Island was never settled with population. The eclipse expeditions found it uninhabited. Enderbury Island is said to have had a small population since it became a member of the Phoenix group.

To what extent has there been abandonment by the United States? To what extent abandonment by the British? Or, if not abandonment, was there failure to institute or to maintain those administrative activities which are the badges of sovereign possession? And just what *indicia* are necessary to preserve title as against abandonment in the case of a small island incapable of sustaining human life, once valuable for its guano deposits, then becoming worthless, only to become again of value for purposes undreamt of until very recently?

The agreement with Great Britain is a sensible arrangement. Progress in commercial aviation might have been hindered by bickering over questions of title. The agreement provides for joint uses for purposes of aviation. If not designed solely to advance commercial or civil aviation, the agreement certainly stresses it, limiting the use for such purposes to British and American companies. Joint control for 50 years is set up and there is no prejudice to the territorial claims of either country. The experience of the United States with joint control and joint occupation has not been wholly satisfactory, as witness Oregon, 1818–1846, and Samoa, 1889–1899. Canton and Enderbury Islands having value for one purpose only, the present agreement is *ad hoc* and encourages their use for that purpose. Logical and strained arguments over "sovereignty" would have served no good purpose. This arrangement becomes of even greater interest now that it has been acclaimed by President Roosevelt, June 8, in his toast to His Majesty George VI, as a symbol of international understanding:

> If this illustration of the use of methods of peace, divorced from aggression, could only be universally followed, relations between all countries would rest upon a sure foundation, and men and women everywhere could once more look upon a happy, a prosperous and a peaceful world.

J. S. REEVES

THE JAPANESE IN KULANGSU

After Japanese terrorism in China during nearly two years of unsuccessful warfare, the landing of Japanese forces at the International Settlement of Kulangsu Island in the harbor of Amoy is not surprising. On the night of May 11 last 150 Japanese troops were landed in the Settlement, blockaded the Settlement by placing guards on all the jetties, and made numerous arrests in the Settlement. The excuse given to the press was the killing on the day before of a Chinese member of some organization which was cooperating with the Japanese, although this is admittedly the only disturbance which has occurred and is presumably the result of inflamed feeling aroused by the Japanese invasion. Coincidently the Japanese made certain demands as to the administration of the Settlement. These demands, as presented

through the Japanese Consul General at Amoy, were, according to reports, that effective steps be taken to suppress anti-Japanese activities, that the superintendent of police and secretary of the Municipal Council be replaced by Japanese, that the right of suffrage and election to the Municipal Council be extended to Formosans, and that the Chinese councilors be appointed by the Japanese puppet government. If acceded to, these demands would place Japan in control of the Settlement, which undoubtedly was the real objective of the forceful landing. The Municipal Council, however, refused to yield to the Japanese pressure, which included interference with the food supply from the mainland, although it made a real effort to obtain coöperation in police measures.

A few days later the Japanese withdrew all their marines except 42, and the next day American, British and French warships landed 42 marines each to match the remaining Japanese. Notwithstanding the announced purpose of protection of their respective nationals in the event of serious disorders, undoubtedly the object of the joint forces was to prevent the seizure of the Settlement by the Japanese.

On the same day, May 17, Ambassador Grew delivered an American *aide-mémoire* denying the somewhat similar demands of the Japanese as to the International Settlement at Shanghai. Secretary Hull linked the steps taken at Kulangsu with the *aide-mémoire* and made clear that both concerned the status of International Settlements in China which had been challenged by Japan. At Kulangsu the foreign interests are relatively slight, but the same principles are involved.

The legal situation is somewhat complicated owing to the fact that foreign Powers have obtained special treaty rights and privileges for their nationals in China, collectively known as extraterritorial rights. These foreign rights and interests go back to the treaties of the 1840's and 1850's by which certain ports of the Empire were opened to foreign nationals. Under these treaties they are allowed to reside, trade, own and lease property, and if they get in trouble their disputes are settled not in Chinese courts but in the courts of the defendant, presided over by the consul of his country. The Port of Amoy, in which the Island of Kulangsu is located, was one of those ports opened to foreign residents. In some of the open ports it seems to have been the custom of foreigners to settle together in one district or area called a "Concession" or "International Settlement", and to seek a municipal government of their own under special arrangements with the Government of China, although they might live elsewhere if they wished. These agreements were generally called Land Regulations and were signed by the local Chinese authorities and the consular officers, and approved by the Ministers of the foreign Powers and the Chinese Government.[1]

