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## Risky Business: Courts, Culture, and the Marketplace

Tahirih V. Lee

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# Risky Business: Courts, Culture, and the Marketplace

TAHIRIH V. LEE\*

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## I. INTRODUCTION

New legal institutions can quickly take root and exert an impact on an economy and on attitudes about an economy, even in the presence of culturally embedded norms and stereotypes that are hostile to such institutions. More specifically, in a context of rapid change, contract enforcing courts help open up the local marketplace and foster competition by reducing the risk and costs of transactions outside of collusive<sup>1</sup> arrangements. So the experience of Shanghai would teach us.

The relationship between law and economic institutions has been

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All translations of Chinese sources have been performed by the author.

1. I do not use "collusive" in its pejorative sense, but rather in a neutral sense, to denote a cooperative network of long-term business relationships such as those found in guilds.

the subject of an exciting wave of inquiry in microeconomics, contract theory, and corporations law.<sup>2</sup> This growing body of theory invites empirical verification.<sup>3</sup> In writing this article, I hope that a case study of the relationship between courts and markets will be useful to those seeking to amplify and test these theories.<sup>4</sup>

Shanghai in the century before the communist revolution of 1949 is a rich source of information on the role of courts in local markets. Nicknamed "the cit[y] of sin,"<sup>5</sup> Shanghai was famous the world over for its chaos. It presents an extreme example of the challenge legal institutions faced in an economic environment in a state of flux. The local economy was in rapid transition out of an agricultural-based trading economy, servicing the interior of China, into an industrialized economy linked to international markets. Shanghai also provides an example of creative legal experimentation to meet the challenge of

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2. Among the seminal works are Ronald Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937); OLIVER WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* (1985). These works spawned more detailed studies on the relationship between legal regulation and economic institutions, principally a relationship of self-regulation of corporations as an efficient alternative to contracting. A notable example is Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 *YALE L.J.* 857 (1984). Studies that focus on commercial relationships in the absence of legal regulation, principally self-enforcing contracts, include Anthony T. Kronman, *Contract Law and the State of Nature*, 1 *J.L. ECON. & ORGANIZATION* 5 (1985); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 *AM. SOC. REV.* 55 (1963); L.G. Telser, *A Theory of Self-enforcing Agreements*, 53 *J. BUS.* 27 (1980); Oliver E. Williamson, *Credible Commitments: Using Hostages to Support Exchange*, 73 *AM. ECON. REV.* 519 (1983).

3. The theorists themselves have encouraged empirical studies. Prominent among them is Oliver Williamson. See WILLIAMSON, *supra* note 2, at 393-98. Two recent studies on the nature of contractual arrangements in a risky economic environment explore the phenomenon of homogeneous middlemen groups. Drawing their data from traditional Chinese merchant communities in Southeast Asia, areas lacking a law of contract, the studies identify self-help mechanisms that allowed traders to "cop[e] with contract uncertainty." Janet T. Landa, *A Theory of the Ethnically Homogeneous Middleman Group: An Institutional Alternative to Contract Law*, 10 *J. LEGAL STUD.* 349, 349-50 (1981) (emphasis omitted). The mechanisms involved a "personaliz[ation] or particulariz[ation]" of "exchange relations." *Id.* at 350. See also Sumner S. La Croix, *Homogeneous Middleman Groups: What Determines the Homogeneity?*, 5 *J.L. ECON. & ORGANIZATION* 211 (1989).

4. The notion running through this article, that the availability of courts for dispute resolution allows merchants to plan in advance for the salvage of profits after the breakdown of a contractual relationship is different from the "post contractual opportunistic behavior" described by Klein, Crawford and Alchian in their article *Vertical Integration, Appropriate Rents, and the Competitive Contracting Process*, 21 *J. LAW & ECON.* 297 (1978). They describe a set of conditions that enhances the risk of breakdown of a contractual relationship. They call this set of conditions "the presence of appropriate specialized quasi-rents" arising out of assets that are specific. I do not believe that the conditions they identify necessarily prejudice future contracting while litigation does prejudice future contracting. The breakdown they discuss also is an effort to increase profits beyond original contracted expectations, whereas the post-breakdown salvage I discuss refers to opportunities to salvage some of the profits from a reneged promise, opportunities anticipated before the contract breach.

5. HENDRIK DELEEUW, *CITIES OF SIN* (1979).

a risky economic environment. Centralized authority dissolved and ancient political taboos against mixing law and commerce lost hold. In their place came freedom to choose. Local autonomy imbued Shanghai residents with a heady sense of possibility and a willingness to experiment. In response to the new freedom, several different political authorities founded thirty-three civil courts in Shanghai within seventy years.

Another advantage of Shanghai in the study of the relationship between legal and economic processes is that Shanghai's legal and economic experimentation grew out of a context far removed from our own. Prominent legal theorists here have called for the incorporation, somehow, of culture into the analysis of law and economics, if not to break down the universality of economic and legal theories, so to give more substantial support to their universality.<sup>6</sup> If anything might tap cultural issues for us, it is China. Culture draws our attention at every turn when we view a society as different from ours as China. If our theories hold for China, they must hold even more certainly at home.<sup>7</sup> As a city open to experiment and change in this century, Shanghai also allows us to consider the transformative effect of law on culture and to consider an economic culture shaped by a different experience with economic stability and chaos.

The idea of law as a means to bring order to commerce was alien to China. Law in traditional China was exclusively penal and reserved for cases of severe aberrations from societal norms. The government attempted to limit the use of law for settling commercial disputes.<sup>8</sup> One way it limited access to courts was to understaff them,

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6. See, e.g., Robert Clark, 94 HARV. L. REV. 1238 (1981); Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI. KENT L. REV. 23 (1989); Arthur Allen Leff, *Commentary: Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 464 (1974) ("One needs an extracultural standing place . . . For nothing can be considered inefficiently achieved until one discovers what the aim of the activity was."); WILLIAMSON, *supra* note 2, at 394-97.

7. For helping me discover how China enriches our understanding of a great variety of issues in law and society, I am indebted to William P. Alford, Paul Cohen, R. Randle Edwards, James Feinerman, William Jones, William C. Kirby, Hugh Scogin, and Jonathan D. Spence. They all generously offered comments at various stages of the development of this article, particularly on drafts I presented at the UCLA Center for Chinese Studies in November 1989, the American Society of Legal History annual meeting in February 1990, at the Association of Asian Studies annual meeting in April 1990, and at the Harvard East Asian Legal Studies Center on February 21, 1991. I am also grateful to Simon Johnson, Dan Little, and Terry Sicular for their consultation on the economic aspects of this study, and to Jim Whitman for encouraging me to think about law and economic development in Chinese history.

8. We do not yet know, however, how much success the government had. Groundbreaking research on litigation rates in imperial China has just begun. See Melissa MacCauley, Pettifoggers and the Problem of Litigiousness in Late Imperial China,

underfund them, and restrict their numbers. The imperial government permitted the operation of only one court per county, staffed by only one judge, the imperial magistrate sitting in his official quarters, the *yamen*.

It might seem axiomatic that law brings harmony and dissipates chaos. But law in the real world is a complicated phenomenon, more than a mere stabilizer. Under conditions of rapid change, law may reduce economic chaos enough to permit growth. However, if the change itself includes an overhaul of the legal system, new law may disrupt commercial practices before merchants adapt their expectations.<sup>9</sup> Because law enjoys varying degrees of success in conception and implementation, it may not reduce chaos in every case. Legal transplants are particularly susceptible to failure of implementation, as they are conceived with a different context in mind. Law may also increase chaos. At the individual's level, litigation increases chaos by encouraging contention and drawing it out into the open. Destabilizing collusive business networks also invites chaos, and such destabilization was a principal contribution of courts to the local economy of Shanghai. The experience of pre-communist Shanghai shows that litigation destabilizes collusive business arrangements by lowering barriers to market entry. Courts accomplished this by *reducing* the risk and cost of non-collusive transactions.

This article tells the story of the courts and the marketplace in Shanghai before 1949 in three parts. First, it briefly describes the chaos and the growth of Shanghai's economy. Second, it summarizes the rise of civil courts in Shanghai between 1849 and 1949. Third, it explores five effects of the courts on the marketplace, those involving property rights, local regulation, credit, the mutation of Shanghai's collusive networks, and attitudes about the marketplace.

## II. CHAOS IN A GROWING MARKETPLACE

Shanghai, in the century before 1949, experienced dynamic eco-

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Presentation at the annual meeting of the Association of Asian Studies, New Orleans, Apr. 13, 1991.

9. Shanghai's economy grew rapidly despite the chaos. Discerning the relationship of stability and economic growth, however, requires analysis beyond the scope of this paper. The evidence presented in the current study suggests only preliminary and tentative observations on this question. One could speculate that, without courts, economic chaos in open markets can reach a point where it erodes the growth potential of a market economy. Courts as mere dispute settlers do not create economic growth. Resources might be exhausted in lawsuits by parties shifting pieces of the pie around rather than directing resources toward the expansion of the numbers and types of transactions possible. Moreover, courts can in fact promote growth by enforcing government regulations that keep market barriers low and encourage local investments, and by favoring economic developers in dispute resolutions.

conomic growth. As the population of Shanghai doubled and tripled within a few decades,<sup>10</sup> the city's development intensified. Contractors constructed 175,310 officially licensed buildings between 1890 and 1930 in the International Settlement alone.<sup>11</sup> From 1928 through 1932, 8,971 new buildings were built in the city.<sup>12</sup> As of 1935, the two foreign municipal councils and the local Chinese government laid 287,565 kilometers of road,<sup>13</sup> 278,370 meters of water mains, and 1,280,413 kilometers of electrical lines,<sup>14</sup> and granted easements for the laying of the most advanced telephone system in the world.<sup>15</sup>

Commerce in Shanghai thrived, integrating Shanghai more strongly into the surrounding region.<sup>16</sup> As access to international trade networks grew, the number of transactions conducted in the city soared. The value of imports and exports passing through Shanghai between 1865 and 1930 increased fourteen-fold.<sup>17</sup> As China's cash-poor central regimes claimed massive contributions from the Imperial Customs House in Shanghai, Shanghai grew in importance.<sup>18</sup>

Industry developed rapidly. Between 1895 and 1911, Chinese entrepreneurs set up 112 factories in Shanghai, with a total capitaliza-

10.

	<i>Total Population of Shanghai</i>	<i>Total Population of International Settlement</i>
1910	1,289,353	501,541
1915	2,006,573	683,920
1920	NA	783,146
1925	NA	840,226
1930	3,144,805	1,007,868
1935	3,701,982	1,159,775
1942*	3,919,779	1,585,673

\*Figures for 1940 not available.

Calculated from Zou Yiren, *Jiu Shanghai renkoin bianqian de yanjiu* [*Research on Demographic Change in Old Shanghai*], Tables 1 & 22 (Renmin Chubanshe [People's Publishing House] 1980).

11. Calculated from C.Y. LO, TONGJIBIAO ZHONG ZHI SHANGHAI [SHANGHAI IN STATISTICAL TABLES], Table 22, at 17.

12. SHANGHAISHI TONGJI [STATISTICS OF SHANGHAI], Tudi [land] section, Table 13, at 7.

13. Calculated from the 1936 SUPPLEMENT TO SHANGHAI TONGJI; Tables 5-6, at 92 [hereinafter 1936 SUPPLEMENT]. For statistics up to 1930, see LO, *supra* note 11, Tables 108, 110, at 56-57.

14. 1936 SUPPLEMENT, *supra* note 13, Tables 5-6, at 98-99. The Municipal Council granted concessions to two private waterworks companies.

15. See 1936 SUPPLEMENT, *supra* note 13, Table 18, at 104. The infrastructure laid in the 1920s and 1930s comprises the major portion of Shanghai's infrastructure today.

16. THOMAS RAWSKI, *ECONOMIC GROWTH IN PREWAR CHINA xx-xxi* (1989).

17. LO, *supra* note 11, Tables 183-185, at 87-89.

18. The total collection of the maritime customs in Shanghai was 175,363,474.13 Chinese dollars in 1934 and 149,127,439.27 in 1935. 1936 SUPPLEMENT, *supra* note 13, Shangye [commerce] section, Table 13, at 61. For figures spanning a longer period, see STANLEY E.

tion of 27,992,000.00 yuan.<sup>19</sup> By 1931, Shanghai was home to 1,687 manufacturing establishments; by 1932, to 2,710.<sup>20</sup> The number of spindles in Shanghai cotton mills jumped from 35,000 in 1890 to 2,850,745 in 1935.<sup>21</sup>

After 1870, Shanghai became China's financial center. Financial institutions proliferated both in number and type. Nine types of lending institutions did business in Shanghai. The number of Chinese lending institutions, called *qianzhuang*, exceeded 105 in 1875.<sup>22</sup> Between 1897 and 1908, Chinese financiers founded in Shanghai five of China's first modern style banks. By 1936 there were 90.<sup>23</sup> Between 1890 and 1903, eight major foreign banks set up branches in Shanghai. In 1936 there were twenty-eight.<sup>24</sup> Total capitalization mounted.<sup>25</sup>

Shanghai's economy grew in a highly unpredictable investment climate of undercapitalized finance and commerce. Certain unregistered banks, called *diaotang*, averaged an eight-percent bank loan-capital ratio.<sup>26</sup> The amount of currency in the coffers of registered Chinese native banks averaged four-percent of their total assets.<sup>27</sup> Consequently, the unregistered banks and *qianzhuang* lending institu-

WRIGHT, THE COLLECTION AND DISPOSAL OF THE MARITIME AND NATIVE CUSTOMS REVENUE SINCE THE REVOLUTION OF 1911 (2d ed. 1966).

For some of the most important English language secondary literature on Shanghai's economic growth, see SHANGHAI: REVOLUTION AND DEVELOPMENT IN AN ASIAN METROPOLIS (Christopher Howe ed., 1981); Rhoads Murphey, *The Treaty Ports and China's Modernization*, in THE CHINESE CITY BETWEEN TWO WORLDS 17 (Mark Elvin & G. William Skinner eds., 1974).

19. SHANGHAI SHI [THE HISTORY OF SHANGHAI], 364-68 (Tangzhen-Chang & Shenheng-Chun eds.) (Shanghai renmin chubanshe [Shanghai People's Publishing House] 1989).

20. STATISTICS OF SHANGHAI, *supra* note 12, Gongye [industry] section, Tables 1, 3, at 1-2.

21. ZHONGGUO JINDAI JINGJISHI TONGJI ZILIAO XUANJI [SELECTED COMPILATION OF STATISTICAL MATERIALS FROM CHINA'S MODERN ECONOMIC HISTORY (1955)], Table 9, at 107-109.

22. SHANGHAI SHI NIANJIAN [ANNUAL MIRROR OF SHANGHAI], Jinrong [finance] section, at 1 (1937).

23. *Id.* Table 4, at 77-82.

24. *Id.* at 91.

25. THE HISTORY OF SHANGHAI, *supra* note 19, at 368-77. One of the first modern banks began with a capitalization of 5,000,000 liang. In 1935, 89 out of 90 of Shanghai's native banks were each capitalized at between 561,063 and 1,383,291,086 liang. ANNUAL MIRROR OF SHANGHAI, *supra* note 22, Finance section, at 77-82. Numbers of *qianzhuang*: 1873: 178; 1883: 58; 1893: 82; 1910: 91. Total capitalization: 1903: 1,590,800.00 yuan; 1906: 1,241,800.00 yuan; 1909: 1,019,900.00 yuan. THE HISTORY OF SHANGHAI, *supra* note 19, at 368-77.

26. PARKS M. COBLE, THE SHANGHAI CAPITALISTS AND THE NATIONALIST GOVERNMENT, 1927-1937, 17 (1986); 2 JULEAN ARNOLD, COMMERCIAL HANDBOOK OF CHINA 373 (1920).

27. ANNUAL MIRROR OF SHANGHAI, *supra* note 22, Finance section, Table 4, at 77-82.

tions defaulted frequently.<sup>28</sup> Their liberal credit policy of lending large amounts over long-term periods<sup>29</sup> further contributed to Shanghai's financial volatility. Retailers, as ubiquitous and fundamental to the economy as rice shops, ran on minimal secured assets,<sup>30</sup> and industrial enterprises operated on slim capital reserves.<sup>31</sup>

Apart from having the propensity for high leveraging in finance and commerce, the financial and commercial sectors of Shanghai performed at the mercy of an unpredictable monetary and pricing environment. Merchants used eleven different types of currency in their transactions, some of them printed by local banks.<sup>32</sup> The exchange rate of one local currency fluctuated within a twenty-five percent range annually.<sup>33</sup>

Shanghai's volatile economy was all the more unsettling to its natives because of its novelty. Before the arrival of significant numbers of foreign traders and goods, Chinese guilds had controlled prices. Chinese merchants had traditionally operated within highly developed, collusive networks. In late nineteenth century China, merchants in the same trade formed associations (*hui*) that roughly equated the guilds known in late medieval Europe. Guild members fixed prices and put non-member entrepreneurs out of business by boycotting them and coercing their employees. In some cases, guilds worked in tandem with other guilds to form vertical monopolies, as occurred with the price-fixing arrangement around the turn of the century between construction laborers and construction materials

28. After 1933, the national government required higher margins of capital reserves in Shanghai banks. Within two years, 30 out of 90 Shanghai banks failed. Fourteen more failed the following year. *Id.* at 1-4. In 1936, the national government required Shanghai banks to guarantee a portion of all deposits. The *qianzhuang* were chronically undercapitalized. James C. Sanford, Chinese Commercial Organization and Behavior in Shanghai of the Late Nineteenth and Early Twentieth Century (May 1976), 104, 106, 148-55 (unpublished Ph.D. thesis, Harvard University).

29. Qian Hongchou, *Fangshi zulin shijian de jige falu guandian* [Some Legal Points About the Matter of Rental Housing], in DISHIWUJIE BIYE JINIANKAN [THE FIFTEENTH GRADUATION CLASS YEARBOOK] (Shanghai fazheng xueyuan [Shanghai College of Law and Politics], 1939) 232, "Zhulun" [articles] section, at 12.

30. SHANGHAI INSTITUTE OF SOCIAL AND ECONOMIC RESEARCH, SHANGHAI MISHI DIAOCHA [AN INVESTIGATION OF RICE IN THE SHANGHAI MUNICIPALITY] 2-3 (1935).

31. Of the 91 cotton mills that reported data in 1935, eight were capitalized at 501 to 1000 dollars; 11 at 1001 to 2000 dollars; nine at 2001 to 3000 dollars; 16 at more than 100,001 dollars. 1936 SUPPLEMENT, *supra* note 13, Industry section, Table 10, at 73. Of the 202 knitting mills for which data was available in 1935, one operated on 101 to 500 dollars; five on 501 to 1,000 dollars; 18 on 1,001 to 2000 dollars, 31 on 2,001 to 3000 dollars; and 16 on more than 50,001 dollars. *Id.* Table 18, at 78.

32. THE HISTORY OF SHANGHAI, *supra* note 19, at 374.

33. THOMAS M. AINSCOUGH, BOARD OF TRADE—COMMERCIAL INTELLIGENCE COMMITTEE, REPORT UPON THE CONDITIONS AND PROSPECTS OF BRITISH TRADE IN CHINA, at 32-33 (1916).



guilds in Shanghai, Canton, and other Chinese ports.<sup>34</sup> Commercial collusion existed on provincial and possibly county (*xian*) levels, establishing price uniformity throughout the county.<sup>35</sup> Itinerancy developed and prevented commercial cellularity from isolating trade networks within provinces and counties. Itinerancy, however, actually strengthened, rather than undermined, collusive networks. Guilds in various commercial centers around China set up native place associations (*huiguan*) in distant commercial centers, associations that functioned like branch offices of the guild. The guilds stationed members at these branch organizations for temporary duty, and each branch worked to promote the interests of the guild in the local economy by conciliating local merchants and regulating the activities of guild members in that locality.<sup>36</sup> This system rapidly equilibrated prices across counties and provinces.<sup>37</sup>

Throughout the second half of the nineteenth century, however, the guilds lost control of the price mechanism. Foreign merchants tied their prices to an international gold standard that fluctuated daily.<sup>38</sup> Massive imports of British goods flooded the consumer-goods market in Shanghai. Import prices, set independently by manufacturers in Britain, the United States, France, Japan, and elsewhere, fluctuated continually and destabilized local prices in Shanghai.<sup>39</sup> Half of the imports were sold by weekly auction, sending fresh signals to the rest of the city to readjust prices. Keen competition from Japanese importers prevented the British from turning this auction process into a controlled monopoly and from setting prices.<sup>40</sup> Local bureaucrats,

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34. T.R. JERNIGAN, *CHINA IN LAW AND COMMERCE* 242-43 (1905).

35. *Id.* at 243-44.

36. See HOSEA B. MORSE, *THE GILDS OF CHINA* 27-31 (1909); J. B. TAYLOR, *FARM AND FACTORY IN CHINA: ASPECTS OF THE INDUSTRIAL REVOLUTION* 44 (1928); SHANGHAI BEIKE ZILIAO XUANJI 1-7 (Shanghai People's Press 1980); Mark Elvin, *The Administration of Shanghai, 1905-1914*, in *THE CHINESE CITY BETWEEN TWO WORLDS* (Elvin & Skinner eds., 1974), at 242.

37. RAWSKI, *supra* note 16, at 60-63.

38. 1936 SUPPLEMENT, *supra* note 13, Table 14, at 16-17; 1 ARNOLD, *supra* note 26, at 265-67.

39. For example, the monthly value of imports into Shanghai fluctuated between 25,867,135 dollars and 56,856,198 dollars in 1935. 1936 SUPPLEMENT, *supra* note 13, "Shangye" [commerce] section, Table 8, at 56. Monthly index numbers of prices for imported raw materials fluctuated between 105.6 and 135.6 in 1934. *Id.* Table 16, at 64. Average monthly wholesale prices of cotton, for example, oscillated between 46.04 dollars and 34.36 dollars in 1934. *Id.* Table 19, at 66. Monthly wholesale prices of black tea in 1934 fluctuated between 86.807 dollars per unit and 187.500 dollars per unit. *Id.* Table 18, at 65. Between the third quarter of 1923 and the second quarter of 1924, the price of imported wool and cotton underwear plummeted 55%. SHANGHAI MINISTRY OF FINANCE, BUREAU OF MARKETS, SHANGHAI SHURU HUOWU GUANJIA ZHISHU BIAO [INDEX NUMBERS OF CUSTOMS IMPORT PRICES IN SHANGHAI] 1 (table III) (Sept. 1925).

40. AINSCOUGH, *supra* note 33, at 23-24.

setting tariffs and customs duties according to Shanghai market prices, painstakingly attempted to follow the movement of local market prices.<sup>41</sup>

Political upheaval also contributed to the economic uncertainty. The most widespread grassroots rebellion in Chinese history scourged the region surrounding Shanghai in the 1860s.<sup>42</sup> The collapse of the centuries-old Qing dynasty removed the underpinnings of central rule in China in 1911<sup>43</sup> and sent shock-waves through the commercial and financial sectors of Shanghai. The coup d'état dashed hopes for the standardization of currency, weights, and measures and fueled a series of financial crises that bankrupted most of Shanghai's native banks.<sup>44</sup> China finally standardized a national currency in 1933, but this currency was not vital to local financial transactions in Shanghai, as banknotes or temporary extensions of credit provided a ready substitute.<sup>45</sup>

Land rights grew problematic, and the complexity of the land ownership system in Shanghai heightened the risk of disputes over property title. As central authority deteriorated, land tenure became subject to overlapping spheres of authority and fell victim to fraudulent conveyances and genuine misunderstandings. The imperial Chinese government recognized eleven different kinds of title documents. In 1855, after crushing the Taiping rebels, the emperor annulled all existing land deeds for Shanghai, had all landholdings in Shanghai resurveyed, and issued special deeds to legitimize the ownership claims at that moment. The deeds, called *fangdan*, contained the name of the owner at the time of the general survey, but not the names of subsequent landholders. Subsequent land transfers were made with another type of deed, called a *hongqi*, registered with the

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41. See Shanghai Ministry of Finance, Bureau of Markets, SHIYINIAN SHANGHAI SHURU WUJIA YU SHUOJIA, SHIJIA YU GUANJIA BIJIAOBIAO [TABLES COMPARING SHANGHAI MARKET PRICES OF DUTY-PAYING GOODS WITH THE TARIFF AND CUSTOMS VALUATIONS OF 1922] (Dec. 1925).

42. See JONATHAN D. SPENCE, *THE SEARCH FOR MODERN CHINA 170-78* (1990), for a beautifully concise account of the Taiping Rebellion.

43. See JOSEPH W. ESHERICK, *REFORM AND REVOLUTION IN CHINA: THE 1911 REVOLUTION IN HUNAN AND HUBEI* (1976).

44. AINSCOUGH, *supra* note 33, at 33.

45. For the use of banknotes and temporary extensions of credit instead of currency in rent transactions, see Qian, *supra* note 29, at 8-13. Merchants used bank drafts [*zhipiao*] when purchasing wholesale goods. See, e.g., Judgment of Dec. 19, 1928 (*Da Kangyang Co. v. Wu Yanwei*), Special District Court, untitled collection of judicial opinions, whose first item is entitled JIANGSU SHANGHAI TEQU DIFANG FAYUAN XINGSHI PANJUE [JUDICIAL OPINION IN CRIMINAL CASE AT JIANGSU (PROVINCE) SHANGHAI SPECIAL DISTRICT COURT] (Shanghai College of Law, 1931) [hereinafter JIANGSU], Civil Case No. 1891, at 265-68. In December 1936, for example, Shanghai's major banks printed bank notes worth 1,409,943,000 yuan. ANNUAL MIRROR OF SHANGHAI, *supra* note 22, Finance section, at 178.

*dibao*, the headman of the district in which the plot was situated, and authenticated with the seal of the provincial treasurer. *Fangdan* and *hongqi* still served as proof of ownership after the fall of the imperial government and their provincial treasurers in 1911, as did the other nine kinds of documents. These other documents created serious questions of validity since they did not require an official seal, and because they sufficiently proved ownership only in certain combinations, not singly.

