance into the interior to purchase produce.(2) In later treaties concluded between Siam and foreign Powers, China was regarded as the most favoured nation and Chinese the privileged aliens. It was laid down in the British treaty of 1855(3) that British shipping should enjoy the same tariff rates paid and the same privileges now exercised by or which might be granted to, Siamese or Chinese vessels or junks.

The position of Chinese was the stronger in contrast to the restrictions to which the Europeans were subject. The treaties concluded between Siam and the Western Powers during

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(1) Anderson, op. cit., 9, note.

(2) Bowring, The Kingdom and People of Siam (1857), II, 205.

(3) British and Foreign State Papers, 46, 138.

the nineteenth century, while conferring extraterritorial rights upon their subjects, had not failed to impose disabilities upon them. The position of British subjects[1] may be instanced: they might reside only at Bangkok, rent land and buy and build houses, but not purchase lands within a certain radius from the city walls until they should have lived there for ten years or obtained special authority from the Siamese Government. In addition, they could not buy or rent houses, lands and plantations situated beyond a distance of 24 hours' journey from the city of Bangkok. They could not go out to sea nor proceed beyond the limits assigned by this treaty without a passport from the Siamese Government. Similar provisions were found in other treaties[2] concluded between Siam and other powers following the suit of Great Britain. It was not until 1909 that their status was improved in this respect.[3] France won the same rights and privileges by the treaty of 1907,[4] but only for her Asiatic subjects and protégés. French citizens and Asiatics who had acquired that status remained subject to restrictions. This was regarded as a disagreeable anomaly, and the possibility was suggested of acquiring lands

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(1) Articles IV and V, Treaty of 1855.

(2) France, 1856, Article V; Portugal, 1859, Articles XI and XII; The Netherlands, 1860, Articles V, VII and VIII.

(3) Article V, Treaty of 1909, British and Foreign State Papers, 102, 126.

(4) Article VI, British and Foreign State Papers, 100, 1028.

by the intermediary of Asiatic persons as a remedy.[1] Their position was not assimilated to that of the Siamese until the signing of a treaty in 1925.

The economic situation was supported by the political preponderance of the Chinese in the country. They were not only admitted to all government offices and noble ranks, but had also founded a dynasty. King Taksin, the son of a humble Chinese immigrant from Kwangtung, who saved Siam from Burmese domination and conquered territories and countries which constitute the dominions of the present kingdom, was one of the most remarkable kings who ever wore the crown of Siam.[2] He established the present capital of Bangkok, Ayuthia having been razed to the ground by the Burmese conquerors, reigned over the Siamese for fifteen years, and was then succeeded by the founder of the present dynasty.

Since the beginning of the seventeenth century Chinese have intermarried with the women of the country, and practically all the best known families in Siam trace their descent to not very remote Chinese ancestors.[3] Chinese immigration

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(1) Regelsperger, "Le Nouveau Traité Franco-Siamois", Revue Générale de Droit International Public, XV (1908), 47.

(2) Wood, A History of Siam (1933), Ch. XVI, "The Reign of King Taksin, 1767-1782".

(3) Graham, op. cit., I, 116.

has produced a fundamental ethnical transformation in the Siamese nation, and the half-castes, invariably the issue of Chinese fathers, gradually penetrate into and dominate over the bourgeois class, which comprises officials, functionaries both on the active and reserve lists, merchants and intellectuals. This middle estate is said to be responsible for the revolutions of 1932 by which the country was turned into a constitutional monarchy on the 150th anniversary of its foundation. Although in appearance it is a revolution of the functionaries, in reality it is deemed a revolution of the Chinese métis.(1)

In accordance with feudal ideas the Siamese Government could always call on the personal services of every citizen. This half-yearly servitude, though commutable by certain kinds of payment, is said to have handicapped the Siamese from devoting themselves wholeheartedly to their business, because of the necessity of being near and ready for the labour periodically required of them.(2) All oriental foreigners resident in the country were subject to the same obligation, but Europeans were exempt. A special assessment was placed on the Chinese population; none of them, however, were required for actual

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(1) L'Asie Française, Nov., 1933, 314.

(2) Thornely, op. cit., 74.

labour, but were obliged to pay a poll tax of 1.50 ticals every three years during and after the second reign, increased to 4.25 ticals in the fourth reign, of the present dynasty.(1) Those who could not pay were required to do a month's work annually for three years.(2) The payment was made on first entering the country and re-collected triennially, and secured to them the privilege of exercising any craft or following any trade they pleased.(3) The imposition of the admission tax seemed to have affected the feudal practice.

21. Historical Retrospect of Chinese Colonisation.- Chinese immigration did not reach large numbers until the beginning of the seventeenth century. Three categories of aliens resident in Siam were distinguished at that time. The Laotians and Peguans, who were prisoners taken in the repeated wars between Siam and those countries, were regarded as "aliens naturalised in the Kingdom". The King appointed officials to observe their conduct and to govern them according to the ordinary laws of the country. Their identity is to-day lost, being completely merged in that of the Siamese. The Japanese, Tonkingese, Cochin-Chinese, Cambodians and Portuguese who were

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(1) Wales, Ancient Siamese Government and Administrations (1934), 201.

(2) Ibid., 223.

(3) Bowring, op. cit., I, 395.

expelled from their country, were also regarded as "naturalised in the Kingdom". Nevertheless, they were subject to chiefs of their own nation elected with the consent of the King, and were governed in the mode of their own country. The third category constituted the Chinese, English, French, Dutch and Moors, who were "aliens established in the country for trade". Each nation had its own chief who would settle all their disputes and was responsible for their conduct to the Barcalon or Phra-Khlang, the Ministry of Finance.(1)

The sea route was the chief channel of Chinese immigration into Siam. There had also been currents of intermigration between the Chinese in Siam and in British Malaya.(2) Large numbers were drawn by tin mines in Southern Siam, and separate colonies had been established since earliest times. At the close of the seventeenth century it was estimated that there were between three and four thousand Chinese in Siam.(3) The population of Bangkok in 1828 was said to include 310,000 Chinese paying tax and 50,000 descendants of Chinese.(4) By the middle of the nineteenth century Chinese immigration had reached

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(1) Gervaise, Histoire Naturelle et Politique du Royaume de Siam (1688), Chapters XIV and XV.

(2) Toynbee, Survey of International Affairs, 1926, 466.

(3) La Lubere, Description au Royaume de Siam (1713), 388. Pallegoix overestimated it as 1,500,000.

(4) Bowring, op. cit., I, 385.

the rate of 15,000 annually.[1] The number has been much exaggerated by recent observers, who do not hesitate to say that from one-half to one-sixth of the population of the country is Chinese. As a matter of fact, there were only 260,194 Chinese according to the census of 1919, and the census taken on 15 July, 1929, returns 445,274. Chinese born in Siam, numbering 113,050 in the census of that year, are counted as "Siamese".[2] The rate is on the increase, however. From individual and masculine immigration as it had been before, this human movement has become household and massive, and has thus aroused the attention of the Government, which has begun to pass laws to check its course.

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(1) Wales, op. cit., 68.

(2) Statistical Year Book of Siam, 1930-1931, 45.

Chapter IX.

CHINESE IMMIGRATION IN FRENCH INDO-CHINA

22. Treaty Relations between China and France in Indo-China.- The contention of the two Powers in Annam had resulted in the Sino-French War of 1884, which brought alternate victory and defeat to both sides. The Treaty of Peace, 1885, provided for the evacuation of the Chinese forces from the country, and the recognition of the treaty provisions by which Annam had accepted the overlordship of France. The Chinese, however, having identified themselves with the Annamits for thousands of years, were able at first to maintain their economic position. They are said to be the best colonists of Indo-China, and are making the greatest profits. Rarely are they farmers; the rice industry on which the national life centres is under their control. They engage very extensively in the retail trade and exercise a virtual monopoly in river transport, owning nearly all the junks in Cochin-China. It has been estimated that Chinese capital in Indo-China probably represents a much higher figure than French capital invested in private ventures.(1) In spite of her political loss, China indeed has managed to retain an economic empire. But in recent years

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(1) Southworth, The French Colonial Venture (1931), 102.

the economic pre-eminence of the Chinese community has shown signs of decline: the reaction and competition of the natives has tended to narrow the sphere of Chinese activity and enterprise. The change in economic life in Indo-China and the system of concession of plantations, which leaves little room for an alien, is also a deadly blow to Chinese supremacy.(1)

(i) Annam under Chinese Suzerainty

All the land from Tonkin to Cochin-China was conquered and colonised by Chinese more than two centuries before the Christian era. From that time China ruled that region off and on. It was a Chinese province from 111 B.C. to 968 A.D.(2) Then there followed various dynasties recognising the overlordship of China by the periodic sending of tributes and by the acceptance of investiture on the accession of each new ruler. In 1407 the country was annexed to China proper, but the incorporation lasted only twenty years, when it again reverted to the condition of a vassal State.(3) An imperial Edict of 1803 decreed that Annam should send tributes once in two years and pay homage every fourth year.(4) Throughout the nineteenth century the Annamite Kings had maintained a loyal vassalage towards China. It was owing to the intervention of France

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(1) Dennery, Foules d'Asie (1930), 155.

(2) Nguyen, Etude Economique sur la Cochin-Chine Francaise (1920), 7.

(3) Morse, op. cit., II, 341.

(4) Nguyen, op. cit., 12.

that Annam broke away completely from Chinese sovereignty.

During the period of Chinese domination the Annamites became impregnated with Chinese civilisation. It was said that their very soul is fashioned on Chinese Confucianism, which determines their social and political laws.(1) Annam is so Chinese that there are celebrated many festivals and formalities that have not taken place in the Celestial Empire for hundreds of years.(2) The Chinese certainly found this country by no means foreign to them in any respect. Restrictions governing aliens were not applied, and they considered Annam a part of their empire.(3) Once established, they would enjoy a very liberal administrative régime. They governed themselves by forming "congregations" or guilds side by side with the Annamite commune. In point of law, they were considered as subjects of the King, and submitted to the laws of Annam. They enjoyed the same civil rights as the Annamites, but could not occupy any office of State. They were also exempt from military service and corvées.

Chinese in Annam as an alien people were subject to a capitation tax. Persons who owned property or exercised a lucrative profession were to pay full tax. Others not holding

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(1) Roberts, op. cit., II, 434.

(2) Franck, East of Siam (1929), 172.

(3) Luro, Le pays d'Annam (1878), 181.

a safe position were to pay half rate. Chinese immigrants during the first three years were also charged a half contribution.(1) In accordance with a population policy, the métis of Chinese by an Annamite wife were considered as Annamite subjects. Their tax was reduced to half the amount they would otherwise pay. But the privileges enjoyed by the Chinese were retained by them. In addition, they were accorded full political rights and admitted to governmental office.(2) This was the situation which was altered upon the arrival of the French.

(ii) The Treaties of Tien-tsen

Under the Treaty of Peace of 9 June, 1885,(3) China engaged to respect, both in the present and in the future, the treaties and conventions concluded directly between France and Annam. As regards the relations between Annam and China, it is understood "they shall be of such a nature as shall in no way injure the dignity of the Chinese Empire or give rise to any violation of the present treaty" - a phrase which is rather vague and intangible. The Treaty, however, assures to Chinese resident peaceably in Annam and supporting themselves by agriculture, industry or trade "the same security for their persons and property as French protégés." Chinese subjects

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(1) Luro, op. cit., 183.

(2) Ibid., 184.

(3) British and Foreign State Papers, 76, 239.

may come to Tonkin from China by providing themselves with passports, which were to be delivered by French agents on the demand of the imperial authority.

In the Commercial Convention of 25 April, 1886,[1] signed in the same city, the status of Chinese in Annam was specifically defined. They were at once assimilated to the natives in certain respects, and to enjoy the most favoured treatment of the Europeans. They would retain the traditional right of possessing land, erecting buildings, opening commercial houses, and having warehouses throughout Annam. They would receive for their persons, their families, and their goods, the same protection as subjects of the most favoured European nation, and, like the latter, might not be made the object of any ill-treatment. As to their legal position, it was further stipulated that Chinese in Annam should be placed under the same conditions with regard to criminal, fiscal or other jurisdiction as the subjects of the most favoured nation. In addition, the Imperial Government might appoint consuls at Hanoi and Haipong, who would have the same rights and privileges as the consuls of the most-favoured-nation in France.[2]

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(1) British and Foreign State Papers, 85, 735.

(2) In a Note exchanged on 23 June, 1887, the Chinese Government consented to adjourn the nomination of consuls "until the two Governments think that circumstances permit their establishment." Ibid., 757.

The régime under the Treaties of Tien-tsen continued until replaced by the Conventions of 1930. During the course of forty-five years restrictions had been placed on the Chinese by the French administration which were hardly consistent with its treaty obligations. China re-asserted her right to the immediate instalment of consuls in Indo-China for the better protection of her nationals. She also demanded the suppression of the capitation tax, to which Chinese alone had been subject. Their juridical status, assimilated to that of the natives, was also a source of irritation. The requirement of finger-prints on passports or permits to reside in the colony from all Chinese immigrants also affronted their national pride. They were demanded in China only from criminals, and the idea became more objectionable to the Chinese when it was found that other foreigners were not required to undergo these formalities. The Chinese Government therefore demanded the complete suppression of all the "vexatious legislation" and the fulfilment of the most-favoured treatment as provided in the Treaty.(1)

The French view was that the Chinese had possessed advantages which were not enjoyed by natives nor by other aliens. In the matter of inland navigation and coastal trade, they were even better treated than the French. Any change in their

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(1) "Chinese under French Rule", China Weekly Review, 17 May, 1930.

status, therefore, would bring no amelioration to their economic system but would, on the other hand, cause great difficulty to the Indo-Chinese administration.(1) The insistence with which the Chinese Government claimed the assimilation of its nationals to the subjects of the most-favoured European Power was regarded as a curious ignorance of the real condition of Chinese in the French colony. The taking of finger-prints was defended as a necessary measure of identification in the absence of civil registration. The similitude of names and the analogy of ethnical type would render any other means of identification of doubtful value.(2) It was also alleged that Annamite law, being largely inspired by the law of China, had certainly benefitted the Chinese, and that the capitation tax, being based on personal wealth, was strictly proportional and in no way contrary to equity. It rather seemed indeed insignificant, in view of the enormous fortune which Chinese commerce had drained from all parts of Indo-China.(3) The case was indeed ably defended. But one phase it failed to reconcile, that is, the inconsistency of the discriminative

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(1) "La Question des Consulats Chinois", L'Asie Française, February, 1929, 63.

(2) "La Révision des Traités Franco-Chinois concernant l'Indo-Chine", Ibid., 83-87.

(3) "La point de vue de l'Indo-Chine dans les négotiations Franco-Chinoises", Ibid., 347-349.

legislation with the treaty provisions.[1] The steady evolution of the legal system in China admits no pretence of its similarity to the Annamite copy, and the supplanting by French legislation of the judicial fabric, devising two separate jurisdictions, suggests no reason why the Chinese should remain with the inferior native status. But the colonial jurists also contended that the Treaty of 1886, which contained the most-favoured-nation clause, not having been promulgated, was not enforceable in the colony.[2]

(iii) The Convention of 1930

The Convention "settling the relation between France and China as regards Indo-China and the frontier provinces"[3] was signed at Nanking on 16 May, 1930, and published simultaneously in China, France, and Indo-China. It is intended to settle at one stroke the outstanding questions in the way of Sino-French rapprochement in Indo-China. As to consular representation, which has been so long deferred, France, upon a thorough

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(1) "The Chinese were guaranteed most favored nation treatment. Europeans in Indo-China are not subject to the laws on immigration and taxation; accordingly, as long as these laws and decrees are enforced and the treaties between France and China are not denounced or superseded, there is plain contravention of treaty rights": Macnair, The Chinese Abroad (1924), 155.

(2) Girault, op. cit., II. (1929), 469, and see supra, § 3.

(3) For comment and text see "L'Indochine et le traité Franco-Chinois de Nankin", L'Asie Française, December, 1930, 406-412. Owing to the protracted negotiation on tariff rates, ratifications were not exchanged until 20 July, 1935.

examination dispelling the conviction entertained by the public and the press that its establishment would present serious inconvenience, consents that China may send consuls to Hanoi or Haipong and to Saigon. As to the identification measures above referred to, the parties undertake to grant to each other, in conformity with their respective laws and regulations, the most-favoured-nation treatment with regard to the fulfilment of formalities, including those relating to identification concerning (1) passports, (2) the system of internal laissez-passer and visa for departure, and (3) the entry and departure of Chinese in Indo-China. Article V. re-affirms the right to reside, travel, and engage in industry and commerce. The treatment accorded to Chinese for the exercise of such rights shall in no way be less favourable than that of the nationals of any other Power. Further, they shall not be subject to taxes or contributions higher or other than those to which nationals of the most-favoured Power may be subject.

The Convention is supplemented by a number of diplomatic Notes. Referring to Article V., the French negotiator, M. de Martel, writes that the Chinese nationals in Indo-China shall enjoy the same treatment with respect to laws, jurisdiction and procedure in civil, criminal, fiscal and other matters, as the nationals of any other country. It is also recorded that the French Government does not regard the provisions of the said Article as preventing it from levying in French Indo-China

taxes applied to Chinese nationals and incidental to the exercise of special rights and privileges traditionally enjoyed by them. The Chinese Government accepts the interpretation on condition that the taxes mentioned therein are also applicable to the nationals of any other Power admitted in Indo-China to the benefit of the same privileges and rights as those traditionally enjoyed by Chinese. Finally, in a Note concerning special privileges, the French Government reassures Nanking that it has no intention of depriving the Chinese nationals of the privileges which they now enjoy in the territory of Indo-China.

The Convention adds nothing new to the advantage of China except that it develops more minutely the intentions and purposes of the most-favoured treatment. By recognising explicitly the legality of the capitation tax, China loses one of the important grounds gained by imperial diplomacy. In early days, when fear of Chinese machinations among the docile Annamites had prompted the imposition of a heavy poll tax upon them, the Chinese Government, appealing to treaty stipulations, protested against the invidious distinction, not without success.(1) The revision of the tax by its application to all Asiatics whether immigrant or resident, though making it consistent with the "same security as French protégés" clause under the Treaty of

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(1) Williams, "The Chinese Immigrant in Further Asia", American Historical Review, 1900, 507.

1885, still could not excuse the French administration for contravening the most-favoured-nation pledge.(1) The subject has been a cause of constant diplomatic remonstrance, and the Chinese Government has never acquiesced in the imposition. It would not have been content with similar treatment to that accorded to the subjects of Western Powers in Indo-China, because the traditional rights and privileges acquired by Chinese during the time they had lived in and been part of the history of Annam, were really not shared by European people. Complete assimilation to the natives would also reduce them in certain respects to a position of inferiority, the French law differentiating the status of citizens, subjects, and protégés, and ascribing a favoured régime to citizenship. To attain the treatment of a most-favoured-nation while preserving vested rights and privileges as provided in the Treaties of Tien-tsen would be the constant objective of those concerned with safeguarding Chinese interests in Indo-China.

23. The General Government of Indo-China.- The Kingdom of Annam was divided into three parts, Tonkin in the north, Annam proper in the middle, and Cochin-China in the south. To this are added Cambodia and Laos, which constitute the five political divisions of French Indo-China. The "full and entire sovereignty" of France over Cochin was recognised by Annam

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(1) Cailleux, La Question Chinois aux Etats-Unis et dans les possessions des Puissances européennes (1898), 110, 111.

in 1874.[1] The country became a French colony and the first group of its oriental possessions. In 1883[2] Annam "recognises and accepts the protection of France". Two years later, China was asked to confirm the capitulation entered into by the vassal State. Cambodia is another French protectorate, established in 1863[3] in place of that exercised by Siam and Annam. The position was reinforced by the Treaty of 1884.[4] The conquest of Laos was accomplished in 1893, when Siam agreed to renounce "all pretention over the territory on the left bank of the Mekong River." Autonomous administration is maintained in these countries, Cochin-China being under a governorship, while a Superior Resident in Cambodia exercises all powers conferred upon France by the treaty of protection. Annam and Tonkin were formerly under a General Resident, and the office was separated in 1889. In Laos the reverse occurred. Two Superior Commandants governed at first, but were replaced by a Superior Resident in 1899.

The Decree of 17 October, 1887, brought into being the general Government of Indo-China, with a Governor-General at its head. He is the repository of French power and possesses

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(1) Treaty of 15 March, 1874, State Papers, 65, 375.

(2) Treaty of 6 June, 1884, State Papers, 75, 100.

(3) Treaty of 11 August, 1863, State Papers, 57, 739.

(4) Treaty of 17 June, 1884, State Papers, 75, 992.

considerable attributes, defined by the organic laws of the Union.[1] In 1900 he was charged with the administration of the territory of Kwang-Chow-Wan when it was leased to France by the Chinese Government. The Decree of 20 October, 1911, again put him upon a new basis, determining the positions of the Governor of Cochin and the Superior Residents and their relations with the governorship-general.

Annam and Cambodia are both protectorates, preserving to a great extent their native institutions, while the French Residents exercise treaty rights side by side with the native potentates. Although Tonkin is now under direct French rule, the powers were originally delegated from the King. The status of Laos is disputed. It has been and still is treated as a protectorate, but upon analysis of its political constitution there is nothing of a protectorate in its proper sense to be observed. No native government enjoying the rôle of a protected State with France as the protector, subsists. Properly, it is but a French colony.[2]

Apart from the colonies and protectorates, the Indo-Chinese Union also comprises the ceded territories and cities of Hanoi, Haipong and Tourane, ceded, under the Treaty of 1884, by the Annamite Government, over which France enjoys undisputed rights of sovereignty, and which politically are under direct French domination.

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(1) See Lois Organiques, II, 485.

(2) Solus, Traité de la condition des indigènes (1927), 43.

24. The Distribution of the Chinese Population.- The influence of the Chinese in Indo-China does not lie in the magnitude of their numbers, their exodus not being a mass movement. British Malaya received in one year alone almost as many Chinese as will be found in the whole French colony.(1) Indo-China, the greater part of which had been Chinese territory from time to time, and admitted Chinese colonists for centuries, has barely 416,000 Chinese, or two per cent. of the total population.(2) Cochin-China, which has the largest number, counts 205,000, while Cambodia ranks second with 148,000. Tonkin, though conterminous with the Chinese frontier but already teeming with its own people and overpopulated, has fifty-two thousand. The countries where the number is smallest are Annam and Laos, containing ten and three thousand respectively.

Chinese immigrants in Indo-China, like their fellow colonists all over the world, are recruited principally from the sea-faring provinces of Kwangtun and Fukien. They are grouped into congregations(3) according to their place of origin. The Kwangtung men are divided into four different congregations speaking different dialects, and co-operating with that of Fukien. The Fukien congregation, which consists of natives

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(1) Dennery, Foule d'Asie (1930), 128.

(2) Annuaire Statistique de l'Indochine, 1930-1931, 53.

(3) See infra, § 58.

from Amoy, are the aristocrats of merchants and industrialists, and own most of the rice mills in Cochin-China. But the most enterprising elements of the Chinese population are the Cantonese, who arrive poor but rise quickly to wealth. The Trieu-Chow people from Swatow in Kwang-tung are mostly boatmen on the rivers and engaged in the loading and unloading of merchandise at the port of Saigon. The congregation of Hakkas, comprising all the people from the north-eastern part of Kwang-tung, are noted as mechanics and market gardeners. The fifth group are the islanders of Hainan in the north of the Tonkin gulf. Differing from the other congregations, who are mostly merchants and industrialists, the Hainanians are in the majority agriculturists and attached to the soil.(1)

A word must be said about the half-castes or Minh-huongs, born of a Chinese father and an Annamite or Cambodian mother. The census of 1931 returns seventy-three thousand Minh-huongs in Cochin-China, while Sino-Cambodians number sixty thousand. They form congregations of their own in each province, and in general constitute no lasting bonds between the Chinese and the native. After one or two generations the half-caste degenerates to the level of the native, and has no further intercourse with the Chinese.(2) They are therefore the forgotten sons of China, yet find it difficult to acquire the status of either

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(1) Dennery, op. cit., 145; Nguyen, op. cit., 26, 60-62.

(2) Dennery, op. cit., 148.

the Annamite or the Cambodian. They are half-Chinese in blood as well as in law.(1)

(1) Cf. Girault, op. cit., II, 47. And see infra, § 80.

Chapter X.

CHINESE IMMIGRATION IN THE DUTCH EAST INDIES

25. China and the Indies

(i) Early Colonisation

The Dutch East Indies, which is the world's largest insular empire, consists of a series of island-groups. A customary division separates Java and Madura from the sparsely settled outer possessions. The territory is either under direct Dutch administration or self-governed by the native States. There are four such States in Java and 278 in the outer islands, occupying about seven per cent. of the area of Java and more than half of the outer territory, and comprising about one-fifth of the Indonesian population.(1) Invariably they recognise Dutch sovereignty, but as the character of the East Indian Company shifted from that of a merchant to that of a ruler, so their position has been constantly changing. They must now accept the European guidance in administration, and are furnished with assistance in the reserved spheres by the Dutch Government.

Chinese immigration to the Indonesian archipelago, which was a natural sequel to its southward movement, is estimated

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(1) Vandenbosch, op. cit., 129.

not to have begun before the fifth century.(1) The first Chinese to travel in the Indies were probably the Buddhist pilgrim Fatheea who visited Java in 413 A.D. and sojourned there for several months. In 435 a mission from the King of Javada to China was recorded in the Chinese annals, and was followed by frequent sending of envoys by both parties.(2) No political or cultural aspirations being entertained, the Chinese traded in peaceful harmony with the islanders. Only on one occasion, in 1292, an expedition was sent by the Yuan Emperor to punish a Javanese prince who had ventured to insult the imperial messenger.(3) The offenders were taken prisoner, and the country submitted before the superior force. Many soldiers were left to settle in the island of Billiton, the base of the expeditionary operation, and a Chinese colony began to flourish in the coastal regions. Then in the beginning of the fifteenth century the Chinese community had risen to such an influential position that the magnates reigned as chiefs over parts of the country.(4) The colonisation received a great impetus when Cheng Ho was sent by the Ming Emperors seven times between 1405

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(1) Groeneveldt, "Notes on the Malay Archipelago", in Trübner's Oriental Series (1887), I, 126.

(2) Cf. Torchiana, Tropical Holland (1921), 46-54.

(3) Groeneveldt, loc. cit., 147.

(4) Ibid., 195.

and 1430 to explore the "Western Ocean", visiting altogether more than thirty different countries in and beyond the archipelago. His name still lives famous in the annals.

The Dutch arrived at the East Indies in 1595, and the Charter of the United East Indian Company was granted in 1602, granting a trade monopoly and the right to wage war, to negotiate treaties, and to take possession of land. It remained the fundamental law of the Company, which governed the islands until its dissolution in 1795. The trading post was first established at Bantam, but was transferred to Batavia in 1617. No antagonism was aroused by the early settlement of the Chinese, - the instructions to the Company had indeed directed that they should be allowed to settle in certain thinly populated islands as they are "an industrious diligent and unweaponed people," who gave no apparent cause for fear that they would ever make themselves masters of the land.(1) In the administration of justice the Company authorities were particularly instructed to see that all the Indian people and especially the Chinese were treated in a friendly manner and were not made subject to improper proceedings.(2) Far from being molested, the Chinese were greatly relied upon. All the government taxes and revenues both in the Company's districts

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(1) Furnivall, op. cit., 11.

(2) Ibid., 13.

and in the dominions of the native princes were farmed out to them and were in their hands, and by this means they had complete control of all trade, internal and foreign.(1) In 1720 it was estimated that there were about one hundred thousand Chinese in Java.(2) Their position and wealth seems to have aroused the jealousy of the Dutch colonists, who now imposed a tax on entering and leaving the islands, besides a poll tax to which no other class of foreigners was subject.(3) Ordinances against Chinese were enforced with the greatest barbarism.(4) Other outrages, culminating in the Batavia massacre of 1740, at last drove the Chinese to armed resistance, and they readily enlisted the support of all the Sultans of Java, who were not less willing than the Chinese to be rid of the "Common Oppressor".(5) Wars continued for fifteen years, desolating the fairest portions of the island and exhausting its resources.(6) The local government sent a letter asserting the rectitude of its conduct against the Chinese to the Emperor of China, to which,

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(1) Crawfurd, History of the Indian Archipelago (1820), I, 135.

(2) Torchiana, op. cit., 114.

(3) Crawfurd, A Descriptive Dictionary of the East Indies (1856), 188.

(4) Torchiana, op. cit., 115.

(5) Crawfurd, History of the Indian Archipelago (1820), II, 430.

(6) For a detailed account see Sir Stamford Raffles, History of Java (1830), II, 231.

however, the Emperor did not vouchsafe a reply.[1] In justice to the Dutch nation it should be added that the massacre was condemned at home. The Governor-General who had connived at the matter was committed to "preventive imprisonment".[2]

(ii) Recent Relations

China entered into official relations with the Netherlands by signing the Treaty of Friendship and Commerce of 6 October, 1863,[3] The King of the Netherlands was allowed to send an envoy to China to look after Netherlands interests. He might also appoint consular agents for the government and protection of his subjects in all the open ports of the Chinese Empire. In addition, the Netherlands Government and its subjects were to enjoy most-favoured-nation treatment. Nothing was said of the position of the Chinese in Dutch territory, and the reciprocal rights of installing Chinese diplomatic and consular services were not granted. Although the Dutch Government raised no objection in 1877 to receiving a Chinese envoy accredited to The Hague,[4] the establishment of consular representatives in Insulinde was only conceded at a heavy price. The

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(1) The tendency of Chinese law being then against emigration, the Emperor was reported to have said that he was little solicitous for the fate of the unworthy subjects, who, in the pursuit of lucre, had quitted their country and abandoned the tombs of their ancestors: Macnair, op. cit., 9.

(2) Winckel, Administration de la Justice aux Indes Neerlandaises (1880), 266.

(3) State Papers, 60, 766.

(4) Morse, op. cit., II, 314.

Dutch law of nationality is based on jus soli, which was in sharp conflict with the Chinese principle of jus sanguinis. In the early part of the present century, China awoke[1] to a sense of responsibility for her migrating sons in the Indies, both China-born and Dutch-born, while the Dutch Government claimed sole jurisdiction over the Peranakans. In order to secure the right to consular representation and, on the part of the Dutch, to withdraw as many Chinese as possible from Chinese protection, a Convention was signed on 8 May, 1911,[2] on the understanding that the question of dual nationality should be settled in the Dutch colonies in conformity with the Dutch legislation.

In other respects the Convention is a reproduction of the Dutch-Japanese Treaty of 1908.[3] But what is good for Japan may not necessarily be suitable to China. The admission of consular agents to those ports only of Dutch colonies where reside officers of the same class of any other foreign nation, may prove a handicap on account of the wider diffusion and the greater number of the Chinese settlers in Insulinde. In view of the extraordinary position of the Dutch consulates in China,

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(1) Vandenbosch, op. cit., 307

(2) State Papers, 104, 877.

(3) Ibid., 101, 1067.

the enjoyment by Chinese officials of the most-favoured-nation treatment, which does not exempt them from customs and other direct or indirect taxes, falls very far short of reciprocity. Stress is laid on the provision that the consular agents of China shall be considered as commercial agents, protectors of the commerce of their nationals within their consular jurisdiction. They are not vested with any diplomatic character, no petition to the Dutch Government except through the medium of the diplomatic agent at The Hague being allowed. Only in case of urgency may they have direct recourse to the Governor of the colony, and then only on proving the urgency and stating the reasons why the petition could not be addressed to the subordinate authorities, or proving that a previous petition addressed to these authorities had not been acted upon. The purely commercial nature of the position of the consuls and the constitutional limitation of the authority of the Indian Government to deal with international affairs have caused great inconvenience to the Chinese community. The history of the consulates reveals many instances when Chinese nationals who wished to secure assistance from the consuls have been deprived of it because of these limitations.(1)

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(1) Cf. China Weekly Review, 22 October, 1932.

26. Demographic Composition.- Netherlands India is a country inhabited by a great variety of races and peoples. The customary threefold division of natives, Europeans, and oriental aliens, does not reveal the actual composition of the population, for within these groups there is again no homogeneity. Java and Madura, which constitute but 7 per cent. of the total area of the insular empire, are inhabited by nearly 70 per cent. of the whole native population.(1) These are principally Javanese, with certain proportions of Madurese, Sundanese and some Malay immigrants. The congestion is regarded with great concern by the Government. The population of the outer possessions, though much less dense, has greater ethnographical complexity. Ninety-six per cent. are natives.(2) The European population includes all persons of occidental origin and other persons who have under Indonesian law the same standing as Europeans. The group thus comprises Japanese, Egyptians, Armenians, Turks, etc. Their numerical strength is four per thousand of the total population.(3)

The oriental aliens consist for the most part of Chinese. These latter numbered 1,233,856 in the whole country, according to the census of 1930, forty-seven per cent. being established in

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(1) Volkstelling, 1930, Pt. I, XX.

(2) Ibid., Pt. II, XXI.

(3) 192,571 in Java and Madura; 48,746 in the outer possessions: Ibid., Vol. VI, 153.

Java and Madura. Other orientals, including Arabs, Klingalese and Mohammedans, make up 8 per cent. of the oriental people.

The Chinese, although they represent but two per cent. of the whole population, constitute 78 per cent. of the non-indigenous elements in the Dutch East Indies. In 1928 the number of Chinese arrivals reached 41,157, but after 1930 their number decreased. In 1932 it fell to 5,921.(1) The Indonesian Government now admits Chinese upon a quota system.

The early Chinese settlers are from Fukien, while the Kwang-tung men have arrived mostly since the middle of the last century. Their occupation varies with the locality, and the Chinese in Java are great merchants and industrialists. The Chinese in West Borneo are devoted chiefly to agriculture, and have successfully improved the land. In Sumatra, the Chinese are labourers, being employed on the plantations of the East Coast and in the gold and coal mines. The tin excavations in Banca and Billiton owe their genesis to Chinese enterprise and absorb a large population. As traders, factors and agents, they form the necessary link between the European importer and the native consumer. They are also beginning to compete with Europeans in the upper economic stratum. The Peranakans, or Dutch-born Chinese, are generally much better off than the Singkehrs, or Chinese immigrants, because after

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(1) Indisch Verslag, 1933, II, 37.

a successful career in Java, unlike the Dutch colonists, who invariably return to their country of origin, they remain established in the land and are, moreover, greatly concerned for the welfare of the Indies.(1) By the accumulation of wealth, the richest Chinese are said to have become richer than the richest Europeans.(2) It is their dominating position that has given prominence to the Chinese problem in the Indies.

The absence of overt antagonism on the part of the native population towards the Chinese, who had become such an important factor in their economic life, was very remarkable. Indeed, the Chinese had developed native production and contributed much to their material advancement. To the Europeans they are also indispensable in a tropical land, and tend to supplement rather than to supplant them. Propaganda amongst the natives, in a sense hostile to Chinese exploitation, has in recent years led to the development of a very high "race sense" among the native population. They are now setting to work to break down the commercial domination of the Chinese, whose air of superiority is much resented.(3) The formation

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(1) Cabaton, Java and the Dutch East Indies (1911), 161; Chailley-Bert, Java et les Habitants (1914), 130.

(2) Meyer Rannette, "The Economic Structure of Java", in Schrieke, The Effect of Western Influence on Native Civilisation in the Malay Archipelago (1929), 71.

(3) Collet, L'évolution de l'esprit indigène aux Indes Orientales Néerlandaises (1921), 56.

of the "Sorekat Islam", or Union of Mohammedans, the connotation of the last word being synonymous with "native" in the Indies, had at first a purely economic object. As it gained in strength, the Union gradually shifted its aim, and came to be directed against the Europeans and their social predominance.(1) The Dutch administration now has to face economic competition with the Chinese on the one hand, and a political struggle with the natives on the other. The constitution of the Volksraad with an increased number of native seats, and its elevation from an emasculated consultative body to a position sharing with the central government legislative power for the Indies, are acknowledgments of the political force of the native population. Since 1931 two Indonesian members have also been appointed to the Council of the Indies.

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(1) Alting and Buning, The Effect of the War upon the Colonies, in the Netherlands and the World War Series, vol. III (1928), 55.

PART II.

IMMIGRATION LAWS AND RESTRICTIONS

Chapter XI.

THE UNITED STATES

27. The Immigration Treaty of 1880.- The Treaty of 17 November, 1880,[1] was in substance a waiver by China of the rights which she was enjoying under the Burlingame Treaty. Permission was given to the United States Government to regulate, limit or suspend in its discretion the coming or residence of Chinese labourers, but not absolutely to prohibit it. The limitation or suspension should be reasonable, and should apply only to Chinese who might go to the United States as labourers, other classes not being included in the limitation. Legislation passed in regard to Chinese labourers should be of such a character only as was necessary to enforce the regulation, limitation or suspension of immigration, and the immigrants should not be subject to personal maltreatment or abuse (Article 1). Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese labourers then in the United States, would be allowed to come and go of their own free will and accord, and would be accorded all the rights, privileges, immunities and exemptions which were accorded to the citizens and subjects of the most-favoured-nation (Article 2). In return, the American Government promised to exert all its power to devise measures for their protection if any Chinese

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(1) 22 U.S. Statutes 826.

should meet with ill-treatment at the hands of any other persons (Article 3). It was also agreed that the great power given it by the Treaty would be exercised by the United States with "a wise discretion in a spirit of reciprocal and sincere friendship and with entire justice."(1)

In the result, the exercise of this power turned out to be of a strongly preventive nature, neither reasonable nor judicious, and even in clear violation of the treaty stipulations. In the course of the discussion of the Acts subsequently passed by Congress it will be apparent that there has been a remarkable excess or abuse of this power. During the eighties of the last century there were frequent riots against the Chinese, and the Imperial Government appealed to successive American Secretaries of State for special protection; this was refused each time on the ground that the Constitution of the United States did not permit the Federal Government to interfere and maintain order within the States except at their request. The Chinese were told to appeal to the local authorities and to the courts.(2) Article 3 of the Treaty also became practically a dead letter. However, this Treaty, upon the termination of later immigration conventions, again comes into operation and will govern the relations of the two countries.

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(1) For the meaning of the words "limitation" and "suspension" agreed to by both parties in the travaux préparatoires, see Foreign Relations, 1881, 184, 188.

(2) Moore, Digest, VI, 820.

28. The Chinese Exclusion Acts of 1882 and 1884.- The first Exclusion Act in pursuance of the Treaty suspended Chinese immigration for a period of twenty years; it was vetoed by President Arthur, who held that the suspending for twenty years amounted to prohibition and that the system of personal registration and passports which it instituted was undemocratic and hostile to the spirit of American institutions.(1) Another Bill suspending the admission of Chinese labourers "both skilled and unskilled and Chinese engaged in mining" for ten years became law on 6 May, 1882.(2) It provided for the issue of certificates for the purpose of identification. These certificates were to be given by the Collector of Customs to such labourers as were in that country on 18 November, 1880, or who should come there prior to 5 August, 1882, ninety days after the passage of the Act. The certificates were issued on their departure from, and entitled them to return to, the United States (called section four certificates). Chinese persons other than labourers who were entitled to enter the United States were to be identified "by a certificate issued under the authority" of the Chinese Government (section six certificates). Disputes soon arose as to the applicability of the Act to persons of Chinese race who were subjects of

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(1) Veto message to the Senate, 4 April, 1882, 47th Cong., 1st Sess. E.D. 148, Ser. No. 1990.

(2) 22 U.S. Statutes 58.

other countries. A District Court of Massachusetts admitted a Chinese subject of Great Britain, ruling that the Exclusion Law was in execution of a treaty with China and so applied to subjects of China only.(1) But in a similar case another District Court, in California, reached an opposite conclusion, and held that labourers of Chinese race coming from any other part of the world were to be excluded.(2) Chinese merchants resident in other countries than China, being unable to produce the certificates issued by the Chinese Government, were allowed to prove their status by parol evidence.(3) Labourers who had left the United States before the Act came into force and were not provided with certificates of re-entry, were allowed to land on the assumption that Congress could not have intended to violate the treaty stipulations exempting Chinese labourers already in the United States although the statute was in conflicting terms.(4)

The Amendatory Act of 5 July, 1884,(5) then expressly declared that the provisions of the Act should apply to all

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(1) U. S. v. Douglass (1883), 17 Fed. 634.

(2) In re Ah Lung (1883), 18 Fed. 28.

(3) The Case of the Chinese Merchant (1882), 13 Fed. 605

(4) In re Chin Ah On (1883), 18 Fed. 506.

(5) 23 U.S. Statutes 115.

Chinese whether subjects of China or of any other foreign Power. Every Chinese person of the exempt classes had to obtain the permission of, and identification by, the Chinese Government or other Government of which they were subjects. The certificate of a labourer was made the only, instead of prima facie, evidence of his right of re-entry. Two classes remained to be dealt with: Chinese labourers who had left the United States at the date of the Treaty of 1880 and returned after 5 July, 1884,(1) and those who had lost their certificate.(2) The Court in each case refused to give the statute a retrospective operation whereby rights previously vested under treaties were injuriously affected, unless compelled to do so by language so clear and positive as to leave no room for doubt that such was the intention of the legislature, and held that both classes were entitled to be admitted. But from labourers who left after the Act of 1882 but before the Amendment, any evidence of the right to re-enter other than the certificate was not accepted.(3) Similarly with a Chinese merchant failing to produce a certificate; his right to enter could not be established by any other evidence.(4)

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(1) Chew Heong v. United States (1884), 112 U.S. 536.

(2) U. S. v. Jung Ah Lung (1887), 124 U.S. 621.

(3) In re Shong Toon (1884), 21 Fed. 386.

(4) In re Wo Tai Li (1888), 48 Fed. 668.

The right to exemption must be certified by the Chinese Government or other Government of which such Chinese person was a subject. Hardship was thus caused to persons of the exempt classes who came from a place where there was no Chinese consular agent,[1] and no one to issue a certificate, and were refused admission although the Treaty had purported to confine the restrictions to labourers. Thus a certain Loi Hoa was denied entrance in 1927 because his certificate was issued by officials of French Indo-China where he was merely domiciled but to which he owed no permanent allegiance.[2]

In Loi Hoa's case the Court dwelt at some length on the history of the legislation, admitting the added weight of the Treaty of 1894, Article III. of which stipulated that Chinese subjects entitled to admission might "produce a certificate from their government or the government where they last resided." When it was in force, Chinese nationals resident abroad could be admitted to the United States on presentation of a certificate either of the Chinese Government, as authorised by section 6 of the Act of 1882, or of the Government of their residence, as permitted by the Treaty. This Treaty, however, expired by efflux of time in 1904 and was not renewed.

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(1) Administrative regulations have now provided that such certificate may be issued by Chinese consular officers.

(2) Nagle v. Loi Hoa (1927), 275 U.S. 475.

But by the Act of 1902 the certificate provisions of section 6 of the Exclusion Act were continued indefinitely, and constituted the law on that subject; hence "the government of their residence" could no longer issue a valid certificate.

This section, however, was construed as limited to those who came to the United States for the first time. It would not apply to Chinese merchants already domiciled there who, having left the country for temporary purposes cum animo revertendi, sought to re-enter it on their return to their business and domicile.(1)

The wife of a Chinese labourer, or a Chinese woman not previously a labourer, who married a Chinese labourer, was held to have or acquire the status of the husband, and was not permitted to enter the United States.(2) The Federal statutes exclude all Chinese persons belonging to the class defined as labourers except those specifically and definitely exempted, and there is no exemption of a resident labourer's wife and minor children, who are therefore not admissible.(3) The Exclusion Laws, however, were held not applicable to native-born citizens of the United States though of Chinese parentage,(4)

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(1) Law On Bew v. U. S. (1892), 144 U.S. 47.

(2) Case of the Chinese Wife (1884), 21 Fed. 785.

(3) Yee Won v. White (1921), 256 U.S. 399.

(4) In re Look Tin Sing (1884), 21 Fed. 905.

under the general rule of law that no citizens can be excluded from the country except in punishment for crime.

The Act of 1882 as amended by the Act of 1884 was continued in force for ten years by the Act of 1892, and was further continued by later Acts. It exists side by side with the Immigration Act of 1924,(1) and the Chinese are still subject to the rules and regulations connected with the two systems of exclusion since 1903, when the application of the general laws was first extended to the Chinese.(2)

29. The Abortive Treaty and the Dolph Act of 1888.- The Federal Government was powerless to prevent local discrimination and abuse perpetrated under State and municipal laws, although the Senate might and did promise protection. Violent outbreaks against the Chinese occurred in the States and Territories during the later eighties. Justice was denied both by the rendering of unfavourable decisions and by the failure to bring offenders to the courts. Due diligence of protection was also lacking. The Secretaries of State in Washington resorted to subterfuge when diplomatic interposition was lodged. "In order that Chinese labourers may gradually be reduced in numbers and causes of dangers averted and

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(1) Annual Report of the Commissioner-General of Immigration, 1924, 30. The repeal of the old Chinese Exclusion Laws was recommended.

(2) S. 36, Immigration Act, 1903, 32 U.S. Statutes 1221.

lives preserved," the Chinese Government proposed in 1888 to prohibit all immigration.(1) A treaty(2) was negotiated providing for the absolute prohibition of Chinese labourers from coming into the United States for twenty years. Exceptions were made for those who had a lawful wife, child or parent in the United States, or property therein of the value of one thousand dollars or debts of like amount due to them and pending settlement. "Considerations of humanity and justice required these exceptions to be made, for no law should overlook the ties of family, and the wages of labour were entitled to just protection." As to the exempt classes, being officers, teachers, students, merchants, or travellers for curiosity or pleasure, the treaty did not affect the rights they then enjoyed.

The provisions were made more drastic by two amendments of the Senate, by which the prohibition was extended to the return of Chinese labourers who were not then in the United States, whether holding certificates under the existing laws or not, and the production of a certificate was made absolutely necessary for re-admission. The Treaty was signed on 12 March, 1888. Consequently, Congress passed an Act(3) on 13

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(1) Foreign Relations, 1888, 357.

(2) Moore, Digest, IV, 193.

(3) 25 U.S. Statutes 476.

September for the carrying into effect of the Treaty. The right of return was limited to one year, and to the port of departure. Ports of entry were specially named. The Secretary of the Treasury was authorised to make all rules and regulations to enforce this Act. The last section of the Act laid down that the Acts of 1882 and 1884 were to stand repealed on the final ratification of the pending agreement.

The Treaty was not ratified, owing to the fact that China desired to lessen the term of twenty years and to gain for Chinese labourers having property less than one thousand dollars in value the right to return. The question arose as to whether the Act could be enforced. The Court held, however, that s. 13 providing for the arrest and deportation of any Chinese person found unlawfully in the United States and his removal to the country whence he came, became effective from the date of approval of the Act and did not depend upon the ratification of the Treaty.(1) It was held constitutional, despite the contention that persons other than Chinese may, by virtue of its provisions, be arrested and possibly deported.(2) In another case the Court ruled that while the restrictions of sections 1, 2 and 4 prohibiting the coming of Chinese labourers and regulating the admission of the exempt classes were postponed until the Treaty should be ratified, the other provisions

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(1) U.S. v. Jim (1891), 47 Fed. 431.

(2) U.S. v. Foong King (1904), 132 Fed. 107.

took effect immediately, although ratifications had not been exchanged.(1) The Act was also claimed to have a field of operation and to be in force excepting sections 2 - 4 and the last section.(2) In the case of Tuck Lee it was held that Chinese labourers who departed from the United States had the right to return only on compliance with sections 5, 6 and 7 of the Act, which required that the alien should have a wife, child or parent in the United States, or property of a certain value, and that, on leaving, he should apply to the Collector of Customs for the district from which he should wish to depart at least a month prior to his departure and make oath concerning his family, property, etc. If a labourer should leave without the return certificate, he could not lawfully re-enter, and if he did re-enter he should be subject to deportation.(3) But section 12, providing that the decision of a Collector as to the right of any Chinese passenger to enter the United States should be subject to review by the Secretary of the Treasury and not otherwise, was held never to have been in force.(4) The administrative officer interpreted in 1899

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(1) U.S. v. Chong Sam (1891), 47 Fed. 878.

(2) U.S. v. Long Hop (1892), 55 Fed. 58.

(3) U.S. v. Tuck Lee (1903), 120 Fed. 989.

(4) U.S. v. Loo Way (1895), 68 Fed. 475; Li Sing v. United States (1901), 180 U.S. 486.

that sections 5 - 14, excepting 12, did not depend upon the ratification of the Treaty, but became operative upon the approval of the Act.(1) To remove all possibility of doubt, the said sections were re-enacted by the Act of 1902 and are in force at present.

30. The Scott Act of 1888: Chae Chan Ping v. United States.- In view of the non-ratification of the Treaty, Congress hastened to pass the Scott Act, deemed "essential as the only way to keep out the Chinese labourers." The Act,(2) which became law on 1 October, 1888, provided that it should be unlawful for any Chinese labourer to return to the United States after having once departed. All certificates of identity issued under sections 4 and 5 of the Act of 1882 were declared to be void, and the issue of such certificates in the future was forbidden. It is obvious that the Act was in plain violation of the existing Treaty, which did not give the United States the power to retrict the free exit or return of Chinese labourers already in this country, and it was a prohibition without limit of time, and so neither suspension nor regulation.(3)

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(1) Report of the Immigration Commission, vol. 39, p. 76, S.D. 785, 61st Cong., 3rd Sess., 1911.

(2) 25 U.S. Statutes 504.

(3) For the Chinese protest see Foreign Relations, 1889, 115-150; 1890, 210-219.

The constitutionality of the Act was tested in one of the most celebrated cases of international law.(1) The Supreme Court held that it must be conceded that this Act was in contravention of express stipulations of the Treaty of 1868 and of the supplementary Treaty of 1880, but it was not on that account invalid or to be restricted in its enforcement. "The treaties are of no greater legal obligation than the Acts of Congress," said the Court. "By the Constitution, laws made in pursuance thereof and treaties made under the authority of the United States are both declared to be the supreme law of the land, and no paramount authority is given to one over the other. A treaty, it is true, is in its nature a contract between nations, and is often merely promissory in its character, requiring legislation to carry its stipulations into effect. Such legislation will be open to repeal and amendment. If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed on that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case the last expression of sovereign will must control."

That the Government of the United States, through the action of the legislative department, can exclude aliens from its territory, the Court continued, is a proposition which it thought not open to controversy. "Jurisdiction over its own

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(1) Chae Chan Ping v. U. S. (1889), 130 U.S. 581.

territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens, it would be to that extent subject to the control of another power." Referring to the certificates of identity issued to Chinese labourers previously to the present Act enabling them to return after departure, the Court said that they were mere licences revocable at the pleasure of Congress. Finally, it added that if the government of the country of which the foreigners excluded are subjects, is dissatisfied with this action, it can make complaint to the executive head of the United States Government or resort to any other measure which, in its judgment, its interest or dignity may demand; and therein lies the only remedy.

31. The Registration Act of 1892: Fong Yue Ting v. United States.- In view of the expiration of the Act of 1882, the Geary Act[1] was adopted on 5 May, 1892, continuing the former Act and all Exclusion Laws to be in force for another ten years. It further provided (s. 6) that all Chinese labourers in the United States entitled to remain, must secure a certificate of residence within one year. Anyone found without such certificate might be arrested without warrant and should be deemed and adjudged to be unlawfully in the United States and liable to deportation unless he could prove by one

(1) 27 U.S. Statutes 25.

credible white witness that he was a resident of the country at the time of the passage of the Act and was unable because of accident, sickness or other unavoidable cause to obtain such a certificate before. Any Chinese person found to be unlawfully within the United States was liable to imprisonment with hard labour for a period of not more than one year and then to be deported (s. 4).

The Chinese Government lodged vigorous protests[1] against this "unquestionable act of barbarous legislation" which violated "every single one of the articles of the treaty of 1880." The question of the constitutionality of section 6 was raised, but it was upheld by a majority Court of the Supreme Tribunal.[2] Mr. Justice Gray, in delivering judgment, asserted that the right of a nation to expel or deport foreigners is as absolute and unqualified as the right to prohibit and prevent their entrance into the country. This being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare, the question before the Court would be whether the manner in which Congress had exercised this right in the Act of 1892 was consistent with the Constitution. He then proceeded to hold that the affirmative was the case. "The power to exclude or to

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(1) Foreign Relations, 1892, 156.

(2) Fong Yue Ting v. U. S. (1893), 149 U.S. 698.

expel aliens, being a power affecting international relations, is vested in the political department of the government, and is to be regulated by treaty or by acts of Congress and to be executed by the executive authority according to the regulations so established except so far as the judicial department has been authorised by treaty or by statute, or is required by the paramount law of the Constitution to intervene." "Congress," he added. "having the right as it may see fit to expel aliens of a particular class or to permit them to remain, has undoubtedly the right to provide a system of registration and identification of the members of that class within the country, and to take all proper means to carry out the system which it provides." After reviewing a number of previous decisions, he ruled that in American jurisprudence it is well settled that the provisions of an Act of Congress passed in the exercise of its constitutional authority on this or on any other subject, if clear and explicit, must be upheld by the Courts even in contravention of express stipulations in an earlier treaty. The proceeding as provided for in section 6 being not a trial and sentence for a crime or offence nor a banishment, the provisions of the Constitution securing the right of trial by jury and prohibiting unreasonable searches and seizures and cruel and unusual punishments, and as to due process of law, had therefore no application.

The dissenting judges, including the Chief Justice, based their opinion on three propositions: first, the persons against

whom the penalties of section 6 of the Act are directed are persons lawfully residing within the United States; secondly, that as such they are within the protection of the Constitution and secured by its guarantees against oppression and wrong: and thirdly, that section 6 deprives them of liberty and imposes punishment without due process of law, and in disregard of constitutional guarantees, especially those found in the 4th, 5th, 6th and 8th Articles of the Amendments. Mr. Justice Field, who was the organ of the Court in announcing the judgment in the case of Chae Chan Ping,(1) also disagreed with the "extraordinary doctrine" of the majority. He pointed out that between the legislation for the exclusion of Chinese persons - that is, to prevent them from entering the country - and legislation for the deportation of those who have acquired a residence in the country under a treaty with China, there is a wide and essential difference. While the power of the Government to exclude foreigners from the United States had never been denied, its power to deport from the country persons lawfully domiciled therein by its consent and engaged in the ordinary pursuit of life could not be asserted. He strongly rejected the doctrine expressed in the opinion of the Court that "Congress, under the power to exclude or expel an alien, might have directed any Chinese labourer found in the United States without a certificate of residence to be removed

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(1) Supra, § 30.

out of the country by executive officers, without judicial trial or examination, just as it might have authorized such officials absolutely to prevent his entry into the country." In conclusion, he reiterated that aliens are not more parties to the laws than they are parties to the Constitution; yet it will not be disputed that as they owe, on the one hand, a temporary obedience to, they are entitled in return, to the protection and advantage of, the law. And if a banishment under s. 6 be not a punishment, and among the severest of punishments, it would be difficult to imagine a doom to which the name could be applied.

But section 4 of the Act, providing for imprisonment with hard labour of all Chinese adjudged to be unlawfully in the United States, was declared void under Article III and Amendments V. and VI. of the Constitution.(1) Aliens within the territory of the United States being entitled to the protection of the provisions of the Constitution regulating procedure in criminal cases, their imprisonment without trial by jury is therefore in violation of the fundamental law. A Chinese labourer who failed to produce one of the prescribed excuses for not having procured a certificate was held liable to deportation though he was able to show the requisite residence.(2) Imprisonment for crime was not an excuse for failure to

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(1) Wong Wing v. U.S. (1896), 163 U.S. 228.

(2) In re Ny Look (1892), 56 Fed. 81.

register.[1] Chinese persons, though of the exempt class, who could not produce the certificate prescribed by the Act of 1882 when arrested, could not establish the right to remain.[2] In this respect the Act, which purported to deal exclusively with labourers, was stretched so as to affect the status of the exempted persons. But a Chinese who became a labourer on his failure in business after the time for registration, was not liable to deportation.[3]

A Chinese labourer convicted of felony was not entitled to register.[4] The status of a minor child of a labourer was that of his father, notwithstanding the fact that such child might be engaged in the occupation of a student.[5] It was also held that the throwing upon an accused Chinese person of the burden of proof that he was lawfully in the country was constitutional.[6] The burden of proving, however, that the person arrested was a Chinese should rest on the United States.[7]

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(1) U. S. v. Ah Poing (1895), 69 Fed. 872.

(2) U. S. v. Chu Chee (1899), 93 Fed. 797.

(3) U. S. v. Leo Won Tong (1904), 132 Fed. 190.

(4) U. S. v. Chen Cheong (1894), 61 Fed. 200.

(5) U. S. v. Chu Chee, supra.

(6) U. S. v. Wong Dep Ken (1893), 57 Fed. 206.

(7) U. S. v. Hung Chang (1903), 126 Fed. 400.

32. The McCreary Amendment of 1893 and the Definition of "Labourers" and "Merchants".- This Amendment[1] to the Act of 1892, which was approved on 3 November, 1893, extended the period of registration for six months. The word "labourers" was defined to mean both skilled and unskilled manual workers including Chinese employed in mining, fishing, huckstering, peddling, laundrymen or those engaged in taking, drying or otherwise preserving shell or other fish for home consumption or exportation. And a Chinese "merchant" is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant does not engage in the performance of any manual labour except such as is necessary in the conduct of his business as such merchant. The Court even went so far as to hold that the word "labourers" included all Chinese persons not specially enumerated as exempt.[2] A restaurant proprietor was then held to be a labourer,[3] and so also was one engaged in keeping a restaurant and lodging house.[4] When a person claims to be a merchant, he must show a fixed place of business and frequent sales of merchandise or an actual and substantial interest in

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(1) 28 U.S. Statutes 7.

(2) U. S. v. Ah Fawn (1893), 57 Fed. 591.

(3) In re Ah Yon (1894), 59 Fed. 561.

(4) U. S. v. Chung Ki Foon (1897), 83 Fed. 143.

some firm,[1] and that his name appears in partnership articles or that in fact he is a partner.[2] Attorney-General Griggs ruled in 1898 that the true theory was "not that all Chinese persons may enter this country who are not forbidden but that only those are entitled to enter who are expressly allowed," and even then, only upon compliance with the requirements of the laws, treaties and regulations. The Chinese Government contended[3] that the object both of the treaties and of the exclusive legislation was to keep out labourers, and that it was never held by the United States authorities that the enumeration of certain exempt classes should operate as an exclusion of all other classes and of labourers besides. The American Government, inclining to the departmental construction above set out, suggested, however, a judicial settlement of the controversy.

By the Department Regulation of 1900, direction was given to admit only Chinese whose occupation or station clearly indicated that they belonged to the exempted classes as "officials, teachers, students, merchants, or travellers for curiosity or pleasure", and to deny admission to salesmen, clerks,

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(1) U. S. v. Lung Hong (1900), 105 Fed. 188.

(2) U. S. v. Pin Kwan (1900), 100 Fed. 609. It was later held that the names of any of the partners need not appear in the company name under which a business is conducted: Tom Hong v. U. S. (1904), 193 U.S. 517.

(3) Foreign Relations, 1899, 196.

buyers, bookkeepers, apprentices, agents, cashiers, physicians, proprietors of restaurants, etc.(1)

This drastic view has been modified since 1915 when the Court held that the proprietor of a restaurant is of the merchant class.(2) In a later case, an assistant manager in a Chinese restaurant was held to be a merchant within the meaning of the Act of 1893, and therefore entitled to bring his minor son into the United States.(3)

33. The Treaty of 1894 and its Effect on Prior Laws.- The Treaty,(4) signed at Washington on 17 March, 1894, was another concession from China, providing for the absolute exclusion of all Chinese labourers for a term of ten years. Those going back to China were allowed to return if they had property worth one thousand dollars somewhere in the United States or a lawful wife, child or parent living there.(5) The registration of all Chinese labourers lawfully in the United States, with a view to affording them better protection, was recognised.

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(1) Cf. Note on "who are merchants within the meaning of the immigration laws", 262 U.S. 258 (1922).

(2) U. S. v. Lee Chee (1915), 224 Fed. 447.

(3) U. S. v. Wong Jun (1925), 7 Fed. (2d.) 311.

(4) 28 U.S. Statutes 1210.

(5) The value of the property must be one thousand dollars at the time of his return to the United States and not merely at the time of his departure: In re On Lung (1903), 125 Fed. 814.

It practically covered the same ground as existing legislation, except that the Scott Act was repealed.

But a contention that "the treaty covers the whole subject of Chinese immigration, designedly makes most radical changes in the law by implication, and is and was intended to be a substitute for the prior laws and treaties which it repeals by implication", was regarded as untenable.(1) The Court ruled that a statute, if not repugnant to the Constitution, is made by that instrument a part of the supreme law of the land, and should never be held to be displaced by a treaty concluded subsequently unless it is impossible for both to stand together and be enforced. It was also decided(2) that certain provisions (s. 3) of the Act of 1892 imposing upon Chinese the burden of establishing their right to remain in the United States, were not inconsistent with the clause in the Treaty giving the Chinese the rights of citizens of the most-favoured-nation, since the Treaty itself (Article V.) expressly refers to the said Act and states that the Chinese Government will not object to its enforcement.

Before the Treaty of 1894, the privilege of transit of Chinese persons across the territory of the United States was not specifically mentioned in any treaty or statute. But such

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(1) U. S. v. Lee Yen Tai (1902), 185 U.S. 213.

(2) Ah How v. U. S. (1904), 193 U.S. 65.

privilege had since been recognised and regulated by departmental orders. By Article III of the Treaty it was now agreed that Chinese labourers should continue to enjoy the privilege of transit subject to such regulations by the Government of the United States as might be necessary to prevent that privilege being abused. The Court now held that, as the Treaty manifestly operated to commit the subject of transit to executive regulation and determination, the action of the Collectors of Customs in refusing transit could not be interfered with by the Courts.(1)

The Treaty terminated in 1904. No new treaties having been negotiated, the relations of the two countries in respect of immigration fell back to the Treaty of 1880, which had neither been denounced nor amended.(2) The American Government, however, continued to enact laws of its own accord dealing with Chinese exclusion in utter disregard of the sanctity of the former conventions.

34. The Act of 1894 and the Finality of Departmental Findings as to Exclusion.- This Act(3) rendered decisions of the Immigration or Customs Officer excluding Chinese persons not labourers from admission to the United States final unless

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(1) Fok Yung Yo v. U. S. (1902), 185 U.S. 296.

(2) It had indeed been continued in force by Article XVII of the Treaty of Commerce and Navigation of 1903 (33 U.S. Statutes 2208).

