

A view of the foreign factories at Canton with a junk in the foreground, sketched in 1832 by George Chinnery. From *Chinnery, The Man and the Legend*, by Robin Hutcheon.

Merchants, Lawyers, and the China Trade of Boston

By Frederic Grant, Jr.

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BIOGRAPHICAL NOTE

Frederic Grant, Jr. is the law librarian at Foley, Hoag & Eliot and is a past president of the Association of Boston Law Librarians.

This article is part of a regular series which has been produced through the joint auspices of the Social Law Library and the Boston Bar Association. The editor of this historical project is Robert J. Brink.

In the first half of the last century the United States conducted a large trade with the Empire of China. This trade with the hong merchants and outside shopmen of Canton made and lost fortunes, and its effects linger today in tastes for tea and china-ware, and in a dream of great trade across the Pacific Ocean.¹ Remembered less well is the history of Boston's China merchants, and of their lawyers. This paper is concerned with the interrelations of these two groups in the first half of the nineteenth century.

A second purpose of this paper is to note the value of the early volumes of the Massachusetts Reports for students of business and social history. While historians have long been aware of the existence of both unreported and reported legal records, they

have not often made use of them, and have too often chosen to believe that records were either inaccessible or destroyed.² In recent years the availability of legal records has become more widely known, along with a recognition that these records yield a particularly high quality of information. The law reports have much to tell us about the world we left behind.

In this case, the Massachusetts Reports, combined with other historical sources, clarify a picture of the close relations of merchants and lawyers. Seen most clearly in these decisions are times of economic stress, when lawyers were a necessity for the defense of business. For China trade merchants finding themselves in disputes, common first steps included discussion, and mediation by an individual (often a lawyer) trusted by both parties.³ Such efforts failing, social and family ties made easier the use of lawyers in bringing sensitive matters to the courts. The legal actions of China trade merchants are characterized by individual, tangible goals (as opposed to abstract class ends). There were no shortage of such disputes in Massachusetts in the first half of the nineteenth century.

The condition of the state's economy through the early years and first flowering of the China trade was quite good, though shaken at irregular intervals by depression. Prosperity was linked to foreign trade, and the "sensitive barometer" of Boston shipping moved in response to European wars through 1815, and in response to the demands of world trade thereafter.⁴

After 1815 the American trade with China resumed on a large scale. "The volume of trade, exports and imports together, mounted from \$7,000,000 to about \$19,000,000 in four years. In the season 1817-8 the gross amount of the American imports and exports at Canton actually exceeded those of the British East India Company, while the American tonnage employed was 18,000 as compared with 21,000 for the British."⁵ This enthusiastic expansion was undercut by the troubles of 1819, and trade returned to earlier ratios. More typical are the combined export/import totals for 1830 of \$43,000,000 British and \$3,500,000 American.

In the course of this half century, the China trade was affected by the world and national economies. China trade merchants were tested by years of embargo (1807-1809), the depression of 1819, panic in 1825, the great depression of 1837, and a recession in 1857. A large number of merchants did not survive. Of those who did, many would withdraw from a changing and increasingly difficult trade in favor of retirement or the challenging new world of domestic manufactures and rail.

As the China trade prospered, it underwent a consolidation in the early part of the century in the hands of a circle of "wealthy firms and commission houses."⁶ A "gifted, prolific, and powerful kinship group in eastern Massachusetts," sometimes called "the Boston Concern," play a key role in this close-knit international trade.

Central to this alliance were the Perkins, Sturgis, Forbes, and Cabot families, but several other names appeared from time to time, notably Bryant, Paine, Cushing, and Higginson. Members were interlinked by ties of blood, marriage, business, friendship, and politics, and for many years they constituted the most formidable American combination in the China trade. Just as the 'Concern' kept a member in China, it also had one in London. Joshua Bates, who was married to a Sturgis and was a partner in Baring Brothers & Co. of London and Liverpool. Cushing's intimate relationship with the great Chinese hong merchant, Howqua, completed the circle.⁷



Portrait of the China trader John Murray Forbes, painted at Canton before 1837. Attributed to the studio of Lamqua. Collection of Mrs. Ward I. Gregg, on loan to the Museum of the American China Trade.

These merchants had many ties with the law. John Murray Forbes, "the Consul" (as opposed to JMF II, the partner in Russell & Co.), was a member of the Forbes clan who studied law with his classmate John Quincy Adams after graduation from Harvard in 1787. Forbes began a Boston law practice in 1794, but abandoned it some years later, sailing for Europe where he established himself as a merchant. Forbes ended his career as U.S. charge d'affaires to the government of Buenos Aires.⁸ John Newmarch Cushing was active in the trade with the Far East and Europe.⁹ His son, the renowned Massachusetts lawyer Caleb Cushing, negotiated the first U.S. treaty with China, served in the Congress, and was Attorney General of the U.S. from 1853 to 1857. Cushing had the unfortunate twin distinctions of having a very poor record on the abolition question, and of having been an early developer of the concept of extraterritoriality in China.

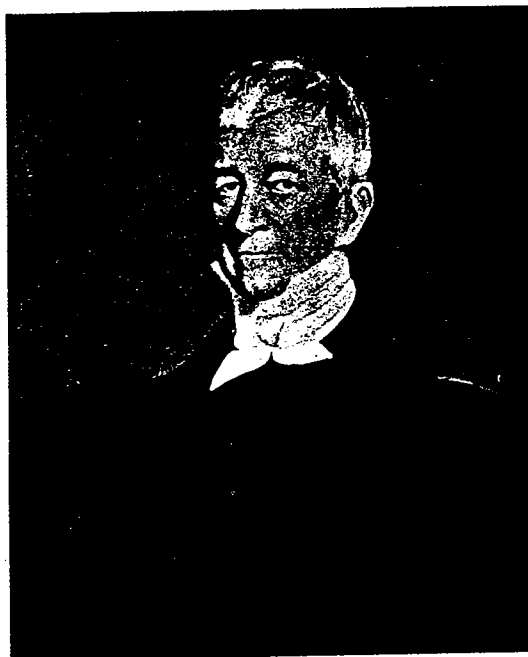
In Philadelphia, the China trader Samuel B. Rawle was the son of an outstanding jurist, and two of his brothers were lawyers. Benjamin Chew Wilcocks, one of the greatest of the China traders and for many years United States Consul at Canton, was the grandson of Pennsylvania Chief Justice Benjamin Chew. His father was Justice for Philadelphia County, and two of his sisters married Ingersolls.¹⁰ George Robert Russell, founder of the important China trading house of Russell & Sturgis, followed his father in studying, but then not practicing, law. He traveled in 1822 from his home in Providence to the city of Philadelphia, where he studied law in the office of John Sergeant. "Admitted to the bar, it took him but three weeks to make up his mind that the law was not for him." Russell married a daughter of Robert Gould Shaw on return to Boston in 1835. James Barr Ames, the first full-time professor at Harvard Law School without experience at the bar, was a son-in-law.¹¹