To further complicate land rights, these documents also served purposes not originally intended. The local Chinese land office issued one of these types of documents, *shengke* papers, for reclaimed wasteland previously unregistered by a *fangdan*. The claimant only needed to pay all taxes due on the land preceding reclamation. In practice, if a *fangdan* was lost or destroyed, owners went to the Chinese government land office in Shanghai and, for a fee of about fifty percent of the land value, obtained a new deed in triplicate with the chop of the *dibao*. The ease with which one could buy *shengke* papers led to their fraudulent purchase and to fraudulent transfers of land ownership. When a foreigner purchased land from a Chinese, the foreigner forwarded the *fangdan* or *shengke* papers to the Chinese land office for verification. The office issued a document, which the foreigner could register in his consulate in exchange for a foreign title deed.<sup>46</sup>

Foreign consulates also registered land and held themselves out as alternative authorities for verifying ownership. All fourteen consulates issued consular title deeds for land registered with them. Land plots in the International Settlement had to be registered in one of the consulates in the name of an attorney of that consulate's nationality. That consul and the attorney had to sign land and lease deeds every time ownership or possession was transferred.<sup>47</sup> The Joint Measurement Office, the *kuaizhangju*, run by the immediate superior of the Shanghai Magistrate, the Circuit Intendant (*Daotai*) for Jiangsu, also had to validate each transaction involving plots in the International Settlement. After the imperial regime fell, its function passed to an office run jointly by the Municipal Council, the Shanghai Magistrate,

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46. H.M. Cumine, *Consular Registration of Land in Shanghai*, CHINA L.J., Mar. 15, 1931, at 10 (*Fangdans* recorded the various levels of the district in which the plot was situated. The smallest official division of land in Shanghai was called the *du*. From 8 to 50 *du* comprised a *bao*, and 30 *bao* made a *qu*. 19 *qu* formed the municipality of Shanghai). See map of Shanghai, SHANGHAISHI ZIZHIZHI, [SHANGHAI MUNICIPAL SELF-GOVERNMENT RECORDS] frontispiece.

47. Cumine, *supra* note 46, at 13. The British Consulate registered 13,600 lots between 1849 and 1931. In the same year, the Chinese conducted the imperial general survey of Shanghai land, the British Consul commissioned a land survey of all lots registered with the British Consulate.

the Circuit Intendant, and the Commissioner for Foreign Affairs. Several years later, the Land Office of a reconstituted pan-city government, the Municipality of Greater Shanghai, assumed the function.<sup>48</sup>

Shanghai's chaotic economy inspired strategies in business transactions designed to cope with the uncertainty. Merchants' fear of risk spawned an active insurance industry, an idea introduced by westerners. Insurance on buildings, ships and shipped goods became routine.<sup>49</sup> Both Chinese and foreign merchants employed in their transactions a variety of methods for reducing the risk of loss from non-performance. Some spread promisor liability with collateral deposits and personal guarantors. Foreign merchants hired Chinese middlemen to select Chinese merchants with whom to contract and to guarantee their reliability. Both Chinese and foreign merchants demonstrated creativity at finding ways to cope with uncertainty. They devised the "commission indent system," a transaction form that permitted trading firms to operate with minimal financial resources. Exchange banks allowed extensive borrowing against cargo and permitted partial payment systems. A British Commercial Attaché in Shanghai in 1916 reported that Shanghai firms conducted more business in proportion to their capital than firms in virtually any other city around the world.<sup>50</sup>

### III. COURTS AND THE COMPETITION FOR DISPUTE SETTLEMENT

Foreigners initially introduced courts that enforced contracts in Shanghai, primarily to facilitate commerce. Aside from a few missionaries and adventurers, foreigners came to Shanghai to seek commercial profits.<sup>51</sup> Merchants comprised eighty-six percent of an early

48. 1 ARNOLD, *supra* note 26, at 250.

49. 1 HUYOU ZAJI [MISCELLANEOUS NOTES OF A SOJOURN IN SHANGHAI] 32b-33a [hereinafter MISCELLANEOUS NOTES]. Fire insurance policies were common in Shanghai. The fire insurance industry was highly developed. Separate types of coverage covered movable and nonmovable property. Different types of buildings, shops in particular, and different types of goods, such as durable goods and perishable goods, required coverage by separate policies. The policy certificate had to specify the value and amount of goods covered. Flood and life insurance were also available, though flood insurance covered only damage in peacetime. See GUOMIN ZHENGFU XIN BANKING BAOXIANFA YANGJUE [DETAILED EXPLANATION OF THE PEOPLE'S GOVERNMENT NEWLY PROMULGATED INSURANCE LAW] 194-97.

The main motivation for the widespread use of insurance in Shanghai was the protection of commercial profits. See BAOXIANFA YAOGANG [OUTLINE OF INSURANCE LAW], "Bianyan" [preface] (Shanghai New Construction Bookstore 1929) 1.

50. AINSCOUGH, *supra* note 33, at 32-36; Foreign Office records, Public Records Office, Surrey, England, 656 series, 1905-1930 [hereinafter FO] 656/126, Oct. 14, 1912 (memorandum on the case of Shen Shun-ch'un v. Wu A-tao and Shen Chin-hsiang) at 2; *Tudi zhangcheng*, *infra* note 143, at art. 4.

51. See ZHONGGUO FAZHISHI JIAOCHENG [A GUIDE TO CHINESE LEGAL HISTORY] 324-30 (Xue Mei, ed. 1988).

group of 143 foreigners who set up residence there.<sup>52</sup> Once there, foreign merchants had trouble penetrating the interior of China.<sup>53</sup> Though the reasons for the impermeability are still poorly understood, a growing body of evidence contradicts the perception that China lacked a sophisticated system of commerce in which foreigners could participate.<sup>54</sup> Rather, highly developed trade networks in the interior impeded foreign access and confronted foreign merchants with a closed, collusive market.

For centuries, foreigners tried and failed to get the Chinese national government to intervene on their behalf and to lower barriers to Chinese commerce.<sup>55</sup> But when in 1843 Britain emerged victorious from a military confrontation precipitated by Chinese imperial efforts to block the growth of the foreign drug market in China, representatives of fourteen foreign governments extracted imperial permission to move into Shanghai and set up consular courts.<sup>56</sup> These courts at first served foreigners and helped them gain access to the local markets by enforcing the contracts they made with Chinese.<sup>57</sup> Freer markets in turn allowed foreigners greater access to China's economy.

Foreigners set up the first sixteen civil courts in Shanghai, including fourteen consular courts and two "mixed" courts, in the 1840s through 1880s. The consular courts tried all suits against their own nationals. A complex set of rules based on both territory and nationality loosely defined the jurisdictions of the mixed courts.

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52. Excluded from this count are the families of the male merchants, because these families are not enumerated. *THE DIAMOND JUBILEE OF THE INTERNATIONAL SETTLEMENT OF SHANGHAI*, frontispiece (I. Kounin & A. Yaron eds. 1940). Even at a time when the settlement was almost a century old, census results show that ninety percent of the foreign male population consisted of accountants, bankers, brokers, clerks, construction engineers, mercantile assistants, merchants and storekeepers. Fifty percent of the foreign population were merchants alone. *MUNICIPAL GAZETTE*, Nov. 20, 1920, at 382-83.

53. "British makers . . . have always regarded [China] as a difficult and expensive market to work . . ." *AINSCOUGH*, *supra* note 33, at 28.

54. See *JERNIGAN*, *supra* note 34, at 238-41. The best English-language studies of China's commerce in the eighteenth, nineteenth, and early twentieth century are *SUSAN MANN, LOCAL MERCHANTS AND THE CHINESE BUREAUCRACY, 1750-1950* (1987); *MARY B. RANKIN, ELITE ACTIVISM AND POLITICAL TRANSFORMATION IN CHINA* (1986); *RAWSKI*, *supra* note 16; *WILLIAM T. ROWE, HANKOW: COMMERCE AND SOCIETY IN A CHINESE CITY, 1796-1889* (1984); *MADELEINE ZELIN, THE MAGISTRATE'S TAEI: RATIONALIZING FISCAL REFORM IN EIGHTEENTH CENTURY CHINA* (1984).

55. Some of these efforts are described in *A GUIDE TO CHINESE LEGAL HISTORY*, *supra* note 51, at 324-30. For the best English language summary of the political events during the residence of British and American merchants in China, see *SPENCE*, *supra* note 42.

56. See, e.g., *LEWIS HERTSLET, TREATIES AND CONVENTIONS*, vol. X, 56-59, 69-72; vol. XII, 281-17 (1st reprinting, 1970, Johnson Reprinting Corp.).

57. The British Consul in Shanghai kept in his files letters requesting advice and assistance in many such cases, e.g. FO 656/124, Letters from Hanson, McNeil and Jones to British Assessor, Sept. 28, 1910.

Additionally, in 1906 the United States Congress founded a federal district court in Shanghai, attempting to align the law administered by Americans in China more closely with United States federal law.<sup>58</sup>

The International Mixed Court of Shanghai was established in 1864. It had police backing and a broad enough jurisdiction to exercise authority over almost every type of commercial dispute, as well as over every breach of local government regulation of the local economy. In terms of caseload, it was the largest of all of the Shanghai courts until 1949, trying about five and a half million cases during its seventy-eight years of operation.<sup>59</sup> The term "mixed" referred to the multi-national composition of the bench.<sup>60</sup> Panels of two judges, one Chinese and one from any of thirteen foreign nationalities, presided over every case. The lawyers and litigants appearing before the courts were also "mixed." Fourteen nationalities of lawyers and over forty nationalities of litigants were involved in cases at the International Mixed Court. The court exercised territorial jurisdiction over the International Settlement, a district governed by a multi-national but British-dominated body called the Municipal Council. An annual assembly of foreign merchants elected the Municipal Council and approved the Council's municipal programs by articulating bylaws, which the International Mixed Court then enforced.<sup>61</sup>

Despite the controversiality of the foreign-run courts on Chinese soil, the local Chinese elite soon adapted to the new procedures for dispute resolution. Chinese in Shanghai used the mixed civil courts in steady numbers after the mixed courts lowered the cost of litigating in the 1900s and 1910s. Between 1913 and 1926, Chinese litigation at the International Mixed Court held steady at about 1,700 cases filed per month, an annual total of about 32,000 lawsuits.<sup>62</sup> More Chinese

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58. Act of June 30, 1906, ch. 3934, 34 Stat. pt. I, 814 (U.S. Comp. St. Supp. 797 (1907)).

59. This is my own rough estimate, based on actual annual figures for the total number of prosecutions for 1867-1869, 1874-1900, 1913-1926, and 1940-1942, plus civil summonses served or civil cases filed for 1896-1898, 1913-1926, and 1933-1942, as listed in the Shanghai Municipal Council Annual Reports for those years, Shanghai Municipal Archives. A French scholar of international law in the 1920s believed that the International Mixed Court handled more cases than any other court in the world at that time. Jean Escarra, *The Extraterritoriality Problem*, 2 CHINA L. REV. 15, 19 (1929).

60. The British founded two other mixed courts in China at this time.

61. Aside from pressures from its constituencies, the Municipal Council had an additional incentive to encourage enforcement of its licensing laws: It was looking for operations revenues because no sovereign power supported it. License fees generated about 13% of the Council's budget and the fines extracted from violators of regulations fell to the council's treasury.

62. The Chinese civil cases heard, exclusive of the figure for 1920, and the foreign civil cases filed, exclusive of figures for 1913 and 1919 but including the partial figure for foreign civil cases heard for 1913, add up to 32,262 cases.

than foreigners sued in the International Mixed Court; however, as a percentage of their respective populations in the International Settlement or in Shanghai as a whole, fewer Chinese per capita brought suit.<sup>63</sup>

TABLE I — YEARLY NUMBER OF CIVIL CASES BEFORE THE INTERNATIONAL MIXED COURT: 1912-1926<sup>64</sup>

	<i>Chinese Civil Cases</i> filed/concluded	<i>Foreign Civil Cases</i> <sup>65</sup> filed/concluded
1912	900/1,068 <sup>66</sup>	
1913	1,667/ 536	158 <sup>67</sup>
1914	1,816/ 904	442/264
1915	1,847/1,001	344/108
1916	1,776/ 986	238/ 76
1917	1,567/ 823	337/105
1918	1,726/ 998	274/130
1919	1,445/ 873	299/124
1920		414/
1921	1,690/1,016	610/183
1922	1,798/ 889	894/243
1923	1,638/ 896	1,060/283
1924	1,700/1,145	1,040/263
1925	1,618/1,106	730/192
1926	1,793/1,121	985/305

63. According to my calculations from demographic figures for 1925, 96% of the population of the International Settlement was Chinese (810, 278 out of 840, 226) and 1.5% of the total population of Shanghai was non-Chinese. Calculated from Zou, *supra* note 10, Tables 56 & 57; SHANGHAISHI TONGJI [STATISTICS OF SHANGHAI], "Renkou" [population] section, Tables 11 & 17 of population figures.

64. SHANGHAI MUN. COUNC. ANN. REP. (1912-1941) [hereinafter ANNUAL REPORT] ("Mixed Court" sections (1912-1926) and "Municipal Advocate" sections (1927-1941)).

65. Of all the foreign civil suits from 1918 to 1926, about 97% involved a foreigner suing a Chinese, and about 3% were foreigners suing foreigners. Not one case involved a Chinese suing a foreigner. Calculations are based on figures and litigant names compiled from Mixed Court Monthly Reports in the MUNICIPAL GAZETTE and from the ANNUAL REPORT, *supra* note 64, at 57A-58A, 67A-68A (1921), 70A (1922), 39 (1923), 45, 47 (1924), 39-41 (1925); raw figures for 1926 came from William Johnstone, *The International Settlement at Shanghai* (unpublished Ph.D. dissertation, Stanford University), at 135 (1929). Sikhs suing Chinese for unpaid debts made up the majority of the foreign civil cases. See ANNUAL REPORT, *supra* note 64, at 38 (1926) (Court Accountant's report).

66. Cases waiting for first hearing. Both figures are my own estimates, based on monthly figures available for six months in 1912.

67. Cases heard, calculated from monthly court reports for all months of 1914 except February. Thus, cases that took longer than one month to try have been counted more than once.

The International Mixed Court handled the largest civil caseload of the Shanghai courts.<sup>68</sup> Demand for adjudication of commercial disputes outstripped the ability of the court to provide the service. Yearly figures labelled "Chinese civil suits awaiting first hearing" attest to a growing backlog of Chinese cases at the International Mixed Court, despite the growing numbers tried.<sup>69</sup> Moreover, Chinese use of the court as a percentage of the court's total civil caseload rose between 1908 and 1925. This trend occurred despite the growing influence of the foreign judges and the increasing controversiality of the court among Chinese in Beijing and Nanjing and even among foreign observers in China and abroad. In 1908, the court for purely Chinese suits at the Mixed Court was in session about one fourth the time the court for foreign suits spent on its cases. By 1925, however, Chinese suits outnumbered foreign suits about four to one.<sup>70</sup>

The French Mixed Court, founded in 1869, tried roughly two fifths of the civil cases at the International Mixed Court.<sup>71</sup> In 1914, it moved to a new building in the French consular compound where it remained until it was phased out during World War II. In 1931 it changed its name to Second Special District Court as part of an attempt by national bureaucrats to align its procedures and subject matter jurisdiction with those of the Chinese courts.<sup>72</sup> Under the innocuous new label, its civil division continued to handle a rich vari-

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68. The consular courts heard far fewer suits owing at least in part to their nationality jurisdiction, which precluded Chinese from suing Chinese there. From 1921 to 1925, for example, their combined caseload amounted to about 0.5 percent of the International Mixed Court caseload. ANNUAL REPORT, *supra* note 64, at 55A, 66A (1921), 68A, 73A (1922), 37, 42 (1923), 59-60 (1924), 55 (1925), 54 (1926); Monthly Police Reports in the Shanghai Municipal Gazette, 1924-25.

Without more, the number of cases heard does not indicate that resources were proportionately allocated to these cases. However, the fact that the court hired more judges to hear these cases, that it extended its Chinese civil sessions into the wee hours of the morning and into Saturdays, and that its Registrar complained to the public that the Court needed more money for courtrooms, shows an increased allocation of Court resources to these cases. See ANNUAL REPORT, *supra* note 64, (1921-25).

69. One can only speculate why this backlog accumulated. The Court may have been short of funds, or may have felt obligated to divert its funds to best fulfill its primary mission of meeting foreign litigation needs. However, even foreign civil cases waited about six months between petition and first hearing. *Id.* (1913-25) (Mixed Court Reports).

70. My calculation is based on caseload statistics compiled from the ANNUAL REPORT, *supra* note 64, the MUNICIPAL GAZETTE, *supra* note 52, and reports by British consular officials taken from the collection of documents cited as FO, *supra* note 50 (on file with the author).

71. This number is an estimate, based on the ratios of reported cases in the SHENBAO and on published caseload statistics from the two courts after 1930. Reports of court sessions, SHENBAO (China), Jan.-Dec. 1914.

72. ANNUAL MIRROR OF SHANGHAI, *supra* note 22, "Sifa" [judicial] section at 12.



ety of debt and contract disputes between Chinese parties.<sup>73</sup>

What motivated Chinese to petition the foreign-controlled, adversarial style mixed courts for a judgment against a fellow Chinese? The answer lies in the courts' structure. The courts insinuated themselves into the Shanghai commercial scene and sustained their own growth by encouraging litigation through measures that reduced costs for plaintiffs.

The courts offered Chinese litigants an attractive forum in four ways. First, the courts had the power to enforce their judgments. The two foreign municipal governments of Shanghai organized and funded professional police forces that were highly-armed and trained to carry out orders. These forces principally carried out court summonses and arrest warrants, detained civil defendants awaiting trial, and enforced court judgments. Second, the courts catered to plaintiffs, the people who initiated civil lawsuits. The courts' procedure tended to favor plaintiffs, and most of the court orders and judgments carried out plaintiffs' requests. Third, the courts were accessible to a wide variety of Chinese. The International Mixed Court carved out a broad subject matter jurisdiction for itself. The rich variety of suits welcomed at the court met the needs of a wide spectrum of Chinese merchants and offered them opportunities to challenge the collusive structure of the guilds. Finally, the courts faced little competition from other fora, such as Chinese courts until 1927 and tribunals run by merchant organizations, for the effective settling of certain types of commercial disputes.

#### A. Enforcement

Civil plaintiffs and criminal complainants in the mixed courts were confident that the people they accused or with whom they had disputes would be subject to the courts' jurisdiction. The Shanghai Municipal Police enforced the International Mixed Court's orders and judgments and ran its debtor's prison. The police force was large and well-armed,<sup>74</sup> aggressively invoked its investigatory powers, and

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73. *Id.*

74. The police force employed 2,662 officers in 1922; 2,501 on active-duty (239 European, 30 Japanese, 713 Sikhs, 1,489 Chinese, and an additional 30 mounted policemen), and 161 on reserve duty. ANNUAL REPORT, *supra* note 64, at 56A (1922). The total number of recruits grew to 3,195 in 1925. *Id.* at 29-30, 35 (1925). Among the 2,662 officers in 1922, 1,928 were trained and qualified to use the .303 Lee-Enfield Rifle. The rifle was used by the British army between 1818 and 1952. 257 officers were qualified to use the powerful colt .45 automatic pistol, 92 were qualified to use a .45 revolver, and 48 were qualified to use a .32 automatic pistol. IAN V. HOGG, MILITARY PISTOLS AND REVOLVERS, (Arms and Armour Press, 1987), at 24-26, 36; BRITISH RIFLES, A CATALOGUE OF THE ENFIELD PATTERN ROOM (London: HMSO Publications Centre, 1981), at 22-23, 41, 48; JOHN KIRK & ROBERT YOUNG, JR.,

pursued its authority to make arrests. Officers of the Shanghai Municipal Police at the International Mixed Court staffed Shanghai's only governmental office specializing in making arrests. The office was famous for its speed and success in locating and arresting suspects.<sup>75</sup>

For the mixed courts and their prisons, funding posed no problem. The Municipal Council bankrolled the International Mixed Court, even after it became the First Special District Court,<sup>76</sup> until 1941,<sup>77</sup> when Japanese troops shut down the court and incarcerated its foreign personnel.<sup>78</sup>

The courts took special measures to ensure that their judgments were enforced. Civil litigants who disobeyed court orders were subject to criminal sanctions.<sup>79</sup> The International Mixed Court developed three procedural devices that reduced the risk of noncompliance with its decisions: pre-judgment detention of civil defendants, the security deposit (*baozhengjin*), and the sealing order. These devices

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GREAT WEAPONS OF WORLD WAR II (Walker and Co. ed., 1990), at 316; ANNUAL REPORT, *supra* note 64, at 63A (1922).

75. 1 MISCELLANEOUS NOTES, *supra* note 49, at 17a-17b; *see also* Shanghai Municipal Police files, IO Dossiers, files 9287, 9583, correspondence and warrant specimens, Oct. through Nov. 1928.

The Municipal Police carried out about 1,800 arrest warrants a month. The Judicial Police, then in Chinese control, executed 274 of the Court's arrests. FO, *supra* note 50, 656/205; Municipal Advocate's Report for July 1930 and Shanghai Municipal Police files, IO Dossiers, file 7245, Sept. 21, 1931, memorandum no. 64.

76. ANNUAL REPORT, *supra* note 64, (1927-41). Local Chinese, possibly with the aid of foreigners, must have financed the District Court between 1927 and 1941 just as they had previously financed the *Caipansuo* and *Shenpanting*. National funds supplied the office of the prosecutor and the prisons in Shanghai, but not the courts. ZHONGGUO ZHI CIFA [CHINA'S JUDICIARY] (SHANGHAI MINZHI SHUJU FAXING [DISTRIBUTED BY SHANGHAI PEOPLE'S KNOWLEDGE BOOK BUREAU], 1932), part 2, "Benlun" [main part of the exposition] section, at 119.

77. *See* ANNUAL MIRROR OF SHANGHAI, *supra* note 22, Judicial section, at 13. The Council retained control of the court finances through its appointment of the Court Clerk, the successor of the Registrar. Shanghai Municipal Police files, IO Dossiers, file 7245, Feb. 23, 1929, report of R. Bryan to Stirling Fessenden. The terms of an official written agreement between foreign diplomats and the Chinese Foreign Ministry distributed the operating responsibilities of the court between the Municipal Council, Municipal Police, and Chinese officials. The agreement remained in effect between 1927 and 1936, with one set of modifications in 1930. Shanghai Municipal Police files, IO Dossiers, file 7245, May 14, 1935. Cooperation between provincial Chinese officials and the Municipal Council was even closer than the terms of the agreement indicated. The Nanjing Viceroy allowed the Municipal Police to retain their full control of the Registrar's office at the time of the official transfer, despite prohibitions in the agreement. Telegram from Ding Wenjian and Xu Yuan to Nanjing Viceroy (Jan. 1, 1927) (on file with the Shanghai Municipal Archives, file 179.4.4).

78. Interview with attorney Jiang Bingfan, in Shanghai (May 1991). The invasion is described in the semi-autobiographical account by J.G. BALLARD, EMPIRE OF THE SUN (1984).

79. Judgment of July 2, 1931 (Tu Songsheng), JIANGSU, *supra* note 45, at 7.

assured plaintiffs that filing petitions would result in injury and inconvenience to the defendant if the defendant did not cooperate.

The *Shenpanting* and the International Mixed Court placed all civil defendants in detention facilities until judgment. The purpose of pre-trial custody at the Mixed Court was twofold. First, the court's small territorial jurisdiction required it to use vigilance and force to ensure that civil defendants would appear at their hearing and comply with the judgment of the court. Second, the court hoped to prevent defendants from continuing to engage in the conduct to which the plaintiff objected.<sup>80</sup>

To soften the harshness of this procedure, the courts released the defendant if he or a guarantor deposited a security with the Mixed Court Registrar. The Mixed Court retained the security if the defendant failed to appear at his hearing.<sup>81</sup> Defendants could file counter-petitions against the persons suing them, compelling them to deposit a security at the court to guarantee their appearance in court.<sup>82</sup> The practice provided a hostage,<sup>83</sup> which decreased the risk of noncompliance with the court's judgment. The International Mixed Court crafted this feature of its civil procedure out of a customary rule used among contracting merchants that relatives or a designated guarantor of a debtor could be compelled to make good the debt.<sup>84</sup> The security deposit at the Mixed Court thus forced wealthy relatives or associates of defendants in debt suits to compensate creditors if the defendant failed to make payment.<sup>85</sup> Chinese courts also followed this procedure during the period.<sup>86</sup>

### B. *Pro-Plaintiff*

The procedure and judgment of the International Mixed Court favored plaintiffs and creditors. Many procedures, such as the requirements for filing a petition and a summons request, were user-

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80. Such as tearing down boundary markers. See, e.g., FO, *supra* note 50, 656/116, Dec. 28, 1908; ANNUAL MIRROR OF SHANGHAI, *supra* note 22, Judicial section at 158.

81. Rules of Procedure, Rule 6, Civil Proceedings, at 6.

82. Rules of Procedure, Rule 27, Civil Proceedings, at 10.

83. See Kronman, *supra* note 2, at 12-15.

84. FO, *supra* note 50, 656/110, Sept. 12, 1906.

85. See, e.g., *Dengbao shengming zhi nuli* [The effect of newspaper announcement], SHENBAO (China), Aug. 8, 1914; FO, *supra* note 50, 656/118, Dec. 10, 1909 (letter from Harold Browett, esq., to British Assessor Coales).

86. See ANNUAL MIRROR OF SHANGHAI, *supra* note 22, Judicial section at 158; Articles 12-14, Revised Provisional Regulations Covering Trial Proceedings by a Magistrate, promulgated Mar. 30, 1923, in COE LAW, 348-49; ANNUAL REPORT, *supra* note 64, at 38, 40 (1926). See also ANATOL KOTENEV, SHANGHAI: ITS MIXED COURT AND COUNCIL (1968, reprint of 1925 version) 232, 294, 302-04; ANATOL KOTENEV, SHANGHAI: ITS MUNICIPALITY AND THE CHINESE 212 (1927).

friendly. The Mixed Court speedily issued orders to evict tenants and to confiscate tenant or creditor possessions after a minimal showing of the existence of a dispute and of its magnitude.<sup>87</sup>

The sealing order was a good example of a Mixed Court procedure that effectuated a plaintiff's request with little effort or cost to the plaintiff, and one that eliminated the formality of a trial. Landlords or creditors, without filing a petition, provided a tenant's or debtor's name and address to the court, which issued an order either sealing the premises until rent was paid or authorizing the immediate sale of the tenant's belongings. Issuance of a sealing order encouraged settlement of the dispute because tenants typically valued their business and possessions more than the amount owed. Moreover, the landlord or creditor could request an arrest warrant for the tenant or debtor without going to trial. This procedure further induced settlement.<sup>88</sup>

In 1908, the sealing procedure was standardized to allow the landlord or creditor to request a "distress warrant," to immediately seal the tenant's home, and to secure the tenant's possessions as collateral. The court required neither proof nor a hearing to issue these orders, although their effect was as severe and permanent as a court judgment. The application required only the applicant's name and address, the tenant's name and amount owed, a description of the property, the period for which rent was owed, and the date it had come due.<sup>89</sup> Before 1909, the procedure cost nothing to the landlord or creditor. After 1909, the landlord or creditor paid the court a fee, but recovered it from the tenant with the back rent or by selling the tenant's possessions.<sup>90</sup> The Mixed Court Chinese judge signed the warrant before 10:00 a.m. the day after the request was filed. Runners delivered the signed warrant to the central Municipal Police station, where the landlord picked it up. Speed of delivery was critical because news about distress warrants spread quickly, causing tenants to remove their belongings before the landlord arrived to seal the premises.<sup>91</sup> Unless paid additional money, runners frequently delayed six hours, providing time for tenants to remove their possessions from the homes.<sup>92</sup> After 1911, the Mixed Court Chinese judge issued warrants directly to the landlord who proceeded to the police station clos-

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87. FO, *supra* note 50, 656/111, June 5, 1906; 656/133, Nov. 20, 1914.

