

Directors

March 26, 1938

MATERIALS REGARDING PROBLEM OF CLAIMS FOR THE UNIVERSITY OF NANKING

Under date of Feb. 21, 1938, a circular of information was addressed to American citizens and organizations in Nanking by Mr. Allison of the American Embassy, beginning with these words: "It is desired that American citizens and organizations prepare and submit in the near future to the Embassy whatever claims for losses or damages they may wish to have presented to the Japanese or Chinese authorities."

We do not know of any possible claims against the Chinese authorities by the University or by members of its staff, except for damage to farms outside the city. That problem is a large one, but at the moment is not a live issue, for the following reasons: (1) Our evidence is thus far incomplete; (2) there is no indication of willingness on the part of the Chinese authorities to consider such claims; (3) such claims would probably be opposed both by the Chinese authorities and by a portion of our own organization and constituency, on the grounds that the destruction was undertaken for reasons of military necessity in self-defence.

Japanese injury to the property rights of the University and of Americans upon its staff seems to fall in a different category: (1) evidence is considerable and convincing; (2) the Japanese authorities have upon several occasions indicated their intention to reimburse Americans for losses at the hands of the Japanese forces, including, as we understand, a formal statement to Mr. Grew by Mr. Hirota with the specified exception of losses due to military operations -- the wording seemed to refer to destruction by shell fire, or the like; (3) with minor exceptions, our losses at the hands of the Japanese were due to acts unjustified by any arguments whatever. (For the time being, we are not raising the question of the destruction of a large farm, for which there is evidence, but inadequate evidence thus far, to put the responsibility upon the Japanese Army).

The losses of American members of the staff are being handled individually. We are here concerned with damage to University buildings, consisting mainly of smashed doors and windows, and of two moderate injuries by shells (the latter a type of damage for which the American Government insists that Japan is liable); and with the theft of equipment of various sorts, notably of valuable animals. The amounts concerned are not large: in American dollars about three hundred for the building items, and something over two thousand for the equipment. However, we suggest that the principles involved should be considered with care, for at least two reasons: (1) other institutions in somewhat analogous positions may have to face the same issues and may benefit from our effort and experience; (2) it is conceivable that during the coming decade some Christian institutions in China may need to be liquidated or to be radically reorganized, in which circumstances determination of legal ownership of all forms of property in the hands of the institution may be required.

Views for and against the claiming of compensation through governmental agencies will not be discussed here in relation to general principles. The particular circumstances provide two arguments for claims: (1) if the injuries inflicted by disorderly conduct of the Japanese Army result in costly compensation, there may be some deterrent effect upon such conduct during the remainder of the war -- and vice versa; (2) failure to file such ~~as~~ claims ~~as~~ are decided to be fully justified, will be a support to the view of some Japanese that the University is really Chinese and therefore subject to their will

without reference to American interests, and, less importantly, will be a psychological repudiation of the previous efforts by report and protest to check the depredations of the soldiers and secure a measure of ordinary protection for the University property -- a process still continuing.

The writer of this paper is not trained in the law, and it may be that a lawyer could cut through the whole problem in one stroke. However, the documents affecting the problem of determining ownership seem to a layman to be plentifully involved if not actually inconsistent. We have used the Constitution of the University of Nanking, which is essentially a Constitution of the Board of Founders but includes the Constitution of the Board of Directors (in China, a majority of the Board to be Chinese citizens, and the Board registered with the Ministry of Education); the Agreement between the Board of Directors and the Board of Founders; schedules of land, buildings, and equipment called for in the Agreement, revised at renewal of the five-year lease of the property by the Board of Founders to the Board of Directors; also the By-Laws of both Boards. The copies now available in Nanking were found in general storage files. They are not all dated, and it is impossible to be certain that they are up-to-date as regards amendments. Since what is put down here is suggestive only, there will be no attempt to give complete quotations and references to these documents.

Before proceeding further, we record items (3) and (4) from the Embassy circular of February 21, referred to above:

"3. Any losses sustained by organizations not incorporated in the United States may be the subject of claims by the American Government on behalf of citizens of the United States only to the extent of the American ownership of the assets of such organizations. For example, if twenty-five per cent of the stock of a foreign corporation is owned by American nationals a claim may be filed on behalf of those nationals for twenty-five per cent of the corporation's losses.

"4. Bonafide American interests in an unincorporated organization are similarly entitled to claim to the extent of the ownership of the assets of such organizations, but the mere fact that the organization was founded and aided by Americans or American money, or the fact that it operated on American property is not material."

These items were in part called forth by previous inquiries from the writer, and are based upon information freshly received from the Department of State.

The true questions for inquiry would seem to be: (1) Were the items of property concerned American-owned, or not? (2) If certain of the items were partly owned by Americans, what is the fraction or the method of determining the fraction?

Both in charter relationships and in actual practice, the connections of the Board of Founders with the Board of Directors may be viewed in two lights: (1) as the cooperation of two separate entities, each of which has property rights; (2) as a delegation of administrative responsibility, or a designation of agency, from the Founders to the Directors, for the carrying out of the purposes of the former and within the legal prescriptions of the former's Charter and Constitution.