The early nineteenth century was a period of steady, if not precisely egalitarian, expansion of the lawyer population in the Commonwealth.¹² As trade grew, the legal profession was emerging from the condemnation and defensiveness of the Revolutionary era. Lawyers experienced a general revival which seems to correspond with recovery from the depression of 1819.

The law was recognized as a road to advancement for young men. Young James Kent, writing after the Revolution, described the law as "a field which is uninteresting and boundless," one "encumbered with voluminous rubbish and the baggage of folios," yet advantageous because it "leads forward to the first stations in the State."¹³ Caleb Cushing wrote a long manuscript entitled "Legal Education" while studying to be admitted to the bar, in 1820. In it he de-

scribes the "situation, character & prospects of the legal profession in these United States," asserting that "no [other] profession is of a nature to confer qualities which lead so directly to fame, power & political ascendancy."¹⁴

Not a small number of successful lawyers had China trade connections. Charles Jackson, from 1813 until resignation in 1823 a Justice of the Supreme Judicial Court, was the son of Jonathan Jackson, one of Boston's great merchants.¹⁵ He represented John Dorr, an important merchant of his own generation, in disputes with insurance companies arising out of seizure of his ship *Jenny* by the British near Canton in 1808. An opinion letter of Jackson's in the papers of Samuel Russell, the founder of the important China trade house of Russell & Company, shows other China trade ties



Charles Jackson, the son of a prominent merchant, served as a Justice of the Supreme Judicial Court for ten years. From *The Supreme Judicial Court of Massachusetts, 1692-1942*.

and suggests that his contacts with the more powerful merchants proved useful to him upon resumption of private practice in 1823.¹⁶ Charles Greely Loring was the son of Caleb Loring, an eminent Boston merchant, and he was from 1816 to 1819 in partnership with Franklin Dexter, who married a daughter of William Appleton.¹⁷ Loring was a close friend of William H. Gardiner, who married one of the daughters of Thomas Handasyd Perkins.¹⁸ Samuel Hubbard (Associate Justice, S.J.C., 1842-

1847) was associated with Charles Jackson for three years, after which his "legal business gradually drew him into mercantile affairs," notably the Suffolk Bank.¹⁹ Two of T. H. Perkins' daughters married lawyers. Thomas Cary, who practiced law for a time in Vermont, married Mary, and came to Boston after nine years as a partner in the Perkins firm in New York. Cary "never particularly enjoyed either the law or business," and devoted his Boston years to writing and managing Perkins' interests.²⁰ William H. Gardiner was admitted to the bar in 1819, and was one of the more prominent Boston attorneys of the first half of the nineteenth century. He married Caroline Perkins, and acted as the Perkins "clan's counselor," serving "at various times as an appraiser, executor, and legal advisor."²¹ Thomas Handasyd Perkins himself was an "early and close" friend of the lawyer and statesman Harrison Gray Otis, whom he had saved from drowning.²²

The importance of the state of trade with China to lawyers is reflected in two speeches by lawyers which are the classic statements of opposing American opinion of the Opium War of 1839-1842.

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The speeches - those of John Quincy Adams in 1841 to the Massachusetts Historical Society and John Worth Edmonds (who at the same time had a large practice in New York mercantile circles) in the same year at the Newburgh Lyceum - were widely reported and reacted to. Edmonds found the British effort indefensible, while Adams defended the British in a lecture which "aroused a storm of protest and was so unpopular that the North American Review refused to publish it."²³

Examination of the interrelations of China traders and the bar began with a survey of the Massachusetts Reports, which are the only reported decisions of the state courts before which these men practiced in the first half of the nineteenth century. The reports are made up of the decisions of the Supreme Judicial Court, which had very extensive original and appellate jurisdiction during this period.²⁴ A survey of the first hundred volumes of the Massachusetts Reports, which cover the period 1804 to 1868, produced a list of 172 cases involving foreign trade.²⁵ Of these, the thirty which bear on the China trade produce in turn a list of trader-litigants, and of the attorneys who represented them. The thirty cases include thirteen directly involving trade with China, fourteen having to do with the activities of merchants engaged in the China trade, and another three which involve opium trade.²⁶

Such lists are quite valuable to those interested in the lives and activities of the traders and their lawyers. By setting out all the reported cases touching on the China trade and the traders, they provide an opportunity to study the many varied sorts of information included in the Massachusetts Reports. Reviewing the cases in chronological order, one is able both to feel the shocks of the economic cycle, and to touch on many of the business concerns of the traders.

The China trade cases run from early in the nineteenth century, when there were a number of disputes involving China trade merchants and the early incorporated insurance companies. The great bulk of the thirty cases, however, come from the period 1830-1868, and reflect the events of those years. When some circumstances of the cases are reconstructed, outlines of the activities of China traders can be seen. These include a view of the financial limitations of some and of the insolvencies of others, of the importance and power of the London banking houses, and of the responses of the local partners of American China coast houses to hard times.