88. *Id.* 656/111, Jan. 3, 1906; 656/111, Feb. 2, 1906; 656/116, Oct. 13, 1908; 656/118, July 2, 1909; 656/118, July 17, 1909; 656/126, July 15, 1912; 656/131, Aug. 1, 1913; 656/141, Aug. 10, 1917.

89. Rules of Procedure, Rules 91-97, Civil Proceedings, at 22.

90. FO, *supra* note 50, 656/126, Aug. 7, 1911.

91. *Id.* 656/116, May 9, 1908.

92. *Id.* 656/116, Jan. 7, 1908.

est to the property.<sup>93</sup>

The court's pro-creditor judgments facilitated the redistribution of massive amounts of forfeited wealth,<sup>94</sup> especially during acute periods of economic volatility. By December 1921, so many bankruptcy cases were before the court that it hired a large accounting firm to maintain records of the claims and amounts involved.<sup>95</sup> The court's pro-creditor stance was well-known. Daily newspaper reports informed merchants about developments in pending suits. Additionally, business networks quickly spread the news of large awards to creditors. In their eagerness to avail themselves of the court's services, creditors normally set forth their claims at the Mixed Court the day a firm closed.<sup>96</sup>

The multiplicity of courts with overlapping jurisdictions created a favorable forum shopping environment that further benefitted plaintiffs. Although territorial jurisdictions could be separated neatly by city district, frequent population movement across those boundaries gave rise to the need to further define jurisdiction by some minimal contacts rule, a rule that never clearly materialized. The International Mixed Court and the French Mixed Court were aware of the jurisdictional overlap and tried to devise clear jurisdictional boundaries, but clever attorneys continued manipulating the system and bringing their clients' claims before the most favorable tribunal.<sup>97</sup>

The Mixed Court practice of civil detention was also pro-plaintiff because anyone could file a lawsuit and obtain a warrant causing another person's detention. Pre-trial detention placed defendants and their pocketbooks at the mercy of anyone suing them. A defendant's absence from his business while in custody afforded his creditors the opportunity to seize his assets.<sup>98</sup> Similarly, a foreigner who accused a Chinese of squatting on his land could request the court to detain the Chinese long enough to level the defendant's house.<sup>99</sup>

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93. Rules of Procedure, Rule 94, Civil Proceedings, at 22.

94. See, e.g., the bankruptcy of Gu Chenzhong, President of the Dahua girls' school. *Zaizhi Gu Chenzhong zhi zhaiwu* [More on the debt of Gu Chenzhong], SHENBAO (China), Oct. 5, 1914.

95. FO, *supra* note 50, 656/164, Dec. 1, 1921 (letter from Wang Tsze Kong to British Assessor).

96. *Id.* 656/141, Jul. 27, 1917 (letter from General Electric Co. of China Ltd. to British Assessor regarding bankruptcy of Hanson Electrical Co.).

97. See, e.g., *Dipi jiuge* [real estate dispute] and *Yizhuan baoshan xian tiandi jiuge'an nei zhi renzheng* [Witness Testifies in Land Dispute Transferred from Baoshan District], SHENBAO (China), June 4, 1914.

98. See FO, *supra* note 50, 656/124, Aug. 5, 1910 (letter of Hugo Reiss & Co. to a Mr. Wilson regarding the suit against Wo Bay Zung cigar shop).

99. *Id.* 656/116, Dec. 11, 1908, Dec. 28, 1908 (letters from D.A. Darling, Manager of Asiatic Petroleum Co. Ltd., to British judge).

Defendants lacking the means for a security deposit or guarantors, or whose guarantors reneged on their promises, were forced, if they could afford it, to hire expensive foreign attorneys to press the court for their release. One defendant argued that detention in civil cases was illegal without grounds for suspecting the defendant would abscond.<sup>100</sup> The court remained hostile to such appeals,<sup>101</sup> holding that Rule 8 of the Mixed Court Rules of Civil Procedure, which provided an exception to release on security, worked against, not in favor of, the defendant. In other words, if the court suspected the defendant would abscond, he was not released even if he had the necessary funds. Even during the course of the suit, the plaintiff could have the defendant arrested and detained simply by making an *ex parte* application, "supported by satisfactory evidence" that the defendant "is about to abscond from the jurisdiction of the Court." The definition of "satisfactory evidence" was vague.<sup>102</sup> The defendant could gain release temporarily to gather witnesses, but only after paying the expenses for their court appearance and only if accompanied by a Municipal Police escort.<sup>103</sup> Guarantors were also imprisoned if they defaulted on their promise to provide the defendant's security.<sup>104</sup> The security bond procedure was sufficiently standardized to allow use of a boilerplate form in English. Issued at the Mixed Court Registrar's office, it provided blanks for the nationality of the presiding foreign judge, the date, the case name, the name and signature of the guarantor, his address, the name of the defendant, and the signatures of the Registrar and the foreign judge. Seeking release imposed a time-consuming and expensive burden on the defendant. In at least one case, the defendant located a guarantor who supplied an additional \$5,000 security simply to buy the defendant's freedom during the approval time. The British judge sent memoranda to the Mixed Court Registrar approving or disapproving the guarantor.<sup>105</sup>

### C. Accessibility

The mixed and foreign courts, and the Chinese courts modeled after them, were accessible institutions, despite their formal court set-

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100. *Id.* 656/111, Sept. 11, 1906.

101. *Id.* 656/110, Sept. 12, 1906.

102. Rules of Procedure, Rule 8, Civil Proceedings, at 7.

103. FO, *supra* note 50, 656/110, June 22, 1906.

104. *Id.* 656/118, Jan. 8, 1909.

105. Even when this procedure involved a Chinese defendant and guarantor, the British judge, not the Chinese judge, was responsible for approving security bonds. Around 1913 the Security Office at the Court began issuing the rulings. *Id.* 656/131, Mar. 17, 1913; 656/131, Jul. 24, 1913; 656/131, Mar. 18, 1913; 656/131, Mar. 20, 1913.

tings. In fact, the Municipal Police encouraged Chinese to file petitions for civil suits in the International Mixed Court.<sup>106</sup> Using the courts was not free, but courts acted to lessen the expense. Fees were low, attorneys were not required, and procedures for initiating suits were simple.

What obstacles there were, such as fees, waiting periods, and jurisdictional hurdles, the mixed courts attempted to reduce. Foreigners paid no fees to file a lawsuit at the International Mixed Court, while Chinese litigants paid minor ones. Waiting the several weeks or months between filing and execution of judgment required patience. Yet, the International Mixed Court attempted to reduce the waiting period by appointing more judges, expediting trials, and scheduling hearings late into the night and on Saturdays.<sup>107</sup>

Defendants bore the brunt of the costs of litigating at the International Mixed Court. The plaintiff paid nothing extra to have a person summoned and detained until hearing and judgment. To be released from detention to gather evidence or to protect assets, the defendant had to arrange for a personal guarantor to deposit a security, often thousands of dollars, and to persuade the judge at a preliminary hearing of his reliability. These practices made delays in the lawsuit more burdensome for defendants than for plaintiffs. Litigation at the International Mixed Court put the burden on the defendant to such an extent that plaintiffs began to bring frivolous suits for the purpose of locking up their enemies in civil detention, to tarnish their business reputation or to raid their assets. Such delays exacerbated the uncertainty of all future business prospects for the defendant.<sup>108</sup>

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106. See the case of Mr. Wong and Mr. Dian, *infra* part IV.B.

107. The criminal section of the Mixed Court tried an average of 60 cases during each session. Over time the Court increased the number of sessions per day from an average of five or six to eight or more. FO, *supra* note 50, 656/175, Feb. 21, 1923 (Mixed Court Registrar's Report regarding "Court Accommodation"). The author's calculations are based on figures in GAZETTE, July 27, 1922, at 258; Jan. 15, 1923, at 7; Oct. 30, 1924, at 407; Apr. 9, 1925, at 155; Dec. 10, 1925, at 395; ANNUAL REPORT, *supra* note 64, at 56A, 68A (1922). By July, 1922, the traffic court heard up to 58 cases per session. ANNUAL REPORT, *supra* note 64, at 60A, 69A (1922); MUNICIPAL GAZETTE, Apr. 28, 1921, at 172; Sept. 26, 1923, at 274. See also the "Traffic" section of monthly Police Reports in MUNICIPAL GAZETTE, 1923-25. Chinese civil courts heard about five cases each session, while foreign civil courts each handled fewer than two per session. ANNUAL REPORT, *supra* note 64, at 56A, 168A (1922); MUNICIPAL GAZETTE, Nov. 30, 1924, at 407; Apr. 9, 1925, at 155; Dec. 10, 1925, at 395. Rent cases were tried in separate sessions, "squeezed in" early in the morning before the regular civil courts commenced. FO, *supra* note 50, 656/175, Feb. 21, 1923 (Mixed Court Registrar's Report regarding "Court Accommodation").

108. The court staff suspected this to be a common motive for lawsuits. See ANNUAL REPORT, *supra* note 64, at 56A (1913).

As proof of the court's accessibility, so many poor Chinese brought suits in the International Mixed Court without the aid of counsel, that the court created a special session to hear these cases and reduce the backlog plaguing its docket.<sup>109</sup> The First and Second Special District Courts later continued this service.<sup>110</sup>

The three district courts agreed to entertain a wide variety of suits, thereby refusing to make subject matter a barrier to litigation. When determining justiciability, the courts did not impose onerous evidentiary thresholds. Agreements struck between the parties did not have to be in writing, since courts enforced both oral and written contracts. To maintain their claims, plaintiffs did not have to produce eye witnesses. Nor did the mixed courts enforce territory-based jurisdictional rules that would have kept certain litigants out.<sup>111</sup> Consequently, these three courts were accessible to virtually all Chinese for suing their fellow Chinese. It is proof of the courts' accessibility that a wide range of Chinese congregated in their courtrooms.<sup>112</sup>

The International Mixed Court made its subject matter jurisdiction amenable to merchants' needs by refusing to limit its scope. Many claims brought to the Mixed Court involved trivial amounts of money. Typically, claims brought by utilities against small Chinese businesses or evicted families aimed to recover merely a gas fixture or a rice boiler.<sup>113</sup> Companies and individuals sued Chinese for amounts as small as a few "Mexican dollars"<sup>114</sup> or for the replacement of personal clothing and linens.<sup>115</sup> On the other hand, the court heard contract suits involving damages clauses of 50,000 taels,<sup>116</sup> corporate debts of \$100,000, and corporate mortgages of 531,911 taels.<sup>117</sup>

Litigants could bring any style of dispute to the courts. Debt

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109. MUNICIPAL GAZETTE, Apr. 22, 1915, at 155.

110. ANNUAL MIRROR OF SHANGHAI, *supra* note 22, Judicial section, at 15, 27.

111. *Id.* at 4-5, 12.

112. 3 MISCELLANEOUS NOTES, *supra* note 49, at 21.

113. FO, *supra* note 50, 656/124, Aug. 24, 1910 (letter from Shanghai Gas Co. to British Assessor).

114. See petition in Shanghai Electric Construction Co. v. Chang Yoa Sung, in FO, *supra* note 50, 656/111, June 5, 1906 (letter from Stokes, Platt & Teesdale regarding Kishan Singh v. Zang Hang Sun and Uttam Singh v. Tsung Tsun Zee and Ou Ziang Zee); *id.* 656/131, June 27, 1913 (letter from Shanghai Gas Co. to British judge Garstin); *id.* 656/116, Feb. 18, 1908 (letter from T.L. Bickerton & Co. to British judge Barton).

115. FO, *supra* note 50, 656/124, Sept. 1910 (letter from Daniel Wood to British judge regarding his suit against Kwa Yseng & Co.); *id.* 656/111, Jan. 22, 1906 (letter from J. Moosa to British judge Twyman).

116. FO, *supra* note 50, 656/175, May 30, 1924 (petition, notice of motion, and answer in Foh Hsing Chong Hong v. Yue Hsing Co. and Tsu Wong Sz).

117. *Id.* 656/124, May 7, 1910 (petition in the case of Chun Shun Yee v. Chun Shing Cheong); *id.* 656/131, Feb. 4, 1913 (petition and judgment in the case of Chen Yih Tsai v. Yuen Woo, Yah Hsing, and Loong Sheng).



disputes were the most common, and "debt" covered a wide variety of obligations, including contract breaches, bankruptcies, liquidations, and disputed accounts.<sup>118</sup> The courts enforced a rich variety of private contracts, from oral debt promises between individual peddlers, to complex exclusive-dealing contracts and restriction-of-trade agreements between major corporations. The remedies sought ranged from compensatory damages to permanent injunctions to restrain corporations from holding directors and shareholders meetings.<sup>119</sup>

Both the breadth and novelty of the subject matter jurisdiction of the mixed courts not only did not discourage, it attracted litigation. For plenary judicial remedies, the International Mixed Court offered a single process for all disputes, excluding no subject matters. The process put police power at the service of anyone who wanted to enforce a personal business deal, a weapon previously not freely available. Beyond welcoming all basic contract disputes, the mixed courts created subject matter innovations such as landlord-tenant disputes, trademark and patent infringement actions, labor striking, forgery, misappropriation, breach of employment contracts, corporate stock ownership, bankruptcy claims and foreclosures. These subjects corresponded to new commercial transactions, whose number and value rose in the 1900's, 1910's and 1920's in Shanghai. Speculation boosted the value of land and population influxes inflated rents; the introduction of tobacco and other consumer products raised the value of brand names; the rise of industry improved the value of patents and brought on labor strikes; the rise of the corporate form created intangible wealth and limited liability; the risky commercial climate increased the numbers of failed enterprises; and transactions with strangers coupled with concentrations of wealth heightened the risk of forged signatures, internal siphoning off of company funds, and employer-employee disputes.

The courts' willingness to rely on the persuasive skill of the parties and their attorneys to persuade the bench contributed to the civil courts' accessibility. The courts followed a procedural form where lawyers were delegated the primary task of persuasion. As conduits, legal brokers, or middlemen, lawyers made the courts more accessible to the Chinese merchant. Attorneys of various nationalities who had emigrated to China founded their own local bar associations in Shanghai, and some were particularly skilled at petitioning judges to view

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118. See, e.g., Reports of court cases, SHENBAO (China), Jan.-Dec. 1914; Court Accountants' report, ANNUAL REPORT, *supra* note 64, at 38 (1926).

119. FO, *supra* note 50, 656/160, Sept. 11, 1920 (documents relating to Tobacco Products Corp. v. Chia Yung Chang, Sun Ching Chun, Yang Chen Sung, Zung Tso Sung, Wu Cheng Hsu, Wong Yu Sung).

their clients' cases favorably. At first foreign, and later Chinese, lawyers<sup>120</sup> cultivated their ties with the courts and used their influence to gain strategic advantages for their clients. After 1926, factions of Chinese lawyers developed around certain judges with whom they cultivated ties, often based on the law school they had both attended.<sup>121</sup> It appears that the closer the relationship between the lawyer and judge, the higher the fee the lawyer could charge.<sup>122</sup> Anyone could hire lawyers, and many learned how to hire this new type of middleman from advertisements in the daily, local newspapers. Hence, while the lawyer's fee was a barrier to professional representation, money made courts accessible in an important way: the preferential system meant that a plaintiff's personal status and connections to the Chinese guild world were not necessary for winning a favorable judgment in the courts.

Those who founded and ran the mixed courts, whether or not they were sensitive to the intangible costs imposed on the litigants by Chinese culture, seem to have achieved some success in reducing them. Traditionally in China, involvement in litigation stigmatized

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120. The number of Chinese lawyers in Shanghai soared after 1926, when Chinese became the language of all courtroom proceedings in the city, except in consular courts. Interviews with members of the alumni association of the Shanghai College of Law and Politics, in Shanghai (Aug. 12, 1990). The Shanghai Bar Association was located in the French Concession. The membership of the Shanghai Bar Association, exclusively for Chinese lawyers, grew as follows:

1926:	235
1927:	323
1928:	400
1929:	430
1930:	642
1931:	816
1932:	1006
1933:	1079
1934:	1174
1935:	1282
1936:	1319

ANNUAL MIRROR OF SHANGHAI, *supra* note 22, Judicial section, at 167-69. Another source reports a smaller membership: 462 members in 1933. ZHONGGUO ZHI CIFA [CHINA'S JUDICIARY], part 2, section "benlun," at 83.

121. Graduates of the largest law school in Shanghai, the Soochow University Law School, formed the largest faction, called the *Dungwu* faction. Its members dominated the Shanghai Bar Association and had ties to many judges at the Provisional Court, including its President Ho Shih-tseng. Graduates who had also studied in France tended to cultivate ties to Chiang Kaishek's Nationalist government in Nanjing. They won such posts as Chief of the Ministry of Justice and President of the Judicial Yuan. FO, *supra* note 50, 656/205, Mar. 24, 1930 (report on Lawyers in Shanghai Bar Association).

122. Interviews with members of the Shanghai fazheng xueyuan alumni association, in Shanghai (Aug. 12, 1990); FO, *supra* note 50, 656/205, Mar. 24, 1930 (report on Lawyers in Shanghai Bar Association); Shanghai Municipal Police files, IO Dossiers, file 7245, statement by Shanghai Bar Association and Shanghai Federation of College Faculties, July 19, 1926.

both plaintiffs and defendants. According to the stereotype, courts in China tainted the reputation of everyone involved, sometimes even the judge.<sup>123</sup> Additionally, in early twentieth century Shanghai, given the effectiveness of mixed court orders and judgments, there existed an enormous potential for devastating one's opponent. Such devastation would have precluded the plaintiff from continuing a business relationship with the defendant after trial. The toll of damaging relationships would have been particularly acute for Chinese litigants because of their acculturation in a collusive economic environment. Yet, while the records show that defendants frequently lost face from litigation, I have found no instances of litigation tainting the reputation of plaintiffs.<sup>124</sup>

#### D. Competition

The rise of Chinese civil courts in Shanghai is testimony to the competitiveness of the mixed courts against traditional Chinese courts. Local Chinese officials, merchants, and lawyers founded sixteen civil courts between 1905 and 1933, one called the *Caipansuo*, or "Place for Judicial Decisions" (1905), seven called *Shenpanting*, or "Hall for Judicial Decisions" (1912-14), three under the Shanghai District Court (1927), three under the First Special District Court (1931), and two under the Second Special District (1933).<sup>125</sup> Each of the new courts employed the civil-criminal distinction, permitted the use of lawyers, and attempted to garner support from a professional police force—all features introduced to Shanghai by the mixed courts. The hybrid character of the mixed courts and the multi-national character of Shanghai may have eased the transplantability of these alien legal concepts.

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123. William Alford, *Of Arsenic and Old Laws: The Criminal Process in Late Imperial China*, 72 CAL. L. REV. 1180, 1222-26 (1984).

124. When a debt suit was filed against comprador Nye Tah Cheong, his British employer's business suffered because customers lost confidence. See FO, *supra* note 50, 656/118, Oct. 27, 1909 (letter from W.T. Garnett & Co. to British judge regarding the case Yang Tsin Zung v. Nye Tah Cheong). A Chinese manager of a general store, Teng Shien-son, could not find work for at least seven months because of a suit pending against him in the International Mixed Court. *Id.* 656/124, Aug. 4, 1910 (letter from Teng Shien-son to British Consul General).

125. In the rushed preparations for the court's official transfer to Chinese control on January 1, 1927, the warlord in control of Shanghai's region and the regional official in charge of the city of Nanjing, which would soon be the nation's capital, made judicial appointments to the Court their first priority. Local lawyers exerted great influence on the appointment of judges. Telegram from Nanjing Viceroy Xu and General Sun Chuanfang to Longhua Chief Executive Ding (Dec. 1926) (on file at the Shanghai Municipal Archives, file 179.4.6); FO, *supra* note 50, 656/205, Mar. 24, 1930 (Shanghai Bar Association Report); *id.* (report on the Provisional Court labelled "secret and confidential").

An experimental local Chinese council set up a court called the *Caipansuo* to try both criminal and civil cases arising in the Chinese sections of Shanghai. The council funded the *Caipansuo* and staffed it with locally-elected judges for seven years before dissolving it. Between 1905 and 1912, the *Caipansuo* heard slightly over 1,700 cases a year.<sup>126</sup> It may have been the first Chinese court in Shanghai to use the term "civil."

Between 1912 and 1914, a new Chinese municipal government for Shanghai, the *Huigongyi*, set up seven German-style courts and called them *Shenpanting*, a derivation from a new Japanese name for court.<sup>127</sup> The *Shenpanting* were meant to be more specialized and western than their predecessor, the traditional *yamen* court, which had served as the official imperial quarters of the local district magistrate. Each *Shenpanting* had both a civil and a criminal section. They allowed lawyers to argue on behalf of parties, and they made litigation more available by each serving separate Chinese districts of the city. The local district magistrate initially adjudicated cases in his *yamen*. After the fall of China's Emperor, the office of the magistrate continued, but the founding of the *Shenpanting* in 1912, which was a court meant to replace many of the judicial functions of the magistrate, signaled that the *yamen* was unsuccessful at competing with the western-style courts.<sup>128</sup>

In 1927, the Shanghai District Court (*Shanghai difang fayuan*) replaced the *Shenpanting* and went on to operate until 1941, despite the Japanese take-over of its courthouse in 1937. The court devoted a permanent and full-time staff to the administration of its civil section. Out of a total staff of 115 for the entire district court, including judges, fourteen employees worked solely in the civil section. Their most important task was managing the security deposits and the

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126. SHANGHAISHI ZIZHIZHI [SHANGHAI MUNICIPAL SELF-GOVERNMENT RECORDS], "Fanli" [explanation] section, at 1b-2a; *id.* "Shanghaishi zizhi kuaiji biao" [Shanghai Municipal Records Statistics Table] section, at 5a, 6a [hereinafter SELF-GOVERNMENT].

127. Interviews with members of the Shanghai College of Law and Politics Alumni Association, in Shanghai (Aug. 12, 1990).

128. Note, though, that a national regulation revised in 1923 still referred to magistrates' courts. Revised Provisional Regulations Governing Trial Proceedings by a Magistrate (promulgated Mar. 30, 1923). From 1910 until at least 1927, magistrates were allowed to try first instance criminal cases and civil cases involving 800 yuan or less, plus all suits involving litigants with special economic relationships, such as landlord-tenant, master-servant, innkeeper-customer, and carrier-customer suits. THE CHINA YEARBOOK (1926-27) 760-61 (1927).

The jurisdictional separation between the *yamen* and the *Shenpanting* is unclear, because the *Shenpanting* performed the judicial functions of the *yamen* court, and, like the *yamen*, was bound to follow national substantive and procedural laws and was under the authority of the Ministry of Justice.

assets of litigants.<sup>129</sup>

Caseloads in Shanghai reflected the success of courts at meeting the demand for litigation services because litigants were fairly free to choose between the traditional courts and the new courts. All the Chinese and mixed courts of Shanghai were available as fora for resolving disputes between Chinese who lived anywhere in the city. The bilateral treaties signed by the imperial Chinese government and thirteen foreign nations in the 1840s through the 1860s, left open the question of personal jurisdiction in civil cases. However, the mixed courts were so effective at competing with the Chinese courts that Chinese who lived in the foreign areas of Shanghai brought their suits to the mixed courts. Under the mixed courts' tacit minimal contacts rules, anyone was permitted to bring to the mixed courts suits against any Chinese who resided in, visited, had assets in, or did business in the territories over which the mixed courts had jurisdiction. The International Mixed Court had territorial jurisdiction over the International Settlement, the district of Shanghai controlled by the British Municipal Police, and the French Mixed Court exercised jurisdiction over the French Concession.

Over ninety-five percent of the residents of those districts were Chinese, and these districts covered the financial district and some of the busiest commercial areas of the city. Movement of the local population across these districts was the shortest route between the Chinese sections of the city and was frequent enough to undermine the ability of any minimal contacts rule to mandate the choice of civil court. The Chinese courts, including the traditional-style Chinese court in the district of Nanshi, ruled out any suits against any Chinese as long as their place of business or residence was Shanghai. Consequently, jurisdictional distinctions did not clearly dictate where Chinese had to take their lawsuits, and Chinese litigants could vote with their feet. Caseloads reflected, if imperfectly, popularity.<sup>130</sup>

As a sign of the freedom to choose one's court, forum shopping was a perennial problem. Though data is scarce, the civil dockets of

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129. ANNUAL MIRROR OF SHANGHAI, *supra* note 22, Judicial section, at 4-6, 12-13.

130. In the district court located in the Chinese section of Nanshi and in the successor courts to both mixed courts, Chinese sued Chinese, Chinese sued foreigners, foreigners sued Chinese, and foreigners sued foreigners. ANNUAL MIRROR OF SHANGHAI, *supra* note 22, Judicial section, at 39-41, 59-67, 105-106. This meant that the courts located in foreign sections of the city did not have exclusive jurisdiction over suits involving foreigners. Case records also show that Chinese at times took the same dispute to different courts in the city. For example, the mixed-court case of merchants Cheng Gongyuan v. Cheng Xiuming, where one half-brother accused the half-brother who was head of the family of misappropriating the family jade pieces, was tried in the *Shenpanting* five years earlier. Special District Court, criminal case no. 174, appeal rejected Mar. 30, 1931, JIANGSU, at 193-96.

Chinese courts before 1927 appear to have been smaller than those of the International and French Mixed Courts. What proportion of the 1,700 annual cases at the *Caipansuo* were civil is unknown; however, we do know that a lone individual, an assistant judge, handled all the civil litigation in the space of only two hours per day.<sup>131</sup>

The smaller civil caseloads of the Chinese courts leads to several possible conclusions, any or all of which are plausible either singly or in combination. First, the courts did not enforce their judgments, nor did they maintain exclusive jurisdiction over property, assets, and people within their territories. Second, the Chinese courts did not offer the popular types of suits that reduced the risk of nonenforcement of the bargains made by the merchants of Shanghai. Third, their procedures and outcomes did not favor plaintiffs or the costs to plaintiffs were high. Finally, administrative burdens pressured the people who ran the courts into accepting fewer cases.

The absence of all of these factors in the mixed courts gave them advantages over their Chinese competitors. First, their lack of power to enforce judgments made the *yamen*, the *Caipansuo* and the *Shenpanting* less attractive fora for enforcing agreements. Even the *Caipansuo* and the *Shenpanting*, while relying on the parties to present the facts of the dispute, also relied on the parties to enforce the judgment. Police assistance was generally unavailable in civil cases there.