(3) 28 U.S. Statutes 390.

reversed on appeal to the Secretary of the Treasury. Although it thus took away from an alien the right of judicial protection previously enjoyed in seeking to re-enter the country, it was held constitutional.(1) The Court admitted the paramount power of Congress to exclude aliens altogether from the United States or to prescribe the terms and conditions upon which they may come, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention. Such appeal to the Secretary is final only in cases where he appears to have jurisdiction under the statute. He may delegate his authority and assign to his assistants the duty of deciding appeals in immigration cases, and their decisions, being those of the Secretary, are also final.(2) The Courts may affirm or reverse such decisions on questions of law, but into questions of fact they do not inquire.(3) The decision of the officer in favour of the right of a Chinese alien to enter the country is, however, not final, but is subject to re-examination by the Courts.(4) Similarly, the Act did not give that officer final jurisdiction to determine whether a person of Chinese descent is a citizen of the United States;

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(1) Lam Moon Sing v. U.S. (1895), 158 U.S. 538.

(2) Lew Shee v. Neagle (1927), 22 Fed. (2d) 107.

(3) Lee Lung v. Patterson (1902), 186 U.S. 168.

(4) In re Li Sing (1898), 86 Fed. 896.

such question may be determined by the Courts.(1) But the Federal Courts will not interfere by habeas corpus with the refusal of the right of entry to Chinese persons alleging citizenship, at least until after a final decision of the Secretary.(2) A mere allegation of American citizenship will not oust the jurisdiction of an Immigration Officer, whose decision denying the claim will not be disturbed unless it is clearly against the weight of evidence.(3) A person of Chinese descent claiming native citizenship is not entitled to habeas corpus if there is, in his petition, no allegation of abuse of the administrative authority.(4) The effect of these decisions is to subject American citizens who travel abroad or are born outside the United States to the potential danger of having their citizenship denied without judicial redress,(5) and this does not appear to be confined to citizens of Chinese origin.

Habeas corpus, however, would be granted to a Chinese person claiming to be a citizen who has been arbitrarily denied a hearing and opportunity to prove his right to enter as the Exclusion Acts demand.(6) Mr. Justice Holmes ruled in favour

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(1) In re Tom Yum (1894), 64 Fed. 485.

(2) U. S. v. Sing Tuck (1904), 194 U.S. 161.

(3) U. S. v. Leung Sam (1902), 114 Fed. 702.

(4) U. S. v. Ju Toy (1905), 198 U.S. 253.

(5) Quon Quon Poy v. Johnson (1927), 273 U.S. 352.

(6) Chin Yow v. U. S. (1908), 208 U.S. 8.

of judicial intervention, on the following grounds. The statutes purport to exclude aliens only. They create or recognise the right of citizens outside the jurisdiction to return to the United States. If one alleging himself to be a citizen is not allowed a chance to establish his right in the manner provided by those statutes, although that mode is intended to be exclusive, the statutes cannot be taken to require him to be turned back without more. As between the substantive right of citizens to enter and of persons alleging themselves to be citizens to have a chance to prove their allegation, on the one side, and the conclusiveness of the Commissioner's fiat on the other, when one or the other must give way, the latter must yield. In such a case, something must be done, and it naturally falls to be done by the Courts.

The judicial authority would also intervene when the finding of the Immigration Officer excluding a Chinese person who alleged American citizenship was not supported by the evidence.(1) The Court reiterated that the great power given to the Secretary of Labour over Chinese immigrants and persons of Chinese descent must not be administered arbitrarily and secretly, and that it is the province of the Courts in proceedings for review to prevent abuse of this extraordinary power. The Court thought it better to admit many Chinese immigrants improperly

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(1) Kwock Jan Fat v. White (1920), 253 U.S. 454.

than to exclude one natural-born citizen of the United States permanently from his country.

35. The Act of 1902. The Extension of Chinese Exclusion Law to Insular Possessions.- By this Act[1] all laws relating to the exclusion of Chinese and their residence in the United States[2] were, so far as not inconsistent with treaty obligations, continued in force for a third time. They were also made applicable to the whole insular possessions of the United States. Chinese labourers not citizens of the United States were forbidden to come from such territory to the mainland, or from one part to another of the island territory, except within the same group.

The Joint Resolution of 7 July, 1898,[3] to provide for annexing the Hawaiian Islands to the United States, had already prohibited further Chinese immigration into these islands except upon such conditions as are now or may hereafter be allowed by the laws of the United States; and no Chinese labourer would be allowed to enter the United States from the Hawaiian Islands. By a military order[4] of 26 September, 1898, the

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(1) 32 U.S. Statutes 176.

(2) Including sections 5, 6, 7, 8, 9, 10, 11, 13 and 14 of the Act of 13 September, 1888.

(3) 30 U.S. Statutes 750.

(4) Foreign Relations, 1898, 207.

Chinese Exclusion Laws had also been extended to the Philippine Islands. The extension as confirmed by the Act of Congress was again greeted by diplomatic remonstrance. China contended that when the Treaty of 1894 was negotiated, the islands named did not belong to the United States. Hence the subject of the exclusion of Chinese labourers from these islands was not considered. For many years Chinese subjects of all classes had been admitted to the Hawaiian Islands and for centuries they had been permitted to go to the Philippines. Social and domestic relations of the most intimate character had been established. The Imperial Government would therefore never have consented to the inclusion of these islands in any treaty which provided for the exclusion of Chinese. It was finally submitted that to include in the operation of a treaty large numbers of people and a great extent of territory without first entering into new negotiations with the nation concerned and obtaining its consent, was not in conformity with international law and the comity of nations.(1)

In view of the impending expiration of the Treaty of 1894, another Act(2) was passed, on 27 April, 1904, re-enacting, extending and continuing without modification, limitation or condition, all the Chinese Exclusion Laws then in force.

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(1) Foreign Relations, 1902, 214.

(2) 33 U.S. Statutes 428.

36. Chinese Exclusion Law and the General Immigration Act.- The general Immigration Act[1] of 1893 was expressly made (s. 10) not applicable to Chinese persons. The Act of 1903 (s. 36), and later the Act of 1907[2] (s. 43) amending the former laws, had stipulated that its provisions should not be construed to repeal, alter or amend the laws relating to the Chinese. It had further provided (s. 21) that any alien who entered the country in violation of such Act might be summarily deported by an executive order at any time within three years. Under the Chinese Exclusion Law, a different deportation procedure involving a judicial hearing, was necessary. The joint effect of the two Acts had given rise to diversity of judicial interpretations. In the case of Wong Yon[3] the Supreme Court deemed it unwarranted to except the Chinese from the liability under the general Act to summary deportation, merely because there was an earlier, more cumbrous procedure which this partially overlapped. The Court was convinced that the existence of the earlier laws only indicated the special solicitude of the Government to limit the entrance of Chinese. "It is the very reverse of a reason for denying to the Government a better remedy against them alone of all the world, now that one has been created in general terms."

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(1) 27 U.S. Statutes 569.

(2) Amended in 1910, 36 U.S. Statutes 264.

(3) U. S. v. Wong Yon (1912), 223 U.S. 67.

The same Court held, however, in United States v. Woo Jan,[1] per Mr. Justice McKenna, that an alien found in the United States "in violation of the Chinese Exclusion Acts", is not subject to deportation under the general Immigration Act, and that such person can be deported only by judicial action. The Court admitted that the universality of the declaration of s. 21 would seem to preclude exception and compel a single judgment. But passing on to s. 43, they found another law preserved and kept in function - a function so firm and exclusive that it is provided that the Act of which s. 21 is but a part shall not be construed to "repeal alter or amend" it. From all the provisions of the Act, then, the Chinese Exclusion Laws are excepted. They are to stand in their integrity and efficacy. Referring to the case of Wong Yon, the Court explained that the case concerned Chinese persons but not the Exclusion Laws, and it was decided that such persons might offend against the Immigration Act and be subject to deportation by the Department of Labour if they should so offend. The opinion was considerate of the difference between Immigration Act and Exclusion Laws. "The Chinese Exclusion Laws," it added, "have not the character or purpose of the Immigration Act. They are addressed under treaty stipulations to laborers only. Other classes are not included in their limitation, and it was provided by the treaty that the limitation or suspension of the

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(1) U. S. v. Woo Jan (1918), 245 U.S. 552.

entry of laborers should be reasonable. The questions therefore which could arise were deemed different from any under the Immigration Act and the Exclusion Laws are adapted to them, and their procedure is hence saved by s. 43."

The Immigration Act of 1917[1] continued s. 43 in force (s. 38) with the proviso that it should not impair the authority of s. 21 (now s. 19), by which any alien who should have entered or be found in the United States in violation of this Act "or any other laws" could be deported on executive orders at any time within five years after entry. It was interpreted as applicable to Chinese persons who had entered the United States before 1 May, 1917, the effective date of the general Act.[2] The Court pointed out the distinction between unlawful remaining and unlawful entry of an alien in the United States. Chinese persons having been found within the United States in violation of the Exclusion Laws are now deportable by executive proceedings. But when such persons claim American citizenship, which is a very different thing from being outside the borders of the United States and seeking entry, they will be entitled to a judicial trial. "Jurisdiction in the executive to order deportation exists only if the person arrested is an alien," the Court ruled. "The claim of citizenship is thus a denial of an essential jurisdictional fact. . . It is well settled that in such a case a writ of habeas corpus will issue to determine the

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(1) 39 U.S. Statutes 874.

(2) Mo Fung Ho v. White (1921), 259 U.S. 277.

status." Judicial procedure will therefore be resorted to when such a claim is advanced and when the Chinese concerned has had a long residence in the country. American jurisprudence has thus differentiated between the positions of citizens, and reduced the protection afforded by the Constitution over the rights of an alien.

37. The Barred Zone Act, 1917.- The Act provided that no person who had originated from any country lying between certain parallels of latitude and meridians of longitude should be admitted to the United States. This was devised to close the door against all Asiatics not barred by the Chinese Exclusion Law and Treaty or by the "gentlemen's agreement" with Japan of 1907. The zone included India, Siam, Indo-China, parts of Siberia, Afghanistan and Arabia, the Islands of Java, Sumatra, Ceylon, Borneo, New Guinea, Celebes and various lesser groups, with an estimated population of 500 millions.(1) The actual boundaries of the barred zone include a portion of China, but the Act provides that where immigration regulation, or rather exclusion, is provided for by the existing treaties, the geographical exclusion is not applicable. Hence China is not within its scope.

38. The Changing Status of Chinese under the Immigration Act of 1924.- As the Chinese Exclusion Law of 1882 excludes Chinese labourers on the basis of race, and the Barred Zone provisions of 1917 exclude other orientals of a prescribed

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(1) Annual Report of the Commissioner-General of Immigration, 1920, 379.

geographical area, so section 13(c) of the Law of 1924 excludes all aliens ineligible for citizenship.

The Law[1] defines the term "immigrant" as any alien departing from any place outside the United States. destined for the United States. Section 3 exempts as non-immigrants (1) a government official, his family, attendants, servants and employees, (2) an alien visiting the United States as a tourist for business or pleasure, (3) an alien in transit through the United States, (4) an alien in transit from one part of the United States to another through foreign contiguous territory, (5) a bona fide alien seaman, and (6) an alien entitled to enter the United States solely to carry on trade[2] under and in pursuance of existing treaty provisions.

All immigrants are classified as 'quota immigrants' and 'non-quota immigrants'. Both classes are required to secure certificates, and only those of the quota class are counted to fill the quotas allotted to the various countries. No Chinese can therefore be admitted under section 13(c) unless, first, he is admissible as a non-quota immigrant as having been previously admitted to the United States and returning from a temporary visit abroad or is a minister of religion or professor of a college or a bona fide student at least 15 years of age;[3] or secondly, is the wife or unmarried child of a

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(1) 43 U.S. Statutes 153.

(2) By an Amendment Act of 6 July, 1932, the provision "between the United States and the foreign state of which he is a national" was inserted after the word "trade", 47 U.S. Statutes 607.

(3) Section 4(b), (d) and (e).

minister of religion, etc.; or thirdly, is a non-immigrant as defined in section 3.

The Act produced significant changes in the position of Chinese under the Exclusion Law. The ineligibility clause excludes all Chinese except those enumerated as exempt, whereas the Exclusion Law debars only labourers. Under the Exclusion Law, all Chinese who are not prohibited by its provisions are admissible, while the Act of 1924, admitting the enumerated classes, provides that any alien who is not particularly specified as a non-quota immigrant or a non-immigrant shall not be admitted by reason of relationship to any individual who is so specified or by reason of being excepted from the operation of any other law relating to or forbidding immigration. Previously, the wife and minor child of a Chinese merchant were admissible, under a ruling of the Supreme Court.(1) For nine months after the operation of the Act, such wives and children were denied admission. The Department of Labour took the position that s. 3(6) of the Act, while providing for the admission of merchants as non-immigrants, made no provision for the admission of their wives. The barrier was finally removed on 25 May, 1925, in the case of Chong Sum Shee v. Nagle.(2) The Court held that although no provision was made for them in the statute, they were entitled to admission under the Treaty

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(1) United States v. Mrs. Gue Lim (1900), 176 U.S. 459.

(2) 268 U.S. 336 (1925).

of 1880 as it had been construed, and that the Act did not show any intent on the part of Congress to impair that right. The Court also ruled that the admission of a Chinese as a student gave him the right to bring his wife with him.(1) Chinese school teachers were admissible under the Treaty, but the Act admits only college professors, and their exclusion seems to be in derogation of treaty rights. The point, however, has not yet been given judicial consideration.

The Chinese wives of American citizens had been deemed admissible on the ground that their husbands were admissible and therefore were members of the classes exempted from the operation of the Chinese Exclusion Acts.(2) But when the new Law became effective, such wives were denied admission under the provisions of s. 13(c) that no alien ineligible for citizenship should be admitted.(3) The Court refused to hold that the provisions contained in s. 4(a) entitling the alien wife of a citizen of the United States to enter as a non-quota immigrant should be applicable to such wives, and indicated that the remedy lay with Congress and not with the Courts.

It thus appears that the privilege of entry is accorded to the wives of Chinese aliens of the exempt class, while it

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(1) Low Cho Oy v. Nagle (1926), 9th C.C. No. 4941.

(2) Tsoi Sim v. U. S. (1902), 116 Fed. 921.

(3) Chang Chan v. Nagle (1925), 268 U.S. 346.

is denied to alien Chinese wives of American citizens. The Department of Labour, referring to the situation in its 1927 Report, indicated that it was never intended by Congress that an alien should be entitled to greater rights under the Immigration Law than an American citizen.(1) Although an Act(2) to admit "to the United States alien Chinese wives of certain American citizens" who were married prior to 26 May, 1924 (the date on which the Immigration Act of 1924 was approved), was adopted on 13 June, 1930, it did not remove the disability of those who were married afterwards.

Other disabilities imposed upon Chinese by the Act of 1924 are the exclusion of the adopted Chinese children of American citizens and their foreign-born grandsons. The former were previously allowed to enter(3) but are no longer admissible, under the departmental regulations, because they are not enumerated in the list of exemptions. Before 1924, children born abroad to American citizens who were themselves foreign-born and had taken up residence within the United States, irrespective of whether the children were born prior to or subsequent to the acquirement of such residence by the father, were admitted. For by § 1993 of the Revised Statutes, all children born out of the limits and jurisdiction of the United

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(1) Report of the Secretary of Labor, 1927, 175.

(2) 46 U.S. Statutes 581.

(3) Ex parte Shue Hong (1923), 286 Fed. 381.

States whose fathers were citizens, are declared to be citizens of the United States; but the right of citizenship does not descend to children whose fathers have never resided in the United States. The Department then held that these foreign-born grandsons of native-born American citizens cannot be regarded as citizens unless their fathers had acquired a residence in the country prior to the birth of such children. This view was confirmed by the Supreme Court in Weedin v. Chin Bow.(1) Chin Bow was born in China in 1914. His father was also born in China, of an American-born citizen, and had never been in the United States until 1922. The boy was denied admission on the ground that, though his father was a citizen, he himself was not a citizen because at the time of his birth in China his father had never resided in the United States. The Court supported the construction that the residence prescribed must occur prior to the birth of the foreign-born children, and the contention of the respondent, that there is a distinction between citizenship and the enjoyment of it in this country on the one hand, and the rules that should limit the protection of it abroad by the American Government on the other, was rejected.(2)

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(1) (1927) 274 U.S. 657.

(2) Ibid., 668. By an Amendment to § 1993 on 24 May, 1934, it was expressly provided that the citizen father or citizen mother must have resided in the United States previously to the birth of such child: 48 U.S. Statutes 797.

It thus appears that the principles deduced to admit the wives and minor children of the "treaty merchants" had not the same application in these cases as to sustain the construction that the new Law has not changed the situation as previously existing.

Under the Chinese Exclusion Laws merchants and students once admitted were permitted to remain permanently in the country. And a merchant might revert to the status of a labourer without acquiring any of its disabilities.(1) Similarly, a student who has become a labourer might not be deported.(2) For students of all other nations can of right follow any legitimate vocation contemporaneously with or after the completion of their studies, and Chinese students are guaranteed the like rights by the most-favoured-nation treaty. But under the 1924 Act (s. 15) Chinese admitted as non-immigrants(3) are expected to maintain the status under which they are admitted during their residence in the United States. Upon the conclusion of their studies, the non-quota immigrant students(4) are also required to leave. Failure to do this entails liability to deportation.(5)

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(1) U. S. v. Sind Bow (1905), 139 Fed. 56.

(2) In re Tam Chung (1915), 223 Fed. 801.

(3) Under s. 3(2), (3), (4), (5) or (6).

(4) Under s. 4(e). See supra, 172. But it has been decided that a Chinese entering the United States as a tourist may change his status to that of a merchant without penalty: Dang Foo v. Dan (1931), 50 Fed. (2d.) 116.

(5) By an Amendment Act of 1 July, 1932, aliens admitted under s. 3(1), except a government official and his family, are required to maintain their exempt status: 47 U.S. Statutes 524.

Chapter XII.

CANADA

39. The Unconstitutionality of the Provincial Acts.- We have briefly reviewed the attempts of British Columbia to restrict Chinese immigration by provincial legislation. Some of this was passed in purported exercise of exclusively provincial powers, some in exercise of the concurrent right of legislation under the British North America Act. It is proposed now to deal with the legal aspect, that is to say, the constitutionality of this legislation, before proceeding to the successive Acts of the Dominion and the Law of 1923 now in force.

(1) The Chinese Tax Act, 1878.

The Act had been allowed by the Dominion Government, but was declared ultra vires by the Supreme Court of the province. In the case of Tai Sing v. Maguire[1] the Court declared that from the examination of its enabling clause, it was plain that the Act was not intended to collect revenue but to drive the Chinese from the country, thus interfering at once with the authority reserved to the Dominion Parliament as to the regulation of trade and commerce, the rights of aliens, and the treaties of the Empire. The Court found that it interfered

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(1) (1878), 1 B.C., Pt. I, 101.

with foreign as well as with the internal trade of the country, and in its practical effect would operate as an absolute prohibition of intercourse with the Chinese. Referring to the constitutional status of the province, the Court declared that British Columbia did not stand in the same position as Queensland, which had passed many laws against Chinese immigration. It was not autonomous. "As the State Legislature of California stands towards the Congress of the United States, so the local legislature of British Columbia stands towards the Parliament of Canada, and is restrained by the federal compact which governs the Dominions." Queensland, on the contrary, was autonomous, legislated solely and only for itself, was restrained by no federal compact, and in its relative position towards the British Empire was constitutionally on the same footing as the Dominion of Canada. In conclusion, the Court ruled that treaties were to be regarded as the highest and most binding of laws, beyond any merely internal regulation which one of the parties might make for the government of its own people, for so far as concerned the matters to which they referred they bound the people of both Powers, however dissimilar in other respects might be their institutions, customs or laws.

(ii) The Chinese Regulation Act, 1884

Under s. 3 of the Act Chinese were required to pay $10 every year for a licence to live in the province. Section 5 fixed a penalty not exceeding $40 for omission to hold such a

licence. One Wing Chong was fined $20 for such an offence. A case was filed, and the Court declared the Act ultra vires on the following grounds: "(1) it is an interference with the rights of aliens, (2) it is an interference with trade and commerce, (3) it is an infraction of the existing treaties between the Imperial Government and China, and (4) it imposes unequal taxation." The Court further held that every person was entitled to be protected in the enjoyment of his property, not only from invasions of it by individuals, but also from all unequal and undue assessments on the part of the Government.(1)

(iii) The Chinese Immigration Act, 1884

This Act, purporting to be passed under s. 95 of the British North America Act, recited that it was "expedient to prevent the immigration of Chinese into British Columbia" and made it unlawful for any Chinese to come into the province or to assist in bringing in any Chinese, under heavy penalties. When it was sent for approval, the Minister of Justice, having regard to the condition of Canada at the time of the union of the provinces, was of the opinion that the authority given by s. 95 of the British North America Act was an authority to regulate and promote immigration into the province, and not an authority to prohibit immigration. Further, a law which prevented the people of any country from coming into a province

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(1) R. v. Wing Chong (1885), 1. B.C., Pt. II, 150.

could not be said to be of a local or provincial nature. On the contrary, it was thought to be one involving Dominion and possibly imperial interests.(1) In recommending its disallowance, the Minister entertained great doubts as to the authority of the Legislature to pass the Act, as it clearly discriminated against the Chinese, and as it imposed great penalties upon them coming into British Columbia and upon those who assisted them to come. The Act was accordingly disallowed.

(iv) The Chinese Immigration Act, 1885

This Act contained the same provisions as the disallowed Act of 1884. It made small concessions to resident Chinese who, upon proof of residence in the province for a certain period, were to be granted a certificate exempting them from the operation of the Act. When the Act was sent for approval to the Minister, he disallowed it, remarking in his report that the 1884 Act had not been disallowed on the ground of its unconstitutionality only, there being other grounds which were thought sufficient and which rendered it unnecessary to express a definite opinion respecting the powers of the Legislature to pass the Act. He expounded the legal points involved,(2) referring especially to the analogous section of the United States Constitution, s. 8(3) of which provides that Congress shall

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(1) Hodgins, op. cit., 1867-1895, 1092, 1093.

(2) Ibid., 1099-1101.

have power to regulate commerce with foreign nations and among the several States. It had been repeatedly held by the Supreme Court of the United States that commerce undoubtedly was traffic, but it was also something more. It was intercourse. The Minister understood that the terms of the American Constitution had at all times been taken to include a power over navigation as well as trade, over intercourse as well as traffic. In American practice, this power extended to commerce with foreign nations and among the several States. In regard to foreign nations, the words comprehended every species of commercial intercourse. No sort of trade or intercourse could be carried on between the United States and another country to which they did not extend. "Commerce" as used in the Constitution was believed to be a whole, every part of which was indicated by the term. He concluded that the present Act was an interference with the power of Parliament to regulate trade and commerce, and that it was a case in which the ordinary tribunals could afford no adequate remedy for, or protection against, the injurious which would result from allowing the Act to go into operation. He felt himself obliged to recommend its disallowance.

(v) The Immigration Act of 1900 and Other Acts

Section 3 of the Act of 1900 prohibits immigration into British Columbia of every person who, when asked to do so, should fail to write out and sign in the characters of some European language a prescribed application. The educational

test might in any case involve translation from English into any European language, and was therefore a very severe one. It was disallowed for the reason that "as Parliament had already legislated with regard to the subject of immigration, and had not seen fit to impose any educational requirement whatever, the Act seemed inconsistent with the general policy of the law." The Minister expressed the view that in cases where foreign relations were involved, it was not at present desirable that the uniformity of the immigration laws should be interfered with by special provincial legislation.(1)

The Act (C. 34) of 1902 to "regulate immigration into British Columbia" was also thought "inconsistent with the general policy of the Dominion Government respecting immigration"; it involved questions of foreign relations and it was therefore considered "inadvisable to leave it to its operation."(2) This Act repeatedly passed the provincial legislature(3) and was repeatedly disallowed.(4) The Act contained the same provisions on each occasion, with slight differences of detail; in

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(1) Hodgins, op. cit., 1899-1900, 134.

(2) Ibid., 1901-1903, 80.

(3) In 1903 (C. 12), 1904 (C. 26), 1905 (C. 28), 1907 (C. 21a) and 1908 (C. 23).

(4) Before its disallowance the Immigration Act of 1908 was held by the Courts inoperative as regards Japanese (In re Nakane, 13 B.C. 370) and other races generally (In re Singh, 13 B.C. 477).

that of 1904, for example, for the application form was substituted a dictation test in the characters of some European language, of a passage of fifty words in length. The aim of the Act is to limit the immigration of other Asiatics rather than that of the Chinese, whose entry into Canada had been severely restricted by the Dominion Act. As soon as an agreement was reached with Japan in 1908 to limit the immigration of Japanese, British Columbia abandoned its favourite but ill-starred Act once for all.

40. The Chinese Immigration Act of the Dominion, 1885.- A Canadian writer, W. G. Smith,(1) has written of the difficulties which the Chinese immigrant has to experience in trying to enter Canada. The Law excluded all Chinese except certain specified classes. A Chinese immigrant had to prove to the satisfaction of the authorities that he belonged to one of these classes, or he was excluded, while in the case of Europeans, Japanese and others, it was for the authorities to show that the immigrant was of a category to be excluded, failing which he was admitted. "This looks on the face of it a discrimination against the Chinese and it is no easy matter to devise ways and means by which the Chinese may be treated on an equality or rather with less inequality with other races." He suggests that if the law were altered so as to admit all

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(1) A Study in Canadian Immigration (1920).

Chinese except certain specific classes, as was the case with other races, then the whole burden would fall on the immigration authorities to prove that the rejected were of the excluded classes. The discrimination is contrary to the idea of the equality of races in regard to immigration conditions.(1)

As regards the right of admission of those Chinese who are British subjects, the existing state of the law assumes the following proposition. British nationality confers upon the holder the right to claim the protection of the British sovereign. It does not entitle the holder to any rights or privileges within any part of the Empire. He may claim the right of entry in the absence of any positive law to the contrary, but a competent legislative authority of any part of the Empire may by law restrict or deny that right of entry to British subjects of Chinese or other oriental origin.(2)

Another writer,(3) dealing with the order of priority in which immigrants have the right to be admitted into Canada, shows that the Chinese come last. Being excluded by special legislation, they stand altogether outside the scope of the general Immigration Act which admits all except the prohibited persons, while the Chinese Immigration Law excludes all Chinese

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(1) Smith, op. cit., 156.

(2) Lefroy, "Exclusion from Canada of British Subjects of Oriental Origin", 15 D.C.R. 191.

(3) Angus, "Canada Immigration: the Law and its Administration", A.J., XXVIII (1934), 85.

except those who can substantiate their right to enter. The combined effect of these two enactments is to reduce the right of the Chinese to enter to a minimum.

The first Act to restrict and regulate Chinese immigration into Canada was passed on 20 July, 1885.(1) It not only made provisions for restricting the number of Chinese immigrants, but also provided a system of registration of and control over Chinese residents. Every person of Chinese origin on entering Canada was to pay the sum of $50. But the duty was ~~also~~ not to be levied on any Chinese person residing or being within Canada at the time of the coming into force of this Act. Every such Chinese who desired to remain must obtain a certificate of such residence. Exemptions from the payment were made for (1) members of diplomatic corps or other governmental representatives, their suite and their servants, consuls and consular agents, and (2) tourists, merchants, men of science and students who were bearers of certificates of identity. It was especially provided that the word "merchant" was not to

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(1) C. 71. It was revised as C. 67 in 1886, and twice amended by C. 35 of 1887 and C. 25 of 1892. In 1900 the Chinese Immigration Act (C. 32) was passed, repealing the preceding Acts. It was amended by C. 5 in 1902 and repealed by C. 8 in 1903, which again was revised as C. 95 in 1906. Several amendments (1908, C. 14; 1917, C. 7; and 1921, C. 21) were made, and they, together with the principal Act, were repealed by the existing Act C. 38 of 1923, which was in turn revised as C. 95 of 1927.

be construed as embracing any huckster, pedlar or person engaged in taking, drying or otherwise preserving shell or other fish for home consumption or exportation. The carrying of Chinese immigrants was limited to one for every 50 tons of the ship's tonnage, with a penalty of £50 for each person carried in excess.

A Chinese who desired to leave Canada with the intention of returning, had to surrender his certificate of entry or residence and to receive in lieu thereof a certificate of leave to depart and return. On presentation of the same, he was to be refunded the entrance fee paid by him on his re-entering Canada. Penalties were provided for evasion of the Act as regards the payments of duty by personating any other individual or making use of a fraudulent certificate. The penalties were either imprisonment not exceeding 12 months, or fine not exceeding £500, or both.

The Act was revised in 1886 and amended by C. 35 of 1887, which exempted "any woman of Chinese origin who is the wife of a person not of Chinese origin". Such woman was deemed to be of the same nationality as her husband. The amending Act further provided that a person of Chinese origin might pass through Canada by railway "in transitu" without payment of the entry dues. The passage had to be made in accordance with special regulations made by the Minister of Customs. The railway company which undertook to transport any such person was made responsible for keeping him in custody during the

whole journey. The 1892 Amendment provided for the registration of Chinese persons who were leaving Canada and intended to return. The person so registered on his return within six months was entitled to recover the entrance duty paid by him a second time. But persons who left Canada under the provisions of the repealed section, which fixed no time limit for the return, must also return within six months from the passing of the Act.

41. The Act of 1900.- The words "Chinese immigrant" were under this Act extended to mean any person of Chinese origin, including one whose father was of Chinese origin. He was to pay £100 on entering Canada irrespective of his allegiance. But children born in Canada of parents of Chinese origin were exempt from payment. In addition, the exempted classes included members of the diplomatic corps and consular agents, merchants, their wives and children, the wives and children of clergymen, tourists, men of science, and students, who substantiated their status to the satisfaction of the Controller, and subject to the approval of the Minister. Chinese wives of foreigners and their children were deemed to be of the same nationality as the husband and father respectively. Any railway company which undertook to transport Chinese through Canada and failed to comply with the transit regulations or to take out such person at the designated port of exit, was to pay a penalty of £200. Persons registered as leaving

Canada with the intention of returning, on their return within twelve months were entitled to the refund of the tax.

In the case of Fong Song the Court held by a majority that the clause requiring registration on leaving was a directive provision merely, and did not extend to depriving the regularly admitted Chinese of the status acquired by due compliance with the Act. An isolated and perhaps inadvertent act of departure from Canada without giving the required notice should not be held to be a forfeiture of the rights acquired.(1) Fong Song entered Canada in 1901 and duly paid the tax imposed by the Act. In 1918 he went to Blaine in the State of Washington, United States, and returned after three weeks. He was arrested and convicted under s. 27 of landing in Canada without paying the tax. His counsel contended that having acquired a domicile in Canada, the accused was at liberty to leave the country and return as he pleased. The opinion of the majority of the Court was that by going to the United States, a country to which he was not entitled to go, and returning therefrom, he did not "land" or "attempt to land" in Canada without payment of the tax payable under the Act. The accused, having regularly landed in Canada, was rightly entitled to be in Canada. To derogate from the status so acquired the Court deemed a "great invasion of right" which would "affront one in the application of the rule of natural justice,

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(1) R. v. Fong Song (1919), 45. D.C.R. 78.

the preservation of true international relations and the observance of international law."

(The dissenting judges, including the Chief Justice, held the view that the word "lands" was used popularly in many senses and among others in the sense of "arrives". It was not to be restricted in its meaning to the landing from a ship, but included entering in any other way. The Act was clearly aimed at the restriction of Chinese immigration into Canada by any means of conveyance. "Lands" therefore should include "enters" or "arrives" in Canada from a place outside Canada, and the accused was properly convicted of having landed in Canada without complying with the Act. The learned judges agreed that the leaving of Canada without reporting under s. 20 did not certainly constitute an offence, but went on to argue that the effect of his not so registering was that he became subject to the provisions of s. 27 on his return.)

Hardships were also experienced by Chinese passengers who travelled through Canada in transit. The Canadian Pacific Railway Company, acting under the threat of heavy penalties, kept Chinese as prisoners. Such detention by the Company was held by the Court to be justified, for the Company was under a statutory obligation to deport from Canada bonded Chinese passengers brought in by it for entry to the United States when entry was refused there.(1) The Court also held that a Chinese

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(1) In re Lee San (1904), 10. B.C. 270.

passing through Canada in bond in the custody of a transportation company, was not allowed to change his destination to any place other than that for which he had first contracted, although both destinations were beyond the limits of Canada.(1) Nor had he the right to be liberated on habeas corpus in Canada when he was refused by the American authorities the right of entry into the United States.(2)

42. The Act of 1903 and its Amendments.- The Act raised the tax to $500, but retained other provisions. It was revised as C. 95 of 1906. The Court for the first time ruled that a Chinaman not of the class absolutely prohibited from entering Canada and not guilty of personation or other frauds, who entered Canada without paying the entry tax, was not guilty of an indictable offence. Section 30 of the Act, which declared that every person who violated any provision for which no special punishment was provided, should be guilty of an indictable offence, had not the effect of making the entry a "violation" of the Act in the absence of an express enactment prohibiting entry without payment of the tax. Sam Shak, who had been convicted by a County Court of entering Canada without paying the tax, was held by the Superior Court

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(1) In re Wing Toy (1904), 13 B.C. 172.

(2) Chew v. The Canadian Pacific Railway Company (1904), 5 Que. 453.

to be entitled to discharge, and the original conviction was quashed.(1)

The Act was then amended in 1908, imposing penalties expressly upon Chinese persons who landed without payment of the tax, or evaded any provisions relating to the payment of tax, or made use of forged or fraudulent certificates or certificates issued to other persons. The penalty was now to be deportation, in addition to fine or imprisonment. The deported person was to be carried to the port from which he entered Canada. Another interesting case resulted from this provision. A woman of Chinese origin entered Canada from the United States, where she had lived for fourteen years. She was convicted of entering Canada without payment of the tax, and in pursuance of the Act she was ordered to be deported. The American authorities refused to receive her and the immigration officials proposed to deport her to China. This was apparently contrary to the statutory provision. The Court held that there was no power under the Act to deport to a country other than that from which the immigrant entered.(2) This was remedied in 1923, when power was given to send a rejected Chinese immigrant to the place whence he came or to the country of his birth or citizenship.(3)

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(1) The King v. Sam Shak (1907), 4 E.L.R. 381.

(2) In re Wong Shee (1921), 30 B.C. 70.

(3) S. 16, C. 38, 1923.

The regulations dealing with the exemption of students were made stricter by this Act. Under the principal Act, students who were unable to produce the requisite certificate on entry, were entitled to a refund of the tax on the production within eighteen months from the date of their arrival of certificates from teachers in any school or college showing that they had been bona fide students for at least one year. This was amended so that a student of Chinese origin, in order to have his tax refunded, had on first entering Canada, to prove his status as a student to the satisfaction of the Controller by showing that he was entering Canada to secure higher education in one of the approved universities or some other educational institution, and afterwards to furnish satisfactory proof that he had been a bona fide student in such university for at least one year.

The Amending Act of 1917 exempted clergymen from taxation; (their wives and children had already been exempted by the Act of 1900). Students coming to Canada for the purpose of securing a "higher education in any Canadian college or university or other educational institution approved by the Minister", were also exempted. Any person admitted as exempt from the tax, who ceased to belong to one of the exempt classes, was required to pay the tax of $500. If he refused or failed to pay the tax, he would be deported. Any person who was believed to be illegally in Canada might be apprehended without a warrant and charged before a magistrate. He was to be deported unless he could prove his right to be in the country.

The Amendment (s. 7B) provided a special procedure for the deportation of Chinese persons which differed from the procedure prescribed under the general Immigration Act. A Chinese immigrant could now plead, before deportation proceedings, that he was entitled to be tried under the provisions of the Chinese Immigration Act. This gave rise to the question of precedence and applicability of the two Immigration Acts.

Under s. 79 of the Immigration Act C. 27 of 1910, all provisions of the Act not repugnant to the Chinese Immigration Act were applicable to persons of Chinese origin as well as to other persons. Section 23 of the Act deprived all courts, judges or officers of the power to review, quash, reverse, restrain or otherwise interfere with any proceeding, decision or order of the Minister, or of any Board of Inquiry, relating to the detention or deportation of any rejected immigrant on any ground whatsoever unless such person was a Canadian citizen or had Canadian domicile. Now, could a Chinese be deported forthwith by a Board of Inquiry under the general Act, or was he entitled to a judicial review of his case, as provided by the special Act governing Chinese immigration? In the case of Jen Jang How, it was held that the position of a person already in Canada was different from that of one seeking admission. The deportation procedure under the Immigration Act had no application to Chinese persons, for whose expulsion special procedure had been provided by the Chinese Immigration Act.

The history of this case is worthy of setting out at some length. Jen, representing himself to be a student, was, upon

payment of the statutory dues, allowed to enter Canada. Subsequently, he was found working in a restaurant, was arrested, and after a hearing before a Board of Inquiry under s. 33(7) of the Immigration Act, he was ordered to be deported as a labourer not entitled to enter Canada at that time under an Order-in-Council (P.C. 1183). Jen applied to a court of first instance, which decided that the Chinese Immigration Act was not a code governing the entry of Chinese into Canada, but was an Act imposing additional conditions upon persons of Chinese origin entering Canada, over and above the conditions required of all immigrants, which conditions were contained in the Immigration Act. In fact, the Court declared, it was put beyond question by s. 79 of the Immigration Act. Thus it held that a Chinese person may be deported under the general Act. The Board of Inquiry having jurisdiction, it was not open to the Court to review the proceedings.(1) On appeal the Court reversed the decision for the reason that the Chinese Immigration Act(2) had provided a clear procedure for deportation of a person of Chinese origin, and that the repugnancy clause in the Immigration Act disentitled the immigration authorities from invoking the procedure under that Act against a Chinese person who had gained admission into Canada.(3) The

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(1) In re Jen Jang How (1919), 2 W.W.R. 844.

(2) S. 7B; C. 7, 1917.

(3) In re Jen Jang How (1919), 27 B.C. 294.

appellant therefore had a right to a judicial inquiry under the Chinese Immigration Act, and to be tried before a magistrate. The special Act was to prevail over the general Act: "the appellant having gained admission to Canada under the Chinese Immigration Act", the argument runs, "can be deported, if at all, only under its provisions. The Act provides clear and explicit procedure for deporting a person of Chinese origin who may be lawfully in Canada. That procedure is quite different to that invoked in this case, founded as the latter is on the provisions of the Immigration Act, which by S. 79 is only to apply to Chinese immigration when not repugnant to the provisions of the Chinese Immigration Act."

The 1921 Amendment Act, C. 21, made the decision of the Minister as to claims of exempt classes entering Canada for exemption from the tax "final and conclusive", while, under the original Act, assistance and intervention might have been obtained from the courts.(1) The Board of Inquiry, appointed under the Immigration Act of 1910, was given the power to deport Chinese found to be illegally in Canada. The position of Chinese before both admission and deportation proceedings was now assimilated. They came under the provisions of the general Act, which in both instances were not repugnant to the Act governing Chinese immigration. The definitions of prohibited persons in the Immigration Act were also made applicable to the admission of Chinese. A Chinese person registered

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(1) In re Lee Him (1905), 15 B.C. 163.

as leaving Canada with the intention of returning was to have his tax refunded if he returned within two years. But an unregistered person would be subject on his return to the tax of $500 as in the case of a first arrival.

A case was soon filed to interpret the amended Act. In a habeas corpus proceeding it was contended that the applicant seeking admission to Canada and being a Chinese, was not in the same position as any other party. In other words, the Chinese Immigration Act of 1906 gave such applicant an advantage over other immigrants. He should be entitled to the protection of the courts against arbitrary decisions.(1) But the Court ruled otherwise. In delivering the judgment Judge Macdonald ruled that if the Chinese Immigration Act were to be considered as the only code or statute governing entry of persons of Chinese origin, it hardly needed to be mentioned to show the position in which matters would stand. The general Immigration Act, however, also applied to the case, and s. 7 of the Chinese Immigration Act, 1906, had been amended by the statute of 1921, empowering the Board of Inquiry to order deportation, so that no distinction now existed between the entry of a Chinese person and of any other person seeking to land in Canada. He admitted that there might be some strength in the claim of a party who had been admitted to Canada under the Chinese Immigration Act to invoke its provisions as a

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(1) In re Wong Sit Kit (1921), 61 D.L.R. 475.

protection, but. while seeking admission at the frontier, all immigrants were in the same position. They all came within the provisions of the Immigration Act, and s. 23 of that Act prevented the Court from reviewing. constraining or otherwise interfering with the decision that might be made by a Board of Inquiry concerning the application of any person to enter Canada.

It was established, however, that the Court may interfere with the decision or order of the Board of Inquiry if the Board had not acted judicially, but merely on instructions from Ottawa, in ordering the deportation of a Chinese. The Court would be bound to grant an application for a writ of habeas corpus in such cases. But when the Board gave evidence to show that they did perform their functions in a judicial manner, and that at any rate they were not influenced by any directions from Ottawa, the Court would not hold in the absence of evidence to contradict them that they had not acted judicially.(1)

The courts, then, were deprived of the jurisdiction to review or interfere with any decisions of the Minister or of the Board of Inquiry unless the person concerned was a Canadian citizen or had a Canadian domicile. The term "Canadian citizen" as defined by the general Act means (i) a person born in Canada, (ii) a British subject who has a Canadian domicile,

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(1) In re Jung Ying (1921), 3 W.W.R. 194.

and (iii) a person naturalised under the laws of Canada. "Domicile" is the place in which a person has his present home, or in which he resides, or to which he travels as his place of present permanent abode and not for a mere special or temporary purpose. Canadian domicile may be acquired by a person having his domicile for at least three years in Canada.(1) A British subject acquiring Canadian citizenship by residence or naturalisation in Canada, will lose his citizenship by residing outside Canada for one year or more and will be denied re-admission into Canada. Furthermore, such domicile gives only a personal right, and the domicile acquired by, e.g., a Chinese father cannot be appropriated to his son. In the case of Wong Suey Mong(2) the Board of Inquiry refused to admit a Chinese boy twelve years of age whose father was a domiciled merchant in Canada. The Board ordered him to be deported as a prohibited immigrant under P.C. 1202, 1919, prohibiting the landing in Canada at the ports of British Columbia skilled and unskilled labourers, a renewal of the Order-in-Council of 8 December, 1913. The Supreme Court declined to review the order of the Board, holding that it has no such right, for domicile conferred only a personal right and the domicile acquired by the father could not be appropriated to his minor son who lived all his life in China.

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(1) Immigration Act, 1910, s. 2(d) and (f). Now in order to acquire Canadian domicile a person must have his domicile in Canada for at least five years.

(2) (1921), 61 D.L.R. 351.

43. The Chinese Immigration Act, 1923.- This Act, though retaining many provisions of the repealed Act, has effected significant changes in the position of the Chinese. The entry into Canada of persons of Chinese origin or descent, irrespective of allegiance or citizenship, is now confined to (a) members of the diplomatic corps or consular agents, (b) children born in Canada of parents of Chinese race or descent, and (c) merchants as defined by the regulation and students coming for the purpose of attendant at any Canadian university or college (s. 5). But a person shall not be deemed to be of Chinese origin or descent merely because his mother or his female ancestors are or were of Chinese origin or descent (s. 2(e)). Merchants and students must substantiate their status to the satisfaction of the Controller, subject to the approval of the Minister, whose decision shall be final and conclusive. All Chinese other than the classes mentioned in (a) and (b) and those persons who have registered for a temporary absence, can enter Canada only at the ports of Vancouver (s. 7). The number of Chinese to be carried on each ship is limited to one for every 250 tons of the ship's tonnage (s. 19). Persons over 15 years of age, physically capable of reading, who cannot read the English or the French language or some other language or dialect are among the prohibited classes (s. 8(n)). An appeal against the decision of the Controller may be taken to the Minister within 48 hours (s. 12) and no court or judge shall have jurisdiction to review any order or decision of the

Minister or Controller relating to the status, condition, origin, descent, detention or deportation of any person unless he is a Canadian citizen or has acquired Canadian domicile (s. 38). A certificate shall be delivered to any immigrant who has been permitted to land (s. 17). Chinese already resident in Canada are required to register within twelve months after the coming into force of this Act (s. 18). Persons leaving Canada with the intention to return may register with the Controller and shall be entitled to re-enter (s. 24(1)). Unregistered persons and persons who did not return within two years after registration shall be treated as in the case of a first arrival (s. 24(2)).[1] Residents of Chinese origin or descent may continue to reside in Canada, but any person who was, subsequent to 25 July, 1917,[2] admitted without paying the $500 tax because of his being a merchant and who has ceased to belong to such class, shall pay the sum of $500 or he shall, ipso facto, forfeit his right to remain in Canada (s. 27). Any other person admitted under this Act who ceases to belong to any of the admissible classes, unless he is a Canadian citizen, shall forfeit his right to remain and shall be deported (s. 27(2)). The Act was revised as C. 95 in 1927.

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(1) The period of absence which is allowed has been extended to four years: P.C. 3173, 29 December, 1931.

(2) The date of the passing of the Amendment Act C. 7, 1917.

A regulation[1] was accordingly made by the Minister of Immigration to define the term "merchant" as one who devotes his undivided attention to mercantile pursuits, dealing exclusively in Chinese manufactures or produce or in exporting to China goods of Canadian produce or manufacture, who has been in such business for at least three years and who has not less than $2,500 invested in it. The designation does not include any merchants' clerk, tailor, mechanic, huckster, pedlar, drier or curer of fish, or any one having any connection with a restaurant, laundry or rooming house.

Chinese may pass through Canada in transit, but such passage must be in accordance with the regulations which were also duly enacted under P.C. 1273 in 1923. Every transport company carrying Chinese in transit must give a bond for every person to cover the penalty for failure to comply with the regulations (s. 2), or in place of such bond a deposit of $1,000 for each person (s. 4). The transport company carrying Chinese through Canada must keep them in the car until their arrival at the port of exit, and there they must be detained in the building provided for that purpose until they are taken on board the vessel in which they are going to depart (s. 8).[2]

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(1) P.C. 1276, 10 July, 1923.

(2) International Labour Office, Migration Laws and Treaties (1928), II, 51.

Under the present law no Chinese except government officials, merchants and students are admissible into Canada. Tourists, clergymen and men of science are excluded. The right of merchants to bring their children and wife is also curtailed. Although persons born of Chinese mothers were not deemed to be of Chinese origin or descent, there is no provision to admit Chinese wives of foreigners. The Chinese wife of a Canadian citizen, having never landed in Canada, will not acquire the status of the husband under the general Immigration Act. But if married in the Dominion, she cannot be denied admission. Other persons admitted as belonging to the exempt classes are required to maintain their status on pain of deportation.

The administration of the law may be illustrated by the following cases. Yee Foo and two others had been legally admitted into Canada at the port of Victoria, British Columbia, had paid the head tax required. had been given certificates and became entitled to remain in Canada. In March, 1924, they left Canada, proceeding from the city of Windsor in Ontario across the Detroit River into the United States, where they remained until the end of June, 1924, when they re-crossed the Detroit River in a small boat and re-entered the city of Windsor. They were detained and examined by the Controller, who found that they had left Canada without registering as required by s. 23(1) and had returned to Canada contrary to the provisions of ss. 6 and 7, which provided that Chinese

must enter Canada at a port of entry and that they could not enter elsewhere than at the ports of Vancouver or Victoria. The Controller ordered their deportation. An appeal was dismissed by the Minister and they then applied to the Supreme Court of Ontario to intervene on the ground of their having acquired Canadian domicile.

The applicants contended that they had each acquired a Canadian domicile, and had the unqualified right to enter Canada notwithstanding any of the provisions to the contrary contained in the Act. Mulock, C.J.O., ruled, however, that whatever right a domicile might give, such right ceased if they lost their domicile, and the appellants had lost it. A domicile of choice was lost when the intention to reside in the country of choice and residence there ceased to exist. They left Canada without registering out, and not being of the exempted classes, had no right to re-enter Canada. The inference drawn from their leaving Canada in such circumstances was that they ceased to intend to reside in Canada. When, therefore, they left Canada, both residence and intention to reside in Canada ceased, whereby they lost their Canadian domicile.(1)

The authority of R. v. Fong Soon was found not to assist the applicants. It was prior to the enacting of s. 24(2) of the Act of 1923, which section expressly provided that unregistered persons would be treated as arriving for the first time.

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(1) In re Yee Foo (1925), 2 D.L.R. 113.

Judge Mulock further ruled that s. 10(2) made it imperative that the Controller should adjourn the hearing for forty-eight hours if he was not satisfied on a preliminary hearing that some person was not entitled to remain in Canada, and an opportunity should be given such person to confer with duly accredited legal counsel who should be entitled to represent him upon the hearing and upon all subsequent proceedings. This the Controller had not done, and therefore he was not entitled to make the order. Section 38 did not deprive the Court of jurisdiction to interfere where the Controller had acted not in pursuance of, but contrary to, his statutory authority. Judge Hodgins and the majority of the Court, however, did not accept this part of his judgment, and ruled that the appellants were in no way prejudiced. The presence of counsel and the appeal to the Minister indicated that every purpose of the provision in question had been served. They deemed the limitations of the jurisdiction of the Court necessary and proper. The effective control of immigration vested in the Government of the Dominion, whose decisions or the decisions of those acting for it ought not to be subject to revision by the courts. The appeal was therefore dismissed.

In the case of Low Hong Hing the Court held that extraordinary tribunals were not bound to follow the usual rules of evidence required by ordinary courts of justice and that for the deportation of a person who either "has entered or remains in Canada", the Controller exercised powers conferred

by ss. 26 and 10(1) of the Act, and not by s. 10(2) which admitted the representation of counsel in the proceedings and had no application in this case because it was limited to Chinese persons "applying for admission or entry to Canada."(1) The respondent, being a person of Chinese origin and descent who arrived in Canada at an unknown port or place of entry, was ordered to be deported in accordance with the provisions of s. 26. On certiorari, the respondent claiming that he was born in Canada, the order for deportation was set aside. The Crown appealed to the Court of Appeal of British Columbia which reversed the order, and restored the order for deportation. Section 26 provided its own summary and complete procedure for adjudicating in the case of a Chinese person who was already in Canada. The Controller, having decided on the question of citizenship, had acted within competent jurisdiction, despite the fact that evidence had been taken in the absence of the respondent.

A Chinese girl seeking admission into Canada was examined by the Controller who, on adjourning the hearing, allowed her to go ashore without any deposit of money as security for her return pursuant to s. 14 of the Act. On the adjourned hearing an order was made for her deportation. The girl appealed, pleading that she had been "landed" and that the Controller had no more power to make the order. The Court admitted the mistake of the Controller's failure to obtain security as

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(1) In re Low Hong Hing (1926), 3 D.L.R. 692.

required by the said s. 14, but ruled that the mistake was not equivalent to an assent to her being landed in Canada and that the appeal should fail.(1) But when a Chinese has been landed and has obtained a proper certificate, the Controller who landed him and issued the certificate could not re-open the matter even on the ground that such entry was obtained by fraud and personation.(2)

The case of Chin Shack is an interesting one, and raises questions of great practical importance and wide application in the working of the Chinese Immigration Act. He was given a certificate under s. 17 of the Act upon first entering Canada. Subsequently, the Controller, who re-opened the matter and held a fresh inquiry, concluding that a fraud had been committed, held Chin Shack in custody and ordered his deportation to China. An application for habeas corpus was refused, but was allowed on appeal, on the ground that having once landed him and issued his certificate, the Controller's jurisdiction was exhausted and he had no right to hold the second inquiry. The provisions of s. 26, under the authority of which the Controller professed to have acted, referred only to persons who ceased to be of the exempt classes after admission, and did not apply to a person who had been lawfully

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(1) In re Lee Chew Ying (1927), 38 B.C. 241.

(2) Ex parte Chin Shack (1928), 1 D.L.R. 779.

landed. "Fraud does not nullify the entry," said the Court, "it enables a judge to set it aside. . . . It is not the right to enter that is now in question. It is the right to remain in Canada, a civil right which he may be deprived of on cancellation of his certificate by a Judge. Prima facie, the appellant is rightly in Canada. That prima facie right arises from his admission into Canada. The certificate is merely prima facie evidence of that fact and, when it is desired to contest it, S. 17 provides the method." Such contestation shall only be heard and determined in a summary manner by any judge of a superior court of any province.

The Controller then instituted proceedings to contest the validity of his certificate, when it was held that the certificate was valid and authentic.(1) Later, an application by Chin Shack to be registered out for the purpose of visiting China was refused by the Controller. Upon motion directing the Controller to show cause why a writ of mandamus should not issue, directing him to register Chin Shack out to China, the Court again held that the sole question in dispute was one of identity, and that that had been decided by the Court in the manner provided by the Act. "It is binding upon the Controller whose duty it is to register the applicant out, his act being no longer judicial but ministerial."(2)

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(1) (1928), 40 B.C. 68.

(2) In re Chinese Immigration Act and Chin Shack (1931), 45. B.C. 3.

The non-observance of a Controller to hold an examination as required by s. 10 has also been held to be no ground for the Court to intervene; "as the immigrant had failed to satisfy the Controller as to her identity, no further examination was necessary". It was re-asserted that the Controller was not bound by the same rules of evidence and procedure as were required in the ordinary courts of justice. The provision in the Act of forty-eight hours adjournment was merely directory, the immigrant did not want counsel and no injustice was being done.(1) It is apparent from these decisions that the established practice is now that the Court will interfere with the decision of the Controller or Minister solely on the ground that there has been a violation of the essentials of justice or a lack of jurisdiction.(2)

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(1) In re Jung Suey Mee (1932), 46 B.C. 533.

(2) In re Low Mong Hing (1926), 3 D.L.R. 692, at p. 698; Ex parte Chin Shack (1928), 1 D.L.R. 779, at p. 791.

Chapter XIII.

AUSTRALIA

44. The Case of Chun Teong Toy.- Before proceeding with the legal position of Chinese under the Federal Immigration Act of 1901, special mention must be made of the case of Chun Teong Toy and the ratio decidendi of the Privy Council judgment. We have seen how the Supreme Courts of both Victoria and New South Wales had ruled that a Chinese was entitled to land on payment of the £10 poll tax, and that the action of the Government in refusing to accept the statutory tax and restraining the Chinese immigrants who were ready and willing to pay the tax, from landing, could not be justified. Leave to appeal to the Privy Council was refused by the New South Wales Court, but the Government of Victoria succeeded in obtaining such leave.

The Privy Council ruled that the decision of the Court below was untenable on two grounds. According to a liberal interpretation of the statute, the Collector of Customs was under no legal obligation to accept payment tendered by the master on behalf of any immigrants, nor when tendered either by or for any individual immigrant. Although by s. 3 of the Victorian Chinese Act, 1881, a Chinese immigrant had no legal right to land in the colony until a sum of £10 had been paid

for him, their Lordships were unable to concur in the construction that a licence to land was intended to be given to any Chinese immigrant provided he paid £10 on landing. The manifest object of the code, declared the Council, was to prevent an excessive number, or what the legislature thought to be an excessive number, of Chinese landing in the colony, and not merely to impose a tax on those who were desirous of entering it. A consideration of the several provisions would render it clear that this was so. Where the master of a vessel had committed an offence by bringing a greater number of Chinese into the colony than the statute allowed, he could have no right to require the Collector of Customs to receipt payment in respect of such immigrants, and thus to further the purpose for which the unlawful act was committed.

Upon international grounds their Lordships also observed that an alien had no legal right enforceable by action to enter British territory. "Circumstances may occur in which the refusal to permit an alien to land, might be such an interference with international comity as would properly give rise to diplomatic remonstrance from the country of which he was a native, but it is quite another thing to assert that an alien, excluded from any part of the British dominions by the executive government there, can maintain an action in a British Court."(1)

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(1) Musgrove v. Chun Teong Toy (1891) A.C. 272.

The statute was indeed enacted not for the purpose of collecting revenue, but, by erecting a tax barrier, to hinder the immigration of Chinese. A Chinese immigrant must pay £10 in order to gain admission, and the master of a vessel must undertake not to carry Chinese passengers in excess of the proportion of one for every hundred tons of the ship's tonnage. If an immigrant fails to pay the poll tax, he is excluded. If the master fails to observe the tonnage limitation, he will be fined.(1) Each party has his duty to perform, and the passengers are not in a position to require that the master shall not carry them in excess of the tonnage limit, which they might have no means of ascertaining. In the absence of the provision that a vessel carrying Chinese immigrants in greater number than allowed by the statute, would be forbidden to land her passengers, in addition to the payment of a fine of £100 for each Chinese carried in excess, the Chinese immigrants could rightly claim admission after tendering the tax. The fact that the master of the "Afghan" had indeed been offered the alternative either to pay heavy fines or to take the Chinese away,(2) indicated that the passengers would be allowed to enter if the master were ready to pay the fine.

As to the second point, it is admitted that an alien has no enforceable legal right to enter the territory of another

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(1) See supra, §1c(ii).

(2) Cf. Willard, op. cit., 84; Campbell, op. cit., 71.

State. The territorial government may exclude him upon whatever grounds it thinks fit, although diplomatic interposition may be exercised on his behalf by the country to which he owes allegiance. But the position will be different if the executive government were sued for its failure to fulfil the existing laws governing immigration. An administrative order cannot displace law, which the government, as well as the individual, is in duty bound to observe. The injury done to an alien by the administrative branch of a State in refusing him permission to land, while the law only imposes a £10 tax for such admittance, amounts to a denial of justice which would constitute an international delinquency and not "an interference with international comity." It is but natural for the alien to resort to the courts for redress before appealing to the home government. The Privy Council admitted likewise the propriety of a diplomatic remonstrance in such cases. The Victorian Government, although in present-day circumstances it is politically immune, is in law answerable to the courts under the provisions of the Constitution.

45. The Immigration Restriction Act, 1901-1932.- As used in Australia, the dictation test in a language selected by an immigration officer is believed to be unique. Under the provisions of the Canadian Act, the language for the reading test is selected by the immigrant.(1) The Australian

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(1) S. 8(n), Chinese Immigration Act, 1923, C. 38.

dictation is thus not a test of fitness for admission, but a most flexible method of exclusion. Recourse to Gaelic was said to have been had with success to exclude undesirables of unusual linguistic attainments.(1)

The Act has been made more drastic and prohibitive by the construction of the courts from time to time, widening the power of the Commonwealth in the matter of restricting immigration.(2) It has been settled that neither the rules of nationality nor the rules of domicile are applicable to test the question whether a person entering the Commonwealth is an "immigrant" who shall be subject to the Act, or an Australian "coming home", exempted from its provisions.(3)

The Immigration Restriction Act No. 17 of 1901 defines a "prohibited immigrant" as, among others, "any person who, when asked to do so by an officer, fails to write out at dictation, and sign in the presence of the officer a passage of fifty words in length in an European language directed by the officer" (s. 3(a)). It exempts (e) persons accredited to the Government of the Commonwealth, or (h) any person possessed of

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(1) Charteris, Australian Immigration Laws and their Working (1927), 4, 5.

(2) Cf. Moore, "The Immigration Power of the Commonwealth", A.L.J., II. (1928), 1.

(3) Quick, Legislative Powers of the Commonwealth (1919), 512.

a certificate of exemption, signed by the Minister administering the Act, or (n) any person formerly domiciled in the Commonwealth, or (m) the wife and children under 18 accompanying the husband and parents who are not prohibited immigrants (s. 3). The dictation test may be applied to any immigrant who has evaded an officer or entered the Commonwealth at any place where no officer is stationed (s. 5(1)), and to any immigrant within one year of admission (s. 5(2)). Every prohibited immigrant entering or found within the Commonwealth in contravention or evasion of the Act, shall be guilty of an offence and liable to imprisonment for not more than six months, and in addition to or substitution for such imprisonment, to be deported (s. 7). The master of a vessel is liable to a penalty not exceeding £100 for each prohibited immigrant entering the Commonwealth contrary to this Act. But in the case of a prohibited immigrant who is of European race or descent, no penalty shall be imposed. The Act has been several times amended.(1)

The words "an European language" in s. 3(a) were replaced by "any prescribed language" in the 1901-1905 Act, to soothe the susceptibilities of oriental nations. But no regulations have been drawn up prescribing any language, so that the provisions of the original Act are still de facto in force. The

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(1) By Nos. 17 and 19 of 1905, No. 25 of 1908, No. 10 of 1910, No. 38 of 1912, No. 51 of 1920, No. 47 of 1924, No. 7 of 1925, No. 56 of 1930, and No. 26 of 1932.

amending Act also omitted paragraphs (m) and (n) of s. 3, with the result that formerly domiciled persons and the wife and children of persons who are not prohibited immigrants can no longer be admitted without being subject to the language test. Any person who has resided in Australia for a period of five years may apply for a certificate on departure exempting him, if he returns, from the test. But the officer may withhold the certificate without assigning any reason. The master of a vessel in which a prohibited immigrant, or a person who later becomes a prohibited immigrant, comes to the Commonwealth, shall provide a passage for him to the place whence he came. The master shall also pay a reasonable sum for the cost of his keep and maintenance while awaiting deportation.

A special arrangement was made in 1912 admitting Chinese students and merchants to the Commonwealth for certain limited periods. Among other conditions, a student in order to be admitted must not be engaged in any calling or occupation other than of an approved nature for pay or to obtain means of supporting himself. The term "merchants" shall mean only persons engaging in promoting the wholesale overseas trade between China and Australia, and is not to be understood as including retail shopkeepers, hawkers and labourers.(1)

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(1) Australian Parliamentary Papers, 1912, III.

46. The Dictation Test.- In the case of Christie v. Ah Foo[1] it was held that in order to obtain a conviction under s. 3(a), it was essential that a coherent and continuous passage of fifty words, neither more nor less, should be dictated. Proof by the officer that he stopped after reading out ten words, being satisfied that the immigrant did not understand what was being read to him and had not attempted to write any of the ten words dictated, was not sufficient. In a later case, when in a dictation test the defendant said that he could not write it, the passage was then not read to him by the officer, the test was held not to have been properly put so as to make the defendant a prohibited immigrant. The Court ruled[2] that where a criminal offence was created by statute, each fact or circumstance constituting the offence must be strictly proved. The defendant's admission by words or conduct, could not dispense with the observance by the officer of some preliminary which the Act made a condition precedent to the arising of the offence. In Chia Gee v. Martin the Court re-affirmed the practice that it was for the officer and not for the immigrant to select the passage for dictation.[3]

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(1) (1904), 29 V.L.R. 533.

(2) Potter v. Minahan (1908), 7 C.L.R. 277, at p. 301.

(3) (1905), 3 C.L.R. 649.

As to the application of the dictation test, it has been settled that the test may be put to any immigrant who has entered the Commonwealth within twelve months of entry, but in the case of an immigrant who has evaded an officer it may be applied at any time.(1) A member of the crew who deserted from a vessel and was absent from a muster of the crew was held to be an immigrant who had evaded an officer within the meaning of s. 5(1), and the test was lawfully put to him although it was put more than twelve months after his entry. The time limit within which a dictation test may be applied to any immigrant entering the Commonwealth (and not evading an officer) was extended to two years in the 1910 amendment, to three years in the 1920 Act, and to five years in the Act of 1901-1932. Thus a Chinese, lawfully admitted to the country, may be expelled within five years after admission by the application of the test.