The earliest reported Massachusetts decisions touching on the China trade involve the mercantile activities of the Dorr family of Boston. Ebenezer Dorr claimed to have been the first Bostonian to

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send a vessel to Canton. The suits involve his sons John, of the trading firm of Joseph & John Dorr, and the younger brother Sullivan, who became prominent in Providence, where he settled upon return from four years' residence at Canton.²⁷ John Dorr's suits of 1812 and 1814, against the Union Insurance Co. and the New England Insurance Co., respectively, were based on his claims for insurance on the ship *Jenny*, which was seized in 1808 by the British frigate *Dover* within a mile of the Chinese coast. After brief detention near Canton, the ship was brought to Calcutta, where she was libelled and then condemned by the British Court of Vice Admiralty, for violation by trading at Guam, of the British Orders in Council of November 11th, 1807.²⁸ Dorr, represented by Mr. Prescott and Charles Jackson, was successful before the court in both of his claims on the insurers. Samuel Dexter, who is said to have had one of the largest practices of all Mass. lawyers in the early nineteenth century, argued unsuccessfully for the companies on both occasions.²⁹

The Massachusetts Reports are silent on how hard the late 1820's were on the China trade in general, and on the tea trade in particular. The years 1825-1826 saw the failures first of Edward Thomson of Philadelphia, the largest tea merchant in that city and "one of the most important in the nation," and then of Thomas H. Smith, "a spectacular plunger who during the early 'twenties carried on most of New York's Canton trade."³⁰ Both affairs involved customs fraud and warehouses full of tea, and had the effect of glutting the tea market, which took years to recover. This period of depression in the tea import trade disgusted a number of Boston merchants. They abandoned the tea trade and sought better returns elsewhere. The Thomson bankruptcy reached the U.S. Supreme Court in 1828 in the case *Conard v. Atlantic Insurance Co.*³¹

A decision from 1830 provides an excellent example of the process of a merchant lawsuit. This is in the case *Dodge v. Perkins*, which pitted John Dodge, a lesser merchant, against Thomas Handasyd Perkins, a man actively involved in the China trade, and one of the great merchants of the age.³² While the case report does not skirt too far from points of law, Mr. Dodge's fulfillment of his promise to publish the details of the dispute with the proceeds of victory, has left us with a very interesting statement of his side.

The dispute settled in 1830 had its roots in 1803 when a young Boston merchant, Unite Dodge, who had established a firm at Cape Francis, was obliged on threat of being shot to loan \$2,000 to the French army there. His receipt for the "loan" was sent to his friend James Perkins, of the Boston trading firm of J.

& T. H. Perkins, with the request to sell it, if possible, without serious loss. The receipt went, along with others sent by Dodge, from Boston to Hottingeur & Co. of Paris, the Perkins' French bankers, who in 1815, after the death of Unite Dodge, were able to exchange the notes for interest-paying French government bonds. In the years that followed the funds worked their way back to the Perkinses in Boston, and John Dodge, as executor of his brother's estate, came to inquire of Colonel T. H. Perkins (James having passed away in 1822) after the old French debt. The question worked well with Perkins' memory, explaining a sum of money he had had difficulty accounting for some years before, and he agreed that the surplus must belong to the Dodge estate. John Dodge included in the claim that Perkins requested he draw up, interest running from the date of receipt of funds from the French bankers. This claim for interest "stuck in Perkins's craw" (he saw himself as having done a favor by not charging standard fees), and there were harsh words.

Dodge retained Perkins' friend Leverett Saltonstall, and when Saltonstall was unable to convince the Colonel to moderate his view, Dodge made an

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Thomas Handasyd Perkins, by Thomas Sully, 1832.
Courtesy of the Boston Athenaeum.

offer to arbitrate. Perkins replied, "The letter you have been pleased to write me is of a very offensive character, and you will please to consider this the last communication I shall make to you. You seem to desire a recourse to law, and you shall be gratified."

Dodge now engaged Daniel Webster who, after a further round of attempts to settle the matter quietly, filed a bill of equity in the Circuit Court (Joseph Story of the Supreme Court on Circuit), and Perkins' lawyers objected to the jurisdiction. After Story sustained this objection, the suit was brought before the Supreme Judicial Court. Saltonstall and Samuel Hubbard "took over as lawyers for Dodge, while Lemuel Shaw and son-in-law William H. Gardiner defended Perkins. Saltonstall declared that 'were he in the place of Col. Perkins he would rather have paid double than have suffered it to come before' the courts." In February Term 1828 a jury found for Dodge, granting him damages of over \$2,000. On appeal in March Term 1830, the court produced an opinion which runs to twenty-seven pages, and reduced the damages granted by some \$300. John Dodge then carried out his earlier pledge to Perkins, using some of these proceeds to publish in 1830 "a long tract detailing his side of the case and reprinting all pertinent documents," proclaiming in the conclusion, that "The end of this affair shows

that neither wealth nor influence can stay the march of justice in our free land."³³

The scope of the Massachusetts Reports runs from harsh civil litigation to crimes set in distant places. Whampoa Reach, the final anchorage for Canton, famous for paintings showing the western trading fleet quietly at anchor there, was the location of a crime which figures in a decision of the Supreme Judicial Court in 1837. A Mr. Stone, represented by Charles G. and F. C. Loring (the insurers represented by Franklin Dexter and William H. Gardiner), pressed a claim under an insurance policy which covered the peril of "barratry . . . of the mariners." The claim originated in the theft, from the first mate's locked trunk by the cook and steward of the vessel, of some \$384 in specie, which the mate had brought out to China in order to purchase goods on his own account (a common practice). The men "were subsequently arrested, but no part of the money was recovered." The policy of insurance taken out on this adventure had to be paid, as the court found that barratry had been committed within the meaning of the policy.³⁴