The enforceability of court decrees was so crucial that as the Chinese courts were founded, several local Chinese police forces developed and worked in tandem with their criminal sides, but less so with their civil sides. Large, professional police forces were an unprecedented phenomenon in China.<sup>132</sup> A local militia called the River Police enforced the criminal decisions of the *Caipansuo*. The prosecutorial departments attached to the criminal section of the *Shenpanting* may have provided some investigation services to its civil side. There surely was a demand for it.<sup>133</sup> The Shanghai Public

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131. SHANGHAISHI ZIZHIZHI, "Gongdu shenbian" [publication of official documents] section, "Jingzheng'an" [Police and government] subsection, 53-54.

132. See SHANGHAI TONGJI ZONG BAOGAO [SHANGHAI STATISTICS GENERAL REPORT], (Shanghaishi zhengfu tongji chubianyin [Compiled and published by Shanghai Municipal Government Statistics], 1946), statistical tables chapter 7, "Jingbao" [police security] section, at 1-62.

133. In 1915, the Ministry of Justice revised and repromulgated an edict of the Guangxu Emperor, parts of which laid out how courts were to try civil cases. In only general terms, the document permitted government enforcement of civil court judgments. Articles 78 to 80 provided for detention of civil debtors. Article 41 provided that, if a civil party did not voluntarily comply with an adverse judgment, his assets could be seized and sold to satisfy the judgment. If the assets were not sufficient, the rule specified, the judgment debtor could be

Security Bureau, a quasi-military force of Chinese that adopted many of the procedures of the Shanghai Municipal Police, enforced the decisions of the Shanghai District Court.<sup>134</sup> Still, the district court's orders and judgments were not enforced as efficiently as those of the mixed courts. The Chinese Public Security Bureau did not automatically enforce the district court's orders for debt payment. Plaintiffs first had to apply for a special judgment authorizing the use of force to implement the order. The Chinese District Court granted enforcement orders under the authority of a national statute.<sup>135</sup> It used summonses to bring defendants into court, but armed police officers did not serve them. If a civil defendant was difficult to locate and summon into court, the plaintiff had to petition the court to appoint a lawyer who would publicly summon the defendant.<sup>136</sup>

The lack of police backing also placed the Chinese courts at a competitive disadvantage when asserting their jurisdiction. The Chinese personnel at the court in Nanshi cooperated with the International Mixed Court, while the Mixed Court's police and judges were reluctant to cooperate with Chinese courts. To handle cases involving people, acts, and property outside the narrow confines of the International Settlement, the Mixed Court needed to arrest and summon defendants<sup>137</sup> and witnesses, and obtain information from Chinese

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forced to work while in detention until he produced the amount of the judgment. Reglement Provisoire Pour Les Tribunaux Superieurs et Ceux Qui Leur Sont Subordonnés de la Republique Chinoise [Provisional Regulations for High Courts and the Courts Subject to the Authority of the Chinese Republic] (Law Codification Commission, trans.) (Ministry of Justice 1915), "1915 Procedure Rules." The central government in 1921 issued a regulation forbidding District Magistrates to call on the prosecutorial units of the *Shenpanting* to process civil cases. GUOMIN ZHENGFU [REPUBLICAN GOVERNMENT], SIFA LIGUI [JUDICIAL LAWS AND REGULATIONS] (Republican Government Judicial Yuan Councilor's office, comps., Feb. 1930), at 1792, Article 5.

134. ANNUAL MIRROR OF SHANGHAI, *supra* note 22, Judicial section, at 13. Many of these procedures used cutting-edge technology, for example fingerprinting, for identification. Frederick Wakeman, *Policing Modern Shanghai*, 115 CHINA Q. 408, 427 (Sept. 1988). *See, e.g.*, Fingerprinted criminal record of Li Kungpao, native of Changchow, age 35, Shanghai Municipal Police doc. no. 23358, Shanghai Municipal Archives.

135. RENMIN SUSONG TIAOLI [CIVIL PROCEDURE REGULATION], ORD. 600, PROVISION 6, ARTICLE 1. *See, e.g.*, Judgment of Nov. 20, 1928 (Huang Jimao), JIANGSU, *supra* note 45, at 309; Judgment of Dec. 13, 1928 (Wang Gongquan), JIANGSU, *supra* note 45, at 311.

136. This procedure is described in the RENMIN SUSONG TIAOLI, provision 182. *E.g.*, Judgment of Feb. 15, 1929 (Han Zhuanghe), JIANGSU, *supra* note 45, at 313; Judgment of Apr. 30, 1929 (Xie Chaoshi), JIANGSU, *supra* note 45, at 317; Judgment of Feb. 18, 1929 (Jin Hanchen), JIANGSU, at 315.

137. *See* FO, *supra* note 50, 656/124, Sept. 8, 1910, Oct. 1, 1910, Oct. 12, 1910 (letters from S. Houston McKean to British judge Garstin regarding the case Horatio Robertson v. Yeh Vee Sung, asking for the arrest of Yeh Vee Sung, who was in the Nanshi yamen). *Id.* 656/137, Jan. 8, 1915. Under considerable pressure, the British judge at the Mixed Court finally asked the Shanghai Circuit Intendant to arrange for Yeh to be delivered to the Mixed Court for trial.

authorities. Local Chinese authorities helped the Mixed Court impound assets outside the Settlement and deport people out of the city.<sup>138</sup> Yet, the Mixed Court never reciprocated and vigorously tried to maintain a monopoly over the first-instance adjudication of matters arising within its territorial jurisdiction. The Municipal Police aimed to exercise exclusive control over all Chinese living in the Settlement, even the political revolutionaries seeking the protection that the British control afforded from Chinese government censure. In the famous *Subao* case, the Emperor himself had to arrange for the Municipal Police to try on his behalf the anti-Manchu activist Zou Rong in the Mixed Court rather than in the Nanshi court, the local extension of the Emperor's national court system.<sup>139</sup> The International Settlement's authorities insisted on first trying all Chinese wanted by Chinese authorities in the International Mixed Court for acts committed outside the Settlement.<sup>140</sup> The Mixed Court also insisted on conducting a judicial proceeding if local Chinese officials wanted to attach Chinese property within the Settlement.<sup>141</sup> The court's unwillingness to relinquish judicial authority over all people and assets within the International Settlement precluded Chinese courts from litigating claims arising in the settlement.

Subject matter jurisdiction formed a second competitive disadvantage of the Chinese courts. The civil process they offered appealed to Chinese merchants less than the actions available in the mixed

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138. Except for a period of recalcitrance between 1911 and 1914, the district magistrate and the Circuit Intendant in Shanghai generally allowed Mixed Court runners and Municipal Police officers into Nanshi. Alternatively, they let their own staff carry out Mixed Court orders and seal up premises, or actually hand over Chinese suspects to the Court. FO, *supra* note 50, 656/118, Oct. 25, 1909 (letter from Burkhill & Sons to British judge regarding a Chinese shopkeeper in Nanshi whom Burkhill sued and against whom he won an order to seal a shop); *id.* 656/131, Jan. 16, 1913 (letter from one Mellows to Captain Myhre, Harbour Master, regarding Chinese defendant arrested by Nanshi police); *id.* 656/133, May 19, 1914 (letter from Houston McKean to British judge Garstin regarding Austrian Export & Import Co. v. Tien Yue Piece Goods Hong); *id.* 656/133, May 12, 1916 (letter from Mixed Court Registrar to British judge Hones regarding *Algar v. Tsang Sau Ding*).

139. The romanticization used in the English language version of the transcript is "Tsou Yung." *The Shanghai Sedition Trial: Popularly Known as the Supao Case, Heard in the Mixed Court of Shanghai On December 3, 4, 5, 7 & 16, 1903*, reprinted in SHANGHAI: N.-CHINA HERALD 1904, at 1-41 (available at the British Library in the British Museum, London).

140. FO, *supra* note 50, 656/131, May 8, 1913; *id.* 656/118, Mar. 2, 1909 (reporting Municipal Police Colonel Bruce's statement to the Shanghai Circuit Intendant that "the arrest of criminals in the Settlement was a matter for the Settlement Police and that if outside detectives came to arrest people in the Settlement, they would themselves be arrested").

141. *E.g.*, FO, *supra* note 50, 656/137, July 1 and 3, 1915 (letters exchanged between Mixed Court Registrar and British judge, indicating that, in 1915, the Zhejiang Salt Commissioner sought to impound 356,317 piculs of salt that the commissioner's agent Li Yung Feng had stored in the Settlement; Li owed the Commissioner \$56,000 in dues for being granted a monopoly over salt in the Settlement).



courts. It does not appear that the *yamen*, *Caipansuo*, and *Shenpanting* offered the variety of commercial actions the mixed courts did. The types of cases transferred from court to court are evidence of a division of labor between the *Shenpanting* and the International Mixed Court. In 1914, for example, the Mixed Court sent twenty-two cases to the *Shenpanting*, most of them criminal. Conversely, the *Shenpanting* sent two cases to the Mixed Court, a debt suit and a copyright suit.<sup>142</sup>

In the same vein, the local Shanghai court run in a *yamen* by the central Chinese government could not compete with the Mixed Court for land litigation, even though land disputes proliferated, and even though foreign control of land in Shanghai was an affront to Chinese sovereignty and thus to the sensibilities of Chinese plaintiffs. Chinese bringing land suits in the mixed courts were considered unpatriotic because doing so gave a foreign judge power over the disposition of the land. Through a variety of agreements, authorities in China permitted foreigners to dwell on and use areas of land in what amounted to an elaborate system of leaseholds. The fiction of Chinese sovereignty was maintained while foreigners exercised control over city land.<sup>143</sup> Despite the stigma, however, Chinese landowners in Shanghai showed a great desire to assert their rights in the mixed courts. While the new Chinese civil courts in Shanghai adjudicated land actions, the territorial jurisdiction of the mixed courts covered the most industrious financial and commercial districts of Shanghai, and the mixed courts maintained an exclusive power to settle land disputes there. Nor could Shanghai's local merchant organizations provide the service of dispute resolution in land cases because the local Chinese and foreign governments in the city created a system of land registration that nullified the merchants' authority.<sup>144</sup>

Imitation suggests that what was imitated worked. When Chinese administrators took over the mixed courts and turned them into the First and Second Special District Courts, they formalized the variety and innovation of the civil subject matter jurisdiction. The registrars broke down caseload statistics by type of suit, and judges handed

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142. See generally reports of court cases, SHENBAO (China), Jan.-Dec. 1914.

143. The system originated in the 1845 version of the Land Regulations (*Tudi zhangcheng*), text in SHANGHAI GONGGONG ZUJIE ZHIDU, (Zhongguo kexue gongsi chengyin, 1931), at 200-13 (China Science Company pub.) [hereinafter *Tudi zhangcheng*]. For a good summary of the official mechanisms for foreign possession of land in Shanghai, see Anatol Kotenev, Shanghai: Transfer of Title to Land in the International Settlement (1931) (unpublished manuscript, prepared for the Secretary of the Shanghai Municipal Council, available at the University of Hong Kong Library). See generally V.A. RIASANOVSKY, THE MODERN CIVIL LAW OF CHINA, PART 1, at 44 (1928).

144. See *supra* notes 46-48 and accompanying text.

down judgments noting the type of suit.<sup>145</sup> The divisions created ready-made lawsuit categories that, in effect, advertised the set of merchants' rights enforceable in the courts. This smorgasbord of civil actions heightened plaintiffs' awareness and may have stimulated the desire to litigate. At the same time, the wide variety of permissible types of suits did not screen out any disputes. The district court's expanded subject matter jurisdiction included family disputes, small commercial cases, land disputes, trademark infringement, building cases, maritime cases, securities, labor strikes, sale of goods and the lucrative suits for recovery of rent by landlords and for the transfer of defaulting mortgagors' assets to mortgagees.<sup>146</sup>

A third competitive disadvantage of the Chinese courts was that they did not follow a procedure favorable to the plaintiff.<sup>147</sup> A pro-plaintiff procedure was alien to China. Confucius touted the notion of avoidance. Under this view, the best judicial work was preventative; the idea was to help people solve their problems among themselves and thereby keep them from seeking a judicial resolution. China's emperors subscribed to this notion in every dynasty.<sup>148</sup> In order to keep dockets small and government costs down, China's imperial rulers encouraged the imperial bureaucracy to promote a forbidding image of the national court system. The Emperor Kangxi wrote in the early Qing period:

The Emperor, considering . . . the notoriously litigious character of the Chinese, is of the opinion that lawsuits would tend to increase to a frightful extent if people were not afraid of the tribunals and if they felt confident of always finding in them ready and perfect justice. . . . The good citizens who may have difficulties among themselves should settle them like brothers by referring to the arbitration of some old man or village head. As for those who are troublesome, obstinate and quarrelsome, let them be ruined in the law courts; that is the justice that is due to them.

The Emperor Kangxi, 1661-1722.<sup>149</sup>

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145. See ANNUAL MIRROR OF SHANGHAI, *supra* note 22, Judicial section, at 15.

146. ANNUAL MIRROR OF SHANGHAI, *supra* note 22, Judicial section, at 34-93. *E.g.*, Judgment of Dec. 19, 1928 (Da Kangyang v. Wu Yanwei), JIANGSU, *supra* note 45, at 265-68.

147. See generally THE CHINA YEARBOOK, 1912-27.

148. Many thanks to Chang Wejen for educating me about court procedure in imperial China.

149. *The Geography of China*, NAT'L GEOGRAPHIC MAG., vol. LI, no. 6 (June 1927). Many thanks to the Honorable James Buckley for alerting me to this edict.

The lesson of Kangxi's edict and the great strength of guilds in Qing China support the notion that court authority over commercial disputes keeps barriers to market participation low. In eighteenth and nineteenth century China, collusive business practices grew in the absence of judicial dispute settlement mechanisms for commercial disputes. Perhaps, further research on courts and guilds in the Qing period will show that the courts' abdication of a

The magistrates who served as first instance judges often reached judgment based solely on the petition. Even if the plaintiff's claim survived to the hearing stage, the law prohibited the plaintiff from marshalling any legal resources to his aid. The imperial law code contained provisions prohibiting certain types of people from serving as representatives for plaintiffs, including government school students and professional specialists in court procedure. Nor was the plaintiff permitted to advance legal arguments at the hearing. Instead, he was limited to presenting facts only. For some claimants, the law prohibited the filing of petitions under any circumstances; this group of claimants included government officials, government school students, prisoners, children (if their complaint was against their parents or grandparents), and junior relatives (if their complaint was against relatives senior to them).<sup>150</sup>

In 1915, the national government promulgated civil procedure rules that provided for legal representation, prescribed the contents of the civil petition, and fixed costs on a sliding scale according to the amount in dispute. The higher the amount, the lower the percentage of the fee. The percentage ranged from about three to five percent.<sup>151</sup> It is unclear to what extent these rules actually dictated practices at the *Shenpanting* in Shanghai, but the rules officially would have bound the *Shenpanting*.

Mimicking the pro-plaintiff mixed courts, the Chinese District Court adopted procedures benefitting plaintiffs. Its services, such as orders to pay, injunctions urging the timely completion of a task, and declarations of death, bankruptcy, and incompetency to manage one's property, reduced risk and costs for property owners, employers, and creditors.<sup>152</sup> Plaintiffs or their lawyers could petition the district court for orders that would be granted summarily and carried out without evidentiary hearing for the defendant, and orders for the arrest and detention of defendants who did not pay court judgments.<sup>153</sup> The district court granted sealing and auction orders

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significant role in adjudicating merchant disputes shifted enough power to guilds to allow them to maintain barriers to market formation.

150. See ZHONGYANG YANJINYUAN [AN ANNOTATED BIBLIOGRAPHY OF CHINESE LEGAL HISTORY], roll 39 at 1004, roll 40 at 1013, 1018, 1025.

151. 1915 Procedure Rules, Articles 48, 51, 84-96.

152. With the exception of prosecution for tax evasion, pursued solely at the First Special District Court, the three largest courts of Shanghai after 1927 had identical subject matter jurisdictions. ANNUAL MIRROR OF SHANGHAI, *supra* note 22, Judicial section, at 35, 41.

153. See, e.g., Judgment of Dec. 13, 1928 (Zhou Decui v. Yin Huairan), JIANGSU, *supra* note 45, at 289; Judgment of Apr. 6, 1929 (Zhang Yuling), *id.* at 287.

almost identical to those used at the International Mixed Court.<sup>154</sup> After the mixed courts came under Chinese control, they continued to be accessible. They even encouraged small suits by reserving special courtrooms for simple civil suits, as did the Chinese District Court.<sup>155</sup> The size of commercial cases processed at each of the three courts varied greatly because the courts imposed no jurisdictional floor or ceiling on the amount in dispute.<sup>156</sup>

A fourth disadvantage of the Chinese courts was their cost to litigators. In monetary and psychological terms, Chinese courts traditionally placed substantial costs on plaintiffs in order to discourage litigation. Plaintiffs often had to travel long distances to file petitions. Petitions had to be filed at the *yamen*, of which there was only one per county. If a lower ranking, and therefore more ubiquitous and accessible, government official tried any lawsuit himself, not only he, but also his immediate superior and his superior's superiors were subject to demerits, demotions, or other punishment.

Petitions had to be in writing and contain certain items of information, such as the names of the people involved in the dispute, and at least several lines clearly describing the facts of the dispute. Although the penalty for failure to meet these pleading requirements was dismissal, the law forbade complainants from hiring professionals or even students of government to write the complaints. By law, magistrates could punish plaintiffs who brought accusations in petitions that later proved to be false. If someone else wrote the petition for the plaintiff, the scrivener could also be punished.<sup>157</sup>

Although the mixed courts did not impose these kinds of burdens and restrictions on plaintiffs, the mixed courts did impose one cost on Chinese plaintiffs that the Chinese courts did not. Atop the ancient stigma attached to courts in general was the evil of foreigners sitting as judges. Potential Chinese plaintiffs were concerned about the nationality of judges, not only because it affected the outcome of judi-

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154. Judgment of Jan. 26, 1929 (Zhang Wenqing), *id.* at 295; Judgment of Dec. 17, 1928 (Jiang Shixiong), *id.* at 297; Judgment of Apr. 12, 1929 (Chen Fengshi), *id.* at 293.

155. The First Special District Court was the Chinese incarnation of the International Mixed Court. The litigation classed as "civil" in the International Mixed Court's official figures involved almost exclusively commercial disputes. See ANNUAL MIRROR OF SHANGHAI, *supra* note 22, Judicial section, at 15.

156. The Shanghai District Court, the First Special District Court, and the Second Special District Court all heard debt cases involving less than 200 yuan. In 1935, the District Court heard 2591 such cases. ANNUAL MIRROR OF SHANGHAI, *supra* note 22, Judicial section, at 41, 107.

157. See generally ZHONGYANG YANJINYUAN [AN ANNOTATED BIBLIOGRAPHY OF CHINESE LEGAL HISTORY], *supra* note 150, at 981-91, roll 39.

cial decisions, but also because it further stigmatized Chinese who submitted to the authority of a foreigner.

The Chinese who took control of the mixed civil courts in Shanghai removed foreign judges, who represented a serious cultural obstacle to Chinese use of the courts. In 1927, when the *Caipansuo* became the District Court of Shanghai, they removed all foreign judges from the International Mixed Court,<sup>158</sup> and later in 1930, all foreign advisors to the bench. By 1931, all French judges had left the bench of the French Mixed Court. In all three courts, then, Chinese judges officially applied national civil statutes.<sup>159</sup> Patriotism no longer stood as a barrier to the use of the Chinese courts located in the foreign settlements.

These changes signalled the progressive incorporation of Shanghai's three major courts, first into a local, and then into a national Chinese court system. They coincided with, and may have precipitated, a dramatic increase in the number of Chinese civil suits litigated in all three courts.

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158. The International Mixed Court was named the "Provisional Court" in 1927, the "Special District Court" in 1930, and the "First Special District Court" in 1931.

159. ANNUAL MIRROR OF SHANGHAI, *supra* note 22, Judicial section, at 12.

TABLE II — CIVIL CASES IN SHANGHAI DISTRICT COURTS<sup>160</sup>

	District <sup>161</sup>		First Special District <sup>162</sup>		Second Special District <sup>163</sup>	
	Cases Accepted for First Hearing	Total Cases Accepted*	Cases Accepted for First Hearing	Total Cases Accepted*	Cases Accepted for First Hearing	Total Cases Accepted*
	1931	2,613	5,971	4,036	8,829	1,672
1932						
1933	4,400	10,809	6,426	14,140	2,914	5,925
1934	5,550	13,438	8,896	17,891	3,515	7,071
1935	8,962	18,001	15,172	28,365	5,575	10,146
1946	9,233		NA	NA	NA	NA
1947		17,284	NA	NA	NA	NA
1948	12,186	26,471	NA	NA	NA	NA

\*Includes Chinese civil cases accepted for first hearing, first rehearing, second rehearing, rehearing for setting aside the ruling, new trial, petitions for injunctions, writ of mandamus, and compulsory execution. Any cases in which parties filed for more than one of these in the same year would have been counted more than once.

The sixteen-fold increase in the total number of civil cases accepted at the First Special District Court between 1926 and 1935<sup>164</sup> far outpaced population growth and so may have been in part a response to the removal of foreign judges. Their removal diminished the stigma borne by the court and thereby lowered the cost to Chinese of litigating there. Of the First Special District Court civil cases,

160. Figures for 1943 through 1944 are lacking, presumably as a result of a general halting of court work during the Japanese occupation of Shanghai. After 1944, the two Special District Courts merged into the Shanghai District Court. Figures for 1945 are available only for criminal cases. See ANNUAL MIRROR OF SHANGHAI, 1946, Judicial section, at 3-5.

161. STATISTICS OF SHANGHAI, *supra* note 12, Judicial Section, Table 5, at 3; ANNUAL MIRROR OF SHANGHAI, 1934, Judicial section, at 17; 1936 SUPPLEMENT, *supra* note 13, Table 5, at 19; ANNUAL MIRROR OF SHANGHAI, *supra* note 22, at 34-36; ANNUAL MIRROR OF SHANGHAI, 1946, Judicial Section, at 3-5; ANNUAL MIRROR OF SHANGHAI, 1947, Judicial Section, at 6-8; SHANGHAISHI TONGJI ZONG BAOGAO [GENERAL STATISTICS REPORT OF THE SHANGHAI MUNICIPALITY], 1948, Judicial Section, Tables 324, 326 (Shanghai Municipal Archives, file 1-0-193). The figures for 1933 refer to cases accepted between July 1933 and June 1934. The figures for 1934 refer to cases accepted between July 1934 and June 1935.

162. STATISTICS OF SHANGHAI, *supra* note 12, Judicial Section, Table 5, at 3; 1936 SUPPLEMENT, *supra* note 13, Table 5, at 19; ANNUAL MIRROR OF SHANGHAI, *supra* note 22, at 56-67; ANNUAL REPORT, 1941, *supra* note 64, at 35-36; ANNUAL REPORT, 1942, at 45.

163. STATISTICS OF SHANGHAI, *supra* note 12, Judicial Section, Table 5, at 3; 1936 SUPPLEMENT, *supra* note 13, Table 5, at 19; ANNUAL MIRROR OF SHANGHAI, *supra* note 22, at 103-07.

164. The total figure for Chinese civil cases filed in 1926 was 1,793. See TABLE I, *supra* text accompanying notes 64-67.

Each civil case accepted at the First Special District Court involved the service of roughly 15 summonses, orders, and other civil processes on average. The following are the figures for total number of "Civil Processes Served" from that court from January of 1933 through December of 1941.

almost all involved Chinese suing Chinese.<sup>165</sup>

The three courts operated nine civil courtrooms and together with the appeals courts they processed more civil cases annually than their predecessors. Their total civil caseload increased each year, interrupted only by the Japanese occupation. Growth finally stopped only when the Chinese Communist Party took over Shanghai in 1949.<sup>166</sup>

The relatively small civil caseloads of the Chinese courts before the procedural reforms beginning in 1927 reflected not just a less favorable civil process there, but also an inadequate dedication of judicial resources. The number of civil cases processed at the *Caipansuo* probably would have been larger if the court had devoted more time to them. The *Caipansuo* had trouble handling its civil docket, even after the provincial official deputized the International Mixed Court to try some of its civil cases.<sup>167</sup>

Yet, with all the reforms rendering the Chinese courts more

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<i>Year</i>	<i>Number of Civil Processes Served</i>
1933	117,311
1934	126,572
1935	158,777
1936	193,461
1937	111,727
1938	95,043
1939	87,193
1940	67,874
1941	36,013

165. FO, *supra* note 50, 656/205, July 1930 (Municipal Advocate's Report); FEITANG FAGUAN YANJIU SHANGHAI GONGGONG ZUIJIE QINGXING BAOGAOSHU [REPORT OF STUDY BY THE OFFICIAL FEI TANG OF THE SITUATION IN THE INTERNATIONAL SETTLEMENT], (Gongbuju huawenchu yishu [Municipal Council Chinese Dept.], 1931), vol. 1, at 411. In 1935, 417 out of 18,001 District Court cases involved at least one foreign party, as did 2,911 out of 28,365 First Special District Court cases, and 175 out of 10,146 Second Special District Court cases. ANNUAL MIRROR OF SHANGHAI, *supra* note 22, at 36-55, 67-102, 107-16.

166. The French and International courts after 1927 received roughly the same proportion of the total caseload received as mixed courts before 1927. The French court processed about 40% of the International court's civil caseload before 1927. *See supra* note 71. From July, 1931 to June, 1932, the three courts together processed 18,386 first instance cases. The District Court, successor to the *Shenpaning*, handled 32% of these cases in 1931-1932. The First Special District Court, successor to the International court, handled 48%, and the Second Special District Court, successor to the French court, handled 20%. Calculated from figures in SHANGHAISHI TONGJI [STATISTICS OF SHANGHAI], "Sifa" [judicial administration] section, table 5. In 1935, the three courts handled a total of 26,964 cases. The District Court handled 30% of the total. "Financial" cases accounted for 84% at the First Special District Court, for 83% at the successor to the Second Special District Court, and for 63% at the District Court. ANNUAL MIRROR OF SHANGHAI, *supra* note 22, Judicial section, at 34-37, 55-57, 103-16.

