MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES,

COMMUNICATING

An abstract of the Treaty between the United States of America and the Chinese Empire.

JANUARY 22, 1845.

Read, referred to the Committee on Foreign Relations, and ordered to be printed.

To the Senate of the United States:

I communicate, herewith, an abstract of the treaty between the United States of America and the Chinese Empire, concluded at Wang Hiya on the 3d of July last, and ratified by the Senate on the 16th instant; and which, having also been ratified by the Emperor of China, now awaits only the exchange of the ratifications in China; from which it will be seen that the special mission authorized by Congress for this purpose has fully succeeded in the accomplishment, so far, of the great objects for which it was appointed, and in placing our relations with China on a new footing, eminently favorable to the commerce and other interests of the United States.

In view of the magnitude and importance of our national concerns, actual and prospective, in China, I submit to the consideration of Congress, the expediency of providing for the preservation and cultivation of the subsisting relations of amity between the United States and the Chinese Government, either by means of a permanent minister or commissioner, with diplomatic functions, as in the case of certain of the Mohammedan States. It appears, by one of the extracts annexed, that the establishment of the British Government in China consists both of a plenipotentiary and also of paid consuls for all the Five Ports, one of whom has the title and exercises the functions of consul general, and France has also a salaried consul general; and the interests of the United States seem, in like manner, to call for some representation in China of a higher class than an ordinary commercial consulate.

I also submit to the consideration of Congress the expediency of making some special provision, by law, for the security of the independent and honorable position which the treaty of Wang Hiya confers on citizens of the United States residing or doing business in China. By the 21st and 25th articles of the treaty, (copies of which are subjoined *in extenso*,) citizens of the United States in China are wholly exempted, as well in criminal as in civil matters, from the local jurisdiction of the Chinese Government, and made amenable to the laws and subject to the jurisdiction of the ap-

propriate authorities of the United States alone. Some action on the part of Congress seems desirable, in order to give full effect to these important concessions of the Chinese Government.

JOHN TYLER.

WASHINGTON, *January* 22, 1845.

ABSTRACT OF THE TREATY.

The preamble sets forth, that the United States of America and the Ta Tsing Empire, desiring to establish firm, lasting, and sincere friendship between the two nations, have resolved to fix, in a manner clear and positive, by means of a treaty or general convention of peace, amity, and commerce, the rules which shall in future be mutually observed in the intercourse of their respective countries: For which desirable object, the President of the United States has conferred full powers on their Commissioner, Caleb Cushing, Envoy Extraordinary and Minister Plenipotentiary of the United States to China, and the August Sovereign of the Ta Tsing Empire on his Minister and Commissioner Extraordinary, Tsiyeng, of the Imperial House, a Vice Guardian of the Heir Apparent, Governor General of the Two Kwangs, and Superintendent General of the Trade and Foreign Intercourse of the Five Ports.

ARTICLE 1. Provides that there shall be a perfect and universal peace and a sincere and cordial amity between the United States of America and the Ta Tsing Empire.

ART. 2. Provides that citizens of the United States resorting to China for the purposes of commerce will pay the duties of import and export prescribed in the tariff annexed to the treaty, and no other duties or charges whatever; and that the United States shall participate in any future concession granted to other nations by China.

ART. 3. Provides for the admission of citizens of the United States at the five ports of Kwang-chow, Hiya-mun, Fu-chow, Ning-po, and Shang-hai.

ART. 4. Provides for citizens of the United States to import and sell, or buy and export, all manner of merchandise at the Five Ports.

ART. 6. Limits the tonnage duty on American ships to five mace per ton, if over one hundred and fifty tons registered burden; and one mace per ton, if of one hundred and fifty tons or less. Also, provides that such vessel, having paid tonnage at one of the Five Ports, shall not be subject to pay a second tonnage duty at any other of said Five Ports.

ART. 7. Exempts boats for the conveyance of passengers, &c., from the payment of tonnage duty.

ART. 8. Provides for authorizing citizens of the United States in China to employ pilots, servants, linguists, laborers, seamen, and persons for whatever necessary service.

ART. 9. Provides for the employment and duties of custom-house guards for merchant vessels of the United States in China.

ART. 10. Provides that masters of vessels shall deposite their ships' papers with the consul, and make a report, &c., within forty eight hours after their arrival in port; forbids the discharge of goods without a per-

mit; and authorizes the vessel to discharge the whole or a part only of the cargo, at discretion, or to depart without breaking bulk.

ART. 11. Prescribes the mode of examining goods, in order to the estimation of the duty chargeable thereon.

