CONSULAR JURISDICTION

AND

RESIDENCE IN ORIENTAL COUNTRIES.

F. T. PIGGOTT.

NEW EDITION

REVISED AND ENLARGED

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EXTERRITORIALITY.

EXTERRITORIALITY.

THE LAW RELATING TO

CONSULAR JURISDICTION

AND TO

RESIDENCE IN ORIENTAL COUNTRIES.

BY

SIR FRANCIS PIGGOTT, Kt., M.A., LL.M.,

CHIEF JUSTICE OF HONGKONG.

NEW EDITION.

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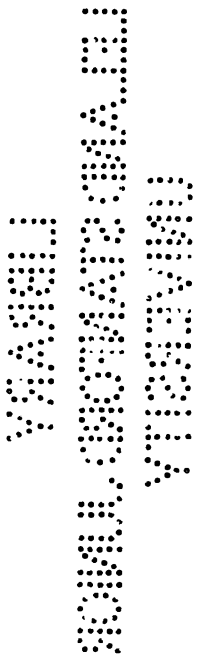

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ADDENDA AND CORRIGENDA.

p. 6. The marginal reference to the "Charges" in the China Rules at the bottom of the page should be "Rules of Court, Form 5."

p. 14. The reference to *Carr* v. *Fracis Times & Co.* in C.A. should be 82 L.T. 698.

p. 28. The reference to *the Laconia* should be "*post* p. 45."

p. 40. The 2nd marginal reference should be "*cf.* Sections VIII and XI."

p. 45. There should be a marginal reference to the second paragraph:—

see the Note, on p. 187, dealing with a reference to this subject in the judgment in *Imperial Japanese Government* v. *P. & O. Co.*

p. 55. The marginal reference to s. 5 of the Foreign Jurisdiction Act, should be:—

cf. ante p. 23, *post* p. 82, and Section VII, *A*, where the Acts are set out, and their application explained.

p. 61. lines 18, 19, *for* "there is practically no direct legislation" *read* "there is very little direct legislation."

p. 72. line 14, *for* "in section" *read* "in the section."

p. 119. 3rd marginal note: *for* 36 & 37 Vict. c. 85 *read* 36 & 37 Vict. c. 88.

The following note should also be added:—

The operation of the Slave Trade Acts is considered in "Nationality," Vol. II, Chap. IV.

p. 121. 1st marginal note: *for* 5 Geo. IV. c. 13 *read* 5 Geo. IV. c. 113.

p. 122 last marginal note: *for* "unciviled" *read* "uncivilised."

p. 131. after the 3rd marginal note, and p. 132. after the 2nd marginal note, and p. 133. after the 1st marginal note. } *add* This question is further considered in Section XV.

p. 185. 3rd line: for "*Revenna*" read "*Ravenna*."

p. 193. 1st line: add marginal note "*cf.* pp. 12 *et seq.*"

p. 219. 21st line: to the words "treaty considerations apart" append the following note:—

Curiously enough Arts. *lxi* and *lxxi* of the Capitulations contemplate the possibility of an Englishman turning Turk.

p. 229. After the reference to *Niboyet* v. *Niboyet* in the margin, *add* but see the criticism of this case in *Le Mesurier* v. *Le Mesurier*, referred to on p. 146.

p. 236. 2nd marginal note: for *55 & 56 Vict. c. 22* read *55 & 56 Vict. c. 23.*

p. 254. At end of the third paragraph, *delete* the note of interrogation.

p. 251. After the reference to *Niboyet* v. *Niboyet* in the margin, *add* but see the criticism of this case in *Le Mesurier* v. *Le Mesurier*, referred to on p. 146.

p. 268. In connexion with the abandonment of foreign jurisdiction, the Protocol to the Corean Treaty (printed in the Appendix) should be noted. It embodies an agreement that the jurisdiction shall be relinquished when, in the judgment of the British Government, the Corean laws and legal procedure shall have been modified and reformed, and the Corean Judges have attained similar legal qualifications, and a similar independent position to those of British Judges.

NOTE on the decision of the Judicial Committee in *Sayad* v. *Muhammad Yusuf-ud-Din* v. *R.* reported in 76 L.T. p. 813 [1897].

On the eve of publication, my attention has been called to the above decision which I had unfortunately overlooked.

In March 1888, the Nizam of Haidarabad granted to the British Government certain jurisdiction within the lands in his territory occupied by the Nizam's Guaranteed State Railways, and other Railways. The Governor General in Council issued a notification in the Gazette of India, to the following effect:—that in the exercise of this jurisdiction, described as "full jurisdiction," and of the powers conferred by ss. 4 and 5 of the Foreign Jurisdiction and Extradition Act, 1879, (of India), the following Acts were extended to these lands —Indian Penal Code, Regulation of the Police, Whipping Act, Cattle Trespass Act, and Code of Criminal Procedure. A Railway Magistrate was also appointed.

The appellant, a subject of the Nizam, resident at Haidarabad, but not within the railway lands, was arrested on a warrant issued by the District Magistrate at Simla on the application of the Resident at Haidarabad, on a charge of abetting an attempt to bribe a person at Simla.

The learned Judges of the Court below held that the effect of the notification was to extend the whole of the Civil Procedure Code to the railway lands: and that, as under the Code a warrant of arrest might be executed in any part of British India, the appellant was as liable to arrest in the railway lands as he would have been at Simla itself.

The arrest was held to be illegal, the following propositions being laid down by Lord Halsbury.

The railway lands are still part of the Nizam's dominions, and the authority to execute criminal process must be derived from the Nizam. The notification in the Gazette was not the source of authority; the source of authority was to be derived solely from the sovereign power of the Nizam—and, as a stream can rise no higher than its source, the notification could not give more extended powers than the Nizam had granted. The correspondence shewed that the Nizam had refused any cession of territory, but had only granted the right to exercise criminal and civil jurisdiction along the line of railway, as in the case of other lines running through independent States. The offence with which the appellant was charged was not committed on the railway, nor was it connected in any way with the administration of the railway. It was committed in another part of India, and the fact that the offender was physically on the railway land did not lay him open to criminal procedure for an offence committed elsewhere.

This decision applies to a case of foreign jurisdiction in little the principles of the general law on the subject which the Judicial Committee have laid down in the recent cases referred to in this book. It is worthy of note that the District Magistrate, when issuing the warrant, had suggested that it might possibly be a case for extradition. It is abundantly clear that if extradition had been resorted to, the application would of necessity have been made to the Haidarabad Government, and that the offender could not have been handed over by the British authorities, in virtue of the jurisdiction exerciseable by them in the railway lands.

EXTERRITORIALITY.

THE SUBJECT of Exterritoriality was described by Sir FitzJames Stephen as "of great curiosity, but very little known." The learned author referred, of course, to the legal aspect of the subject, for, in practice, it has been familiar to officials and merchants since the date of the "Capitulations", agreed to by Turkey in 1675.

Fifteen years ago, when the first edition of this book appeared, the attention of a wider circle of observers was being more and more directed to the subject in all its aspects, commercial, legal, and social, by the great strides in intercourse with Western Nations which were being made by one of the countries in which other Sovereign States are permitted to exercise jurisdiction over their own subjects and citizens. That country is now a Great Power. But I think I am justified in saying that the attention to the details of Consular Jurisdiction which the progress of Japan compelled, has led to the improvement in the system by which it is worked in many directions. Orders in Council are seldom looked at, little read: the care which is involved in their elaboration is hardly appreciated. Unlike statutes, they are not often subjected to criticism, for editors and lawyers rarely have them in their hands. Yet the progress which has been made during the last ten years in reducing chaos to order is surprising. Method has taken the place of the old hap-hazard treatment, and an effort to attain a uniformity, both of system and of style, is everywhere noticeable. Not the least important step has been the collection into one volume of the "Statutory Rules and Orders (Revised)" of all the Foreign Jurisdiction Orders in Council.

Another thing too has made for progress in what I may call the science of the subject.

The legal principles involved do not often come before the Courts, but during the last few years some cases have been decided which have done much to settle the foundations of the subject.

The settlement has been on the lines suggested in the first edition; in this edition, therefore, it will be possible to start from a new standpoint, and much of the argument and elaboration necessary to establish those lines may now be curtailed, and be treated with greater freedom.

Another point personal to myself has also tended to make the preliminary matters formerly discussed in the book easier to deal with. These relate to Allegiance and Extra-territorial Jurisdiction, which have been fully discussed in another work which has recently appeared.† Although they lie at the foundation of Exterritoriality, it will not now be necessary to do more than allude to the conclusions arrived at in that book. I propose in this edition to treat the question as an offshoot of the wide subject of "Nationality," making it follow that subject in natural sequence.

† "Nationality," Vols. I and II.

While, however, the theoretical consideration of the question has been considerably reduced, I have endeavoured to elaborate it in its practical side: and in doing this, I have devoted a much larger space to the examination of the English law and statutes which have been applied to countries subject to the King's foreign jurisdiction, indicating, with as much precision as possible, the results of that application.

The system which the claim and grant of foreign jurisdiction has called into being is artificial in the extreme. It recognizes the existence of two separate communities in the same country. Where one is savage and the other is civilised, the points of disturbance are few. But where the foreign community is a large one carrying on a prosperous trade, and where the native community is also prosperous and busy, has its own laws, police, Courts, and the whole system of executive government, the points of disturbance are many, deepening in interest with every recurrence of them.

The words "exterritoriality" and "extra-territoriality" are treated by some writers as identical; by others as indicating, the first, the privilege of ambassadors and their suites; the second, the treaty privilege under which consular jurisdiction has been established in the East.

Both these privileges are, however, more correctly described as "exterritorial"; the condition of those to whom they are accorded as "exterritoriality."

The position of an ambassador with reference to the jurisdiction of the country to whose Sovereign he is accredited is, in theory, precisely identical with that of a person who is withdrawn from the jurisdiction of the country in which he resides. The two privileges rest on different grounds; the one is granted by courtesy,* the other by treaty. They differ in degree; the one being almost complete and uniform, while the other is partial and varies in different Oriental States. They differ too in the resulting relations to the home Government, and the manner in which laws may be passed affecting those who enjoy the privileges. But they have this fundamental fact in common; the ordinary consequences of residence in a foreign country do not attach, jurisdiction being waived, in greater or less degree, by the Sovereign Authority of that country.

On the other hand, the government of these privileged persons by their own authorities from home is "extra-territorial."

"Extra-territoriality" as a term conveys no definite meaning, for there is no state to which it is properly applicable. All British subjects beyond the realm are subject to the extra-territorial laws of the kingdom which are of general application, and those who are specially indicated in them to such laws as are of special application. But the intricate questions which arise in connexion with them do not concern the subject with which we have now to deal.

I

The General Theory of Exterritoriality.

EXTERRITORIALITY in its practical, and also partly in its theoretical aspect, is governed by the provisions of the Foreign Jurisdiction Act, 1890. But there are some cardinal principles on which the subject rests which require to be first established, before we can be in a position to consider its many details.

The first of these principles is that all the fundamental rules of law which are bottomed in allegiance and in jurisdiction,

* In England by statute:—7 Anne, c. 12.

Fundamental rules governing the subject.

whether of Parliament or of the Courts, are as applicable to oriental, or so-called barbarous countries, and to British subjects resident or being therein, as to civilised States.

This branches out into the following minor propositions which express the same idea in different ways:—

The British Sovereign has no inherent rights in an oriental country, or over his subjects there. Such subjects are beyond the ligeance of the British Crown, and are therefore not specially subject to the Crown, the Parliament, or the Courts, by reason of their residence or presence in these countries. They are, however, subject to those authorities in precisely the same way, to the same extent, and for the same reason, as they are subject to them when they are in civilised countries. Such powers as the Crown still wields over its subjects beyond the seas, such authority as Parliament exerts over them, such jurisdiction as the Courts exercise against them, exist and are exercised in these countries as in all others, neither more nor less. "Barbarous country" is a negligeable quantity as a term of law, not connoting any right in any British authority: and, save for the statute which we are about to consider, and one other analogous to it—

38 & 39 Vict. c. 51. the Pacific Islanders Protection Act, 1875—there is only one old statute still extant which differentiates barbarous from other

57 Geo. III, c. 53. foreign countries, the Murders Abroad Act, 1817.

Recognition of status of oriental Sovereign.

Again, the sovereignty of the potentates of these oriental States, as well as of barbarous chieftains, is recognized to as full an extent as that of the Sovereigns of what was formerly called "Christendom." The basis of the King's "foreign jurisdiction" is treaty: and although "other lawful means" are recognized as a sound foundation for the exercise of the jurisdiction, and indeed have occasionally to justify it, treaty is resorted to wherever possible for its establishment. The due observance of these treaties is as much regarded by the Executive, and, if need be, enforceable by the Courts, as in the case of treaties with civilised Powers. They are concluded by the British Sovereign as with an equal Sovereign Prince. They are so concluded in virtue of the prerogative, and independently of Parliament: hence the term "the King's foreign jurisdiction."

Countries without regular forms of government.

From this it follows that the claim to exercise this jurisdiction (under s. 2 of the Act) in countries which were without regular governments at the time when it was asserted, falls to the ground

so soon as the natives establish a regular Government for themselves with which an agreement could be concluded. Such countries are termed in that section "foreign countries not subject to any government from whom His Majesty the King might obtain jurisdiction in the manner provided by this Act."

Theoretically, it also falls to the ground when a valid and effectual full claim in sovereignty is made by another Power to the territory, in accordance with the usages of international law. In practice, however, it is probable that certain formalities would be gone through in both cases, in order to put the abandonment in due form.

Extent of the prerogative.

For reasons which will be explained in due course, the exercise of this jurisdiction, as distinguished from its acquisition, does not fall within the prerogative, and it has been found necessary to regulate its exercise by Act of Parliament. This Act has authorised the promulgation of legislation, the creation of offices, and the establishment of Courts in these countries.

cf. Section II.

Further, although it is usual to speak of the jurisdiction as exerciseable over British subjects, there is nothing in the prerogative which could prevent the acquisition of this jurisdiction over natives of the country, or over foreigners resident there: nor, indeed, is there anything in the Act which is inconsistent with its exercise in such cases. The question how far foreigners may be affected by, or included in, the jurisdiction will be dealt with fully in due course.

cf. Section X.

Rights exercised belong to the oriental Sovereign.

From these elemental propositions there emerges one which is cardinal to the complete understanding of the subject. The rights which the King exercises in these countries are not his sovereign rights at all, but are merely the delegated rights of the Sovereign of the country: the Courts which are created are not the King's Courts properly so called, but form part of the judicial system of the country in which they are established. This point, which seemed when it was first written to be purely theoretical, has since received full recognition by the Judicial Committee: first, in *Imperial Japanese Government* v. *P. & O. Co.*, and afterwards in *Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co.*, in which case it became necessary to go to the root of the matter in connexion with exterritoriality in Zanzibar. In the judgment Lord Hobhouse said, "The root of the jurisdiction is the treaty grant or other matter by which the Queen has

Japanese Govmt. v. *P. & O. Co.* 1895, A.C. 644. *Sec. of State* v. *Charlesworth*, 1901, A.C. 373: at p. 385.

power and jurisdiction in Zanzibar. She thereby becomes an authority in the foreign country of Zanzibar, though exercising her powers quite independently of the will of the Sultan. . . . But throughout the matter Zanzibar remains foreign territory, and the Queen and her officers are acting as Zanzibar authorities by virtue of the power she has acquired, and which is within its limits a Sovereign Power. It results that a Judge acting within those limits is a Zanzibar Judge, and is bound to take judicial notice of the Zanzibar law, whatever it may be, applicable to the case before him."

The meaning of this must not, however, be misunderstood. The relation of the Consular Court and the Judge to the Sovereign of the oriental country cannot divest that Judge of the privileges which the law of England gives to Judges appointed by the King; and therefore, "whilst sitting and acting as Judge of the Consular Court, he is entitled to the same degree of protection which is accorded by the law of England to the Judge of a Court of Record." (*Haggard* v. *Pélicier Frères.*)

Haggard v. *Pélicier*, 1892, A.C. 61.

The judgment in the *Zanzibar case* cited above, presses the theory home to its logical conclusion, and will again be referred to when we come to consider the subject more in detail. For the present it is quoted to show the full extent of the theory of the subject. The importance of this theory is perhaps best illustrated by referring to a curious point of practice in the administration of the criminal law. In the indictments used in the Consular Courts, offences were formerly described as being "against the peace of our Lord the King his peace and dignity."

Use of "the peace of the King" in indictments.

Now, I believe (certainly in the "Charges," according to the form given in the China Rules), the offence is charged as being against the article of the Order in Council applicable to the case.*

* Precisely the same question arises with respect to a murder by an Englishman in a foreign country.

R. v. *Sawyer*, Russ. and Ryan, 294. In the case of *R.* v. *Sawyer* it was held that the indictment need not conclude *contra formam statuti*; but the indictment was under the 33 Hen. VIII. c. 23, which did not create the authority to try a person for murder committed out of England, but introduced a reform in procedure. *Contra pacem* imported protection of the subject: under the old law it was absolutely necessary to show that the person killed abroad was a subject of the Sovereign; and hence a species of extra-territorial protection. But now that the statute (9 Geo. IV. c. 31, s. 7, as interpreted by *R.* v. *Azzopardi*, and afterwards expressly by 24 & 25 Vict. c. 100, s. 9), has made the murder by British subjects of foreigners abroad triable in England, it seems obvious that the crime is against the form of the statute, and not *contra pacem*.

R. v *Azzopardi*, Moody C. C. 288.

But it is not unimportant to realise at the outset why the old form was wrong. The "peace" broken by an assault or any crime, cannot be other than the peace of the Sovereign of the country in which it occurs. "Such offences are in truth offences against the people and Sovereign of the country in which they are committed": (see *Imperial Japanese Government* v. *P. & O. Co.*). *Japanese Govmt.* v. *P. & O. Co.*, 1895, A.C. at p. 657.

The fact that the power of punishing the offender is granted to his own Sovereign, even though the criminality of the offence be judged, and the punishment be determined, by a law which is not the national law, does not alter the main principle. It is not as though the British community were put under the protection of their Sovereign, so that the peace of the community might in some measure be regarded as part of the larger peace of Great Britain. For in any crime the public peace is broken because of the offence to one whom the Government of the country protects. Whereas in the criminal jurisdiction under a system of exterritoriality, the person injured is not taken into account; the nationality of the offender is the sole criterion of the Court and law by which the nature of his offence will be tried. If it were true to say that the King's peace is broken by any crime which an Englishman commits when Englishmen in a foreign country are put under his jurisdiction, it would also be true to say that the Emperor's peace is broken when a German commits a crime, the peace of the Republic when a Frenchman commits a crime, in a country in which Germans and Frenchmen are under the jurisdiction of their own laws. King's protection of his subjects does not extend to oriental countries.

The result of the treaty is that Englishmen in oriental countries are put under the jurisdiction of the King, and it matters not who is the victim of the crime: he may be a Russian, a Spaniard, an American, or a subject of the oriental country itself. There is no question of protection of the subject, only of punishment of the subject. Obedience to the law of England is required, not because that law has any inherent extra-territorial force, nor because of any allegiance due to the King, such protection as exists being neither correlative nor co-extensive with the area of the duties: but because the Sovereign of the country has expressly placed English subjects under the jurisdiction of the English King, his jurisdiction being as defined in the treaty.

Strictly speaking, then, both the protection of, and the right to

exact obedience to the law from, foreigners in an oriental State, reside in the Sovereign of that State. If they are injured by natives, redress must be sought from, and punishment awarded by, the tribunals of that State. If they are injured by other foreigners or by their own countrymen, redress must be sought from, and punishment awarded by, tribunals which are indeed not those of that State, but which owe their existence to the express permission of its Sovereign.

The law to which obedience is required may be that of the foreigner's country, but this solely in virtue of the law of the oriental country whose Sovereign has sanctioned its operation therein.

Powers remaining in oriental Sovereign.

There is, however, one side of the question which is not infrequently lost sight of—the extent of unsurrendered power which remains in the oriental Sovereign: the fact that in spite of the privilege of exterritoriality, there may be some laws to which that Sovereign may require obedience even from foreigners. An example of this may be found in the case of *Carr* v. *Fracis, Times & Co.*, where the seizure of a British ship in the territorial waters of Muscat, under the authority of a proclamation issued by the Sultan, was held to have been justified.

Carr v. *Fracis, Times*, 1902, A.C., 176.

The exact position involved in exterritoriality may be shortly stated thus:—Such powers alone as are surrendered by the Sovereign of the oriental country can be exercised by the Sovereign of the Treaty Power.* All those powers which are not surrendered are retained; and to the exercise of such powers by the Sovereign of the oriental country, the subjects of the Treaty Powers are bound to submit.

The question involved in the acquisition of foreign jurisdiction by usage or sufferance will be considered later.

Note on the *Muscat case: see also* pp. 13, *et seq.*

NOTE.—I must confess to having some difficulty in understanding the case of *Carr* v. *Fracis, Times & Co.*, as it is reported. Muscat is a country in which the King exercises foreign jurisdiction, British subjects being governed by the Muscat Order in Council, 1867. But the fact of exterritoriality existing there does not seem to have been

* The term "Treaty Power" is in common use in the East, and it seems convenient to use it to indicate a State whose Sovereign has acquired exterritorial rights in another country. The term "Sovereign State" indicates the State whose Sovereign has granted the rights. I have, however, frequently used the expression "Oriental Country" in the text, instead of the cumbrous sentence "country which has granted exterritorial privileges."

referred to, nor the questions of law resulting therefrom mooted. There was indeed a certificate from the Secretary of State for Foreign Affairs stating that Muscat was an independent State, and that the Sultan was the Sovereign thereof. Presumably, this certificate must have been given in virtue of a request from the Court below, under s. 4 of the Foreign Jurisdiction Act, although even this fact does not appear in the report. In view of the Order in Council, the existence of the King's jurisdiction can hardly have been negatived. Note on the *Muscat case.*

The certificate is, however, consistent with the existence of that jurisdiction, if it be conceded that its exercise may still leave the oriental country an independent Sovereign State. I have not felt justified in advancing such a proposition, as there appears to be a derogation from a Sovereign's independence in the grant of exterritorial privileges, although he has not submitted to such a loss of independence as is implied in accepting the protection of the British Crown; it may be that this is the true meaning of the certificate issued in the case of Muscat.

The statement in the text is based on the supposition that foreign jurisdiction is exercised in Muscat: as to its soundness, however, I do not think there can be any question.

The case will be again referred to in connexion with the questions of the territorial waters of an Oriental State, and of the law applicable to torts committed in such State.

Protectorates and countries subject to foreign jurisdiction.

There are many forms of exterritoriality, varying according to the terms of the treaty by which the rights are granted: but they may be broadly divided into two groups—the first, which includes all those cases in which the grant to the foreign Sovereign does not include more than the exercise of jurisdiction over his own subjects in the country: the second, in which a special relationship is established between the two Sovereigns themselves *vis à vis* other Powers, which is described appositely as "Protection." The questions which attach specially to this second group are purely political, and we need not concern ourselves with them. There is indeed involved in protection an exercise of jurisdiction similar to that exercised in the common form of exterritorially: but it must of necessity be larger in its scope, including a jurisdiction over natives, and, in its widest sense, over foreigners, usually identical in all respects with that exercised over subjects, although, of course, it may be varied by the terms of the arrangement by which the protection is created: an arrangement to which other Powers may be parties.*

* *cf.* Zanzibar Order in Council, 7 July, 1897, art. 5.—This Order extends to British subjects and to foreigners with respect to whom the Government whose subjects they are has, by treaty or otherwise, agreed with Her Majesty for, or consented to, the exercise of power or authority by Her Majesty: and the expression "person subject to this Order" shall be construed accordingly.

It is obvious, however, that protection, so far as the purely legal aspect of the case is concerned, differs only from exterritoriality in degree, and we need not, therefore, pause to consider its varied forms. It is obvious also that the rights exercised by the King in protected States are in their nature the same as those exercised by him in a non-protected State which has granted exterritorial privileges. They are acquired by treaty, and they are exercised subject to, and in accordance with, the provisions of the Foreign Jurisdiction Act. The rights acquired in Cyprus by the Convention with Turkey, of 4 June, 1878, are also exercised in virtue of the Act.*

Personal nature of the privileges.

It is clear from the foregoing discussion, that the privileges conferred by exterritoriality are purely personal to the subject, and that so far as the Sovereign is concerned, they are strictly and accurately defined by the term "jurisdiction", which, by s. 16 of the Act of 1890, includes "power." In other words, that the King is granted jurisdiction over his subjects, and that, as a result, the subject obtains certain definite immunities—"complete personal protection, assurance of satisfactory judicial tribunals, and such enjoyment of his property for himself and those who claim under him, as British law would afford him for British property."

1901, A.C. at p. 384.

Sec. of State v. Charlesworth, 1901, A.C. 373.

This explanation of the privileges of exterritoriality was given by the Judicial Committee in the *Zanzibar case* referred to above. The question in dispute arose out of the compulsory purchase of land by the British Government for the construction of the Mombasa railway. Subsequently to the purchase by Charlesworth, Pilling & Co. of certain plots of land, the Government engineers had entered upon them without lawful authority, and had erected certain buildings thereon. The plaintiffs contended that their rights were governed by English law, and that, therefore, the buildings had become attached to the soil and belonged to them. It was decided that as the law of England recognizes the principle that the incidents to land are governed by the law of its site, the Consular Court in administering English law would have regard to that principle in this case, and would, therefore, apply the law of Zanzibar, which is Mahommedan law, and which differed in this respect from English law. The contention that exterritoriality warranted the application of the English law was rejected, except in so far as it recognized the law of the site. "It is

No territorial rights acquired.

* *cf.* Cyprus Order in Council, 14 Sept. 1378.

going a long way beyond the reason for the immunities" granted by exterritoriality, "to say that the moment a plot of land is purchased by an Englishman it is stamped with the same character and is attended by the same incidents that would belong to it if it were actually transferred to England and surrounded by other English land: and to say that his neighbours, who may or may not be British subjects, must have their rights and liabilities governed by its fictitious and not by its actual situation." The grant of exterritoriality does not involve any such conclusion, even if foreigners are included in the jurisdiction granted.

The right claimed was not a personal right, but one which in eye of the English law, attached to the land itself, and therefore fell outside the grant of jurisdiction over his subjects to the King.

The Judicial Committee had already laid down the same doctrine in *McArthur* v. *Cornwall*, with regard to the jurisdiction which is claimed in the Pacific Islands:—"It is true that the Pacific Islanders Protection Act does not and could not give jurisdiction to Her Majesty over land in Samoa; but the Order is clearly framed to give jurisdiction over British subjects in questions affecting land to the High Commissioner's Court, and must be held to do so in all those places in which Her Majesty has been enabled to give it by the assent of the ruling Power." *McArthur* v. *Cornwall*, 1892, A.C. 75.

The area within which the jurisdiction is exercised is coincident with the limits of the country from which the right has been acquired, subject, of course, to any limitation which may be contained in the agreement. The expression "Limits of the Order" is generally used in the Orders in Council to express this. Area within which the jurisdiction is exercised.

The necessity for referring to what must appear obvious arises from the fact that in China (and formerly in Japan) there are specific ports at which alone foreigners have a right to trade and reside—hence called "Treaty Ports"—the far-eastern States having in the past completely closed their territories to foreigners: and an erroneous idea is sometimes found current that the operation of consular jurisdiction is limited to these ports. Treaty Ports.

Within these Treaty Ports certain areas are set apart for the residence of foreigners: sometimes called a "Concession," Concessions and Settlements.

as in the case of the Shameen in Canton, and sometimes a "Settlement", as in the case of Shanghai. These names convey their own meaning: the former being in fact expressly conceded to the British or other Government, carrying with it the right to grant leases: the latter being a right granted to the subjects of the Treaty Power to reside and trade, but in practice not necessarily limited to those subjects. The right to acquire land in perpetual lease from the Chinese Government is attached to the privilege of settlement.

The grant of a Concession or Settlement usually carries with it the right of municipal control. In Shanghai the different settlements save one, have been merged into one Municipality, governed by Regulations, made by the representatives of the different Powers interested. So far as these concern and affect British subjects, they are treated, after they have received the approval of His Majesty, in the same light as "King's Regulations".

[*see* arts. 156 and 157 of the China Order.]

But to however wide an extent such a Municipality may exercise its powers of local self-government, this in no wise affects the general principles of the subject: and these, so far as this branch of it is concerned, are—first, neither the limits of the Concession or Settlement, nor those of the Treaty Ports, are the limits of the consular jurisdiction in the country: secondly, the rights of municipal control do not carry with them, nor their exercise import, any territorial rights of sovereignty, the principles laid down in the *Zanzibar case* being as applicable to the case of a Concession as to the rest of the country.

"Limits of the Order" include territorial waters of oriental State.

But the "limits of the Order" generally include the territorial waters of the foreign country: and here not a little difficulty arises over what I venture to think is the still unsettled law on the subject of these waters. The question is discussed at length in another work.† It is, however, necessary to give a summary of the results of that discussion, in view of certain *dicta* in the *Muscat case*, which I feel compelled, with the most profound respect, to criticise.

† "Nationality," Vol. I, Chaps. 2 & 3: Vol. II, Chap. 5.

41 & 42 Vict. c. 73.
R. v. *Keyn*, 2 Ex. D. 63.
R. v. *Cunningham*, 28 L. J: M.C. 66.

An analysis of the Territorial Waters Act, 1878, and of the decisions in the *Franconia case* (*R.* v. *Keyn*), and in *R.* v. *Cunningham*, leads, as I believe, to the following conclusions. The "territorial waters" are not, but differ entirely from, the "waters of the realm": legislation does not extend automatically

to them as it does to the waters which are part of the realm, although Parliament has ample legislative authority over them, which is occasionally exercised specially, as in the case of the Fisheries (Dynamite) Act, 1877, but more usually in a general manner, as being included within the application of high sea legislation. These waters do not exist without definite claim being made to them, but the right to make such claim is recognized for all purposes, especially for the purposes of defensive legislation, other than that of preventing free navigation. When they are so claimed, they are not limited to what we in England know as the "3-mile limit," but may extend to such distance as the State claiming them considers necessary for its self defence, so long as it exercises the right within the limits of reasonable necessity. The 3-mile limit is the creation of English law, and is not recognised as the universal limit by international or any other law; though it is adopted in the North Sea Fishery Conventions.† Further, the Territorial Waters Act has not in any way altered these principles: for, in spite of the declaration in the preamble that "the rightful jurisdiction" of the Sovereign "extends and has always extended over the open seas adjacent to the coasts . . . to such a distance as is necessary for the defence and security of the dominions," the Act proceeds to enact provisions which are directly at variance with this expression as commonly understood—that it is synonymous with actual inclusion within the realm.

40 & 41 Vict. c. 65.

Nature of territorial waters.

† *cf.* "Nationality," Vol. II, Chap. 9.

In the *Muscat case* in the House of Lords, Lord Halsbury said—"Then comes the other question . . . It is that this act was not done within the territorial waters of the Sultan at all. The authority of *R.* v. *Keyn* was cited in support of this contention of the respondents. It is an unusual occurrence—but it happened—for the Legislature of this country to pass an Act of Parliament to reverse a judgment of a Court. But the Territorial Waters Jurisdiction Act, 1878, affirmed in terms that the judgment of the majority of the Judges in *R.* v. *Keyn* was not the law of England, and declared that the law as in the Act set forth had always been the law of this country."

Carr v. *Fracis, Times*, 1903, A.C. 176.

R. v. *Keyn.* 2 Ex. D. 63.

The reversal of the decision of the majority of the Judges in the Court of Crown Cases Reserved was not enacted in express terms: and there is a well-known principle that "though the Legislature may declare the law by enactment, yet they are not

interpreters of the law, and Courts of Justice are not bound by a mistake of the Legislature as to what the existing law is" (*ex parte Lloyd*). What the existing law is on any point is to be found in the unreversed decisions of the Courts: and the principle has been more than once enunciated, that Parliament cannot reverse a decision of the Courts, though it can relieve from its consequences, and alter the law for the future. *

Ex parte Lloyd 1 Sim. N.S. at p. 250.

The question which now concerns us is the exercise of the King's foreign jurisdiction in the territorial waters of the State in which that jurisdiction has been acquired: and this raises the prior question, What are the territorial waters of such a State?

Throughout the judgments in all the Courts in this case there is an assumption that the 3-mile limit applies to Muscat. In the Queen's Bench, Grantham J. said: "I have no doubt that the 3-mile limit applies to the waters of Muscat, and that within that limit those waters must be considered as under the territorial power and authority of the Sultan." In the Court of Appeal, Williams, L. J. said: "There seems no doubt but that the goods were seized within the 3-mile limit. We assume that a ship within the 3-mile limit bound for Muscat is within the territorial waters of Muscat, and as such within the jurisdiction of the Sultan and his Courts executing his delegated authority, although, if this case depended upon the truth of that assumption, it might be necessary to consider further whether by international law such a vessel must be considered within the jurisdiction of the Sultan for the purpose of legal proceedings." And in the House of Lords, Lord Macnaghten said: The act "was committed within the territorial waters of Muscat, which are, in my opinion, for this purpose as much part of the Sultan's dominions as the land over which he exercises absolute and unquestioned sway."

Carr v. *Fracis, Times* & *Co.*: Q.B.D. 81 L.T. 51.

C.A. 82 L.T. 613.

H.L. 85 L.T. 144.

I have already indicated the difficulty in fully appreciating this decision owing to the fact that there was no reference, from the beginning to the end of the case, to the existence of foreign jurisdiction in Muscat. But putting this on one side, and, if I may say so with great respect, putting also on one side these *dicta*, the decision falls well within the principles enunciated by Cockburn C. J. in the *Franconia case*. There was a claim to exercise jurisdiction by the Sultan over waters adjoining his dominions, within a limit which comes within the accepted limits of territorial waters: and the claim, being for a definite and

cf. p. 8.

R. v. *Keyn*, 2 Ex. D. 63.

*See also on this point, Lord Justice Mellish's remark during the argument in *A.-G. for Hong Kong* v. *Kwok-a-Sing*:—"There is no case that I know of—and it appears to me to involve an important principle—where, even if a declaratory statute is passed after a formal decision of a Court, it has altered that decision. The Court of Appeal has to decide whether the Judge did right at the time he decided the case. The new Ordinance no doubt applies to litigation which is going on at the time: but the question is, does it apply so as to make erroneous a judgment which has been already given?" *A.-G. for Hong Kong* v. *Kwok-a-Sing*, L.R. 2 P.C. at p. 190.

doubt that the same principle must apply to all oriental States where foreign jurisdiction is exercised. But when this has been done, then it follows incontrovertibly, I venture to think, from the fundamental principles of the subject, that the King's foreign jurisdiction can be exercised in those waters to the same extent and for the same purposes as the jurisdiction of the foreign Sovereign is exercised or claimed, but no further.

There is a further curious difficulty in the case: the Muscat Order in Council of 1867, does not include the territorial waters within the limits of the Order: and so far as consular jurisdiction is concerned, the suit was between British subjects, and therefore within that jurisdiction as defined in the Order. As to this another interpretation of the decision may be given, following on the lines already suggested: As the King's jurisdiction is not claimed in the territorial waters of Muscat, the Sultan has reserved the right of legislating for them, and to this extent may be regarded as an independent Sovereign. *cf.* p. 8.

Delegated exercise of Foreign Jurisdiction in other parts of the Empire.

THERE ARE three statutes creating a limited jurisdiction over British subjects in uncivilised countries adjacent to some of the African Colonies, which must here be referred to, as they occupy a definite place in the history of the subject, and serve to indicate one of the earlier stages in the gradual development of the present complete system of foreign jurisdiction. They were passed for the prevention and punishment of offences committed by Her Majesty's subjects within these adjacent territories; and the recital in the preambles was, that, whereas the inhabitants of these territories being in an uncivilised state, offences against the persons and property of such inhabitants and others are frequently committed by Her Majesty's subjects within the said territories with impunity.

Legislation for territories adjacent to certain Colonies.

These statutes are—

24 & 25 Vict. c. 31—the Sierra Leone Offences Act, 1861—in respect of territories adjacent to Sierra Leone.

26 & 27 Vict. c. 35—the South Africa Offences Act, 1863—in respect of the territories in South Africa south of the 25th degree of south latitude, not being within the jurisdiction of any civilised Government.

34 & 35 Vict. c. 8—the West Africa Offences Act, 1871—in respect of territories adjacent to Sierra Leone, Gambia, Gold Coast, and Lagos, and the adjacent Protectorates, not being within the jurisdiction of any civilised Government.

The enactments have merged into the new Orders in Council.

These enactments are still on the statute-book, though it is very doubtful, in view of the Orders in Council which have been since passed, whether they are still operative, the territories having been absorbed either into Colonies or Protectorates. The first two are included in the 2nd schedule of the Foreign Jurisdiction Act, 1890, and may, by s. 17, be revoked or varied by Order in Council. The Orders above referred to, however, do not expressly repeal, or even refer to them.

The territories in West Africa are now absorbed in the following—Sierra Leone Protectorate (1), Lagos Protectorate (2), Gold

(1) Order in Council, 24 Aug. 1895.

(2) „ „ „ 29 Dec. 1887, and 24 July 1901.

Coast Protectorate (3), Northern Territories Protectorate (4), and Gambia Protectorate (5); those in South Africa, in the Bechuanaland Protectorate (6); and Orders in Council have been issued with reference to them, based entirely on the Foreign Jurisdiction Act, reciting that jurisdiction had been acquired in these different territories, and directing how it shall be exercised.

The important point in respect of these Orders is that the jurisdiction is not exercised by the King, but his power is delegated to the Legislatures of the adjacent Colonies, whose names the Protectorates bear. In the case of South Africa, the power is delegated to the High Commissioner for South Africa, and there is an express general reservation of any jurisdiction already existing by statute.

Power delegated to Legislatures of Colonies.

This delegation of power comes strictly within s. 1 of the Act of 1890, which provides that the power acquired shall be exercised in the same manner as in a conquered or ceded colony. There can be little doubt that if territories adjacent to a colony are acquired by cession or conquest, the prerogative of the King would allow him to annex them to a neighbouring colony, or to make them a dependency of any colony, putting them within its legislative sphere, instead of erecting them into a separate colony. The case of Seychelles and Mauritius which were at first joined, and afterwards severed, by Order in Council, is an illustration of power so exercised.

There has been a similar delegation of power to the Governor General of India in Council, in the case of the King's power and jurisdiction in India and in certain territories adjacent thereto, by the Indian (Foreign Jurisdiction) Order in Council, 11 June, 1902.

Delegation of power to Governor General of India.

The powers of the Governor General in Council are defined to be—

(*a.*) to determine the law and procedure to be observed, whether by applying with or without modifications all or any of the provisions of any enactment in force elsewhere, or otherwise:

(*b.*) to determine the persons who are to exercise jurisdiction,

(3) Order in Council, 26 Sept. 1901.
(4) „ „ „ 26 Sept. 1901.
(5) „ „ „ 23 Nov. 1893.
(6) „ „ „ 9 May 1891.

either generally or in particular classes of cases, and the powers to be exercised by them:

(*c.*) to determine the Courts, Authorities, Judges, and Magistrates, by whom, and for regulating the manner in which, any jurisdiction, auxiliary or incidental to, or consequential on, the jurisdiction exercised under this Order, is to be exercised in British India:

(*d.*) to regulate the amount, collection, and application of fees.

II

The Relation of Parliament to the King's Foreign Jurisdiction.

THE FUNDAMENTAL principles of exterritoriality having been considered, and the use of the term the "King's foreign jurisdiction" having been justified, we must next examine the position of Parliament in the matter. So far we have dealt only with the acquisition of the jurisdiction; but the manner of its exercise raises questions of considerable importance: of which the first is—Has the King any constitutional right to exercise the powers which he has obtained in a foreign country without the sanction of Parliament?

Limitation of the prerogative when acts are required to be done in the kingdom.

The treaty-making power is one of the prerogatives of the Crown, whether treaties relate to peaceful or to warlike affairs. The law does not fetter the prerogative with regard to the mere acquisition of rights from, nor the mere incurring of obligations to, a foreign Sovereign. But if either the enjoyment of the right, or the performance of the obligation, involves the performance of any act in the kingdom, though it be the mere giving of an order, then the law of the constitution steps in and the sanction of Parliament is required. The acts of the Sovereign within the realm are so fettered by the constitution that it is difficult to conceive a treaty requiring acts to be done in England affecting personal rights, which, save in one case, the King could carry out without the creation by Parliament of the necessary machinery. Extradition is the instance of this theoretical view of the case

which suggests itself at once. The Act of 1870 does not authorise the King to enter into extradition treaties, but deals with the matter "where an arrangement has been made with any foreign State". It provides the necessary machinery for fulfilling the treaty obligation of surrendering foreigners charged with crimes, and, in so far as it is necessary, for carrying into effect the treaty right in the case of criminals surrendered to England. It is true that political offences are excluded, as also offences not mentioned in the schedule, and this, in a certain sense, limits the prerogative; but the more accurate way of looking at this is to say that Parliament declines to provide the machinery, and therefore renders the obligation in such cases, if undertaken, impossible of fulfilment.

Analogy between Extradition and Foreign Jurisdiction.

The analogy of fact between extradition and foreign jurisdiction is not perfect, because the former necessitates the performance of certain acts in England, whereas by an exterritorial treaty the performance of the acts resulting from the treaty grant is contemplated in the foreign country. If it were possible to imagine the King himself acting in China, for example, on his acquired rights in that country, the doubts as to the legality of his action by constitutional law would perhaps be more difficult to solve. But though the King has representatives in the foreign countries where these rights are acquired, they cannot act of their own mere motion, but only on instructions; and these emanate from England, and, therefore, must be given in a constitutional manner. Such instructions are in fact given by the King in Council: they are, therefore, subject to the constitution, and except in so far as the prerogative otherwise allows, Orders in Council affecting personal rights cannot be issued except as the law provides, whether their scope be territorial or extra-territorial.

The Act is necessary to enable extra-territorial Orders to be issued.

This seems to reduce the question to a somewhat refined point; but it does account, in a not unsatisfactory manner, for the necessary interference of Parliament in a matter which, so far as its existence is concerned, is essentially within the prerogative. The Extradition Act was necessary because the King cannot now give executive commands. The Foreign Jurisdiction Act is necessary because the exercise of the jurisdiction involves the issuing of extra-territorial commands to subjects as well as to officers; and by the common law, the only extra-territorial power of legislation inherent in the Sovereign is in respect of the Crown Colonies, strictly so called.

Prerogative right of legislation for conquered colonies.

For countries which come to the Crown by virtue of conquest or cession the Sovereign may legislate. But the prerogative extends no further. In the case of colonies acquired by occupation, although they come within the King's dominions, he has no such inherent power; and, therefore, in such cases the authority of Parliament is necessary to enable Orders in Council to be issued: as in the case of the Act of 1843,—to provide for the government of the settlements on the Coast of Africa and in the Falkland Islands.

6 & 7 Vict. c. 13.

23 & 24 Vict. c. 121.

This Act was extended by the Coast of Africa Amendment Act of 1860, which was rendered necessary by the fact that other places had been occupied by Her Majesty's subjects. Both these Acts were repealed and replaced by the British Settlements Act, 1887, which deals generally with the subject. The preamble recites that, "Whereas divers of Her Majesty's subjects have resorted to and settled in, and may hereafter resort to and settle in, divers places where there is no civilised government, and such settlements may have become or may hereafter become possessions of Her Majesty, and it is expedient to extend the power of Her Majesty to provide for the government of such settlements."

50 & 51 Vict. c. 54.

In occupied Colonies sanction of Parliament necessary.

The second section provides "that it shall be lawful for Her Majesty the Queen in Council, to establish all such laws and institutions, and constitute such Courts and officers, and make such provisions and regulations for the proceedings in the said Courts and for the administration of justice, as may appear to Her Majesty in Council to be necessary for the peace, order, and good government of Her Majesty's subjects and others within any British settlements . . . ."

The question examined in connexion with foreign jurisdiction.

The question therefore may be put in this way—Is the exercise of the treaty rights of exterritoriality, which have been acquired in virtue of the prerogative, to be regarded as analogous to the exercise of power in the Crown Colonies? If it is, then what is called an "enabling statute" would not be necessary. The better opinion seems to be that this prerogative right of legislation is limited, as the above statutes show, to Crown Colonies, and extends no further: and, therefore, that the acquisition of a similar right of exercising jurisdiction in foreign countries does not dispense with the necessity of an enabling statute. For precisely the same reason, jurisdiction over subjects in countries without regular forms of government, as distinguished

from colonies acquired by occupation or settlement, has never been considered as being within the prerogative, but has always been subject to parliamentary legislation. [*cf.* s. 2 of the Act of 1890.]

In its most concise form, the reason may be thus stated: The comparatively modern rights of exterritoriality have no connexion with, and do not add to, the dominions or dignities of the Crown, with which alone the prerogative has to deal.

The Act which now renders legal the issue in England of Orders in Council regulating the exercise of rights acquired, and thereafter to be acquired, in foreign countries, is known as the Foreign Jurisdiction Act, 1890.

Early Foreign Jurisdiction Acts.

Prior to the passing of this Act, there were already in existence some local Foreign Jurisdiction Acts, which also empowered the Sovereign to issue Orders in Council for the government of his subjects in the countries to which they applied: *3 & 4 Will. IV. c. 93, s. 6,* for China: *6 & 7 Will. IV. c. 78,* for the Ottoman Empire.*

The first general Foreign Jurisdiction Act, *6 & 7 Vict. c. 94,* was passed in 1843, and a complete system was inaugurated by which the Queen was empowered to direct from home the full exercise of her foreign powers. The preamble of the Act recited that, "Whereas by treaty, capitulation, grant, usage, sufferance, and other lawful means, Her Majesty hath power and jurisdiction within divers countries and places out of Her Majesty's dominions: and whereas doubts have arisen how far the exercise of such power and jurisdiction is controlled by and dependent on the laws and customs of this realm, and it is expedient that such doubts should be removed":—

The Act then enacts "that it is and shall be lawful for Her Majesty to hold, exercise, and enjoy" the foreign jurisdiction so obtained.

The nature of the doubts which the Act of 1843 removed.

In Chitty's Statutes there is a marginal "[*sic*]" referring to the "it is lawful" of the enacting clause. At first sight it looks as if the Law Officers of the Crown had settled that the doubts were not well founded. I think, however, that the section may probably be correctly paraphrased thus:—"It is lawful for Her Majesty

* The former enactment was not repealed till it was included in the Statute Law Revision Act of 1874; the latter, said in 1843 to have already become a dead letter, was repealed by the Act of that year.

to hold, and it shall be lawful for Her Majesty to exercise, any power or jurisdiction . . . ."

cf. p. 14.

Parliament, as the Courts are not slow to declare, does not combine omniscience with omnipotence; and statements of law in a statute are not always accepted as accurate. But in this case the Earl of Aberdeen assured the House of Lords that the Bill was not a crude effort of legislation, but had been framed with the utmost care, and for months had been under the consideration of the Law Officers of the Crown; and indeed the preamble is framed in full accordance with constitutional principles. It does not question the treaty-making prerogative. The doubts which existed were not as to the acquisition of the rights of foreign jurisdiction, but only as to how far the exercise of them by the Queen was controlled by, and dependent, on the law of the realm. From the previous discussion I think it will appear that it would have been impossible to say that these doubts were not well founded.

The Act of 1890.

In the Act of 1890, "to consolidate the Foreign Jurisdiction Acts," the doubts are no more expressed, though the phrase "it is and shall be lawful" is retained.

Having legalised the exercise of the foreign power and jurisdiction, the first section proceeds to declare the manner in which it is to be exercised. It is, and shall be, lawful for the King "to hold, exercise, and enjoy" the foreign jurisdiction obtained by "treaty, capitulation, grant, usage, sufferance, and other lawful means, in the same and as ample manner as if [His Majesty] had acquired that jurisdiction by the cession or conquest of territory."

The reference to "cession or conquest."

The reference to cession or conquest is unfortunate. The object with which the words were introduced is, however, made clear by what has been already said. There was a doubt whether rights acquired abroad by the Sovereign in virtue of the prerogative could be exercised in virtue of the prerogative; it had been settled that they could not be so exercised, the authority of Parliament being necessary. But seeing that they were none the less rights springing out of the prerogative, when the authority for their exercise came to be given, it was declared that they should in fact be exercised as the prerogative legislative right was exercised in the Crown Colonies: that is to say, by the Orders of the Sovereign in Council.

The same idea is carried out in s. 5 (2) which gives power to extend the Acts mentioned in the 1st schedule to any country where foreign jurisdiction is exercised; thereupon these Acts are to operate as if that country were a British possession, and as if the King in Council were the Legislature of that possession.* [As to the value of these words *see* p. 82.]

Nevertheless, as I have said, the reference to ceded and conquered territories in a matter of such great delicacy is much to be regretted. The words are misleading to the ordinary British subject who is placed under the jurisdiction, for he is disposed to consider that the Act makes the country in which exterritorial privileges have been acquired to all intents and purposes, so far as he is concerned, a colony of the British Crown. And they are not only misleading to the country by which these privileges have been granted, but have, in strenuous times, been viewed there as insulting to its Sovereign and its Government. Both British residents and nationals attach an undue importance to the words, deeming them to be of direct application. Their meaning is, however, plain. Any jurisdiction which may be acquired in an oriental country is to be exercised in the same way as similar jurisdiction is exercised in a conquered or ceded colony. The comparison is not between the State granting the privileges and a conquered country, but between the method of exercising the privileges in that State and the method of exercising the rights corresponding to them in a conquered country. The principle of the Act examined.

The rights acquired in one oriental country are not necessarily identical with those acquired in another. The jurisdiction of the Courts may be complete, or it may be partial; the law may be administered by an English Judge alone, or he may sit with native assessors; the law to be administered may be English, or it may be native: it may include resident foreigners, or it may not. Whatever the extent of jurisdiction may be, the principle laid down by the first section as to the method of its exercise is, that it is to correspond with the method of exercising the same jurisdiction in a conquered country: that is to say, by Order in Council. The same principle is extended to the details of its exercise. *cf.* p. 26.

* In the few statutes which are extended to places where foreign jurisdiction is exercised by sections in the statutes themselves, a similar expression is generally used. It is not, however, used in s. 88 of the Merchant Shipping Act, 1894, which allows ports in oriental countries to be declared "ports of registry" by Order in Council. *cf.* Section VII, *B*, p. 107. *57 & 58 Vict. c. 60.*

The alternative method of exercising this jurisdiction would have been to declare the British community in these foreign countries subject to the sole jurisdiction of the British Parliament. The objection to this course is, I think, obvious; for even assuming it to be within the provisions of the treaties, the colloquial expression "the British Colony" would come to have a too realistic meaning. Both on the ground of convenience, and also because the rights appertain to the prerogative, legislation by the Sovereign in Council was to be preferred.

The exercise of legislative functions in an otherwise independent State might I think be open to objection, which is avoided by the method actually adopted. It is true that the exercise of the King's jurisdiction involves the exercise of his administrative power, and the Minister has authority to make Regulations for the peace, order, and good government of British subjects in the oriental country. The effect of this provision however can best be judged by the manner in which it is acted on, which will be explained in due course.

cf. Section IX.

The "Municipal Regulations" for the government of a Concession or Settlement, under art. 156 of the China Order, already referred to, are from their nature free from this objection The "International Regulations" (sanitary, police, port, game, or other) which may be made, by agreement between the representatives of the foreign Powers, for the government of the subjects of those Powers, a breach of which constitutes an offence under art. 74 of the China Order, are to be made in conjunction with the Chinese authorities.

cf. p. 12.

But, in spite of this, and although I think the words do not carry the meaning which has occasionally been attributed to them, and although I think that they are accurate, and that the comparison is convenient, there is no doubt that a more explicit form would have been more suited to the occasion. These same words might indeed have been used in the British Settlements Act already referred to; the authority given to the Sovereign there was the same as he has in his own right in conquered or ceded territories; but in that Act both the scope of the authority and the manner of its exercise were defined and provided for. In the case of foreign jurisdiction, as its scope varies in each country, it would be impossible to define it more fully than is, in fact, done in s. 1 of the Act; but with regard to the method

cf. p. 20.

of its exercise, a direct reference to the Sovereign and the Privy Council would, I venture to think, have been more satisfactory.

Another question connected with the powers of Parliament in relation to exterritoriality has now to be considered. Is there any parliamentary authority over British subjects in these oriental countries, in addition to the King's authority by Order in Council? Can Parliament pass Acts with special reference to them?

Authority of Parliament over British subjects in oriental countries.

There are to be found in the old cases far-reaching statements, like that of Dr. Lushington in *the Griefswald*, to the effect that "Parliament may legislate for British subjects anywhere": and there can be little doubt that whenever in old times the question of exterritoriality was discussed, it was assumed to be bottomed in allegiance, and in the general power of legislation over British subjects, as it was said, "anywhere". Even Sir FitzJames Stephen, in his "History of the Criminal Law of England", seems to express a similar view, when he says that the Sovereign's power of legislation in these countries is unlimited.

The Griefswald, Swab. Adm., 434.

[Vol. II, p. 58.]

The whole question of extra-territorial laws has been fully discussed elsewhere,† and it is unnecessary to refer to it again, except very generally. I think that so far as it affects our present subject, the law is as it was stated in the preliminary propositions set out in Section I:—Parliament may legislate for British subjects in these foreign countries in the same way, and subject to the same principles, as it may legislate for British subjects in other countries. How far such legislation can be tested by the Courts is an intricate question to be discussed in the next Section. But we have now to consider whether Parliament has not precluded itself from interfering with the exercise of the King's jurisdiction by the very terms of the Act which authorises its exercise by the King himself: and this apart from the initial question that the rights over his subjects have been acquired by the King in virtue of his prerogative? This question is one which does not lie within the province of the Courts to decide. It is for Parliament itself to determine whether it will keep to what may be termed the arrangement with the Sovereign.

† "Nationality," Vol. II.

cf. p. 4.

In the case of conquered or ceded colonies, the legislative right which belongs by prerogative to the Sovereign does not oust the jurisdiction of Parliament. Lord Mansfield said that they were the King's dominions in right of his Crown, "and therefore necessarily subject to the legislative power of the

Distinction between foreign jurisdiction and conquered or ceded colonies.

Campbell v. Hall, 20 State Trials, 323.

Parliament of Great Britain" (*Campbell* v. *Hall*). But this is evidently because of the "transcendent and absolute" power of Parliament within the King's dominions. But the countries in which the rights of foreign jurisdiction exist are not within the dominions, and therefore the same principle does not apply. I am disposed to think that Parliament has always, and will always, respect what I have called the arrangement. All the details of the Foreign Jurisdiction Act are based on the same principle of sanctioning the issue of Orders in Council by the King, and not of direct legislation. Thus, the 6th section provides for sending persons charged with offences for trial to a British possession: but it does not expressly so legislate, only conferring a power on the King to authorise by Order in Council the Consular Court to send the prisoner for trial, and the Colonial Court to hold the trial. And the same is true of the 5th section, which enables the King to apply certain specified statutes to the foreign countries in question: and of the 7th, which sanctions deportation to colonies to be specified by Order as places where punishment may be inflicted.

Statutes containing sections extending them to foreign jurisdiction.

There are a few instances of direct legislation for subjects in these countries. But in these Acts the same principle has usually been adopted, of sanctioning their extension by the King by Order in Council. They are the following:—

44 & 45 Vict. c. 69. *47 & 48 Vict. c. 31.* *53 & 54 Vict. c. 27.*

The Fugitive Offenders Act, 1881: by s. 36; the Removal of Prisoners and Criminal Lunatics Act, 1884: by s. 15; the Colonial Courts of Admiralty Act, 1890: by s. 12; and

57 & 58 Vict. c. 60.

The Merchant Shipping Act, 1894: by s. 88, which enables ports of registry to be created in these countries for British ships: and also by s. 737, which allows officers to be appointed to perform the functions of consular officers under the Act, in places in oriental countries where there is no such officer.

48 & 49 Vict. c. 49. *52 & 53 Vict. c. 52.* *56 & 57 Vict. c. 5.*

The exceptions are the Submarine Telegraph Act, 1885, applied generally to all places where the King has jurisdiction, by s. 11; the Official Secrets Act, 1889, applied to British officers and subjects everywhere, by s. 6 (1); and the Regimental Debts Act, 1893, which is applied directly by s. 30 (3). These Acts are however of a more general nature than the others.

55 & 56 Vict. c. 6.

The provision referring to foreign jurisdiction in s. 3 of the Colonial Probates Act, 1892, operates only in the United Kingdom.

merely extending the benefit of the Act to probates and letters of administration granted by the Consular Courts. Yet even here an Order in Council is required in respect of each country to the Consular Courts in which the Act is to apply.

The practice of Parliament, therefore, appears to coincide with the principle which I have suggested as constitutional.

There is indeed warrant of the highest authority on such matters for applying the term "unconstitutional" to legislation which should ignore this principle. In precisely analogous circumstances, legislation for the self-governing colonies in matters of domestic concern, Sir Erskine May, in the chapter on the Power and Jurisdiction of Parliament in his "Parliamentary Practice" gives the following note:—"Parliamentary legislation on any subject of exclusively internal concern to any British Colony possessing a representative Assembly, is, as a general rule, unconstitutional. It is a right of which the exercise is reserved for extreme cases, in which necessity at once creates and justifies the exception."—Lord Glenelg (Parl. Papers, 1839 [118] p. 7.) [Chapter II.]

We have now established the complete chain which supports the King's foreign jurisdiction.

An Englishman in China—to take a concrete case: a certain amount of power which the Emperor of China would otherwise exercise over him ceded to, and accepted by the King of England: all other sovereign powers not ceded remaining with the Emperor. The extent of the ceded powers defined by specific articles of the Treaty of Tientsin—or, more strictly speaking, by the specific articles in the group of Chinese treaties concluded with other Powers, under the most-favoured-nation clause.

The ability to accept these powers dependent on the prerogative of the Crown, and the right to exercise them vested in His Majesty by the general enabling Act of the British Parliament. The extent to, and the manner in which, they will be exercised, declared by the King in Council in various Orders issued from time to time.

III

The Relation of the Courts to the King's Foreign Jurisdiction.

Position of British subject *vis-à-vis* British Government.

WE COME now to an important point which follows naturally on the discussion in the preceding Section. For convenience it may be thus stated:—What is the position of a British subject in an Oriental country *vis-à-vis* his own Government? I say that the question may be stated thus for convenience, because what has gone before shews that the British subject has nothing to do with the Sovereign of England, except through the intermediate action of the Sovereign who has granted the privileges by treaty. When jurisdiction is conferred on the King over foreigners, as in the case of Zanzibar, precisely the same question arises, the accurate form of which is:—What is the position of the person over whom the jurisdiction is exercised *vis-à-vis* the Sovereign exercising the jurisdiction?

Seeing that the jurisdiction exists by treaty, and is limited and defined by treaty, it is possible to imagine the exercise of some power which depasses the limits and definitions. This, evidently, gives cause of complaint to the Sovereign of the country;* but does it not also give a cause of complaint to the person against whom it is exercised? And if it does, what is his remedy?

If it is wrong *quoad* the foreign Sovereign because the grant of jurisdiction has been exceeded, it must also be wrong *quoad* the person over whom the jurisdiction is claimed, because it is non-existent.

One remedy lies on the surface; he may seek the protection of the Government of the country, and request its intervention.

But is there not another remedy, or rather, some means by which the validity of the jurisdiction claimed in the Order in

* *See* the judgment in *the Laconia*, in which this proposition is discussed: *post*.

Council may be tested? If the case arose before a Court, could he not raise the question for decision? Or, if it were a case of exercise of power on the part of the Executive wrongfully authorised by the Sovereign, is there not a wrong done for which he may claim redress, the plea of the Sovereign's command being bad in law? Shortly, in whatever form the question is raised, have the English Courts, whether Consular or other, any power of supervision over the exercise of the King's foreign jurisdiction?

The remedy where Orders in Council are at variance with the treaty.

On general principles, it would seem that the Court itself, before which the matter comes, could enquire into its own jurisdiction, and could pronounce on the validity of the Order in Council pretending to confer the jurisdiction claimed to exist.

There appears to be no doubt that the Courts in any colony may be called upon to adjudicate upon the validity or constitutionality of any Act of the Colonial Parliament.*

The argument is that if the colonial law is at variance with the provisions of an Act of Parliament extending to the colony in question, of the two commands, the Judges would be bound to obey that of the higher authority—the Imperial Parliament.

And so in the case of the Consular and other Courts: so far as the Order in Council is concerned, if it exceeds the provisions of the treaty, the Sovereign's command must be over-ridden by the general law. The only power which the Sovereign is permitted to exercise in a foreign country by means of an extra-territorial command is the power obtained by treaty. And therefore in this case also there are two commands: the Sovereign's, as expressed in the Order in Council, and that of the common law. And as before, the higher command—that of the law—must prevail.

In the case of *The Fox*, a precisely analogous question was considered by Sir W. Scott: "What would be the duty of the Court under Orders in Council that were repugnant to the law of nations?" It was contended on one side, that the Court would at all events be bound to enforce the Orders in Council; on the other, that the Court would be bound to apply the rule of the law of nations adapted to the particular case, in disregard of the Orders in Council. The learned Judge declared that the Court

The Fox, Edw. Adm. 311.

* Dicey on the "Law of the Constitution," p. 100.

would be bound, if such an occasion arose, to administer the law of nations. The peculiar nature of the "higher command" in this case introduced, it is true, the relations between the Government and foreign Powers; but the principle, it is submitted, is precisely analogous to that applicable to conflicts between the Colonial and Imperial Legislatures: and both seem to be analogous to the question in hand.

The Act itself, in s. 12, leaves the matter free from doubt.

Provisions of s. 12 of the Act of 1890.

That section provides, in the first place, that if any Order in Council made in pursuance of the Act is repugnant to the provisions of any Act of Parliament extending to British subjects in any foreign country, or to any Order made under the authority of any such Act, it is to be read subject to that Act or Order, and is to be void to the extent of the repugnancy. Secondly, that an Order in Council is not to be deemed void on the ground of repugnancy to the law of England, unless it is repugnant to the provisions of some such Act or Order.

[*see* the examination of ss. 4 and 12, in Section V, *post.*]

These provisions, which will be examined at greater length in due course, permit all Courts, including the Consular Courts, to test, should occasion arise, the validity of any Order in Council. The provisions of s. 4, which enable the Secretary of State to give a decision on certain points connected with foreign jurisdiction, may, however, have some bearing on the question; but this also must be postponed for the present.

So far we have only considered the repugnancy of the Order in Council to the treaty. A far more difficult point remains to be considered. An Act of Parliament itself may be repugnant to the treaty; or may authorise Orders in Council to extend to foreign countries a statute which is repugnant to the treaty.

[*see* the examination of this question in Section X.]

The point involved in the hypothesis will be considered in due course; but let us assume for the moment that deportation of prisoners is not warranted by treaty, and that, therefore, the general deportation sections of the Foreign Jurisdiction Act, and the special provisions for deportation in the statutes which may under that Act be applied to foreign countries by Orders in Council, exceed the power granted by the oriental Sovereign.

I have spoken with all becoming reverence of the omnipotence of Parliament: but I propose to enquire whether it is really true to say, with Lord Coke, of the power and jurisdiction of the Parliament, that "it cannot be confined either for causes or

persons within any bounds"; and with Lord Fortescue, "*si jurisdictionem spectes, est capacissima?*"—whether there are not, in fact, some broad limitations to this omnipotence; and whether, if these limitations are overpassed, the Courts may not disregard the provisions of the statute?—whether, in short, there is such a thing as an Act which is *ultra vires* the Parliament?

The limitation to the omnipotence of Parliament.

There are scattered through the old Reports many expressions of judicial opinion that the common law is superior to an Act of Parliament. The "sages of the law have left us examples of what in their view a statute is impotent to command. Parliament, they tell us, may not permit a man to commit adultery, nor forbid that even in extreme necessity alms should be given, or make a man a judge in his own cause."* Two or three quotations from judgments will be sufficient for my purpose.

In 1623, in the case of *Day* v. *Savadge*, Lord Hobart, in pronouncing against a certain alleged custom of the City of London, said, "By that which hath been said it appears, that though in pleading it were confessed, that the custom of certificate of the customs of London is confirmed by Parliament, yet it made no change in this case, both because it is none of the customs intended, and because even an Act of Parliament, made against natural equity, as to make a man judge in his own case, is void in itself; for *jura naturæ sunt immutabilia*, and they are *leges legum*." Two centuries later Sir William Scott, in the case of *The Fox*, continuing the argument already quoted as to the powers of the Court in the case of Orders in Council, said, "The constitution of this Court, relatively to the legislative power of the King in Council, is analogous to that of the Courts of Common Law relatively to that of the Parliament of this kingdom. Those Courts have their unwritten law, the approved principles of natural reason and justice—they have likewise the written or statute law in Acts of Parliament, which are directory applications of the same principles to particular subjects, or positive regulations consistent with them, upon matters which would remain too much at large if they were left to the imperfect information which the Courts could extract from mere general speculation. What would be the duty of the individuals who preside in those Courts if required to enforce an Act of Parliament which contradicted those

Day v. *Savadge*, Hobart, 87.

The Fox, Edw. Adm. 311. *cf.* p. 29.

* Hearn's "Government of England," p. 49.

The limitations to the omnipotence of Parliament.

principles, is a question which I presume they would not entertain *a priori*, because they will not entertain *a priori* the supposition that any such case will arise. In like manner this Court will not let itself loose into speculations as to what would be its duty under such an emergency, because it cannot, without extreme indecency, presume that any such emergency will happen; and it is the less disposed to entertain them, because its own observation and experience attest the general conformity of such orders and instructions to its principles of unwritten law."

Lee v. *Bude Ry. Co.*, L.R. 6 C.P. at p. 582.

Sixty years later, in 1871, in *Lee* v. *Bude and Torrington Railway Company*, Willes J. said, "The argument resolves itself into this, that Parliament was induced by fraudulent recitals (introduced, it is said, by the plaintiffs) to pass the Act which formed the company. I would observe, as to these Acts of Parliament, that they are the law of this land; and we do not sit here as a Court of Appeal from Parliament. It was once said—I think in Hobart—that if an Act of Parliament were to create a man judge in his own case, the Court might disregard it. That *dictum*, however, stands as a warning, rather than an authority to be followed. We sit here as servants of the Queen and the Legislature. Are we to act as regents over what is done by Parliament with the consent of the Queen, Lords, and Commons? I deny that any such authority exists. If an Act of Parliament has been obtained improperly, it is for the Legislature to correct it by repealing it; but, so long as it exists as law, the Courts are bound to obey it. The proceedings here are judicial, not autocratic, which they would be if we could make laws instead of administering them." Finally, in 1889, in *Russell* v. *Cambefort*, in which the jurisdiction of the Courts in the case of a foreign partnership was considered, Cotton L. J. said, "In construing the rule, we must have regard to what Parliament has the power to do, and, in my opinion, we should be wrong in construing it as giving jurisdiction against those who are in no way subject to the English Parliament." And Lopes L. J. said, "The rule cannot have a greater effect than an Act of Parliament, and Parliament itself could not give such jurisdiction."

Russell v. *Cambefort*, 23 Q.B.D. 526.

It is probable that this short sentence exactly hits the mark; there are some things—beyond the making a man a woman—which Parliament cannot do. And if it does what it cannot do, it does what it has no right to do, and the remedy must lie

in the Courts. It may not always be possible to adopt Sir William Scott's, and Lord Justice Cotton's convenient method of construction: that what has been done is to be construed by the light of what may be done. It was possibly an amplification of the rule laid down by Blackstone, that "when some collateral matter arises out of the general words and happens to be unreasonable, the Judges are in decency to conclude that this consequence was not foreseen by the Parliament, and are to expound the statute by equity, and only *quoad hoc* to disregard it." It smoothed away the difficulties in *Russell* v. *Cambefort*, but it is impossible to apply it where the question whether Parliament has the power to do what it has claimed to do, demands a categorical answer, yes or no.

The limitations to the omnipotence of Parliament.

Russell v. *Cambefort*, 23 Q.B.D. 526.

Nor is there anything very alarming in the declaration that the Judges are the "servants of the Queen and the Legislature," except perhaps its unsoundness. It forces the attention back to first principles, and the first among them is that by the constitution, the Government of England is in effect a trinity of independent powers—the Legislature, the Executive, the Judiciary—linked only by the fact that the Sovereign is the head of each unity. The Legislature decrees; the Executive acts; the Judiciary interprets. It is true that, in some measure, the lines of division are not hard and fast. The House of Lords exercises judicial functions; some maintain that in the wide power of interpreting the common law, the Judiciary become in effect law-makers—that there is such a thing, in fact, as judge-made law. But, though the functions may somewhat overlap, there is nothing which makes one branch of the Government subservient to another. The natural sequence of events arranges them in the above order. The thing to be interpreted naturally comes into being before the necessity of interpretation. So too the Legislature may legislate in respect both of the Executive and of the Judiciary, chiefly because they are made up of persons within the territory which is subject to the Legislature. But so also may it legislate in respect of the prerogatives of the Crown. But neither does this power make the Sovereign, nor does the former power make the Judiciary, "servants of the Legislature." Nor does the function allotted to the Judiciary in the State, interpretation, put it necessarily in a lower place. It has to declare whether what is done in the State is right or wrong; and if there is a limit to the power of Parliament, and that limit

The functions of the different branches of the Government.

The limitations to the omnipotence of Parliament.

is exceeded, it seems to follow inevitably that the Courts may say so.

Whether there is such a limit, and if there is what it is, are two very different questions. It is quite certain that neither the old judgment in Hobart, nor the comparatively recent one of Sir William Scott are sound. Their appeals to natural justice, to the immutable laws of nature, are too high-flown; the Judges know of no such code. It is quite certain too that the Courts could not enquire into the question whether a private Act of Parliament had been obtained by fraud, the case before the Court of Common Pleas. But is it not equally certain that if a statute made gambling by German subjects at Monte Carlo a criminal offence punishable in England, and authorised arrests by Monegascan policemen for the purpose of deportation to England, then that such a statute would be beyond the powers of Parliament; and further that the Court of Crown Cases Reserved would not be slow to say so?

The illustration is, of course, absurd and far-fetched; but if Parliament is really omnipotent, it has the power to pass such an Act. The only constitutional check to prevent the wisdom of the Legislature enacting such and similar provisions would be the "practically extinct" veto of the Crown.

[Vol. II, p. 37.]

Sir FitzJames Stephen, in his "History of the Criminal Law of England," puts a similar case, of Parliament passing an Act to the effect that the whole criminal law of England should apply to the conduct of Frenchmen in France, and that the Central Criminal Court should have jurisdiction over all offences against that law committed in France. Such a law, the learned author says, the Judges could not refuse to put in force. In effect such a law would profess to regulate men's conduct in another country, but the sanction being territorial, the result would be equivalent to saying that if persons do certain things abroad, and afterwards come to this country, they will be punished for what they have done. This is in fact one of the grounds on which extra-territorial laws are usually defended. Yet I cannot help thinking that such Acts are not within the power of Parliament; that there is in fact a very visible limit to its omnipotence; and that an efficient check lies dormant in the Courts to keep even "the King, Lords and Commons in Parliament assembled" within the limits of that law which is specially applicable to them.

cf. "Nationality," Vol. II, Chap. III.

To revert to the question in hand. In the matter of extradition the law as to variances between the Act and the treaty has been discussed in two cases.

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The first is *R.* v. *Wilson*. The Extradition Act is drawn very broadly, and sanctions, seeing that it does not forbid, the surrender of British subjects. But by the treaty with Switzerland, as by most others, the subjects of either contracting State are not to be surrendered. In the case, an extraditable offence had been committed by a British subject in Switzerland, and it was argued that the Act sanctioned his extradition. The Court held that the question was to be decided by the terms of the treaty and not by the statute. Cockburn C. J. said, "The Order in Council must be co-extensive with, and limited by the treaty, for otherwise our municipal legislation* might be at variance with the terms which the two countries have arranged between themselves—a proposition absurd on the very face of it. I must therefore take it that the Order in Council has embodied the terms of the treaty, and that the Act of Parliament is only applicable so far as it can be applied consistently with the terms and conditions therein contained." And Mellor J. said, "It is a matter of positive bargain between the two countries." And Field J. said, "The Act proceeds upon the fact that there has been some arrangement between this country and a foreign State, and yet we are asked to disregard this arrangement altogether, and to hold that the Act applies in its entirety, although the arrangement itself contains an exception and condition."

