

In concluding the discussion under the group (II., Civil Jurisdiction) Mr. Zappe drew attention to the desirability of putting into more practical form and more in unison with European principles the Tariff of fees and costs now in force in Japanese Courts.

The President replied that this subject should receive consideration and that copies of the Tariff should be furnished to the Foreign Representatives. He believed that the fees and costs in Japanese Courts were lower than those in foreign courts.

The following order of subjects to be discussed at the ensuing meeting was then agreed to:

Group III, Criminal Jurisdiction, divided into six headings.

1. Direct application to foreign Courts.
2. Right of arrest.
3. Right of police to enter houses.
4. Absence of competent courts.
5. Compulsory attendance of witnesses.
6. Absence of accessible courts of appeal.

The meeting was adjourned at a quarter to six.

## PROTOCOL No. 4.

MEETING OF 16<sup>TH</sup> FEBRUARY, 1882.

The Conference assembled at 2 P. M.

Present:

For Japan,

Mr. Inouye Kaoru and Mr. Shioda Saburo;

For Austro-Hungary,

The Chevalier Hoffer von Hoffenfels;

For Belgium,

Mr. Scribe;

For France,

Mr. Guillaume de Roquette;

For Germany and the Swiss Confederation,

Mr. von Eisendecker and as second delegate for Germany, Mr. Zappe;

For Great Britain,

Sir Harry S. Parkes;

For Italy,

The Chevalier E. Martin Lanciarez;

For the Netherlands, for Sweden and Norway, and for Denmark,

Mr. van der Pot;

For Russia,

Baron Rosen;

For Spain,

The Chevalier Don Luis del Castillo y Trigueros.

The President announced that he had received a telegram from the Belgian Government, informing him that Mr. Scribe had been appointed Charge' d'Affaires *ad interim* for Belgium, and in that capacity was instructed to represent that Power at the Conference. The President had therefore invited him to take his place among the Delegates of the European Treaty Powers.

A letter to the same effect from Mr. Scribe to the Minister for Foreign Affairs was read.

Copies of the above letter and telegram are annexed to this protocol.

Sir Harry Parkes on the part of the Diplomatic Body welcomed Mr. Scribe as a member of the Conference.

Protocol No. 3 was then read and signed.

Mr. Inouye desired to make the following observations upon the memorandum read by the Minister of Holland at the meeting of the 8th February, inserted in Protocol No. 3.

He desired in the first place to express his satisfaction at finding that Mr. van der Pot concurred with his views on two points, namely that the right of travel in the interior should not extend to merchant Consuls and that all permanent and provisional Consular appointments should be officially communicated through the Diplomatic Representative.

With regard to the remaining observations contained in the Memorandum he might be permitted to reply, that in drawing the attention of the Conference to the inefficiency of the system of merchant-consuls, it was not his intention to complain of partiality in individual cases, but merely to express his doubt, whether the administration of Justice could be safely left in the hands of persons whose vocations were likely to bring them into personal contact with matters which they might afterwards be called upon to deal with as judges.

It was a well-recognized principle that judges should occupy an independent position and be entirely free from all bias concerning the questions they were called upon to decide. He had consequently recommended that judicial powers should not be conferred upon merchant-consuls, under which term he included all persons engaged in commerce or following any private vocation, as distinguished from Consuls de carrière.

In regard to criminal jurisdiction, he entertained still greater doubts whether the possession by a merchant-consul of the requisite legal acquirements for the position of judge or president of a consular court could be sufficiently guaranteed.

He entertained the highest respect for the character and upright intentions of the persons selected by those Treaty Powers which are in the habit of appointing merchant-consuls, but he did not consider that these qualities sufficed to make them competent judges in the difficult and intricate legal cases arising at the Treaty ports. He would add to this the well known fact that the merchant consul was often not of the nationality, and was unacquainted with the language, of the country which he represented, circumstances which in his opinion must render it difficult for such consul to interpret and apply the law of that country.

With regard to cases in which the Consul was a defendant in his national court, Mr. Inouye did not feel entirely satisfied with the remedies referred to by Mr. van der Pot.

In the one case the special court would be presided over by an assessor not otherwise holding an official position and in the other by the Consul of another nationality.

It might be questioned whether a court so constituted could be considered to possess the power of executing its decisions.

