unusual in the legislation of other countries, and tend to prevent the miscarriage of justice.

And President McKinley, in his second annual message of December 5, 1898, renewed the recommendation of his predecessor.

No legislative action has resulted from either of these recommendations, nor, in the case of our treaty with Mexico, where it was specially stipulated that a clause permitting transit rights should await the action of congress to make it effective, has any step been taken toward the desired end. It would seem useless to argue in favor of the advantages of such an enactment. It is hoped that in the near future, legislation with this object in view will become an accomplished fact. Let it not be said that the United States is behind other nations in the punishment of crime; and let it be made plain, that in the mind of all thinking people, a common criminal is an enemy of the human race, an international outlaw, to be seized wherever he may be found, and returned without let or hindrance by the most convenient way to the country against whose laws he has transgressed.

EXTRATERRITORIALITY AND THE UNITED STATES COURT FOR CHINA

In the western parts of the world, alien merchants mix in the society of the natives, access and intermixture are permitted; and they become incorporated to almost the full extent. But in the East, from the oldest times, an immiscible character has been kept up; foreigners are not admitted into the general body and mass of the society of the nation; they continue strangers and sojourners as their fathers were—*Doris amara suam non intermiscuit undam*—not acquiring any national character under the general sovereignty of the country. (Lord Stowell in the Indian Chief, 1801, 3 Charles Robinson, p. 12).

Extraterritorial jurisdiction is a survival of, or a reversion to, the time when sovereignty was personal rather than territorial, when there was a king of the English rather than a king of England. It means the establishment of an *imperium in imperio*. It means the legal recognition of the existence of a foreign colony in a native state whose members remain in the picturesque language of Lord Stowell, "immiscible," perpetuating their own institutions, governed by their own laws and responsible to their own officers.

Secretary Frelinghuysen in defining extraterritoriality with special reference to the practice of the United States described it as a condition in which

the national sovereignty of law is transferred bodily into a foreign soil and made applicable to citizens or subjects of its own nationality dwelling there. (Letter to

Hon. William Windom, chairman of the committee on foreign relations, United States Senate, April 29, 1882, Senate Miscellaneous Documents, 89, 47th Congress.) First Session, p. 1.

Extraterritoriality is of ancient origin.

The consul was originally an officer of large judicial as well as commercial powers, exercising entire municipal authority over his countrymen in the country to which he was accredited. But the changed circumstances of Europe and the prevalence of civil order in the several Christian states have had the effect of greatly modifying the powers of the consular office. (Denise v. Hale, 91 U. S. 1516.)

But the peculiar status of the municipal colonies organized by the Latin Christians and especially by those of the Italian republics in the Levant, growing out of the racial antipathies and still keener religious rivalry between the Latin merchants and the Greeks among whom they settled and traded, perpetuated the original jurisdiction of the consular office long after it had lost its political significance in the western world. (See opinion of Atty. Gen. Cushing, 7 Opinions Atty. Gen. 342, at 346.)

The coming of the Mahomedan only increased the necessity for extraterritoriality. Mahomedan religion and Mahomedan law were indissolubly connected. The perpetuation of extraterritoriality, far from being regarded as a concession to the strength and superior intelligence of the western Christians, was an inevitable consequence of the unwillingness of the Mahomedan courts to attempt to administer justice among aliens who were not merely enemies but were regarded as unclean. The Mahomedan refused to extend his law over the western Christians for a reason not unlike that which has prevented the United States from extending its laws over transactions between Indians upon Indian reservations. (See Sec. Bayard to Mr. Straus, Foreign Relations, 1887, pp. 1094-1095.)

During the centuries immediately preceding the discovery of America, the Italian republics obtained from the Christian emperors, and later from their Mahomedan conquerors, numerous charters granting protection for commerce and exemption from local administration, for their mercantile colonies in the Levant. These charters consisting of articles or "capitula" acquired the name of "capitulations," a term now in general use to denote the early treaties by which Turkey conceded extraterritoriality to the nations of the western world. (Hinckley: American Consular Jurisdiction in the Orient, pp. 2 and 3). In this manner, extraterritoriality has gradually changed from the rule to the exception. The powers of the consular office have dwindled until

it may now be considered as generally true that for any judicial powers which may be vested in the consuls accredited to any nation, we must look to the express pro-

visions of the treaties entered into with that nation and to the laws of the states which the consuls represent. (Denise v. Hale, *supra*.)