R. v. *Wilson*, 3 Q.B.D. 43.

Variances between the Act and the treaty in extradition cases.

The point here decided is of the simplest.§ The Act is an enabling Act, and it is drawn sufficiently wide to permit an

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* "Legislature" in the report.

§ It may be open to question whether the same principle applies when the statute has been passed merely to give effect to a treaty, and is not a general enabling statute. The Hongkong Ordinance, No. 7 of 1889, was passed to carry out the obligations which England had undertaken towards China in the extradition article (*xxi*) of the Treaty of Tientsin. It is possible that other considerations might arise in the event of a difference between the treaty and the ordinance.

In this connexion, it should be noted that the Magistrate holds a preliminary enquiry only in extradition matters, and not a trial. The question of variance, therefore, would not properly be taken before him (*see* the observation of the Chief Justice quoted in the report of *A.-G. of Hong Kong* v. *Kwok a Sing*, in the Privy Council).

A.-G. of Hong Kong v. *Kwok a Sing*, L.R. 5 P.C. 179.

arrangement for the mutual surrender of subjects to be carried out, should it be made. But if the case, whether it be as to the person whose extradition is demanded, or as to the offence committed, does not fall within the terms of the arrangement, how is it possible for the State which is a party to the arrangement to ask for the offender to be surrendered in spite of it?

re Counhaye, L.R. 8 Q.B. 410.

The converse was decided in *re Counhaye*.* If the arrangement with the foreign State includes an offence which is not included in the schedule of extraditable offences in the statute, the Courts, for precisely the same reason, will decline the request for extradition.

General proposition as to variances between the statute and the treaty.

The general proposition, in its application to foreign jurisdiction as well as to extradition, and to all other cases in which the point may arise, may be thus stated:—The Courts will have regard to the treaty in the first place, and will only regard the statute if the exercise of the right in question is either expressly forbidden, or does not fall within it. The statute will be treated as what it in fact is, an enabling Act: an Act to enable, the law not permitting it otherwise, the Sovereign to exercise rights, or fulfil obligations, in this country, which he has acquired or entered into with foreign Sovereigns. If it does not enable entirely, the entire right cannot be exercised, nor the entire obligation fulfilled.

NOTE.—It is perhaps unnecessary to point out that the limitations to parliamentary omnipotence which I have dealt with in the text are, if they exist, very different from those which the old Judges contended for. It does not need the declaration the Act *6 George III. c. 12*, to support the contention that the Imperial Parliament has full power to make laws for the whole of the King's dominions. But it needs something more than reliance on a vague quotation about Parliament legislating for British subjects anywhere, to test the true position of Parliament with regard to British subjects in a country which has sanctioned their exterritoriality. Directly one reads the statement that "within its own local bounds the sovereign power of each nation is absolute so long as it subsists," the query

* The schedule to the Extradition Act includes "crimes by bankrupts against bankruptcy laws". The Court held that with regard to the other crimes enumerated in the schedule, accessories before the fact would be included, because they are now liable to be indicted as principals, and were always liable to be punished as principals; the provision in question dealt with crimes by bankrupts, but as this could not be held to include persons who assist others in committing crimes against those laws, but who are not themselves bankrupts.

comes uppermost—If there are local bounds, what is the true limit to extra-territorial legislation?

I have dealt with the subject of extra-territorial laws so fully in another work, that I have here omitted most of the Note which was originally written to this Section. It will be useful, however, for the sake of clearness, to link the two discussions together.

In the 2nd. Volume of "*Nationality*", I was concerned chiefly with the question whether Parliament could legislate for foreigners abroad. The difficulty of the matter arose from the fact that the tendency of some learned Judges seemed to be to insist upon a rule of construction, the effect of which is to push the fundamental question into the background. The effect of that rule cannot be stated otherwise than as follows:—Words, however plain, must be bent to mean what they apparently do not mean, and what Parliament has said be construed by the light of what Parliament may say. But even Cotton L. J., who was the chief exponent of the doctrine, recognised the existence of a limit to parliamentary omnipotence: one of his propositions being that Parliament *has no right* to legislate in respect of foreigners who are beyond the limits of the Empire.

cf. "Nationality," Vol. II, Chap. III.

But the question under discussion in my book on "*Nationality*" does not exhaust the subject, for we find it arising here in another form: a form moreover which does not admit of a solution by the aid of a convenient rule of construction. Such a solution might be useful in a case where the language of the statute under discussion was doubtful, and not on the face of it inconsistent with the treaty. But in the present subject we are compelled to consider the broad question—Supposing that a statute, either by its own direct provisions, or by the principles it lays down on which Orders in Council may be issued, exceeds the treaty, are the Courts justified in ignoring it, and restricting its operation strictly to the limits created by the treaty? I believe the answer can only be that given in the text.

The subject of extra-territorial legislation, discussed briefly in the foregoing Note, has an important bearing on consular jurisdiction, owing to the fact mentioned at the commencement of this Section, that there are executive officers in the country by means of whom such legislation could, if it were necessary, and the law valid, be carried out. Its validity is, therefore, a question of great moment.

There are three forms of extra-territorial legislation in respect of which the question of its validity might arise:—

(*a.*) Direct legislation applicable to British subjects in oriental countries, which, by ignoring the King's right to legislate by Order in Council may be termed "unconstitutional."

cf. p. 27.

(*b.*) Direct legislation which exceeds the limits of the treaty, and which is not to be justified as jurisdiction acquired by "sufferance or other lawful means."

(*c*.) Direct legislation of a similar nature, which imposes a duty of carrying out its provisions on the executive officers in the oriental country.

The last two cases fall within the meaning of "unconstitutional" as used in the first case: but they contain features special to themselves which require consideration.

The second case brings us round once more to the principle which is fundamental to the whole matter—The basis of foreign jurisdiction is not the right of Parliament "to legislate for British subjects anywhere". For if it were, the treaty would drop out of consideration altogether.

If the second form of legislation is bad, *a fortiori* the third form is bad also. It is bad also as being beyond the power of Parliament on another ground. There can be little doubt that the validity of extra-territorial legislation for which some Judges have contended, and which I believe to be sound doctrine, is limited to such laws as are of imperfect sanction, not being executable unless and until the person who has disobeyed them comes within the jurisdiction. The principle established in the case of *the Le Louis*, that legislation authorising executive action beyond the realm is not within the power of Parliament to pass, and will not be enforced, has, I think, never been contested.† The existence of executive officers in the foreign country who can carry out the law cannot remedy its inherent defect. The fact that there is a jurisdiction in the oriental country would not bring such executive action within the doctrine on which the validity of extra-territorial legislation depends, the extreme limit of which has been discussed in another work,§ and remove it from the criticism of such laws with which all the decisions abound.

the Le Louis, 2 Dodson, 239.

†*cf.* "Nationality," Vol. II, p. 122.

§*cf.* "Nationality," Vol. II, Chaps. III and IX.

The special questions which arise in connexion with the extra-territorial provisions of the statutes relating to foreign marriages, foreign wills, and foreign oaths and evidence, have also been considered in the same work, and need not be further dwelt on here.

cf. "Nationality," Vol. II, Chap. VI.

The question whether the extra-territorial legislation of England is properly applicable to British subjects in an oriental country, either specially or generally, under the Order in Council applying the whole body of English law, seems to depend on other considerations, and will be dealt with in due course.

cf. Section X.

IV

Jurisdiction by Sufferance.
Most-favoured-nation Treatment.

IN THE previous Sections exterritoriality has been considered solely as the outcome of a treaty to which it is entirely subservient, not merely from the point of view of the Sovereign of the country in which the rights are exercised, but also from that of the persons who are subject to them. We must now consider the question from the less strict point of view of rights acquired by usage or sufferance.

The Foreign Jurisdiction Act recites that the King has jurisdiction within divers foreign countries by "treaty, capitulation, grant, usage, sufferance, and other lawful means." The first three clearly fall under the general head of "treaty": the last three may conveniently be grouped under the head of "sufferance". Practically there are no other lawful means of acquiring such jurisdiction: for the next step is obviously acquisition of territory, by one of three means—occupation, either by the Sovereign, or by his subjects on his behalf: cession, which includes merger in right of the Crown†: and conquest. So far as I am aware, there is no country in which the exercise of foreign jurisdiction has ever depended entirely on sufferance, but it seems probable that it enters largely into the creation of Protectorates, at least in their early history.

† *cf.* "Nationality," Vol. I, Chap. V.

Jurisdiction acquired by sufferance.

Yet sufferance holds an important place in the general scheme of foreign jurisdiction. The most cursory glance at the treaties will show how slight, indeed how incomplete, a foundation the articles of those treaties are for the very extensive structure of jurisdiction which has been raised upon them. Speaking very generally, the consular jurisdiction treaties do not express much more than this—that questions of rights arising between British subjects are to be determined by the British authorities: that British subjects who commit crimes in the country are to be punished by those authorities: that natives who commit crimes

against British subjects are to be punished by the native tribunals according to native laws: and that grievances by British subjects against natives, and by natives against British subjects, are to be stated to the British Consul, who is to endeavour to arrange them amicably, or failing that, to decide them equitably with the assistance of the native authorities. These are the principal provisions of the Treaty of Tientsin, and the treaties with other States do not differ from them, except in one particular, in any material respect.

The Orders in Council, on the face of them, go beyond the treaty.

The most cursory glance at any of the Orders in Council will in its turn show how complete is the jurisdiction which is claimed and exercised over British subjects. The Consular Courts are in fact the Courts of England in little, exercising, with some few exceptions, the territorial jurisdiction of those Courts in all its branches—Admiralty, Bankruptcy, Lunacy, in addition to the ordinary civil jurisdiction; and also in respect of some special statutory offences, in addition to the ordinary criminal jurisdiction, such as offences against the Patents and Trade-marks Acts. There is also a contemplated jurisdiction over foreigners resident in the country, exerciseable subject to certain conditions.

cf. Section XI.

A detailed examination of these various jurisdictions will be made in a subsequent Section: for the present it is sufficient to note the want of correlation which is apparent between the rights actually granted and the rights actually exercised. The explanation is that much of the jurisdiction claimed is in excess of the treaty grant, and therefore must depend for its validity on sufferance. Whether it is right that it should be so, or whether it is wrong: how shadowy soever the doctrine may be, the fact remains, and the Courts are bound to deal with it as they find it: and indeed the doctrine has acquired a certain definiteness and precision owing to the way in which it was treated by Dr. Lushington in the case of *the Laconia*. But before examining that judgment it will be advisable, owing to the practical importance of the question, that the legal position which requires to be re-inforced by sufferance should be once more stated.

The Laconia, 2 Mo. P.C. (N.S.) at p. 181.

Position of sufferance in the legal aspect of the question.

If, under ordinary conditions, it is beyond the power either of the Sovereign or of Parliament to legalize the commission of any act in any foreign country which is wrongful by the law of that country, or which requires the authority of that law, it must also be beyond the power either of the Sovereign or of Parliament to

legalize its commission in a country where exterritorial privileges have been granted, unless it be in fact one of the privileges. In other words, it is not competent, either for the Sovereign or for Parliament, to tack on to the powers with which the Consular Court and officers are invested in virtue of the treaty, other powers which do not exist in other foreign countries, and are not to be found among the treaty privileges. Such powers must find their justification, not in the mere fact that they are claimed, but in "sufferance" considered as a legal principle.

Dr. Lushington's judgment in the case of *Papayanni* v. *The Russian Steam Navigation Co.*—"*The Laconia*," is as follows:— "In considering what power and what jurisdiction was conceded to Great Britain within certain portions of the Turkish dominions, it must always be borne in mind that in almost all transactions, whether political or mercantile, a wide difference subsists in the dealings between an oriental and a Christian State and the intercourse between two Christian nations. This is an undoubted fact. Many of the reasons are obvious, but this is not the occasion for discussing them. It is sufficient for us to know and acknowledge that such is the fact. It is true beyond all doubt that, as a matter of right, no State can claim jurisdiction of any kind within the territorial limits of another independent State. It is also true that between two Christian States all claims for jurisdiction of any kind, or exemption from jurisdiction, must be founded on treaty, or engagements of similar validity. Such indeed were the factory establishments for the benefit of trade. But though, according to the laws and usages of European nations, a cession of jurisdiction to the subjects of one State within the territory of another would require, generally at least, the sanction of a treaty, it may by no means follow that the same strict forms, the same precision of treaty obligations, would be required or found in intercourse with the Ottoman Porte. It is true, as we have said, that if you enquire as to the existence of any particular privileges conceded to one State in the dominions of another, you would, amongst European nations, look to the subsisting treaties; but this mode of incurring obligations, or of investigating what has been conceded, is a matter of custom and not of natural justice. Any mode of proof by which it is shown that a privilege is conceded is, according to the principles of natural justice, sufficient for the purpose. The formality of a treaty is the best proof of

The Laconia, 2 Mo. P.C. (N.S.) at p. 181.

Meaning of "sufferance."

the consent and acquiescence of parties; but it is not the only proof, nor does it exclude other proof; and more especially in transactions with oriental States. Consent may be expressed in various ways; by constant usage permitted and acquiesced in by the authorities of the State, active assent, or silent acquiescence, where there must be full knowledge."

Its application to jurisdiction over foreigners.

The materials for deciding whether the jurisdiction claimed existed in fact were statutes, Orders in Council, and other documents: and having considered them, the judgment proceeds:—"We entertain no doubt that so far as relates to the Ottoman Government, no objection is tenable against the exercise of jurisdiction between British and Russian subjects," which was the jurisdiction exercised and questioned in the case. "Indeed, the objection, if any such could be properly urged, should come from the Ottoman Government rather than a British suitor, who, in this case, is bound by the law established by his own country. The case may, in some degree, be assimilated to the violation of neutral territory by a belligerent: the neutral State alone can complain. We think, looking at the whole of this case, that, so far as the Ottoman Government is concerned, it is sufficiently shown that they have acquiesced in allowing to the British Government a jurisdiction, whatsoever be its peculiar kind, between British subjects and the subjects of other Christian States. It appears to us that the course was this: that, at first, from the total difference of religious habits and feelings, it was necessary to withdraw as far as practicable British subjects from the native Courts: then, in the progress of time, commerce increasing, and various nations having the same interest in abstaining from resort to the tribunals of Mussulmans, *etc.*, recourse was had to Consular Courts: and by degrees the system became general.

"Of all this the Government of the Ottoman Porte must have been cognizant, and their long acquiescence proves consent."

This part of the judgment has been given in its entirety, as it touches on several points of interest. The one which concerns us at the present moment is the very explicit statement of the meaning of jurisdiction acquired by "sufferance". First, there must be "full knowledge" in the Sovereign or Government of the country: and then there may be either "active assent," or "silent acquiescence".

It is difficult, however, to state with precision what the legitimate inference from the decision is as to the amount of publicity

in the exercise of the jurisdiction claimed, from which the Court will infer the essential knowledge of that exercise in the Government of the oriental State. The jurisdiction granted by the Treaty of Peace concluded at the Dardanelles in 1809, did not extend in civil matters beyond the settlement of disputes between British subjects. The jurisdiction to decide questions arising between British subjects and the subjects of other Christian Powers was given to the Consuls by the statute *6 & 7 Will. IV. c. 78* [1836], which enabled Orders in Council to be issued regulating its exercise. This statute was repealed by the first Foreign Jurisdiction Act of 1843, which was construed as conferring in its more general terms this same jurisdiction, under which Orders in Council were also to be issued. There is nothing in the report of the case to show that the various documents referred to had been communicated to the Government of the Porte: if they had been, *cadit quæstio*. But assuming that they had not been so communicated, the Judicial Committee would seem to have adopted the principle that the exercise of a jurisdiction over foreigners—whether by their own consent or with the consent of their Governments is for the present immaterial†—publicly for 30 or 40 years could not have taken place without the Government of the country being cognizant of it; and this extension of the jurisdiction of the Consular Courts not having been objected to, acquiescence was inferred.

Decision in *the Laconia* considered.

cf. Section X.

†[This question is discussed in Section X.]

In applying this principle to other cases the question of time may obviously become important. How far the Courts would go in upholding a jurisdiction recently assumed is a question which must be left to be determined when it arises: it is sufficient for the present purpose to emphasise the last sentence from the judgment quoted above:—"Of all this the Government of the Ottoman Porte *must* have been cognizant, and their *long* acquiescence proves consent."

In this discussion the subsequent enquiry in the judgment whether the Consular Court had full Admiralty jurisdiction, or only a special jurisdiction *in rem*, is obviously immaterial: because the broad question alone had to be decided in the first part of the judgment, whether the Porte had suffered jurisdiction to be exercised at all between British subjects and foreigners. The subsidiary question was this: such jurisdiction having been suffered, did it include the power for the Court to decide the case then before it.

Sufferance may also have to be appealed to in respect of the jurisdiction exercised over British subjects—whether, for example, the Consular Court has power to decide the question in issue between two British subjects: such a question as may be in-

Hart v. *Gumpach*, L.R. 4 P.C. 439.

volved, in a simple case such as *Hart* v. *Gumpach*—an action for libel: the question being whether the right involved came within the expression "rights of property or person." But the larger question may also be raised:—Is the jurisdiction which the Court claims to exercise within the treaty, or does it rest on sufferance alone? and in this case the dispute must inevitably be decided on the lines above indicated. It is conceivable that this issue might be raised in connexion with the probate or the matrimonial jurisdiction of the Consular Court, neither of which come clearly within the treaty grant of jurisdiction to settle "disputes." And so as to the provisions of the Act with regard to deportation, and to send-

cf. Section X.

ing prisoners for trial to a neighbouring British Colony. These points will be discussed at a later stage.

So much may I think be legitimately inferred from this judgment. But when we turn to the other matters with which it deals, it is submitted that some of them are hardly consistent with doctrines which are now a recognised part of the subject.

As to the vital difference between Christian and non-Christian States which is so much emphasised, it is perhaps sufficient to say that although this is still admitted to be the reason why the

The privilege of of Christendom not now acted on in practice.

grant of foreign jurisdiction is obtained, the modern practice is to treat oriental States on a footing of perfect equality, as States from which certain definite rights can be acquired. The Act itself, even in the case of native tribes, recognises the title of the Chiefs to enter into treaties with the King. With regard to sufferance there can be very little doubt, more especially when it was relied on to supplement the treaty grant, that its province was to extend the jurisdiction actually acquired to some matters not within the treaty which were not of great moment to the oriental State; and its justification was perhaps to be found in an unconscious construction of all the different treaty grants as meaning one and the same thing—the grant of complete jurisdiction over subjects. It cannot be denied, however, that so far as the jurisdiction affects, or is extended to, foreigners, the treaty, in the absence of express stipulation, in no case warrants it, and therefore that it must find its justification in sufferance.

The last statement which seems to be questionable in this judgment is that the objection cannot be raised by a British suitor, because "he is bound by the law established by his own country." The last part of the sentence has been so fully dealt with that it is unnecessary to refer again to the matter. The first part is more serious, and with great respect it is submitted that it is unsound.

The suitor should be entitled to raise the question that jurisdiction not justified.

cf. Section III.

It follows that as the jurisdiction in general which is exercised over him in oriental countries is not inherent either in King or Parliament, but depends entirely on the treaty grant, or on acquisition by sufferance, he must be entitled to raise the question which we have already considered, that the jurisdiction claimed over him in any particular instance is not justified.

Most-favoured-nation Treatment.

The "most-favoured-nation" clauses in the different treaties introduce another element of difficulty into the subject. The actual treaty grant of privileges to any one Sovereign is, by virtue of these clauses, the sum of all the privileges contained in the treaties entered into with all the Powers by the Sovereign grantor. And, therefore, if it should ever come to be a question, as in these pages I have assumed that it may, whether the jurisdiction claimed to be exercised falls within the treaty grant, not only must the article in the English treaty be looked to, but also all the corresponding articles in the exterritorial treaties with the other Powers. This was done in the judgment of the Privy Council in *Imperial Japanese Government* v. *P. & O. Co.*

Operation of most-favoured-nation clauses.

Japanese Government v. *P. & O. Co.* 1895, A.C. 644.

The following article (*liv*) from the Tientsin treaty, 1858, is the common form in which such articles are drafted:—

"It is hereby expressly stipulated that the British Government and its subjects will be allowed free and equal participation in all privileges, immunities, and advantages, that may have been, or may be hereafter, granted by His Majesty the Emperor of China to the Government or subjects of any other nation."

Form of the clause.

As treaties with oriental States are entered into by other Powers at different times, it may well be that in the later ones

Its beneficial operation.

difficulties are removed which have arisen in the construction of the earlier ones, the benefit conferred on the one Power being automatically conferred on all the others which have existing treaties at the time. It may be unnecessary, therefore, in all cases to rely on sufferance for the exercise of some power which appears to exceed the actual grant to Great Britain. In applying the principles which I have endeavoured to work out to any given oriental country, all the grants made by that country must therefore be examined. The most-favoured-nation treatment appears to work backwards as well as forwards, and as a general rule, works against the country granting the privilege of exterritoriality. A later grant of jurisdiction, though less in extent than an earlier one, must, if coupled with the most-favoured-nation treatment, be treated as of the same extent.

Persia.

In the case of Persia, the King's jurisdiction rests entirely on the most-favoured-nation clauses of the treaty of 1857. None of the usual jurisdiction clauses are included in the treaty: these are to be found in the treaties entered into by the Shah with other Powers. There will also be found in them articles granting reciprocally to Persians in Europe the rights of the most-favoured-nation. This is, I think, the only example of a reciprocal article in any form in exterritorial treaties.*

Persia has granted exterritorial privileges by treaties with the following Powers:—Austria, Hungary, Belgium, France, Germany, Greece, Italy, Russia, Spain, Switzerland, and the United States; and with Turkey on the basis of reciprocity.†

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* *e.g.*—"Dans le Royaume d'Italie les sujets Persans seront également dans toutes leurs contestations, soit entre eux, soit avec des sujets Italiens ou étrangers, jugés suivant le mode adopté dans ce Royaume envers les sujets de la nation la plus favorisée.

"Quant aux affaires de la jurisdiction criminelle, dans les quelles seraient compromis des sujets Italiens en Perse, des sujets Persans en Italie, elles seront jugées en Italie et en Perse suivant le mode adopté dans les deux pays envers les sujets de la nation la plus favorisée."—*Treaty between Persia and Italy, 24th September, 1863, art. v.*

† All these treaties will be found set out in full in Sir Edward Hertslet's "Persian Treaties," published in 1891.

V

The Foreign Jurisdiction Act.

THESE preliminary considerations disposed of, it will now be convenient to consider the remaining provisions of the Foreign Jurisdiction Act, 1890—*53 & 54 Vict. c. 37*—by which the three existing statutes dealing with the subject were consolidated and repealed.

Preamble, and Section 1.

An Act to consolidate the Foreign Jurisdiction Acts.

Whereas by treaty, capitulation, grant, usage, sufferance, and other lawful means, Her Majesty the Queen has jurisdiction within divers foreign countries, and it is expedient to consolidate the Acts relating to the exercise of Her Majesty's jurisdiction out of her dominions: *be it therefore enacted:*

1. It is and shall be lawful for Her Majesty the Queen to hold, exercise, and enjoy any jurisdiction which Her Majesty now has or may at any time hereafter have within a foreign country in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory. Exercise of jurisdiction in foreign country.

These provisions have already been fully considered.

Section 2.

2. Where a foreign country is not subject to any government from whom Her Majesty the Queen might obtain jurisdiction in the manner recited by this Act, Her Majesty shall by virtue of this Act have jurisdiction over Her Majesty's subjects for the time being resident in or resorting to that country, and that jurisdiction shall be jurisdiction of Her Majesty in a foreign country within the meaning of the other provisions of this Act. Exercise of jurisdiction over British subjects in countries without regular governments.

This section has also been fully considered. It will, however, be convenient here briefly to consider the provisions of ss. 6 and 7 of the Pacific Islanders Protection (Amendment) Act, 1875,— which covers the same ground so far as the Pacific Islands are concerned. *38 & 39 Vict. c. 51.*

38 & 39 Vict. c. 51.

Pacific Islanders Protection Act.

Power for Her Majesty to exercise jurisdiction over British subjects in islands of the Pacific Ocean. High Commissioner.

6. It shall be lawful for Her Majesty to exercise power and jurisdiction over her subjects within any islands and places in the Pacific Ocean not being within Her Majesty's Dominions, nor within the jurisdiction of any civilized Power, in the same and as ample a manner as if such power or jurisdiction had been acquired by the cession or conquest of territory, and by Order in Council to create and constitute the office of High Commissioner in, over, and for such islands and places, or some of them, and by the same or any other Order in Council to confer upon such High Commissioner power and authority, in her name and on her behalf, to make regulations for the government of her subjects in such islands and places, and to impose penalties, forfeitures, or imprisonments for the breach of such regulations.

Power to Her Majesty's to erect a Court of Justice for British subjects in the islands of the Pacific.

It shall be lawful for Her Majesty, by Order in Council, to create a Court of Justice with civil, criminal, . . .† jurisdiction over Her Majesty's subjects within the islands and places to which the authority of the said High Commissioner shall extend, and with power to take cognizance of all crimes and offences committed by Her Majesty's subjects within any of the said islands and places, or upon the sea, or in any haven, river, creek, or place within the jurisdiction of the Admiralty; and Her Majesty may, by Order in Council, from time to time direct that all the powers and jurisdiction aforesaid, or any part thereof, shall be vested in and may be exercised by the Court of any British Colony designated in such Order concurrently with the High Commissioner's Court or otherwise, and may provide for the transmission of offenders to any such Colony for trial and punishment, and for the admission in evidence on such trial of the depositions of witnesses taken in such islands and places as aforesaid, and for all other matters necessary for carrying out the provisions of such Order in Council, [†"admiralty jurisdiction," *rep. 53 & 54 Vict. c. 27, s. 18.*]

Power to make Ordinances.

It shall also be lawful for Her Majesty, by any Order or Orders in Council, from time to time to ordain for the government of Her Majesty's subjects, being within such islands and places, any law or ordinance which to Her Majesty in Council may seem meet, as fully and effectually as any such law or ordinance could be made by Her Majesty in Council for the government of Her Majesty's subjects within any territory acquired by cession or conquest.

The person for the time being lawfully acting in the capacity of High Commissioner, and any Deputy Commissioner duly appointed and empowered under the provisions of any such Order in Council as aforesaid and acting under the directions of the High Commissioner, shall have and may exercise and perform any power, authority, jurisdiction, and duty vested in or imposed upon any British consular officer by the principal Act or by any other Act having reference to such consular officers, passed either before or after the passing of this Act; and every such Act shall be construed as if the said High Commissioner and Deputy Commissioner were named therein in addition to a British consular officer. Pacific Islanders Protection Act.

Saving of rights of tribes.

7. Nothing herein or in any such Order in Council contained shall extend or be construed to extend to invest Her Majesty, Her Heirs and Successors, with any claim or title whatsoever to dominion or sovereignty over any such islands or places as aforesaid, or to derogate from the rights of the tribes or people inhabiting such islands or places, or of the chiefs or rulers thereof, to such sovereignty or dominion, and a copy of every such Order in Council shall be laid before each House of Parliament within 30 days after the issue thereof, unless Parliament shall not then be in session, in which case a copy shall be laid before each House of Parliament within 3 days after the commencement of the next ensuing session.

Amendment of definition of Australasian Colonies in principal Act. Fiji.

8. Whereas by reason of the cession to Her Majesty of the Colony of Fiji, it is expedient to amend the definition of Australian Colonies in the principal Act [Pacific Islanders Protection Act, 1871—*35 & 36 Vict. c. 19*]:—

The term "Australasian Colonies" in the principal Act and this Act shall mean and include the Colony of Fiji.

Subject to the provisions of any Act or Ordinance passed by the Legislature of the Colony of Fiji, the provisions of the principal Act and this Act shall continue to apply and be deemed always to have continued to apply to natives of Fiji in like manner as if they were natives of islands in the Pacific Ocean not being in her Majesty's dominions nor within the jurisdiction of any civilized Power.

Comparison of Pacific Islanders Act with Foreign Jurisdiction Act.

The difference of wording between the provisions of these sections and of s. 2 of the Act of 1890, will be noticed. The words corresponding to "a foreign country not subject to any government from whom His Majesty the King might obtain jurisdiction", of the Act of 1890, are, in the Pacific Islands Act, "any

islands and places in the Pacific Ocean not being within His Majesty's dominions, nor within the jurisdiction of any civilized Power". The special feature of this Act is the creation of an officer, the High Commissioner, to administer the jurisdiction. The King is empowered to create this office, and to confer on the Commissioner the power to make regulations for the government of British subjects in these islands and places.

The question is almost academic: but the combined effect of the two enactments must be considered. As general provisions of a later Act do not repeal special provisions already in existence, the Act of 1875, remains intact. But it would seem as if the Act of 1890 had added to the earlier Act the recognition of the right of the chiefs to a special treaty on the same terms as those concluded with the African tribes, when they have established their right to be recognised as such. There is indeed a saving provision in s. 7, disclaiming any assumption of dominion or sovereignty over the islands, or any derogation from the rights of the chiefs or rulers to such sovereignty or dominion.

Section 3.

Validity of acts done in pursuance of jurisdiction.

3. Every act and thing done in pursuance of any jurisdiction of Her Majesty in a foreign country shall be as valid as if it had been done according to the local law then in force in that country.

This section is based on the maxim *locus regit actum*, and brings all acts done in pursuance of the jurisdiction into line with the general law. It applies, in the first place, to all official and judicial acts done in the foreign country by the King's officers and Judges: the point which the section apparently aims at being the settlement of any doubts which might arise in other Courts with regard to the validity of these acts, as not having been done in accordance with the local law. Indeed in s. 2 of the Act of 1843, the corresponding section was expressly so drafted. It provided that any act done in pursuance of the jurisdiction, should, "in all Courts ecclesiastical and temporal and elsewhere within Her Majesty's dominions, be and be deemed and adjudged to be, in all cases and to all intents and purposes whatsoever, as valid and effectual as though the same had been done according to the local law then in force within such" foreign country.

Recognition of maxim *locus regit actum*.

Provision in the old Act.

But the recognition of this principle involves also the recognition of the cardinal principle of the subject, that the constitutional

Cardinal principle involved in the section.

authority of the Sovereign of the foreign country remains intact: that the legislative origin of English law, or of such other law as the King declares shall be in force, is that Sovereign: that the Consular Courts form part of his system of judicature: and that the officers and Judges appointed by the King are in fact official and judicial authorities of that Sovereign. In the case already cited, *Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co.*, the Judicial Committee throughout their judgment used the term "Zanzibar Court" when referring to the Court established by Order in Council.

cf. p. 6.

Sec. of State v. *Charlesworth*, 1901, A.C. 373.

Consular Court must act as if it were a Court of the oriental country;

From this it also follows that, in the absence of any express direction, the King's Court must act as a Court would act if it had been created by the Sovereign of the country. Thus, as was pointed out in the *Zanzibar case*, the Court will take judicial notice of the laws of that country. There is, it is true, an assumption that the rule on this point is identical with the rule of the English Courts; but if an opposite practice prevailed, and the Zanzibar rule had been that the laws had to be proved, that practice would presumably have been followed.

and be treated as such.

Finally, it follows further, that the King's Courts are, *quoad* British Courts, foreign and not colonial Courts. At the present time I doubt if anything of practical importance turns on this. But if, in the future, the judge-made law were to be modified in the direction of affording more recognition to colonial than to foreign judgments, the judgments of the Consular Courts would remain foreign judgments. If, however, the question were to be dealt with by statute, the case would probably be specially provided for, as was done in the case of probates coming from these Courts, by s. 3 of the Colonial Probates Act, 1892.

55 & 56 Vict. c. 6. *cf.* p. 26.

Section 4.

Evidence as to existence or extent of jurisdiction in foreign country.

4. If in any proceeding, civil or criminal, in a Court in Her Majesty's dominions or held under the authority of Her Majesty, any question arises as to the existence or extent of any jurisdiction of Her Majesty in a foreign country, a Secretary of State shall, on the application of the Court, send to the Court within a reasonable time his decision on the question, and his decision shall for the purposes of the proceeding be final.

(2) The Court shall send to the Secretary of State, in a document under the seal of the Court, or signed by a Judge of the Court, questions framed so as properly to raise the question, and sufficient answers to those questions shall be

returned by the Secretary of State to the Court, and those answers shall, on production thereof, be conclusive evidence of the matters therein contained.

This section is identical with s. 3 of the Act of 1843, but is more succinctly drafted. There is, however, one new word introduced which may be productive of some difficulty. The "sufficient answers" of the Secretary of State to the questions put to him by the Court with regard to the existence or extent of the jurisdiction, are called "his decision."

Meaning of "decision" of Secretary of State.

The Attorney General stated in the House when the Bill for consolidating the law was introduced, that no changes in the law had been made: and it seems probable that the word "decision" is used for convenience with reference to answers which are, by the section, declared to be "conclusive evidence of the matters therein contained." The use, however, of such an emphatic word renders it necessary to examine with some care what the question is which the Courts may submit to the Secretary of State. Here again the more elaborate wording of the old Act seems to throw some light. It was there provided that if in any proceeding in any Court within the dominions, any issue or question of law or of fact should arise for the due determination of which it should, in the opinion of the Court, be necessary to produce evidence of the existence of any such power or jurisdiction as aforesaid, or of the extent thereof, then the question could be put by the Court to the Secretary of State, who was to return "proper and sufficient answers" thereto, which were to be "final and conclusive evidence of the several matters therein contained."

Provision in s. 3 of the old Act.

Example of application under the Section.

If the words of the Act of 1890 are interpreted in the clear sense of the old provision, little or no difficulty can arise as to their meaning. Thus: a question may arise in an action as to whether the acts of a certain officer, not done within the dominions, have been done in the exercise of foreign jurisdiction, and the Court may require to know whether, and to what extent, foreign jurisdiction is exercised in that country. Such a question arose in *Harvey* v. *Fitzpatrick*, where a British subject died intestate at Cape Coast Town, in Africa, leaving personalty there. The Judicial Assessor to the native Princes had taken possession of it, claiming to be the official administrator of it by usage. The intestate's father obtained letters of administration, and brought a suit against this officer for the administration of the estate. An enquiry to the Secretary

Harvey v. *Fitzpatrick*, 23 L.J. Ch. 564.

of State was directed, "whether Her Majesty has at any time exercised any jurisdiction with respect to the administration of personal estates of persons dying intestate in Cape Coast Town, and if so, to what extent and in what manner and through what Court or officer such jurisdiction has been exercised."

It would at first sight seem superfluous to trouble the Secretary of State with such a question: for treaties, Orders in Council, and other similar documents, are not merely available to the Court, but it is bound to take official cognizance of King's Printers' copies. But, practically, it is not difficult to imagine cases in which such a query might be usefully and expeditiously solved by the Secretary of State: for example, as to the geographical limits within which an Order in Council applies, or as to the claim of jurisdiction actually made. Suppose, for example, it were a disputed point in a case where the cause of action arose in Canton, whether English law prevailed generally on the Shameen as a natural result from the treaty with China. This might turn on the construction of documents, and, always assuming them to be available, it is not likely that the Court would put such a question to the Secretary of State, but would interpret the documents for itself. But a point raised in a case might depend on the construction of the most-favoured-nation clause, and so involve a reference to the different treaties with other Powers: it might indeed be almost a political question. Then, quite apart from the fact that such treaties might not be available, it would be right, not only that the question should be put, but also that the Secretary of State should give an answer which would virtually amount to a "decision." Or again, where the jurisdiction claimed rests on sufferance, it seems right that the Secretary of State should state whether as a fact such jurisdiction is so claimed as alleged. Looked at in this light, the answer is the same in quality as the certificate of the Secretary of State under s. 16 (2) of the Foreign Marriage Act, 1892, as to any house being the "official house" of a British Ambassador for the purpose of solemnising marriages under that Act: or of a similar certificate under s. 3 (1) (*a*) of the Mail Ships Act, 1891, that the owner of a ship is subsidized for the execution of any postal service within the meaning of a convention to which the Act applies.

Probable object of the reference to the Secretary of State.

55 & 56 Vict. c. 23.

54 & 55 Vict. c. 31.

It is to be observed that it is not obligatory on the Court to

The jurisdiction of the Courts not ousted.

put the question to the Secretary of State: the words "on the application of the Court" of the new Act clearly do not limit the discretion which was more clearly apparent in the old section. It is therefore probable that if the question whether the jurisdiction exists as alleged were purely one of construction, the Court would solve it for itself and not proceed under this provision. Such a question, for example, as the one already discussed, where the question in issue might depend on whether there was a conflict between the treaty and the Order in Council, would certainly not be referred. But in doubtful cases the query might be so worded as to raise the question whether the jurisdiction is in fact claimed, leaving open the question for the Court, whether the claim is legitimate or not. Thus: the Secretary of State might reply that the claim is made and is based on sufferance: the Court would then determine whether the claim was rightly so made.

It seems improbable that it was ever intended to turn the Secretary of State into a judge, and a judge moreover whose duty it would be to decide an intricate point of law without hearing arguments on either side.

33 & 34 Vict. c. 14.

A very similar point arises under s. 7 of the Naturalization Act, 1870, as to the power of the Secretary of State to grant special certificates of naturalization to persons with respect to whose right to be deemed British subjects a doubt exists, for the purpose of quieting such doubts. This provision has been discussed in another work, and the conclusion at which I have arrived is, that it was not intended to throw the burden of deciding difficult questions of fact, and perhaps of law, on the Secretary of State: questions which from their nature must inevitably be decided by the Courts. I believe that the same principle must be applicable in the case now under discussion.

cf. "Nationality," Vol. I, Chap. XIII.

It might be necessary for a foreign Court to obtain similar information: and it is probable that if it were thought better to procure it through the English Courts rather than by diplomatic channels, the word "proceedings" in s. 4 would be held to be sufficiently wide to enable the English Court to whom a request was addressed under the Foreign Tribunals Evidence Act, 1856, to put the necessary question to the Secretary of State.

19 & 20 Vict. c. 113.
cf. Section VII.

Section 5.

Power to extend enactments in first schedule.

5. (1.) It shall be lawful for Her Majesty the Queen in Council, if she thinks fit, by Order to direct that all or any of the enactments described in the first schedule to this Act, or any enactments for the time being in force amending or substituted for the same, shall extend, with or without any exceptions, adaptations, or modifications in the Order mentioned, to any foreign country in which for the time being Her Majesty has jurisdiction.

(2.) Thereupon those enactments shall, to the extent of that jurisdiction, operate as if that country were a British possession, and as if Her Majesty in Council were the Legislature of that possession.

The power conferred by this section on the King to extend by Order in Council certain scheduled statutes will be considered, and the effect of their extension explained, in a subsequent Section. *cf.* Section VII.

Section 6.

Power to send persons charged with offences for trial to a British possession.

6. (1.) Where a person is charged with an offence cognizable by a British Court in a foreign country, any person having authority derived from Her Majesty in that behalf may, by warrant, cause the person so charged to be sent for trial to any British possession for the time being appointed in that behalf by Order in Council, and upon the arrival of the person so charged in that British possession, such criminal Court of that possession as is authorized in that behalf by Order in Council, or if no Court is so authorized, the Supreme criminal Court of that possession, may cause him to be kept in safe and proper custody, and so soon as conveniently may be may inquire of, try, and determine the offence, and on conviction punish the offender according to the laws in force in that behalf within that possession in the same manner as if the offence had been committed within the jurisdiction of that criminal Court.

Provided that—

(*a*) A person so charged may, before being so sent for trial, tender for examination to a British Court in the foreign country where the offence is alleged to have been committed any competent witness whose evidence he deems material for his defence and whom he alleges himself unable to produce at the trial in the British possession:

(*b*) In such case the British Court in the foreign country shall proceed in the examination and cross-examination of the witness as though he had been tendered at a trial before that Court, and shall cause the evidence so taken to be reduced into writing, and shall transmit to the criminal Court of the British possession by which the person charged is to be tried

Power to send persons charged with offences for trial to a British possession.

a copy of the evidence, certified as correct under the seal of the Court before which the evidence was taken, or the signature of a Judge of that Court:

(*c*) Thereupon the Court of the British possession before which the trial takes place shall allow so much of the evidence so taken as would have been admissible according to the law and practice of that Court, had the witness been produced and examined at the trial, to be read and received as legal evidence at the trial:

(*d*) The Court of the British possession shall admit and give effect to the law by which the alleged offender would have been tried by the British Court in the foreign country in which his offence is alleged to have been committed, so far as that law relates to the criminality of the act alleged to have been committed, or the nature or degree of the offence, or the punishment thereof, if the law differs in those respects from the law in force in that British possession.

(2) Nothing in this section shall alter or repeal any law, statute, or usage by virtue of which any offence committed out of Her Majesty's dominions may, irrespectively of this Act, be inquired of, tried, determined, and punished within Her Majesty's dominions, or any part thereof.

Summary of s. 6. This section provides for the trial in Colonies specified in that behalf by Order in Council, of persons charged with offences, who would in ordinary circumstances be tried by the Consular Courts. The order may be made by any person having authority from the King in that behalf.

In the case of China, this power has been exercised by art. 50 of the China Order, the places of trial indicated being Hongkong and Mandalay. The article vests the discretion to make the order entirely in the Court which would otherwise have cognizance of the case, the cause of the transfer being expediency, as to the existence of which the Court is to decide.

The Colonial Court is to have regard to the law by which the offender would have been tried in the Consular Court, so far as the criminality of the act, the nature or degree of the offence, and the punishment are concerned, if that law differs in those respects from the law administered by the Colonial Court; otherwise the trial and punishment are to be in accordance with the colonial law.

There is a proviso that the evidence of witnesses for the defence may be taken before the Consular Court if the prisoner alleges that he is unable to produce them at the trial in the

colony: a copy of the evidence being transmitted to the colonial Court.

Lastly, there is a saving of extra-territorial laws, if any, in force in the colony applicable to the offence, which would enable the colonial Court to try the case in virtue of its own statutory jurisdiction. The question how far this provision is warranted by the treaty will be considered in due course. *cf.* Section X.

Section 7.

7. Where an offender convicted before a British Court in a foreign country has been sentenced by that Court to suffer death, penal servitude, imprisonment, or any other punishment, the sentence shall be carried into effect in such place as may be directed by Order in Council or be determined in accordance with directions given by Order in Council, and the conviction and sentence shall be of the same force in the place in which the sentence is so carried into effect as if the conviction had been made and the sentence passed by a competent Court in that place.

Provision as to place of punishment of persons convicted.

This section, which provides generally for the regulation of execution of sentences by Order in Council, is couched in language which, at first sight, appears again to refer to the principle enunciated in s. 3, the recognition of the local law and of the maxim *locus regit actum*. It appears to provide merely that the conviction and sentence of the Consular Court are to be of the same force as if they had been made and passed by a competent Court of the foreign country.

But the section is of wider application; and in the words "the sentence shall be carried into effect in such place as may be directed by Order in Council", it contemplates provision being made for carrying sentences of the Consular Courts into effect in other places. It is curious, however, that the direct form of words which had been used in the Act of 1843 was abandoned; for by s. 5, it was expressly provided that offenders sentenced to suffer death or imprisonment might be sent to any colony specified by Order in Council in order that the sentence might be carried into effect. This is the more difficult to understand in view of the provisions of s. 6, just considered, where a British possession is specifically referred to as the place where prisoners may be sent for trial. The new section is in practice treated as having the same meaning as the one which it replaces.

"Power to send convicts for execution or imprisonment to a British Colony": *cf.* marginal note to s. 5 of the old Act.

Where a prisoner is sent to a colony to undergo his sentence,

the section legalises the carrying out of the sentence in the colony, making the conviction and sentence of the Consular Court of the same effect there as if they had been pronounced by a Court in the colony. The question how far deportation for this object is warranted by the treaty will, as in the case of s. 6, be considered in due course. In art. 66 of the China Order, the place specified is "either Hongkong, or a place in some other part of His Majesty's dominions, the Government whereof consents that offenders may be sent thither under this article."

cf. Section X.

Section 8.

Validity of acts done under Order in Council.

8. Where, by Order in Council made in pursuance of this Act, any British Court in a foreign country is authorized to order the removal or deportation of any person from that country, that removal or deportation, and any detention for the purposes thereof, according to the provisions of the Order in Council, shall be as lawful as if the order of the Court were to have effect wholly within that country.

Deportation as a punishment.

This section indirectly recognises deportation as a punishment which may be provided by the Order in Council; the absence of any express directions in the matter giving the greatest latitude with regard to the offences in respect of which it may be imposed, either specially, or conjointly with any other punishment. Removal or deportation, and any detention for the purposes thereof, are declared to be as lawful as if the order for deportation were a sentence of the Court having effect wholly within the foreign country.

In the China Order deportation is prescribed as the punishment, under art. 71, for levying war against the Government of China, and other kindred offences: and under art. 75, for seditious conduct against that Government. Deportation may also be ordered under art. 83 (*iii*), where a person is required to give security to keep the peace, or for his future good behaviour, and fails to do so. By the 4th clause of the article, the deportation is to be to that part of the dominions to which the person belongs, or the Government of which consents to receive persons deported under the Order. It would appear that this provision is necessary to the completeness of the article, in spite of the fact that there is nothing to be done by the authorities in the place to which the offender is deported in order to carry out the sentence, which, strictly speaking, is exhausted when the deportation has been effected.

cf. Section VIII.

But by art. 84 of the China Order, where the person is deported to Hongkong, he is to be kept in custody while the case is being considered by the Governor, who has power then to send the person to England "if the circumstances of the case appear to him to make it expedient," and in the meantime to detain him in custody for a period not exceeding three months. If this power is not exercised, the person deported is to be discharged from custody. This article finds its warrant in the general power of the Sovereign to legislate for Crown Colonies by Order in Council, and does not depend on the powers granted by the Foreign Jurisdiction Act.

Power of the Governor of Colony to which offender deported.

cf. p. 20.

The object of the deportation is effected in a practical way by art. 83(*xi*), which makes the return of the offender to China, without the permission in writing of the Secretary of State, a "grave offence" against the Order in Council, for which, in addition to fine and imprisonment (*see* art. 61), he may be again deported.

Section 9.

9. It shall be lawful for Her Majesty the Queen in Council, by Order, to assign to or confer on any Court in any British possession, or held under the authority of Her Majesty, any jurisdiction, civil or criminal, original or appellate, which may lawfully by Order in Council be assigned to or conferred on any British Court in any foreign country, and to make such provisions and regulations as to Her Majesty in Council seem meet respecting the exercise of the jurisdiction so assigned or conferred, and respecting the enforcement and execution of the judgments, decrees, orders and sentences of any such Court, and respecting appeals therefrom.

Power to assign jurisdiction to British Courts in cases within Foreign Jurisdiction Act.

This section, in the first place, enables the machinery for the trial of disputes by the Consular Courts to be completed by the creation of an appellate tribunal in a neighbouring colony, where the size of the British community in the oriental country is not such as to warrant the establishment of such a Court in the country itself.

Appellate jurisdiction in neighbouring colony.

Secondly, the section sanctions the creation of an original jurisdiction in the colonial Courts for the trial of offences committed in the oriental country.

Original jurisdiction conferred on colonial Courts.

This provision is an important one, and differs from that dealt with in s. 6, which, as we have seen, only contemplates the trial by the colonial Courts of persons sent by order of the Consular Courts for the purpose of such trial.

Example of exercise of power under s. 9.

The power under the section was exercised with regard to China by the Order in Council of 23 Oct. 1877, by which jurisdiction was given to the Supreme Court of Hongkong in respect of offences committed by British subjects at any place on land, being within 10 miles of any part of the colony, and in respect of disputes between British subjects being in any such place within that limit. The jurisdiction was to be exercised as if the offences had been committed, or the disputes had arisen, within the colony. This Order was revoked by the Order of 1904, the acquisition of the New Territories of Kowloon* on the mainland having rendered it superfluous.

The jurisdiction given to the Governor of Hongkong in the matter of deserters, by art. 82, like that in respect of deported persons by art. 84, depends on the general power of legislation for Crown Colonies by Order in Council.

cf. p. 20.

The jurisdiction of the Hongkong Courts, under art. 81, in respect of offences committed within 100 miles of the coast of China, depends on the general provision in s. 14 of the Act, anthorising laws to be made dealing with such offences.

cf. s. 14, *post.*

Sections 10 and 11.

Power to amend Orders in Council.

10. It shall be lawful for Her Majesty the Queen in Council to revoke or vary any Order in Council made in pursuance of this Act.

Laying before Parliament, and effect of Orders in Council.

11. Every Order in Council made in pursuance of this Act shall be laid before both Houses of Parliament forthwith after it is made, if Parliament be then in session, and if not, forthwith after the commencement of the then next session of Parliament, and shall have effect as if it were enacted in this Act.

These sections are in the common forms generally used where statutes provide for the issue of Orders in Council.

Section 12.

In what cases Orders in Council void for repugnancy.

12. (1) If any Order in Council made in pursuance of this Act as respects any foreign country is in any respect repugnant to the provisions of any Act of Parliament extending to Her Majesty's subjects in that country, or repugnant to any other order or regulation made under the authority of any such Act of Parliament, or having in that country the force and effect of any such Act, it shall be read subject to that Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be void.

* As to this, *see* Order in Council, 20 Oct. 1898.

(2) An Order in Council made in pursuance of this Act shall not be, or be deemed to have been, void on the ground of repugnancy to the law of England unless it is repugnant to the provisions of some such Act of Parliament, order, or regulation as aforesaid. In what cases Orders in Council void for repugnancy.

This section lays down two broad principles:—

first: Orders in Council made under the Act are to be read subject to other legislation applicable to British subjects in the foreign country to which the Orders apply: Principles established by s. 12.

secondly: Orders in Council are not to be held void on account of repugnancy to the law of England.

First:—In so far as Orders are in Council repugnant to any other legislation, or to orders having legislative effect with regard to British subjects in a foreign country, they are declared to be void: and it follows therefore that a Consular, or any other British Court, before which the question is raised, may so declare. *cf.* Section III.

It is probable that the word "extending" should be read "extended" or "applied": for, as we shall presently see, there is practically no direct legislation extending to subjects in these foreign countries. With but few exceptions, the whole body of English statutes is, in China, extended by Order in Council, in virtue of the legislative power given to the King: and the same system is adopted in such statutes as are directly extended by sections contained in them. *cf.* p. 26.

Secondly:—By declaring that Orders in Council are not to be held void for repugnancy to the law of England, the section extends to the exercise of foreign jurisdiction in its legislative side, the principles established with regard to colonial legislation by the Colonial Laws Validity Act, 1865, ss. 2 and 3. *28 & 29 Vict. c. 63.*

That law was passed to do away with the doctrine, supposed to be applicable to colonial enactments, that they must not be based on principles at variance with what were termed the "fundamental principles" of English law. An illustration of the application of the rule laid down in this section is to be found in *ex parte Carew*, which is considered later. *exp. Carew*, 1897, A.C. 719. *post.*

The question whether an Order in Council is repugnant to the provisions of the Foreign Jurisdiction Act under which it is made, is obviously one which is independent of this section. So also is the question of repugnancy to the treaty: that point being covered *cf.* Section III.

by the fundamental principle that the King has no jurisdiction other than that acquired by the treaty or by sufferance.

Repugnancy to the law of England considered.

The point involved, however, is not altogether free from difficulty. Take such a case as the following. Suppose that an Order in Council authorized the British Minister to levy an income tax on British residents in China, and inflicted fines for refusal to fill in the papers, to be recovered in the Consular Court. The Treaty of Tientsin would not support the exercise of such a power. In a suit to recover the fine in the Consular Court, the defence that the Order was invalid seems to raise the question of repugnancy to the law of England, because by the law of England the Sovereign has no power in a foreign country except such as the foreign Sovereign may have granted by treaty. And sufferance would not support it.

It is hardly conceivable that the plea would be overruled because the Order was not repugnant to the provisions of some Act: there being, indeed, no Act to prohibit the Sovereign from doing illegal acts, but only the law of England. It is probable that as the statute only authorizes the exercise of power lawfully acquired, an act not warranted either by the treaty or by sufferance would be held to be void as repugnant to the provisions of the statute itself.

Section 13.

Provisions for protection of persons acting under Foreign Jurisdiction Acts.

13. (1) An action, suit, prosecution, or proceeding against any person for any act done in pursuance or execution or intended execution of this Act, or of any enactment repealed by this Act, or of any Order in Council made under this Act, or of any such jurisdiction of Her Majesty as is mentioned in this Act, or in respect of any alleged neglect or default in the execution of this Act, or of any such enactment, Order in Council, or jurisdiction as aforesaid, shall not lie or be instituted—

(*a*) In any Court within Her Majesty's dominions, unless it is commenced within 6 months next after the act, neglect, or default complained of, or in case of a continuance of injury or damage within 6 months next after the ceasing thereof, or where the cause of action arose out of Her Majesty's dominions within 6 months after the parties to the action, suit, prosecution, or proceeding have been within the jurisdiction of the Court in which the same is instituted; nor

(*b*) In any of Her Majesty's Courts without Her Majesty's dominions, unless the cause of action arose within the jurisdiction of that Court, and the action is commenced within 6 months next after the act, neglect, or default complained of,

or, in case of a continuance of injury or damage, within 6 months next after the ceasing thereof.

Provisions for protection of persons acting under Foreign Jurisdiction Acts.

(2) In any such action, suit, or proceeding, tender of amends, before the same was commenced may be pleaded in lieu of or in addition to any other plea. If the action, suit, or proceeding was commenced after such tender, or is proceeded with after payment into Court of any money in satisfaction of the plaintiff's claim, and the plaintiff does not recover more than the sum tendered or paid, he shall not recover any costs incurred after such tender or payment, and the defendant shall be entitled to costs, to be taxed as between solicitor and client, as from the time of such tender or payment; but this provision shall not affect costs on any injunction in the action, suit, or proceeding.

With slight verbal differences this section repeats the principal provisions of the Public Authorities Protection Act, 1893. In the China Order that Act is extended to China by art. 127. *56 & 57 Vict. c. 61.*

The following points should be noticed with regard to s. 13.

Public Authorities Protection Act is probably combined with s. 13.

There is a special provision for the case where the cause of action arises out of the dominions, when the six months limitation commences to run only after the parties to the action have been within the jurisdiction of the Court in which it is instituted. Where the action is brought in the Consular Court, the cause of action must have arisen within its jurisdiction, and the action be commenced within six months after the act complained of was committed.

In the Act of 1893, there is this further provision, that "if, in the opinion of the Court, the plaintiff has not given the defendant a sufficient opportunity of tendering amends before the commencement of the proceeding, the Court may award to the defendant costs to be taxed as between solicitor and client." This, presumbly, is in force in China, in virtue of the extension of the Act by art. 127 of the Order.

Section 14.

Jurisdiction over ships in certain Eastern seas.

14. It shall be lawful for Her Majesty the Queen in Council to make any law that may seem meet for the government of Her Majesty's subjects being in any vessel at a distance of not more than one hundred miles from the coast of China *or of Japan*, as fully and effectually as any such law might be made by Her Majesty in Council for the government of Her Majesty's subjects being in China *or in Japan*.

Section probably obsolete as regards Japan.

So far as Japan is concerned, although there has been no direct repeal of the words in the section relating to that country, it is

probable that they have become a dead letter since the abolition of consular jurisdiction there.

This abolition was effected by the Order in Council of 7th October, 1899, which suspended the operation of the existing "China and Japan" and "China, Japan and Corea" Orders in Japan as from 4th August, 1899. Practically all these Orders were abrogated by the "China and Corea Order, 1904": there is, therefore, no claim made to exercise jurisdiction under the section with regard to the coast of Japan.

Consideration of the section independently of foreign jurisdiction.

But, as the reference to Japan has not been repealed, a question, not without interest in connexion with the law of the high sea generally, may appropriately be considered—whether such jurisdiction could still be exercised with due regard to the sovereign rights of Japan. It must be borne in mind that, although the section is included in the Foreign Jurisdiction Act, it has no relation to exterritoriality; and, except in so far as it applies to territorial waters, does not profess to deal with jurisdiction derived from the oriental Sovereign by treaty or otherwise. It is in reality an independent piece of high sea legislation, deemed to be specially appropriate to the China seas, which can be effectively put in force by Order in Council; and, therefore, the offences contemplated are put within the jurisdiction of the Consular Court. As we shall presently see, in its application it has, in one respect only, added to the provisions of the Merchant Shipping Act, 1894, as applied to the Consular Courts by art. 39 of the Order.

57 & 58 Vict. c. 60.

Viewed simply as high-sea legislation, the provisions of the section do not infringe, except so far as the territorial waters are concerned, the sovereign rights of the country whose shores are specially referred to. The jurisdiction created by it is limited to British subjects being in any vessel within the specified area of sea: and there is no doubt that Parliament can legislate for subjects in such circumstances, and, therefore, can delegate the power of legislating to the King in Council. Nor can there be any doubt that, were it thought expedient, similar legislation could be adopted, in the same conditions, in respect of a like or greater distance from the coasts of France or Spain, without any derogation from the sovereign rights of those countries. Diplomatic courtesy would probably require some explanation to be given to the Governments of those countries with regard to the reference

cf. p. 12.

cf. "Nationality," Vol. II, Chap. III, p. 136.

to them in the statute: but beyond this they would have nothing to say in the matter, for they have no general jurisdiction over the high sea beyond territorial waters. They may legislate for for British subjects in national ships on the high seas; but this does not oust the jurisdiction of the British Courts under laws applicable to British subjects on board foreign ships.

Application of s. 14 to Corea.

So far as Corea is concerned, it will be noticed that art. 80 keeps strictly within the limits of s. 14, and does not refer to offences on ships within 100 miles from the coast of Corea.

cf. Section X.

The question whether the Consular Courts can be invested with any extra-territorial jurisdiction arises here in a special form, as the Courts in Corea are given jurisdiction over offences on board ship committed within 100 miles from the coast of China.

The special interest of the section lies, however, in the method of its application to the 100 miles from the coast of China by art. 80 of the Order, which we now proceed to consider. Its provisions, stated shortly, are as follow:—

The application of s. 14 by art. 80 considered.

Where a British subject being in China, is charged with having committed any offence—

within a British ship, or
within a Chinese or Corean ship, or
within a ship not lawfully entitled to claim the protection of the flag of any State,

at a distance of not more than 100 miles from the coast of China, the Consular Courts in China or Corea are given jurisdiction to try the case, or otherwise deal with it, as if the offence had been committed in China or Corea respectively.

Adaptation of Part. XIII of M.S. Act to China. *57 & 58 Vict. c. 60.*

By art. 39 of the Order, Part XIII of the Merchant Shipping Act, 1894, is adapted to China and Corea in the following way:—

cf. Section VIII.

In the case of any offence committed on the high seas or within Admiralty jurisdiction, by any British subject—

on board a British ship, or
on board a foreign ship to which he did not belong,

the Court is given jurisdiction as if the offence had been committed within its jurisdiction.

Article 39 is in reality only a modification of s. 686 of the Act of

1894,* in so far as it relates to British subjects, the provision regarding persons not British subjects being omitted as they are not within the consular jurisdiction. Offences on board British ships in foreign ports or harbours are also omitted, the broader term "offences committed within the jurisdiction of the Admiralty" being substituted. The effect of this difference of terms will be found discussed in another work, and need not here detain us.

cf. "Nationality," Vol. II, Chap. III.

The provisions of the two articles overlap.

It must be confessed, however, that the question whether the provisions of s. 14, as acted on in art. 80, carry the high sea jurisdiction in Eastern seas any further than it exists under the general law as extended by art. 39, is exceedingly difficult to answer, except in regard to offences on board ships not carrying a recognised flag. This has been borrowed from the Slave Trade (East African Courts) Act, 1873, which gave the East African Courts a similar jurisdiction in respect of slave trade offences: and it is possible that this provision in the article was specially directed against piracy. But the other provisions as to offences on board British ships, or on board Chinese or Corean ships, overlap those of art. 39 of the Order: and should the question arise in the Hongkong Courts, under art. 81 of the Order, it will add a further complication to the already complicated subject of jurisdiction over offences committed at sea.

36 & 37 Vict. c. 59.

cf. "Nationality," Vol. II, p. 156.

Section 15.

Provision as to subjects of Indian Princes.

15. Where any Order in Council made in pursuance of this Act extends to persons enjoying Her Majesty's protection, that expression shall include all subjects of the several Princes and States in India.

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* *Merchant Shipping Act, 1894, s. 686* [in Part XIII]:—

(1) Where any person, being a British subject, is charged with having committed any offence on board any British ship on the high seas or in any foreign port or harbour, or on board any foreign ship to which he does not belong, or, not being a British subject, is charged with having committed any offence on board any British ship on the high seas, and that person is found within the jurisdiction of any Court in Her Majesty's Dominions, which would have had cognizance of the offence if it had been committed on board a British ship within the limits of its ordinary jurisdiction, that Court shall have jurisdiction to try the offence as if it had been so committed.

12 & 13 Vict. c. 96. (2) Nothing in this section shall affect the Admiralty Offences (Colonial) Act, 1849.

Protection of subjects of Indian Princes.

The question involved in this section is one which, theoretically, is of importance in all cases; but it is of special and practical importance in the case of those oriental countries which are frequented by natives of India.

"*Slave Trade Act, 1876.*"

The origin of the section, in so far as it relates to the "subjects of the several Princes and States in India," is to be found in the statute *39 & 40 Vict. c. 46*, which was passed "for more effectually punishing offences against the laws relating to the slave trade", committed by both British subjects and subjects of the native Indian States in Zanzibar and Muscat.

Having this object in view, it seems to have been thought advisable to settle any doubts which might exist as to whether the subjects of the Indian protected States were entitled to the privileges of exterritoriality in those countries. The occasion was then taken to declare that they were entitled generally to be considered as under the protection of the British Crown, and therefore were to be deemed to be within the meaning of "protected persons" in all foreign jurisdiction Orders in Council. The declaration is contained in the third recital of the preamble which is as follows:—

> And whereas the several Princes and States in India in alliance with Her Majesty have no connexions, engagements, or communications with Foreign Powers, and the subjects of such Princes and States are, when residing or being in the places hereinafter referred to, entitled to the protection of the British Government, and receive such protection equally with the subjects of Her Majesty—

Declaration in Act of 1876 that subjects of native Indian Princes, being entitled to protection, are within the exterritorial privilege.

It was then provided by s. 4, that the Orders in Council for Zanzibar of 1866, and Muscat of 1867, should "extend and apply to all British subjects whether by birth or by naturalization, and also to all persons enjoying Her Majesty's protection" in those dominions: and that for the purposes of those Orders, and of any others made under the Foreign Jurisdiction Act, 1843, "all subjects of the several Princes and States in India in alliance with Her Majesty, residing and being in the several dominions comprised in such Orders respectively, are and shall be deemed to be persons enjoying Her Majesty's protection therein".

By s. 6, save as aforesaid, nothing in the Act was to affect any Orders made under the Foreign Jurisdiction Act of 1843.

In Orders issued after 1876, there was usually introduced into the definition of "British subject" a reference to the above Act.

Sections 4 and 6 were repealed by the Foreign Jurisdiction Act, 1890, and were replaced by s. 15. The definitions of "British subjects" in the Orders subsequently issued, contain a corresponding reference to this section.*

Definitions of "British subjects" which include protected persons in the Orders in Council.

* The following are the references to, and definitions of, "British subjects," in the Foreign Jurisdiction Orders in Council.

Muscat, 1867.

The Order extends to all British subjects, whether by birth or naturalization, and also to all persons enjoying Her Majesty's protection in the dominions of the Sultan of Muscat.

Morocco, 1889.

The Order extends to all persons within the limits of the Order who are British subjects by birth or naturalization, or are otherwise for the time being subject to British law: and to persons properly enjoying Her Majesty's protection in Morocco, including all subjects of the Indian Princes (by virtue of *39 & 40 Vict. c. 46*) residing or being in Morocco.

Persia, 1889.

"British subject" includes a person enjoying Her Majesty's protection in so far as Her Majesty has jurisdiction in respect of such person, and includes all subjects of the Indian Princes (by virtue of *39 & 40 Vict. c. 46*) residing or being in Persia.

Persian Coast and Islands, 1889.

The Order extends to British subjects by birth or naturalization, and to persons enjoying Her Majesty's protection, including all subjects of the Indian Princes (by virtue of *39 & 40 Vict. c. 46*), residing or being within the Persian Coast and Islands.

Zanzibar, 1897.

"British subject" includes a British protected person, that is to say, a person (*a*) who being a native of any place beyond the dominions of the Sultan of Zanzibar, which is under the Protectorate of Her Majesty is temporarily within the limits of the Order: or (*b*) who by virtue of the Foreign Jurisdiction Act, 1890, or otherwise, enjoys Her Majesty's protection in Zanzibar.

Turkey, 1899.

"British subject" includes a British-protected person, that is to say, a person who either (*a*) is a native of any Protectorate of Her Majesty, and is for the time being in the Ottoman dominions: or (*b*) by virtue of s. 15 of the Foreign Jurisdiction Act, 1890, or otherwise, enjoys Her Majesty's protection in the Ottoman dominions.

Siam, 1903.

The same as Turkey, *mutatis mutandis.*

China and Corea, 1904.

The same as Turkey, *mutatis mutandis.*

But s. 15 is based on the general principle that persons enjoying British protection are included in the benefits of exterritoriality; and it is necessary, therefore, to enquire how far this accords with the general theory of foreign jurisdiction: for the treaties, except occasionally in the case of natives of the country with which the treaties are made who are in British service, accord the privileges only to British subjects, and persons who are under the protection of the King are not subjects.

Sec. 15 extends to all persons enjoying British protection.

The definitions of British subjects in the Orders in Council [*see* note on p. 68] also refer to subjects by naturalization, and as to this one point at least is clear. If by the law of England aliens are made British subjects by naturalization, then they must be included in this term when used in the treaties: for the oriental State must be assumed to agree to the use of terms in the treaty on the footing of English law, in so far as persons subject to that law are concerned. I state the case of naturalized persons in this guarded language on account of the well-known difficulty of interpreting the Naturalization Act, 1870, which I have dealt with in another work. It is sufficient to say here, that there is still an uncertainty as to whether the effect of the certificate of naturalization is not limited to the United Kingdom; and if it were eventually to be held that persons naturalized ceased to be British subjects when out of the United Kingdom, the same doubt which arises as to protected persons would also arise as to them. I believe that the certificate has not so limited an effect; and I think, therefore, that no difficulty in connexion with foreign jurisdiction could arise with regard to persons who have become British subjects by naturalization in the United Kingdom.

Naturalized subjects included in privilege of exterritoriality.

33 & 34 Vict. c. 14.

cf. "Nationality," Vol. I, Chap. VIII.

But with regard to aliens naturalized in the colonies, there is no uncertainty as the law now stands. They have the privileges of British subjects only within the colony in which they are naturalized. It could not, therefore, be contended that they come within the definition of "British subject" in the Orders in Council: for, on the hypothesis, the jurisdiction is only exerciseable in places which are not colonies. It is unnecessary to go deeper into the complex questions, such as "double nationality," and "no nationality," which arise under the existing Naturalization Act: the joint application of the principles of nationality and of exterritoriality can easily be worked out as occasion arises.

But persons naturalized in the colonies are not so entitled.

cf. "Nationality," Vol. I, Chap. XV.

Subjects of native Indian States entitled to the privilege.

Reverting now to protected persons, it seems fairly clear that the principle which, as I think, supports the inclusion of naturalized subjects within the benefits of exterritoriality, applies equally to the subjects of the native Indian Princes; for the recital of the statute above referred to, declares them to be entitled to the King's protection, and it may be assumed as before that the oriental State would conclude the treaty with knowledge of this fact, its attention being in all probability called to it.

The case of natives of Protectorates doubtful.

But when we come to natives of other British Protectorates, the point, in the absence of such an implied assent, is far from clear.

It will be seen that the later Orders in Council expressly refer to these persons as coming within the definition of "British subject": but that the treaties, except perhaps that with Persia, refer only to another class of protected persons—natives of the State with which the treaty is entered into who are in the service of British subjects.* In the absence of any stipulation or

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Referrences to "Protected Persons" in the treaties.

* The following are the references to "Protected Persons" in the Foreign Jurisdiction treaties.

Morocco—Treaty, 1856.

VII.—No subject of the Queen of Great Britain, nor any person under her protection, shall, in the dominions of the Sultan of Morocco, be made liable to pay a debt due from another person of his nation, unless he shall have made himself responsible or guarantee for the debtor, by a document under his own handwriting.

Zanzibar—Treaty, 1886.

XVII.—Subjects of His Highness the Sultan or any non-Christian nation not represented by Consuls at Zanzibar, who are in the regular service of British subjects, within the dominions of His Highness the Sultan of Zanzibar, shall enjoy the same protection as British subjects themselves.

Muscat—Convention, 1839.

IV.—Subjects of the dominions of His Highness the Sultan of Muscat, actually in the service of British subjects in those dominions, shall enjoy the same protection which is granted to British subjects themselves: but if such subjects of the dominions of His Highness the Sultan of Muscat shall be convicted of any crime or infraction of the law requiring punishment, they shall be discharged by the British subject in whose service they may be, and shall be delivered over to the authorities of His Highness the Sultan of Muscat.

understanding outside the treaty, as to the existence of which the decision of the Secretary of State under s. 4 of the Act would be the only proper evidence, it is difficult to see how the jurisdiction could be exercised against them. The words of s. 15 seem to leave the question open to be dealt with by Order in Council—"where any Order in Council made in pursuance of this Act extends to persons enjoying Her Majesty portection"—and therefore, presumably, the question whether such a provision in the Order is warranted by the treaty in virtue of which it is made, must be considered to be also open. It may be that the solution of the difficulty is that in this, as in all other matters, the Order in Council must not go beyond the treaty; and that the provision is inserted in order to enable the Order in Council to include within the jurisdiction such protected persons as are referred to in the treaty. But this is advanced with much diffidence.

cf. p. 53.

Protection of native servants.

Were it not for the inclusion of natives of the Indian States both in the section and in the definitions of the Orders in Council, it would seem as if the protected persons intended to be included in the jurisdiction were limited to natives in the service of British subjects. This would seem to be the true meaning of the expression used in the older Orders such as that with Muscat:—"The Order extends . . . to all persons enjoying His Majesty's protection in the dominions of the Sultan of Muscat"—

Persia—Treaty, 1857.

References to "Protected Persons" in the treaties.

XII.—Saving the provisions in the latter part of the preceding article †, the British Government will renounce the right of protecting hereafter any Persian subject not actually in the employment of the British missions, or of British Consuls General, Consuls, Vice Consuls, or Consular Agents, provided that no such right is accorded to, or exercised by, any other foreign Power: but in this, as in all other respects, the British Government requires, and the Persian Government engages, that the same privileges and immunities shall in Persia be conferred upon, and shall be enjoyed by the British Government, its servants and subjects, and that the same respect and consideration shall be shewn for them, and shall be enjoyed by them, as are conferred upon and enjoyed by, and shewn to, the most favoured Government, its servants and subjects.

† This refers to certain claims against the Persian Government by Persian and other foreign subjects under British protection, which were to be adjudicated upon after the return of the British Mission to Tehran.

The protection of native servants is, from its nature, temporary. The rights arising from it are in some cases, expressly defined: thus, by the Turkish Regulations, relative to the employment of native dragomans and cavasses in foreign Consulates, 1863-65, the number is strictly limited: and their rights are, shortly, described as follows—"Les protégés temporaires jouiront des mêmes droits que les protégés ordinaires . . . La protection des employés privilégiés des Consulats est individuelle, et attachée à leurs fonctions. Elle cessera en cas de décès et de cessation de ces fonctions." The regulations are explained in a subsequent circular addressed to the Turkish Governors-General, 20 December, 1865.