In his opinion such arrangements partook simply of the character of arbitration, to which the parties submitted voluntarily. It would however he thought, be undesirable to bring before the Conference the details of cases on record in which the course of justice had been delayed or obstructed by the system of merchant-consuls. He regretted, therefore, his inability to comply with Mr. van der Pot's desire to be informed of the circumstances of the cases alluded to unless, indeed, the Conference should request it. He was of opinion, however, that the cases complained of were not exceptions, but were the result of faults inherent in a system

which he trusted all the Treaty Powers would agree to modify.

The Japanese Government was in his opinion concerned equally, if not more, than the Foreign Powers in the administration of justice on its own soil, both on general grounds, and also in the interest of its subjects who formed an overwhelming majority of the population of the open ports.

Mr. Inouye observed, however, with pleasure that the Delegates of the other Powers present at the previous meeting concurred in his suggestion, and that the Government of the Netherlands likewise proposed to appoint Consuls de carrière to exercise judicial functions. He hoped, therefore, that Mr. van der Pot would favourably recommend the same course to the other Governments which he represented, and induce them to give their assent to the principles advocated by him.

Mr. Inouye desired to add the remark that rights of jurisdiction had been conceded by Japan to each Power in the some manner as to all, and the responsibility had been equally accepted by all. But in fulfilling the obligations appertaining to those rights they had adopted different modes of procedure, the consequence of which were serious enough to justify him in bringing them to the attention of the Conference. He would suggest that the various Powers should adopt an uniform principle in the exercise of this jurisdiction.

Mr. van der Pot replied that the observations he had made referred to the proposal not to recognize the judicial authority of merchant-consuls, but that he was quite willing to recommend to the Governments of Stockholm and Copenhagen the adoption of a system of Consular jurisdiction more in conformity with that carried on by other Treaty Powers, though he could not undertake beforehand any obligation in the matter on their behalf.

Sir Harry Parkes observed that all the Powers recognized the necessity of taking adequate measures for ensuring the efficient administration of justice by the Consular Courts.

The consideration of the questions included under Group III "Criminal Jurisdiction" was next proceeded with.

Under Heading 1, Direct Application to Foreign Court, Mr. Inouye wished to draw the attention of the Conference to the fact that difficulties had been experienced owing to the system which required that a complainant, however petty the offence of which he complained or the claim which he had to put forward, could only proceed to obtain redress by making formal application through his own authorities instead of taking his complaint at once to the Court where the offender would be tried. This rule applied to civil as well as to criminal matters, but in the case of the latter it might happen that the delay and inconvenience thus suffered might entail consequences of considerable gravity, since owing to this practice it might happen that offences capable of being easily dealt with at the moment, might sometimes escape unpunished owing to the criminal having time to make his escape. He had reason to think that the principle proposed by him was regarded with favour by many of the Consular body, and believing that if it were put into practice, the administration of justice would be greatly facilitated, he begged to submit for the consideration of the Conference the desirability of agreeing to an arrangement by which in all civil and criminal cases the plaintiff should have the option of

making direct application to the Court of the defendant or offender. It would naturally still be in the power of the respective authorities to bring the complaint before the other Court through the official channel, and in the case of Japan the new Code of Criminal Procedure provided the proper officers for this purpose, namely the public prosecutors (Officiers du Ministère public). The exact form which official action should take might be decided hereafter.

Sir Harry Parkes stated that Japanese subjects were free to enter the British Consular Courts direct, either in civil or criminal cases, if they wished to do so, and he considered it very desirable that British subjects should have similar liberty to enter Japanese Courts directly, especially in minor criminal matters, but the Japanese Local authorities had hitherto insisted on receiving all complaints, even in police cases, only through the Consuls. The procedure observed in civil cases brought by British subjects in Japanese Courts was arranged between the Japanese Foreign Minister and himself in 1877. He begged to lay before the Conference a copy of this arrangement embodying all the forms to be used in such cases, which had been drawn up with great care. The system so arranged had worked well, and he would not wish it to be lightly abandoned, but he admitted that subsequent improvement in Japanese civil procedure generally might now render some modification of this system desirable.

The French and German Ministers were of opinion that in all cases it should be optional for the complainant to go direct to the Court of the defendant or offender, or to bring his complaint through his own authorities.

The proposal of the Minister for Foreign Affairs was then unanimously agreed to, with the reservation that plaintiffs should have option of proceeding direct or through the intervention of the authorities of their own nationality.