ART. 12. Provides for regularity and uniformity of weights and measures at the Five Ports.

ART. 13. Provides for the time and mode of paying duties; tonnage duties being payable on the admittance of the vessel to entry, and duties of import or export on the discharge or lading of the goods.

ART. 14. Forbids the transhipment of goods from vessel to vessel in port, without a permit for the same.

ART. 15. Abolishes the hong and other monopolies and restrictions on trade in China.

ART. 16. Provides for the collection of debts due from Chinese to Americans, or from Americans to Chinese, through the tribunals of the respective countries.

ART. 17. Provides for the residence of citizens of the United States; the construction by them of dwellings, storehouses, churches, cemeteries, and hospitals, and regulates the limits of residence, excursion, and trade, permitted to citizens of the United States at the Five Ports and the anchorages appertaining thereto.

ART. 18. Empowers citizens of the United States freely to employ teachers and other literary assistants, and to purchase books in China.

ART. 19. Provides for the means of assuring the personal security of citizens of the United States in China.

ART. 20. Provides that citizens of the United States, having paid duties on goods at either of the said ports, may at pleasure re-export the same to any other of the Five Ports, without paying duty on the same a second time.

ART. 21. Provides that subjects of China and citizens of the United States in China, charged with crimes, shall be subject only to the exclusive jurisdiction, each, of the laws and officers of their respective Governments.

ART. 22. Provides that merchant vessels may freely carry on commerce between the Five Ports and any country with which China may happen to be at war.

ART. 23. Provides for reports to be made by consuls of the United States of the commerce of their country in China.

ART. 24. Provides for the mode in which complaints or petitions may be made by citizens of the United States to the Chinese Government, and by subjects of China to the officers of the United States, and controversies between them adjusted.

ART. 25. Provides that all questions in regard to rights, whether of person or of property, arising between citizens of the United States in China, shall be subject to the jurisdiction and regulated by the authorities of their own Government.

ART. 26. Provides for the police and security of merchant vessels of the United States in the waters of China, and the pursuit and punishment of piracies on the same by subjects of China.

ART. 27. Provides for the safety and protection of vessels or citizens of the United States, wrecked on the coast, or driven by stress of weather or otherwise into any of the ports of China.

ART. 28. Provides that citizens of the United States, their vessels and

property, shall not be subject to any embargo, detention, or other molestation, in China.

ART. 29. Provides for the apprehension in China of mutineers or deserters from the vessels of the United States; the delivering up of Chinese criminals taking refuge in the houses or vessels of the Americans; and the mutual prevention of acts of disorder and violence; and that the merchants, seamen, and other citizens of the United States, in China, shall be under the superintendence of the appropriate officers of their own Government.

ART. 30. Prescribes the mode and style of correspondence between the officers and private individuals, respectively, of the two nations.

ART. 31. Provides for the transmission of communications from the Government of the United States to the Imperial Court.

ART. 32. Provides that ships of war of the United States, and the officers of the same, shall be hospitably received and entertained at each of the Five Ports.

ART. 33. Provides that citizens of the United States, engaged in contraband trade or trading clandestinely with such of the ports of China as are not open to foreign commerce, shall not be countenanced or protected by their Government.

ART. 34. Provides that the treaty shall be in force for twelve years, or longer, at the option of the two Governments, and that the ratifications shall be exchanged within eighteen months from the date of the signatures thereof.

The treaty purports to be signed and sealed by the respective plenipotentiaries, at Wang Hiya, the 3d of July, 1844, and is signed—

C. CUSHING. TSIYENG, (*in Manchu.*)

The following are the 21st and 25th articles, at length.

ART. 21. Subjects of China, who may be guilty of any criminal act towards citizens of the United States, shall be arrested and punished by the Chinese authorities according to the laws of China; and citizens of the United States, who may commit any crime in China, shall be subject to be tried and punished only by the consul or other public functionary of the United States thereto authorized, according to the laws of the United States. And in order to the prevention of all controversy and disaffection, justice shall be equitably and impartially administered on both sides.

ART. 25. All questions in regard to rights, whether of property or person, arising between citizens of the United States in China, shall be subject to the jurisdiction and regulated by the authorities of their own Government. And all controversies occurring in China between citizens of the United States and the subjects of any other Government shall be regulated by the treaties existing between the United States and such Governments, respectively, without interference on the part of China.

Mr. Cushing to Mr. Calhoun.

[No. 97.] UNITED STATES BRIG PERRY,

September 29, 1844.