A certain Ah Mook, who claimed to have been in Australia for 35 years, was charged as an immigrant and required to pass the dictation test, which he failed to do. He was also held to have entered the Commonwealth within three years before failing in the dictation and was therefore a prohibited immigrant offending against the Immigration Act, 1901-1920. The magistrate dismissed the case for the reason that although

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(1) Li Wan Quai v. Christie (1906), 3 C.L.R. 1125.

there was evidence that the defendant failed to pass the test, there was no evidence that he entered the Commonwealth within three years. On appeal, the Higher Court ruled that s. 5(3) clearly provided that the averment of the prosecutor that the defendant was an immigrant and had entered the Commonwealth within one year before failing to pass the dictation test, should be deemed to be proved in the absence of proof to the contrary by the personal evidence of the defendant either with or without other evidence. This exactly met the circumstances of the case and the appeal was allowed.(1) This "personal evidence" as required by the 1920 amendment shall include a definite statement as to the date and place of his arrival in the Commonwealth and the name of the vessel by which he travelled to Australia.

In a similar case(2) the Court held that the Parliament of the Commonwealth had power, under s. 51 (XXVII) and (XXXIX) of the Constitution, to cast upon a person charged with being a prohibited immigrant found within the Commonwealth, the burden of proving that he was not an immigrant as well as that he had not evaded a customs officer. The provision of s. 5(3) of the Act of 1901-1925 that in any prosecution the averment of the prosecutor that the defendant is an immigrant who (a) has evaded an officer, shall be deemed to be proved in

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(1) Gabriel v. Ah Mook (1924), 34 C.L.R. 591.

(2) Williamson v. Ah On (1926), 39 C.L.R. 95.

the absence of proof to the contrary by the personal evidence of the defendant, is therefore valid. These alterations, though made after the year 1911 when the accused was alleged to have entered the Commonwealth, were held to be a matter of mere procedure and therefore retrospective, that is to say, applicable to facts which took place before the alterations.(1) Ah On was found in Perth, Western Australia, in May, 1926, and failed to pass the dictation test. There was no proof that he had evaded an officer. There was also no "proof to the contrary" of the averment. The magistrate in the Court of Petty Sessions, acting on the decision in Ah Hing v. Hough,(2) that the Immigration Acts were not retrospective, dismissed the complaint. Williamson, an officer of the Customs, then appealed. Knox, C.J., in a dissenting judgment, said that the provisions of s. 5(3) were invalid because they were not within the competence of Parliament. Parliament had not confined itself to saying that "an immigrant" who was charged

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(1) Per Higgins, J., ibid., 122. Rich and Starke, JJ., ruled to the same effect but on different grounds. They concluded that these provisions had no retroactive operation at all. The defendant entered the Commonwealth in 1911; at that time s. 5(1) under which he was charged (as having evaded an officer) was in force. Further, the complaint in this case was made on 15 May, 1926, and at that time s. 5(3) and (3A) were in force. These subsections referred to prosecutions - legal proceedings - and not to the entry of persons into the Commonwealth. In this case it was therefore unnecessary to discuss the rule that enactments dealing with procedure applied to all proceedings whether commenced before or after the passing of the Act. The proceedings here in question were in fact commenced after the passing of s. 5(3) and (3A) and necessarily fell within their terms (p. 129).

(2) (1926), 28 W.A.L.R. 95.

with evading an officer must prove that he had not done so, but had enacted that "any person" whatsoever who was charged with the offence must show in the way directed above that he was not an immigrant and that he had not evaded an officer. The Constitution, by s. 31 (XXVII), authorised Parliament to deal with immigrants, but it had attempted to bring within its net all those who did not prove in the prescribed way that they were not immigrants. This was a demarcation of power beyond that allotted by the Constitution. The respondent also contended that s. 5(3) and (3a) defining how "proof to the contrary" by personal evidence shall be deemed to have been given, were not procedural provisions, or that they were not within the class of provisions which were retrospective, for they changed the methods of proof for the purpose of conviction. On their proper interpretation, he maintained they could only apply to persons who came into the Commonwealth after they had been enacted.

The decision has been modified in a recent case[1] where the Court ruled that the provisions of s. 5(3) and (3A), being expressly confined to prosecutions under s. 5(1) and (2), which appeared in their present form only after 1924 (No. 47), could relate only to immigrants charged with the evasion of an officer, whose offence is alleged to have been committed after the

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(1) Ah Yon v. Gleeson (1930), 43 C.L.R. 589.

date of the passing of the 1924 Act. Where an immigrant whose entry into the Commonwealth was alleged to have been "about 1906", when the original s. 5(1), providing the dictation test for any immigrant who has evaded an officer, was in force, an immigrant could not be convicted, in the absence of proof that he had evaded an officer, The defendant, therefore, being found in March, 1930, and having failed to pass the test, but alleging that he had been in Australia before 1924, could only be dealt with according to the repealed provisions of s. 5(1) of the Act of 1901-1908, and such repeal would not affect their previous operation.(1)

47. The Definition of an Immigrant.- Every Chinese immigrant entering or found within the Commonwealth is subject to the provisions of the Immigration Act. He may be required to pass the dictation test, failure in which makes him a prohibited immigrant liable to imprisonment and deportation. The question whether a person is an immigrant or not is therefore material to his right both of entry and of remaining in Australia, and may be raised at any time. Nationality and domicile may be adduced to prove that the person seeking admission is not an immigrant. They are evidentiary facts of more or less weight in certain circumstances, but they are not

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(1) Ah Yon v. Gleeson (1930), 43 C.L.R. 595-596.

the ultimate or decisive considerations before Australian law. The interpretation of who is an immigrant within the meaning of the Immigration Restriction Act has not been free from ambiguity. It was first held that, in its ordinary meaning, immigration implied leaving an old home in one country to settle in a new home in another country, with a more or less defined intention of staying there permanently or for a considerable time.(1) In Chia Gee v. Martin the High Court held that in order to prove that a person entering the Commonwealth is an "immigrant" it is not necessary to prove that he intended to remain in the Commonwealth for any definite period. "The test is one to be applied on entry, and the question whether a man is an immigrant must be a matter capable of being determined then and there. It would be reducing the Act to nullity if it were held that the test of whether a man were an immigrant or not was to be some intention the Commonwealth authorities might have no means of discovering. . . . The term 'immigrant' is clearly satisfied by the act of coming into the Commonwealth."(2) In Ah Yin v. Christie it was again held that any person who sought to enter the Commonwealth from abroad was prima facie an immigrant. The word involves the idea of coming into a country or region from a former

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(1) Ah Sheung v. Lindberg (1906), V.L.R. 332.

(2) (1906), 3 C.L.R. 654.

habitat, especially a native land.(1) The right of residence acquired by a father in Australia was not transmissible to his minor son. Even assuming that his legal domicile was at the place of his father's domicile, it did not follow that he was not an immigrant.

The argument based on the decision in Chia Gee v. Martin, that proof of entry without proof of an animus manendi was sufficient evidence of immigration, was, however, rejected in a later case.(2) The Chief Justice expressed his opinion that the word "immigration" as used in the Constitution did not mean mere physical entry into the Commonwealth, although the fact of entry was, if no more appeared, sufficient prima facie evidence that the person entering was an immigrant. If "immigrating" into Australia be taken to mean "entering" Australia and every person entering Australia a prima facie immigrant, the consequence would be that an Australian born person whose permanent residence was in Australia might be made to submit to the dictation test on his returning home after a month's stay abroad. The ultimate fact to be established as a test whether a given person is an immigrant or not, is whether he is or is not at that time a constituent part of the community known as the Australian people.

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(1) (1907), 4 C.L.R. 1432-1437.

(2) Potter v. Minahan (1908), 7 C.L.R. 277.

In construing the term "immigrant", the doctrine of domicile is of more importance than that of nationality. Minahan was the illegitimate son of a British mother and a Chinese father, who took him to China in 1882. Apart from the fact that he was born in Victoria, he was held to have his original home in Australia, the mother's domicile. Therefore his re-entry into the Commonwealth in 1908 was "coming home" and he was not an immigrant. In Donohoe v. Wong Sau[1] a Chinese woman, born in New South Wales of naturalised British parents belonging to the Church of England and married to a domiciled Australian of the Chinese race, was held to be an immigrant on her return in 1924 to the country which she had left in 1889. The Court ruled that the mere fact that a person was born in Australia did not prevent his being an immigrant within the meaning of the Act whenever, after an absence from Australia, he desired to come back there. The respondent was not a member of the Australian community when she entered the Commonwealth and therefore was not in point of fact coming back to Australia as to her home.

48. The Question of Domicile.-

(i) Evidence of Former Domicile

By virtue of the provisions of s. 3(n) of the Immigration Act, 1901, Chinese persons formerly domiciled in Australia

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(1) (1925), 36 C.L.R. 404.

were exempted from the class of prohibited immigrants. They could not be kept in custody for being prima facie prohibited immigrants or for failing to satisfy the Immigration Officer of the fact of such domicile when no one appeared to show cause why they should be so kept. The Officer was bound to act reasonably in accordance with the evidence adduced and his conduct must be subject to control by the Court.(1) In Chow Chin v. Martin the Court also held that if the appellants had satisfied the proper Officer that they had been formerly domiciled in the Commonwealth, they were entitled to come back and could not be convicted of being prohibited immigrants.(2) The Court regretted that they had not asked for an adjournment in order to tender evidence to the Officer. But as the Court could only deal with convictions, it could not but declare that the convictions were technically right.

(ii) Derivative Domicile

This has been held to confer no political status. Through the acquisition of a domicile by a Chinese father, his minor sons may take a derivative domicile. But such derivative or legal domicile confers no right upon an alien to enter another country.(3) The application of the law of domicile has been

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(1) The King v. Lindbergh (1905), 3 C.L.R. 93.

(2) (1905), 3 C.L.R. 654.

(3) Ah Yin v. Christie (1907), 4 C.L.R. 1428.

confined to the determination of questions of civil status, questions of capacity to contract marriage, and questions of succession to personal property. The right of an alien to claim admission to a foreign country depends upon political and not civil status. The Court further declared that permission given to a person to enter a country did not necessarily imply permission to his wife and children to enter the country. The whole tenor of the principal Act went to show that the privileges it conferred in allowing persons to enter the Commonwealth were merely personal and did not extend beyond the person of the immediate recipient.

A Chinese came to Australia in 1898, leaving his wife in China, and remained in Melbourne for about six years. In 1904 he went back to China at the call of filial duty and again came to Australia in 1912, still without his wife. The Court found that he had not abandoned his Chinese domicile of origin and that there was no evidence of his having acquired an Australian domicile before he went to China in 1904. He was therefore a prohibited immigrant, having failed in a dictation test.(1) From this decision it is clear that the right to admission depends on domicile in the legal sense of the term and not on bona fide residence merely. The provision of s. 3(n) which exempted persons formerly domiciled in

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(1) Ling Pack v. Gleeson (1913), 15 C.L.R. 125.

Australia from the language test and which was in force when Ling Pack left Australia in 1904, is not to be taken as a guarantee of the vested rights of those who have once been in Australia. It assures the right of re-entering Australia to those persons only who have maintained a permanent abode in the Commonwealth and who, as the successive interpretations of the power to restrict ~~legislation~~ immigration show, can never be deemed to fall under the category of an immigrant.

But it has also been decided that the fact that a person has been convicted under the Act of being a prohibited immigrant is not, on a subsequent prosecution of the same person for being a prohibited immigrant found on a subsequent occasion within the Commonwealth, evidence that he is then a prohibited immigrant.(1) There are several categories under which a person may be charged as a prohibited immigrant. Some are of a temporary nature. Unless the facts could be proved to be continuing facts affecting the status of a person charged, a conviction for being a prohibited immigrant is not in the nature of an adjudication of status.

49. The Question of Nationality.- In early colonial Acts intended to exclude Chinese immigration, exceptions were made either of all British subjects or of all Australian-born Chinese. But under the Federal Act more weight is laid upon

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(1) Bain v. Ah Kee (1914), 17 C.L.R. 433.

the doctrine of domicile than on that of nationality. The Immigration Restriction Act is taken admittedly to exclude British subjects who may come from other parts of the Empire. It also excludes British subjects born in Australia for the reason that there is no Australian nationality as distinguished from British nationality. Under s. 5 (XXVII) of the Constitution, the Commonwealth Parliament has power to exclude immigrants, whether aliens or not. That it may determine who shall be the component factors of the Australian people is not contested. But in one case the question arose whether this power to deal with "immigration" extends to the case of Australians merely absent from Australia on a visit cum animo revertendi.

A Chinese named Ah Sheung came to Victoria about 1881, was naturalised in 1883, made two visits to China prior to 1901, when he again went to China and returned to the Commonwealth in 1906. He was held to be an immigrant and put to the dictation test, in which he failed. The Supreme Court of Victoria found that Ah Sheung was a domiciled Victorian subject of the King and that, except during his visits to China, he was also resident in Victoria. It ruled[1] that he had not lost his domicile by his visits to China, that he was entitled to the privileges flowing from naturalisation and that he could not be prevented from entering under an Act dealing

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(1) Ah Sheung v. Lindbergh (1906), V.L.R. 323.

with immigration and immigrants. On appeal, the High Court ordered a re-hearing to establish the identity of Ah Sheung with the naturalised Victorian of that name.(1) Pending the re-hearing, the Attorney-General of the Commonwealth intervened against the judgment of the Supreme Court.(2) It seemed that the High Court was not disposed to give any countenance to the novel doctrine that there was an Australian nationality besides a British nationality. The term "immigration" included the power to exclude British subjects in general, and extended to persons of Australian nationality, whatever that might mean. Nationality alone was held to have nothing to do with the question whether a person seeking admission into Australia was an immigrant. But the Court admitted the force of the view taken by the Victorian Tribunal, that the term should not extend to the case of Australians absent temporarily from the country. Who, in this view, should be considered Australians, so as not to be "immigrants" on their return? The question was left open as the appeal was abandoned upon the establishment of the identity.

That the question of nationality is always taken together with the question of domicile is further illustrated in the case of Minahan. The respondent, having been born in Victoria,

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(1) Christie v. Ah Sheung (1906), 3 C.L.R. 998.

(2) Attorney-General v. Ah Sheung (1906), 4 C.L.R. 949.

was a member of the Australian community; being the son of a British mother and a Chinese father, between whom no presumption of a legal marriage could be entertained, he had his mother's domicile, which was in Australia. The High Court ruled: "Every person becomes at birth a member of the community into which he is born, and is entitled to remain in it until excluded by some competent authority. Every human being is a member of some community, and is entitled to regard the part of the earth occupied by that community as a place to which he may resort when he thinks fit. . . . The respondent is a person who, upon the evidence, was entitled by the circumstances of his birth to regard Victoria as his home. Nothing has been done to deprive him of that right, or to confer on him a right to enter in any other part of the world, except so far as his British nationality may confer any such right."(1) The answer to the question whether a person is an Australian or not depends on whether he is or is not at the time when he enters the Commonwealth a constituent member of the community.

This last decision seems to conflict with the case of Wong Sau, whom the Court described as not Australian "in point of language, upbringing, education, sentiment, marriage, or any of those indicia which go to establish Australian nationality."(2) Her case is distinguished from that of Minahan

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(1) (1908), 7 C.L.R. 289.

(2) (1925), 36 C.L.R. 408, 409.

only in its facts and not on grounds of law. In the latter case, the Court pointed out that the father took the birth certificate with him when leaving Australia, while in the former the certificate was procured for Wong Sau ten years after departure; this was taken to be an indication of lack of intention to return. Further, the mother of Minahan was an Australian of European stock, while Wong Sau's mother was a Chinese and "there was not the slightest evidence of anything Australian about the respondent except her birth". Here we have a person who, born in the Australian community of naturalised British parents but having no "real home" in Australia, was therefore held not to be one of its people.

We now come to the conclusion that under the Immigration Acts Chinese may be deported at the discretion of the immigration authorities at any time and debarred from returning when once deported. Minor sons may not join their parents, wives their husbands, and vice versa. Australian-born Chinese may be excluded from their country of origin; or if naturalised, from their country of adoption. The meaning of "immigration" is virtually if not actually equivalent to entry into Australia, and covers nearly every case of the Chinese seeking admission. Indeed, the drastic penalties which may fall upon the master of a vessel carrying Chinese passengers results in refusal on the part of shipping companies to afford them accommodation, or to agree to transport them except on severe terms. Their practical effect is to exclude Chinese from entering Australia long before they have the chance to land.

Chapter XIV.

NEW ZEALAND

50. The Chinese Immigration Act of 1881 and its Amendments.- In order to show the different position of the Chinese as defined by this Act and the Act of 1908 now in force, it seems opportune to recapitulate the main points of the former legislation. The Act of 1881 applied to "Chinese", which word was to mean any person born of Chinese parents, and any native of China or its dependencies or of any island in the China seas, born of Chinese parents. The justices might decide upon their own view and judgment whether any person charged before them was a "Chinese" within the meaning of the Act. For the purpose of any proceeding taken under the Act, the burden of proof shall lie on the defendant to show that he is exempt from the operation of any of such provisions. The number of Chinese passengers carried by each vessel is limited to one for every ten tons of its tonnage. No entry shall be deemed to have been legally made or to have any legal effect until a payment of £10 has been made for every Chinese. Chinese within the colony of New Zealand at the date when this Act comes into operation may, within two months, apply for a certificate of exemption from payment (known as a section 13 certificate). A bona fide resident of the colony who desires to be absent for a temporary purpose may also apply for a certificate which will exempt him from the provisions of the Act for a specified time and from all payments (section 14 certificate).

The 1888 Amendment excluded Chinese naturalised in New Zealand from the term "Chinese". It also exempted from payment of the tax persons duly accredited to the colony by the Government of China or by or under the authority of the Imperial Government on any special mission. The Act shall also not apply to the officers or crews of any vessel or vessels of war of the Emperor of China, who shall have all the privileges and immunities enjoyed by the officers or crews of the vessels of war of any other friendly Power. The passenger limitation was raised to one for every 100 tons of the ship's tonnage. It was provided, however, that the whole Act was to remain in force only until the end of the next year. But by a Continuance Act in 1889 the suspension clause was repealed and the Act continued in force pending further enactment.

The tonnage limitation was further raised to one for every 200 tons by the Amendment Act of 1896, and Chinese, in order to obtain admission into New Zealand, must pay £100 instead of the £10 required by the original Act. The Act was to be in operation only until the coming into force of the Asiatics Restriction Act, 1896, which, however, was not assented to by the Crown.

A general immigration law was enacted in 1899, adopting the education test on the Natal model. But the provisions did not apply to Chinese, for whose immigration special provision had been made. The Chinese Immigrants Act was amended further in 1901 to give facilities to Chinese members of the

crew of any ship arriving in New Zealand "to go ashore from time to time in the performance of their duties in connection with the ship", but for no other purpose.

The Amendment Act of 1907 provided that it was not lawful for any Chinese to land in New Zealand until it had been proved to the satisfaction of the Collector of Customs that he was able to read a printed passage of not less than 100 words of the English language selected at the discretion of such Collector. Chinese who were dissatisfied with the decision of the Collector could appeal to a magistrate, who was to administer a further reading test and whose decision should be final. Teachers of the Christian religion were exempted from such test.

51. The Immigration Restriction Act, 1908.- The Act of 1881 and its subsequent amendments were consolidated in Part III of the Immigration Restriction Act (No. 78). "Chinese" shall now mean any person born of Chinese parents and any native of China or its dependencies or of any island in the Chinese seas born of Chinese parents: but it does not include Chinese naturalised in New Zealand (s. 2). No ship shall bring a greater number of Chinese (not being members of the crew) than in the proportion of one to every 200 tons of the ship's burden. The master shall be liable to a fine not exceeding £100 for each Chinese carried in excess (s. 29). He shall also pay £100 for every Chinese before making any

entry at the customs, and before any such Chinese are permitted to land. Government representatives accredited to New Zealand are exempt from payment (s. 31). If any master neglects to pay any such sum, or permits Chinese passengers to land before such sum is paid, he shall be liable to a fine not exceeding £50 for each person, and in addition, the ship shall be forfeited and may be seized, condemned and disposed of in like manner as ships forfeited for a breach of any law relating to the customs (s. 32). Every such Chinese who enters or attempts to enter without paying the sum is liable, in addition to such sum, to a fine not exceeding £50 and, in default of payment, to imprisonment for twelve months (s. 34). A Chinese who was bona fide resident in New Zealand on 30 March, 1882 (the date of the coming into operation of the Chinese Immigration Act, 1881), desiring to be absent for a temporary purpose, might apply for a certificate which would exempt him from the provisions of this part of the Act (s. 39).(1) The additional restriction of a reading test in the English language and other similar provisions of the consolidated Acts are retained. The officers or crews of any vessel of war and teachers of the Christian religion also enjoy the aforementioned exemptions.

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(1) The section 14 certificate under the original Act was granted to any bona fide resident who desired to be absent from New Zealand.

The Act was first amended in 1908 (No. 230) to exempt from the reading test any Chinese who has left or leaves New Zealand after registering his name and thumb-print with a Collector of Customs and who returns within four years after the date of such registration. Those returning before 1 January, 1909, who had at any time been resident in New Zealand should enjoy the same immunity.

By the Amendment Act (No. 16) of 1910, certain provisions (ss. 18-24) of Part II. dealing with prohibited immigrants, the application of which to Chinese was excluded by the principal Act, were made to apply mutatis mutandis to Chinese persons. Chinese who land in New Zealand in breach of Part III. of the Act shall, in addition to the penalties, be removed from New Zealand. The master of a vessel carrying them shall be liable to defray the expenses of so removing them and of detaining and maintaining them pending such removal. But the tonnage limitation shall no longer apply to the bona fide holder of a through ticket to some place beyond New Zealand.

A significant change was made in the Amendment Act of 1920 (No. 23). The reading test was revoked both in the case of Chinese and other immigrants. The provisions of the 1908 Amendment were also repealed. In addition to the restrictions imposed upon immigration into New Zealand of the several classes of persons, the unique "permit system" was created. No person of other than British birth and parentage shall enter New Zealand unless he is in possession of a permit obtained

beforehand. A person shall not be deemed to be of British birth and parentage by reason only of the fact that he or his parents or either of them is a British subject, or that he is an aboriginal native of any Dominion other than New Zealand. The application for a permit to enter must be sent from the country of origin of the applicant or from the country where he has resided for at least one year. The Minister of Customs may grant or refuse to the applicant a permit at discretion, and such permit may include or exclude the wife of the applicant or any of his family. Persons who enter New Zealand without having obtained a permit are liable to a fine of £100 or to imprisonment for one year, and may be deported. A temporary permit is granted to any person who desires to enter New Zealand as a visitor only for purposes of business, pleasure or health, and intends to leave within six months. It may be extended at the discretion of the Minister to longer periods. Any person who fails to comply with the conditions subject to which a temporary or permanent permit has been granted, commits an offence against the Act and will be fined and deported. On entering New Zealand every person must take an oath of allegiance, this requirement being cancelled by the Amendment Act of 1923 (No. 11) in the case of British subjects.

The permit system was extended to cover persons of British birth and nationality by an Amendment Act in 1931 in order to protect the labour market and to prevent the aggravation of the unemployment problem. But the Act ceased to be in force at the end of 1933.

The position of a Chinese under the immigration laws of New Zealand may be thus summarised. In order to be allowed to enter the Dominion he must apply for a permit, which is granted at the discretion of the Minister. He must be carried by a ship in which the proportion of Chinese does not exceed one to every 200 tons of its capacity, and pay £100 tax for admission. Should a Chinese once leave New Zealand for a brief visit abroad, it seems from the express provisions of the Act that he could not re-enter the country unless he obtained a fresh permit entitling him to do so, or was a bona fide resident in New Zealand prior to the year 1882 and had been granted a certificate under s. 39 of the principal Act. The mere fact that he is a naturalised subject under the laws of New Zealand would not facilitate his return to his country of adoption. Considerable ambiguity exists, however, on this point, as the term "Chinese" under the principal Act excludes Chinese naturalised in New Zealand from the operation of Part III., while the 1920 Amendment considers naturalised persons or persons whose parents are naturalised, not to be of British birth and parentage; for their immigration, therefore, special permits may be required. But since the aim of the Amendment was to impose additional restrictions upon persons specified in the principal Act, Chinese naturalised in New Zealand and Chinese certified to be exempt from the provisions of Part III. are not persons on whom the Legislature might have intended to impose further restriction. The permit system

must be reasonably construed and as not applicable to those persons who, though not of British birth and parentage, are not dealt with by the principal Act. The provision that "a naturalized person or a person whose parents are naturalized British subjects" shall not be deemed a person of British birth and parentage, must refer to one naturalised outside New Zealand or naturalised otherwise than under the laws of New Zealand. Likewise, the phrase, "a person whose parents are naturalized", must be reasonably interpreted to mean "a person born outside New Zealand" whose parents are British subjects naturalised "not under the laws of New Zealand." The case of Lum v. Attorney-General for New Zealand (1) may be cited in support of this construction although it was decided before the Amendment.

Lum and his wife, who were natural-born Chinese, resided and married in New Zealand, where six children were born to them. Desiring to take the children to China to be educated, Lum asked the Court to determine whether upon their return they would be subject to the restrictions imposed upon the immigration of Chinese by the Immigration Restrictions Act, 1908, and its Amendments. For the purpose of these Acts "Chinese" is defined as "any person born of Chinese parents, and any native of China or its dependencies, or of any island on the Chinese seas born of Chinese parents; but does not include Chinese naturalized in New Zealand." The Attorney-General contended that the term Chinese should mean (a) any person of

(1) N.Z.L.R. (1919) 741.

the Chinese race wherever born; (b) any person of whatever race who was born in China or its dependencies or in any island of the China seas if his parents were also born there. "Parents" was used in two senses in the same section. The term "native of China" was ambiguous. It meant either born in China or a member of the aboriginal race. "Island in China seas" was inserted so as to include Hong Kong or Formosa. "Chinese parents" did not mean belonging to the Chinese race, as that would be mere repetition, but should mean persons born in China. He submitted that this was the only way the section could be interpreted without doing violence to it.

But the Court held that Lum's children were not "Chinese" within the meaning of the definition upon the following grounds: (1) that it was not to be supposed that the Legislature intended to discriminate between Chinese naturalised in New Zealand and Chinese in New Zealand who were British subjects by birth, to the disadvantage of the latter; (2) that the last clause of the definition excluding "Chinese naturalized in New Zealand" could be reasonably interpreted as applying to Chinese naturalised by being born in New Zealand; (3) that the words "born of Chinese parents" could be reasonably limited to persons born of Chinese parents outside New Zealand; and (4) that as Lum's children were British subjects by reason of their birth in New Zealand, the rights vested in them as such were not to be taken away except by express words or necessary implication, and that the language of the definition did not satisfy either of these conditions.[1]

(1) (1913) [illegible]

Chapter XV.

THE UNION OF SOUTH AFRICA

52. The Provincial Acts.- Immigration in South Africa was governed by provincial laws before the enactment by the Union Government in 1913 of the Immigrants Regulation Act. In the Cape Province, special Acts regulating the admission and residence of Chinese were repealed only in 1933. Owing to the peculiar traditions of the provinces, the Union Act was so framed as to embody all the salient features of the provincial legislation. Discussion will therefore be facilitated if attention is drawn at the outset to the close relationship existing between the two sets of laws.

(i) The Transvaal. (a) Law III of 1885

The first Law[1] of the Transvaal dealing with Asiatics provided for their registration and regulated the right of property and of trade and residence; it was intended to control and not to prohibit the immigration of Asiatics, including Chinese. It applied to persons belonging to any of the native races of Asia, including Arabs, Malays, and Mohammedan subjects of the Turkish dominions (s. 1). Asiatics settling in the Republic were required to register themselves within eight days after arrival and to pay a fee of £25. Contravention of this section was punished with a fine or imprisonment in default. The Government had the right to point out certain streets, wards and locations for them to live in (s. 2).

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(1) Laws of the Transvaal (translated by Barber, 1901), 250.

The registration fee was reduced to £3 by the 1886 Amendment.[1] Section 2(d) should now be read: "the Government shall have the power for sanitary purposes, of showing them fixed streets wards and locations for habitation". The Law was further slightly amended in 1887[2] and 1890.[3] A resolution was adopted by the Volksraad in 1892[4] to enforce the provisions regarding trade and residence of the Asiatics. The first Volksraad again passed a resolution, in 1893,[5] urging strict application of the Law and requiring every Chinese to provide himself with a special pass on which a stamp of £25 should be affixed and renewed annually. If he failed to exhibit his pass, he would be arrested and punished by a fine of £25, and in default of payment by imprisonment not exceeding one month, and upon repetition of such default he should be banished from the Republic.

(b) The Indemnity and Peace Preservation Ordinance, 1902

The Ordinance was passed "for the maintenance of good order and government and the public safety" of the colony. It provided that no person might enter the Transvaal without a

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(1) Laws of the Transvaal, 1155.

(2) Ibid., 1156; Executive Council Resolution, 24 January, 1887.

(3) Ibid., 342.

(4) Ibid., 436.

(5) Ibid., 456.

permit granted under the Ordinance unless he was resident and actually in the colony or the Orange River Colony on 31 May, 1902, or had before the date of this Ordinance received a permit or other authorisation to enter the Colony. An Amendment of the Ordinance in 1903 required any person to produce the permit on demand by the police, and if he failed to prove that he was duly authorised to enter or reside in the Colony, the magistrate might make an Order directing such person to leave the Colony within a specified time. Penalties for failure to leave were imprisonment with or without a fine, and in default of payment a further term of imprisonment (s. 7). Should the person again fail to leave the Colony after such imprisonment, he was to be sentenced to ~~deportation~~ imprisonment, with or without fine (s. 8).

(c) The Asiatic Registration Act, 1907

The Act No. 2 of 1907, amending Law III., provided for the registration of Asiatics lawfully resident in the Colony. "Asiatics" was to mean "any such male person as is described in article 1 of Law III of 1885 not being a Malay born and resident in South Africa nor a person introduced into the Colony under the Labour Importation Ordinance, 1904, and not being an officer in the Chinese Consular Service." The following were deemed to be Asiatics lawfully resident in the Colony: (i) any Asiatic authorised to enter by a permit issued under the Indemnity and Peace Preservation Ordinance, or issued between 1 September, 1900, and the date of the

passing of the said Ordinance; (ii) any Asiatic resident and actually in the Colony on 31 May, 1902; or (iii) any Asiatic born in the Colony since that date (s. 3). Every Asiatic who entered the Colony must apply for registration within eight days after arrival (s. 4(2)). If he failed to make the application he was liable to fine and imprisonment, or if he was found without a certificate of registration he was ordered to leave the Colony, but subject to the provisions of the Peace Preservation Ordinance. From the foregoing it is apparent that the Government had no power to deport the Asiatics who failed to register either through negligence or because they were not lawfully resident in the Transvaal.

(d) The Immigration Restriction Act No. 15 of 1907

The Act defined a prohibited immigrant as, inter alia, any person who was unable to write out (from dictation or otherwise) and sign in the characters of a European language an application for permission to enter the Colony (s. 2(1)) and who at the date of his entry was subject to the provisions of any law in force which might render him liable to be removed or to be ordered to leave the Colony for failure to comply with its provisions (s. 2(4)). The effect was to exclude perpetually all Asiatics, however high their social status or educational attainments, who had not already acquired domiciliary rights. The education test which has elsewhere been found sufficient to exclude "undesirable immigrants" has become, in the Transvaal, a dead letter as regards Chinese and other

Asiatics, except that it might be utilised to bar the re-entry of Chinese persons domiciled before the war who had not yet taken the necessary steps to assert their claim to return.[1] Therefore a Chinese domiciled in the Transvaal and eligible for a certificate under Act No. 2 of 1907, would not be entitled to return if he could not pass the test. Chinese newcomers, though qualified in "education" but not entitled to a certificate, were prohibited immigrants.

The Government, by the repeal of the Peace Preservation Ordinance, was now armed with the power to remove any person from the Colony who was deemed dangerous to the peace, order and good government of the Colony and who, having been ordered to leave, failed to comply with the terms (s. 6).[2] The section being amended by Act No. 38 of 1908, the power of removal now extended to a person who, having complied with the terms of such order, subsequently re-entered the Colony without the prescribed written authority.

(e) Act No. 36 of 1908

Law III. of 1885 was further amended by an Act to validate the voluntary registration (being registration outside that required by Act No. 2 of 1907) which took place after 10

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(1) Which had to be done within a year after the commencement of the Act No. 36, 1908.

(2) Cf. Report on the Act by the Attorney-General, Cmd. 3887, 1908, 35-37.

February, 1908, after a compromise had been reached between the Asiatic community and the Government. The Act applied to the Asiatics who failed to comply with the provisions of the 1907 Act, but to the Asiatics who should refuse to take advantage of the new Act, Act No. 2 of 1907 remained applicable. The definition of "Asiatic" was modified so as to exclude Mohammedan subjects of the Turkish Dominions. Certain circumstances were to give Asiatics the right to registration. They were either (a) the holding of a certificate under Act No. 2 of 1907, (b) birth in the Transvaal, (c) residence in the Transvaal for three years prior to the outbreak of war (11 October, 1899), (d) actual residence in the Transvaal at the end of the war (31 May, 1902), or (e) possession of a Peace Preservation Ordinance permit. An Asiatic who, being entitled to registration, should happen to be outside the Colony, had under the new Act to make his application for registration by post. One of the loopholes of Act No. 2 of 1907 had been that under s. 4(2), an Asiatic who on entering the Colony claimed that he was lawfully resident therein, had eight days after his entrance within which to apply for registration. This provision made it impossible in many cases effectively to enforce either that Act or the Immigrants Restriction Act of 1907, as an Asiatic was soon lost sight of amongst his compatriots in Johannesburg and other towns. An Asiatic under age who, under the 1907 Act had to apply for registration at the age of eight, now need only apply when he

attained the age of 16. The legal machinery for dealing with Asiatics found not to have any right of residence in the Colony, was modified so as to enable a removal order to be issued under s. 6 of the Immigrants Restriction Act of 1907. Before the passing of the latter Act, provisions of the Peace preservation Ordinance were applied, which consisted in the making of an order to leave the Colony, and infringement of it merely involved fine and imprisonment.

The place to which a deportee might be sent was considered in the case of Leung Quinn v. The Attorney-General.(1) The appellant, pending deportation, had been detained in custody for a considerable time. He applied to the Court to declare whether he could lawfully be deported to some adjoining territory instead of to China, between which country and the South African ports transport facilities were insufficient, in the absence of express provisions in the Act that an Asiatic so removed must be sent to his country of origin. The Court ruled that the Legislature could not have intended the removal to be confined to mere removal to neighbouring territories, but must have intended to provide for deportation to some other country in cases where the adjoining colonies and States might object to receive the persons sent away. The evidence was clear, the Court stated, that the Coast Colonies and the Orange River Colony emphatically objected to any Asiatics or

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(1) (1910), T.P.D. 348.

undesirables being sent to their territory to remain, unless they were either born or domiciled there. Indefinite detention would not be justifiable, but the question whether the duration of custody was reasonable depended on the circumstances of each case. The applicant was at last sent to Ceylon, with 25 other Chinese. In a later case[1] it was decided that an Asiatic convicted of failing to produce a certificate of registration was liable to a fine of £100 as provided in the general penalties clause (s. 18), in addition to deportation. The Court has given a series of other judgments construing this Act. In case of refusal by the Registrar of Asiatics to issue a certificate where an appeal from his refusal had been dismissed by the magistrate, the Court had no power to interfere unless the applicant could show that he was entitled to the certificate or that the magistrate or the Registrar had committed a breach of some statutory duty.[2] The Registrar could demand the production of such certificate at any time or place whatsoever, together with the thumb impressions.[3] But the police could not forcibly enter into the house of an Asiatic in order to demand such production.[4] "For Asiatics like everybody else in the Colony were entitled

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(1) R. v. Daba Abdullah (1911), T.P.D. 236.

(2) Ho Ying v. Minister of Justice (1911), T.P.D. 33.

(3) R. v. Ain Hong (1913), T.P.D. 708.

(4) Ho Si v. Vernon (1909), T.S. 1074.

to enjoy certain fundamental rights to the liberty of their persons and the privacy and security of their dwellings, unless these rights were clearly taken away by statute. These were disabling acts and must be strictly construed." The Court further held that the power to arrest, without a warrant, any Asiatic who failed to produce a certificate on demand should be confined to cases in which deportation proceedings were taken, and did not extend to cases in which it was intended to proceed against an Asiatic for fine and imprisonment for a breach of one of the sections, as provided by s. 18 of the statute.

The Immigration Acts and Act No. 2 of 1907, except so far as applicable to the registration of minors lawfully resident in the Transvaal, were repealed by the Union Act in 1913. Act 36, 1908, stood intact until amended by Act 37 in 1927, but the protection given to holders of registration certificates was repealed when Act 15, 1931, became law.(1)

(ii) The Cape of Good Hope

The Immigration Act, 1902, defined "prohibited immigrant" as, inter alia, one who was unable to write out and sign in the characters of any European language an application for admission. The wife and minor child of any admitted person and persons domiciled in South Africa were exempted. The Law was found not sufficient to prevent the introduction of Chinese into the Colony. A special Act (No. 37) to exclude the Chinese, passed in 1904,(2) was to be in force for thirty

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(1) See infra, § 53.

(2) Sanctioned by an Order in Council of 10 August, 1904: State Papers, 99, 598.

years, being amended in 1906 and repealed by Act No. 19 of 1933. The Act made it unlawful for any Chinaman to enter into or reside in the Colony except by virtue of a certificate of exemption, which was granted only to persons being British subjects either by birth in any Colony or by naturalisation in the Cape (s. 3), and to every Chinese resident or present in the Colony at the time of the passing of the Act (s. 6). A register was compiled of the certificated Chinese who, together with their wives and children, were exempt from the operation of the Act. Chinese not being British subjects by birth, nor being naturalised subjects naturalised in the Colony, who left the Colony were not permitted to re-enter. Their certificate of exemption lapsed from the date of their departure. No further certificate of naturalisation was to be issued to any Chinese on any ground whatever (s. 33). The certificate of exemption was to be renewed once a year (s. 12) and produced in each and every case either (i) on application for registration when the holder, leaving one district, took up residence in another district (s. 15); (ii) when he was temporarily present in a district other than that in which he resided (s. 16): (iii) when applying for a trade licence or entering into a contract of labour (s. 17); (iv) when renting or seeking occupation of any shop, store or building (s. 21); (v) on receipt of the railway ticket authorising him to travel by rail in the Colony (s. 25); or (vi) when applying for registration as a voter in any election, in the case of a Chinese who was a British subject born or naturalised in the

Colony (s. 35). The contravention or evasion of the provisions of the Act by any Chinese was punishable by a fine and/or imprisonment (s. 18). In addition to the penalties, he was liable to be deported from the Colony to China or to the place whence he had come (s. 19). The Court may decide for the purpose of any prosecution whether any person is a Chinese, to whom only the Act would apply (s. 27).

The Chinese Exclusion Amendment Act of 1906 bestowed a great benefit upon the holder of a certificate of exemption granted under s. 6 by allowing him to re-enter the Colony if a permit to visit China or other eastern country from which he may originally have come had been obtained. The Governor was to prescribe by regulation the mode in which applications for permits should be made, and the conditions under which permits were issued.

Any Chinese changing his residence from one district to another must notify the fact to the magistrate of both districts as soon as possible. Although there was no provision defining the period within which he must discharge his duty so to report, a Chinese who had not notified his arrival until after the lapse of seven months was held to be rightly convicted as contravening the law.(1) But, it was held in another case, the mere change of address from one street to another in the same district imposed no duty upon the Chinese

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(1) R. v. Lok Jan (1906), E.D.C. 28.

to give such notification.(1) Regulation s. 9, promulgated under powers given by the Act, providing that the holder of any certificate before permanently changing his address or occupation in any district should personally notify the magistrate of his intention so to do, was not to be understood as compelling a notification of a change of address within a district, as well as of a change from one district to another. States in derogation of common law rights should be construed strictly, and the regulation, which could be so understood, was to that extent ultra vires.

Section 2(e) of the Act, which provided that the Act shall not extend to any person who held a certificate of exemption under the Act, was construed as exempting the holder of a certificate merely from the general prohibition in the Act as to entry into and residence in the Colony, and not from all its provisions. Therefore the provisions of s. 34, that any Chinaman, not being a British subject, if twice convicted of either assault or gambling or of any other crime before a Supreme Court, was to be deported after the expiration of the sentence passed upon him, were applicable to the holder of such a certificate.(2) The expression "expiration of the sentence" was held to include cases where a fine had been imposed and paid, as well as cases where a sentence of imprisonment had been served. It was conviction and not penalty

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(1) R. v. Sen Anton (1906), E.D.C. 49.

(2) Ah Yet v. Union Government (1921), A.D. 97.

which involved deportation. The appellant Chinese concerned in the case, having been convicted at least twice for offences against the gambling laws and fined, but none of them having served two terms of imprisonment, were liable under the terms of the section to be deported to China.

The Immigration Act, 1902, was repealed by the passing of a new Act in 1906, which in turn was replaced by the Federal Immigrants Regulation Act, 1913. The Chinese Exclusion Act, however, continued in force in the Cape, governing the admission and residence of Chinese until its repeal in 1933.

(iii) Natal

The Immigration Restriction Act of 1887 first created the language test. The immigration into Natal by land or sea of any person who should fail to write out and sign in the characters of any language of Europe an application for admission, was prohibited. Unlawful entry of prohibited immigrants was punishable, in addition to any other penalty, by removal from the Colony. Any person who had been formerly domiciled in Natal, and the wife and children of a non-prohibited immigrant, were to be free from any prohibition of the Act.

Act No. 30 of 1903, repealing the Act of 1897, placed closer restrictions upon immigration. The education test was retained. Domiciled persons, as distinguished from a person who has had his ordinary place of residence in Natal for a

period of not less than three consecutive years, were exempted. A prohibited immigrant may apply for a pass to enter Natal for a temporary visit or for the purpose of embarking at a Natal port for some other country, upon deposit of a certain amount of money. But if he makes his way into, or is found within Natal, in disregard of the provisions of the Act, he may, in addition to liability to removal, be imprisoned for six months.

The reference to domicile was interpreted by the Amendment Act No. 3 of 1906 to be applicable only to the domicile acquired by residence in Natal on the part of a person seeking to enter the Colony, and not to domicile acquired in any other manner. And such domicile must imply that the person concerned was not a prohibited immigrant within the meaning of the Immigration Restriction Act, 1897, or that of 1903, if either of the said Acts was in force at the time when he began to reside in the Colony. The wife and child of such a person, seeking to take advantage of the exemption, must prove to the satisfaction of the Immigration Officer that they are such wife and child of a person who was not a prohibited immigrant and who was at the time resident in Natal. In other words, the matter was left to the absolute discretion of the Officer. An Asiatic boy claiming exemption by virtue of his father's being a resident in Natal, was refused permission to land by an officer who was not satisfied with the fact of parentage. The Court upheld the decision of the officer, admitting that the question whether there was any reasonable doubt in such

case was one which the Act left to the Immigration Officer alone. The Court could not interfere unless it had found that there had been no exercise of his discretion or something on the part of the Officer to render the Act nugatory, as, for instance, the refusal to listen to evidence or to allow a reasonable opportunity for it to be adduced. But where an opportunity was given of producing all evidence, and the Officer had considered that evidence and given his decision upon it, the Court had no jurisdiction to interfere with the decision even although the Court might consider that it was entirely wrong.(1) An application for leave to appeal was also dismissed by the Supreme Court.(2)

The Act was superseded by the Union Act.

(iv) The Orange Free State

Chapter XXXIII. of the Law Book enacted in 1890 that no Arab, Chinaman, coolie or other Asiatic coloured person may settle in the State or remain there for longer than two months without having obtained permission from the State President. Any such coloured person found in the State contrary to the provisions of this law was liable to a fine of £25 or imprisonment not exceeding three months. By Chapter LXXI., a poll

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(1) Nathalia v. Principal Immigration Restriction Officer (1911), N.L.R. 552.

(2) (1912) A.D. 23.

tax of ten shillings per annum was levied on each coloured person of the male sex between the ages of 17 and 70 who resided within the State but outside the public diggings. Arabs, Chinese and coolies were considered as coloured persons for the purposes of this Law.

It was held by the Courts that the law prohibiting the Asiatic from dwelling in the State without the permission of the President was not in conflict with s. 58 of the Constitution, which provided that "the laws are equal for all", and was valid.(1)

The Admission and Expulsion of Aliens Act of 1899 adopted the education test of any European language. Aliens who failed to pass the test were in no circumstances permitted to enter the State. The Union Act of 1913, superseding the 1899 Act, retains the provisions of ss. 7 and 8 of Chapter XXXIII. forbidding coloured persons to own property or to carry on commercial business or farming. Any person who acts in contravention of those provisions shall be deemed a prohibited immigrant in respect of the Free State.

53. The Immigrants Regulation Act No. 22, 1913.- The Act consolidated and amended all laws in force in the provinces relating to prohibited immigrants. In addition to the education test, any person or class of persons deemed by the Minister

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(1) Cassim v. The State (1891), 9 C.L.J. 58.

on economic grounds or on account of standard of habits of life to be unsuited to the requirements of the Union or of any particular province, was declared a prohibited immigrant. No prohibited immigrant shall be allowed to enter the Union, unless he was born before the commencement of the Act in South Africa of parents lawfully resident there, or was born after the commencement in any place at a time when his parents were domiciled in any part of the Union. or he himself had a domicile in any province. The wife and child of a domiciled person of a lawful and monogamous marriage duly celebrated according to the rites of any religious faith outside the Union, are among the exempt classes. But an Asiatic person lawfully resident in one province may not enter another province, or he will be held a prohibited immigrant and deported. The Immigration Board shall have full jurisdiction to deal with appeals of persons seeking to enter or being found within the Union against the decisions of an immigration officer. Before such appeal can be heard, a deposit must be made of an amount sufficient to cover the detention expenses, the costs of bringing the appellant before a Board and of returning him to the place at which he had been "restricted" or challenged and the cost of his return passage to the place whence he came. No court of law shall review, quash, reverse, interdict or otherwise interfere with any proceedings or actions of the immigration authority, except upon a question of law reserved by the Board. The question of domicile, among

other questions, is deemed a question of law. The Minister is empowered to issue a temporary permit to any prohibited immigrant to enter and reside in the Union. He may also in his discretion authorise the issue of a certificate of identity to any lawful resident who, desiring to go abroad with the intention of returning, is apprehensive that he will be unable to prove on his return that he is not a prohibited immigrant.

When the Act came into operation on 1 August, 1913, a notice was published by the Minister of the Interior under powers conferred by the Act, in which he declared every Asiatic person to be unsuited on economic grounds (1) to the requirements of the Union, and (2) to the requirements of every province of the Union (a) in which such person was not domiciled, or (b) in which such person was not, under the terms of any statute of such province, entitled to reside. The effect of the Notice is that thereafter all Asiatics, to whatever class they may belong, become prohibited immigrants. It has been contended that Asiatics have nothing in common as a class in economic attributes, that the classification is made not on economic but on racial grounds, and that the Notice is beyond the powers conferred upon the Minister. Conflicting decisions have been rendered by the provincial tribunals. In Natal, in Re Seedat,[1] a full Court of three judges held that

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(1) (1914), N.L.R. 198.

the Notice is intra vires. In the Cape Provincial Division it was held by a majority that the Notice is ultra vires.(1) The Transvaal Court concurred in the Natal decision. The matter was finally brought before the Appellate Division which again decided by a majority of three to two, with the Chief Justice dissenting, that the Notice is intra vires.(2) Three points were dealt with in the judgment. In the first place, the expression "Asiatic person" in its primary sense denotes a member of one of the native races of Asia, regardless of colour; but, in its secondary meaning, it should mean coloured Asiatic only. The Syrians, though an Asiatic people, who have been held not to be "Asiatics", are not included.(3) The contention that the basis of classification is too wide, that it is not a classification which conforms to the provisions of the statute, and that the discretion of the Minister has not been duly exercised, therefore fails. Secondly, any number of persons possessing some attribute in common might constitute a class. It is immaterial whether the number is few or many. Asiatics certainly have a common attribute, and the mere fact that they run into many hundreds of millions is no reason for holding that they do not form a class of persons in the general sense of that expression. The argument that Asiatics are of different position and of various ranks, and that not every

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(1) Mohamed v. Immigrants Appeal Board (1917), C.P.D. 159.

(2) R. v. Padsha (1923), A.D. 281.

(3) Ganduer v. Rand Township Registrar (1913), A.D. 250.

individual of them will affect the economic condition of the Union remains unchallenged. (The Court referred to the history of legislation which had held or intended to hold Asiatics as prohibited immigrants.) In the third place, the Court ruled that the classification is based upon economic and not racial grounds. The Minister may select any person or class of persons possessing common attributes as being unsuitable to the requirements of the Union for economic reasons. Here economic ground corresponds to the racial or national one. Asiatics are chosen not because of their common quality but because, in the interest of the Union, they should be permanently excluded.

The decision does not seem to have cleared up the controversies. We may add, in passing, that the words "every Asiatic person" cannot be properly construed as confined to coloured Asiatics. It is not the task of a court, as the dissenting judges asserted, to supply words which Parliament or the Minister has either intentionally or carelessly left out. Further, the basis of the classification is racial merely, which is not justifiable on the terms of the Act authorising it, which are limited to "economic reasons". Economic attributes of members of the same race may vary indefinitely, while those of men of different races may be identical. The Act undoubtedly aims at the exclusion of a certain section or fraction of the Asiatic community, whose presence is deemed undesirable or unsuitable in the interest of the Union. But

taking the literal meaning of the Notice, the whole Asiatic community, rich or poor, noble or mean, is included in the prohibition. The departmental document therefore has a wider purview and operation than the enabling statute purports to confer, although it had been the tradition of South African legislation to deal with Asiatics without discrimination. The construction, as appears in the judgment, may be correct from the historical or logical point of view, but seems unsound in the legal sense.

A gross miscarriage of justice occurred when the Natal Court interpreted the Act in relation to the rights of the wife and child of a domiciled Asiatic to enter the Union. Judging from the debates in Parliament on the Bill, the intention of the clause concerned appeared to have been to admit freely into the Union the wife and children of any domiciled Asiatic, if she were in fact his only wife, even though she had been married to him according to the rites of a religion which recognised polygamy.(1) The Natal Court, however, held in the case of an Indian woman that under the words "lawful and monogamous marriage" were included only such marriages as were recognised as valid in South Africa as well as in England, that was to say, "the voluntary union of one man with one woman, to the exclusion, while it lasted, of all others," and that consequently the marriage of a man with a woman under a system

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(1) Cmd. 7265, 1914, 18.

which recognised the right of the husband to marry another woman was in law not monogamous but polygamous.(1) The wife of a domiciled Indian was therefore excluded, contrary apparently to the intention of the legislature. An Indian's Relief Act was eventually introduced in 1914 to interpret the law, providing in express terms that "the wife" shall include any one woman between whom and the exempted person existed a union recognised as a marriage under the tenets of an Indian religion.

But the wife and children of a domiciled Chinese are still barred from admission into South Africa. The Court has held that the Indian's Relief Act exempts a woman married under the tenets of an Indian religion to a person who is not a prohibited immigrant and the children of such a marriage, but that Confucianism not being an Indian religion, the children of a marriage according to its tenets cannot claim to be exempted persons.(2) The Court was of the opinion that the Act had been passed with a view to ameliorating the condition of Indians and not of other Asiatic peoples. "It was entirely directed towards benefitting Indians and when the legislature spoke of an Indian religion they mean such religious tenets as are usually held by Indians. Confucianism is a well known Chinese religion, and it is not a religion peculiar to India". This construction totally ignores the fact that the teachings of

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(1) Bibi v. Immigration Officer for Natal (1913), A.D. 495.

(2) Ho Poy v. Principal Immigration Officer (1916), T.P.D. 53.

Confucius are ethical and not religious commandments, and again defeats the original intention of the legislature to ensure to Asiatics the right to bring in their wives and children, a right which they enjoyed unconditionally under provincial laws.

The jurisdiction of the Courts over immigration cases is clearly taken away. They cannot even examine the evidence taken before the Board with a view to ascertaining whether the findings of fact of the Appeal Board are correct or not.(1) But they have power to interfere when there is any evidence to show that the wide powers granted under the Act are being abused and that the officials are not acting in a bona fide manner but in a purely arbitrary manner and contrary to some express provisions of the Act.(2)

A child born after the commencement of the Act, of Asiatic parents illegally resident in the Union at the time of its birth, has been held not to be a prohibited immigrant and entitled to enter Natal, although such child will be excluded if born before the operation of the Law.(3) An Amendment was effected in 1927 (No. 37) which provides that no child of an exempted person not accompanied by its mother shall be admitted unless its mother is already resident in the Union or is deceased. And a child, if born outside the Union at a time when

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(1) Juvan v. Immigration Officer (1922), N.L.R. 105.

(2) Ebrahim v. Immigration Board (1922), C.P.D. 129.

(3) Shantabhai v. Immigration Officer (1924), N.L.R. 284.

its parents were domiciled in the Union must be brought into the Union within three years from the date of its birth. Domicile in the Union shall be deemed to have been lost if a person absents himself from the Union and does not re-enter within three years from the date of departure or from the date of the commencement of the Amendment. The deportation of Chinese persons under s. 34 of the Chinese Exclusion Act, 1904, was also made not compulsory but "in the discretion of the Minister." The Amendment further empowers an Immigrant Appeal Board to cancel any registration certificate or certificate of domicile or any other document authorising the holder to enter or remain in the Union if it is proved that such certificate was obtained by fraudulent representations. This was aimed at the thousands of Indians who were said to have obtained their certificates illegally as a consequence of the compulsory registration.(1)

A fraudulent original entry has been held to be legalised by the issue of a certificate of identity, enabling the person to re-enter the Union. The certificate, being issued with full knowledge of the facts,(2) the Asiatic is deemed to have been exempted from the provisions of the Act and to have acquired a domicile. A domicile once acquired cannot be lost through lengthy absence merely. The onus is upon the officer to prove that the domicile has been lost. Sonday, who had

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(1) Millin, The South Africans (1934), 228.

(2) Kara v. Principal Immigration Officer (1931), C.P.D. 149.

left South Africa early in 1918, arrived in 1930 just a few days short of the three-year limit. It was held that the presumption created by the 1927 Amending Act did not arise.(1) But an Asiatic, having acquired a domicile in one province, cannot by virtue of that domicile enter another province. His residence must be confined to the province where he had become lawfully domiciled.(2)

By an amendment in 1931 (No. 15) the authority of the certificate of registration or of domicile issued at any time under any law was finally annulled. After the passing of Act 37 in 1927, the Board could cancel a certificate obtained by fraud by an Asiatic or by anyone on his behalf. It was held to apply to such documents issued on and after 1 August, 1913, when Act 22 had been in force and to which Act 37 was an amendment.(3) The Courts reserved the power to cancel certificates granted under Act 36, 1908, prior to 1 August, 1913, but only when the fraud was that of the holder himself. If the holder was innocent of any fraud, his certificate was conclusive evidence of his right to reside in the Transvaal.(4) The situation has thus changed with the passing of the Act in 1931. An Asiatic

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(1) Principal Immigration Officer v. Sonday (1931), C.P.D. 384.

(2) Omar v. Principal Immigration Officer (1931), C.P.D. 16.

(3) Principal Immigration Officer v. Purshotam (1928), A.D. 435.

(4) Principal Immigration Officer v. Bhula (1931), A.D. 323.

cannot now by virtue of such certificate be entitled to enter or reside in the province. In other words, all Asiatics unlawfully in the Union according to the early provincial Acts or the Immigration Act of the Union, though having obtained a certificate, are no longer protected by it and thus become prohibited immigrants.(1)

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(1) Ismail Mia v. Commissioner for Immigration (1933), T.P.D. 338.

Chapter XVI.

BRITISH MALAYA

54. The Immigration Restriction and Alien Ordinances.- The legislative policies of the Straits Settlements and other Malay States have been parallel. An initiative taken in the Colony is invariably followed by the States. The High Commissioner, moreover, being entrusted with the task of carrying out British policy throughout Malaya, will exercise influence to secure uniform legislation. Therefore when we are speaking of the legal position in the Colony, similar statutes may be presumed to prevail in the States, and vice versa.

The Labour Ordinance XIX of 1923, revised in 1926, of the Straits Settlements contains special provisions relating to Chinese immigrants of the labouring class. For the purpose of the Ordinance, "China" is to include Hong Kong, Macao and all such territory as formed part of the Chinese Empire on 1 January, 1841. "Chinese immigrant" does not include a native of China who travels as a first or second class passenger. An immigrant ship will be boarded by a Health Officer and an officer of the Chinese Protectorate, who shall inquire into the physical and economic condition of the immigrants. They may be removed to the office of the Protector or to a depot for further examination. An immigrant, if found unfit for labour, or who has

promised to enter into a contract, may be sent back to China at the discretion of the Protector. It is evident that the Ordinance imposes no restriction upon the immigration of free Chinese labourers. A corresponding enactment is found in the Labour Code No. 18. 1923, of the Federated Malay States.

The Immigration Restriction Ordinance, 1928, vests the Governor in Council with the power to prohibit or regulate, with the approval of the Secretary of State for the Colonies, the entry into the Colony of immigrant labourers or any class of immigrant labourers, when he is satisfied that the conditions of labour prevailing in the Colony or in any Malay State are such that the influx of immigrant labourers is likely to cause unemployment. The power was not used until 31 July, 1930, when the Governor by proclamation in the Gazette ordered that for a period of three months no adult male Chinese immigrant labourers shall land in the Colony. The provisions did not apply in the case of certain ships, which might bring within each successive period of one month a number of adult male Chinese immigrant labourers not exceeding one-tenth of the total number they have brought during the three previous months. The expression "adult" shall mean a person of 14 years of age or more. The practical number admissible was 6,016 per month.(1) No restriction is placed upon the immigration of Chinese women and children. The proclamation has been renewed and continued in force in successive periods, a quota being fixed at 2,500

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(1) Colonial Reports, S.S. 1930, 65.

per month from October, 1931.[1] Since June, 1932, the number permitted to land has been 1,000 in each period of one month.[2] The same enactment became Federal law (No. 24) in 1930.

The Alien Ordinance of 1932 was passed to regulate the immigration of aliens into the Colony and to control their residence. The word "alien" shall mean any person not being either a British subject or the subject of a State under British protection or British mandate. No ship shall bring during any month a number of aliens exceeding twenty-five of any one nationality. They must not land or disembark except at appointed places and with the permission of the Immigration Officer, or they can be arrested without warrant and are liable to a fine of $500, and in default of payment, imprisonment not exceeding six months. A landing fee of $5 is charged on every immigrant upon the issue of a landing permit. which is not to be withheld except in certain circumstances.

An alien exempted from the provisions relating to admission includes any person (1) entering the Colony from another part of the Colony or from any Malay State, (2) from any part of the Dutch East Indies or British Borneo, (3) being a child not over 12 or a woman, and (4) being in lawful possession of a certificate of admission or a certificate of residence.[3] An alien

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(1) S. S. Proclamations and Orders, 1931.

(2) Ibid., 1932.

(3) Ibid., 1932, No. 2442.

already resident in the Colony may apply for an admission certificate and pay a fee of $5. In the case of an alien in lawful possession of a landing permit, or who can prove that he arrived in the Colony or in any Malay State before the commencement of the Ordinance, no fee is chargeable. The certificate is valid for a period of two years and may be renewed for any number of periods, or cancelled by the local authority. Appeal lies from the refusal of such renewal to the Governor in Council, whose decision shall be final. An alien who fails or refuses to apply for the certificate will be arrested without warrant and returned to the country of his birth or citizenship.

The certificate of residence is granted to an alien who has resided in the Colony for a period of eight years. Like the certificate of admission, it also is subject to cancellation by the Governor in Council, which in both cases automatically brings about the deportation of the holder.(1)

55. The Government of Chinese Immigrants

(i) The Protectorate

Considerable powers have been delegated to the Protectors of Chinese. Besides the functions enumerated in the Labour Ordinance, which had originally led to the creation of the Protectorate, the Secretary for Chinese Affairs and the Protectors

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(1) S. S. Proceedings of the Legislative Council, 1932, B. 144.

of Chinese are to be the Registrar and Assistant Registrar of Societies,[1] Deputy and Assistant Controller of Labour,[2] and Assistant Directors of Education in the Federated Malay States.[3] They are further entrusted with the exercise of powers conferred by the Children Ordinance, 1927, and the Protection of Women and Girls Ordinance, 1930, to direct Chinese Advisory Boards and to control the repatriation of destitute Chinese.

(ii) The Secretary for Chinese Affairs

The Secretary was specially vested with certain judicial powers in respect of summoning, examining and arbitrating between persons of Chinese nationality. Under the enactment of 1899, concurrently adopted by the several Malay States, the Resident may direct the Secretary to inquire and report as to any public matter relating to persons of Chinese nationality; or when both parties to any complaint or petition addressed to the Secretary are of Chinese nationality, he may make such order as may be necessary to secure substantial justice. He can lawfully summon any person of Chinese nationality to give information, and a warrant may be issued for the arrest of any person failing to attend. He may appear in the court in certain cases, both civil and criminal. The Court may also refer

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(1) Rule No. 1957, 1924, under the Societies Ordinance.

(2) Rule No. 533, 1921, under the Labour Ordinance.

(3) Rule No. 5801, 1928, under the Registration of Schools Enactment.

certain matters concerning Chinese Customs or Chinese affairs demanding special knowledge to the Secretary for inquiry or arbitration, the award of which is final. The jurisdiction of the Court will be ousted in certain cases relating to civil status if the Secretary can prove that he is empowered to decide and that he has begun to entertain such dispute before the parties had resorted to the Court.

In the conducting of such judicial inquiries the Secretary may hear and decide in the absence of any person who fails to attend notwithstanding that the interests of such person may be prejudicially affected by such hearing or decision. No advocate or solicitor is allowed to appear in the Secretary's Court except in proceedings where the matter at issue has been referred there by the Court, or presented for arbitration by mutual agreement of the parties.

Among his administrative functions there may be mentioned the power to establish Chinese Advisory Boards, to exercise censorship over Chinese publications and performances, to register and control Chinese passenger lodging houses, and to visit and inspect Chinese schools in regard to sanitary conditions.

For the purpose of the enactment a person of Chinese nationality was to mean "any person bearing a Chinese name, who is a Chinese subject owing natural allegiance to the Emperor of China, or who has his domicile in the Empire of China or its dependencies." Christian Chinese are not deemed to

be of Chinese nationality, and the Law was not to apply to these. The words "Chinese nationality" were repealed by an Amendment in 1926 and the words "Chinese race" were substituted. A person of Chinese race was then to mean any person bearing a Chinese surname whose ancestors formerly had a domicile in China or its dependencies and who did not profess the Christian or Mohammedan religion. It is apparent that the alteration was made to include British subjects of Chinese origin in the application of the Law. The whole enactment was, however, repealed in 1932.