State Papers, Vol. CXVIII, p. 1046.

ib., p. 1049.

An example of the application of English law to such protected persons will be found in the case of *Abd-ul-Messih* v. *Farra*, which is considered in section dealing with the law of domicil.

Abd-ul-Messih v. *Farra*, L. R. 13 A. C. 431.

cf. Section XII.

In this connexion it is interesting to note that when the convention of protection was entered into between France and Madagascar†, 17 December, 1885, the following special clause was inserted:—" Les Malgaches à l'étranger seront placés sous la protection de la France."

†[*i.e.* before the Island became a French colony.]

Section 16.

16. In this Act—

Definitions.

The expression "foreign country" means any country or place out of Her Majesty's dominions:

The expression "British Court in a foreign country" means any British Court having jurisdiction out of Her Majesty's dominions in pursuance of an Order in Council, whether made under any Act or otherwise:

The expression "jurisdiction" includes power.

The Act does not limit the possible exercise of foreign jurisdiction to unciviled countries.

It is important to notice how wide the enabling provisions of the statute are. We have already seen that it includes all forms of foreign jurisdiction, whether in Protectorates or in oriental countries, and extends to the case of Cyprus. But it is most material to the subject to note that, on its civil side, it is not outside the bounds of possibility for foreign jurisdiction to be acquired in a European, or "civilised," country; and if acquired, the terms of the Foreign Jurisdiction Act, including its reference to "ceded and conquered territories," would be the sufficient and proper authority for its exercise by the King.

cf. p. 10

Take the following hypothetical case. In France the Courts as a general rule refuse to entertain civil suits between foreigners:

they are remitted to their own tribunals. Now, it is quite possible that, owing to this, and to the strict rules of jurisdiction which govern the English Courts in civil actions, a dispute between two Englishmen in Paris could not be tried either in France or in England, and that, therefore, the parties would be without redress. Such a state of things might be remedied by allowing the King's Consuls in France to act as arbitrators in such disputes, subject to the consent of the parties; and there would then be no question of treaty or of any new Act of Parliament. But the King might acquire, by treaty with the French Government, the right to give his Consuls jurisdiction in such cases over his subjects, and to this end to set up Consular Courts, with power to issue summonses to English defendants, to compel the attendance of English witnesses, and provided in fact with all the machinery necessary to an effective Court of Law. Such a Court would be validly established under the Foreign Jurisdiction Act, and its rules would be properly provided by Order in Council.

Section 17.

17. The Acts mentioned in the second schedule to this Act may be revoked or varied by Her Majesty by Order in Council. Power to repeal or vary Acts in second schedule.

The Acts in question are—

24 & 25 Vict. c. 31: "For the prevention and punishment of offences committed by Her Majesty's subjects within certain territories adjacent to the Colony of Sierra Leone."

26 & 27 Vict. c. 35: "For the prevention and punishment of offences committed by Her Majesty's subjects in South Africa."

In that part of Section I which deals with the "Delegated exercise of Foreign Jurisdiction in other parts of the Empire," the action which has been taken in connexion with the matters dealt with by these two Acts is explained. *cf.* p. 16.

Section 18.

18. The Acts mentioned in the Third Schedule to this Act are hereby repealed to the extent in the third column of that Schedule mentioned: Provided that,— Repeal.

(1) Any Order in Council, commission, or instructions made or issued in pursuance of any enactment repealed by this Act, shall, if in force at the passing of this Act, continue in force, until altered or revoked by Her Majesty, as if made in

Repeal.

pursuance of this Act; and shall, for the purposes of this Act, be deemed to have been made or issued under and in pursuance of this Act; and

(2) Any enactment, Order in Council, or document referring to any enactment repealed by this Act shall be construed to refer to the corresponding enactment of this Act.

In addition to the old Foreign Jurisdiction Acts of 1843, 1865, 1866, 1875, and 1878, which were consolidated by the new Act, the following Acts are repealed:—

20 & 21 Vict. c. 75:—"To confirm an Order in Council concerning the exercise of jurisdiction in matters arising within the Kingdom of Siam."

33 & 34 Vict. c. 55:—"To vest jurisdiction in matters arising within the dominions of the Kings of Siam in the Supreme Court of the Straits Settlements."

39 & 40 Vict. c. 46, ss. 4 & 6,—whereby the subjects of certain Indian Princes were made amenable to the Orders in Council relating to Zanzibar and Muscat: these sections already been referred to under s. 15.

cf. p. 68.

Section 19.

Short title.

19. (1) This Act may be cited as the Foreign Jurisdiction Act, 1890.

(2) The Acts whereof the short titles are given in the first schedule to this Act may be cited by the respective short titles given in that schedule.

The Acts contained in the first schedule are those which may be applied to foreign jurisdiction by Orders in Council. They are analysed, and their application considered, in Section VII.

VI

General Principles governing the Exercise of Foreign Jurisdiction.

The Act provides that the jurisdiction which the King has acquired in a foreign country by treaty or other lawful means, is to be exercised in the same and as ample a manner as in a conquered or ceded colony. By s. 16, "jurisdiction" includes "power."

The question now to be discussed is, on the face of it, very similar to that discussed in the Section dealing with "Jurisdiction by Sufferance." It is, however, of a much wider nature, and depends on different considerations.

cf. Section IV.

The King's power and jurisdiction is three-fold: legislative, administrative, judicial. In the United Kingdom this three-fold power is exercised in conjunction with Parliament, by means of Secretaries of State, and through the Judges and the House of Lords. In ceded colonies† it is exercised in conjunction with the Privy Council, by means of representatives or agents, and through the colonial Judges and with the advice of the Judicial Committee. In countries where the King has foreign jurisdiction the Act assumes that he has this same three-fold power; it is, therefore, if the assumption is accurate, to be exercised, for legislation, in conjunction with the Privy Council: for executive action, by means of representatives or agents: and in administering justice, through specially appointed Judges and with the advice of the Judicial Committee. The exercise of foreign jurisdiction must, therefore, be separately considered in its three aspects—legislative, executive, and judicial. There are, however, some general questions which must be disposed of before we deal with the details and manner of its exercise.

Three-fold nature of the King's foreign jurisdiction.

†[The term "ceded colony", is used throughout this Section for the sake of brevity.]

The first of these questions is of paramount importance—Has the King in fact this three-fold power in foreign jurisdiction countries: and, if so, whence does he derive such extensive jurisdiction? The statute contemplates the full and ample exercise of sovereignty in the foreign country: but in foreign jurisdiction, as distinct from protected countries, the exercise can never be other than partial, for the treaty grant is itself partial, even when supplemented by sufferance.

In the first place, it cannot be too often insisted on that the Foreign Jurisdiction Act covers all forms of jurisdiction acquired in foreign countries, from the highest, which is involved in a Protectorate, to the narrowest. In what we call for convenience "Foreign Jurisdiction", which stands for the exercise of consular jurisdiction in oriental countries where the sovereignty still remains independent, subject only to the exercise of the rights of exterritoriality, the jurisdiction is purely personal, and with certain small exceptions, is limited to British subjects.

cf. p. 9.

cf. Note on the *Muscat case*, p. 9.

cf. p. 10.

The three-fold power exists even though the area of its exercise is limited to a personal jurisdiction over subjects.

The question, therefore, must be put in this form—Whence does the King derive such extensive powers in connexion with this purely personal jurisdiction over his subjects? and if we turn, as we must, to the treaties supplemented by sufferance, it is not easy in all cases to find the answer. Very rarely does the treaty run in so simple a form as this—"Jurisdiction over British subjects is hereby granted to the King of England". The Corean treaty is, I think, the only example of "jurisdiction over the persons and property of British subjects" being granted in general terms. In the treaties entered into with native tribes, the form indeed is usually wider. Thus, in the agreement with the Barolongs, the Chief says "I give the Queen to rule in my country over white and black men". But I believe, though I hesitate to express the opinion positively, that all the tribes with which treaties were concluded, have now become merged into Protectorates.*

Protectorates and Foreign Jurisdiction Countries.

The subject might, therefore, be broadly divided into two heads—Protectorates, and countries where Consular Jurisdiction

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Lists of Protectorates, and Foreign Jurisdiction Countries.

* The list of Protectorates given in the British Protectorates Neutrality Orders in Council, 24th October, and 14th November, 1904, is as follows:—

Northern Nigeria.	Swaziland.
Southern Nigeria.	British Central Africa.
Sierra Leone Protectorate.	British East Africa.
Gambia Protectorate.	Uganda.
Lagos Protectorate.	Somaliland.
Northern Territories of the Gold Coast.	Wei-Hai-Wai.
Bechuanaland Protectorate.	British North Borneo.
Southern Rhodesia.	Brunei.
Barotziland—North-Western Rhodesia.	Sarawak.
North-Eastern Rhodesia.	

Together with any protected Islands and Territories within the limits of the Pacific Order in Council, 1893.

This list is presumably exhaustive, and therefore warrants the statement in the text that a hard and fast line has now been drawn between Protectorates and Consular Jurisdiction Countries.

The list of Foreign Jurisdiction Orders in Council referred to in the Foreign Jurisdiction Neutrality Order in Council, 24th October, 1904, and which also is probably exhaustive, is as follows:—

Muscat (1867).	Zanzibar (1897).
Morocco (1889).	Ottoman Empire (1899).
Persia—Inland (1889).	Siam (1903).
Persian Coasts and Islands (1889).	China and Corea (1904).

is exercised. But there is no necessity for so doing, because in practice both are treated by the Foreign Office in the same way: no difference of principle being observable in the Orders in Council which are issued in respect of them, though there are naturally many differences of detail. Of this the Neutrality Orders in Council of 1904 are a sufficient example.

This digression serves to emphasise the importance of giving the correct answer to the question just propounded.

Common form of the treaty grant examined.

Turning to the treaties, we find them almost invariably drafted in a form which appears to be no more than a grant of the right to exercise judicial power in cases in which the King's subjects have disputes among themselves, or in which complaints are made against them: in other words, it would seem to be of "Consular Jurisdiction" pure and simple; and this has been the basis of the discussions in the foregoing Sections. We have now to consider whether the three-fold power which is in fact claimed and exercised can be derived from the grant. I think it may be justified.

cf. Section X.

Sufferance, as we shall presently see, has probably added a jurisdiction affecting foreigners: and further, may have to be appealed to in justification of some of the details which the treaty grant can hardly be said to warrant. But we are now concerned with the larger question, how the exercise of the other sovereign powers can be derived from a grant which, in its most common form, runs as follows:—"all questions in regard to rights, whether of property or persons, arising between British subjects, shall be subject to the jurisdiction of the British authorities."

cf. art. 15 of the treaty with China.

The exercise of legislative power flows from the grant of judicial power.

As I have just said, on the face of them these words seem to contemplate only the exercise of judicial powers. It does not appear, however, to involve a too great straining of these words, to hold that the jurisdiction, to which all questions in regard to these rights are made subject, must include the right to decide, legislatively, as distinct from judicially, what those rights are: for that is one of the questions which arises in regard to them. But the broad rule of interpretation of treaties, which in due course we shall consider, may also be appealed to in order to justify this construction. If the grant were to be construed to be one of trial of disputes only, the law to be applied would of necessity be that of the oriental country; and this, it may be safely asserted, is never, in the absence of express stipulation,

cf. Section X.

contemplated by the contracting parties. The point involved in this discussion may be put shortly thus—Is a reference to the decision of disputes "by British law" essential to the application of that law, or can it be inferred as above suggested? The answer is, I think, that it is not essential.

Criminal jurisdiction.

The same interpretation must be put on the grant of criminal jurisdiction over subjects. But here it will be found that in many cases the law by which the criminality of the act is to be decided, and hence the right of the injured party determined, is expressly provided in the treaty.

The power to declare what the rights are is, therefore, I think, to be derived from such a grant as the one referred to above, as well as the right to determine all disputes in connexion with them.

Power to erect Courts and determine their constitution.

The grant of the judicial power carries with it also the right to erect Courts for the purpose, and to determine their constitution.

exp. Carew, 1897, A.C. 719.

This latter point was discussed in *ex parte Carew*, where it was held that the constitution of the Consular Court—in the instance, trial by a jury of five—was absolutely in the discretion of the Sovereign in virtue of the treaty grant. The question was argued on the ground that, by the law of England, no British subject can be tried and convicted of any capital or other felony except by a verdict of twelve men. The decision of the Judicial Committee may also, therefore, be taken to be an illustration of the rule laid down in s. 12 (2) of the Foreign Jurisdiction Act, that an Order in Council is not to be held void on account of repugnancy to the law of Engand.

cf. p. 61.

The limitation of the treaty grant not to be lost sight of.

It will be understood that the exercise of the right of legislation is, in the same way as the right of judicial decision, limited by the extent of the treaty grant; and that, in accordance with principles already established, the general nature of the provisions of the Foreign Jurisdiction Act cannot be appealed to to warrant any larger exercise of this power. This consideration does, I think, remove the difficulties in the way of tracing the right of executive action to the same words in the treaty, which undoubtedly exist. Executive action generally, though it comes within the terms of the Act, could not find its warrant in a treaty grant such as the one given above. But it is included, as the right of legislative action is, in the jurisdiction to which all questions in regard to the rights of property or person are made subject; and,

cf. the cases cited on pp. 35, 36.

The warrant for executive action is also to be derived from the treaty grant.

so far as it may be necessary to the settlement of such questions, administrative or executive action is justified. It will be found, when we come to deal with the "Exercise of the Administrative Power", that such action as is authorised by the Order in Council is very limited, and may be assumed to fall, or to be intended to fall, within the terms of the treaty grant.

cf. Section IX.

The exercise of the King's jurisdiction in its three branches being thus justified, we must now consider another important preliminary point which arises in connexion with the exercise of the right of legislation, namely, interpretation or construction; for the method adopted for exercising this right involves a practical question of considerable difficulty.

Interpretation and construction of laws passed for foreign jurisdiction countries.

There has recently been an example of direct legislation by Order in Council in the case of neutrality: but the more common form in which the right of legislation is exercised is by applying the laws of this country to these foreign communities, in so far as it may be desirable and applicable, either specially or collectively. For example: an isolated statute, such as the Public Authorities Protection Act, 1893, may be specially applied: or a group of enactments, or a body of law, such as the laws applicable to probates and letters of administration: or again, a still larger body of law, such as the whole of the criminal law of England, or, as in the case of Zanzibar, of the law of British India, may be applied generally.* Such a simple and expeditious method of legislation is inevitable and useful: but it brings in its train a most complicated question of interpretation; for it is obvious, that to make the necessary changes in the terminology of all the statutes would involve a great amount of labour, and the result could hardly be expected to be exact in all cases. And terminology is not the only trouble. To meet these difficulties certain broad principles of adaptation have been established.

Example of direct legislation.

Common method of legislating.

56 & 57 Vict. c. 61.

Broad principles governing adaptation of laws.

First: by s. 5 of the Principal Act,† the King may by Order in Council direct that all or any of the Acts set out in the first

† *i.e.* the Foreign Jurisdiction Act, 1890.

* More accurately, certain specified enactments of the Governor-General of India in Council, and of the Governor of Bombay in Council, so far as circumstances admit; and so far as they are inapplicable, the common and statute law of England in force at the commencement of the Order; also, future enactments of the Governor-General of India in Council, or of the Governor of Bombay in Council, at such time as the Secretary of State may fix *(Zanzibar Order in Council, 1897, art. 11).*

schedule, "or any enactments for the time being in force amending or substituted for the same, shall extend with or without any exceptions, adaptations, or modifications in the Order mentioned, to any foreign country in which for the time being His Majesty has jurisdiction. Thereupon those enactments shall, to the extent of the jurisdiction, operate as if that country were a British possession, and as if His Majesty in Council were the Legislature of that possession."

The "Applied Acts." *cf.* Section VII, *A.*

These Acts, some twelve in number, will be for convenience termed the "Applied Acts": and it will be seen, when we come to consider them in their applied form, that some of the necessary substitutions in the wording of their provisions have been made.

Acts extended by sections in the Acts themselves. *cf.* p. 26.

Secondly: there is a smaller group of Acts which contain sections applying them to foreign jurisdiction when an Order in Council is issued for that purpose. The main difference between these two groups is that the modifications necessary to make them fit the new conditions to which they are to apply are, in the first group, to be determined by Order in Council, in the second, are left to be dealt with by the general rules of adaptation.

cf. Section VII, *B.*

cf. China Order, art. 31.

Thirdly: the broad principle is laid down in the Orders in Council governing the operation of applied Acts, whether they are applied "by virtue of any Imperial Act or of the Order or otherwise," that all Acts, laws, orders, forms, regulations, or procedure so applied "may be construed or used with such alterations and adaptations not affecting the substance as may be necessary having regard to local circumstances." In the case of Courts or officers, the substitution is to be of Courts and officers having the like or analogous functions, or by a specially designated officer. And in the case of difficulty in the application, a Secretary of State may direct "by, to, or before whom and in what manner anything is to be done," the Act being to be construed accordingly.

Principle governing operation of Applied Acts.

General principle of application "as far as circumstances admit."

Finally: there is the further rule which is generally laid down specifically in all cases where an entire body of law is introduced, such as the criminal, or the Admiralty, that it is to be applied "as far as circumstances admit."

These are the machinery clauses by which existing legislation can be made to work in a country subject to foreign jurisdiction, each contributing its own special facility. What one fails to

accomplish may perhaps be effected by means of one of the others: for, clearly, when an Act has been applied, all of the principles of interpretation must operate upon it if and when necessary. Yet, even then, it can hardly be said that these provisions contain the master-key for unlocking all difficulties of interpretation. Special substitutions, from their nature, can only be resorted to when they can be foreseen: for example, where it is necessary to prescribe that some special Court or officer shall perform the functions of some Court or officer in the dominions mentioned in the Act in question. In spite of the provision with regard to analogous Courts and officers in the Orders in Council referred to above, it would seem that such substitutions, if not essential, are certainly expedient, in view of the question of jurisdiction which is involved. But it is manifestly impossible, apart from the labour involved, to indicate every change of language which is necessary to the application: or even to indicate what parts of the Act are capable of being applied. Recourse must, therefore, be had to the general adaptation clause, which enables such adaptations to be made as the circumstances of the case may require. A similar clause figures in almost every constitutional document dealing with government or jurisdiction in the different parts of the Empire. By means of it the common and the statute law of England have been introduced and made workable in occupied colonies;* subject to this rule too, foreign laws are allowed to continue in force in conquered or ceded colonies. The scope and meaning of the rule, as well as the knotty problems connected with its interpretation, have been dealt with in another book, and need not here detain us.

Limited possibilities of special substitutions.

cf. "Nationality," Vol. I, Chap. XIV.

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* *e.g.* So much of the common law and the statute law of England is in force in colonies acquired by settlement as is applicable to the condition of the settlers, or is adapted to their new situation (*Mayor of Lyons* v. *East India Co.*, and *Whicker* v. *Hume*).

Mayor of Lyons v. *E. I. Co.* 1 Mo. P.C. 175. *Whicker* v. *Hume*, 7 H.L. Ca. 124.

By 9 Geo. IV. c. 83, all rules and statutes in force in England at the time of the passing of the Act, are applied to the administration of justice in the Courts of New South Wales, as far as the same can be applied within the colony.

cf. "Nationality," Vol. I, pp. 211, 213.

In Tobago, a local Act of 1841, declared that such parts of the common and statute law of England as are or shall be or become applicable and suitable to the circumstances and population of the colony, should be in force in the Island.

The law applied is that in force at the time the cause of action arises.

But the method usually adopted for doing this in the Order in Council differs from that used in the case of colonial constitutions. The body of English law introduced into a colony acquired by occupation, whether in virtue of the doctrine that settlers take the law of their mother-country with them, or in virtue of the express terms of the charter or other constitutional document, is the law of England as it then is: whereas in the case of the bodies of law introduced for the purpose of consular jurisdiction, it is the law of England "for the time being:" that is, the law which exists in England at the time when the cause of action arises.

Application of amending Acts.

In the same way, s. 5 of the Principal Act contemplates, though it does not direct, the application of Acts amending the "applied Acts." This course will be found to be generally adopted. By this means the troublesome question which often arises in the colonies, whether a later amending Act is incorporated in an old Act which has been introduced is avoided: a question which is not entirely settled by s. 11 of the Interpretation Act, 1889: and which is not even attempted to be dealt with in the case of old foreign laws which remain in force in ceded colonies.

52 & 53 Vict. c. 63.

cf. "Nationality," Vol. I, p. 216.

Further rule of adaptation derived from s. 5 (2) of Principal Act.

cf. p. 23.

Lastly, it may also be necessary to resort to s. 5 (2) of the Principal Act in order to find warrant for some substitutions. The meaning of this provision has already been discussed. There seems to be a practical intention which may be given to the words, the applied enactments "shall operate as if that country were a British possession," which may facilitate interpretation. It is obvious that, speaking generally, the class of Acts which it would be advantageous to extend to foreign jurisdiction are those which are applicable to, or have been extended to, the colonies. Then the Act, when applied to foreign jurisdiction, is to be construed as if the country to which it is applied were, for the purposes of construction, a British possession.

22 Vict. c. 20.

cf. Section VII, *A.*

Example of special substitution, and of substitution under s. 5 (2).

To take a concrete example. The Evidence by Commission Act, 1859, provides that a Court of competent jurisdiction in the dominions" may issue a commission to "a Court having authority under the Act," to take the evidence of witnesses in cases pending before it. By special substitution, the Supreme Consular Court takes the place of a Colonial Supreme Court in s. 5, and thus becomes "a Court having authority under the Act." The Colonial Supreme Court is, however, not mentioned in the other

sections of the Act: but in virtue of this provision of the Principal Act, it is clear that the Consular Courts take the place of the Courts of competent jurisdiction in the dominions, and that they also have power to issue commissions under the Act to other Courts having authority under the Act. It may well be that this result would also be arrived at under the general substitution clause: but the text of s. 5 (2) of the Principal Act gives direct warrant for it.

These principles being, as I trust, made clear, I proceed, in the next Section, to give as accurate a paraphrase as possible of both classes of the applied Acts.

VII

The Applied Acts.

A

ACTS APPLIED IN VIRTUE OF SECTION 5 & SCHEDULE 1, OF THE PRINCIPAL ACT.

Admiralty Offences (Colonial) Act, 1849,.....p. 84.

Admiralty Offences (Colonial) Act, 1860,.....p. 85.

Merchant Shipping Act, 1894—Part XIII, [in lieu of Merchant Shipping Act, 1854, Part X, and Merchant Shipping Act, 1867, s. II].....p. 86.

Evidence Act, 1851, ss. 7 and 11,.....p. 88.

Foreign Tribunals Evidence Act, 1856,.....p. 89.

Evidence by Commission Act, 1859,.....p. 91.

Evidence by Commission Act, 1885,.....p. 93.

British Law Ascertainment Act, 1859,.....p. 94.

Foreign Law Ascertainment Act, 1861,.....p. 96.

Conveyancing (Scotland) Act, 1874, s. 51,.....p. 97.

Fugitive Offenders Act, 1881,.....p. 98.

Admiralty Offences (Colonial) Act, 1849.—*12 & 13 Vict. c. 96.*

[Imp. Stats.,† Vol. I, p. 110.]

To provide for the prosecution and trial in Her Majesty's Colonies of offences committed within the jurisdiction of the Admiralty.

[*applied by art. 39, China Order.*]

Provisions of the Act.

Person charged in a colony with offence on the sea to be dealt with as if offence committed in colonial waters.

If any person within any colony charged with treason, piracy, felony, robbery, murder, conspiracy, or other offence of what nature or kind soever, committed upon the sea, or in any place where the Admiral has jurisdiction: or if any person charged with any such offence upon the sea, or in any such place, shall be brought to trial in any colony, the Courts in the colony are to exercise the same jurisdiction as by the law of such colony they would have had if the offence had been committed upon the waters situate within the limits of such colony, and within the limits of the local jurisdiction of the criminal Courts of such colony. [*s. 1*]

Trial of murder or manslaughter where death only happens in colony or on the sea.

Where any person dies in any colony of any stroke, poisoning or hurt, having been feloniously stricken, poisoned or hurt upon the sea, or in any place where the Admiral has jurisdiction, or at any place out of such colony, the offence (whether murder or manslaughter, or of being accessory) may be tried and punished in such colony as if it had been wholly committed therein; and if any person in any colony shall be charged with any such offence in respect of the death of any person who, having been stricken, poisoned, or otherwise hurt, shall have died of such stroke, poisoning or hurt upon the sea, or in any place where the Admiral has jurisdiction, the offence shall be held for the purpose of this Act to have been wholly committed upon the sea. [*s. 3*]

Provisions of the Order in Council.

"In cases of murder or manslaughter if either the death, or the criminal act which wholly or partly caused the death, happened within the jurisdiction of a Court acting under this Order, that Court shall have the like jurisdiction over any British subject who is accused either as the principal offender, or as accessory

† I have given the references to the "Imperial Statutes Applicable to the Colonies" of all the statutes considered in this Section, for the convenience of those who use that book of reference.

before the fact to murder, or as accessory after the fact to murder or manslaughter, as if both the criminal act and the death had happened within that jurisdiction". [*art. 39*, i]

This provision shall be deemed to be an adaptation, for the purpose of this Order and of the Foreign Jurisdiction Act, 1890, of the Admiralty Offences (Colonial) Act, 1849, which shall apply and be administered accordingly. [*art. 39*, iii]

Operation of the Act as applied.

The use of the word "adaptation" in the third clause of art. 39, would seem to show that clause *i* is to be read in lieu of the Act with the usual substitutions. It is indeed an ingenious amalgamation, for the purposes of the Consular Courts, of the Act of 1849 itself, of ss. 9 and 10 of the Offences against the Person Act, 1861: that is to say, of the general criminal law of England with regard to murder and manslaughter on the high seas, with the exception of the provisions of the Merchant Shipping Act, which are dealt with separately in the same article.

24 & 25 Vict. c. 100. [Imp. Stats., Vol. I, p. 108.]

cf. p. 86.

If this construction is right then the application of this Act is limited to murder and manslaughter, the other offences falling to be dealt with under s. 686 of the Merchant Shipping Act, 1894, as applied. As I have pointed out in another book, the whole of the English law as to high sea offences is in inextricable confusion, and it is unnecessary to go into the question again.

Act as applied seems limited to murder and manslaughter.

cf. "Nationality," Vol. II, pp. 139, *et seq.*

Admiralty Offences (Colonial) Act, 1860.—*23 & 24 Vict. c. 122.*

To enable the Legislatures of Her Majesty's possessions abroad to make enactments similar to the enactment of the Act Ninth George the Fourth, chapter thirty-one, section eight.

[Imp. Stats., Vol. I, p. 112.]

[*applied by art. 39, China Order.*]

Provisions of the Act.

The Act enables colonial Legislatures to pass laws similar to the Act 9 Geo. IV. c. 31, which was repealed by 24 & 25 Vict. c. 95, s. 1, and replaced by 24 & 25 Vict. c. 100, s. 10.

The effect of this provision is that a colonial Legislature may provide that where any person feloniously stricken, poisoned or otherwise hurt at any place within the colony, shall die of such stroke, poisoning or hurt upon the sea or at any place out of the

Colonial legislation in respect of acts in the colony resulting in death out of colony.

colony, the offence, (whether murder or manslaughter, or of being accessory) may be tried and punished in the colony as if it had been committed wholly within the colony.

This statute is supplementary to the Act of 1849, which deals by Imperial legislation with the complicated question of jurisdiction arising when the stroke happens in one place and the consequences of the stroke in another. For reasons which it is not now necessary to enquire into, it was thought advisable to allow colonial Legislatures to pass laws on the same lines, which, being extra-territorial, they could not do without the sanction of the Imperial Parliament.

Provisions of the Order in Council.

These are the same as in the case of the preceding statute.

Operation of the Act as applied.

It is probable that the reason why the Act is included among the applied Acts, is to sanction similar extra-territorial legislation for the Consular Courts by the King in Council, who is, by s. 5 (2) of the Principal Act, made equivalent to the Legislature of countries where foreign jurisdiction is exercised. It is, therefore, in virtue of the application of this Act, that the variations of the previous Act are warranted.

cf. pp. 23, 55.

Merchant Shipping Act, 1894: Part XIII.—*57 & 58 Vict. c. 60.*

[Imp. Stats., Vol. I, p. 382.]

[*in lieu of Merchant Shipping Act, 1854: Part X, and 30 & 31 Vict. c. 124, s. 11.*]

[*applied by art. 39, China Order.*]

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In the Orders in Council for Siam and Turkey, s. 686 of the Merchant Shipping Act, 1894, is expressly referred to in the corresponding articles dealing with "Admiralty Offences, &c.", instead of Part XIII. It would seem however as if the result were the same so far as the remaining sections of that Part are concerned, for they are not otherwise expressly extended, although the power to do so exists, Part XIII being included in the 1st schedule of the Principal Act.

(s. 684): jurisdiction over ships lying off the coast (s. 685): jurisdiction in case of offences on board ship (s. 686): jurisdiction in respect of offences committed by British seamen in foreign ports (s. 687): jurisdiction to arrest foreign ships that have occasioned damage (s. 688): the conveyance of offenders to the United Kingdom or to the colonies (s. 689): enquiries into the cause of death on board ship (s. 690): receiving depositions in evidence when a witness cannot be produced (s. 691): enforcing detention of ship under the Act (s. 692): together with other sections dealing with legal procedure.

Some of the sections, *e.g.* s. 689, apply generally to British consular officers, and therefore do not come within the purpose of this book.

Provisions of the Order in Council.

By the inclusion of the Part of the Act in the schedule, it would seen as if the whole of its provisions were intended to be applied to countries where foreign jurisdiction is exercised.

The Order in Council, however, contains the following provision, which, as in the case of the Admiralty Offences (Colonial) Act, 1849, it declares to be an adaptation for the purposes of the Order and of the Foreign Jurisdiction Act, 1890:—

"In the case of any offence committed on the high seas, or within the Admiralty jurisdiction, by any British subject on board a British ship, or on board a foreign ship to which he did not belong, the Court shall, subject to the provisions of this Order, have jurisdiction as if the offence had been committed within the jurisdiction of that Court". [*art. 39*, ii]

Operation of the Act as applied.

Art. 39 *(ii)* reproduces, with certain verbal alterations, s. 686 of the Act; and if the meaning of the term "adaptation" be, as above suggested, that this clause is to be read in lieu of the Act with the usual substitutions, this is the only section of this Part of the Merchant Shipping Act which is applied to the Consular Courts. In furtherance of this view it may be pointed out that this section is the only one which is *in pari materiâ* with the other enactments applied under art. 39 of the Order, the marginal note to which is "Admiralty Offences, &c."*

Sec. 686 of M.S. Act alone applied.

In connexion with these three applied Acts there are two general considerations to be noted.

In art. 39 (ii) of the Order, it is provided that "in cases tried under this article no different sentence can be passed from the sentence which could be passed in England if the offence were tried there." In spite of its position in the second clause, its general terms shew that this provision applies also to the first clause, which adapts the Admiralty Offences (Colonial) Acts.

The expression "within the jurisdiction of the Court" used in both paragraphs of the article, is equivalent to the term "limits of the Order". These are defined in art. 2, and include the territorial waters of China.

cf. p. 12.

Evidence Act, 1851, ss. 7 and 11.—*14 & 15 Vict. c. 99.*

[Imp. Stats., Vol. I, p. 173.]

[*applied by art. 168, China Order.*]

Provisions of the Order in Council.

Sections 7 and 11 of this Act are extended for all purposes, as if the Courts, districts and places to which this Order applies were in a British Colony.

Operation of the Act as applied.

Proof of judgments, &c., of Consular Courts in British Courts.

By the extension of s. 7, all judgments, decrees, orders, and other judicial proceedings of the Consular Courts, and all affidavits, pleadings, and other legal documents filed or deposited in such Courts, may be proved in any Court, or before any person having authority to take evidence, either by examined copies, or by authenticated copies sealed with the seal of the Court, or if the Court has no seal, by the signature of the Judge, who shall attach to his signature a statement that the Court has no seal. These documents shall thereupon be admitted in evidence in every case in which the original document could have been received in evidence, without proof of the seal or signature, or of the truth of the statement attached thereto, or of the judicial character of the person appearing to have made such signature or statement.

Proof of documents, &c., referred to in s. 7, in Consular Courts.

By the extension of s. 11, the documents admissible without proof under s. 7 in England, are equally admissible in the Consular Courts. This includes, in addition to judgments and other

judicial documents, all proclamations, treaties, and other acts of state of any foreign State or British colony, and judgments, decrees, orders and other judicial documents of any foreign or colonial Court, the copy being authenticated by the seal of the foreign State or British colony, or foreign or colonial Court, or in default of such seal of the Court, by the signature of the Judge, coupled with a statement that the Court has no seal.

Foreign Tribunals Evidence Act, 1856.—*19 & 20 Vict. c. 113.*

To provide for taking evidence in Her Majesty's dominions in relation to civil and commercial matters pending before foreign tribunals. [Imp. Stats., Vol. I, p. 174.]

[*applied by art. 125, China Order.*]

Provisions of the Act.

Application by foreign Court to Courts having authority under the Act to obtain evidence of witnesses in civil or commercial matters.

Where upon an application made for the purpose it appears to *any Court or Judge having authority under this Act*, that any Court or Tribunal of competent jurisdiction in a foreign country, before which any civil or commercial matter is pending, is desirous of obtaining the evidence in relation to such matter of any witness within the jurisdiction of such first-mentioned Court, an order for such examination upon oath, interrogatories, or otherwise may be made. The order (or any subsequent order) may command the attendance of the witness, or the production of any specified writings or other documents, and may give all reasonable and just directions as to the time, place and manner of such examination, and all other matters connected therewith. The order may be enforced in the same way as an order made by such Court in a cause depending before it. [*s. 1*]

A certificate under the hand of the ambassador or other diplomatic agent of the foreign country, or where there is no such agent, then of the Consul General or Consul of the country in London, that the matter is a civil or commercial matter pending before the Court, and that the Court is desirous of having the evidence, shall be evidence of the matters so certified: but other evidence is admissible. [*s. 2*]

Authority to administer oath: perjury.

The person authorised to take the examination of the witness by an order made under this Act may take such examination on

oath. A witness wilfully and corruptly giving false evidence is to be deemed guilty of perjury. [*s. 3*]

The witness is entitled to the like conduct money, and payment for expenses and loss of time, as upon attendance at a trial. [*s. 4*]

A witness may refuse to answer questions tending to criminate himself, or to produce documents that he would not be compellable to produce at a trial. [*s. 5*]

"Authorised Courts."

Courts and Judges "having authority under this Act" are:—

The Superior Courts of Common Law in England:

The Court of Session in Scotland:

The Supreme Court in any colony,

and any Judge of any such Court:

Any Judge in any colony who may be appointed for the purpose by Order in Council. [*s. 6*]

Provision of the Order in Council.

In this Act the Supreme Court (*i.e.* the Supreme Court created by the Order) is substituted for a Supreme Court in a colony.

Operation of the Act as applied.

Consular Courts may take evidence for foreign Courts.

The effect of the application of the Act is to make the Consular (Supreme) Court, or any Judge thereof, a Court or Judge "having authority under this Act" within s. 6: that is to say, that requests for taking evidence may be made to it, or him, by a foreign Court in relation to civil and commercial matters pending before it. The Court must, however, be of competent jurisdiction in the foreign country; and the combined operation of ss. 1 and 2 would seem to exclude the Consular Courts of such country. The Act would, therefore, not enable the British Consular Courts to assist the Consular Courts of other Powers in the country by obtaining evidence for them.

Foreign Consular Courts excluded.

Where the substitution in the Order is of the "Supreme Court" (as in the case of the China Order) the request must be made to the Supreme, and not to any of the inferior, Consular Courts: for example, to the Supreme Court at Shanghai, and not to the Consular Court at Canton. The necessary instructions would thereupon be sent to the Consular Court by the Supreme Court.

The Order in Council referred to in s. 6 would relate to colonial Judges other than those of the Supreme Courts. An Order in Council would, therefore, be necessary to authorise a request being addressed to one of the inferior Consular Courts.

Evidence by Commission Act, 1859.—*22 Vict. c. 20.*

To provide for taking evidence in suits and proceedings pending before tribunals in Her Majesty's dominions in places out of the jurisdiction of such tribunals. [Imp. Stats., Vol. I, p. 176.]

[*applied by art. 125, China Order.*]

Provisions of the Act.

Examination of witness under order of Court in dominions when witness out of its jurisdiction.

Where upon an application made for the purpose it appears to *any Court or Judge having authority under this Act*, that any Court or Tribunal of competent jurisdiction in the dominions has authorised, by commission, order, or other process, the evidence in relation to any proceeding pending before it of any witness out of its jurisdiction, but "within the jurisdiction of such first-mentioned Court, or of the Court to which such Judge belongs, or of such Judge," such Court or Judge may order the examination of the witness before the person appointed, in the manner directed by the commission. The order (or any subsequent order) may command the attendance of the witness, or the production of any specified writings or other documents, and may give all reasonable and just directions as to the time, place and manner of such examination, and all other matters connected therewith. The order may be enforced, and disobedience thereof punished, in the same way as in the case of an order made by such Court in a cause depending before it. [*s. 1*]

Perjury.

A witness wilfully and corruptly giving false evidence on such examination is to be deemed guilty of perjury. [*s. 2*]

The witness is entitled to the like conduct money, and payment for expenses and loss of time, as upon attendance at a trial. [*s. 3*]

A witness may refuse to answer questions tending to criminate himself, or to produce documents that he would not be compellable to produce at a trial. [*s. 4*]

"Authorised Courts."

Courts and Judges "having authority under this Act," are—

The Superior Courts of Common Law in England:

The Court of Session in Scotland:

The Supreme Court in any colony:

and any Judge of any such Court:

Any Judge in any colony who may be appointed for the purpose by Order in Council. [*s. 5*]

Rules and orders "for giving effect to the provisions of this Act, and regulating the procedure under the same", may be made by the Lord Chancellor and two Common Law Judges, for England: the Lord Chancellor and two Common Law Judges, for Ireland: two Judges of the Court of Session, for Scotland: the Chief, or only, Judge, of the Supreme Court of any colony, for such colony. [*s. 6*]

Amendment Act by Act of 1885: *cf.* p. 93.

The provisions of s. 6 as to making rules includes rules with regard to costs of or incidental to the examination, including the remuneration of the examiner: whether the examination is under *22 Vict. c. 20*, or *48 & 49 Vict. c. 74*, or any other Act relating to the examination of witnesses beyond the jurisdiction. [*48 & 49 Vict. c. 74, s. 5*]

Provision of the Order in Council.

In this Act the Supreme Court (*i.e.* the Supreme Court created by the Order) is substituted for a Supreme Court in a colony.

Operation of the Act as applied.

Consular Courts may take evidence for Courts in the dominions.

The effect of the application of the Act is to make the Consular (Supreme) Court or any Judge thereof, a Court "having authority under this Act" within s. 5: that is to say, that commissions for taking evidence may be directed to the Consular Court by the Courts and Judges within the dominions referred to in s. 1.

Consular Courts may issue commissions.

The inclusion of the Consular Court among the Courts specified in s. 1 is warranted by s. 5 (2) of the Principal Act. It has power, therefore, to issue a commission for the examination of witnesses to Courts within the dominions.

The special substitution under the Order warrants the Chief Consular Judge being included in s. 6; he may, therefore, make rules for carrying out the provisions of the Act, so far as relates to his own jurisdiction.

Where the substitution under the Order is of the "Supreme Court" (as in the case of the China Order), the commission must be addressed to the Supreme, and not to any of the inferior Consular Courts: for example, to the Supreme Court at Shanghai, and not to the Consular Court at Canton. The necessary instructions will thereupon be sent to the Consular Court by the Supreme Court. Commission to issue to Supreme Consular Court.

The Order in Council mentioned in s. 5 would relate to colonial Judges other than those of the Supreme Courts. An Order in Council would, therefore, be necessary in order to sanction a commission being addressed to one of the inferior Consular Courts.

The power to make rules under s. 6 is given both to the Courts issuing, and to those receiving, the commission.

Evidence by Commission Act, 1885 — *48 & 49 Vict. c. 74.*

To amend the law relating to taking evidence by commission in India and the Colonies, and elsewhere in Her Majesty's dominions. [Imp. Stats., Vol. I, p. 183.]

[*applied by art. 125, China Order.*]

Provisions of the Act.

Where in any civil proceeding in any Court of competent jurisdiction a commission for the examination of a witness is addressed to any Court or to any Judge of a Court, in India or the colonies, or elsewhere in His Majesty's dominions, the Court or Judge to whom the commission is addressed, or the Chief Judge thereof, may nominate a commissioner to take the evidence, which is to be admissible in evidence to the same extent as if it had been taken before such Court or Judge, under the preceding Act of 1859. [*s. 2*] Evidence taken under Act of 1859 may be taken before a commissioner. *cf.* p. 91.

A similar provision is made with regard to a mandamus or order for examination of a witness in any criminal proceeding, addressed to any Court or Judge, as in s. 2. [*s. 3*]

The provisions of 22 Vict. c. 20 are to apply to proceedings under this Act. [*s. 4*]

The witness is to be examined according to the law in force in the place where the examination is taken. [*s. 6*]

Provision of the Order in Council.

In this Act the Supreme Court (*i.c.* the Supreme Court created by the Order) is substituted for a Supreme Court in a colony.

Operation of the Act as applied.

The special substitution is unnecessary in this case, as the words "Supreme Court in a colony" do not appear in the Act.

Nomination of commissioner by Consular Court.

The substitution effected in virtue of s. 5 (2) of the Principal Act, however, warrants the inclusion of the Consular Courts (probably inferior as well as superior) in ss. 2 and 3, as Courts to which a commission may issue. The result of this is that the Consular Courts have power to nominate a commissioner to take the evidence, where the commission is addressed to the Court.

† referred to on p. 92.

The provisions of 22 Vict. c. 20, referred to in s. 4, apply only to ss. 2, 3, 4 and 6 of that Act; but s. 5 of this Act† applies to the Consular Courts, as an amendment of 22 Vict. c. 20.

British Law Ascertainment Act, 1859.—*22 & 23 Vict. c. 63.*

[Imp. Stats., Vol. I, p. 177.]

To afford facilities for the more certain ascertainment of the law administered in one part of Her Majesty's dominions when pleaded in the Courts of another part therefore.

[*applied by art. 126, China Order.*]

Provisions of the Act.

Courts in one part of dominions may remit case for opinion in law of Court in any other part.

The Courts in one part of the dominions may remit a case for the opinion of a Superior Court in any other part of the dominions on any point of law arising in any action before it, where the law in such other part differs from that in which the Court is situate. The facts as ascertained by a jury or other mode competent, or as agreed or settled, are to be set forth in the case, and the questions of law arising out of the same are to be settled by the Court, and an order made remitting the case for the opinion of the other Court. Any party to the action may then petition the Court whose opinion is to be given to hear counsel, or to pronounce their opinion without hearing counsel. [*s. 1*]

A certified copy of the opinion when pronounced shall be given to the parties applying for it. [*s. 2*]

The Court remitting the case for opinion is to be moved to

apply the opinion so obtained, which is to be lodged with an officer of the Court, and the Court shall thereupon apply such opinion to the facts as if it had been pronounced by itself upon a case reserved: or it may be submitted to the jury with the other facts of the case as evidence, or conclusive evidence as it thinks fit, of the foreign law stated in it. [*s. 3*]

In the event of an appeal to the Privy Council or House of Lords, the opinion so given may be adopted or rejected, if it has been given by a Court whose judgments are reviewable by the Privy Council or House of Lords respectively. [*s. 4*]

"Action" includes any judicial proceeding, civil, criminal or ecclesiastical; and "Superior Court" includes the superior Courts of England, Ireland and Scotland, and in the colonies. [*s. 5*]

Provision of the Order in Council.

In this Act the Supreme Court (*i.e.* the Supreme Court created by the Order) is substituted for a Superior Court in a colony.

Operation of the Act as applied.

This substitution warrants applications being made under the Act by Courts in the dominions to the Consular (Supreme) Court. Applications to Consular Courts.

It is, however, a little difficult to appreciate the benefit of this application: for the condition of remitting a case for opinion under the Act is that the law administered by the Court whose opinion is desired "is different from that in which the Court is situate," and the law administered by the Consular Courts, both civil and criminal, is usually the law of England. Yet it might well be that a Court in England should desire to know, for example, the law of China in a case arising before it. It is submitted that it would have to be proved in the usual way, and not under the Act; for although the Consular Judges in China may possibly be conversant with the law of China, that is not the law administered by them, except as an incidental issue in any given case, in the same way as it may be one of the issues in a case before an English Court. Applications to ascertain law of oriental country probably not within the Act as applied.

The chief benefit of the application of this Act appears, however, to be derived from substitution effected by s. 5 (2) of the Principal Act. This puts the Consular Courts in the same position as the enquiring Courts in the dominions under the Act, and therefore, warrants similar applications being made by any of the Consular Courts to any of the Superior Courts of the dominions. Applications by Consular Courts.

Foreign Law Ascertainment Act, 1861.—*24 & 25 Vict. c. 11.*

[Imp. Stats., Vol. I, p. 179.]

To afford facilities for the better ascertainment of the law of foreign countries when pleaded in Courts within Her Majesty's dominions.

[*applied by art. 126, China Order.*]

Provisions of the Act.

Courts in dominions may remit case for opinion of foreign Courts on points of foreign law, where there is a convention.

This Act affords like facilities to those afforded by the previous Act [*22 & 23 Vict. c. 63*], for ascertaining in similar circumstances, the law of any foreign country with which a convention for the purpose has been entered into.

The text of the Act follows the previous one with certain modifications of which the following are the most important:—

The right to remit a case for the opinion of the foreign Superior Court is limited to the Superior Courts in the dominions. The procedure before the Court applied to is omitted. [*s. 1*]

On the motion to apply the opinion when obtained, the English Court may, if it shall see fit, apply such opinion to the facts in the same way as if it had been pronounced by itself upon a case reserved: or may submit it to the jury in the same way as under the previous Act. But if the Court is not satisfied that the facts have been properly understood by the foreign Court, or is, on any ground, doubtful whether the opinion "does correctly represent the law as regards the facts to which it is to be applied," it may remit the case again to the same or some other superior Court in the foreign country. [*s. 2*]

Conversely, any Court in such foreign country desiring to ascertain the law of any part of the British dominions applicable to the facts of any action pending before it, may remit to the Court in the dominions whose opinion is desired, a case setting out the facts and the questions of law arising out of them: and any party may petition the Court to hear counsel, or to pronounce an opinion without hearing counsel. A certified copy is to be given to the parties applying for it. [*s. 3*]

"Action" includes any judicial proceeding, civil, criminal, or ecclesiastical; and "Superior Court" includes the Superior Courts of England, Ireland and Scotland, and in the colonies: and so far as regards foreign countries, any Court specified in the convention. [*s. 4*]

Provision of the Order in Council.

In this Act the Supreme Court (*i.e.* the Supreme Court created by the Order) is substituted for a Superior Court in a Colony.

Operation of the Act as applied.

A convention with a foreign State is a condition precedent to an application under the Act. At present no such conventions have been entered into. On the basis, however, of the conclusion of any such convention, the substitution in s. 4 warrants an application being made by a Consular Supreme Court to a foreign Court. Convention a condition precedent to application of Act.

When, if ever, the essential conventions are concluded, it would be of manifest advantage to the administration of justice by the different Consular Courts in an oriental country, if the agreements were made so as to include these Courts, for questions of foreign law must often arise in actions on contracts tried before them.

The substitution effected by s. 5 (2) of the Principal Act warrants the inclusion of the Consular Courts, inferior as well as superior, in s. 3. Applications by foreign Courts will, therefore, be property made to the British Consular Courts when conventions are concluded. The remarks made under the British Law Ascertainment Act, 1859, as to the nature of the law administered by the Consular Courts, apply also to this Act. Applications to Consular Courts. *cf.* p. 94.

Conveyancing (Scotland) Act, 1874, s. 51.—*37 & 38 Vict. c. 94.*

[*applied by art. 105, China Order.*] [Imp. Stats., Vol. I, p. 592.]

Provision of the Order in Council.

The Supreme Consular Court is substituted for a Court of Probate in a colony.

Operation of Act as applied.

The production to a notary public in Scotland of the probate of the will, or other testamentary settlement, of a deceased person issued by a Supreme Consular Court, or of an exemplification of such probate, is for the purpose of expeding a notarial instrument, or otherwise completing a title to any estate in land or to any hereditable security, as effectual as the production to the notary of the will or settlement itself. Production of consular probate equivalent to will for completing title.

Fugitive Offenders Act, 1881.—*44 & 45 Vict. c. 69.*

[Imp. Stats., Vol. I, p. 200.]

To amend the law with respect to fugitive offenders in Her Majesty's dominions, and for other purposes connected with the trial of offenders.

[*applied by art. 88, China Order.*]

[*This Act, in addition to being included in the 1st schedule of the Principal Act, may also be applied under s. 36 of the Act itself.*]

This Act applies to foreigners accused of having committed offences in one part of the dominions and escaping to another part. In the extension of the Act, however, the fundamental principle of consular jurisdiction requires it to be limited to British subjects.

Provision of the Order in Council.

The Act is to apply as if China were a British possession and part of the dominions, with the following substitutions—

The British Minister for the Governor or Government of a British possession:

The Supreme Court for a Superior Court of a British possession.

The Supreme Court and each Provincial Court for a Magistrate of any part of the dominions.

Operation of the Act as applied.

Only so much of the Act as relates to procedure in the foreign country, China being taken as the illustration, is given. The procedure in the colonies in the case of fugitives from China is of course that prescribed in the Act.

PART I.—*Return of Fugitives.*

Apprehension of fugitive offender in or from China. [*s. 2*]

Where a person accused of having committed an offence in one part of the dominions or in China, is found in China, or in another part of the dominions, he may be apprehended under a warrant and returned to the country from which he is a fugitive.

Endorsing of warrant in China for apprehension of fugitive. [*s. 3*]

The warrant, where the offender has escaped to China, may be endorsed by the Judge of the Supreme Court, or the British Minister, if he is satisfied that the warrant was issued by a lawful authority: and such power of apprehending offenders as the Court has been invested with may be put in force on this endorsed

warrant, and the fugitives brought before the Supreme or a Provincial Court.

Provisional warrant for apprehension of fugitive. [s. 4]

The Supreme or a Provincial Court may also issue a provisional warrant "for the apprehension of a fugitive who is or is suspected of being in or on his way to" China, if the information is such that the Court would be justified in issuing a warrant if the offence had been committed within that country. The issue of the warrant is to be reported to the Minister, who may, if he think fit, discharge the person apprehended.

Dealing with fugitive when apprehended. [s. 5]

When the fugitive is apprehended he is to be tried as if he were charged with an offence committed in China. The endorsed warrant being duly authenticated, if the evidence raises "a strong or probable presumption that the fugitive committed the offence mentioned in the warrant," and that the offence comes within s. 12, the Judge is to commit him to prison to await his return, and to send a certificate of committal, together with a report on the case, to the Minister.

The fugitive is to be informed that he will not be surrendered until after the expiration of 15 days, and that he has a right to apply for a writ of *habeas corpus* or other like process.

A fugitive apprehended on a provisional warrant may be remanded from time to time, for not longer than 7 days at one time, "as under the circumstances seems requisite for the production of an endorsed warrant."

Return of fugitive by warrant. [s. 6]

On the expiration of 15 days after the fugitive has been committed to prison to await his return (or, if a writ of *habeas corpus* has been issued, after the decision thereon), the Minister may, if he thinks just, by warrant under his hand, order the fugitive to be held in custody by the person to whom the warrant is addressed, and to be conveyed by sea or otherwise, to that part of the dominions from which he is a fugitive, "to be dealt with there in due course of law as if he had been there apprehended."

"The governor or other chief officer of any prison" shall, on payment of expenses, receive and detain the fugitive for a reasonable time at the request of the person to whom the warrant is addressed, for the purpose of the proper execution of it.

Discharge of fugitive if not returned within one month. [s. 7]

If a fugitive has been committed to prison by a Consular Court in pursuance of this Act, and is not conveyed out of China within one month after his committal, the Supreme Court may on the

fugitive's application order him to be discharged, unless sufficient cause is shewn to the contrary. Notice of the intention to apply for the discharge is to be given to the Minister.

Returned fugitive from China to be sent back if not prosecuted in 6 months. [*s.* 8]

Where the person accused of an offence and returned to China [*i.e.* in the custody of the person to whom the warrant of the Consular Court was addressed], is not prosecuted there within 6 months after his arrival, or is acquitted, the Minister may cause him to be sent back free of cost, and with as little delay as possible, to that part of the dominions in, or on his way to which, he was apprehended.

Offences to which this Part of Act applies. [*s.* 9]

The offences to which the Act applies are treason, piracy, and every offence which is punishable in that part of the dominions in which it was committed, or according to the law administered by the Consular Court in China, if it was there committed, by imprisonment with hard labour for a term of 12 months or more, or by any greater punishment (which includes rigorous imprisonment, or confinement in a prison combined with labour, by whatever name it is called). The question whether the act is an offence or not is to be judged solely by the law of the place where it was committed, or if committed in China, by the law administered by the Consular Court, and not in any way by the law of the country where the fugitive is apprehended.

Fugitive to be discharged if case frivolous or return unjust. [*s.* 10]

Where it appears to the Supreme Consular Court that the case is trivial, or that the application for the return of the fugitive is not made in good faith in the interests of justice or otherwise, and that it would, having regard to the distance, to the facilities for communication, and to all the circumstances of the case, be unjust or oppressive, or too severe a punishment to return the fugitive either at all, or until the expiration of a certain period, the Court may discharge him either absolutely or on bail, or may order that he shall not be returned until after the expiration of a certain period, or may make any other order that may seem to it just.

PART II.—*Inter-Colonial Backing of Warrants.*

Application of Part II to colonies and foreign jurisdiction countries. [*s.* 12]

The second part of the Act provides a simpler procedure for the rendition of criminals by means of backing warrants, among groups of colonies; and by the adaptation of this Part, the groups may be composed of colonies and countries in which Consular Courts have been established. The groups are to be composed of colonies and countries "to which by reason of their contiguity

or otherwise, it may seem expedient" to apply the Part. The Order by which the adaptation is made may except certain offences, or it may be otherwise limited, as may be deemed expedient.

The Eastern group. [art. 88 *(a)* China Order.]

By the China Order; China, Corea, Wei-hai-Wei and Hong-kong are to be deemed one group for the purposes of this Part of the Act. A point of some interest arises in consequence of the inclusion of two foreign jurisdiction countries in the group, thereby making this Part of the Act applicable to fugitives escaping from China to Corea, and *vice versa*. This will be referred to again in connexion with s. 20 of the Act.

Backing of warrants issued in a colony or country in the group. [*ss. 13, 14*]

In the case of a fugitive in or on his way to China, the Supreme or a Provincial Court may back a warrant, or a provisional warrant [s. 16], issued for the apprehension of a fugitive offender by the proper authority in any other country or colony in the group, and may order his return in custody.

Endorsing summonses to witnesses in group. [*s. 15*]

In the same way, witnesses who are required to give evidence on a trial for any offence in one of the countries or colonies in the group, and who are or are suspected of being in, or on their way to, China, may be summoned as if they were within the jurisdiction of the Court before which the trial is taking place, and the summons may be endorsed by a Consular Judge in China. The witness on service of the endorsed summons, and payment or tender of a reasonable sum for expenses, must obey the summons: and in default he is liable to be tried and punished either in China or in the place in which the summons was issued, according to the law enforced by the Court before which he is tried. The subsequent procedure is dealt with by s. 27.

Discharge of prisoner not returned within one month. [*s. 17*]

The Supreme or a Provincial Court may order the fugitive to be discharged out of custody if he is not conveyed out of China within one month after the date of the warrant ordering his return. Notice of the application for discharge is to be given to the person holding the warrant, and to the chief officer of the police where the fugitive is in custody. A refusal to grant the order is subject to appeal to the Supreme Court.

Returned fugitive to be sent back if not prosecuted in 6 months. [*s. 18*]

In the case of a prisoner returned to China who is not prosecuted within 6 months, or who is acquitted, the Minister may on his requisition cause him to be sent back free of cost, and with as little delay as possible to the country or colony in or on his way to which he was apprehended.

Refusal to return prisoner where offence trivial. [s. 19]

The power to refuse the fugitive's rendition where the offence is trivial, and in the other cases mentioned in s. 10, is vested in the Supreme Court, or in the Provincial Courts with appeal to the Supreme Court.

PART III.—*Trial, &c. of Offences.*

The first two sections of this Part of the Act when applied, confer a most important original jurisdiction in certain criminal matters on the Consular Courts. The interpretation of them is, however, not altogether free from difficulty.

Offences committed on boundary of two countries or colonies. [s. 20]

By s. 20, it is provided that where two colonies adjoin, a person accused of an offence committed on, or within 500 yards from, the common boundary, may be tried and punished in either colony.

Boundaries between Hong Kong and China, and China and Corea.

By the extension of the Act to China and Corea as if they were British possessions, this section will find its application to the boundary between the New Territories of Kowloon, which are part of Hong Kong, and China, the trial taking place either in Hong Kong or in the Consular Court in China having jurisdiction in respect of offences committed in that part of China. Also, as the Act is extended to both China and Corea, the section will apply to the boundary between these two countries, the trial taking place in the Consular Court having jurisdiction either in China or Corea.

Offences committed on journey between colony and country. [s. 21]

By s. 21, it is provided that where an offence is committed on any person, or in respect of any property in any vehicle employed in a journey, or on board any vessel employed in a navigable river, lake, canal, or inland navigation, the person accused may be tried in any British possession through a part of which the vehicle or vessel passed in the course of the journey during which the offence was committed; "and, where the side, bank, centre, or other part of the road, river, lake, canal, or inland navigation along which the carriage, cart, vehicle, or vessel passed in the course of such journey or voyage is the boundary of any British possession," the offence may be tried in any possession of which it is the boundary.

Proviso as to foreigners.

The section does not authorise the trial of persons who are not British subjects, where it is not shown that the offence was committed in a British possession.

By the application of the Act to China this section will probably find its application to the inland navigation* between Hong Kong and the Chinese towns on the Canton river, the trial being either in Hong Kong or in the Consular Courts in China. Application of s. 21 to Hong Kong and China:

By the application of the Act to China and Corea, the Consular Courts in both those countries would have jurisdiction over offences committed on the Yalu River. and to China and Corea.

The substitution of China or Corea for "British possession" in the proviso is unnecessary, as the Consular Courts have no jurisdiction to try persons who are not British subjects.

It will be convenient to deal here with a kindred question to those raised under these two sections: Does the application of this Act sanction the rendition of fugitives between two consular jurisdictions? for example: Can a British subject, a fugitive offender from China, be returned by the consular authorities in Persia. There seems to be no doubt that in the case of China and Corea this can be done, as has been above pointed out, because both countries are mentioned in the Order extending the Act. But as the Act only applies to foreign jurisdiction when it is expressly applied, and not generally, it would seem as if the answer to the general question must be in the negative. Rendition of fugitives from one consular jurisdiction to another.

The trial of the offence of false swearing, or of giving or fabricating false evidence for the purposes of the Act, may be in the Consular Court, if the offence was committed or the evidence used in China. Trial of false swearing, &c. [*s.* 22]

Where the Act provides for the place of trial of a person accused of an offence, the offence is to be deemed, for all purposes, to have been committed in the place where it may be tried; and sentence is to be passed accordingly. But if the offence is not punishable by the law administered by the Court where the trial takes place, sentence is to be passed as nearly as possible corresponding to the punishment which would have been inflicted according to the law of England, in virtue of the Courts (Colonial) Offences to be tried as if committed in place where tried. [*s.* 23]

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* That is to say, assuming that the term "inland navigation" applies to such arms of the sea as come within the "waters of the realm". There can be no doubt that the long channel which forms the estuary of the Canton River falls within the principle established in *R.* v. *Cunningham* with regard to the Bristol Channel, and that it is included in the waters of the realm of China. *cf.* "Nationality," Vol. I, Chap. II. *R.* v. *Cunningham*, 28 L.J: M.C. 66.

37 & 38 Vict. c. 27. Jurisdiction Act, 1874, which must be deemed to be extended to the Consular Courts, *pro hac vice.*

Search warrant. [*s. 24*] A Court in which a warrant is endorsed, or in which an accused person can be tried under the Act, has the same power to issue a warrant to search for property alleged to have been stolen, or otherwise unlawfully taken by the accused, or otherwise to be the subject of the offence, as if the property had been stolen or the offence had been wholly committed within the jurisdiction of the Court.

Removal of prisoner by sea from one place to another. [*s. 25*] Where a person is in legal custody in China, either in pursuance of this Act or otherwise, and he is required to be removed in custody to another consular jurisdiction in China, he may be conveyed thither by sea in a vessel belonging either to His Majesty or to any British subject, and legal custody is deemed to continue throughout the voyage. All the provisions of the Act relative to escape are to apply to escapes during the voyage.

PART IV.—*Supplemental.*

Endorsement of warrant. [*s. 26*] An endorsement of a warrant under the Act is to be signed by the authority endorsing the same, and shall authorise all or any of the parties named in the endorsement, and of the persons to whom the warrant was originally directed, and every constable, to execute it in the place in which the person endorsing has authority or jurisdiction.

For the purposes of the Act any warrant, subpœna or endorsement shall remain in force notwithstanding that the person signing it dies or ceases to hold office.

Conveyance of fugitives and witnesses. [*s. 27*] Where a prisoner is authorised to be returned to a consular jurisdiction in China, he may be sent in a ship belonging either to His Majesty or to any British subject.

The authority who signs the warrant may, on tender of the reasonable expenses, order the master of a ship belonging to a British subject, to receive and afford passage and subsistence for prisoners under the Act, and the persons who have them in custody, and also for witnesses subpœnaed under the Act. The master is subject to a penalty of £50 for refusal to comply with the order: he is, however, not compelled to receive more than one prisoner for every 100 tons of the ship's registered tonnage, or more than one witness for every 50 tons.

Such particulars as the Board of Trade may require are to be endorsed upon the agreement of the ship.

If the prisoner is not in the custody of any person, the master is to hand him over to a constable on arrival in port.

Escape of prisoner from custody. [s. 28]

An escaped prisoner may be retaken in the consular jurisdiction of China, if he escapes out of the custody of a person acting under a warrant issued or endorsed under the Act, in the same manner as he may be retaken if he had originally been taken into custody there.

The offences of escaping or attempting to escape, or of aiding or attempting to aid an escape, by breach of prison or otherwise, may be tried by the Consular Court—

if the prisoner is being removed to or from the consular jurisdiction: or,

if he escapes or is found within the consular jurisdiction.

Depositions to be evidence. [s. 29]

Depositions may for the purposes of the Act, be taken in the absence of a person accused of an offence: and may, if duly authenticated, be received in evidence in proceedings under the Act. But they are not to be used in evidence upon his trial for an offence.

Jurisdiction of Courts. [s. 30]

The jurisdiction to hear a case and commit a fugitive to prison to await his return is to be exercised in China by the Supreme or Provincial Consular Courts: or by such other Court or Judge as may be from time to time provided by Order in Council.†

Power to make Orders in Council. [s. 32]

The King may by Order in Council—

define the offences committed in China to which the Act or any part of it is to apply:

determine the Court, Judge, officer or person by whom, and the manner in which any jurisdiction or power under this Act is to be exercised in China:

regulate the payment of costs incurred in carrying the applied Act into execution:

give general directions for carrying the Act into execution in China;

† "Order in Council" is inserted in both s. 30 and s. 32, in lieu of "Ordinance passed by the Legislature of a British possession" in virtue of s. 5 (2) of the Principal Act, which makes the King in Council equivalent to the Legislature of a British possession in the matter of extending the Acts in the schedule to foreign jurisdiction countries. cf. p. 55.

and further, the King may by Order in Council direct that such first Order in Council or any part thereof, shall, with or without modifications or alterations, be recognised and given effect to throughout the dominions, or on the high seas, as if it were part of the Act.

Application of Act to offences at sea or triable in more than one colony. [*s. 33*]

By s. 33, in the case of offences committed at sea, or which are triable in more than one part of the dominions, the necessary warrant may be issued from any part of the dominions in which the accused can be tried if he happen to be there, and the fugitive is to be returned there, although there is jurisdiction to try him in the place where he is apprehended.

By the application of this section, China and Corea are treated, as in sections 20 and 21, as parts of the dominions so as to bring them within its meaning. But it is doubtful whether the section can be given a larger extension so as to include all countries in which foreign jurisdiction is exercised.

cf. p. 102.

cf. p. 103.

Trial may be ordered in place of arrest, if it can be held:

A Secretary of State in the United Kingdom, the Governor of a British possession, or the Minister in the foreign country, according to where the fugitive is apprehended, if he is satisfied that under all the circumstances of the case, it would be more conducive to the interests of justice for the fugitive to be tried where he is apprehended, if, by law, he can be tried there, may so order: and the warrant shall not then be executed.

or in some other colony where it can be held: [*s. 35*]

And conversely, if, in such cases, the accused is in custody, a Superior Court, and also the authorities mentioned above, according to where he may be in custody, may direct the removal of the prisoner to some other part of Her Majesty's dominions, or to China or Corea, where the offence is also triable, if it would be more conducive to the interests of justice that the prisoner should be tried there. The warrant for removal is to be in all things treated as if it were a warrant for the return of a fugitive.

Escaped convicts. [*s. 34*]

The Act applies generally to escaped convicts.

Past offences. [*s. 38*]

The Act applies also to offences committed before the application of the Act.

B

*ACTS APPLIED BY EXPRESS PROVISION THEREIN.**

Foreign Enlistment Act, 1870.....p. 107
Fugitive Offenders Act, 1881.....p. 108
Colonial Prisoners Removal Act, 1884.....p. 108
Submarine Telegraph Acts, 1885, 1886.....p. 112a
Colonial Courts of Admiralty Act, 1890.....p. 113
Admiralty Court Act, 1840.....p. 115
Admiralty Court Act, 1861.....p. 115
Naval Prize Act, 1864.....p. 117
Slave Trade Act, 1873.....p. 119
Slave Trade Act, 1824.....p. 121
Slave Trade Act, 1843.....p. 121
Colonial Probates Act, 1892.....p. 121
Regimental Debts Act, 1893.....p. 122
Merchant Shipping Act, 1894.....p. 123

Foreign Enlistment Act, 1870.—*33 & 34 Vict. c. 90.*

To regulate the conduct of Her Majesty's subjects during the existence of hostilities between Forign States with which Her Majesty is at peace.

[Imp. Stats., Vol. I, p. 211.]

The section in this Act applicable to foreign jurisdiction is negative, and must therefore be noted in this group. It is provided by s. 33, that

> "nothing in this Act contained shall extend or be construed to extend to subject to any penalty any person who enters into the military service of any Prince, State, or Potentate in Asia, with such leave or license as is for the time being required by law in the case of subjects of Her Majesty entering into the military service of Princes, States, or Potentates in Asia."

Act not to apply to persons entering into military service in Asia.

The Act itself is, however, incorporated both as to Protectorates and to foreign jurisdiction in the Neutrality Orders in Council of 1894, which will be considered in Section VIII.

See also note on p. 76.

* The Official Secrets Act, [*52 & 53 Vict., c. 52*] should also have been included in this list. It is considered on p. 161.

[Imp. Stats., Vol. I, p. 200.]

Fugitive Offenders Act, 1881.—*44 & 45 Vict. c. 69.*

This Act may be applied to foreign jurisdiction by s. 36: but it is also one of the Acts mentioned in the 1st schedule of the Principal Act, and is, therefore, included in the first group of enactments in this Section.

cf. p. 98.

Colonial Prisoners Removal Act, 1884.—*47 & 48 Vict. c. 31.*

[Imp. Stats., Vol. I, p. 46.]

To make further provision respecting the removal of prisoners and criminal lunatics from Her Majesty's possessions out of the United Kingdom

[*applied by art. 88, China Order, under s. 15.*]

Provisions of the Order in Council.

The Act is to apply as if China were a British possession and part of the dominions, with the following substitutions—

The British Minister for the Governor or Government of a British possession:

The Supreme Court for a Superior Court of a British possession:

The Supreme Court and each Provincial Court for a Magistrate of any part of the dominions.

Operation of the Act as applied.

The following paraphrase of the Act is limited as far as possible to the procedure consequent on its application to the consular jurisdiction of China.

Removal of prisoners from China in certain cases. [*s. 1.*]

Where a prisoner is undergoing sentence of imprisonment in China for any offence, he may be removed to any British possession or to the United Kingdom to undergo the sentence or the residue thereof, if it appears to the removing authority—

(a) That it is likely that the life of the prisoner will be endangered or his health premanently injured by further imprisonment in the foreign country; or

(b) That the prisoner belonged, at the time of committing the offence, to the Royal Navy or to Her Majesty's regular military forces; or

(c) That the offence was committed wholly or partly beyond the limits of China; or

(d) That by reason of there being no British prisons in the consular jurisdiction in which the prisoner can properly undergo his sentence, or otherwise, the removal of the prisoner is expedient for his safer custody or for more efficiently carrying his sentence into effect; or

(e) That the prisoner belongs to a class of persons who, under the law administered by the Consular Court in China are subject to removal under this Act.

Removal of prisoners to China.

The converse case of removal under similar circumstances of prisoners undergoing sentence in a British possession to the consular jurisdiction in China, also falls within the application of the Act. The question of principle involved in this will be considered in Section X.

Meaning of "sentence of imprisonment." [*s 18*]

"Sentence of imprisonment" means any sentence involving confinement in a prison, whether combined or not with labour, and whether known as penal servitude, imprisonment with hard labour, rigorous imprisonment, imprisonment or otherwise, and includes a sentence awarded by way of commutation as well as an original sentence passed by the Court.

Return of removed prisoner. [*s. 3*]

A Secretary of State, or the Government of the possession to which a prisoner has been removed, may order him to be returned to China for the purpose of undergoing the residue of his sentence, or for the purpose of being discharged. In other cases, when discharged at the expiration of his sentence, the prisoner is entitled to be sent to China free of cost, except in case *(b)* above.

The converse case of the return of prisoners from the consular jurisdiction in China, also falls within this section as applied, the necessary orders being made by the British Minister.

Regulations as to removal. [*s. 4*]

The King in Council may make regulations for the removal, return, and discharge of prisoners under the Act. They may provide for varying the conditions of a sentence of imprisonment passed in a possession, where they differ from the conditions of a sentence in the possession to which the prisoner is removed, with a view to bringing the sentence more into conformity with those conditions; but a prisoner is not to undergo an imprisonment of longer duration than his actual sentence. And if the conditions of a sentence would become more severe in consequence of the removal, a Secretary of State may remit a portion of the imprisonment so as to equalize the conditions.

This section must apply to prisoners removed from or to the consular jurisdiction in China; the word "China" being substituted for "possession", when first or secondly used, as the case requires.

The "removing authority." [s. 5]

The "removing authority" for the purposes of the Act is a Secretary of State "acting with the concurrence of the Government of every British possession concerned:" and in the case of China, with the concurrence of the British Minister.

Evidence of act of Government of colony: [s. 6 (1)]

The concurrence of, and any requisition by, the Government of a British possession, as well as the officer whose duty it is to signify the same by writing, are to be governed by the law of the possession.

If this Act had been included in the schedule of "Applied Acts" to the Foreign Jurisdiction Act, the King in Council would be substituted for the Legislature of a colony, and Orders in Council for "the law of the possession" in this section, in virtue of s. 5. The necessary regulations in this case may, however, be made by Order in Council, under s. 15 of this Act, which allows Orders to be made "to provide for carrying into effect" the application of the Act to foreign jurisdiction.