SIR: Among the provisions of the treaty of Wang Hiya, there is one class, to which I am solicitous to call your attention. I mean the stipula-

tions, which confer the privilege of exterritoriality on citizens of the United States residing or being in China.

In a previous despatch, (No. 22,) I addressed to the Department some general remarks on the difference, in this respect, in the principles of the law of nations, as received by the Governments of *Christendom*, in their practice among themselves, and between one another; and the practice which prevails between each of them, respectively, and the Mussulman Governments. Referring to that despatch, I beg leave to add some more particular remarks on the same subject, and with more especial relation to China.

I might show, by quotations from all the standard authors, how imperfectly the general question is at present understood, and infer the apparent difficulties which surround it. Thus, among the elementary writers on the law of nations, the most approved,—such as Vattel and Kluber,—omit to place in a proper light the all-important fact, that what they denominate the law of nations, as if it were the law of *all* nations, is, in truth, only the international law of *Christendom*. The same error is yet more prevalent among authors of a more popular caste. I content myself with instancing one only of deservedly high estimation, Mr. McCulloch, who touches upon the subject, though unconsciously, in the article "Consul," of his Commercial Dictionary.

It is doubtless true, as Mr. McCulloch states, that the office of commercial consul "originated in Italy;" and that, soon afterwards, the "French and other Christian nations," trading to the Levant, began to stipulate for liberty to appoint consuls to reside in the ports frequented by their ships, &c., and that from thence the practice gradually extended "all over Europe;" but the language of this statement evinces that the exact origin and nature of the office were not rightly apprehended by Mr. McCulloch.

That the ordinary *municipal officers* of each important city, especially in Italy and among the Italian cities, which, by their possession of the commerce of the Levant, were fast growing up into independent and wealthy republics, were frequently, if not for the most part, designated by the Roman title of consul, is familiarly known to all who are conversant with the history of Europe in the middle age. Indeed, this phraseology was adopted by many of the municipalities in other parts of Europe, especially those in which the Roman or civil law continued in force, while in the boroughs and cities which grew up in countries where the Saxon, Frankish, and other northern codes obtained, other terms, such as alderman, bailiffs, burgomaster, and the like, came into use, and the term *consul* disappeared from common speech. Even, however, in municipal communities of the latter class, when writing in the Latin language, it was quite customary to adopt the word "consul" as the designation of their municipal magistrates. The usage still continues, in some parts of the south of Europe, of applying this term to certain of the magistrates or tribunals of the country itself. In short, the consuls found in Italy about the middle of the twelfth century were the domestic or municipal magistrates of the cities, which, having thrown off the feudal authority of the great northern princes, were now flourishing as republics, and still clung to or revived the name of the magistracies of the Roman commonwealth.

These republics drew their opulence from the ports of the Levant, and especially from their trade in the commodities of Asia, which, prior to the discovery of the passage to the East by the Cape of Good Hope, came to

the Mediterranean across Egypt and Syria, and were distributed through Europe by the Italians.

The conquests of the Mohammedans had converted all those regions into a scene of bloodshed, confusion, and anarchy. There was no systematic administration of justice; no regular imposts on commerce; above all, no security for the lives and property of Christians, when committed to the authority of the local officers of the barbarous and bigoted Saracens and Turks. There was little of such security even in the ports which continued subject to the tottering power of the Greek sovereigns of the Lower Empire.

Accordingly, we find that at an early period, certainly long before the thirteenth century, as the Italians proceeded to resort to the ports of the Levant in numbers continually increasing, they claimed and obtained for their people the privilege of *exterritoriality;* that is, of being held exempt, to a greater or less degree, from any authority except that of their own Government. In the ports of the East, the Genoese, the Pisans, and others, residing or doing business there, formed, each respectively, a separate community, governed by their own home laws and by their own magistrates, to which magistrates they gave the name borne by magistrates of the same class in their own countries of Genoa and Pisa. This I apprehend to be the true origin of the commercial consuls of modern times.

In the despatch above referred to, I have suggested how, in my opinion, it happened that the various local Governments of the Levant came to be willing that these foreign jurisdictions should exist in their territories, and I will not repeat those remarks in this place.

Mr. McCulloch is right in the general idea that modern commercial consuls were found in the Levant before they were in Europe generally. They were introduced, however, not (as he supposed) by the *French* and other Christian nations, but by the Italians, to whom, in common with other European Christians, the Asiatics, at the time of the Crusades, began, as they have ever since continued, to apply the national designation of "Franks." Thus, for example, in the treaty between the United States and Turkey, it is stipulated of the citizens of the United States, that, in the very case under consideration, the same rule shall be applied to them as to "*other* Franks;" thus extending this term even to Americans.