When the United States became a nation it found the system of extraterritoriality already firmly established in usage and secured by treaty provisions between the nations of the Orient and the western powers. Just as the United States accepted international law itself, so it accepted the principle of extraterritoriality and at once proceeded to negotiate treaties securing for its citizens exemption from local jurisdiction in the semi-barbarous countries of the Orient. The United States early negotiated treaties securing the privileges of extraterritoriality in various minor Mahomedan states; the treaty with Morocco being negotiated in 1787; with Tunis, 1797; with Tripoli, 1805; and with Algiers, 1815. Indeed, it is a curious and interesting fact that one of the earliest treaties recognizing a qualified form of extraterritoriality was concluded between the United States and France, namely the treaty of November 14, 1788, negotiated by Jefferson, which contains a provision that all differences and suits between citizens of the United States and France shall be determined by the American consuls and vice consuls, either by reference to arbitrators or by summary judgments without costs.

It was natural, if not inevitable, that when the barriers of exclusion within which China and Japan had isolated themselves for centuries gave way and a limited intercourse with the western world was permitted, that the principle of extraterritoriality should be included in the treaties securing to the citizens of the western nations the right to reside and carry on trade within the treaty ports. China conceded extraterritorial privileges to Great Britain in 1842 and 1843, and to the United States in 1844, while Japan conceded civil extraterritoriality to the United States in 1857, and in the treaty of 1858 provided for extraterritorial jurisdiction in both civil and criminal cases.

The United States has always regarded the exercise of extraterritoriality as a necessary evil, and has always been inclined to take a conservative view of the scope of the powers conferred by the grant of extraterritorial privileges. An interesting illustration of both of these statements is found in the negotiation of an extradition treaty with Japan on April 29, 1886, at the very time that negotiations were pending between Japan and the western powers for the relinquishment of extraterritoriality. The United States, through the negotiation of this treaty, at one and the same time conceded, by implication, that the grant of extraterritoriality did not, when properly construed, imply the power to extradite, contrary to the position maintained by England and other countries, and through its willingness to conclude such a treaty, and

the confidence thus manifested in the ability and impartiality of the Japanese courts, it lent its moral support to the Japanese contention that the time had come for the abandonment of extraterritorial privileges in Japan, and contributed materially to the successful conclusion of the negotiations through which extraterritoriality was finally abandoned by all the powers, and Japan placed in all respects upon the footing of a modern civilized power.

The traditional American policy in respect to extraterritoriality is embodied in the treaty provisions with Corea and China (treaty with Corea of May 22, 1888, article 4; treaty with China of October 8, 1903, article 15), in which the United States expressly agrees to relinquish extraterritorial privileges as soon as the judicial administration of these countries shall be so reformed as to warrant such action.

The treaty provisions under which extraterritoriality in China is exercised today are articles 21, 24, 25 and 29 of the treaty of July 3, 1844; article 11 of the treaty of June 18, 1858; and article 11 of the treaty of November 17, 1880. The combined effect of these treaties is to confer complete civil and criminal extraterritoriality upon citizens of the United States residing in China, to be exercised

> by the consul or other functionary of the United States thereto authorized.

The exceptions and qualifications to complete extraterritoriality arise only in cases in which citizens of the United States become involved in controversies with citizens of China or of some other foreign power. In the first case the treaties provide that the questions arising

> shall be examined and decided conformably to justice and equity by the public officers of the two nations acting in conjunction,

while in cases of the latter class, custom has long since established the rule that the court of the nation of which the defendant is a subject or citizen shall have jurisdiction.