167. SHANGHAISHI ZIZHIZHI, "Gongdu shenbian" [publication of official documents] section, "Jingzheng'an" [Police and government] subsection, 53-54.

attractive to Chinese civil plaintiffs, the courts suffered under new administrative burdens after 1927. China's new ruler, Chiang Kaishek, created a Ministry of Justice in his capital of Nanjing in November 1926, one of whose functions was to unite all existing courts in China into a single, uniform court system. The Ministry charged the clerks and judges at the Shanghai District Court with onerous administrative tasks for each civil case. Dozens of new internal regulations required detailed reports and recordkeeping. Judges were bound to pay scrupulous attention to substantive rules emanating from the Ministry and from its executive arm after October 1928, the Judicial Administration Bureau.<sup>168</sup>

As part of Chiang Kaishek's attempt to incorporate the Shanghai courts into the national court system, national bureaucrats in Nanjing, more concerned with increasing state revenues and legal uniformity across China than with encouraging litigation, tried to minimize the local autonomy of the former mixed courts and reduce their plaintiff bias. The Judicial Administration Bureau of Chiang's national regime in Nanjing attempted to narrow the subject matter jurisdiction of the Shanghai courts by allocating jurisdiction for some of the courts' types of suits into government administrative departments. Each department specialized in a different subject matter that corresponded to a type of dispute formerly tried in the International Mixed Court.<sup>169</sup> The plan was to shift the task of enforcing local government regulations from the former mixed courts to local administrative departments.<sup>170</sup>

The plan failed, despite much bureaucratic effort. One of the departments processed cases of land disputes<sup>171</sup> while the courts continued to try them. Likewise, the courts continued to entertain labor

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168. *Sifa xingzhengbu daishu zhibian* [The development of the chain of command over the Judicial Administration Bureau], at 1, in *ZHANSHI SIFA JIYAO* [AN OUTLINE OF THE IMPLEMENTATION OF THE JUDICIARY].

169. Shanghai Municipal Archives, file 181.1.19. See especially chart at 92, outlining each district level department.

170. For example, the Bureau of Social Affairs was set up under the City Government of Greater Shanghai. One of its principal functions was to keep track of and diffuse labor unrest. See *SHANGHAI BUREAU OF SOCIAL AFFAIRS, JIN SHIWUNIANLAI SHANGHAI ZHI TAIGONGTINGYE* [STRIKES AND LOCKOUTS IN SHANGHAI SINCE 1918] (1933); *SHANGHAI BUREAU OF SOCIAL AFFAIRS, ANNUAL REPORT ON LABOR STRIKES IN GREATER SHANGHAI* (Yearbook) (1928); *SHANGHAI BUREAU OF SOCIAL AFFAIRS, SHANGHAI TEBIESHI TAIGONGTINGYE TONGJI* [THE SPECIAL MUNICIPALITY OF SHANGHAI STRIKES AND LOCKOUT STATISTICS] (1929).

171. For a summary of disputes handled by the Land Administration Office, see *SHANGHAISHI TONGJI ZONG BAOGAO* [SHANGHAI STATISTICS, GENERAL REPORT], 1946, Chapter 2, *Dizheng* [land administration] section, at 8, table 6.



cases while another department mediated labor disputes.<sup>172</sup> Chinese litigation of family disputes continued through 1941 despite the creation of mediation procedures in all three courts for “human relations” cases and for commercial cases.<sup>173</sup>

On the whole, the central government’s efforts did not diminish the number of civil cases brought to the Shanghai courts. The civil courts under Chinese control after 1927 tried more civil disputes than the mixed civil courts ever did. The First Special District Court processed multiples more cases than the International Mixed Court did during even its busiest days in the mid-1920s.<sup>174</sup> Yet, the new administrative burdens indirectly impaired the courts’ accessibility by giving court personnel incentives to minimize caseloads. Corruption raised costs as well. National bureaucrats, who ranked above the local judges, had trouble preventing the judges from accepting fees directly from the parties.<sup>175</sup>

Guilds and government arbitration tribunals tried to compete with the courts, but none of them offered as attractive a dispute resolution mechanism as the courts. The commercial arbitration tribunals established by the Ministry of Justice in the early 1920s did not cater to plaintiffs to the extent of the courts. The tribunals were not permitted to award default judgments.<sup>176</sup> The tribunals were also restrained from compelling any action by the parties, and so could not assure the

172. See the enumeration of strike cases for 1935, *id.* at 35.

173. All three Chinese courts offered mediation after 1927. See *id.* at 68-69, 108-09 (yearly mediation statistics).

Case records show that mediation was rarely effective for commercial cases. For example, First Special District Court civil case no. 1888 underwent mediation in 1935, then resorted to litigation between 1936 and 1942. File 190/4003 Shanghai Municipal Archives. Another case went to trial at the First Special District Court after undergoing mediation procedures there. Recorded in *Minshi tiaojie zhuanpiao, Jiangsu Shanghai yitequ difang fating*, [petition for civil mediation in the Jiangsu Shanghai First Special District local court], file 190/3998, Shanghai Municipal Archives.

These courtroom mediation procedures may have been modelled after an earlier effort by the Chinese national government to draw commercial disputes out of the courts by establishing “arbitration courts.” Shangshi gongduanchu zhangcheng [regulations of the arbitration court of the Chinese republic], promulgated Jan. 28, 1913, by the Ministry of Justice and the Ministry of Agriculture and Commerce (Cifabu [Ministry of Justice], at the Ecole des Hautes Etudes des Sciences Sociales, Paris [hereinafter Arbitration Court Regulations]).

174. The criminal side of the court grew from 4,466 successful prosecutions of Chinese in the Mixed Court in 1872 (April 1872 to March 1873) to 124,215 prosecutions (including appeals) in the First Special District Court in 1941. See ANNUAL REPORT, *supra* note 64, at 51, 54 (1872); *id.* at 35-36 (1941).

175. Hence, the Judicial Yuan issued in 1929 a directive to the High Court of the neighbor Zhejiang province that explained a new civil procedure regulation restricting the secret acceptance of litigant fees. GUOMIN ZHENGFU, *supra* note 133, at 1793.

176. Arbitration Court Regulations, *supra* note 173, ch. V, art. 26.

same enforcement guarantees the courts offered.<sup>177</sup> Because the tribunals were attached to the Shanghai Chinese General Chamber of Commerce (*Zongshanghui*), a non-governmental organization, the government's reluctance to delegate the use of force to the tribunal is understandable. The close association of the Chinese Chamber of Commerce with the tribunals also raised the specter of the Chamber influencing arbitrator selection. This shortcoming, together with the fact that the arbitrators were not accountable to any public authority, exposed the parties to the same pressures to settle disagreements that existed in the guilds.<sup>178</sup>

Guilds and merchant associations in Shanghai continued to offer traditional mediation for disputes among their members.<sup>179</sup> It is unclear how much dispute-settling business the courts took from the guilds and other non-court fora. Without more information about what was happening to dispute management in merchant organizations in Shanghai, we cannot know the extent to which the court's alternative replaced other dispute resolving techniques. Apparently, the merchant organizations aimed to suppress conflict within their membership and so did more to prevent disputes from developing than to adjudicate disputes. The dispute-resolving role Shanghai guilds and native place associations played in the late nineteenth century and the first decades of the twentieth has only been discussed tangentially in other works. These discussions do not address the question of whether guilds in traditional China ever acted as impartial tribunals more than they simply quelled disputes before they arose or could be aired publicly.<sup>180</sup> It is likely, however, that traditional Chinese methods for settling commercial disputes became less effective as more commercial disputes involved transactions among strangers not subject to guild sanctions.

#### IV. EFFECTS OF THE JUDICIAL SYSTEM ON THE MARKETPLACE

How can investment be attracted and industrial productivity sustained in a chaotic environment? Contract-enforcing courts in Shanghai met this challenge by helping parties reduce their risk while they maintained the openness of the city's economy. Every unsecured

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177. *Id.*, ch. IV, art. 16-22.

178. Article 36 articulated in vague terms that arbitrators were "liable" for "damage to any party." *Id.*, ch. V, art. 36.

179. General Chambers of Commerce arbitration figures, published in SHENBAO, 1927.

180. See the works on guilds by Susan Mann Jones, *The Ningpo Pang and Financial Power at Shanghai*, in *THE CHINESE CITY BETWEEN TWO WORLDS* (Mark Elvin & G.W. Skinner, eds. 1974), and MORSE, *supra* note 36, and forthcoming work by Bryna Goodman. See also ARNOLD, *supra* note 26, at 246-47.

transaction outside a collusive structure exposed parties to some risk of loss. This risk chilled willingness to transact where no efficient enforcement mechanism against arbitrary takings existed. Civil courts provided such an enforcement mechanism for any commercial dispute between Chinese merchants in Shanghai. The courts thus reduced the cost of raising capital and the risk of conducting business transactions outside the protective umbrella of the guilds, and concurrently expanded the number and types of possible transactions. Hence, courts were one of the forces destabilizing Shanghai's collusive business networks. Once the courts opened the market, they continuously reduced the risk to foreign merchants of participating in the new market.

The simple presence of adversarial-style courts in Shanghai between 1849 and 1949, along with the upsurge in civil litigation they processed between 1927 and 1937, initiated two kinds of change in the local economy. First, the courts enforcing foreign contracts lowered barriers to market entry and encouraged market forces. Second, as if to solidify and perpetuate the open market, the courts fostered a competitive economic culture.

#### A. *Opening the Local Marketplace*

Civil courts opened the Shanghai marketplace in three ways. First, they eased the transferability of land and made transferring land a means of raising capital. Courts defined claims to land as individual property rights, and instantly selected one of the competing claims as the valid one. The easier it was to transfer land, the easier it was to raise funds from the land by way of mortgages, development of the physical infrastructure, rent collection, and land speculation. Second, courts enforced government regulations keeping barriers to market entry low. Third, courts protected private contracts. Lowering the risk inherent in individual transactions opened the door to competitive pricing. The new security dispensed of collusive networks as a means to enforce credit arrangements.

##### 1. LAND

The courts defined, individualized, and secured land ownership. They made land rights more easily transferrable and so facilitated raising capital. In land disputes, courts settled questions of ownership and control. In land transactions, courts assured notice of the transfer of various rights to land through public documents authorizing the transfers.

From their inception in the 1860s, the mixed courts considered

Chinese land-rights questions. The mixed courts employed a clever strategy of using indigenous legal devices,<sup>181</sup> while gradually replacing them with appropriate alien devices. This helped accomplish a remarkably rapid and meaningful institutional involvement of the courts in the land system. An example of a traditional Chinese institution for settling and preventing land disputes is the *dibao*, a local elder with peacekeeping responsibilities within his neighborhood. Transfers of ownership and possession of all plots required a *dibao*'s signature on a deed.<sup>182</sup> The *dibao* was a witness to the transaction and his testimony was considered valuable evidence to supplement written agreements. Chinese parties to land disputes at the Mixed Court commonly brought the *dibao* to testify at trial. He was an integral part of all Chinese transactions within the Settlement.<sup>183</sup> However, courts also were fora in which the *dibaos* authority and possible abuses could be challenged.<sup>184</sup> The presence of a new court system eventually diminished the importance of the *dibao*. Yet, even by the 1940s, lawyers still joined *dibaos* as necessary witnesses to written contracts.<sup>185</sup>

Courts also contributed to a breakdown in land ownership by family collectives. Individual family members sued each other on charges of mismanagement of family property.<sup>186</sup> Before the 1840s, families and guilds held land in Shanghai collectively. Title to land was not easily transferrable because there were always several claims to the same tract of land. In Shanghai's land economy, internal Chinese family mechanisms for passing land control across generations through collective ownership broke down. Many land disputes

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181. E.g., the *dibao*, the *fangdan*, the *hongqi*, and tax receipts; see *supra* note 46 and accompanying text.

182. 3 MISCELLANEOUS NOTES, *supra* note 49, at 27b; interview with Zhang Quan, Shanghai Academy of Social Sciences, Lishisuo (July 28, 1990).

183. See, e.g., *Gaowu zhandi zhi zhengzhi* [dispute involving squatters], SHENBAO (China), Dec. 3, 1914 (the case of Xu Yingshi v. Xu Mashi & Xu Yinmei); *Gongxie yizhuan dibao zhi zhoushe* [controversy regarding International Mixed Court transfer to the *dibao*], Apr. 19, 1914.

184. See, e.g., *Daomai dichan zhi bianlun* [debate over the misappropriation and sale of land], SHENBAO (China), June 12, 1914 (reporting case of a *dibao* accused in the International Mixed Court of misappropriating and selling a British land company's land).

185. One example is the contract signed July 19, 1941, part of the record of the First Special District Court criminal case 352, file 190/4002; other examples: a marriage contract between the Xie family and Shu family, signed Aug. 28, 1940, file 190/3999; two employment contracts, signed Nov. 20, 1939 and Oct. 20, 1940, file 190/4011; a contract for purchase of a factory, file 190/4012, Shanghai Municipal Archives.

186. See, e.g., *Qingfeng guchenzhong jiachàn* [sealing of *guchenzhong*'s family requested], SHENBAO (China), Sept. 19-24, 1914; *Zhongren nazhu dijia* [Chinese lowers the price of house], *id.* Sept. 2, 1914 (wife accused husband of selling family land at too low a price); *huotui gongsi zhu zhi zhaiwu* [ham company owners go into debt], *id.* Sept. 18, 1914, Oct. 8, 1914 (articles about brothers' squabble over a mortgage on family property).

between Chinese in Shanghai arose upon the death of a family head. Plaintiffs were usually sons or widows who sought from the Mixed Court a declaration of inheritance of title to the land.<sup>187</sup> People even brought suits against their living husbands, sons, and brothers for selling or mortgaging family property to pay off personal debts without the consent of the family. Court orders in land transactions helped shape the local economy by providing the backbone for rapid wealth creation in Shanghai, an important concomitant to an expanding marketplace. In order to transform city land into capital for use in the commercial marketplace, rights to the control of land had to be precisely defined and easily and quickly transferred. Individualizing land rights furthered this goal. Thus, courts validated a single claim to a land tract and declared other claims void.

In Shanghai, land control became crucial for several reasons. First, speculation in land provided lucrative incomes for enterprising land developers and lawyers. A local plan that placed a premium on speedy development of the city's infrastructure raised land values and made a broad power to take designated land parcels a valuable prerogative for the local government. Second, mortgages became a rich source of commercial capital. Finally, renting multiple family dwellings was a lucrative business. The mixed courts played a decisive role in each of these types of transactions and disputes.

#### a. Speculation

Land was a major source of capital in Shanghai. In the 1890s, as the value of land became the powerful engine of Shanghai's economy, British businessmen set up "land corporations," to buy land in Shanghai. The land corporations instigated land speculation and, over time, drove land prices up a thousand percent.<sup>188</sup> In the International Settlement,<sup>189</sup> land values in 1869 totalled 5,268,826 liang. By 1899 land values amounted to 37,644,752 liang. By 1903, land values had

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187. FO, *supra* note 50, 656/124, Sept. 8, 1908 (letter from General Wilkinson, British Consul to A.E. Algar, Esq., regarding the widow Wang Ch'en-shih); *id.* 656/124, Aug. 30, 1910 (letter from Algar to British Assessor); *id.* 656/126, Feb. 10, 1912 (court order holding that sons of Fang Pi Che'en are entitled to his property); *id.* 656/126, Jan. 26, 1912 (court order declaring Su Chingjen, Su Chingni and Su Chinghsin, sons of deceased Su Paosen, as his heirs); *id.* 656/126, Apr. 9, 1912 (court order declaring the widow Mak Tsz Tong's son the absolute owner of lots 1786 and 1787 under Mak's deceased husband's will); *id.* 656/124, Aug. 6, 1910 (letter from Union Insurance Society of Canton to British Assessor regarding the land of a deceased employee named Dong Mingje); *id.* 656/118, Oct. 1, 1909 (letter from Hanson, McNeill & Jones to British Assessor regarding British Consular lot 5548).

188. 2 SHANGHAI YANJIU ZILIAO [SHANGHAI RESEARCH MATERIALS], 304-05 (Shanghai tongshu bian, 1984).

189. The city's financial district, including the Hankou district was located in the International Settlement.

increased to 60,423,773, and by 1930 to 597,243,161 liang. From 1904 to 1929, land prices in every district of Shanghai increased between 10 and 29% annually.<sup>190</sup> Land values usually remained high and, because speculation affected prices, volatile. Moreover, land values depended on various developments, ranging from prospective road sites to China's political future in general.

While speculation made land more profitable, it also made land ownership a less secure tool of control. However, courts reduced the threat of speculators. Until a ruling by the International Mixed Court in 1912, the Shanghai Municipal Council purchased from leaseholders the right to take the land to build roads on it. To profit from spiraling land values on land tracts slated for development, speculators only needed to obtain a leasehold interest in the land, rather than purchase the land outright. The International Mixed Court put an end to this bizarre practice in 1912, when a tenacious Buddhist monk insisted on challenging the practice in court. Cheng Sheng sued two speculators for selling to the Municipal Council their leasehold rights on sections of Buddhist temple land. The Council had condemned the land for road building. The ruling of the International Mixed Court increased the costs of speculating, because it forced speculators to purchase the full bundle of ownership rights to the land, including the right to sell. Simultaneously, the decision decreased the risk for owners who leased their land, particularly the risk that their lessees would "steal" the right to make infrastructural changes to the land.<sup>191</sup>

Competitive and volatile land speculation generated disagreements, which the International Mixed Court could adjudicate exclusively. Both foreigners and Chinese brought title suits to the Mixed Court and litigated these suits with great energy. Foreigners were understandably insecure about their status as land owners. Under the terms of the extraterritorial treaties, that status was unclear. Yet, land control was a vital part of their mission as entrepreneurs because it created the basis of their commercial system in Shanghai. Foreigners interpreted the treaties as giving foreign possession a status close to ownership, and allowing commercial developers and the Municipal Council's Public Works department unrestrained access to land in order to maximize the commercial utility of the land and to make infrastructural improvements. The treaty determined whether foreign police had access to private dwellings and establishments to enforce

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190. LO, *supra* note 11, Tables 19-21, at 16.

191. FO, *supra* note 50, 656/131, Dec. 17, 1912 (judgment in the case of Cheng Sheng v. Lu Chi-chang and Lu Chun-fang); N. CHINA HERALD, Dec. 21, 1912, at 845-47.

orders from the Mixed Court and Municipal Council. It also gave foreigners the right to set and collect rents from Chinese tenants.

The rapidly changing use of land in Shanghai raised the value of services that prepared land for development. Fees for removal of gravesites were the subject of disputes within larger disagreements over the transfer of land parcels. The mixed courts willingly entertained these types of disputes and so facilitated the preparation of land for development.<sup>192</sup> Additionally, the mixed courts enforced the hundreds of detailed regulations in the building codes of the international settlements.<sup>193</sup>

The International Mixed Court performed several essential functions in the transfer of ownership of local land. Before parties could transfer ownership, the Mixed Court Magistrate had to issue a formal order to the current owners declaring a transfer of ownership. Assessors channeled applications for these orders from foreign lawyers to the Mixed Court Magistrate. The *dibao* then had to chop the bill of sale and witness the transfer between buyer and seller of the *fangdan*.<sup>194</sup> In some cases, *dibao* were recalcitrant and the only way to secure their chop on bills of sale for land tracts was for Mixed Court runners or Municipal Police officers forcibly to bring the *dibao* before the Court.<sup>195</sup>

The Mixed Court forwarded applications for foreign title deeds to the respective consulates. This was an important function of the court because foreign title deeds were held superior to *fangdan* to prove ownership in both the consular and mixed courts, even when a Chinese family had held the *fangdan* and tax receipts as supplementary proof of ownership for generations.<sup>196</sup> Consequently, many Chinese tried to obtain foreign title deeds for their land parcels even though they already possessed the *fangdan* and tax receipts. Foreign lawyers acted as gatekeepers in the commerce of foreign title deeds. They carried on a lucrative business taking Chinese *fangdan* and bills

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192. *E.g.*, *Dijia yu qianfen feijun you zhaoluo* [equilibrating the price of land and the cost of removing graves has results], SHENBAO (China), Oct. 5, 1914.

193. See SHANGHAI LAND RESEARCH CENTER, SHANGHAI DICHAN DAQUAN [THE COMPLETE SHANGHAI REAL ESTATE] (1933); Mixed Court Monthly Reports, offenses labeled "building."

194. *Tudi zhangcheng*, *supra* note 143, at art. 6. See, *e.g.*, *Dichan jiuge zhi shengsu* [pleadings in land dispute], SHENBAO (China), Dec. 2, 1914 (referring to the case of Shen Pingshi v. Dou Mingshan).

195. FO, *supra* note 50, 656/131, Dec. 30, 1913 (letter regarding acquisition of foreign title deed for property belonging to Van Chin Sun located in the 27th bao, 9th doo); *id.* 656/111, June 15, 1906.

196. *Id.* 656/126, Oct. 14, 1912 (memorandum on the case of Shen Shun-ch'un v. Wu A-tao and Shen Chin-hsiang at 2).

of sale to consulates and registering them on behalf of the Chinese owner or channeling the applications through the appropriate Mixed Court Assessor for more immediate attention. Not surprisingly, foreign lawyers were parties in many mixed court land disputes. Some foreign lawyers took advantage of their middleman position and sued Chinese in the Mixed Court for title to the land they had registered on their behalf.<sup>197</sup> In virtually every reported land case, both parties employed lawyers to represent them.<sup>198</sup>

The court reduced the risk of full-blown title disputes by trying prophylactic suits against potential challengers to land title. Generally, if someone sought to transfer land in the settlement or land outside but registered in a consulate, knowing of someone who might dispute the transfer, he could sue the potential disputant before the transfer.<sup>199</sup> The court also issued to parties declarations of control over land and immunity from suit over the rights to particular land parcels. Finally the Mixed Court notified the *dibao* of new mortgages on land in their jurisdiction to reduce risk of future title disputes.

Land control was necessary for infrastructural improvements to support the expanding population and to facilitate the commercial need for mobility and communication. This third wealth-creating function of land showed in the International Mixed Court suits over the exclusivity of land control and access. Both the International and French Mixed Courts laid the ground rules for land transactions. These ground rules defined the scope of various property rights and provided which rights to land were transferrable, which were inviolable, and to what extent rights were compensable.

The importance of exclusive land control explains why land disputes brought in the Mixed Court often alleged trespass or boundary infringement.<sup>200</sup> A variety of acts constituted trespass: refusing to remove or ceasing to maintain family gravesites;<sup>201</sup> erection of shacks on sites owned by others<sup>202</sup> or on sites condemned by the Municipal

197. *Id.* 656/124, Sept. 8, 1908 (Wang Ch'en-shih v. Chou-shih and Chin Hsu-kuan); *id.* 656/131, Dec. 30, 1913 (Van Nieh Foong v. Van Chin Sun); *id.* 656/137, Mar. 24, 1915 (H. Robertson v. Yeh Vi Sung).

198. *See, e.g., Fuxun zhandi an* [person who forcefully seized land is interrogated in court], SHENBAO (China), June 21, 1914.

199. FO, *supra* note 50, 656/126, Sept. 21, 1912 (letter regarding lot 3825 registered in the British Consulate).

200. The term in use at the International Mixed Court was *zhantun* [occupation and annexation]. *See Fuxun zhandi an* [person who forcefully seized land is interrogated in court], SHENBAO (China), June 21, 1914.

201. FO, *supra* note 50, 656/126, Oct. 16, 1912 (letter from British Assessor to China Land & Finance Co.).

202. *See, e.g., Gaowu zhandi zhi zhengzhi* [dispute involving squatters], SHENBAO (China), Dec. 3, 1914 (referring to the case of Xu Yingshi v. Xu Mashi & Xu Yinmei).



Health Office,<sup>203</sup> and interference with a foreign developer's removal of the eaves of a house extending to the developer's land.<sup>204</sup> In one case, an old woman, who probably had lost title to her deceased husband's land, continued to live on her homesite by selling some of the scrap materials of her demolished house and by using the rest to piece together a new dwelling.<sup>205</sup> The Court also granted tenant ejection orders when landlords wanted to make improvements or rebuild on the land.<sup>206</sup>

Creating the massive infrastructure of Shanghai required giving members of local governing bodies unrestricted access to and decision-making power over certain parcels of land. Speculators made and lost fortunes by buying and reselling not just full title, but also various types of rights to land in the International Settlement and land chosen along areas outside the settlement by the Municipal Council for development. Frequently, release of road building plans and land condemnation schedules by the Municipal Council triggered strings of arrangements, where the final sub-lessors negotiated with the Municipal Council a price for their leasehold rights. The contracts between parties to these transfers were based on projections of future changes in land value. Making these projections was as risky as gambling at the Shanghai racetrack. Insider information about Council development plans diminished the risk, and the earlier a speculator knew of the plans, the greater advantage he enjoyed.<sup>207</sup>

The mixed courts tried some of the fiercest disputes over the assumption of Municipal Council control over private land in Shanghai. The courts settled the disputes by giving the Council authority over land development while providing some measure of satisfaction to the private owners. In 1912, for example Buddhist priests won their case against Chinese speculators, but lost their battle to block

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203. FO, *supra* note 50, 656/133, Nov. 14 and 20, 1914 (letters of Lester, Johnson & Morriss to British Assessor Jones); *id.* 656/133, Nov. 23, 1914 (letter of Platt, MacLeod & Wilson to British Assessor regarding Woo Chow Sze).

204. *Id.* 656/131, Sept. 23, 1913 (letter from Davies & Brooke to British Assessor).

205. *Id.* 656/133, Aug. 27, 1914 (letter from Davies & Brooke to British Assessor).

206. *Dichan jiuge zhi shengsu [pleadings in land dispute]*, SHENBAO (China), Dec. 2, 1914 (discussing the case of Shen Pingshi v. Dou Mingshan). The Municipal Police executed one Mixed Court ejection order on the application of a Chinese in 1915, and four in 1925. ANNUAL REPORT, *supra* note 64, at 38A (1915); *id.* at 41 (1925). These figures must be incomplete. The files of the British Assessors contain dozens of applications every year for ejection orders, beginning in 1906. The Assessor granted many of them. FO, *supra* note 50, 656/111, Jan. 30, 1906 (China Land and Finance Co. v. Li Zung Yen, tenant of No. 775 Broadway).

207. *Id.* 656/131, Dec. 17, 1912 (judgment in the case of Cheng Sheng v. Lu Chi-chang and Lu Chun-fang); N. CHINA HERALD, Dec. 21, 1912, at 845.

construction of a road.<sup>208</sup> In a 1914 decision, the French Mixed Court held that family property could not be pledged as collateral or used as payment in personal debt agreements.<sup>209</sup> In another case, discussed earlier, the Buddhist priest Cheng Sheng sued two Chinese merchants for selling their leasehold rights to the Municipal Council so that the Council could build Bubbling Well Road, one of the major access roads to the International Settlement through Shanghai.<sup>210</sup> The court declared that the Council's right to take land both inside and outside the Settlement was not negotiable.<sup>211</sup> After 1927, Chinese judges took control of the International Mixed Court. The Municipal Council no longer could hope for judicial articulations of its eminent domain power, and thus began publishing dozens of regulations detailing this power.

### b. Mortgages

Because land values were high, land was good collateral for loans. First and second mortgages on land became a common method of raising commercial capital in Shanghai. Owners of land tracts in the city raised cash to set up and expand commercial establishments by mortgaging their factories, homes and vacant lots to local banks and "land companies."<sup>212</sup> At times individuals borrowed money by simply handing over a *fangdan* as collateral.<sup>213</sup> Mortgage banks and land companies took over the land when owners defaulted.<sup>214</sup>

Mortgages and trust arrangements on the land complicated questions of ownership. A variety of Mixed Court orders helped settle these types of questions. The orders were simple dated statements declaring that a certain person or persons was solely entitled to make

208. *Id.*

209. *Gongchan buneng dizhai [family land cannot be used as collateral]*, SHENBAO (China), Aug. 31, 1914.