He is right also in supposing that these consuls were appointed "to watch over the interests of their countrymen, and judge and determine such differences with respect to commercial affairs as arose amongst them;" but he errs in describing their jurisdiction as *thus* limited; for the histories of that day show that they were, *in things generally*, the magistrates of their country, except when superseded by the casual presence of functionaries from that country of a superior rank; being the ordinary magistrates, established as the means of administering law, civil and criminal, so far as regarded their own countrymen; in a word, as the agents through whom a Genoese, a Pisan, or a Venetian, in the Levant, became assured of exterritoriality, of exemption from the power of the local barbarians, and of subjection only to that of Genoa, Pisa, or Venice, as the case might be.

At the period when these exceptional jurisdictions were established in the Levant in favor of the Christians of Europe, they were in unison also, to a certain degree, with the usages of Europeans themselves; since the northern conquerors, in the early stages of their progress, were accustomed to allow their separate law, and the privilege of being governed and tried by it, to such of the conquered Gauls, Italians, &c., as desired it; each na-

tion in the same city might have its own law: the effect of which was, the existence in various parts of Europe of exceptional jurisdictions, analogous, in many respects, to those permitted in the countries conquered by the Saracens.

But, as the several modern *European* Governments became consolidated, the conquerors and the conquered coalesced into one people, and these separate jurisdictions disappeared, and the now received idea began to obtain, that each Government is in general to exercise *exclusive* jurisdiction over all persons in its territory, and the privilege of exterritoriality was gradually restricted to the persons of foreign Sovereigns, to their diplomatic representatives, to troops *in transitu*, to ships of war in a foreign port, and to some few other analogous cases, established or defined either by the usage of the nations of Christendom, or by specific treaties; while the old usage remains in full force in the East.

Under these circumstances, it came to be the received law of nations, (in Christendom,) that foreigners as well as subjects, in any given country, are amenable to the criminal, and in many respects to the civil, jurisdiction of the local authorities of the Government. And, of course, the authority of commercial consuls, under the same circumstances, that authority being only an incident to and element of the condition of the foreigner residing or sojourning in the given country, when it came to be introduced generally in Europe, was deprived of the judicial or magisterial functions, which it continues to possess in the East.

The *extended* power of foreign consuls, still maintained by Christian States as against Mohammedan States, was the original fact; the *limited* power of foreign consuls *within Christendom itself* is the new fact, or the innovation, which the several States of Christendom have established and asserted in favor each of the completeness of its respective domain and sovereignty.

This fact is indeed the result and the evidence of the superior civilization and respect for individual rights consequent thereon, which prevail in Christendom; in presence of which superior civilization, a foreigner, who happens to be in any of the countries of Christendom, does not need for his personal security that he should be exempt from the local jurisdiction, but only that there should be at hand consular or other officers of his country, through whose intervention he may either be sure of just treatment from the local Sovereign, or, if need be, make his individual case a public one, and invoke in his aid the intervention of his own Sovereign. In the semi-barbarous Mohammedan States, on the contrary, no Christian feels safe in subjection to the local authorities; and there, accordingly, each Christian State asserts for its subjects more or less of exemption from the authority of the local Sovereign.

Mr. McCulloch says, that the powers of consuls differ very widely in different States, according to express convention or custom; that consuls established in England have no judicial power, and the British Government has rarely stipulated with other Powers for much judicial authority for its consuls; but that "Turkey, however, is an exception to this remark." He proceeds to give an account of the jurisdiction over British subjects belonging by treaty and by act of Parliament to British consuls in "Turkey." To which he adds, "other States have occasionally given to consuls similar powers to those conceded to them in Turkey." As an example of this, he cites the treaty between the United States and Sweden, ratified on

the 24th of July, 1818; meaning the fifth article of the treaty of September, 4th, 1816; which treaty is no longer in force, though the same provision is renewed in the existing commercial treaty between the United States and Sweden.

In all this, Mr. McCulloch assumes that the subjection of a citizen to the jurisdiction of the foreign country in which he may happen to be, is the *general* fact by convention or custom in the whole commercial world; that the case of Turkey, however, is a nearly solitary exception; and that of the United States and Sweden another exception, and of the same class of cases with that of Turkey; while he fails to remark that the wide differences of which he speaks in the nature of the consular powers in different States, are differences chiefly out of Christendom; and, in the general tenor of his observations, as well as going to the United States for an example, he *implies* that, (except in the case of Turkey,) Great Britain makes no such stipulation.