[1] The legal basis of these International Settlements may be the Chefoo Convention of Sept. 13, 1876, between China and Great Britain, which provided in Art. 2 that in all treaty ports, whether opened by earlier or later agreement, where no settlement area has been

As early as 1877 agitation began among the foreign residents of Kulangsu for the establishment of an International Settlement comprising the whole island of about one and one-half square miles. The plan, however, did not materialize until January 10, 1902, when the Land Regulations and the Bye-laws were agreed upon and signed by the local Chinese authorities and the consuls at Amoy of the United States, Great Britain, Germany, Japan, France, Spain, Denmark, Holland, Switzerland and Norway. This agreement was forwarded to the diplomatic representatives at Peking and was approved by them and the Chinese Government in 1903.

This agreement set up a municipal organization under the control of a Municipal Council consisting of "five or six persons" elected periodically by ballot of qualified voters of the Settlement, plus a Chinese representative appointed by the Taotai. After Chinese agitation for increased representation on the Council, the parties agreed in 1919 that China should have two members, and subsequently, in 1926, that she should have three members. There are five foreign representatives distributed among the largest number of rate-payers in the Settlement, namely, Britain, 30 rate-payers, one member; United States, 20 rate-payers, one member; Japan, 18 rate-payers, two members, &c. Japan has the largest representation in proportion to rate-payers.[2]

Amendments of the Land Regulations must be agreed upon by the foreign consuls and the local Chinese authorities, subject to confirmation by the Ministers of foreign Powers and the Chinese Government at Peking. This appears to be the only method by which the Japanese can legally obtain a change in the Land Regulations to satisfy some of their demands.

It will be observed that the authority for establishing the International Settlement derives directly from the central Chinese Government in agree-

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defined, it will be the duty of the British Consul, acting in concert with his colleagues, the consuls of other Powers, to come to an understanding with the local authorities regarding the definition of the foreign settlement areas. The United States and probably other countries have the advantage of this convention by virtue of the most-favored-nation clause. See the treaties of 1844, 1858, 1868, 1880 and 1903 between the United States and China.

[2] The preamble of the Land Regulations states the legal basis of the Settlement and gives a summary of the municipal functions delegated, as follows:

"China establishes Kulangsu as a Settlement in order that due provision may be made for constructing roads and jetties and keeping them and existing roads and jetties in repair, for cleansing, lighting, watering and draining the Settlement, establishing and maintaining police force thereon, making sanitary regulations, paying wages and salaries of persons employed in any Municipal Office or capacity and for raising the necessary funds for any of the purposes aforesaid, the following regulations are hereby drafted and submitted to the Chinese Foreign Office for discussion with the Foreign Ministers and subsequent confirmation by Imperial Rescript."

The body of the Land Regulations sets forth the boundaries of the Settlement and provides for the annual meeting, the qualifications of voters, the number and qualifications of Councillors, the powers of the Council, and other machinery for carrying out the purposes mentioned in the preamble. China reserves the right to collect the land taxes and to establish a Mixed Court like that at Shanghai.

ment with the representatives of the foreign Powers at Peking. It amounts to a delegation by the Chinese Government of limited administrative powers, but the Settlement is not foreign territory and the ultimate sovereignty rests in China. Among other things, she retains the right to collect the land taxes to be handed over to the Council as a contribution toward expenses, as well as the right to handle all cases in which Chinese are defendants. The enforcement of the administrative orders of the Settlement must be through the consular courts on the basis of extraterritorial rights.

To take the strongest hypothesis, that war exists between Japan and China[3] and that Japan has the rights of a military occupant in the Port of Amoy, query, has she a right to seize by force the International Settlement and to demand administrative control? The question is one of some difficulty. It boils down to whether a military occupant is bound to respect the treaty rights of third Powers in the occupied territory. To say the least, the military occupant is probably supreme in all things relating to the maintenance of his position and the safety of his forces. If the Settlement is a hazard to these, action to remove it may be justified. However, such action is not that of a conqueror but that of a temporary occupant who gains no permanent rights in the territory until the conquest is complete or fixed by a treaty of peace. On this narrow basis the Japanese forces may perhaps explain the Kulangsu landing if the place is a military menace, as they assert is the case, but Japan as a temporary occupant can claim no permanent change of *status quo* by the act.