With respect to the 2nd and 3rd Headings, Right of Arrest, and Right of Police to enter Houses, Mr. Inouye proposed to defer their discussion to the next meeting, as these subjects seemed to be intimately connected with the questions of Administrative Regulations which formed Group IV.

Fourth Heading, "Absence of Competent Courts." Mr. Inouye desired to draw the attention of the Conference to two questions connected with this subject. The first of these was that some Treaty Powers had no Court in Japan empowered to deal with the graver class of crimes, and secondly that some of the Treaty Powers had no Court at all at some of the ports. It seemed to him very desirable to consider what improvements could be made in the existing system. There was no doubt that the Consular Courts in general exercised a comparatively extensive criminal jurisdiction, and consequently that cases in which a miscarriage of justice had taken place were comparatively rare, but when they did happen they were unfortunately of so grave a nature as to require serious attention. There had been instances of murder being committed by subjects of a Treaty Power, whose tribunal was it appeared unable to inflict a punishment heavier than that accorded to manslaughter, namely ten years imprisonment, and it was not impossible that some of the Consular Courts as at present constituted, might have equally limited powers of dealing with crimes on the spot. In the case of some Consular authorities there existed the power of sending important criminal cases for trial elsewhere. He

desired to submit to the appreciation of the Conference the question whether this practice might not in some instances tend to defeat the ends of justice, owing to the impossibility of transferring all the witnesses. He would be glad if the Powers were willing to recognize the necessity of making more ample provision for the administration of justice on the spot. He would suggest that each Power might establish at least one Court of plenary jurisdiction in Japan for criminal cases. It would at the same time be desirable to create the means of trying a case at the Port where the offence had been committed, and he suggested that this might be done by empowering the judge to transfer his Court to the locality, instead of having the trial removed to the ordinary seat of the proposed Court. With regard to small offences it was still more obvious that the complainant should be able to obtain complete and speedy justice on the spot, instead of being compelled to go to another port at perhaps, a considerable distance.

The following consideration would show the necessity of this very clearly. A large portion of the foreign population consisted of seamen of various nationalities who were perpetually moving from one place to another, and experience had shown that a majority of the offences committed by Foreigners occurred among this floating population. If cases had to be transferred from one place to another, it would often become impossible to keep the witnesses at hand during the length of time required for this purpose. The reason why this had a different effect on the criminal side from what it had on the civil was that in civil suits the Courts of most nationalities allowed the evidence of persons about to leave the country, to be taken in writing to be used at the trial, while this could not be done in criminal cases. In these it was almost universally necessary that the witnesses, beside giving evidence at the preliminary inquiry, should also be present personally to repeat their testimony at the trial. Upon these grounds he begged to submit to the Conference the desirability of taking these questions into consideration.

Mr von Eisendecher remarked that the expression of this wish was perfectly natural, and could not be contested in principle. At the same time it would be extremely difficult and in some cases almost impossible to give practical effect to it, for more than one reason.

The constitution of a jury for the trial of the graver offences would meet with particular difficulties. In some ports the number of residents of certain nationalities was too small to furnish a jury list. In the case of Switzerland, which he had the honour to represent at the Conference, he could state that the adoption of the principle was probably impossible. As a matter of experience, it appeared that as far as the German Courts were concerned, the difficulties alluded to had never been felt.

Mr. Zappe stated that during a period of ten years the number of criminal cases, including the most unimportant, tried in the German Court at Yokohama had been 104, in only 21 of which Japanese subjects were interested, and the powers of the Court had sufficed to deal with every one of these cases. He drew the inference that the criminal offences for which German Consular Courts are not competent might be classed as exceptions. But the law had not failed to make provision for such emergencies by vesting the Consular Courts with authority to

apprehend offenders and to take all depositions and collect all evidence necessary in bringing the accused to trial before the competent Court in Germany.

Baron Rosen concurred in the remarks of Mr. Von Eisendecker as to the great practical difficulties that would stand in the way of extending the powers of criminal jurisdiction of Consular Courts to all cases without exception. He submitted that the chief object of criminal justice, namely the protection of society, would, so far at least as Japan is concerned, be fully attained by the imprisonment and deportation of persons accused of important criminal offences. The selection of the best means to ensure the ultimate punishment of the criminal might be properly left to the Government concerned, which was obviously interested in not permitting a dangerous criminal to escape condign punishment. He begged to add, however, that in principle he was quite prepared to admit the desirability of establishing in at least one of the open Ports a Consular Court with full powers of jurisdiction in criminal matters, and was willing to submit to his Government the wishes of the Imperial Japanese Government in that respect.