While it is true that extraterritoriality is an exception to the ordinary principle of international law which asserts the exclusive jurisdiction of every nation within the limits of its own territory and all extraterritorial rights, internationally speaking, must be founded upon treaty provisions, according to the constitution and municipal law of the United States, special statutory authority is necessary in order to provide for the exercise of the powers secured by the treaty except in so far as treaties may be self-operative, in which case they would need no further legislative reinforcement. Congress has made legislative provision for enforcing the extraterritorial rights of the United States upon three

separate occasions; namely, by the act of August 11, 1848, 9 Statutes at Large 276; the act of June 22, 1860, 12 Statutes at Large, p. 72; the act of July 1, 1870, 16 Statutes at Large, p. 183. Minor amendments were also introduced by the act of March 3, 1873, chapter 249, 17 Statutes at Large 582; the act of June 14, 1878, chapter 193, 20 Statutes at Large, 131. These various provisions are consolidated in the Revised Statutes, §§4083-4130. The substance of all this legislation has been summarized in an opinion of Attorney General Cushing of September 19, 1855, and it may be well noted in passing that in the learned and comprehensive opinions of Attorney-General Cushing may be found the clearest and almost the only authoritative discussion of the scope and meaning of American extraterritoriality in the Orient.

In order to execute these treaties—to carry the laws of the United States into Turkey and China—to have our territorial jurisdiction follow our people and our flag into those empires—persons clothed with lawful authority are the necessary instruments. * * *

Accordingly, the statute contains the following important provision:

That such jurisdiction in criminal and civil matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as is necessary to execute said treaty, extended over all citizens of the United States in China (and over all others to the extent that the terms of the treaty justify or require), so far as such laws are suitable to carry said treaty into effect; but in all cases where such laws are not adapted to the object or are deficient in the provisions necessary to furnish suitable remedies, the common law shall be extended in like manner over such citizens and others in China; and if defects still remain to be supplied and neither the common law nor the statutes of the United States furnish appropriate and suitable remedies, the commissioner shall, by degrees and regulations which shall have the force of law, supply such defects and deficiencies."

The system of law is composed, therefore, of:

1. The laws of the United States, comprehending the constitution treaties, acts of congress, equity and admiralty law, and the law of nations, public and private, as administered by the supreme court, and circuit and district courts of the United States, and, in certain cases, regulations of the executive departments.

2. "The common law." In this respect, the statute furnishes a code of laws for the great mass of civil or municipal duties, rights, and relations of men, such as, within the United States, are of the resort of the courts of the several states.

Some general code in these respects became necessary, because the law of the United States—that is, the federal legislation—does not include these matters, and, of itself, would be of no avail toward determining any of the questions of property, succession, the contract, which constitute the staple matter of ordinary life.

For such of the states as were founded in whole or chief part by colonists from Great Britain and Ireland, or their descendants, the law of England, as it existed in each of those states at the time of their separation from Great Britain, with such modifications as that law had undergone by the operation of colonial adjudication, legislation, or usage, became the common law of such independent state.

Meantime, in addition to many changes, differing among themselves, which the

common law underwent in each of the colonies before it became a state, that common law has been yet more largely changed by the legislation and judicial construction of each of the states.

Hence, it was not enough to enact that the common law should intervene to supply, in China, deficiencies in the law of the United States. For the question would be sure to arise: What common law? The common law of England at the time when the British colonies were transmuted into independent republican states? Or the common law of Massachusetts? Or that of New York, or Pennsylvania, or Virginia? For all these are distinct, and in many important respects diverse, "common law."

To dispose of this difficulty, the statute went one step further, and enacted, that:

3. "Decrees and regulations" may be made from time to time by the commissioner, which shall have the force of law, and supply any defects or deficiencies in the common law and the laws of the United States.

This power of supplementary decree or regulation serves to provide for many cases of criminality, which neither federal statutes nor the common law would cover.

In addition to which, it is enacted that the commissioner, with advice of the several consuls, shall prescribe the forms of processes to be issued, the mode of executing the same, the form of oaths, the costs and fees to be allowed and paid; and generally to make all such decrees, regulations, and orders, under the act, as the exigency may demand, which shall be "binding and obligatory until annulled or modified by congress." (§5).

In certain respects, therefore, the commissioner *legislates* for citizens of the United States in China, it being required meanwhile, that such "regulations, orders and decrees," as he may make in the premises shall be transmitted "to the President, to be laid before congress for its revision" (§6). 7 Opinions of the Attorney-General, p. 495 at 502–505.