(iii) The Chinese Advisory Board

During the administration of Sir Cecil Clements Smith (1887-1893), the first Chinese Advisory Board was set up. It has been styled "an institution which was to the present time proved of the greatest utility and benefit, not only in affording facility to the Government for ascertaining the feelings of the Chinese community on any question it may choose to raise, but in securing for the Chinese an easy and inexpensive means of ventilating their views on any subject which might be considered by them inimical to their interest."(1) The Board is maintained throughout Malaya under similar regulations. Taking that of Malacca(2) as an example, it consists of official and unofficial members nominated by the Governor and

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(1) Makepeace, One Hundred Years of Singapore (1921), 111, 112.

(2) S. S. Proclamations and Orders, 1931, No. 381.

certain Chinese public bodies. The Secretary for Chinese Affairs and Protectors are among the official members. Members nominated by the Governor shall not exceed twelve, and shall hold office for life. The Straits Chinese British Association and the Chinese Chamber of Commerce shall nominate one member each, to hold office for two years. The Governor may at any time remove a member from the Board without assigning any reason. The Board may discuss and propose resolutions and take vote on any matter (1) specially affecting the general interests of the Chinese community, (2) affecting any particular section of the community, (3) connected with the promoting of education among the Chinese, (4) any scheme for relieving distress and sickness among Chinese, (5) any matter submitted for arbitration, and (6) any individual case of hardship in regard to which a member of the Chinese community may wish to seek the assistance of the Board in order to bring the matter to the notice of the Government.

Chapter XVII.

THE ASIATIC COUNTRIES

56. The Siamese Immigration Law of 1927.- The Immigration Act,[1] dated 11 July, 1927, is the first law of its kind ever enacted by Siam. Its provisions are generally applicable to any alien who is not of Siamese nationality as defined in the Nationality Law of 1913. But the Minister in charge of the Act is empowered to make orders fixing the numbers of aliens of any nationality or of any category of such aliens that may be admitted into the Kingdom each year. The country that contributes the greatest number of immigrants will therefore be the worst hit by the limitations, because no alien shall enter beyond the fixed number (s. 8). The prohibited immigrants include aliens (1) not possessing a proper passport or certificate of nationality, (2) who have suffered from certain diseases, (3) not having been vaccinated against small pox, (4) having no independent income, or (5) of bad character or likely to create disturbance or to endanger the safety of the public (s. 6). The Minister may also make an order fixing the amount of money which an immigrant must have in his

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(1) I. L. O. Legislative Series, 1927, VIII., Part II.

possession (s. 7). But alien travellers who come only temporarily or for the purpose of transit, and not for the purpose of taking up a permanent residence or exercising any habitual work, trade or industry, are exempt from this provision. They are also not affected by the fixed quota (s. 9).

To carry out the provisions of the Act, the official inspecting a ship may order the deportation by the same ship of any alien who in his opinion belongs to any category of aliens excluded by the Act (s. 11). And any alien who has entered the Kingdom after the coming into force of the Act and is found to be of the excluded categories may also be deported (s. 12). An appeal from prohibition to enter is to be decided by the Minister, whose decision shall be final, but any question arising as to alienage is to be heard by the Court (s. 16). The Act is silent as to the procedure of excluding an alien after admission. There is also some doubt as to the place to which the alien may be deported if his origin or nationality has not been proved by official documents. The Act provides that any alien not furnished with a passport or certificate of nationality may be permitted to enter upon obtaining an identification paper from an official. It is apparent that any nation may refuse to accept the expelled person who possesses no document issued by that nation evidencing national status. The question might be a serious one in view of the magnitude of the Chinese population in the country, many of whom might

have been born within British allegiance in the neighbouring Malay archipelago, as well as others recruited from China proper. The ethnical similarity between Chinese, Chinese métis and pure Siamese also prevents the clause from being carried out in its full vigour.

A fine of 1,000 baht is imposed on any alien who enters the Kingdom contrary to any of the provisions of the Act or to the order of an official (s. 14). Whoever wilfully brings or assists an alien in contravention of the Act is also punished with imprisonment or fine or both (s. 15).

The Amendment Act[1] of 1931 adds a sixth category of persons to the prohibited list, namely, persons who are unable to pay such fees as may be charged according to this Act or to the regulations.[2] The requirement of the possession of a certain amount of money by an immigrant is thereby dispensed with. The important feature of the Amendment, however, is that any alien, other than children under twelve years of age, must obtain a certificate of residence on entering Siam. This is not required of an alien who has obtained such certificate or a return permit when he left the country. Both documents are liable to cancellation if the holder is considered to have become a danger to the public peace and order. The Act is silent as to the consequences of cancellation.

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(1) I. L. O. Legislative Series, 1931, XII., Part II.

(2) The Amendment Act of 1933 adds a seventh category, that of illiterates.

In accordance with the provisions of the Act, ministerial regulations have been issued, imposing fees on admission and for residence certificates and return permits.(1) A tighter control over immigration has naturally caused resentment on the part of the persons affected.

57. The Immigration Laws of French Indo-China.- The population of the French Colony, from the point of view of its legal condition, may be grouped in two categories: the French and those assimilated to the French, on the one hand; and the natives and those assimilated to them, on the other. The first category comprises all French and other white aliens who, being of the same race and civilisation, enjoy a legal position analogous to that which they would hold in France. The second group are natives and aliens who, on account of their similitude of race and culture with the native people, are assimilated to them and treated as the natives.

In pursuance of this division, two systems of immigration law exist in Indo-China, the one governing Asiatic aliens and Chinese, and the other, other aliens, the provisions of this latter not being applicable to the "natives and assimilated".(2)

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(1) Under the Act of 1927 the admission tax was (with incidentals) 6.50 baht, increased in 1931 to 13.50. The residence certificate was originally 30 baht, increased in 1933 to 100 baht. The return permit was increased from 5 baht to 20 and its validity reduced from two years to one year.

(2) S. 36, Decree of 30 June, 1929: Annuaire de Documentation Coloniale Comparée, 1929, II, 147.

After the conclusion of the Convention of Nanking, which guarantees to the Chinese with regard to the fulfilment of formalities concerning their entry and departure the most-favoured-nation treatment, the Colonial Government does not seem to have departed from the practice of relegating Chinese immigrants to the category of other Asiatic persons of native status in the whole matter. The Decree of 1933 relating to the admittance of French and aliens into Indo-China, is not applied to natives, nor, subject to diplomatic conventions, to aliens who, by virtue of the Indo-Chinese local regulations, are authorised to organise themselves into congregations.(1)

(i) Cochin-China

The control of Chinese immigration is at present administered in Cochin by an order(2) of the Governor-General of 16 October, 1906, which regulates the immigration of Asiatics. The order, supplementing several previous orders, has been itself modified by continuous Acts.(3) It applies to Asiatic aliens or persons assimilated to them, who are defined as follows: (a) subjects of powers in whose territory France exercises a right of extra-territoriality by virtue of existing treaties; and (b) subjects or dependents of foreign Powers to

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(1) S. 39, Decree of 31 August, 1933: Annuaire de Documentation Coloniale Comparée, 1933. II, 256.

(2) Journal Officiel de l'Indochine Française, 1906, 1514.

(3) 29 June, 1910; 23 January, 1912; 4 January, 1917; 27 October, 1922.

whom the legislation of their own country does not accord full civil and national rights.

The definition will include all persons of Asiatic origin except the Japanese, who, by a treaty signed on 4 August, 1896, have been assimilated to Europeans.(1) The second part of the definition was later modified,(2) designating in most express terms the "subjects or ressortissants of Asiatic origin of foreign powers". This definition has been extended to Cambodia (Order of 30 July, 1924) and Annam (Order of 25 September, 1928). By simple analogy, it is also applied to Tonkin and Laos.

The regulation of immigration has, as an essential basis, the grouping of Asiatic aliens, or the assimilated residing in Cochin-China in congregations constituted in each province or municipality. The Chinese belong to one or other of the five congregations mentioned above, comprising all their countrymen of the same district or birthplace. The Indians may affiliate to the Buddhist or Musselman congregation, the Malays or Arabs to the Malay congregations.(3) The Chiefs of a congregation inscribe all their compatriots in a special register and record their subsequent changes, submitting it every quarter to the

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(1) State Papers, 88, 530; De Galembert, Les Administrations et les Services publics indochinoises (1931), 58.

(2) Order of 27 October, 1922: J. O. I., 1922, 2354.

(3) Nguyen, op. cit., 25.

Immigration Service or to the authority of a province or municipality for verification. All Asiatic aliens must join one of the congregations on penalty of being expelled if they refuse to do so or if the congregation does not consent to accept them. The Chiefs are free to accept or refuse new members who may apply for admission. The acceptance of membership will involve the acceptance of responsibility both civil and pecuniary, for the member.

The immigrants are received on board the ship by the agents of the Immigration Service and the Chiefs of a congregation if they land at Saigon, or they should present themselves immediately to the local authority if they arrive at other places in Cochin-China. If they intend only a short stay in the Colony, they receive a "permis de circulation" valid for three months and not renewable. If they are holders of a French passport they are authorised to reside for six months after their passport has been visaed. If the immigrants are in transit to one of the adjacent protectorates, a special pass valid for fifteen days will be issued. If, on the contrary, they declare their intention to settle in the Colony, and they are accepted by a congregation, they receive a laissez-passer valid for thirty days, and should present themselves within that period to the immigration authority. They are then immatriculated and inscribed on a personal tax roll, and receive a residence permit which must be carried at all times during their stay in the Colony.

Similar formalities are required in the case of change of residence in and departure from the Colony. An Asiatic alien must report every change to the Chief of his congregation, who delivers to him a certificate showing the new domicile he has chosen and certifying that he has paid all the sums due to the Treasury. He then presents himself to the authorities of the place where he has been inscribed to have his certificate visaed and to hand in his residence permit. Within a further period of thirty days he must, with the Chief of his new group, appear before the authority of his new place of residence. During this period the residence permit has been transferred from one place to another the change having been noted on it, and the permit is returned to the immigrant in exchange for his certificate. All information concerning Asiatics is transmitted to the central Immigration Service.

When he desires to leave the Colony temporarily, he must likewise surrender his residence permit, and receives in turn a laissez-passer valid for three months or, exceptionally, one year, if he is going to Cambodia, after having had certified the payment of his tax; if he is going to other countries of the Union, a departure permit, if to a foreign country, a passport valid for one year. is handed to him.

The above regulation is of general application. A special régime has been organised by the order of 16 August, 1907 (modified on 4 January, 1917) in favour of Asiatic aliens who belong to higher tax categories. They are inscribed on a

special roll kept by the central Service, and receive a photographed card of identity which entitles them to move and travel freely throughout the whole of Indo-China without undergoing any formalities.

(ii) Cambodia

Chinese immigration into Cambodia is governed by the Order of 15 November, 1919,[1] and its subsequent modifications.[2] It is a replica of the regulations in force in Cochin-China, except for a few points concerning the designation of congregation Chiefs by the authorities.

(iii) Tonkin

The immigration régime in Tonkin is fixed by the Order of 12 November, 1913,[3] modified by numerous Acts.[4] Unlike the Orders applying to the countries already dealt with, which employ the general term of Asiatic immigration, this Order concerns only Chinese persons. It differs also materially from the Orders applicable to the Southern Colony. In the first place, there is not in principle in the same province or municipality a separate congregation for Chinese from the same

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(1) J. O. I., 1919, 2509.

(2) 30 July and 31 October, 1924; 30 March, 1935; 20 July, 1926.

(3) J. O. I., 1913, 1998.

(4) 3 March, 30 June and 20 July, 1916; 26 September, 1919; 19 August, 1920; 18 January, 1922; 6 October, 1923; 11 November, 1924; 30 December, 1925; 20 July, 1928.

birthplace. All Chinese in one province form a single congregation. Nevertheless, where there exists an agricultural or mining undertaking, or other works employing Chinese, they shall be authorised to form a special congregation. On the other hand, the régime to which the Chinese are subject in Tonkin is more strict. The laissez-passer delivered to an immigrant is valid for fifteen days if the province in which he desires to settle is in the neighbourhood of the place of arrival. The residence permit, called in Tonkin "carte de résidence", which is to be renewed each year on the payment of the personal tax, should bear the photograph of the holder and is not valid except in the province of immatriculation. He cannot leave even temporarily for another province without a laissez-passer valid for fifteen days, though renewable. Finally, by reason of proximity to the Chinese frontier, the condition for temporary stay is more severe in Tonkin than elsewhere. And Chinese leaving for a foreign country or other country of the Union except Annam are required to carry a passport.

(iv) Annam

Less important in Annam than in other countries of the Union, Chinese immigration is regulated by the Order[1] of 25 September, 1928, abrogating the Order of 1926, and retaining

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(1) J. O. I., 1928, 2869.

in force all provisions of former legislation not contrary to the present Act. Four congregations are recognised, but in provinces where the number of Chinese is small, they may be united into a single congregation. As in Tonkin, a card of residence with photograph is delivered to each Chinese and must always be carried with him. Other provisions are analogous to those in force in Tonkin. A special disposition is that Chinese merchants domiciled in Torrane or Faifoo, and regularly inscribed on the roll of one of the congregations established in these centures, may travel from one place to another without being required to carry a laissez-passer. Similarly, Asiatics arriving by sea may be permitted to reside temporarily in Annam to transact their commercial dealings. They must take out a special laissez-passer valid for one month and within the limits of the province which is the place of landing. This laissez-passer is delivered by the Receiver of Customs. The Asiatics when provided with a proper passport may be allowed to travel in the interior for a similar period. The passport is visaed both on arrival at and departure from each place.

(v) Laos

Chinese immigration into this country has been the subject of the order[1] of 7 January, 1919. There is in each Muong

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(1) J.O.I., 1919, 107.

or district a congregation, of which all Chinese living in the Muong are members. The document of immatriculation is called a "capitation card", and a "permis de circulation" or a passport is necessary before leaving the province where he is inscribed.

58. The Chinese Congregation and its Legal Status.- During the reign of King Gialong of Annam (1802-1820) the right of the Chinese to form congregations had been recognised in view of the difficulty which would arise if they were to live in the same commune with the Annamites.(1) In each province there were as many congregations as there were Chinese of different dialects. In cases where the numbers were small, the Government would group them into one congregation comprising several languages.(2) At the head of each congregation there were a Chief and Sub-Chief elected for two years, and indefinitely re-eligible by the principal congregationalists. King Minh-Mang (1820-1840) ordained in 1824 that Chiefs on election should be approved by the provincial authority.(3)

In the time of conquest, France had found that the congregations were well constituted and active submitting to the traditional usage, and invested with prerogatives conceded by

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(1) Nguyen, op. cit., 13.

(2) Luro, op. cit., 182.

(3) Nguyen, op. cit., 14.

the sovereigns of Annam. She recognised their principle and organisation. The institution has been further consolidated and legally sanctioned by repeated Orders regulating Chinese or Asiatic immigration. The Chiefs become the official intermediary between the administration and their fellow-members, and are the agents for receiving all communications addressed to them by the Government. Under certain responsibility, and possessing some prerogatives, they are controlling and supervising agents facilitating the regulations concerning immigration and the collection of taxes. The congregation has become such a powerful factor in local administration that its refusal to apply or suspension of the law, as it did refuse and suspend the Order of 1892, would have a disastrous effect.(1) Nevertheless, it is by no means imperium in imperio, as alleged, but is engaged in receiving orders from, and fulfilling auxiliary functions of, the Colonial Government, which it has helped rather than hindered in forming its policy.

The status of the congregation in colonial law is an obscure question. By traditional usage, it possesses property, movable and immovable, places of gathering, pagodas, cemeteries, hospitals, and other establishments serving the aims of the congregation. As a body distinct from the personality of its members, it has performed many acts in its collective capacity. This right was challenged for the first time in 1923, when the

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(1) Nguyen, op. cit., 78.

Court decided that the Chief of a congregation could not in his capacity as mandatory acquire property for the benefit and in the name of his congregation. Considering the direct control under which the congregation submits to the administration, the Court ruled that the congregation "appeared rather as an administrative person in the colonial law," and that it is in that capacity placed under administrative guardianship, and that it cannot, in consequence, conclude important transactions of civil life, such as acquiring immovables, receiving gifts and legacies, and appearing in judicial courts, except with the authorisation of the Administration.(1)

The decision was bitterly criticised. Instead of appreciating that the rules governing Chinese congregations are the result of native laws and customs, from which alone conclusions should be drawn concerning their capacity to acquire property and to appear in courts by their Chiefs, the Tribunal was accused as being erroneously inspired by the principles of French public law.(2) It extended to Chinese congregations the canon of "administrative guardianship", which applied to the legal persons of public law only. Certainly it went too far, because the Orders relating to Chinese congregations had never contained anything that might found such an interpretation.

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(1) Tri. 1re inst., Saigon, 20 October, 1923.

(2) Solus, op. cit., 177.

On appeal, the decision was overruled.[1] The Court held, adopting the above line of reasoning, that in submitting the Chinese congregation to administrative authorisation and guardianship, the jurisprudence of the Civil Tribunal at Saigon had read into the Orders concerning Chinese congregations what had never really been intended. If the Chinese congregation is to be treated as a legal person, the Court reiterated, still it should not be considered as being of the type known to French public law, but as a native legal person under the native traditional statute. The question whether it is desirable to submit the congregation to administrative guardianship was one for the legislature alone to decide.[2]

59. The Capitation Tax.- The capitation tax to which the Chinese are subject in the Union of Indo-China varies from country to country and differs from that imposed upon other persons. How far its imposition is consistent with treaty provisions has been discussed in the foregoing pages. The French insist on the payment of the tax as an indemnity against the rights and privileges traditionally enjoyed by the Chinese. Under the Convention of 1930 its legality was recognised by China on the condition that the tax is also paid by other

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(1) Cour d'Appel de Saigon, 26 June, 1925.

(2) Lapradelle and Niboyet, Répertoire de Droit international, III. (1929), 604.

foreigners enjoying the same rights and privileges. What really constitute these rights and privileges not having been defined, the abuse of the treaty power by an indiscriminate imposition of the tax seems irresistible. Further, the tax is required of all Chinese whether or not they exercise any of such rights and privileges, which makes it an unjustified burden upon them.

In Cochin-China the tax is fixed by the Order of 24 October, 1920. Chinese males aged from eighteen to sixty shall pay a fixed sum of 15 piastres with a progressive rate proportionate to the trading licence charges and the land tax paid by them. The amount which a single person may be required to pay must not exceed $4,000 in the same city or its environs. The Chiefs of a congregation who collect the tax for the Treasury are exempt from payment and are awarded a commission of one-half per cent. for their service. All Annamites, including Sino-Annamite half-castes, pay the nominal sum of one piastre.(1)

In Cambodia the rate is fixed at $10, with a maximum of $4,000.(2) The number of categories is six. Instead of being exempt from payment, the Chiefs of the congregation are given a commission of three per cent. Chinese in Cambodia

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(1) Order of 26 June, 1920.

(2) Order of 6 July, 1929.

are also subject to a Prestation tax which represents the value of ten days' work for the Government.(1) The redemption figure for the Cambodians and assimilated is ₰4, while Chinese pay double that sum.

Tonkin(2) fixes the tax in three categories of 3.5, 8 and 10 piastres respectively, with a maximum proportionate rate of ₰1,000.

Annam(3) imposes no proportionate surtax on the tax of immatriculation, and devises seven categories of 8, 12, 20, 50, 70, 120 and 150 piastres each for the Chinese. The capacity year when a tax is chargeable is sixteen and not eighteen. The Annamite(4) pays ₰2.5, when eighteen years of age.

The tax is fixed at ₰8 in Laos.(5) For those exercising a trade or industry, there is a proportionate rate according to the capital of the licence. The natives(6) pay ₰2.5. A Prestation(7) of sixteen days, redeemable at ₰30 each, is imposed both on the native and on the Asiatic alien. The whole redemption is obligatory for the alien.

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(1) Order of 2 October, 1920.

(2) Order of 4 September, 1925.

(3) Order of 28 April, 1926.

(4) Order of 30 October, 1928.

(5) Order of 30 November, 1900; 22 September, 1926.

(6) Order of 8 May, 1929.

(7) Order of 18 June, 1929.

60. The Immigration Laws of the Dutch East Indies, 1911-1933.- The question of the expatriation of Chinese from Insulinde is an issue which has long deeply concerned the Colonial Government. Wholesale deportation is virtually, if not actually, impossible, and the Decree of 1837, prohibiting further Chinese immigration, had to be repealed for political reasons.(1) The question was thoroughly gone into in 1897-1900, but the fears that the presence of Chinese constituted a danger were dissipated upon a close study of the facts. The report of the Mindere Welvaart Commission showed that Chinese immigration in the Colony had produced nothing but advantages.(2)

Under the Constitution of 1854 the conditions of admission of Netherlanders and aliens to the Indies were to be regulated by general Ordinance, which might take the form of law, royal decree, or ordinance (ss. 31, 105). The new Constitution has directed these conditions to be established as far as necessary by general administrative measure, and for the rest by ordinance (s. 160). In the interest of public tranquility and order, the Government may expel any person not born in Insulinde, or deny him the right to reside in specified parts (ss. 35, 36). It may also require native-born persons to reside or not to reside at particular or specified places (s. 37).

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(1) Cabaton, op. cit., 164.

(2) Chailley-Bert, op. cit., LXXII. (1914).

This being so, and in pursuance of these provisions, the Royal Decree of 1911 enacted more severe rules for Java and Madura than for the Outer Possessions. A landing permit was required, to be obtained on the payment of 25 florins, which in due course was to be exchanged for an admission card.

The subject was further dealt with by Decree No. 32 of 1915, applying to Dutch nationals being the children of parents domiciled in the Dutch East Indies or being themselves domiciled there, as well as to aliens who are not domiciled in the East Indies. It was rendered applicable by Ordinance No. 693 of 1917, and has since been several times modified.(1) The admission tax, which had already been raised to 50 florins, was again raised to 100 in 1924 and to 150 in 1931.(2) The sum is refunded if the immigrant is denied admission or if he leaves within six months after landing. Unlike the landing permit which is issued for a whole family, including wife and minor children of the immigrant, the admission card is personal only. It is valid for two years, and may be extended twice for a period of one year, and a third time for six years. It is liable to be cancelled if the holder is considered to be a danger to the public peace, and cancellation results in expulsion. Persons desiring to establish themselves in Insulinde must have resided there for ten years and must obtain a

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(1) See I.L.O. Migration Laws and Treaties (1928), II.

(2) Royal Decree No. 31 of 1931: Annuaire de Documentation Coloniale Comparée, 1931, I., 211.

residence licence before the expiration of the admission card. The licence may be refused to persons whose presence might be harmful to the economic interests of the population, or may be issued subject to certain conditions. It expires if the holder remains out of Insulinde for longer than eighteen months.

Dutch persons not born of parents domiciled in the Indies or not domiciled there themselves, and all aliens, may only land at certain prescribed ports. Government representatives and foreign consular officials are exempt from this provision, and so are the persons holding admission cards who have been registered out and have returned within a year.

The rules are not applicable to recruited labourers of oriental nationality, whose immigration, according to s. 20 of the Decree, is to be governed by special regulations. Ordinance No. 694 of 1917 was enacted for the purpose of placing such labourers in a different position. They are not subject to the capitation tax, no landing permit being required. But a duty of 75 florins is payable if they wish to stay after the expiration of their contract.

The year 1933 witnessed a radical change in Dutch immigration policy in the East Indies. By amending the previous Decrees, a Royal Decree[1] of 4 November, 1933, enacted that in each year the number of aliens in all and the number of aliens of each nationality to be admitted during the coming calendar year shall be determined by ordinance. The number

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(1) Annuaire, 1933, I., 403.

fixed for all nationalities shall be the same, but as long as the total quota has not been reached, the number allotted to each nationality may be increased to a maximum of one-tenth of the total number of aliens of that nationality who have been admitted during the ten consecutive years preceding the operation of the present Act. The quota law was carried out by Ordinance No. 492 of 1933,(1) the total number being fixed at 12,000 for the year 1934, to be distributed among 15 groups or nationalities. China is placed on a level with other nations, most of whom contribute nothing or very little to the population of the Indies, and is entitled, like them, to send the number of eight hundred, in spite of the fact that Chinese immigration has hitherto reached a much higher figure.

61. The Segregation and Pass System in the Dutch East Indies.- After admission, the Chinese were subject to residence and travel restrictions. The group life, which is a characteristic of Chinese immigration, was made obligatory by legislation. Under the Government Act of 1854, oriental aliens established in Netherlands India were required to live as far as possible in separate quarters under the direction of their proper chiefs (s. 73). These chiefs, entitled majors, captains, or lieutenants, were appointed by the Dutch Administration, which held them responsible for the proper policing

(1) Annuaire, 1933, I., 401.

and good conduct of their compatriots.(1) They received and acted upon instructions from the local authority and were entrusted with the execution of Chinese law and customs among disputants. On entering Java the Chinese were confined to the Chinese quarters assigned in each city by the Government. Special leave was required to reside beyond the limits, and negligence in this respect was punished.(2) Nor could they travel about freely. For every journey they made they had to obtain a pass from government officials. Segregation was claimed to be necessary in order to exercise control over them and to afford protection to both Chinese and natives. The restriction on free movement had also an economic motive behind it, namely, that large parts of the native population might be preserved from contact with Chinese traders.(3)

The segregation does not appear to have been strictly enforced, and, especially since 1910, permission to live outside the quarter has been liberally granted.(4) Relaxations were also made in the pass system. The regulation of 22 September, 1904, enacted that passes were no longer limited to a specific journey, but were valid for a year. Another regulation, of

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(1) Campbell, Java, Past and Present (1915), II, 1100.

(2) Smith, Reports on the Federated Malay States and Java, Australian Parliamentary Papers, 1906, II., 56.

(3) Jenks, Report on Certain Economic Questions in the English and Dutch Colonies (1902), 55.

(4) Day, The Policy and Administration of the Dutch in Java (1904), 364; Chailley-Bert, op. cit., LXXIII.

17 November, 1910, dispensed with the necessity of passes for travel between the main business centres and markets situated along the main highways. But the system was maintained for other localities, though exempting numerous categories of Chinese from its operation, not including Chinese born in Insulinde.(1) Further relaxations both in the segregation and in the pass regulations, were made in 1914. 1915 and 1916,(2) and the travel restrictions were totally removed in 1918.(3) The segregation clause does not appear in the Constitution Act of 1925. With the abandonment of the quarter system, the increase of legal assimilation with Europeans, and the intensification of local administration, further maintenance of the Chinese "Civil Service", as the "Chiefs" of the quarters have been termed, will no longer be justified. The remnant of their civil jurisdiction having been taken away,(4) the position of "Chief" has indeed been allowed to fall vacant in some large cities.

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(1) Chailley-Bert, op. cit., LXXIII.

(2) Vandenbosch, op. cit., 309.

(3) Alting and Bunning op. cit., 53.

(4) Annuaire, 1929, I., 275; and see infra, §151(iii).

PART III.

PROBLEMS OF NATIONALITY AND NATURALISATION

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Chapter XVIII.

THE UNITED STATES

62. The Race Clause in the Naturalization Law.- The first Naturalization Law of the United States, passed in 1790, provided that "any alien being a free white person may be admitted to become a citizen." The Law was amended in 1870 after the adoption of the Thirteenth and Fourteenth Amendments to the Constitution. Suggestions were made by some that the Declaration of Independence and the doctrine of human equality and brotherhood so freely promulgated at the time of the Revolution should find expression in a liberal naturalisation law, by striking out the word "white", so that in naturalisation there would be no distinction of race or colour. Others pressed for the insertion, after the words "aliens of African nativity and to persons of African descent", the phrase "or persons born in the Chinese Empire."(1) But the Law was passed and revised in 1875 to read, "the provisions of this title shall apply to aliens being free white persons and to aliens of African nativity and to persons of African descent."(2) And

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(1) Congressional Globe, 1869-70, 5122.

(2) 16 U.S. Statutes 254; 18 ibid. 318.

so it stood in the Act of 1906[1] and as § 2169 of the Revised Statutes.

The amended Law, however, not having positively and expressly prohibited the naturalisation of Chinese, some of the eastern States, assuming that they were included in the term "white", admitted them to full citizenship. The case of Hong Yen Chan,[2] who applied for admission to practise in the Courts of California, was that of a Chinese who had been naturalised in the State of New York. The first case where naturalisation was denied occurred in 1878. After consulting the New American Cyclopedia on the title "ethnology", the Court held that no classification of races included the Mongolian in the white or whitish race.[3] The words "white persons" were meant to indicate only persons popularly understood as belonging to the Caucasian race, and a native of China was not a white person within the meaning of the Act of Congress. This interpretation was confirmed in the case of Gee Hoy, in which the naturalisation of a Chinese was held invalid.[4] Gee Hoy, being a naturalised citizen of the State of New Jersey, was granted a passport for a visit to China. Upon his return, he was denied admission. The Court ruled that there was no law conferring

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(1) 34 U.S. Statutes 596.

(2) In re Hong Yen Chan (1890), 84 Cal. 163.

(3) In re Ah Yup (1878), 5 Sawyer 155.

(4) In re Gee Hoy (1895), 71 Fed. 274.

the right of naturalisation upon Mongolians or natives of China, that the judgment of the Court of New Jersey naturalising the said Gee Hoy was absolutely null and void for want of jurisdiction, and that the passport did not constitute any proof of the American nationality of its bearer. In the case of Ozawa, a Japanese was held not eligible for American citizenship.(1) The Court denied that there was any suggestion of individual unworthiness or racial inferiority either in the legislation or in the constructions. No Chinese case has been brought before the Supreme Court, but the tenor of judicial decisions is sufficiently strongly marked and the result of any appeal would be a foregone conclusion. In a recent case, the Court has inferred that "white persons" within the meaning of § 2169, are members of the Caucasian race, as Caucasian is understood by the mass of men, and that the term excludes Chinese, Japanese, Hindus, American Indians and Filipinos though they be not of the full blood.(2)

The right of naturalisation was expressly excepted in the clause of the Burlingame Treaty granting the most-favoured-nation treatment to the Chinese people.(3) Section 14 of the Chinese Exclusion Act of 1882 provided again that hereafter no state court or court of the United States should admit Chinese

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(1) Ozawa v. United States (1922), 260 U.S. 178.

(2) Morrison v. California (1934), 291 U.S. 82.

(3) Nor could an American citizen become naturalised in China. Expatriation under the Chinese law at the time of the Treaty was a criminal offence: see Moore, Digest, III, 586.

to citizenship. In the renewal of the most-favoured-nation guarantee, a clause "excepting the right to become naturalized citizens" was added to Article IV of the Treaty of 1894.

The ethnical restriction is extended to persons of mixed blood, when one of the parents is of the ineligible race. In the case of Knight, the Court rejected the demand because the mother of the applicant was half Chinese and half Japanese although his father was of English birth and descent.(1) Similarly, in the case of Young, who had a German father and a Japanese mother and claimed the status of a German citizen, the Court declared that the right to become an American citizen by naturalisation depended upon filiation and blood, not upon nationality or statute.(2) A recent application by a person whose grandfather was of pure Portuguese blood and grandmother and mother Chinese, and who claimed to be a "free white person", being of Portuguese descent through the paternal line, was rejected.(3) The doctrine as expounded by the Supreme Tribunal is that men are not white if the strain of coloured blood in them is a half or a quarter, "or, not improbably, even less."

In order to facilitate the naturalisation of aliens and persons not citizens of the United States who formed part of the United States forces during the World War, the Act of 9 May,

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(1) In re Knight (1909), 171 Fed. 299.

(2) In re Young (1912), 198 Fed. 715.

(3) In re Fisher (1927), 21 Fed. (2d) 1007.

1918,[1] was passed. It was provided that any alien serving in the military or naval forces might file his petition for naturalisation without making the preliminary declaration of intention and without proof of the required residence. This was amended by the Act of 19 July, 1919,[2] providing that any person of foreign birth who served in the army or navy of the United States during the War should have the benefits of s. 4(7) of the Act as amended in 1918 and should not be required to pay any fees. It was held, however, that the Acts did not enlarge the class of eligible foreigners established by § 2169 so as to apply to a Chinese who had served from 1917 to 1919 in the national forces.[3] The Supreme Court, confirming this ruling in a later case, further held that the words "any alien" are limited by § 2169 to aliens of the colour and race there specified, and that the phrase "any person of foreign birth" in the Act of 1919 is not more comprehensive than the words "any alien" in the Act of 1918.[4] The implied enlargement, added the Court, should be taken at its minimum, and the legislative history of the Act indicated that the intention of Congress was not to enlarge § 2169 except in respect of Filipinos

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(1) 40 U.S. Statutes 452.

(2) 41 U.S. Statutes 222.

(3) Dong Chong's Petition (1923), 287 Fed. 546.

(4) Toyato v. United States (1925), 268 U.S. 402.

who, not being "free white persons" or "of African nativity", were otherwise ineligible. Hence the Chinese are deprived of the benefit of naturalisation for war service.

65. American Nationality and Insular Citizenship.- In spite of the ethnical disability in the Naturalization Law, Chinese may become American citizens either by birth within the jurisdiction of the United States or outside it if the father or mother is an American citizen or by citizenship in a territory annexed to the United States. By virtue of the first clause of the Fourteenth Amendment to the Constitution, declaring all persons born or naturalised in the United States and subject to the jurisdiction thereof citizens of the United States and of the State wherein they reside, a child born in American territory, though the parents are Chinese subjects, is considered a United States citizen. This was first decided in the case of Look Tin Sing,(1) and affirmed in United States v. Wong Kim Ark.(2) In this celebrated case the Court ruled that the Constitution of the United States must be interpreted in the light of the common law, and repudiated the contention that the rule of Roman law, by which citizenship of the child followed that of the parent, was the true rule of international law, as now recognised in most civilised countries, and had superseded the rule of common law, depending on birth within the

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(1) In re Look Tin Sing (1884), 21 Fed. 905.

(2) (1898), 169 U.S. 649.

realm, originally founded on feudal considerations. In the meantime, it asserted the inherent right of every independent nation to determine for itself and according to its own Constitution and laws what classes of persons shall be entitled to its citizenship. Chinese persons born out of the United States remaining subjects of the Emperor of China, and not having become citizens of the United States, are held entitled to the protection of, and owe allegiance to, the United States so long as they are permitted by the United States to reside there; and they are "subject to the jurisdiction thereof" in the same sense as all other aliens residing in the United States. Wong Kim Ark, having been born in the United States of parents of Chinese descent and allegiance but not being employed in any diplomatic or official capacity under the Government of China, and not having ever renounced, either himself or by his parents acting for him, his allegiance to the United States, "becomes at the time of his birth and remains a citizen of the United States." The fact, therefore, observed the Court, that Acts of Congress or treaties have not permitted Chinese persons born out of the United States to become citizens by naturalisation cannot exclude Chinese persons born in that country from the operation of the broad and clear words of the Constitution.

The words "in the United States" of the Fourteenth Amendment, however, do not have a wide scope. Thus a child born on board an American vessel on the high seas of parents of

Chinese race and allegiance was held not to be a citizen of the United States.(1) The theory that a merchant ship is to be considered a part of the territory of the country under whose flag she sails was not applied. It is now settled and recognised elsewhere, declared the Court, that the territory subject to the jurisdiction of a country includes the land areas under its dominion and control, the ports, harbours, bays, and other enclosed arms of the sea along its coast, and a marginal belt of the sea extending from the coastline outwards a marine league or three geographical miles. This, the Court held, is the territory which the Amendment designates as its field of operation. Modern international law, it added, regards the fiction of territoriality of vessels on the high seas as untenable, and the jurisdiction exercised by a State over its merchant vessels upon the ocean is conceded to it in virtue of its ownership of them as property in a place where no local jurisdiction exists. Such vessels are therefore not literally "part of" or "in the United States" although the United States has jurisdiction over them. Lam Mow, though born in a place where the United States has jurisdiction, was not born "in the United States" and is not its citizen.

By a similar reasoning, a son of a Chinese merchant domiciled in the United States, who was on board a vessel which reached the United States the day after he became 21 years of

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(1) In re Lam Mow (1927), 19 Fed. (2d) 951, affirmed in Lam Mow v. Nagle (1928), 24 Fed. (2d) 316.

age, was denied admission.[1] The Court denounced the metaphorical usage that a ship on the high seas constitutes a part of the territory of the flag State and that upon boarding an American vessel an alien is deemed to have entered the United States.

By § 1993 of the Revised Statutes children born out of the limits and jurisdiction of the United States of American citizens are declared to be citizens of the United States. But by judicial construction[2] and by a recent Amendment to that section[3] the rights of American citizenship shall not descend upon such child unless the citizen father or "citizen mother"[4] (who are themselves foreign-born) has resided in the United States previous to the birth of such child.[5] And in cases where one of the parents is an alien, the right of citizenship shall be deferred until the child has fulfilled certain conditions.

The Chinese had also acquired American citizenship by collective naturalisation. Under the Act of 30 April, 1900,[6]

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(1) Wong Ock Yee v. Weedin (1928), 24 Fed. (2d) 962.

(2) Weedin v. Chin Bow (1927), 274 U.S. 657.

(3) Act of 24 May, 1934, 48 U.S. Statutes 797.

(4) See infra, § 64.

(5) For the derivative acquisition of American nationality see Hover, "Derivative Citizenship in the United States", in A.J., XXVIII (1934), 255.

(6) 31 U.S. Statutes 141.

establishing the Government of the Territory of Hawaii, all persons who were citizens of the Republic of Hawaii on 12 August, 1898, the date of the formal transfer of sovereignty to the United States, were declared to be citizens of the United States and of the Territory of Hawaii. These included several hundreds of Chinese, who, being Hawaiian citizens either by birth or by naturalisation, could now claim American nationality.

As to the other possessions, the Act of 1 July, 1902,(1) created a citizenship of the Philippine Islands as distinct from the citizenship of the United States. By the Amendment(2) to the American Naturalization Law of 1918 before referred to, the native-born Filipinos who served in the American forces during the World War were allowed to be further naturalised as United States citizens. The local Law of 1925, however, maintains an ethnical restriction prohibiting aliens who cannot be naturalised according to the laws of the United States from being eligible for the Filipino citizenship.(3)

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(1) 32 U.S. Statutes 692.

(2) 40 U.S. Statutes 542.

(3) Cf. Hazard, "Restrictions ethniques à la Naturalisation et à l'acquisition de la qualité de citoyen aux Etats-Unis", in Revue de Droit international et de Législation comparée, 1931, 711.

64. The Cable Act and the Status of Chinese Women.- By the Law of 1855, re-enacted as § 1994 of the Revised Statutes, "any woman who is now or hereafter married to a citizen of the United States and who might herself be lawfully naturalized, shall be deemed a citizen." The provisions were interpreted as imposing an ethnical restriction, and a Chinese woman not being born in the United States and not eligible to become naturalised, remained an alien in spite of her marriage to an American citizen.(1) And though married to a natural-born citizen, she is not entitled to the same privilege as the alien wife of a naturalised citizen under the Immigration Act.(2) According to the Expatriation Law of 1907,(3) a woman of American birth who marries an alien took the nationality of her husband. An American-born Chinese woman would thus acquire Chinese nationality if she married a Chinese, but become stateless if she was born in China and married an American.

The Cable Act of 1922(4) attributed to a married woman a status separate from and independent of that of the husband. An alien woman will no longer become an American citizen through her marriage to a citizen (s. 2). But the citizenship was forfeited if an American woman married an alien husband ineligible

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(1) Low Wah Suey v. Backus (1912), 225 U.S. 460.

(2) Chung Fook v. White (1923), 264 U.S. 442.

(3) 34 U.S. Statutes 1288.

(4) 42 U.S. Statutes 1021.

for naturalisation. The Act further provided that a woman who before the passage of the Act had lost her American nationality by marriage to an alien eligible for naturalisation, might resume her former citizenship by naturalisation (s. 4), but a woman whose husband was not eligible for citizenship could not be naturalised during the continuance of the marital status (s. 5). The Courts having naturalisation jurisdiction would not therefore accept a declaration of intention made by an alien who is or whose husband is of the Chinese race. The provisions did not thus have a uniform operation and are inconsistent with the basic theory of the Act.

The Cable Act, though stipulating that a woman shall not follow the nationality of her husband, made no changes in the status of Chinese women. By marrying an American citizen she did not under the statute become an American citizen and could not be naturalised.(1) And an American woman by marrying a Chinese lost American citizenship. Even upon the termination of the marriage, she might not return to the United States to recover her American status. In the case of Ng Fung Sing(2) the Immigration Service refused such a woman permission to enter because she was "an alien ineligible to become citizen." The Court held, approving the executive decision, that the applicant, being of an excluded race and a citizen of an excluded

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(1) Chang Chan v. Nagle (1925), 268 U.S. 346.

(2) Ex parte Ng Fung Sing (1925), 6 Fed. (2d) 670.

racial country, was not eligible for citizenship - although she was a natural-born citizen - and therefore could not be admitted according to the Law.(1)

The policy of the Cable Act that marriage to an alien ineligible for citizenship would divest an American woman citizen of her nationality and debar a married woman from being eligible for separate naturalisation, was discontinued by the amending Act of 3 March, 1931.(2) A woman citizen does not now cease to be a citizen of the United States by reason of her marriage, and any woman who has lost her United States citizenship before this Amendment by marriage to an ineligible alien may be naturalised to her former status. The naturalisation of any woman who was a citizen of the United States at birth shall not be denied on account of her race. The repeal of section 5 of the Cable Act offers an opportunity to an alien married woman, being herself eligible, to acquire American nationality by separate naturalisation irrespective of the racial ineligibility of the husband.

By a recent Amendment(3) to § 1993 of the Revised Statutes, any child born out of the limits and jurisdiction of the United States of an American woman citizen is also declared to be a citizen of the United States.

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(1) The same rule was followed in Ex parte Hing (1927), 22 Fed. (2d) 554, and Toshiko Inaba v. Nagle (1929), 36 Fed. (2d) 481.

(2) 46 U.S. Statutes 1511.

(3) Act of 24 May, 1934, 48 U.S. Statutes 797.

Chapter XIX.

CANADA

65. The Power of the Dominions to Deal with Naturalisation and Aliens.- By the common law rule, nationality was a matter not of race but of birth-place. Every person born within the King's dominions was a British subject, every person born without was an alien. The absurdity of the result was later removed by statutes from time to time, and then an Act of Parliament might confer wholly or in part the privileges of a natural-born British subject.(1) Naturalisation, then, "hath the like effect as a man's birth hath." And the power to confer British nationality has since been reserved to the Imperial Parliament. Under the Naturalisation Act of 1870 the legislature of any British possession might make laws for imparting to any person the privileges of naturalisation, to be enjoyed by such person within the limits of such possession, but only within such limits had they the authority of law. It is apparent that British nationality could not be conferred by any naturalisation acts of the Colonial legislature. But

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(1) Cf. Clement, Canadian Constitution (1916), 171.

certificates of naturalisation granted by the Secretary of State were, on the contrary, to have validity throughout the Empire, although it was believed that they accorded to an alien no rights or privileges in a British Colony.(1) The Privy Council had held that the status of an alien must be determined by the law of England, while the consequences of that status would depend upon the local laws.(2) The position of a person naturalised in a Colony seemed to be that he was entitled as a subject of the King in that Colony to the protection of the British Government in every State except that in which he was born and to which he owed a natural allegiance.(3) He was also an alien in the United Kingdom.(4) The question was raised at the Colonial Conference of 1907, and the Dominions suggested that the law as to naturalisation should be uniform throughout the Empire, and that naturalisation whenever granted should be imperial and not local. The period of residence required before naturalisation, which was two years in Australia and the Union of South Africa, and three years in Canada, while New Zealand fixed no limit, seems to have been the focus of dispute.(5) The Imperial Government insisted that unless the

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(1) Van Pittius, Nationality within the British Commonwealth (1930), 50.

(2) Clement, op. cit., 179.

(3) Ibid., 182, note.

(4) Keith, Responsible Government in the Dominions (1928), II., 1041.

(5) Ibid., 1042.

Dominions conformed to the minimum imperial requirements - of which five years residence was the most important - their naturalisation could not be recognised.(1) This was accepted somewhat reluctantly, and the Imperial Parliament passed the British Nationality and Status of Aliens Act in 1914. It defines who shall be natural-born British subjects and elaborates rules by which the national status of married women(2) and infant children shall be determined. Naturalisation of universal validity may be granted to any person who fulfils the requisite conditions, and he is given the full status of a natural-born British subject. The Government of any British possession enjoys the same power if it adopts Part II of the Act.

In creating the Imperial nationality, which was to be Empire-wide and uniform, the Dominions entertained the apprehension that the proposed law might affect the validity and effectiveness of local laws regulating immigration or the like, or differentiating between classes of British subjects.(3) The Imperial Act then expressly stipulated (s.26) that the Act should not take away or abridge any power vested in the legislature of any British possession or affect the operation of any law at that time in force or prevent any such legislature from treating differently different classes of British subjects. The differentiation between various classes of British subjects,

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(1) Van Pittius, op. cit., 51.

(2) See the Amendment Act, 23 & 24 Geo. V., c 49, 1933.

(3) Van Pittius, op. cit., 53.

who may receive different treatment according to the particular laws governing them, was thus given statutory approval.

66. The Canadian Naturalisation Law.- The Dominion Government is empowered by two Imperial Acts to deal with naturalisation. Apart from the Act of 1870, the British North America Act, 1867, had also assigned, under s. 91(25). to the Federal Parliament jurisdiction over naturalisation and aliens. This being so, Canada enacted its first Naturalisation Act in 1881, which was amended by subsequent Acts.(1) The revised statute of 1906 (c.77) consolidating these Acts, was itself repealed by the legislation of 1914 (c.44) which adopted the Imperial Act. The Immigration Act of 1910 creates the status of "Canadian citizen", who is to be exempt from its restrictions. In pursuance of the Statute of the Permanent Court of International Justice, the Canadian Nationals Act was passed in 1921. There are thus three Laws in force at present dealing with nationality in Canada and passed for different purposes. A Canadian citizen, as provided by the Immigration Act, shall include any person born or naturalised in Canada, and any British subject who has maintained a domicile in the Dominion for five years. In addition to a Canadian citizen, a Canadian national comprises any person born outside Canada whose father was a Canadian national. Such a national, it is interesting to note, not being a Canadian citizen and having no domicile in Canada, may be prevented from entering the country under the terms of the Immigration Act.(2)

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(1) C. 23, 1902; C. 38, 1903; C. 24, 1904; C. 25, 1905.

(2) Cf. Mackenzie, "Citizenship in Canada", B.Y., 1934, 159.

Under the Canadian Naturalisation Act, any alien who had resided in Canada for a term of not less than three years or had been in the service of the Crown for a similar time and intended, when naturalised, either to reside in Canada or to continue in such service, might apply for a certificate of naturalisation. An alien to whom a certificate had been granted would be entitled within Canada to the same political and other rights, powers and privileges, and be subject to the same obligations, as a natural-born British subject. The 1914 Act adopted the Imperial legislation which empowers Dominion Governments to issue certificates of imperial validity. An applicant must fulfil certain conditions as to residence, good character, etc., but the grant of a certificate is in the absolute discretion of the Minister. The Act also accords to a naturalised person all political and other rights, powers and privileges to which a natural-born subject is entitled, and repeats mutatis mutandis the relevant provisions of the Imperial legislation.

67. Problems and Consequences of Naturalisation in Canada.- Canada sets no actual bar to Chinese who wish to be naturalised, although the latter show no great inclination to avail themselves of the opportunity.(1) The rights and privileges

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(1) Jenks and Lauck, The Immigration Problem (1926), 277.

flowing from naturalisation which fall within Federal competence are largely curtailed by provincial legislation on the ground that the various topics have been assigned to the province. Naturalisation in Canada, therefore, confers very few privileges, and since early days political rights have been denied, apart from which, naturalisation had very seldom any other object.(1) It is submitted that the permanent denial of full citizenship privileges cannot be justified on high grounds of justice, nor on the dubious ground of expediency. Further, the conflict of Dominion and provincial power is apparent as regards the treatment of naturalised aliens. The views expressed in the decisions of the Privy Council are difficult to reconcile, as the distinction between the two spheres is really not very well marked.(2) It may be taken that the authority of the Dominion Parliament becomes exhausted with naturalisation, and that the person naturalised passes under the jurisdiction of the provincial legislature to the same extent as if born a British subject. But since the disabilities imposed by provincial legislation affect naturalised British subjects as well as alien Chinese, because they are based on racial and not national character, the question at once arises whether the validity of provincial law, applicable to British subjects, retains its full force in the case of aliens. Or,

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(1) Clement, op. cit., 677, note.

(2) Ibid., 672, 673.

in other words, could a provincial law affecting the rights of aliens be defended on the plea that its enactment was within the allotted authority of the province? In the second place, does the Federal power of dealing with naturalisation and aliens include the power to enact what shall be the consequences of naturalisation? That the interpretation has been different and even contradictory is seen from the following cases.

(i) Union Colliery Co. v. Bryden[1]

The Coal Mines Regulations Act of British Columbia, as amended in 1890, provided (s. 4) that no boy under 12 and no woman or girl of any age and no Chinaman should be employed or allowed to be for the purpose of employment below ground in any mine to which this Act applied. The question was raised whether or not the provision was intra vires the provincial legislature. The Courts of the province upheld its validity as concerning regulation of coal mines and so not ultra vires as an interference with the subject of aliens.[2] The Supreme Court ruled that the legislature had imposed a restriction on the freedom of contract, a restriction which might be supported on the ground that it dealt with property and civil rights and was a merely local matter. It took the view that the determination of the age or other qualifications required of those

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(1) (1899), A.C. 580.

(2) In re Coal Mines Regulations Amendment Act. 1890, (1896), 5 B.C. 306.

residing in the province to exercise certain professions or certain branches of business attended with danger or risk to the public, was a local subject in the nature of internal police regulations. In passing laws upon those subjects, the Court reiterated, even if those laws incidentally affected Federal powers, it must be held that this incidental power was included in the right to deal with the subjects specially placed within the provincial powers.

The case was taken to the Privy Council. The respondent, John Bryden, Attorney-General for British Columbia, and a shareholder in the appellant Company, averred that the employment of Chinese in positions of trust and responsibility, or as labourers below ground, was a source of danger and injury to other persons working in the mines, which involved the liability of the Company for damages, and was also injurious and destructive to the mines. This, however, was totally denied by the Company. He also pleaded that the employment of Chinese in these capacities was contrary to the statutory law of the province. In the character of intervener, appearing by counsel, he contended that the case had two aspects: one as relating to aliens, and the other as to restricting the employment in mines of a particular kind of labour. As regards the former, counsel admitted that it would be within the competence of Dominion legislation only. But Chinese were not necessarily aliens. It might include aliens within its meaning: but most of the Chinese affected had been naturalised.

Apart from the case of alien Chinese, the contention went on, there was still the other aspect of the question. The restriction of employment in the terms of the Act was a matter included in the class of subjects "property and civil rights in the province" within the meaning of s. 92(13) of the Imperial Act of 1867. In that aspect, he submitted that it was within the competence of the provincial legislature.(1)

The judgment, delivered by Lord Watson, answered the first question in the negative and the second in the affirmative. Their Lordships were of the opinion that every alien when naturalised in Canada became ipso facto a Canadian subject of the Queen; his children were not aliens, requiring to be naturalised, but were natural-born Canadians. The Dominion Parliament had not been given the right to legislate for the latter class of persons, i.e., the natural-born Canadians. But under s. 91(25) Parliament possessed the power to legislate in the case of naturalised aliens after naturalisation. "The subject of naturalisation", ruled Lord Watson, "seems prima facie to include the power of enacting what shall be the consequences of naturalisation, or in other words, what shall be the rights and privileges pertaining to residents in Canada after they had been naturalized." The expression "aliens" was thought to include all aliens who had not been naturalised, and the words

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(1) (1899) A.C. 582-584.

"no Chinaman" as used in s. 4 of the Act also implied every adult Chinese who had not been naturalised.

As regards the first question, their Lordships believed that the subject-matter was clearly included in s. 92(10), which extended to provincial undertakings such as the coal mines of the appellant Company, as well as in s. 92(13), embracing "property and civil rights in the province". But since the leading feature of the enactment could have no application except to Chinese who were aliens or naturalised subjects, and since it established no rule or regulation except that these aliens or naturalised subjects should not work in underground mines, therefore s. 4 of the Act trenched upon the exclusive authority of the Parliament of Canada. In conclusion, Lord Watson further emphasised the fact that by virtue of s. 91(25) the Dominion Legislature was undoubtedly invested with exclusive authority in all matters which directly concerned the rights, privileges and disabilities of the class of Chinese, naturalised or not, who were resident in the provinces of Canada. It is thus apparent from the judgment that the jurisdiction of the assigned provincial powers will be ineffective if it overlaps the Dominion authority. But this line of argument was not followed in the case of Cunningham v. Homma.

(ii) Cunningham v. Tomey Homma[1]

In this case the question whether the Dominion power to

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(1) (1903) A.C. 151.

deal with naturalisation and aliens extends so as to cover the enactment of the consequences of naturalisation, is answered in the negative. The Provincial Elections Act, 1897, of British Columbia, while conferring the right of franchise on every male of full age, provided that no Chinaman, Japanese, or Indian should have his name placed on the register of voters for any electoral district or be entitled to vote at any election. The expressions "Chinaman" and "Japanese" were to mean any native of the respective Empires not born of British parents, and included any person of the Chinese or Japanese race, whether naturalised or not. The provincial Courts, following the judgment rendered in the Union Colliery Co. case, held the enactment ultra vires. This was, however, reversed by the Privy Council, and the Act was held to be within provincial competence. It was argued that s. 91(25) reserved the whole subject of naturalisation to the exclusive jurisdiction of the Dominion, while the Naturalisation Act of Canada provided that a naturalised alien should be entitled within Canada to all political and other rights, powers and privileges to which a natural-born British subject was entitled. To this the appellants replied that the power of naturalisation related only to the mode in which naturalisation was to be conferred and not to the rights which might or might not follow according to the electoral law of the district. This was a matter which was within the exclusive competence of the provincial legislature, being within the classes of subjects assigned to it by

s. 92(1). It was the province, and not the Dominion legislature, which had power to regulate the electoral law of the province, and to decide whether the respondent, naturalised by virtue of the Dominion Act, should have the right to vote at the elections of members to serve in the provincial legislature.

Lord Halsbury, in delivering the judgment of the Committee, upheld the view of the respondents. He said that the Act did not purport to deal with the consequences of either alienage or naturalisation. It was for the Dominion, he observed, to determine what should constitute either the one or the other, but the question as to what consequences should follow from either was not touched. "The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalisation; and the privileges attached to it, where these depend upon residence, are quite independent of nationality." The term "political rights" used in the Naturalisation Act was thought to be a very wide phrase, and could not be held to give necessarily a right to the suffrage in all or any of the provinces.

In distinguishing this construction from that in the earlier case, it was pointed out that the latter depended upon totally different grounds. The regulations there impeached were not really aimed at the regulation of coal mines at all, the decision runs, but were in truth devised to deprive the Chinese, naturalised or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prevent their continued

living there. It was obvious, their Lordships concluded, that such a decision could have no relation to the question whether or not any naturalised person had an inherent right to the suffrage within the province in which he resided.

(iii) Quong Wing v. The King[1]

This case established clearly the power of the provincial legislature within its allotted sphere to enact laws affecting the rights of a naturalised alien. It further defined who was a "Chinaman" according to the common understanding of the word in Canada. The statute of Saskatchewan of 1912 prohibited the employment of white women in any restaurant, laundry or other place of business or amusement which was kept, owned or managed by a Chinaman, Japanese or other oriental person. Quong Wing, being a naturalised British subject, contended that the Law encroached upon the Dominion power in regard to naturalisation and that he was not a "Chinaman" within the meaning of the statute. The Supreme Court of Canada, however, upheld its validity, considering that the Act, touching civil rights in the province under s. 92(13) , and being for the suppression or prevention of a local evil under s. 92(16), was within provincial competence. Leave to appeal was refused by the Judicial Committee, who ruled that this was too wide a question to raise in a case of this kind in which an individual subject was complaining.[2]

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(1) (1914), 18 D.L.R. 121.

(2) Lefroy, Constitutional Law of Canada (1918), 215, n. 205.

Davies, J., referring to the Union Colliery case, confessed that if the exclusive authority in all matters which directly concerned the rights, privileges and disabilities of the class of Chinaman resident in Canada was vested in the Dominion by s. 91(25), it would afford a strong argument for holding the legislation in question ultra vires. But accepting the interpretation of s. 91(25) in Homma's case, that "its language does not purport to deal with the consequences of either alienage or naturalization," and that, while it clearly reserved these subjects to the jurisdiction of the Dominion so far as to determine what should constitute either alienage or naturalisation, it did not touch the question of what consequences should follow from either, he was relieved from the difficulty he would otherwise feel. "Once it is decided", he remarked, "that the subject matter of the employment of white women is within the exclusive powers of the provincial legislature and does not infringe upon any of the enumerated subject matters assigned to the Dominion, then such provincial powers are plenary."

With regard to the term "Chinaman", he ruled that although the appellant had become a naturalised British subject and had changed his political allegiance, he had not ceased to be a "Chinaman" within the meaning of that word as used in the statute. The prohibition was not aimed at alien Chinamen simply, or at Chinamen having any political affiliation. It was against any Chinaman whether owing allegiance to the rulers of

the Chinese Empire, or the United States Republic, or the British Crown. In other words, he continued, it was not aimed at any class of Chinaman or at the political status of Chinamen, but at Chinamen as men of a particular race or blood and whether aliens or naturalised. Duff, J., also drew a distinction between persons of a certain racial origin and those of a certain nationality. The Act, he argued, applied to persons of the races mentioned, without regard to nationality. "The terms Chinese or Chinamen as used in the Canadian legislation, point to a classification based upon origin, upon racial or personal characteristics and habits, rather than upon nationality or allegiance."

Idington, J., dissenting, was of the opinion that the political rights given to any one whether naturalised or natural-born British subjects, might in many respects be limited and varied by the legislation of a province, even discriminating in favour of one section or class as against another. But the "other rights or powers and privileges" of natural-born British subjects did not so fall within the power of the legislatures to discriminate between classes or sections of the community.

From the decision in these two cases it is obvious that provincial Acts, which affect the rights of aliens but do not "purport" to deal with alienage and naturalisation, are valid so long but only so far as the power to enact them comes within the assigned topics of the provincial legislature. The Dominion

jurisdiction over naturalisation and aliens is confined to the determination of what constitutes either alienage or naturalisation, and does not extend to its consequences. These cases seem to overrule the principle of the Union Colliery case.

(iv) Brooks-Bidlake and Whittall, Ltd. v. Attorney-General for British Columbia[1]

The appellants were holders of licences granted in 1912 enabling them to cut timber on certain lands of the province of British Columbia, and containing a provision that no Chinese or Japanese labour was to be employed in connection therewith. The licences were for one year and were renewable if the terms had been complied with. The Court of Appeal of British Columbia declared in 1920 the provision to be invalid, on the grounds (a) that it conflicted with s. 91(25) of the British North America Act, and (b) that it was repugnant to the Japanese Treaty Act of 1913 of the Dominion, which conferred most-favoured-nation treatment on Japanese subjects.[2] But the provincial legislature passed an Act[3] (C. 49) in 1921 declaring that such a provision had the force of law, and that a violation of it would be a sufficient ground for cancelling a licence. The appellants, who employed both Chinese and

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(1) (1923) A.C. 450.

(2) In re Japanese Treaty Act, 1913 (1920), 29 B.C. 136.

(3) Entitled "an act to validate and confirm certain orders in Council and provisions relating to the employment of persons on Crown property".

Japanese, sued for a declaration that they were entitled so to do and that the Act was ultra vires the provincial legislature.

The Supreme Court of British Columbia, considering itself bound by the decision of the Court of Appeal in Re Japanese Treaty Act, 1913, made an order as claimed by the appellants; but the decision was reversed by the Supreme Court of Canada,(1) against which the appellants appealed to the Privy Council.

Viscount Cave, in delivering the judgment of the Committee, ruled that although s. 91(25) reserves to the Dominion the general right to legislate as to the rights and disabilities of aliens and naturalised persons, it does not empower the Dominion to regulate the management of public property of the province, or to determine whether a grantee or licensee of that property shall or shall not be permitted to employ persons of a particular race. These functions, he said, are assigned by s. 92(5) and s. 109 of the Act to the legislature of the province, and there is nothing in s. 91 which conflicts with that view. Referring to the Union Colliery case, he remarked that the statute which prohibited the employment of Chinese in coal mines underground was beyond the powers of the provincial legislature on the ground that "the enactment was not really applicable to coal mines only - still less to coal mines belonging to the province - but was in truth devised to prevent

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(1) (1922), 66 D.L.R. 475.

Chinamen from earning their living in the province." Speaking of Cunningham v. Homma, where a statute had denied the franchise to Chinamen and Japanese, the Board held this to be within the powers of the provincial legislature, which had the exclusive right to prescribe the conditions under which the provincial suffrage was to be conferred. In their Lordships' opinion, the present case fell within the principle and authorities last cited, and not within Bryden's case. The stipulation in question was accordingly not void as contrary to s. 91 of the Imperial Act.

It behoves at this point to add a few words of comment. The judgment last quoted admits "the general right of the Dominion to legislate as to the rights and disabilities of aliens and naturalized persons" under s. 91(25), which had been interpreted in Homma's case as confined only to the determination of what shall constitute alienage and naturalisation, and not extending to the consequences. The decision in that case had taken away from naturalised persons one of the most substantial political rights. The power to legislate regarding "civil rights" is reserved to the province. We can hardly see, therefore, any room left for the Dominion to legislate on the subject of "naturalization and aliens". The contention of the intervener in Bryden's case seems to depend on the fact that the Coal Mines Act did not affect the rights of aliens, and he admitted that to do so would invalidate the provincial laws. But it is here submitted that the

rights of an alien may be affected if the power to enact legislation which concerns him come within the assigned sphere of the provincial authority. If this line of argument is adopted, the earlier Bryden case is virtually overruled on the ground that the restriction of employment in coal mines is a matter included in "property and civil rights in the province"; and further, that the right to deal with the subjects assigned to the province includes incidental powers such as those here discussed, even if the laws enacted under the authority of this right encroach upon Federal powers. On the other hand it might equally have been held in the Brooks-Bidlake case that the prohibition has no application except to Chinese, aliens or naturalised, and that it is not really aimed at the regulation of timber-cutting but is devised to deprive the Chinese, naturalised or not, of the ordinary rights of the inhabitants of British Columbia and to prohibit them from earning a living in the province. The rulings are indeed conflicting.(1)

(v) Attorney-General for British Columbia v. Attorney-General for Canada(2)

In this case the views taken in the Brooks-Bidlake case were greatly modified. The Oriental Orders in Council Validation Act, which had been held not inconsistent with s. 91(25)

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(1) It is suggested that the limited application of the provisions as to timber licences may be made a ground of differentiation, though in fact the distinction is not great: Keith, Responsible Government in the Dominions, I, 543.