Any writing purporting to give such concurrence or make such requisition, and to be signed by the proper officer, is to be conclusive evidence that the concurrence or requisition has been duly given or made according to law. And a writing purporting to be under the hand of the Secretary of State ordering the removal of a prisoner under the Act, is to be conclusive evidence that the order has been duly given, and is to be admissible in evidence in the Consular Courts without further proof.

and of Secretary of State. [s 6 (2)]

Warrant for removal of prisoner. [s. 7]

Where a prisoner is ordered to be removed or returned under the Act, the Minister by warrant may give the necessary directions as to custody and conveyance by sea or otherwise of the prisoner. The warrant is to be received in evidence in all Courts without further proof.

Dealing with removed prisoner. [s. 8]

A removed prisoner is to be dealt with in China, or in the possession to which he is removed, as if his conviction had taken place and his sentence had been pronounced there. But the sentence may be questioned, and remitted, and an order that the prisoner be discharged may be made, in China or in the possession from which he has been removed.

The officer in charge of any prison is to receive and detain the prisoner for the purpose of the proper execution of the warrant,

on request of the person having the custody of the prisoner under the warrant, and on payment or tender of a reasonable amount for expenses.

If a prisoner in custody under this Act escapes out of custody, he may be retaken in the same way as prisoners may be retaken by the law of the country to which he escapes. Escape of prisoner from custody. [s. 9]

The offences of escaping or attempting to escape, and aiding or attempting to aid a prisoner to escape, may be tried in the possession to or from which the prisoner is being removed or returned, in which he escapes, or in which he is found; and in the application of the Act, in China in the like circumstances. The offence is to be deemed an offence according to the law administered by the Court where the offence is tried, and he may be punished in accordance with the Courts (Colonial) Jurisdiction Act, 1874, which must be deemed to be extended to the Consular Courts, *pro hac vice*. *37 & 38 Vict. c. 27.*

The provisions of the Act are to apply to a person in custody as a criminal lunatic in like manner, so far as is consistent with its tenor, as they apply to a prisoner undergoing sentence of imprisonment. Separate regulations may be made by Order in Council in relation to criminal lunatics: and subject thereto, the laws in force in China with regard to British subjects who are criminal lunatics shall apply to criminal lunatics removed or returned to the consular jurisdiction, as if they had become criminal lunatics within that jurisdiction. Application of Act to removal of criminal lunatics. [s. 10]

Where a person who is a criminal lunatic by reason of being unfit to be tried for an offence, is removed under the Act to or from the consular jurisdiction, and a Secretary of State or the British Minister considers that such person has become sufficiently sane to be tried for the offence, and requires him to be returned for trial to the consular jurisdiction, he shall be returned thereto in custody in like manner as if he had been arrested under a warrant on a charge for the said offence.

The expression "criminal lunatic" means a person detained in custody by reason of his having been charged with an offence, and either found to have been insane at the time of such offence, or found, or certified, or otherwise lawfully proved to be unfit on the ground of his insanity to be tried for the same, and includes a person convicted of an offence and afterwards certified or otherwise lawfully proved to be insane. Meaning of "criminal lunatic." [s. 18]

Cost of removal. [s. 11]

The cost of removal of any prisoner or criminal lunatic under the Act, of his maintenance while in confinement, and of his return, and of his being sent after discharge to any place, shall be paid as may be arranged between the Governments of the British possessions concerned and the Secretary of State: and so far as the consular jurisdiction is concerned, between such authorities and the King in Council.* The consent of the Treasury is required as regards any costs to be paid out of moneys provided by Parliament.

The cost may be recovered from the property of the prisoner or criminal lunatic removed or returned, or otherwise according to law.

Orders in Council for carrying the Act into effect: [ss. 12, 15.]

For the purposes of the application of the Act to foreign jurisdiction, Orders in Council, in virtue of the combined effect of s. 12 and s. 15, may be made—

(*a*) for determining the authority by whom and the manner in which any jurisdiction, power, or concurrence under the Act is to be exercised or given: or

(*b*) for payment of the costs incurred in the removal, maintenance, return or sending back after discharge of a prisoner or criminal lunatic: or

(*c*) for dealing with prisoners or criminal lunatics removed to a consular jurisdiction: or

(*e*) for making any class of prisoners subject to removal: or

(*f*) otherwise in any manner for the carrying into effect of the Act as regards the consular jurisdiction;

and the Order may direct that such Order or any part thereof, shall, with or without modifications or alteration, be recognised and given effect to throughout the dominions and on the high seas, as if it were part of the Act.

By s. 16, nothing in the Act is to affect the provisions of the Army Act, 1881, nor shall the Act affect any agreement made under the Colonial Prisoners Removal Act, 1869, nor any provisions contained in the Lunatics Removal (India) Act, 1851.

44 & 45 Vict. c. 58.
32 & 33 Vict. c. 10.
14 & 15 Vict. c. 81.

[*cf.* Imp. Stats., Vol. I, pp. 402, 46 (*1*); and Vol. II, p. 177.]

* This would appear to result from s. 15, in spite of the substitution in the Order in Council of the British Minister for the Government of a possession.

Submarine Telegraph Act, 1885.—*48 & 49 Vict. c. 49.*

To carry into effect an International Convention for the protection of Submarine Telegraph cables. [Imp. Stats., Vol. I, p. 635.]

incorporating

SUBMARINE TELEGRAPH ACT, 1886.—*50 Vict. c. 3.*

To amend the Submarine Telegraph Act, 1885. [*ib.* p. 640]

[*applied by s. 11.*]

By s. 11, the Act extends "to the whole of the dominions, and to all places within the jurisdiction of the Admiral of England, and to all places where [His] Majesty has jurisdiction."

Provisions of the International Convention.

The convention was made on 14th March. 1884, between practically all the States in the world. It applies outside territorial waters to all legally established submarine cables landed on the territories, or possessions of one or more of the contracting States, and declares it to be a punishable offence, to break or injure a submarine cable, wilfully or by culpable negligence, in such manner as might interrupt or obstruct telegraphic communications either wholly or partially: the punishment being without prejudice to any civil action for damages [*art. 2*]. By a subsequent declaration,† "wilfully" in the above definition was declared not to apply to "cases of breakage or injury caused accidentally or of necessity in the repair of a cable, when all precautions have been taken to avoid such breakage or injury". The penal provision does not apply to cases "where those who break or injure a cable do so with the lawful object of saving their lives or their ship, after they have taken every necessary precaution to avoid so breaking or injuring the cable".

† [embodied in the amending Act of 1886.]

The owner of a cable who injures another cable while laying or repairing his own must bear the cost of repairs: in other words§ his civil responsibility together with the consequences are to be determined by the competent Courts of each country in conformity with their laws [*art. 4*]. A vessel laying or repairing cables is to conform with regard to signals to the Regulations for the Prevention of Collisions at Sea; and other vessels are to withdraw to or keep beyond a distance of one nautical mile so as not to interfere with its operations, fishing vessels being allowed 24 hours within which to obey [*art. 5*]. Vessels are to keep a quarter of a mile away from the buoys showing the position of

§ [as explained the subsequent declaration: *cf.* the Act of 1886.]

a cable when being laid or repaired [*art. 6*]. Owners of vessels who can prove that they have sacrificed an anchor or a net, or fishing gear in order to avoid injuring a cable are to receive compensation from the owner: a declaration of the circumstances being made to the proper authorities 24 hours after next putting into port, who will communicate the same to the consular authorities of the country to which the owner belongs [*art. 7*]. Infractions of this convention are to be dealt with by the Courts of the country to which the vessel belongs on board of which the offence was committed [*art. 8*].

Operation of Act as applied.

The offence under art. 2 as is made punishable by s. 3: the proviso being extended to saving life or limb of the person doing the damage or of any other person. Accessories and abettors are dealt with in s. 3 (5), which is given an extra-territorial application in the case of British subjects. The provisions of the Merchant Shipping Act, 1894, Part V, "Safety", are applied by s. 5, with regard to lights and signals.

Duties of naval officers.

Officers commanding British ships of war and those of the signatory Powers, or British or foreign ships specially commissioned for the purpose, are authorised by s. 6 (1) to take statements from captains of vessels in connexion with the convention. The penalty for obstructing officers or for refusing or neglecting to comply with any demand or direction is a fine of £50 or imprisonment not exceeding 2 months, with or without hard labour [*s. 6 (2)*]. Actions against officers for acts done in execution or intended execution of the Act, or in respect of any alleged neglect or default in the execution of the Act, are to be commenced within 12 months [*s. 6 (3) (4)*]. By s. 6 (5) such actions can only be brought in the Superior Courts in England, or in a Colonial Court exercising the like authority as the High Court of Justice in England; and by s. 11, the Act is extended "to all places where [His] Majesty has jurisdiction". In order to avoid a difficult question of construction, it would perhaps have been better to have introduced into s. 11 the phrase "as if such places were British possessions". Where an offence has been committed by means of a vessel or of any boat belonging to a vessel, the master of such vessel is to be deemed to have been in charge of and navigating her, and be liable to be punished accordingly, until some other person is shewn to have been in charge of and navigating her [*s. 9*].

q p. 23.

Jurisdiction of Consular Court.

Colonial Courts of Admiralty Act, 1890.—*53 & 54 Vict. c. 27.*

To amend the law respecting the exercise of Admiralty jurisdiction in Her Majesty's dominions and elsewhere out of the the United Kingdom. [Imp. Stats., Vol. I, p. 6.]

incorporating

ADMIRALTY COURT ACT, 1840.—*3 & 4 Vict. c. 65.* [Imp. Stats., Vol. I, p. 5 (*a*).]

To improve the practice and extend the jurisdiction of the High Court of Admiralty in England.

ADMIRALTY COURT ACT, 1861.—*24 & 25 Vict. c. 10.* [*ib.* p. 5 (*c*)]

To extend the jurisdiction and improve the practice of the High Court of Admiralty.

NAVAL PRIZE ACT, 1864.—*27 & 28 Vict. c. 25.* [*ib.* Vol. I, p. 583]

For regulating naval prize of war.

SLAVE TRADE ACT, 1873.—*36 & 37 Vict. c. 88.* [*ib.* p. 622]

For consolidating with amendments the Acts for carrying into effect Treaties for the more effectual suppression of the slave trade, and for other purposes connected with the slave trade.

SLAVE TRADE ACT, 1824.—*5 Geo. IV. c. 113.* [*ib.* p. 615]

To amend and consolidate the law relating to the abolition of the slave trade.

SLAVE TRADE ACT, 1843.—*6 & 7 Vict. c. 98.* [*ib.* p. 621]

For the more effectual suppression of the slave trade.

[*applied by art. 100, China Order, in virtue of s. 12.*]

By s. 12 of the Act, it may be applied to any Consular Court "as if that Court were a Colonial Court of Admiralty," and provision may be made for carrying into effect such application.

Provisions of the Order in Council:

The Supreme Court shall have admiralty jurisdiction for and within the limits of the Order, and over vessels and persons coming within the same.

The following provisions of the Colonial Courts of Admiralty Act, 1890, that is to say, s. 2 (2) (3) and (5), ss. 5 and 6, and s. 16 (3), shall apply to the Supreme Consular Court as if that Court were a Colonial Court of Admiralty, and as if China were a British possession. For the purpose of this application the expressions

"judgment" and "appeal" shall, in the enactments so applied, have the same meanings as are assigned to them in s. 15 of the Act.

Operation of Act as applied.

Jurisdiction of Consular Court of Admiralty. [s. 2 (1) (2)]

By the application of this Act the Consular Court has the same jurisdiction as the Colonial Court of Admiralty, exercising "for the purpose of that jurisdiction all the powers which it possesses for the purpose of its other civil jurisdiction." The jurisdiction is "over the like places, persons, matters and things, as the Admiralty jurisdiction of the High Court in England", and the Consular Court "may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations".

Operation of Imperial Acts. [s. 2 (3)]

Imperial Acts referring to a Vice Admiralty Court are to apply to the Consular Court.

Prize and slave trade jurisdiction. [s. 2 (3) *(b)*] *27 & 28 Vict. c. 25.* *36 & 37 Vict. c. 88.*

The Consular Court has under the Naval Prize Act, 1864, and under the Slave Trade Act, 1873, and any enactment relating to prize or the slave trade, the jurisdiction thereby conferred on a Vice Admiralty Court only, and not the jurisdiction conferred by this Act exclusively on the High Court of Admiralty, or the High Court of Justice; "but, unless for the time being duly authorized", the Consular Court "shall not by virtue of this Act exercise any jurisdiction under the Naval Prize Act, 1864, or otherwise in relation to prize".

Jurisdiction in criminal matters. [s. 2 (3) *(c)*]

The Consular Court has not jurisdiction under this Act "to try or punish a person for an offence which according to the law of England is punishable on indictment".

Jurisdiction in respect of the navy. [s. 2 (3) *(d)*]

The Consular Court has no greater jurisdiction in relation to the laws and regulations relating to the navy at sea, or to the discipline of the navy, than is conferred on it by Order in Council.

Jurisdiction outside "limits of the Order." [s. 2 (4)]

The application of s. 2 (4) to the Consular Court is doubtful. It would provide that where the Court exercises any jurisdiction under this Act in respect of matters arising outside the "limits of the Order," that jurisdiction shall be deemed to be exercised under this Act and not otherwise.

Rules for procedure in slave trade offences. [s 13]

Rules may be made by Order in Council as to the procedure to be observed in, and the returns to be made from the Consular Courts in the exercise of their jurisdiction in matters relating to the slave trade.

By the extension of s. 2 (2), the Supreme Consular Court is invested, subject to the provisions of the Act, with the same jurisdiction as the Admiralty jurisdiction of the High Court in England. This incorporates the following jurisdiction sections of the Admiralty Court Acts, 1840 and 1861.

The parts of the sections as to which there is any doubt whether the jurisdiction can be exercised by the Consular Court, on account of its extra-territorial nature or otherwise, are put in brackets.

Jurisdiction under Admiralty Court Act, 1840. 3 & 4 Vict. c. 65. [Imp. Stats., Vol. I, p. 5 (*a*)]

The jurisdiction under this Act extends to—

Claims and causes of action of any person in respect of any mortgage of any ship or the proceeds of any ship arrested by process of the Court. Claims of mortgagees. [*s.* 3]

Questions as to the title to or ownership of any ship, or the proceeds thereof remaining in the registry, arising in any cause of possession, salvage, damage, wages or bottomry. Questions of title in causes of possession, &c. [*s.* 4]

All claims and demands whatsoever in the nature of salvage for services rendered to or damage received by any ship or sea-going vessel, or in the nature of towage, [or for necessaries supplied to any foreign ship or sea-going vessel] and to enforce payment thereof, [whether such ship or vessel may have been upon the high seas or not at the time when the services were rendered or damage received, or necessaries furnished, in respect of which such claim is made]. Claims for services or necessaries, &c.: [*s.* 6] although vessel not on the high seas.

All matters and questions concerning booty of war, or the distribution thereof, as may be referred to the judgment of the Court by Order in Council. Booty of war. [*s.* 22]

The procedure sections of the Act also extend to suits in the Consular Court.

Jurisdiction under Admiralty Court Act, 1861. 24 & 25 Vict. c. 10. [Imp. Stats., Vol. I, p. 5 (*c*)]

The jurisdiction under this Act extends to—

Claims for the building, equipping, or repairing of any ship, if at the time of the institution of the cause the ship or the proceeds thereof are under the arrest of the Court. Building, repairing, &c. ships. [*s.* 4]

Claims for necessaries supplied to any ship elsewhere than in the port to which she belongs, unless at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales. Necessaries. [*s.* 5]

[Damage to cargo imported in England or Wales. s. 6]

[Claims by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of, or for any breach of duty, or breach of contract on the part of the owner, master, or crew of the ship, unless at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales].

Damage by ship. [s. 7]

Claims for damage done by any ship.

Ownership of ships. [s. 8]

Questions arising between the co-owners, or any of them, touching the ownership, possession, employment, and earnings of any ship registered at any port in England or Wales, or any share thereof: with power to settle accounts, and to direct the sale of the ship.

Wages and disbursements. [s. 10]

Claims by a seaman of any ship for wages earned by him on board the ship; and claims by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship.

Claims under mortgages. [s. 11.] *57 & 58 Vict. c. 60.*

Claims in respect of any mortgage duly registered under the Merchant Shipping Act, 1894, whether the ship or the proceeds thereof be under the arrest of the Court or not.

M.S. Act, 1894, s. 504, extended to Consular Courts. [s. 13]

Whenever any ship or the proceeds thereof are under arrest of the Consular Court, it "shall have the same powers as are conferred upon the High Court of Chancery in England by Part IX of the Merchant Shipping Act, 1854". The section referred to was s. 514, which is now replaced by s. 504 of the Act of 1894. Presumably therefore, the powers of the High Court in England are conferred on the Consular Court. This section also confers the same powers on "any competent Court in a British possesion"; but as the Merchant Shipping Act is not extended bodily to Consular Courts, but only Part XIII, there is no warrant for substituting the Consular Court for the Colonial Court.

Power to consolidate claims against owners.

The power granted to the Consular Court by this application of s. 504, is the following:—"Where any liability is alleged to have been incurred by the owner of a British [or foreign] ship in respect of loss of life, personal injury, or loss of or damage to vessels or goods, and several claims are made or apprehended in respect of that liability," the Court may, on the owner's application "determine the amount of the owner's liability, and

may distribute that amount rateably among the several claimants, [and may stay any proceedings pending in any other Court in relation to the same matter], and may proceed in such manner and subject to such regulations as to making persons interested parties to the proceedings, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to the payment of any costs, as the Court thinks just".

The jurisdiction conferred by the Act of 1861, may be exercised either by proceedings *in rem* or by proceedings *in personam*. Jurisdiction *in rem* or *in personam*. [*s.* 35]

The procedure sections of the Act are also applicable to the Consular Court.

Jurisdiction under Naval Prize Act, 1864. 27 & 28 Vict. c. 25. [Imp. StatS., Vol. I, p. 583.]

The Consular Court, by the application of s. 2 (3) (*b*) of the Act now under analysis, has the jurisdiction conferred on a Vice-Admiralty Court under the Naval Prize Act, 1864, and any other enactment relating to prize, subject, however, to being duly authorised for the time being by Order in Council issued under s. 12. A Court of Vice-Admiralty in the colonies, "for the time being authorised to take cognizance of and judicially proceed in matters of prize," is a "prize Court," by s. 3 of the Act of 1864, and is included in the term "Vice-Admiralty Prize Court "when used in that Act. By s. 4, the orders and decrees of such a Court will be enforced by the High Court of Admiralty in England. Consular Prize Court. [*s.* 3] Enforcement of orders in England. [*s.* 4]

The question whether the exercise of this jurisdiction, or of any part of it, in an oriental country is warranted either by treaty or sufferance, must be left to be decided when it arises.

The Consular Court is to enforce within its jurisdiction all orders and decrees of the Judicial Committee in prize appeals, and of the High Court of Admiralty in prize causes. Enforcement of orders of High Court, &c. [*s.* 9]

The jurisdiction of the Court to condemn or release the captured ship extends to every ship, other than ships of war, taken as prize and brought into port within its jurisdiction: and also to goods taken as prize on board ship. Jurisdiction. [*ss.* 16, 20, 31]

The jurisdiction extends to the following "Special cases of Capture":— Special jurisdiction.

(*a*). Where in an expedition of any of His Majesty's naval, or naval and military forces, against a fortress or possession of land, goods belonging to the State of the enemy, or to a public company Capture in land expedition. [*s* 34]

of the enemy exercising powers of government, are taken in the fortress or possession, or a ship is taken in waters defended by or belonging to the fortress or possession.

Capture in expedition with ally. [s. 35]

(*b*). Where any ship or goods is or are taken by any of His Majesty's naval, or naval and military forces, while acting in conjunction with any allied forces; with power to apportion the due share of the proceeds to the allies (in accordance with the agreement as to such apportionment).

Droits of Admiralty. [s. 39]

Ships or goods taken as prize by a ship other than His Majesty's ships of war, shall, on condemnation, belong to the King in His Office of Admiralty.

Jurisdiction to award salvage to re-captors of ship or goods from enemy. [s. 40]

Where any ship or goods belonging to any British subjects, after being taken as prize by the enemy, is or are retaken from the enemy by any of the King's ships, the same shall be restored by decree of the Consular Court to the owner, on his paying as prize salvage one-eighth of the value of the prize, to be ascertained by the Court, or such sum not exceeding one-eighth of the estimated value of the prize, agreed between the owner and the re-captors, and approved by the Court: provided, that where the re-capture is made under circumstances of special difficulty or danger, the Court may award as prize salvage more than one-eighth, but not more than one-fourth of the value of the prize; but where a ship after being so taken is used by the King's enemies as a ship of war, this provision for restitution shall not apply, and the ship shall be adjudicated on as in other cases of prize.

Prize bounty to officers and crew present at engagement with enemy. [s. 42]

If in relation to any war, the King has granted prize bounty to the officers and crews of a ship of war, then such of the officers and crew of any such ship as are actually present at the taking or destroying of any armed ship of the enemy, shall be entitled to have distributed among them as prize bounty, a sum calculated at the rate of £5 for each person on board the enemy's ship at the beginning of the engagement.

Amount to be ascertained by Consular Court. [s. 43]

The number of the persons on board the enemy's ship may be proved in the Consular Court either by the examinations on oath of the survivors of them, or of any three or more of the survivors, or if there is no survivor, by the papers of the enemy's ship, or by the examinations on oath of three or more of the officers and crew of the King's ships, or by such other evidence as the Court may deem sufficient.

Persons giving false evidence in prize proceedings are guilty of perjury. Perjury. [s. 50]

Nothing in the Act shall take away, abridge, or control, further or otherwise than as expressly provided by this Act, the jurisdiction or authority of a Prize Court to take cognizance of and judicially proceed upon any capture, seizure, prize, or reprisal of any ship or goods, and to hear and determine the same, and, according to the course of admiralty and the law of nations, to adjudge and condemn any ship or goods, or any other jurisdiction or authority of or exercisable by a Prize Court. Saving of jurisdiction of Prize Court by law of Nations. [s. 55 (5)]

Jurisdiction under Slave Trade Act, 1873. 36 & 37 Vict. c. 88. [Imp. Stats., Vol. I, p. 622.]

The Consular Court, also by the application of s. 2 (3) *(b)* of the Act now under analysis, has the jurisdiction conferred on a Vice-Admiralty Court under the Slave Trade Act, 1873, and any other enactment relating to the slave trade. Slave trade jurisdiction of Consular Court.

The Court thus becomes a "British Slave Court", and is included in that term, and in the term "Vice-Admiralty Court", when used in the Act. Definitions. [s. 3]

As in the case of naval prize, the question whether the exercise of this jurisdiction is warranted by treaty or sufferance must wait for decision until the point arises.

A Slave Court has jurisdiction to try and condemn or restore any vessel, slave, goods and effects, alleged to be seized, detained, or forfeited, in pursuance of this Act, and on restoring the same to award such damages in respect of the visitation, seizure and detention of such vessel, goods and effects, and of any person on board such vessel, and in respect of any act or thing done in relation to such visitation, seizure or detention, or in respect of any such matters, and in any case to make such order as to costs as, subject to the provisions of the Act or of any treaty, it may think just. Jurisdiction in regard to slave vessels, slaves, &c. [s. 5]

The jurisdiction is not to be exercised inconsistently with any slave trade treaty over a vessel which is shewn to be the vessel of any foreign State, and which has not been engaged within the consular jurisdiction in the slave trade: [but where any vessel of a foreign State, is liable to be condemned by a British Slave Court, the Court is to have the same jurisdiction as if she were a British vessel].

The Court has the same jurisdiction in regard to any person

who has been seized, [either at sea or on land], on the ground that he has or is suspected to have been detained as a slave, for the purpose of the slave trade, as the Court would have had if he had been so detained on board a vessel that was seized and brought for adjudication.

Provisions as to Mixed Courts under slave trade treaties. [*ss.* 7, 8]

Provision is made in s. 7 for the appointment of Judges, Commissioners, and other officers of any Mixed Court or Commission appointed under any slave trade treaty. And by s. 8, the regulations contained in the treaty with respect to the Court or Commission are to have effect as if they were enacted in this Act. The Court or Commission is to have all the necessary jurisdiction for the purpose of carrying into effect any treaty referring to them: and in particular, shall have jurisdiction to try, condemn, and restore British vessels seized in pursuance of such treaty on suspicion of being engaged in the slave trade, and shall, for the purpose of their jurisdiction, have the same power as any Vice-Admiralty Court in the colonies has, and may take evidence, administer oaths, summon and enforce the attendance of witnesses, and require and enforce the production of documents in like manner as any such Court.

Perjury. [*s.* 22]

Persons giving false evidence in slave trade proceedings are guilty of perjury.

Incorporation of previous Acts. [*ss.* 24, 25]

This Act is to be construed as one with the Slave Trade Act, 1824, and any enactments amending it; and all pecuniary forfeitures and penalties imposed by those Acts may be recovered in the Consular Court within the jurisdiction of which [the offence was committed, or] the offender may be.

Jurisdiction and trial. [*s.* 26]

Any offence against this Act or the previous Acts, shall for all purposes of jurisdiction and trial, be deemed to have been committed either in the place in which the offence was committed, [commenced or completed, or in the county of Middlesex], "or in any place in which the person guilty of the offence may for the time being be, either in His Majesty's dominions, or in any foreign port or place in which his Majesty has jurisdiction." The person charged may be moved to some place within the dominions for trial if the Court considers it would be conducive to the interests of justice: and s. 689 of the Merchant Shipping Act, 1894, shall apply to such removal. This section regulates the procedure with regard to the conveyance of offenders and witnessess to the United Kingdom or to a colony.

57 & 58 Vict. c. 60.

The Slave Trade Act, 1824, which is incorporated with the Act of 1873, contains a long list of acts which are deemed to be slave trade offences. 5 Geo. IV, c. 113.

The Slave Trade Act, 1843, declares that all the provisions of the Act of 1824 shall extend to British subjects wheresoever residing or being, and whether within the dominions or in any foreign country. 6 & 7 Vict. c. 98.

Admiralty Appeals. [Act of 1890, s. 6 (4)]

Appeals from the Consular Admiralty Court lie to the King in Council: and all Orders in Council, or Orders of the Judicial Committee with regard to appeals from judgments of any Court exercising jurisdiction under this Act, are to have effect in all places subject to foreign jurisdiction.

Rules of Court. [s. 16 (3)] 26 & 27 Vict. c. 24.

The Rules in force under the Vice Admiralty Courts Act, 1863, on 1st July, 1891, are to be the rules for the Consular Court in exercising its Admiralty jurisdiction, in the absence of any rules made under this Act; and the fees payable under such rules are to be the fees leviable in the Consular Court. So far as such rules are in applicable or do not extend, the rules applicable to the ordinary civil jurisdiction of the Court shall apply to the exercise of Admiralty jurisdiction.

Colonial Probates Act, 1892.—*55 & 56 Vict. c. 6.*

To provide for the recognition in the United Kingdom of probates and letters of administration granted in British possessions. [Imp. Stats., Vol. I, p. 593.]

[*applied by s. 3.*]

Provisions of the Act.

Sealing in United Kingdom of colonial probates.

The Act authorises the application of the Act by Order in Council to colonies, the Legislatures of which have made adequate provision for the recognition of probates and letters of administration granted by the Courts in the United Kingdom. [*s. 1*]

When the Act has been so applied to any colony, probate or letters of administration granted by the Court of Probate in that colony may be sealed by a Court of Probate in the United Kingdom, and shall thereupon be of the like force and effect, and have the same operation in the United Kingdom as if granted by that Court. [*s. 2*]

Sealing of consular probates.

The Act extends to authorise the sealing in the United Kingdom of any probate or letters of administration granted by "any British Court having jurisdiction out of the King's Dominions in pursuance of an Order in Council, whether made under any Act or otherwise, in like manner as it authorises the sealing of a probate or letters of administration granted in a British possession to which this Act applies, and the provisions of this Act shall apply accordingly with the necessary modifications". [*s. 3*]

Operation of Act as applied.

The effect of this section seems to be that the Act applies to Consular Courts where provision has been made in the Order in Council for the recognition of probates of the United Kingdom.

Such provision is made by art. 106 of the China Order, which also extends to probates or letters of administration or confirmations granted by Courts of Probate in colonies to which the Act extends. The probates and letters of administration granted in the Consular Courts in China are, therefore, entitled to recognition in such colonies under the colonial law corresponding to the Act of 1892.*

Regimental Debts Act, 1893.—*56 & 57 Vict. c. 5.*

[Imp. Stats., Vol. I, p. 179.]

To consolidate and amend the law relating to the payment of regimental debts, and the collection and disposal of the effects of officers and soldiers in case of death, desertion, insanity, and other cases.

[*applied by s. 30 (3).*]

This Act is the only example of a direct extension of legislation to foreign jurisdiction without the intervention of an Order in Council.

By s. 30 (1), the Act is to apply to all persons subject to military law, within or without the dominions; and by s. 30 (3) it is to apply to a place where foreign jurisdiction is exercised that place were a colony."

Provisions of the Act.

Administration of estate of deceased soldier.

This Act provides that on the death of a person while subject to military law, the committee of adjustment shall take charge of

* The Orders in Council applying the Act to colonies and foreign jurisdiction countries will be found in the "Statutory Rules and Orders."

all his property, and, after paying certain preferential charges, wind up the estate; for this purpose the committee has "to the exclusion of all authorities and persons whomsoever, the same rights and powers as if they had taken out representation to the deceased". [*ss. 1, 6 (5)*]

Duties of committee of inspection.

The surplus is to be paid to a representative of the deceased if there is one in the same part of the dominions: or in the absence of such a representative it is to be remitted to the Secretary of State to be disposed of in accordance with the further provisions of the Act. [*s. 7*]

An official administrator, notwithstanding any law regulating his office, is not to interfere in any manner in relation to the property of the deceased unless expressly required to do so. [*s. 14*]

Where the will of a person dying while subject to military law comes to the hands of the Secretary of State and representation is not taken out, he may cause it to be deposited in the place appointed in London for the deposit of wills, unless the domicil of the testator is in Scotland or Ireland: and if he dies intestate and representation is not taken out he may cause a declaration of intestacy to be so deposited.

Merchant Shipping Act, 1894.—*57 & 58 Vict. c. 60.*

To consolidate enactments relating to Merchant Shipping. [Imp. Stats., Vol. I, p. 333.]

Provisions of the Act applicable to Foreign Jurisdiction.

Where the King exercises jurisdiction within any port in accordance with the Foreign Jurisdiction Act, 1890, he may by Order in Council declare—

Consular Ports of registry.

(*a*) the port to be a "port of registry".

(*b*) the description of persons who are to be registrars of British ships there, and

(*c*) make regulations with respect to the registry of British ships thereat. [*s. 88*, and *s. 4 (1) (f)*].

For convenience I have used the term Consular Port of Registry in the following summary of the law.

Provision for loss of certificate.

In the event of the certificate of registry of a ship being mislaid, and if the port at which the ship is at the time of the event,

or first arrives after the event, is a consular port of registry other than such port at which the ship was registered, the consular officer may grant a provisional certificate, which shall within 10 days after the first subsequent arrival of the ship at her consular port of registry, be delivered up to the registrar, who shall thereupon grant a new certificate. [*s 18*]

Order for sale on transmission to unqualified person.

Where the property in a registered ship or share therein is transmitted on marriage, death, bankruptcy or otherwise, to a person not qualified to own a British ship, then if the ship is registered in a consular port of registry, the British Court having the principal civil jurisdiction there may, on application by the unqualified person, order a sale of the property so transmitted and direct the net proceeds of the sale to be paid to the person entitled under such transmission, or otherwise. If the application is not made within 4 weeks after the occurrence of the event on which the transmission has taken place, (or within such further time not exceeding one year as the Court may allow), the ship or share transmitted shall be subject to forfeiture. [*s. 28*]

Power of Court to prohibit transfer.

The British Court having the principal civil jurisdiction at a consular port of registry, may, on the application of any interested person prohibit for a specified time any dealing with a ship or share therein, subject to any terms or conditions which the Court may think just: the registrar being served with a copy of the order. [*s. 30*]

Restrictions on certificates of mortgage and sale.

If a ship is registered at a consular port of registry, a certificate of mortgage or sale shall not be granted so as to authorise any mortgage or sale to be made at that port, or within such adjoining area as is specified in the Order in Council establishing the port of registry, by any person not named in the certificate. [*s. 41*]

Fresh registration in respect of alteration in ship.

Provisional or endorsed certificates in respect of an alteration in a ship registered in a consular port of registry are to be delivered up to the registrar within 10 days of her first subsequent arrival at that port, and the ship is to be registered anew. [*s. 50*]

Application of fees.

Fees taken at a Consular Port of registry, except where otherwise provided by the Act are to be disposed of as directed by Order in Council. [*s. 62*]

Penalties for carrying improper colours.

Where the jurisdiction of a Colonial Court of Admiralty has been conferred upon the Consular Court, fines in respect of carrying improper national colours may be recovered before

it [*s. 73*]: and a ship may be adjudged to be forfeited under the Act. [*s. 78*]

Part I of the Act,—"Registry"—applies to all places where the King has jurisdiction. [*s. 91*] Application of Part I.

If a colonial Legislature by law applies or adopts any provisions of Part II of the Act,—"Masters and Seamen"—which do not otherwise apply, to any British ships registered at, trading with, or being at, any port in the colony, and to the owners, masters, and crews of those ships, such law shall have effect in places subject to foreign jurisdiction, as if it were part of this Act [*s. 264*] Application of Part II.

The Public Authorities Protection Act, 1893* for the purposes of the provisions of Part III—"Passenger and Emigrant Ships"—of the Act (other than the provisions relating to passenger steamers only) shall apply to every place where the King has jurisdiction. [*s. 358*] *56 & 57 Vict. c. 61.*

Part XIII of the Act—"Legal Proceedings"—is included in the 1st schedule of the Principal Act which contains the Acts which may be applied by Order in Council. The method of its application has been considered earlier in this section. *cf.* p. 86.

Where any thing is authorised to be done by to or before a British consular officer, and there is no such officer in a country subject to foreign jurisdiction, it may be done by to or before an officer designated by Order in Council. [*s. 737*] Power to designate officers to perform duties under the Act.

VIII

The Exercise of the Legislative Power.

To the extent shewn in the preceding Section, the exercise of the King's legislative power has been, if not controlled, at least directed by Act of Parliament. The selection of certain specified statutes for extension to foreign jurisdiction would seem to amount to an intimation that Parliament considers it appropriate that they should be so extended, leaving it, however, to the King in Council to determine whether, and to what extent, they should be extended.

* This Act is referred to in Section V, under s. 13 of the Principal Act. *cf.* p. 63.

But it is obvious that much more legislation is necessary for the proper exercise even of the main objects of the jurisdiction—deciding questions of disputed rights between British subjects: punishing offences committed by British subjects. The method adopted—of introducing the law of England bodily, or as in the case of Zanzibar, part of the law of India,—has already been explained and justified. In this Section the manner and the details of the introduction must be more particularly examined.

cf. Section VI.

The Courts invested with Bankruptcy, Probate, and other jurisdictions, in addition to civil and criminal.

But even with the adaptation of a body of laws for these two purposes, and the creation of Courts to apply and enforce them, the necessities of the situation are not fully complied with. The Courts in England have other important jurisdictions with which it is necessary to invest the Consular Courts if there is to be a complete system of judicature appropriate to the needs of the British community, if the community is to have that "complete personal protection," and "assurance of satisfactory judicial tribunals" which it is the object of obtaining exterritorial privileges to achieve. These are the Bankruptcy, Probate, Matrimonial and other jurisdictions: and in the Orders in Council there are clauses conferring the requisite powers on the Consular Courts. They are drawn in the broadest possible manner, and always subject to the modification that the English, or other, law on the subject is to be in force "as far as circumstances admit". As to these clauses difficult questions of interpretation arise, which have already been examined in a previous Section. There is also the further question, to be examined as occasion arises, how far the exercise of these special jurisdictions are warranted by the treaty or sufferance.

cf. p. 10.

cf. p. 80.

It is in these clauses also that the Acts contained in the 1st schedule are to be found applied, with or without modifications. Other important Acts are specially applied in the same manner. I propose in setting them out, to adopt the same method of paraphrase as in the previous Section.

A.—*CRIMINAL JURISDICTION.*

Application of criminal law of England.

By article 35* the whole of the criminal law of England is applied "as far as circumstances admit": power, however, being

* The articles referred to in this Section are, as in previous Sections, those of the China Order.

reserved to create special offences by Order in Council, or by Rules made under such Order.

> 35 (i) Except as regards offences made and declared such by this or any other Order . . . , or by any Rules or Regulations made under any Order:—
>
> Any act that would not by a Court of Justice having criminal jurisdiction in England be deemed an offence in England, shall not, in the exercise of criminal jurisdiction under this Order, be deemed an offence, or be the subject of any criminal proceeding under this Order.
>
> (ii) Subject to the provisions of this Order, criminal jurisdiction under this Order shall, as far as circumstances admit, be exercised on the principles of, and in conformity with, English law for the time being, and with the powers vested in the Courts of Justice and Justices of the Peace in England, according to their respective jurisdiction and authority.

This fundamental principle being established, the Order in Council proceeds to deal specifically with certain clauses of offences.

ADMIRALTY OFFENCES.

Admiralty offences are specially dealt with by art. 39, in which three of the Acts specified in the 1st schedule are applied as adapted. These have already been considered in the last Section.

cf. pp. 84-88.

CORONER'S JURISDICTION.

By art. 68, the Court is invested with all the powers and duties appertaining to the office of coroner in England, in relation to deaths of British subjects happening in the district of the Court: and also in relation to deaths of any persons having happened at sea or on board British ships arriving in the district, and to deaths of British subjects having happened at sea on board foreign ships so arriving.

Jurisdiction of Consular Court in the matter of inquests.

The duties of the coroner of enquiring into all cases of sudden death, or death under any circumstances of suspicion, form so integral a part of the administration of the criminal law, that there is no difficulty in tracing the warrant for the exercise of the power to the simple grant of criminal jurisdiction over nationals.

Under the Coroners Act, 1887, the cases in which the Consular Court will hold an inquest under the Coroners Act, 1887, are, when the dead body of a British subject is found in the circumstances specified in the article, and there is reasonable cause to suspect that such person— *50 & 51 Vict. c. 71. s. 3.*

i. Has died either a violent or unnatural death: or

ii. Has died a sudden death of which the cause is unknown: or

iii. Has died in prison, or in such place or under such circumstances as to require an inquest in pursuance of any Act of Parliament [which Act presumably would be applied *pro hac vice*].

Warrant for arrest. [*s.* 5]

The warrant for arrest or detention of a person charged with murder or manslaughter, or of being accessory before the fact to a murder, by the inquisition can obviously only be directed against a British subject; but presumably the inquisition may charge the

Foreigners.

offence against either a native or a foreigner, leaving it to the foreign Consular Court to take cognizance of the case. On the other hand, presumably, the Court will take notice, and give

Foreign inquests.

effect to an inquisition held by a foreign Consular Court under its own law, the result of which is to charge a British subject with the murder of a foreigner.

Dead body found in sea or creeks.

It is provided by s. 7, that "where a body is found dead in the sea, or any creek, river, or navigable canal within the flowing of the sea where there is no deputy coroner for the jurisdiction of the admiralty of England, the inquest shall be held only by the coroner having jurisdiction in the place where the body is first brought to land." This determines the question of the jurisdiction of the Consular Court in the cases contemplated by the section, and it is not necessary to go into the question of the jurisdiction

cf. "Nationality," Vol. II, p. 134.

of the admiral and coroners appointed by him in such cases.

The sections of the Act which regulate the procedure at inquests, and with regard to medical witnesses and *post mortem* examinations, are in force in the Consular Courts when holding inquests, in so far as they may be applicable.

Treasure trove.

With regard to the jurisdiction of coroners "to inquire of treasure that is found, who were the finders, and who is suspected thereof," preserved by s. 36, it seems doubtful whether it can be conferred on the Consular Court, as the coroner is bound to secure the property on treasure and trove for the King. The property so found would go to the Sovereign or to some other person according to the law of the oriental country.

OFFENCES IN RELATION TO COPYRIGHT, INVENTIONS, DESIGNS, AND TRADE-MARKS.

Article 69 extends the penal clauses of the English Acts relating to these subjects to consular jurisdiction.

69. Any act which, if done in the United Kingdom, or in a British possession, would be an offence against any of the following statutes of the Imperial Parliament or Orders in Council, that is to say:— Art. 69 of China Order.

The Merchandize Marks Act, 1887:

The Patents, Designs, and Trade-Marks Acts, 1883 to 1888:

Any Act, statute, or Order in Council for the time being in force relating to copyright, or to inventions, designs, or trade-marks:

Any statute amending, or substituted for, any of the above-mentioned statutes:

> [which includes (*i*) the Merchandize Marks Acts, 1891 and 1894: (*ii*) the Patents Act, 1901, and (*iii*) the Trade-Marks Act, 1905, now in force in lieu of (*a*) ss. 62 to 81, and (*b*) so far as they respectively relate to trade-marks, ss. 85 to 99, 101, 102, 105, 108, and 111 to 117, of the Patents, &c., Act, 1883: and (*c*) ss. 8 to 20, and (*d*) so far as they relate to trade-marks, ss. 21 to 26, of the Patents, &c., Act, 1888.] Amendments in Patents Acts, 1883 and 1888, by Trade-Marks, Act, 1905. [Imp. Stats., Vol. I, pp. 476, *et seq.*]

shall, if done by a British subject . . . , be punishable as a grave offence against this Order, whether such act is done in relation to any property or right of a British subject, or of a foreigner, or native, or otherwise howsoever.

There are two provisos:—(*i*) That a copy of the Act or Order is to be published in the Consulate, and to be open for inspection by any person at all reasonable times: and no person is to be punished for anything done before the expiration of one month after such publication, unless he is proved to have had express notice of it. Provisos to enforcement of penal clauses in Patents Acts, &c.

(*ii*) No prosecution is to be entertained on behalf of a person not a British subject, unless effectual provision exists for the punishment in Consular or other Courts in China of similar acts committed by the subjects of the State of which such person is a subject, in relation to, or affecting the interests of, British subjects.

The offences are made "grave offences" against the Order, and as such punishable under art. 61 *, which supersedes the penalties provided in the statutes.

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* The punishments for "offences" against the Order, by art. 60, are

i. fine not exceeding £5, without imprisonment: or

ii. imprisonment not exceeding one month, without fine: or

iii. imprisonment not exceeding 14 days, with fine not exceeding 50 shillings:—

the imprisonment is to be without hard labour.

[This note is continued on p. 130.]

The questions raised by the extension of these Acts are somewhat abstruse, and, not without much diffidence, I suggest the following as some of the consequences. It is obviously impossible, in the absence of concrete cases to work with, to pretend to give any comprehensive summary of the cases which fall within the scope of this article of the Order.

50 & 51 Vict. c. 28.
54 & 55 Vict. c. 15.
57 & 58 Vict. c. 19.

Merchandize Marks Act, 1887 (and Acts of 1891 and 1894).

The principal offences created by s. 2 are—

Offences under Merchandize Marks Acts. [Imp. Stats., Vol. I, pp. 503, *et seq.*]

(i) forging any trade-mark: falsely applying to goods any trade-mark, or any mark so nearly resembling a trade-mark as to be calculated to deceive: applying any false trade description to goods: unless, in any of these cases, there is absence of intent to defraud.

(ii) Selling, exposing or having possession for sale, or any purpose of trade or manufacture, goods to which a forged trade-mark or false trade description is applied, or to which any trade-mark or mark so nearly resembling a trade-mark as to be calculated to deceive is falsely applied, in the absence of proof (*inter alia*) that the act was innocent.

Definition of "trade-mark." *46 & 47 Vict. c. 57. 5 Edw. VII, c. 15.*

A "trade-mark" is, by s. 3, defined to be a trade-mark registered under the Patents Act, 1883, [*now*, Trade-Marks Act, 1905]: *i.e.*, in the Patent Office in London: and also any trade-mark which is protected by law in any colony or foreign country to which s. 103 of the Patents Act, 1883, is by Order in Council applicable.

Foreign and colonial trade-marks.

In virtue of s. 103, where a convention has been entered into with a foreign country for the mutual protection of trade-marks, and an Order in Council has declared the section applicable, a person who has applied for protection of a trade-mark in such country is entitled (subject to certain conditions) to registration of his mark in priority to other applicants. And, by s. 104, this section may be applied by Order in Council to any colony which has made satisfactory provision for the protection of trade-marks registered in the United Kingdom.

The punishments for "grave offences" against the Order, by art. 61, are

i. fine not exceeding £10, without imprisonment: or

ii. imprisonment not exceeding 2 months, without fine: or

iii imprisonment not exceeding one month, with fine not exceeding £5:—

the imprisonment to be with or without hard labour, at the discretion of the Court.

A "trade description" is, by s. 3, defined to be "any description, statement or other indication, direct or indirect— Definition of "trade description."

(*a*) as to the number, quantity, measure, guage or weight of any goods, or

(*b*) as to the place or country in which any goods were made or produced: or

(*c*) as to the mode of manufacturing any goods: or

(*d*) as to the material of which any goods are composed: or

(*e*) as to any goods being the subject of an existing patent, privilege or copyright:

and also the use of any figure, word, or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters".

A "false trade description", by s. 3, means one which is false in a material respect as regards the goods to which it is applied: and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise, where that alteration makes the description false in a material respect. The fact that a trade description is a trade-mark, or part of a trade-mark, does not prevent such description being a false trade description. Definition of "false trade description."

The 3rd section contains other important provisions: but the above are sufficient for the present purpose, which is to illustrate, rather than treat exhaustively the different provisions of the Order in Council.

It will be seen that the effect of the article differs according as it is considered in its application to trade-marks and trade descriptions.

So far as trade-marks are concerned, the act done in China is an offence if it would be an offence if done in the United Kingdom. This clearly extends the area of protection afforded by registration of trade-marks in the United Kingdom to China, in so far as offences by British subjects are concerned. For example, the false application to goods in China of a trade-mark registered in the United Kingdom, or the exposing for sale in China of goods to which any forged trade-mark is affixed, is, when done by a British subject, an offence cognisable by the Consular Courts. It would seem, however, that where the registration in the United Kingdom has been by a foreigner, the reciprocity proviso would come into play. But in cases falling under s. 103 of the Patents Act, the reciprocity would seem to be assured. Effect of extension of Acts. Trade-mark offences.

Colonial trade-marks.

There is no provision for the protection of colonial registered trade-marks unless the legislation in any given colony entitles it to the benefits of s. 104; in which case the act done in China is an offence if it would be an offence if done in the colony.

Trade description offences.

The question differs in the case of trade descriptions because there is no act to be performed in the United Kingdom as a condition precedent to the right arising which it is intended to protect. The offence is created for the protection of the public, and only incidentally for the protection of the rights of any individual in any mark or description. The article simply makes the use of a false trade description in China by a British subject an offence. The effect of the extension is, therefore, of the benefits of the Act in the first instance to the British community in China: and to the foreign and native communities subject to the condition of reciprocity: which, in this instance, means that effectual provision exists for the punishment by his Consular or native Court of a foreigner or native who has, by a false trade description, deceived a British subject.

46 & 47 Vict. c. 57. 48 & 49 Vict. c. 63. 49 & 50 Vict. c. 37. 51 & 52 Vict. c. 50. 1 Edw. VII, c. 18. [Imp. Stats., Vol. I, pp. 476 *et seq.*]

Patents and Designs Act, 1883 (and Acts of 1885, 1886, 1888 and 1901).

The article only extends the penal clauses of the Acts, and does not deal with any civil remedy for infringement.

Offences under Patents Act, 1883.

The only penal clause in these Acts is s. 105 of the Act of 1883. This section makes it an offence for any person to represent that any article sold by him is a patented article, when no patent has been granted for it: or to describe any design applied to any article sold by him as registered which is not so. A person is held to represent that an article is patented or a design registered, if he sells the article with the word "patent," "patented," "registered," or any word or words expressing or implying that a patent or registration has been obtained for the article, stamped, engraved, or impressed on, or otherwise applied to, the article.

The unauthorised assumption of the Royal Arms, dealt with by s. 106 of the Act of 1883, is also extended.

5 Edw. VII, c. 15.

Trade-Marks Act, 1905.

The penal clause of this Act is s. 68, which makes it an offence for any person to represent a trade-mark as registered which is not so. A person is held to represent that a trade-mark is registered, if he uses in connexion with it the word "registered", or

any words expressing or implying that registration for it has been obtained.

By the same section the unauthorised use of the Royal Arms may be restrained by injunction: but it is doubtful whether the language of art. 69 is sufficient to apply this section to the Consular Courts.

Copyright Acts.

The question how far the protection afforded to authors and others by the various Copyright Acts is extended by article 69, to countries subject to foreign jurisdiction is not free from doubt. The word "offender" is constantly used in the Acts, but the penalties are pecuniary; in some cases one moiety goes to the proprietor of the copyright, and again in other cases the remedy is no more than a recognition of the right of the proprietor to recover damages in an action, together with costs of suit. There is usually the further penalty of forfeiture or destruction of the pirated copies.

[see the "Copyright" group of Acts in Imp. Stats., Vol. I, pp. 71, *et seq.*]

The difficulty may be thus stated. The act of infringement being treated by all the Acts as an offence, it would seem that, when committed by a British subject in China, it falls within the language of art. 69. It is, however, punishable as a "grave offence against the Order", which involves fine or/and imprisonment, with or without hard labour. But a further question would then have to be considered: whether the power of the Court under art. 59, to "award in respect of an offence any punishment which may in respect of a similar offence be awarded in England", is alternative to the provisions in respect of punishments in articles 60 and 61, in which case possibly the Consular Court might impose the civil penalties provided in the Act. As this is an offence made such by the Order, the provisions of art. 35 (i), that acts which are not deemed offences (presumably criminal offences) in England shall not be deemed offences in the Consular Courts, would seem not to apply.

cf. p. 130.

cf. p. 127.

OFFENCES CREATED BY ORDER IN COUNCIL.

We now come to a group of offences specially created by the Order, which, as they depend on the words of the Order, need here only be specified.

Order in Council offences.

Smuggling. [*art. 70*]

This includes—

(*a*) smuggling out of China goods liable to export duty:

(*b*) importing or exporting into or out of China any goods, intending and attempting to evade payment of duty:

(*c*) importing or exporting into or out of China any goods the importation or exportation whereof is prohibited:

(*d*) selling or offering for sale in China without a proper licence, any goods whereof the Chinese Government has a monopoly: together with attempts at the same.

The punishment is imprisonment, with or without hard labour, not exceeding 6 months, and with or without a fine not exceeding £100, or a fine not exceeding £100 without imprisonment.

The goods are forfeited to the King to be disposed of, subject to general or special directions of the Secretary of State, as the Court thinks fit.

Levying War. [*art. 71*]

This includes—

(*a*) levying war or taking part in any operation of war, or aiding or abetting any person in carrying on war, insurrection, or rebellion against the Chinese Government.

(*b*) taking part in any operation of war in the service of the Chinese Government against any persons engaged in carrying on war, insurrection, or rebellion against that Government.

The punishment is imprisonment, with or without hard labour, not exceeding 2 years, and with or without a fine not exceeding £500, or a fine not exceeding £500 without imprisonment.

The person convicted is also liable to deportation.

Piracy. [*art 72*]

A British subject in China may be tried for piracy wherever committed: that is to say, piracy by the law of England.

28 Hen. VIII, c. 15.
13 & 14 Vict. c. 26.

The English statutes on piracy commence with the Offences at Sea Act, 1536, and end with the Piracy Act, 1850.*

* *See* the "Piracy Group" in "Imperial Statutes Applicable to the Colonies," Vol. I, pp. 510, *et seq.* *See* also these statutes set out in "Nationality" Vol. II, Chap. II, and the analysis of them in the same Volume, Chap. IV, pp. 161, *et seq.*

Order in Council offences.

Piracy.

"Piracy is only a sea-term for robbery, piracy being a robbery committed within the jurisdiction of the Admiralty." It is a crime *jure gentium*, because "the King of England hath not only an Empire and Sovereignty over the British Seas, but also an undoubted jurisdiction and power, in concurrency with other Princes and States, for the punishment of all piracies and robberies at sea, in the most remote parts of the world." (*per* Sir Charles Hedges, Judge of the High Court of Admiralty, in his charge to the Grand Jury, in *R.* v. *Dawson*.)

13 State Trials, 454.

The warrant for conferring this jurisdiction on the Consular Court is therefore to be found, not in the treaty, but in the fact that the crime is triable by the Courts of all nations irrespective of the nationality of the criminal.

A. G. for Hong Kong v. *Kwok-a-Sing*, L.R. 5 P.C. at p. 198.

It appears from the judgment of the Judicial Committee in *A. G. for Hong Kong* v. *Kwok-a-Sing*, that oriental States are included among the nations who have this right, at least so far as their own coasts and seas are concerned: "Their Lordships think it may properly be assumed, without proof, that China has laws to punish piracy on her own coast."

The provisions of art, 72 are, however, limited to piracy by British subjects.

cf. p. 63.

The article is independent of the provision of s. 14 of the Foreign Jurisdiction Act, which allows jurisdiction to be exercised over British subjects in any vessel at a distance of not more than 100 miles from the coast of China, which has already been considered. This jurisdiction is defined in art. 80.

Note on Kwok-a-Sing's case.

NOTE.—The judgment of the Judicial Committee above referred to contains a very lucid exposition of the distinction between piracy *jure gentium*, and piracy by municipal law. The question was whether Kwok a-Sing should have been surrendered to the Chinese Government under art. *xxiii* of the Treaty of Tientsin, which enables Chinese subjects who have escaped to Hong Kong to be extradited for crimes and offences against the law of China. The facts were that Kwok-a-Sing was alleged to have murdered the master of a French ship on which he was, bound for Peru, and to have then taken command of the vessel and changed her course to China. The question which the Judicial Committee considered, after having expressed the opinion that there was evidence of a piratical intention, was the following—

"Next it must be considered what was the legal duty of the magistrate when he had received the evidence: ought he to have signed a warrant enabling the Governor to deliver Kwok-a-Sing to the Chinese authorities to be tried for both murder and piracy, or ought he to have committed him to be tried for the piracy at Hong Kong?

Order in Council offences.

In their opinion he ought to have committed him to be tried for the piracy at Hong Kong. They think that the acts of piracy *jure gentium* with which Kwok-a-Sing was charged may be plainly distinguished from those acts of piracy which they have before stated to be, in their opinion, within the ordinance and the treaties. If Chinese subjects, starting from, and returning to, Chinese territory, attack a ship of some other nation, whether in harbour or at sea, they, making that territory as it were the base of their operations, must be held to commit an offence against the municipal law of China and against the Chinese Government, whether they commit an act of piracy *jure gentium* or not. But if Kwok-a-Sing committed an offence against the municipal law of any nation, he committed an offence against the municipal law of France, to which he was subject at the time, and not against the muncipal law of China: and if he is punishable by the law of China, he is only so punishable because he has committed an act of piracy which, *jure gentium*, is justiciable everywhere. They are of opinion that such an offence is not an offence against the law of China within the meaning of the ordinance.

Violation of Treaties. [*art 73*]

The violation or failure to observe any stipulation of any treaty between Great Britain and China, in respect of the violation whereof any penalty is stipulated for in the treaty, is to be deemed guilty of an offence against the treaty and liable to conviction under the Order. The punishment is that provided in art. 60.

cf. p. 129 *note.*

Breach of International Regulations. [*art 74*]

Where by agreement among some or all of the diplomatic or consular representatives of foreign States in conjunction with the Chinese authorities, sanitary, police, port, or game, or other regulations are established, and as far as they affect British subjects, are approved by the Secretary of State, complaints for breach thereof may be entertained by the Court, and payment of the fine enforced as if it were declared to be an offence against this Order.

cf. p. 24.

Seditious Conduct. [*act. 75*]

Every person subject to the criminal jurisdiction of the Court who prints, publishes, or offers for sale any printed or written newspaper or other publication containing matter calculated to excite tumult or disorder, or to excite enmity between the King's subjects and the Government of China, or between that Government and its subjects, is guilty of a grave offence; the punishment

being under art. 61. The offender may in addition to, or in lieu of any other punishment, be order to give security for good behaviour, and, in default, or on a further conviction, he may be deported.

Order in Council offences. *cf.* p. 130 *note*.

Offences against Religions. [*art. 76*]

This includes—

(*a*) publicly deriding, mocking, or insulting any religion established or observed within China:

(*b*) publicly offering insult to any religious service, feast or ceremony established or kept in any part of China, or to any place of worship, tomb, or sanctuary belonging to any religion established or observed within those dominions, or to the ministers or professors thereof:

(*c*) publicly and wilfully committing any act tending to bring any religion established or observed within those dominions, or its ceremonies, mode of worship, or observances, into hatred, ridicule or contempt, and thereby to provoke a breach of the peace.

The punishment is imprisonment not exceeding 2 years, with or without hard labour, and with or without a fine not exceeding £50, or a fine alone not exceeding £50.

Consular officers are to take precautionary measures for the prevention of such offences.

Contempts of Court. [*art. 77*]

This includes—

(*a*) wilfully, by act or threat, obstructing an officer of, or person executing any process of the Court in the performance of his duty:

(*b*) within or close to the room or place where the Court is sitting wilfully misbehaves in a violent, threatening or disrespectful manner, to the disturbance of the Court, or to the intimidation of suitors or others resorting thereto:

(*c*) wilfully insults any member of the Court, or any assessor or juror, or any person acting as clerk or officer of the Court, during his sitting or attendance in Court, or in his going to or returning from Court:

(*d*) any act in relation to the Court or a matter pending therein, which if done in relation to the High Court in England, would be a contempt.

Order in Council offences. *cf.* p. 130 *note.*

The offender is guilty of a grave offence againt the Order, punishable under art. 61. The Court has also a power of dealing summarily with the offender.

Negligence of Officers. [*art. 78*]

If an officer of the Court employed to execute an order looses by neglect or omission the opportunity of executing it, the Court may, on complaint of the party aggrieved order him to pay damages.

Extortion. [*art. 79*]

If a clerk or officer of the Court acting under pretence of the process or authority of the Court, is charged with extortion, or with not paying over money duly levied, or with other misconduct, the Court may enquire into the charge summarily, and may make such order as to repayment as it thinks fit. A fine not exceeding £5 may also be imposed.

AUTHORITY WITHIN 100 MILES OF THE COAST. [*art. 80*]

cf. p. 65.

This article gives effect to the provisions of s. 14 of the Foreign Jurisdiction Act, and has already been considered in connexion with that section.

By art. 81, if the person charged is in Hong Kong, he may be tried by the Supreme Court of the colony as if the offence had been committed there.

DESERTERS. [*art. 82*]

The British Minister in China, the Judge of the Supreme Consular Court, any consular officer in China, or the Governor of Hong Kong, on receiving satisfactory information that any soldier, sailor, marine, or other person belonging to the naval or military forces has deserted and has concealed himself in any British ship within 100 miles from the coast of China, may issue a warrant for his search and apprehension, and on being satisfied that any person so apprehended is a deserter, may cause him to be delivered over to the nearest military station or to the officer in command of a man-of-war serving in China.

cf. p. 60.

This article, as has already been pointed out, depends on the general power of legislation for Crown Colonies by Order in Council. It is however limited in the area of its application to the 100 miles from the coast of China specified in s. 14 of the

Foreign Jurisdiction Act: and therefore appears to derive its warrant from that section, which, as we have seen, is general in its terms and not limited to foreign jurisdiction. *cf.* p. 64.

DEPORTATION. [*art. 83*]

By this article it is provided that where it is proved that there is reasonable ground to apprehend that a British subject is about to commit a breach of the peace, or that the acts or conduct of a British subject are or is likely to produce or excite to a breach of the peace, the Court may require him to give security to keep the peace, or for his future good behaviour: or where a British subject is convicted of an offence, the Court may require him to give security for his future good behaviour. In either of these cases, if the person so required fail to give security, the Court may order him to be deported to such place as it may direct.

The place is to be a place in some part (if any) of the dominions to which the person belongs, or the Government of which consents to the reception of persons deported. The case is to be reported to the British Minister and to the Secretary of State.

Returning without permission of the Secretary of State is a grave offence, punishable under art. 61, and the person may be again deported. *cf.* p. 130 *note.*

By article 84, if the deportation is to Hong Kong, the Governor may cause him to be taken to England, or else discharge him from custody.

The authority for these provisions is art. 8 of the Foreign Jurisdiction Act. *cf.* p. 58.

Fugitive Offenders Act. [*44 & 45 Vict. c. 69*]

Colonial Prisoners Removal Act. [*47 & 48 Vict. c. 31*]

Both these Acts are applied by art. 88, with certain adaptations. The first† is included among the Acts applied by the schedule to the Principal Act: the second§ among those which are applied by special provision in the Acts themselves. †analysed on p. 98.
§analysed on p. 108.

B.—*CIVIL JURISDICTION.*

By article 89, the civil jurisdiction of the Consular Court is, as far as circumstances admit, to be exercised on the principles of, and in conformity with, English law for the time being in force.

China Order, 1865, art. 5.

The old Order of 1865 contained the fuller form—"in conformity with the common law, the rules of equity, the statute law, and other law for the time being in force in and for England."

"English law" includes all branches of that law.

There can be little doubt, however, that the short form "English law" includes all the elements of that law which are specified in the long form. If there were any doubt on this point it is settled by the common interpretation of the principle that the law of England, as far as circumstances admit, is applicable to colonies acquired by occupation: for the cases in which that principle has been in question nearly all turn on the question whether any given statute is in force as being applicable to the circumstances of any given colony. And if the statute law is included, *a fortiori* all other law is equally included.

BANKRUPTCY.

Jurisdiction of Consular Court in bankruptcy.

The jurisdiction of the Court in bankruptcy is, by art. 99, declared to be "all such jurisdiction in bankruptcy as for the time being belongs to the High Court and the County Courts in England," as far as circumstances admit; and to be exerciseable with respect to the following classes of persons being either resident in China, or carrying on business there: namely, resident British subjects and their debtors and creditors, being British subjects, or foreigners submitting to the jurisdiction of the Court.

The statutory provisions of the Bankruptcy Act, 1883, on which this jurisdiction depends are the following; the application of them will be considered in a subsequent Section.

cf. Section XI.

46 & 47 Vict. c. 52.

Acts of bankruptcy.

4. (1) A debtor commits an act of bankruptcy in each of the following cases:

(a) if in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees, for the benefit of his creditors generally:

(b) If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof:

(c) If in England or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon which would under this or any other Act be void as a fraudulent preference if he were adjudged bankrupt:

(d) If with intent to defeat or delay his creditors he does any of the following things, namely, departs out of England, or being

has suspended, or that he is about to suspend, payment of his debts.

(2) A bankruptcy notice under this Act shall be in the prescribed form, and shall state the consequences of non-compliance therewith, and shall be served in the prescribed manner.

Jurisdiction to make receiving order.

5. Subject to the conditions hereinafter specified, if a debtor commits an act of bankruptcy the Court may, on a bankruptcy petition being presented either by a creditor or by the debtor, make an order, in this Act called a receiving order, for the protection of the estate.

Conditions on which creditor may petition.

6. (1) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless,

(*a*) the debt owing by the debtor to the petitioning creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to the several petitioning creditors, exceeds £50, and

(*b*) the debt is a liquidated sum, payable either immediately or at some certain future time, and

(*c*) the act of bankruptcy on which the petition is grounded has occurred within 3 months before the presentation of the petition, and

(*d*) the debtor is domiciled in England, or, within a year before the date of the presentation of the petition has ordinarily resided or had a dwelling house or place of business in England.

(2) If the petitioning creditor is a secured creditor, he must in his petition, either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt, or give an estimate of the value of his security. In the latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him, after

* *53 & 54 Vict., c. 71, s. 1.*

A debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods under process in an action in any Court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for 21 days.

Provided that, where an interpleader summons has been taken out in regard to the goods seized, the time elapsing between the date at which such summons is taken out and the date at which the sheriff is ordered to withdraw, or any interpleader issue ordered thereon is finally disposed of, shall not be taken into account in calculating such period of 21 days.

addition to sub-sec. (g) by the same section of the Act of 1890.

Any person who is for the time being entitled to enforce a final judgment shall be deemed a creditor who has obtained a final judgment within the meaning of s. 4 of the principal Act.

Jurisdiction of Consular Court in bankruptcy.

declared to be "all such jurisdiction in bankruptcy as for the time being belongs to the High Court and the County Courts in England," as far as circumstances admit; and to be exerciseable with respect to the following classes of persons being either resident in China, or carrying on business there: namely, resident British subjects and their debtors and creditors, being British subjects, or foreigners submitting to the jurisdiction of the Court.

The statutory provisions of the Bankruptcy Act, 1883, on which this jurisdiction depends are the following; the application of them will be considered in a subsequent Section.

cf. Section XI.

46 & 47 Vict. c. 52.

Acts of bankruptcy.

4. (1) A debtor commits an act of bankruptcy in each of the following cases:

(a) if in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees, for the benefit of his creditors generally:

(b) If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof:

(c) If in England or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon which would under this or any other Act be void as a fraudulent preference if he were adjudged bankrupt:

(d) If with intent to defeat or delay his creditors he does any of the following things, namely, departs out of England, or being

out of England remains out of England, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house: [para. *(e)*, *rep. 53 & 54 Vict. c. 71, s. 29.*]* 46 & 47 Vict. c. 52 Acts of bankruptcy.

(f) If he files in the Court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself:

(g) If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim, set off, or cross demand, which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained:

(h) If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts.

(2) A bankruptcy notice under this Act shall be in the prescribed form, and shall state the consequences of non-compliance therewith, and shall be served in the prescribed manner.

Jurisdiction to make receiving order.

5. Subject to the conditions hereinafter specified, if a debtor commits an act of bankruptcy the Court may, on a bankruptcy petition being presented either by a creditor or by the debtor, make an order, in this Act called a receiving order, for the protection of the estate.

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(*b*) the debt is a liquidated sum, payable either immediately or at some certain future time, and

(*c*) the act of bankruptcy on which the petition is grounded has occurred within 3 months before the presentation of the petition, and

(*d*) the debtor is domiciled in England, or, within a year before the date of the presentation of the petition has ordinarily resided or had a dwelling house or place of business in England.

(2) If the petitioning creditor is a secured creditor, he must in his petition, either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt, or give an estimate of the value of his security. In the latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him, after

46 & 47 Vict. c. 52.

deducting the value so estimated in the same manner as if he were an unsecured creditor.

British and Consular Courts to be auxiliary to each other.

118. The High Court, the County Courts, the Courts having jurisdiction in bankruptcy in Scotland and Ireland, and every British Court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of those Courts respectively, shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of the Court seeking aid, with a request to another of the said Courts, shall be deemed sufficient to enable the latter Court to exercise, in regard to the matters directed by the order, such jurisdiction as either the Court which made the request, or the Court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions.

Definition of "property."

163. In this Act, unless the context otherwise requires—

* * * *

"Property" includes money, goods, things in action, land, and every description of property, whether real or personal and whether situate in England or elsewhere; also, obligations, easements, and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined.

ADMIRALTY.

The Supreme Court is, by art. 100, invested with the jurisdiction of a Colonial Court of Admiralty, under the Colonial Courts of Admiralty Act, 1890.

cf. p. 113.

This Act has already been considered in the previous Section.

MATRIMONIAL.

The Supreme Court is, by art. 101, so far as circumstances admit, invested with respect to British subjects, with all the matrimonial jurisdiction for the time being of the High Court in England, except the jurisdiction relative to dissolution, or nullity, or jactitation of marriage.

Matrimonial jurisdiction of Consular Court.

This leaves the Court, under its matrimonial jurisdiction, with the right to pronounce decrees of judicial separation on a petitition by the husband or the wife, on the ground of adultery, or cruelty, or desertion without cause for two years and upwards, and of restitution of conjugal rights, together with the collateral orders incident thereto: custody of children, alimony to the wife, settlements of property, and damages against co-respondents, together with all questions as to liability for costs.

It would further appear that the Consular Court has at least some of the jurisdiction of the Divorce Court under the Legitimacy

Declaration Act, 1858. It will be observed that art. 101 refers to the "jurisdiction in matrimonial causes" which belongs to the High Court in England, and not to the general divorce jurisdiction of the Probate, Divorce and Admiralty Division of the High Court. If the powers of that Court under the Act of 1858 were limited to declarations of legitimacy and of the right to be deemed a natural-born subject, there can be little doubt that, art. 101 being drafted as it is, the Consular Court would have no jurisdiction under the Act, even though the question in any given case depended on the validity or invalidity of the marriage of the petitioner's parents. But the Court is given an express power to grant a decree declaring that the marriage of the petitioner's father and mother, or of his grandfather and grandmother, was a valid marriage, and it is difficult to say that this is not a "matter matrimonial": not, it is true, within the jurisdiction of the old Ecclesiastical Court, but expressly put within the jurisdiction of the Court created by the Matrimonial Causes Act, 1857, by the Act of the following year.

21 & 22 Vict. c. 93.

Jurisdiction of Consular Court under Legitimacy Declaration Act, 1858.

20 & 21 Vict. c. 83.

The case for the jurisdiction of the Court is all the stronger where the petition is for a decree declaring that the petitioner's own marriage was or is a valid marriage. Whether such a decree having been given on either form of petition, a further decree on the question of legitimacy or illegitimacy is necessary in view of the wording of s. 1 of the Act, is perhaps a moot point. It is probable that the Consular Court would have no power to pronounce such a decree, as it does not fall within the words of art. 101: but it is suggested that the legitimacy or illegitimacy must follow from the decree as to the validity or invalidity of the marriage.

The same difficulty arises under s. 2 of the Act, which allows applications to be made to the Court for a declaration of the petitioner's right to be deemed a natural-born subject, for this right may also follow as the natural and direct consequence of the decree as to the validity or invalidity of the marriage.

The conditions of obtaining the benefit of the Act are that the petitioner is a natural-born subject, or one whose right to be so deemed is in issue in the proceedings: that he is domiciled in England or Ireland,† or is claiming any real or personal estate situate in England. As the Act is not applied to consular jurisdiction, but the jurisdiction, if existent, is only exercised by

†[Persons domiciled in Scotland are dealt with in s. 9 of the Act.]

inference, there would be no warrant for altering the condition of domicil in a part of the United Kingdom. The difficulty, therefore, which arises from the decision in *re Tootal's trusts* as to the impossibility of acquiring a domicil in an oriental country would not arise.

re Tootal's trusts, 23 Ch. D. 532.

There can be no doubt that if, as is suggested, the Consular Court has jurisdiction under the Act even in a limited degree, it is an exceedingly valuable one, as cases to which the Act is specially applicable very frequently arise in the East. The questions connected with the interpretation of the provisions of the first two sections are exceedingly complicated, and have been fully dealt with in another work. These two sections are here set out for convenience of reference.

cf. "Nationality," Vol. I, Chap. XIII.

21 & 22 Vict. c. 93.

Application to Divorce Court for declaration of legitimacy or validity or invalidity of marriage.

1. Any natural-born subject of the Queen, or any person whose right to be deemed a natural-born subject depends wholly or in part on his legitimacy or on the validity of a marriage, being domiciled in England or Ireland, or claiming any real or personal estate situate in England, may apply by petition to the Court for Divorce and Matrimonial Causes, praying the Court for a decree declaring that the petitioner is the legitimate child of his parents, and that the marriage of his father and mother, or of his grandfather and grandmother, was a valid marriage or for a decree declaring either of the matters aforesaid, and any such subject or person, being so domiciled or claiming as aforesaid, may in like manner apply to such Court for a decree declaring that his marriage was or is a valid marriage, and such Court shall have jurisdiction to hear and determine such application and to make such decree declaratory of the legitimacy or illegitimacy of such person, or of the validity or invalidity of such marriage, as to the Court may seem just: and such decree, except as hereinafter mentioned, shall be binding to all intents and purposes on Her Majesty and on all persons whomsoever.

Application to Court for declaration of right to be deemed a natural-born subject.