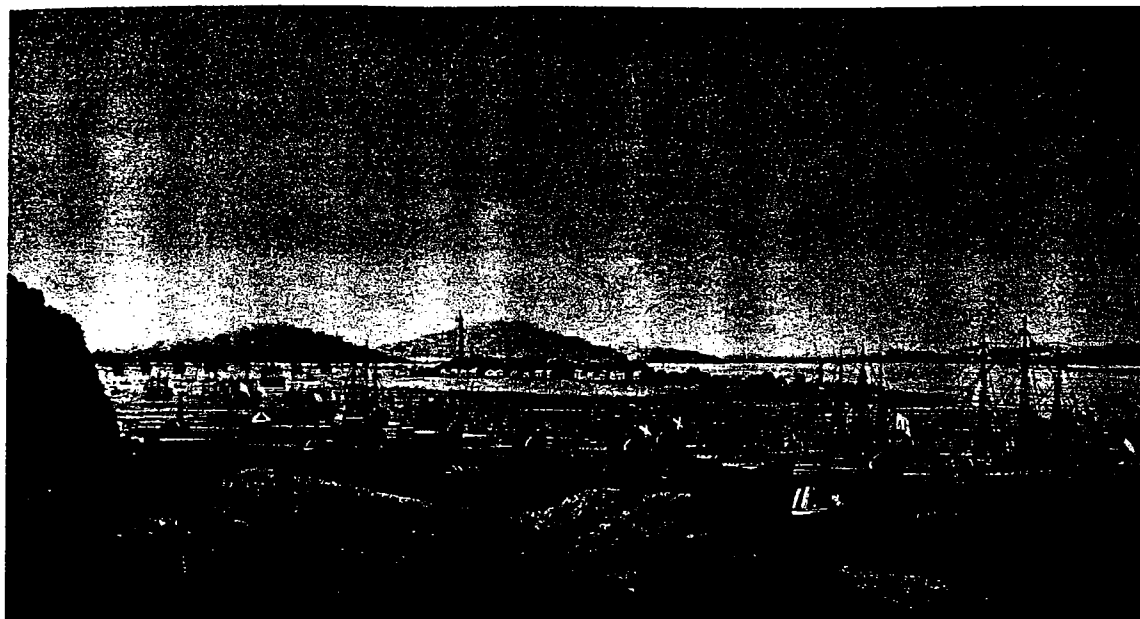
The severe troubles of 1837 were predicted in recession through late 1833 and the year 1834. While times were easy by contrast with depression to come, February of 1834 saw the failure of the Boston house of P. & C. Flint & Co., which had been engaged in the China and other foreign trade, and the rest of the year saw more difficulties for other merchants. "At least six New England firms compromised with their [London] creditors or took several years to pay."³⁵ The Massachusetts Reports reflect this stress in three cases which stem from the Flint bankruptcy. In the first, *Baring v. Clark*, the London banking house of Baring Brothers & Co. attempted to recover funds which the Flints had drawn at Havana, for the shipment of a cargo by Clark, who did not do so, but rather applied these funds to the account of the Flints when they failed.³⁶ Ferdinand Clark also figures in the two other Flint failure cases, *Clark v. Flint* (dispute centering on a brig half owned by both Clark and the Flints), and *Brigham v. Clark*.³⁷ The latter case was an action to recover from Clark the proceeds from his sale of a brig owned half each by Brigham (a Boston merchant who failed on February 6, 1834), and by the Flints, who failed two days later, and were among the creditors of Brigham.

The history of the disaster of 1837 found in the Massachusetts Reports clearly demonstrates both the great importance of the London banking houses, and of the local partners of the American China coast firms. The old and strong London banking firm of Baring Brothers & Co. had an early start in American activities, but were strongly challenged in

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Whampoa Reach, circa 1810, painted by an unknown Chinese artist. *Courtesy of the Museum of the American China Trade.*

the years up to 1837 by "active, if not too numerous, merchant bankers specializing in services to American business men and institutions."³⁸ Through curtailment of loans and the maintenance of high liquidity the Barings were able to ride out 1837 and the lean years which followed, and proved able to help their major clients in an hour of need. "Specie was scarce and high in price. As stoppages and failures in England and America increased, reliable bills grew fewer and fewer and protested bills were returned to the United States in vast quantities. Securities acceptable for remittance could be counted on the fingers of one hand. Merchandise sold slowly."³⁹

Not all London bankers were as well prepared for the depression as the Barings. After a running effort to sustain them proved insufficient, the "three W's" (the great banking houses of Wildes & Co., Wiggin & Co., and Wilson & Co.) stopped payment of their obligations on June 2, 1837, and they were shortly thereafter joined by a number of lesser banks.⁴⁰ The Wildes failure figures in the Massachusetts Reports in *Stevenson v. Austin* (claims of Russell & Sturgis of Manila and assignees for the benefit of creditors to a cargo of sugar purchased by James Bruce of Boston from Russell & Sturgis with a bill on Wildes & Co.), and *Wildes v. Fessenden* (efforts of Wildes to collect from bankrupt and solvent Boston merchants who had drawn funds for a voyage).⁴¹ In the 1845 case of *Greene v. Goddard*, Russell & Co. had acted to protect their interest after notes drawn on Wiggin & Co. became worthless.⁴²

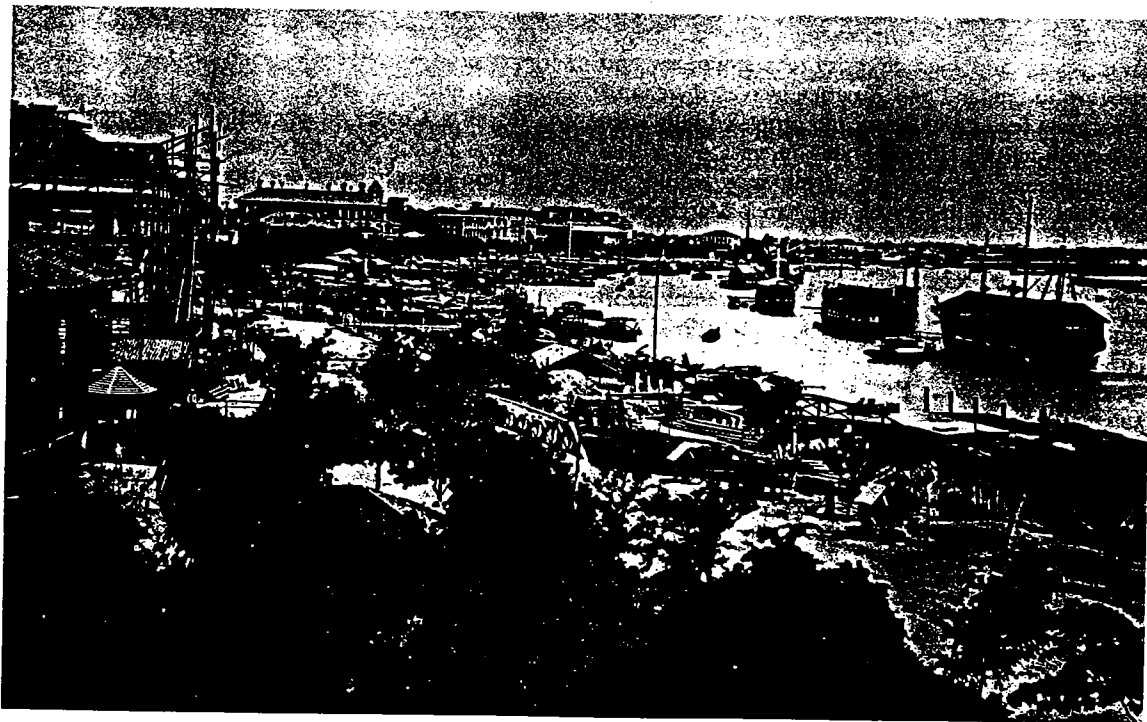
A key to the activities of the large American houses in the China trade was a partner residing in the United States, whose job was to maintain relations with clients, seek business, and protect the interests of the firm in times of stress. As the price of Canton teas in the United States dropped below purchase cost in 1837, John Murray Forbes (resident partner of Russell & Co.) consulted several lawyers, in an effort to learn more about the liability of Russell & Co. for advances that clients might fail to repay. In late May he wrote the house at Canton, "There seems to be no question whatever that we are bound for all bills drawn by us and wherever it is in my power to protect such bills I now think it will be for our interest to do so."⁴³ So it was that in the case of *Greene v. Goddard* in 1845 (John C. Greene being another of the partners in Russell & Co.) Forbes reacted to the news of the failure of Wiggin by promptly requesting of Goddard what he intended to do to cover "bills drawn by Russell & Co. of Canton, on Messrs. Timo, Wiggin & Co., London, for your account." The bills were paid at maturity at London, "supra protest, by Baring, Brothers & Co., for the honor of the drawers, under the arrangement made by . . . Forbes." Forbes kept up pressure on Goddard, who was trying to avoid having to sell too quickly at too great loss, until the final of a number of payments covering the bills, with interest and notarial charges of protest, was paid on July 13, 1838. Russell & Co., represented by Benjamin R. Curtis, then brought suit against Goddard, who was defended by Sidney Bartlett, first for certain addi-