According to the statutes, as they exist at present, the power to make regulations, vested in Cushing's time in the American commissioner, is entrusted to the United States minister. The liberal construction given by Attorney-General Cushing to this power to make decrees and regulations has since been questioned. In an instruction of Secretary Fish to Mr. Bingham, dated January 20, 1876, it is denied that the provisions of the statute confer upon the minister any power of general legislation as the words are commonly understood, and it is said that they simply confer the power to supply any defects in the mode of exercising the jurisdiction which the statutes and treaties give to the consular courts. This would appear to confine the activities of the minister to the regulation of remedies and to forbid him to enter upon the definition of rights. This view has apparently been adopted by the department of state and is expressed in §627 of the consular regulations. No authoritative definition of the power to make decrees and regulations appears to have been given, although the question is one of great importance even at the present time.

It has long been recognized that the federal legislation regulating the

exercise of extraterritorial powers was wholly insufficient, whether judged by comparison with the regulations adopted by other nations or with the needs of American citizens in extraterritorial countries as developed in actual practice, and it has been freely admitted by those best acquainted with conditions in the Orient that if our administration of extraterritorial authority in general and especially in China has operated with reasonable satisfaction it has been due entirely to the good sense of those charged with its administration and not at all to the wisdom or completeness of statutory regulations provided by congress. (See letter of Secretary Frelinghuysen, *supra*.)

Several efforts have been made to remedy these conditions. In 1881 the American residents in Japan memorialized congress, praying for legislation modifying the antiquated rules of the common law imposed by the provisions of the statute upon Americans in extraterritorial jurisdiction. The memorialists said in part:

> For us there is no statute of frauds; there is no insolvency legislation * * * imprisonment for debt has not been abolished; the disabilities of women at the common law have remained unaltered; we have no statute of limitations and none providing for conditional bills of sale or chattel mortgages. In many other respects investigation will show how unfavorable is the legal status of a citizen of the United States residing here. (Senate Miscellaneous Documents, 70, vol. i, 47th Congress 1st Session.

In 1882 an effort was made to secure legislation and an elaborate bill was presented to congress, providing for the establishment of a regular judicial system in China. (See letter of Secretary Frelinghuysen to the Hon. William Windom, *supra*.) The bill, however, failed to become a law and the old conditions were suffered to continue.

It was to relieve this situation that the recent act of congress of June 30, 1906, was enacted. (An act creating a United States court for China and prescribing the jurisdiction thereof. U. S. Statutes at Large, 1905-1906, p. 814.)

The first section of the act provides for the establishment of a United States court for China, having jurisdiction in all cases in which jurisdiction may now be exercised

> by United States consuls and ministers, by law and by virtue of treaties between the United States and China,

except in so far as the jurisdiction of the consular courts is preserved in the second section of the act.

Section 2 retains

> the jurisdiction of the consular courts in civil cases where the value of the property involved * * * does not exceed $500 * * * and in criminal cases where the

punishment for the offense charged cannot exceed by law $100 fine or sixty days imprisonment or both.

An appeal is granted from all final judgments of the consular courts to the United States court for China. Supervisory control is conferred upon the United States court

over the discharge by consuls and vice consuls of the duties prescribed by the law of the United States relating to the estates of decedents in China.

Section 3 provides for appeals from all final judgments of the United States court for China to the United States circuit court of appeals of the ninth judicial circuit, and thence in proper cases to the supreme court of the United States.

Section 4 once more provides that the jurisdiction of the court shall be exercised in conformity with treaties and laws of the United States,

but in all such cases when such laws are deficient in the provisions necessary to give jurisdiction or to furnish suitable remedies the common law and the law as established by the decisions of the courts of the United States shall be applied by said court in its decisions and shall govern the same, subject to the terms of any treaties between the United States and China.

Section 5 prescribes the procedure of the court in accordance with existing procedure in the consular courts in China

in accordance with the Revised Statutes of the United States; provided, however, that the judge of the said United States court for China shall have authority from time to time to modify and supplement such rules of procedure.

The remaining sections of the act provide for the officers of the court, a judge, district attorney, marshal and clerk, and regulates the practical details of instalation. It is understood that the act was drawn in brief and general terms in order that the court might be left free to adapt itself to the needs of a situation little understood in the United States, with the idea that further legislation may be enacted by way of amendment and supplement as needs shall develop in the course of the practical operation of the act.