2. Any person, being so domiciled or claiming as aforesaid, may apply by petition to the said Court for a decree declaratory of his right to be deemed a natural-born subject of Her Majesty, and the said Court shall have jurisdiction to hear and determine such application and to make such decree thereon as the Court may seem just: and where such application as last aforesaid is made by the person making such application as herein mentioned for a decree declaring his legitimacy or the validity of a marriage, both applications may be included in the same petition: and every decree made by the said Court shall, except as hereinafter mentioned, be valid and binding to all intents and purposes upon Her Majesty and all person whomsoever.

So far as the general matrimonial jurisdiction of the Consular Court is concerned, there seems to be little doubt that it falls within the terms of the treaty grant, as involving a decision in regard to rights arising between British subjects. But even when all the complicated qnestions of jurisdiction which have troubled the English Courts with regard to the exercise of matrimonial jurisdiction over foreigners are removed, there still remains a question in connexion with consular matrimonial jurisdiction in respect of British subjects which is not free from difficulty.

Matrimonial jurisdiction falls within treaty grant.

In the first place, it is limited to cases in which the husband is British, the nationality of the wife being that of her husband [*Naturalization Act*, 1870, s. 10 (*i*)].

33 & 34 Vict. c. 14.

In the second place, the operation of art. 101 limits it to resident British subjects, and it would seem, therefore, that this condition must apply to both parties: and also to the co-respondent, if there is one.

But the jurisdiction of the Divorce Court in England is independent of residence and also of nationality, and is based on other considerations. I think that it does not admit of question that it was not intended to put the matrimonial jurisdiction of the Consular Court on a wider basis in this respect than the English Courts: and therefore the English and the consular rules must be combined. It is unnecessary to renew here the enquiry so often made whether the foundation of the English jurisdiction be domicil, or the existence of the matrimonial home in England: it is sufficient to say that in the Consular Court the condition of residence within the "limits of the Order" is superadded to the English rule whatever it may be. But if the decision in *re Tootal's trusts*, to be presently discussed, be sound, then, if the English jurisdiction depends on domicil alone, the matrimonial jurisdiction of the Consular Court vanishes: for there can be on domicil in an eastern county. But if the English jurisdiction depends on the presence of the matrimonial home in England, then the jurisdiction of the Consular Court may be held to exist when the matrimonial home is within the limits of the Order. It may be pointed out that the doctrine of the matrimonial home was elaborated in the Court of Appeal in *Niboyet* v. *Niboyet*, in the case of a foreign Consul, a person who could not acquire an English domicil. The case is therefore altogether paralled with that of persons residing in a country in which they cannot acquire a domicil.

Consular jurisdiction probably founded on existence of matrimonial home.

re Tootal's trusts, 23 Ch. D. 532.

Niboyet v. *Niboyet* 4 P.D. 1.

Le Mesurier v. *Le Mesurier*, 1895, A.C. at p. 531.

This decision was criticised by the Judicial Committee in *Le Mesurier* v. *Le Mesurier*, and it has been said to have been overruled. It is sufficient for our present purpose to note that Lord Watson admitted that there may be residence without domicil sufficient to sustain a suit for restitution of conjugal rights, for separation, or for aliment. As the consular jurisdiction does not extend to divorce the criticism of the earlier case need not detain us here.

Concurrent jurisdiction in matrimonial causes is by no means an uncommon incident of the law. In nearly all cases of English subjects resident in an oriental country, their domicil will be English, and the English Court will have jurisdiction to pronounce decrees as well as the Consular Court: the English Court having sole jurisdiction in the case of dissolution, nullity, and jactitation, which are excepted from the consular jurisdiction. But if the domicil which is maintained in spite of continued residence in the oriental country be not English, then the English Court will have no jurisdiction at all, but only the Court of the country of that domicil.

LUNACY.

The Supreme Court is, by art. 102, so far as circumstances admit, invested in relation to British subjects, with all such jurisdiction relative to the custody and management of the persons and estates of lunatics, as for the time being belongs to the Lord Chancellor or other Judges in England intrusted with the care and commitment of the custody of the persons and estates of lunatics: and also with such jurisdiction as may be exercised in England by a judicial authority under the Lunacy Act, 1890.

53 & 54 Vict. c. 5. [Imp. Stats., Vol. I, p. 288 (*i*)]

The inferior Consular Courts are also invested with a jurisdiction in respect of the same matters subject to Rules of Court, and until they are made and so far as they do not apply, with such jurisdiction as may be exercised in England by a judicial authority, and by the Masters in Lunacy under the Lunacy Act, 1890.

Analysis of Lunacy Act, 1890.

The jurisdiction of the respective authorities in England above referred to under the Act of 1890, is as follows:—

Inquisition.

The Judge in Lunacy may upon application direct an inquisition whether a person is of unsound mind and incapable of managing himself and his affairs [s. *90*]: which inquisition may be before a jury, the issue being tried in the Supreme Court. [s. *94*]

Certificate of Master without jury.

The certificate of the Master that an alleged lunatic is of unsound or of sound mind has the same effect as an inquisition taken upon the oath of a jury. [s. *95*]

Number of jury.

The Lord Chancellor may regulate by order the number of jurors to be sworn, but so that every inquisition be found by 12 men at least. [*s. 97*]

By art. 32 (3) of the Order, a jury in the Consular Court is to consist of not more than 12 and not less than 5, as may be determined by Rules of Court. Presumably, in the case of inquisitions in lunacy, the jury would consist of 12, the statutory number.

Jurisdiction of Judge in Lunacy.

The Judge in Lunacy may make orders for the custody of lunatics so found and the management of their estates: but where he is capable of managing himself and is not dangerous to himself or others, the Judge may make orders for the commitment of the estate and its management, including the maintenance of the lunatic, but he need not make any order as to the custody or commitment of his person. [*s. 108*]

Property in colonies.

By s. 110, the power of the Judge extends to property within any colony; but this provision cannot be held to confer similar powers on the Consular Judge.

Administrative powers of Judge in Lunacy.

The administrative powers of the Judge in Lunacy apply—

(a) to lunatics so found by inquisition:

(b) to lunatics not so found, where an administration order has been made before the commencement of this Act:

(c) to persons lawfully detained as lunatics though not so found:

(d) to persons not so detained and not so found, who, it is proved to the satisfaction of the Judge, through mental infirmity arising from disease or age are incapable of managing their affairs:

(e) to any person who, it is proved to the satisfaction of the Judge, by the certificate of a Master, or the report of the Commissioners, or by affidavit or otherwise, is of unsound mind and incapable of managing his own affairs, and whose property does not exceed £2,000 in value, or the income thereof does not exceed £100 a year:

(f) to any person with regard to whom the Judge is satisfied that he is or has been a criminal lunatic, and continues to be insane and in confinement. [*s. 116*]

Powers conferred on administrator.

In the case of any of the above-mentioned persons who are not lunatics so found, the powers under the Act which are exercisable by the committee of the estate under order of the Judge, shall be exercised by such person in such manner and with or

without security as the Judge may direct. The order of the Judge may confer upon such person authority to do any specified act, or exercise any specified power, or may confer a general authority to exercise on behalf of the lunatic all or any of such powers without further application to the Judge. [*s. 116 (2)*]

Power to raise money for certain purposes.

The Judge may order any property of the lunatic to be sold, charged, mortgaged, or otherwise dealt with, for the purpose of raising money to pay his debts, or for his maintenance [*s. 117*]: and he may make other orders of a similar nature in respect of his property, which are specifically dealt with in ss. 118 to 124, and 133 to 141.

Exercise of powers of lunatic trustee.

The Judge may order the committee to exercise powers vested in the lunatic in the character of trustee or guardian. [*s. 128*]

14 & 15 Vict. c. 81.

By art 102, (5) of the Order, ss. 5 to 7 of the Lunatics Removal (India) Act, 1851, are applied to China, the Supreme Court being substituted for "the Supreme Court of Judicature at any of the Presidencies of India".

Removal of lunatics to United Kingdom.

By the application of these sections where a guardian, keeper or curator of the person or estate of any idiot, lunatic, or person of unsound mind, has been appointed by the Supreme Consular Court, the Court may order his removal to any part of the United Kingdom, and may make further orders touching his safe custody and maintenance. The transcript of the proceedings are to be sent to the Chancery in England or Ireland, or to the Court of Session in Scotland.

Enquiry whether consular jurisdiction in lunacy warranted by treaty.

The warrant for the exercise of lunacy jurisdiction in oriental countries is not very clear. The charge of his lunatic subjects, their persons and property, is now one of the prerogatives of the King of England: but he can only, except as it may be otherwise provided by statute, exercise it within his dominions. In seems to follow, therefore, that the authority for including its exercise in foreign jurisdiction should be found in the words of the treaty, and can hardly be justified by sufferance. Where, as in the treaty with Corea, it is provided that "jurisdiction over the persons and property of British subjects in Corea shall be vested in the duly authorised British judicial authorities", jurisdiction in lunacy is, without doubt, properly included, if we treat the sentence following, "who shall hear and determine all cases brought against British subjects, &c." as illustrative and not limitative. But where, as in the treaty with China, it is provided

only that "all questions in regard to rights, whether of property or person, arising between British subjects [in China] shall be subject to the jurisdiction of the British authorities", coupled with special provisions as to disputes between British subjects and Chinese, the warrant for the exercise of lunacy jurisdiction is, to say the least, doubtful. For although the "management of his affairs" might be held to connote the settlement of questions thereafter to arise between the lunatic and other people, the question whether he is capable of "managing himself" is purely personal to the lunatic: and the King is not even *pro formâ* a party to the proceedings by way of inquisition. Even this is not a full statement of the difficulty; for the management of the affairs of a lunatic in China, or even in Corea, must inevitably involve the exercise of jurisdiction in respect of property in which foreigners may have an interest. There is, therefore, included in the exercise of lunacy jurisdiction an extension of its effect with regard to foreigners who do not submit to the jurisdiction.

Points of doubt in connexion with lunacy jurisdiction.

On general principles, s. 96 of the Act of 1890, which allows an inquisition to be had where the alleged lunatic is out of the jurisdiction, finds no application to a Consular Court: nor, as pointed out in the analysis of the Act, s. 110, which extends the powers and authority of the Judge in Lunacy to property within any British possession. And conversely, this section does not extend the power and authority of the Judge in Lunacy to property within the jurisdiction of a Consular Court.

Apart from these considerations, however, the Consular Court has the full power of the Judge in Lunacy to make orders for the custody of lunatics so found by inquisition and the management of their estates: or, where the lunatic is found to be capable of managing himself, to make orders for the commitment of the estate of the lunatic and its management, including all proper provisions for the maintenance of the lunatic (s. 108). A certificate of an inferior Consular Court that the alleged lunatic is of unsound mind and incapable of managing his affairs, or that he is of sound mind and capable of managing his affairs, has the same effect as an inquisition before a jury. (s. 95).

The powers of the Judicial Authority, which may also be exercised by the Consular Supreme Court, are defined in s. 9 and following of the Act of 1890, as amended by subsequent Acts.

PROBATE AND ADMINISTRATION.

Real property to devolve as personalty.

By art. 103, all real or immovable property situate in China belonging at the time of his death to any British subject, is to be deemed personal estate, and the devolution thereof in case of intestacy is to be governed by the law of England for the time being relating to personal estate.

Jurisdiction of Consular Court as to probate and letters of administration.

By art. 104, the Supreme Court is to have as far as circumstances admit, for and within China, with respect to the wills and property in China of deceased British subjects, all such jurisdiction as for the time being belongs to the High Court in England. But in non-contentious matters, probate or letters of administration may be granted by the inferior Courts.

Probate or administration so granted is to have effect over all property of the deceased within China, and to effectually discharge persons dealing with an executor or administrator thereunder, notwithstanding any defect afterwards appearing in the grant.

By art. 105, s. 51 of the Conveyancing (Scotland) Act, 1874, is extended. This enactment has been considered in the previous Section.

cf. p. 97.

Resealing of probates granted in United Kingdom or colonies. *55 & 56 Vict. c. 6.*

Probates or letters of administration or confirmation granted in the United Kingdom, or in any colony to which the Colonial Probates Act, 1892, extends (or duplicates sealed with the seal of the Court granting the same, or copies certified by or under the authority of that Court) shall be sealed by the Supreme Court, and thereupon shall be of the like force and effect and have the same operation as if granted by that Court. Before sealing the Court is to be satisfied that all probate or estate duty has been duly paid, or that security has been given in a sum sufficient to cover the property (if any) in China, and may require such evidence as it thinks fit as to the domicil of the deceased person. It may also, on the application of any creditor, require before sealing that adequate security be given for the payment of debts due from the estate to creditors residing in China.

cf. p. 121.

cf. p. 122.

Operation of Colonial Probates Act with regard to consular probates.

As already pointed out, this provision in the Order corresponds with the provision which is required by the Colonial Probates Act to be made in a colony with regard to probates granted in the United Kingdom, in order that probates granted in that colony may be re-sealed in the United Kingdom under the Act. It, therefore, satisfies the requirements of s. 3, and entitles probates granted by

the Consular Court in China to be re-sealed in the United Kingdom. By the inclusion of probates granted in any colony to which the Act has been extended by Order in Council under s. 1, the article also satisfies the requirements of legislation passed in any colony with a view to obtaining the benefits of the Act, and therefore entitles consular probates granted in China to be re-sealed in such colony.

Custody of property of intestate.

By art. 107, where a British subject dies in China or elsewhere intestate, his property in China is vested in the Judge of the Supreme Court until administration is granted. The Court within whose jurisdiction any property is situate shall, if the circumstances so require, take possession of it and put it under the seal of the Court until it can be dealt with according to law.

Deposit in Court of testamentary papers.

By art. 111, all testamentary papers or writings of a British subject dying in China are to be forthwith brought to the Court by any other British subject having them in his possession: or if necessary he may be ordered to do so by the Court.

Administration of small estates.

By art. 112, where the value of the property of a deceased person does not exceed £50, the Court may administer it without any probate or letters of administration or other formal proceeding, paying the surplus to such persons as it thinks proper.

C.—*PROCEDURE, &c.*

Proceedings in Consular Court to be by action.

The general principle is laid down in art. 90, that every civil proceeding in the Consular Court shall be taken by action, and shall be designated an action. And further, that for the purposes of any statute applicable under the Order to any civil proceeding in the Court, an action shall comprise and be equivalent to a suit, cause, or petition, or to any civil proceeding, howsoever required by the statute to be instituted or carried on.

The following Acts are adapted by arts. 125 and 126:—

The Foreign Tribunals Evidence Act, 1856,	*19 & 20 Vict. c. 113.*
The Evidence by Commission Act, 1859,	*22 Vict. c. 20.*
The Evidence by Commission Act, 1885,	*48 & 49 Vict. c. 74.*
The British Law Ascertainment Act, 1859,	*22 & 23 Vict. c. 63.*
The Foreign Law Ascertainment Act, 1861;	*24 & 25 Vict. c. 11.*
and ss. 7 and 11 of the Evidence Act, 1851, by art. 168.	*14 & 15 Vict. c. 99.*
These Acts are dealt with in the preceding Section.	*cf.* pp. 88, *et seq.*

By art. 127, the Public Authorities Protection Act, 1893, is applied as if China were mentioned therein in place of the United

Kingdom, and as if this Order and Rules under it were therein referred to in addition to any Act of Parliament.

This Act has already been considered in connexion with the similar provisions contained in s. 13 of the Foreign Jurisdiction Act.

cf. p. 63.

44 & 45 Vict. c. 41. By art. 163, s. 48 of the Conveyancing and Law of Property Act, 1881, which relates to the deposit of instruments creating powers of attorney in the Central Office of the Supreme Court in England or Ireland, is extended with these modifications: the Office of the Supreme Court is substituted for the Central Office, and the Rules of Court under the Order are substituted for General Rules.

Deposit of powers of attorney.

By this extension, an instrument creating a power of attorney, its execution being verified by affidavit, statutory declaration, or other sufficient evidence, may, with the affidavit or declaration, if any, be deposited in the Office of the Supreme Court.

A separate file of instruments so deposited is to be kept, and any person may search the file, and inspect the instruments deposited, and he may have an office copy delivered to him on payment of the fee prescribed by the Rules of Court. Further a copy of an instrument deposited may be presented at the Office and may be stamped and marked as, and so become, an office copy.

An office copy of an instrument so deposited shall, without further proof, be sufficient evidence of its contents and of the deposit thereof in the Office of the Supreme Court. The section applies to instruments executed either before or after the commencement of the Act.

Rules of Court may be made for the purposes of the section, regulating the practice of the Office, and prescribing the fees to be taken therein, under art. 119.

MORTGAGES.

Registration of mortgages.

By art 129, it is provided that deed or other instruments of mortgage, legal or equitable, of lands or houses in China, executed by a British subject, may be registered at any time after execution at the Consulate of the consular district wherein the property is situate. But if it is not registered within the time prescribed by art. 131, then the debt secured by the mortgage shall not have priority over judgment or simple contract debts contracted before

the registration. Registered deeds, &c., are to have, by art. 132, priority among themselves in order of registration.

By art. 133, the Minister may with the approval of the Secretary of State, make rules with regard to the making and keeping of indexes of mortgages, and searches therein, and for other matters connected therewith: and also with respect to unregistering any deed, &c., or for registering any release or satisfaction thereof. Rules as to indexes of mortgages.

BILLS OF SALE.

By arts. 134 to 150, certain provisions are made relating to bills of sale executed by British subjects, and intended to affect chattels in China.

Every bill of sale must conform with the following rules:—

(a) it must state truly the name, description and address of the grantor, and *(b)* the consideration: *(c)* it must have annexed thereto or written thereunder an inventory of the chattels comprised in it: *(d)* any defeasance, condition, or declaration of trust affecting the bill not contained in the body of it must be written on the same paper as the bill: and *(e)* it must be attested by a credible witness, with his address and description. In the case of failure to conform with these rules the bill is wholly void in China, except in the case of *(c)*, when it is void only as regards the chattels omitted from the inventory. Conditions of valid bill of sale.

If a bill of sale is not registered within the time prescribed by art. 138, it is from and after the expiration of that time void in China— Registration of bills of sale.

(i) as against trustees or assignees of the estate of the grantor, in or under bankruptcy, liquidation, or assignment for benefit of creditors: and

(ii) as against all sheriffs and others seizing chattels under process of Court, and any person on whose behalf the seizure is made: but only

(iii) as regards the property in, or right to, the possession of such chattels comprised in the bill as, at or after the filling of the petition for bankruptcy or liquidation, or the execution of the assignment, or the seizure, are in the grantor's possession or apparent possession.

Bills of sale affecting the same chattels have priority according to their order of registration. Chattels comprised in a bill of sale

are not in the possession, order or disposition of the grantor with-n the law of bankruptcy.

Where there is an unregistered bill of sale, and within the time for registering a subsequent bill is granted affecting the same or some of the same chattels, for the same or part of the same debt, it is absolutely void to that extent, unless the Court is satisfied that it was granted in good faith to correct some material error in the prior bill, and not for the purpose of unlawfully evading the operation of the Order.

Renewal of registration.

Registration must be renewed every 5 years, and on failure to renew the bill is to be deemed unregistered. Transfers and assignments need not be registered. If the failure to register or to renew the registration is accidental or inadvertent, the Court may allow the error to be rectified.

Indexes of bills of sale.
cf. p. 153.

The power to make rules as to indexes, &c., of bills of sale, corresponding with those of the Minister in the case of mortgages, is conferred on the Judge of the Supreme Court.

General Legislation for Foreign Jurisdiction.

The application of the law in its different branches and jurisdictions dealt with in the foregoing pages of this Section, is special in the case of each oriental country. Up to the present time this method of legislating for foreign jurisdiction has been invariably adopted, in spite of its very cumbersome results. But

General legislation in respect of neutrality adopted in 1904.

in 1904, the outbreak of hostilities between Russia and Japan, and the necessity for taking the usual steps to proclaim and enforce the neutrality of Great Britain, so far as her subjects in different parts of the world were concerned, was made the occasion of a new departure. In the colonies on similar occasions it is usual for the Governors, acting on instructions from home, to issue the necessary proclamations, (practically reproductions of the King's proclamation in the Mother Country, which consists in the main of recitals of certain sections of the Foreign Enlistment

33 & 34 Vict. c. 90.

Act, 1870), enjoining all persons within their respective Governments to obedience thereto.

On the occasion of the war in 1904, however, the necessity for similar action on the part of the Government with regard to

British subjects in places subject to foreign jurisdiction, engaged the attention of the Foreign Office; the result was satisfactory in every respect, for Orders in Council were issued which extended the Foreign Enlistment Act to these places permanently, and without special regard being had to the war then being waged. The drafting of these Orders was also made to subserve another purpose of great practical utility—the places where foreign jurisdiction is exercised were scheduled into two main classes: Protectorates and Consular Jurisdictions. This was essential in the case of the extension of the Foreign Enlistment Act, because of the different categories of persons affected in the two classes, and also because certain sections of the Act were inapplicable to places where consular jurisdiction is exercised. But the schedules stand good for all purposes: and the issue of these two Orders in Council may be looked upon as being the most important step in the process of putting the law into a definite shape which has been taken since foreign jurisdiction was first established.

The Neutrality Orders in Council.

see the lists printed on p. 76.

It will be understood then that the Foreign Enlistment Act extends bodily to all places where the King exercises jurisdiction abroad; it is necessary, therefore, only to mark the more important of the alterations and omissions which have been made.

Extension of Foreign Enlistment Act, 1870.

The Orders in Council are—

for Protectorates, No. 1653, of 24 Oct., 1904, amended, on account of an omission in the schedule, by No. 1716, of 14 Nov. 1904:

for Consular Jurisdictions, No. 1654, of 24 Oct. 1904.

It will be convenient and instructive to note the differences between the two Orders in parallel columns.

Protectorates.	*Consular Jurisdictions.*
The Order extends to all Protectorates in the schedule, including the adjacent territorial waters.	The Order extends to all persons and to all property subject to Foreign Jurisdiction Orders in Council.

The different articles of the Orders follow the sections of the Act, and deal with the offences of "Illegal Enlistment", "Illegal Shipbuilding and Illegal Expeditions", "Illegal Prize", and "Legal Procedure."

	Protectorates.	*Consular Jurisdictions.*
The Neutrality Orders in Council.	The articles generally apply to "any person being a British subject or a native of a Protectorate," and, when the nature of the offence requires it, to such persons either "within" or "within or without the Protectorate", as the case may be: with a corresponding provision as to ships.	The articles generally apply to "any person subject to this Order", with a special provision as to his being "within the jurisdiction of the Court", when the nature of the offence requires it: with a corresponding provision in the case of ships.
	Art. 14, corresponding with s. 14 of the Act, deals with the restoration of illegal prize brought into Protectorate ports.	This article is omitted, probably as being inapplicable to foreign jurisdiction, either on the ground that there is no territorial jurisdiction in the foreign country, and therefore no ports in respect of which the jurisdiction created by the article could properly be exercised; or because the jurisdiction is exerciseable against a foreign captor. It will be noted, however, that the Consular Courts have prize jurisdiction under the Naval Prize Act, 1864, [*see* ss. 16, 20, 31].
27 & 28 Vict. c. 25. *cf.* p. 117.	Any offence against the Order is to be deemed to have been committed either in the place in which it was wholly or partly committed, or in any Protectorate in which the offender may be.	Any offence against the Order is to be deemed to have been committed either in the place where it was wholly or partly committed, or in the country in which the offender may be.
	The venue in respect of offences by persons may be that of the district, town or place in which the trial is held, the offence being averred to have	*Omitted.*

Protectorates.	*Consular Jurisdictions.*
been committed within the dominions or within a Protectorate. [*art. 17*]	
The highest Criminal Court in a Protectorate may direct that an offender shall be removed for trial to some other place in the dominions or in some other Protectorate, when it is of opinion that it would be conducive to the interests of justice.	*Omitted.*
Proceedings for the condemnation and forfeiture of a ship or equipment, or arms and munitions of war, shall require the sanction of the Officer Administering the Government of a Protectorate.	Proceedings for the condemnation and forfeiture of a ship or equipment, or arms and munitions of war shall require the sanction of the Minister.
Special power of the Officer Administering the Government of a Protectorate to detain ships in probable contravention of the Order. [*art. 23*]	Special power of the Minister to detain ships in probable contravention of the Order. [*art. 20*]
Special power of the Officer Administering the Government of a Protectorate to grant a search warrant to enter any dockyard or other place to enquire as to the destination of any ship in probable contravention of the Order.	*Omitted.*

IX

The Exercise of the Administrative Power.

WE HAVE now to enquire into the manner in which the King's administrative power is exercised, a subject which is of importance both theoretically and practically.

cf. Section VI.

In dealing with the general principles governing the exercise of jurisdiction, the exercise of administrative power has been justified even in the case of so limited a grant as that acquired by the treaty with China. But, although the Foreign Jurisdiction Act deals in the abstract with the King's power and with all its elements, assuming the possibility of the widest exercise, the administrative, like the legislative and the judicial power must in each case be directly traceable to the terms of the treaty, or find its warrant in sufferance. Two questions arise in connexion with this question: administrative power requires persons on the spot to exercise it, and we have, therefore, first to enquire into the machinery by which it is exercised; secondly, we must examine the forms in which it is in fact exercised.

The administrative power referable to the treaty grant.

Colonial methods of administrative government in applicable to foreign jurisdiction.

The administrative power, is, as the other powers are, to be exercised in the same way as that power is exercised in conquered or ceded colonies. Whatever form of administration may be necessary in Protectorates, no one would imagine that in a non-protected country the King would appoint a representative or accredited agent with powers similar to those of a Governor of a Crown Colony, with an Executive or advisory Council invested with the same administrative powers as the colonial Councils. The administrative body of a colony includes the Council and the civil service, whose business it is, apart from ordinary administrative work, to carry out the legislation of the colony, in so far as that legislation requires or permits it, in matters which lie outside the jurisdiction of the Courts. The orders given relate, not to questions between persons, but to those which concern what may be called the territorial administration of the colony, and

affect persons who are interested or concerned in it. But the King's foreign jurisdiction is essentially personal, and in no sense territorial; and therefore from this point of view alone, an Executive Council and a civil service would be both out of place and useless. *cf.* p. 10.

But the King has already in the countries where his foreign jurisdiction is exercised, officers charged with other functions: his Minister, or other diplomatic representative, and his staff, charged with duties of representation *vis à vis* the foreign State, and his Consuls and their staffs, charged with the ordinary consular duties. The practice has therefore arisen of utilising both these classes of officers for the discharge of the duties which arise in connexion with the exercise of foreign jurisdiction.

For the purpose of the judicial power the Consuls have judicial duties added to their ordinary duties, special Judges being appointed to assist them in countries where the circumstances are sufficiently important to warrant the creation of a Supreme Court. In the same way, for the purpose of exercising the administrative power, His Majesty's Ministers are charged with the performance of special duties. But it is important to bear in mind that neither the Consuls nor the Ministers have any inherent powers resulting from foreign jurisdiction: they have to be specially invested with them by the King, and he does this as part of his legislative power by Order in Council.

Additional duties imposed on Ministers and Consuls.

One of the most practical ways in which the services of the Ministers are utilized is in connexion with the Applied Acts, where action on the part of an executive officer is required for the purpose of putting an Act in force; as in the case of the Fugitive Offenders Act, 1881, and the Colonial Prisoners Removal Act, 1884, in virtue of which the Governors of colonies have many duties to discharge. These duties have to be performed in oriental countries by the British Minister. The most common substitution in these Acts is that of the Minister in the place of the Governor or Government of a colony.

44 & 45 Vict. c. 69. *cf.* p. 98. *47 & 48 Vict. c. 31.* *cf.* p. 108.

In the case of the Consuls it is specially important to remember that these duties in no way interfere with or modify the powers which they have as Consuls, either by custom or statute, a point of great importance in connexion with the adminstration of the Merchant Shipping Act. In the China Order this is expressly dealt with in art. 161, which provides that—

Consular duties specially preserved by the Order.

Art. 161 of China Order.

Nothing in the Order shall prevent any Consular officer in China from doing anything which His Majesty's Consuls in the dominions of any other State in amity with His Majesty are, for the time being, by law, usage, or sufferance, entitled or enabled to do.

The Order does, however, in art. 155, confer more general legislative powers on the Minister. He is given the power to make Regulations, to be called King's Regulations, for the following purposes:—

General powers of legislation of Minister.

(a) for the peace, order, and good government of British subjects in relation to matters not provided for by the Order:

(b) for securing the observance of any treaty for the time being in force relating to any place, or for securing the observance of any native or local law or custom, whether the treaty, law, or custom, relate to trade, commerce, revenue, or any other matter:

(c) for regulating or preventing the importation or exportation in British ships or by British subjects of arms or munitions of war, or any parts or ingredients thereof, and for giving effect to any treaty relating to the importation or exportation of the same:

(d) for requiring export and import returns to be made by or on account of any British subjects subject to the Order, or in any British ship; and providing penalties for breach, of fine, imprisonment, and forfeiture of offending goods.

Municipal Regulations. *cf.* p. 12.

The Minister may further, in conjunction with the Ministers of other Powers, make Regulations for the municipal government of any foreign concession or settlement in China. [*art. 156*]

cf. p. 136.

Neither the King's or the Municipal Regulations, nor, presumably the International Regulations made under art. 74, are to affect British subjects until they have received the King's approval: except in case of urgency, when they are to continue in force until they have been disapproved. [*art. 157*]

Ministers power of regulating prisons.

The establishment of prisons is essential to the proper exercise of the criminal side of the King's judicial power. In China, the Judge of the Supreme Court may, subject to the approval of the Secretary of State, prescribe the manner in which, and the prisons in China at which, the sentences of the Court are to be carried out. [*art. 65*] And by art. 159, the Minister's power of making Regulations extends to the governance, visitation, care and superintendence of prisons, the removal of prisoners from one prison to another, and the infliction of corporal or other punishment

on prisoners committing offences against the rules or discipline of a prison.

Limited exercise of prerogative of mercy.

In Crown Colonies it is usual for the Governor to be invested with the exercise of the King's prerogative of mercy; but the same power is not given to the Minister, although he has certain limited powers derived from the prerogative.

By art. 64, when any person is sentenced to death, a copy of the evidence is to be sent to the Minister together with a report and observations of the Judge, and the sentence is not to be carried out without the direction of the Minister in writing under his hand. If the Minister does not direct the death sentence to be carried out, he is to direct what punishment in lieu thereof is to be inflicted: a power which does not seem to include complete remission of the sentence. But by art. 67, if a Judge reports to the Secretary of State or the Minister, recommending a mitigation or remission of any punishment awarded by any Court, it may be remitted or mitigated accordingly, and this would seem to include death sentences. It is expressly provided that nothing in the Order is to affect the King's prerogative of pardon.

Jurisdiction of Court over Minister: rights of Legation.

Other provisions affecting the Minister's relation to the Consular Courts are provided by art. 30. The Court is not to exercise any jurisdiction in any proceeding whatever over the Minister, or over his official or other residences, or his official or other property: nor over any person attached to or being a member of, or in the service of the Legation, except with the written consent of the Minister. If it appears to the Court that the attendance of the Minister, or of any person attached to or being a member of the Legation, or being in the service of the Legation, to give evidence is requisite in the interests of justice, the Court may address to the Minister a request in writing for such attendance. But in such case no evidence shall be given or document produced, if, in the opinion of the Minister, it would be injurious to His Majesty's service.

Offences under Official Secrets Act. *52 & 53 Vict. c. 52.*

In this connexion it should be noted that by s. 6 (1) of the Official Secrets Act, 1889,* its provisions apply "to all acts made offences by this Act when committed by British officers or subjects elsewhere" than in the dominions. By s. 6 (2), an offence

* This Act should have been included in Section VII *B*, among the "Acts applied by express provision therein."

alleged to have been committed out of the United Kingdom may be tried by "any competent British Court in the place where the offence was committed;" the Consular Courts have, therefore, jurisdiction under the Act. The offences are, disclosure of information (s. 1): breach of official trust (s. 2): inciting or counselling to commit such offences (s. 3). But by s. 7 a prosecution is not to be instituted except by or with the consent of the Attorney General: or, where the prosecution is instituted in any Court out of the United Kingdom, by or with the consent of the person who exercises the like functions as the Attorney General: that is to say, the Crown Advocate, in Consular Courts.

Minister to approve urgent Rules of Court.

The Minister may approve Rules of Court made by the Judge of the Supreme Court in case of urgency, and they are in such case to continue in force unless and until they are disapproved by the Secretary of State.

cf. p. 153.

The Minister may further make rules in connexion with the indexes of mortgages.

These are all the executive powers conferred on the Minister by the China Order which are independent of the Applied Acts, under

cf. p. 159.

which he has substituted powers which he exercises in lieu of the Governor of a colony. There can, I think, be no doubt that the

cf. p. 79.

statement made in a previous Section, that such executive action as is authorised by Order in Council is intended to fall, and does in fact fall, within the terms of the treaty grant, is justified. The very wide terms in which the general power of making King's Regulations is conferred on the Minister cannot, however, be overlooked.

Wide form in which the Minister's legislative power is conferred.

They may be such as are necessary for the "peace, order and good government" of British subjects in China. This is the common form in which powers of government are granted to the governing authority of all places subject to the dominion of the British Crown: whether, as in the case of India, to the Governor General [see *24 & 25 Vict. c. 67, s. 23,* and *s. 44* as to the Presidencies], as in the case of the Australian Commonwealth, to the

cf. p. 20.

Parliament [see *63 & 64 Vict. c. 12, s. 51*], as in the case of occupied colonies, to the King in Council [see *50 & 51 Vict. c. 54, s. 2*], as in the case of the Crown Colonies, by Letters Patent, to the Governor and the Legislative Council: or, as in the case of Cyprus, to the High Commissioner and his Council. The symmetry of our legislation in this respect would have been marred if any other form had been used; and although the result

of it is that, theoretically, the British Minister in countries subject to foreign jurisdiction has as full a legislative power as any other body or officer charged with the King's government, yet I do not think it can be said to import any intention to depart from the fundamental principle of the subject, or to imply that the Minister's power of legislation is to be exercised otherwise than as treaty or sufferance may justify. The few King's Regulations which have in fact been issued in China shew that practice warrants this statement.

The article itself, however, contains one practical limitation; the power of making Regulations is to be exercised in relation to matters "not provided for by the Order," and the Order, as we have seen, covers practically the whole field of law. And further, the subjects in respect of which the power of legislating is most likely to be exercised are specially indicated in the remaining subclauses of art. 155, all of which are justified on the face of them.

REGISTRATION.

Varying practice as to registration.

The subject of registration is dealt with in different ways. In some cases, as in that of Siam, it is expressly mentioned in the treaty; the privileges are then only granted to registered British subjects. In other cases it is made compulsory only by the Order in Council; but here again the practice is not uniform. In some cases again a pecuniary penalty for non-compliance with the Order is imposed; in other cases the method of recovering the fee only is indicated. In all cases a small fee, of about £1, is charged.

Objections to registration fee.

A question of some difficulty arises in connexion with this fee. By some it is argued, not without a show of plausibility, that the fee is a tax—a "poll tax," that most obnoxious of all taxes—and that the British Government has no authority by treaty to levy any taxes The argument, if it were applied to an attempt to levy an income tax, for example, is, as I have already pointed out, a sound one, but the application of it to the fee for registration is, I think, open to some question. The register is essential in order that the protecting duties of the Minister may be properly exercised: it would be essential even if there were only the national and the British communities; it is ten times more important when the foreign community is composed of many nationalities. If the sheep upon the mountains are not marked, how shall the shepherds know their sheep?

cf. p. 62.

Justification of registration fee.

I am disposed, therefore, to regard the registration fee in the light of a charge for work and labour done, or service rendered, and in the same category as other fees charged by the Consuls on the authority of Orders in Council issued under s. 2 of the Consular Salaries and Fees Act, 1891.

54 & 55 Vict. c. 36.

The provisions of the China Order with regard to registration are contained in art. 162. Resident British subjects are required to register themselves personally at the Consulate of their district in the month of January in every year: and also British subjects arriving in China, unless borne on the muster-roll of a British ship there arriving, on the expiration of one month after arrival, when they are deemed to be resident. The registration of a man includes that of his wife and of all females and minors being his relatives in whatever degree, living under the same roof with him at the time.

The fee payable, and the form of registration may be prescribed by regulations made by the Minister under art. 155.

Penalty for failure to register.

Failure to register is declared to be an offence against the Order, the offender being liable to fine and imprisonment as provided by art. 60*: together with this further important penalty, that "any Court or authority may, if it thinks fit, decline to recognise him as a British subject," which carries in the bare statement of it both the reason and the justification of the practice of registration.

*cf. p. 129.

X

The Exercise of the Judicial Power.

THE EXERCISE of the judicial power is subservient to the exercise of the legislative power by which the special forms of the jurisdiction of the Consular Courts are determined. There are, however, a few matters still to be considered which, while they depend on articles of the Orders in Council, yet raise questions in which the principles proper to guide and determine the exercise of the legislative power in matters of jurisdiction are involved.

Among these, the settlement of disputes between British subjects and natives or foreigners is the most important.

Up to the present we have not advanced much further than the recognition of the fundamental idea of exterritoriality, that civil and criminal proceedings against British subjects are to be determined by the British authorities, and those against natives by the native Courts. But the following are the different cases which may arise, and each requires special consideration:—

Different categories of cases in which British subjects may be involved. *cf.* p. 10.

Criminal jurisdiction.

1. Crime by a subject against a subject.
2. Crime by a subject against a native.
3. Crime by a subject against a foreigner.
4. Crime by a native against a subject.
5. Crime by a foreigner against a subject.

Civil jurisdiction.

6. Action brought by a subject against a subject.
7. Action brought by a native against a subject.
8. Action brought by a foreigner against a subject.
9. Action brought by a subject against a native.
10. Action brought by a subject against a foreigner.

Two incidental matters of interest must first be referred to: the different forms of exterritorial Courts, and the law governing the interpretation of the jurisdiction clauses of the treaties.

Different Forms of Exterritorial Courts.

The common form usually known by the name of the Consular Court is well understood. It is a Court constituted on the lines of Courts in England, presided over by the Consul, who is invested with judicial powers as distinct from his consular duties, or by a specially appointed Judge. The number of these Courts varies according to the size of the country and of the British community residing in it. In China there are Provincial Courts held by the Consuls of the respective districts, and also a Supreme Court with an original and appellate jurisdiction, in Shanghai presided over by a Judge, formerly styled the Chief Justice. In these Courts civil and criminal proceedings against British subjects are instituted. In other countries their constitution is varied.

Ordinary constitution of Consular Court.

Variety, in which native law recognised.

The first variation specially worthy of note is to be found in the treaty with Tonga*. A British subject charged with an offence against the municipal law of Tonga not cognisable as such under British law, is amenable to the jurisdiction of the Tongan Courts. And if charged with a criminal offence cognisable as such both by British and Tongan law, he may elect whether he will be tried by a Tongan Court or by the Court of the High Commissioner for the Western Pacific.

Variety, in which presence of native official authorised, where native plaintiff:

The second variation from the common form is to be found in the treaty with Corea. In all cases tried either in the British or Corean Courts, a properly authorised official of the nationality of the plaintiff or prosecutor may attend the hearing, with liberty to call or cross-examine witnesses, and to protest against the proceedings or decision.

and of foreign official, where foreigner plaintiff.

This provision does not appear to be limited to cases in the British Courts where a Corean, and *vice versa*, to cases in the Corean Courts where a British subject, is plaintiff or prosecutor. It certainly warrants the presence of a foreign official where the proceedings in the British Court are instituted by a foreigner. This interpretation of the provision is in accordance with the general theory of the subject.

cf. p. 7.

Variety, in which presence of native official authorised in all cases: and *vice versa*.

A third variation is to be found in the treaty with Kashgar and Yarkund. Civil and criminal cases in which both parties are British subjects are to be tried by the British representative or his agent, in the presence of an agent appointed by the Ameer. Civil suits in which one party is a subject of the Ameer and the other a British subject, are to be tried in the Ameer's Courts, in

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* It is possible that many changes have been made during the last fifteen years in the relations between Great Britain and the countries where exterritoriality is established. Some of the treaties which are referred to in this and other Sections may have been abrogated, or may have merged into more intimate relations. In view of the great difficulty in bringing the Appendix of the former edition up to date, I have not attempted to make this edition one of reference: for the actually existing relations can only be ascertained with accuracy from official publications which are not easy of access in a colony. It may well be therefore, that some of the treaties referred to in the text are now non-existent: they will, however, serve the purpose of illustration of details of the subject, which its complex nature so much requires, which have at one time or other been extant. The necessity of illustration must also be my excuse for referring, as I must do frequently, to the old Treaty of Yeddo.

the presence of a person appointed by the British representative. Criminal cases in which neither prosecutor nor accused is a subject of the Ameer, except as above provided, are to be tried in the Ameer's Courts in the presence of a person appointed by the British representative. In any case disposed of by the Ameer's Courts, to which a British subject is a party, the British representative, if he considers that justice has not been done, may represent the matter to the Ameer, who may cause the case to be tried in some other Court in the presence of some person appointed by the British representative.

Second form of exterritorial Court: presence of native Judge in mixed cases.

In the second form of exterritorial Court, the official of the plaintiff's, or prosecutor's, nationality becomes a Judge; and we come to what are known as Mixed Courts, which have jurisdiction over cases in which one of the parties is a national and the other a subject, disputes between British subjects still remaining within the sole jurisdiction of the British authorities. Thus in the old treaty with Burmah it was declared that "civil cases between Burmese subjects and registered British subjects shall be heard and finally decided by a mixed Court, composed of the British Political Agent, and a suitable Burmese officer of high rank."

Evolution of the International Mixed Court.

Where the foreign community has attained to considerable dimensions, the mixed Courts of different nationalities may be found to be merged, by consent of the Governments interested, into one permanent tribunal, of which the bench is composed of both native and foreign Judges. Each nationality may or may not be represented on the bench of Judges according to the terms of the mutual agreement. The Mixed Courts of Egypt, (which, it should be noted, do not oust the jurisdiction of the Consular Courts in ordinary criminal matters), are constructed on this principle. They administer the native law, thus introducing the third form of exterritorial Court.

Third form of exterritorial Court: native law administered.

In this third form the local sovereignty obtains still further recognition. The Mixed Court is to administer the national law, and its sentences are to be executed by the Sovereign of the country, even in cases in which a national is not concerned. Thus, by the old agreement with Borneo, crimes by British subjects were to be tried by a mixed Court; but disputes between British subjects, or between British subjects and the subjects of any other Power, were to be tried by a mixed Court "according to the customs of Borneo," "and the Sultan will receive the sentences and carry them out."

Reconciliation by Consul.

It should be noted that in nearly every case the Consul is enjoined, in cases where natives are concerned, to attempt to effect a reconciliation between the parties.

Interpretation of the Jurisdiction Clauses.

Causes which lead to imperfect jurisdiction clauses in the treaties.

The interpretation of the jurisdiction clauses of the treaties raises some interesting questions, for their language is often open to legal criticism. The diplomatists who are engaged in negotiating treaties have no lawyers at their elbows to guide them in the use of terms of art and precision in matters which may involve legal questions of great nicety. Even if expert assistance were available, they would probably refrain from using it: for the time which would otherwise be devoted to the settlement of large issues would be frittered away in the discussion of details, introducing fresh points of difficulty, and hindering the progress of the negotiations. Conventions which are entered into for the express purpose of arranging legal questions are of course most carefully drafted: but in the case of exterritorial treaties—which is after all only a convenient expression—it must be remembered that the jurisdiction usually depends only on a few clauses introduced into a treaty dealing with matters of larger moment. To these matters indeed the privilege of exterritoriality is a most important adjunct: but to have laboured these clauses, to have introduced all manner of minor issues, would have fogged the main issue, and done much not only to dissipate the energies of our own negotiators, but also to destroy such good will as the oriental had brought to the negotiation. Many blemishes from the lawyer's point of view exist in the Treaty of Tientsin, and existed in the now-vanished Treaty of Yeddo: such mistakes were inevitable, for it would be absurd to imagine the British Plenopotentiaries cudgelling their brains to find the most exhaustive language proper to dispose of all the disturbing questions which the presence of British subjects in the oriental country might cause, even if it were possible to have foreseen them or their future importance. The lawyer's business arises afterwards: and the nature of the case being what it is, no narrow construction of these jurisdiction clauses, as of the sections of an Act of Parliament, is possible.

cf. Section III.

I do not lose sight of the fact already insisted on, that the question of interpretation affects not the State only with which the treaty has been entered into, but also the subjects of the Treaty

Power whose rights and obligations have been dealt with. The broad general interests of trade and residence have in the first instance been safeguarded: and this should justify in the eyes of the subject the widest possible interpretation of the terms of the treaty, even though his particular interest may, in any given case, appear to be sacrificed.

This broad view finds its warrant in the judgment of Dr. Lushington in *Maltass* v. *Maltass*. The question in issue was, what law was to govern the succession to property of a British subject who died at Smyrna in 1842, his son propounding a will executed in 1834. The learned Judge found that the deceased, although born at Smyrna, was a British subject. The next question was as to his domicil: assuming him to have died domiciled in Smyrna, what was the law of Turkey as to British subjects dying domiciled there? The answer depended on the treaties between Great Britain and the Porte, in which words appropriate to domicil were not used, for reasons which the learned Judge examined with great care. "These reasons," he said, "appear to me to operate most strongly in favour of a liberal and extended construction of the treaties: in my opinion the contracting parties never contemplated the anomaly which a contrary construction would lead to. With regard then to the parts of the treaties applicable to the question we are now discussing, to wit, whether the treaties extend to a permanent residence, and not merely to a temporary visit. The treaties commence at an early period, but they are all included in the Treaty of the Dardenelles (1809). Now, in the construction of treaties of this description, we cannot expect to find the same nicety of strict definition as in modern documents, such as deeds or Acts of Parliament; it has never been the habit of those engaged in diplomacy to use legal accuracy, but rather to adopt more liberal terms. I think, in construing these treaties [the Turkish Capitulations], we ought to look at all the historical circumstances attending them, in order to ascertain what was the true intention of the contracting parties, and to give the widest scope to the language of the treaties in order to embrace within it all the objects intended to be included."

Maltass v. *Maltass*, 1 Rob. Eccl. 67.

This doctrine received the approval of the Judicial Committee in 1895, in *Imperial Japanese Government*, v. *P. & O. Co.*, in which the old treaties with Japan were in question:—"The treaties must be interpreted according to their manifest spirit and

Japanese Govmt. v. P. & O. Co., 1895, A.C. at p. 657.

intent. In construing such instruments a too slavish adherence to the letter would be out of place, although, of course, violence must not be done to the language used."

Illustration of loose method of drafting treaties.

In order to illustrate the somewhat loose way in which legal questions are dealt with in these treaties, I may refer to art. *xxiii* of the Treaty of Tientsin. This article confers a most important right on the merchants of Hong Kong, but it is drafted in language which if interpreted in any narrow spirit would reduce the benefit appreciably, and which, so far as it deals with the Courts of the Colony, is such as even a layman would seldom use.

Treaty of Tientsin, 1858: art. xxiii.—

> Should natives of China who may repair to Hongkong to trade incur debts there, the recovery of such debts must be arranged for by the English Courts of Justice on the spot; but should the Chinese debtor abscond, and be known to have property, real or personal, within the Chinese territory, it shall be the duty of the Chinese authorities, on application by and in concert with the British Consul, to do their utmost to see justice done between the parties.

Examination of jurisdiction clauses.

The common form of the treaty clauses dealing with jurisdiction, must now be examined. I take the text of the clauses of the old treaty with Japan, because, although it was concluded two months after the Treaty of Tientsin, there is a curious slip in the drafting of these clauses which brings into strong relief the importance of the question of interpretation.

Treaty of Yeddo, 1858.

> IV. All questions in regard to rights, whether of property or person, arising between British subjects in the dominions of His Majesty the Mikado of Japan†, shall be subject to the jurisdiction of the British authorities.
>
> V. Japanese subjects, who may be guilty of any criminal act towards British subjects, shall be arrested and punished by the Japanese authorities according to the laws of Japan.
>
> British subjects who may commit any crime against Japanese subjects, or the subjects or citizens of any other country, shall be tried and punished by the Consul, or other public functionary authorized thereto, according to the laws of Great Britain.
>
> Justice shall be equitably and impartially administered on both sides.

†[*see* O. in C. 13 May, 1869, "correcting an error in the Order of 1865."]

Now, if the question be asked, under which of the above clauses could jurisdiction have been exercised in the case of an assault by one British subject on another? we are driven to decide between two most unsatisfactory alternatives: either the obviously civil

formula "questions in regard to rights whether of property or person arising between British subjects", in clause *iv*, must be held to include criminal jurisdiction in the same matters; or British subjects must be included in the sentence in clause *v*, "any crime against Japanese subjects, or the subjects or citizens of any other country." Although the first interpretation is possible, and warranted in virtue of the principle now being considered, it is not strictly accurate under a system of criminal procedure in which the proceedings are intituled "the King, on the prosecution of *A. B.* against *X. Y.*" In the treaty with China the words "British subjects who commit any crime in China" are used to create the criminal jurisdiction.

This principle of interpretation may be further illustrated by the case of *Hart* v. *Gumpach*, which was an action for libel. It was assumed all through the case that the right of reputation which is involved in such an action, was not excluded from the jurisdiction of the Consular Court of China by the words "all questions in regard to rights, whether of person or property", in the clause cited above, which also appears in the treaty with China.

Hart v. *Gumpach*, L.R. 4 P.C. 439.

So, in the case of the *Imperial Japanese Government* v. *P. & O. Co.*, it was contended that as the treaty only referred to suits in which Japanese subjects were plaintiffs, a suit by the Japanese Government, or by the Emperor of Japan under that name, did not fall within the treaty. The Judicial Committee declined to accept this view, more especially as the result would have been to render British subjects, defendants in such suits, amenable to the local Courts.

Japanese Govmt. v. *P. & O. Co.*, 1895, A.C. 644.

The Exercise of the Judicial Power as it affects Foreigners.

WE HAVE hitherto considered the King's foreign jurisdiction solely in relation to its exercise over his subjects: the possibility that it may, and in some cases must, affect foreigners living in the oriental country has only been hinted at. This question is one of considerable importance both theoretically and practically.

The fact with which exterritoriality deals is the presence of western merchants in an oriental country, where, "from the oldest times, an immiscible character has been kept up": where "foreigners are

cf. judgment in *the Indian Chief*, 3 Rob. Adm. at p. 29.

not admitted into the general body and mass of the society of the nation:" where the laws, inapt to accommodate themselves to western ideas, have no standards appropriate to the settlement of disputes among the merchants. The method by which the system deals with the problem is to remove the merchants, their disputes and offences, from the operation of those laws, placing them under the jurisdiction of their own authorities. But the very simplicity of the remedy has entailed difficulties peculiar to it. For when one nation steps into the markets of the East, others are bound to follow, claiming the same privileges and exemptions from the operation of the native laws. So, where there is one exterritorial treaty there are generally several, the rights accorded to one Power being granted to the others, and, as we have seen, the whole being assimilated by the most-favoured-nation treatment. But this creates a series of independent communities, each governed by its own laws, the whole without coherence. The system deals only with the elements of which the "foreign community" is composed, not regarding it as a unity, nor providing means for settling the disputes which must arise between the members of the different national communities. In a country such as Egypt, where the interests are of great importance, the remedy for this state of affairs has been found in the establishment of Mixed Courts: but this is the only attempt which has been made to arrive at combined action between the different Treaty Powers. To a certain extent the close proximity of a Colony to a Treaty Port, as of Hong Kong to Canton, eases the strain: for the jurisdiction of English Courts is built on so broad a foundation, that cases which would otherwise be heard by the Consular Court are often tried in the Courts of the Colony. But obviously this is an insufficient substitute for the general principle which is lacking in some treaties. In others, the question is partially dealt with. Thus in the Corean treaty the British judicial authorities are vested with jurisdiction to "hear and determine all cases brought against British subjects by any British or other foreign subject or citizen": and the same right is accorded to the other Powers who have entered into treaties with the once-called Hermit Kingdom. This provision links the foreign communities in Corea into one for cases which fall within the normal jurisdiction of Courts of Law: that is to say, so far as suits by foreigners against defendants in their

cf. p. 10.

The system treats the different foreign communities as independent.

national Consular Courts are concerned. But this only deals with one branch of the question.

Provision in the Chinese treaties.

In the Treaty of Tientsin the subject is not dealt with: but in the Chinese treaties with France, Germany, Austro-Hungary, and the United States, there is a negative provision to the effect that the Chinese authorities shall not in any manner interfere in any dispute between the subjects or citizens of those countries respectively and other foreigners. The most favoured-nation clause makes the article in the Chinese treaties with these Powers applicable to Great Britain. This may, therefore, be treated as equivalent to the positive provision of the treaty with Corea.

cf. p. 45.

Position of foreigners in the absence of provision in the treaty.

Putting on one side, however, the express provisions of the treaties which may deal with the question, it is essential to consider the position of foreigners in the abstract, from the point of view of a treaty which contains no such provision. And, moreover, these express provisions do not deal with jurisdiction exercised over foreigners as defendants in actions brought against them in the British Consular Courts by British subjects, which is sanctioned by the Order in Council; nor, conversely, with actions brought against British subjects in the Consular Courts of other countries. The possibility of such jurisdiction being exercised must now be considered.

Who are "foreigners," and who "natives."

It is necessary, however, in the first place to determine who come within the definition of "foreigners": where the line is to be drawn between "natives" of the oriental country and foreigners, for a similar question arises in connexion with "natives," that is, subjects of the oriental country.

It may seem almost superfluous to say that "foreigner," for the purposes of this discussion, means the subject of a Treaty Power: and that all others, whatever their nationality, must be included in the term "native"; for being without the protection of an exterritorial treaty, they must be subject to the native laws and tribunals.

Definition of "foreigner": China Order, art. 3.

The definition of "foreigner" in the China Order includes "a subject or citizen of a State in amity with His Majesty, including China and Corea," no distinction between foreigners and natives being made. But the distinction, as we shall presently see, is an important one, and it would seem to have been through oversight that it has not been recognised in art. 151.

It follows, from what has been said on the general theory of the subject, that among the fundamental principles which are as

cf. Section I.

cf. "Nationality," Vol. I, Chap. XII.

applicable to Eastern as to Western States is the one for which we have invented the inappropriate name "Temporary Allegiance." The privilege of exterritoriality withdraws the subjects of the State to which it has been accorded from that psendo-allegiance; that is, exempts them from obedience to the laws of the oriental State in which they reside.* But failing a grant of such privilege those laws prevail; and a subject of a State which has not entered into an exterritorial treaty is bound by those laws so long as he remains within the sphere of their operation. In the early days of our intercourse with oriental, and even some other, nations, the difficulties of the situation as it then existed were partly overcome by what was known as the factory system, and it is necessary both to understand its scope and to realise that it has now disappeared.

Subjects of non-treaty Power have no privileges.

the Indian Chief, 3 Rob. Adm. 12.

The law applicable to that system was explained in the judgment in *the Indian Chief*:—"It is to be remembered, that wherever even a mere factory is founded in the eastern parts of the world, European persons trading under the shelter and protection of those establishments are conceived to take their national character from that association under which they live and carry on their commerce. It is a rule of the law of nations, applying peculiarly to those countries . . . In China, and I may say generally throughout the East, persons admitted into a factory, are not known in their own peculiar national character: and being not admitted to assume the character of the country, they are considered only in the character of that association or factory." Having referred to two other examples of the application of the principle, Sir W. Scott continued, "I remember perfectly well, in the later case of Mr. Constant de Rubecque, it was the opinion of the Lords, that although he was a Swiss by birth, and no Frenchman, yet if he had continued to trade in the French factory in China, which he had fortunately quitted before the time of capture, he would have been liable to be considered as a Frenchman."

Protection of foreigners resulting from factory system.

The "Factory" was an establishment tolerated by the State in which it was set up, which, apparently for the convenience of all parties, was withdrawn, as well as all persons therein residing, from the operation of the local laws. Such an establishment existed, I believe, even in St. Petersburg.

* Though not from all laws: *see* p. 8.

But it is obvious that so soon as exterritorial treaties became common, or rather should it be said, so soon as it was discovered that the nations of the East were found to be not unwilling to grant the privilege of exterritoriality, and to grant it moreover on the footing of the most-favoured-nation, the reason for the factory rule which the law of nations had invented ceased to exist. And, therefore, if any nation refrained from acquiring the rights which the oriental countries were willing to give, they fell into the opposite category of the least-favoured-nation, and their subjects could no longer expect the protection which the artificial factory system had invented in their favour. That system may be described as the thin edge of the wedge which the oriental nations have now permitted to be driven home.

Factory system disappeared when exterritorial treaties became common.

From a practical point of view moreover, no difficulty presents itself: for, as we have seen in the case of Persia, the privileges of British subjects in that country depend entirely on a short clause guaranteeing the most-favoured-nation treatment. As we shall presently see, there is nothing to prevent the jurisdiction granted to one country from being extended to the nationals of another, all the countries interested agreeing. By means of such an agreement, therefore, a State with very few nationals residing in the oriental country, may still secure for them the benefits of exterritoriality, without going to the expense of maintaining a diplomatic representative in the country.

cf. p. 46.

These preliminary points disposed of, we may proceed to consider the question—In what circumstances, in the absence of any treaty provision, can the British Consular Courts exercise civil jurisdiction over or in respect of foreigners? Can it be assumed? Can it be sanctioned by the Sovereigns interested? Can it be acquiesced in by the subjects irrespective of their Sovereigns?

Questions involved in jurisdiction over foreigners.

Now it is obvious that underlying the questions as thus stated is that question which is fundamental to the whole subject: that foreign jurisdiction depends in no wise upon allegiance. If it were true that British subjects in China, for example, owe allegiance to the King: may be legislated for by the Parliament at Westminster: may have sentence passed on them by the British Consul at Canton, for example, quite independently of the terms of the treaty between Great Britain and China, then the same positions are true of Italian subjects in China with regard to their King and Parliament, of German subjects, and of all other

The question of allegiance. *cf.* Section I.

nationalities. And then this proposition follows inevitably—Although the Emperor of China could give and has given to the Christian Powers of Europe authority to administer justice to their own subjects according to their own laws, he "neither has professed to give, *nor could give*, to one such Power any jurisdiction over the subjects of another Power. But he has left those Powers at liberty to deal with each other as they may think fit; and if the subjects of one country desire to resort to the tribunals of another, there can be no objection to their doing so with the consent of their own Sovereign, and that of the Sovereign to whose tribunals they resort."

cf. Dr. Lushington's judgment in *the Laconia*, 2 Mo.P.C.(N.S.), at p. 153.

I venture to think that this is an impossible proposition; but it was stated in so many words, as applicable to the Ottoman Porte, by Dr. Lushington, delivering the judgment of the Privy Council in *the Laconia*.

Argue backwards from it, and we come at once to the astounding theory that sovereignty is an attribute of Christian Sovereigns only. It is true that it is not the custom in exterritorial treaties to give jurisdiction expressly to one Sovereign over the subjects of another, but the power of doing so exists, notwithstanding; and, as I have before pointed out, the Foreign Jurisdiction Act is so drawn as to include the exercise by the King of jurisdiction over foreigners if policy warrants or demands his acceptance of the power. And singularly enough, in the earlier case of *the Griefswald*, Dr. Lushington himself seems to consider that the case is not impossible: for he says, "How the subjects of a foreign Power can be brought within the jurisdiction so conferred, save by treaty, I have no means of forming an opinion." The learned Judge must have meant a treaty to which the Sovereign of the country in which the jurisdiction was to be exercised was a party. How would an independent treaty be worded between England and Italy, giving to the English King jurisdiction over Italian subjects in China? It could not have been done prior to the existence of the Chinese treaties, and certainly it has become more than ever impossible since.

cf. p. 72.

the Griefswald, Swab. Adm. at p. 434.

The fact that jurisdiction over the subjects of another State is not likely to be granted or accepted in a treaty without the assent of the Sovereign to whom they are subject, depends on courtesy only, and does not in any way interfere with the theoretical aspect of the question. Where, however, the assumption

of jurisdiction by one State involves the abandonment or destruction of the exterritorial privilege of another State, or, as in practice it is more likely to be, of several other States, their assent must of course be obtained. This point will be discussed in the concluding Section.

Exercise of some jurisdiction over foreigners essential.

But it is obvious that the exercise of jurisdiction over foreigners in certain cases is essential to the settlement of the disputes which must arise where many nationalities are engaged in commerce in an oriental country, and is essential, therefore, to the well-being of the foreign community.

It is obvious too, that even assuming all the different Consular Courts to have, as in China, jurisdiction to decide cases brought by foreigners against their nationals, this would be insufficient to deal effectively with the necessities of the case. For, to take a very common example, a contract may give rise to claim and cross claim, and it must often be expedient for all parties concerned that both should be decided by the same Court, and by the same law of construction: and this could only be done by sanctioning the exercise of jurisdiction against the foreign plaintiff as defendant in the cross action. That this might depend on the express consent of the parties is, for the moment, beside the question. It is not merely jurisdiction *in invitum* which requires the sanction of the oriental Sovereign to its exercise, but jurisdiction in any form. It may well be that anybody can act as arbitrator in a foreign country: but quite apart from the fact that he has no means enforcing his decision, a foreign Sovereign cannot exercise his judicial attributes in another country, even by consent of the parties, without infringing the sovereignty of that State.* He cannot exercise jurisdiction as against his own subjects, much less can he do so as against foreigners.

cf. p. 173.

But a means of doing so was in due course discovered, which the Courts have subsequently justified: first, as was natural, in

* In justification of this statement, if it be necessary, I may refer the reader to the Chapter on "Extra-territorial Legislation creating Rights and Privileges" in my book on "Nationality" (Vol. I, Chap. VI), in which the question and other kindred ones are discussed in connexion with "Extra-territorial Marriages" and "Extra-territorial Oaths and Evidence".

the Laconia, 2 Mo. P.C. (N.S.) 161; *cf.* p. 41.

the Ottoman dominions.* The judgment in the case of *the Laconia* has already been quoted at some length in connexion with jurisdiction which depends on sufferance; it must now be referred to as establishing the propositions, that in the absence of express stipulation jurisdiction over foreigners can be acquired by sufferance, and that the necessary ingredients exist in the case of the Ottoman Empire.

cf. Section IV.

In determining whether this jurisdiction is rightly exercised in any other oriental country by sufferance, the Court would have to be satisfied that its Sovereign had full knowledge of, and had actively assented to, or silently acquiesced in, its exercise.

It follows that if the King could not acquire such jurisdiction by treaty, neither could he acquire it by sufferance.

Jurisdiction over foreigners depends on sufferance.

While then it seems to be now unquestioned that sufferance may, and must in many cases, be looked to, to justify the assumption of jurisdiction over foreigners so far as the oriental State is concerned, we have still to consider how the matter stands with regard to the foreigner's own Sovereign. For this purpose it will be convenient to examine what has been done in our own Orders in Council in the case of China. There have been many fluctuations in the provisions: with the issue of almost every successive

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cf. p. 43.

* The jurisdiction in the Ottoman Empire was dealt with in 1836, by an Act introduced by Lord Campbell: repealed by the Foreign Jurisdiction Act, 1843.

6 & 7 Will. IV. c. 78, s. 2:—And whereas cases occasionally arise within the dominions of the Ottoman Porte above specified, and in the States of Barbary, wherein the interposition of His Majesty's Ambassadors, Consuls or other officers is required by the subjects of other Christian Powers in the determination of differences or disputes between such persons and British subjects; Be it therefore enacted, That it shall be lawful for His Majesty, by any Order or Orders in Council, to make and issue, in the same manner, directions and regulations for the guidance of his Ambassadors, Consuls and other officers, and of all others subjects of His Majesty, in cases in which the interposition of His Majesty's Ambassadors, Consuls, and other officers may be so required for the settlement of any differences or disputes which may arise between British subjects and the subjects of any Christian Power within the dominions of the Sublime Porte in Europe, Asia and Africa, and in the States of Barbary: Provided always, that every Order in Council issued by the authority of this Act shall be published in the *London Gazette*, and shall be laid before the Houses of Parliament, and shall not be binding and effectual until six months after it shall have been so laid before the Houses of Parliament.

Order in Council a change has been introduced: facts which of themselves are sufficient to show how very difficult in theory the subject really is.

Different provisions in China Orders as to this jurisdiction.

The Order of 1860 decreed that "it shall be lawful for the Consul of the district within which the party sued shall be found, to hear and determine any suit of a civil nature against a British subject, arising within any part of the dominions of the Emperor of China, whether such suit be instituted by a subject of the Emperor of China, or by a subject or citizen of a foreign State in amity with Her Majesty"; and also "to hear and determine any suit of a civil nature arising within any part of the dominions of the Emperor of China, instituted by a British subject against a subject of the Emperor of China, or against a subject or citizen of a foreign State in amity with Her Majesty, provided that the defendant in such suit shall consent to submit to his jurisdiction, and give sufficient security that he will abide by the decision of the Consul, and will pay such expenses as the Consul shall adjudge."

China Order, 1860.

In the Order of 1865, which abrogated that of 1860, it was provided simply that "where a foreigner desires to institute or take any suit or proceeding of a civil nature against a British subject, the Supreme or other Court, according to its jurisdiction, may entertain the same . . . . and determine it according to the provisions of this Order, and of the rules made under it applicable in the case."

China Order, 1865.

This was repealed by the Order of 1881, which promulgated an elaborate series of rules, dealing, as in the Order of 1860, with suits by foreigners and suits against foreigners; both were put within the jurisdiction of the Court. But the exercise of the jurisdiction was subject to certain provisos: first, that the foreigner should obtain and file in Court "the consent in writing of the competent authority of his own nation to his submitting" to the jurisdiction; secondly, that he did submit; thirdly, that he should give security, if required by the Court, "to pay fees, damages, costs and expenses, and abide by and perform the decision to be given either by the Court or on appeal."

China Order, 1881.

The submission did not carry with it the right of the defendant to bring a counter-claim or cross-suit against a foreign plaintiff, except by leave of the Court. And this leave would not be given unless it was shown that the claim arose out of the matter

Jurisdiction over foreigners

in dispute, that there was reasonable ground for it, and that it was not made for vexation or delay. But this provision did not destroy the right of the British defendant to sue the foreigner in the ordinary way provided by the Order after the termination of the pending suit. Further, the enforcement of the order in the first suit might be stayed pending the decision in the second; the same principle being applied in a modified form to an order by a foreign plaintiff obtained against two or more British subjects jointly. Security was not required from foreigners who were co-plaintiffs with a British subject, he being made responsible for all fees and costs.

China Order, 1886.

In 1886, a special Order was issued by which the provisos were altered as follows:—

The foreigner was required, first, to file his consent to the jurisdiction of the Court; secondly, if required by the Court, to obtain and file a certificate in writing from a competent authority of his own Government to the effect that no objection was made by that Government to his submitting in the particular cause or matter to the jurisdiction; thirdly, to give security, if required by the Court.

China Order, 1904. art. 151.

In 1904, a fresh Order was issued which introduced a further modification. The consent of the competent authority of the foreigner's own nation, and his own submission, need only be filed if the Court so requires: and security for costs also is only to be given if the Court requires it.

The further provisions are as follow—A cross action or counter-claim may not be brought against a foreign plaintiff: if a foreigner obtains an order against a British subject, and there is another suit between the same parties in which the British subject is plaintiff, the Court may stay the enforcement of the order in the first suit pending the decision in the second, and may set off the amount ordered to be paid by one party against the amount ordered to be paid by the other. There is a similar provision for the case of a foreigner who obtains an order against two or more defendants, British subjects, where one of them has another action against the foreigner. Where a foreigner is co-plaintiff with a British subject who is within the particular jurisdiction, it is not necessary for the foreigner to give security for costs, unless the Court so orders: but the British subject is responsible for all costs.

It will thus be seen that the view which has been taken in England of this complicated question has changed from time to time.

Summary of provisions as to foreigners in successive China Orders.

In 1860, the Order in Council empowered the Consular Court to try suits to which foreigners were parties, irrespective of the consent of the foreigner's Government.

In 1865, suits against foreigners were cut out.

In 1881, they were restored, and in all cases the consent of the foreigner's Government to his submission to the jurisdiction, either as plaintiff or defendant, was made a condition precedent.

In 1886, the foreigner's consent to the jurisdiction had to be filed, but the absence of any objection on the part of his Government was to be shewn only if the Court required it,

In 1904, both his own submission and the consent of his Government had to be filed only in case the Court so required.

Suits by British subjects in foreign Consular Courts. China Order, 1904, art. 153.

In the converse case, an action brought by or against a British subject in a foreign Consular Court, art. 153 of the Order is based on a still wider principle, no provision being made for obtaining the consent of the British authorities; neither is it insisted on as essential, nor is the possibility of such consent being required by the foreign Court even alluded to. The article provides simply that where "a British subject invokes or submits to the jurisdiction of a Chinese or foreign tribunal, and engages in writing to abide by the decision of that tribunal, or to pay any fees or expenses ordered by such tribunal to be paid by him," a British Consular Court will enforce payment of such fees and expenses (though not of the judgment, except by garnishee order) in the same way as if the order had been made in a proceeding before it. *cf.* art. 154 *post.*

In view of such wide variations in the provisions of the various Orders, and in view more especially of the principle upon which the last two Orders have been based, it is important to enquire what is the true position of a foreigner, whether plaintiff or defendant, in the British Consular Courts, *vis à vis* his own Sovereign; for obviously a claim to exercise jurisdiction which, so far as the oriental State is concerned, depends only on sufferance, could not deprive a foreign Sovereign of his rights over his own subjects, if he has any. This is not a mere theoretical question, for it might arise in practice in either of the following cases.

Practical case in which the question might arise.

Suppose an action brought in the British Court by a foreign plaintiff against a British subject who enters a conditional appearance, and judgment given against him, the Court not having required the consent of the plaintiff's Government to be filed. Could the British subject successfully raise the question that the provision of the Order was bad as infringing the rights of the foreign Government.

Or, conversely, suppose an action brought by an American citizen against a French subject* in the Consular Court of the United States, under a similar rule, and in similar circumstances, and judgment given against him. In an action in a British Court on that judgment, could the defendant sucessfully raise the defence that the American rule was a violation of the comity or the law of nations, because the consent of the French Government had not been obtained to the jurisdiction of the United States Court being exercised against him?

Putting all other pleas or defences on one side, it must I think be clear that if the Sovereign or Government of the nation to which the foreigner defendant belongs, has by recognised principles any voice in the matter, the fact that it has been ignored is an infringement of its sovereign rights which the British Courts would take notice of.

The question we have to consider is, therefore, this—What position does the foreign Government hold in the circumstances? or: Does the jurisdiction of a Consular Court over or in respect of foreigners depend entirely on the consent, or submission to the jurisdiction, of the foreigner himself? Or again: bearing in mind the fact that our own rules contemplate the exercise of this jurisdiction without the consent of the foreign Government, Is the provision that the Court may decide whether that consent shall be obtained or not introduced into art. 151 merely as a matter of international courtesy?

Foreigner plaintiff submits to the jurisdiction.

So far as the foreigner himself is concerned, the question involved is the same whether he be plaintiff or defendant: for if he is plaintiff, whether the rules require an express submission to the jurisdiction or not, the fact of bringing an action in our Courts is in itself a submission, and jurisdiction may, in case of

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cf. p. 181.

* The case of an action against a British subject in similar circumstances is covered by art. 153 of the Order given above.

need, be exercised against him in the proceedings which he has initiated.

Question of Sovereign's consent depends on general theory of the subject. *cf.* pp. 5, *et seq.*

But so far as the Sovereign is concerned, the answer is, I believe, to be found in the fundamental theory of exterritoriality: which is that the foreign Sovereign enforces the duties of his subjects, representing the oriental Sovereign *pro hac vice*, but does not protect their rights: except in the single instance of disputes amongst themselves. The jurisprudence of the subject is that in all cases, civil or criminal, the forum is that of the defendant: with this somewhat curious result, that a man's duties are governed by his own law, but his wrongs, whether civil or criminal, are redressed by the law of the wrongdoer. Each Treaty Power has in charge the enforcement only of the duties of its own subjects in accordance with its own laws, and so each Power undertakes duties of protection with regard to the subjects of all other Treaty Powers. A Frenchman, for example, in China is, strictly speaking, protected as occasions may arise, by all the other nations who have Courts in the country which derive their mandate from the Emperor of China. The only redress which an injured person can obtain depends on the nationality and laws of the wrongdoer.

cf. p. 7.