(2) (1924) A.C. 203.

in the previous case, was considered invalid, as it affected the rights of a particular class of aliens - the Japanese, who had been accorded the most-favoured-nation treatment by the Treaty of 1913. which was declared to have the force of law by the Dominion Parliament under s. 132 of the Constitution Act.

The Governor-General of Canada had referred the said statute to the Supreme Court to consider its validity, and, upon that Court advising that the Act was ultra vires the provincial authority, he disallowed it. The province now appealed against the judgment of the Supreme Court and the case came before the Privy Council.

The views taken by the Supreme Court Judges were divergent.(1) Davies, C.J., thought that the provincial Act of 1921 was ultra vires as infringing s. 91 of the Constitution as well as the Treaty Act, 1913, by prohibiting the employment of Japanese subjects. Idington, J., was of the opinion that the powers of the Provincial Government over the lands of the province were as extensive as those of private owners, and that a private owner could have determined not to have Japanese subjects on his property, and could have stipulated to that effect. Anglin, J., based his opinion entirely on s. 91, which he held the Statute of 1921 to contravene. It was in

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(1) Re Oriental Orders in Council Validation Act (1922), 65 D.L.R. 577.

effect passed to deprive Chinese and Japanese of the general right to earn their living. Mignault, J., concurred with Anglin, J. Brodeur, J., thought the statute intra vires so far as s. 91 was concerned and as regards the Chinese. But he considered it to be ultra vires as far as the Japanese were concerned, since it conflicted with the provisions of the Treaty Act.

Viscount Haldane remarked, in delivering the judgment of the Judicial Committee, that what their Lordships decided in the Brooks-Bidlake case was the validity of the stipulation in the licences against the employment of Chinese, with s. 91(25). So far as Chinese labour was concerned no question could arise under the Japanese Treaty. Their Lordships now entertained no doubt that the statute violated the principle laid down in the Dominion Act of 1913. This conclusion, they added, did not in any way affect what they had decided on the previous appeal as to the title to a renewal of the special licences relative to particular properties. "It is concerned with the principle of the statute of 1921, and not with that of merely individual instances in which particular kinds of property are being administered." The Committee seems to adopt the view that the fact that the statute contravened the rights of Japanese subjects as well as those of others "who were not such subjects and who happened to be included, could make no difference to this conclusion."

Chapter XX.

AUSTRALIA AND NEW ZEALAND

68. The Naturalisation Laws of the Australian States.- Prior to the enactment of the Naturalisation Act in 1903 by the Commonwealth, the subject of naturalisation was dealt with by the legislatures of the different States. Even under the Constitution Act of 1900, the jurisdiction over naturalisation and aliens has not been declared exclusively to belong to the Commonwealth, although it is clearly intended that its power shall be plenary.(1)

New South Wales first enacted, by Act No. 3 of 1861, that no certificate of naturalisation would be granted thereafter to any Chinese. The Act was left in operation although it was thought that such denial was "impolitic and unnecessary." The Act being repealed in 1867, the disability was re-imposed in the Act of 1888 (No. 4). In Queensland, Act No. 28 of 1867 denied an Asiatic or African alien the right to become naturalised unless such alien had been married and resided in the Colony for three years and provided that his wife also resided within the Colony. As early Chinese immigration consisted predominantly of males matrimonially unattached, and

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(1) Moore, The Constitution of the Commonwealth of Australia (1910), 465.

the racial antipathy to mate with women of other races could only with difficulty be overcome, the Chinese were practically excluded from acquiring British nationality through naturalisation. But quite a number of Chinese took out letters of naturalisation in the other States.

69. The Federal Law and the Rights of British Chinese in the Commonwealth.- The Commonwealth has power to remove disabilities of aliens existing at common law, and to secure to them the ordinary rights of inhabitants. It is exercised under the headings either of s. 51 (XXIX) relating to external affairs, or of s. 51 (XIX) concerning naturalisation and aliens, or of s. 51 (XXVI) relating to the people of any race for whom it is deemed necessary to make special laws. But it is said that it is rather s. 51 (XXVI) that has enabled the Parliament to pass laws concerning the Indian, Afghan and Syrian hawker; the Chinese miners, laundrymen, market gardeners and furniture manufacturers; the Japanese settlers and Kanaka plantation labourers of Queensland: and the coloured races employed in the pearl fisheries of Queensland and Western Australia.(1)

The Federal Naturalisation Act, 1903, suspended all the State naturalisation laws. It declared that from the commencement of this Act the right to issue certificates of

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(1) Moore, op. cit., 464. Other writers consider that the power is derived under s. 51 (XIX): cf. Quick and Garran, Annotated Constitution (1901), 603.

naturalisation should be exclusively vested in the Government of the Commonwealth, and no certificate issued hereafter under any State Act would be of any effect. But persons who had previously obtained State certificates were deemed to be naturalised under the Commonwealth Act.

Under the Federal Law, an aboriginal native of Asia, Africa or the Islands of the Pacific (excepting New Zealand) was not entitled to apply for a certificate of naturalisation. Moreover, the Law empowered the Governor-General in Council to revoke a certificate with or without assigning any reason. Chinese and other Asiatics were thus excluded from acquiring citizenship unless born in the Commonwealth.

Australia adopted the general provisions of the British Nationality and Status of Aliens Act, 1914, in 1920, repealing the Naturalisation Act, 1903-1917. British citizenship is acquired by any person either by birth or by naturalisation under certain conditions. The national status of married women and minor children is also determined by rules embodied in the Imperial Act. Although there is no express provision denying Chinese the right of naturalisation, the actual practice seems to be that Chinese aliens are debarred through the exercise of the absolute discretion by the Governor-General.(1

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(1) Bailey, Legal Position of Foreigners in Australia (1931), Data Paper, Institute of Pacific Relations, 4.

On the other hand, the possession of British nationality in Australia does not seem to confer any benefits upon the Chinese holders. Chinese born in Australia may be denied admission under the Immigration Law. They are also deprived of the franchise in some States while other British subjects, natural-born or naturalised, are entitled to all political and other rights, powers and privileges. A distinction is also made in the Act (s. 11) between the rights, powers and privileges of natural-born British subjects and those of persons naturalised in the Commonwealth. The Invalid and Old Age Pensions Act, 1908-1931, which insures naturalised subjects of at least three years standing against sickness, incapacity and old age, penalises naturalised Asiatic subjects except those born in Australia.(1) Relief was granted to Indians by an Act in 1926 which entitles "Indians born in British India" to the privilege. The Maternity Allowance Act, 1912, which grants an allowance of £5 to every woman who gives birth to a child, excluded women who were Asiatics from its benefits. By an Amendment in 1926 the word "Asiatics" was omitted and "Aliens" inserted in its place. The Act of 1927 further provides that a woman who is an alien by reason of her marriage to an alien shall not be subject to the disqualification.

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(1) Under the State laws, Chinese were ineligible for the old-age pensions: New South Wales, 1900, No. 74, s. 51; Victoria, 1901, No. 1751, ss. 6(3), 7; Queensland, 1908, No. 6, s. 7.

British Chinese subjects are therefore granted the benefit, as are those women who marry Chinese aliens.

70. Local and Imperial Naturalisation in New Zealand.- Under the Aliens Act, 1908, a friendly alien residing in New Zealand may present a memorial to the Governor setting forth (1) his name, age, birth place, residence, and occupation, (2) the length of his residence in New Zealand and his intention to settle, and (3) a request that letters of naturalisation may be granted to him. Every person naturalised under the Act shall enjoy within New Zealand all the rights and capacities that a natural-born subject can enjoy, except such rights and capacities as are specially excepted in the letters of naturalisation issued to him. No special provisions were made with regard to a Chinese except that he should pay a fee not exceeding £1 in respect of his naturalisation. This had been first imposed by Act No. 19 of 1892, which did not apply to other aliens. From 1895 to 1914, only 146 Chinese were naturalised,(1) and since 1910 the New Zealand Government "did not consider it expedient to grant naturalisation letter to persons of the Chinese race." They were accused of having as the sole object in becoming naturalised the bringing of their wives into New Zealand and so evading the £100 poll tax which alien Chinese were required to pay upon admission.

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(1) New Zealand Year Book, 1920, 11.

designated persons of Cambodian race only or all the subjects of the King of Cambodia, had once been raised. It related to the Chams, a typical Asiatic tribe inhabiting the Cambodian Kingdom. The Court first ruled that the Chams, being a different race and having preserved their peculiar religion and customs, should be considered as aliens in Cambodia. But this opinion was rejected by the Court of Cassation.(1) Since then, the question has been settled by Article 23 of the Cambodian Code Civil in pursuance of the judicial award. Asiatic aliens born of an ethnical group not attached to a nationality enjoying international personality, and domiciled in a permanent and definite manner on the territory of the Kingdom, are considered as Cambodian subjects. According to the same Code, Sino-Cambodian métis, if claiming Cambodian nationality, become also Cambodians. A Chinese woman marrying a Cambodian husband would also acquire Cambodian nationality.(2)

The matrimonial union of an alien woman with an Annamite subject will also bestow Annamite nationality on the spouse. The position of Minh-huongs, métis of a Chinese father and Annamite mother, was much disputed. In a circular of the Superior Resident of Annam dated 27 May, 1904, citing the ordinances of the Annamite Kings which had always considered

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(1) Cour d'Appel de l'Indo-Chine, 8 November, 1904; overruled by the Court of Cassation, 22 July, 1905.

(2) Cour d'Appel de l'Indo-Chine, 5 January, 1899; 25 August, 1926. See J.I., 1901, 566.

New Zealand at first refused to adopt Part II. of the British Nationality and Status of Aliens Act when its Nationality Act was passed in 1923 (No. 46). The reason is not disclosed, but stress has been laid by the Dominion on its "peculiar conditions".(1) The effect of naturalisation under that Act is therefore local, and it requires only a three-year residence. The Minister could revoke, in his absolute discretion, a certificate without any reference to the quasi-judicial body referred to in the Imperial Act.(2) But the Dominion eventually enacted the British Nationality and Status of Aliens (in New Zealand) Act in 1928, repealing the former Act and its amendment. Every certificate of naturalisation granted in other British possessions adopting the Imperial Act, is recognised in New Zealand, while persons naturalised under this Act shall not cease to be British subjects by mere absence from the Dominion. It is specially provided, however, that the Act shall not in any manner repeal, limit or affect the provisions of the Immigration Act of 1908 or of other Acts relating to electoral rights and distinguishing between classes of British subjects in relation to such rights. Persons naturalised under the former Act may apply for a certificate under this Act. But the holder of such a certificate shall

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(1) Van Pittius, op. cit.,210.

(2) Ibid., 212.

continue to have to all intents and purposes the status of a natural-born British subject in New Zealand and not elsewhere.

The possession of British nationality in New Zealand again does not save the Chinese from being labelled "race aliens". Their position is the same as, or even worse than, that of white aliens. The Pensions Act, 1926, excludes Chinese and other Asiatics, whether naturalised or not, or whether British subjects by birth or not, from its benefits. And, save with the direction in writing of the Minister, no family allowance shall be payable to an alien or an Asiatic.(1)

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(1) s. 8, Family Allowances Act, 1926.

Chapter XXI.

THE UNION OF SOUTH AFRICA

71. The Provincial Laws.- Law III of 1885 has long excluded "persons belonging to any of the aboriginal races of Asia" from acquiring the rights of citizenship in the Transvaal. The traditions of the country have been that no "white privileges" shall be accorded to the coloured races. Although there were no provisions in the Acts of the province debarring the naturalisation of Chinese, actually Chinese seldom availed themselves of the opportunity. This might have been due partly to the exercise of absolute discretion in granting the application, and partly because no alien Chinese were admitted under the strict immigration laws.

The Cape Colony, under Act No. 2 of 1883, as amended in 1889, permitted any alien then residing or who might thereafter reside to make application for letters of naturalisation, which were to be granted by the Governor if he thought fit. Chinese enjoyed the same privilege until the passing of the Chinese Exclusion Act, 1904, which provided that thereafter no certificate of naturalisation would be issued to any Chinese on whatever ground.(2)

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(1) Ordinance No. 46, 1902, "Naturalization of Aliens", amended by Ordinance No. 11, 1904.

(2) s. 33, Act No. 37, 1904.

Under the Act of Natal, No. 18 of 1905, only aliens of European birth or descent may receive naturalisation papers. The Orange Free State passed an Ordinance in 1903 to provide for the naturalisation of aliens, which has no application to Chinese as they are not allowed to settle in the State.

72. The "Union National".- By Act No. 4 of 1910, the Union Parliament consolidated and amended the laws in force in the provinces relating to the naturalisation of aliens. In 1926 it adopted the Imperial legislation. Any certificate of naturalisation granted by the Governments of the United Kingdom or the British possessions is declared to have the same force and effect as the certificate granted by the Union Government. Subject to the Law, a naturalised person is entitled to all political and other rights, powers and privileges to which a natural-born British subject is entitled. But it is also stipulated that should, by any provisions of any law, a distinction be made between the rights, powers or privileges of natural-born British subjects and those of naturalised persons, the persons so naturalised shall be entitled only to those rights expressly conferred.

The Union Nationality and Flags Act of 1927 creates African nationality as distinguished from British nationality. The following persons are Union nationals: (1) a person born in South Africa who is not a prohibited immigrant, (2) a British subject who has lawfully entered the Union and has been

there domiciled for a period of two years, (3) a domiciled person who has become a naturalised subject, and (4) a person born outside the Union whose father was a Union national at the time of such person's birth, provided that he would not be a prohibited immigrant. The Act bears a striking resemblance to the Canadian Nationals Act of 1921. And a Union national, like a Canadian national, is not exempt from the provisions of the Immigrants Regulation Act if born outside the Union. The only difference is that there are no provisions in the Union Act with regard to the loss of national status through prolonged absence. A Union national other than one born in the Union remains such as long as he retains his Union domicile, while a Canadian national by naturalisation is presumed to lose his Canadian domicile and his Canadian citizenship if he resides outside Canada for one year.(1)

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(1) For the importance attached to the new definition of nationals as a basis of extraterritorial legislation by the Dominions and its use for international purposes, see Keith, The Constitutional Law of the British Dominions (1933), 123.

Chapter XXII.

BRITISH MALAYA

73. Naturalisation and the Civil Status of Chinese.- According to the common law rule, Chinese born in the Straits Settlements are British subjects and those born in the States are British protected persons. The Naturalisation Ordinance, 1926,(1) of the Colony fixed no time limit for the period of residence required before naturalisation. A naturalised person shall be deemed a natural-born subject, and shall be entitled within the Colony to all rights, privileges and capacities of a subject born within the Colony. The Naturalisation Enactment, 1904, of the Federated Malay States requires a residence of not less than five years in the States before a person may present a memorial praying to be naturalised. By a special provision, a natural-born subject of the Ruler of any of the Federated States is not permitted to apply for naturalisation in another State. The person so naturalised shall be deemed a natural-born subject of the Sultan in whose State he presents the memorial, and entitled within the State to all the rights of a natural-born subject except those specially reserved.

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(1) Revising Ordinance VIII of 1867.

The question arising from naturalisation or nationality in British Malaya is, however, not one of any barrier against the naturalisation of a certain race, nor of any differentiation between different classes of British subjects. The political rights, or rather the franchise, generally consequential upon citizenship, are not exercisable by the people of Malaya. Chinese form the bulk of the population. They bring their own traditions, manners and customs. In order to cause no injustice or oppression to the aliens who were established in the British territory before British rule began, the question which arises is, to what extent the law of England should be modified in its application to the alien races under its administration. Or, in other words, how far are Chinese laws and customs contrary or unknown to the laws of the land recognised in determining the civil status of Chinese? In this case, Chinese are clothed with a special personal status and personal law. No distinction is made between Chinese whether States-born, Straits-born or aliens. But the practice in the Colony and the States has been different.

74. The Modification of English Law in its Application to Chinese Persons.- The law of England was introduced into Penang by the Charter of 1826[1] which ordained that the "religion manners and customs of the inhabitants" should be respected in administering the law. In early cases, judicial

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(1) Terrell, Malayan Legislation and its Future (1932), 23, 24.

decisions were based on the provisions for indulgence and protection contained in the Charter. But their extent not having been clearly defined, the application of the principle varied. In two inheritance cases, an adopted son and daughter of an intestate Chinese were preferred to the lawful nephew.(1) The judges saw no objection in a case concerning Chinese to the mingling of the custom of adoption with the English laws of inheritance. The ruling was not followed, however, in the case of Moh Allang (1858), in which administration was refused to an adopted daughter in favour of collateral next of kin. This was decided in ignorance of the previous decisions, but it became settled law after the case of Regina v. Willans,(2) where the Court considered that modification such as would so fundamentally alter the English law of inheritance as to admit adopted children as objects of succession, could not be made. Sir Benson Maxwell admitted that it might possibly happen that hardship would sometimes be the consequence of "thus inflexibly applying our laws to men alien to us not only in race and religion but in all other habits and domestic institutions." But this was a question for the legislature, and not for the Bench. Judges and lawyers, he remarked, might legitimately give it full consideration in applying the known and established principles of law

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(1) In the Goods of Abdullah (1855), Wood's Oriental Cases ( ), 11; In re Chee Siang Long's Estate (1843), ibid.

(2) (1858), 3 Kyshe 16.

to a new state of facts; but if those principles were to be departed from or "modified", it could not be done by those whose whole and sole duty was to administer the law as it stood. This ruling has been generally followed,(1) and it became the established rule in the Colony that the status of an adopted child, being unknown to the law of England until 1926, should have no legal effects as regards transactions in England.(2)

The validity of Chinese marriages is recognised by the Courts of the Colony for the purposes of succession and legitimacy.(3) The question is one of the highest importance to the Chinese, a great many of whom are natural-born British subjects and who have been brought up in the religion, usage and customs of their parents. If the marriages of their parents are not valid, they are illegitimate and consequently in the event of their parents dying intestate, have no right of succession to their estates and effects. But the alleged Chinese customs of males inheriting to the exclusion of females (which is now obsolete), or of illegitimate children being given a share in the estate of their deceased father, were not recognised.(4) Nor did the Court think it

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(1) E.g., Khoo Tiang Bee v. Tan Beng Quat (1877), 1 Kyshe 413.

(2) Goh Tat Eng v. Goh Eng Loon (1910), 12 S.S.L.R. 18.

(3) Choo Ang Chee v. Neo Chan Nao (1908), 12 S.S.L.R. 120.

(4) Lee Joo Neo v. Lee Eng Suee (1887), 4 Kyshe 325.

desirable to recognise the custom that legitimation of a natural son should be effected by recognition and without regard to the status of the mother.(1) The recognition of one custom does not mean that every custom which is proved to be recognised by Chinese in China becomes part of the law of the Colony. The Privy Council upheld a decision which found that there were no grounds which would justify such a modification of English law as to treat an illegitimate natural son as legitimated by the mere fact of subsequent recognition. "Legitimation of a child, whose parents are not husband and wife, is unknown and repugnant to the common law of England," ruled their Lordships, "and no hardship much less injustice or oppression need result from a refusal to admit a modification in this respect of the English law in its application to Chinese."(2)

75. The "Malayan Nationality" and the Common Law of the Federated Malay States.- There were two enactments in the Federated States which laid down rules to be observed by the Courts in adjudicating upon matters affecting the status of Chinese. The Perak Order in Council of 1893 accorded recognition to "certain national laws and customs of the Empire of China regarding marriage adoption and inheritance" as law and

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(1) Re Khoo Thean Tek's Settlements (1925), S.S.L.R. 178.

(2) Khoo Hooi Leong v. Khoo Chong Yeok (1930) A.C. 346.

enforceable by the courts of the State of Perak. The Secretary for Chinese Affairs Enactment, 1899, which was law in each of the four States forming the Federation, provided that, as far as local circumstances and justice and equity allow, the Secretary shall pay regard to the "known laws and customs of the Chinese", and the Court may refer questions on Chinese customs to the Secretary for inquiry and report. The Order did not exclude from its operation that section of the Chinese community which consisted of Straits-born Chinese. Though under the terms of the Enactment the Secretary had jurisdiction only over persons of "Chinese nationality",(1) in practice he did not as a rule inquire, in determining the status of Chinese, whether the parties were Straits-born or States-born or Chinese-born if they appeared to be Chinese. Similarly, the Court had never refused to recognise Chinese customs on the ground that Chinese nationality is a condition of such recognition. The common law in the Federated Malay States in the sense of customs judicially recognised does not distinguish between persons of Chinese nationality and other persons of the Chinese race.(2)

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(1) The Enactment was amended in 1926, the words "Chinese nationality" being repealed and the words "Chinese race" substituted.

(2) Per Whitley, J.C., in Yap Tham Thair v. Low Hup Neo (1919), 1 F.M.S. 383. The decision of the Court of First Instance that neither the Order nor the Enactment could be applied in the case because the parties were not of Chinese nationality, was reversed.

The question whether there is a Malayan nationality, or rather a Federated Malay States nationality, is necessarily answered in the negative. There is no municipal law of nationality in the States. According to principles of law, any person born in the States is a subject of the Ruler of the State concerned. Each State is an independent sovereign State, and the Treaty of Federation of 1895 had not curtailed any power of the Rulers or altered their existing relations. The contention that by reason of his birth in one of the Federated States a person acquires what is called "F.M.S. nationality", has been rejected.(1) A person born in any of the States is a natural-born subject of a State in which he was born, and not a subject of each of the other States. Nor is he a subject of the Federation. This would indeed be impossible, because he would then become the subject of four Sultans, which is repugnant to the conception of sovereignty. The provision in the Naturalisation Enactment of 1904 that a natural-born subject of the Ruler of one of the Federated States is not allowed to apply for naturalisation in another, does not imply that he possesses Federal nationality. It is interpreted by the Court as only intended to discourage the acquisition of dual nationality in the Federated States and to prevent the subject of one State from being naturalised in another State.(2)

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(1) Ho Chink Kwan v. Public Prosecutor (1932), F.M.S. 271.

(2) Per Elphinstone, C.J., ibid.

The Perak Order in Council was repealed in 1929 by the passing of the Distribution Enactment which adopts the principle of the Straits Settlements law in the distribution of the estate of an intestate Chinese. The Secretary for Chinese Affairs Act was also abridged in 1932. The tendency in other States seems also to adopt the "recognised system" of law of the Colony rather than to ascertain from China what the present law is on the subject when enacting the local laws.(1)

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(1) Terrell, op. cit., 70, 71.

Chapter XXIII.

SIAM

76. The Importance of the Question of Nationality and the Early Practice.- In view of the existence of the system of extraterritoriality in Siam, the question of nationality, that which links an individual with his country, has much practical value in determining the legal position of an alien. The nationals of treaty Powers to whom Siam has surrendered the capitulations are exempt from local jurisdiction, while, since this is not the inherent right of an alien of any other nationality than those excepted by treaty, the nationals of other Powers which made no such treaties with Siam are under the ordinary laws and jurisdiction of the country. The status of aliens in Siam therefore varies from absolute extraterritoriality to virtual assimilation with that of Siamese subjects, according to the facts that determine their allegiance. Various problems present themselves as to the principle deciding Siamese nationality and alienage. Does birth in Siam confer native nationality on resident aliens of both European and Asiatic origin? Shall jus sanguinis nationality of foreign fathers who settle permanently in Siam continue to the second and third generations? What is the status of Siamese women marrying alien husbands, and alien women marrying Siamese,

and of these women as widows and divorced wives? These and other incidental questions are as interesting as they are important.

Siam had no law on nationality before 1913, and the Law of that year is a departure in many respects from her former practice. The long established rule was that all Asiatics resident in Siam were considered, until the contrary was shown, as Siamese subjects and amenable to local laws and jurisdiction. On the other hand, all individuals of European origin or race were considered as aliens, even if their family had been established on Siamese soil for several generations.(1) According to Lehr, the word nationality in Siamese is expressed by the phrase "under the dependence of"; from this point of view all the inhabitants of the Kingdom are under the dependence of the Government except where otherwise provided by a treaty. All foreigners not being nationals of a treaty Power, and in particular all Asiatics, as soon as they set foot in Siam, are considered as Siamese, or at least as being under the dependence of Siam. In a more limited sense, nationality connotes that only persons of the Siamese race will be considered as Siamese. This is not affected by the fact of residence, and they remain Siamese in the eyes of their Government even if they reside in a foreign country, while the

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(1) Padoux, "Condition juridique des étrangers au Siam: II. Qui est étranger?", J.I., 1906, 697.

Government claims no right over a Chinese or other Asiatic person even if born in Siam.(1)

This being so, the quality of white people had never been disputed by Siam, who never claimed any rights of jurisdiction over them. Conflicts often arose on the subject of the nationality of Asiatics not natives of Siam. The position was also unclear concerning those individuals who had left their country of origin and established themselves in Siam before their country had become a European possession or protectorate. The acutest conflict was that which arose over Chinese and other Asiatics provided with certificates of protection but whose origin and quality as European subjects remained doubtful. Controversy was particularly great with England and France, by reason of the large numbers of ressortissants from these nations in Siam, and their peculiar situation in having Siam as a frontier State. Incidents had occurred out of the conflict. The question was then regulated, with England by the Convention of 29 November, 1899, and with France by the Convention of 13 February, 1904, which, however, constituted two different systems in the matter of Siamese nationality.(2)

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(1) Lehr, La Nationalité dans les principaux Etats (1909), 189.

(2) Zeballos, La Nationalité au point de vue de la Législation comparée (1914), I, 608.

77. The Anglo-Siamese and Franco-Siamese Nationality Agreements.- The Anglo-Siamese Agreement of 1899[1] defining the position of British subjects resident in Siam, stipulates that all British natural-born or naturalised subjects not of Asiatic origin, their children and grandchildren born in Siam shall enjoy the status of British subjects. The great grandchildren and illegitimate descendants have not such right and consequently are Siamese subjects. Persons of Asiatic descent, born within the British dominions or naturalised in the United Kingdom or born in the territory of Indian States under British suzerainty, and their children born in Siam, enjoy the right of British protection.[2] The grandchildren are Siamese subjects. The natives of Upper Burma and of the British Shan States domiciled in Siam before 1 January, 1888 (the date of the annexation of these territories to Great Britain) retained Siamese nationality.

The Agreement remains in force to-day and the provisions relating to persons of Asiatic descent have been extended to other persons who enjoy British protection by virtue of being citizens of or born in British protectorates or territories under British mandate, and to the children of such persons.[3]

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(1) British and Foreign State Papers, 91, 101.

(2) It is to be noted that Asiatic persons naturalised in a British Colony and their children born in Siam are not British subjects.

(3) Article VI, General Treaty of 14 July, 1925, League of Nations Treaty Series, 55, 57.

Apparently certain categories of these persons are not British subjects although they enjoy British protection. They are, however, excluded from Siamese nationality.

The French Treaty[1] has different rules. Under French legislation, three categories of ressortissants are distinguished. French citizenship is conferred on any person born in France and certain Colonies. Persons born in a French Asiatic Colony, of Asiatic descent, are French subjects, while the subjects of countries under her protection are French protégés. Distinction is also made between Asiatic and non-Asiatic French subjects and protégés. They both may acquire the quality of French citizen by further naturalisation, and therefore that category of French ressortissants may also comprise persons of different racial origin but with equal rights. As regards French citizens, the Convention is silent. It follows that nothing has been changed in the practice that has since been established. They shall preserve indefinitely from one generation to another, jure sanguinis, the French nationality. Persons of Asiatic origin born in territories under French dominion or in countries protected by France, and their children, are accorded French status. The nationality does not descend to the grandchildren. The natives of a territory who fixed their residence in Siam before such territory was placed under French rule or protection, are not protected by France. This will exclude persons who came from

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(1) State Papers, 97, 961.

Cochin-China before 1858, from Cambodia before 1863, from Annam and Tonkin before 1884, from Laos before 1893, and from Kwang-Chow-Wan before 1899.(1)

The Anglo-Siamese Convention declares that wives and widows of British persons are entitled to British protection. No clause of this kind was introduced into that between France and Siam. The two Governments appeared to be in accord on the point that the wife follows the condition of the husband, but the position remained uncertain as to widows and divorced wives, - so numerous in a country where the bonds of marriage tended to be very much loosened. It was also complicated by practical difficulties in establishing the existence and nature of the union, the marriage never being certified by writing, and local laws distinguishing two categories of spouse having different rights. There seems no doubt, however, that a married woman when once widowed might renounce the status of her husband by a simple declaration and resume her nationality of origin. It was also admitted that a European woman, marrying a Siamese, would take the nationality of the husband.(2) In case of doubt as to the right of protection or the nationality of the person concerned, the English Convention provided for a joint inquiry by the contracting parties. The French Treaty contained no such clause. In case of dispute, the decision seems to rest with the French consular authority.(3)

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(1) Hegelsperger, op. cit., 42.

(2) Lehr, op. cit.

(3) Padoux, op. cit., 700.

78. The Nationality Law of 1913.- The subject is further clarified and supplemented by the Nationality Law[1] of 10 April, 1913, which is now in force. The Law recognises as Siamese every person who is born to a Siamese father on Siamese territory or abroad, or every person whose mother is Siamese and father is unknown, or every person born on Siamese territory. An alien may acquire Siamese nationality by naturalisation or by marriage to a Siamese husband. A Siamese woman who marries an alien also loses her Siamese nationality if, by the law of her husband, she acquires his nationality. But she resumes Siamese nationality on the dissolution of such marriage. As a consequence, the Siamese wife of a British subject may possess dual nationality, for under British law an alien woman who has by marriage become a British subject shall not by reason only of the death of her husband or the dissolution of her marriage cease to be a British subject.[2]

A Siamese cannot be naturalised in a foreign country unless he has obtained the sanction of his Government. His wife and children shall retain Siamese nationality unless by the law of the naturalising State the nationality he acquires extends to them.

The jus soli principle is naturally subject to the provisions of international agreements which Siam has undertaken

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(1) State Papers, 108, 585.

(2) s. 11, British Nationality and Status of Aliens Act, 1914.

to observe. Thus Asiatic persons born or naturalised[1] in British or French possessions will keep their nationality to the second generation. As to Chinese, the co-existence in the Siamese law of jus soli and jus sanguinis gives rise to many cases of dual nationality. The Chinese Nationality Law[2] of 1909 being purely jure sanguinis, a child born to a Chinese father, whatever the locality might be, was considered Chinese. No provisions for the repudiation of Siamese nationality by such children being made, the position has reached a dead-lock. The difficulty is aggravated by the number of Chinese so affected and the obstinacy of the Siamese Government in enforcing the policy of assimilation with respect to these persons. The Nationality Convention of 1930[3] having failed to deal adequately with the conflict of the two opposing principles, it is highly expedient that the question should be settled by a bilateral agreement.

A Naturalisation Law[4] was passed on 18 May, 1911. The conditions required for naturalisation are that the applicant

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(1) Although according to the terms of the Agreement colonially naturalised persons of Asiatic origin do not enjoy British status in Siam, the Orders in Council have since treated them as "British subjects". See infra.

(2) Cf. American Journal of International Law, 1910, 404. It was re-enacted on 5 February, 1929: see J.I., 1929, 814.

(3) Cf. A. J., XXIV (1930), 450.

(4) State Papers, 105, 703.

must be of full age and have resided in Siam for not less than five years. He must be a person of good character and in possession of sufficient means of support. The naturalised person shall acquire all rights and be subject to all obligations attendant upon the status of a Siamese subject, which also extend as of right to his wife and minor children. Such minor children may repudiate Siamese nationality and resume their former nationality by making a declaration of alienage on attaining full age, while their major brothers desiring to acquire the Siamese nationality of their naturalised father must undergo the process of naturalisation.

Chapter XXIV.

FRENCH INDO-CHINA

79. The Legislative History of the French Law of Nationality.- French nationality is governed by the Code Civil (Articles 8-21) observing strictly the doctrine of jus sanguinis. Owing to the peculiar position of the colonial legislative régime under the French Constitution, the validity of the Code is confined to the home country and to French possessions where it has been promulgated. The relevant provisions of the Code were afterwards incorporated and revised by the Law of 26 June, 1889, as a separate Code of Nationality and declared applicable by Article 2 to the old Colonies. The rule of jus sanguinis was supplemented by the application of jus soli, having a constantly increasing operation in the nineteenth century, which witnessed a progressive reinstatement of the latter principle. As to the other Colonies, a commission was appointed to determine the conditions under which the Law of 1889 could be extended. The result was the issue of a Decree in February, 1897, applying the Law in radically modified form to the newer Colonies. It differed vitally from the metropolitan Law, the chief features being that birth in the Colonies would not produce the same effect in relation to French nationality as birth in France, and that colonial

naturalisation was in certain aspects easier and in others more difficult.[1] The Decree was promulgated in Indo-China on 13 April, 1898.

To facilitate the acquisition of French nationality, orders had already been issued on 25 May, 1881, in Cochin-China and on 29 July, 1887, in Annam and Tonkin, for the naturalisation of both the native and aliens. Upon the promulgation of the Decree in 1897, superseding the previous orders but without changing the condition of the native,[2] a question arose as to which Law should operate in the protectorate with regard to the naturalisation of European persons. The Minister of Justice was of the opinion that naturalisation in Annam and Tonkin, which were protected States, should continue to be governed by the Order of 1887, the Decree of 1897 being confined to the "colonies".[3] The controversy was finally settled by another Decree, of 6 March, 1914, abrogating the Order of 1887 and explicitly extending the Decree of 1897 to Annam, Tonkin, Cambodia and the Territory of Kwang-Chow-Wan.

The metropolitan Law of Nationality was replaced by the legislation of 10 August, 1927, Article XV of which dealt with its application in Algeria as well as in the old Colonies. The Decree of 1897 was also replaced by that of 5 November,

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(1) Audinet, "La Nationalité Française dans les Colonies", J.I., 1898, 23.

(2) This limitation is expressly added by Article 17 of the Decree.

(3) Girault, op. cit., II, 363.

1928, which, unlike its predecessor, which had essential discrepancies with the Law of 1889, is a reproduction, mutatis mutandis, of the metropolitan Act. Under the Law of 1927 the relevant Articles of the Code Civil, except 11, 14, 15 and 16 relating to the conditions of aliens, are repealed. The application of jus soli is more extended. Birth in the Colonies has now the same effect as birth in France. Further, France will consider as having the nationality of a foreign country a child born of French parents in a country whose law imposes, jure soli, its own nationality on the child.(1) Another conspicuous innovation introduced by the Law is that concerning the nationality of married women, the general principle of which has had a world-wide adoption.

Similarly, the Decree of 1928 is primarily intended for "the colonies". Although it was intended that it should have the same domain as the Law it superseded,(2) the enactment of the special Decree on Nationality on 4 December, 1930, for Indo-China helps to clear up the revived controversy. By a special provision(3) the two Decrees are not applicable to "natives and persons of assimilated status", who shall be governed by special texts.

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(1) Garner, "The New French Code of Nationality", A.J., XXII (1928), 379.

(2) Audinet, "La Nationalité Française dans nos Colonies", J.I., 1929, 25.

(3) Article 26, Decree of 1928; Article 21, Decree of 1930.

Now there are separate Codes of Nationality Law, one in operation in the home land, and the other in the Colonies, especially in Indo-China. The legislation is again divided as between persons of European status on the one hand, and natives and the assimilated on the other. In the protected States, the native governments are sovereign in internal matters. France has consented by the Treaty of Protection to preserve to the natives of Annam and Tonkin, the Annamite nationality. It may legislate, however, to facilitate the acquisition of French citizenship by aliens and subjects of these States through naturalisation. In Cochin-China, which is a French Colony, the Code Civil, having been promulgated by the Decree of 3 October, 1883, will determine French nationality. But the first law relating to the naturalisation of natives in Cochin-China is the Decree of 25 May, 1881. In Annam and Tonkin, it is regulated by that of 29 July, 1887. The two Decrees also governed the naturalisation of other foreigners until their exoneration by the Decree of 1897. The position of natives, however, remained untouched. Nothing had been provided for the naturalisation of the natives in Cambodia and Laos except that they might avail themselves of the provisions of Cochin-China by establishing their domicile there for one year.(1) Then another Decree was enacted on 26 May, 1913,

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(1) Article 6, Decree of 1881.

repealing contrary stipulations of former Decrees, and formulating conditions necessary to obtain the quality of French citizen for all the natives of Indo-China.

This Decree, with subsequent amendments,[1] is the law now in force.

80. The Diverse Categories of French Ressortissants

(i) The French Subjects

Under the Decree of 1881[2] concerning the status of natives in French Indo-China and naturalisation of aliens in that Colony, it was provided that "a native Annamite born and domiciled in Cochin-China is a French subject; he shall continue to be ruled by the Annamite law according to the legislation now in force. He may demand on reaching the age of 21 the rights of a French citizen." Two things are to be noticed with regard to this statement: first, the Annamites of Cochin-China acquire French nationality by the French conquest. For under rules of international law, the natives of an annexed territory cannot but have the nationality of the annexing State. They enjoy the diplomatic protection of France as accorded to her nationals. In the territory under French sovereignty they are not to be treated as aliens nor be submitted

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(1) 4 September, 1919; 7 August, 1925; 24 June and 22 October, 1929; 21 August, 1932.

(2) Sirey, Lois Annotées. 1881, 130.

to the legal régime governing aliens. On the other hand, as French subjects, they do not enjoy the civil and political rights which citizens may possess in the Colony. They have a special personal status, the right of which is derived from native laws and customs. Indo-Chinese jurisprudence has therefore assigned to them an "intermediary position between a French citizen and an alien".(1) By their nationality, they approach to citizenship and differ from aliens. By their submission to native status, they are distinct from the citizen and assume a quality analogous to that of alien persons of their kindred race.(2)

According to the statute of 1881, the quality of French subject could not be acquired by an alien, either by original or by derivative means. Acquisition of the quality by birth in the Colony is confined to persons whose parents themselves are French subjects. French legislation deals only with the naturalisation to citizenship. Nor would a woman acquire the status of her husband by marrying a French subject. The Annamite law not having provided for the acquisition of Annamite nationality by marriage, jurisprudence held that a French woman marrying an Annamite of Cochin-China shall not lose her French citizenship and become a French subject.(3) On the

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(1) Cour d'Appel de l'Indo-Chine, 27 October, 1910.

(2) Cf. Solus, Condition des Indigènes (1927), 36.

(3) Cour d'Appel de Saigon, 9 April, 1926.

contrary, an Annamite woman who is a French subject marrying an Annamite subject or French protégé, will lose her French quality, and follows the condition of her husband.(1)

By special legislation, however, Chinese in Cochin-China may acquire the French quality. The Decree of 3 October, 1883,(2) has rendered applicable certain Articles of the Code Civil in the Colony. Under the stipulations of Article 9, Chinese and other Asiatics assimilated to the Annamite, by being born in the Colony, may claim French quality on their majority either by a declaration showing their intention to fix their domicile in France, if they reside there, or, if they reside in a foreign country, to establish it within a year of an undertaking so to do. But it should be noted that the quality which they so acquire is that of a French subject, and not French citizenship, "Article 9 having not extended to confer French nationality with all its advantages on the assimilated Asiatics on the accomplishment of the prescribed formalities."(3) To acquire citizenship, further naturalisation is required which was regulated for them by the Decree of 1881.

Apart from the Annamites of Cochin-China, the natives of the French concessions of Hanoi, Haipong and Tourane enjoy the

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(1) Cour de Hanoi, 29 November, 1926. See J. L. 1930, 702.

(2) Sirey, Lois Annotées, 1884, 547.

(3) Cour d'Appel de l'Indo-Chine, 27 October, 1910.

quality of French subjects if they are born and domiciled in these cities.(1)

(ii) The French Protégés

They are not French subjects nor French citizens. The internal sovereignty of the protected States to which they belong being maintained over them, they cannot exercise any of the civil or political rights that France may accord to her own nationals. Further, the territory of these States not having been annexed, no change in nationality takes place that will break the relations between them and such States, of which they are and remain the subjects. But as French protégés, they submit to French authority. By virtue of the treaties of protection and Article 18 of the Senatus-Consulte of 3 May, 1854, France will participate in, and legislate for, the government and administration of these protectorates. She exercises such an influence on the legal condition of their subjects that no line of demarcation can be drawn between them and the French subjects of a Colony under direct French domination.

The Annamite and Cambodian nationality is regulated by native legislation, which is strictly jure sanguinis. Only persons born of native parents in the State will be its subjects. A question whether by the term "Cambodians" were

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(1) Cour d'Appel de l'Indo-Chine, 24 June, 1910; 20 February, 1914; 29 April, 1921.

them as Annamite subjects, it was suggested that that solution should obtain in the protectorates.(1) But the judicial authority had a different opinion. It ruled that in Cochin-China, as well as in the French concessions, as a result of the Decree of 3 October, 1883, applying the Code Civil to the Colony, the Minh-huongs would have Chinese nationality if they did not claim the quality of French subject in the year of their majority.(2) In Annam and Tonkin, they should also retain Chinese nationality.(3)

The question is now positively resolved by recent legislation. In the Decree of 24 August, 1933,(4) it is provided that all legitimate or natural children born in Indo-China whose parents are natives, or one of whose parents if foreign and the other native or assimilated Asiatic, or, finally, one of whose parents is an assimilated Asiatic and the other a native, are French subjects or protégés according to the place of their birth.

An analogous controversy arose concerning the Nungs of Tonkin. They are persons of Chinese race, language and civilisation who had come to settle in the desert Tonkin provinces

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(1) Solus, op. cit., 67; Girault, op. cit., II, 471.

(2) Cour d'Appel de l'Indo-Chine, 27 October, 1910.

(3) Cour d'Appel de l'Indo-Chine, 3 May, 1916.

(4) J.I., 1934, 1119.

without any intention of returning to China. A favourable treatment had been accorded to them in order to persuade them to stay, by the Annamite Government, with the concurrence of the French authorities. Instead of being inscribed in Chinese congregations, they are permitted to register with the Annamite communes. The grant of this sort of right gives rise to the question of nationality. But jurisprudence has refused to recognise in them the quality of Annamite subjects.(1)

Owing to the non-existence of any local sovereign in Laos except Luang-Prabang, the natives of which are French protégés, the majority of Laotians are French subjects.(2)

(iii) The French Citizens

The early laws of France, inspired by the principles of the great revolution, made no distinction of race, colour or caste. Persons born in the old Colonies of whatever origin were considered as equals, and to them was attributed the unqualified status of French citizenship. The native population of the younger Colonies, no matter how highly they may have developed, cannot acquire the quality of French citizen except by further naturalisation. The case also differs with the status of the person concerned. For a French subject already possessing French nationality, there remains the acquisition of the rights of a French citizen. As to French

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(1) Cour d'Appel de Hanoi, 29 October, 1907; 3 June, 1916.

(2) Solus, op. cit., 43; Répertoire, III, 580.

protégés, they may apply for naturalisation, because they are not French subjects but simply aliens, submitting to the rule of France.

Under the Decree of 1881,[1] an Annamite native of Cochin-China might demand the rights of a French citizen on reaching the age of 21. He would then, together with his wife and minor children, be governed by the civil and political laws applicable to the French in the Colony. An essential qualification of the applicant is the knowledge of the French language. But natives decorated with the Legion of Honour and other medals were exempt from this obligation. Foreigners established in the Colony for at least three years could also apply, but the benefits of naturalisation would not extend to their family as in the case of an Annamite. The Court has ruled that the minor son of a Chinese who had acquired French nationality by naturalisation could not, under the Decree of 1881, claim French nationality, despite the contention that such nationality would devolve upon the minor sons of an Annamite who had been so naturalised. It also rejected the idea of assimilation, by which the status of Chinese in Indo-China has been so closely identified with that of the natives, and ruled that the effect of the naturalisation of a foreigner would extend only to the person concerned.[2]

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(1) Sirey, Lois Annotées, 1881, 130.

(2) Cour d'Appel de l'Indo-Chine, 30 December, 1910.

Naturalisation in Tonkin and Annam under the Decree of 1887[1] was rather simple. Foreigners who had resided for three years either in Annam or Tonkin or in Cochin-China, but at the time of application were resident in Tonkin or Annam, and natives who had served France for three years either in the army or navy or in the civil service, might be admitted to enjoy the rights of a French citizen.

The Decree of 1913[2] concerns all the natives of Indo-China, who after reaching the age of 21 and showing their ability to write and read the French language, may obtain the quality of French citizen if they "resemble the French by their culture, or distinguish themselves by their services or manifest their inclination for French civilisation by becoming members of a French family." The cultural requirements are satisfied by having obtained a brevet of primary or secondary instruction, or certain higher educational diplomas. Public service for ten years with merit and distinction, or eminently in the interests of France, will also qualify for naturalisation. Natives who have been patronised or adopted by French families, or those marrying French women, also enjoy the faculty of becoming naturalised. The Decree of 1919 has added natives who have taken part in active military operations during the World War to the privileged list.

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(1) J.I., 1887, 683.

(2) J.I., 1913, 1469. See also Mournoy and Hudson, Nationality Laws (1929), 275.

A naturalised person is definitely placed under the same civil and political jurisdiction as one of French origin, no distinction being made by the French legislation between citizens of different racial origins. But the rights of a French citizen in the Colonies are not identical with those which a citizen may possess in the metropolis. On the one hand, their political rights are diminished by the fact that the political organisation of a Colony does not correspond with that of the home land. On the other, the civil rights of a French citizen are those emanating not from metropolitan laws but from special legislation in force in the Colony. The metropolitan laws are not applicable to the Colonies if they have not been specially promulgated. Indeed, not all laws are promulgated in all the Colonies, and certain of them are promulgated with modifications and corrections varying according to local needs. A naturalised native citizen resident in a Colony is therefore not ruled by the same law as in France, but this is also true of citizens of French origin.(1)

The rights of the spouse and descendants of a naturalised native undergo frequent changes. Originally, French naturalisation, or accession to the rights of a French citizen, was considered a personal benefit. The Decree of 1919 extended it to the wife of a naturalised native if she associated herself with her husband's application, and to the minor children

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(1) Solus, op. cit., 13, 14.

if the grant of naturalisation did not expressly except them. The extension was modified by the Decree of 24 June, 1929, but is re-affirmed by another Decree,(1) of 22 October of the same year. By the Decree of 1932,(2) natives born of a native who has been himself naturalised, will acquire French citizenship without other conditions.

Nothing was said about the naturalisation of foreigners in Indo-China in the Decree of 1913. Other decrees dealing with this subject provide expressly that they are not applicable to Asiatic aliens of the assimilated native status. In the absence of express statute, Chinese are practically denied eligibility for French citizenship. But as this can never have been the intention of the colonial legislation, three cases of reasonable interpretation may be submitted. In the first place, resort may be had to the Decrees of 1881 and 1887, where are provisions relating to the naturalisation of foreigners which have been left intact. But to become naturalised in Cochin-China, a foreigner must comply with all the requirements under which a native may become naturalised (Article 2) and which had been seriously modified by the Decree of 1913. The Decree of 1887 had also been abrogated by the Decree of 6 March, 1914, extending the Decree of 1897 to the protectorates. Therefore Chinese might avail themselves of the two

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(1) Annuaire, 1929, II, 159.

(2) Ibid., 1932, II, 240.

Decrees, but not later than 1913 and 1914. The Decree of 1897 contained nothing to prevent the Chinese or Asiatic aliens from utilising its provisions, except that it would not "change the condition of the native" (Article 17). But its substitute, the Decree of 1928, expressly denied any application to them. Secondly, the Chinese having been guaranteed the most-favoured-nation treatment with respect to laws and jurisdiction, they may rightly invoke the Decree of 4 December, 1930,[1] concerning the conditions for the acquisition of French citizenship by foreigners in Indo-China, although it provides to the contrary. Finally, in view of the traditional assimilation of the Chinese to the native by local legislation, the submission may be advanced that the Decree of 1913 will also cover the naturalisation of aliens of the native status. The Decree of 1897, making "no changes in the condition of natives", had in practice never been invoked by Asiatic aliens since its promulgation. They and the native population had continued to become naturalised or have access to the quality of French citizen by the process prescribed in the Decrees of 1881 and 1887. But as the Decree of 1913 concerns only "natives of Indo-China, either French subjects or protégés", its analogical application to Chinese seems to require legislative sanction.[1]

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(1) The naturalisation of Chinese was regulated by separate Articles in the Decrees of 1881 and 1887. And a suggestion that the son of a naturalised Chinese should share the same rights as those that were accorded to the son of a naturalised native by assimilation, had been ruled out.

Chapter XXV.

THE DUTCH EAST INDIES

81. Public Law and Civil Law Citizenship.- Under the Constitution of 1922 Dutch nationality will be regulated by law, which may distinguish Netherlands subjects and citizens. Naturalisation shall take place by virtue of a law, and its consequences respecting the wife and minor children of the naturalised person shall also be regulated by imperial legislation.(1)

The early rules for the determination of Dutch nationality were embodied in the Civil Code. It was laid down by Article V. that persons (1) born in the Kingdom or its colonies of parents domiciled there or of parents not there domiciled provided that they themselves established their domicile there, or (2) born abroad of foreign parents domiciled in the Kingdom or its colonies on certain conditions, are Netherlanders. The jus soli principle was somewhat modified by the enactment of the Nationality Law of 1850 which ascribed, with regard to military service, the status of Netherlanders to persons born

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(1) Article 6, State Papers, 116, 863.

within or without the Kingdom of parents domiciled in the Kingdom, or, if their parents were not domiciled there, who themselves declared their intention of retaining their domicile within the twelve months following their twenty-third year, and their descendants. Both legislations laid stress on domicile, but differed in that in the latter Act domicile in the Kingdom was alone contemplated and the principle of jus sanguinis was adopted. As a consequence, during the period in which the Civil Code and the Law of 1850 were both in force, namely from 1850 to 1892, a person might be a Netherlander according to the statute but not a Netherlander according to the Civil Code, or vice versa.(1)

As to the status of the population of the East Indies, persons born there of parents there domiciled enjoyed Dutch nationality in virtue of the Civil Code, but, by being born in the Colonies, were not Netherlanders under the Law of 1850. The Dutch colonists and their descendants would retain the status of Netherlanders under both provisions. Chinese born in Insulinde before 1892 were therefore Dutch citizens under civil law, but did not possess public law citizenship, that is to say, citizenship under the Nationality Law of 1850, implying liability to military service.

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(1) Report on Netherlands Nationality Laws and Military Service, State Papers, 103, 601.

82. The Law of 1892.- The Law of 12 December, 1892,[1] put an end to the dual citizenship by superseding the relevant articles of the Civil Code and the Act of 1850. It laid emphasis on the principle of jus sanguinis or nationality proper, as opposed to that of domicile, which had formed the basis of the previous laws. Under the present legislation, which is still in force, children of Netherlanders wherever born are themselves Netherlanders. Birth, within the Kingdom, of foreign parents domiciled there shall no longer ipso facto entail Dutch nationality. And persons not possessing the status of a Netherlander or a Netherlands subjects in accordance with the provisions of the Act are deemed to be aliens. Another status peculiar to the Indonesian Constitution is that of an inhabitant who has maintained a domicile for eighteen months in the Kingdom or colonies.

By a transitional article it was enacted that all persons who had the status of Netherlander under previous legislation at the date of enforcement of the new Act should retain that status, with the exception of those who, by the Government Act of 1854 of the Dutch East Indies, were considered as natives or assimilated as such. Therefore persons born in other Dutch Colonies retained Dutch nationality despite the Act of 1892 and continue to do so to-day, whereas East Indians lost

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(1) State Papers, 84, 663. The Law was amended in 1907, 1910 and 1921, Annuaire, 1928, I, 174.

Netherlander status by its operation. In consequence, Chinese born in Insulinde whose position had by law been assimilated to that of the native, and the whole Indonesian population, even those who had formerly been "Netherlanders", were relegated to the status of aliens in the eyes of the law from 1892 to 1910. The only remaining legal connection between them and the Kingdom of the Netherlands was that they were inhabitants of a Dutch Colony, who might claim protection for their person and property only when they were within the territory of the East Indies. Their status abroad was quite uncertain and, in the case of natives, amounted practically to statelessness. Other aliens who had acquired the quality of Netherlander, and the original Dutch in Insulinde, will keep, jure sanguinis their Dutch nationality.

83. The Law of 1910 and the Sino-Dutch Nationality Convention.- The Law of 10 February, 1910,(1) was intended to fill the lacunae in Dutch nationality resulting from the Act of 1892. It created the new status of Netherland subject as distinct from that of Netherlander. Persons born in the East Indies of parents domiciled there, if not Netherlanders according to the previous law, shall no longer be aliens, but shall be Netherland subjects. But Dutch nationality will not

(1) State Papers, 103, 600. The Law was amended in 1927, Annuaire, 1927, I, 215.

devolve upon the children of such subjects who are not born in the Indies. They are considered to have the father's status only as long as they are under eighteen years of age and unmarried. After that age, or on marriage before, if they come to reside within the allegiance, they and their unmarried children under eighteen will acquire full Dutch nationality. The wife and widow will follow the condition of the husband.

The newly instituted status will confer the right to Dutch protection when East Indian persons possessing this status emigrate to the adjoining countries. But this national quality is not a lasting bond. The children of such subject born abroad will not ipso facto acquire Dutch nationality, and the status is lost by residence in a foreign country if the Netherland subject omits to give notice within three months after arrival to the consular officer. And when such residence is continued, the omission to repeat that notice within the first three months of each calendar year produces the same effect. He will, however, recover that status by settling again in Insulinde.

The Law has since been criticised on two grounds. In the first place, it is too loose in that it allows the status of Netherland subject to lapse so very quickly when a subject is outside Dutch territory. Secondly, the Law has the effect of forced naturalisation. No means for the repudiation of Dutch allegiance being provided, persons born in Insulinde

may well find themselves possessed of dual nationality. To meet the first complaint, an amendment[1] to the Act was made in 1929 by which the loss of status by foreign residence shall not apply to persons belonging to the "native population of the Dutch East Indies". A Convention had also been signed with China to resolve the conflict of nationality laws.

The Chinese Nationality Law of 1909[2] was strictly jure sanguinis. Children of Chinese parents wherever born take Chinese nationality while persons born of alien parents in Chinese territory are aliens. This did not run counter to the Dutch Law of 1892, which similarly adopted the jus sanguinis principle. On the passing of the Act of 1910, however, Dutch nationality being also subject to jus soli, a sharp conflict ensued. China was strenuously opposed to the Dutch legislation but had to accept it in exchange for the right to consular representation so that better protection might be extended to Chinese born elsewhere than in Insulinde. By the Convention of 8 May, 1911,[3] the parties agreed that the question of dual Chinese and Dutch nationality should be settled in the possessions and Colonies of the Netherlands in conformity with the legislation in force in these possessions

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(1) Annuaire, 1929, I, 265.

(2) See Tsai, "The Chinese Nationality Law, 1909", A.J., 1910, 404; also Supplement, 160.

(3) State Papers, 104, 877.

or Colonies. It is noticeable, therefore, that Dutch-born Chinese, in other foreign countries, will, in pursuance of Chinese law, resume Chinese nationality and enjoy Chinese protection.

84. Naturalisation in Political Allegiance and Naturalisation in civilibus.- The Law of 1910, though maintaining the distinction between a Netherlander and a Netherland subject, is silent as to the privileges, duties and disabilities attending either status. Nor is there any provision relating to the acquisition of Dutch nationality by derivative methods. The Act of 1892, which chiefly concerns the position of Netherlander, provides that Dutch nationality can be acquired by naturalisation. An applicant must produce proofs that he has attained majority according to Dutch law, that he has resided for five consecutive years in the Kingdom or its Colonies, and that the amount due for naturalisation fees has been deposited. In addition, proof may be required that the legislation of his country of origin presents no obstacle to his being naturalised as a Dutch national.

The Law having deprived the natives of the East Indies of the Dutch status which they previously possessed, it remained doubtful whether it could be invoked by them to become naturalised Netherlanders, until the negative was established by later legislation.

Similarly, the Law is silent as to who may or who may not be naturalised pursuant to its provisions, although two categories of persons, namely, Europeans and natives, with different legal status had been distinguished by the Government Act of 1854. Colonial jurisprudence has devised a two-fold classification of the personal status, namely, by nationality and by jurisdiction. Under nationality, there are Netherlanders, Netherland subjects, and aliens. Under jurisdiction, all Europeans are grouped in one category as opposed to natives. The positions do not correspond to one another and have therefore no relevancy. Netherland subjects and aliens may have the same civil status as Europeans, while natives possessing the status of Netherlanders before 1892 retain the native personal status. The creation of the status of Netherland subject for the East Indian population tends to identify the status of a Netherlander with that of a European, the former being nowinvariably amenable to the civil jurisdiction over Europeans. To attain the European status, or rather the quality of a "Netherlander", a native person must undergo a further naturalisation or process of assimilation. That this process has nothing to do with political allegiance in the case of a native Dutch subject is obvious.

The conditions laid down by the Law of 1907[1] for naturalisation <u>in civilibus</u> of native persons and the assimilated

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(1) Angoulvant, <u>Les Indes Néerlandaises</u> (1926), I, 195.

include the ability to speak the Dutch language, the possession of a certain amount of property, and residence of five consecutive years. The candidate must also live a European life, be monogamous, and, finally, pay a fee of one hundred florins. A naturalised person shall be amenable to the same law and jurisdiction as a European Netherlander, and subject to the same obligations, including military service. In other words, he acquires full citizenship.

In practice it has been shown that very few natives seek such naturalisation, which would not grant much benefit. Being of Dutch nationality, they had already access to all public offices except the highest, and European status means only higher taxation for them. On being naturalised or assimilated, they will also lose the special protection of the Governor-General guaranteed by the Constitution, and will no longer have the benefit of their adat or customary laws. As to the Chinese who are assimilated to the natives, they resent the relegation to that status and other invidious discrimination derogatory to their interest and pride. Their present demand is for the position of a foreigner on a level with that of Europeans, and not Dutch assimilation, much less Dutch citizenship,[1] that is to say, amelioration of civil status without involving any change of political allegiance.

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(1) The census of 1920 returned 528 Chinese who had been naturalised to the quality of Netherlander: Indisch Verlag (1933) II, 34.

PART IV.

THE RESTRAINTS IN TRADE AND OCCUPATION

Chapter XXVI.

THE UNITED STATES

85. The General Situation

(i) Employment in Public Works

As has been shown, the laws of California and Oregon prohibiting the employment of Chinese labourers in public works of the State were nullified by court rulings. The right to labour for a living was considered to be as inviolable as the right to property and as sacred as the right to life. The Chinese are fully protected on a parity with other aliens by the Treaty and the Constitution.(1) But if the discrimination is made between citizens and aliens generally, it has been held that the State may dictate its employment policy respecting public works, whether constructed by the State itself or by its municipalities or contractors.(2) This, however, must be distinguished from attempts to restrict the right of aliens to be employed by private persons pursuing their private concerns. A statute of Arizona which prohibited the employment

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(1) See supra, § 6.

(2) Crane v. New York (1915), 239 U.S. 195.

by any individual or corporation of less than eighty per cent. qualified electors or native-born citizens in works on which more than five persons were employed, was declared unconstitutional.(1) The Court found that the respondent, being admitted under the Federal Law, with the privilege of entering and abiding in the United States or any State of the Union, and being lawfully an inhabitant of Arizona, was entitled under the Fourteenth Amendment to the equal protection of its laws. It further ruled, per Mr. Justice Hughes, that the assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted into the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. If such a policy were permissible, the Court continued, the practical result would be that those lawfully admitted to the country under the authority of the Acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer them hospitality.

(ii) The Trade Licence

In refusing to issue trade licences to aliens, the exercise of the police power tends to contravene the equal protection clause of the Constitution. Much will depend upon

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(1) Truax v. Raich (1915), 239 U.S. 33.

the nature of the trade that is to be carried on and the status of the person who proposes to engage in it. And in determining the validity of a disabling ordinance, some latitude must be allowed for legislative appraisement of the local conditions and for legislative choice of methods of controlling an apprehended evil. In spite of the Fourteenth Amendment, which prohibits arbitrary discrimination against aliens, American jurisprudence has established that alien race and allegiance may bear such relation to a legitimate object of legislation as to be made the basis of a permitted classification.(1) Even among full citizens , differentiation has justification in the police power of the State.(2)

This being so, a city may, within constitutional limits, prohibit the issue to aliens of licences for the operation of pool and billiard rooms. The statute authorising the issue of peddlers' licences to citizens only was upheld in Massachusetts,(3) but declared void in Maine.(4) An Ordinance of the city of Niagara, New York, providing that no licences should be issued to aliens to conduct "soft-drink parlours", and another denying aliens the licence to operate a motor bus on the public highways, were declared constitutional.(5)

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(1) Ohio v. Dickebach (1927), 274 U.S. 392.

(2) Murphy v. California (1912), 225 U.S. 623.

(3) Commonwealth v. Hann (1906), 195 Mass. 262.

(4) State v. Montgomery (1900), 94 Maine 192.

(5) Mears, Resident Orientals on the Pacific Coast (1927), 285, 286.

A statute of California prohibiting the issue of licences to aliens not eligible to become electors of the State was invalidated, since the classification was not reasonable and the equal protection of the laws was thereby denied.(1) A Michigan statute denying aliens licences to conduct barber shops had the same fate.(2) The Ordinance that only citizens should be licensed as pawnbrokers in the city of Seattle, Washington, was held void as applied to Japanese, whose "liberty to carry on trade and generally do anything incident to or necessary for trade" was guaranteed by treaty to be upon the same terms as that of native citizens.(3)

86. The Chinese Bookkeeping Case.- The position of Chinese merchants and the enforcement of the Federal Constitution in the insular possessions is well illustrated in this case.(4) Under the Bookkeeping Act, 1921, enacted in the Philippine legislature, it was made unlawful for any person, company or partnership engaged in commerce or industry to keep its account books in any language other than English, Spanish or any local dialect. Violation of its provisions would be

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(1) Mears, op. cit., 285, 286.

(2) Templar v. Michigan (1902), 131 Mich. 254.

(3) Asakura v. Seattle (1923), 265 U.S. 332.

(4) Yu Cong Eng v. Trinidad (1926), 271 U.S. 500.

punished by heavy fine or imprisonment for not more than two years, or both. A petition for prohibition against the operation of the Law having been rejected by the local tribunal, the case was brought to the Supreme Court of the United States on writ of error.

It was alleged that most of the Chinese merchants, who do sixty per cent. of the business of the Islands, neither read, write nor understand the English or Spanish languages or any local dialect, and that the Act would necessitate the employment of a capable bookkeeper and probably an interpreter, and would put them at the mercy of their employees, who if dishonest might cheat and defraud them of the proceeds of their business and involve them in civil or criminal liability. They also averred that under the provisions of the Act they were prohibited from keeping a duplicate set of accounts in their own language and would be compelled to remain in total ignorance of the state of their business, and that in the case of small traders, their limited profits never being sufficient to justify the employment of a bookkeeper, the enforcement of the Law would drive them out of business. The Act would thus have the effect of depriving them of their liberty and property without due process of law and of denying them the equal protection of the laws. It also violated the treaties between China and the United States under which they were entitled to the same rights and privileges as the subjects of Great Britain and Spain.