In truth and fact, the subjection of foreigners, in all criminal matters, and in most civil, to the local jurisdiction, and the consequent limitation of the powers of consuls, is the general fact in the States of Christendom.

In States not Christian, on the other hand, the general fact is the exemption of Christians from the local jurisdiction. Where the course of commerce admits of the residence of consuls in such non-Christian States, the exemption of the Christian from such local jurisdiction is secured through them; and if there be no consuls there, then through the agency of other officers appointed by the Christian Covernment.

Take the practice of Great Britain as an example. In no part of Asia, Africa, or America, so far as I remember, has the British Government ever admitted the subjection of her people to the local authorities, unless the local authorities were Christian, they being, in the latter case, with one or two exceptions, (such as the Sandwich Islands,) either European colonies or new States formed of such colonies. At the present time she secures this exemption in Morocco, in Turkey, in Egypt and the other African States, of which Turkey is the real or nominal suzerain, in the dominions of the Imam of Muscat, and of other independent Arabic or Mohammedan princes in the East, and in China, by means of consuls or other resident agents of the same character. Formerly she attained the same object in Turkey proper, through the instrumentality of the Levant Company, as she did throughout the countries beyond the Cape of Good Hope by that of the East India Company; those companies having factories or forts in the ports of Asia and Africa, for the separate residence and government of British subjects, which factories or forts, indeed, formed the nucleus of the British conquests in India. Gradually, as the privileges of the Levant Company and of the East India Company were withdrawn or restricted in scope, British consular establishments took the place of British factories, as in Turkey and China. And such has been the practice of all the other States of Christendom, in their commercial relations and intercourse with the non-Christian States of Asia and Africa.

In regard to the provision of the treaty between the United States and Sweden, it is by no means a solitary case. There is a stipulation to the same effect in the 8th article of the subsisting treaty of commerce between the United States and Russia; a similar power was mutually conceded to consuls by the (extinct) consular convention between France and the United States of 1778; as also in the treaty of commerce concluded on the

17th of August, 1817, between Great Britain and Brazil, which stipulates that "the consuls and vice consuls of the two nations shall, each in his respective residence, take cognizance and decide upon the differences which may arise between the subjects, the captains and crews of the vessels of their respective nations, without the intervention of the authorities of the countries, unless the public tranquillity demand it, or unless the parties themselves carry the affairs before the tribunals of the territories in which the differences arise." Here the jurisdiction given to British consuls in Brazil is much greater than that which is given to American consuls in Sweden and Russia. In the former case the jurisdiction is *complete*, (with consent of parties,) and *seems* to extend to all British subjects. In the latter case, it is but a power of temporary arbitration, the effect of which ceases on the return of the parties to their own domicil, and applies only to controversies between masters and seamen of merchant ships; a class of controversies, which, in Christendom generally, are committed more or less to the jurisdiction of foreign consuls; it being a rule of the European law of nations that a ship, even a merchant ship, is to be deemed in many relations a portion of the territory of the country to which she belongs; in accordance with which the acts of Congress give to our courts jurisdiction of crimes committed on board American vessels in foreign ports. But the British treaty cited apparently covers British subjects on shore, in Brazil. And, in Portugal, all subjects of Great Britain enjoy the advantages of a peculiar and distinct (though a local) magistrate, called *juiz conservador*, as they did in Brazil, when it formed an integral part of the Portuguese monarchy. And, if I had the means of research at hand, I might, I doubt not, find equally pertinent cases of the same sort in the treaties between Great Britain and other States of Christendom.

But neither the consular jurisdiction secured in the treaties of commerce between the United States and Sweden and Russia, nor that of the British treaty with Brazil, belongs to the same class with the consular jurisdiction which Great Britain exercises in Turkey.

In many parts of Europe, indeed, to this day, foreign consuls exercise, either of right or by consent of parties, more or less of judicial power over subjects of their sovereign, but it is in general limited to commercial questions between their countrymen, especially the seamen of their country, and does not extend to criminal matters; all which last, in general, fall under the jurisdiction of the local sovereign.

It is altogether otherwise in the case of European subjects residing or sojourning in States not Christian.