The French Minister remarked that the practice observed in the case of the graver class of crimes, if committed by a French citizen, was to send the prisoner for trial to the duly constituted Court at Saigon, the Consul in that case acting as *juge d'instruction*, and at the same time to forward the written depositions of the witnesses which were found to be of at least equal value with the oral testimony of witnesses in the presence of a jury.

The Representatives of Austro-Hungary, Holland, Spain, Russia and Belgium spoke in the same sense.

Sir Harry Parkes observed that the principle which the President advocated had long ago been recognized by his Government and applied in the British judicial system established in Japan. The British residents being much more numerous than those of other countries, the difficulties alluded to by the other Representatives in regard to the formation of juries, did not exist in the case of his Government, who considered both as a matter of principle, and with due regard to British interests, that the judicial establishments maintained in this country should be efficient in all respects.

The President learnt with much satisfaction that the Delegates of the Treaty Powers agreed with him as to the principle, and begged them to represent his views to their Governments. At the same time he would beg leave to call their attention to his remarks on the fact that certain of the Powers had no Courts whatever at some of the open Ports, even for the trial of minor criminal cases.

The German Minister desired to explain that two Consuls *de carrière* were appointed by his Government to reside at Yokohama and Kobe respectively, who also exercised jurisdiction in the remaining Ports, whither they could always transfer their Courts in case of necessity.

The French Minister and the Italian Chargé d'Affaires pointed out that their Consuls for Yokohama also exercised judicial powers at the other open Ports, and that the practice was for them to proceed thither when necessary, for the trial of cases originating there.

Mr. Inouye observed that communication between Yokohama and certain of

the Ports was frequent and easy, while in other cases it was uncertain. It was true that some of the Powers had but few subjects at certain Ports, but it could not be maintained that no Consul need be appointed unless the subjects exceeded a certain number. Seeing that Japan had by Treaty conceded jurisdiction over Foreigners to the Powers, he was willing to believe that the latter were disposed to take the necessary steps for exercising that jurisdiction in an efficient manner, and he begged the Delegates to submit the views expressed by him to their Governments.

The Representatives of the Powers undertook to do this.

Heading 5, Compulsory Attendance of Witnesses: Mr. Inouye remarked that this subject had already been referred to under Group II, Civil Jurisdiction, but the necessity of enforcing the presence of witnesses was even greater in criminal cases. All that had been said already on this subject might be repeated here with still greater emphasis.

Heading 6, Absence of accessible Court of Appeal, having been already discussed under Group II., Civil Jurisdiction, Mr. Inouye would simply say that there was no desire on his part to have the power of appeal from Consular Courts extended in criminal cases, only that, whatever rights of appeal were allowed, the Court to which the appeal lay should be readily accessible.

Mr. Inouye begged to bring to the notice of the Conference a class of cases in which a criminal might escape punishment altogether in consequence of a lapse of jurisdiction. A case had occurred not long ago, which, as it was well-known, he thought there would be no objection to his citing. A seaman on the articles of a ship of a nationality not his own committed an assault upon a Japanese on shore. The offender was arrested on the complaint of the latter and handed over to the Consul of the nationality to which the ship belonged. The latter declared that he had no power to try the case, upon the ground that the accused having committed the offence ashore ought to be brought before his own Consul. The Consul of the nationality to which the seaman belonged did not acknowledge this view to be correct, and declared himself to be equally unable to exercise jurisdiction because the said seaman was employed on board a vessel of another nationality.

In spite of the representations made to the offender's Consul, the latter adhered to his own view of the matter.

The President proposed that in such cases, in which a lapse of jurisdiction would occur, resulting in the escape of the offender from justice, the latter should be punished by the Japanese authorities according to Japanese law.

The Delegates were unanimously of opinion that in such a case the Japanese Authorities were entitled to exercise jurisdiction in the same way as if the offender belonged to a nation having no Treaty with Japan.

The President observed that the principle having been accepted, he would take note of it, with a view to its being hereafter applied in similar cases.

It was agreed that Group IV, "Administrative Regulations", should be considered at the next meeting.

The Conference adjourned at a quarter to six.