The Court ruled that with respect to questions of local law or those properly affected by custom inherited from the countries of Spanish control, it would defer much to the judgment of the local courts. But the question of applying American constitutional limitations to a Philippine statute dealing with the rights of persons living under the government established by the United States was not a local one, especially when the persons affected were subjects of another sovereignty with which the United States had made a treaty promising to make every effort to protect their rights. It would be oppressive and arbitrary to prohibit all Chinese merchants from maintaining a set of books in the Chinese language and thus prevent them from keeping themselves advised of the state of their business and directing its conduct. Further, it would greatly and disastrously curtail their liberty of action and be oppressive and damaging in the preservation of their property. The Court therefore held that as against the Chinese merchants of the Philippines the Law, which deprived them of something indispensable to the carrying on of their business and which was obviously intended chiefly to affect them as distinguished from the rest of the community, was a denial to them of the equal protection of the laws, and hence that they might keep their books in their own language.(1)

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(1) The Philippine legislature promptly passed an Act in 1926 levying special fees for the examination by the Revenue officials of books kept in the Chinese language.

Chapter XXVII.

CANADA

87. The Exclusion of Chinese Labourers from Public Works and Mining.- The imposition of anti-Chinese legislation of an economic nature which always precedes immigration restriction against Chinese, reveals the fact that the causes of their exclusion are primarily economic as well as racial. In young Dominions undergoing Europeanisation, or destined to the furtherance of Western civilisation, the establishment and prospering of alien races possessing a civilisation of their own, are therefore not welcome, much less encouraged. Devices are introduced having the object of preventing them from earning a living or establishing themselves in the land and discouraging their existence there, so that eventually absolute exclusion is achieved. This is the case in Canada. This is also the case in the other Dominions.

Early attempts in Canada to impose special taxes on Chinese and prevent them from being employed on the Canadian Pacific Railways failed to pass the legislatures.(1) The Chinese

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(1) Campbell, op. cit., 37, 38.

Tax Act, 1878, of British Columbia was held ultra vires.(1) Section 5 of the Chinese Regulation Act, 1884, inflicting penalties for omission to obtain the licence to reside in the province required to be held by Chinese, was also void.(2) Since the invalidity of one section in an Act does not render void the whole Act, it required another action to avoid the operation of s. 14 of the Regulation Act, which provided that Chinese should pay £15 for a free miner's certificate. Low Chin, relying on the Mineral Act, 1884, which required the payment of £5 for the certificate, refused to pay the triple sum, while the Commissioner insisted. The section was declared void by the Court, as an attempt to impose a differential tax on the Chinese.(3)

We have seen how the Coal Mines Regulation Amendment, 1890, prohibiting the employment of Chinese, whether naturalised or not, underground, was declared ultra vires by the Privy Council. British Columbia now passed the Oriental Labour Bill, 1897, which provided that where any Act granted to any person or body corporate any property, rights, or privileges, no Chinese or Japanese person shall be employed in connection therewith. The Japanese Consul instantly protested

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(1) See supra, § 39(i).

(2) See supra, § 39(ii).

(3) R. v. Gold Commissioner of Victoria (1886), 1 B.C., Pt. II, 260.

against this "most unjust and unfriendly measure".(1) The Bill was reserved, the Government considering it exceptional and being doubtful as to whether it was within the provincial competence. The Labour Regulation Act (C. 28), together with the Tramway Corporation Amendment Act (C. 44) and a number of private Acts, containing the same provisions and imposing a penalty of £5 per day for each and every Chinese or Japanese person employed by the respective companies, were again passed in 1898. When the Acts were sent to the general Government for approval, the Minister recommended the disallowance of the general Acts, namely, CC. 28 and 44, but considered that the other statutes, which concerned the incorporation of companies and had come into effect upwards of a year before, could not be disallowed without great inconvenience, confusion and loss on the part of the corporations, which had been established and had acquired property and transacted business. He suggested, however, that an earnest recommendation should be made to the provincial government that at the ensuing session the legislature should introduce legislation to repeal the clauses in question.(2)

The reply to the recommendation was the passing of a number of further private Acts (CC. 78-89) in the following

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(1) Hodgins, Provincial Legislation, 1896-1898 ( ), 77.

(2) Ibid., 108, 109.

year by the province, prohibiting the employment of Chinese and Japanese workers. They again remained in force in the province. But two Acts (CC. 44 and 46 of 1899) forbidding them to work on the construction of railways or in coal mines (in the case of Japanese) were disallowed because it was considered undesirable to leave these provisions affecting Japanese in operation.(1) The Placer Mining Act of the same year was also disallowed on the ground that it was contrary to the principle of the Union Colliery case.(2)

British Columbia now continued its attack on the orientals by the use of more general terms. Acts C. 14 of 1900 and C. 38 of 1902 forbade the employment in works to be constructed under provincial franchise of any workman who could not read a European language. They were again disallowed on the same grounds as before and as contrary to imperial interests and interfering with international relations.(3) The Coal Mines Regulation Act was further amended in 1904 (C. 39), defining "Chinaman" as "any person or persons of Chinese blood or race whether born within the limits of the Chinese Empire or not and shall not be affected by naturalisation". No Chinaman was to occupy any position of trust or responsibility in or about a mine whereby through his ignorance, carelessness

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(1) Hodgins, Provincial Legislation, 1899-1900 ( ), 104.

(2) Ibid., 120.

(3) Ibid., 135, 136; 1901-1903, 80.

or negligence, he might endanger the life or limb of any person therein employed. The Supreme Court of the province soon held this Act ultra vires, on the authority of Bryden's case.(1) It was also evidenced to be an interference with trade and commerce, which, under s. 91(2) of the Constitution, should include freedom to engage in occupation in Canada for the purpose of earning a livelihood.(2) The Act was accordingly revoked by the Dominion Government.(3)

By two Orders in Council in 1902, the Government of British Columbia recommended that in all contracts, leases and concessions made by the Government, provision should be made that no Chinese or Japanese should be employed in connection therewith. In 1920 the Court of Appeal held the stipulation to be invalid as it encroached upon the Dominion power to deal with "naturalization and aliens" and the provisions of the Japanese Treaty.(4) The provincial Assembly then passed the Oriental Orders Validation Act, 1921, confirming the two Orders, which was promptly held invalid by the Supreme Court of Canada.(5)

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(1) Re Coal Mines Regulation Act (1904), 10 B.C. 408.

(2) R. v. Priest (1904), 10 B.C. 436.

(3) Hodgins, Provincial Legislation, 1904-1906 ( ), 130.

(4) Re Japanese Treaty Act, 1913 (1920), 29 B.C. 136.

(5) Re Oriental Orders Validation Act, 1921 (1922), 65 D.L.R. 577.

Now licences had been granted to certain persons enabling them to cut and carry away timber on lands belonging to the province on the condition that no Chinese or Japanese were to be employed. The Privy Council decided that the condition not being complied with, the licencee was not entitled to the renewal of such licence.(1) But, on the other hand, the Council upheld the decision of the Supreme Court ruling that the Validation Act was invalid as it violated the principle of the most-favoured-nation treatment laid down in the Japanese Treaty Act of 1913.(2)

As a matter of fact, no oriental labour is permitted either directly or indirectly on any contract or day-labour work on roads, bridges, buildings or any public works whatever, so far at least as British Columbia is concerned. Under Clause 45 of the Form of Contract of the Department of Public Works, the contractor undertakes not to employ any Asiatic upon, about or in connection with, the works, and in the event of his so doing, the Minister may declare forfeited to the Government all moneys due to or accruing due to the contractor.(3)

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(1) Brooks-Bidlake and Whittall, Ltd. v. Attorney-General for British Columbia (1923) A.C. 450. See §67(iv).

(2) Attorney-General of British Columbia v. Attorney-General of Canada (1924) A.C. 203. See §67(v).

(3) Oriental Activities in British Columbia, prepared by the Provincial Assembly, 1927, 23.

88. The Trade Licence and the Chinese Laundry.- The early provincial Law depriving Chinese of the right to apply for a pawnbroker's licence was declared a "very wide interference with trade and commerce". The Court assumed that no authority existed in the provincial legislature or in a municipality to deprive certain nationalities or individuals of the right to these trade licences. "If such a power existed", ruled the Court, "then since no man may in any municipality pursue any avocation without such licence, the local legislature might exclude large classes of men from gaining a livelihood or indeed existing in the province."(1) The Liquor Licence Act, passed in 1899, which provided that no licence was to be issued or transferred to any person of the Indian, Chinese or Japanese race, was disallowed because it affected the rights of Japanese.(2) The Government did not deem it necessary to disallow a similar Act in the following year which excluded Mongolians and Indians from signing petitions for the grant of a licence. It was thought undoubtedly to be within the competence of a provincial legislature to regulate the sale of intoxicating liquors. The Minister of Justice, in reviewing the statute, said that he was unable to discover any reason why the legislature of British Columbia

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(1) R. v. City of Victoria (1888), 1 B.C., Pt. II, 331.

(2) Hodgins, Provincial Legislation, 1899-1900 ( ), 104.

ought not to be permitted to establish the procedure by which licences were to be sought and obtained.(1)

The Municipal Act, 1885, of British Columbia extended the powers of municipalities so as to include "licensing and regulating wash-houses and laundries" and to collect from every person who keeps or carries on a public wash-house or laundry a tax not exceeding $75 for every six months. The Supreme Court soon held that taxation by means of licence fees and the tax in question was indirect and not direct taxation, that all indirect taxation except that authorised by s. 92(9) of the British North America Act was ultra vires the provincial legislature, and that the tax was not bona fide within the purpose provided for but was indeed a restriction on the Chinese.(2) To the contention that the statute was different from those which, by their title and preamble, were expressly aimed at Chinese by name, and that it was quite general, extending to all laundries without exception, it was answered that the object of a statute was not to be ascertained from its title or preamble alone, but mainly from its provisions. Bigbie, C.J., in quashing the conviction for carrying on a laundry without a licence, said that he could not arrive at any other conclusion than that it was specially directed against Chinese because they were Chinese, and for no other reason; and

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(1) Hodgins, Provincial Legislation, 1899-1900 ( ), 136.

(2) R. v. Mee Mah (1886), 3 B.C. 403.

that it aimed at compelling them to remove certain industries from the city or themselves from the province. Considering the amount of the tax, which was $150 per annum, he proceeded, one was convinced that the clause was intended rather to hamper or expel Chinese than to increase the revenue of the corporation. The fact that this "menial and poor paid occupation" was taxed fifteen times the annual amount imposed upon any retail shop however extensive or lucrative its business, strengthened the opinion of the Court that the main object of such tax was not financial. But a similar Law in Quebec[1] imposing upon laundries a provincial tax varying from $15 to $50 has been sustained, it being held that there is nothing in the Constitution of Canada requiring taxes and imposts to be uniform throughout the Federation, and that a province has the right to impose such tax.[2] A by-law in the same province providing for a municipal licence in addition to the provincial licence for operating a laundry, and the taking out of the municipal licence in advance, was also held valid and intra vires the city. The Court ruled that the fact that the province had itself imposed a tax or licence upon this class of business did not make it beyond the powers of any authority

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(1) C. 22 of 1915.

(2) Wong Sing v. Bedard (1915), cited in Tyau, op. cit., 117. See also Sing v. Recorder's Court of Quebec (1921), 23 Que. P. R. 104.

which was inferior or subsidiary to the province to impose another tax upon the same business.(1)

It is said that much of the labour legislation in British Columbia was advocated before its enactment on the ground that it would make the employment of Asiatics less profitable to the employer.(2) It also purported to prevent the Asiatics from establishing themselves permanently and making large profits. In moving to quash a by-law of Gatham relating to the licensing of laundries, certain Chinese swore that their profits were very small and that they could not carry on business under the terms of the by-law, while the city authorities insisted that their profits were large. But the decision of the Court laid emphasis on the bona fide exercise of powers and not on the profitable or unprofitable nature of the business.(3) The Factories Act of 1908 of British Columbia included laundries where five persons or more were employed in its operation. Certain standards of amenities to be provided for employees were laid down and hours of work were limited. The Act was interpreted not to apply to a laundry where several persons were working and sharing in the profits equally, no others being employed. This was held not to be a "factory"

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(1) Sun Lung v. Recorder's Court (1921), 60 Que. S.C. 169.

(2) Angus, "Legal Status in British Columbia of Residents of Oriental Race and their Descendants", Canadian Bar Review, IX (1931), 9.

(3) Pang Sing v. Catham (1909), 14 O.W.R. 1161.

and a prosecution for work done therein after 7 p.m. was not justified.(1) The Act was therefore amended to include "every laundry run for profit".(2) Now it has been the custom of Chinese laundry-workers to maintain their laundry and dwelling house in the same building. Another by-law in British Columbia prohibited the use of a factory as a dwelling house. Four Chinese operating a laundry were found working after 7 p.m.. They first elected to class it as a laundry, and because they did not run their laundry within the hours prescribed by law, they then contended that it was a dwelling house. The use of a laundry or "factory" as a dwelling house being forbidden, the conviction of the accused was sustained.(3)

Under the Manitoba Factories Act, 1913, "factory" is defined as any building, workshop or premises in which three or more persons are employed, and any laundry operated by Chinese. The Act of Saskatchewan included laundry and tailors' shops.(4) In Alberta, laundry is interpreted as not included in "Commercial business" within the meaning of the Early Closing of Shops Act.(5)

Among other forms of legislation which, though containing nothing discriminatory on the surface, is in reality aimed at

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(1) R. v. Chow Chin (1920), B.C., 2 W.W.R. 997.

(2) C. 27, 1919.

(3) R. v. Chong Kee (1920), 29 B.C. 165.

(4) Revised Statutes, 1930, C. 220.

(5) R. v. Wah Kee (1920), 55 D.L.R. 695.

the Chinese, or makes no exception to meet the special circumstances of the racial minorities, may be mentioned the Produce Marketing Act, 1928, of British Columbia. Under the provisions of this Act, Chinese persons may not sell their farm products at lower prices than those fixed by a local committee. Contravention of the Act constitutes the offence of unlawful marketing, and entails fines and imprisonment. The Act, though regulating the marketing of merchandise, was held to be within the provincial powers of legislating with regard to property and civil rights and not to infringe the Dominion power to regulate trade and commerce.(1) By using the voters' list as a basis, Chinese are excluded from the professions of law and pharmacy, and registration as a student-at-law or certified apprentice is limited to those entitled to be placed on the voters' list under the Provincial Elections Act, which however disqualifies the Chinese.(2) Licences for hand-logging are also issued to persons on the voters' list.(3) Under the Trade Licence Board Act of British Columbia the Board may refuse to issue a licence to do business to any person if the Board thinks it not advisable to do so in the public interests of the municipality.(4)

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(1) R. v. Chung Chuck (1928), 4 D.L.R. 659; affirmed in Chung Chuck v. R. (1930) A.C. 244.

(2) Statutes, 1928, C. 49.

(3) Angus, loc. cit., 6.

(4) S. 22, Forest Act, 1923.

89. The Elimination of Orientals from the Fishing Industry.- In the fishing industry a discriminative policy against orientals has also been inaugurated. Under the provisions of the Special Fisheries Regulations for the province of British Columbia made under the authority of the Dominion Fisheries Act, 1914, licences were issued only to persons who were British subjects resident in the province or returned soldiers who had served in the Canadian Army or Navy overseas. Now a Commission was appointed in 1922 to investigate the conditions of the fisheries of British Columbia. As a result of their recommendations, alterations in the regulations were made to the effect that the number of licences issued to persons other than resident white British subjects and Canadian Indians was greatly reduced. It is admitted that the general elimination of the orientals from the fisheries of the province is primarily for the purpose of providing greater encouragement to white men and Canadian Indians to take up fishing for a living.(1)

The Fisheries Act also contained provisions requiring licences to be obtained for the operation of a fish cannery (s. 7A), or in British Columbia, for a salmon cannery or curing establishment (s. 18). The Dominion Government claimed that the authority to grant licences to fish under the Regulations

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(1) Sessional Papers, 1925, No. 29, 52, 53.

and to operate a cannery was in form discretionary. In a case decided in British Columbia s. 7A of the Act was held ultra vires the Parliament of Canada.(1) Reference was therefore made to the Supreme Court of the Dominion to consider the constitutional validity of the said sections of the Act and the Regulations concerned. The Attorneys-General of the several provinces and representatives of the oriental fishermen, predominantly Japanese, intervened. The Court again held that the right to operate a fish cannery is a civil right in the province where the operation is carried on, like the right to operate a fruit cannery or a vegetable cannery, and that any British subject resident in the province of British Columbia who is not otherwise legally disqualified has a right to receive a licence under the Regulations if he submits a proper application and tenders the prescribed fees.(2) The decision was affirmed by the Privy Council, which ruled that the sections purport to confer upon the Minister powers which fall under s. 92(13) (property and civil rights in the provinces) of the British North America Act, 1867, and are not directly or incidentally within s. 91(12) which assigned "Sea coast and inland fisheries" to the Dominion. Sections 7A and 18 are therefore ultra vires. As to the Special Fisheries

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(1) R. v. Somerville Cannery Co. (1927), 4 D.L.R. 494.

(2) Re Fisheries Act, 1914 (1928), 4 D.L.R. 190.

Regulations for British Columbia, the Council held that they did not expressly or by implication give the Minister discretion to withhold a licence to fish from an applicant thereby qualified, and the Minister therefore had not that discretion.(1)

But the powers curtailed by the Courts are expressly restored by the legislature which, in 1929, by amending the Fisheries Act (C. 42), gives the Minister "absolute discretion" to issue or authorise to be issued fishery leases and licences for fishery and fishing wheresoever situate or carried on.

90. The Prohibition of Employment of White Women in Chinese Restaurants.- The statute of Saskatchewan, C. 17 of 1912, prohibiting the employment of white women in any restaurant, laundry or other place of business kept by a Chinese, Japanese or other oriental person, was upheld by the Provincial Court as a police regulation safeguarding the virtue of woman.(2) How the decision was affirmed by the Dominion Court has been reviewed in the foregoing pages.(3) The Act was amended in 1913 by the striking out of the words "Japanese" and "or other Oriental person", leaving it applicable to Chinese alone. It was further re-enacted as C. 85 in 1919,

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(1) Attorney-General for Canada v. Attorney-General for British Columbia (1930) A.C. 111.

(2) R. v. Quong Wing (1914), S.L.R. 242.

(3) Supra, § 67(iii).

requiring a special licence for the employment of any white woman or girl, without singling out Chinese by name. In practice, their application for such licence had often been refused by local authorities and a ruling of the Court was sought to sustain the Law. In the case of Yee Clun, the resolution of a municipal Council refusing the grant of a licence, which had been recommended by the Licence Inspector and the Chief Constable, to a Chinese person, was reversed. The Court ruled that the Council could not refuse the licence under the Act on a principle of discrimination against Chinese, nor on any other ground, as the power to grant licences under this Act was a mere police power and not a discretionary matter.(1) The reason given by the Council for the refusal was that the plaintiff had employed a number of Chinese in his premises who, owing to the restrictions of Federal laws, were not permitted to bring their wives into the country, and it was feared that such employees would constitute a menace to the virtue of white women if the latter were allowed to work on the same premises. This was seen to be fallacious, for it suggested that if the plaintiff had employed an equal number of white men matrimonially unattached, instead of Chinese, no member of the Council would have raised the point, though actually the menace might be greater since there was no racial antipathy to be overcome. White restaurant keepers frequently

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(1) Yee Clun v. City of Regina (1925), 4 D.L.R. 1015.

employed Chinese on their premises and no question had been raised in granting the licence. It would be an absurd conclusion, said the Court, that when a Chinese was employed by a Chinese, the former was a menace to the white women's virtue while, when the white man employed him, he was not. The municipality should not maintain the discriminative principle which the legislature had been at such pains to abolish.

As a result, the Act was revised in 1926 (C. 53), by which the grant, refusal or revocation of the special licence is made to be in the absolute discretion of the Council, which shall not be bound to give any reason for such refusal or revocation, and its action shall not be open to question or review by any Court.(1)

An Ontario Act also forbids Chinese to employ in any capacity any female white person in any factory, restaurant or laundry.(2) A similar Act of Manitoba (C. 19) of 1913, originally applying to all oriental persons, was amended and made applicable to Chinese only.(3) The Winnipeg City Charter, as amended in 1923, enables by-laws to prohibit such employment by any Chinese person except under licence. The law of British Columbia practically prohibits the employment by Chinese of white women or girls as well as Indian women or girls.(4)

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(1) Revised Statutes, 1930, C. 257.

(2) Ibid., 1927, C. 275.

(3) Labour Legislation in Canada, 1928, 416.

(4) Revised Statutes, 1924, C. 275.

Chapter XXVIII.

AUSTRALIA AND NEW ZEALAND

91. Yellow Labour and White Australia.- The colonial laws of the Australian States restraining Chinese immigration contained provisions that Chinese should not work in mines. Since 1888, an Act (No. 4) of New South Wales prohibited Chinese from engaging in mining without express ministerial authority. Queensland imposed a heavier tax on an Asiatic alien on the issue of a miner's right than on Europeans, and the right was not made available for any new goldfields.(1) The Mining Act of 1898-1930 further provides that any alien, holding a miner's right, who by lineage belongs to the Asiatic race, is not entitled to exercise rights other than mining for gold on alluvial ground, and that a consolidated miner's right shall not authorise the employment by virtue thereof of an Asiatic alien upon any goldfield or mineral field. Nor could such alien obtain a business licence for the purpose of residence and carrying on business in the goldfield or mineral field. Under the Mining Act, 1904, of Western Australia, no Asiatic alien is entitled to a miner's right. Nor can any

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(1) S. 1, No. 12, 1877; S. 5, No. 2, 1878.

person of Asiatic race, claiming to be a British subject, obtain the right to hold any interest by virtue of a miner's right without the written authority of the Minister.(1) The Northern Territory disentitled an Asiatic alien holding a miner's right from exercising any of the rights or privileges conferred upon white miners. He could not work on any new goldfield unless he was the first discoverer.(2)

Having defeated the Chinese on mining fields, the white Australia policy soon led to the exclusion of coloured labour from all manual works. Queensland prohibited Asiatics from being employed in the construction, maintenance or management of the railway, or in any of the mineral lands. The company would be liable to a penalty of £1 per day for each Asiatic person so employed.(3) Other Acts in Queensland provided that unless a person not of European descent has a certificate of having passed a dictation test in the English language, he may not be employed in the construction or working of tramway and omnibus services,(4) or in the sugar(5) and banana(6) industries or in dairy(7) or margarine(8) produce premises.

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(1) S. 23 and s. 24, Statutes, 1926.

(2) Ss. 19 and 21, Mining Act, 1903.

(3) S. 43, No. 11, 1892; s. 7(1), No. 16, 1901.

(4) Local Authority Act, 1902-1920.

(5) Ss. 3 and 4, Sugar Cultivation Act, 1913.

(6) Banana Industry Reservation Act, 1921.

(7) S. 35, Dairy Produce Act, 1904-1920.

(8) S. 23, Margarine Act, 1910-1931.

Any person who, not having obtained such certificate, engages in or carries on the cultivation of sugar cane, shall be liable to a penalty of £100, and the crop of sugar cane shall be forfeited. In the cultivation of sugar cane or the manufacture of sugar, if such person is employed, the employer is liable to a penalty of from £5 to £10 per day for each person and the employee 40 shillings. An award of the Industrial Court rendered in 1924, which applies to the whole of Queensland, prohibits the employment of coloured labour in the cutting of sugar cane or in the cultivation of cane; but an owner of a sugar cane plantation may employ his own countrymen.(1)

To encourage certain industries bounties are paid under the Commonwealth Acts on the condition that white labour only is employed. Following on the Sugar Bounties Act of 1903, the subsequent Acts have practically excluded Chinese or other coloured labour from the industries thus affected.(2) The Beet Sugar Works Act, 1915, of Victoria imposes a penalty of £1 per day for each person upon any company obtaining an advance under this Act which shall employ Asiatic labour or coloured labour not born in Australia. The crews of all vessels of Australian registry and those engaging in coastal trade are required to be British subjects who are able to speak the

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(1) Smith, Economic Control (1929), 128, 129.

(2) See, for instance, the General Bounties Act, 1907, the Wood Pulp and Rock Phosphate Bounties Act, 1912, and the Apple Bounties Act, 1918.

English language.[1] Contracts made on behalf of the Commonwealth for the carrying of mails, always contained a provision that only white labour shall be employed.[2] Administrative orders also impose a disability on alien labourers. In Western Australia, government contracts are made only with British subjects, and in Victoria some municipalities insist in their contracts that no alien labour shall be employed.[3]

92. Businesses and Occupations.- In studying the measures by which the economic position of the Chinese has been affected, further reference must be made to the impediments put in the way of the exercise of businesses or occupations. To obtain a hawker's licence in South Australia a person must show that he possesses a sufficient knowledge of English.[4] For the sale and export of pearl in Northern Territory, no licence shall be granted to an Asiatic alien.[5] Nor can a licence be issued to any person of Asiatic race to employ aboriginal natives.[6] Queensland disqualifies Chinese

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(1) Navigation Act, 1912-1920.

(2) Post and Telegraph Act, 1901.

(3) Bailey, Legal Position of Foreigners in Australia (1931), 7.

(4) Ibid.

(5) S. 3, Act 763, 1901, South Australia.

(6) S. 24, Act 1024, 1910, South Australia; Ordinance 9, 1918, Northern Territory.

alone from such employment.(1) In the same State, no person shall buy any gold unless he is the holder of a licence, which is not issued to any Chinese person or any person having a Chinese father or mother.(2) Similarly, a foreigner is not entitled to a licence to operate a fishing vessel unless he has passed the dictation test.(3) The same restriction on pearling also exists in Western Australia.(4) It is of interest to note that Victoria admits aliens to the legal profession, which is closed to them in other States, but it prohibits the profession of medicine to aliens, while in other States they are freely admitted.(5)

No Chinese are admitted to the trade unions, which are strongly anti-Chinese. The explanation is historical.(6) As early as 1873 Chinese were employed as strike breakers in a Victoria mine, which aroused the hatred of the miners' unions. Some two years afterwards, the same question caused considerable trouble in Queensland. Then in 1878 when the Australian Steam Navigation Company in Sydney decided to employ Chinese

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(1) The Aboriginal Protection Act, 1901, Queensland.

(2) S. 10, Gold Buyers' Act, 1901-1928, Queensland.

(3) S. 7, Pearl Shell Fishing Act, 1913, Queensland.

(4) The Pearling Act, 1912-1924.

(5) Bailey, op. cit., 10.

(6) Sutcliffe, A History of Trade Unionism in Australia (1921), 34, 35.

seamen in some of their vessels, the white crew were called out on strike by their Union officers. The Company at last ceded to their demands and promised to withdraw the Chinese gradually. The unions therefore are by nature hostile to Chinese, and largely as a result of their action the Colonies passed laws against Asiatics with increasing severity. It is feared that a supply of cheap labour would tend to give the employer an undue advantage over his employee and would injuriously interfere with the existing relations of capital and labour. It is also believed by many that the non-European labourers, by their competition and attitude to economic questions, would prevent further advance towards the ideal of industrial democracy.(1)

93. Factories and Factory Workers.- In the factory legislation Chinese encountered another insurmountable economic barrier in the Commonwealth. Under the Factories Act, 1904, of Western Australia no person of Chinese or other Asiatic race may be registered as owner or occupier of a factory or be employed therein unless he can prove to the satisfaction of the Inspector that he was so engaged or employed on and before 1 November, 1903. The employment of a single Chinese or Asiatic person would constitute the establishment of a factory and bring it within the provisions of the Act. Where the occupier

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(1) Willard, op. cit., 197.

of a factory or any person so employed is of the Chinese or other Asiatic race, the registration fee shall be £5 instead of five shillings as in the case of Europeans. Further, the registration is to be renewed and fees paid annually, and the hours of work are specially limited. The Act, despite its special discrimination against "persons of the Chinese or other Asiatic race", was held not unconstitutional nor ultra vires the Colonial Laws Validity Act of 1865.(1) Another question which arose was whether a naturalised Chinese who was employed in a factory in the State of Victoria on 1 November, 1903, could also be employed in Western Australia on the ground that s. 117 of the Constitution protects a subject of the Queen resident in any State from being subject in any other State to any disability or discrimination which would not be applicable to him if he were a subject of the Queen resident in such other State. It was decided that the section applied only to a person who, being resident in one State, was seeking to assert rights in another. In the case concerned the person in respect of whom the rights were asserted was a resident in Western Australia and not in another State, and the rights were asserted in Western Australia. The section therefore had no application, and the provision in the Act was not ultra vires the legislature of Western Australia as discriminating between residents of different States.(2)

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(1) Vincent v. Ah Yeng (1906), 8 W.A.L.R. 145.

(2) Lee Fay v. Vincent (1909), 7 C.L.R. 389.

The Act was replaced by the Factories and Shops Act of 1920, which, while retaining the principal disabilities, further provides that no Asiatic person shall be registered as the keeper of or as an assistant in a small shop. Any person in occupation of any shop not registered is liable to a penalty. When a person apparently of the Chinese or other Asiatic race is found in a factory, he shall be deemed to be employed therein, and the burden shall lie on him to prove the contrary.

In Queensland[1] and Tasmania,[2] the employment of any person either of Chinese or of Asiatic race in any building or premises will constitute a factory, while in Victoria,[3] New South Wales[4] and South Australia[5] Chinese alone are designated. The Factories Acts contain other similar provisions. The hours during which an Asiatic person may work are limited, except in Queensland and Tasmania. All furniture made in the states of Victoria, Queensland, and Western Australia must be stamped with the mark either of "European labour only" if made solely by European labour, of of "Chinese labour"[6] if made solely by Chinese.

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(1) S. 2(b), Factories and Shops Act, 1900-1928.

(2) S. (a), ii, Factories Act, 1910-1917.

(3) S. 3, Factories and Shops Act, 1928.

(4) S. 3(b), Factories and Shops Act, 1912-1927.

(5) Industrial Code, 1921.

(6) "Asiatic labour" in the case of Western Australia.

The Act of Victoria of 1905 provided (s. 5) that any office or building in which Chinese are employed directly or indirectly in working in any handicraft, is a "factory", and that the term "handicraft" includes any work whatsoever done in any laundry and whether or not done in preparing or manufacturing articles for trade or sale. By s. 42, no person shall work for himself or for hire or reward or shall employ or permit any person whomsoever to work on any day before 7.30 a.m. and after 5 p.m. in any factory or workroom where any Chinese person is employed. The question soon arose as to whether or not a Chinese, lodger and boarder in a Chinese laundry, ironing his own shirt during the prohibited hours, was contravening the law. It was contended that the term "no person shall work" did not mean "no person shall do any manual labour", but meant "no person shall work as a workman" or "work at factory work". In this view the words "work for himself or for hire or reward" would mean "do factory work either as a proprietor or as an employee", the antithesis being between work done for his own exclusive benefit and work done for wages. The contention of the appellant was that the antithesis is between work done for hire or reward and work not done for hire or reward, and that these two cases covered every possible kind of manual labour. The High Court[1] admitted that the words were susceptible of both constructions,

(1) Ingham v. Hie Lee (1912), 15 C.L.R. 267.

but it deemed it to be the bounden duty of the Court to adopt the construction which would avoid injustice. Moreover, it held that an Act which restricts the common law was not to be construed as restricting it further than the plain language of the statute required. The Court further maintained that the word "work", according to the appellant's argument, would include the case of a carpenter mending the leg of his saw bench, or a laundryman mending the leg of his ironing table, or brushing his own coat, or polishing his own boots, or mending his own clothes. With regard to the purview of the Act, which was to restrict the hours of factory labour and to prevent unfair competition, the Court rejected this construction, and the word "work" was construed as meaning "work at factory work". Hence the work done by the defendant was not unlawful.

The objection that this construction would render evasion of the Act easy, was not a sufficient reason for extending the meaning of the words used in the context. On the other hand, it was thought to be very difficult for a defendant to establish such a defence as that set up in this case, and he would do the act at great risk of being unable to excuse himself. The Act has since been amended to the effect that, for the purpose of this section, "work" shall be deemed and taken to include performing any of the operations usually carried on in the factory,[1] thus defeating the decision.

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(1) S. 39(6), Factories and Shops Act, 1928.

94. Labour Legislation in New Zealand.- The Factories Act, 1921-1922, of New Zealand includes within its operation every laundry and every building or place in which any Asiatic is directly or indirectly employed or occupied. By "Asiatic" is meant a native of any part of Asia or of the Islands in Asiatic seas and the descendants of any such native, excluding British subjects or any person of European or Jewish extraction. The hours of employment in a laundry are specially limited, but under the former Act[1] the provision prohibiting the extension of working hours to any holiday or half-holiday was construed to apply only to workers to whom such holiday or half-holiday must be given, namely, boys under 18 and women, as specified in the Act. A Chinese person engaging in laundry work and employing two adult males in the factory assisting him in such work on a Saturday afternoon, was therefore held not to be committing a breach of the law.[2] The hours are now regulated by reference to the number employed, irrespective of whether they are called assistants or part proprietors. This is designed to meet a special situation, for in many laundries run by Chinese where several persons were engaged in the business, all could be described as partners and thus the working-hour limit could be evaded.[3]

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(1) S. 3(1), C, Factories Amendment Act, 1910.

(2) Shanaghan v. Low Shing (1911), N.Z.L.R. 387.

(3) Hall, Status of Aliens in New Zealand (1931), 10.

Under the Shops and Offices Act, 1921-1922, as amended in 1927, the closing hours may be fixed on requisition by a majority of shopkeepers either in the whole of the local district or in any particular trade. No occupier of shops shall join in the requisition unless he is a British subject. They can also petition for the prohibition of the sale of certain goods after the hour fixed for the closing of such shops in order to prevent their sale as a side-line in another trade. In the case of shops where certain enumerated businesses are exclusively carried on, which include a fruiterer and a confectioner, the occupiers are not required to close on any working day. But an occupier whose principal business is that of a fruiterer and confectioner but who has other sources of profit, not covered by the exemption, who fails to close at the appointed hours will be convicted for contravening the law.(1) In the trade of fruiterer, which has attracted many Chinese, only one person, excluding husband or wife, shall be deemed to be the occupier, and every other person shall be deemed an assistant and shall be subject to the law as to hours of employment.

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(1) Wong Lowe v. Georgeson (1919), N.Z.L.R. 830.

Chapter XXIX.

THE UNION OF SOUTH AFRICA

95. The Colour Bar in Skilled Labour.- The Mines and Works Act of 1911 empowered the Governor-General, under s. 4, to issue regulations in respect of the grant or cancellation of certificates of competency to mine managers, mechanical engineers, and such other classes of persons as he might deem expedient. In pursuance of the provisions, the Union Government issued regulations stipulating that "the operation of or attendance on machinery shall be in charge of a competent shiftsman and in the Transvaal and Orange Free State, such shiftsman shall be a white man."(1)

The legality of the regulation was doubted for some time, and in 1923 the Transvaal Court held it to be ultra vires.(2) The Court declared that the regulation did not discriminate because of skill, but absolutely prohibited a certain section of the population from being so employed because the colour of their skin did not happen to be white. "Such restriction"

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(1) The colour bar was first instituted in 1903 in the Transvaal on account of fear of the Chinese: Buell, The Native Problem in Africa (1928), I, 58.

(2) R. v. Hildick-Smith (1924), T.P.D. 69.

of the right of the citizen to so employ skilled and competent colored persons or of such persons to be so employed could never have been contemplated by the legislature and were unreasonable and even capricious and arbitrary." The Court cited a number of cases in which a regulation discriminating between white and coloured had been held unreasonable and ultra vires unless the enabling statute authorised the discrimination.

The Government, however, passed an Amendment in 1926 restoring the denounced regulation. Certificates of competency shall now be granted only to (1) Europeans, (2) Cape Malays, and (3) the Mauritius Creoles or St. Helena persons or their descendants born in the Union. This measure gave statutory approval to the colour bar against Asiatics and the African native.

96. Restrictions of Trading Rights in the Transvaal.- By Ch. XXXIII of the Statute Book of the Orange River Colony, no coloured person shall in any circumstances be permitted to settle in the State for the purpose of carrying on a commercial business or farming either directly or indirectly. They will be held "prohibited immigrants" if contravening the law, and removed from the Union.(1)

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(1) s. 7, Immigrants Regulation Act, 1913.

Under Law 3, 1885, of the Transvaal, the Government has the power to assign to Asiatics, for the purpose of sanitation, certain streets, wards and locations in which to live. The Government took the view that the Law forbade residence as well as trade outside such locations. In 1888, an application for a trading licence by an Asiatic person was refused on the ground that he wished to carry on business at a place which was not situated within the location appointed to the Asiatics for occupation. The Court upheld that view, ruling that it would be inconsistent with the spirit of Law 3 of 1885 to draw a distinction between "living" and "trading".(1) The Government do not seem to have enforced the Law strictly, however. Asiatics were permitted not only to trade but to reside outside locations. In 1892, the Volksraad, having regard to the fact that Asiatics continued to open stores and to trade in towns in the name of white persons and thus to defeat the object of the Law, resolved(2) to instruct the Government to take stringent measures in order to prevent Chinese or Asiatics from trading within the towns, and to cause all their shops which were opened subsequently to 1889 to be removed out of the town. Government officials then refused to issue licences to Asiatics trading in the towns.

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(1) Suliman & Co. v. Middleburg (1888), 2 S.A.R. 244.

(2) Laws of the Transvaal, 436.

The Court upheld this action, following the decision in the Suliman case, and gave judgment in favour of the Government.(1) The Executive Council of the Republic again resolved(2) in 1898 that coolies and other Asiatic coloured persons who were not yet residing or carrying on business in the location appointed for that purpose, should go and reside and carry on business in the location before 1 July, 1899. By a Government Notice, No. 208 of 1899, it was expressly stipulated that no licence would be granted after 30 June save in locations. After the Boer War the Crown Colony Government decided(3) to take immediate steps to have bazaars in every town set apart, in which alone Asiatics might reside and trade. No new licence to trade was to be issued to any Asiatic except to carry on his business in the bazaars. But Asiatic traders who held licences before the outbreak of war outside locations, might have their licence renewed under the same conditions. An action was filed to test the validity of this. The Supreme Court decided, reversing the two decisions of the High Court of the Republican régime, that Law 3 of 1885 segregating Asiatics from the rest of the community, did not apply to business places, but only to the residences of Asiatics. The Government therefore had not the power to refuse licences to

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(1) Mohamed v. The Government (1898), 15 C.L.J. 291.

(2) Laws of the Transvaal, 1037.

(3) Government Notice, No. 356, 1903.

Asiatics to trade in places outside the boundaries of the locations allotted to them for occupation.(1) The Chief Justice remarked in the course of his judgment that Law 3 of 1885 did not contain a single line purporting in express terms to curtail the trading rights of Asiatics. The only provision made was one giving the Government the right for sanitary purposes to assign to them certain streets, wards and locations for residence. He therefore failed to see any ground for holding that those words in any way prohibited trading outside residential locations. The Court further held that "it was for sanitary purposes that locations were established and such purposes had a more obvious relation to places of residence than to places of business. The mischief purported to be aimed at was an insanitary mode of life in the midst of a European population, not an inconvenient competition with the European trader."

The Gold Law of 1898, prohibiting by s. 133 coloured persons(2) from being licence holders or from being in any way connected with the working of the diggings, but allowing them to be employed only as workmen in the service of whites, was interpreted as referring only to such licences as digger's and claim licences, and not prohibiting such persons from holding

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(1) Motan v. Transvaal Government (1904), T.S. 404.

(2) S. 3, Gold Law, No. 15, 1898. The term "coloured person" shall signify any African, Asiatic native or coloured American person, coolies or Chinamen.

general dealer's licences to trade on diggings.[1] This construction had important results, for the rights of those Asiatics who had traded for many years on the proclaimed land, were thereby confirmed.

Two Acts passed by the Transvaal legislature in 1908 greatly affect the trading rights of Asiatics. Under the Townships Amendment Act, any land may be proclaimed as a public digging. And the provisions of the Gold Law of 1908, repealing the Act of 1898, prohibited coloured persons from residing on or occupying proclaimed land except in locations, bazaars, mining compounds and such other places as the Mining Commissioner may permit (s. 131). No right shall be acquired under this Act by a coloured person, and the holder of a right acquired under the Law of 1898 or a prior Law or under this Act, shall not transfer or sublet any portion of such right to a coloured person to reside on or occupy ground held under such right (s. 130). The Act recognised, however, the vested rights of Asiatics and exempted coloured persons who at the date of the commencement of this Act were lawfully in occupation of the premises, from the operation of the Act. The rights to trade on proclaimed land as already acquired by Asiatic persons under the right granted by the Law of 1898 and confirmed by the decision in the Khotas case, were therefore

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(1) Khotas & Co. v. Colonial Treasurer (1909), T.S. 180.

continued. But they are not allowed to trade on any stand acquired under the Law of 1908.

By forming limited liability companies in pursuance of the Transvaal Company Act of 1909, Asiatics were able to own "fixed" or real property in the name of their company, where they were otherwise prohibited, an obvious evasion of the provisions of Law 3 of 1885. Such ownership was declared to be legal by the Courts.(1) The Government then passed the Asiatics (Land and Trading) Amendment Act in 1919, by which the provisions of Law 3 of 1885 prohibiting the ownership of land by Asiatic persons, were made applicable thereafter to companies in which Asiatic persons have a controlling interest. The trading rights were also affected. Only British Indians and their successors in title who on 1 May, 1919, were carrying on a duly licensed business on proclaimed land or in townships and their bona fide employees will be left undisturbed in their business. In this respect they are said to be completely exempted from the operations of s. 130 of the Gold Law of 1908 and in exactly the same position as any other person in the township. They retain all rights under the Gold Law just as if they were not coloured, or, in other words, as if they were European persons.(2) This exemption, however, lasts

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(1) See infra, § 107.

(2) Krugersdorp Municipality v. Dadoo Ltd. (1920), T.P.D. 38.

only so long as such British Indian continues to carry on business on the same ground.

The trading rights of Asiatics are further restricted by an Amendment of the Gold Law in 1932. Asiatics had been forbidden to trade on the proclaimed land by the former Act. Now any land which has ceased to be a public digging shall continue to be subject to the prohibition against occupation by coloured persons.(1) No licence to carry on any business or trade in the province shall be issued to any person unless he produces a certificate from the authorities allowing the issue of the licence. And no such certificate shall be granted to any person unless he proves that the holder and the person in actual control of the business are not Asiatics, or, if they are Asiatics, that they may lawfully carry on the business on the premises.(2) A certificate issued by the Minister of the Interior exempting a coloured person from the prohibition of residence or occupation of any land shall constitute proof that he may lawfully carry on business on such premises.

97. The Trade Licence.- The Licensing Laws of the several provinces are usually of general application. There is no differentiation in express terms between European and

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(1) s. 5(1), The Asiatic Land Tenure Act, 1932.

(2) s. 9(1), ibid.

coloured holders, although Asiatics complain of unjust treatment in the administration of those Laws.

In the Transvaal, a general dealer's licence is required of any person who carries on a trade or business. Under the Local Government Ordinance of 1912, as consolidated in 1926, the grant or refusal to grant by a municipal council of an application for a licence may be appealed from to the magistrate, whose decision shall be final. Such magistrate in hearing the appeal was said not to sit as a judicial officer, but in his administrative capacity. He has to inquire whether the Council has satisfied him that their reasons for refusal are good and sufficient, and having done so, the Supreme Court has no right to interfere with his decision.(1) It has also been decided that in refusing a licence the Council need not pass a resolution and state the particular section under which the licence is refused. It would be sufficient if they had good and sound reasons which fall within any of the grounds on which a licence might be refused, enumerated by the Law.

Under the General Dealers Ordinance of 1926, an applicant for a licence must produce with the application a certificate to be granted by the local authority or the licensing Board, who have a discretion to refuse on certain grounds. Their decision in cases of certificates for new licences is

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(1) Ah Yen v. Pretoria Municipality (1920), T.P.D. 28.

final, but the applicant can appeal to the Court in the case of refusal to renew a licence. It is complained that the requirement of obtaining a certificate from the municipal council before a licence is issued is hard for Asiatics to fulfil, and that the Ordinance is ultra vires on the ground that it has the ulterior object of discriminating against a particular class. This contention, however, has been set aside by the Court, which ruled that the Ordinance must be taken at its face value and that it must be assumed that its object is to control all general dealers impartially.(1) But the Court, by virtue of its jurisdiction in appeal cases, did relieve grievances of the Asiatic community. The allegation that they belonged to a class of traders who "permit natives to loiter on the pavement outside their shops and do not drive them away", was held not to be a good ground for the refusal by the town council to grant a certificate to the Asiatic applicants.(2) Another reason, that the business of an Asiatic is likely to cause natives to congregate in the vicinity of the shop, especially on Sundays, which would cause nuisance and annoyance to worshippers in a church situated opposite the premises in which the business is to be opened, has also been rejected.(3) The evidence showed that the Council

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(1) Beloomal v. Receiver of Revenue (Potchefstoom) (1927), A.D. 401.

(2) Moosa and Sidat v. Springs Town Council (1930), W.L.D. 48.

(3) Johannesburg v. Turf Stores (1930), T.P.D. 893.

refused the application merely because the applicant was an Asiatic, without any inquiry into what class of business the Asiatic trader wished to transact, and what class of trader he was. The conclusion being unreasonable, the refusal of permission to any Asiatic to conduct a business in certain localities is therefore an instance of racial discrimination.

In Natal, the dealers' licences were formerly granted as a matter of course to any person desiring to trade, on payment of a fee. In consequence of competition by persons whose standard of living was said not to be equal to that of ordinary tradesmen, it was complained that the latter could not make a livelihood. The Dealers Act was then passed in 1897 throwing upon local authorities the responsibility and conferring upon them the power of deciding who should and who should not be permitted to trade.(1) Licences were issued in boroughs and townships by licensing officers appointed by town councils. In the rest of Natal there was one licensing officer who was a government official and whose policy towards Asiatcs was said to be far more liberal than that of the licensing officers in the boroughs.(2) Under the provisions of the Dealers Ordinance, a licensing officer had a discretion to issue or refuse a wholesale or retail licence, and his decision was not liable to review, reversal or alteration by

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(1) The circumstances in which the Act had been passed were reviewed in the Karodia Case (1918), N.L.R. 253.

(2) Cmd. 7265; Report of the Indian Inquiry Commission, 1914, 38, 39.

any court of law (s. 5). But the applicant or any other person having any interest in the question had a right to appeal from the decision of the licensing officer to the town council, if the licence was sought in a borough or township, or to the licensing board if it was sought elsewhere (s. 6). The ouster of the jurisdiction of the Court was extended to an appeal from the decision of a town council,(1) and the judgment was confirmed by the Privy Council.(2) But it would seem that the Court might have the right to interfere with the proceedings of the town council.

As revealed in the reports of the licensing cases, the members of a licensing board were usually themselves storekeepers holding retail licenses, and were therefore very interested in cancelling the licence of an Asiatic competitor. Residents in a township might also appeal against the grant of a licence to any licensee. It was held that such residents and ratepayers were "persons having any interest in the question".(3)

The Ordinance also provided that no licence was to be issued to any person who was unable to keep his books of account in the English language (s. 7). But the Court had

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(1) Vauda v. Newcastle Corporation (1898), N.L.R. 28.

(2) (1899) A.C. 246.

(3) Hoi Lee v. Dundee Local Board (1898), N.L.R. 204.

decided that it was not necessary for the applicant himself to be able to keep the books in English; it would be sufficient if they were kept for him in that language by some other person.(1)

The right of appeal to the Court against the refusal to renew a dealer's licence was finally allowed by the enacting of Ordinance No. 28 in 1909. But much dispute arose as to the scope of the jurisdiction. The Court once held that it did not feel called upon to criticise the policy of a licensing officer in refusing to grant the renewal even though the renewal had been refused on the ground that Asiatic salesmen were being employed in the conduct of the business.(2) The applicant, however, was entitled to a fair trial of his application. If, in refusing the transfer of a licence to an Asiatic, the licensing officer merely thought it not advisable in the interest of the province at large to induce European traders to close down their businesses in favour of Asiatic competition, and if the board took into consideration especially the fact that the applicant was unable to keep his books in the English language, such evidence will show that the applicant has not had the fair trial due to him.(3) It has also been decided that the modification made by Act 22 of 1909 extends only to the right of "appeal" in cases of renewals

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(1) Meer v. Licensing Officer of Durban (1920), N.L.R. 126.

(2) Nool v. Pietermaritzburg Town Council (1913), N.L.R. 483.

(3) Badhanya v. Estcourt Licensing Board (1913), N.L.R. 543.

and that the ouster of the jurisdiction of the Court to "review" is left intact. The function of the Court is limited to inquiring whether or not the discretion of the licensing authority has been properly exercised. It will interfere only when the authority has acted ultra vires, corruptly or mala fide,(1) or where there is a manifest absence of jurisdiction, or where fraud or a similar element is found to have been present.(2) Indeed, the effect of the Act of 1909 was not to transfer to the Court from the officer to whose discretion the granting of licences was confided by the Act of 1897, the duty of performing his administrative act, but to give to the Court the power to interfere in cases where the licensing officer has either refused to exercise his discretion or has exercised it in a manner which the Court would not countenance.(3)

The procedure is altered, though not to any material extent, in that the licence is now issued by the revenue officer under the terms of Ordinance No. 26 of 1926, but subject to the obtaining of a certificate from the town board that the issue of such licence is approved. In regard to the grant or refusal of certificates of approval, the town board shall have the same discretionary authority as is enjoyed by the

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(1) Peltz v. Licensing Officer of Durban (1926), N.L.R. 185.

(2) Peer v. Ladysmith Town Council (1927), N.L.R. 429.

(3) Bhayla v. Estcourt Town Council (1926), N.L.R. 221.

licensing officer under s. 5 of the Dealers Act. As a consequence, the very complete ouster of the jurisdiction of the Court under the Dealers Act still remains.

PART V.

RESTRICTIONS OF OTHER CIVIL AND POLITICAL RIGHTS

Chapter XXX.

THE UNITED STATES

98. The Alien Land Laws.- The powers to enact legislation prohibiting the ownership of land by an alien being reserved to the States, no uniformity of practice has ever been established. Prior to 1920, aliens had the same land rights as American citizens in nearly thirty States of the Union.(1) And where there are anti-alien land laws, these differ from State to State, and range from tenure limitations to absolute prohibition. The class of alien affected also differs; in some States all aliens, in others only aliens ineligible for citizenship, are denied the right to own land. In Illinois, for instance, aliens may hold real property for six years only. In Indiana, aliens may own land not exceeding 320 acres in extent. In Kentucky, they may hold land for twenty-five years for business; other real property acquired by the operation of law may be held for eight years. Alien ownership is limited to 90,000 square feet in Minnesota, and to 5,000 acres in Pennsylvania. The laws of Nebraska

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(1) Cf. Alien Land Laws and Alien Rights, H.D. 89, 67th Cong., 1st Sess., 1921.

prohibit aliens from acquiring title to and from taking or leasing land or real estate for more than five years. The Kansas Constitution authorises the legislature to determine alien property rights. In the absence of legislation, the common law rule is to hold. In Missouri, ownership is permitted to aliens only in cases where such right is guaranteed by treaty.

The Constitution of Oklahoma provides absolute prohibition; land previously acquired by operation of law had to be disposed of within five years after the adoption of the said Constitution.

The Land Law of 1921 of the State of Washington allows aliens to acquire land upon the same basis as citizens if they have declared their intention to become citizens of the United States. Hence persons who are held to be ineligible for American citizenship and are unable to make the intending declaration, are disqualified from taking any interest in the land. An action was brought against the State by one who sold land to such an alien, who could not complete his purchase, but the Law was upheld by the Federal Court.(1) It ruled that the regulation was within the police power of the State, that there was no violation of the equal protection clause since there was a great difference between aliens who

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(1) Terrace v. Thompson (1923), 263 U.S. 197.

had declared their intention and those who had not or could not do so, in the interest they had in the State and its affairs. The classification, which was challenged as bearing no reasonable relation to a legitimate legislative end, was interpreted as a reasonable one in view of the close relationship between land-holding and citizenship. The Court further held, defending the discriminative nature of the naturalisation law, that Congress may grant or withhold the privilege of naturalisation upon any grounds or without any reason as it sees fit and that the rule established by Congress on the subject of naturalisation of aliens in and of itself furnishes a reasonable basis for classification in a State law, in withholding from aliens the privilege of land ownership.

Although the Constitution of Oregon in 1857 had expressly provided that no Chinese could hold real estate in the State, yet California was the first of the Pacific States to use the distinction between aliens eligible and those ineligible for citizenship. The Californian Constitution of 1879 provided that foreigners of the white race or of African descent, eligible to become citizens of the United States under the naturalisation laws, might hold real property. In 1913 the first anti-alien law of that State was passed, prohibiting all ineligible aliens from owning or possessing any interest in land except such right as is allowed by treaty existing between the United States and their country. They might, however, lease lands for agricultural purposes for a term not

exceeding three years. An initiative measure was voted in 1920, eliminating the permission to hold leases. It had been observed that a short lease becomes a long lease through repeated renewal, and was practically as injurious in effect to the State as ownership. The Act further denied to ineligible aliens the right to act as guardians to minor children when a part of the estate consists of real property, which cannot be owned by themselves. It was directed apparently against the orientals, who in California were mostly land-owning farmers and who, being prohibited from owning land, were acquiring it in the name of their native-born children.

The constitutionality of the Law was tested in two cases. In Porterfield v. Webb[1] it was held that the classification of aliens with respect to the right to hold land into those eligible for citizenship and those ineligible, giving the former the right to hold land and denying it to the latter, is not so unreasonable as to be invalid as denying the equal protection of the laws. In Webb v. O'Brien[2] the Court further ruled that the legislation was neither in violation of the Treaty with Japan nor contrary to the Federal Constitution. The rights of Japanese under the Treaty of 1911, being limited to owning, leasing and occupying of houses and land for "residential and commercial" purposes, were held not

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(1) (1923), 263 U.S. 225.

(2) (1923), 263 U.S. 313.

to embrace the right to purchase, lease, or even cultivate, on a crop-sharing contract, land for "agricultural" purposes.

The provisions, however, denying to alien fathers the right to act as guardians were condemned in California[1] as contravening the equal protection clause, but were upheld in Washington.[2] The Supreme Court of the latter State, while criticising the decision in the Yano case as "academic and blind to practical operations", declared that this stipulation was no more objectionable under the treaties and Constitution than the other provisions upheld in Terrace v. Thompson. It was of the opinion that though parents are the natural guardians of their children, there are well established disqualifications such as insanity, lack of physical capacity, etc., to which the legislature has now added alienage. The statute is deemed not discriminatory because "it applies to all aliens of whatever nationality and is applicable only to guardianship of the minor's real property."

The Californian Law further prohibited a corporation, the majority of whose members are ineligible aliens, from owning land, and ineligible aliens from purchasing shares in a land corporation. These provisions were held not unconstitutional.[3] The Act also made it a criminal conspiracy

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(1) In re Yano's Estate (1922), Annual Digest, 1919-1922, Case No. 166.

(2) In re Fujimoto (1924), ibid., 1923-1924, Case No. 153.

(3) Frick v. Webb (1923), 263 U.S. 326.

to evade its provisions, and cast the burden of proving citizenship or eligibility upon the defendant. In Morrison v. California,[1] in which the appellant was accused of conspiring to place an Asiatic in the possession and enjoyment of agricultural land within the State, the Supreme Court held that such a conviction without any proof that the defendant knew of the disqualification of his tenant was based on an arbitrary presumption, and was therefore a denial of due process of law. Mr. Justice Cardozo, speaking for the Court, remarked that the statute did not make it a crime to put a lessee into possession without knowledge or inquiry as to race and place of birth. It only made it a crime to put an ineligible lessee in possession as the result of a wilful conspiracy to violate the law. Nothing in the evidence supported the inference that Morrison had any knowledge of the disqualifications of his tenant or could testify about them, and the conviction must be quashed. He further ruled that as the conviction of one of two defendants charged with conspiracy failed because of his lack of guilty knowledge, it must also fail as to the other defendant.

The application of the Alien Land Acts to Chinese was first affirmed by the State Court of California. In Mott v. Cline[2] the Court held that the "acts are not repugnant to

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(1) (1934), 291 U.S. 82.

(2) (1927), 200 Cal. 434.

any article of the federal or state Constitutions, nor impinging upon the treaty agreements between this nation and China," and that it was not "the intention of either the state or federal governments to grant to native-born subjects of China the right of acquiring title to agricultural lands." The decision cannot, however, be regarded as final in view of the inferior authority of the State Court, which had indeed misinterpreted the treaty provisions. The Chinese in the United States are accorded the most-favoured-nation treatment which, being capable of general enforcement, has the advantage over that of a conditioned or specified nature.(1) It has been well settled that any legislation denying Chinese certain rights, and not applicable to citizens of other foreign nations, is in conflict with this guarantee. So while any alien is permitted to acquire land in California, the Chinese cannot be denied the same rights, privileges or immunities.(2) They may, it is therefore submitted, hold real property in that State on the ground of treaty rights,(3) but the point remains to be decided by the Federal Courts.

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(1) See supra, § 1(i).

(2) In an earlier case it had been held that, the citizens of the Chinese Empire being granted the same rights, privileges and immunities as are enjoyed by citizens of the most-favoured-nation, they can hold a lease interest in real estate in Idaho: Duck Lee v. Boise Development Co. (1912), 21 Idaho 461.

(3) Arizona (1921), Arkansas (1925), Delaware (1921), Idaho (1923), Montana, New Mexico (Constitution) and Oregon (1923) all adopted alien land laws on the Californian model. But the Act of Arkansas has been held void as being in conflict with the State Constitution: Applegate v. Tuke (1927), Annual Digest, 1927-1928, Case No. 222.

99. Segregation in Public Education.- In the early sixties of the last century Californian statutes had provided for the exclusion of coloured children from the white schools on account of race.(1) A later statute provided that, if parents of white pupils made no objection, coloured children might be admitted to white schools.(2) But when separate schools were established, Indian children and children of Chinese, Japanese or Mongolian parentage were not to be admitted to a white school.(3) The statutes raised questions of both constitutional and international complication. The Circuit Court was first called upon to decide whether the exclusion from white schools of an American citizen of Chinese descent was an infringement of his constitutional rights. The Court held(4) that the State had the right to provide separate schools for the children of the different races and that such action was not forbidden by the Fourteenth Amendment, provided that the schools so established made no discrimination in the educational facilities they afforded. When the schools were conducted under the same general rules, the Court emphasised,

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(1) Statutes, 1863, 210.

(2) Statutes, 1866, 398.

(3) s 1662, Political Codes, 1906.

(4) Wong Him v. Callaham (1902), 119 Fed. 381.

and the course of study was the same in the one school as in the other, it could not be said that pupils in either were deprived of the equal protection of the law in the matter of receiving an education.

When the Board of Education of San Francisco resolved in 1906 to establish separate schools for Chinese and Japanese pupils, and directed them to be sent to the oriental public school, the question assumed an international phase.(1) Japan contended that as the children of residents who were citizens of all other foreign countries were freely admitted to the schools, the citizens of Japan residing in the United States were by that exclusion denied the same privileges, liberties, and rights relating to the right of residence as accorded to the citizens of the most favoured nation. There was much excited discussion, and opinion varied as to whether the Japanese had such right under the treaties and whether, if they were construed to have treaty right, it was competent for the treaty-making power to deprive the local authorities of the right to adopt the school regulation in question. The resolutions were, however, rescinded owing to the intercession of the Federal Government.

Referring to this incident, Mr. Elihu Root, then Secretary of State, took the following position. He denied that

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(1) See Report on the San Francisco School Incident, S.D. 147, 59th Cong., 2nd Sess., 1906.

in asserting the validity of the Treaty with Japan the United States was asserting the right to compel the State of California to admit Japanese children to its schools. But the Treaty did assert, he claimed, the right of the United States to assure to the citizens of a foreign nation residing in American territory equality of treatment with the citizens of other foreign nations, so that if any State chose to extend privileges to alien residents as well as to citizen residents, the State would be forbidden by the obligation of the Treaty to discriminate against the resident citizens of the particular country with which the Treaty was made, and would be forbidden to deny to them the privileges which it granted to the citizens of other foreign countries. He was of the opinion that the effect of such a Treaty was not positive and compulsory, but was negative and prohibitory. It was not a requirement that the State should furnish education; it was a prohibition against discrimination when the State did choose to furnish it.(1)

In a recent case the term "colored race" as used in the Constitution of Mississippi, providing for separate schools for coloured children, was interpreted to include all races other than the white race, and was not limited to persons of

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(1) American Journal of International Law, 1907, 273.

negro blood.[1] A Chinese child of American birth was classed as "colored" and denied admission to a white school. The Court ruled that no right of a Chinese citizen under the Federal Constitution was infringed by classifying him for purposes of education with coloured children and denying him the right to attend schools established for the white race. It is to be noted, however, that the decision was rendered on the presumption that equal facilities for education were offered to all, whether white, brown, yellow or black.

The assignment of a boy of Chinese nationality to the coloured school was also held not to be in violation of the Treaty of 1868 with China.[2] In spite of the special provisions of Article VII. assuring to Chinese subjects the most-favoured-nation privilege in all the public educational institutions, the boy was expelled from a white school. But it has likewise been decided that foreign parents have constitutional rights to direct the education of their own children without unreasonable restrictions. A statute of Hawaii enacted to bring foreign language schools, established by the resident Chinese and Japanese, under strict government control. This had the effect of destroying the schools, and was rendered void as contravening the due process of the law clause of the Constitution.[3]

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(1) Gong Lum v. Rice (1927), 275 U.S. 78.

(2) Bond v. Tii Fung (1927), Annual Digest, 1927-1928, Case No. 224.

(3) Farrington v. Tokushige (1927), 273 U.S. 284.

100. The Miscegenation Laws.- The race distinction in America has led to the prohibition of intermarriage between the Caucasian and coloured persons. Thirty-one States, including all the Southern States, have enacted laws providing that there shall be no admixture of races.(1) And in States where the Chinese are found in large numbers, the prohibition is extended to them.(2) Thus in Arizona negroes, Mongolians and Indians, and their descendants, are prohibited from intermarriage with the Caucasian race.(3) In California all marriages of white persons with negroes or Mongolians are illegal and void.(4) It is interesting to note that the word "Mongolian" was not added to the statute until 1905, when the Japanese immigration was causing public comment. The similar Montana Law applies to a person of whole or part negro blood, and to a Chinese or Japanese person.(5) Nevada includes persons of black, brown, yellow or red race within the prohibition;(6) the Law of Oregon applies to negroes, Chinese, or

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(1) American Law Review, XLIII (1909), 364; Chinese Social and Political Science Review, XVI (1933), No. 4, 640.

(2) Fourteen States prohibit intermarriage between the white and the Chinese or Mongolian race: Arizona, California, Georgia, Idaho, Mississippi, Missouri, Montana, Nebraska, Nevada, Oregon, South Dakota, Utah, Virginia and Wyoming. Cf. May, Marriage Laws and Decisions in the United States (1929).