The Hon. Lebbeus R. Wilfley, of Missouri, was appointed the first judge of the United States court. Judge Wilfley leaves behind him in the Philippines, where he served as attorney general, a record of accomplishment. Frank E. Hinckley, author of a convenient and valuable monograph on American consular jurisdiction in the Orient, has been appointed clerk of the court, while Arthur Bassett of Missouri who had served with credit as assistant to Judge Wilfley in the Philippines was selected as district attorney, and Hubert O'Brien, a lawyer of Detroit,

Mich., highly recommended by members of his profession, has been appointed marshal of the court. Concerning the personnel of the court, it is, without in any wise intending to reflect upon many capable and conscientious men who have served this government in consular and diplomatic positions in the East, perhaps not improper to quote from a private letter recently received by a leading newspaper editor from a prominent American business man at Shanghai, in which it was said that the members of the court

> represented a new type of American officials in China.

Judge Wilfley opened court on December 17, 1906. His first order provided that all American attorneys who wished to be placed on the roll of attorneys for the court should first qualify by an examination and the presentation of satisfactory proofs of a good moral character. Eight applicants presented themselves for an examination and only two qualified. As a result of this purging, the American bar of the United States court for Shanghai consists of the United States district attorney, who presumably was not called upon to pass an examination, and Messrs. Fessenden and Jernygan of the firm of Jernygan and Fessenden. A monopoly in restraint of trade in violation of the fundamental principles of the common law has however, been avoided by the admission of duly certified members of thebar of consular courts of the various other nationalities on the principle of comity.

This action of the court aroused much criticism which has been to some extent reflected in the United States. As to the inherent power of the court to determine the qualifications necessary in a member of the bar by means of an examination there would seem to be no question. (Ex parte Garland 4, Wall 333 at 378; ex parte Secunbe 19 How 9 at 13.) As to the expediency of the somewhat drastic exercise of the power in the particular instance, opinions of men equally qualified to judge might well differ, and any opinion expressed at this distance would be necessarily uninformed. It can only be said that the learned judge has certainly failed to realize the hope humorously expressed by an English common law judge suddenly called upon to sit in the admiralty division, who opened court by remarking

> And may there be no moaning of the bar when I put out to sea.

If the action of the court in regard to the qualifications of attorneys aroused the opposition of an important and vociferous profession and its friends, another policy initiated by the court and district attorney rallied to the support of the court all the best elements of the American

community. In the past the houses of prostitution conducted under American auspices have disgraced our country in the eyes of both European and Chinese and made the words "American girl" a by-word and reproach in all China. So bold and shameless had the proprietors of these establishments become that they actually had the effrontery to issue on special occasions invitations decorated with American flags. Informations were presented by the district attorney against all of the keepers of houses of ill-fame in Shanghai who claimed American nationality. The informations proceeded on the theory that the common law regards the prosecution of such a calling as a misdemeanor. Eight were arrested and brought into court. They were held under bond of $2000 and were only permitted to leave court in the company of the marshal to secure bail. On the hearing, four immediately pleaded guilty. The other four entered pleas in bar on the ground of citizenship. Two of them claimed to be Spaniards and presented registration certificates from the Spanish consul; one claimed to be a German and the other asserted English nationality. The court held that in the matter of proving citizenship the certificate of a consul was not conclusive but would be considered along with other evidence. As a result the Spanish certificates were immediately withdrawn and the holders admitted the jurisdiction of the court and pleaded guilty. The court later over-ruled the plea of the defendant who claimed British citizenship and she pleaded guilty. In view of a promise on the part of all the defendants to adjust their affairs and leave China, the court let them off with a fine of $1000, Mexican, apiece. The one remaining case appears to be still under advisement, but if the defendant is released, the Shanghai public will understand that she is not an "American girl."