Protection of the subject absent in exterritoriality.

Seeing, therefore, that protection of the subject enters to so slight a degree into the system, I am disposed to think that the British Consular Courts may legitimately be used by foreigners to bring actions against British subjects, independently of the consent of their own Governments: subject to such conditions as to express submission, to giving security for costs, and to other matters which the Court may think fit to impose; and subject, of course, to any national law on the question binding the foreigner.

Foreigner defendant withdrawn from national jurisdiction.

But the case of foreigners sued in the British Consular Courts is a very different matter: for there is here involved a withdrawal of the foreigner from the jurisdiction which his own Government has acquired by treaty over him. With some diffidence I submit that the consent or submission of the foreigner by itself is insufficient to give the Court a stable jurisdiction, but that the consent of the foreign Government is a *sine quâ non*. Further, I am disposed to think that both are requisite, and that the consent of the Government would not of itself be sufficient. In all this I have assumed that *vis à vis* the oriental State, the right to

Consent of both Government and defendant probably required.

exercise such jurisdiction in the absence of any provison in the treaty, has been duly acquired by sufferance: for it is contrary to the law of nations, for one nation to deliberately exercise jurisdiction or power of any sort in another country, whether eastern or western, unless it has acquired the right to do so by lawful means. *

There is one practical consideration in connexion with this matter which must not be overlooked. To allow a foreign Court to exercise jurisdiction over a foreigner by his own consent alone, is to invite collusion: for the friendly creditor may step in to the frustration of the rights of the defendant's creditors of his own nationality.

Actions by or against Natives.

The question of actions by or against natives depends on treaty.

Although, as we have seen, the definition of "foreigner" in the China Order includes natives, art. 151 therefore applying to both foreigners and natives, yet theoretically, actions by or against natives in the British Consular Courts differ from actions by or against foreigners, for these are specially provided for by treaty. This question has been elaborately discussed by the Judicial Committee in connexion with counter-claims against natives who have brought actions against British subjects in the British Courts, in *Imperial Japanese Government* v. *P. & O. Co.*, in a most luminous judgment which throws much light on the whole subject. The effect of the decision, stated briefly, is to establish the paramount importance of recognising the terms of the treaty.

Japanese Govmt. v. *P. & O. Co.*, 1895, A.C. 644.

An action was brought in the Consular Court at Yokohama by the Japanese Government in respect of a collision between a Japanese ship of war, the "*Chishima*," and a P. & O. steamer, the "*Ravenna*," in the Inland Sea of Japan.† The petition alleged that the "*Ravenna*" was alone to blame. The Company in their answer alleged that the "*Chishima*" was alone

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* *see* the footnote on p. 177.

† The Judicial Committee did not decide the other question raised in this case, which was that the Inland Sea of Japan was the high sea. They intimated, however, that they must not be regarded as sanctioning the very wide propositions which the Supreme Court at Shanghai had laid down. The question is, it is submitted, on the authorities, free from doubt. These authorities show that the Inland Sea is included in the waters of the realm of Japan, and not even in the territorial waters.

cf. "Nationality," Vol. I, Chap. II, p. 29.

to blame: and they subsequently moved for leave to file a counter-claim against the Government, claiming damages for injuries sustained by the "*Revenna*": also for an order that the suit and counter-claim be heard together, and that the petitioner should give security for costs to abide the decision on the counter-claim. The Judge refused leave: but the Supreme Court for China and Japan (as the Court at Shanghai was then called) reversed the decision, and made the order prayed for. The Japanese Government appealed to the Privy Council. It is obvious that on these facts practically the whole question of the jurisdiction of the Consular Courts would have to be enquired into.

Counter-claims against natives plaintiffs in British Court.

The first proposition laid down in the judgment* was, that it needed no argument to shew that if the claim for damages made by the Company "were not set up by way of counter-claim, the British Consular Court would have no jurisdiction to entertain such an action *in invitum* against a Japanese subject. The proper forum would be a Japanese Court." Dealing then with the argument that the Consular Court ought to dispose of both suits in order that complete justice should be done, and that a counter-claim was the proper way in which it should do so, Lord Herschell, C. pointed out that it was only in recent years that it had become the general practice to allow such counter-claims in the English Courts. But that, apart from this, "the argument overlooks the limited scope of the jurisdiction which the Consular Courts are authorised to exercise:" that is to say, that they had exclusive cognizance only of complaints brought against British subjects, but that on the other hand, the territorial Courts alone were competent to deal with claims against a Japanese subject: "there is nothing to take away this natural right. It is indeed expressly recognised by the treaties."

Native plaintiff does not submit to the jurisdiction: he has a right to sue in British Courts by treaty.

The question of the submission to the British Courts by a Japanese subject suing in them was then dealt with. "It is said, however, that if a Japanese chooses to sue in a British Consular Court he submits to its jurisdiction in all respects: so that if, according to the rules by which its practice and procedure are governed, a defendant is entitled to set up a counter-claim,

* I am compelled to retain the references to Japan in this judgment. It will of course be understood that this is the Japan when foreign jurisdiction was in force there. In its application to the present day, the judgment should be read as if China were substituted for Japan.

the plaintiff cannot escape from the obligation to submit to adjudication upon it. He has elected his tribunal, and he must take the consequences of that election. Their Lordships think that this is altogether a false view of the situation. It is not a matter of election on his part to seek his remedy in the Courts of the defendant's country. He has no choice. The defendant has obtained, by virtue of the treaty made with his Sovereign, complete immunity from process in the territorial Courts which would otherwise be open to the plaintiff. It is difficult to see on what ground a British subject can insist, when sued in his own Consular Court, that the Court shall take cognizance of and adjudicate upon a claim which he makes against a Japanese. It appears to their Lordships that it would be in violation of the treaty, and in excess of the jurisdiction which the sovereign power of Japan, in derogation of its sovereign rights, has granted to the British Consular Court, if it were to yield to such a contention." The next step in the argument is obvious: if counter-claims were allowed in the British Courts a similar right could not be denied in the converse case of an action brought by a British subject against a Japanese in the Japanese Courts, if their practice sanctioned counter-claims.

To allow counter-claims against natives in British Courts, would involve counter-claims against British suitors in local Courts.

"The point is one of no small moment. If the respondents' contention be well founded, it must apply equally where a British subject brings an action in a Japanese or Chinese Court in respect of a claim against a Japanese or Chinese subject. The Japanese or Chinese Court would be entitled to allow a counter-claim to be made against a British subject, and to require security to be given to satisfy the counter-claim, whatever its amount, and however much in excess of the claim, and to stay proceedings in the action until the security was given. The effect would be to deny the British subject any redress in the local Court except upon terms of his submitting to its arbitrament a dispute which under the treaty was reserved exclusively for the determination of the British Consular Court. Such a proceeding would, in their Lordships' opinion, be clearly inconsistent with treaty rights, and it can be no less so when it is made a condition of suing in the British Consular Court that the Japanese shall submit a claim against himself to the jurisdiction of that Court, and give security so as to enable it to render its judgment effective, in case it should be unfavourable to him."

The consequences of this decision were said to involve a hardship on the Company, and the practical side of this question in a collision case were dealt with at the end of the judgment, and do not concern us here: but Lord Herschell pointed out that if there were hardship or inconvenience, it was "the necessary result of the immunity afforded to British subjects from suit in the local Courts. It is the price which they must pay for this immunity. But for the treaty, they would be liable to process in the Courts of Japan. Those Courts would have complete jurisdiction to deal with the case, whether the defendant were a British subject or a Japanese. A British subject cannot claim the advantage of being amenable exclusively to his own Consular Court, and at the same time object to the limited jurisdiction which alone it possesses."

The decision is the consequence of the immunity granted by treaty.

The incidental point raised that the action was in reality brought by the Emperor of Japan has already been referred to. It is now established that the Sovereign of the oriental country may sue in the British Consular Courts, the principles which govern proceedings by foreign Sovereigns in the English Courts being applied.

cf. p. 171.

It is apparent from this judgment that the case of actions by or against natives in the British Courts rests on an entirely different footing from that of actions by or against foreigners: the latter, as we have seen depends on sufferance where the foreigner is defendant, the former rests entirely on the treaty. This being so it is a little difficult to understand why art. 151 should have been so drafted as to apply to natives as well as to foreigners. It does not seem consistent with the principles enunciated by Lord Herschell to interpose between natives and their access to the Court the conditions that the consent of his Government should be obtained, or security for costs given. The fact that the conditions are only insisted on at the discretion of the Court does not affect the question of principle involved.

Distinction between actions by natives and those by foreigners.

cf. p. 173.

NOTE.—In order to make the analysis of this important case complete, I must not omit the following reference to the question what remedy a suitor has if the Order in Council exceeds the treaty grant: "Their Lordships do not find it necessary to express any opinion upon the arguments addressed to them in relation to the construction of the Orders in Council. It is clear that these could not operate to confer a jurisdiction upon the British Courts in Japan wider than was acquired by treaty. If indeed an Order in Council in terms prescribed something which was inconsistent with the treaty, it may

be that the Consular Judge would be bound to conform himself accordingly, and that the party aggrieved would have to seek redress through the diplomatic intervention of his Government. But no such difficulty arises in the present case. There is no necessary conflict between the treaty rights and any of the provisions of the Orders in Council. They may all have full effect given to them without stretching the consular jurisdiction beyond its legitimate treaty limits."

The suggestion contained in this sentence does not support the position advanced in the early parts of this book, that a suitor is entitled to raise the question of variance between the Order in Council and the treaty before the Consular or any Court. It was not a considered expression of opinion, and it is the only part of the judgment which, if I may say so with all respect, does not contain an authoritative statement of the law. It must, however, be noted that the same opinion was given by Dr. Lushington in *the Laconia*, already cited. It is submitted that the law is as it has been stated in Section III.

cf. Section III.

the Laconia, 2 Mo. P.C. (N.S.) at p. 181; *cf. ante* pp. 41, 45.

Extra-territorial Exercise of the Judicial Power.

The next question to which we must turn our attention is one of considerable importance, which has been referred to from time to time in the foregoing pages: how far any extra-territorial exercise of the judicial power is justified.

cf. p. 38.

There are some crimes committed beyond the realm which the State is justified in punishing: the effective administration of the criminal law in an empire such as ours demands extra-territorial provisions in aid: the necessities of commerce have compelled the Courts to assume a jurisdiction over absent defendants in certain cases which have been embodied in Rules of Court, and a similar jurisdiction is assumed in many cases, sometimes by statute, sometimes of their inherent power. Thus for practical reasons, neither the civil nor the criminal jurisdiction of the English Courts can be limited territorially. The question arises, therefore, whether the Consular Courts, which are erected on their model, can be invested with a similar extra-territorial jurisdiction. The question is strictly speaking twofold, and may be stated in this way: first: Is there any warrant for extending the English exterritorial legislation and practice to the Consular Courts? secondly: Can those Courts be invested with such extra-territorial jurisdiction as is necessary to the more effective discharge of the duties which exterritoriality imposes upon them.

cf. "Nationality," Vol. II.

The fundamental idea of exterritoriality involves this cardinal proposition, that the territorial area within which the rights are exercised must be coincident with the territory of the Sovereign who grants them. The treaties are invariably so drafted as to bear this construction, the jurisdiction granted being expressed to be over British subjects in the country in which it is acquired. There must, therefore, be added to the fundamental principles governing the subject, this further one, that the jurisdiction must be exercised territorially and not extra-territorially. In its criminal side the territoriality of the jurisdiction is still further emphasised: for the criminal clauses of the treaties limit its exercise to crimes committed in the oriental country, thus recognising the maxim that "all crime is local" (see *McLeod* v. *A. G. of New South Wales*).

Territoriality of consular jurisdiction. *cf.* p. 11.

McLeod v. *A. G. of New South Wales*, 1891, A.C. 455. *cf.* "Nationality," Vol. II, Chap. III.

But it may be that the same necessities which have compelled the extension of the civil and criminal jurisdiction of the English Courts also apply to the Consular Courts, in which case sufferance must be appealed to for the justification on principles which are now familiar. When we come to examine the special jurisdiction of the Court in the case of bankruptcy, the importance of the questions will become apparent. For the present, however, we must examine the broad general extensions which have been made by the Act of 1890, and by the Orders in Council. The questions which require special attention are—with regard to criminal jurisdiction, the extra-territorial legislation of the United Kingdom, high sea offences, and the different cases in which deportation of offenders is provided: and with regard to civil jurisdiction, procedure against absent defendants.

Extra-territorial Legislation of the United Kingdom.

This legislation is divisible into two heads: laws which deal with offences on the high seas, and those which deal with offences committed beyond the realm. The whole of this legislation is included in the general extension of the criminal law of England to the Consular Courts; and in so far as the second category of statutes is concerned, there can be no doubt that they are applicable to oriental countries, and that in virtue of the general provisions of the Orders in Council, the Consular Courts have jurisdiction to try offences under them when committed by British subjects within the limits of the Order.

Extra-territorial Statutes: †*cf.* Section VII, *B*; p. 107.

These statutes are supplementary to those which are expressly applied† to foreign jurisdiction by sections therein contained. They are as follow*:—

those dealing with treason and sedition:

53 & 54 Vict. c. 27. cf. p. 119.

the Slave Trade Acts—dealt with specifically under the Colonial Courts of Admiralty Act, 1890:

12 Geo. III, c. 24.

the Dockyards Protection Act, 1772; though practically only in so far as it deals with setting on fire or otherwise destroying the King's ships of war afloat, or building or repairing by contract in any private yard for the use of the King: or military, naval or victualling stores, or any place where such stores are kept:

42 Geo. III, c. 85.

the Offences by Public Officers Act, 1802, which deals with offences committed abroad by persons in the service of the Crown, "in any civil or military office, station or capacity, out of Great Britain":

cf. p. 155.

the Foreign Enlistment Act, 1870—dealt with specifically by the Neutrality Orders in Council:

46 & 47 Vict. c. 3.

the Explosive Substances Act, 1883; which deals with unlawfully and maliciously causing, by an explosive substance, an explosion in the United Kingdom of a nature likely to endanger life or to cause serious injury to property, the act being committed within or without the dominions: together with kindred offences, including those committed by accessories.

48 & 49 Vict. c. 69.

the Criminal Law Amendment Act, 1885, which deals with procuration, and with procuring defilement of women by threats or fraud, or administering drugs.

24 & 25 Vict. c. 100.

Finally, there are the express provisions of the Offences against the Person Act, 1861, ss. 4, 9, and 10, of which deal with murders and manslaughters committed abroad; and s. 57 with bigamy, whether the second marriage shall have taken place in England or elsewhere. With regard to this latter provision, however, it seems probable that the principle on which *McLeod* v. *A.-G. of New South Wales* was decided, would be as applicable to foreign jurisdiction as to colonial legislation, and the section held inapplicable to Consular Courts.

McLeod v. *A.-G. of New South Wales*, 1891, A.C. 455.

* All these statutes are set out and analysed in "Nationality," Vol. II; Chap. II, which deals with "The Substance of the Extra-territorial Criminal Law of England."

Although the extra-territorial provisions of these statutes enable them to be enforced territorially when the offence is committed in the oriental country, these provisions making them in effect "Applied Acts," their extension does not confer on the Consular Courts any jurisdiction when the offences are committed beyond the limits of that country.

Extra-territorial statutes only to be enforced territorially by Consular Courts.

High Sea Legislation of the United Kingdom.

The high sea legislation of the United Kingdom consists of— High sea statutes.

the Piracy Acts, which are specially dealt with by art. 72 of the China Order: *cf.* p. 134.

the Offences at Sea Acts, which, except s. 1 of the Act of 1799, deal with the procedure for trial of offences committed on the high sea: *28 Hen. VIII, c. 15.*

the Post Office (Offences) Act, 1837, which provides for the trial of offences against the Post Office Acts, when committed at sea: *7 Will. IV & 1 Vict. c. 36.*

the Wild Birds Protection Act, 1889, which extends the penalties under the Act to offences committed at sea: and *43 & 44 Vict. c. 35.*

the Admiralty jurisdiction sections of the Criminal Law Consolidation Acts, 1861, which make all the offences dealt with by the Acts triable in England when committed at sea. *24 & 25 Vict. cc. 96 to 100.*

The jurisdiction of the Consular Courts over high sea offences is specially dealt with by s. 14 of the Foreign Jurisdiction Act, and art. 80 of the China Order, in respect of offences committed in vessels within 100 miles from the coast of China: and also by the application and adaptation of the Admiralty Offences (Colonial) Acts of 1849 and 1860, and Part XIII of the Merchant Shipping Act, 1894. *cf.* p. 63. *cf.* pp. 84, *et seq.*

In connexion with the present question the most important point arises from the adaptation of s. 686 of the Merchant Shipping Act†, which deals generally with any offence committed by a British subject on board any British ship on the high seas or in any foreign port or harbour, or on board any foreign ship to which he does not belong. There is in this case a special adaptation in art. 39 (ii) of the Order, which does not do much more than introduce certain verbal alterations into s. 686. But high sea offences are also dealt with by s. 1 of the Offences at Sea Act, 1799, and by the Admiralty jurisdiction sections of the Criminal Law Consolidation Acts, 1861, above referred to. † [set out on p. 66.] *cf.* p. 65. *28 Hen. VIII, c. 15.*

The combined operation of these three enactments has been fully analysed in another work†, and the question which still awaits decision has been stated as follows:—"Is the application of the general criminal law to the high seas now governed solely by s. 686 of the Merchant Shipping Act?"

†*cf.* "Nationality," Vol. II, Chap. III, pp. 143, *et seq.*

The occasion for solving this question may arise when an offence in a British ship on the high seas comes to be tried before a Consular Court. There can, I think, be little doubt that the adaptation of s. 686 by art. 39 (ii) of the Order in Council, does not of itself oust the application to the Consular Courts of the other branches of English high sea legislation.

High sea jurisdiction of Consular Courts.

Then comes the further question whether this extension of high sea legislation to the Consular Courts is justified, or whether the principle that those Courts can exercise no extra-territorial jurisdiction overrides it.

In the first place, the "extent of jurisdiction" as defined by art. 5 (5) of the Order, includes only "British ships with their boats; and the persons and property on board thereof, or belonging thereto, being within the limits of the Order," which of itself appears to preclude the exercise of any jurisdiction by the Consular Courts in respect of offences on British ships on the high seas.

But putting this definition on one side, and considering the question from the standpoint whether such jurisdiction can be exercised or not, I am disposed to think that it may be justified by sufferance on very broad grounds. Jurisdiction over subjects in ships carrying the flag on the high seas is claimed by every civilised State. Having regard to the respect with which the local jurisdiction of the Courts was treated in the *Muscat case*: having further regard to the views expressed by the Judicial Committee in *A.-G. for Hong Kong* v. *Kwok-a-Sing* in connexion with the laws of China on the subject of piracy, we are justified in saying that the States with which exterritorial treaties are concluded are assumed to deal with such matters on the same lines as civilised States, and, therefore, to know of the existence of so universal a practice. If the oriental State itself exercised a similar jurisdiction on the high seas over its subjects there could be no difficulty in making the latter assumption. But even without this, it is suggested that this assumption is warranted.

Carr v. *Fracis Times*, 1902, A.C. 176.
cf. pp. 8, 14.
A.-G. for Hong Kong v. *Kwok-a-Sing*, L.R. 5 P.C. at p. 198.
cf. p. 135.

The question may be put on precisely the same footing as the exercise of the King's jurisdiction in the territorial waters of the

oriental State. They are properly included in the "limits of the Order," because the oriental Sovereign is assumed to claim jurisdiction over them as all Sovereigns may. And so, it is submitted, may the King's jurisdiction be exercised by the Consular Courts over British subjects in British vessels on the high seas, because the oriental Sovereign may be assumed to exercise jurisdiction over his own subjects in ships carrying his flag as all other Sovereigns in fact do.

The question of high sea jurisdiction over foreigners in British ships does not arise, as the Consular Courts have no jurisdiction at all over foreigners in criminal cases.

Deportation.

Cases in which deportation authorised.

Deportation is provided as a punishment for certain offences created by Order in Council; it is also resorted to for the purposes of trial and execution of sentence. It will be convenient to summarise the cases in which accused or convicted persons may be deported.

Foreign Jurisdiction Act, s. 6: persons charged with offences cognisable by the Consular Court may be sent for trial to a colony. *cf.* p. 55.

Foreign Jurisdiction Act, s. 7: persons convicted by a Consular Court may be sent for execution or imprisonment to a colony. *cf.* p. 57.

Foreign Jurisdiction Act, s. 8: persons convicted of an offence against the special provisions of the Order in Council, may be punished by deportation. *cf.* p. 58.

Fugitive Offenders Act, 1881: fugitive offenders from the dominions may be apprehended on an endorsed warrant and surrendered. *cf.* p. 98.

Colonial Prisoners Removal Act, 1884: prisoners undergoing sentence in a consular prison may be removed to the United Kingdom or a colony to complete the sentence. *cf.* p. 103.

The subject of deportation may, therefore, be considered under the following heads—

(a) in respect of offences not committed in the oriental country:

(b) in respect of offences committed in the oriental country:

(c) for the purpose of execution of sentence: and

(d) as a punishment for certain offences.

Each of these raises questions of principle which require to be carefully examined, for they each, in the absence of treaty warrant, infringe some sovereign right of the oriental State: and the case for sufferance is not very clear in all of them. The principles involved have already been so fully discussed that it will only be necessary to refer to them very briefly.

A—Offences not committed in the Oriental Country.

Offences under this group are those committed in British territory, where the offender has escaped to the oriental country, his return following his arrest in that country on a warrant endorsed by the Consular Court. Technically this is not "deportation," because action is taken in these cases in virtue of the extension of the Fugitive Offenders Act, 1881, to the oriental country as if it were a British possession. But the consequences are the same, and it is convenient to consider the question in connexion with deportation strictly so called. This Act extends the principles of extradition to our colonial Empire, and the application of it to foreign jurisdiction brings oriental countries into the scheme of colonial extradition, thereby denying to those countries any voice in the matter. There can be little doubt that this infringes what is known as the "right of asylum": that sovereign right, possessed alike by civilised and uncivilised, Christian and Mahommedan States, to protect all who come within their borders. There is a right to refuse to surrender, as well as a right to surrender, criminals to their own Governments: and the right to demand the surrender can only be acquired by treaty.

44 & 45 Vict. c. 69.

Infringement of right of asylum of oriental country.

The extension of the Act of 1881, is, however, not even a demand of the right of extradition, but a claim to exercise that right by our own officers, tacked on to the grant of exterritorial rights. Sufferance must be looked to in support of it, and I cannot refrain from expressing the opinion that the strongest evidence of the existence of the ingredients of sufferance, knowledge, assent or acquiescence, would be required by a Court before which the practice was challenged. It has the appearance of interpreting the reference in the Foreign Jurisdiction Act to "the cession or conquest of territory" too literally.

In a very modified form, extradition is mentioned in two treaties, but in these it involves only a surrender of criminals to the oriental country.

In the treaty with Tonga, there is a one-sided provision for the surrender of Tongan subjects accused or convicted of murder, attempt to murder, embezzlement or larceny, fraudulent bankruptcy, and forgery, when found in British territory. And in the Treaty of Tientsin (art. *xxi)* there is a provision for the surrender generally of "criminals, subjects of China" who take refuge in Hong Kong or on board British ships there.

Cases of extradition in exterritorial treaties.

cf. Note on *Kwok-a-Sing's case*, p. 135.

In the case of Siam there is a special extradition treaty for the prevention of crime in certain territories adjacent to Burmah.

With regard to the converse case, return to the consular jurisdiction of offenders who have escaped to British territory, no question of importance arises. It fulfils the theoretical requirements of the subject, the offender being returned for trial to the oriental country in which the offence was committed.

B—Offences committed in the Oriental Country.

Deportation to a colony for trial of offences committed in the oriental country seems also to involve a deviation from the stipulations, express or implied, of the treaty.

The Corean treaty provides that on the trial of cases in the Corean or British Courts in Corea, an official of the plaintiff's or prosecutor's nationality shall be allowed to attend the hearing. The text of the treaty itself, therefore, requires that the trial of offenders shall take place in the Consular Courts in Corea and nowhere else. The same inference must, it is submitted, be drawn from the provision in a treaty that British offenders shall be tried by their Consul. But even without either provision, it can hardly be disputed that where an offence has been committed by a British subject against a native of the oriental country, the Government of that country would have a right to protest against the withdrawal of the case from the jurisdiction of the Courts whose creation, for the express purpose of trying offences by British subjects in lieu of its own, it has sanctioned. In principle there can be no difference between offences against natives or foreigners and those against British subjects. It is unnecessary to insist on so technical an argument as that when British subjects are made subject to the jurisdiction of the "British authorities", the Consul not being referred to, this means the jurisdiction of those authorities only who are duly constituted in the oriental country under the treaty. The broad principles on

Treaty provisions for trial of offences imply trial in the oriental country.

which the administration of criminal law rests warrant the proposition that the State wherein an offence has been committed has a right to the conduct of the trial; and this cannot be affected by the fact that it has sanctioned the trial of offences by foreign Courts which form in fact part of its own system of judicature. The principle fundamental to the whole subject is that all offences committed in an oriental country are as much offences against the Sovereign of that country and what we term his "peace", as in occidental countries. And this being admitted, the following are unimportant factors in the case: the nationality of the person against whom the offence has been committed: the nationality of the Court which the oriental Sovereign has authorised to try it: and the nationality of the law which he also has allowed to govern the question whether the act be criminal or not. Here again I venture to think the case for sufferance would have to be very strong indeed.

cf. the references to the *Zanzibar case*, pp. 5, 10.

cf. p. 183.

C—Execution of sentence in neighbouring Colony.

Deportation for the purpose of executing sentence passed by a Consular Court may apparently be ordered either under s. 7 of the Foreign Jurisdiction Act, or in virtue of the extension of the Colonial Prisoners Removal Act, 1884, to oriental countries.

cf. p. 57.

cf. p. 108.

Combined effect of s. 7 of Principal Act and Colonial Prisoners Removal Act.

The express provision of the Principal Act and the operation of the Applied Act in some measure overlap, in so far as the removal of prisoners from the oriental country is concerned. The Removal Act of 1884, however, only comes into operation "where a prisoner is undergoing sentence of imprisonment," whereas s. 7 of the Act of 1890, provides generally for the place of punishment of persons convicted by a Consular Court, the wide manner in which it is drawn covering both the oriental country itself and colonies. It is unnecessary to work out with precision what the combined effect of the two enactments is, nor how far they may be in conflict, for the power of putting them both in force is vested in the same authority, the King in Council: and their joint operation practically sanctions the making of any order in connexion with execution of sentence which occasion may require.

Deportation in this case is more easy to justify by sufferance than in the last case: for, although the execution of sentence belongs as of right to the Sovereign State in which the offence

has been committed for the same reason as the conduct of the trial, the question is of minor importance. So long as the Government of the oriental country is satisfied that the trial has been impartially conducted (a question as important in the eyes of the Eastern, as the converse is to the Western State, as the provision in the Corean treaty already alluded to shows) no difficulty is likely to occur with regard to the carrying out of the sentence, if the Government is further satisfied that the sentence will be carried out, and that deportation is not equivalent to remission of sentence. There is moreover this practical side to the question. It is obvious that the right to exercise criminal jurisdiction over subjects carries with it both the right and the duty to provide proper means for carrying out the sentences pronounced, and therefore to establish prisons, and to make all necessary regulations for their discipline, imprisonment of occidentals in oriental prisons being out of the question. But expense where the British community is small, and climatic conditions in the majority of cases, renders imprisonment in tropical countries, at least of long-sentence prisoners, unadvisable, and should form sufficient warrant in the eyes of the oriental Government to justify this departure from the strict rule. The fact that similar rules prevail with regard to sentences passed in our own colonies would also have due weight in justification of the practice.

Deportation for punishment probably acquiesced in.

cf. p. 160.

In connexion with this subject it may here be noted that no difficulty should arise in respect of an arrangement between two foreign countries to avail themselves of the same prison: for although, as we have seen, it is of importance for the smaller Powers to acquire exterritorial privileges, even though their nationals resident in the oriental country are few in number, yet the cost of providing all the necessary staff and machinery for the exercise of these privileges is considerable, and there seems to be no reason why in this instance the expense of prisons may not be saved. The imprisonment of foreigners sentenced by a foreign Consular Court in a British prison, would of course require due provision to be made in that behalf by the laws of the two countries.

Arrangements for prisons of one country to be used by another.

cf. p. 175.

D—Punishment of offences created by Order in Council.

The objections which could be raised to deportation almost vanish in this case: for, as the analysis of the offences created by

cf. pp. 133, *et seq.*

Order in Council offences created out of respect for religious and other rights of oriental country.

Order in Council has shewn, they all have the special object in view of enforcing either obedience to the treaty obligations where the English law may not otherwise provide, or respect for the laws and customs of the oriental country and its people. The elaborate code of offences which lie beyond the purview of the law of England, and the carefully minute way in which it endeavours to reach every possible case of offence, cannot fail to impress the oriental Government with the scrupulous regard which it is the policy of all western Governments to pay to the rights of that State and the idiosyncracies of its people. It is indeed the practical recognition that the West does in fact regard the rights which the East has conferred as a privilege, and one which it is worth safeguarding from possibility of being diminished or curtailed owing to reckless misbehaviour of those who profit by it. It is probable that the provisions of the Orders in Council in this respect would be brought to the notice of the Eastern Government: and even in the absence of an express provision such as that contained in the Corean treaty, that "British subjects in Corea shall be amenable to such municipal, police, and other regulations for the maintenance of peace, order, and good government as may be agreed upon by the competent authorities of the two countries," it would be difficult for a British Court to come to the conclusion that the acquiescence which sufferance requires did not exist in this case as a fact.

Civil Jurisdiction.

We have next to consider the civil aspect of extra-territorial jurisdiction.

How far Consular Courts may exercise jurisdiction over absentees.

There are, as is well known, a great number of cases in which jurisdiction is assumed over absentees by English law and practice. The most important of these cases, that exercised in bankruptcy, will be specially examined in its application to consular jurisdiction in the next Section. For the present we have to enquire how far, if at all, procedure analogous to the provisions of "Service out of the Jurisdiction" in civil actions under the English Order XI, and to the practice of substituted service, can be adopted by the Consular Rules of Court.

The exercise of civil jurisdiction being as much an attribute of sovereignty as the exercise of criminal jurisdiction, the treaty provisions must in this case also be taken as the basis upon

which this question must rest, unless sufferance can be invoked to supplement them.

The *compétence* of Consular Courts in civil matters.

First, with regard to the area covered by the civil jurisdiction, the *compétence*, of the Consular Courts. I am disposed to think that they will act on the same principles as the English Courts: that is to say, they will (subject to the well-known exception in the case of land abroad) hear and decide actions irrespective of the place where the cause arose, so long as the defendant is properly before them. I do not, however, advance this proposition without some hesitation, for at first sight it might appear strange that a Court which is created specially for dealing with local affairs and disputes, should have jurisdiction, as the English Courts have, to decide cases which may have arisen in France or Formosa. On the other hand, in order that such cases should be excluded, it would be necessary to give a very forced construction to the words of the civil jurisdiction clause in the treaty. "All questions in regard to rights arising between British subjects in China" would have to be construed as meaning not only that the British subjects, parties to the disputes, must be in China, but also that the questions must arise, or that the rights must exist, in China. Looking at the matter as one merely of grammar, I think the words "in China" qualify "British subjects" only.

English jurisprudence probably applicable.

But looking at the matter from a broader standpoint, it seems more reasonable that the English jurisprudence should apply to the Consular Courts, and that while their criminal jurisdiction should be limited by the maxim "all crime is local," their civil jurisdiction should be unlimited. The reason of the thing too supports this view; for the Consular Courts are created in order that the British residents in the oriental country should have satisfactory tribunals to resort to; and therefore it is more natural that these Courts should be governed by the same rules in respect of disputes triable before them as the Courts at home. Otherwise, in many cases, there would be no tribunal to which those who reside in these countries could resort.

cf. p. 189.

With regard to the persons in respect of whom the jurisdiction may be exercised, the questions are, whether absent plaintiffs may sue, and whether absent defendants may be sued, in the Consular Courts.

No jurisdiction exerciseable in respect of absentees.

There can be little doubt that the answer in both cases must be in the negative: the treaty and the definition of the "extent of jurisdiction" contemplate that all the parties to litigation should be in the oriental country. But this, so far from settling the question merely raises another difficulty. If the jurisdiction of the Consular Courts is based on the same principles as that of the English Courts, then mere presence in the oriental country is sufficient for a writ to be served on a defendant, and for the Court to be seized with the action. This, undoubtedly, was never the intention of the treaty, and it would seem that the only way of avoiding the application of English principles is to interpret the word "in," in the civil jurisdiction clause, to mean "resident in."

Definition of "resident" in Orders.

In the Morocco Order the word "resident" is defined to mean "having a fixed place of abode" in the country. But this does not in reality remove the difficulty; for, in the first place, the definition of the "extent of jurisdiction" is precisely the same as in the China Order: and secondly, there is no provision dealing with jurisdiction to which this definition is applicable, "resident" not being used in connexion either with plaintiffs or defendants. The same definition is introduced into the China Rules of Court.

Rule 1.

Jurisdiction probably limited to persons usually resident.

It is impossible to give more than a hesitating opinion on this practical question with so little to guide one. I think, however, that the Courts will be disposed to interpret the word "in" to mean something more than mere presence in the country, and to give it the meaning "having a fixed place of abode in," or "usually resident in," and this with regard to both plaintiffs and defendants.

But even this does not exhaust the potential difficulties of the subject.

The case of branch establishments in Treaty Ports considered.

The conditions under which trade is carried on in the Treaty Ports must be borne in mind. The most important houses of commerce are branch establishments of the large firms who carry on business in the East; and unless a partner is resident within the jurisdiction of the Consular Court, who can sue or be served with process in the name of the firm, neither this modified condition of the treaty, assuming it to be accurate, nor the condition of the Order or Rules, assuming it to be applicable, can be satisfied. The questions here involved are essentially practical, and unless we find that the jurisdiction which is assumed is manifestly too wide, sufferance may rightly be appealed to

to justify it; for unless disputes arising between British firms carrying on business in the country can be decided by the Consular Courts, they would fail altogether in their intended usefulness. We must therefore turn to the China Order as on previous occasions, in order to see what interpretation has been put in practice on the treaty provision.

"Extent of jurisdiction" defined.

The "extent of jurisdiction" exercised in China is, by art. 5, defined as follows. It is to be exercised over "British subjects, as herein defined, within the limits of this Order", that is to say, within the dominions of the Emperor of China: and over "the property and all personal or proprietary rights and liabilities within the said limits of British subjects, whether such subjects are within the said limits or not:" and over "British ships with their boats, and the persons and property on board thereof, or belonging thereto, being within the limits of this Order."

The first provision clearly contemplates personal service only, as does also the last. But the second, though it is exceedingly wide and may be of great importance in executing judgments against property in China when delivered, does not remove the difficulty in the way of serving persons who are not actually present within the limits, although they may have places of business or residence therein: for in English practice, save for the procedure known as Foreign Attachment (which, it must be noted, is not incorporated into the Rules), there is no jurisdiction *in personam* founded on seizure of property.

Rule 99 deals with plaintiffs out of the jurisdiction, and rule 108 (8) with service out of the jurisdiction; but in both cases the jurisdiction referred to is the "particular jurisdiction" of the Provincial Court, and not that expressed by the term "Limits of the Order."

Substituted service.

Rule 111 sanctions substituted service by order of the Supreme Court, if "for any reason personal service cannot be conveniently effected," where the person to be served is not within the limits of the Order. This rule appears to be justified so long as the English practice is strictly observed. The practice, stated briefly, is, that absence from the jurisdiction is not a sufficient reason for allowing substituted service, because in such a case an order for service out of the jurisdiction under Order XI must be obtained. If an order for such service is obtained, then, if personal service cannot be conveniently effected, a further order for substituted

service may be made. This case, on the hypothesis, cannot occur in the Consular Court. Substituted service can, therefore, only be allowed in the case of a defendant who can be normally served with process: that is, if the suggestion made above is correct, a defendant usually resident within the jurisdiction, but who is evading service.

Actions by and against firms.

Rule 91 deals with actions by and against firms. It provides that "any two or more persons claiming or being liable as co-partners, and carrying on business within China, may sue or be sued in the name of the firms whereof they were partners at the time of the accruing of the cause of action." And by rule 100 (3), where partners are sued in the name of their firm, service may be effected either upon any one or more of the partners, or by delivering the summons to any person at the principle place of business of the partnership, who at the time of service, apparently has the control or management of the partnership business there. But if the partnership has to the knowledge of the plaintiff been dissolved before the commencement of the action, service must be effected upon every person within the jurisdiction sought to be made liable.

It is unnecessary to go deeper into the details of the procedure. There seems to be something missing in the Orders and Rules necessary to make them a satisfactory instrument for carrying out the rights of jurisdiction which have been acquired. For reasons which have already been dealt with, more precision could not be expected in the clause of the treaty; but it is not difficult in this case to arrive at the intention of those who drafted it. If it be said that the present circumstances have far outgrown those existing at the time of the negotiations, it may, I think, be answered legitimately that with the growth of commerce the meaning of the words used should expand in proportion: for it is just such an expansion in such a case that the doctrine of sufferance is intended to legalize. I think it can hardly be denied that in some measure these rules go beyond the strict words of the treaty. But, on the other hand, in this question of civil jurisdiction precision is woefully lacking in the Orders and Rules, and sufferance would undoubtedly justify greater preciseness being adopted, even though the language of the treaty were not rigidly adhered to. It must, however, be borne in mind that sufferance can only be appealed to justify express provisions of

cf. p. 168.

A larger measure of jurisdiction would be justified.

the Orders which appear to go beyond what the treaty warrants, and not to supplement the provisions of the Orders themselves.

That the jurisdiction conferred by the treaty was never intended to extend to persons merely present in the country, but to be limited to residents, is, I think, indisputable. On the other hand, if civil jurisdiction could by English law be exercised against persons usually, though not actually resident, without the necessity for personal service, there can be no doubt that some provision for service out of the jurisdiction of the Consular Court would be justified. In the case of firms, the provision for service on agents or managers of branch establishments is essential, though in this case it should probably be limited to causes of action arising within the jurisdiction of the Court. These points, among others, are left too vaguely in the Rules as they now stand. The more important of the Supreme Consular Courts have probably worked out rules for themselves, and it is to be hoped that they may, ere long, be reduced into a written code. Uncertainty in a matter of such great importance is much to be deplored.

The difficulty arises from the necessity for personal service.

Jurisdiction in Aid.

The question how far the Consular Courts may be made auxiliary to the Courts of other nationalities established in the oriental country is one of great importance, but it is not dealt with in the Order in any very exhaustive manner. Art 154 provides that garnishee proceedings in the British Court may be taken in aid of a judgment of a foreign Consular Court in China. The order may be made on the application of any British subject or foreigner (which includes natives), who has obtained a judgment or order for the recovery or payment of money in a foreign Court in China (which does not include a native Court), against a person subject to the jurisdiction of that Court. The application is to be supported by a certificate that the judgment is still unsatisfied, and that a British subject is alleged to be indebted to the judgment debtor and is within the jurisdiction. The condition under which the order may be made is that the foreign Court is authorised to exercise similar powers in the case of a debt due from a person subject to the jurisdiction of that Court

Garnishee proceedings in aid of judgment of foreign Consular Court:

subject to reciprocity.

to a British subject, against whom a judgment has been obtained in a British Consular Court. It is a little difficult to see why, when a judgment has been given by a foreign Consular Court against a British subject properly before it, as by submission to its jurisdiction, the assistance of the British Court by way of execution should not be given: subject of course to the condition of reciprocity. As we have already seen, art. 153 only authorises the enforcement by the British Court of the undertaking of a British subject suing in a foreign Court to pay any fees or expenses ordered by that Court to be paid. The article extends to suits brought by British subjects in Chinese Courts.

cf. p. 111.

A still more important question arises in connexion with the assistance which the Consular Courts may give to the Courts in adjacent colonies.

Jurisdiction in aid of Colonial Courts.

By art. 29 of the Order it is provided that a Consular Court in China may cause any summons, order, or judgment issuing from the Supreme Court of Hong Kong in any civil proceeding, and accompanied by a request in writing under the seal of that Court, to be served in China. Presumably, however, the service only will be effected on British subjects. As a matter of practice, however, the British Consuls in their consular, as distinguished from their judicial functions, will, I believe, assist in the service of these documents on natives, by obtaining the help of the native authorities: and possibly, through the intermediary of other Consuls, on foreigners.

The auxiliary jurisdiction of the Court in bankruptcy will be dealt with in the next Section.

Colonial judgments.

Still further and most useful service could be rendered to the Courts of adjacent colonies, if some provision were made for obtaining execution of their judgments against defendants who have absconded, and who have property within the jurisdiction of the Consular Court. But this is trenching on debateable ground, and I can do no more than make this passing allusion to a subject of great importance to the colonial merchants.

XI

The Bankruptcy Jurisdiction of the Consular Courts.

THE QUESTIONS involved in the bankruptcy jurisdiction of the Consular Courts are so important, and at the same time so intricate, that I have thought it advisable to devote a special Section to their consideration. The sections of the Bankruptcy Act, 1883, to which it will be necessary to refer are set out on p. 140.

The jurisdiction is raised on the very narrow and obscurely defined foundation of art. 99 of the China Order. This form has been adopted in the most recent Orders,* and it must, therefore, have been considered to be the one best suited to bankruptcy under the system of foreign jurisdiction. China Order, art. 99.

Bankruptcy jurisdiction is at all times complex, and the limitations inevitable to its exercise in oriental countries render this

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* The following are the most recent forms of the article creating bankruptcy jurisdiction in the Orders in Council. It will be seen that the last two in point of date follow the form used in the China Order. Bankruptcy articles in Orders in Council.

Morocco, 1889.

78.—(1) The Supreme Court for Gibraltar shall have, for and in Morocco, in relation to the following classes of person, being either resident in Morocco or carrying on business there, namely, British subjects and British-protected persons, and their creditors and debtors, being British subjects or British-protected persons, or Moorish subjects, submitting themselves to the jurisdiction of the Court, or foreigners so submitting, all such jurisdiction in bankruptcy as for the time being the Court of Bankruptcy of Gibraltar or the Supreme Court has in Gibraltar in relation to persons resident or carrying on business there.

Persia, 1889.

68.—Each Court shall be a Court of Bankruptcy, and as such shall, as far as circumstances admit, have, for and within its own district, with respect to resident British subjects, and to their debtors and creditors being either resident British subjects or natives or foreigners submitting to the jurisdiction of the Court, all such jurisdiction as for the time being belongs to any judicial authority having for the time being jurisdiction in bankruptcy in England.

Extra-territorial difficulties of the Bankruptcy Act.

aspect of it still more so. From its very nature bankruptcy as it affects foreigners presents many difficulties. And apart from this, the English Bankruptcy Act is full of extra-territorial provisions†: from s. 4, with its reference to acts of bankruptcy which may be committed "in England or elsewhere", to the interpretation of property in s. 168, which vests in the trustee the bankrupt's property wherever situate. Both in regard to interpretation and to practical application these provisions render the Act difficult to carry out even in England. The difficulty is increased in the colonies when their bankruptcy laws are drafted on the lines of the English Act. But when we have to interpret the provisions of the Act in its application bodily to the Consular Courts, questions of great complexity must inevitably arise which it is almost impossible to foresee, and which the rules of interpretation which we have already considered may be powerless to solve.

I propose to deal as best I may with some of these difficulties which appear to be the most likely to arise, the absence of reported decisions not making the task any easier.

Lastly, the peculiar form of words which has been used in art. 99 introduces additional difficulties of interpretation: and this must be the excuse for a somewhat elaborate analysis of their meaning. It will be convenient at the outset to put the simpler

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Bankruptcy articles in Orders in Council.

Turkey, 1899.

105.—(1) Each Court shall, as far as circumstances admit, have, for and within its own district, with respect to the following classes of persons being either resident in the Ottoman dominions, or carrying on business there, namely, resident British subjects and their debtors and creditors, being British subjects, or Ottoman subjects or foreigners submitting to the jurisdiction of the Court, all such jurisdiction in bankruptcy as for the time belongs to the High Court and the County Court in England.

Siam, 1903.

89.—(1) Each Court shall, as far as circumstances admit, have, for and within its own district, with respect to the following classes of persons being either resident in Siam, or carrying on business there, namely, resident British subjects and their debtors and creditors, being British subjects, or foreigners submitting to the jurisdiction of the Court, all such jurisdiction in bankruptcy as for the time being belongs to the High Court and the County Courts in England.

† "The Extra-territorial effect of the English Law of Bankruptcy" forms the subject of Chapter VIII in the 2nd Volume of "Nationality."

article of the China Order of 1865 side by side with that used in 1894, as this may be of assistance in arriving at its meaning.

Order of 1865 (art. 52)	*Order of 1894 (art. 99)*
The Court shall "as far as circumstances admit have . . . with respect to British subjects and to their debtors and creditors, being either British subjects or foreigners submitting to the jurisdiction of the Court, all such jurisdiction as for the time being belongs to the Court of Bankruptcy and the County Courts in England, or to any other judicial authority having for the time being jurisdiction in bankruptcy in England."	The Court shall "as far as circumstances admit have . . . with respect to the following classes of persons being either resident in China, or carrying on business there, namely, resident British subjects and their debtors and creditors, being British subjects, or foreigners submitting to the jurisdiction of the Court, all such jurisdiction in bankruptcy as for the time being belongs to the High Court and the County Courts in England."

Definition of consular bankruptcy jurisdiction.

Looking first at the form used in 1865, it will be seen that the condition of residence in China was not expressed; it was probably incorporated into it from the normal principle governing the general bankruptcy jurisdiction of the English Court of Bankruptcy prior to the Act of 1869.*

Jurisdiction under the Order of 1865.

The material point to notice, however, is that the grammatical construction of the sentence made it clear that the words "being either British subjects or foreigners" referred only to the debtors and creditors of the bankrupt. No doubt, therefore, arose on the wording that the jurisdiction to make persons bankrupt was limited to British subjects. In the case of foreign debtors or creditors, submission to the Court's jurisdiction was a condition precedent to the jurisdiction being exercised in respect of them.

In the previous Section the difficulties which arise in connexion with civil jurisdiction, owing to the omission of any express provision in the Order as to residence being a condition of its exercise, have been pointed out. But the Bankruptcy Act of 1883 introduced a new provision dealing with bankruptcy jurisdiction

cf. p. 200.

* It would be difficult and not very profitable to attempt to give a definition of the jurisdiction of the English Court of Bankruptcy under the Act of 1849. It seems clear that domicil entered into it, and therefore residence in England was not a *sine quâ non*. But residence must have been an important factor in the definition, and this must have supplied the Consular Court with what was missing in the definitions of its own jurisdiction.

in s. 6 (1) (*d*), in which residence occupied a prominent position; and the question which must have presented itself to the draftsman of the new Orders in Council was, whether there should be a mere reference to the jurisdiction of the English Court of Bankruptcy, as in the case of matrimonial jurisdiction, or whether there should be a special definition dealing with bankruptcy jurisdiction of the Consular Court.

It will materially assist the reader to understand the somewhat complicated argument which follows if the words of s. 6 (1) (*d*) of the English Act are again set out.

Bankruptcy Act, 1883, s. 6 (1) (*d*).

"A creditor shall not be entitled to present a bankruptcy petition against a debtor unless—

(*d*) the debtor is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling house or place of business in England."

The problem must have been a little complicated by the condition as to domicil having to be omitted in consequence of the decision, to be discussed at length hereafter, in *re Tootal's Trusts*, that no domicil of any sort can be acquired in an oriental country. The alternative conditions, however, seem peculiarly appropriate to consular jurisdiction.

re Tootal's Trusts, 23 Ch. D. 532.

The decision to which the draftsman came, however, was that a special definition of the Consular Courts jurisdiction was necessary. But in interpreting this definition a somewhat peculiar difficulty confronts us. Is it intended to be a paraphrase of s. 6 (1) (*d*) with the condition of domicil omitted, or is it entirely new? It will be presently seen that the meaning of the article is rendered obscure by the introduction of the condition of residence; for the word "resident" is used twice, and this creates a special difficulty of its own, quite apart from the grammatical complexity of the rest of the sentence. I shall now endeavour to arrive at its meaning

A—The Persons subject to the Jurisdiction.

The first question which arises is, what are "the following classes of persons being either resident in China, or carrying on business there", with respect to whom the Court is to exercise its bankruptcy jurisdiction? Neither the fundamental principles of the subject, nor strict grammatical construction permit us to

interpret the "classes" as being—*(a)* resident British subjects, and *(b)* foreigners submitting to the jurisdiction.* ·

The civil jurisdiction of the Court may, as we have seen, be exercised against foreigners submitting to the jurisdiction. This is obviously a rule peculiar to the Consular Courts, to which there is nothing analogous in English procedure, adopted on the ground of convenience, because foreigners form part of the same exterritorial community. But the exercise of bankruptcy jurisdiction against foreigners involves consequences far more serious than the exercise of civil jurisdiction: involves too questions of principle. It is impossible to imagine that it was ever intended that the introduction of our complicated system of bankruptcy into our Consular Courts should include foreigners in its scope, to the extent of allowing them to be made or to become bankrupt. All other considerations apart, it must be borne in mind that the English system of bankruptcy is by no means of universal adoption in Europe, and if foreigners were included merely because they happen to reside in the oriental country where our Courts exercise bankruptcy jurisdiction, many might become bankrupt in the East whose national law did not permit them to do so. The same objection does not arise to allowing foreign debtors and creditors to come into the bankruptcy; indeed, the fact that they form part of the community might be urged in support of the practice, so long as it is kept within definite limits.

cf. p. 171.

The reason for the exercise of jurisdiction against foreigners.

Having in view the true meaning and operation of bankruptcy jurisdiction, it is suggested that the proper construction of the article is, that the "following *classes* of persons" referred to are, *(i)* resident British subjects, and *(ii)* their debtors and creditors.

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* The following are the possible constructions of this very involved sentence. The "classes of persons being either resident in China, or carrying on business there," are either.—

Possible constructions of art. 99.

A *i.* resident British subjects and their debtors and creditors, being British subjects;
ii. foreigners submitting to the jurisdiction of the Court: *or*

B *i.* resident British subjects;
ii. their debtors and creditors, being British subjects;
iii. foreigners submitting to the jurisdiction of the Court: *or*

C *i.* resident British subjects;
ii. their debtors and creditors, being British subjects, or foreigners submitting to the jurisdiction of the Court.

Twofold effect of bankruptcy jurisdiction the probable reason for the reference to "classes" of persons.

"Jurisdiction in bankruptcy" is twofold in its nature, and differs according to the persons to whom it is applied: those who may be made bankrupt, and those who are debtors to or creditors of the estate. Seeing, therefore, that it could not have been intended to make foreigners bankrupt, but that it might well have been intended to extend the operation of the administrative side of the jurisdiction to foreigners, the reason for keeping these two classes of persons distinct in the article becomes apparent. This being established, the grammar of the remainder of the sentence is plain: the condition attached to the exercise of jurisdiction—"being British subjects, or foreigners submitting the jurisdiction of the Court," relates only to the second class, the "debtors and creditors."

[Construction "C" in the footnote on p. 209.]

It would seem, therefore, as if the bankruptcy jurisdiction of the Consular Court may be exercised in the following way:—

(a) resident British subjects may be made bankrupt:
and the administrative powers of the Court may be exercised with regard to

(b) their British debtors and creditors: and

(c) their foreign debtors and creditors, if they submit to the jurisdiction of the Court.

With regard, however, to all three classes, the article attaches the prior condition that they must be either resident in China, or carry on business there.

Difficulty owing to double use of "resident."

But this prior condition introduces the difficulty already hinted at, which arises from the double use of the word "resident." This seems to involve the following amplification of the first class—"resident British subjects may be made bankrupt, *(x)* if they are resident in China, or *(y)* if they carry on business in China." The condition *(x)* carries no definite meaning on the face of it. Tautology being out of the question, I venture to make the following suggestion—that the word "resident" when secondly used, is intended to exclude the condition of "carrying on business" in the case of the persons liable to be made bankrupt.

It must be confessed that it is exceedingly difficult to find any other reason for this very curious phraseology.

If this is the true meaning of the words, then the statement of the law given above must be modified as follows:—

The bankruptcy jurisdiction of the Consular Court may be exercised in the following way:—

(*a*) resident British subjects may be made bankrupt: and the administrative powers of the Court may be exercised with regard to

Suggested definition of consular jurisdiction in bankruptcy;

(*b*) their British debtors and creditors, who either reside or carry on business in China: and

(*c*) their foreign debtors and creditors, who either reside or carry on business in China, if they submit to the jurisdiction of the Court.

The conclusion to which this analysis of the article leads us is that no mere paraphrase of s. 6 (1) (*d*) was intended, but that it was meant to be a substantive declaration of the jurisdiction of the Consular Courts. The differences between the provisions of the article and the English rule are as follows:—

(a) the condition of domicil within the jurisdiction is omitted;

(b) the condition of having a place of business within the jurisdiction is also omitted.

compared with s. 6 (1) (*d*).

(c) the time limit of a year in respect of residence disappears;

(d) ordinary residence or having a dwelling house is insufficient to satisfy the condition of residence, which must be, as defined in rule 1, having a fixed place of abode within the limits of the Order.

Rules of Court, rule 1.

Although this very narrow construction of the article restricts the bankruptcy jurisdiction to a great extent, yet I am disposed to think that it is the only construction possible, and that it was adopted in order to avoid any appearance of an extra-territorial extension of this jurisdiction. Concurrent bankruptcies raise questions of the greatest nicety, even when the concurrent proceedings are in British Courts in different parts of the Empire. It seems to be more than probable that, assuming the suggested construction of the article to be sound, it was deliberately drafted in this form in order to prevent the possibility of consular bankruptcies coming in to still further complicate an already too-complicated subject.

The importance of arriving at the strict meaning of the article will become clear when the fact is borne in mind, to which reference has already been made in considering the civil jurisdiction of the Court, that the bulk of the trade at Treaty Ports is carried on by firms or persons who carry on business, but who do

Bankruptcy of firms.

cf. p. 200.

not themselves reside there: and the question whether such firms or persons may be made bankrupt obviously goes to the root of the matter. The bare possibility forms an additional argument in favour of limiting the effect of consular bankruptcies to the territory within which the Court exercises its jurisdiction.

A firm as such cannot commit an act of bankruptcy: it must be the personal act or personal default of the person who is to be made bankrupt (per Brett, L. J. *ex parte Blain, re Sawers*). From this fundamental principle as to the law of bankruptcy in its application to firms, it follows that the limitation of the jurisdiction to "resident British subjects" makes it impossible for a firm carrying on business in China to be made bankrupt unless the act of bankruptcy is committed by a resident partner. And further, the rule deducible from the series of cases ending with *Cooke* v. *Charles A. Vogeler Co.*, that some acts of bankruptcy may be committed by an agent of a firm whose partners are non-resident, finds no application in this case for the same reason.

exp. Blain, re Sawers, 12 Ch. D. 522.

cf. "Nationality," Vol. II, Chap. VIII, p. 274.

Cooke v. *Charles A. Vogeler Co.*, 1901, A.C. 102.

B—The Acts of Bankruptcy.

Acts of bankruptcy are defined by s. 4 of the Act of 1883; the commission of one of the acts enumerated is the foundation of the exercise of jurisdiction against the debtor.

It was decided in *ex parte Pearson, re Pearson*, that s. 4 and s. 6 (1) (*d*) must be read together: that is to say, that an act of bankruptcy by itself is insufficient to give the Court jurisdiction, but must be committed by a person who satisfies the condition of s. 6 (1) (*d*); and this whether the debtor be a British subject or a foreigner (see *ex parte Barne, re Barne*). In the Consular Court, therefore, the act of bankruptcy must be committed by a person who fulfills the conditions of art. 99. The important question, therefore, which we have now to determine is how far, if at all, the extra-territorial provisions of s. 4 apply to the Consular Courts.

exp. Pearson re Pearson, 1892, 2 Q.B. 263.

exp. Barne re Barne, 16 Q.B.D. 522.

Summary of s. 4 (1) (*a*) (*b*) and (*c*) of Act of 1883.

The first three clauses of the section provide that, "if in England or elsewhere" the debtor makes a conveyance of his property to a trustee for the benefit of his creditors generally, or makes a fraudulent conveyance of any part of his property, or makes a conveyance of, or creates a charge on, any part of his property which would be void as a fraudulent preference if he were adjudged bankrupt, it is an act of bankruptcy. By adaptation

this must read, that if any one of these things is done "in China or elsewhere", it is an act of bankruptcy giving jurisdiction to the Consular Court: and the question arises whether this creation of jurisdiction in respect of an apparently extra-territorial act is beyond the treaty grant. The judgment of James L. J. in *ex parte Crispin, re Crispin*, makes it clear that the interpretation to be given to the word "elsewhere" is, that the conveyances referred to are those which, though actually made abroad, are intended to be executed or to operate according to English law: or are fraudulent, or fraudulent preferences by English law: that it is the operation of the deed, the result of the deed, and not the mere making of the deed, which the law treats as an act of bankruptcy. As the law does not treat the fact of making the deed "elsewhere" an act of bankruptcy, but regards only its operation within the jurisdiction, the adaptation of these clauses to the Consular Courts cannot be said to involve any extra-territorial extension of the jurisdiction of the Courts. The application of these provisions to the Consular Court would seem therefore to be this—Wherever the deed may have been made, if it is intended to operate in China according to the law enforced by the Consular Court, it is an act of bankruptcy under clauses (*b*) and (*c*) of s. 4, if it is fraudulent according to that law. With regard to clause (*a*) the question is more difficult. The operation of the deed "for the benefit of the creditors generally" according to the law enforced by the Consular Court, would seem to be limited to those creditors generally who come within the sphere of its bankruptcy jurisdiction: that is to say, British creditors in China. It could hardly refer to creditors who are not, but who may, if they choose to submit, come within the bankruptcy jurisdiction.

Acts of bankruptcy.

ex. Crispin, re Crispin, L.R. 8 Ch. 374.

Making a deed "elsewhere" to have effect in England.

Application of principle to Consular Court.

The act of bankruptcy defined in s. 4 (1) (*d*) as applied would read: "if with intent to defeat or delay his creditors" (that is, his British creditors in China) he "departs out of China, or being out of China remains out of China." "Departing out of China" would clearly be an act of bankruptcy in the case of a person who is "resident," that is, who has a fixed place of abode in China. But "remaining out of China," which is the act on which the petition rests, follows on to "being out of China"; and, quite apart from the fact that it negatives the existence of residence, this makes the act in question entirely extra-territorial, and it is

Being or remaining out of China.

cf. "Nationality," Vol. II, p. 266.

doubtful, therefore, whether it is an available act of bankruptcy in the Consular Court.

Service of bankruptcy notice.

The act of bankruptcy defined in s. 4 (1) (*g*), in its application to the Consular Court, requires the substitution of "in China" for "in England," in respect of the service of the bankruptcy notice after final judgment in the Consular Court in China: and the omission of the reference to service of such notice "elsewhere;" for although the absent debtor may yet be a "resident" debtor, the Court has apparently no power to sanction the service of such a notice beyond the limits of the Order. Absence in this case would, therefore, probably defeat the exercise of its bankruptcy jurisdiction.

Filing declaration of inability to pay debts, etc. *53 & 54 Vict. c. 71.*

No difficulty arises with regard to the other acts of bankruptcy defined in s. 4 (1) (*f*), and the Bankruptcy Act, 1890, s. 1, which stands in the place of s. 4 (1) (*e*) of the old Act, there being no substitutions to make, the act being to be performed within the limits of the Order.

C—The Extent of the Jurisdiction.

The debtors to the estate who may be sued, and the creditors who may prove, in the bankruptcy are British subjects, or foreigners submitting to the jurisdiction, in both cases being either resident or carrying on business in China.

Foreigners includes natives. In the case of such debtors it is not clear what form the submission to the jurisdiction would take other than actual payment: though possibly a submission in writing after application for payment by the trustee might be made. But this depends on another question: whether the trustee is precluded from making such an application to a person not normally subject to the jurisdiction, or from suing and recovering debts in the native or foreign Courts. The answer is probably the practical one that it is doubtful whether his right to sue would be recognised by such Courts: and that if he propounded his title, the Court would reply that his duties and official representation must be limited in the same manner as the jurisdiction of the Court of which he is an officer. But there does not appear any reason why the debtor himself should not recover debts due to him in the native or foreign Courts, for the defence which set up his bankruptcy in the British Consular Court would not, *ex hypothesi*, hold water, its jurisdiction not extending to such debtors without submission. Should he recover,

Power of trustee to recover debts.

however, the trustee would have the right to compel him to hand over the proceeds for the benefit of the estate.

In the case of native or foreign creditors to the estate the submission to the jurisdiction would be by proving their claims; in which case they would be put in the same position as British creditors: for example, with regard to any securities held by them.

Bankrupt's estate limited to property in China.

Next, as to the property of the bankrupt which falls within the jurisdiction of the Consular Court, for distribution among the creditors of the estate. By art. 5 (2) of the Order, the "extent of jurisdiction" of the Courts generally includes "the property and all personal and proprietary rights and liabilities within the said limits of British subjects, whether such subjects are within the said limits or not". This clause must also govern the bankruptcy jurisdiction: and therefore the divisible assets are limited to the bankrupt's property in China. This must exclude altogether the extra-territorial operation of the definition of "property" in s. 168 of the Bankruptcy Act, 1883, by which all property of the bankrupt "whether real or personal, and whether situate in England or elsewhere", vests in the trustee, in virtue of s. 20 (1). The general definition of the Order precludes the possibility of applying this to all property of the bankrupt "whether situate in China or elsewhere".

English definition of "property" inapplicable.

Section 118 of the English Act extends, without any adaptation, to the Consular Courts. It enacts that the Bankruptcy Courts in the United Kingdom, "and every British Court elsewhere having jurisdiction in bankruptcy", and the officers of those Courts respectively, are to be auxiliary to one another, acting in aid by mutually enforcing orders.

Consular Court auxiliary to English Court.

It seems abundantly clear that if Messrs. *A. B. & Co.* were made bankrupt in Hong Kong, their property in Shanghai could be recovered by means of a request to the Consular Court there; or, to take a wider case still, that if Messrs. *A. B. & Co.* traded also in England and were made bankrupt there, their property both in Hong Kong and Shanghai could be recovered for the benefit of the estate.

The effect of s. 118 is to make the Bankruptcy Courts in the dominions auxiliary to the Consular Courts in their bankruptcy jurisdiction. It would seem, however, that the limitation of this jurisdiction to property within the limits of the Order, referred

to in the preceding paragraph, renders this auxiliary jurisdiction of the British Courts inoperative.

Callender v. *Col. Sec. of Lagos*, 1891, A.C. 460.

The decision of the Judicial Committee in *Callender Sykes & Co.* v. *Colonial Secretary of Lagos* (known as *the Lagos case*) is often referred to in connexion with s. 118. The decision depended on the application of the English Bankruptcy Act of 1869 to a colony which had no Bankruptcy Court, and it is doubtful whether the question actually decided is likely to recur. It is, however, important to note one of the principles enunciated in the judgment. The section only relates to British Courts which have bankruptcy jurisdiction; otherwise they cannot act in aid of other British Bankruptcy Courts. This principle would apply to a Consular Court which has no bankruptcy jurisdiction.

at p. 465.

English warrants not executable.

Warrants of the English Bankruptcy Court cannot, however, be executed by request by the Consular Courts in China, as the provisions of s. 119, by which such warrants are executed out of England, are limited to the dominions.

The following special provisions of the Bankruptcy Act, 1883, also apply to the Consular Court:—

Small bankruptcies.

under s. 121, in respect of "small bankruptcies", which provides that when a petition is presented by or against a debtor, if the Court is satisfied that the debtor's property is not likely to exceed £300, it may make an order that the estate be administered in a summary manner. The section indicates the modifications which are to be introduced into the proceedings.

Small administration orders.

under s. 122, which gives power to the County Court Judge to make an administration order where a judgment has been obtained, and the debtor is unable to pay the amount forthwith, and alleges that his whole indebtedness amounts to not more than £50, inclusive of the judgment debt. The order may be coupled with an order for the payment of his debts by instalments or otherwise, and either in full or not as may appear practicable, and subject to conditions as to future earnings as the Court thinks just.

Estates of deceased insolvents.

under s. 125, and s. 21 of the Act of 1890, which deal with the administration in bankruptcy of the estate of a person dying insolvent. The petition may be presented by any creditor of the deceased debtor whose debt would have been

sufficient to support a bankruptcy petition against the debtor had he been alive.

The jurisdiction clause s. 125 (10) allows the administration order to be made by the Court within the jurisdiction of which the debtor resided or carried on business for the greater part of the six months immediately prior to his decease. It seems probable that this, like the provisions of s. 6 (1) (*d*), is supplemented by the general rule as to the jurisdiction of the Consular Court given in art. 99 of the Order. *cf.* p. 207.

Court to exercise powers of Board of Trade.

By rule 274 of the China Rules of Court, the powers of the Board of Trade, or of the Bankruptcy Court on the application or representation of the Board of Trade, are to be exercised by the Consular Court itself. This rule supplies all the necessary machinery for working the bankruptcy jurisdiction, but it leaves in some doubt the question how far the exercise the administrative side of that jurisdiction by the Consular Court is subject to the control of the Board of Trade.

Bankruptcy is specially dealt with in some of the treaties.

Muscat Treaty.

In Muscat it is provided, by art. *vii*, that if a British subject becomes bankrupt the Consul or resident agent is to take possession of all his property, and "give it up to his creditors to be divided among them. This having been done, the bankrupt shall be entitled to a full discharge from his creditors, and he shall not at any time afterwards be required to make up his deficiency, nor shall any property he may afterwards acquire be considered liable for that purpose". This somewhat primitive provision, made in 1839, is supplemented by a further clause intended to make it still more effective in favour of the local creditors. The Consul is to "use his endeavours to obtain for the benefit of the creditors any property of the bankrupt in another country, and to ascertain that everything possessed by the bankrupt at the time when he became insolvent has been given up without reserve".

The Muscat Order in Council of 1867, does not deal with the question; whereupon a variation of the question, discussed in Section III, as to the result of a difference between the Order in Council and the treaty, arises: for here the Order is silent, and it is by no means clear that a Court can act on a clause in a treaty in such circumstances. The case contemplated in s. 12 *cf* p. 29.

cf. p. 60. of the Principal Act does not arise, for the variance there dealt with is an express variance; and an omission cannot be "null and void".

Zanzibar Treaty. In the Zanzibar Treaty of 1886, the Consul is directed by art. *xviii* to "take possession of, recover, and realise all available property and assets" of a British subject who is adjudicated bankrupt, which is to be dealt with and distributed according to British bankruptcy law.

It would appear from the Zanzibar Order in Council, 1897, though the point is not very clear, that the Indian law of bankruptcy is applied in this country.

Turkish Capitulations. In the Turkish Capitulations, art. *viii* is to the effect that if an Englishman absconds or becomes bankrupt, "either for his own debt or as surety for another", the debt is to be demanded from the real debtor only. The bankruptcy jurisdiction of the Consular Courts in Turkey is based on the same principle as in China.

cf. p. 206 *note*.

XII

Domicil, Marriage, and Divorce in Oriental Countries.

I PASS now from the expressed or implied consequences of the treaty grant to those which are independent of it, resulting from the mere fact of residence in oriental countries, and with which the treaty has little or no concern. The most important of these questions arise in connexion with domicil, marriage and divorce.

Domicil.

Law of domicil in oriental countries. The question of domicil, with all its attendant results, inevitably attracts immediate attention. It is one of the few questions which has been the subject of express decision. "*Tootal's Trusts*" is a household word among the communities which are affected by the principle it established, that no domicil can be acquired by a British subject in an oriental country. Although

re Tootal's Trust, 23 Ch. D. 532.

the decision was quoted with approval by the Judicial Committee in *Abd-ul-Messih* v. *Farra*, I think, with great respect, that the judgment contains certain misconceptions, or at least leaves room for a further examination into the question. In the case itself these misconceptions and the unexhaustive nature of the argument were of little moment. It involved only the least of the consequences of the doctrine—the payment of tribute to Cæsar. And it was strictly a case of *aut Cæsari, aut nulli*, for the oriental Government does not attempt to tax foreigners, or foreign estates as they pass from hand to hand. The English law exacts legacy duty from the personal estate of a testator or intestate domiciled in England, and Mr. Tootal's English domicil of origin was held still to exist in spite of his clear *animus manendi* in the Treaty Port of Shanghai. The application of the remedy was easy since the fund was in Court, and the officers of the Court were bound to see that the legacy duty, if payable, was paid before the fund was parted with. But even supposing that the fund had not been so conveniently within the powers of the Court, it would, under Order XI, rule *d*, have had jurisdiction to deal with the matter. But there might be many circumstances which would induce the Court to decline to deal with it, and the question arises whether, alternatively or concurrently, the Consular Court, under the general jurisdiction conferred on it, is not also bound in such a case to see that the legacy duty, if payable, is paid, on so much of the estate as is situate within its jurisdiction. In the case of re-sealing British or colonial probates this is expressly provided by art. 106 (2) of the Order. Before dealing with the principles of domicil laid down in this case, there are certain *dicta* contained in Mr. Justice Chitty's judgment which, I venture to think, are open to criticism: the following amongst others.

Abd-ul-Messih v. *Farra*, L.R. 13 A.C. at p. 441.

The question was argued with reference to payment of legacy duty.

23 Ch. D. at p. 541.

cf. p. 150.

Dicta of Chitty J. criticised.

"The exceptions from the jurisdiction of the Court [*i.e.* the Consular Court] as a matrimonial Court in regard to dissolution, nullity, or jactitation of marriage are important, and the effect of them is apparently to leave Englishmen subject to the jurisdiction of the Court for matrimonial causes in England in respect of the excepted matters."

23 Ch. D. at p. 536.

"The British community at Shanghai, such as it is, resides on foreign territory; it is not a British Colony, nor even a Crown Colony, although by the statutes above referred to the Crown

ib. at p. 538.

has, as between itself and its own subjects there, a jurisdiction similar to that exercised in conquered or ceded territory."

23 Ch. D. at p. 540. "The jurisdiction conferred on the Supreme Court at Shanghai is merely the jurisdiction of Her Majesty exercisable in China, and confined to British subjects. It is not exclusive and does not oust the jurisdiction of Her Majesty's Courts in England."

With great respect it is submitted that all these *dicta* are calculated to mislead the student. They are at best only imperfect or incomplete statements of the law; but in so recondite a subject such statements are misleading, undue reliance being inevitably placed upon them when they are referred to, more especially as being contained in a judgment which, so far, has been put in the position of a leading case on the subject with which it deals. It is the more important to note them as I venture to think that the same imperfect and incomplete treatment permeated the learned Judge's analysis of the main question with which he was dealing. Enough has already been said to show, for example, how misleading is the statement that the jurisdiction of the King is "similar to that exercised in conquered or ceded territory". And the last sentence quoted suggests almost inevitably that the English Courts have jurisdiction generally over British subjects in China. The meaning of the learned Judge probably was, however, that the fact that a Consular Court has jurisdiction in certain matters does not oust the jurisdiction of the English Courts if they also have jurisdiction in those matters: otherwise the proposition is untrue. But this is merely stating what is true of all Courts; it is the fundamental idea contained in the term "concurrent jurisdiction", and in the rules which the Courts have worked out in connexion therewith. The fact that certain wills which are provable in the Court at Shanghai are also within the jurisdiction of the Probate Court in England, depends on the rules of jurisdiction of that Court; it proves nothing to the point, because many wills which are provable in France, or Germany, or Russia, are also within the jurisdiction of the English Probate Court; and in certain cases not only may, but must, receive the authority of that Court before they can be used as an effective title to property in England.

cf. p. 22.