(3) § 3837, Civil Code, 1913. (4) § 60, Civil Code, 1906.

(5) § 5700, Revised Code, 1921. (6) § 6514, Revised Laws, 1912-1919.

persons having one-fourth of the prohibited blood;(1) Utah simply includes negroes and Mongolians.(2)

The statutes have been assailed on the ground that they violated the first Article of the Federal Constitution forbidding any State to pass laws impairing the obligation of contract, and also the Fourteenth Amendment, guaranteeing equal privileges and immunities to the citizens. But the Courts had upheld certain miscegenation laws as constitutional.(3) They ruled that the prohibition did not contravene the Fourteenth Amendment, because that Amendment did not prohibit the making of race or colour the constituent of an offence if it did not lead to discrimination.(4) The Court declared that "marriage is not a mere contract but a social and domestic institution, upon which are founded all society and order." Therefore it might be regulated and controlled by the sovereign power for the good of the State.(5) The Supreme Court of the United States had also been called upon to decide on the statute of Alabama, prohibiting miscegenation of white persons with negroes or persons of negro descent, and

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(1) § 9721, Laws, 1920.

(2) § 2967, Compiled Laws, 1917.

(3) Arizona, Kirby v. Kirby (1922), 24 Ariz. 9; Oregon, In re Estate of Paquet (1921), 101 Ore. 393; Missouri, State v. Jackson (1883), 8 Miss. 175. Cf. May, op. cit., 47, 238, 356.

(4) Ellis v. State (1866), 42 Ala. 525.

(5) Green v. State (1877), 58 Ala. 190.

was satisfied that there was no discrimination against either race.(1) But how far the prohibition may be found not inconsistent with the rights of resident aliens under the most-favoured-nation treaty has not been disposed of. The unequal distribution of the sexes among the Chinese is giving rise to a serious social problem which is aggravated by the enforcement of the 1924 Act, by which native-born citizens are no longer allowed to bring their Chinese wives, married after 24 May, 1924, into the United States.

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(1) Pace v. Alabama (1882), 106 U.S. 583.

Chapter XXXI.

CANADA

101. Chinese and the Acquisition of Crown Land in British Columbia.- Under the common law rule, an alien was not allowed to own real property. The prohibition had its origin in the feudal system, but was relaxed from time to time until in 1870 it was finally enacted in the Naturalisation Act of that year that real and personal property of every description may be taken, acquired, held and disposed of by an alien as by a natural-born British subject. The provision is retained in the British Nationality and Status of Aliens Act, which was adopted by the Dominion in 1914. In the Canadian provinces there is generally no law imposing disabilities on aliens as regards ownership of land.

Exception must be made of British Columbia, which prevented Chinese persons from acquiring Crown land in the province. The Land Act of 1884 provided that it shall be unlawful for a commissioner or any other person to grant a preemption on any Crown land, or sell any portion thereof to any Chinese. Any grant contrary to the Act shall be void and of no effect. The term "Chinese" was to include any person of the Chinese race; therefore a Chinese citizen of the province could not do what is not prohibited in the case of aliens

other than Chinese. When the Act was sent to the Dominion Government for approval, the Minister entertained a doubt whether or not the Act, which applied only to a portion and not to the whole of the population of the province, was constitutional. But he thought that this was a question which, if it arose, could be most conveniently dealt with by the Courts, and recommended its allowance.(1) But when British Columbia enacted in 1899 the Place Mining Amendment Act, prohibiting any persons other than British subjects from having any right or interest in any of the mining properties, the Dominion Government disallowed the Act, considering that it was contrary to the Union Colliery case, and that the provincial legislature could not make exceptional provisions affecting the rights and privileges of aliens.(2)

102. The Disfranchisement of the Chinese in British Columbia and Saskatchewan.

(i) Provincial Elections

The first Act of British Columbia denying the vote to the Chinese was passed in 1872, entitled "an Act to Amend the Qualification and Registration of Voters Act, 1871"; the Attorney-General of Canada however recommended its reservation

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(1) Hodgins, op. cit., 1867-1895, 1094.

(2) Ibid., 1899-1900, 120.

on the ground that s. 13 of the Act precluded the exercise of the electoral franchise in respect of the legislative Assembly by Chinese and Indians. He was of the opinion that this was in contravention of the instructions furnished to Governors of Colonies, and of s. 91(24) of the Constitution Act.(1) Assent was given, however, for the reason that s. 92 had conferred upon each province the right to legislate as to its franchise. The Provincial Elections Act, 1897, of British Columbia, disentitling a Chinese, Japanese or Indian, whether naturalised or not, from having his name placed on the register of voters or to vote at any election, was upheld by the Privy Council.(2) It also ruled that the provincial legislature had, under s. 92(1) of the British North America Act, the power to regulate the electoral law and to decide who should vote at the election of members to serve in the provincial Assembly.

When Act C. 17 of 1904, consolidating and amending previous laws and denying Chinese the right to vote as aforementioned was sent for approval, the Minister would have recommended its disallowance had it not been for the fact that the provisions were merely re-enactments of similar provisions which had been standing in the British Columbia Election Act

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(1) Hodgins, op. cit., 1867-1896, 1011-1012.

(2) See supra, § 67(ii).

for a number of years.[1] He admitted that a legislature might define the local franchise, but the Dominion Government ought not to approve the policy of a legislature withholding from naturalised British subjects, merely because of their race or naturalisation, rights or privileges conferred generally on natural-born British subjects of the same class. He apprehended that Parliament, having exclusive authority with regard to naturalisation and aliens, had the right to declare what the effect of naturalisation should be. Local legislation intending to interfere, or having the effect of interfering, with the apparent policy of Parliament in the exercise of its powers with regard to any subject, might, even if it could be held intra vires the legislature, be properly disallowed by the Dominion. He therefore urged reconsideration by the province and amendment of the Act to remove the objectionable clauses.

The Provincial Election Act, revised as C. 67 of 1924, retains the same provisions. An Amendment (C. 21) was only effected in 1931 excepting "any Japanese who served in the Navy Military or Air forces of Canada in the Great War 1914-1918" from the disqualification. By using the "voters' list" as a basis of qualification, British subjects of Chinese race are also excluded from membership of the provincial legislature,[2]

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(1) Hodgins, op. cit., 1904-1906, 129, 130.

(2) S. 27, Revised Statutes, British Columbia, 1924, C. 45.

from nomination for municipal office,[1] from nomination at an election of School Trustees,[2] and from Jury Service.[3]

Saskatchewan disfranchised Chinese in 1908. C. 4 of the Revised Statutes, 1930, provides in terms that persons of Chinese race are not entitled to be registered as voters, and shall not vote.

(ii) Municipal Elections

Under s. 92(8) of the British North America Act, the right to vote in municipal elections is regulated by provincial legislation, and in this case too, all British subjects of the Chinese race are excluded in British Columbia. The Municipal Act of 1881[4] provided that no Chinaman, Japanese or Indian should be entitled to vote at any municipal election. The Vancouver Corporation Act, 1900, contained the same stipulations. It was thought that the establishment of municipal corporations was entirely a matter of local concern, and that the method of constituting a municipal council or the determination of the municipal franchise were not subjects for review by the Dominion Government. The Minister apprehended that the withholding of the franchise in any municipality from any class of British subjects would not be made

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(1) S. 42, Revised Statutes, British Columbia, 1924, C. 75.

(2) S. 37, C. 226.

(3) S. 4, C. 123.

(4) Revised Statutes, British Columbia, 1924, C. 75.

the ground for interference in the internal affairs of the community by the Dominion Government.(1)

(iii) Dominion Elections

The right to vote for a member of Parliament is not an ordinary civil right. It is historically a statutory privilege and falls within the category of electoral rights in Canada, and so is not a provincial right.(2) The Chinese subject is nevertheless excluded from voting for and sitting as a member of Parliament in the provinces which disqualify him from voting in provincial elections. For under s. 41 of the Constitution Act, it is provided that until Parliament otherwise provides, all laws in force in the provinces relative to the qualifications and disqualifications of persons to be elected as members of the legislative assembly of the provinces, the voters at elections of such members, etc., shall apply to election of members to serve in the House of Commons for the same provinces. The Dominion Elections Act, 1927, then stipulates that persons who by the laws of any province in Canada are disqualified from voting for a member of the legislative assembly, shall not be qualified to vote for a member of Parliament in such province. Exemptions have been made, however, for any person who has served in the

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(1) Hodgins, op. cit., 1899-1900, 137.

(2) Ibid., 1867-1896, 521.

military, naval or air forces of Canada during the World War. There is no racial disqualification of candidates for election to the House of Commons.(1) As regards the qualifications of a Senator, there is also no legal disability on racial grounds from eligibility for appointment under s. 23 of the British North America Act.

(1) Sections 38, 39, Revised Statutes of Canada, 1927, C. 53.

Chapter XXXII.

AUSTRALIA

103. The Land Laws of the States.- The British Nationality Act comprises a special section on the capacity of aliens as to ownership of property, which was purposely left out when Australia adopted its general provisions in 1920. The Law of the Commonwealth is not in general concerned with proprietary rights. Various restrictions have, however, been imposed by different States with the object of barring Chinese or other Asiatic persons from acquiring any interest in landed property. They constitute either discrimination eo nomine by specifying those persons who are forbidden to own land, or virtual, by requiring as a prerequisite to land holding the passing of a dictation test in some foreign language or naturalisation, for which Asiatics were legally ineligible. But it is necessary to point out that these disabilities extend only to aliens of the Chinese or Asiatic race, and do not affect British subjects, either naturalised or natural-born, of that race; although other aliens are accorded full capacity. The only States in Australia which grant aliens, or rather the Asiatics, full proprietary rights are Victoria[1] and Tasmania.[2]

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(1) S. 3, The Supreme Court Act, 1915.

(2) The Aliens Act, 1913.

Under the Land Act, 1910-1931, of Queensland, no alien who has not first obtained a certificate that he is able to read and write from dictation words in such language as the Minister for Lands may direct, is permitted to apply for or hold any selection. And if an alien acquires a selection or any interest therein but does not become naturalised within five years, all his interest in such selection is forfeited.(1) Nor can he acquire the lease of any parcel of land exceeding five acres in extent if he has not first passed a dictation test.(2) The Mining Act, 1899-1930, of the same State also disqualifies an alien who by lineage belongs to any of the Asiatic, African, or Polynesian races from being either a purchaser (s. 88) or a lessee (s. 89) or a mortgagee (s. 90) of a miner's homestead. And only a person who has obtained a certificate of passing the dictation test is qualified to apply for or hold a petroleum permit or lease.(3)

In New South Wales an alien cannot acquire landed property unless he has resided in the State for one year and, at the time of application, he lodges a declaration of intention to become naturalised within five years.(4)

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(1) S. 59(1)b, Land Act, 1910-1931.

(2) S. 34, Leases to Aliens Restriction Act, 1912.

(3) S. 10(v), Petroleum Act, 1923-1927.

(4) S. 241(1), Crown Lands Act, 1913-1927.

In South Australia, persons of Asiatic race not being British subjects are disqualified from holding leases of lands in irrigation areas.(1) According to the Mining Act, 1903, of the Northern Territory, no mining lease may be granted to an Asiatic alien, and no such Asiatic alien shall hereafter be entitled to acquire or hold any such mining lease or any interest (s. 50). Western Australia imposes no restriction in its Land Act on the holding of land by aliens. But under its Mining Act, 1904, an Asiatic could not hold a mining lease.

104. The Deprivation of Political Suffrage.-

(i) The State Laws

The subject of electoral franchise of the States and eligibility for membership of the State Assembly is wholly governed by State laws. Queensland enacted in 1885 that aboriginal natives of Australia, India, China or the South Sea Islands should not vote as freeholders at Parliamentary elections. The Elections Amendment Act, 1905, of the same State further provided that no aboriginal native of Australia, Asia, Africa or the Islands of the Pacific should be entitled to have his name placed on an election roll. The Electoral Act, 1907-1921, of Western Australia also disqualifies every person from being enrolled as an elector or, if enrolled, from

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(1) s. 19, Irrigation and Reclaimed Lands Act, 1914.

voting at any election, who is an aboriginal native of Asia or a person of the half-blood. Apart from the two latter states, Chinese subjects are not deprived of the State suffrage.(1)

(ii) The Commonwealth Electoral Act, 1918-1929

The Commonwealth suffrage is similarly not a concomitant right of citizenship. British subjects of Chinese origin, if not entitled to vote for a member of a State Assembly, are disqualified in Commonwealth elections. Under s. 41 of the Constitution, any person who has or acquires a right to vote at elections for the more numerous House of Parliament of a State shall not, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of Parliament of the Federation. The Electoral Law, 1918-1929, repealing the Franchise Act of 1902, penalises the aboriginal native of Australia, Asia, Africa or the Islands of the Pacific, who are not entitled to vote at any Senate election or House of Representatives election unless so entitled under the Constitution. Since a Chinese is not qualified to vote at State elections in Queensland and Western Australia, he does not possess the Commonwealth suffrage in these States. Nor is he eligible to become a member of the Parliament, one of the qualifications for membership being

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(1) Cf. Australian Year Book, 1901-1919, 938, 939, 946, 947.

that the candidate must be an elector entitled to vote at the election of members of the House or qualified to become such an elector.(1) The disqualification on racial grounds in the case of the native of British India is removed by an Act (No. 20) of 1925 of the Commonwealth.

It has been decided that an aboriginal of Asia is not entitled to vote under the Electoral Act of Western Australia, even though enrolled, and cannot on that ground plead that he is entitled by s. 41 of the Constitution to have his name placed on the Commonwealth roll. It is also settled that Japanese persons born in Japan must be treated as aboriginal natives of Japan or of Asia or of the Islands of the Pacific.(2) One Muramats came to Australia in 1893, was naturalised in Victoria in 1899, and had resided in Western Australia since 1900. He was placed on the electoral roll for the legislative assembly in May, 1922, and applied to be enrolled on the Commonwealth roll, relying on s. 41 of the Constitution. It was contended that he was not an aboriginal native of Japan and that by naturalisation in Victoria he was naturalised for the purposes of the Commonwealth and entitled to all political and other rights of a natural-born British subject. But the Court interpreted the word "aboriginal" as meaning an

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(1) Sections 16 and 34, The Constitution Act, 1900.

(2) Muramats v. Commonwealth Electoral Officer (W.A.) (1923), 32 C.L.R. 500.

aboriginal inhabitant of any land as distinguished only from the subsequent European colonists. The fact that there was a race inhabiting Japan before the present Japanese came, would not prevent the present Japanese from being the aboriginals of Japan in contradistinction to the Europeans and Americans who settled in Japan in and after the nineteenth century. Furthermore, the Court held, Muramats had not established that he had a right to vote for the legislative assembly and therefore he could not claim Commonwealth enrolment by virtue of s. 41. The Commonwealth Electoral Act did not admit an aboriginal native of Asia to vote unless he was entitled under that section, and the appellant could not prove that he was so entitled.

The Electoral Act, 1927, of New Zealand only disqualifies aliens from being registered as voters, and persons who are disqualified as electors shall not be elected as members of Parliament.(1) In the matter of local government, an alien may be registered, if qualified, as an elector or rate payer, and may vote at an election, but is not eligible to be elected or appointed as a member of a local governing body.(2)

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(1) Sections 15 and 32(1), Act No. 44, 1927.

(2) S. 17(4), Local Elections Act, 1926.

105. The Mixed Marriages.- Of the early Chinese settlers in Australia, few brought with them their women-folk. The dearth of women of their own race induced them to mate with European females when racial animosity could be overcome. There is no legal ban against miscegenation, and a Bill introduced in 1910 to prohibit marriages between Europeans and Asiatics was dropped because public feeling was not in favour of the legislation.(1) Only in Samoa, mandated territory of New Zealand, Chinese under contract for manual or domestic service are prohibited from marrying Samoan women.(2) A breach of the Law is punishable by a fine or imprisonment. The reason for this lay in the temporary nature of the stay of the Chinese, who must leave the island on the termination of their contract. The enactment was also said to have been prompted by the desire to preserve the racial purity of a fine native race which has been entrusted to the care of New Zealand by the League of Nations.(3)

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(1) Keith, Responsible Government in the Dominions (1928), II, 817.

(2) S. 300, The Samoa Act, 1921.

(3) Hall, op. cit., 11.

Chapter XXXIII.

THE UNION OF SOUTH AFRICA

106. The Anti-Asiatic Land Laws.- In Cape Province and in Natal, Asiatic enjoy the same rights and privileges in regard to ownership of land as Europeans.(1) But the land system of the Transvaal is comprised in a series of very complicated legislative acts. Law 3 of 1885 prohibited "persons belonging to any of the aboriginal races of Asia" from being owners of landed property in the Republic. By an Amendment in 1886, rights were conferred upon Asiatics to own land "only in the streets, wards and locations which the Government shall for sanitary purposes point out to them for habitation." The Law was not retrospective, but in its strict application an Asiatic could not even inherit any rights in fixed property.(2) To remedy this grievance, the Law was amended in 1907 (No. 2), whereby any fixed property acquired by an Asiatic before the taking effect of Law 3 and registered in the name of such Asiatic may be transmitted by him to another Asiatic by testamentary or other inheritance. In the course of time, Asiatics were allowed to own fixed property outside locations through a European nominee or trustee in whose name

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(1) Cf. Report of the Asiatic Inquiry Commission, 1921, 51.

(2) Amod's Executor v. Registrar of Deeds (1906), T.S. 90.

the land was transferred and registered. The practice had always taken the form of passing a mortgage bond, by the European trustee, on the property to the full amount of the purchase price, without interest, in favour of the Asiatic purchaser and giving him an unrestricted power of attorney to deal with the property.(1) Such a private agreement by a European to hold land on behalf of an Asiatic and to give the latter the benefit of the land was held not to be a contravention of the Law.(2) But the property, having been registered in the name of a European person, could not be transmitted thereafter to an Asiatic legatee.(3) This system of indirect ownership of land became common in spite of the risk involved that in the case of the trustee being declared insolvent, the property registered in his name could be claimed by his creditors as an asset of his estate.

By the Gold Law of 1898, the term "coloured person" was defined expressly so as to include Chinese, who were placed under various disabilities with regard to the digging for and dealing in precious metals. But s. 92 of the Law, prohibiting any but white persons from being holders of stands granted thereunder, was construed as not preventing coloured persons

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(1) Report of the Asiatic Inquiry Commission, 1921, 6.

(2) Khamissa v. Mohomed (1913), T.P.D. 597.

(3) Polak v. Registrar of Deeds (1907), T.S. 1084.

from acquiring and exercising leasehold rights over such stands.[1] "Because it does not say that a white man shall not let his stand to a coloured person, nor does it say that no coloured person shall occupy a stand". The Law was then replaced by Act 35 of 1908, under which the holder of a stand shall not transfer or sublet any portion to a coloured person nor permit any such person other than a bona fide servant to reside on or occupy such stand (s. 130). Coloured persons are not allowed to reside on proclaimed land in the mining district of Witwatersrand except in bazaars and locations (s. 131). The sections apply to any townships proclaimed under Act 34 of 1908. But any rights acquired with respect to stands inside and outside townships prior to the passage of that Law were safeguarded (s. 77). And such rights were construed to imply not only those rights created by the previous statutes, but all the common law rights which the owner of such a stand had as regards the letting of the property to coloured persons, etc.[2] When a person once had the right to let the stand acquired under a prior Gold Law, he would continue to enjoy such right and others would also have the right to make use of that lease. Therefore such stand could be let to and occupied by coloured persons for residential purposes, the restrictions of sections 130 and 131 of the Act being not applicable to such stand.[3]

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(1) Khotas and Co. v. Colonial Treasurer (1909), T.S. 180.

(2) R. v. Tamblin (1911), T.P.D. 772.

(3) R. v. Chong Sam (1915), T.P.D. 396.

107. The Personality of Asiatic Companies.- The passing of the Company Act in 1909 led Asiatics to form themselves into a number of limited liability companies in the name of which they purchased lands and registered them with the Deeds Office. It was obviously an evasion of the Law, but was declared legal in the case of Reynolds v. Cothuizen.(1) The Court ruled that the provisions of the Law could not operate against a private limited liability company although such company consisted entirely of Chinese shareholders. The company is not a Chinaman, submitted the Court, and the contention that a corporation is a person quite distinct from the members of the corporation and that the nationality of the corporators is irrelevant, rightly prevailed. The decision was, however, later modified to a great extent, for in another case where coloured employees of an Asiatic company were held not entitled to occupy a stand leased to it by an Asiatic person, the Court being of the opinion that a company could not be legally formed to conclude a contract into which its individual members were by statute forbidden to enter. The occupation by a company the shareholders of which were all Asiatics was in fraudem legis as an illegal device to circumvent the law.(2) On the other hand, it was also decided that, assuming that an Asiatic company could

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(1) (1916), W.L.D. 103.

(2) Madrassa v. Johannesburg Municipal Council (1919), A.D. 439.

own land, it could not itself occupy the premises. "For a company", declared the Court, "is purely a legal conception; it has no physical existence , but exists only in contemplation of law, so that it is incapable of being physically present at any time." In a previous case[1] it had been settled that a coloured salesman in charge of a shop on a stand on behalf of a European master, was not the "occupant", but that the master was the real occupant who, being a white person, was entitled to occupy the premises. Now, in this present case, the alleged occupant was a limited company which could not in fact itself occupy premises; the Asiatics were therefore the actual occupants, and such occupation was illegal.

The decision was affirmed by the Privy Council,[2] which held that the words "to occupy" were to mean "to be physically present for a substantial period of time", and were not to mean to have legal possession in a technical sense. Consequently, if the owner of a stand let it to a limited company, whose Asiatic manager and employees carried on business there, the enactment was infringed. The point was likewise clarified in an earlier case[3] by Innes, C.J., speaking of the legal persona of a company: "Taking the case of a company with

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(1) Abelman v. Lodewijk and Ho Chong (1917), W.L.D. 124.

(2) (1922) A.C. 500.

(3) Dadoo Ltd. v. Krugersdorp Municipal Council (1920), A.D., at 552.

European shareholders owning a Krugersdorp stand and allowing an Asiatic employee to reside upon it. As a mere legal person, it would be unable physically to occupy anything, and the occupation would be by the Asiatic and therefore illegal. But if the same members formed a partnership instead of a company, they would be the occupants, and the residence of their Asiatic servant upon the stand would be perfectly legal."

The right of an Asiatic company in the Transvaal to own fixed property was at last confirmed by the Appellate Court, which held in 1920 that the provisions of Law 3 of 1885 and Act 35 of 1908 did not apply to joint stock companies, even though their stores were held by Asiatics or coloured persons, and that the transfer to the company of any land was not in fraudem legis.(1) The Trial Court, after considering the history and policy of the Republic as regards the relations between the white and coloured races, reached the conclusion that the object of the Law was to prevent the control of land by Asiatics or coloured persons. A company could own land apart from its members, but could not control it. The Law therefore impliedly prohibited Asiatics from forming themselves into a corporation in order to control fixed property. Dadoo Ltd. was manifestly formed to acquire what Dadoo personally could not hold; the transfer to it was an attempt to do indirectly what the law would not tolerate directly, and therefore was

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(1) Dadoo Ltd. v. Krugersdorp Municipal Council (1920), A.D. 530.

void (per Wessels, J.). The Supreme Court, reversing the decision, intimated that a judge had authority to interpret, but not to legislate, and he could not do violence to the language of the law by placing upon it a meaning of which it was not reasonably capable in order to give effect to what he might think to be the policy or object of a particular measure. Solomon, J.A., remarked that the legislature, having deliberately stopped at declaring Asiatics incapable of owning land, did not intend to disqualify them from exercising any control over such property. Further, the land was not owned by the Asiatic shareholders but by the company, which could in no sense be described as an Asiatic. The Court, after reviewing the nature of the doctrine of in fraudem legis, again concluded that a transaction was in fraudem legis when it was deliberately disguised so as to escape the provisions of the law, and fell in truth within these provisions. In the present case, the land was controlled, not owned, by Dadoo and therefore was not transferred in fraudem legis. The statute, prohibiting ownership of land by Asiatics, had not therefore been contravened. The Court thus affirmed the principle decided in Reynolds' case that a company, being merely an abstraction of law, an artificial person separate and distinct from the personality of its shareholders, could not naturally be the subject of racial restriction.

That holds good, however, only in respect of such property acquired by companies before 1 May, 1919, for by Act 37 of

that year the provisions of Law 3 prohibiting the ownership of land by coloured persons were made applicable to companies in which Asiatic persons have a controlling interest. Any such company which had acquired fixed property since that date must dispose thereof within two years. The expression "acquired" is held to refer to the acquisition of dominium in fixed property and not to the acquisition of a mere right to claim dominium. Any property, therefore, which had been purchased by an Asiatic company before 1 May, 1919, but of which transfer was only passed to the company after that date (1 June 30), was subject to the statutory prohibition although the Act did not come into operation until 3 July, 1919.(1) The Act also prohibits the registration of a mortgage over fixed property in favour of an Asiatic person otherwise than as security for a loan or investment.

108. The Legal Situation with regard to Ownership of Land before 1932: Recapitulation.- The position may be summarised thus. In the province outside public diggings an Asiatic person could not own fixed property either directly or indirectly, i.e., through nominal trustees or limited liability companies, except in bazaars and locations. But he could acquire leasehold rights. As regards places inside public

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(1) Transvaal Investment Co. v. Springs Municipality (1922), A.D. 337.

diggings proclaimed under the Gold Law and the Townships Act of 1908, he could not own fixed property, including stands inside and outside townships, directly or indirectly, except in such locations as the Government might assign to him for residence. But he could continue to acquire leases with respect to stands outside townships which had been granted under the mining laws prior to 1908, but not after the Law of 1908 had come into force. The rights acquired with respect to stands inside and outside townships prior to the passage of the Law of 1908 are safeguarded. Further, fixed property acquired by Asiatic companies before 1 May, 1919, are also protected.(1)

It may be noted, as a point of interest, that the restrictions are not confined to Chinese, and are actually aimed at the Indians. The term "persons belonging to one of the native races of Asia" (Law 3 of 1885) is construed as applying to coloured native races and does not include Syrians who, though natives of Asia, have been held to belong to a white race and capable therefore of owning fixed property in the Transvaal.(2) In a later case(3) the prohibition was held applicable to Cape Malays, and accordingly the provisions of Act 37 of 1919 apply to a company in which Cape Malays have a

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(1) Cf. Report of the Asiatic Inquiry Commission, 1921, 24.

(2) Gandur v. Rand Township Registrar (1913), A.D. 250.

(3) Transvaal Arcade Ltd. v. Rand Township Registrar (1923), A.D. 442.

controlling interest. The Court further declared that the expression embraces all coloured races of Arabia and the Malay Peninsula, as well as Indian labourers. Nor could the large and important sections of Asiatics, such as the Japanese, have been intended to be omitted.

Although the Law of 1919 prohibits mortgages of fixed property in favour of Asiatics, an agreement whereunder a European in whose name certain land is registered undertakes to hold such land in trust for certain Asiatics is held to be legal and enforceable.(1) Shares of land companies held by Asiatics are also registered in the names of Europeans. It has also been held that the restrictive condition to which the owner of a township stand is subject, that no coloured persons other than servants will be allowed to occupy the lot, purported to prohibit habitual physical presence or physical presence for a substantial period of time, and that the exception in favour of servants refers to servants of a domestic or menial kind and does not include clerks and managers of a business.(2) The authority of Madrassa's case(3) is therefore followed. Finally, to enforce the prohibition contained in s. 130 of Act 35 of 1908 regarding the ownership or occupation of stands by coloured persons, a municipality owning

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(1) Waja v. Polak (1927), W.L.D. 32.

(2) North-Eastern District Association v. Norwood Land Co. (1928), W.L.D. 142.

(3) See supra, s.190.

stands in a township is held to have a locus standi in judicio to claim the intervention of the Court against an Asiatic landholder.(1)

109. The Land Tenure Act, 1932.- The remnants of the proprietary rights of Asiatics have been largely abrogated by the Transvaal Asiatic Land Tenure Act of 1932 which enacts elaborate provisions to prevent the acquisition of or control over land by an Asiatic either directly or indirectly. Although they are said not to infringe any vested rights, certainly they have curtailed many rights possessed by an Asiatic. The term "Asiatic" now means any Turk and any member of a race or tribe whose national home is in Asia, but shall not include any member of the Jewish or Syrian race or a person belonging to the race known as the Cape Malays. A new section 131A is inserted in the Law of 1908 by which the Minister of the Interior is empowered to issue a certificate which will withdraw any land from the provisions of ss. 130 and 131 of that Act, in order to legalise the previously unlawful occupation of proclaimed land by coloured persons. They are forbidden to occupy any land which has ceased to be a public digging since 1 May, 1930, and any number of pieces of land in a township in excess of the number of pieces on which they

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(1) Roodepoort-Maraisburg Town Council v. Eastern Properties Ltd. (1933), A.D. 87.

lawfully resided or which they lawfully occupied on that date, shall not be exempt from the said sections, although they may continue to reside on or occupy the land where they were unlawfully residing or occupying on 1 May, 1930, until 30 April, 1935.

The expression "fixed property" shall now mean any real right in immovable property in the province outside an area assigned for the occupation of Asiatics, other than a mortgage bond not exceeding one-half of the value of such property, and shall include any lease of immovable property for a period of ten years or longer. Any such fixed property held on behalf of or registered in favour of any Asiatic or Asiatic company in any deeds registry, which they are debarred from holding, after 1 May, 1930, shall become the property of the State. No shares of a land-holding company shall be held by or pledged to an Asiatic or Asiatic company or any person on behalf of them after 1 May, 1932, except that an Asiatic may inherit them from a lawful Asiatic shareholder.

With a view to avoiding friction with other governments, the Minister of the Interior may issue certificates of exemption to any Asiatic or coloured person who is a consular officer or public agent of any State or a servant working under or in conjunction with such officer, etc., and thereupon the prohibition with respect to residence or occupation of any land shall not apply. Such persons may also acquire ownership of or an interest in any land for the purposes of their

office or residence with the consent in writing of the Minister of the Interior.

110. The Suffrage.-

(i) The Provinces

By Letters Patent of the Transvaal[1] and the Orange Free State,[2] which set up the system known as responsible government in the provinces, the franchise is confined solely to European or white British subjects. They were mere re-enactments of the Grondwet of the Boer Republics which conferred "Burgher rights" on white persons only and denounced equality between coloured people and the white inhabitants either in Church or State.[3] It was decided in the Transvaal that the word "white" as used in the Municipal Elections Ordinance, 1903, was substantially equivalent to "wholly of European descent". The Court would consider his personal appearance in deciding whether an applicant was a white person. When he seemed to be of coloured blood, the onus of proving that he was wholly of European descent rested upon the applicant.[4]

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(1) Letters Patent, 6 December, 1906, ss. 9 and 10.

(2) Letters Patent, 5 June, 1907, ss. 9 and 10.

(3) Eybers, Select Constitutional Documents Illustrating South African History, 1795-1910 (1918), 286, 364.

(4) Swarts v. Pretoria Town Council (1905), T.S. 621.

Cape Province accords to its citizens both parliamentary and municipal franchise. It provides under the Union Act of 1909 that no electoral law affecting coloured voters shall pass the Parliament except by a vote of two-thirds of the total number of members of both Houses. But the recent tendency is not in favour of the coloured inhabitants. By Act 18 of 1930, which extended the suffrage to women, the right is confined wholly to Europeans.

In Natal the case is different. Asiatics were deprived of the parliamentary franchise in 1896, and another Ordinance in 1924 disqualifies them from voting in municipal elections. The Charter of Natal, 1856, had originally conferred upon every man over the age of 21, possessing or renting property of a certain value and being duly registered, the right to vote. This right was curtailed, however, by the Franchise Act, 1896, which disfranchised persons not being of European origin who were natives or descendants in the male line of natives of countries which had not hitherto possessed elective representative institutions founded upon the Parliamentary franchise. The Asiatic peoples, not having enjoyed the representative form of government, were therefore disqualified from being registered as voters, except in virtue of a saving clause by which the provision was not to apply to persons whose names were rightly contained in any voters' roll at the date of the promulgation of this Act (23 May, 1896).

The qualifications of voters for the municipal elections were defined by the Townships Act, 1881, s. 7 of which provided that the Local Board shall prepare a town roll and shall enter the names of all male persons possessing within the township "a" qualification entitling them to vote for a member of the legislative council (as prescribed by the Charter of Natal). It was contended that the provisions of the Franchise Act should apply in the local elections, and that Asiatics, not being exempted from its operation, were not entitled to vote. But the Court ruled that the Act of 1896 affected only the parliamentary franchise, and that according to the Townships Act, 1881, the possession of one and not all of the qualifications of a parliamentary elector would entitle a person to vote in a township.(1) The question before the Court was the construction of s. 7 of the Law of 1881 and the application and effect of other statutory enactments relating to the parliamentary franchise. The Court was of the view that the qualification for exercising the municipal franchise in terms of s. 7 was something less than is necessary for the parliamentary franchise, and that the section was not affected by a statute which merely prohibited voting at parliamentary elections. The registration on any voters' roll on 23 May, 1896, was made a condition of the right to vote at a parliamentary election by the Charter of 1856, modified and restricted as regards the

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(1) Hoffajee v. Estcourt Local Board (1907), 28 N.L.R. 321.

class to which Asiatics belonged by the Act of 1896. Persons might rightly claim to be put on the township roll under the Law of 1881 even though they were not registered as parliamentary voters.

The Court then proceeded to show that the Franchise Act of 1896 had only the parliamentary franchise in view. It said that at first sight the words in s. 2 "no persons shall be qualified to have their names inserted in any list of electors or in any voter's roll" were wide enough to include township or borough voters' rolls. But the section went on "or to vote as electors within the meaning of s. 22 of the Constitution Act of 1893, or any law relating to the election of members of the legislative assembly", and these words showed that the legislature had in view only the parliamentary franchise.

The municipal franchise of the Asiatics in Natal is now abrogated by the Borough Ordinance of 1924, which provides as one of the necessary qualifications for the enrolment of a person as a burgess that he be "entitled to be registered as a parliamentary voter". Asiatics, having been disqualified from voting in the parliamentary election under the Act of 1896, could not now vote in the boroughs. A case was filed to test the validity of the Law. The Appellate Court ruled that the Ordinance is not ultra vires. The provincial council having powers under s. 85(6) of the South Africa Act to make Ordinances in relation to municipal institutions, it is clear that it can determine the qualifications of those who are entitled to exercise the municipal franchise and that it can

change those qualifications at any time. The Court considered the fact that the effect of such a provision is to exclude Asiatics from the burgess roll and so to discriminate between one race and another to be immaterial. "Once granted that a provincial council may at any time alter the qualifications for the municipal franchise," said the Court, "which cannot be denied, it follows that it may take away the vote from those who had previously been entitled to it."(1)

Asiatic persons, not entitled to vote for the election of the provincial council, are not eligible for its membership. For qualifications of members are those of the electors, which in turn are those of voters for members of the House of Assembly of the Union.(2)

(ii) The Union

Under s. 26 of the South Africa Act, the qualifications of Senators included the being a British subject of European descent. Union nationals of Asiatic origin are therefore not entitled to sit in the Upper House. Under s. 44 they are also disqualified from being members of the Lower House. This is therefore a capitis diminutio in the case of coloured persons of the Cape Province. The right to vote for the election of members of the Lower House is again confined by s. 36 to

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(1) Abraham v. Durban Corporation (1927), A.D. 444.

(2) Sections 70(2) and 71(4), The Union Act, 1909.

those who are qualified provincial parliamentary voters in the respective provinces. Asiatics being disfranchised in provincial elections, except in the Cape, are not allowed, except in the Cape, to take part in the election of the members of the House.

111. Residential Segregation and the Legal Position of the Asiatic Bazaars.- Under Law 3 of 1885, the Government has the right to designate "certain streets wards and locations for Asiatics to live in." The provision does not apply to those who live with their employers. A Volksraad Besluit of 1886 added that the locations were assigned to the Asiatics for habitation and for sanitary purposes. It was first thought that Asiatics should carry on their trade in the same localities where they resided, but in 1904 the Court decided that the segregation under Law 3 does not apply to business places.(1)

The segregation of residential quarters, however, has been strictly observed. A non-Asiatic woman, even though married to an Asiatic person, is prevented from residing in a bazaar set apart for Asiatics.(2) Nor shall a person other than a native be permitted to reside or trade in a native location.(3) The establishment of a location in proclaimed land for the

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(1) Motan v. Transvaal Government (1904), T.S. 404.

(2) White v. Pretoria Municipality (1908), T.S. 1128.

(3) Smith v. Germiston Municipality (1908), T.S. 940.

residence of Asiatics requires some affirmative action. Mere inaction, the neglect to take steps to prevent coloured persons from living upon ground controlled by the Government, does not constitute such ground a location.(1) On the contrary, a location once set apart for the use of Asiatics cannot be closed by the Government.(2) The Supreme Court of the province ruled that Law 3 of 1885 merely gives the Government the right to point out locations or streets in which Asiatics shall be entitled to live. No power is expressly given by the statute to close or deproclaim a location or a street once pointed out. The statute is a disabling measure and necessitates a strict construction. "Great injustice might be worked", ruled Innes, C.J., "if from time to time streets or locations were pointed out to Asiatics in which they might live, and if on the strength of the permission to live there, they erect expensive houses, and were then liable to be called upon at short notice to vacate their houses and go elsewhere without compensation. Because there is nothing in the statute which compels the government to compensate." Solomon, J., also indicated that the mere fact that no provision is made for compensation rather implies that the legislature did not intend to confer upon the Government the power to close an area which had been set apart for the residence of Asiatics.

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(1) Devos v. R. (1909), T.S. 214.

(2) Essop v. R. (1909), T.S. 480.

112. The Category of "Coloured Person" in South African Legislation.- Acting upon the principle of non-recognition of equality between coloured persons and white inhabitants, the provinces have been specially abundant in discriminative measures. It has been decided that the word "Kleurlingen" or coloured persons, occurring in a Republic statute, cannot be limited to the natives or coloured persons of South Africa unless there is something in the context which shows that the term was used in that limited sense.(1) And being comprehended in the category of coloured persons or Asiatics, Chinese are subject to a number of disabilities. Under the curfew restriction, they must not be about the streets after 9 p.m., and a request to be allowed in the streets after that hour has been refused.(2) The Volksraad enacted that no coloured person, even though taking a first-class ticket, should travel together with whites in trains, but should be confined in a separate and inferior compartment.(3) The administration is empowered by the Railways Act, 1916, of the Union to make regulations with respect to the reservation of railway premises or of any railway coach or of any portion thereof for the exclusive use of persons of particular races,

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(1) R. v. McCulloch (1930), T.P.D. 350.

(2) Volksraad Besluit of 8 June, 1888, Laws of the Transvaal, 327.

(3) Volksraad Besluit of 14 October, 1897, ibid., 822.

and the restriction of any such person to the use of the premises, coach or portion thereof so reserved.(1) Under the Town Regulations, 1899, of the Transvaal, coloured persons were prohibited from walking on sidewalks of the streets, and Asiatics were held to be coloured persons.(2) In Bosch v. R., Mason, J., said that the words "coloured person" in this country certainly are intended to include Asiatics as well as natives, to whom no intoxicating liquor could be sold.(3) When a person was convicted of supplying liquor to a coloured person and the evidence showed that the person supplied was a Chinese, the Court held on appeal that that fact justified the inference that he was a coloured person.(4) A provincial Ordinance empowering a town council to make by-laws to appoint separate tramcars for the use of white persons and of coloured persons respectively and restricting the use of such cars to such persons was held intra vires the provincial council. The fact that no accommodation had been provided for coloured persons was no defence if they boarded a tram reserved for the use of white persons, and they were rightly convicted of contravening the by-law.(5)

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(1) S. 4(6), Act 22 of 1916.

(2) Salugee v. R. (1903), T.S. 13.

(3) (1904), T.S. 55.

(4) Drury v. R. (1906), T.S. 640.

(5) George v. Pretoria Municipality (1916), T.P.D. 501.

It is well settled in South African jurisprudence that the legislative authority conferred upon the provinces is an original authority and that within the limits imposed they may make laws as freely and effectively as the Parliament of the Union.(1) And s. 147 of the South Africa Act, vesting the power to deal with matters affecting Asiatics in the Governor-General in Council, will not interfere with the powers of the provinces in regard to coloured races in matters on which they are competent to legislate.(2)

In a recent case, an instruction issued by the Postmaster-General to set apart separate counters at post offices for the use of "non-Europeans" and "Europeans" has been held not ultra vires and not rendered invalid by s. 147 of the Constitution.(3) Before December, 1931, Europeans and Asiatics used to do their postal business in one room, natives in another. By the instructions issued in December, 1931, Europeans were to be served in one room over the door of which the word "Europeans" was painted, and all non-Europeans in the other room labelled "non-Europeans". The respondent, an Indian, obtained an order from the Transvaal Provincial Court in the form of a mandamus

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(1) Middleburg Municipality v. Gertzen (1914), A.D. 562.

(2) R. v. Amod (1922), A.D. 217.

(3) Minister of Posts and Telegraphs v. Rasool (1934), A.D. 167.

compelling the Postmaster-General to withdraw the instructions. The Government appealed against the order. The Supreme Court reversed the decision, with Gardiner, A.J.A., dissenting. The Court declared that a discrimination which is not accompanied by inequality of rights, duties and privileges or treatment is not per se unreasonable merely because it is made on grounds of race or colour, but any person objecting to such discrimination must show that in the particular case it is unreasonable in that it involves oppressive or gratuitous interference with his rights, or in that it possesses some other unreasonable feature. "The effect of the instruction", observed Stratford, A.C.J., "was to divide or classify the community of rendering that service and I am unable to appreciate how their operation is partial or unequal between these divisions or classes when we have the definite admission that they are not." Speaking of s. 147 of the South Africa Act, the Court was of the opinion that the matter dealt with by the Postmaster-General is not one "specially or differentially affecting Asiatics throughout the Union" within the meaning of the section. There is no restriction here against the legislative authority of Parliament. It deals only with executive power and not with legislative action. The judgments delivered in both Courts were based on the principle in Kruse v. Johnson.(1) The Lower Court had held that the instructions

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(1) (1898) 2 Q.B.D. 91.

in question were "unreasonable" within the meaning of the rule laid down by that authority because the discrimination effected by them was "partial or unequal in operation". The Superior Court maintained, however, that discrimination coupled with equality is no more unreasonable than a division of counters whereunder persons whose surnames begin with a letter under A - M go to one counter while others go to the counter for letters N - Z. The respondent also contended that discrimination on the ground of race or colour in the Union is in itself "unequal", and the fact that the discrimination does not create inequality of service or give one class greater or less facilities than the other is immaterial or irrelevant. It was also argued that a municipality can discriminate regardless of the fact that there is no inequality of service, if there is a power to discriminate between the white and coloured. But if there is no power so to discriminate, the municipality cannot discriminate even if service is equal between the two classes. A department running a service for the public such as the post office, has no more power to segregate for reasons of race or colour than it has to segregate for reasons of religion. The dissentient Judge, referring to the peculiar circumstances and the trend of judicial opinion in South Africa, associated himself with the cause of the respondent and held that this relegation of Indians to a non-European counter is humiliating treatment. "In view of the prevalent feeling as to colour, and in view of the numerous statutes treating non-Europeans as belonging to an inferior order of civilisation,"

he concluded, "any fresh classification or relegation of Asiatics and natives to a lower order, and this I consider humiliating treatment. Such treatment is an impairment of the dignitas of the person affected, and it is the legislature only that can cause that impairment."(1)

113. The Education and Miscegenation Laws.- The segregation of school buildings for white and coloured boys is also enforced in South Africa. The Education Act, 1907, of the Transvaal provided that no coloured child or person shall be admitted or allowed to remain a pupil or member of any school, class or institution under the control of local authorities. In Cape Province people of other than European parentage or extraction in a school district desiring to have established for their children a public undenominational school, must first approach the school board by petition signed by fifty parents at least of such children. Compulsory school attendance is required of all children of European parentage or extraction, but for other children attendance is compulsory only in districts where there exist separate schools for them. It was decided that the children of a European father and a coloured mother, whose father was also a pure-bred Englishman, were of other than European parentage or extraction.(2) Lord de

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(1) Minister of Posts and Telegraphs v. Rasool (1934), A.D. 167 at 191.

(2) Moller v. Keimoes School Committee (1911), A.D. 635.

Villiers, C.J., in commenting on the universal meaning attached to the term "European" throughout South Africa, ruled thus: "A white citizen of the United States who has never been in Europe, would be regarded as a European, while a black man, born and bred in Europe, would be regarded as other than European. It is in the gradations of colour between white and black that difficulties may occur, but when once it is established that one of a man's near ancestors, whether male or female, was black, like a negro or Kafir, or yellow, like a Bushman or Hottentot or Chinaman, he is regarded as being of other than European descent."(1) The policy of the Cape School Act, 1905, to promote the establishment of separate schools for children of different racial elements, was therefore judicially approved. The Consolidated Education Act of 1921 treated European and non-European education in separate chapters. The management and classification of European and non-European schools are also put under distinct systems.

In the legislation with respect to marriage between European and coloured persons, the attitude of the provinces is also divided. Each of the provinces has its own laws which differ so fundamentally that it is not practicable to enact a Union marriage law, with or without penalty provisions, and a Government Bill introduced in 1911 had to be dropped.(2) An

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(1) Moller v. Keimors School Committee (1911), A.D. 643.

(2) Cf. Mathews, "South African Legislation relating to Marriage or Sexual Intercourse between Europeans and Natives or Coloured Persons", S.A.L.J. 38 (1921), 313-320.

Order of the Queen-in-Council which took effect in the Cape Colony in February, 1839, is the principal marriage law of that province. From the terms of the Order it would seem that so far from prohibiting mixed marriages, it contemplated such unions. When Natal was separated from the Cape in 1845 the provisions of the Order were extended to the district. An Ordinance enacted in 1847 also contains no bar to marriages between Europeans and members of other races. In the Transvaal, separate marriage laws exist side by side. Law 3 of 1871 deals with the solemnisation of marriages between white persons, while under Law 3 of 1897 male and female coloured persons may contract a lawful marriage. Marriages of white persons with coloured persons are not allowed. The minister would be guilty of an offence if he solemnised such a marriage. In the Orange Free State, the Law of 1899 contains no prohibition, express or implied, of mixed marriages. But the public sentiment has always been strongly against miscegenation.

Chapter XXXIV.

BRITISH MALAYA

114. The Land Reservations.- There is no law in the Straits Settlements prohibiting the ownership of land by aliens. The Aliens Property Ordinance XIII of 1875, as revised in 1926, provided that any alien may acquire lands or other immovable property situated in the colony, and the lands or other property may be sold or transmitted to any other person as fully and as effectually to all intents and purposes and with the same rights and privileges, as if he was a natural-born subject of the King residing in this Colony.

Aliens enjoy the same capacity in the Malay States. But in recent years, for one reason or another, the alienation of so much land for the development of rubber and other industries has led to a longer view being taken of the land needs of Malaya. The Malay Land Reservations Ordinance was enacted in 1913 by the Federated States. Under its provisions the British Resident of any State may declare any area of land within such State to be a Malay Reservation within which any alienated land or State land may be included. No State land included in a Reservation shall be sold, leased or disposed of to any person not being a Malay, defined as a person belonging to any Malayan race habitually speaking the Malay language and professing the Moslem religion. Nor shall any right or

interest of a Malay in Reservation-land be transferred to or vested in any person not being a Malay. All dealings or disposals contrary to the provisions of the enactment shall be null and void. But persons other than Malays may acquire leaseholds of Reservation-land for a term not exceeding three years. Large tracts of land have been declared as Reservations[1] since 1914, which has affected in no small measure the proprietary rights of the Chinese.

115. The Choice of Law in Intestate Succession to Landed Property.- Probably the complicated position relating to the proprietary rights of Chinese in British Malaya arises not from the question of acquisition, but from that of distribution of the estate of a Chinese resident dying intestate. This is due to the reason, first, that English law administered in the Straits Settlements differs radically from the law of the States which, being in a primitive stage and pursuing a different policy, is either incomplete or contradictory to the system of the Colony. In the second place, Chinese domiciled in the Colony may acquire property, movable or immovable, in the States and vice versa. Should such person, amassing a great fortune in the country, die intestate, what would become of his property in the absence of any stipulation governing

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(1) For declarations and the various areas see Chronological Lists of State and Federal Laws, 1877-1930, compiled by Forner in 1931, 232-260.

his case? Or, in other words, what law or principle shall apply in the distribution of such estate among his successors? According to the general rule within the Empire, an intestate's movable property descends according to the law of his domicile, while his immovable property is distributed according to the lex situs, that is, the law of the place where the immovable property happens to be. But here the case differs according as the immovable property is situated in the Federated States or in the Unfederated States.

In one case, where a Chinese intestate domiciled in Malacca and owning property in Selangor, a State of the Federation, which had enacted no law applicable to the successions of Chinese, the Court held that the "common law" of the Federation should apply.(1) Innes, A.C.J.C., so ruled on the following grounds. The Perak Order of 1893 accorded recognition to Chinese laws and customs. And the judges of the Supreme Court of the Federated Malay States sitting in the other States found themselves, in the absence of any enactment declaring the personal law applicable to the Chinese residents, obliged to pay regard to the existence of certain broad principles and institutions which governed their family life. The adoption of these broad principles was sanctioned by the legislature of Selangor, which in common with the other legislatures

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(1) Yap Tham Thai v. Low Hup Neo (1919), 1 F.M.S. 383.

of the Federation enacted the Secretary for Chinese Affairs Ordinance in 1899. The Perak Order was thus made a part of the common law of Selangor and applicable therefore in matters pertaining to Chinese family life. The Court further remarked that such recognition was of absolute necessity because Chinese domiciled in Perak frequently own property in Selangor and other States of the Federation and vice versa; thus if the law upon such matters were dissimilar in the various States, intolerable chaos would result.

In another case, a Chinese died intestate in Penang leaving immovable property of considerable value in Kedah, one of the Unfederated States. The Court held, in the absence of any law in Kedah dealing with the devolution of the property of a Chinese upon intestacy, that it would be guided by the law of the intestate's domicile, that is, the law of the Colony.(1) The argument in favour of the rule of "common law" in Kedah, that is, the application of Chinese custom to the present case, was not supported, because "one could not infer simply from the existence of a common law in a neighbouring state, that a similar law prevailed in this state." Further, the Court found that there was no personal law attaching to the Chinese such as a Mohammedan carries with him. If there were such law, it ruled, no enactment would be required to legalise the

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(1) In the Estate of Chong Sin Yew (1923), 3 F.M.S. 244.

Chinese family custom of succession. In the absence of any local law or custom, the Court suggested the application of that prescribed for the movables left by the deceased. It was admitted that that mode rested upon the notion that the deceased, by acquiring a civil domicile in the Straits Settlements, deliberately attracted to himself the municipal law of the country in question. The Court then deemed it entirely just to apply those laws to his Kedah immovables.

An Amending Act was passed in Kedah in 1926 (1345) to deal with the question of intestate succession among the Chinese, embodying the principle of the Perak Order. The President of the State Council is empowered to make rules from time to time prescribing the law of distribution which shall apply to deceased persons of the Chinese race domiciled at the time of death in China or in Kedah. The Federated States also passed the Distribution Enactment in 1929, repealing the Perak Order of 1893. It is there expressly provided that the distribution of movable property of a deceased person shall be regulated by the law of his domicile, and that all immovable property situated in the Federated Malay States shall for purposes of distribution generally be treated as if it were movable property. The Enactment, therefore, though adopting the principle of distribution appertaining to Chinese intestate estate in the Colony, throws over the doctrine of lex situs as applying to immovable property, with the consequence that when an intestate is not domiciled in the Federated Malay States the

whole of his property whether movable or immovable will be distributed according to the law of his domicile.

116. The Malay Civil Service and the Straits Settlements Civil Service.- The British Administration in Malaya has in recent years accorded preferential treatment in the matter of appointments in public service to Malay persons. They hold high positions in most, if not in all, respects on a level with the Europeans. The colour bar is partly in operation.(1) The Chinese claimed, relying on the proclamation of Queen Victoria that colour alone should not prevent qualified subjects from holding official posts, that, as loyal British subjects domiciled in the Colony, they should be recognised as worthy of admission to the Civil Service proper.(2) A separate Straits Settlements Civil Service to which they would be admitted, in contradistinction to the Malay Civil Service, was thereupon constituted with the approval of the Secretary of State for the Colonies in 1933.(3) This is a separate organisation and applies only to posts in the Colony of the Straits Settlements. Eurasians and men of any Asiatic race may be admitted to the Service provided they are natural-born British

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(1) Bilainkin, Hail Penang (1932), 233.

(2) "British Malaya", vol. VII (1932), No. 6, 131, 132.

(3) Ibid., No. 12 (1933), 270.

subjects and the sons of parents who are themselves either British-born or naturalised British subjects. If a candidate possesses dual nationality, such as British and Chinese, he will be required on appointment to the Straits Civil Service formally to renounce the non-British nationality.(1) The Malayan Civil Service is to remain exclusively European, the "pure European descent" qualification being thus maintained. Administrative appointments in the Federated Malay States will therefore continue as at present to be staffed by British and Malay officers only.(2)

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(1) "British Malaya", vol. VIII (1933), No. 2, 39.

(2) Proceedings of the Federal Council, F.M.S., 1932, 79.

Chapter XXXV.

FRENCH INDO-CHINA

117. The Asiatic Commercial Regulations.- The fact of being assimilated to the natives in French Indo-China is said not necessarily to be a disadvantage to the alien Asiatics. It was always an advantage, and it was believed that competition would never have been equal between the European merchants and the Chinese tradesmen, who enjoyed many benefits under Annamite law. From early days, the French and assimilated complained of not being adequately protected in the conclusion and execution of contracts with the natives, and especially with the Chinese. Under the shelter of native law, and profiting by the ease with which they could return to their country of origin to evade all responsibility, they were alleged to have committed certain frauds and to have abandoned their traditional honesty, the Europeans being helpless against them. It was as a result of the demand that the identity of Asiatic merchants should be capable of being easily established, and that contracts concluded should be implemented with means of effective enforcement, that special legislation in commercial matters was first introduced in the Colony.

Two regulations are in force in Indo-China. The Decree of 27 February, 1892, applies to Cochin China, French concessions, and Laos. The Order of the Governor-General of 22

April, 1910, is in operation in Annam, Tonkin, and Cambodia.

The Decree[1] of 1892 concerning Chinese commerce is a double measure, extending certain stipulations of the French Commercial Code on the one hand, and imposing special obligations on the other. It applies to "Asiatic aliens and French subjects carrying on a trade or industry in the French territory of Indo-China", Books I and III of the metropolitan Code and other supplementary laws (Article 1). They are amenable to the jurisdiction of the French Court which will decide according to French law and procedure (Article 2). It is to be noted that the regulation is not enforceable as regards Asiatic French citizens, and that Asiatic aliens and French subjects who were formerly subject to the native law, now submit to French legislation in commercial matters.

To this source of guarantee for European merchants, the Decree has added a second. In order to provide full identification of the Asiatic merchants, and to follow in their different commercial operations, the Decree has imposed upon them the obligation of making certain declarations. Eight days at least before commencing business, a declaration both in French and in Chinese must be made, showing the name or names of the declarant and his partners, their matriculation number, the congregation to which they belong, the place of

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(1) Recueil de Législation Coloniale, IV, 238.

business, the name and style of the firm, the signature and impression of seal of the declarant (Article 3). If they wish to cease trading either by the transfer or liquidation or on account of retirement from the business, a declaration is again necessary, this time three months before such cessation (Article 7). In default of such declaration or any of the formalities, the Decree provides penalties of fine and imprisonment (Articles 11-14).

The books of account should take the form current in the merchant's country and be kept in his language (Article 6). Nevertheless, the Decree[1] of 29 September, 1927, has made it obligatory for foreign merchants to employ "any language using Latin characters" in keeping their accounts. The figures used must be Arabic numbers. This is evidently a precautionary measure against the Chinese.[2]

At the instance of the Chamber of Commerce at Hanoi, the Order of 1910 was issued aiming undoubtedly at the Chinese merchants established in the protectorate, and reproducing closely the second part of the Decree of 1892.

118. The Legal Personality of Asiatic Companies.- Closely related to the commercial régime of the Chinese in Indo-China, the question of the quality and nationality of

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(1) Recueil de Législation Coloniale, IV, 254.

(2) Girault, op. cit., II, 351.

companies formed by Asiatic persons deserves careful consideration. This is not of purely academic interest in view of the legal institution of the country that distinguishes native and French jurisdictions.(1) A company is subject to the one régime or the other according to the category in which it is deemed to fall. No rule being formulated for this differentiation, colonial jurisprudence has also been divided within itself. In certain cases emphasis is placed upon the quality of the persons who compose the company, while in others the siège social is treated as the criterion. The law under which the company has been constituted is also taken into consideration. The doctrines have each their merits and demerits.

Although in principle a legal person should acquire a quality independent of and distinct from that of its constituent members, French legislation shows an inclination to identify them, at least in cases where persons of native status are concerned. But a rash suggestion(2) that the quality or nationality of a company depends upon that of its components and that it remains native in quality and subject to native jurisdiction if it was formed exclusively by natives, is not acceptable.(3) Apart from the fact that it had never been consecrated

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(1) See infra, § 130.

(2) Duretestе, "Le régime des sociétés commerciales en Indo-Chine française", J.I., 1928, 262.

(3) Cf. Solus, op. cit., 182.

by colonial legislation, the criterion will meet with many obstacles including the necessity of knowing all the members who compose the company and of verifying their personal status. There is also a deadlock if the company comprises both native and French persons.

A second tentative solution is that the quality may be ascertained by the siège social or the principal place of business of the company. This indeed has been the general practice of French jurisprudence, especially in determining cases of an international nature.(1) The Court of Indo-China had admitted the French quality of a company formed exclusively by Chinese on the ground that it had its seat and principal business centre on French territory.(2) The Court of Cassation has also recognised the British quality of a company constituted by natives in a British Colony in conformity with British laws. The decision was based mainly on the fact that the seat of the company was situated there.(3) In a recent case, the siège social was again adopted as the criterion.(4) This theory has

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(1) See, for instance, Cass. req., 24 December, 1928; also note by Niboyet in Sirey, 1929, I, 121.

(2) Cour d'Appel de l'Indochine, 27 August, 1913.

(3) Cass. req., 10 February, 1925.

(4) In this case a company comprising all Annamite subjects and having its seat in Annam is considered not to be French although it had been constituted in the French form: Cass. req., 22 January, 1929, Sirey, 1930, I, 9.

its disadvantages[1] in that, though applicable in determining the national character of foreign companies, it is not of much value in ascertaining their legal quality in private law.[2] Under it, all companies founded in Indo-China, except in the protected States, though composed exclusively of natives, will be French, submitting to French authority and possessing the rights and obligations of a French national. In fact, in annexed territory there could exist only the French company, a native corporation being unknown to the law. It is also contradictory of the avowed policy of France of maintaining the personal status, either individual or collective, of the natives. On the contrary, all companies established in the protectorate will possess native status. The quality would also be that of a French subject or a French protégé according to the location of the company which is inconceivable.

A third solution, supported by Professor Solus,[3] suggests that the quality of a company may be deduced from the law under which it has been constituted. It is native if it is formed according to native law, and French if it is formed under French law, and a native having the capacity to opt, the activities of the company will then be governed by that law. Instances were given in which the Courts recognised the native quality of

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(1) Niboyet, Précis de Droit international privé (1928), 112.

(2) Cf. Solus, op. cit., 182.

(3) Solus, op. cit., 183. See also his note in Sirey, 1930, I, 9.

companies formed by the natives or assimilated although their sièges sociaux were established either in Cochin-China or in the concessions. But he did not deny qualifications to the hypothesis. In the first place, companies formed by natives or Chinese could not be French to the extent of applying the stipulations of the French Commercial Code and the Law of 1867. For under the Decree of 27 February, 1892, they are required to observe the French legislation, which being of a purely regulative nature, is likened to police regulations adherence to which is without any effect upon the quality of the company. Further, since the Asiatics are compelled to adopt its provisions, this is by no means equivalent to a voluntary option of French law as a whole. The Court had occasion to decide upon this matter. A company formed by Chinese desiring to attract French jurisdiction, claimed that the company was French because it had been formed according to the French Company Law of 24 July, 1867, and that all the formalities prescribed by that Law had been observed. However, the Court refused to hold that submission to the Law of 1867 was ipso jure the adoption of French law.(1) Such company should therefore remain native in quality and amenable to the native jurisdiction.

Another fact which the theory has to admit is that while superficially the quality may be determined according to the

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(1) Cass. req., 28 April, 1904.

law under which a company is constituted, in reality it is the nationality or quality of the constituent members that counts. The Decree of 1892 is enforceable only among Asiatic aliens, French subjects and French protégés. A company is not native because it is formed under that Decree, but because it is a person of such status that it comes within the scope of the Decree. The Company Law adopted in the Colony is the very law of the home land. The natives cannot again opt for French law in this respect, for in following the Decree of 1892 they have indeed come under the authority of that legislation. But should they individually acquire French citizenship, the company they form would be French, although they perform the same formalities as their fellow natives. In the last analysis, it is not the law which they follow, but the category of status to which the shareholders belong, that is the determining factor.

Viewing this question from another angle, as the domicile theory may be employed to ascertain the quality or nationality of foreign companies, but fails to define that of an indigenous corporation in its relations to internal private law, so, on the other hand, the "law category" theory gives the opposite result. It concerns, in the light of colonial legislation, only the personal status of an association, and leaves unsolved the question of nationality or quality of foreign firms. The transplantation of Asiatic companies upon Indo-Chinese soil is not an infrequent phenomenon. They are evidently constituted under neither system of French law, and the juridical status

attributable to them must therefore rest upon other grounds. The quality of a foreign company is not determinable by French legislation, which deals primarily with trading houses constituted in the Union. If, by analogy, a corporate body is considered to be a national of the power to the laws of which it owes its existence, and has attributed to it the assimilated status of such a national, there will be a dangerous confusion of the quality of the company and its nationality, which in the legal tradition of the Union are not necessarily identical.(1) The quality is either French or native, and it is governed by French or by native law accordingly: while nationality is a distinction between French and alien. The question of the legal quality of native physical persons cannot be settled by the application of the principles pure and simple governing nationality, and this is equally the case in the matter of companies. It is quite possible that a company may have a legal quality distinct from its nationality, and the solution of the impasse seems to lie in positive legislation.

The nationality of the members of a company has been used by recent legislation to determine the nationality of the company. Under the Decree of 30 June, 1929, a company is deemed

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(1) Cf. supra. Professor Solus has been at great pains to dissipate the confusion of the two terms: see his note "Des Sociétés constituées entre indigènes dans les Colonies françaises", Sirey, 1930, I, 9.