In the United States, at the present time, it is undoubtedly the general rule of law, that no foreign Power can, of right, institute or erect any court of judicature, of whatever kind, within the jurisdiction of the United States, unless such as may be warranted by and in pursuance of treaties; and we have no subsisting treaties, I believe, which confer on foreign States any rights of jurisdiction in the United States, except of the qualified and limited nature stipulated for in the treaties with Russia and Sweden. Consequently, though in cases of intestacy, and various other civil questions, the law of *domicil* applies to the rights of foreigners residing or sojourning in the United States, yet the questions are to be adjudicated, or rather the rights enforced, in the courts of the country; and, in criminal matters, not the ordinary subjects of a foregin State alone, but even its consuls, are in like manner subject to the jurisdiction of the local authorities. Ou

courts of law have had occasion to recognise expressly the rights of exterritoriality in the case of foreign ministers and foreign ships of war, and they would undoubtedly, if occasion required, and the emergency arising, recognise it in the other cases, to which it is accorded by the European law of nations. But, with these exceptions, they receive and act on the doctrine that the jurisdiction of the nation is *de jure* absolute and exclusive within the territory of the United States.

And our courts do, in terms, attribute to *all* other nations the same exclusive jurisdiction within their respective territories, and the waters adjacent thereto; from which they deduce the general inference, also, that consuls universally, except those in the Barbary States, are merely and exclusively commercial officers, and subject, as such, to the local jurisdiction. But I apprehend they have, in these cases, while using such language of absolute generality in this relation, omitted to reflect that the principles they were laying down, instead of meeting with exception in the Barbary States only, do, in truth, apply to the international intercourse of no States but those of Christendom. For, in regard to the various Mohammedan States, which alone, in a large part of Asia and Africa, are possessed of strength and stability enough to be treated as Governments, I conceive that the universality of the practice, anterior to treaties, and still more, when confirmed in signal instances by treaties, of conceding to Christian foreigners exemption from the local jurisdiction, renders such a practice a part of the law of nations, as against them, just as much as in the same way the opposite rule has come to be the doctrine of the law of nations within the limits of Christian States.

All the reason of the thing, which dictates the assertion of such a right in behalf of Christian foreigners in the Mohammedan States, applies with equal force to the Pagan States of Asia and Africa.

If any reasonable question could exist on the subject, so far as regards the Mohammedan States, our treaties with the principal among them, to wit, the Barbary States, the Porte, and the Imam of Muscat, have put an end to such questions.

In regard to Pagan States, there is none of any magnitude, within which citizens of the United States are found residing, or with which we have extensive commercial intercourse, except the great Empire of China, itself occupying nearly half of Asia.

Questions of jurisdiction have arisen frequently in China, and these questions have not been without difficulty, arising from the peculiar character of that Empire, and the want of clear and fixed ideas on the subject among Europeans as well as Americans.

Nothing, it would seem, correspondent to our law of nations, is recognised or understood in China. I had some evidence of this in the progress of my own intercourse with the Chinese authorities; and there is abundance of public facts to the same effect. When, for example, Commodore Anson visited China, in 1741, the Chinese claimed to apply the municipal law to the Centurion, as they have repeatedly, since then, sought to do in case of other ships of war, those of the United States as well as of Europe. In the progress of the late events, we have seen the Chinese Government subject a diplomatic agent of Great Britain to personal restraint, and undertake to restrain the consuls of *all* foreign Powers, in order to enforce the submission of the subjects of one Power. Subsequently, during the prosecution of hostilities, the Chinese paid no regard to flags of truce, and treated

prisoners of war of both sexes as common felons. These things evince utter ignorance, or at least disregard of the law of nations, as understood in Europe. Similar inferences are deducible from the fact, that formerly, all ministers of European States in China (except perhaps those of Russia) were compelled to admit, either directly or indirectly, the sovereignty of China; for the several Dutch and Portuguese ministers who visited Peking did homage to the Ta Howang Tei; and even Lord Macartney and Lord Amherst, though the former peremptorily refused to do homage, and the latter was reluctantly persuaded by Sir George Staunton to refuse it, yet went to Peking, both of them, knowingly and with tacit acquiescence designated as tribute bearers.

With such extravagant political pretences, it is to be supposed, of course, that the Chinese Government would assert a complete and exclusive municipal jurisdiction over all the persons within the territory and waters of the Empire. Accordingly, when crimes have been committed by Europeans other than Portuguese in China, the Government has never failed to assert jurisdiction over the case, to seize the accused if accessible on land, and to demand his surrender if on board ship in the waters of China; which claim of surrender has been sometimes successfully resisted, but has also been acquiesced in sometimes by vessels belonging to various European States.

Thus, in 1780, a French seaman, who killed a Portuguese seaman in one of the hongs at Canton, was delivered up to the local authorities, by whom he was tried, convicted, and executed, for the crime.