Another case interesting in its facts as throwing light upon the new and strange conditions to which the principles of Anglo-Saxon jurisprudence are being applied was a case in which a Chinese firm brought an action for deceit against an American who had leased to the plaintiffs certain grandstand privileges, including the right to conduct Chinese gambling games during the autumn race meets, this upon the distinct understanding that Chinese gambling was to be permitted by the authorities. On the face of this understanding, as the plaintiffs alleged, the the defendants took their money which they now refused to return, although, at the time of taking the same, said defendants well knew that Chinese gambling would not be permitted upon the premises. Here arises an interesting situation. We can well imagine a court in this country struggling with the doctrine of *pari delicto* and perhaps permitting the defendant to escape. Not so the United States court for

China. The principle of the square deal was vindicated by a decision which mulcted the defendant in damages while the district attorney was directed to institute criminal proceedings.

But the court has not been entirely engaged in qualifying its bar (purifying society). A number of civil and criminal cases of a general nature have been discussed by the court during its first term, involving questions of law both interesting and important. One defendant was prosecuted for obtaining money under false pretences. The charge was brought under the statute of 30 George II. and a motion to quash was made on the ground that the information did not charge a crime under the common law. This raised the difficult question of the construction of the term "common law" as used in the statute creating the court. The court appears to have taken the position that the term "common law" was to be construed to include those laws which would have been in force in the colonies after the change of sovereignty without further legislation, or in other words all the laws of England, written or unwritten, which were applicable to the colonies at the time of the declaration of independence. The opportunity to test this construction through an appeal to the United States court of appeals for the ninth judicial district was lost by the escape from Shanghai of the accused before he was sentenced.

In the next case which came before the court, the judge took precaution against the escape of the defendant. After the conviction and sentence of the accused, the court exercised the authority conferred by §5 of the act creating the court and modified rule 66 in force in the consular court as regards bail after conviction, providing that after conviction and appeal, bail should be allowed or denied in the discretion of the judge. The court then denied bail to the defendant on the ground that it appeared to him that the appeal was frivolous. *Habeas corpus* proceedings were begun on behalf of the defendant and it is reported in the press that he has been released on appeal to the United States court of appeals for the ninth judicial district. The grounds on which the court acted are not known.

These two cases have served to develop two questions which will doubtless provide ample opportunity for argument before the new court, namely the scope of the words "common law," and the nature of the power originally vested in the United States minister to make rules and regulations to supply the defects of the common law and the power now vested in the court to modify such rules so far as they relate to procedure.

At a banquet of the American Association at Shanghai, Judge Wilfley, as reported in the Celestial Empire of December 22, 1906, in responding

to the toast, "The Judicial Department," defined the requisition of a typical American court as

> First, honesty; second, courage; third, good sense, and fourth, a knowledge of the law.

All in all the new court seems to have grappled with energy the perplexing situation before it, and we may look forward to some new developments of the common law in this new field for American jurisprudence which will not only make for the betterment of conditions in China but throw some interesting light upon old legal problems in a new environment.

ANGLO-AMERICAN RELATIONS

The year 1907 opened without any friction between Great Britain and the United States and it is to be hoped that the year will close without any. It is a pleasure to be able to state that the *modus vivendi*, safeguarding the American fishing rights within the Newfoundland waters, accomplished the purpose which the contracting countries had in mind. The rights of both parties were clearly set forth in advance of the fishing season, the imperial authorities had seen to it that these rights were in no instances violated by local ordinance or action, with the result that the fishing season of 1906-1907 closed without any untoward incident. If the *modus vivendi* (the text of which was in the Supplement to the January number, pp. 22-31) should be continued or if a permanent arrangement could be reached or if a treaty or convention could be negotiated which would clearly define and adequately protect the rights of American fishermen, a recurrent cause of friction would be removed.

For one brief moment an incident occurred at Jamaica which might have caused an unpleasant feeling if there had been any source of irritation existing between the two countries. The lamentable earthquake which destroyed Kingston and caused the death of many an inhabitant seemed to furnish opportunity to the jingo on both sides of the water to resort to favorite, but fortunately forgotten, methods. The landing of Admiral Davis at the request of subordinate authorities for protection of life, liberty and property did not meet with favor from the governor, and a thoughtless phrase written by the governor in a moment of excitement might have caused infinite trouble if it had not been disavowed by the English press and had it not been charitably received in this country. If Admiral Davis had landed without the consent of the local authorities he would have been guilty of a technical violation of