tional expenses directly related to the late payment, which were granted, and secondly for "loss arising from not drawing against the goods in the hands of Baring, Brothers" who had received them from Russell & Co., Canton, and had to apply the value of the goods to Goddard's unpaid bills. This second claim was denied by Justice Samuel Hubbard in an opinion which states that "[s]peculative damages (sometimes so called) are not favored in law; and the actual damage, arising out of breach of contract for the non-payment of money, is usually measured by the interest of money." (which Goddard had already paid) Hubbard noted that this "deprivation of an opportunity for making money," might as easily have been an opportunity for loss.⁴⁴ (This especially in the hard course of 1837 and succeeding years.) In the 1844 case of *Gould v. Rich*, John Murray Forbes again made efforts on behalf of the house at Canton, this time in an attempt to recover the amount of an overdraft made without authority by a supercargo (ship's commercial officer) during the period Forbes was resident at Canton.⁴⁵

It was common for partners in trading firms to spend years working for the firm at Canton (until 1842 the only Chinese port open to foreign trade), as well as for a few years after return to the United States. The Massachusetts Reports record the varied activities of these returned traders. J. M. Forbes re-

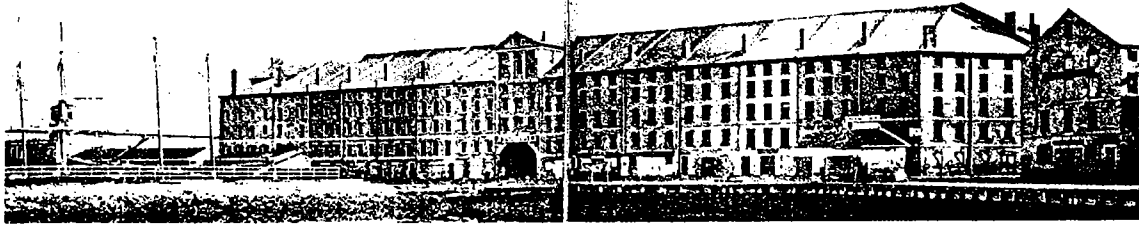
appears in an 1849 suit against William Appleton which arose from Forbes' discontent with Spanish dollar conversion costs on a bill that was taken out at Cape Town to cover costs of repairs on his bark *Ackbar*, and in an 1854 decision which held an insurer liable for a partial loss on teas "jettisoned for the common benefit" during a return voyage from Canton.⁴⁶ Augustine Heard, an important China trader from Massachusetts and founder of the great house of Augustine Heard & Co., also had a long record of involvement with the law, dating from 1815 when he was sued at the end of a long and unhappy voyage (decision against Heard reversed on appeal).⁴⁷ When the Merchants Bank brought suit against Heard in 1850 he was successfully defended by Rufus Choate and Ellis Loring. Three years later, when Heard brought suit as a Director of the Roxbury Land Company, challenging a sale of land authorized by other Directors, he was not successful (Rufus Choate now arguing against Heard).⁴⁸ In 1864 Augustine Heard collected a \$1,246.14 judgment from Caleb Cushing.⁴⁹

With the treaties of Nanking (British, 1842) and Wanghsia (American, 1844) the China trade begins changes in quantity, nature, and ownership. Opium imports, which had paid the price of exports for many years, fell as the Chinese cultivated and increased domestic production of the drug. The



A photograph of the busy waterfront at Shanghai. 1870's photographer unknown. Courtesy of the Museum of the American China Trade.

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Photograph of India Wraft, circa 1855. From *Harrison Gray Otis, The Urbane Federalist*, by Samuel Eliot Morison.

Cohong (guild of hong merchants), which had made valiant efforts to monopolize, and which in a number of ways facilitated trade at Canton, was broken by treaty, and Chinese merchants wielded considerable power in the very new world of the numerous open treaty ports.⁵⁰ The age of the clipper had dawned, and teas were moving to Great Britain and the United States with greater speed than ever before. John Murray Forbes wrote in the late 1840's, that "The truth is that competition is so sharp here [in Boston] that money must be made either by the most penurious saving in fitting ships or storing goods, etc., etc., or by being constantly on the lookout and giving up body and soul to managing business."⁵¹