French if all its administrative officers and more than half of its members are of French nationality[1] (Article 24). In consequence, corporations constituted by French subjects of the Colony who owe natural allegiance to France will have a French nationality and perhaps a native quality.

119. Land Ownership and the Concession system.- No restriction is imposed upon the capacity of aliens to acquire immovable property in Cochin-China. A similar right is granted in Cambodia by an early convention. It was specially extended to Asiatic aliens and Annamites resident in Cambodia by a royal Ordinance of 13 May, 1909. Similarly, nothing restrains the French or aliens from acquiring land in Laos.[2]

In Annam and Tonkin the situation is different. The traditional principle has been that aliens are incapable of acquiring immovables on Annamite territory. A sole exception is made in favour of the Chinese, whose traditional privileges were specially preserved by the Treaty of 1885 for Annam and Tonkin, and by the Convention of 1886 for Annam.[3] The right was denied to non-resident Chinese for some time. A local Court of Saigon ruled in 1889 that, China not having granted reciprocal

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(1) Girault, op. cit., III (1930), 93.

(2) Ibid., 167; Solus, op. cit., 406.

(3) Article 1 of the Treaty of 1885, State Papers, 76, 239; Article 4 of Convention of 1886, State Papers, 85, 735.

regularly constituted under French law and whose capital is subscribed by a majority of French citizens, subjects, and protégés (Article 9).[1] The effect of the Decree is to drive the Chinese from the plantations, of which the crop was one of the main sources of their wealth; this constitutes the most formidable blow struck at their economic supremacy.[2] Whether the measure is compatible with the treaty obligations of France is extremely doubtful. The inclusion of all aliens in the prohibition is no justification for a measure levelled against a race who had been assured of a security of tenure equal to that of the native Annamite.

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(1) The Decree has been rendered applicable by administrative orders to Laos (5 June, 1929: see Annuaire, 1929, II, 194), Cochin-China (13 June, 1929), Tonkin (21 June, 1929) and Cambodia (13 July, 1929). The régime in Annam is governed by the order of 27 April, 1929, envisaging a similar proscription (see J.O.I. 1929, 2213).

(4) Dennery, op. cit., 155.

PART VI.

THE JURISDICTIONAL RÉGIME IN THE ASIATIC COUNTRIES

Chapter XXXVI.

CONSULAR JURISDICTION AND THE CHINESE RESIDENTS IN SIAM

120. The Precarious Position of the Chinese.- The existence of Western consular jurisdiction in Siam affects the status of Chinese in two respects. Chinese, as nationals of a non-treaty power, are subject to local laws and jurisdiction of the country, while nationals of many of the European Powers are granted extraterritoriality. In commercial dealings and legal relations with such nationals, the Chinese are not only subject to Siamese legislation and authority, but are amenable to the respective consular courts as plaintiffs, and as defendants to special Siamese courts, with their adversary's consul sitting on the bench concurrently with the native judge. The situation has become even more complicated by the conclusion of later treaties between Siam and Western States, which have created different categories of their nationals, varying from place to place, and under different jurisdictions. When involved in litigation with some foreign persons, the Chinese applicant will encounter the greatest difficulty to know before which judicial tribunal he shall bring his case. He must investigate, first of all, the nationality of his party, and whether he is of European or Asiatic descent, and when he began to reside in Siam and registered with his consulate. In

addition, he has to ascertain the quality of the national status of his opponent, whether he enjoys full citizenship or is a subject or a protégé of one or other Power - facts which have material consequences and which do not concern an ordinary person who may happen to engage in a lawsuit.

As nationals of treaty Powers that count Celestial elements among their colonial population, the Chinese are equally affected. They enjoy extraterritoriality themselves by virtue of birth, naturalisation, or otherwise, in the European colony or protected State. Mutatis mutandis, their position is just as complicated as that of Chinese nationals. Who are to be considered as European nationals or entitled to the "protection" of a treaty Power? What are the relations between them and European persons on the one hand, and the native Siamese subjects on the other? Obviously, they differ from ordinary Chinese. They also differ among themselves according as they are nationals or protected persons of one treaty Power or another, because the régime of extraterritoriality granted by Siam varies with the Powers concerned. They may differ further among themselves as nationals of a given Power because of the repeated treaties it made dividing its nationals into several categories having different legal positions. To grasp the full situation and the development of extraterritoriality in Siam, separate and close study will be necessary.(1) A few cursory remarks only have been made here.

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(1) Cf. infra, Chs. XXXVII and XXXVIII.

121. Political Protection and Judicial Immunities.- At the outset it seems opportune to point out the distinction between diplomatic protection by way of good offices over nationals of a foreign Power and judicial exemption of persons from the jurisdiction of the territorial State. The delegated protection exercised by diplomatic or consular agents of one Power over nationals of a third Power either because that other Power has not made a treaty with the resident State or because it keeps up therein no legation or consulate of its own, confers no treaty rights of the protecting State upon the foreign national, whose status therefore is not changed. Jurisdictional immunity, on the other hand, is limited to nationals or natives of a protectorate only, of the Power exercising the jurisdiction, and differs fundamentally from "good offices" diplomacy.

The United States Consul for Siam appeared to have exercised the former kind of protection over Chinese, which however does not imply that Chinese would ever enjoy any of the extraterritorial advantages of that Power. This is apparent in view of a passage in the Certificate of Protection issued by the American authorities which shows that the "Consul has granted the protection of his consulate to the person who is a subject of the Chinese Empire and who having made known to the Consul that he has no consul resident of his own nation to assist him in case of need."(1) The protection is of a

(1) Thornely, op. cit., 100.

delegated nature, and is not based on fraudulent representation on the part of the Chinese, as is sometimes alleged. It is therefore legally admissible if the consent of the interested Powers has been obtained, and the consul has not attempted to entertain jurisdiction over their nationals.(1) Whether owing to mere misapprehension on the part of the Siamese Government of the extended protection, or as a precautionary measure against abuse, the State Department at Washington instructed the American Consulate in 1899 to transmit to it a list of all persons registered there with a statement of the grounds of registration, and thereafter to send in such a list regularly twice a year. The Consulate was not to register any Chinese person claiming to be a citizen of the United States by naturalisation, nor to register any Chinese claiming to be a citizen of the United States by birth until the evidence of such birth should have been submitted to the Department.(2) Good offices extended to persons of foreign nationality might have been countenanced.

122. Ratione personae of the Consular Régime.-

(i) The Problem

Controversies often arose as to the extension of jurisdictional protection over persons who were not contemplated in

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(1) Borchard, op. cit., 467.

(2) Nathabanja, Extra-Territoriality in Siam (1924), 124.

the original treaty of capitulations. Towards the end of the nineteenth century Great Britain and France were fast acquiring colonies and protectorates in the Far East, and they insisted on extending extraterritoriality to all natives who came from such territory. For in point of law, these colonials were either European subjects or protected persons. As a result, hosts of Annamites and Laotians from French Indo-China,(1) together with Burmese, Malays, and East Indians, as well as Chinese born in Macao, Hong Kong and other Western possessions, were exempt from Siamese jurisdiction. The inhabitants of these territories, especially of those parts carved out of Siam, were closely assimilated to the Siamese, who naturally resented their being treated differently from themselves. The inclusion of Chinese in the protected list was also accepted as a real danger because "it amounted to no less than entirely obstructing the action of the local police authority as well as the legislation of the state over one of the richest and most industrious portions of the population," and consequently the effective administration and progress of the country was also impossible.(2) Some were of the opinion that extraterritoriality had the object of securing to the nationals of

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(1) The Cambodians probably were excluded from the privilege. By Article V of the Treaty between France and Siam of 15 July, 1867, in which Siam recognised the newly acquired French protectorate over Cambodia, it was provided that "if Cambodian subjects commit any crime or offence on Siamese territory, they shall be tried and punished with justice by the Siamese Government according to the laws of Siam": State Papers, 47, 1340.

(2) Nathabanja, op. cit., 249.

certain States a protection which they could not find in a country less civilised than their own. This principle does not apply to the subjects of States who find in Siam at least the same legal protection as in their own country. It was not therefore thought proper to accord extraterritoriality to the subjects of those States which themselves were under a consular régime.(1)

It was also alleged that foreign legations in Siam appeared to have delivered certificates of protection to foreign persons of other nationalities, to whom they thus accorded advantages of jurisdiction reserved by treaty to their own nationals.(2) Under the generic name of protégés or protected persons, two categories of different individuals were distinguished: those who by birth had the right to protection, or the right to the quality of subjects of a treaty Power, and those who, having no legal title, derived their privileged position by an act of grace which was always revocable. Aliens thus registered at a consulate could claim exemption from arrest, trial, or possible conviction by the Siamese courts. The foreign Powers that chose to enlist such persons might think it a means of increasing their influence by swelling the protected list, their protection being the raison d'être of their intervention. Registration was always made the basis

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(1) Douge, "Condition des étrangers et Organisation judiciale au Siam", J.I., 1900, 461.

(2) Padoux, op. cit., 695.

for a claim of extraterritoriality even though it had been improper. The correction of the register was a matter for the particular consulate concerned, and the Siamese court might not reject a registration certificate.(1)

That there were instances of abuse in consular jurisdiction it would be ungrateful to deny. But it must not be supposed, at least so far as the protected persons were concerned, that extraterritorial jurisdiction, which applied Western law and procedure, might unjustly and unconditionally benefit the Asiatics. They escaped local authority only to find themselves faced with the more enlightened and efficient European legal system. To suggest the outlawry of the persons who claim extraterritoriality would imply that the régime was a necessary evil and detrimental to the sublime aims of justice, for the attainment of which the institution has been and still is advocated.

(ii) French ressortissants

France particularly was accused of extending her extraterritoriality for political instead of judicial purposes by encouraging, instructing, and receiving the demands of all those asking for the favour. This was regarded as a clear indication of her intention to bring the country under her control.(2)

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(1) James, "Jurisdiction over Foreigners in Siam", A.J., XVI (1922), 595.

(2) Morse and Macnair, op. cit., 364.

In the three years from 1893 to 1896, the number of French ressortissants jumped from two hundred to thirty thousand. Annamites, Cambodians, Laotians and Chinese were registered at the different consulates.(1) By 1901 the number of protégés alone reached 11,400 in the city of Bangkok,(2) but was reduced to 4,700 after 1904. By that year France consented to withdraw her protection from natives of a territory who had settled in Siam before such territory came under French rule, and from the grandchildren born in Siam of the natives of the territory.(3)

The Siamese Government was obliged to accept the list of French protégés as they existed at the date of the agreement, except those persons whose registration should be found by one or other Power to have been improperly obtained.(4) France also reserved the rights which Siam might accord to other Powers concerning admission and protection of those Asiatics not born or naturalised in a French colony or protectorate.(5)

Similar arrangements to limit the registration of protégés were made with Great Britain in 1899.(6) Siam also obtained

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(1) Niel, "Conditions des Asiatiques sujets et protégés françaises au Siam", 6-8, cited in Dictionnaire Diplomatique, II, 726.

(2) Regelsperger, op. cit., 41.

(3) See supra, § 77.

(4) Article X, Convention of 1904.

(5) Article XIII, ibid.

(6) See supra, § 77.

from the Netherlands a list of Dutch-Chinese protégés of the East Indies, restricting her protection to Dutch subjects.(1) No agreement has been made with Portugal, one of the four European Powers having numerous Asiatic subjects in Siam, who therefore continues to exercise her unmitigated authority.

(iii) British Subjects

The inclusion of Chinese as British subjects in the protected list was not unanticipated. The Treaty of 1855 (Article III) excluded only those Chinese not able to prove their status as British subjects, from the protection of the British Consul. The question whether natives of countries under British protection and persons naturalised in a British Colony were to enjoy extraterritoriality had been much disputed. The former were evidently not British subjects, to whom only the treaties usually referred. Colonial naturalisation had no extraterritorial effects and persons so naturalised enjoyed the privileges of British subjects only in the one colony. It therefore could not be contended that they came within the definition of "British subjects" over whom consular jurisdiction, as originally intended, was exercisable in places which were not colonies.(2) Equally, there could be no doubt that they enjoyed the political protection of Great Britain when

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(1) Agreement of 1 May, 1901; Nathabanja, op. cit., 129.

(2) Piggott, Extraterritoriality (1907), 69.

they were in foreign lands. An early Order-in-Council[1] regulating the exercise of consular jurisdiction in Siam had thus included any person enjoying British protection in Siam and the subjects of Indian States under the protection of the British Crown within the definition of "British subjects". That this exceeded the scope of the treaty provision was obvious. The benefit of diplomatic protection was by no means identical with that of extraterritoriality. It was not until the Convention of 1899 was concluded that the legal position of the subjects of the Indian States was formally recognised.[2] The same agreement excluded from "protection" colonially naturalised Asiatic persons, naturalisation within the United Kingdom only being envisaged, but for a European or other white person naturalisation in any part of the Empire sufficed.

There was no reason why a British subject by colonial naturalisation should be treated less favourably than a native of a protected State who was not a subject of the British Crown. It must not be supposed that when a person is treated as a subject for all purposes in any part of the British Dominions, it is possible for the State "entirely to wash its hands of him and his affairs the moment that he oversteps the boundary of the Empire."[3] It had also been suggested that

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(1) Order in Council of Siam, 1889, State Papers, 81, 431.

(2) Article I(3), Convention of 1899.

(3) Hall, The Foreign Powers and Jurisdiction of the British Crown (1894), 29.

since the subjects of Indian States had been treated in the same manner as British protected persons under the Foreign Jurisdiction Acts, the natives of other British protectorates might no doubt justly claim to be treated as British protected persons for the purpose of foreign jurisdiction.(1)

The definition laid down by the Convention of 1899 was soon overridden by another Order in Council, under which "British subject" would include any British protected person, that is to say, any person who (a) is a native of any protectorate of the Crown for the time being in Siam, or (b) by virtue of s. 15 of the Foreign Jurisdiction Act, 1890, or otherwise enjoys British protection.(2) This too was agreed upon by Siam in the Treaty of 1925, which preserves in force the agreement of 1899, and extends those provisions relating to an Asiatic person to other persons to whom the said agreement did not apply and who enjoy British protection by virtue of being citizens of or born in a British protectorate or territory under British mandate.(3) By strict interpretation, a colonially naturalised British subject remains unrecognised, although by

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(1) Jenkyns, British Rule and Jurisdiction beyond the Seas (1902), 155.

(2) Order in Council of Siam, 1903, State Papers, 96, 111. S. 15 of the Jurisdiction Act provided that the expression "persons enjoying British protection" shall include all subjects of the several princes and States in India.

(3) Article VI, Treaty of 14 July, 1925.

later Orders[1] "British subject" shall include a British protected person. But persons naturalised in a British protectorate are entitled to the rights of extraterritoriality for being its citizens.

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(1) Order, 1914, State Papers, 108, 127, as supplemented by the Order of 1926, ibid., 123, 158.

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The Chinese, as non-treaty foreigners, come under the full local jurisdiction and thus have the same status as Siamese. As British subjects, they will enjoy extraterritoriality.

125. The First Phase of British Jurisdiction: The Treaty of 1885.- British jurisdiction in Siam found its genesis in the Treaty of 1855.(1) It was provided that any disputes arising between British and Siamese subjects shall be heard and determined by the British Consul in conjunction with the proper Siamese officers; and criminal offences will be punished in the case of English offenders by the Consul according to English laws, and Siamese offenders by their own laws through the Siamese authorities. But the Consul shall not interfere in any matter referring solely to Siamese, neither will the Siamese authorities interfere in questions which concern only the subjects of the British Crown. A difficulty arose as to the practice of concurrent hearing and decision between the Consul and the representative of the Siamese Government in civil matters. The Treaty presumed the complete accord of the two authorities in all cases submitted for their examination. If they disagreed, no arbitration being provided, the case would remain without solution. An additional Convention,(2)

(1) State Papers, 46, 138.

(2) Ibid., 146.

interpreting the text of the 1855 Treaty, was signed in the following year and modified it by extending to mixed civil cases the rule actor sequitur forum rei already introduced in the first Treaty for criminal matters. It stated with precision (Article II) that all civil as well as criminal cases in which both parties are British subjects or in which the defendant is a British subject, shall be tried and determined by the Consul alone. Similarly, the Siamese authorities shall be competent to have cognisance of all cases where a Siamese subject is defendant. When the parties are of different nationality the authority to which the plaintiff belongs had the right to be present at trials under the jurisdiction of the nationality of the defendant. The presence of the British Consul at the sitting of the Siamese tribunal, or of a representative of the Siamese authorities at that of the Consular Court, was the only reciprocal guarantee that the negotiators of 1856 had thought necessary to stipulate. However, this had fallen into disuse for a long time.(1)

With the opening up of the Northern part and the increased intercourse between Burma and Siam, large numbers of British subjects were found in the interior of the Kingdom. On the one hand, they were entitled to all privileges of extraterritoriality, while on the other, they were debarred from residing

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(1) Padoux, op.cit., 702.

there at all. To meet the situation the British Government consented in 1883 to restore to the Siamese, under certain guarantees and for certain territories only, the right of jurisdiction conceded to it by the Treaty of 1855. In consequence, in the three Northern provinces, all cases, civil or criminal, between British subjects, or in which British subjects might be parties, were to be submitted to Siamese judges, reserving, however, the Consul's right to be present at the trial, to make any observations which would appear to him necessary in the interest of justice, and at any time before judgment, to evoke any case in which a British subject was defendant, to the consular court by a written requisition.(1) The "International Court" administered Siamese law. But appeal from a judgment thus rendered was to be decided at Bangkok by the Siamese authorities in consultation with the British Consul-General. In case of disagreement between the two authorities, the opinion of the judge of the defendant or accused would prevail (Article IX).

The Agreement of 1883 is a work of mutual concessions. Great Britain renounced her right of consular jurisdiction in matters arising between British subjects, and in mixed cases where British subjects are the defendants. Siam consented on her part to submit to consular control and, on appeal, before

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(1) Article VIII, Treaty of 3 September, 1883, State Papers, 47, 78.

a mixed jurisdiction, all cases, even in which a Siamese defended against a British subject, and which previously were within the competency of the ordinary Siamese courts.

The arrangement contemplated an experimental period of seven years, but instead of being discontinued at the expiration, it was extended[1] to eight more provinces by 1896, to all British subjects registered before 1909 (with some reservations) by a Convention of that year, and finally to the whole British community in Siam.

124. The Second Phase of British Jurisdiction: The Convention of 1909.- The Convention of 10 March, 1909,[2] was in many respects the most important since the Treaty of 1855. It divided British subjects in Siam into two classes, those registered at the British Consulate before the date of the Convention, and those registered afterwards. The jurisdiction of the International Courts established in 1883 was extended to all pre-registered persons, but the system was to come to and end on, and conditionally on, the promulgation and coming into force of the Siamese Codes, i.e., the Civil and Commercial Codes, the Penal Code, the Code of Civil Procedure, the

(1) State Papers, 88, 33.

(2) Ibid., 102, 126. For reasons for the extension of the system in 1883 see Explanatory Memorandum, Par. Pap. Cmd. 4646, 1909.

Code of Penal Procedure, and the Law of Judicial Organisation. The jurisdiction of these courts should then be transferred to the ordinary Siamese courts, to which all the post-registered were at once to be subject.

The retrocession of jurisdiction was regulated by an annexed protocol defining the conditions under which it was to be exercised. The International Courts were to have cognisance of all civil and commercial matters to which British subjects were parties, and of penal matters - breaches of law of every kind whether committed by British subjects or to their injury. The right of evocation in International Courts was to be exercised in accordance with the provisions of the Treaty of 1883, which was to cease as to all matters coming within the scope of Codes or Laws regularly promulgated.

The most noteworthy feature in the jurisdiction protocol is perhaps the use of the European legal adviser and the differentiation between British subjects. It was stipulated that in all cases whether in the International Courts or in the ordinary Siamese tribunals, in which a British subject was defendant or accused, a European legal adviser would sit in the court of first instance. In cases in which a British born or naturalised subject not of Asiatic descent might be a party, the Adviser would sit as a judge of the court, and if such subject was defendant or accused, the opinion of the Adviser should prevail.

The position may be conveniently summed up thus: For a pre-registered British subject, the jurisdiction goes to the International Court, where the British Consul may sit. If he is defendant or accused, an Adviser must also sit, and the Consul may evoke the case to his own tribunal. However, if the pre-registered subject be plaintiff or prosecutor and British-born, or naturalised not being of Asiatic origin, the Adviser sits as one of the judges. And if such person be defendant or accused, the Adviser's opinion shall prevail. For a post-registered British subject, all cases go to the ordinary Siamese courts if he be plaintiff or injured party, without the presence either of the Consul or of the Adviser. If he be defendant or accused, an Adviser will sit. This is then known as an "Empowered Court". Similarly, if the plaintiff be a British born or naturalised subject not of Asiatic descent, an Adviser will also sit as one of the judges and his opinion shall prevail before a "British born or naturalised" defendant or accused person".

The Treaty provides for the termination of the International Courts and the right of evocation by the British Consul. But it is silent as to the privileges of the European Legal Adviser, who was attached to the International as well as to the ordinary Siamese courts. If this privilege is not to be extinguished with the International Court system, then the provision for the termination of International Courts will have no legal effect at all. It would be a mere change in the

name of the courts.[1] In a Note[2] exchanged between the contracting parties on the same date as the signature of the Treaty, the British Government merely state that they "will be prepared in due course to consider the question of modification of or release from this guarantee when it shall no longer be needed." But the conditions which must be fulfilled by the Siamese Government before the questions may be considered are not set out. It will therefore remain a subject for further diplomatic negotiation.

The "British-born" clause also deserves some explanation. British subjects enjoying this status had great advantages over those who were descended from Asiatic lineage. The protocol failed to define what the word "desent" was to mean. In a general sense, a Eurasian would necessarily be of Asiatic descent, and therefore had an inferior status. Similarly, the Asiatic wife of a European subject would be amenable to different courts and enjoy different protection ~~protection~~ from her husband. On the other hand, a non-Asiatic British woman marrying an Asiatic British subject would retain her British-born status. Because the differentiation is based not on national but on racial grounds. They are both British subjects, but of different descent, which is the criterion of the

(1) Padoux, "Du régime juriadictional des Français et des Anglais au Siam", J.I., 1910, 81; Nathabanja, op. cit., 283.

(2) See Annex 4, State Papers, 102, 132.

classification. But if the word "descent" is given a legal sense on account of its being used in a section of a jurisdiction protocol creating a special legal status for a particular class of person, the principle employed to determine the nationality of wife and children should also be applied to determine their status. The wife should acquire the husband's status as a pre- or post-registered "British-born" subject in Siam, whether she was before marriage pre- or post-registered, or was not a British subject at all. Their children should also take the father's status and be treated as not of Asiatic descent. For in English law descent in general is reckoned through the father.(1) According to this thesis, the Asiatic wife of a "British-born" subject and their children would take the status of the husband and father. And since the status was inherent and depended upon birth, the wife of such children and their issue would equally attract "British-born" status although they might have an overwhelming proportion of Asiatic blood in their veins.

125. The Last Phase of British Jurisdiction; The Treaty of 1925.- The system of extraterritoriality is hardly consistent with either the broadest or the most restricted definition of that equality which is the basis of international order,

(1) Thomely, op. cit., 231.

and in view of the change of circumstances in modern States, the age-worn institution could scarcely justify its existence. It is but a passing phase of international development, and it seems that suppression of the system can not longer be resisted. The United States[1] led the way in 1920 by relinquishing her consular jurisdiction in Siam, although the Central Powers had already consented to its abrogation in the Peace Treaties.[2] In 1925 Great Britain followed suit. By a protocol[3] annexed to the Treaty of that year concerning the jurisdiction applicable in Siam to British subjects and protected persons, it is provided that the old system shall absolutely cease and therefore all British subjects in Siam shall be subject to the jurisdiction of the Siamese courts. Siam however has not regained her judicial autonomy completely. By Article 2 of the protocol, British diplomatic and consular officials in Siam shall enjoy within five years after the promulgation[4] of Siamese Codes, the right to evoke any case

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(1) Germany, Article 135, Treaty of Versailles, 28 June, 1919; Austria, Article 110, Treaty of St. Germain, 10 September, 1919; Hungary, Article 94, Treaty of Trianon, 4 June, 1920.

(2) Treaty of 16 December, 1920, State Papers, 113, 1168.

(3) Treaty Series, 55, 57. By Article V, the Treaty of 1855 and the supplementary agreement of 1856, the Treaty of 1883 together with the Exchange of Notes in 1898, and the Treaty of 1909, were abrogated.

(4) The Penal Code was promulgated in 1908.

pending in any Siamese court in which a British subject or protected person is defendant or accused. The extension of this right is contrary to the provision of the Treaty of 1909 which already regulated the cessation of the right of evocation in all matters coming within the scope of codes or laws regularly promulgated. And since all British persons have now come under the local jurisdiction, the exercise of this right (which was confined to the International Court) in an ordinary Siamese tribunal also constitutes an anomalous feature.

The case as evoked shall be disposed of in the consular court according to English law, except that, as to all matters coming with the scope of laws properly promulgated, the rights and liabilities of the parties shall be determined by Siamese law. Further, a British subject who is defendant or accused in any case arising in the provinces, may apply for a change of venue, and the trial will then take place at Bangkok. It is also to be noted that the protected list has been enlarged by the present Treaty to include all persons being citizens or born in British protectorates or territories under British mandate, and the children of such persons. But the right of application for change of venue shall cease upon the termination of the right of evocation. And subject to these restrictions, Siam resumes unlimited jurisdiction over the whole British community, which was formerly not amenable to her laws and authority. The status of Chinese, either as non-treaty foreigners or as British subjects, created by British treaties

will soon be neutralised upon the termination of the extra-territorial jurisdiction.

Chapter XXXVIII.

THE STATUS OF CHINESE AS AFFECTED BY FRENCH JURISDICTION IN SIAM

126. The First Phase of French Jurisdiction: The Treaty of 1856.- The Treaty of 1856[1] between France and Siam contained rules analogous to but more detailed than those of the British Treaty. In Article VIII it was provided that when a French national had to complain against a Siamese, he should first lodge his plaint with the French Consul who, after having examined the case, would seek to bring about an amicable arrangement. Similarly, when a Siamese complained against a French person, the Consul should also try to find an amicable settlement. But, in the one case or the other, if such an arrangement was impossible, the Consul should request the assistance of the competent Siamese authorities, and they, after having examined the matter concurrently, might decide according to equity. The Consul should not interfere in any disputes between Siamese subjects or between Siamese and foreigners. The French, in any dispute among themselves, should depend upon French jurisdiction, and the Siamese authorities should in no way interfere with them, nor with matters arising between French and "treaty" foreigners.

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(1) State Papers, 47, 993.

In criminal matters, the offender would be punished by the respective authority according to the laws of its country. The jurisdiction of mixed civil cases caused some difficulty. No mention was made as to the competent courts to which the parties either as plaintiff or defendant might resort. France did not adopt the rule actor sequitur forum rei. By a strict application of the Treaty, she declared herself competent[1] to have cognisance of all civil claims brought by Siamese against a French national. When the Siamese was defendant, French representatives would also hear and determine in consultation with the Siamese authority, or the case would come before the mixed court. The Siamese Government generally waived the right to be present when her nationals sued a French national. As a result, the French consular tribunal assumed sole jurisdiction over any of its ressortissants who was in the position of a defendant, Siam being bound by treaty not to interfere in disputes among the French or between French and other foreigners. Discord and delay in the mixed jurisdiction resulted in injustice and was detrimental to the interests of both parties.

The situation was then regularised in the Convention of 1904[2] by which the two Governments agreed to replace the existing system by new provisions adopting partly the institution

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(1) Padoux, "Condition juridique des étrangers", loc. cit., 703.

(2) State Papers, 97, 961.

of International Courts. It was now defined with precision (Article XII) that in criminal matters French persons were amenable only to the French judiciary. In civil cases when a Siamese was plaintiff, the case should also be brought before the consular court. In every case, whether civil or criminal, where a Siamese was defendant or accused, the Siamese Court of Foreign Causes established at Bangkok would have jurisdiction.

As an exception, in the four northern provinces, all cases, civil or criminal, involving French ressortissants should be brought before the Siamese International Courts. The French Consul had the right to be present at the trials in the International Court, to make any observations he thought proper, and to evoke the case in which a French national was defendant by a written requisition to his own tribunal.

The specific mention of the position of a Siamese plaintiff in civil cases was to eliminate definitely the mixed tribunal created by the former Treaty.(1) There was also some doubt as to whether or not the French Consul had a right to sit in the Foreign Causes Court. This was eventually decided in the negative by implication from the provisions of the Danish and Italian Conventions concluded in the following year, which stipulated that their Consul had no right to sit in the Court of Foreign Causes.(2)

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(1) Thornely, op. cit., 146.

(2) Ibid., 147.

The régime of the French Treaty was identical in certain aspects with that implemented by Great Britain. Either in the centre or the south of Siam, competence was determined by the rule actor sequitur forum rei, and in the north, they both recognised the jurisdiction of the International Court. There was a regional difference. The Court had jurisdiction over British subjects in eleven provinces, while that for French nationals only in four. The French Treaty also had created the Foreign Causes Court, which was to adjudicate on complaints and actions arising from the remaining part of Siam not under the cognisance of the International Court, brought by French nationals against a Siamese or any person under Siamese jurisdiction. No Court of Foreign Causes had been created by the British Treaty, and when a British subject was plaintiff against a Siamese, the action had to be filed in the ordinary Siamese courts. This did not mean, however, that British subjects were reduced to a less favourable position. The reverse was the fact. The French Treaty provided for only one Court of Foreign Causes, which was in Bangkok and which had jurisdiction over the whole Kingdom except the northern provinces. No matter where the case might arise, and where the parties resided, the French national had to come to the capital to settle the dispute. This would cause great inconvenience involving heavy expenses. On the contrary a British subject might resort to any ordinary court to redress his grievance, and with sufficient protection.

127. The Second Phase of French Jurisdiction: The Treaty of 1907.- The Treaty of 1907[1] was most noteworthy because it affected very fundamentally the status of French Asiatic subjects and protégés in Siam. It virtually gave up extraterritorial rights, so far as these persons were concerned, by placing them in one form or another under complete Siamese jurisdiction. By Article V, all French Asiatic subjects and protégés were divided into two categories, those registered at the French Consulate before the signature of the Treaty and those registered after it. All the post-registered Asiatics were amenable to the ordinary Siamese courts, whereas the International Courts established by the Convention of 1904 would have jurisdiction in the whole of Siam over all the pre-registered. It was further provided that this system should terminate upon the promulgation and coming into force of the Siamese codes, and then the jurisdiction of the International Courts would be transferred to the ordinary Siamese courts.

The conditions under which the jurisdiction of the International Court might be exercised were defined in an annexed protocol. It was to have cognisance of all civil matters to which French Asiatic subjects or protégés were parties, and, in penal matters, of breaches of law of every kind whether committed by them or to their injury. An exception was made for

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(1) Treaty of 23 March, 1907, State Papers, 100, 1028.

the post-registered Asiatics in the provinces of Udon and Isan, where they would be "provisionally" treated as pre-registered. In other words, Asiatics in these provinces were to enjoy the jurisdiction of the International Court irrespective of the date of their registration.

The French Consul retained the right of evocation to the International Court when the defendant was a French Asiatic person. It should cease to be exercised, however, in all matters which were the subject of codes or laws regularly promulgated. The right was also confined to cases concerning pre-registered Asiatics, for in ordinary courts to which the post-registered were amenable, no Consul would sit at the trials.

The Treaty surrendered the jurisdiction over cases arising not only between a French Asiatic person and a foreigner, ascribed to the consular court by the Treaty of 1856, but also among certain French persons themselves. The post-registered French persons or protégés, being assimilated to Siamese subjects, could only be sued by another French person, who was himself not post-registered, in the Siamese Court of Foreign Causes. A pre-registered person could be defendant in the International Court and plaintiff in the same tribunal against a Siamese or any French person not possessing superior status to his own. The submission to local jurisdiction involved the applicability of Siamese laws both substantive and adjective to Asiatic persons who were formerly to a great extent

under French law. The Treaty left intact, however, the position of French citizens, both European and non-European, who had acquired that quality, as well as that of French subjects and protégés not of Asiatic origin, the jurisdiction protocol being destined to be "applicable to the French Asiatic subjects and protégés in the Kingdom." They remained, therefore, under the régime of the Treaty of 1904, that is to say, in the north, the International Court, and in the rest of Siam, consular jurisdiction on the one hand, and the Court of Foreign Causes on the other.(1) The limitation of the right of evocation contained in the annexed protocol would also affect only the form of International Court system for French Asiatic subjects and protégés, and the Consul's original power under that of 1904 would be unaffected. Similarly, the promulgation of Siamese Codes, which was a condition for the termination of the International Court system of the present protocol, would not bring the northern system envisaged in the Treaty of 1904 to an abrupt end.

The French Treaty was followed by the British Convention of 1909, in analogous terms but with different effect. The division of their subjects into two classes under different jurisdictions was, in the British case, based on the date of

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(1) For by Article VII of the Treaty of 1907 it had provided for the full enforcement of all the provisions of the various treaties which this Treaty had not modified.

registration, whether they were registered before or after the date of the Convention. France distinguished the racial origin of the ressortissants and made a double classification among Asiatic subjects and protégés as pre- and post-registered. French European citizens did not submit to any one type of the Siamese courts, except in the four northern provinces where they were under the jurisdiction of the International Court according to the Treaty of 1904. On the contrary, British subjects of European birth throughout Siam were either under the Siamese International Courts or the ordinary courts. France, however, surrendered all Asiatic subjects and protégés registered after the Treaty of 1907 to Siamese jurisdiction, except in the provinces of Udon and Isan, while Britain did not make any such complete renunciation of any type of her subjects. Further the French Treaty laid down expressly conditions under which the International Court for Asiatic subjects and protégés should terminate. No such system, except in the north, having been provided for French European citizens, they would therefore maintain complete extraterritorial positions throughout the Kingdom. The same condition was made for the termination of this special court for all British subjects in the Convention of 1909, but it was silent as to the privilege of the European Legal Adviser, whose presence and prerogative would, indeed, render the ordinary Siamese tribunal an International Court.

128. The Last Phase of French Jurisdiction: The Treaty of 1925.- As the French Treaty of 1907 differed to a large extent from the British Convention of 1909, so the jurisdiction protocol attached to the Treaty of 1925[1] differed from that of the British Treaty concluded in the same year. The protocol affected the status of all classes of French ressortissants, especially that of French citizens. The International Court system as previously instituted is retained and extended to cover French citizens throughout the whole extent of Siam, who shall be subject to its jurisdiction until the date when Siamese codes shall all come into force. After that date, they shall submit to the ordinary Siamese courts, but for a period of five years French diplomatic and consular agents in Siam may continue to exercise the right of evocation (Article I). French Asiatic subjects and protégés residing in the provinces of Udon and Isan, and other pre-registered Asiatic persons under the Treaty of 1907 shall also be subject to the jurisdiction of International Courts until the promulgation of all the Siamese codes. After that date, they shall be amenable to the ordinary courts (Article II). As to the post-registered Asiatic person as well as the non-Asiatic French subject and protégé, the ordinary Siamese courts shall have

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(1) 14 February, 1925, Treaty Series. 43, 193.

jurisdiction, and by express stipulation the right of evocation is here withheld (Article III).

The competence of International Courts as defined in the protocol extends to all civil cases in which French ressortissants are parties, either as plaintiff or as defendant, and, in criminal matters, to all offences committed by them or to their injury (Article IV(1)). In the court of first instance, where a French ressortissant is a party, the French Consul shall have the right to be present and to make observations (Article IV(2)). If the French party is defendant, he may exercise the right of evocation. Every case so evoked shall be transferred to the consular court and adjudicated on in accordance with French law, provided, however, that Siamese laws shall remain applicable to all matters coming within the scope of codes or laws duly promulgated (Article V). The protocol also provides for the right of application for a change of venue by all French ressortissants appearing as defendant or accused, from a provincial court to the Court at Bangkok (Article VI.). This is not mentioned in the previous Treaties.

The right of evocation under French treaty shall also survive the termination of the International Court system, and therefore may be exercised in an ordinary tribunal. But unlike the British Treaty, which preserves this right for all British subjects, the French authority in Siam could only evoke a case in which French citizens only are involved as defendants. The pre-registered Asiatics are entitled to it so long only as

the International Court retains its jurisdiction, that is to say, before the promulgation of the Siamese codes. For the post-registered, this right is altogether non-existent. But they may always apply for a change of venue during the period of operation of the evocation right.

France impairs Siamese judicial autonomy by retaining the International Court system after a period of twenty years for the greater part of her ressortissants, while Britain surrendered completely all her subjects in favour of the local jurisdiction. But it is the latter and not the former State that commands better means of judicial protection. The status of British subject without distinction is assimilated to that of French citizen so far as the right of evocation is concerned, which is an essential reserve against the abolition of consular rule. French Asiatic subjects and protégés not enjoying this safeguard, or from whom this right will be withdrawn as soon as the Siamese codes are published, therefore are in an inferior position to British Asiatic subjects and protected persons.

Chapter XXXIX.

THE JURISDICTIONAL RÉGIME IN FRENCH INDO-CHINA

129. The Assimilation of Chinese to the Natives.- In principle, aliens in French colonies should be treated in the same manner as if they were in France. Though deprived of the political privileges, they should enjoy all the civil rights and submit to the same obligations special to the colonies and common to all aliens. This conception, however, does not hold in practice, except as regards aliens of European status. As to certain aliens belonging to a neighbouring State of the French Colony, and possessing with the natives a great affinity of race, manners, and institutions, French legislation has decided not to treat them as though they were in France, but has considered them as natives and assimilated them to the native population.

The assimilation of Chinese to the natives in Indo-China is consummated under the French rule. By the Decree of 1864[1] it is stipulated that the Annamite law shall regulate all contracts and disputes, civil, criminal and commercial, between natives and Asiatics. In a later Decree[2] the term "Asiatics"

(1) Decree of 25 July, 1864: Sirey, Lois Annotées, 1864, 59.

(2) Decree of 31 August, 1871: Ibid., 1871, 104.

was defined so as to include Chinese, Cambodians, Minh-huongs, Siamese and persons of other native races. The word Chinese has an extended connotation. In determining his quality, the French Administration always attaches more importance to the race and origin of the individual than to his domicile or place of birth.(1) Jurisprudence has also sanctioned the assimilated status of Chinese who are born in European territory and invested with foreign nationality.(2) In a recent case a British naturalised Chinese subject was deemed to be of native status and amenable to the native jurisdiction. The Court ruled(3) in the first place that British naturalisation in Hong Kong operates exclusively within the limits of the Colony, and that he retains his Chinese nationality everywhere else and especially in Indo-China. In the second and more important point, the Court declared that Chinese in Indo-China are governed not by their personal status but by the status of an Annamite as it results from native law as well as from French legislation applicable to the natives.

The extent to which the assimilation of Chinese to the native status may be admitted has practical importance and is a potential source of lively controversy. While preserving certain traditional rights of an assimilated native, the Chinese

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(1) See the definition of Asiatics in the Immigration Act, supra, s 57.

(2) Cour d'Appel de l'Indo-Chine, 9 February, 1900; 27 October, 1910.

(3) Cour de Hanoi, 25 January, 1929; J.I., 1931, 444; Annual Digest, 1929-1930, Case No. 140.

cannot be treated less favourably or otherwise than the nationals of any other Power. Further, the quality of assimilation must be interpreted uberrimae fidei, and not applied in any way to the detriment of the persons concerned. No hard and fast rules being laid down, the French legislation has purported[1] to establish that assimilation, except as an exceptional measure, is closely restricted to matters relating solely to the personal status in private law. It has nothing to do with nationality and its incidental rights of a public and political nature. The relations between the assimilated and their country of origin are not modified or altered. They are not to enjoy other than private rights, and they must submit to the same personal statute in legal relations as the natives. "It is by that statute only, and by reason of the community of manners, social conditions, and institutions, that assimilation is conceived and justified." For all the rest, the assimilated are subject to the rules applicable to aliens.

By assimilation the Chinese are amenable to the same law and justice as that which governs the natives. Contracts or disputes, either with the natives or among themselves, are judged according to the native law. They are not required to lodge cautio judicatum solvi when suing a French defendant. The Court was satisfied that being assimilated to French

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(1) Solus, op. cit., 63.

subjects, who are without doubt exempt from furnishing bail, the Chinese could not be treated in the same way as other aliens in the Colony.(1) In another case the quality of assimilation was given a restrictive interpretation. The son of a naturalised Chinese was held not able to claim French nationality under the Decree of 1881 which, relating to an Annamite, would extend to the wife and children the effects of naturalisation.(2)

130. Law and Jurisdiction.- The judicial organisation of French Indo-China to which the Chinese are subject is a complex system. It is dualistic, inasmuch as it governs one set of people with one law and another with different laws, and acts sometimes through different tribunals. In mixed cases between the two sets of people the law and jurisdiction will vary. Among the people who are in the inferior position of the two, there are persons of various status. Cases between these persons themselves are amenable to different judicial systems according to the locality where they arise and the parties who are involved. To facilitate discussion, it is expedient to bear in mind the different categories of persons repairing to French authority and the diversity of political régime of the territory that comprises the Union. In

(1) Cour d'Appel de l'Indo-Chine, 29 November, 1907.

(2) Cour d'Appel de l'Indo-Chine, 30 December, 1910. And see supra, § 80(iii).

general, it may be said that disputes in which Chinese in Indo China are concerned will come before the French tribunal, to which will apply French or native law according to the status of the parties. The native courts have cognisance only of cases between the natives, and will apply native law and custom. It is significant that in the administration of Indo-Chinese justice, the competence of jurisdiction and the application of laws are based on separate canons.

(i) Cochin-China

Before French domination, there existed a very rudimentary native judicial system. The Decree of 25 July, 1864,(1) organising the administration of justice in Cochin-China created two parallel judicial systems. A French judiciary dealt with French and the assimilated, while the native judiciary administered native laws and customs in conventions and constitutions between the natives and the assimilated. The native courts, however, were abolished by the Decree of 25 May, 1881,(2) by which French courts were instituted everywhere, administering justice to all without distinction, French or native alike, but applying different legislations. The régime has been continued by the Decree of 16 February, 1921,(3) concerning judicial

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(1) Sirey, Lois Annotées. 1864, 59.

(2) Ibid., 1881, 127.

(3) Sol and Haranger, Recueil Général et Méthodique de la Législation et de la Réglementation des Colonies Françaises (1930-1932), III, 901.

re-organisation of the whole of Indo-China, and defining in precise terms the rationæ personæ (Articles 107-111) and the rationæ materiæ (Articles 112-116) of the French jurisdiction. The Annamite law[1] as preserved by the Decree of 1864 (Article 11) was applicable in civil and commercial cases. It governed equally crimes and offences committed by the native or the Asiatic. The position in criminal cases lasted until 16 March, 1880, when a special Penal Code was enacted. Then in turn the Decree of 1880 was supplanted by the Decree of 31 December, 1912,[2] which declared the metropolitan Penal Code applicable by the French courts to the natives and the assimilated Asiatics. This was confirmed by the Decree of 1921 (Article 115).

The application of Annamite law by the French tribunal in commercial matters was also eclipsed by the Decree of 27 February, 1892,[3] which is applicable to "Asiatic aliens and French subjects in the French territory of Indo-China." The civil competence of Annamite law is maintained by the Decree of 1921. It will govern all contracts and disputes between the natives and assimilated. But where the parties declare

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(1) The only codification of Annamite law carried out under French rule consists in the "Précis de Droit Annamite": Sirey, Lois Annotées, 1884, 547.

(2) Recueil de Législation Coloniale, II, 485.

(3) Ibid., IV, 236.

their intention to be governed by French law, French law may be applied. The native or assimilated may also make a joint demand, before a court of competent jurisdiction, for the application to them of French law. This option is not granted to the natives of Cambodia and Annam if the Ordinances of their sovereigns do not authorise it expressly (Article 112). In the French concessions of Hanoi, Haipong and Tourane, all persons without distinction and in all matters will submit to French jurisdiction (Article 107). The competent French courts will apply Annamite law as regards the natives and assimilated, and in civil matters. For mixed cases of a civil nature between a French person or assimilated and a native or assimilated, French law is paramount (Article 112). For other mixed matters the Decree of 1892 will regulate commercial disputes (Article 114), and that of 1912 criminal matters (Article 115).

(ii) Annam and Tonkin

Native justice exists, but in certain cases the Annamite and assimilated are amenable to the French tribunal. The first restriction imposed in this matter is found in the Treaty of 1874.[1] According to Article 16 of the Treaty, disputes between French and aliens were to be decided by the French resident, while those between the French and Annamite by common

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(1) State Papers, 65, 375.

accord of the Resident and a native judge. By virtue of this Treaty, the Court of Residence has been instituted in Annam. Its jurisdiction was enlarged by another Treaty[1] which assumed the cognisance not only of disputes among the French or assimilated but also of those between the French and the Annamites. By extending the jurisdiction over French and "aliens", the Residential Court acquires competence in civil and commercial cases concerning a French or assimilated person, a French subject and an original Annamite of the French concession, a French protégé who is alien to the country and any other alien (Article 108). Therefore it has jurisdiction in Annam and Tonkin over cases between the Annamites of the country and the Cambodians or Laotians. In penal matters, the French court assumes a similar jurisdiction over cases concerning one of those persons, and over wrongs committed by a native to the injury of any of them. The native justice is competent only in disputes exclusively among its Annamite subjects (Article 110). Further, natives in Tonkin may bring their civil differences before the French courts when the parties so agree. They may declare their intention to remain governed by the native law. But when the natives choose to be subject to the authority of French law, the option confers competence on the French jurisdiction (Article 109).

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(1) Article 1, Treaty of 6 June, 1884: State Papers, 75, 100.

The native courts of the Kingdom in all cases will administer native law over disputes among the Annamite subjects, the laws and customs in civil matters actually in force being maintained in Tonkin. For cases between a French litigant and a native, the competent French jurisdiction will apply French law. But when both parties are natives other than Annamites, or when an Annamite is one of the parties to a case in which French jurisdiction is competent, the law applicable will be the Annamite law (Article 112). The Commercial Decree of 1892, adopted successively in Tonkin and Annam, is approved by the Decree of 1912. But its application is confined to the Asiatic aliens. In criminal matters, the French jurisdiction will resort to the Decree of 1912 applying the metropolitan Penal Code in a modified form.

Chinese, being aliens, are always amenable to the French court when either a French person or a native is one of the parties. In the former case, the French jurisdiction will apply French legislation, and in the latter, native laws are enforceable.

(iii) Cambodia

The evolution of French jurisdiction in this country is parallel to that of Annam. From the early days of the protectorate, French persons were excluded from native justice.(1)

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(1) Article 7, Treaty of 1863: State Papers, 57, 739.

Disputes between the French and the Cambodians were decided by a mixed court "according to equity, respecting as far as possible the Cambodian customs and inspired by the principles of French law." This is the same as provided in the Treaty of 1874 with Annam. An Ordinance of 1 May, 1887, further yielded to French jurisdiction disputes among French Asiatic subjects from Cochin-China, and actions against Europeans. Then another Ordinance in 1897 and the Decree of 6 May, 1898, marked a conspicuous extension of the competence rationæ personæ of the French tribunal. By this text, the mixed courts were abolished, and French jurisdiction was declared solely competent over cases in which a European, a French subject, or an alien was one of the parties. The present régime is regulated, as in Annam, by the Decree of 1921 (Article 108). The native courts have no cognisance except over disputes exclusively among the Cambodians. In such cases, they will continue to apply native law.

In mixed civil cases between a French litigant and a native, the French court in Cambodia will apply French law (Article 112). It has also competence over civil cases between a Cambodian and any other native or assimilated person in the Union, native law being applicable. The Commercial Decree has also been extended to Cambodia by an Order of the Governor-General (12 January, 1912). In criminal matters, the Decree of 1912 is also paramount (Article 115).

(iv) Laos

The disposition of the native judicial organisation in Laos emanates wholly from French legislation. An Administrative Order of 20 November, 1922, confirming the Order of 2 May, 1908, promulgating the Codes of law to be operative in the territory, stipulates that persons amenable to native justice are limited to those belonging to races definitely settled in the territory, born in Laos or inscribed on the roll of taxation, and not being attached to any nationality that is foreign to the country (Article 2). In consequence, French tribunals assume competency over cases in which "persons appertaining either to French nationality or to other races of Indo-China or to foreign nationalities" are parties (Article 3). The Decree of 1921 re-asserts that French jurisdiction in Laos will have cognisance of the litigation between Laotians and Annamites or Cambodians (Article 108). The Commercial Code of Cochin-China has also been promulgated in Laos by an Administrative Order (1 May, 1914).

The Chinese in Cambodia or Laos are therefore in no case amenable to the native courts. But when they are involved in litigation with a native, the French judiciary will apply native legislation.

Chapter XXXX.

THE JURISDICTIONAL RÉGIME IN THE DUTCH EAST INDIES

131. The Law and Dualism.-

(1) The Dual System

The Government Act of 1854 sanctioned two categories of persons with different legal status.(1) Europeans and all Christians formed one group, while natives and persons assimilated to them formed another. Chinese, Arabs and all the Mohammedans, were given the status of native in contradistinction to the European status, to which latter, however, were assimilated the Japanese, in 1899,(2) and all other oriental persons who are "naturalised" Netherlanders. Separate laws and ordinances were enacted for Europeans and natives respectively, and were declared applicable to all persons assimilated to each respective group unless the contrary was expressed. The Governor-General, however, had the power to declare enactments applicable to Europeans to be applicable to other persons as well, and such declaration also extended to the descendants of such other persons (s. 75, R.R.).

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(1) S. 109, Lois Organiques, III. 147.

(2) State Papers, 92, 856.

The impropriety of the assimilation of Chinese to the indigenous population, from whose position theirs differed in so many important aspects, was soon realised.(1) The Constitution Act of 1925 therefore devised a three-fold classification of Europeans, Indonesians and Oriental aliens (s. 163). The first category will comprise all Netherlanders and persons of European origin, all Japanese and, further, persons originating elsewhere who in their own country would be subject to a personal law based essentially on the same principles as that of the Netherlands. Indonesians are defined as persons who are members of the native population of Netherlands India, and have not joined a group of the population other than that of the natives, and likewise those who, having belonged to other groups, have become merged in the native population. Other persons not falling within the above are declared to be Oriental aliens. Legislation will apply to them in accordance with this grouping and not in a summary manner, but the position of native Christians will be regulated by Ordinance. Similarly, legislation intended for Europeans will be extended to other ethnical groups by the Dutch administration as may be found necessary.

The dual division of the 1854 Act was said to be founded on a religious basis, and not inspired either by racialism or by views as to white domination. But a clause in the Act requiring natives who profess Christianity to remain under the

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(1) Angelino, Colonial Policy (1931), II, 164.

authority of their Chiefs, and to submit, as to their rights, duties and obligations, to the same legislative acts and institutions as the non-Christian natives, seemed to cast doubts on this statement. Due consideration for converted persons was had by the new Constitution, and the tripartite division was advocated as arising out of practical legal needs. This, however, again coincided with racial differences within the populace. The designation "Oriental aliens", which may include Chinese or other persons who have been settled in Insulinde for generations and are by no means "alien" to the country of their birth, has inevitably irritated susceptibilities among such people. Being averse to naturalisation, they have had to look to the legislation of a country with which their connection had long been severed, to ameliorate their legal status,(1) and the effect has been a revival of loyalty and interest towards the land of their ancestors.

(ii) The Legal Rules

The corpus of the Indonesian law presents a composite aspect. There is the adat or customary law(2) prevailing among

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(1) When in 1931 China introduced a Western Civil Code with a family law based upon the same principles as those of Dutch law, the Chinese eventually demanded their assimilation to the Europeans: Vandenbosch, op. cit., 182.

(2) One distinguishes Javanese, Balinese, Atjehnese Batahs and other types of adat law distributed over nineteen adat circles: Angelino, op. cit., II, 171, note.

the natives, and Western legislation derived from the home country is often applied. The Colonial Government may also enact ordinances. Under the Act of 1854, civil, commercial as well as penal laws governing Europeans shall be in accordance, as far as possible, with the laws in force in the Netherlands (s. 75). By declaration of applicability or voluntary submission to the civil and commercial laws, the European codes could be made applicable to the indigenous population. In the absence of such declaration or submission, the natives remained subject to their religious or customary law so far as it was not contrary to the admitted principles of justice and equity. In any case where native law was silent or incomplete, recourse was to be had to the general principles of European jurisprudence.

The delimitation of the administrative and judicial powers formed the subject of a special clause (s. 78). All lawsuits concerning ownership or rights arising therefrom, concerning claims on account of debt or other civil rights, should come exclusively within the competence of the judicial power. Nevertheless, civil disputes between natives or between persons of the same race assimilated to natives, which, according to their religious laws or ancient customs, would be settled by their priests or Chiefs, should remain under the jurisdiction of these latter. This constituted a native enclave in the sphere of government authority.

(5) Angelico, op. cit., p. 142.

The laws governing Europeans might be enacted by general regulation, emanating either from the Dutch Parliament, the Crown or the Colonial Government. The States-General having omitted to deal with these matters, royal decrees were published in 1848 for the codification of the rules of judicial organisation, civil and commercial laws and procedures. In 1866, a Penal Code followed. The native private law having been left in operation, a colonial ordinance was sufficient to establish the penal law and procedure as well as rules of judicial administration for the natives.

In the days of the Company, natives and Chinese in the district of Batavia seem to have been governed in civil matters by the same laws as the Europeans. Crimes committed by them had always been tried by European judges and according to European law.(1) In other districts, native administration of justice not being interfered with, the authority of native law was respected. In matters of inheritance and minor civil differences within Dutch jurisdiction, native priests and Chinese Chiefs were left to administer their religious law and custom.(2) An effort was made in 1754 to codify the Indonesian and Chinese hereditary rule, and its applicability was extended to Batavia.(3) The East Indian

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(1) Raffles, History of Java ( ), I, 314.

(2) Furnivall, op. cit., 29.

(3) Angelino, op. cit., II, 162.

Government then decided in 1824 to recognise the full domain of customary law throughout the country.(1) From that time until 1855, Chinese lived practically under their own private law,(2) and this legal doctrine was incorporated in the Government Act of 1854. In 1855 an Ordinance to apply European legislation was proposed, and was originally intended for both the Indonesian and the oriental population, but the Government withheld its approval so far as the natives were concerned, considering that they were not in need of this legislation.(3) Since then, in civil and commercial matters, the Chinese have been governed partly under Chinese law (family law and intestacy law) and partly under European law (law of real and personal property and testamentary succession), while the indigenous population was left under its own religious laws, institutions and customs. On 1 May, 1919, the whole European private law was extended to the Chinese, with the exception that the right of adoption, which is unknown to the Dutch legal system, was retained by them. A separate penal law for the natives was introduced in 1872, the difference between it and the European code being purely formal, both being based on the French criminal law. On 1 January, 1918, they were

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(1) Vandenbosch, op. cit., 177.

(2) Vollenhoven, "Jurisprudence in Netherlands India", in Science in the Netherlands Indies (1929), 381.

(3) Angelino, op. cit., II, 165.

replaced by a common Code. Except the reservations in certain civil cases, the substantive law is therefore the same for Europeans and Chinese, who are far removed in type from the natives. But in adjective law, the Chinese, being subject to the same European civil code, are assimilated to Europeans in civil cases and to natives in criminal procedure.

(iii) The Recent Judicial Tendency

The judicial doctrine above set out was left intact by the Constitution Act of 1925. A strong tendency towards a unified system by gradually absorbing other ethnical groups into the European is, however, becoming manifest. The evolution is to be accompanied by a diminution in the authority of the native legal rules, for which the Dutch administration has already begun to work. All substantive and adjective laws are now to be regulated by colonial ordinance, and regulations may be made either collectively for all or some groups of the population or parts thereof, or for parts of the territory, or separately for one or more of such groups or parts. In regulating the civil and commercial laws for Europeans, departures from the laws in force in the Netherlands may be made both on account of special Indonesian conditions and in order to enable Europeans together with one or more of the ethnical groups or parts thereof to be subject to the same rules. The non-European population shall, as their social requirements demand, either submit to the provisions

obtaining for Europeans, modified where needful, or be subject with Europeans to common provisions. As regards other matters, the legal procedure in force among them and connected with their religions and customs shall be respected. Departures from this may, however, be made if public interest or their social requirements so demand.

In regulating penal law and civil and penal procedures for Europeans, the Dutch law is again to be followed with such modifications as special Indonesian conditions may require. Apart from the consequences of a declaration of applicability or of submission, natives and orientals (other than Chinese) may elect to be governed in general or for a particular legal action by the European civil and commercial laws which do not apply to them. The Act empowered the Dutch Administration to make ordinances regulating native private law, a power which it did not before possess. The native civil code or, in other words, the various adat laws continue to be in force as long and so far as not replaced by ordinance. The jurisdiction over civil disputes between natives or between persons of the same race assimilated to natives by their priests or Chiefs, which was reserved by Article 134, was suppressed in the case of the Chinese and may be withdrawn from native priests. By an Amendment[1] to the Act in 1929, only such

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(1) Annuaire. 1929, I, 275.

disputes between Mohammedans as are allowed by their customary law and as have not been regulated by ordinance, shall be decided by the ecclesiastical judge. The validity of the adat or customary law, which was formerly subject to its not being inconsistent with principles of justice and equity, is now made dependent upon the vaguer factor of public interest or social requirements.

132. Native Jurisdiction versus Government Jurisdiction.- In the Dutch East Indies, government jurisdiction exists side by side with native jurisdiction. The former is maintained both in directly and in indirectly governed territories, while the latter operates mainly in the autonomous state. Several different forms of native jurisdiction may be still distinguished. In the indirectly governed territory where local autonomy is being retained, the Indonesian States keep their own judicial system. The concession given in the Constitution[1] that "wherever the native population has not been permitted to retain its own judicial institution, justice shall be administered in the name of the King", has also assured a similar privilege to the natives in the directly governed territory.[2] The religious jurisdiction in cases

(1) S. 74, R.R.; s. 130, I.S.

(2) Native jurisdiction in a part of the territories subject to direct administration where the population has kept its own judiciary, is regulated by Ordinance No. 80, 1932: Annuaire, 1932, I, 343.

of matrimonial and hereditary law, largely influenced by Islamic precepts and reserved to native judges, is another inroad in the sphere of the government judiciary.

The relationship between the East Indian Government and these States is regulated either by political contracts or by short declarations. Fifteen States are now bound by such a Contract, enumerating mutual rights and duties, while two hundred and sixty-eight have signed a summary Declaration.(1) The document was supplemented by the Native States Regulations(2) of 1927, which contained the substance(3) of the Long Contract, and may be regarded as comprising a constitution for all the native States.

For matters within the competence of native jurisdiction, the judges of the State will apply Indonesian customary law in civil as well as in penal cases,(4) and apparently not "in the name of the King". General ordinances are applicable only so far as they are consistent with the right of autonomy.(5) This

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(1) Kleintjes, op. cit., 325.

(2) Annuaire, 1927, I, 264.

(3) Vandenbosch, op. cit., 132.

(4) The native Penal Code as administered in the government courts indicates, however, the "lines of conduct" and is usually applied by the State courts: Ter Haar, "Western Influence in the Law for Native Population", in Effect of Western influence on Native Civilisation in the Malay Archipelago ( ), 161.

(5) S. 27, R.R.; s. 21, I.S.

differs essentially from the case of the native jurisdiction in the directly governed territory, to which government legislation is applicable in so far as compatible with its administration (s. 131(5)). The exercise of native jurisdiction is, however, qualified by fundamental conditions. In the first place, the jurisdiction of the States has cognisance only of the subjects of the State as distinct from the subjects of the Government.(1) Excluded from their competence are the following categories of persons: (1) Europeans and assimilated. (2) oriental aliens, (3) the native civil servants of the Crown, (4) all persons settled within the State on the territory ceded to or placed at the disposal of the Government, (5) natives from outside who are temporarily in the State, and (6) natives who have entered into a labour contract as contract coolies or free labourers. These enjoy extraterritorial rights in the State and are under the jurisdiction of the Government courts provided in its territory. Further, the Crown's courts reserve the right to decide all mixed cases where persons not amenable to the native jurisdiction are involved, and also the right to try crimes or offences against the security of the State or property and revenue of the Crown. Finally, the exercise of native justice is always under the direction and supervision of European administration.

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(1) Article 13, Native States Regulations, 10 May, 1927: Annuaire, 1927, I, 264.

It will be subject to special regulations, already or to be promulgated by the Chief of the region, concerning European interference with its exercise (Article 17).

Although it is the rule that Chinese in Insulinde, whether in the directly or indirectly governed territories, submit to government jurisdiction, they are amenable to the same courts and judges as the natives. The Police Court (Politierol) was an object of much criticism; its working "penetrated deeply into the life of the people"; it handled cases in the most arbitrary manner. Its suppression after much abuse has brought the institution of the Land Tribunal (Landgerecht). In this tribunal, which hears cases of minor offences without distinction of race or nationality, judicial dualism ceased to apply.(1) It has thus deprived the Residential Court (Residentiegerecht) for the Europeans of jurisdiction in cases of petty offences. In the Outer Possessions where Landgerechten have not been introduced, Chinese are amenable to the Magistrate's courts (Magistraatsgerechten).(2) The Residentiegerecht will have competence in civil cases.(3) The Landraad is the most important government court, having ordinary jurisdiction over the non-European population. The Courts of

(1) Angelino, op. cit., II, 155.

(2) Angoulvant, op. cit., I, 191.

(3) Alting and Buning, op. cit., 27.

Justice (Raden van Justitie), which are the courts of first instance over Europeans in civil and criminal cases, hear appeals from the Landraden. At the top of the judicial organisation is the High Court of Justice, to which Europeans may bring final appeal. The procedure in the non-European tribunals generally allows great inroads on the rights of the individual, and sentences of preventive confinement are freely passed. The non-juristic character of the members of the Landraad also derogates from the confidence which can be placed in the Court. Since the Chinese are invariably amenable to the government jurisdiction, and are subject to the same civil, commercial and penal laws as the Europeans, there seems no justification for retaining their position with the native courts. In view of the increasing tendency in government legislation to assimilate the Chinese to the Europeans, it seems difficult to justify the retention of the dual judicial system. This was earlier advocated on the ground of differing legal requirements, and at first assimilated the position of the Chinese to that of the natives. As it became obvious that the two were extremely ill-matched, the Chinese were given a separate status, and the division became tripartite. If dualism is to survive, it can only be by granting to the Chinese the same status as the Europeans.

B I B L I O G R A P H Y

In the preparation of this thesis the author has relied chiefly upon primary sources, i.e., statutes, treaties, law reports and other official or semi-official documents. Secondary works have also been consulted both as clues to the sources and for the general appraisement of the questions reviewed. The list which follows does not include general works on public international law, of which frequent use has been made. Certain special monographs are therein mentioned, namely, copies of theses presented at various universities in France which, although they have not been consulted for the purpose of the thesis, are here recorded to indicate possible courses of further research.

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