The existence of concurrent jurisdiction in other Courts.

These *dicta* formed, however, no material part of the judgment,

and we may pass to the three principal propositions which led up to the decision in the case. These were

Principles established by Chitty J.

first:—there is no Chinese domicil;

secondly:—there is no Anglo-Chinese domicil;

thirdly:—there is no exterritorial domicil: and therefore a prior domicil, determined in a subsequent case to be the domicil of origin, remains.

First:—there is no Chinese domicil: in other words, no domicil can be acquired in an oriental country.

No oriental domicil. 23 Ch. D. at p. 534.

For this principle, said to depend on the immiscible nature of occidental and oriental races, *the Indian Chief* was cited as the main authority. "The difference," to quote the often-quoted phrase, "between the religion, laws, manners and customs of the Chinese and of Englishmen is so great as to raise every presumption against such a domicil." The *presumption* is against it; but so far as I can see, there is no prior authority for saying that such a domicil cannot be acquired. Lord Stowell's judgment does not support it, for, although cited, it did not deal with this branch of the subject; and the current of the argument in *Maltass* v. *Maltass*, and even in the more recent case, *in re Bethell*, assumes, in the one case, that it was not impossible, treaty considerations apart, for an Englishman to become a Turk, and so subject to the law of Turkey: and in the other, that a little more evidence only was necessary to show that Mr. Bethell had actually become a Barolong. This points, of course, to nationality; but if nationality can be acquired in a Mahommedan or barbarous State, it would follow that domicil can be acquired therein also. On this point Dr. Lushington said in *Maltass* v. *Maltass*, "I give no opinion whether a British subject can or cannot acquire a Turkish domicil; but this I must say—I think every presumption is against the intention of British Christian subjects voluntarily becoming domiciled in the dominions of the Porte."

the Indian Chief, 3 Rob. Adm. 12.

Presumption is against oriental domicil.

Maltass v. *Maltass*, 1 Rob. Eccl. 67. *re Bethell*, 38 Ch. D. 220.

But the conditions are changed when an exterritorial treaty has been entered into with the "barbarous or non-Christian State", and this both as regards nationality and domicil; and as, practically, the whole of the uncivilised world has now been brought within the scope of the King's foreign jurisdiction, the above argument must be regarded as the theoretical aspect of the case. In practice treaty, statute, and Order in Council have compassed the British subject in these countries round about

Effect of treaty on acquisition of oriental domicil or nationality.

with privileges. And with the acquisition of privileges by each member of the community has come also the acquisition of rights each against the other. To take the simplest example: one English subject has a right to sue another English subject in the Consular Courts. But if an Englishman could divest himself of his English nationality, and become a subject of the oriental country, the right to sue him in the Consular Court would be gone. Domicil stands on a somewhat lower plane, but the same principle must apply: for whether it be considered as a status voluntarily or involuntarily acquired, the effect of it is that if it were acquired in a country subject to foreign jurisdiction, this also would deprive his fellow nationals of their right of redress in the Consular Courts in cases where jurisdiction is founded on domicil.

Subjects cannot divest themselves of duties resulting from exterritoriality.

cf. p. 5.

And whether we regard the legislative authority of British law in an oriental country to be the Sovereign of that country or the King of England, the same thing results in this respect. The right in question has been expressly created by law against British subjects; it is vested in others besides their fellow-subjects, and it is impossible for them either voluntarily to withdraw themselves, or involuntarily to be withdrawn, from the compass of the duties correlative to those rights. In this respect nationality and domicil stand on the same basis of principle.

Maltass v. *Maltass*, 1 Rob. Eccl. 67.

In *Maltass* v. *Maltass*, Dr. Lushington considered the question from another point of view: whether the treaty with the Porte applied to all British subjects both temporarily and permanently resident in Turkish dominions; and the obvious answer was that it did. From this it followed as a legitimate deduction, identical with the point just taken, that it is impossible for a British subject to be living in Turkey out of the protection of the treaty.

Subjects cannot be out of the exterritorial protection.

It should, however, be pointed out that the consequences of acquiring a domicil apart from nationality in an oriental country, if it were possible, would make little difference in cases dependent on the law of the domicil; for the status would be, for example, "British subject domiciled in Turkey." In any case, therefore, in which the *lex domicilii* had to be applied, the law would be the law of Turkey, which, in the cases of British subjects, is by treaty the law of England.

The broad principle must, however, be admitted that the treaty so binds the persons it refers to that they cannot loosen the obligations it imposes on them.

The result, it is submitted, is, that the presumption is against a British subject becoming domiciled in a barbarous State; but where there is an exterritorial treaty with such a State, the acquisition of a domicil in that State is impossible.

Converse case: domicil of orientals in Europe.

There is a converse side to this question, on which some light must be thrown, if possible. What is the position of orientals in this country? Probably the principle of the "immiscible nature" applies both ways, so as to raise a presumption against the acquisition of domicil by an oriental in a western community; but the same reasons do not exist for holding it to be impossible. And as for naturalization, the desire to become an Englishman can be shown by compliance with certain statutory forms.

Naturalization of orientals.

But exterritorial treaties are not reciprocal*: the rights they confer are limited to the country which confers them. And thus a Corean, for example, in England could be sued in the English Courts as any other resident foreigner. And there seems no valid reason why, his own laws not prohibiting so as to raise a presumption against any *animus manendi*, such a person should not also acquire an English domicil.

The possibility of acquiring an oriental nationality has been referred to in the foregoing argument; it will, therefore be convenient to conclude this branch of the subject by considering how far the question is affected by s. 6 of the Naturalization Act, which deals with ex-patriation, or the capacity of a British subject to renounce allegiance to His Majesty. The section provides that "any British subject who . . . . may . . . . when in any foreign State and not under any disability, voluntarily become naturalized in such State, shall, from and after the time of his so having become naturalized in such foreign State, be deemed to have ceased to be a British subject, and be regarded as an alien".

33 & 34 Vict. c. 14, s. 6.

cf. "Nationality," Vol. I, Chap. X, p. 136.

Now, in the first place, there is nothing in the section limiting the countries in which a British subject, desiring to expatriate himself, may be naturalized. There is no question of any formal renunciation; he *ipso facto* ceases to be a British subject when he naturalizes himself in another country. He may do this

* See, however, an exception to this rule in some of the Persian Treaties, in which Persians in the territory of the other contracting Power are put on the footing of subjects of the most-favoured-nation. *cf.* p. 46.

according to the naturalization law of that country; and there seems to be no reason on the face of it, why he should not also be able to do it according to some custom among barbarian tribes equivalent to such a law. The possibility was admitted all through the argument in *Bethell's case* that he might, had he so wished, have become one of the Baralong tribe. Whether the formality be the receipt of a certificate from a Foreign Minister of State, or a gift to a Chief of a present of oxen, if the effect be that thenceforward the person is regarded as a national or a tribesman, the English Courts must, under the Act, regard him as an alien.

re Bethell, 38 Ch. D. 220.

Disability prevents ex-patriation.

But in an oriental country the conditions seem to be changed. It is doubtful whether the permission contained in the section of the Naturlization Act could be limited expressly by the law under which British subjects in an oriental country are governed. But the section itself refers to subjects "not under any disability"; and it is suggested, though the point is far from clear, that the result of being within the exterritorial privilege does amount to a disability within the meaning of the section, which prevents British subjects from becoming naturalized in such a country.

cf. "Nationality," Vol. I, p. 155.

No Anglo-oriental domicil possible.

Secondly:—there is no Anglo-Chinese, or Anglo-oriental, domicil, similar in its nature to the Anglo-Indian domicil.

23 Ch. D. at p. 537.

the Indian Chief, 3 Rob. Adm. 12.

It is this branch of the subject which is governed by the decision in *the Indian Chief*. It is only necessary, but still very necessary, to understand what the term "Anglo-Indian domicil" means, to see that the question does not admit of argument. The decision in that much-quoted, much-misunderstood case, had nothing to do with exterritoriality as now existing. It is true that Sir William Scott based his judgment on the immiscible characters which from old time had kept Westerns apart from Easterns, even when they had set up factories in their midst; but the "strangers and sojourners" to whom the learned Judge referred were the foreigners who worked in the British factories, not the British themselves. And these foreigners were strangers and sojourners because not only did they not acquire any national character under, or protection from, the general sovereignty of the country: not only did they not trade under any recognized authority from their own country, so as to retain their original nationality: but because they derived their present national

character from that of the factory under whose protection they lived and carried on their trade. The domicil which they acquired was not Indian, because although the authority of the Mogul was practically non-existent it had not yet been entirely destroyed. It was not English, nor English-colonial, because the authority of the Queen was not yet fully existent, although the East India Company exercised actual authority there. It was "Anglo-Indian," because they worked in a factory established by Englishmen in India which was still the Empire of the Mogul.

It would appear from Lord Watson's judgment in *Abd-ul-Messih* v. *Farra*, that the term "Anglo-Indian domicil" was also applied to British subjects, and that, so far as they were concerned, the name indicated that, although they were permanently resident in the territory of India, this permanent residence imported subjection not to Indian law but to British law. The distinction between the Anglo-Indian domicil in this aspect of it, and the suggested Anglo-Egyptian domicil, or Anglo-Chinese domicil, is that India was then becoming, if it had not already become, "British India," a process to which neither Egypt nor China has submitted.

Abd-ul-Messih v. *Farra*, 13 A.C. at p. 440.

In the same way I imagine that, while the throne of the Mogul still existed, there must have been a Franco-Indian domicil at Chandernagore, and a Portugo-Indian domicil at Goa.

It was strictly speaking a "factory domicil": and as the factory included people of many nationalities, all of whom were withdrawn from the operation of the Indian law, to all of them, therefore, a domicil attached which was that of the factory in which they had permanently established themselves, and to whose national law they were subject.* For any larger proposition the decision in *the Indian Chief* is no authority. The rhetoric of the judgment tempts to fascinating quotations, but the facts on which the decision was based have passed away. Under the system of exterritoriality each person carries his nationality with him under the sanction of his treaty. A Venezuelan working in the godowns of an English firm in Canton could not claim the privileges of the Anglo-Chinese treaty; and as there is no treaty between Venezuela and China, nor any treaty

Consequence of disappearance of factory domicil.

the Indian Chief, 3 Rob. Adm. 12. *cf.* p. 175.

cf. pp. 174, *et seq.*

* There was, I believe, in old days a similar factory in St. Petersburg, and it seems probable that the same principles would have applied to create an Anglo-Russian domicil.

to which China is a party sanctioning the inclusion of Venezuelans in the privilege of British exterritoriality, he would be under the national law of China, and subject to the Chinese Courts. Obviously there is no Anglo-Chinese domicil.

The nearest approach under the present system to the factory domicil is to be found in the case of people under British protection, a question which has already been fully considered; but it differs from it in all essential particulars, and is, or should be, entirely dependent on treaty.

cf. pp. 67, *et seq.*

NOTE.—It will be noticed that Lord Watson's judgment does not deal with Anglo-Indian domicil in its relation to foreigners, nor was it necessary to the question then being considered to refer to it. There is one part of the judgment, however, which does not seem to fit in with Sir W. Scott's explanation. The learned Lord said—Anglo-Indian domicil "is altogether independent of political status; it arises from residence in India, and has always been held to carry with it the territorial law of that country, whether under the empire of the Queen, or under the previous rule of the East India Company, which the Courts in England treated (in questions of domicil) as an independent government." The "territorial law" referred to is presumably the English law of India. But it is difficult to explain the phrase "whether under the empire of the Queen." With the establishment of the Queen's Government in India, it would seem as if the necessity for "Anglo-Indian domicil" had vanished. So far as British subjects are concerned they may acquire a domicil in British India, as they may acquire a domicil in Australia: the resulting law applicable being the law which the British Government has sanctioned—the laws passed by the Government of India for the white residents, the Hindu law for natives. And so far as foreigners are concerned they would come under the category of white residents. There should be no more objection to the use of the term "Indian domicil" than there is to Australian domicil. But if the former term should be thought to connote the application of Hindu law to white residents, then "British Indian" domicil might be adopted. It seems inadvisable to preserve the old term "Anglo-Indian domicil," which, as we have seen, had a very special significance of its own.

No domicil, arising from exterritorial privilege.

Thirdly:—there is no exterritorial domicil, no domicil springing out of the exterritorial privilege. In other words, no domicil of any sort or description arises from long-continued residence in a Treaty Port, or elsewhere, in an Oriental country.

In an expanded form the principle laid down is this: though all the conditions are satisfied which would create a domicil of choice in a foreign country under ordinary circumstances, no domicil can be acquired *quoad* the British community established in a country which has granted exterritorial privileges. If no

domicil of choice can be acquired in such a country, *a fortiori* there can be no domicil of origin there.

Yet an important consequence does result from an intention to reside permanently among such a community. Although it does not destroy the domicil of origin, it must from the very circumstances of the case, destroy a pre-existing domicil of choice, the conditions under which such a domicil has arisen having ceased. The result is that the domicil of origin revives. (*per* Lord Watson, in *Abd-ul-Messih* v. *Farra.*)

Revival of domicil of origin.

Abd-ul-Messih v. *Farra*, L.R. 13 A.C. at p. 445.

If the British community in the Treaty Port were purely English, and if English law without any modifications were administered by the Courts, the point would have little importance, for the exterritorial domicil, if it existed, would produce in all cases precisely the same result as the English domicil. But the importance of the question is realised directly we come to consider its application to every part of the Empire, as the following case will show. A person with a domicil of origin in Mauritius resides permanently and with a complete *animus manendi* in Shanghai; does he retain, and do his children succeed to, his Mauritian domicil?* It is not necessary even to go so far afield as a colony where the French Civil Code is in force. Do people domiciled in Scotland carry with them for all time into the British settlement in an oriental country, the law of, for example, legitimation by subsequent marriage? This would seem to be the natural corollary from Mr. Justice Chitty's decision.

The most superficial glance at the subject reveals difficulties and complications which it might be considered the policy of the law to remove in the interests of the community. The elements exist in every exterritorial community out of which these complications may arise at any moment, and the settlement of them in accordance with principles now assumed to be the law cannot fail to result in unexpected hardship and injustice. It is necessary, therefore, to examine with some care whether the opposite view is maintainable or not.

A priori, there does not seem to be much fault to find with such an argument as this. The expression "domicil of choice" connotes the existence of certain circumstances and a certain idea

Statement of the argument on opposition to decision in *re Tootal's Trusts.*

* Dr. Lushington alluded to this point as one of great difficulty in *Maltass* v. *Maltass*, taking British Guiana as an example.

Maltass v. *Maltass*, 1 Rob. Eccl. at p. 80.

in connexion with residence in a foreign country, and on certain occasions the application of certain principles of law. When the same circumstances and the same idea exist in connexion with residence among an exterritorial community, the same principles of law should on the same occasions, be applied; and to this the expression "domicil of choice" should be equally applicable.

The circumstances are permanent residence, the establishment of a settled home, the absence of *animus revertendi*. The idea is the setting up of that relationship to the rest of the community which is involved in becoming permanently a member of it. The occasions are those on which questions which depend on this personal relationship between one member of the community and another arise, and which the law has decided are to be governed by the same rules. The whole case seems equally applicable to an exterritorial community governed by its home law as to a national community governed by its national law.

Enquiry whether domicil is the relation of a person to a locality or a community.

This argument is, however, not supported by Mr. Justice Chitty's judgment, which rejects entirely the notion that domicil is more intimately related to the community than to the locality. The learned Judge said that there is no authority in English law that an individual can become domiciled as a member of a community which is not the community possessing the supreme or sovereign territorial power. But this merely states the question in issue. In the absence of authority we are plunged inevitably into the numerous definitions which have been given of the term "domicil"; and in this connexion it is not inappropriate to refer to Dr. Lushington's remark in *Maltass* v. *Maltass* that, "even at this day [1844], although so many powerful minds have been applied to the question, there is no universally-agreed definition of the word domicil—no agreed enumeration of the ingredients which constitute domicil . . . Indeed, I think there are no less than fourteen or fifteen different definitions of this word." With all deference I think that *Tootal's Trusts* has not tended to the final solution of the matter.

Maltass v. *Maltass*, 1 Rob. Eccl. at p. 74.

re Tootal's Trusts, 23 Ch. D. 532.

Permanent residence in a territory or country at some period of life is an essential part of the legal idea of domicil. "Domicil of choice," said Lord Westbury, in *Udny* v. *Udny*, "is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place with

Udny v. *Udny*, L.R. 1 Sc. App. 458.

the intention of continuing to reside there for an unlimited time." He speaks of residence in a particular place, and not of a man attaching himself to a particular community resident in the place. In *Bell* v. *Kennedy*, the same learned Lord used similar expressions. Domicil is an idea of the law; "it is the relation which the law creates between an individual and a particular locality or country." Again he refers to locality or country, and to a particular society existing in the locality or country. "The idea of domicil" said Lord Watson, in *Abd-ul-Messih* v. *Farra*, "independent of locality, and arising simply from membership of a privileged society, is not reconcilable with any of the numerous definitions of domicil to be found in the books. In most, if not all of these, from the Roman Code to Story's, "Conflict," domicil is defined as a locality—as the place where a man has his principal establishment and true home." . . . . "According to English law, the conclusion or inference is that the man has thereby attracted to himself the municipal law of the territory in which he has voluntarily settled, so that it becomes the measure of his personal capacity, upon which his majority or minority, his succession, and testacy or intestacy must depend. But the law which thus regulates his personal status must be that of the governing Power in whose dominions he resides; and residence in a foreign country, without subjection to its municipal laws and customs, is therefore ineffectual to create a new domicil." . . . . "But it is needless to pursue this topic farther. Their Lordships are satisfied that there is neither principle nor authority for holding that there is such a thing as domicil arising from society, and not from connexion with a locality."

Bell v. *Kennedy*, L.R. 1 Sc. App. 320.

Abd-ul-Messih v. *Farra*, 13 A.C. at p. 439.

It would serve no useful purpose to accumulate quotations,* which, if the construction put upon them in the two authorities now under consideration is sound, are without exception so expressed as to be against the acquisition of an exterritorial domicil. It may be taken for granted that all the well-known definitions do refer domicil to "locality" and not to "community." And yet the argument does not seem to be very conclusive.

* Mr. Dicey's definition, however, must not be omitted:—"The domicil of any person is, in general, the place or country which is in fact his permanent home, but is in some cases the place or country which, whether it be in fact his home or not, is determined to be his home by a rule of law". This is followed by the comment, "No definition of domicil has given entire satisfaction to English Judges." [Conflict of Laws: p. 79.]

Possibility of relationship to a community being involved in domicil considered.

At the time when many of the definitions were framed, the law applicable to exterritoriality was little known, and in some cases was not present in the mind of the Judges who framed them. Locality and territory were obviously the terms which would be used; the community among which a person settled being as obviously identified with the locality. But it attached undue importance to the word to insist that because "locality" is used in the definitions in cases where there could be no question as to its fitness, therefore it excluded the idea of "relationship to a community" in the first case that came up for argument, in which the point was whether "relationship to a community" is or is not involved in domicil.

Or, looking at the question the other way: if the word "community" had been used in the definitions, as it well might have been, with reference to the community residing in a locality, it would have been begging the question to say that therefore they applied to the exceptional circumstances of an exterritorial community. It is just these exceptional circumstances which necessitate an enquiry whether "locality" or "community" is the more accurate term: and I do not find in the judgments any trace of an examination whether the legal consequences which in a territorial community attach to the idea expressed by the word domicil, should not also attach when the circumstances which are involved in the idea exist in an exterritorial community.

Let us examine what these legal consequences are.

Legal consequences of domicil.

They can be summarised in one short sentence. The law of his domicil governs a man's personal status or capacity. That is to say, it governs the relation of one member of a community to another; only in the smallest degree does it govern his relation to the locality. It is essentially the law which regulates the personal dealings of the community one with the other: it is the law which keeps the community together: it is the law of the community which any member of it carries with him into other lands, and which forms the one exception to the fundamental rule that a man is subject to the laws of the country in which he is. In his personal status he is governed by the law of the community among which he has elected to live; the law of the land gives way in such matters because of the great inconvenience, hardship, and injustice which would ensue if it enforced its principles on one who was only temporarily within its power,

which might be opposed to those of the community to which he in fact belonged. It is true that the law of the community is the law of the locality in which the community resides; but it is the community which is affected by the application of the *lex domicilii*, not the locality, rarely the Government of the locality. It seems more true to say that the principle requires the law of the community to be enforced, rather than the law of the locality, because in dealing with a person on questions of personal status, the Courts would be touching the rights of hundreds which are bound up with his. From whatever point of view it is looked at, the important fact on which the reason of the rule depends is residence among a community, not residence in a locality. In Lord Esher's judgment in *Niboyet* v. *Niboyet*, the law of domicil is treated throughout as the law which, for certain enacted or predicated causes, affects the personal relations of individuals to each other, that is to say, their relations to the community.

Importance of a person's relationship to the community among which he resides.

Niboyet v. *Niboyet*, 4 P.D. at p. 9.

"The status of marriage," said the learned Judge, who dissented from the judgment of the majority of the Court, "is the legal position of the married person as such in the community or in relation to the community. Which community is it which is interested in such relation? None other than the community of which he is a member—that is, the community with which he is living as a part of it. But that in fact is the community in which he is living so as to be one of the families of it. That is the community in which he is living at home with intent that among or in it should be the home of his married life. But that is the place of his domicil."

The judgments of the majority of the Court carry the idea still further. If the law of domicil should appear to interpose technical relief, as it does in the case of a Consul, to the duty of conforming to the laws of the community among which the permanent home has been established, the law of the actual domicil must give way, and the law of the community to which the parties in fact belong must prevail.

And so through the whole law of personal status or capacity, whether it be the capacity to contract, or a question of sanity or insanity, or of guardianship, or a question of succession, or any other question which is governed by the law of the domicil, it is the position of the person with regard to the rest of the community which is alone affected and considered.

General principles which determine domicil applicable to an exterritorial community.

The community referred to is of course the community which inhabits a country, or a definite locality; in other words, a community which has laws and customs of its own, which the Government of the locality imposes on all members of it; but the question is whether the reason of the rule, the whole principle on which it is based, do not render it as applicable to an exterritorial community as to a territorial one. On the hypothesis the circumstances may be the same in the one as in the other. A man may set up his home in a Treaty Port, he may have banished for ever the idea of returning to his native country; the *animus manendi* may be clear without shadow of doubt: on the hypothesis, too, there is a body of law regulating the community. Why is it impossible then for the ordinary principles of the law to be applied, and for the personal relations of the permanent members of the community to come under that law permanently as the law of the domicil of their choice: of those who are born members of the community, as the law of the domicil of their origin?

Permanent residence in oriental country destroys existing domicil of choice, and revives domicil of origin.

The consequences of a fundamental principle of this nature should at least be logical. Now, the most important consequence of the decision has already been pointed out. It is that the *animus manendi* in China, which may undoubtedly exist so far as it is possible for a man to have it, should destroy a previous domicil of choice and yet revive a domicil of origin, when there is, *ex hypothesi*, no *animus revertendi* to that domicil.

This rider to Mr. Justice Chitty's decision results from the rule that no man can be without a domicil. The pre-existing domicil of choice must be destroyed, because *ex hypothesi* the choice of that locality as a domicil has ceased. But although a departure from the country, coupled with an absence of *animus revertendi*, destroys a domicil of choice at once, it does not destroy a domicil of origin until a fresh domicil of choice is determined on. But when a domicil of choice is destroyed, the domicil of origin is resumed. A man cannot be without a domicil, because certain questions in connexion with himself and his property are determinable solely by the law of his domicil; and, therefore, either for this very sufficient reason, or for that law of nature which ultimately turns wandering footsteps homewards, the domicil of origin is held to resume its sway. But how is it possible to apply a rule, which is at best a mechanical

contrivance for supplying a want of definite intention, to a case where there are definite intention, and every ingredient and every idea involved in the assumption of a new domicil? There is a community which, being fixed in a definite locality, has no resemblance to a nomad tribe: it is a community in which the relations usually governed by the law of the domicil arise: there is a governing body of law which might be applied to those relations: and there is a desire to become a member of the community, and to enter into those relations. There is no analogy whatever to the facts to which the rule as to the resumption of domicil of origin is commonly applicable; and in the absence of analogy it is difficult to find the warrant for its application.

On the other hand the conditions of residence render it unstable.

There is one reason, however, which may perhaps be urged on the other side. I am not sure that, after all, the circumstances of the two cases are precisely identical. The conditions attached to the residence of the community are not altogether stable. Permanent residence may be proposed by the person who sets up his home among the community; but *force majeur* may dispose otherwise. The native Government may decide to dispense with the presence of the foreign community altogether. The home Government may decide to abandon exterritorial privileges in favour of the native law. There is, therefore, a contingency attached to residence in a Treaty Port, even though coupled with an intention never to return to England, which may possibly destroy the permanence of those circumstances which are essential to the idea of domicil. On this ground it is possible perhaps that the decision in *re Tootal's Trusts* may be supported; but even this requires careful consideration.

re Tootal's Trusts, 23 Ch. D. 532.

Is it possible to contend that a person who has abandoned without question all idea of returning to Mauritius, for example, and so has satisfied one essential condition: who has, moreover, manifested by word and deed an intention of settling permanently among the British residents in China, and so has satisfied another essential condition: is it possible to contend that his intention cannot be effective because *force majeur* may interrupt the fulfilment of his desire? Further, it is to be remembered that the question of domicil as often as not arises after death, when the desire has been completely satisfied. And after all the question of fact involved in the *animus manendi* in China is the desire to become part of the highly favoured British community

which resides there: to share its privileges, its freedom from Chinese taxation, and to come under the British law by which it is governed. It is difficult to see how the possible action of either of the Powers concerned can affect this question. It seems more reasonable to suggest that the consequences of this action should be considered after it has happened and not before. If residence in China were abruptly terminated by the Chinese Government, or if the privileges were voluntarily surrendered by our own, the necessity would arise for choosing a fresh domicil. Continued residence in China would indicate a wish to adopt a Chinese domicil under the altered state of things; settling down elsewhere would afford some evidence of a desire to establish a new domicil, and in the absence of either the domicil of origin would revive. The question is in reality a very practical one; for I have no doubt that some cases of this nature must have arisen in Japan in consequence of the abolition of exterritoriality, and may at any moment bring the question again before the Courts.

Practical aspect of the question in the case of Japan.

I venture to think that when the question is again raised, it will be found that the principles established by the most recent cases necessitate a re-consideration of the law laid down on this subject by Mr. Justice Chitty.

In 1888, when that law was approved in *Abd-ul-Messih* v. *Farra*, to the Judicial Committee itself had not had an occasion for going so deep down among the roots of the subject as they have done in recent years. I cannot put the case in any clearer light than by setting the two propositions side by side. Lord Watson laid down the rule as to domicil thus: The law which regulates a man's personal status must be that of the governing power in whose dominions he resides. . The law as to exterritoriality established in the *Zanzibar case* is that the law administered by the English Consular Courts under the Order in Council is the law of the governing Power in the dominions in which they are established.

Abd-ul-Messih v. *Farra*, L.R. 13 A.C. 431.

Sec. of State v. *Charlesworth*, 1901, A.C. 375. *cf.* p. 5.

Linking these two propositions together, it is suggested that the inevitable result is a modification of Lord Watson's interpretation of the law of domicil referred to above on the following lines:—The law which regulates a man's personal status must be that of the governing Power in whose dominions his intention is permanently to reside, or must be so recognised and

Suggested rule as to exterritorial domicil.

established by that governing Power as to be in fact the law of the land.

I cannot think it essential that the community of which he forms part should be the governing community; but I think that it should be so recognised by the governing community that the laws by which it is governed are part of the established government of the country.

We have seen, in the decision in *re Tootal's Trusts* itself, one of the consequences of the opposite doctrine. Its application was very easy, "because the fund was in Court," and the legacy duty due in England was ordered to be paid. But there are many other consequences.

re Tootal's Trusts, 23 Ch. D. 532.

Take the case of an action brought in England against a person in Mr. Tootal's position in his lifetime. His domicil is English, and, therefore, under Order XI, rule 1 (*e*), a writ may be served on him out of the jurisdiction, because he is domiciled within the jurisdiction, irrespective of the nature of the relief sought.

To those who have studied the law and procedure of jurisdiction over absent defendants, this will, I think, appear to be almost the *reductio ad absurdum* of the principle.

In the case of *Abd-ul-Messih* v. *Farra* the principle was applied to persons under the protection of a Government which had acquired exterritorial privileges. It is clear that whether the law be as decided by Mr. Justice Chitty, or as I have suggested, the same rule must apply to persons who are protected by a foreign Government in the oriental country; for that protection, when recognised by the oriental Government makes them part of the exterritorial community, giving them the same privileges and putting them under the same obligations as the other members of it.

Abd-ul-Messih v. *Farra*, L.R. 13 A.C. 431.

Application of rule to protected persons.

The case of a protected country makes the argument still stronger. There are not then many foreign communities, as in an ordinary case of foreign jurisdiction; but all the foreign residents, of whatever nationality, are gathered into one community placed by the law of the protected State under that of the protecting State.

Case of a protected state.

Protection is, as we have seen, the ultimate form of exterritoriality; but the next step is complete absorption, from which it differs in all material respects. The principles of exterritoriality

cf. p. 10.

must apply to a protected State; and therefore also the rule laid down by Mr. Justice Chitty as to domicil, if it is sound. But the argument against that rule is in this case almost conclusive. "The law which regulates a man's personal status must be that of the governing Power in whose dominions he resides." It needs surely little argument to show that it is possible to substitute for "governing Power" in this sentence, the "Power which stands in lieu of the governing Power." Whether this be for all purposes or not is immaterial, so long as the relations between the two States come within the accepted definition of protection, for it is obvious that in this matter of domicil there could not be two rules varying according as the protection is complete or partial. And if this is true as to protection, it must also be true of that lower form of this artificial relationship between two States which is known as "foreign jurisdiction."

Argument from "protected State" to "foreign jurisdiction."

In conclusion, the final result of Mr. Justice Chitty's decision must be noted, and its application in the case of *Abd-ul-Messih* given by way of illustration.

The exterritorial domicil being non-existent in any given case in which domicil is a question of importance, the person's actual domicil remains to be determined, in order to ascertain what the *lex domicilii* is by which such a question as that of succession has to be decided.

Facts in *Abd-ul-Messih's case.*

In the case the testator was born at Bagdad, of Ottoman parents resident there. In early life he went to India, where he remained for a considerable period: he then went to Jeddah, and afterwards to Cairo, where he resided till the time of his death, and he did not appear to have entertained any intention of changing his residence. During that time he was under the protection of the British Government. The conditions of a domicil of choice in Cairo existed, had an exterritorial domicil been possible. Even if he had formerly acquired a domicil in India, he had abandoned it by reason of the facts which would have given him that exterritorial domicil had it been possible for him to acquire it. He was, therefore, held to have resumed his domicil of origin, which was within the Ottoman dominions. Being, nevertheless, under British protection, the English Consular Courts at Constantinople had jurisdiction to grant probate of his will: but in considering the power of testacy of the deceased, and in distributing his effects, the English Court applied the

law of the domicil, which was, in accordance with the above argument, the law of Turkey.

Marriage.

In no branch of the subject is the absence of judicial argument more to be regretted than in this; in no branch is it more important than in this that the principles of law which govern it should be understood. The plasticity of our language has blended the two words European and Asian into one—Eurasian—to signify the offspring of a union between Oriental and Occidental. The rigidity of our legal principles proposes no more enlightened solution to a difficult social dilemma than one which depends on the "fundamental difference between Christian and non-Christian countries." The "law of nature" and the "law of God" are both appealed to in support of the proposition, said to be part of our law, that marriages in countries where polygamy is recognised, or as it is often paraphrased, "in non-Christian countries", are not recognised in civilised countries. But as the editor of Story remarks in a note—"It seems to us there is great difficulty in defining whether and to what extent incest or polygamy is prohibited by the law of nature. And it is certain that, while the former was prohibited by the law of the Hebrews, the latter was allowed and practised to an unlimited extent". Some few cases there are which enable us to get a slight idea of the principles which ought to govern the subject; but text-writers rely too much on this vague proposition about non-recognition, and I find nowhere any analysis of its real meaning. The case of the Mormon marriage, *Hyde* v. *Hyde*, properly understood gives us probably the whole of one branch of the law; it does not support any such doctrine as the one of mere non-recognition, and yet even the redoubtable "Conflict", wherein the judgment is printed almost at full length, omits the last and most important sentence of it, in which the principle which it established lies patent.

General principle of non-recognition of non-Christian marriages considered.

Hyde v. *Hyde*, L.R. 1 P. & D. 130.

The importance of the question from the point of view of an exterritorial community cannot be exaggerated. The recognition of the marriage by English law involves also, if the husband be a British subject, the nationality and domicil of the

wife, the legitimacy, nationality and domicil of the children, and the subjection of the whole family to the British jurisdiction; and if the wife be a British subject, the assumption of her husband's nationality and domicil, and the surrender of her privileges. The legitimacy or illegitimacy of the children is a question which must obviously carry with it important consequences as to succession to property in this country. Nor is this the only point at which the question travels into the domain of the Law Courts of "civilised" countries. Such a case as the following might arise at any time. Some Indians are stopping in London. A squaw is injured in a railway collision, or is guilty of some act of negligence. Ought the Chief, her husband, to be joined as plaintiff in the one case, as defendant in the other? or will she come within the meaning of "married woman" in the Married Women's Property Act? It must be confessed that the books do not throw very much light on the matter, though common-sense may, perhaps too readily, suggest an affirmative answer to the latter question. If this view is sound then there is no such rule of non-recognition as generally stated.

45 & 46 Vict. c. 75.

55 & 56 Vict. c. 22. Apart from marriages abroad under the Foreign Marriage Act, and those celebrated abroad according to English law,* the fundamental principle is that marriages contracted abroad and solemnised according to the *lex loci* will be recognised in England.

Marriage governed by *lex loci*, and capacity to marry by *lex domicilii.*

The second principle is that the capacity or incapacity to contract marriage is to be governed by the *lex domicilii.*

We must first enquire whether these principles are of universal application, or whether there is any rule as to non-Christian or polygamous marriages which must be grafted on as an exception, and if so, what is its extent.

Facts of *Mormon case.*

The law is laid down in the well-known case of the Mormon marriage, in which Mr. Hyde the petitioner, claimed a dissolution of marriage on the ground of his wife's adultery. Both the parties were Mormons at the time of the marriage in Utah. The husband had left the territory and abandoned the faith; the wife had married again, and this re-marriage in accordance with the custom of the sect was the adultery complained of. The petition was dismissed, the gist of the learned Judge

* *see* Mr. Dicey's summary of the law as to "validity of marriage", Rule 169—"Conflict of Laws", p. 626.

Ordinary's argument being as follows:—"Marriage is something more than a contract, either religious or civil; it is an institution, which in Christendom, though its minor incidents vary, has a pervading identity and universal basis. This identical and universal basis is the voluntary union for life of one man and one woman, to the exclusion of all others. There are countries in which this institution is not known. The men take to themselves several women, whom they jealously guard from the rest of the world, and whose number is limited only by considerations of material means. But the status of these women in no way resembles that of the Christian 'wife.' They may be called by some name which corresponds to our 'wife'; but if the relation is not the same as the relation which is expressed by our words 'husband and wife,' the use of a common term cannot make the relations the same. The matrimonial law of England is adapted to the Christian marriage: it is wholly inapplicable to polygamy. This law is correspondent to the rights and obligations which the contract of marriage has, by the common understanding of the parties, created. If the provisions and remedies of that law were applied to polygamous unions, the Court would be creating conjugal duties, not enforcing them, and furnishing remedies where there was no offence. There is in England no law framed on the scale of polygamy, or adjusted to its requirements. And it may well be doubted whether it would become the tribunals of this country to enforce the duties, even if we knew them, which belong to a system so utterly at variance with the Christian conception of marriage, and so revolting to the ideas we entertain of the social position to be accorded to the weaker sex." To the suggestion that the matrimonial law might be applied to the first polygamous marriage the second and others being treated as void, and the women concubines, it was answered: "The duty of cohabitation is enforced by the Divorce Acts on either party at the request of the other. But this duty is never enforced on one party if the other has committed adultery. The husband who had, in accordance with the terms of his marriage contract, married a second wife would be incapable of this remedy." And as the power of enforcing the duties of marriage would thus be lost, so would remedies for breach of marriage vows be unjust and unfit.

Judgment in *Mormon case.*

The law as laid down, and the reasons for it are capable of being stated in a very clear and intelligible proposition. If the

compact which underlies a polygamous union does not import those duties which it is the office of the marriage law in this country to assert and enforce, such unions are not within the reach of that law.

The limited effect of the judgment in the *Mormon case.*

This was the proposition on which Lord Penzance acted. "In conformity with these views the Court must reject the prayer of this petition; but I take the occasion of here observing that this decision is confined to that object. This Court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous unions, nor upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves. All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England."

Matrimonial law of England inapplicable to polygamous marriages.

The decision rested entirely on the matrimonial law, the law administered by the Divorce Court in suits to enforce the marital duties and to punish marital offences, as those duties and offences are known to English law. The question arose with regard to an Englishman, but the principles laid down are applicable to the marriages themselves, and are independent of the nationality of the persons who have contracted them.

There is therefore an exception to the rule that marriages which conform to the *lex loci* will be recognised as valid in England. Those contracted subject to a law which recognises polygamy will not be recognised by Courts which administer the matrimonial law of England.

Rule extends to all Courts which enforce the matrimonial law.

This principle obviously extends beyond the Divorce Court, and applies to any Court which deals with marital duties or marital offences. The argument seems conclusively to show that a marriage in England after a marriage in a polygamous country—that is to say, after a marriage whose rights and duties would not be enforced in England—would not amount to bigamy.* Presumably the same argument would apply to the

* "There is no analogy whatever between the union of a man and a woman in a country where polygamy is allowed, and the union of a man and a woman in a Christian country. Marriage in the contemplation of every Christian community is the union of one man and one woman to the exclusion of all others. No such provision is made, no such relation is

converse case of an Englishman married in England, who afterwards contracted a polygamous union in an oriental country. For the "second marriage" referred to in s. 57 of the Offences against the Person Act, 1861, would be construed to mean a marriage recognised by English law. *24 & 25 Vict. c. 100.*

The next point to consider is whether the same rule applies to concubinage. Concubinage.

Concubinage as generally misunderstood, is a custom which has so many degrees that it is almost impossible to deal with it generally. It is at times a species of polygamy, the concubines being "lesser wives"; at times it is no more than keeping a mistress, the relationship being assumed without any ceremonial. Where the concubines enter the husband's household with recognised ceremonies, and are in fact "lesser wives," it would seem that the argument of the *Mormon case* applies directly, and neither the position of them nor that of the "chief wife" will be recognised by Courts which enforce the matrimonial law of England.

The rule, however, seems capable of extension to the lower degrees of concubinage. A marriage contracted subject to the right of mere concubinage, the condition being recognised by law, can hardly be said to come within the purview of the English law of marriage; because here also, as in the case of a polygamous marriage, there can be no redress for the breach of conjugal duties sanctioned by that law under which it was contracted, nor restitution of conjugal rights which that law does not require the fulfilment of. It is to be noticed that in the case of marriages under a polygamous law, the rule is sweeping and admits of no degrees. That law allows to the husband many wives; it does not allow to a woman a plurality of husbands. But the rule of non-recognition with all its consequences applies, as we have seen, to the case of a wife taking two husbands, for neither marriage has the marriage contract as understood by English law to support it. The rule too does not admit of discrimination; it probably rejects

Rule applies to marriages contracted subject to right of concubinage, even if the concubines are not "lesser wives."

Rule applies to wives as well as husbands.

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created, in a country where polygamy is allowed, and if one of the numerous wives of a Mohammedan was to come to this country, and marry in this country, she could not be indicted for bigamy, because our laws do not recognise a marriage solemnised in that country, a union falsely called marriage, as a marriage to be recognised in our Christian country". (Lush L. J., *Harvey* v. *Farnie*). *Harvey* v. *Farnie*, 6 P.D. at p. 53.

the whole body of the polygamous law, and all marriages contracted under it.

And so, very probably, the law would not discriminate between the varying degrees of recognised concubinage. In the absence of direct authority, I venture on the following proposition. In countries where concubinage is a recognised institution—that is to say, where the law or custom sanctions it, in the way of attaching rights and duties with regard to concubines and their offspring: where it is regarded, as it were, as an incident of marriage—the rule laid down in *Hyde* v. *Hyde* will be applied. But where concubinage is not actually sanctioned, but is only tolerated, then the rule will not be applied. The fact that the law does not provide redress for adultery would not be sufficient to bring the case within the rule, which is based on its formal recognition.

Suggested rule as to concubinage.

Hyde v. *Hyde*, L.R. 1 P. & D. 130.

The first principle which it is important to deduce from the above argument is that there is nothing to warrant the supposition that an English subject cannot contract a marriage with a native woman of a "non-Christian or barbarous" country. Such a marriage is entitled to full recognition by the English Courts, if the law or custom of the country does not sanction polygamy or concubinage.

In *Brinkley* v. *The Attorney General*, heard in 1892—that is to say, long before the treaties of alliance—the question of marriages of English people in Japan, a non-Christian country, was considered. Hannen J., said that "it had been proved in the most satisfactory manner by the deposition of a Japanese professor of law, that by the law of Japan marriage does involve this—that one man unites himself to one woman to the exclusion of all others." There had been a marriage according to the *lex loci*, the necessary condition of its recognition as a marriage as understood by English law was satisfied; the petition under the Legitimacy Declaration Act, 1858, was granted, and the marriage declared valid.

Marriage in non-Christian country, where polygamy not allowed, recognised.

21 & 22 Vict. c. 93.

But from *Hyde* v. *Hyde* there is nothing to lead us to infer a general non-recognition of marriages contracted under a polygamous law: there is nothing to lead us to suppose that the children are illegitimate, that the wife and the children do not follow the domicil and nationality of the husband.

Hyde v. *Hyde* does not declare children of polygamous marriages illegitimate.

So far as we have gone, there is no authority for saying that

even if the evidence had not been given in *Brinkley's case* which showed that the marriage was entitled to be recognised as such, the children of the marriage would have been held illegitimate.

The authority for this proposition is to be found in the South African marriage case, *Bethell* v. *Hildyard, re Bethell*, which it is necessary now to examine. *re Bethell*, 38 Ch. D. 220.

An English subject, Christopher Bethell, was appointed British Resident with the tribe of the Barolongs, "a barbarous or semi-babarous tribe, who inhabit a portion of Bechuanaland beyond the limits of the British dominion." The appointment was cancelled, but he continued to reside among the tribe, and became a storekeeper within their territory. He took as his "principal wife" Teepoo, the daughter of the Chief, marrying her according to Barolong customs, declaring that he was a Barolong. He seems, however, to have expressed his intention of returning to England: and the Chief Clerk found that he had retained his English domicil. He died in South Africa, Teepoo giving birth to a child ten days after his death. He was in receipt of an income derived from rents of estates in England, devised to him for life with remainder to his lawful child or children. The question of the legitimacy of the child was argued before Mr. Justice Stirling, and he held, on the authority of the *Mormon case*, that the marriage was "invalid," and that the child was illegitimate: "invalid" meaning that the English law would not recognise the marriage, and therefore would not recognise the offspring. The reason for the decision being, that among the Barolongs "each male is allowed one great wife and several concubines, who have almost the same status in the home as the great or principal wife." As a fact, though it is immaterial, Bethell had no concubines. Facts in *Bethell's case.*

The judgment is divided into two parts. The first assumes that *Hyde* v. *Hyde* laid down the broad rule of "invalidity," or non-recognition of polygamous marriages, and applied it to the case, as I venture to think erroneously. Stirling J. quoted Lord Penzance's *dictum*—"The matrimonial law of this country is adapted to the Christian marriage, and it is wholly inapplicable to polygamy," and then drew this inference, that a union between a man and a woman in a foreign country, "is not a valid marriage according to the law of England unless it be formed on the same basis as marriages throughout Christendom." Analysis of judgment in *Bethell's case.* *Hyde* v. *Hyde*, L.R. 1 P. & D. 130.

The second part of the judgment seems to admit that under certain circumstances the marriage might have been recognised. It seems to admit that if in his communications with his relatives at home Bethell had mentioned his marriage, or if he had introduced Teepoo to any European as his wife, or spoken of her as such, the Court might have been induced to consider that there had been that reputation of marriage, in the Christian sense, which has in many cases afforded weighty evidence of the actual existence of such a union. This doctrine is not very material to the question before us; the chief point being how far the principle of invalidity can be carried.

Now, in the first place, the *Mormon case*, in view of the express limitation which Lord Penzance appended to his judgment, had no bearing on the issue raised in *Bethell's case*. No question of marital rights and duties arose: no question of applying the matrimonial law of England; only a question of the legitimacy of the child of a polygamous marriage raised before the Chancery Division. Lord Penzance had expressly said that he did "not profess to decide upon the rights of succession or legitimacy which might be proper to accord to the issue of the polygamus unions." For authority previous to Mr. Justice Stirling's decision, we are obliged to go back to Lord Brougham's judgment in *Warrender* v. *Warrender*, in which the following sentences occur: "The general principle is denied by no one that the *lex loci* is to be the governing rule in deciding upon the validity or invalidity of all personal contracts. . . . Therefore the Courts of the country where the question arises resort to the law of the country where the contract was made, not *ex comitate*, but *ex debito justitiæ*, and in order to explicate their own jurisdiction by discovering that which they are in quest of, and which alone they are in quest of, the meaning and intent of the parties . . . . Thus a marriage, good by the laws of one country, is held good in all others where the question of its validity may arise. For the question must always be, did the parties intend to contract marriage? And if they did that which in the place they were in is deemed a marriage, they cannot reasonably, or sensibly, or safely be considered otherwise than as intending a marriage contract . . . . But the rule extends, I apprehend, no further than to the ascertaining of the validity of the contract, and the meaning of the parties, that is, the existence of the contract and its construction. If, indeed,

[1] *Warrender* v. *Warrender*, 2 Cl. & F. at p. 529.

there go two things under one and the same name in different countries—if that which is called marriage is of a different nature in each—there may be some reason for holding that we are to consider the thing to which the parties have bound themselves, according to its legal acceptance in the country where the obligation was contracted. But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe that we regard it as a wholly different thing, a different status, from Turkish or other marriages among infidel nations, because we clearly never should recognise the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorise and validate. This cannot be put upon any rational ground, except our holding the infidel marriage to be something different from the Christian, and our also holding Christian marriage to be the same everywhere. Therefore all that the Courts of one country have to determine is, whether or not the thing called marriage, that known relation of persons, that relation which those Courts are acquainted with, and know how to deal with, has been validly contracted in the other country where the parties professed to bind themselves. If the question is answered in the affirmative, a marriage has been had, the relation has been constituted, and those Courts will deal with the rights of the parties under it according to the principles of the municipal law which they administer."

Warrender v. *Warrender*, 2 Cl. & F. at p. 529.

Undoubtedly, the law is stated in the judgment in much broader terms than in Lord Penzance's judgment, and without the limitation.

It is, however, to be noticed that this very quotation was used by Lord Penzance in the *Mormon case* as the warrant for his ruling. Moreover, *Warrender* v. *Warrender* involved a question of matrimonial law—dissolution of marriage—and Lord Brougham specially referred to "dealing with the relation called marriage," and "dealing with the rights of the parties under it."

I believe that Lord Penzance was interpreting and applying practically Lord Brougham's expression of opinion, which it may be remarked was not very germane to the question whether the Scotch Courts had jurisdiction to dissolve a marriage contracted in England. If, however, Lord Brougham's opinion goes further than Lord Penzance's judgment, its effect cannot stop at its

application in *Bethell's case*, but must cover "invalidity" and non-recognition in its fullest significance.

Recognition of non-Christian or polygamous marriages between members of the community, except for purposes of matrimonial law.

Yet the rule of the *lex loci* does, I believe, warrant this proposition: that a marriage between two members of a community, celebrated in their own country according to the customs or laws of that community, will be recognised in all cases except those which arise under the matrimonial law of England, whatsoever that community may be, and whatsoever the customary form of marriage may be, so long as the domicil of origin of the parties remains unchanged, For example, I think there can be no question that two Turks married according to Mahommedan law, two Chinese according to Chinese law, two Esquimaux according to Esquimaux customs, or two Red Indians according to the customs of their tribe, would each respectively be considered married in England, and their children legitimate, whether the law or the customs sanctioned concubinage, polygamy, or incest, so long as they did not seek to apply to their relationship the matrimonial law of England.

They would be considered married, that is to say, in such a case as I have put of joinder of parties in an action; or, assuming them to be resident in England, for the purposes of the Married Women's Property Act: or in the case of a legacy to the wife of a Red Indian chief. The children would be considered legitimate, for example, in the case of inheritance to any property which a Chinese father might possess in London. With such matters Christianity has nothing to do. It concerns itself solely with the formation of the marriage tie, and the sanctity of the marriage vows.

When we speak of the "marriage" of two persons of a different race and creed to ours, we apply our word "marriage" for convenience to describe a union which has this, at least, in common with the Christian union, that it depends on the consent of the parties to live together. We cannot apply our matrimonial law to that union when the consent disregards the condition which we attach to it—"the exclusion of all others." But where the law does not involve the consequences of this condition, there can be no difficulty in applying it. The intention of the parties is the only thing the Court need seek after.

And as, when we speak of the marriage of two Japanese, we imply that the Japanese law of marriage, and not the English

law, has been fulfilled, so when we speak of legitimate Japanese children, we mean children whom the Japanese law considers legitimate. If I should leave a legacy of English money to the children of Tokiji Tanaka, my intention is clear enough: I mean those whom Japanese law recognises as his legitimate children.

There can be no valid reason why the principle acted on in *Andros* v. *Andros* should not apply to oriental nations.—"A bequest of personalty in an English will to the children of a foreigner must be construed to mean to his legitimate children, and by international law, as recognised in this country, those children are legitimate whose legitimacy is established by the law of their father's domicil."

Andros v. *Andros*, 24 Ch. D. 637.

And so it is when the law requires evidence to be given on oath, it does not mean that a Hottentot shall kiss the book: the intention of the law is looked to, and he is required to go through that ceremony of his native country which binds him to speak truly. And so when the Court requires a foreign probate to be produced, actual "probate" as we understand it is not necessary, but any document will suffice which shows an intention of the foreign Court to act as our own Court of Probate does, and sanction the dealing with a dead man's property by the person properly entitled [see *in the goods of Dost Aly Khan*].

goods of Dost Aly, 6 P.D. 6.

But Bethell was a domiciled Englishman.

The bare decision in the case therefore is, that where a domiciled Englishman is concerned, "marriage" means "marriage" according to English law in all cases, whether under the matrimonial law or not, in which it arises in question. And therefore a union with a savage woman will not be taken into account at all if the customs of her tribe sanction polygamy or concubinage. The case really, therefore, proceeds on the same principle as *Andros* v. *Andros*. The domicil of the father was English, the principle on which the marriage was based was not recognised by English law, and therefore the children were illegitimate. It seems possible to support the decision on this ground, although it was not given as one of the reasons for it.

Principle laid down in *Bethell's case* limited to domiciled Englishmen.

We have still, however, to find some warrant from earlier cases for this principle, assuming it to be sound.

In *Sottomayor* v. *De Barros*, two Portuguese subjects domiciled in Portugal, and first cousins, resided in England for about eight

Sottomayor v. *De Barros*, 3 P.D. 1.

years, when they went through a form of marriage before a Registrar.

Prohibitions by law of the domicil.

By the law of Portugal a marriage between first cousins is illegal as being incestuous. The Court of Appeal held that the marriage ought to be declared null and void, the parties being by the law of their domicil under a personal disability to contract marriage. "It is a well-recognised principle of law", said Lord Justice Cotton, "that the question of personal capacity to enter into a contract is to be decided by the law of the domicil". "If the laws of any country prohibit its subjects within certain degrees of consanguinity from contracting marriage, and stamp a marriage between persons within the prohibited degrees as incestuous, this imposes on the subjects of that country a personal incapacity, which continues to affect them so long as they are domiciled in the country where this law prevails, and renders invalid a marriage between persons both at the time of their marriage subjects of and domiciled in the country which imposes this restriction, wherever such marriage may have been solemnised".

So then there are two well-recognised principles which may be combined into one proposition: a marriage valid by the *lex loci* is valid everywhere, unless the *lex domicilii* imposes a personal incapacity on either of the parties.

The importance of this case is that it declares a prohibition on the ground of consanguinity to be a personal incapacity; and further, that where there is a personal incapacity by the law of the domicil, there is no marriage *ab initio*; and therefore, for no purposes and in no circumstances can these parties be considered as married.

Prohibited marriages not recognised.

This supplies the first principle of general invalidity: if a marriage is prohibited by the law of the domicil of the parties it will not be recognised for any purposes.

The omission of a formality, such as that required by French law, known as the *acte formel et respectueux*, has been held not to be a personal incapacity, although the law takes the form of a prohibition to marry unless the formality has been complied with *(Simonin* v. *Mallac)*.

Simonin v. *Mallac*, 2 Sw. & T. 67.

There are other grounds on which marriages will be held to be invalid for all purposes, one of which is said to be the fact that it is "incestuous by the laws of all Christian countries"; but

it is foreign to the subject in hand to pursue this subject further.* It is sufficient for our present purpose to note that there is no authority prior to *Bethell's case* which goes to the extent of saying that a marriage valid by the *lex loci* and the *lex domicilii* will be held to be no marriage for any purpose, if those controlling laws recognise polygamy or concubinage.

Mr. Justice Stirling's decision goes to this extent:—Where the law of England does not recognize the principle on which the marriage is based, the marriage will be treated as null and void for all purposes.

But with the fact of Bethell's English domicil admitted, it is submitted that the principle cannot be extended beyond cases in which England is the domicil of at least one of the parties.

Rule of domicil applies to man and woman.

This rule must apply to both husband and wife. If there is a personal incapacity, though probably not if there were merely a prohibition, by the law of her country, the marriage of an Englishman with a native woman would be invalid, though both the *lex loci* and the *lex domicilii* of the husband were satisfied. This seems to result from the case of *re Alison's Trusts*. An English Protestant was married by a Roman Catholic priest to an Armenian Protestant Christian at Tehran. She was pregnant at the time. By the Persian law Christian marriages are recognised if they are valid according to the law of the religion of the parties. By the laws of the Armenian Church a woman may not marry while in a state of pregnancy. The marriage was clearly invalid, because neither the *lex loci* nor the statutory law of England as to marriages abroad had been complied with. But even if either of them had been satisfied, it seems clear that the personal disability of the Persian girl would have led to the marriage being pronounced invalid by an English Court.

re Alison's Trusts, 31 L.T. 638.

Rule of domicil cuts both ways, and eliminates nationality.

Again, the rule as to domicil must cut both ways. And, subject always to the question whether such a domicil can be acquired or not, it follows that where an Englishman is domiciled in a country where polygamy or concubinage is recognised, or where unions are permitted which our law deems incestuous, his marriage will be recognised in England in all cases which do not depend upon the English matrimonial law, and his children held

* *see* Mr. Dicey's summary in the chapter on "Marriage" in his "Conflict of Laws," and also the chapter on the same subject in my book on "Foreign Judgments."

legitimate. The principle does not admit of doubt where the case is one of marriage with a deceased wife's sister, the parties being English subjects domiciled in Denmark, for example: it must also be true of marriages subject to concubinage, or to polygamous marriages whether the first, the fifth, or the fortieth, if the rule of domicil be satisfied.

Summary of law as to non-recognition.

In both cases, the non-recognition by English law of the principle on which the marriages are based leads to the non-recognition of the marriages if there is an English domicil. If the domicil is in a country where the principle of the marriage is recognised, the marriage itself is recognised in England. But our matrimonial laws not being framed on the scale of polygamy, they cannot be applied to a marriage contracted under a polygamous law.

But it must be confessed that the question of recognition, except in the case of applying the matrimonial law, bristles with difficulties, even when we have to deal with natives. Is such a partial non-recognition possible? The following case illustrates the possible anomalies which would result from it.

Example of consequence of recognition of polygamous marriages;

If it is not true to assume that a marriage between two orientals, even in a polygamous country, will be recognised as a valid marriage in this country outside the Divorce Court, then we must admit the truth of the following argument. A Chinaman, for example, married in China, and with children born in China, comes to reside in London. He is possessed of consols, and dies intestate. The property goes to the Crown, because there is no wife or child whom the English Courts will recognise as such.

and of partial recognition.

On the other hand, it is exceedingly difficult to follow the practical working of the idea that such a marriage should not be recognised in some Courts, but should be recognised in others. For example, if the Chinaman contemplated in the previous example married an English woman in England before the Registrar, it would not be bigamy, and children of the marriage would be legitimate; but if the question of intestate succession arose, if all Courts are not equally to refuse recognition of the marriage, the children of the Chinese marriage would be recognised as legitimate, and also presumably the first wife. But the second marriage *ex hypothesi* was not bigamous, so that the Court in distributing the estate would be compelled to recognise two wives and two families.

But with regard to exterritoriality there is the further difficulty raised by the question of domicil. No domicil can be acquired in such countries: not even, according to the decision in *re Tootal's Trusts*, an exterritorial domicil. On this point, however, somewhat curious results follow if that case was rightly decided.

re Tootal's Trusts, 23 Ch. D. 532.

If there is no exterritorial domicil, in all questions which depend on the *lex domicilii*, British subjects who have made their permanent home among the community would be judged by the law of their domicil of origin; this would not necessarily be English, nor even colonial: it might indeed be in Utah. And even in the case of marriages within the prohibited degrees, a colonial domicil might import questions of considerable complexity. On the other hand, if *re Tootal's Trusts* is not sound law, all questions which depend on the law of the domicil would, with regard to English subjects permanently resident among the exterritorial community, be determined by the law established by Order in Council.

Divorce.

From marriage we pass to divorce, and here the difficulties thicken round the subject. It may well be that in these Eastern countries with which we are dealing, the law may recognise not only a simple civil ceremonial of marriage, but also a simple civil method of putting away a wife, either for lawful cause assigned, or by mutual consent.

Divorce between natives according to local law.

And first as to divorces between natives, the expression "native" being understood to mean subjects of the country who have not acquired a domicil in any foreign country. We have here the corollary of the simple question, which I have assumed to be answered in the affirmative, of the validity of marriage of natives of oriental countries by their own law. It would seem to follow that just as such a marriage should be recognised in England whatever consequences may be attached to it—subject to the sole exception of applying the matrimonial law—so a divorce between two natives according to their own law should be recognised, although such a divorce does not need the decree of a Court of Law, but only the simplest of formalities.

cf. p. 244.

If such marriages are entirely invalid in the eye of English law, then the question falls to the ground.

Cases of frequent occurrence in India.

This position cannot be supported by any decision in the English Courts, nor does it find any place in the text-books. The cases in the Indian Courts involving native law or custom are of course not parallel, for those Courts are established expressly to administer, among other things, the laws and customs of the natives under Indian rule. In the case—one among many—of *Ibrahim* v. *Syed Bibi*, the Court acted on the Mahommedan law of divorce, and upheld a separation which had followed on expressions by the husband clearly indicating an intention to put an end to the relation of husband and wife. That moreover was a case of divorce which was by law liable to be reversed by the husband. Such cases do afford us, however, some little assistance, for it would not be difficult for the Court, should the case arise as to Mahommedans who had separated under their law in another country, to apply a principle with which it is already perfectly familiar. The difficulty in an English Court would be that it would have neither precept nor precedent to guide it.

Ibrahim v. *Syed Bibi*, Ind. L.R. 12 Madras, 63.

Case of English subjects domiciled in England.

The difficulties multiply themselves when we come to consider the question as it affects English subjects. If the marriage of an English subject domiciled in England with a subject of an eastern country, in which polygamy or concubinage does not obtain, and which is not incestuous by English law, is good if it conform to the law of the country, so also must a divorce be good which in like manner conforms to that law?

Let us look at the matter in the first place *a priori*.

A marriage is valid, the law of the domicil not impeding, if it conforms to the *lex loci*, more fully the *lex loci actus*. It is but a common example of the maxim *locus regit actum*. So also should a divorce, if it conform to the *lex loci actus*, be valid; for this also appears only to be another example of the maxim *locus regit actum*. But this, which has an appearance of soundness with regard to marriages contracted under the same *lex loci*, has a very manifest appearance of unsoundness with regard to marriages contracted under another law.

Summary of English law as to divorce jurisdiction.

As a matter of fact, however, the decisions of the English Courts support neither proposition. English law recognises neither the indissolubility of an English marriage by foreign

Courts, nor the indissolubility of foreign marriages by the English Courts. The key to the jurisdiction in both cases, to the foreign jurisdiction recognised, and the English jurisdiction exercised, was for a long time thought to be the matrimonial home. The judgment of the majority of the Court in *Niboyet* v. *Niboyet*, in which this principle was laid down, was dissented from by the Judicial Committee in *Le Mesurier* v. *Le Mesurier*, and was said by Gorell Barnes J. in *Armytage* v. *Armytage*, to have been practically overruled by that decision. The result of these decisions is to emphasize the application of the law of the domicil in cases where the question is the dissolution of the marriage, and this both with regard to suits brought for that purpose in England, and to the recognition of foreign sentences of divorce. So English law, in dealing with marriages, does not regard the place of the marriage, but, in the case of dissolution, the place of the domicil, and in other cases the place of the matrimonial home.*

Niboyet v. *Niboyet*, 4 P.D. 1.
Le Mesurier v. *Le Mesurier*, 1895, A.C. 517.
Armytage v. *Armytage*, 1898, P. 178.

This seems to cut away the plausible argument which *locus regit actum* supplies. That maxim implies also this, that the interpretation of the contract must be governed by the law of the place where it was made; and it might be said that although divorce is not an incident of marriage as understood in Christian countries (*per* Cotton L. J., *Harvey* v. *Farnie*), yet that a marriage contracted under an eastern law had an implied term that it should be dissoluble by that law. But this would again have to be limited by *locus regit actum*; the dissolution would have to be effected in the country where the contract was made. The speedy method of ending the marriage could not be resorted to in this country, at least if the husband were English. In the case of a foreign marriage dissoluble on the ground of incompatibility of temper, nothing is more certain than that the English Court would not entertain such a question, though it arose between subjects of the country where the law obtained. In the same way, if the English Court had jurisdiction over an oriental marriage (one, that is to say, not subject to a law of polygamy) by reason of the domicil being in England, it would dissolve the marriage for grounds known to English law alone,

Divorce granted for marital offence known to the law of the domicil.

Harvey v. *Farnie*, 8 A.C. 43.

* This paragraph contains a very brief summary of the law on the subject, which is sufficient for the purposes of the argument. It will be found in a more extended form in the chapter on Marriage and Divorce in my book on "Foreign Judgments." *See* also the chapter on Divorce in Mr. Dicey's "Conflict of Laws."

though those grounds were unknown to the oriental law; and conversely, it would not dissolve the marriage for grounds known to that law, but not to English law.

Niboyet v. *Niboyet*, 4 P.D. 1.

And further, the judgment of Lord Justice James in *Niboyet* v. *Niboyet*, would seem to show that the Court's jurisdiction is not merely to grant divorce or separation, but extends over the marriage. If this be so, then even in the case of two orientals whose domicil is England, the Divorce Court has jurisdiction over the marriage, and a divorce in conformity with oriental law, and without the intervention of the Court, would not be recognised. It is unnecessary to follow out all the consequences of this principle if it be sound.

Effect of a marriage where law sanctions dissolution by consent. *Hyde* v. *Hyde*, L.R. 1 P. & D. 130.

It is possible, however, that a marriage contracted under a law which permits dissolution by consent comes within the principle of the *Mormon case*, and would not be recognised by the Courts which administer the matrimonial law of England. One of the terms of the definition which was given of marriage, as understood in Christendom, was that it should be "a union for life." Although it has been said that divorce is not an incident of a Christian marriage, it is inevitable that this definition should in strictness be "a union for life dissoluble only by decree of a Court by way of punishment for certain marital offences." If this be so, then many of the difficulties are removed; for the marriages, divorces, and re-marriages of orientals under a law which permits dissolution by consent, would not come within the purview of the Matrimonial Courts in England.

Case of domiciled Englishman.

And further, the case with regard to a domiciled Englishman who had contracted such a marriage would fall within the same principle if it be sound; for the marriage, being based on a matrimonial law entirely at variance with the law of the domicil, would not be recognised for any purposes. The question of recognising the divorce would therefore not arise. This point was not considered in *Brinkley's case*, the examination of Japanese law not having been addressed to it. The principle is, therefore, only advanced with diffidence.

Brinkley v. *A.-G.*, 15 P.D. 76.

Suggested rule as to recognition of oriental divorces.

But in cases which do not fall within this principle, that is to say, where the domicil is in the State which sanctions such marriages and such divorces, then, as I have suggested at the commencement of the discussion on this subject, both the marriage and the divorce would be recognised for all purposes outside the matrimonial law.

Precisely the same arguments hold good with regard to infant marriages.

Suggested summary of the law.

The general result seems to be that the question of domicil does not arise except where the Christian law, should the domicil be in a Christian country, imposes impediments either to the actual fact of the marriage, as in the case of incest, infant marriages, or to the second of a series of polygamous marriages; or to the principle on which the marriage rests, as in the case of the first of a polygamous series, though there be no second marriage; or that it is dissoluble at will, though in fact the marriage be undissolved, and although the State demands some official confirmation of the dissolution.

Effect of foreign jurisdiction on the question.

The law both as to marriage and divorce in an oriental country has been considered irrespective of the question how it may be affected by the existence of foreign jurisdiction. The principle of recognition, where the law sanctions it, has been said to be based on the fulfilment of the requirements of the *lex loci*. But among an exterritorial community what is the *lex loci?* Is it the national law, or the English law introduced by the Order in Council?

What is the *lex loci?*

Here, again, we must go back to first principles. When it is said that a certain act must conform to the law of the place where it is done, it means the law of the place applicable to the actor. Now in an oriental country the law of the place as it affects British subjects between themselves is the law of England. As we have already seen, the consequence of this is that as between themselves British subjects must conform their conduct to English law. Therefore, with regard to two domiciled British subjects residing in an oriental country, the *lex loci* to which the ceremonies of their marriage must conform is the law of England, and a marriage according to the native customs would be invalid.

With regard to mixed marriages the question is more complicated, because, as we have already seen, no regular rule of conduct can be laid down, the law governing any case which arises depending on the nationality of the defendant. This point will be more fully considered in the next Section, when we come to consider the law applicable to contracts.

In its application to marriages the point was not argued in

Brinkley v. *Att.-Gen.*, 15 P.D. 76.

Brinkley v. *The Attorney General*, it being assumed in that case that the *lex loci* was the law of Japan. The question is a particularly delicate one, and, in the present state of the law, it is sufficient to say that it would seem more reasonable that the doubt should be resolved in this way; though a marriage by the law of England would also be valid.

Adoption.

The last point which arises in this connection is the recognition of adoption.

As a general principle, the recognition of adopted children may be put upon a par with the recognition of children legitimated by subsequent marriage; and as to this the law is clear. The legitimation is recognised if it is sanctioned by the law of the domicil at the time of the child's birth—recognised, that is, for all purposes, with a possible exception only as to succession to real estate in England.

The law of the domicil is to govern the question, and this probably would be construed to mean, in the case of adoption, the domicil both of the person adopting and of the person adopted.

Adopted children of native orientals will be recognised as such by the English Courts, and all questions as to their rights will be determined by the law of their nation.

With regard to adoption by English subjects, it is impossible so long as the adopter retains his English domicil: it is possible when he has acquired a domicil in a country whose laws allow it.

But in oriental countries the domicil of British subjects is never national, and no question of adoption can therefore arise.

Adoption by native wife.

Further, by English law the wife's nationality and domicil follow her husband's. An adoption by her, though valid by the native law, would probably not be recognised in England, even though by the native law the woman did not lose her nationality by her marriage.

XIII

The Effect of Foreign Jurisdiction on Contracts and Torts.

Judgments of Consular Courts.

IT IS inevitable that the consequences of so artificial a system as that under which foreign jurisdiction is exercised should extend beyond the actually defined limits of the system into those branches of the law wherein locality occupies a definite place. How, for example, in the law of contracts are we to indicate the *locus* in order to determine the *lex loci contractus* and the *lex loci solutionis* when it is necessary to do so: or in the law of torts, in order to apply the maxim *locus regit actum*? For, to take a concrete instance, the place where a contract made in England or Singapore is to be performed may be Shanghai: or the place where a wrongful act in respect of which an action is brought in Hong Kong may be Canton. Unless Chinamen are concerned, Chinese law is in no circumstances applicable, and in the Treaty Ports there are as many laws in force as there are nationalities engaged in commerce. It is clear that in some contracts arising out of the commercial dealings with the Chinese, or where a tort is committed by a Chinaman, the rights and liabilities of the parties must be governed by Chinese law. To such cases the ordinary principles which determine what law is applicable will apply as in the case of any other foreign country; and if these principles point to Chinese law, it must be ascertained in the usual way, by the evidence of those competent to interpret it. As has been pointed out, it could not be ascertained through the Consular Court under either the British Law, or the Foreign Law Ascertainment Acts.

The necessity for determining the *locus* with regard to Europeans in oriental countries.

22 & 23 Vict. c. 63. 24 & 25 Vict. c. 11.

cf. pp. 95, 97.

We must now ascertain therefore what the *locus* is in respect of Europeans in the same circumstances in which the *locus* is China in respect of Chinese.

The question, though it must often arise in the Consular Courts, is obviously one which may arise in any other Court, British or foreign, in the world.

Contracts.

Contracts between British subjects;

In the case of a contract made between two British subjects in Shanghai, for example, the question introduces no difficulty; the law of the place where the contract was made is the law which governs British subjects in China—the English law as established by Order in Council; if the place of performance is China, and the law of the place of performance has to be resorted to, this again is the English law; and the law of the forum, if that has to be resorted to, is the law of the Consular Court.

and between British subjects and foreigners.

But how are these three terms to be interpreted in the case, say, of a contract made and to be performed in Shanghai, between an Englishman and a Frenchman, or between an Englishman and a Chinese?

It will be advisable in the first place to have before us a concise statement of the general law of contracts on these points.

General rules as to law governing contracts.

"The general rule," said Lord Mansfield, "established *ex comitate et jure gentium*, is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception where the parties at the time of making the contract had a view to a different kingdom". "It is generally agreed that the law of the place where the contract is made is, *prima facie*, that which the parties intended, or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention . . . . which intention is inferred from the subject matter and from the surrounding circumstances, so far as they are relevant to construe and determine the character of the contract". "The place of performance is necessarily in many cases the place where the obligations of the contract will have to be enforced, and hence, as well as for other reasons, has been introduced another canon of construction, to the effect that the law of the place of fulfilment of a contract determines its obligations. But this maxim, as well as the former, must of course give way to any inference that can legitimately be drawn from the character of the contract and the

nature of the transaction." These quotations are taken from Lord Justice Bowen's judgment, citing Lord Mansfield and Mr. Justice Willes, in *Jacobs* v. *Credit Lyonnais*.

Jacobs v. *Credit Lyonnais*, 12 Q.B.D. at p. 600.

The law as established in this case may, I think, be summarised thus. *Prima facie*, in some cases the *lex loci contractus* prevails, in others the *lex loci solutionis;* but in either case the *prima facies* may be rebutted by showing that the intention of the parties was to adopt the law of another country as the footing upon which they dealt. This obviously allows the proposition to be stated in a different way, as was in fact done in *re Missouri Steamship Company*. In solving the question as to what law ought to prevail, the general principle is that the rights of the parties to a contract are to be judged of by that law by which they intended to bind themselves. If the intention is not expressed or to be inferred from surrounding circumstances, it is to be presumed from other circumstances.

re Missouri Co., 42 Ch. D. 321.