With the China trade gradually changing and growing less profitable, the China traders looked within the rapidly developing United States for investment opportunities. The Massachusetts Reports reflect this change in the trade—the decreasing value of the goods carried in it—in the last few cases in the survey. These involve insurance on a cargo of coal which caught fire off Woosung (near Shanghai), *Wales v. China Mutual Ins. Co.*, and three actions which stemmed from an ill-fated ice shipment in 1866.⁵² (The ice industry was important in New England at this time.) The first of these three decisions, *Commercial Mutual Insurance Co. v. McLoon* (won by ins. co.), was in a suit brought against McLoon, who "obtained a policy of insurance by fraud, which gives him an apparent cause of action, from which [the insurer] is in danger," on a voyage to carry ice from Boston to Hong Kong, during which, off South America on the 10th of April 1866, both vessel and cargo were lost to fire.⁵³ The two parties returned to the Supreme Judicial Court in November Term 1868, with the continuing dispute now focused on wording in the policy, "Warranted by the assured that the vessel be commanded by a captain holding a certificate from the American Shipmasters' Association." The Commercial Mutual Ins. Co. demonstrated that at the

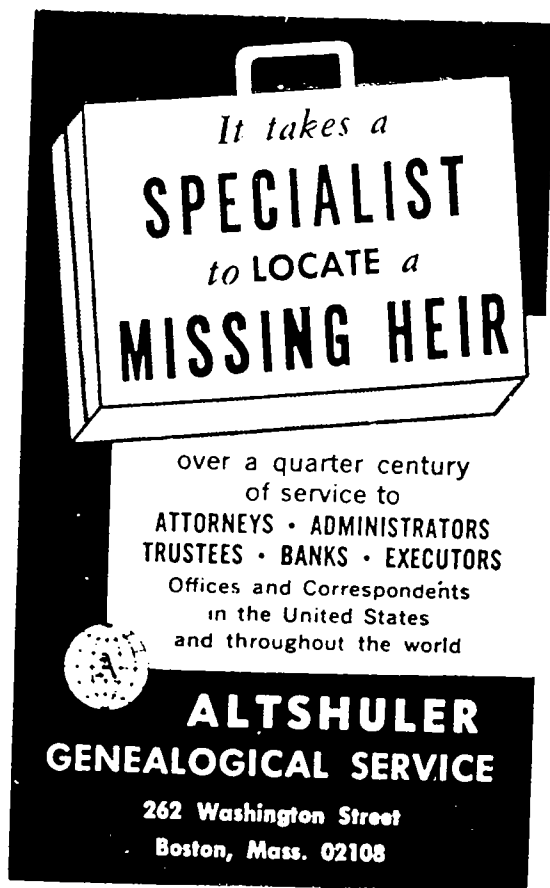
time of the voyage in 1866, the captain held a certificate issued in 1861, which plainly required annual renewal, but which had not been renewed. To the certain despair of the insurer, Justice Horace Gray held that "the only question . . . is whether he actually held one" (a certificate), that "a warranty must be strictly complied with according to its terms, whether such strictness operates in favor of the insurers or of the assured."⁵⁴

In its early nineteenth century bloom, the China trade operated to the benefit of groups other than merchants both in the United States and China. In Massachusetts, one prominent group which benefited, along with workers and suppliers of articles carried in the trade, was the growing lawyer class, which had close ties to the merchant community. Examination of the Massachusetts Reports and other historical sources show how these two groups were related, and how they worked together during years when both groups prospered and grew.

While a sample as small as the thirty China trade cases involves certain limitations, it is nonetheless useful for studying the nature of merchant disputes, and the process by which merchants came to use lawyers. Trade disputes which reached the Massachusetts courts often involved insurance companies or trading firm bankruptcies, although their scope reaches beyond such activities to encompass much of the mercantile activity of the time. There would commonly have been an attempt at compromise or mediation, and the attorneys used in this last resort were often connected with the merchants involved. The sample of China trade decisions is too small and covers too long a period of time to admit a general conclusion on continual merchant use of the same lawyers, except in the case of Thomas Handasyd Perkins, where there is abundant evidence of his longstanding employment of his son-in-law, William H. Gardiner. It is clear that family ties and the bond of friendship made it much easier for merchants to approach lawyers, and that the actions they brought involved individual, tangible goals. In particular,

the case *Dodge v. Perkins* stands as an excellent example of the development and resolution of a dispute, while *Greene v. Goddard* provides a view of the use of lawyers and of the individual efforts of a merchant trying to collect from a debtor.

The reported decisions of the Supreme Judicial Court of Massachusetts reflect the immediate historical conditions of the Commonwealth in the early nineteenth century. In the case of the China trade, the decisions produce general information on the activities of China traders and trading firms, on the nature of the trade, of reaction to economic troubles, subsequent careers, etc., and also information of more narrow legal and historical significance. Yet our memory of the China trade and of our legal history is poor. While it has been exceptional to probe the interrelations of lawyers and sections of the merchant community, there is a great deal of information to reward such effort. The use of historical sources along with the records of legal disputes, which provide a high quality of information about disputes in our past, is of especial value to the study of change, which is the first business of history.



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Endnotes

- ¹ This dream is not new. Tyler Dennett comments, in reviewing statistics of the American China trade through 1840, that "commercial relations with China were valued not so much because of their present returns as for their future possibilities." Tyler Dennett, *Americans in Eastern Asia* (1922; rpt. New York: Barnes & Noble, 1941), 75.
- ² An example of this is to be found in Mr. Dennett's classic, at page 85. He discusses an instance in which "A Philadelphia merchant sued Houqua, the famous hong merchant, in a Pennsylvania court for failure to keep his engagements in 1818 as to the quality of tea and obtained a judgment for \$25,000." Dennett observes, "How the defendant was represented in this suit or by what means the judgment was collected is not known," and cites the entire reference to a short article in *Niles' Register* on April 23, 1825 (pages 118-119). When the writer became interested in the case, and inquired about it, the only scholar (he could locate) who had heard of the case expressed certainty that the court house and records had *burned* years ago. Further inquiry turned up some twenty-eight pages of documents in *Thomson v. Houqua*, case no. 34, December Term 1820, Records of the Supreme Court (Eastern District), Division of Archives and Manuscripts, Pennsylvania Historical and Museum Commission. (the case, which is the correct one, involves poor quality silks, not tea.)
- ³ John Dodge, *Report of the Case of John Dodge, Executor of the Last Will and Testament of Unite Dodge, Deceased. vs. Thomas H. Perkins* (Boston: F. Ingraham, 1830), 11-12. "Whenever there is a difference of opinion among honorable merchants, the usual course every where is to submit the question in dispute to gentlemen, in whom both parties place confidence."
- ⁴ John D. Forbes, "European Wars and Boston Trade, 1783-1815," 11 *New England Quarterly* 709, 717 (1938).
- ⁵ Dennett, 74-75.
- ⁶ *Ibid.*, 70.
- ⁷ Jacques M. Downs, "American Merchants and the China Opium Trade, 1800-1840," 42 *Business History Review* 418, 429-30 (1968).
- ⁸ Duncan Yaggy, "John Forbes: Entrepreneur." (Unpublished Ph.D. dissertation, Brandeis University, 1974), 564. For more on the circumstances of Forbes' death at Buenos Aires, see: *Sturgis v. Slacum*, 35 Mass. (18 Pick.) 36 (1836). *Fleet's Pocket Almanac and Register* (title varies) lists Forbes as practising before the Court of Common Pleas in 1793, and before the Supreme Judicial Court from 1795 to 1799.
- ⁹ Claude M. Fuess, 1 *The Life of Caleb Cushing* (New York: Harcourt, Brace and Co., 1923), 20-23.
- ¹⁰ Jacques M. Downs, Unpublished biographies of Samuel B. Rawle and Benjamin Chew Wilcocks.
- ¹¹ Jacques M. Downs, Unpublished biography of George Robert Russell. Theodore Lyman, "Memoir of George Robert Russell," 18 *Proceedings of the Mass. Historical Society* 280 (1880). James Willard Hurst, *The Growth of*