But there are broader questions of international right at issue in China. By the Nine Power Treaty of 1922, Japan, in conjunction with other Powers, including China, agreed specifically:

> (1) To respect the sovereignty, the independence, and the territorial and administrative integrity of China; . . .
> (4) To refrain from taking advantage of conditions in China in order to seek special rights or privileges which would abridge the rights of subjects or citizens of friendly states, and from countenancing action inimical to the security of such states.

In the Land Regulations, Japan for herself and jointly with other Powers has recognized the international status of Kulangsu in which each Power participates according to the stipulations in the agreement. Thus in the treaty and the regulations independent action is supplanted by international coöperation. It seems clear that Japan cannot rightfully claim the unrestricted right of a military occupant which she has thus foresworn to exercise in China, and by the same token that she cannot rightfully take the law into her own hands in Kulangsu and obtain thereby any permanent advantage or status by the use of force. To do so would be to obtain the benefit of her own wrong—the disregard of her own pledges.

As to landing troops in an emergency for the protection of nationals in

[3] See editorial in this JOURNAL, Vol. 32 (1938), p. 314.

Kulangsu, it would seem that any nation, whether or not a party to the Nine Power Treaty or Settlement agreement, would have this right under the general law and practice of nations, but that one nation has no superior rights in this respect above another. The Land Regulations do not cover the question of enforcing public order except through the Settlement police under control of the Council.

As to a change in the control of the administration of the Settlement, this is governed by the provision above cited for the amendment of the Land Regulations in agreement with all of the parties thereto. This appears to be the only method by which the Japanese can properly obtain fundamental modifications in the present administration of Kulangsu.

L. H. WOOLSEY

CONCERNING THE NAVEMAR

The vicissitudes of the Spanish steamship *Navemar* between the libel of the vessel on December 7, 1936, and its final release in April, 1939, have not produced a *cause célèbre;* but they have done more than furnish a choice bone of contention for certain proctors in admiralty, for they have inspired a series of adjudications resulting in some interesting and important judicial conclusions.[1] The relevant facts as stated by Judge Augustus N. Hand in the judgment of the Circuit Court of Appeals, Second Circuit, on March 6, 1939, are given below.[2]

[1] See *The Navemar*, 17 F. Supp. 495, 647, 18 F. Supp. 153, 90 F. (2d) 673; Compañía Española de Navegación Maritima *v. The Navemar* (*certiori* granted), 302 U. S. 669; same case, 303 U. S. 68, this JOURNAL, Vol. 32 (1938), p. 381. *The Navemar*, 24 F. Supp. 495, 102 F. (2d) 444. See also New York Times, April 23, 1939, p. 22.

[2] "The libellant, a Spanish corporation, filed a possessory libel against the steamship *Navemar in rem*, and against five members of the crew of that vessel *in personam*, alleging that libellant had been wrongfully deprived of possession of the vessel by those members of her crew. A decree by default was entered on December 14, 1936. The Consul General of Spain in New York sought on behalf of the Spanish Ambassador to open the default and vacate the decree and filed a suggestion alleging that the court had no jurisdiction because the *Navemar* was the property of the Republic of Spain by virtue of a decree of attachment appropriating the vessel to the public use and was then in the possession of the Spanish Government, and asking that the court direct delivery of her to the Spanish Consul General of New York.

"The District Court 'allowed a full hearing upon the suggestion and upon reply affidavits submitted by libellant in the course of which there was opportunity for the parties to present proof of all the relevant facts.' Compañía Española *v. Navemar*, 303 U. S. 68, 72, 58 S.Ct. 432, 434, 82 L. Ed. 667. The court found that the *Navemar* was never in the possession of the Spanish Government prior to her seizure by the five members of her crew in New York Harbor and likewise that she was not a vessel in the public service of Spain and accordingly denied the petition to intervene. Upon the appeal, we reversed its order and held that the suggestion of the Ambassador was binding on the court and that the evidence had established a possession of the *Navemar* by the Spanish Government which rendered her immune from seizure in the possessory action. *The Navemar*, 2 Cir., 90 F. 2d 673. The Supreme Court granted a writ of *certiorari*, reversed the order of this court and affirmed the order and findings of the District Court holding that possession of the *Navemar* was not in the Spanish