210. The temple on that land is the well-known *Jingansi* in the northwest part of the city. 1 MISCELLANEOUS NOTES, *supra* note 49, at 11a. Today, the temple is a tourist attraction on West Nanjing Road.

211. FO, *supra* note 50, 656/131, Dec. 17, 1912 (judgment in the case of Cheng Sheng v. Lu Chi-chang and Lu Chang-fang); N. CHINA HERALD, Dec. 21, 1912, at 845.

212. Land companies [*dichan gongsi*] also handled the construction, building management, design, buying and selling of real property. SHANGHAISHI GONGSHANGYE JILAN [OUTLINE OF SHANGHAI MUNICIPAL INDUSTRY AND COMMERCE] (Gongshang chubanshe [Industrial and Commercial Press], 1948), at 274-75.

213. See *Shike fen nian bahuan [party ordered to return a portion of annual profit]*, SHENBAO (China), Oct. 8, 1914 (party borrowed money using *fangdan* as collateral).

214. FO, *supra* note 50, 656/118, Mar. 20, 1909 (letter regarding Ching Siang Chao's defaulted mortgage to the Eastern Trading Co. and Brunner, Mond & Co. Alkali Manufacturers); *id.* 656/118, Dec. 12, 1908 (letter from one Brunner to Pelham Warren regarding land in the Yangtzepoo district of Shanghai); *Tudi zhangcheng*, *supra* note 143, at article 8.

decisions concerning the property. If a bank had a mortgage on the property when the owner died, and a lawyer held the land in trust for the deceased, the lawyer could apply for a Mixed Court order authorizing him to ignore the deceased's family and transfer the land to whomever the bank wished. Such orders also protected the lawyer from future claims by the family.<sup>215</sup>

Bankruptcy and foreclosure were common in the volatile economy of republican-era Shanghai. Liquidations created so much legal business that lawyers used their own boilerplate forms to process them. Land companies with defaulting mortgagors or tenants retained lawyers solely for this purpose.<sup>216</sup> By deciding how to parcel the assets of defaulted mortgagors to creditors, the Mixed Court helped redistribute great amounts of wealth in China's financial capital.<sup>217</sup> In the chaotic economy, without an arbiter to enforce the apportionment of mortgaged property upon foreclosure, banks would probably not have agreed to advance the cash for business ventures. Given the important capital-raising function of mortgages, therefore, the International Mixed Court's enforcement of such mortgages provided an essential component to commercial and financial growth in Shanghai.

Two aspects of the mixed courts' role in property transactions involving mortgages compromised any stabilizing effect of the courts on the real estate market, however. First, the mixed courts refused to regulate land transactions except on a case-by-case basis. They developed no clear rules for prioritizing the claims of competing mortgagees. Second, by making risky mortgages possible, the courts encouraged speculative transactions. The courts could have tried to change the propensity of Shanghai merchants to engage in risky ventures. Instead, the courts chose to be enforcers of private arrangements, only occasionally formulating rules on how merchants, landowners, and real estate developers were to conduct their transactions. Without court-enforced sanctions against entering into risky transactions, the only penalty for entering a risky transaction was losing the bargain — not a deterrent to those not deterred by high risk alone. In fact, the International and French Mixed Courts went to

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215. FO, *supra* note 50, 656/124, Aug. 23, 1910 (letter from Hanson, McNeill & Jones to British judge); *id.* 656/126, Feb. 10, 1912 (court order); Court order regarding lot 2457, registered in the British Consulate, Jan. 26, 1912.

216. The Cathay Land Co. hired attorney Jiang Bingfan to handle a liquidation. File 190/4007, Shanghai Municipal Archives.

217. Disputes over mortgaged land were common enough to appear almost daily in newspaper reports. See, e.g., *Tianchan dichang qiankuan* [field of land compensates for money owed], SHENBAO (China), Sept. 18-24, 1914.

great lengths to enforce the bargains originally struck by merchants. The courts imprisoned even penniless defendants until they used their social contacts to amass the judgment award. The courts also obtained personal guarantors for defendants and imprisoned the guarantors until they satisfied the judgment.<sup>218</sup>

### c. Rents

A third source of capital from land was the rental income the land produced. The International Mixed Court and its successors had exclusive jurisdiction over landlord-tenant disputes arising on property in the International Settlement. Economic and political volatility constantly spawned disputes over leaseholds. Merchants usually rented their factories, warehouses, and shops, and so forced their landlords to come to court as creditors in the event of bankruptcy.<sup>219</sup>

Landlords were not the only parties interested in settling leasehold disputes quickly. The status of leasehold arrangements was financially significant also for the Municipal Council. After all, renters formed its tax base.<sup>220</sup> Hundreds of thousands of Chinese lived in the International Settlement, most of them renting their homes. Those able to amass enough capital to purchase or construct multiple-dwelling buildings reaped substantial financial rewards from renting rooms and apartments. Shanghai grew in a climate of political volatility. The precarious political climate, combined with Shanghai's state-of-the-art infrastructure, made the heavily policed International Settlement the most desirable place to live in the East China region. Elites, as well as destitute refugees, flocked to the city and inflated the demand for rental units. Landlords raised rents at will and drove the market with continual rent hikes.<sup>221</sup> The turnover rate of rental resi-

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218. See, e.g., *Dengbao shengming zhi xiaoli* [the effect of newspaper announcement], SHENBAO (China), Aug. 8, 1914 (describing borrower's reliance on a family member to guarantee payment of the court judgment at the French Mixed Court).

219. Hyperinflation forced landlord G.E. Marden & Co. to raise the rent of warehouses by 40% within a short time. When one tenant, the Diamond Steel Furniture Co., refused to pay the increases, Marden hired attorney Jiang Bingfan to bring a suit of "vacant possession" against the tenant in the First Special District Court. Judgment July 14, 1941, file 190/3998, Shanghai Municipal Archives. Another example is a suit on a written lease between Zhongguo yang paper factory and E.D. Sassoon & Co. Ltd. The lease was signed Dec. 22, 1941, and the suit filed on Oct. 7, 1942. File 190/4006, Shanghai Municipal Archives.

220. The landlords paid to the Shanghai Municipal Council a tax that was added to the amount of the tenants' rent. Files 190/4181 and 190/3998, Shanghai Municipal Archives.

221. Rapid rises in rents in 1921 and 1922 in Shanghai created a desperate situation for tenants. The International Mixed Court suspended the building licenses of landlords who persisted in charging exorbitant rents. The measure helped save the city from economic disaster. FO, *supra* note 50, 656/164, Nov. 24, 1921 (letter from Platt, MacLeod, Gregson & Ward to British Judge Blackburn); *id.* 656/164, Dec. 6, 1921 (letter and attached accounting

dences was high.<sup>222</sup> A sublet market flourished, buoyed by the unsatiated need for housing. Subletting provided some downward pressure on turnover rates.

The multiple layering of leasehold arrangements was a fertile ground for landlord-tenant disputes. The International Mixed Court was willing to try disputes over all kinds of leasehold arrangements, and so reduced the risk of leasing property in Shanghai. Lawyers for some of Shanghai's wealthiest citizens, such as the Sassoon family and Edward Ezra, regularly brought rent disputes against tenants before the Mixed Court. Suits for unpaid rent constituted another large portion of land disputes.<sup>223</sup> In some cases, the tenants withheld payment from a new owner of the land they leased. The new owner had two possible remedies; either petition the Mixed Court to order the old owner to hand over the rent pass book necessary for collecting rent,<sup>224</sup> or have the Mixed Court send a runner to accompany the district's *dibao* to notify the tenants of the change in ownership.<sup>225</sup> Landlords' lawyers also asked for harsh monetary penalties if tenants ignored judgments and refused to vacate.<sup>226</sup>

Intermediaries became significant players in the lucrative rental market. In one of their many capacities, lawyers and land companies acted as agents or managers for landlords in tenant matters. Land companies and lawyers managed rental properties by collecting rents for landlords, paying utility bills and fielding tenant complaints. The proliferation of intermediaries complicated land control rights by contractualizing every level of the leasehold arrangement, thus multiplying the potential for contract disputes.<sup>227</sup>

reports from British Judge to Platt & Co.); *id.* 656/164, Dec. 9, 1921 (letter from British Judge to Edward Ezra); *id.* 656/164, Dec. 10, 1921 (letter and attached accounting reports from British judge to Mixed Court Chinese judge Kuan); MUNICIPAL GAZETTE, Dec. 15, 1921, at 412; Apr. 20, 1922, at 141.

222. 1 MISCELLANEOUS NOTES, *supra* note 49, at 23b-24a.

223. *See, e.g.*, FO, *supra* note 50, 656/131, May 27, 1913 (letter from Platt, MacLeod & Wilson to British Assessor Garstin); *id.* 656/124, Dec. 19, 1910 (letter from J.E. Salmon to British Assessor Garstin regarding David Sassoon & Co. v. Zung Ling Kuen). Foreigners also sued unrepresented foreigners for unpaid rent. *E.g.*, *id.* 656/164, Nov. 21, 1921 (letter from Platt, MacLeod, Gregson & Ward to British Assessor Blackburn regarding Edward Ezra & Co. v. The Russian Assembly).

224. *Id.* 656/118, Sept. 10, 1909 (letter from the Kiangsu Land & Construction Co to British Assessor regarding lot 5877 in Putong, registered in the British Consulate).

225. *Id.* 656/118, June 30, 1909 (letter from Noel, Murray & Co. to Senior Mixed Court Magistrate regarding Jan Yik v. Chao Ming Char).

226. *Dichan jiuge zhi shengsu* [pleadings in land dispute], SHENBAO (China), Dec. 2, 1914 (Shen Pingshi v. Dou Mingshan); FO, *supra* note 50, 656/111, Jan. 30, 1906 (discussing China Land and Finance Co. v. Li Zung Yen, tenant of No. 775 Broadway).

227. For example, the China Realty Company, acting as agent for a set of apartment buildings, hired a prominent Chinese attorney to represent it in a series of lawsuits against

The proliferation of intermediaries increased confusion over legal rights and duties. The confusion spawned disputes, and courts served as leverage when landlords wished to enforce the terms of their leases.<sup>228</sup> Courts were less available to tenants to enforce promises made to them by their landlords, however. In Shanghai, tenants had virtually no legal rights against managers; tenants could not sue managers unless tenants had reserved such a right in a separate contract with the manager. Chinese tenants tended not to enter such contracts, and instead preferred flexible tenancy arrangements free of written contracts or specified termination dates.<sup>229</sup>

Chinese tenants sublet to other Chinese, thus complicating both the collection of rent for the landlord and the carrying out of ejection orders by the court.<sup>230</sup> The practice of subleasing in the Settlement created an entire class of second-tier landlords who made a profit charging rents to their subtenants. Naturally, the tenants who sublet cared about preserving their claims to their leases as zealously as if they held ownership titles. They brought suits in the Mixed Court to certify the transfer of leases<sup>231</sup> and to recertify leaseholds when lease deeds were lost or stolen.<sup>232</sup>

Courts secured the right of land ownership, and thereby strengthened its connection to capital raising, by adopting a pro-landlord bias in their decisions and orders. The pro-landlord pattern shifted the cost of lease transactions to tenants and reduced the risk of loss in lease ventures for landlords. Mixed Court decisions in rent disputes between landlords and tenants usually favored landlords, and those between tenants and subtenants usually favored the lessee collecting rent from his sub-tenant. In disputes over unpaid rent the Mixed Court also issued eviction and sealing orders so that new tenants could immediately move in and begin paying rent. The old tenants' possessions were auctioned and the proceeds used to compensate the landlord. These orders cost foreign landlords nothing and Chi-

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tenants who refused to pay mounting rents during a period of hyperinflation. File 190.4181, Shanghai Municipal Archives.

228. *E.g.*, the case of China Realty Co. v. Shanghai Water Works Co., First Special District Court, civil case no. 31 (involving nonpayment of water bills by owners of 65 houses managed by China Realty Co.). File 190/4181, Shanghai Municipal Archives.

229. Qian, *supra* note 29, at 8, 10.

230. FO, *supra* note 50, 656/131, Nov. 1913 (letter from Davies & Brooks to British Assessor).

231. *Id.* 656/118, 24th day, 10th moon, 1909 (letter from the Mixed Court Magistrate regarding the application for an order to transfer the lease of property from Ho Chin Fong to Ho Yuen Tsing).

232. *Id.* 656/124, Oct. 19, 1910 (letter from Hanson, McNeill & Jones to British Assessor).

nese landlords only a nominal fee.<sup>233</sup> The public knowledge that these orders were always executed at the mere request of landlords reduced the cost of lease transactions for landlords and increased the cost of leasing for tenants. Simply stated, sealing orders shifted the risk of nonpayment of rent to tenants. The court left landlords with almost complete discretion to take action against tenants through application for court orders. Landlords could obtain sealing orders with minimal evidence of wrongdoing. Sealing orders unmistakably directed tenants quickly to settle the outstanding amounts with their landlords or else risk ejection and loss of all personal property. Tenants had about an hour or two to appease the landlord between the time the court issued the sealing order and the moment the police arrived at the leased premises with boards, hammer, nails, and an official sign declaring the premises sealed and not to be reopened under pain of criminal sanction. Once the police sealed the premises, a tenant could still negotiate with the landlord to recover his possessions, but the tenant was in a less advantageous bargaining position. These orders had considerable power to "induce" settlement.

Even after they became Chinese courts, the mixed courts continued issuing sealing orders, and the Chinese District Court willingly adopted the sealing order. However, the three District Courts assigned some of the cost of the order to the landlord by imposing on the petitioner the costs of sealing the defendant's premises and auctioning the defendant's possessions. The Chinese District Court also was more reluctant than the other two District Courts to grant sealing orders, though the court still required only minimal evidence of the landlord's need to recover personal property or unpaid rent, or to rebuild.<sup>234</sup>

## 2. LOCAL REGULATION OF THE MARKET: THE CRIMINAL FACE OF THE COURTS

Local government regulation of Shanghai's economy grew between 1900 and 1927. Criminal cases enforced local regulation. Licensing requirements, for example, lowered barriers of entry to the marketplace. Engaging in entrepreneurial activities such as operating shops and vehicles and renting lodging required that residents purchase licenses. Because licensing was relatively cheap and open to

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233. Mixed Court Rules of Procedure, rules 19-25, Civil proceedings, at 9.

234. Qian, *supra* note 29, "Zhulun" [articles] section, at 9. *E.g.*, Judgment of Jan. 24, 1928 (granting petition of Tu Meichun), JIANGSU, *supra* note 45, at 301; Judgment of Jan. 26, 1929 (granting petition of Zhang Wenqing), *id.* at 295; Judgment of Mar. 25, 1929 (sealing order denied while contract dispute was pending on grounds that defendant, who paid rent for his shop, would have no way to pay damages if he lost the contract suit), *id.* at 303.

anyone, it gave official permission to conduct commerce without guild blessing.<sup>235</sup> Entering the retail market was less expensive under the licensing regime than under the guild regime.

The criminal branch of the courts enforced this municipal patrolling of the marketplace. Seeking fines for violators, the Municipal Police prosecuted violations of the licensing regulations at the International Mixed Court. License cases comprised over half of the court's docket, and they accounted for the largest share of any type of case, criminal or civil. Local government concerns about the economy affected the prosecution of criminal offenses. The Municipal Police enthusiastically used its plentiful weaponry to establish a monopoly on official use of force within the International Settlement. They exercised exclusive discretion over whether to prosecute criminal cases at the International Mixed Court. In doing so, the Municipal Police controlled the size and range of the Mixed Court's criminal caseload. Although the level of violence in republican-era Shanghai was notoriously high due to political violence such as assassinations and kidnappings, licensing prosecutions made up the bulk of the International Mixed Court's criminal docket.<sup>236</sup> Licensing was so successful a strategy for raising revenue that the Chinese municipal government copied it and sold licenses to Chinese enterprises within its jurisdiction.<sup>237</sup>

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235. The Municipal Council created the license regulations and collected the revenues from licenses even though the founding charter for the International Settlement gave the power to sell licenses exclusively to the consuls. See *Tudi zhangcheng*, *supra* note 143, art. 7, at 200-13.

236. See Table I, *supra* text accompanying notes 64-67. For example, from 1918 through 1925, the Police every month arrested thousands on charges of "begging," "hawking," "ragpicking," "nuisance," "vehicles," and "traffic." The Police dropped most charges against the defendants, many of whom were Chinese and therefore were brought before the Mixed Court for sentencing. The number of defendants charged for those petty offenses fluctuated monthly between roughly 1000 and 5000. See *Return of Foreigners coming Under Notice of Police for Criminal and Other Offenses: Not Charged*, in *Monthly Police Reports*, MUNICIPAL GAZETTE, 1918-1925; *Return of Foreigners and Chinese Summoned or Apprehended and Charged*, and *Return of Foreigners and Chinese Apprehended and Not Charged*, *id.* The Municipal Council's annual report for 1922 noted that "the greater attention given by the Police to traffic offenses is indicated by the increase in ricksha cases." ANNUAL REPORT, *supra* note 64, at 69A (1922). The report for 1925 states: "At the Special Traffic Sessions at the Mixed Court, prosecutions show a slight decrease to 2,821 compared with 3,091 for the previous year. This is entirely due to the fact that men ordinarily employed on traffic duty were otherwise employed in connection with, and during, the 'Strike' period." *Id.* at 33 (1925). The decrease in the Court's total caseload from 1922 to 1923 (see Table III) was not due to a dip in the Court's popularity. The decrease stemmed from a cut-back in the number of petty traffic cases prosecuted by the Municipal Police as a result of the strain on the Court caused by the institution of a Traffic Court. In 1922, an over-zealous police force prosecuted about 3,003 cases, resulting in a 150% increase over 1921. *Id.* at 69A (1922).

237. For the number of hotels operating under Chinese municipal government license, see SHANGHAI MUNICIPAL GOVERNMENT OFFICE OF STATISTICS, SHANGHAI TEBIE SHI



TABLE IV — TOTAL CRIMINAL CASES AND NUMBER OF LICENSE CASES AT THE INTERNATIONAL MIXED COURT/FIRST SPECIAL DISTRICT COURT<sup>238</sup>

	<i>Total</i>	<i>License</i>
1912	48,048 <sup>239</sup>	
1913	44,449	
1914	47,998	25,468
1915	42,985	27,313
1916	40,229	23,489
1917	59,613	33,520
1918	48,987	24,630
1919	38,307	
1920	44,566	
1921	57,226	32,936
1922	93,136	57,471
1923	84,999	52,290
1924	91,696	52,290
1925	80,529	48,612
1926	103,932	63,702
1940	126,272	
1941	124,215	
1942	114,721	

The licensing regulations were yet another market stimulant administered by the courts. The mixed courts and the second wave of Chinese courts prosecuted people for various acts that raised risk and transaction costs in the Shanghai marketplace. These acts were labelled the fraudulent breach of promise, breach of fiduciary duty,<sup>240</sup> deceit, misrepresentation, misappropriation,<sup>241</sup> copyright infringements, trademark disputes,<sup>242</sup> illegal fabrication of negotiable instruments, intimidation,<sup>243</sup> burglary of warehouses and ships,

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SHIZHENG TONGJI JIYAO [IMPORTANT STATISTICS OF THE SHANGHAI SPECIAL MUNICIPALITY GOVERNMENT] 126-30 (1927).

238. Numbers from ANNUAL REPORT, *supra* note 64 (numerous records between 1912 and 1926); *see specifically id.* at 70A-71A (1919); *id.* at 35-36 (1941); *id.* at 44-45 (1942). Figures for 1940-42 include single appeals cases.

239. Figure is my own estimate, based on monthly figures available for six months in 1912.

240. Judgment of June 13, 1931 (Chairman of the Board Zeng Xianzhi v. Board of Directors of Zhoulu Corp.), Shanghai Special District Court, Criminal Case No. 22, JIANGSU, *supra* note 45, at 159-61.

241. *See, e.g.*, Judgment of June 9, 1931 (Merchants Meng Handu, Li Shengji, and Meng Shanyang v. Merchant Shen Shixing), Shanghai Special District Court, Criminal Case No. 574, *id.* at 209-11; Judgment of June 13, 1931 (Zhu Renquan v. Yang Shansong), Shanghai Special District Court, Criminal Case No. 488, *id.* at 229; Judgment of Mar. 30, 1931 (Merchant Cheng Gongyuan v. Cheng Xiuming), Shanghai Special District Court, Criminal Case No. 174, *id.* at 193.

242. *See, e.g.*, Judgment of Apr. 29, 1931 (Shanghai Mun. Couns. v. Merchant Le Genbao), Shanghai Special District Court, Criminal Case No. 193, *id.* at 197.

243. *See, e.g.*, Judgment of July 30, 1931 (Shanghai Mun. Couns. v. Chauffeur Qi Gongsheng), Special District Court Criminal Case No. 292, *id.* at 53; Case against

counterfeiting paper currency,<sup>244</sup> coins, printed documents (such as contracts and banknotes), and securities, falsifying weights and measures, and "doing harm to agriculture, industry, and commerce."<sup>245</sup> The criminal charge "doing harm to agriculture, industry, and commerce" usually triggered a corresponding civil action for trademark infringement.<sup>246</sup>

Some types of prosecutions reduced the risk and cost of doing business for industry and banks. Criminal cases that involved factory strikers<sup>247</sup> and trademarks<sup>248</sup> reduced the risk and cost of transactions for factory owners. The Municipal Police successfully prosecuted factory strikers who disrupted production in the Settlement,<sup>249</sup> reducing for factory owners the risk of breaching supply contracts. The fact that manufacturers could win in trademark cases against other manufacturers reduced the risk of losing market share to competitors.

Shanghai's financial sector relied on the courts to preserve the integrity of the several monetary systems in use. The International Mixed Court tried Chinese for forgery and counterfeit of coin and paper money.<sup>250</sup> Forgery cases usually involved commercial paper. Chinese banks issued their own notes, which functioned as currency,<sup>251</sup> to depositors as ten-day extensions of credit.

coppersmith Gu Jingui (arising from a threatening letter Gu sent to his neighbor, whose family he knew to be rich, demanding 50,000 yuan), Special District Court, Criminal case no. 2499, decided Feb. 13, 1931.

244. *See, e.g.*, Judgment of May 25, 1931 (Shanghai Mun. Couns. v. Shen Yuankang), Shanghai Special District Court, Criminal Case No. 213, *id.* at 151.

245. *See, e.g.*, Judgment of May 4, 1931, Shanghai Special District Court, Criminal Case No. 196, *id.* at 121. The number of prosecutions in Shanghai's three largest courts are listed in the ANNUAL MIRROR OF SHANGHAI, *supra* note 22, Judicial section, at 44-45, 79, 109, 111, 113.

246. *See, e.g.*, Judgment of May 4, 1931 (Bank Manager Lin Dao'e v. Merchants Chen Zhengcai, Song Huangsheng, and Zheng Wenkai), Shanghai Special District Court, Criminal Case No. 196, JIANGSU, *supra* note 45, at 121; Judgment of May 11, 1931 (Corporation Board of Director Qiao Ya and Corporation Chairman-Secretary Bai Anshi v. Wu Lusheng, Yang Linzhi, Zheng Yanlin, and Shi Renfang), Shanghai Special District Court, Criminal Case No. 184, *id.* at 127; Judgment of Apr. 8, 1931 (Cotton Cloth Factory Manager Jiang Jiezhen v. Cotton Cloth Factory Managers Zheng Zhonghe), Shanghai Special District Court, Criminal Case No. 12, *id.* at 187.

247. *See* Huang Wensi, *Lun woguo pochafu diaoxie shike ji chexiao zhi xiaoli* [essay on the effects on our country of the approval and abolition of mediation in the strike law], DISHIWUJIE BIYE JINIANKAN (Yearbook of the 15th graduating class), "Zhulun" [articles] section, at 43-50 (Shanghai fazheng xueyuan [Shanghai College of Law and Politics], 1939).

248. FO, *supra* note 50, 656/118, Mar. 29, 1909 (letter from British Consul General in Tianjin to British American Tobacco Co.).

249. *See* ANNUAL REPORT, *supra* note 64, at 77A (1922); *id.* at 49 (1923).

250. *E.g.*, MUNICIPAL GAZETTE, Nov. 20, 1920, at 274.

251. 4 MISCELLANEOUS NOTES, *supra* note 49, at 47 (listing 109 *qianzhuang* that provided checking accounts to members whose checks were not redeemable for 10 days after signing); Qian, *supra* note 29, at 12-13.

The courts, however, did not make industrial and financial transactions cheaper or more secure for all participants. The courts did not allow reorganization of firms once banks foreclosed on their assets, thereby making credit generally cheaper, but setting up businesses riskier than if courts allowed reorganization. Nor did the courts when they parcelled out assets of firms in foreclosure try to prevent a race of creditors to the courthouse. Thus, while foreclosure lawsuits may have reduced the risk for plaintiff banks of losing loans, it did not decrease the risk of forfeiting wealth in credit transactions for those who happened to arrive late at the courthouse. The courts did not follow any rule when banks sued each other for foreclosed assets.<sup>252</sup>

TABLE V — SOME TYPES OF IMC CRIMINAL CASES: 1906-1926

	Strikers	Counterfeiting <sup>253</sup>	Forgery
1906	15	6	
1907	18	2	
1908	28	4	
1909	36	5	
1910	51	4	
1911	136	6	
1912	45	11	
1913	51	4	
1914	57	15	
1915	82	18	
1916	58	14	
1917	45	23	
1918	60	17	
1919			
1920			
1921	67	22	
1922	55	42	71 <sup>254</sup>
1923	64	18	12 <sup>255</sup>
1924	80	28	117 <sup>256</sup>
1925	117	26	408 <sup>257</sup>
1926	121	26	142

The International Mixed Court enforced another type of government regulation that eroded the guilds' prerogatives, further reducing

252. See, e.g., FO, *supra* note 50, 656/118, June 11, 1909 (letter from Gardner to Hanson, McNeill & Jones regarding Shanghai Paper Mill in default of mortgage to Ningbo Commercial Bank).

253. Counterfeiting cases include prosecutions for forgery of both coin and paper money.

254. ANNUAL REPORT, *supra* note 64, at 77A (1922).

255. The Report of the Municipal Police Commissioner K.J. McEuen states that the police prosecuted "more than a dozen" strikers at the Mixed Court. *Id.* at 49 (1923).

256. *Id.* at 57 (1924).