In 1784, the gunner of an English merchant ship, which, in firing a salute, had accidentally killed a Chinese, was given up, and strangled therefor, by the order of the Chinese Government.

Other cases have occurred of the same nature, affecting one or another of the European Governments, which I pass over to refer to the single instance of surrender in which the United States were involved. This was the case of an Italian sailor named Terrannova, on board the American ship the Emily, who, whether rightfully or not is immaterial to the immediate question was accused of causing the death of a Chinese boat woman, alongside of the vessel whilst lying, in 1821, at the anchorage of Whampoa. Terrannova was demanded by the Chinese, and at length surrendered to them, taken on shore, and strangled. To be sure, Terrannova was not an American, but, being a seaman on board an American ship, it was regarded as a recognition of the right of local jurisdiction by Americans.

In all these cases, the Chinese enforced a reluctant submission on the part of the foreign residents, by stopping or threatening to stop all trade. And the foreign residents were the less able to defend themselves against the claims of the Chinese, from not having any distinct perception of the true principle of public right which governed the subject.

Europeans and Americans had a vague idea that they ought not to be subject to the local jurisdiction of barbarian Governments, and that the question of jurisdiction depended on the question, whether the country were a civilized one or not; and this erroneous idea confused all their reasonings in opposition to the claims of the Chinese; for it is impossible to deny to China a high degree of civilization, though that civilization is, in many respects, different from ours; yet the magnitude of the Empire, the stability of its political institutions, the great advancement which the Chinese have made in the arts of life, the sedulous cultivation of letters, as well as the other useful and ornamental objects of intellectual pursuit, are such as to

give to China as complete a title to the appellation of *civilized*, as many if not most of the States of Christendom can claim. And while repudiating the jurisdiction of the local authorities in China, Europeans and Americans failed to perceive that the rejection of that jurisdiction implied the claim and admission of the jurisdiction of their own Government.

Captain Elliott, whose proceedings in China have received less of approbation than they deserve, had a right conception of the true point of this question. At an early stage of the late controversy between his Government and that of China, a number of English sailors, charged with homicide by the Chinese, were demanded of Captain Elliott, which demand he firmly resisted, himself taking jurisdiction of the case, as the plenipotentiary of his Government, and, after investigation of the facts, refusing to proceed against the parties, from conviction that they were innocent, or, at any rate, justifiable under the circumstances; after which, so far as concerned Great Britain, the whole matter was definitively settled by the late treaties, which secured to British subjects in China perpetual exemption from the local jurisdiction, as elsewhere in Asia, and exclusive subjection to the laws and authorities of their own Government.

It may be that I trespass on your indulgence by entering at so much length into this question; but it is one of great importance in itself, rendered more so by late events, which give to it a novel aspect in some respects; and, without such a detailed exposition, I could not do justice either to my own convictions, or to the course which those convictions impelled me to pursue in the negotiations appertaining to the treaty of Wang Hiya.

I entered China with the formed *general* conviction, that the United States ought not to concede to any foreign State, under any circumstances, jurisdiction over the life and liberty of any citizen of the United States, unless that foreign State be of our own family of nations; in a word, a Christian State.

The States of Christendom are bound together by treaties, which confer mutual rights and prescribe reciprocal obligations. They acknowledge the authority of certain maxims and usages received among them by common consent, and called the law of nations, but which, not being acknowledged and observed by any of the Mohammedan or Pagan States, which occupy the greater part of the globe, is *in fact* only the international law of Christendom. Above all, the States of Christendom have a common origin, a common religion, a common intellectuality, associated by which common ties, each permits to the subjects of the other in time of peace ample means of access to its dominion for the purpose of trade, full right to reside therein, to transmit letters by its mails, to travel in its interior at pleasure, using the highways, canals, stage coaches, steamboats, and railroads of the country as freely as the native inhabitants. And they hold a regular and systematic intercourse, as Governments, by means of diplomatic agents of each residing in the Courts of the others, respectively. All these facts impart to the States of Christendom many of the qualities of one confederated republic.

How different is the condition of things out of the limits of Christendom! From the greater part of Asia and Africa individual Christians are utterly excluded, either by the sanguinary barbarism of the inhabitants, or by their phrenzied bigotry, or by the narrow-minded policy of their Governments; to their courts, the ministers of Christian Governments have no means of access, except by force and at the head of fleets

and armies; as between them and us, there is no community of ideas, no common law of nations, no interchange of good offices; and it is only during the present generation that treaties, most of them imposed by force of arms or by terror, have begun to bring down the great Mohammedan and Pagan Governments into a state of inchoate peaceful association with Christendom.