American Law: The Law Makers (Boston: Little, Brown, 1950), 264.

- ¹² Gerard W. Gawalt, "Sources of Anti-Lawyer Sentiment in Massachusetts, 1740-1840," 14 *Am. J. Leg. Hist.* 283, 299-303 (1970).
- ¹³ Lawrence M. Freidman, *A History of American Law* (New York: Touchstone Books, 1973), 266.
- ¹⁴ Caleb Cushing Papers, Library of Congress. "Legal Education" is in Container 211, the "Speech, Article, and Book File 1816-1877."
- ¹⁵ William T. Davis, *History of the Judiciary of Massachusetts* (Boston: The Boston Book Co., 1900), 187. "Jackson, Charles," *DAB* (1932). Kenneth W. Porter, *The Jacksons and the Lees* (1937; rpt. New York: Russell & Russell, 1969), 380-87.
- ¹⁶ Russell & Co. Papers (Samuel Russell Papers), Library of Congress. Container 10, folder (mis)labeled "Court Opinion."
- ¹⁷ Conrad Reno, *1 Memoirs of the Judiciary and the Bar of New England* (Boston: Century Memorial Pub. Co., 1900), 213. Arthur M. Johnson and Barry E. Supple, *Boston Capitalists and Western Railroads* (Cambridge: Harvard University Press, 1967), 24.
- ¹⁸ Theophilus Parsons, *Memoir of Charles Greely Loring* (Cambridge: John Wilson, 1870), 25. Yaggy, 608.
- ¹⁹ Reno, *2 Memoirs of the Judiciary* (Boston, 1901), 503.
- ²⁰ Yaggy, 584-86.
- ²¹ Yaggy, 608. Carl Seaburg and Stanley Paterson, *Merchant Prince of Boston, Colonel T. H. Perkins, 1764-1854* (Cambridge: Harvard University Press, 1971), mention several examples.
- ²² Thomas G. Cary, "Thomas Handasyd Perkins," 10 *New Eng. Historical and Genealogical Register* 201, 203 (1856).
- ²³ Kenneth Scott Latourette, "The History of Early Relations Between the United States and China, 1784-1844," 22 *Transactions of the Connecticut Academy of Arts and Sciences* 1, 125 (1917). "Edmonds, John Worth," *DAB* (1931). Edward Delano, a clerk in the house of Russell & Co. (partner 1844-1846), provides verification of the wide distribution of the lectures in a diary entry of June, 1842, while he was at Macao. "Read newspapers in which were the printed lectures of J. Q. Adams and Prof. Edmonds on the China question - the former upholding the course of the British Government, and the latter deprecating - I agree with the latter though

the paper does not compare with Adams'." Delano Family Papers, Franklin Roosevelt Presidential Library, Hyde Park, New York. Edward Delano Diary, June 13, 1842.

- ²⁴ 1 *The General Laws of Massachusetts from the Adoption of the Constitution to February, 1822* (Boston: Wells & Lilly and Cummings & Hilliard, 1823), 65-67. Also, Michael S. Hindus, *The Records of the Massachusetts Superior Court and its Predecessors* (Boston: A Report of the Judicial Records Committee, 1977), 15.
- ²⁵ It is quite clear that this list does not include every case from the period which involves foreign trade. The method employed - reading headnotes in the indexes at the back of each of the hundred volumes - is fallible, although it was carefully carried out.
- ²⁶ Directly involving trade with China: *Dorr v. Union Ins. Co.*, 8 Mass. (8 Tyng) 494 (1812), *Dorr v. N.E. Ins. Co.*, 11 Mass. (11 Tyng) 1 (1814), *Lovering v. Mercantile Mar. Ins. Co.*, 29 Mass. (12 Pick.) 348 (1832), *Stone v. Nat'l Ins. Co.*, 36 Mass. (19 Pick.) 34 (1837), *Gould v. Rich*, 48 Mass. (7 Met.) 538 (1844), *Greene v. Goddard*, 50 Mass. (9 Met.) 212 (1845), *Forbes v. Appleton*, 59 Mass. (5 Cush.) 115 (1849), *Forbes v. Manufacturers' Ins. Co.*, 67 Mass. (1 Gray) 371 (1854), *Cabot v. Amory*, 76 Mass. (10 Gray) 428 (1858), *Wales v. China Mut. Ins. Co.*, 90 Mass. (8 Allen) 380 (1864), *Commercial Mut. Ins. Co. v. McLoon*, 96 Mass. (14 Allen) 351 (1867), *McLoon v. Com. Mut. Ins. Co.*, 100 Mass. 472 (1868), *Phoenix Ins. Co. v. McLoon*, 100 Mass. 475 (1868). Having to do with the activity of merchants engaged in the China trade: *Dorr v. Union Ins. Co.*, 8 Mass. (8 Tyng) 501 (1812), *Perkins v. Lyman*, 9 Mass. (9 Tyng) 522 (1813), *Perkins v. Lyman*, 11 Mass. (11 Tyng) 76 (1814), *Dodge v. Perkins*, 26 Mass. (9 Pick.) 369 (1830), *Sturgis v. Slacum*, 35 Mass. (18 Pick.) 36 (1836), *Baring v. Clark*, 36 Mass. (19 Pick.) 220 (1837), *Brigham v. Clark*, 37 Mass. (20 Pick.) 43 (1838), *Clark v. Flint*, 39 Mass. (22 Pick.) 231 (1839), *Stevenson v. Austin*, 44 Mass. (3 Met.) 474 (1842), *Wildes v. Fessenden*, 45 Mass. (4 Met.) 12 (1842), *Baring v. Crafts*, 50 Mass. (9 Met.) 380 (1845), *Merchants Bank v. Heard*, 59 Mass. (5 Cush.) 461 (1850), *Heard v. March*, 66 Mass. (12 Cush.) 580 (1853), *Forbes v. Am. Mut. Life Ins. Co.*, 81 Mass. (15 Gray) 249 (1860). Having to do with opium trade: *Parsons v. Mass. Fire and Marine Ins. Co.*, 6 Mass. (6 Tyng) 197 (1810), *Pratt v. Park-*