257. *Id.* at 52 (1925).

the guilds' grip on the marketplace by trying Chinese residents of the International Settlement for failure to pay taxes to the Municipal Council.<sup>258</sup> Enforcement of tax obligations encroached on one of the guilds' traditional spheres of authority. Chairmen of guild committees in the late nineteenth century had struck agreements with local government officials who gave the guilds kickbacks in exchange for collecting local taxes and delivering them into official hands.<sup>259</sup>

In yet another sense, much of the criminal work of the Mixed Court fostered commerce. The Court enforced municipal regulations that promoted sanitation, traffic safety, and public order.<sup>260</sup> Promoting public health, safety, and order helped make the city attractive to capital investment. The Court also enforced municipal taxes,<sup>261</sup> fines,<sup>262</sup> and license fees,<sup>263</sup> which boosted government revenues, which the government funneled back into the locality. These revenues funded a world-class physical infrastructure, including state-of-the-art roads, parks, electrification, telephone system, and sanitation system. Along with the revenues, court enforcement of zoning regulations and takings under the Municipal Council's eminent domain power facilitated the Council's economic growth plans.

### 3. CREDIT

#### The contract-enforcing services offered by the courts undermined

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258. Owners paid a dwellings tax of 8 yuan per 100 yuan of the assessed value of the building. The physical character of the neighborhood influenced the assessments. 1 MISCELLANEOUS NOTES, *supra* note 49, at 32b.

259. JERNIGAN, *supra* note 34, at 219.

260. Traffic regulations were introduced fairly swiftly in the 1920s, after a decade of reluctance by local courts to charge car drivers with murder when deaths resulted from auto accidents. Upon the introduction of automobiles in the 1910s, the streets of Shanghai became extremely hazardous. Cases of fatal automobile accidents tried at the International and French Mixed Courts made frequent headlines in the largest circulating newspaper in Shanghai. However, these trials may not have gone far toward inducing drivers to adopt more cautious driving habits. Convictions were rare. Even the driver of a car who ran over a five-year old boy was acquitted. See *Qiche zhuangbi xiaohai zhi jieju* [outcome of child's fatal car accident], SHENBAO (China), July 1, 1914; *Fuxun qiche zhuangbi xiaohai an* [update on case of child killed when hit by car], SHENBAO (China), Sept. 1, 1914.

261. The original agreement between the Shanghai Daotai and the British Consul in 1845 created a Committee of Roads and Jetties, whose function was to receive and maintain land surrendered for public use. *Tudi zhangcheng*, *supra* note 143, art. 5. The Municipal Council evolved out of this body. The only taxation permitted by the agreement was a tax on foreigners who owned land and had consular representation. The tax went to an elected group who spent the funds on behalf of the Committee of Roads and Jetties. *Id.*, art. 10.

262. William C. Johnstone, Jr., *The Administration of the International Settlement at Shanghai, China 44-45* (1931) (Ph.D. dissertation, Stanford University).

263. From 1916 to 1925, license fees generated seven and a half million teals, roughly thirteen percent of the Council's income for those ten years. ANNUAL REPORT, *supra* note 64, at 434 (1925).

traditional Chinese merchant collusion by lowering the barrier to market entry created by the transaction cost of entering into agreements without the means to make them binding. The threat of civil litigation helped to enforce any kind of business transaction and lowered the risk of entering into individual transactions without collusive backing. The civil courts enforced credit agreements for anyone who had contact with a Chinese resident or business in the International Settlement of Shanghai. The courts also lowered the cost of enforcing credit arrangements. In contrast to the self-help mechanisms and the sheer effort required to maintain and repair a business relationship outside the purview of the guilds, courts enforced debt contracts quickly and definitely.

Guilds for centuries had had a self-perpetuating hold on the market: their leverage was the ability to threaten withdrawal of a crucial good or service—a prerogative made possible by their exclusive control over the good or service. As long as a guild maintained a monopoly, the only way non-guild members could fill their needs was to enter an agreement with the guild on the guild's terms.

Guilds enforced retail credit arrangements in the same manner. Long-term personal relationships formed the basis for such agreements, resulting in a liberal and widespread availability of credit. Accounts were customarily settled once a year at the New Year. Collusive arrangements among retailers provided leverage over customers when personal relationships weakened or broke down.<sup>264</sup>

Until civil courts appeared in Shanghai, guilds guaranteed enforcement of agreements between guild members by threatening or executing expulsion. Guilds guaranteed enforcement of agreements between guild members and non-guild members by threatening withdrawal of the guilds' goods or services from the non-guild member. High transaction costs plagued business deals made outside the guilds' purview because parties had no low-cost alternative to make agreements binding.

Leverage was particularly essential to the profitability of business deals in Shanghai because exchange rates fluctuated wildly—bargains struck at a set price could easily ruin one of the parties by the delivery date. Chinese middlemen sometimes waited to accept delivery until the exchange rate turned in their favor. In order to keep a Chinese

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264. For example, assume Shanghai had only two rice shops, Rice Shop A, which sells on credit to a retail customer, and Rice Shop B. The customer does not settle his account at the appropriate time, and instead goes to buy rice on credit at Rice Shop B. If Rice Shop B has an alliance with Rice Shop A, the customer will not succeed in obtaining the rice he needs, and must either make good his account at Rice Shop A or starve.

middleman financially afloat while he waited for a favorable exchange rate, both foreign dealers and native banks gave the middleman liberal advances, using the cargo as collateral. If patience and loans were not enough to save him, the Chinese middleman often repudiated the contract. Merchants developed a variety of self-help mechanisms to cope with the uncertainty of enforcement, but the success of all of the mechanisms ultimately depended on the strength of the business relationship involved.<sup>265</sup>

The courts provided leverage or bargaining power to merchants outside the guild structure to engage in transactions with guild members or people independent of the guilds. But even guild members could go to court if they thought they would lose in a guild arbitration. Monopoly power also provided leverage in credit arrangements in wholesale commerce. The availability of a credit-enforcement mechanism outside the guild network removed the source of the guilds' leverage. The courts lowered transaction costs for independent merchants by providing an enforcement mechanism outside network alliances.

Of course, had substantive law influenced civil court judgments as heavily as did evidence of the terms of the individual parties' agreements, then the courts of Shanghai might not have provided an alternative to guild leverage. Preliminary evidence suggests, however, that the civil courts tended to enforce the bargains struck by the parties rather than the commercial statutes.<sup>266</sup>

Persistent court enforcement of contracts created a new freedom for merchants. In most of the reported civil suits before the courts, merchants did not invoke guild status even when they were engaged in trades in which guilds existed.<sup>267</sup> In such cases, it is plausible to

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265. Under a common form of import transaction, called the "forward indent," a Chinese middleman bore all the risks of nondelivery, including insurance, interest, storage, import taxes and Chinese commissions, in exchange for a commission (usually from 1.5 percent to 2.5 percent of the value of the goods). A foreign dealer based in Shanghai, a "hong," would obtain an offer from a Chinese middleman on price and delivery terms. Such terms were difficult to predict even for the middlemen because delivery time ranged from two months to two years for any given shipment. After the hong's client, a foreign manufacturer based abroad, accepted the offer, the hong would draw up a written contract containing terms of quantity, price, shipment, and goods specifications. Upon shipment, an international bank would transfer funds from the hong's account to the bank's local branch in Shanghai, with a maturity date around the time of delivery. If the Chinese middleman did not pay the hong after a predetermined delivery date, the hong frequently negotiated an extension from the local bank branch and absorbed the cost of the additional interest. AINSCOUGH, *supra* note 33, at 24-25.

266. According to my preliminary research, only in the 1930s and 1940s did the District Courts of Shanghai become constricted by national statutes.

267. See, e.g., *Fagongtang xiao'an* [cases at the French Mixed Court], and *Gonggong gongtang xiao'an* [cases at the International Mixed Court], SHENBAO (China), June 19, 1914

assume that the parties were either not guild members or were pursuing dispute settlement in a transaction outside the sanction of the guild. Guild affiliation did not improve chances of success in court. Instead, the significant role accorded to lawyers gave individual Chinese the chance to secure powerful court judgments regardless of their personal connections to Shanghai's commercial organizations.

The types of actions prevalent in the courts demonstrate the litigants' independence from guild control and the willingness of the courts to grant specific performance. The most common type of civil case was the debt dispute. The typical dispute concerned cash loans between individuals, frequently where at least one party was from out of town.<sup>268</sup> Other cases arose from disintegrated profit-sharing arrangements<sup>269</sup> or unpaid retail credit.<sup>270</sup> The court also accepted petitions to enforce contracts for the delivery of goods when a sudden price change made delivery unprofitable for one of the parties and created a windfall for the other.<sup>271</sup>

Industrialization gave rise to new forms of ownership, products, and marketing opportunities. The traditional expertise of the *dibao* and the functions of local land offices were irrelevant to determining the ownership status of corporate securities. Without a ready-made hold on manufactured goods, guilds were not positioned to compete with courts for disputes arising from the buying and selling of such goods.<sup>272</sup>

The courts posed a threat to the guilds by trying liquidations of

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(reporting on dispute involving rice shop owners); *Suojia bei'ou* [person who demanded a price assaulted], SHENBAO (China), Nov. 2, 1914 (describing events where a rice shop claimed a portion of retail customer's assets when customer went bankrupt before paying for rice bought on credit); Judgment of Dec. 18, 1928 (Gong Chengxu v. Huang Eda (merchant)), Shanghai Special District Court Civil Case No. 1879 (Gong was owner of a hemp sack store; no mention of guild affiliation despite presence in Shanghai of a hemp guild), JIANGSU, *supra* note 45, at 269.

268. *See, e.g., Zhaiwu ren xianqi dao'an* [case of debtor whose time is up], SHENBAO (China), Aug. 4, 1914 (describing contract drawn up in the nearby city of Suzhou).

269. Judgment of Jan. 12, 1929 (Zhu Jiafan v. Chen Yisheng), District Court Civil Case No. 1903, JIANGSU, *supra* note 45, at 279 (involving defendant who managed a profit-making company for the plaintiff and kept the profits); Judgment of Jan. 18, 1929 (Fan Bingyu v. Jin Hanchen), District Court Civil Case No. 1967, *id.* at 271 (describing dispute between joint owners of company).

270. *E.g.*, Judgment of Jan. 18, 1929 (Pan Chinheng v. Jin Hanchen), District Court Civil Case No. 1967, *id.* at 271; Judgment of Jan. 12, 1929 (Zhu Jiafan v. Chen Yisheng) District Court Civil Case No. 1903, *id.* at 279.

271. File 190/4013, Shanghai Municipal Archives.

272. *E.g.*, Judgment of Dec. 18, 1928 (Da Kangyang Co. v. Wu Yanwei), Special District Court, Civil Case No. 1891, JIANGSU, *supra* note 45, at 265 (involving situation where buyer of processed silk sued employee of silk thread factory for nondelivery of goods).

Chinese banks.<sup>273</sup> Chinese banks formed the most powerful elements of the guild world in Shanghai, and it was the freedom of the Chinese banks to grant liberal extensions of credit and operate at low capitalization that gave the guilds discretion over the financial aspects of their business transactions.<sup>274</sup> Courts supervised the liquidation of financial institutions and so withheld discretion over the granting of credit from the families who dominated Shanghai's financial world.

Though the major legal innovations occurred in the civil courts, the criminal courts accommodated the merchants' desire to punish business associates for renegeing on promises or duties. Some criminal cases arose from simple business relationships gone awry. The courts allowed private complainants to bring criminal charges against anyone.<sup>275</sup> This way, an individual could bring a private foe, such as a business competitor, into court, using a court prosecutor to represent his case.<sup>276</sup> And they did. Merchants initiated prosecutions against those who "cheated them out of money."<sup>277</sup> Criminal actions alleging cheating routinely carried pendant civil actions that sought monetary compensation for unpaid debt.<sup>278</sup> From 1927 to 1948, the three largest courts in Shanghai allowed complainants to sue criminal defendants in three types of supplementary civil actions: misappropriation of goods, damage from nonpayment of debt, and defamation.<sup>279</sup> Merchants used libel suits as a way to expand the scope of their damages, claiming defamation of their business reputation.<sup>280</sup>

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273. See FO, *supra* note 50, 656/116, Nov. 30, 1908 (draft letter from Sir Pelham Warren to Hongkong & Shanghai Bank).

274. Sanford, *supra* note 28, at 104, 106, 148-55.

275. Interview with Jiang Bingfan, practicing attorney in Shanghai from 1933 to 1949 (May 1991).

276. One of the wealthiest foreigners in Shanghai, British citizen Edward Ezra, sued a business associate for embezzling funds from the sale of Ezra's opium stashes. The case drew considerable public attention. See *The Great Canton Road Opium Case*, N. CHINA HERALD, Aug. 22, 1925, at 220-21; *id.*, Aug. 29, 1925, at 267; *id.*, Sept. 19, 1925, at 398-99; *id.*, Sept. 26, 1925, at 444.

277. See Judgment of July 4, 1931 (Ceng Shaohuai v. Deng Yi), Shanghai District Court, JIANGSU, *supra* note 45, at 29; Judgment of July 11, 1931 (Guo Zhuqiao, Manager of the China Commercial Savings Bank v. Jiang Junsun), Shanghai District Court, *id.* at 17; Judgment of Nov. 30, 1930 (Wu Xibai v. Li Jingyuan), Shanghai Special District Court, Criminal Case No. 79, *id.* at 113; Judgment of May 6, 1931 (Zhu Gengfu v. Zhuang Ruozhou), Shanghai Special District Court, Criminal Case No. 183, *id.* at 139; Judgment of Mar. 5, 1931 (Eleven Chinese bank managers v. He Gengxing), Shanghai Special District Court, Criminal Case No. 10, *id.* at 175.

278. See Judgment of Mar. 23, 1931 (Wang Zhilun (banker) v. Yang Changjin), Special District Court, Criminal Case No. 165, *id.* at 179; Judgment of June 30, 1930 (Tu Shizhu v. Merchant Fang Ting), Shanghai Special District Court, Criminal Case No. 105, *id.* at 257.

279. See ANNUAL MIRROR OF SHANGHAI, *supra* note 22, Judicial section at 52-53, 112-13.

280. See Judgment of July 11, 1931 (Guo Zhuqiao, Director of the China Commercial Savings Bank v. Jiang Junsun), Shanghai District Court, JIANGSU, *supra* note 45, at 17;



#### 4. GUILD RESPONSE AS AN INDICATION OF COURT IMPACT ON THE LOCAL MARKETPLACE

The presence of contract-enforcing courts offered an alternative to collusive networks. Although centuries of cultural conditioning to shun the courtroom did not disappear overnight, by the 1880s, the outcasts and opportunists in Shanghai began taking advantage of new legal opportunities. This option provided the pinprick sufficient to burst the guilds' monopoly "bubble" on pricing, market entry, and capital raising. Between 1905 and 1910, the civil courts made themselves attractive to plaintiffs. The courts' usefulness became known through daily newspaper coverage and word of mouth, making their use appealing even to the less daring. Collusive arrangements had by then weakened to the point of capitulation or adaptation to a more competitive marketplace. Capitulation was signalled by a deal struck in 1911 between the largest civil court in town, the International Mixed Court, and the new guild umbrella organization, the Chinese General Chamber of Commerce. Once the collusive arrangements had to some degree disintegrated and mutated, courts were available to fill the void in dispute resolution formerly filled by the guilds. Then, between 1927 and 1933, civil courts further lowered the cost of litigation to Chinese merchants by replacing foreign judges with Chinese judges, and rates of civil litigation soared until the Japanese invaders disrupted the courts' operation and ended the experiment.

From their inception, the courts posed a threat to Shanghai's traditional Chinese merchant networks. The presence of the powerful courts with discretion to adjudicate financial cases lowered the cost and risk of raising capital. License and debt cases came to comprise approximately seventy percent of the total caseload of the International Mixed Court. Regardless of the number of disputes that never reached a courtroom, having the courts available as bargain enforcers transformed merchants' strategies for structuring deals.

Courts also affected the way capital, a key feature of market participation, was raised. Outside collusive networks, speculation in land allowed capital to be accumulated. Land played a pivotal role in capital raising in Shanghai, and the International and French Mixed Courts' ability to enforce speculators' deals and determine eminent domain questions made raising capital outside the guilds possible.

One of the strongest attestations of the courts' success in opening the marketplace was guild mutation. The combination of the capital

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Judgment of July 21, 1931 (appeal by merchant Ma Lizhou), Shanghai Special District Court, Criminal Case No. 219, *id.* at 133; *The Opium Libel Case*, N. CHINA HERALD, Dec. 14, 1912, at 771.

raising function of land and the presence of adversarial courts, it seems, forced the guild world to organize on a larger scale. Guilds had always performed financial functions—many of the guilds had begun as lending associations.<sup>281</sup> In the first decade of the twentieth century, however, as guilds in Shanghai grew, sectors of the Chinese economy, organized cellularly as they had been in traditional China, relinquished control of some of their affairs in Shanghai to an umbrella organization, the Chinese General Chamber of Commerce. Bankers comprised the leadership of this organization,<sup>282</sup> and the higher level of organization reflected the critical function of capital raising in the Shanghai business world and the need for guilds to pool their resources in order to compete in the business of raising capital.

The mutation also allowed the guilds to fashion a cooperative relationship with the International Mixed Court, through which it sought to minimize the loss of guild leverage in the marketplace. The Chinese General Chamber of Commerce acted as speaker for the Chinese business community in matters before the International Mixed Court. In 1911, the predecessor to the Chinese General Chamber of Commerce struck a deal with the Mixed Court, assenting to Mixed Court jurisdiction over Chinese commercial dispute resolution, presumably in return for a promise either to expedite Chinese General Chamber of Commerce claims at the Mixed Court, or to give the Chamber the authority to punish its own members convicted at the Mixed Court, or both.<sup>283</sup>

At the same time, some guilds developed separate relationships with the International Mixed Court, marked by cooperation and efforts to achieve mutual benefits. Guilds began to serve as aids to the International Mixed Court and as intermediaries in merchant disputes at the court.<sup>284</sup> They hired lawyers on an annual retainer to advise members on how to avoid lawsuits.<sup>285</sup> Guilds were occasionally sued, however, and they pooled their extensive monetary resources to hire the best defense attorneys to improve their members' chance of win-

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281. JERNIGAN, *supra* note 34, at 242.

282. Sanford, *supra* note 28, at 262-84.

283. Untitled Essay by Zhao Shi'en, delegate of Shanghai General Chamber of Commerce, to the foreign diplomatic corps in Beijing in 1924, *Falupinglun*, no. 24, 2-3 (June 22, 1924).

284. The General Chamber of Commerce acted as a funnel for distributing settlement payments to foreigners who brought debt suits against its members in the Mixed Court. See FO, *supra* note 50, 656/111, May 16, 1906 (letter from Dickeson, Jones & Co. to British judge). See also *id.*, 656/123, May 1910 (petition from creditors in Hong Kong of the firm Chun Shing Cheong) (describing how Court handed to the Chamber of Commerce for distribution to creditors the \$20,000 of securities found on the defendant).

285. Interview with Jiang Bingfan, Legal Counsel to the Shanghai Goldsmith Guild in the 1940s, in Shanghai (May 7, 1991).

ning. They also came to the courts as third parties, either as creditors or as guarantors of members involved in disputes with Chinese outside the guild.<sup>286</sup> For example, when a rice shop went bankrupt, other rice shops joined the group of creditors petitioning the Mixed Court for a share of the assets.<sup>287</sup> Native banks, such as the Ningbo Commercial Bank, petitioned the court as creditors of bankrupt Chinese shops and factories. The Bankers Guild was itself a party in these court actions.<sup>288</sup> When members of Shanghai's various types of guilds and merchant organizations sued and were sued, invoking the aid of the courts as individuals,<sup>289</sup> guilds came to their assistance.

The partial breakdown of collusive trade networks in Shanghai presumably made it more difficult for guilds to enforce their own rules on members. However, the guilds adjusted to the court system to such an extent that they learned to use it against their own members, sometimes to enforce guild rules.<sup>290</sup> On one occasion, the printed cotton guild sued a member for mortgaging guild land without permission.<sup>291</sup> Another time, the Anhui native place association accused its loan officer of intentionally misappropriating a hefty portion of the association's funds for his personal use.<sup>292</sup>

286. See, e.g., FO, *supra* note 50, 656/124, Aug. 17, 1910 (letter from Silk Guild's attorney to British judge regarding a case of stolen silk cocoons); *id.* 656/124, Sept. 28, 1910 (letter accompanying a guarantee from the Silk Guild to the Mixed Court and petition for probate and rightful title suit); *id.* 656/124, Sept. 23, 1910 (letter from Silk Guild's attorney to British judge accompanying a guarantee and petition for probate and land transfer suit).

287. *Gongtang fafeng midian*, [Mixed Court issues orders to close rice shop], SHENBAO (China), Dec. 11, 1914.

288. See, e.g., FO, *supra* note 50, 656/131, Dec. 10, 1912 (letter to Mixed Court Registrar from M. Hughes, regarding Chao Kong Bank's deposit in Hongkong & Shanghai Bank); *id.* 656/164, Feb. 28, 1921 (letter from White-Cooper, Master & Harris to British judge, regarding Tsing Teh Native Bank v. Sing Tai Yah Hong and Dzang Tse Tsung).

289. A member of the Native Banker's Guild in Shanghai, representing ten Chinese banks, brought a foreclosure suit against three Chinese businesses. The businesses had purchased a series of equitable mortgages from him on fourteen tracts of land in the International Settlement and the French Concession. The amount of the defaulted mortgage payments was 531,911 taels, excluding the value of rents collectable on the property. FO, *supra* note 50, 656/131, Feb. 4, 1913 (petition of Chen Yih Tsai against Yuen Woo, Yah Hsing, and Loong Sheng).

290. A contemporary observer reported that Shanghai had about 150 guilds and 500 members in the Zongshanghai. He noted that the guilds had difficulty enforcing their own rules on members. He also maintained that, though these bodies settled "the great majority of disputes in a Chinese mercantile community," they had no means for enforcing decisions without both parties' consent. In the absence of cooperation, these bodies sent the cases to court to retry the case and enforce the judgment. The court's judgement tended to favor the complainant or plaintiff. ARNOLD, *supra* note 26, at 195, 245-47, 250-51.

291. *Simai hechan zhi chansong* [private sellers of joint property embroiled in lawsuit], SHENBAO (China), Mar. 14, 1914.

292. Judgment of July 30, 1931 (prosecution of Zhu Yuzhi for misappropriating 12,928.95 yuan), Special District Court, Criminal Case No. 194, JIANGSU, *supra* note 45, at 49.

The cooperative relationship forged by the guilds with the International Mixed Court can best be explained as a pragmatic response to the threat the court posed to organized commerce. The guilds, and their more recent incarnations in the General Chamber of Commerce and street merchants' associations, persistently supported a local Chinese takeover of the court, and so would not likely have cooperated with a foreign-run court unless their survival had depended on it.<sup>293</sup> The guilds mutated to reduce the growing risks for guild members after the guilds lost control over pricing in the city, a mutation which immediately led to collaboration with the court. The proximity in time of these two accommodations suggests a linkage of some sort, a common motivation for both. Thus, the guilds collaboration was capitulation to the court's power to reduce the risk and cost of commercial transactions.

Despite some gain in guild leverage on a case-by-case basis in the courts, guild involvement in litigation did not recoup all the leverage guilds had lost. Guilds suffered from a natural handicap in the courts. The procedural form of the lawsuit lent itself to the articulation of individual rights. Groups such as guilds found the lawsuit a limited vehicle for addressing their needs for justice.

The guilds, in recognition of the limitations of the lawsuit, requested services from the International Mixed Court that extended beyond the lawsuit. They retooled their organizational strengths and employed longstanding public lobbying techniques to elicit from the court advisory opinions that protected members from certain types of

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293. Between 1922 and 1924, the Shanghai General Chamber of Commerce was instrumental in organizing Shanghai's guilds and merchant associations to press for transfer of control away from the Mixed Court. In late 1922, the Chamber of Commerce drew up a plan for reform of the court and sent it to the Commissioner for Foreign Affairs for approval. The Chamber of Commerce and eleven guilds and merchant associations publicly petitioned the Consular Body to institute a revised version of the plan. They proposed six reforms that gave Chinese more influence over the court's operation. At a banquet honoring the British Ambassador to China, they urged the consuls present to make the requested changes at the court. The Chamber of Commerce later repeated that plea in a letter to the Senior Consul. A year later, the national government forwarded the proposal to the Diplomatic Body in Beijing. Between 1922 and 1924 the Shanghai General Chamber of Commerce sent dozens of letters and telegrams to the Commissioner for Foreign Affairs urging him to pressure the Shanghai consuls into surrendering control over the Mixed Court's operations. See File 179.4.2, Qian jiangsu jiaosheshu shouhui gongxie gexiang wenjian [documents on various aspects of the former Jiangsu negotiations for the rendition of the International Mixed Court], at 1-41, Shanghai Municipal Archives. In 1924, the General Chamber of Commerce and smaller commercial organizations from Shanghai sent delegates to Beijing to pressure both the Chinese Ministry of Justice and the Ministry of Foreign Affairs to arrange for Chinese control of the Mixed Court. FALU PINGLUN [THE LAW CRITIC], no. 52, June 22, 1924, at 2. In 1927, several guilds in Shanghai formed "Merchant Associations" (*Shangmin xiehui*). Joseph Fewsmith, *The Shanghai Connection*, in 11 MODERN CHINA No. 1, 128 (Jan. 1985).

suits before disputes would have prompted merchants to sue.<sup>294</sup> Representatives of guilds asked the International Mixed Court's Chinese judge to act as an intermediary between the Chinese business community and the Municipal Council when problems arose in the enforcement of Municipal Council executive orders. Organized segments of the Chinese business community invoked the court's aid to stave off an impending commercial crisis. In 1911, for example, the Council ordered Chinese innkeepers to substitute iron bed-posts for the wooden ones then in use and to carry out structural alterations to their inns. One hundred and sixty innkeepers, unable to absorb the cost of the alterations, petitioned the Mixed Court Magistrate to suggest modified instructions to the Council.<sup>295</sup> In another instance, the goldsmith guild asked the International Mixed Court to follow local Chinese custom in settling all disputes over goods bought at pawnshops.<sup>296</sup>

The cooperative arrangement looked more like an effort by the guilds to cut their losses under duress than a change welcomed by them under any circumstances. While the courts, from their responses to guild capitulation, appear to have lost little, they gained much from guild recognition of court authority. The patterns of cooperation between the International Mixed Court and the organized Chinese merchant community in Shanghai suggest that the court acknowledged local business practices when doing so strengthened its authority. The court's practice of detaining a civil defendant unless a guarantor deposited a sum of money with the court was an example of the court's adoption of local business custom. Used by merchants for settling debts, the custom supplied the court with an inexpensive and convenient means to ensure compliance with its judgments.

Another example of the upper hand gained by the court in its alliance with the guilds was in the court's new authority to shape the course of local business custom. Shanghai's development brought high-rise buildings in the 1900s and automobiles in the 1910s, both of which produced new kinds of disputes involving accidental and negligent injury or death. In the first decade of this century, a spate of Chinese child apprentices to construction workers fell to their deaths during the erection of multi-storied office buildings along the now-famous wharf promenade called "the Bund." The court's presence and an eager local bar made tort a potential area of growth in the

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294. The Gold- and Silversmiths and Pawnbrokers Guilds wrote to the Mixed Court asking for a declaration of Guild members' immunity from criminal liability for selling stolen goods. See MUNICIPAL GAZETTE, Apr. 30, 1914.