To none of the Governments of this character, as it seemed to me, was it safe to commit the lives and liberties of citizens of the United States.

In our treaties with the Barbary States, with Turkey, and with Muscat, I had the precedent of the assertion, on our part, of more or less of exclusion of the local jurisdiction, in conformity with the usage, as it is expressed in one of them, observed in regard to the subjects of other Christian States.

Mr. Urquhart thinks these concessions have been unwise on the part of the Asiatic and African States. It may be so, for them; but it will be time enough for them to claim jurisdiction over Christian foreigners, when these last can visit Mecca, Damascus, Fez. or Peking, as safely and freely as they do Rome and Paris, and when submission to the local jurisdiction becomes *reciprocal.*

Owing to the close association of the nations of Christendom, and the right their people mutually enjoy and exercise, of free entry into each other's country, there is reciprocity in the recognition of the local jurisdiction. Not so in the case of the great Moslem or Pagan States of Asia and Africa, whose subjects do not generally frequent Europe and America, either for trade, instruction, or friendship.

In China, I found that Great Britain had stipulated for the absolute exemption of her subjects from the jurisdiction of the Empire; while the Portuguese attained the same object through their own local jurisdiction at Macao. And, in addition to all the other considerations affecting the questions, I reflected how ignominious would be the condition of Americans in China, if subjected to the local jurisdiction, whilst the English and the Portuguese around them were exempt from it.

I deemed it, therefore, my duty, for all the reasons assigned, to assert a similar exemption in behalf of citizens of the United States. This exemption is agreed to in terms by the letter of the treaty of Wang Hiya. And it was fully admitted by the Chinese in the correspondence which occurred cotemporaneously with the negotiation of the treaty, on occasion of the death of Shu Aman.

By that treaty, thus construed, the laws of the Union follow its citizens, and its banner protects them, even within the domains of the Chinese Empire.

The treaties of the United States with the Barbary Powers and with Muscat confer judicial functions on our consuls in those countries; and the treaty with Turkey places the same authority in the hands of the minister or consul, as the substitute for the local jurisdiction, which, in each case of controversy, would control it if it arose in Europe or America. These treaties are, in this respect, accordant with general usage, and with what I conceive to be the principles of the law of nations in relation to the non-Christian Powers. In extending these principles to our intercourse with China, seeing that I have obtained the concession of absolute and unqualified exterritoriality, I considered it well to use in the treaty terms of such

generality in describing the substitute jurisdiction, as, while they leave unimpaired the customary, or law of nations jurisdiction, do also leave to Congress the full and complete discretion to define, if it please to do so, what officers, with what powers, and in what form of law, shall be the instruments for the protection and regulation of the citizens of the United States.

And it only remains, in case the treaty shall be ratified, to adopt such legislative provisions as the wisdom of the President and of Congress may devise or approve, to give effect to the concessions which the Chinese Government have made in this matter, and which seem to me so important in principle and so essential to the honor and interests of the United States.

I am, with great respect, your obedient servant,

C. CUSHING.

Hon. JOHN C. CALHOUN,
Secretary of State.

Mr. Cushing to Mr. Calhoun.

[No. 98.] UNITED STATES BRIG PERRY,
October 1, 1844.

SIR: I cannot forbear to express a strong conviction of the expediency of making some new and permanent provision for the future official intercourse between the United States and China, in consideration both of the magnitude of our existing interests in that empire, and still more of those which may be expected to grow up under the provisions of the treaty of Wang Hiya.

The ordinary commercial and other concerns of the United States in China call for the appointment of a public functionary there of a higher class than a mere unpaid consul, himself engaged in mercantile concerns, and for that reason not possessing the independence of position which is desirable in relation to his own countrymen as well as to the Chinese, among whom commercial pursuits are not held in distinguished estimation.

The force of these considerations is augmented by the fact of the privilege of exterritoriality being conferred on citizens of the United States in China, and great additional power and responsibility being thus deferred to and imposed on our public officers there, as explained in my despatch of the 29th of September, numbered (97) ninety-seven.

What opinion the British Government entertains of this matter may be inferred from its practice. In addition to its military establishment, it has a plenipotentiary permanently residing in Hong Kong; and it has, besides, paid consuls in each of the Five Ports, one of whom is of the rank of consul general. The French have also both a plenipotentiary and a consul general.

And I do not well see how our own interests in China can be guarded, or our national character honorably maintained, without the appointment of a resident minister or commissioner from the United States.

I am, with great respect, your obedient servant,

C. CUSHING.

Hon. JOHN C. CALHOUN.