It does not appear from the documents that the Board of Directors has exercised its rights to hold property in respect of land, build-

ings, and equipment. Section 7 (Building and Property Committee) of Article III of the By-Laws of the Board of Directors, declares: "The title to all lands and buildings added by the Board of Directors shall, until further arrangement, be vested in the Board of Founders." This clause does not refer to equipment, much less to current supplies. However, the schedules of equipment called for by the Agreement (of which I have summaries dated November 1933, as of the first quinquennial renewal), imply ownership of all equipment by the Founders, for their completeness includes such classes as athletic equipment, books, and even musical instruments. The summaries contain no specification of agricultural tools or stock as such.

The Constitution of the University, article III Section 4 Powers of the Board of Founders, A §, declares that all property shall be administered by the Board of Founders or their successors; and that the titles of all owned property are vested in the University of Nanking, but that this provision shall not prevent the Board of Directors from holding and administering endowment funds raised in China. The Constitution seems to look upon the Founders as the essential property-holder, and the Directors as ^{their} administrative agent, with power to hold supplementary properties, not yet exercised in a distinctive manner -- at least in regard to real property and physical equipment. Article III Section 4 B 2 provides for delegation by the Founders to the Directors of administrative responsibility according to the Directors' pleasure, and within the permission of the law (of the Charter by the ~~State~~ State of New York).

Article IV of the Constitution of the University and Article V of the Constitution of the Board of Directors both give to the Directors comprehensive powers of management in China in accordance with the defined purpose of the University. They do not, however, imply ownership or ultimate authority. The Founders lease to the Directors the grounds, buildings, and equipment "of the University" (Agreement, Section III), and the Directors are referred to as responsible administrators according to their Constitution. The Directors' Constitution is also part of the Agreement. It may be amended only with the approval of the Founders, of whose Constitution (the Constitution of the University of Nanking) it is a part. The conditions of the lease are strict, requiring detailed measures of upkeep of the property, and providing for reentry by the Founders in case of failure of the Directors to conduct the institution in accord with the Constitution. The agency concept is found also in the provision that the President of the University (elected by the Directors) shall be the official representative (in China) of the Board of Directors, though supplemental representation is also provided.

The working basis is that of mutual trust and cooperation between the Founders and the Directors in the conduct of the whole institution through the President and staff. The minimum of legal prescription is laid down, and that largely to guard against possible political pressure from without, or forcible interference with the normal functioning of the University. A basically American institution wished to adapt its effort increasingly to Chinese conditions, and made over its organization in the conditions of 1927-1928. Hence we find ingenious combinations of delegation of authority to a quasi-corporation that is predominantly Chinese with American aid and participation, and of reserving rights of ownership and maintenance of purpose to the American corporation. An analysis of the various uses of the term "University of Nanking" in these documents and in current usage will indicate the difficulties, which have been met well enough in friendly practice.

The Agreement wisely stipulates that (Section III, 6) "In the event of a cancellation of the lease or of other disposition of the property, a settlement of conflicting interests shall be secured through conference between the Board of Directors and the Board of Founders, or, if necessary, by arbitration." This implies a potential division of property, or at least a recognition of two cooperating owners, though the Directors seem to have done little as owners separate from the "University of Nanking" in the sense of the Founders with the Directors as their administrative organ in China.

The simplest way to meet the issue is to file no claim, whether on grounds of principle, or expediency, or of escape from a tedious job. Another method would be to report only for buildings and permanent equipment unmistakably and obviously the property of the Founders. A third would add the value, or a percentage of value, for the miscellaneous equipment and the animals, if it is right and possible to adduce proof of American ownership.

It does not seem that current supplies have been considered the property of the Board of Founders. What is the line between equipment and supplies? Animals appear to be permanent neither in place nor in time. Yet they are a more lasting and professionally significant part of the equipment of College of Agriculture than are short-lived electric bulbs or some of the more transient types of laboratory equipment which must be continually replaced. With just what funds were the animals purchased, or does that bear upon the question, assuming that their origin and use was distinctive?

There are hints that we may at various times be challenged to back up our current position that our property is American. Whatever is done must look to clear demonstration, for we are compelled to meet a logic and an illogic not our own.

The writer feels that it is his duty as custodian in an emergency, to propose the presentation of full claims, asking the advice of the President and other administrative personnel in Chengtu, of the Chairman and perhaps of other members of the Board of Directors as he may suggest, and of the ~~XXX~~ interested Committees of the Board of Founders, whose authority and trusteeship are most significantly involved. Preliminary inquiries have already been sent out, and promptness is desirable. Such missionary consultation as is available appears to be unanimous in favor of claims so far as ownership can be demonstrated. In Nanking we are sceptical of performance of Tokyo promises. But that does not affect the problem of rights and duties. Moreover, it seems clear that any failure to file claims for certain items of property belonging to "the University of Nanking" will be interpreted here as recognition that such property and all that can reasonably or unreasonably be assimilated to it, will be considered Chinese rather than American, and therefore subject to confiscation or to reorganization at the will of the current authorities. The losses were "viewed" on the spot by the Chief of Police for the Japanese Embassy (now Consulate-General) in my company, at the Embassy's own request.

The proposal here made is to be regarded as an inquiry, put in the form of a recommendation in order to expedite a decision, but with no intention of forcing the minds of those more truly responsible than the writer. No irrevocable step has been taken, and the proposal may be rejected or modified as facts and judgment dictate. On some points our information and experience is plainly incomplete, and our own opinion is put forward out of long perplexity.

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M. S. B.