295. FO, *supra* note 50, 656/126, Sept. 11, 1911.

296. *Id.* 656/137, Jan. 25, 1915; *id.* 656/137, Feb. 17, 1915; *id.* 656/126, Mar. 3, 1911.

local law, but one that would have looked undesirable to an already overworked, pro-development court. In a move that surely discouraged tort actions against the construction community, the court's senior Chinese judge asked the Chinese General Chamber of Commerce and the masons' and carpenters' guilds to codify new professional standards for construction jobs performed at great heights. In response, three hundred members of two rival factions of those guilds met and promptly issued a rule prohibiting workmen shorter than four feet from performing construction work alone above ground level.<sup>297</sup>

The International Mixed Court sent an average of twenty-one convicts every month to guilds for execution of their judgments.<sup>298</sup> Not even this practice is convincing evidence, however, that guilds cooperating with the court recouped all the leverage they lost with the introduction of contract-enforcing courts. First of all, the number of convicts made up too small a portion of the total number of people sentenced at the court—less than one percent—to be a significant delegation of court authority to guilds. Furthermore, the numbers do not necessarily reflect the infrequency with which guild members came before the court but, rather, could reflect the infrequency with which the court delegated to guilds the task of executing the court's judgments. Moreover, this delegation need not have included a transference of authority. Rather, the court may have exacted its own pen-

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297. *Id.* 656/118, Mar. 20, 1909.

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TABLE VI — INTERNATIONAL MIXED COURT CONVICTS SENT TO  
GUILDS FOR PUNISHMENT\*

1913	8 (Mar., Apr., May, Dec. only)
1914	38 (excluding Feb.)
1915	27
1916	25
1917	15
1918	14
1919	13
1921	13
1922	23
1923	41
1924	48
1925	14
1926	9
1929	10**

\*ANNUAL REPORT, *supra* note 64, at 70A-71A (1919); MUNICIPAL GAZETTE, May 1, 1913, at 112-13; May 22, 1913, at 130; June 26, 1913, at 153; Jan. 22, 1914, at 17; Apr. 30, 1914, at 138-39; May 28, 1914, at 167-68; June 25, 1914, at 210-11; July 23, 1914, at 236-37; Sept. 3, 1914, at 259-60; Sept. 24, 1914, at 280-82; Oct. 29, 1914, at 304-05; Nov. 26, 1914, at 326-27; Dec. 24, 1914, at 363-64; Feb. 4, 1915, at 32-33.

\*\*Data taken from ANNUAL REPORT, *supra* note 64 (1929).

alty from these defendants, such as compensation to the plaintiff or complainant, before sending them to the guilds. The judgment of the court in these cases was always called a "punishment," indicating either that these cases were all criminal,<sup>299</sup> or that the guilds were suing their own members for breaking guild rules. Either way, the court would have retained discretion over the execution of judgments against guild members sued by non-guild members.

The guilds' grip on price controls presumably loosened as professions outside of the guild structure emerged. Divisions between the guilds and non-guild professional groups of Chinese became more pronounced, and the divisions revealed a loosening of guild control over capital accumulation. "Compradores," a new type of broker, were one class of Chinese who grew wealthy outside the bounds of guild restrictions.

Courts played a role in the rise of brokers free of guild control. Compradores frequently filed lawsuits at the International Mixed Court, some on behalf of their foreign bosses, some on their own.<sup>300</sup> Chinese lawyers also amassed wealth outside the guild structure functioning much like the compradores, as brokers and middlemen.

Some sinologists refer to the rise of these brokers as "compradore capitalism,"<sup>301</sup> the implication being that the growth of this class of middleman was either simply one of many forms of capitalism operating in Shanghai at the time, or merely a strange breed of capitalism particular to the city. The rise of these middlemen represented some-

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299. See JIANGSU, *supra* note 45, at 19.

300. See, e.g., FO, *supra* note 50, 656/118, Oct. 27, 1909 (letter from W.T. Garnett & Co. to British judge, regarding the case of Yang Tsin Zung v. Nye Tah Cheong); *id.* 656/118, July 19 and 23, 1909 (letters from Platt, Teesdale & MacLeod to British judge, regarding the case of Ma Liang Kung v. Shar Yin Chay); *id.* 656/126, June 12, 1912 (letter from British judge to Mixed Court Registrar); *id.* 656/132, Jan. 19, 1916 (letter from Police Commissioner McKuen to British judge); *id.* 656/110, Mar. 19, 1906 (letter from British judge to comprador's British attorneys).

301. E.g., Lucian Pye, Chinese Nationalism and Modernization, Presentation at the Fairbank Center, Harvard University, Mar. 7, 1991. Chinese other than compradores, who did not enjoy foreign support but may have benefitted from Chinese government backing, found themselves at a disadvantage against merchants with foreign ties, euphemistically known as the *guanliaoshiban*. They were simply unable to compete with the foreigners. Chinese historians and writers on the mainland have depicted this split as an intended "divide-and-conquer" strategy of foreign businesses and governments in early twentieth century Shanghai. The land-investment patterns put indigenous Chinese investment and entrepreneurs at a particular disadvantage. Interview with historian Yu Xingzhong, East Asian Legal Studies Center of Harvard University (Feb. 28, 1991). See also MAO DUN, MIDNIGHT (Foreign Languages Press, 2d ed., 1979) (illustrating this phenomenon in a work of fiction). JIU ZHONGGUO DE ZIBENZHUYI SHENGCHAN GUANXI (Renmin chubanshe, 1976), at 1-20; ZHONGGUO JINDAI GONGYE SHI ZILIAO (Zhonghua shuju, Wang Jingyu and Sun Yutang, comps.), vol. 1, at 957-1173; vol. 2, at 1019-20.

thing far more significant, however. The growth of the compradores' incomes and their role in commercial transactions spelled the growth of capital outside the guild structure, and their services offered a viable alternative to guild arrangements. By offering alternatives to guild arrangements and guild capital, the compradore was a vehicle for the very competitive market conditions that make capitalism possible.

The split between the guilds and the new kinds of professionals manifested itself in the public positions the two sides took toward the International Mixed Court. When it appeared that the court might transfer its power to Chinese control, the organized Chinese merchant community espoused a vision of the court's structure different from that of local lawyers, a group that grew wealthy outside the guild structure. Both groups wanted to play a dominant role in running the new court, but each differed over the desirability of national supervision. Merchants wanted to gain influence over the court's decision-making, while allowing the Municipal Police to continue enforcing the court's decisions. Merchants also wanted to keep the court's Anglo-American-Chinese structure largely intact, and tried to preserve its local control. Local control of the court would have facilitated the merchants' bid for decisionmaking power there, particularly their proposal to elect its judges from their own ranks. The merchants also sought to add a jury of local residents, which was considered an unpatriotic desire because it went beyond preserving to actually strengthening the Anglo-American nature of the court. The group also wanted the Ministry of Justice, responsible for appointing the new judges to the court, to select people very familiar with local customs and well-known in the community—in other words, Shanghai residents. The merchants explicitly requested of the Shanghai Commissioner for Foreign Affairs that he act to preserve the independence of the court after its reorganization.<sup>302</sup>

In contrast, the local Chinese lawyers who practiced before the International Mixed Court wanted the court to be integrated into the growing national court system. The Shanghai Bar Association envisioned a court system following the basically Anglo-American civil procedure already in use at the court, which allowed lawyers to represent both civil plaintiffs and defendants.<sup>303</sup> In 1923, when it became clear that the Chinese Shanghai Bar Association was leagued with the

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302. Communique from the Shanghai gelu shangjie zonglianhehui [United Street Merchants Association] to Shanghai jiaoshe shixu [Shanghai Commissioner for Foreign Affairs] 87-89 (Aug. 10, 1926), File 179.4.4, Shanghai Municipal Archives.

303. *Faqun taolun weiyuanhui shanghai gongong huishengongxie shicha baogao*, *FALU ZHOUKAN*, no. 10, Sept. 9, 1923, at 19-20.



national Ministry of Justice,<sup>304</sup> provincial authorities put the Bar Association in charge of negotiating on behalf of the Chinese government.<sup>305</sup> The lawyers wanted decisionmaking power passed to nationally appointed officials,<sup>306</sup> posts coveted by ambitious law students, local judges and prosecutors.

### B. Courts and Culture

In Shanghai, courts that favored plaintiffs and enforced contracts shaped the local economy in an environment unfamiliar with and inhospitable to litigation. This observation is not evidence of the insignificance of the cultural environment; the lack of indigenous experience with contract-enforcing courts may have slowed their rise in Shanghai. Far from being insignificant to the development of the courts, the cultural environment stood in complex relation to them. Looking at the cultural environment is crucial to understanding not just the development of the courts, but also the effect of the courts on the local economy. Thus, the lessons of the Shanghai experience may only be completely grasped by factoring culture into the court-marketplace equation.

The twin concepts of rationality and expectations, both central to law and economic processes, are highly susceptible to cultural conditioning. An individual's context-rooted experience forms his expectations of both justice and future profits. Such experience also defines how a "reasonable person" behaves in a dispute-producing crisis and what is rational behavior in reaching agreements in the marketplace. In this way, the experience with economic transactions of Chinese judges and litigants in Shanghai courts differed from that of the foreign judges and litigants.

Courts helped change not only the local economy, but also the economic culture. As if to cement and perpetuate the opening of the marketplace, courts also altered culturally-embedded definitions of

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304. *Cifabu duiyu shanghai zujie huishengongtang diaocha baogao shu* [Report on the Examination by the Ministry of Justice of the Shanghai International Settlement Mixed Court], FALU ZHOUKAN, no. 12, Sept. 23, 1923, at 16-18.

305. Communique from Zheng Yipeng, President of the Shanghai Bar Association, to the Commissioner of Foreign Affairs Hsu, at 66-67 (July 15, 1923), File 179.4.4, Shanghai Municipal Archives.

306. You Xiaoquan, *Gongxie yuequan shouli zhi zeyan* [Acting Without Authorization, International Mixed Court Receives Reprimand], FALU ZHOUKAN, no. 9, Sept. 2, 1923, at 32-33. See also Cai Xiuzuan, *Faquan taolun* [Report on the Examination of the Shanghai International Mixed Court by the Legal Rights Council], FALU ZHOUKAN, no. 11, Sept. 16, 1923, at 19-20; *id.* no. 12, Sept. 23, 1923, at 18-20; *id.* no. 13, Sept. 30, 1923, at 35-38; Chao Kun, *Shanghai huishengongtang biji* [notes on the Shanghai International Mixed Court], FALU ZHOUKAN, no. 12, Sept. 23, 1923, at 30-35.

what was rational in the expectations of profit and in the resolution of commercial disputes. As Shanghai residents took advantage of the new opportunity to enforce agreements in court, their attitudes about the marketplace and dispute resolution changed. This phenomenon should not surprise us. After all, law is not wholly the product of culture, as not all legal development arises indigenously.<sup>307</sup>

Culture in Shanghai at the turn of the century evolved in an economic and legal context different from ours. Contract enforcement by legal institutions was new to China. Before the opening of Shanghai, as far as we know, law was not used in China as a tool for economic growth. More specifically, legal institutions were not a dependable means to achieve personal economic enrichment or compensation for the breakdown of business relationships. China lacked a tradition of investing discretion in courts of first instance over the disposition of merchant assets. Courts in China were removed from most people's lives, and not easily accessible to the public for resolution of commercial matters. Law was not a local affair, and national law touched people's lives only if they committed a violent, anti-social act that came to the attention of the jurisdiction's sometimes distant District Magistrate, an official presiding perhaps several days' journey away.<sup>308</sup> China's last imperial rulers enacted virtually no laws regulating commercial activities or land ownership, and issued edicts expressing their disapproval of people taking their disputes to court.<sup>309</sup> An absence of statutory law combined with official disapproval of litigation and punishment of those who were deemed to

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307. Alan Watson has unearthed extensive evidence of this. See generally ALAN WATSON, *LEGAL TRANSPLANTS* (1974); ALAN WATSON, *THE NATURE OF LAW* (1977); ALAN WATSON, *SOCIETY AND LEGAL CHANGE* (1977); ALAN WATSON, *SOURCES OF LAW, LEGAL CHANGE, AND AMBIGUITY* (1984).

308. Systematic research gauging the reach of central government law in imperial China has yet to be undertaken. Work on the Chinese imperial bureaucracy and its functioning at the district or local level so far suggests a shallow penetration of government into society. See CHANG WEJEN, *QING DAI FACHI YANJIA* [RESEARCH ON THE QING LEGAL SYSTEM] (3 vols. 1983); CH'U T'UNG-TZU, *LOCAL GOVERNMENT IN CHINA UNDER THE CH'ING* 1-18, 116-29 (Harvard University Press, 4th printing, 1988); JONATHAN OCKO, *BUREAUCRATIC REFORM IN PROVINCIAL CHINA: JIANGSU PROVINCE, 1867-1870* (1982); JONATHAN D. SPENCE, *THE DEATH OF WOMAN WANG* (1979); G.W. Skinner, *Marketing and Social Structure in Rural China*, 24 *J. OF ASIAN STUD.* 7 (Nov. 1964); see also THOMAS METZGER, *THE INTERNAL ORGANIZATION OF THE CH'ING BUREAUCRACY: LEGAL, NORMATIVE AND COMMUNICATION ASPECTS* (1973); JAMES WATT, *THE DISTRICT MAGISTRATE IN LATE IMPERIAL CHINA* (1972); Chen Fu-mei, *Local Control of Convicted Thieves, in CONFLICT AND CONTROL IN LATE IMPERIAL CHINA* (Frederic Wakeman, Jr., ed. 1975).

309. For a discussion of the few exceptions to this, see Sanford, *supra* note 28, at 98; James Feinerman, *The Dian Transaction* (unpublished paper delivered at the American Society for Legal History annual conference, Atlanta, Feb. 10, 1990); William Jones, *Economic Regulation in the Qing Code* (unpublished paper delivered at the American Society for Legal History annual conference, Atlanta, Feb. 10, 1990).

have brought "frivolous" lawsuits all contributed to the view that China had a cultural aversion to litigation. Chinese and Western observers consequently have agreed that China was, and still is, an anti-litigious culture.<sup>310</sup>

Chinese merchants, steeped in the collusive economic culture and predominantly penal legal culture prevailing in China before the mid-nineteenth century, were not used to weighing the costs of litigating against the benefits of reducing risk that litigation afforded. Not all Shanghainese in the early years of this century even understood the difference between civil and criminal court processes. For example, in 1909, a Mr. Wong lent a Mr. Dian \$360 to set up a business as a timber merchant. The two later met in Shanghai and Mr. Wong asked Mr. Dian to repay the loan. When Mr. Dian refused, Mr. Wong took him to the Municipal Police station in the Hankou district police informed him that the case was a civil matter and that he should file a petition with the Mixed Court. Instead, the two merchants went to a teashop to settle their differences themselves. There, they got into a fight, and this time Mr. Dian took Mr. Wong to the police station to have him prosecuted for robbery. The police subsequently prosecuted both of them for disturbing the peace.<sup>311</sup>

Fully "rational" in the context of their cultural experience, Mr. Wong and Mr. Dian followed an all-or-nothing approach. Their first response to a breakdown in a commercial agreement was to settle the disagreement without resorting to litigation, but instead trying to negotiate in the favorite Chinese watering hole, the neighborhood tea-room. Methods of cooperation governed their strategic behavior until late in the negotiation process. Mr. Wong and Mr. Dian either did not understand or did not care that suing in the Mixed Court was cheaper for the plaintiff than for the defendant, or that suing reduced the risk of losing money on their loan arrangement. Neither considered that civil litigation might be financially more rewarding than revenge by criminal prosecution. Their story also shows a propensity to invoke the strong arm of the law—police and criminal sanctions—when settlement proved impossible and passions flared. Profitmaking

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310. See, e.g., VICTOR H. LI, *LAW WITHOUT LAWYERS* 19-20 (1978); SYBILLE VANDERSPRENDEL, *LEGAL INSTITUTIONS IN MANCHU CHINA* 112-30, 135-36 (1962); Benjamin Schwartz, *On Attitudes Toward Law in China*, in *GOVERNMENT UNDER LAW AND THE INDIVIDUAL* 28-39 (1957); Zhou Zheng, *China's System of Community Mediation*, *BEIJING REV.*, Nov. 23, 1981. See also Stanley B. Lubman, *Emerging Functions of Formal Legal Institutions in China's Modernization*, in *CHINA UNDER THE FOUR MODERNIZATIONS* 237-40 (Dec. 30, 1982); Stanley B. Lubman, *A Legal Opinion*, *CHINA TRADE REPORT* 7 (Sept. 1989).

311. FO, *supra* note 50, 656/118, 1909.

beyond the breakdown of the business relationship was not part of rational behavior in their economic culture.

We have seen how the Shanghai courts reduced the cost of litigation in the 1900s and 1910s. The civil-criminal distinction alone created a courtroom solution to disputes that was relatively free from the stigma Chinese associated with the criminal process. Cost reduction, however, does not fully explain Shanghai's reception of the lawsuit. Litigation makes sense only if merchants expect to profit beyond the breakdown of the business relationship. Nearly a century of litigation instilled this expectation in the Shanghai business community. As an initial step in this fundamental change, the introduction of contract-enforcing lawsuits allowed strategic planning to extend beyond the breakdown of the business relationship. Once possible, it made sense. Once sensible, it factored into business calculations.

By "sensible," one could mean "rational," and so one could consider this change in expectations to have changed what was "rational" in the marketplace. The enforcement power that courts gave to individuals independent of collusive networks reduced the importance to economic survival of preserving business relationships. When cooperative, long-term relationships ceased to be a necessary for profitmaking, bargains with strangers became rational.

In this light, the courtroom was the classroom, not just for litigation techniques, but also for business strategy. Cheaper and more plentiful opportunities to litigate taught Chinese merchants to shift their strategic planning away from forming and maintaining relationships and toward maximizing profits in the event of a breakdown. As thousands passed through the courts, they learned that the distinction between civil and criminal allowed commercial enrichment outside the cooperative business relationship. Thus, litigation created a new horizon for profitmaking and a new horizon for competition. While not causing merchants to abandon efforts to create and maintain business relationships, this new way of thinking about profitmaking opportunities made the breakdown of a deal something to contemplate in advance of the relationship's formation, before passion led to abandoning the quest for compensation. By incorporating the courtroom option into their business calculations, Chinese merchants' concerns about profitmaking extended farther along the time horizon of any business relationship, and merchants became more competitive in the negotiating process before disputes arose.

This teaching process extended beyond the courtroom. Civil lawsuits captured the imagination of the Chinese public. Measured by the relative frequency of the types of cases reported in Shanghai's

largest circulating Chinese newspaper, the Chinese population was more interested in debt cases than in theft and robbery prosecutions, with all their human melodrama.

TABLE VII — CASE TYPES AS PERCENTAGE OF TOTAL REPORTED CASES<sup>312</sup>

	<i>Jan.-June 1914</i>	<i>July-Dec. 1914</i>
Debt	21.8%	17.6%
Written Contract	2.8	2.4
Land	1.0	1.1
Theft	13.2	15.6
Kidnapping	8.7	6.2
Fraud	6.5	8.5
Robbery	4.8	6.2
Gambling	3.6	1.5
Prostitution	2.7	2.4
Battery	3.4	4.7
Other	31.5	33.8

Lawyers did their part to encourage Chinese to litigate. British and American attorneys advertised the range of their services in local Chinese newspapers and opened Shanghai's first law school. When young Chinese noticed the handsome income made by local lawyers in private practice, they enrolled in law schools and opened others of their own. On the initiative of these energetic and creative legal professionals, popular legal publications flourished.<sup>313</sup> Lawyers made themselves indispensable to the conduct of business in all stages of the business relationship. As negotiators of contracts and land transfers, lawyers assumed the traditionally crucial position of broker in Chinese commerce, and thus became necessary to the formation of business relationships. As counsellors on retainer, lawyers assumed the traditional mediation functions of the village elder or *dibao*, advising their clients on how to avoid disputes. As litigators, lawyers assumed the traditional position of political power broker with an entré to government officials with decisionmaking authority over disputes, from the District Magistrate up to the Emperor. The access lawyers had to judges through the regular course of their duties made lawyers indispensable in early twentieth century Shanghai to convincing judges to

312. See Daily Reports of court sessions, SHENBAO (Jan.-Dec. 1914).

313. Among the most prominent publications were FALU JIKAN [LAW QUARTERLY], FALU PINGLUN [THE LAW CRITIC], FALU ZHOUKAN [LAW WEEKLY], FALU CONGKAN [LAW PERIODICAL], FAXUE ZAZHI [JURISPRUDENCE MAGAZINE], AND FAXUE ZAZHI [POLITICAL SCIENCE MAGAZINE].

order the salvaging of profits after the breakdown of the business transaction.

That contract enforcing courts took root in Shanghai does not by itself prove that the option to enforce contracts provided by courts is essential to opening markets everywhere and in every age. Of course, transactions between strangers are possible without courts, if the strangers use hostages or other devices for guaranteeing profit upfront. But these forms are imperfect at eradicating both the need for some relationship and the possibility of breakdown of that relationship.<sup>314</sup> Nor can these devices carry with them the means for cultural transformation that courts can; rather, these devices presuppose an economic culture already deemphasizing longterm business relationships. Thus, it is the change in economic culture fostered by courts that is a necessary part of the process of opening up any marketplace. Strategic and competitive behavior of market participants is a prerequisite to freer markets, and the presence of the new courts encouraged such behavior in Shanghai. Courts gave the Chinese living in Shanghai a forum for practicing and adjusting to strategic behavior. It is plausible that contract-enforcing courts can make themselves attractive in any cultural context. Structural incentives to litigate built into the courts were capable of inducing Chinese to use the courts despite the double stigma that, in their view, attached to the courts: the ancient stigma associated with all courts, as fostered by centuries of harsh yet distant experience with them; and the ancient stigma associated with any institution run by foreigners. The structural incentives overrode both disincentives, but only once merchants understood what a civil court process could do within the context of a business relationship.

Once we take into account the change in the way Shanghai merchants arrived at their business calculations, we confront the issues of cultural determinism and litigiousness. This study presents evidence that calls into question the proposition that anti-litigiousness is a timeless characteristic of Chinese legal culture. If Chinese merchants in late nineteenth century Shanghai were initially anti-litigious, the courts of Shanghai provide us with a case study of the circumstances in which merchants learn to use courts, and of the degree to which economics can override culture to encourage litigiousness. The figures in this study suggest a trend in Shanghai before the communist revolution toward courtroom adjudication of commercial disputes. True, litigiousness—the tendency to take disputes to court—may not have grown in republican-era Shanghai if the total number of

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314. See Kronman, *supra* note 2.

disputes grew faster than the court caseload. It is impossible, however, to gather data on the total number of disputes in Shanghai. This study shows, at a minimum, however, that new economic opportunities in Shanghai in the first decades of the twentieth century overrode, at least for some Chinese, whatever cultural distaste for litigation had previously kept them out of court. We can see that a preference for informal modes of dispute resolution, such as those within the family, village, or business organization, is not *influenced by* something we call "culture" as much as it *is* culture. Such preferences form legal culture. Legal culture is not immutable, but in fact is quite vulnerable to economic pressures. Dispute resolution preferences are conditioned by the advantages afforded to plaintiffs by the courts, and in Shanghai, a new set of economic opportunities created these advantages.

A second lesson of the Shanghai experience is that economics can override legal culture. In other words, legal culture can grow to accommodate economic opportunities. Definitions of rational behavior change to fit the prevailing economic system. The story of Shanghai in the century before 1949 demonstrates that courts are one of the mechanisms that reshape definitions of rational behavior to fit the open marketplace.

## V. CONCLUSION

In mid-nineteenth century Shanghai, courts helped foreign merchants to open the China market. Despite centuries of cultural conditioning to shun competition and fear the courtroom, Chinese merchants took advantage of the new bargaining power offered by the courts to strive for profits even after the breakdown of their business relationships. Courts helped the merchants succeed outside collusive networks, escape those networks, and enhance the predictability of their non-collusive business relationships by settling commercial disputes more definitely and quickly than was otherwise possible.

Because of the courts' ability to enforce their decisions, their plaintiff slant, and their accessibility to all actors for all kinds of disputes, the courts offered Chinese merchants powerful incentives for bringing their disputes to court. By providing an alternative to guilds for enforcing agreements, the mixed courts challenged the collusive control of guilds over prices and market entry. Courts aided the transformation of the marketplace by drawing law and economics together more closely than ever before in China. Statutory law and policy proclaimed in executive decrees and bureaucratic orders could not have had the immediate and widespread impact on the local econ-

omy that the enforcement of the approximately six million local court cases did.

Moreover, these courts exerted an impact on law itself. From 1905 to 1949, a host of new Chinese courts incorporated some variation of the mixed court model into the Chinese court system. Although the Chinese rejected the mixed nationality of the bench of the mixed courts, other fundamental aspects of the mixed courts, namely their procedure, territorial jurisdiction, subject matter jurisdiction, and methods of enforcement, became important characteristics of the new Chinese courts in Shanghai.

From this story emerge two general principles of the relationship between courts and markets. First, contract-enforcing courts can quickly come into being and affect the economy even in locations unused to the interaction of court and marketplace. Courts can sustain their own growth and their role in the economy by structuring themselves to attract litigation, principally by offering incentives to plaintiffs. Incentives may include inexpensive and easy-to-use procedures for filing petitions, outcomes that are known to favor plaintiffs, a high probability of enforcement of court orders and judgments, a subject matter jurisdiction encompassing a wide variety of commercial disputes, and the opportunity of direct access to the judge through the hiring of professional counsel.

Second, the story suggests that courts can open markets in four ways. For one, courts that enforce contracts can reduce risk inherent in property transactions by settling questions of control. If property ownership is closely linked to raising capital—a barrier to market entry—then courts that resolve questions of property control lower the cost of raising capital and thus lower a barrier to market entry. As a second way to open markets in a collusive local marketplace, courts in criminal cases lower barriers to market entry if they enforce government regulations, such as licensing requirements that require only a small monetary fee in order to enter the market. Third, courts that enforce private deals lower barriers to market entry by lowering the transaction cost of contract enforcement for merchants outside collusive networks. Fourth and finally, courts willing to enforce private, non-collective bargains promote the culture needed for open markets, a culture based on individual claims to rights, competition, and strategic calculation of enrichment beyond the breakdown of the business relationship. By hearing commercial quarrels in the dyadic form of a lawsuit, courts remold definitions of rational economic behavior to value the autonomy of individuals and the assertion of



individual rights, both fundamental assumptions of open markets in the western experience.