The alternative principles.

These principles are interchangeable. It is obviously immaterial whether we say that a contract is to be governed by the law of the place where it was made unless the intention of the parties points to another law; or, that the law governing a contract is that law which the parties intended should govern it, and in the absence of any express intimation, or of any legitimate inference, the intention will be presumed to be in favour of the law of the place where the contract was entered into.

As examples of inferences we may take a case where the contract is to be entirely performed at some place abroad the inference is that the law of that place is intended to govern; or the case of a contract of affreightment, when the inference is that the law of the flag must govern. Both of these inferences would be legitimate if no other circumstances rebutted them.

Application of principles to "exterritorial contracts."

In applying these principles to the case of a contract between an Englishman and a Frenchman entered into and to be performed in Shanghai, it is useless to start with the *prima facie* rule that a contract is to be governed by the law of the place where it is made or to be performed, for there is no "place" which can furnish us with the necessary law. We must therefore fall back on the alternative statement of the rule, that the intention of the parties as to the law which is to govern the contract must be ascertained. It is true that in this statement of the rule there is an ultimate presumption in favour of the law of the place where the contract

was entered into, and that the same difficulty arises with regard to it. But the solution of the difficulty is a practical one. The impossibility of applying the presumption makes it imperative on the Court to ascertain the intention of the parties, and to draw the most legitimate inferences possible in the circumstances. Inferences must be drawn from facts which would possibly not in ordinary circumstances be considered as entitled to so much weight. They assume indeed a greater importance because of the peculiar circumstances of the case, which are in fact well known to both parties who enter into the contract. Such facts as these might become all-important instead of material only: the language in which the contract is made, the form of it, the nationality of the person for whom the contract is to be performed, the part of the Settlement where it is to be performed, as in the case of a bill accepted payable at a French bank: and so on.

The form of "exterritorial contracts."

And so with regard to the form of the contract, the same considerations would appear to settle the difficulties which arise. If the intention of the parties is that the contract, entered into in Shanghai, should be governed by the law of France, for example, it would be considered as a French contract, and the form of it would have to be in accordance with French law. This seems to be the result of Mr. Justice Pearson's decision in *re Marseilles Extension Railway Company, Smallpage's case.*

Smallpage's case, 30 Ch. D. 598.

Leroux v. *Brown*, 12 C.B. 801. Application of s. 4 of Statute of Frauds.

In this connexion of course the application of the Statute of Frauds needs consideration. It was held in *Leroux* v. *Brown*, that s. 4 of the Statute of Frauds, which requires certain contracts to be in writing, is a mere rule of procedure, and therefore a question appertaining to the *lex fori*. Without going into the difficulties suggested by this rule, it seems clear that an action cannot be maintained in the Consular Court on a parol agreement to which an Englishman is a party, which is not to be performed within one year, although it is valid by the law of the other party's nationality.*

Assuming this decision to be good law, the result is to create an exception to the statement already made, that as all disputes are referred for settlement to the Court of the defendant's nationality, each man's conduct in this mixed community must be governed by his own law. In cases of contract entered into

cf. p. 8.

* The adverse comments which have been made upon this decision are considered in my book on "Foreign Judgments," at p. 200.

between foreigners and Englishmen it is advisable, in view of a possible action to be subsequently brought in the English Court, to act upon the provisions of the fourth section of the Statute of Frauds.

Statutes of Limitation.

The rule that the *lex fori* governs all questions of procedure in the Consular Court is also important as regards dealings between foreigners and British subjects in connexion with the Statutes of Limitation. If an action is brought on a contract by an Englishman against a Frenchman in the French Court, the French period of limitation will be adopted; but if the suit is brought by the Frenchman against the Englishman on the same contract in the English Court, the English period will be adopted. But in this respect exterritoriality does not introduce any complication into the general law, for the same thing would result if the French Court sued in were in France, and the English Court in England, instead of both of them being in an oriental country.

Torts.

The question takes a somewhat different form in the case of torts committed in the oriental country; and the application of general principles is made easier by the fact that under the system of foreign jurisdiction the law applicable to any given act, by which its wrongfulness is to be determined, depends entirely on the nationality of the person who commits it.

Rule of double wrongfulness of act.

the M. Moxham, 1 P.D. 107.

the Halley, L.R. 2 P.C. 198.

With regard to actions in the British Courts, the rule, arbitrary but well-established, is that the act must be wrongful by the law of the place where it was committed *(the M. Moxham)*, and also by English law (*the Halley*): or rather, by the law administered by the British Court in which the action is brought. The first part of the rule is of course the recognition of the maxim *locus regit actum*. When the act is committed by a foreigner in the oriental country, although the *locus* is, for example, China, the *lex loci* is the law of the defendant's nationality.

At this point, however, an important question arising out of the fundamental principles of the subject must be considered.

Wrongfulness of act by law of oriental country.

cf. p. 8.

Seeing that all the powers of the Eastern Sovereign which are not surrendered by treaty, or are not usurped by sufferance, remain in and can be exercised by him in respect even of

foreigners present in his empire: seeing also that the whole area of law is not necessarily covered either by treaty or sufferance, it follows that there may be some acts whose wrongfulness must be determined by the law of the oriental country itself. The *Muscat case* affords the best illustration that could be found of this principle. The wrongfulness of the act of the shipowners, and the rightfulness of the seizure by the British naval officer, were determined by a judgment of a Muscat Court which had been approved and adopted by the Sultan himself. The ship had been seized for a violation of a proclamation of the Sultan prohibiting the transit through his territorial waters of ships laden with ammunition for Persia. The House of Lords held that as the seizure was authorised by the law of Muscat, ascertained in the manner explained above, no action would lie in the English Courts, for the law of the place where the alleged wrongful act was committed pronounced it to be not wrongful. The importance of the decision becomes manifest when it is considered in relation to the act of the shipowners. This was wrongful by the law of Muscat where it was committed, and the House of Lords decided that no difference in this respect existed between an oriental and a western country. Lord Halsbury put the point shortly thus: "The law of the Sultan of Muscat is his will—*stet pro ratione voluntas*. In my opinion no British tribunal is competent to go behind the Sultan's declaration. A serious question of policy is involved, and British tribunals cannot decide as against the Sultan what is the law of the Sultan's country".

Carr v. *Fracis Times*, 1902, A.C. 176.

cf. p. 8.

This point lies outside the other difficulties which arise in connexion with this case which I have already pointed out. But, with great deference, it shows how exceedingly important the omission was to consider the exterritorial relations which exist under the treaty with the Sultan of Muscat.

cf. p. 15.

Rule of double wrongfulness not applicable to Consular Courts.

The rule as to double wrongfulness referred to above, would seem to find no application in the Consular Courts. If we take the simple case of an assault by an Englishman on a Frenchman in Canton, a suit brought in the English Court there, and the plea of self defence raised. It might perhaps be suggested that as the law for Frenchmen in China is French law, the act must be wrongful both by French and English law in accordance with this rule. But, as we have seen, French law can be said to be applicable to Frenchmen in China only in cases of disputes between

Frenchmen, English law to Englishmen only in cases of disputes between Englishmen. Directly we get to mixed disputes the law applicable is that of the defendant's nationality.

In the case of assault the maxim *locus regit actum* does not regard the nationality of the person injured, but only that of the wrongdoer. There is therefore no room for the application of the rule, and the wrongfulness of the act will be decided solely by English law.

Judgments of Consular Courts.

Action on judgments of English Consular Courts;

Tapp v. *Jones*, L.R. 9 C.P. 418.
Grant v. *Easton*, 13 Q.B.D. 302.
Barber v. *Lamb*, 29 L.J. C.P. 234.

The judgments of the British Consular Courts rank in the same way as foreign judgments when they are sued on, or pleaded, in the Courts in England. *Tapp* v. *Jones*, a judgment of the Supreme Court of Shanghai; *Grant* v. *Easton*, a judgment of the Vice-Consular Court at Cairo: an application for summary judgment under Order XIV.; *Barber* v. *Lamb*, a judgment recovered in the Consular Court at Constantinople: held to be a bar to an action in England on the same cause of action.

and of foreign Consular Courts.

Dent v. *Smith*, L.R. 4 Q.B. 414.
Messina v. *Petrococchino*, L.R. 4 P.C. 144.

And in the same way the judgments of the Consular Courts of foreign Powers will be treated as foreign judgments. *Dent* v. *Smith*, a judgment of the Russian Consular Court at Constantinople; *Messina* v. *Petrococchino*, a judgment of the Greek Court at Constantinople.

"That the Ottoman Porte," said Sir Robert Phillimore, in this last case, "has given to the Christian Powers of Europe authority to administer justice to their own subjects according to their own laws within its dominions is a fact *publici juris*, which their Lordships are not now called upon for the first time to take cognizance of . . . It would be strange, indeed, if it had been otherwise, inasmuch as Her Majesty has established a Supreme Consular Court at Constantinople and Provincial Courts, with rules for the exercise of civil and criminal jurisdiction . . . Judicial cognizance being, therefore, taken by their Lordships of the fact that a Greek tribunal, capable of exercising jurisdiction in this case, existed at Constantinople, it is the duty of their Lordships to apply to such tribunal the ordinary principles which regulate the reception of the judgment of a foreign tribunal by other Courts."

XIV

The Operation of Right-conferring Statutes in Oriental Countries.

IN THAT part of Section VIII—The Exercise of the Legislative Power—in which the criminal jurisdiction conferred on the Consular Courts was considered, there is one group of offences which is treated independently of the general application of the criminal law by art. 35. This group is headed "Offences in relation to Copyright, Inventions, Trade-Marks and Designs:" the effect of art. 69 of the Order being to bring the penal clauses of the English Acts relating to these subjects specially within the consular jurisdiction. Some of the consequences of this extension have already been suggested. But it must be obvious that there are other questions involved in it, the answers to which are not too readily forthcoming. First: Why was it necessary to make special reference to the penal clauses of these statutes, for the whole of the criminal law of England had already been extended? This question should be put in a larger manner—Do all statutes which create special offences require special extension? Or in yet another way—Does the expression "the criminal law of England," which is extended by art. 35 of the Order, refer only to the Criminal Law Consolidation Acts of 1861, together with such common law offences as lie outside the provisions of those statutes? An affirmative answer to this last question appears to lie on the surface, because the criminal law as generally understood punishes the infringement of those rights which all alike possess at common law, and which the treaties guarantee the enjoyment of in the oriental country, by English law in so far as British offenders are concerned. These rights are protected by the Larceny Act, the Malicious Damage Act, the Forgery Act, the Coinage Offences Act, and the Offences against the Person Act of 1861 [*24 & 25 Vict. cc. 96* to *100*], supplemented by the Accessories and Abettors Act, [*c. 94*].

cf. p. 128.

cf. p. 131.

Effect of special extension of penal clauses of a statute.

Consequences of the extension of the criminal law.

The theory of exterritoriality presumes these rights to be the same in all western systems of law, though the punishments may vary: and, as we have seen, the infraction of them is punished by the law of the offender's nationality, whatever may be the nationality of the person injured. It might well be said that the case is very different when we come to consider the operation of a special criminal statute, such, for example, as the territorial provisions of the Criminal Law Amendment Act, 1885. It might well be argued that here is a provision of the criminal law peculiar to England; and whereas, when the offence is committed by a British subject against a British subject, no objection can be raised to enforcing its provisions in the oriental country, when the offence is committed by a British subject against a foreigner there seem to be at least some good reasons why it should not be enforced.

cf. p. 7.

48 & 49 Vict. c. 69.

It is however by no means certain that this answer is the right one; and in order to elucidate the point still further, we must revert to the question of the Copyright and the Patents Acts, with which we began.

Consequences of the extension of the civil law.

The civil jurisdiction of the Courts is also, by art. 89, exercisable in conformity with the law of England, and the effect of this, as has already been pointed out, is to incorporate all the statute and common law into the consular jurisdiction. Therefore, all statutes are extended without express reference, including their penal clauses. The difficulty with which we have now to deal arises specially in connexion with right-conferring statutes.

cf. p. 140.

Effect of extension of a right-conferring statute.

The extension of the Copyright and the Patents Acts considered independently of the provisions of art. 69, implies, first, that so far as the British community is concerned the rights created by them can be acquired in China. But in the case of these statutes the acquisition of the right is dependent on the fulfilment of a condition, registration; and it therefore follows in the first place, that a British subject resident in China can by registration in England acquire copyright and patent rights in England. But this is no greater right than any other person abroad has in the case of right-conferring statutes which impose the fulfilment of a territorial condition before the right can be acquired. Foreigners and British subjects, alike non-resident, can, by fulfilling the condition, acquire the right. I do not forget that

the Patents Acts expressly apply to foreigners, and that residence is not a condition of registration: but so far as copyright is concerned, I do not think there can be any question, and the principle would be the same in the absence of the special provision of s. 4 of the Patents Act, 1883.*

But then there is this further question:—Does not the fact that these Acts are extended to China imply something more than this? Does it not mean that registration in England carries with it copyright and patent rights in China among the British community?

Where territorial condition attached to acquisition of the right.

One point is quite clear: that the extension of the Acts implies the possibility of creating such offices as may be necessary to ensure the enjoyment of the rights in China, in this way treating the statutes as legislation for the British community. The operation of the statutes as far as circumstances admit, and with such variations as may be necessary, must involve the right—in which we may assume, for the propose of the argument, the oriental Government to have no concern—of taking the necessary steps to enable the right to be enjoyed. The provisions of the China Order in respect of mortgages and bills of sale are illustrations of this.

cf. pp. 152, 153.

Statutes which confer rights without condition.

At this point in the argument it is necessary to consider the case of statutes which are self-operative, requiring no office or machinery to give effect to them: such, for example, as the Married Women's Property Act. There can be no doubt that under the general provisions of art. 89, the Act applies to China, and governs the property of married women British subjects in that country. If there were any doubt about the question it can be answered directly from the words of the treaty; for in the suit of, say, a dressmaker for payment of her account, the question whether a married woman's earnings are her separate property is a "question in regard to rights arising between British subjects in China," and therefore subject to the jurisdiction of the Consular Court, and to be determined according to English law. Unless the common law alone is extended by art 89, there can be no doubt about the matter.

45 & 46 Vict. c. 75.

* This question, and other kindred ones, are discussed at length in Chapter VII, of "Nationality," Vol. II, which deals with "The Enjoyment of Territorial Rights by Subjects and Aliens abroad." In order not to repeat what has already been printed, I am obliged to base the argument in this Section on the conclusions arrived at in the work above referred to.

The question is obviously one of great importance in view of the innumerable questions which may arise in so large a foreign community as that in China, and the very many important statutes which may have to be applied to British subjects residing there. Take the Fatal Accidents Acts, for example; there can be no question that the relief which is given by these Acts to the relatives of a person killed by the wrongful act, neglect or default of another, can be recovered in the Consular Court.

9 & 10 Vict. c. 93.
27 & 28 Vict. c. 95.

Reverting now to the Copyright and the Patents Acts. It may not be advisable, for financial or other reasons, to create offices in China for the purpose of registering the ownership. Assuming that registration in the United Kingdom by itself confers no rights in China, yet a certain measure of protection may still be afforded to those who, resident in the East, have registered in England, by extending the area of protection consequent on registration to the limits of the Order applicable to China. By the extension of the penal clauses of these statutes, as is done in art. 69, the rights acquired under them are protected in China among the British community. The result of this is to extend the benefits of the Acts to oriental countries: the benefit, more expecially in the case of the Merchandize Marks Acts, not being, as it would seem, limited to the British community. This, however, must be taken subject to what will presently be said on this question. The point to be specially noted in connexion with the present argument is, that it is probable that this result is arrived at by the mere fact of the Acts being extended by art. 89. There is also the difficulty pointed out on a previous page, that the remedies in the case of copyright are only quasi-penal.

Consequence of extending penal clauses only.

cf. p. 132.

cf. p. 133.

The question can now be put into most practical shape. Does the civil remedy for infringement of copyright, registration having been effected at Stationer's Hall, or of patent rights acquired in England, lie before the Consular Court for an infringement by a British subject in China? If the extension of the statute law to China means anything, I think it must. And if the civil remedy lies, then also the penal clauses must be enforceable.

Civil remedy under Copyright and Patent Acts probably enforceable in Consular Court.

There is, however, a special condition in art. 69 in connexion with foreigners, which introduces another complication into the argument. So far as the United Kingdom is concerned, the position of foreigners is this. They can acquire the rights,

Foreigners.

though non-resident, by fulfilling the condition of registration.* Can they therefore obtain the benefits of the extension of the Acts to an oriental country? If the Order in Council imposes a condition to such enjoyment, as of reciprocity, then that condition must override all other considerations. But supposing no such condition, then I am disposed to think that the extension of English law to the oriental country, being expressly for the purpose of determining disputes as to rights arising between British subjects, the consequent right to determine what those rights are must be limited also to British subjects.

How far the power of exercising jurisdiction imports the power of determining the rights of foreigners?

It seems to be more than doubtful whether the right, acquired by treaty or sufferance, of exercising jurisdiction as against foreigners, would involve the right of deciding what the rights of foreigners are: and even in the case of a suit by a foreigner against a British subject for infringement of a right acquired in England, it is doubtful whether the extension of the Act under which the right was acquired to China would cover this case. I do not profess to give a decided opinion on a point which is one of great difficulty: for we have now come round to the question with which we started, Does a special criminal statute applicable to British subjects in China apply to them when the offence is committed against a foreigner, whose own laws afford him no such protection, nor perhaps even any similar to it?

To bring this theoretical argument to a conclusion, one further point must be mentioned. Suppose the necessary machinery established in China for registering, for example, rights to patents, could a foreigner avail himself of it as he could in similar circumstances in the case of the Act itself in the United Kingdom? Putting the question of reciprocity on one side, the answer to this question would probably be the same as in the case considered in the last paragraph.

Although as I have just said, this somewhat lengthy argument may seem to be purely theoretical, yet at certain points its practical application peeps through, so to speak, the envelope of theory: for example, in the case of Lord Campbell's Act, and in the case of mortgages and of bills of sale. I must now endeavour to give the argument a most practical turn by pointing out that, in almost every branch of it, it may at any moment have to be considered in connexion with the English Company Acts.

25 & 26 Vict. c. 89.

* *see* the footnote on p. 264.

Here is a very concrete illustration of an Act of the United Kingdom which, in its territorial application, non-resident foreigners may avail themselves of. There is a registration office in Somerset House, and the Act is included in the English law extended to oriental countries. The questions which arise are: Can associations of more than 7 persons [*s.* 6] formed in, say, China, register in England, thereby acquiring both in England and China all the rights of registered limited liability companies? Secondly, must such an association of more than 10 persons, formed for the purpose of carrying on the business of banking: or of more than 20 persons [*s.* 4] formed for the purpose of carrying on any business other than banking, having for its object the acquisition of gain, register under the Act? Thirdly, would it be possible to establish a registry for companies in Shanghai; and if so, would it of necessity be limited to companies composed entirely of resident British subjects?

Application of argument to company law.

Incidentally, a fourth question arises: Can the company law of a neighbouring colony, such as Hong Kong, be used in substitution for the law of England?

The most practical way of shewing the extreme importance of arriving at a correct solution of these questions is by putting a still more concrete case. A British subject has taken shares in such an association: there is a false description in the prospectus, or there is an omission of a contract which ought to have been disclosed: can the promoters be prosecuted for fraud?

Possible consequence of applying English company law.

I am here travelling into a region which is familiar enough in practice, but is at present most unfamiliar in law. The principles which I believe to be applicable to the subject, and from which the answers to these questions are to be derived, are the logical conclusions from fundamental principles which are no longer merely theoretical, but which have received practical recognition by the Judicial Committee. But there may be many considerations which have escaped my attention, and discussion in a Court of Law is the only way in which all the necessary considerations can be brought to bear on so knotty a problem. It seems wiser therefore to leave the argument in the somewhat suggestive form in which I have put it, adding only one word to emphasise its importance. Foreigners may be members of English companies. There seems indeed no reason why a company registered in England may not be composed entirely of

foreigners. A company formed in an oriental country, such as China, and registered in England may therefore presumably be composed entirely of foreigners or natives. Such a company may also, it is presumed, be registered in Hong Kong; and having its principal place of business in Hong Kong, though carrying on its business in China, it may, under s. 1 of the Merchant Shipping Act, 1894, be the owner of a British ship.

57 & 58 Vict. c. 60.

XV

The Abandonment of Foreign Jurisdiction.

THE abandonment of the Queen's foreign jurisdiction forms naturally the subject of the concluding Section of this book.

Examples of abandonment. Servia. *cf.* Appendix.

In Servia, where the Turkish Capitulations were in force, the exercise of the jurisdiction has been surrendered by the Treaty concluded in 1880, except with regard to disputes, other than those effecting real estate in Servia, between British subjects and the subjects of other Powers which have not surrendered their privileges under the Capitulations.

Japan.

In Japan, the jurisdiction was abandoned by the Treaty of 16th July, 1894, which ultimately came into force on 4th August, 1899. The abandonment was effected by an Order in Council, 7th October, 1899, which, after reciting the existence of the Queen's power and jurisdiction in Japan and the Treaty above referred to, declared that the operation of the Order in Council regulating the exercise of the jurisdiction should cease from the 4th August.

Method adopted in the case of Tunis. *cf.* Appendix.

The case of Tunis, in which the jurisdiction was abandoned in favour of the French Protectorate, or Regency, furnishes an interesting example of the process by which such a surrender in favour of a protecting State should be accomplished. The essential documents were three in number. First, a French law for the organization of the new French Courts to be established in the country. These tribunals were declared to form part of the jurisdiction of the Supreme Court of Algiers in the French Colony of Algeria. Their jurisdiction is defined in much the same language as the jurisdiction clauses in the treaties, and includes French and French protected subjects. Their authority may

i. French law.

be extended over all other persons by edicts of the Bey, issued with the assent of the French Government. This law was promulgated by the Bey.

ii. Tunisian law.

Secondly, a decree of the Bey of Tunis, reciting the disposition of several of the friendly Powers to renounce the jurisdiction of their respective Consuls, "if their subjects become amenable to the jurisdiction of the French tribunals;" and, in conformity with the preceding law, decreeing that "the subjects of the friendly Powers whose Consular tribunals shall be suppressed shall become amenable to the jurisdiction of the French tribunals under the same conditions as the French themselves."

iii. English Order in Council.

Finally, a British Order in Council, abolishing British Consular jurisdiction in Tunis. The recitals in the Order included the French law, the Bey's decree, and Her Majesty's consent to abandon her consular jurisdiction "with a view to British subjects in the Regency becoming justiciable by the French tribunals."

These documents fit in at all points with the fundamental theory of exterritoriality.

Act of Parliament unnecessary.

The Queen merely abandoned her jurisdiction in the dominions of the Bey. Her treaty prerogative, which allowed her to acquire such jurisdiction, allowed her also to abandon it. The Foreign Jurisdiction Act deals only with the exercise of the power, and not with the acquisition of it. It declares that if and where acquired it is to be exercised in such and such a way. And as it does not touch the acquisition of the power, nor the method of acquiring it, neither does it affect the abandonment of the power, nor the method of abandoning it.

The Queen, however, though abandoning her power could do no more. She could not and did not declare that thenceforward her subjects must submit to the jurisdiction of the French Protectorate. Such a declaration would have been inconsistent with the abandonment, for it would have become the continuing authority for the exercise of the French jurisdiction. The utmost that the Queen could do was to declare the reason for her abandonment: that it was done with a view that her subjects should pass under the French jurisdiction, it being known and understood that they would so pass. The recital in the Order in Council of 1876, which recognised the creation of the Mixed Courts in Egypt, proceeds on the same principle.

cf. Appendix.

Abandoment of Queen's jurisdiction implies resuscitation of Bey's jurisdiction.

But the abandonment of the Queen's jurisdiction implied the resuscitation of the Bey's jurisdiction. And it is in consequence of this resuscitation that British subjects pass under the jurisdiction of the Regency by decree of the Bey, and by no other way. This decree of the Bey required the assent of the French Government to assume the jurisdiction over foreigners, because the gist of such jurisdiction in a foreign country over foreigners lies in the willingness to accept it. This assent would probably be formally expressed: though in the case of recognised Protectorate, it would not appear to be necessary.

cf. p. 176.

The chain by which the edifice of foreign jurisdiction is demolished is as complete scientifically as the chain by which it was erected and supported.

It is almost superfluous to add now, that if the doctrine that "Parliament can legislate for British subjects anywhere" admitted of the interpretation that "Parliament can not only legislate for British subjects anywhere, but can also empower the consular officers to enforce its statutes and its ordinances anywhere," it would have been impossible for the Queen to deprive those officers of the power to enforce the behests of Parliament. If the doctrine were true, it would have required a special Act to place British subjects in Tunis under the French jurisdiction; but such an Act was not necessary. Nor was it necessary in the more simple case of Japan where the privileges which had been acquired by force of arms and circumstances, were surrendered by the King into the hands of the Sovereign who had granted them.

cf. p. 25.

APPENDIX

CONTAINING THE ARTICLES OF THE TREATIES NOW IN FORCE BY WHICH EXTERRITORIAL PRIVILEGES HAVE BEEN GRANTED TO BRITISH SUBJECTS.

The Articles have been printed by permission from Sir Edward Hertslet's valuable collection of Commercial Treaties.

The Orders in Council will be found collected in the Statutory Rules and Orders Revised, 1904.

APPENDIX.

TURKEY.

Capitulations and Articles of Peace, 1675—confirmed by Treaty, 1809.

VIII. That if an Englishman, either for his own debt or as surety for another, shall abscond, or become bankrupt, the debt shall be demanded from the real debtor only; and unless the creditor be in possession of some security given by another, such person shall not be arrested, nor the payment of such debt be demanded of him.

IX. That in all transactions, matters, and business occurring between the English and merchants of the countries to them subject, their attendants, interpreters, and brokers, and any other persons in our dominions, with regard to sales and purchases, credits, traffic, or security, and all other legal matters, they shall be at liberty to repair to the judge, and there make a hoget, or public authentic act, with witness, and register the suit, to the end that if in future any difference or dispute shall arise, they may both observe the said register and hoget; and when the suit shall be found conformable thereto, it shall be observed accordingly.

Should no such hoget, however, have been obtained from the judge, and false witnesses only are produced, their suit shall not be listened to, but justice be always administered according to the legal hoget.

X. That if any shall calumniate an Englishman, by asserting that he hath been injured by him, and producing false witnesses against him, our judges shall not give ear unto them, but the cause shall be referred to his Ambassador, in order to his deciding the same, and that he may always have recourse to his protection.

XI. That if an Englishman, having committed an offence, shall make his escape, no other Englishman, not being security for him, shall, under such pretext, be taken or molested.

XII. That if an Englishman, or subject of England, be found to be a slave in our States, and be demanded by the English Ambassador or Consul, due enquiry and examination shall be made into the causes thereof, and such person being found to be English, shall be immediately released, and delivered up to the Ambassador or Consul.

XIII. That all Englishmen, and subjects of England, who shall dwell or reside in our dominions, whether they be married or single, artisans or merchants, shall be exempt from all tribute.

XV. That in all litigations occurring between the English, or subjects of England, and any other person, the judges shall not proceed to hear the cause without the presence of an interpreter, or one of his deputies.

XVI. That if there happen any suit, or other difference or dispute, amongst the English themselves, the decision thereof shall be left to their own Ambassador or Consul, according to their custom, without the judge or other governors our slaves intermeddling therein.

* * *

XXIV. That if an Englishman or other subject of that nation, shall be involved in any law suit, or other affair connected with law, the judge shall not hear nor decide thereon until the Ambassador, Consul, or interpreter shall be present; and all suits exceeding the value of 4000 aspers shall be heard at the Sublime Porte and nowhere else.

XXV. That the Consuls appointed by the English Ambassador in our sacred dominions, for the protection of their merchants, shall never, under any pretence, be imprisoned, nor their houses sealed up, nor themselves sent away; but all suits or differences in which they may be involved shall be represented to our Sublime Porte, where their Ambassadors will answer for them.

XXVI. That in case any Englishman, or other person subject to that nation, or navigating under its flag, should happen to die in our sacred dominions, our fiscal and other officers shall not, upon pretence of its not being known to whom the property belongs, interpose any opposition or violence, by taking or seizing the effects that may be found at his death; but they shall be delivered up to such Englishman, whoever he may be, to whom the deceased may have left them by his will; and should he have died intestate, then the property shall be delivered up to the English Consul, or his representative, who may be there present; and in case there be no Consul, or Consular representative, they shall be sequestered by the judge, in order to his delivering up the whole thereof, whenever any ship shall be sent by the Ambassador to receive the same.

* * *

XLII. That in case any Englishman, or other person navigating under their flag, should happen to commit manslaughter or any other crime, or be thereby involved in a law suit, the governors in

our sacred dominions shall not proceed to the cause until the Ambassador or Consul shall be present; but they shall hear and decide it together without their presuming to give them any the least molestation, by hearing it alone, contrary to the holy law and these Capitulations.

LVIII. That whereas it is specified in the Capitulations, that in case an Englishman should become a debtor or surety, and run away or fail, the debt shall be demanded of the debtor; and if the creditor be not in possession of some legal document given by the security, he shall not be arrested, nor such debt be demanded of him; should an English merchant, resident in another country, with the sole view of freeing himself from the payment of a debt, draw a bill of exchange upon another merchant, living in Turkey, and the person to whom the same is payable, being a man of power and authority, should molest such merchant who had contracted no debt to the drawer, and oppress him, contrary to law and the sacred Capitulations, by contending that the bill was drawn upon him, and that he was bound to pay the debt of the other merchant: now we do hereby expressly command, that no such molestation be given in future, but if such merchant shall accept the bill, they shall proceed in manner and form therein pointed out; but should he refuse to accept it, he shall be liable to no further trouble.

LXI. That if any Englishman should turn Turk, and it should be represented and proved that, besides his own goods, he has in his hands any property belonging to another person in England, such property shall be taken from him, and delivered up to the Ambassador or Consul, that they may convey the same to the owner thereof.

* * *

LXIX. It being registered in the Imperial Capitulations, that all suits wherein the English are parties, and exceeding the sum of 4000 aspers, shall be heard in our Sublime Porte, and nowhere else:

That if at any time the commanders and governors should arrest any English merchant, or other Englishman, on the point of departure by any ship, by reason of any debt or demand upon him, if the Consul of the place will give bail for him, by offering himself as surety until such suit shall be decided in our Imperial Divan, such person so arrested shall be released, and not imprisoned or prevented from prosecuting his voyage, and they who claim anything from him shall present themselves in our Imperial Divan, and there submit their claims, in order that the Ambassador may furnish an answer thereto. With regard to those for whom the Consul shall not have given bail, the commandant may act as he shall think proper.

LXXI. That should any Englishman coming with merchandize turn Turk, and the goods so imported by him be proved to belong to merchants of his own country, from whom he had taken them, the whole shall be detained, with the ready money, and delivered up to the Ambassador, in order to his transmitting the same to the right owners, without any of our judges or officers interposing any obstacle or hindrance thereto.

Treaty of the Dardanelles, 5 January, 1809.

IV. The Treaty of Capitulations agreed upon in the Turkish year 1806 (A.D. 1675), in the middle of the month Gemmaziel Akir, as also the Act relating to the Commerce of the Black Sea, and the other privileges (*Imtiazat*) equally established by Acts at subsequent periods, shall continue to be observed and maintained as if they had suffered no interruption.

Provisions of the Treaty of Berlin, 13 July, 1878.

BULGARIA.

VIII. * * * * *

The immunities and privileges of foreigners, as well as the rights of Consular jurisdiction and protection as established by the Capitulations and usages, shall remain in full force so long as they shall not have been modified with the consent of the parties concerned.

EASTERN ROUMELIA.

XX. * * * * *

The immunities and privileges acquired by foreigners, whatever their status, shall be respected in this Province.

SERVIA.

XXXVII. * * * * *

The immunities and privileges of foreign subjects, as well as the rights of Consular jurisdiction and protection, as at present existing, shall remain in full force so long as they shall not have been modified by mutual consent between the Principality and the Powers concerned.

ROUMANIA.

XLIX. Roumania shall have power to make conventions to determine the privileges and attributes of Consuls in regard to protection within the Principality. Existing rights shall remain in force so long as they shall not have been modified by the mutual consent of the Principality and the Parties concerned.

SERVIA.

Treaty, 1880.

XIII. In consideration of the present Treaty, and as contemplated by Article XXXVII of the Treaty concluded at Berlin on the 13th July, 1878, Her Majesty the Queen of the United Kingdom of Great Britain and Ireland consents to surrender the privileges and immunities hitherto enjoyed by her subjects in Servia, in virtue of the Capitulations between Great Britain and the Ottoman Empire as agreed upon, augmented, and altered at different periods, and finally confirmed by the Treaty of Peace concluded at the Dardanelles on the 5th January, 1809.

Provided always, and it is hereby expressly agreed, that the said Capitulations shall, as regards all judicial matters, except those affecting real estate in Servia, remain in full force so far as they concern the mutual relations between British subjects and the subjects of those other Powers which, having a right to the privileges and immunities accorded by the aforesaid Capitulations, shall not have surrendered them.

CYPRUS.

Convention of Defensive Alliance between Great Britain and Turkey, 4 June, 1878.

I. * * * * * *

His Imperial Majesty the Sultan further consents to assign the Island of Cyprus to be occupied and administered by England.

Annex.

It is understood * * * *

I. That a Mussulman religious tribunal (Mehkéméi Shéri) shall continue to exist in the Island, which will take exclusive cognizance of religious matters, and of no others, concerning the Mussulman population of the Island.

EGYPT.

Order in Council, 5 February, 1876.

Whereas, Her Majesty the Queen has power and jurisdiction within that part of the dominions of the Sublime Ottoman Porte called Egypt:

And whereas, with the concurrence of Her Majesty, Egytian Courts have been or are about to be established as follows: (namely) 3 Courts of First Instance at Alexandria, Cairo, and Zagazig, and a Court of Appeal at Alexandria:

* * * * * *

As regards all such matters and cases as arise after the time when the Egyptian Courts aforesaid begin to sit, and act judicially, and as come within the jurisdiction of those Courts, the operation of the Order of Her Majesty the Queen in Council for the regulation of Consular jurisdiction in the dominions of the Sublime Ottoman Porte made at Windsor the 12th day of December, 1873, and of every Order amending the same, shall be and the same is hereby suspended until it shall seem fit to Her Majesty the Queen, by and with the advice of Her Privy Council, to otherwise order.

TRIPOLI.

Protocols signed by Great Britain, France, Italy and Turkey, February, 1873.

La Sublime Porte s'étant adressée aux Gouvernements de la France, de la Grande Bretagne, et de l'Italie pour leur exprimer le désir que, dans la province de Tripoli d'Afrique, la compétence de la juridiction locale dans les causes entre les indigènes et les étrangers de nationalité Française, Anglaise, ou Italienne, fût établie sur les mêmes bases que dans les provinces de l'Empire Ottoman en Europe et en Asie, les dits Gouvernements, après avoir adhéré individuellement à ce vœu, out résolu de consacrer leur assentiment par un acte collectif.

* * * * * *

I. Les Agents de la France, de l'Angleterre, et de l'Italie á Tripoli d'Afrique receveront de leurs Gouvernements des ordres précis et formels pour que désormais tous les procès et toutes les contestations entre les indigènes et sujets Français, Anglais, ou Italiens dans cette province, quelle que soit la nationalité du défendeur, soient jugés conformément aux dispositions des capitulations en vigueur, et de la même manière que ces capitulations sont appliquées dans les provinces de l'Empire Ottoman en Europe et en Asie.

II. La Sublime Porte s'engage à traiter les Consuls et les sujects Anglais, Français, et Italiens à Tripoli d'Afrique, en ce qui concerne la juridiction consulaire, sur le pied de la nation la plus favorisée, et à les faire participer à la jouissance de toute faveur ou avantage accordé sous ce rapport aux Consuls et aux sujets de tout autre État.

MOROCCO.

Treaty, 9 December, 1856.

VII. No subject of the Queen of Great Britain, nor any person under her protection, shall, in the dominions of the Sultan of Morocco, be made liable to pay a debt due from another person of his nation, unless he shall have made himself responsible or guarantee

for the debtor, by a document under his own handwriting; and in like manner, the subjects of the Sultan of Morocco shall not be made liable to pay a debt due from another person of his nation to a subject of Great Britain, unless he shall have made himself responsible or guarantee for the debtor by a document under his own handwriting.

VIII. In all criminal cases and complaints, and in all civil differences, disputes, or cases of litigation which may occur between British subjects, the British Consul General, Consul, Vice-Consul, or Consular Agent, shall be sole judge and arbiter. No Governor, Kadi, or other Moorish authority, shall intermeddle therein; but the subjects of Her Britannic Majesty shall, in all matters of criminal or civil cognizance arising or existing between British subjects exclusively, be amenable to the tribunal of the Consular General, Consul, or other British authority only.

IX. All criminal cases and complaints, and all civil differences, disputes, or causes of litigation arising between British subjects and subjects of the Moorish Government shall be adjusted in the following manner:

If the plaintiff be a British subject, and the defendant a Moorish subject, the Governor of the town or district, or the Kadi, according as the case may appertain to their respective Courts, shall alone judge the case; the British subject making his appeal to the Governor or Kadi, through the British Consul General or his deputy, who will have a right to be present in the Court during the whole trial of the case.

In like manner, if the plaintiff be a Moorish subject, and the defendant a British subject, the case shall be referred to the sole judgment and decision of the British Consul General, Consul, Vice-Consul or Consular Agent; the plaintiff shall make his appeal through the Moorish authorities; and the Moorish Governor, Kadi, or other officer who may be appointed by them shall be present, if he or they so desire, during the trial and judgment of the case. Should the British or Moorish litigant be dissatisfied with the decision of the Consul General, Consul, Vice-Consul, Governor or Kadi (according as the case may appertain to their respective Courts), he shall have a right of appeal to Her Britannic Majesty's Chargé d'Affaires and Consul General, or to the Moorish Commissioner for Foreign Affairs, as the case may be.

X. A British subject suing, in a Moorish Court of Law, a subject of the Sultan of Morocco for a debt contracted within the dominions of the Queen of Great Britain, shall be required to produce an acknowledgment of the claim, written either in the European or Arabic characters, and signed by the Moorish debtor in the presence

of, and testified by, the Moorish Consul, Vice-Consul, or Consular Agent, or before 2 witnesses, whose signatures shall have been at the time, or subsequently, certified by the Moorish Consul, Vice-Consular or Consular Agent, or by a British notary in a place where no Moorish Consul, Vice-Consul, or Consular Agent resides. Each document so witnessed or certified by the Moorish Consul, Vice-Consul, or Consular Agent, or British notary, shall have full force and value in a Moorish tribunal. Should at any time a Moorish debtor escape to any town or place in Morocco where the authority of the Sultan may be established, and where no British Consul or Consular Agent may reside, the Moorish Government shall compel the Moorish debtor to come to Tangier, or other port or town in Morocco where the British creditor may desire to prosecute his claim before a Moorish Court of Law.

XI. Should the British Consul-General, or any of the British Consuls, Vice-Consuls or Consular Agents, have at any time occasion to request from the Moorish Government the assistance of soldiers, guards, armed boats, or other aid for the purpose of arresting or transporting any British subject, the demand shall be immediately complied with, on payment of the usual fees given on such occasions by Moorish subjects.

XII. If any subject of the Sultan be found guilty before the Kadi of producing false evidence to the injury or prejudice of a British subject, he shall be severely punished by the Moorish Government according to the Mahomedan law. In like manner the British Consul-General, Consul, Vice-Consul, or Consular Agent, shall take care that any British subject who may be convicted of the same offence against a Moorish subject, shall be severely punished according to the law of Great Britain.

* * * * * *

XIV. In all criminal cases, differences, disputes or other causes o litigation arising between British subjects and the subjects or citizens of other foreign nations, no Governor, Kadi, or other Moorish authority, shall have a right to interfere, unless a Moorish subject may have received thereby any injury to his person or property, in which case the Moorish authority, or one of his officers, shall have a right to be present at the tribunal of the Consul.

Such cases shall be decided solely in the tribunals of the foreign Consuls, without the interference of the Moorish Government, according to the established usages which have hitherto been acted upon, or may hereafter be arranged between the Consuls.

TUNIS.

French Law, 27 March, 1883. (Erecting Tribunals in Tunis.)

I. A French tribunal and six Magistrates' Courts shall be established in the Regency of Tunis.

* * * * * *

II. These tribunals shall form part of the jurisdiction of the Court of Algiers. They shall take cognizance of all civil and commercial questions between French and French protected subjects. They shall take cognizance likewise of all proceedings instituted against the French and French protected subjects for infractions of the law, misdemeanours, or crimes.

Their authority may be extended over all other persons by edicts or decrees of His Highness the Bey, issued with the assent of the French Government.

Decree of the Bey, 5 May, 1883.

* * * * * *

We have been informed that several of the friendly Powers whose Consuls, by virtue of Capitulations and Treaties negotiated with our predecessors, have been invested with certain judiciary powers, are disposed to rénounce this privilege, if their subjects become amenable to the jurisdiction of the French tribunals recently established.

Article II. of the Law of the 27th March, 1883, allows us to extend the competence of these tribunals, with the assent of the French Government.

Being assured of this assent, we make the following decree:—

Sole Article.—The subjects of the friendly Powers whose consular tribunals shall be suppressed shall become amenable to the jurisdiction of the French tribunals under the same conditions as the French themselves.

English Order in Council, 31 December, 1883.

Whereas by Treaty, capitulation, grant, usage, sufferance, and other lawful means Her Majesty the Queen has power and jurisdiction in the Regency of Tunis: * * * *

And whereas by virtue of certain laws of the French Republic, and of certain decrees of His Highness the Bey of Tunis, French tribunals have been established in the Regency:

[*Recital of the Decree of 5 May, 1883.*]

And whereas Her Majesty the Queen has consented to abandon her consular jurisdiction with a view to British subjects in the Regency becoming justiciable by the said French tribunals, under the

same conditions as French subjects, and to the extent of the jurisdiction vested by law in the said tribunals:

Now, therefore, Her Majesty, by virtue and in exercise of the powers in this behalf by the "Foreign Jurisdiction Acts, 1843 to 1878," or otherwise, in Her Majesty vested, is pleased by and with the advice of her Privy Council to order, and it is hereby ordered as follows:

As regards all such matters and cases as come within the jurisdiction of the said French tribunals, the operation of the Orders in Council regulating Her Majesty's consular jurisdiction in Tunis shall cease to be in force and operation within the Regency on and after the first day of January, 1884, except as regards any judicial matters pending in Her Britannic Majesty's Court for Tunis on the day above mentioned.

* * * * * *

ZANZIBAR.

The dominions of the Sultan of Zanzibar are placed under the Protectorate of Her Britannic Majesty.

The Protectorate comprises the territory recognised as belonging to the Sultan in the articles of agreement between Great Britain and Germany, 29th October, 1886, with the exception of the territory lying to the south of the River Umba, of the Island of Mafia, and of the districts of Brava, Merka, Magadisho, and Warshiekh. (*Notification—London Gazette, November 4, 1890.*)

Treaty, 30 April, 1886.

V. Subjects of Her Britannic Majesty shall be permitted, thoughout the dominions of His Highness the Sultan, to acquire, by gift, purchase, intestate succession, or under will, or in any other legal manner, land, houses, and property of every description, whether movable or immovable; to possess the same, and freely to dispose thereof by sale, barter, donation, will, or otherwise.

XVI. Subjects of Her Britannic Majesty shall, as regards their persons and property, enjoy within the dominions of His Highness the Sultan of Zanzibar the rights of exterritoriality.

The authorities of His Highness the Sultan have no right to interfere in disputes between subjects of Her Britannic Majesty amongst themselves, or between them and members of other Christian nations. Such questions, whether of a civil or criminal nature, shall be decided by the competent consular authorities. The trial and also the punishment of all offences and crimes of which British subjects may be accused within the dominions of His Highness the Sultan, also the

hearing and settlement of all civil questions, claims, or disputes in which they are the defendants, is expressly reserved to the British consular authorities and Courts, and removed from the jurisdiction of His Highness the Sultan.

Should disputes arise between a subject of His Highness the Sultan or other non-Christian Power not represented by Cousuls at Zanzibar, and a subject of Her Britannic Majesty, in which the British subject is the plaintiff or the complainant, the matter shall be brought before and decided by the highest authority of the Sultan, or some person specially delegated by him for this purpose. The proceedings and final decision in such a case shall not, however, be considered legal unless notice has been given, and an opportunity afforded for the British Consul or his substitute to attend at the hearing and final decision.

XVII. Subjects of His Highness the Sultan or any non-Christian nation not represented by Consuls at Zanzibar, who are in the regular service of British subjects, within the dominions of His Highness the Sultan of Zanzibar, shall enjoy the same protection as British subjects themselves. Should they be charged with having committed a crime or serious offence punishable by law, they shall, on sufficient evidence being shown to justify further proceedings, be handed over by their British employers or by order of the British Consul to the authorities of His Highness the Sultan for trial and punishment.

XVIII. Should a subject of Her Majesty, residing in the dominions of His Highness the Sultan of Zanzibar, be adjudicated bankrupt, the British Consul shall take possession of, recover, and realise all available property and assets of such bankrupt, to be dealt with and distributed according to the provisions of British bankruptcy law.

XIX. Should a subject of His Highness the Sultan of Zanzibar resist or evade payment of the just and rightful claims of a British subject, the authorities of His Highness the Sultan shall afford to the British creditor every aid and facility in recovering the amount due to him. In like manner the British Consul shall afford every aid and facility to subjects of His Highness the Sultan of Zanzibar in recovering debts justly due to them from a British subject.

XX. Should a British subject die within the dominions of His Highness the Sultan of Zanzibar, or dying elsewhere, leave property therein, movable or immovable, the British Consul shall be authorized to collect, realise, and take possession of the estate of the deceased to be disposed of according to the provisions of British law.

XXI. The houses, dwellings, warehouses, and other premises of British subjects or of persons actually in their regular service within the dominions of His Highness the Sultan of Zanzibar shall not be

entered, or searched, under any pretext by the officials of His Highness, without the consent of the occupier, unless with the cognizance and assistance of the British Consul or his substitute.

XXII. It is hereby agreed between the two High Contracting Parties that, in the event of an agreement being hereafter arrived at between His Highness the Sultan of Zanzibar and the various Powers with which His Highness shall be in treaty relations, including Great Britain, which must be a consenting party, whereby the residents of a district or town shall, without distinction of nationality, be made subject to the payment of local taxes, for municipal and sanitary purposes, the same to be fixed and administered by or under the control of a special Board, nothing contained in this Treaty shall be understood so as to exempt British residents from the payment of such taxes.

MUSCAT *(the capital of Oman in South East Arabia.)*

Convention, 31 May, 1839.

IV. Subjects of the dominions of His Highness the Sultan of Muscat, actually in the service of British subjects in those dominions, shall enjoy the same protection which is granted to British subjects themselves; but if such subjects of the dominions of His Highness the Sultan of Muscat shall be convicted of any crime or infraction of the law requiring punishment, they shall be discharged by the British subject in whose service they may be, and shall be delivered over to the authorities of His Highness the Sultan of Muscat.

V. The authorities of His Highness the Sultan of Muscat shall not interfere in disputes between British subjects, or between British subjects and the subjects or citizens of other Christian nations. When differences arise between a subject of the dominions of His Highness the Sultan of Muscat and a British subject, if the former is the complainant, the cause shall be heard by the British Consul or Resident Agent, who shall administer justice thereupon. But if the British subject is the complainant against any of the subjects of His Highness the Sultan of Muscat, or the subjects of any other Mahomedan Power, then the cause shall be decided by the highest authority of His Highness the Sultan of Muscat, or by any person nominated by him; but in such case the cause shall not be proceeded in, except in the presence of the British Consul or Resident Agent, or of some person deputed by one or other of them, who shall attend at the Court House where such matter shall be tried. In causes between a British subject and a native of the dominions of His Highness the Sultan of Muscat, whether tried before the British Consul or Resident Agent, or before the above-mentioned authority of His

Highness the Sultan of Muscat, the evidence of a man proved to have given false testimony on a former occasion shall not be received.

VI. The property of a British subject who may die in the dominions of His Highness the Sultan of Muscat, or of a subject of His Highness the Sultan of Muscat who may die in the British dominions, shall be delivered over to the heirs or executors, or administrators of the deceased, or to the respective Consuls or Resident Agents of the contracting parties, in default of such heirs, or executors, or administrators.

VII. If a British subject shall become bankrupt in the dominions of His Highness the Sultan of Muscat, the British Consul or Resident Agent shall take possession of all the property of such bankrupt, and shall give it up to his creditors to be divided among them. This having been done, the bankrupt shall be entitled to a full discharge from his creditors, and he shall not at any time afterwards be required to make up his deficiency, nor shall any property he may afterwards acquire be considered liable for that purpose. But the British Consul or Resident Agent shall use his endeavours to obtain for the benefit of the creditors any property of the bankrupt in another country, and to ascertain that everything possessed by the bankrupt at the time when he became insolvent has been given up without reserve.

VIII. If a subject of His Highness the Sultan of Muscat should resist or evade payment of his just debts to a British subject, the authorities of His Highness shall afford to the British subject every aid and facility in recovering the amount due; and, in like manner, the British Consul or Resident Agent shall afford every aid and facility to subjects of His Highness the Sultan of Muscat in recovering debts justly due to them from a British subject.

SENNA *(probably now included in Persia.)*

Treaty, 15 January, 1821.

VI. All subjects of the British Government trading to Mocha, and particularly the merchants of Surat, shall do so under the protection of the British flag. If they are of the Islam faith, and they wish to settle their disputes according to the Mahomedan Sharah, they shall be at liberty so to do, a person on the part of the Resident attending; and all differences among themselves shall be decided by the Resident. In the event of any of the Imaum's subjects being concerned in the disputes, they shall be decided by an agent on the part of the Resident (or by himself, if he pleases) and the Governor conjointly. If the Imaum's subject is wrong, the Government shall punish him; if the British subject is wrong, the Resident shall punish him. And all dependents of the factory, of every denomination, from

broker downwards, shall be wholly under the protection of the British flag, and the control of the Resident, who alone shall possess the power of punishing them, and redressing all complaints against them.

PERSIA.

Treaty, 4 March, 1857.

[for art. xii, *see* p. 71.]

IX. The High Contracting Parties engage that, in the establishment and recognition of Consuls-General, Consuls, Vice-Consuls, and Consular Agents, each shall be placed in the dominions of the other on the footing of the most favoured nation. And that the treatment of their respective subjects, and their trade, shall also, in every respect, be placed on the footing of the treatment of the subjects and commerce of the most favoured nation.

Order in Council, 13 December, 1889.

"Whereas, by Treaty, grant, usage, sufferance, and other lawful means, Her Majesty the Queen has power and jurisdiction in Persia:"

For the purposes of this Order, Persia does not include places which are included in the two following Orders relating to the Persian coasts and islands.

Disputes as to whether a place is in Persia or within the limits of the Persian coasts, are to be determined by the Consul-General; his decision is to be conclusive unless the Secretary of State otherwise directs.

PERSIAN COASTS AND ISLANDS.

Order in Council, 13 December, 1889.

"Whereas, by Treaty, grant, usage, sufferance, and other lawful means, Her Majesty the Queen has power and jurisdiction, in relation to Her Majesty's subjects, and others, in that portion of the coast and islands of the Persian Gulf and Gulf of Oman which is within the dominions of His Majesty the Shah of Persia."

The term "Persian coast and islands" is used in distinction to "inland Persia," and includes the territorial waters of Persia adjacent to the coast and islands.

KASHGAR AND YARKUND.

Treaty between the Government of India and the Ameer, 2 February, 1874.

VIII. The following arrangements are agreed to for the decision of civil suits and criminal cases within the territories of His Highness the Ameer in which British subjects are concerned:—

(*a*) Civil suits in which both plaintiff and defendant are British subjects, and criminal cases in which both prosecutor and accused are British subjects, or in which the accused is a European British subject mentioned in Article III. of this Treaty [persons in the territory for trade or other purposes furnished with passports certifying their nationality], shall be tried by the British representative or one of his agents, in the presence of an agent appointed by His Highness the Ameer.

(*b*) Civil suits in which one party is a subject of His Highness the Ameer, and the other party a British subject, shall be tried by the Courts of His Highness, in the presence of the British representative, or one of his agents, or of a person appointed in that behalf by such representative.

(*c*) Criminal cases in which neither prosecutor nor accused is a subject of His Highness the Ameer shall, except as above otherwise provided, be tried by the Courts of His Highness, in the presence of the British representative, or of one of his agents, or of a person deputed by the British representative, or by one of his agents.

(*d*) Except as above otherwise provided, civil and criminal cases in which one party is a British subject, and the other the subject of a foreign Power, shall, if either of the parties is a Mahomedan, be tried in the Courts of His Highness; if neither party is a Mahomedan, the case may, with consent of the parties, be tried by the British representative or one of his agents; in the absence of such consent, by the Courts of His Highness.

(*e*) In any case disposed of by the Courts of His Highness the Ameer to which a British subject is a party, it shall be competent to the British representative, if he considers that justice has not been done, to represent the matter to His Highness the Ameer, who may cause the case to be retried in some other Court, in the presence of the British representative, or of one of his agents, or of a person appointed in that behalf by such representative or agent.

IX. Extension of rights and privileges under the Treaty to the subjects of all Princes and States in India in alliance with His Majesty.

X. Every affidavit and other legal document filed or deposited in any Court established in the respective dominions of the high contracting parties, or in the Court of the Joint Commissioners in Ladakh, may be proved by an authenticated copy, purporting either to be sealed with the seal of the Court to which the original document belongs, or in the event of such Court having no seal, to be signed by the Judge, or by one of the Judges of the said Court.

XI. When a British subject dies in the territory of His Highness

the Ameer, his movable and immovable property situate therein shall be vested in his heir, executor, administrator, or other representative in interest, or (in the absence of such representative) in the representative of the British Government in the aforesaid territory. The person in whom such charge shall be so vested shall satisfy the claims outstanding against the deceased, and shall hold the surplus (if any) for distribution among those interested. The above provisions, *mutatis mutandis*, shall apply to the subjects of His Highness the Ameer who may die in British India.

XII. If a British subject residing in the territories of His Highness the Ameer becomes unable to pay his debts, or fails to pay any debt within a reasonable time after being ordered to do so by any Court of Justice, the creditors of such insolvent shall be paid out of his goods and effects; but the British representative shall not refuse his good offices, if needs be, to ascertain if the insolvent has not left in India disposable property which might serve to satisfy the said creditors. The friendly stipulations in the present article shall be reciprocally observed with regard to His Highness's subjects who trade in India under the protection of the laws.

SIAM.

Commercial Agreement, supplementary to the Treaty of 18 April, 1855, 13 May, 1856.

II. On the exclusive jurisdiction of the Consul over British subjects.

The second Article of the Treaty [of 1855] stipulates, that "any disputes arising between British and Siamese subjects shall be heard and determined by the Consul in conjunction with the proper Siamese officers; and criminal offenders will be punished, in the case of English offenders by the Consul according to English law, and in the case of Siamese offenders by their own laws, through the Siamese authorities; but the Consul shall not interfere in any matters referring solely to Siamese, neither will the Siamese authorities interfere in questions which only concern the subjects of Her Britannic Majesty."

On the non-interference of the Consul with the Siamese, or of the Siamese with British subjects, the said Royal Commissioners [appointed by Her Majesty and the first and second Kings of Siam] desire, in the first place, to state that while, for natural reasons, they fully approve of the Consul holding no jurisdiction over Siamese in their own country, the Siamese authorities, on the other hand, will feel themselves bound to call on the Consul to apprehend and punish British subjects who shall commit, whilst in Siamese territory, any

grave infractions of the laws, such as cutting, wounding, or inflicting other serious bodily harm. But in disputes, or in offences of a slighter nature, committed by British subjects among themselves, the Siamese authorities will refrain from all interference.

With reference to the punishment of offences, or the settlement of disputes, it is agreed:

That all criminal cases in which both parties are British subjects, or in which the defendant is a British subject, shall be tried and determined by the British Consul alone. All criminal cases in which both parties are Siamese, or in which the defendant is a Siamese, shall be tried and determined by the Siamese authorities alone.

That all civil cases in which both parties are British subjects, or in which the defendant is a British subject, shall be heard and determined by the British Consul alone. All civil cases in which both parties are Siamese, or in which the defendant is a Siamese, shall be heard and determined by the Siamese authorities alone.

That whenever a British subject has to complain against a Siamese, he must make his complaint through the British Consul, who will lay it before the proper Siamese authorities. That in all cases in which Siamese or British subjects are interested, the Siamese authorities in the one case, and the British Consul in the other, shall be at liberty to attend at, and listen to, the investigation of the case; and copies of the proceedings will be furnished from time to time, or whenever desired, to the Consul or the Siamese authorities, until the case is concluded.

That although the Siamese may interfere so far with British subjects as to call upon the Consul, in the manner stated in this Article, to punish grave offences when committed by British subjects, it is agreed that:

British subjects, their persons, houses, premises, lands, ships, or property of any kind, shall not be seized, injured or in any way interfered with by the Siamese. In case of any violation of this stipulation, the Siamese authorities will take cognizance of the case, and punish the offenders. On the other hand, Siamese subjects, their persons, houses, premises, or property of any kind, shall not be seized, injured, or in any way interfered with by the English; and the British Consul shall investigate and punish any breach of this stipulation.

III. On the right of British subjects to dispose of their property at will.

By the fourth Article of the Treaty, British subjects are allowed to purchase in Siam "houses, gardens, fields, or plantations." It is agreed, in reference to this stipulation, that British subjects, who have

accordingly purchased houses, gardens, fields, or planations, are at liberty to sell the same to whomsoever they please. In the event of a British subject dying in Siam, and leaving houses, lands, or other property, his relations, or those persons who are heirs according to English law, shall receive possession of the said property; and the British Consul may proceed at once to take charge of the said property on their account. If the deceased should have debts due to him by the Siamese, or other persons, the Consul can collect them; and if the deceased should owe money, the Consul shall liquidate his debts as far as the estate of the deceased shall suffice.

Article V. of the Treaty of 1855.

All British subjects intending to reside in Siam shall be registered at the British Consulate.

Treaty between Great Britain and Siam, for the Prevention of Crime in the Territories of Chiengmai, Lakon, and Lampoonchi, and for the Promotion of Commerce between British Burmah and the Territories aforesaid, 3 September, 1883.

VI. If any persons accused or convicted of murder, robbery, dacoity, or other heinous crime in any of the territories of Chiengmai, Lakon, and Lampoonchi escape into British territory, the British authorities and police shall use their best endeavours to apprehend them. Such persons when apprehended shall, if Siamese subjects or subjects of any third Power, according to the extradition law for the time being in force in British India, be delivered over to the Siamese authorities at Chiengmai; if British subjects, they shall either be delivered over to the Siamese authorities, or shall be dealt with by the British authorities as the Chief Commissioner of British Burmah, or any officer duly authorized by him in this behalf, may decide.

If any persons accused or convicted of murder, robbery, dacoity, or other heinous crime in British territory, escape into Chiengmai, Lakon, or Lampoonchi, the Siamese authorities and police shall use their best endeavours to apprehend them. Such persons when apprehended shall, if British subjects, be delivered over to the British authorities, according to the extradition law for the time being in force in Siam; if Siamese subjects, or subjects of any third Power not having treaty relations with Siam, they shall either be delivered over to the British authorities, or shall be dealt with by the Siamese authorities, as the latter may decide, after consultation with the Consul or Vice-Consul.

VII. The interests of all British subjects coming to Chiengmai, Lakon, and Lampoonchi shall be placed under the regulations and control of a British Consul or Vice-Consul, who will be appointed to

reside at Chiengmai, with power to exercise civil and criminal jurisdiction in accordance with the provisions of Article II of the Supplementary Agreement of the 13th May, 1856, subject to Article VIII of the present Treaty.

VIII. His Majesty the King of Siam will appoint a proper person or proper persons to be a Commissioner and Judge, or Commissioners and Judges, in Chiengmai for the purposes hereinafter mentioned. Such Judge or Judges shall, subject to the limitations and provisions contained in the present Treaty, exercise civil and criminal jurisdiction in all cases arising in Chiengmai, Lakon, and Lampoonchi, between British subjects, or in which British subjects may be parties as complainants, accused, plaintiffs or defendants, according to Siamese law; provided always, that in all such cases the Consul or Vice-Consul shall be entitled to be present at the trial, and to be furnished with copies of the proceedings, which, when the defendant or accused is a British subject, shall be supplied free of charge, and to make any suggestions to the Judge or Judges which he may think proper in the interests of justice: provided also, that the Consul or Vice-Consul shall have power at any time, before judgment, if he shall think proper in the interests of justice, by a written requisition under his hand, directed to the Judge or Judges, to signify his desire that any case in which both parties are British subjects, or in which the accused or defendant is a British subject, be transferred for adjudication to the British Consular Court at Chiengmai, and the case shall thereupon be transferred to such last-mentioned Court accordingly, and be disposed of by the Consul or Vice-Consul, as provided by Article II of the Supplementary Agreement of 13th May, 1856.

The Consul or Vice-Consul shall have access, at all reasonable times, to any British subject who may be imprisoned under a sentence or order of the said Judge or Judges, and, if he shall think fit, may require that the prisoner be removed to the consular prison, there to undergo the residue of his term of imprisonment.

The tariff of Court fees shall be published, and shall be equally binding on all parties concerned, whether British or Siamese.

IX. In civil and criminal cases in which British subjects may be parties, and which shall be tried before the said Judge or Judges, either party shall be entitled to appeal to Bangkok; if a British subject, with the sanction and consent of the British Consul or Vice-Consul, and in other cases by leave of the presiding Judge or Judges.

In all such cases a transcript of the evidence, together with a report from the presiding Judge or Judges, shall be forwarded to Bangkok, and the appeal shall be disposed of there by the Siamese authorities and Her Britannic Majesty's Consul-General in consultation.

Provided always that in all cases where the defendants or accused are Siamese subjects the final decision on appeal shall rest with the Siamese authorities; and that in all other cases in which British subjects are parties the final decision on appeal shall rest with Her Britannic Majesty's Consul-General.

Pending the result of the appeal, the judgment of the Court at Chiengmai shall be suspended on such terms and conditions (if any) as shall be agreed upon between the said Judge or Judges and the Consul or Vice-Consul.

In such cases of appeal, as above set forth, the appeal must be entered in the Court of Chiengmai within a month of the original verdict, and must be presented at Bangkok within a reasonable time, to be determined by the Court at Chiengmai, failing which the appeal will be thrown out of Court.

X. The British authorities in the frontier districts of British Burmah, and the Siamese authorities in Chiengmai, Lakon, and Lampoonchi, will at all times use their best endeavours to procure and furnish such evidence and witnesses as may be required for the determination of civil and criminal cases pending in the Consular and Siamese Courts at Bangkok and in Chiengmai respectively, when the importance of the affair may render it necessary.

Annex.

List of heinous crimes appended to the Treaty in connexion with the provisions of Article VI of that Treaty with regard to the extradition of offenders :—

Murder,	Forgery,
Culpable homicide,	Counterfeiting coin or Government stamps,
Dacoity,	Kidnapping,
Robbery,	Rape,
Theft,	Mischief by fire or by any explosive substance.

CHINA.

Treaty, 26 June, 1858.

XV. All questions in regard to rights, whether of property or person, arising between British subjects in the dominions of His Majesty the Emperor of China, shall be subject to the jurisdiction of the British authorities.

XVI. Chinese subjects, who may be guilty of any criminal act towards British subjects, shall be arrested and punished by the Chinese authorities according to the laws of China.

British subjects who may commit any crime in China, shall be

tried and punished by the Consul, or other public functionary authorized thereto, according to the laws of Great Britain.

Justice shall be equitably and impartially administered on both sides.

XVII. A British subject having reason to complain of a Chinese, must proceed to the Consulate and state his grievance. The Consul will inquire into the merits of the case, and do his utmost to arrange it amicably. In like manner, if a Chinese have reason to complain of a British subject, the Consul shall no less listen to his complaint, and endeavour to settle it in a friendly manner. If disputes take place of such a nature that the Consul cannot arrange them amicably then he shall request the assistance of the Chinese authorities, that they may together examine into the merits of the case and decide it equitably.

XVIII. The Chinese authorities shall at all times afford the fullest protection to the person and property of British subjects, whenever these shall have been subjected to insult or violence. In all cases of incendiarism or robbery, the local authorities shall at once take the necessary steps for the recovery of the stolen property, the suppression of disorder, and the arrest of the guilty parties, whom they will punish according to the law.

XIX. If any British merchant vessel, while within Chinese waters, be plundered by robbers or pirates, it shall be the duty of the Chinese authorities to use every endeavour to capture and punish the said robbers or pirates, and to recover the stolen property, that it may be handed over to the Consul for restoration to the owner.

XXI. If criminals, subjects of China, shall take refuge in Hong Kong, or on board the British ships there, they shall, upon due requisition by the Chinese authorities, be searched for, and, on proof of their guilt, be delivered up.

In like manner, if Chinese offenders take refuge in the houses or on board the vessels of British subjects at the open ports, they shall not be harboured or concealed, but shall be delivered up, on due requisition by the Chinese authorities, addressed to the British Consul.

XXII. Should any Chinese subject fail to discharge debts incurred to a British subject, or should he fraudulently abscond, the Chinese authorities will do their utmost to effect his arrest, and enforce recovery of the debt. The British authorities will likewise do their utmost to bring to justice any British subject fraudulently absconding, or failing to discharge debts incurred by him to a Chinese subject.

XXIII. Should natives of China who may repair to Hong Kong to trade incur debts there, the recovery of such debts must be arranged for by the English Courts of Justice on the spot; but should the

Chinese debtor abscond, and be known to have property, real or personal, within the Chinese territory, it shall be the duty of the Chinese authorities, on application by and in concert with the British Consul, to do their utmost to see justice done between the parties.

Art. XVI explained in Agreement of 13 September, 1876.

II. In order to the fulfilment of its treaty obligations, the British Government has established a Supreme Court at Shanghai, with a special code of rules.

The Chinese Government has established at Shanghai a mixed Court.

III. It is agreed that, whenever a crime is committed affecting the person or property of a British subject, whether in the interior or at the open ports, the British Minister shall be free to send officers to the spot to be present at the investigation.

It is further understood that so long as the laws of the two countries differ from each other, there can be but one principle to guide judicial proceedings in mixed cases in China, namely, that the case is tried by the official of the defendant's nationality, the official of the plaintiff's nationality merely attending to watch the proceedings in the interests of justice. If the officer so attending be dissatisfied with the proceedings, it will be in his power to protest against them in detail. The law administered will be the nationality of the officer trying the case. This is the meaning of the words "*hui t'ung*," indicating combined action in judicial proceedings in Article XVI of the Treaty of Tientsin, and this is the course to be respectively followed by the officers of either nationality.

COREA.

Treaty, 26 November, 1883.

III. i. Jurisdiction over the persons and property of British subjects in Corea shall be vested exclusively in the duly authorized British judicial authorities, who shall hear and determine all cases brought against British subjects by any British or other foreign subject or citizen without the intervention of the Corean authorities.

ii. If the Corean authorities or a Corean subject make any charge or complaint against a British subject in Corea, the case shall be heard and decided by the British judicial authorities.

iii. If the British authorities or a British subject make any charge or complaint against a Corean subject in Corea, the case shall be heard and decided by the Corean authorities.

iv. A British subject who commits any offence in Corea shall be tried and punished by the British judicial authorities according to the laws of Great Britain.

v. A Corean subject who commits in Corea any offence against a British subject shall be tried and punished by the Corean authorities according to the laws of Corea.

vi. Complaints against a British subject involving a penalty or confiscation by reason of any breach either of this Treaty or of any regulations annexed thereto, or of any regulations that may hereafter be made in virtue of its provisions, shall be brought before the British authorities for decision, and any penalty imposed and all property confiscated in such cases shall belong to the Corean Government.

vii. British subjects in Corea shall be amenable to such municipal, police, and other regulations for the maintenance of peace, order, and good government, as may be agreed upon by the competent authorities of the two countries.

viii. In all cases, whether civil or criminal, tried either in Corean or British Courts in Corea, a properly authorized official of the nationality of the plaintiff or prosecutor shall be allowed to attend the hearing, and shall be treated with the courtesy due to his position. He shall be allowed, whenever he thinks it necessary, to call, examine, and cross examine witnesses, and to protest against the proceedings or decision.

ix. If a Corean subject who is charged with an offence against the laws of his country takes refuge on premises occupied by a British subject, or on board a British merchant vessel, the British consular authorities, on receiving an application from the Corean authorities, shall take steps to have such person arrested and handed over to the latter for trial. But, without the consent of the proper British consular authorities, no Corean officer shall enter the premises of any British subject without his consent, or go on board a British ship without the consent of the officer in charge.

x. On the demand of any competent British Consular authority, the Corean authorities shall arrest and deliver to the former any British subject charged with a criminal offence, and any deserter from a British ship of war or merchant vessel.

Protocol.

I. With reference to Article III. of this Treaty, it is hereby declared that the right of extra-territorial jurisdiction over British subjects in Corea granted by this Treaty shall be relinquished when, in the judgment of the British Government, the laws and legal procedure of Corea shall have been so far modified and reformed as to remove the objections which now exist to British subjects being placed under Corean jurisdiction, and Corean judges shall have attained similar legal qualifications, and a similar independent position to those of British judges.

PACIFIC OCEAN.

Order in Council, 15 March, 1893.

The limits of the Order as defined in the Pacific Order in Council, 1893, are as follow:—

IV. The limits of this Order shall be the Pacific Ocean and the islands and places therein, including—

(*a*) Islands and places which are for the time being British settlements,

(*b*) Islands and places which are for the time being under the protection of His Majesty,

(*c*) Islands and places which are for the time being under no civilised government,

but exclusive (except as in this Order expressly provided in relation to any particular matter) of—

(1) Any place within any part of His Majesty's dominions or the territorial waters thereof which is for the time being within the jurisdiction of the Legislature of any British possession.

(2) Any place for the time being within the jurisdiction or protectorate of any civilised Power.

V. In islands and places which are not British settlements, or under the protection of His Majesty, jurisdiction under this Order shall be exercised (except only as in this Order otherwise expressly provided) only over His Majesty's subjects, and any foreigners or natives, in so far as by reason of being, or having been, on board a British ship or otherwise they have come under a duty of allegiance to His Majesty, and their property and personal and proprietary rights and obligations.

VI. Until otherwise directed by a Secretary of State as hereinafter provided, jurisdiction under this Order shall be exercised only in relation to the following parts of the limits of this Order, that is to say—

(1) The groups of islands with the dependencies and territorial waters thereof known as—

The Friendly Islands.
The Navigators' Islands.
The Union Islands.
The Phœnix Islands.
The Ellice Islands.
The Gilbert Islands.
The Solomon Islands, so far as they are not within the jurisdiction of the German Empire.
The Santa Cruz Islands.

(2) Any seas, islands, and places which are not excluded by the 4th article of this Order, and are situate in the Western Pacific Ocean, that is to say, within the following limits—

North, from 140° east longitude by the parallel 12° north latitude to 160° west longitude, thence south to the equator, and thence east to 149° 30′ west longitude.

East by the meridian of 149° 30′ west longitude.

South by the parallel 30° south latitude.

West by the meridian 140° east longitude.

Provided that the Secretary of State from time to time, by any instructions given to the High Commissioner and published as the Secretary of State thinks fit, may direct that jurisdiction under this Order may be exercised in relation to any part of the limits of this Order not herein specified, or that any part of this Order shall, until otherwise directed, be excepted from the application of this Order.

Provided also that in relation to the Navigators' Islands, this Order is subject to the provisions of the Final Act of the Conference on the Affairs of Samoa, signed at Berlin, the 4th June, 1889.

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