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- man, 41 Mass. (24 Pick.) 42 (1834), *Reggio v. Braggiotti*, 61 Mass. (7 Cush.) 166 (1851).
- ²⁷ Howard Corning, "Sullivan Dorr, China Trader," 3 Rhode Island History 75, 77 (1944). Howard Corning, "Sullivan Dorr, An Early China Merchant," 78 Essex Institute Historical Collections 158 (April 1942).
- ²⁸ *Dorr v. Union Ins. Co.*, 8 Mass. (8 Tyng) 494, 496-97 (1812). The two other Dorr cases are: *Dorr v. N. E. Ins. Co.*, 11 Mass. (11 Tyng) 1 (1814), and *Dorr v. Union Ins. Co.*, 8 Mass. (8 Tyng) 501 (1812).
- ²⁹ Charles Warren, *A History of the American Bar* (Boston: Little, Brown, 1913), 309.
- ³⁰ Jacques M. Downs, Unpublished biography of Edward Thomson. Robert Greenhalgh Albion, *The Rise of New York Port* (New York: Charles Scribner's Sons, 1939), 198.
- ³¹ 26 U.S. (1 Pet.) 386 (1828).
- ³² *Dodge v. Perkins*, 26 Mass. (9 Pick.) 368 (1830).
- ³³ Seaburg and Paterson, 345-50. John Dodge's report (see Endnote 3) may be found in Law Pamphlets, Volume 12, Social Law Library.
- ³⁴ *Stone v. Nat'l Ins. Co.*, 36 Mass. (19 Pick.) 34, 37 (1837). "These definitions would seem to prove, that the loss of Stott's adventure has been occasioned by the barratry of the mariners. But the defendants contend that Stott was himself a mariner, viz. the mate of the vessel, and that no act of barratry could be committed against him, he not being owner of the ship, nor a freighter, within the meaning of the law. But we think that the plaintiff was acting in two capacities, one as mate of the vessel, and another, as the freighter of goods on board... Again, it is contended for the defendants, that the owners of the vessel would not be answerable for the loss, and therefore the underwriters are not answerable, inasmuch as there can be no barratry unless the criminal act be prejudicial to the owner of the ship. But that would be a very short and imperfect definition of barratry. It may be committed against the owners of the cargo, as well as against the owners of the ship."
- ³⁵ Ralph W. Hidy, *The House of Baring in American Trade and Finance* (Cambridge: Harvard University Press, 1949), 180.
- ³⁶ 36 Mass. (19 Pick.) 220 (1837).
- ³⁷ *Clark v. Flint*, 39 Mass. (22 Pick.) 231 (1839), *Brigham v. Clark*, 37 Mass. (20 Pick.) 43 (1838).
- ³⁸ Hidy, 78.
- ³⁹ *Ibid.* 231.
- ⁴⁰ *Ibid.*, 222. *Wildes v. Fessenden*, 45 Mass. (4 Met.) 12, 15 (1842), states that Wildes & Co. suspended payments on the third of June.
- ⁴¹ *Stevenson v. Austin*, 44 Mass. (3 Met.) 474 (1842), *Wildes v. Fessenden*, 45 Mass. (4 Met.) 12 (1842).
- ⁴² 50 Mass. (9 Met.) 212 (1845).
- ⁴³ Yaggy, 95-96.
- ⁴⁴ *Greene v. Goddard*, 50 Mass. (9 Met.) 212, 214-15, 216, 218, 229, 231-32 (1845).
- ⁴⁵ 48 Mass. (7 Met.) 538 (1844).
- ⁴⁶ *Forbes v. Appleton*, 59 Mass. (5 Cush.) 115 (1849), *Forbes v. Manufacturers' Ins. Co.*, 67 Mass. (1 Gray) 371 (1854).
- ⁴⁷ Thomas F. Waters, *Augustine Heard and His Friends* (Salem: Ipswich Historical Society, 1916), 23.
- ⁴⁸ *Merchants Bank v. Heard*, 59 Mass. (5 Cush.) 461 (1850). *Heard v. March*, 66 Mass. (12 Cush.) 580 (1853).
- ⁴⁹ Caleb Cushing Papers, Library of Congress. Container 231.
- ⁵⁰ Thomas G. Rawski, "Chinese Dominance of Treaty Port Commerce and its Implications, 1860-1875," 7 Explorations in Economic History 451 (1970).
- ⁵¹ Johnson & Supple, 21.
- ⁵² *Wales v. China Mut. Ins. Co.*, 90 Mass. (8 Allen) 380 (1864) (and briefs at the Social Law Library). *Commercial Mut. Ins. Co. v. McLoon*, 96 Mass. (14 Allen) 351 (1867), *McLoon v. Com. Mut. Ins. Co.*, 100 Mass. 472 (1868), *Phoenix Ins. Co. v. McLoon*, 100 Mass. 475 (1868).
- ⁵³ 96 Mass. (14 Allen) 351 (1867).
- ⁵⁴ *McLoon v. Com. Mut. Ins. Co.*, 100 Mass. 472, 475 (1868).
- ⁵⁵ The writer is greatly indebted to Robert J. Brink, Jacques M. Downs, and Thomas M. S. Hemnes.

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