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CHINESE JURISPRUDENCE

BY

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ENVOY EXTRAORDINARY AND MINISTER PLENIPOTENTIARY OF THE EMPEROR OF
CHINA TO THE UNITED STATES, SPAIN AND PERU.

An Address Delivered before the New York State Bar Association at
its Annual Meeting at Albany, N. Y., January 15, 1901, and
Reprinted from the Proceedings of the Association.



ALBANY:

THE ARGUS COMPANY, PRINTERS.

1901.

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Of Washington, D. C.

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THE UNIVERSITY OF CHICAGO

PHILOSOPHY

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CHINESE JURISPRUDENCE.

Coming before you this evening, I wish first to express my appreciation of the honor you have done me by inviting me to deliver an address on this most interesting occasion. It seems somewhat strange that the representative of the most ancient empire in the world, in the person of such a man as my humble self, should be called upon to speak before such a learned body as the New York State Bar Association, at the Capital City of the Empire State in this young Republic. I suppose this is due to a natural desire on your part to know something about the principles of law that prevail in that ancient empire, not so much, I believe, for the purpose of adopting them as for the purpose of comparison.

The law of China may be treated under three heads: Common law; statute law; case law. By common law I mean that which consists of those principles and rules sanctioned by usage and custom from time immemorial, and observed and followed by the courts. The customary law rests, undoubtedly, as did the Roman law before the publication of the Twelve Tables, upon the *mores majorum*, that is, customs long observed and sanctioned by the consent of the people. The fundamental social principles enunciated by the Book of Rites since the time of Chow Kung have continued to exercise a profound influence upon the Chinese mind. By fundamental principles, it is meant

those, such as the patriarchal principle and the fraternal principle, which pervade the law and customs of China as completely as the *patria potestas* ever did the jurisprudence of Rome. Another source of common law is to be found in the wise maxims and injunctions of ancient emperors scattered through the classics. Some of these are forty centuries old, and are still scrupulously observed. It is curious to note, in passing, that the spirit of the well-known legal maxim, "It is better to let nine guilty persons go unpunished than to adjudge one innocent person guilty," is exemplified in the ancient law of the Chinese. I find in the chronicle of Shun, whose reign commenced 2317 B. C., the established rules of procedure in these words:

"Pardon inadvertent faults, however great; and punish wilful crimes, however small. In cases of doubtful crimes deal with them lightly; in cases of doubtful merit, prefer the high estimation. Rather than put to death an innocent person, it is better to fail in the strict administration of the law."

Whatever faults and irregularities there are in the Chinese judicial system — and I admit that they are not few — I have no hesitation in saying that the good old rules quoted in the above passage, especially in the last portion of it, are generally observed. In the trial of cases for murder and other serious crimes, Chinese judges are particularly careful and cautious. If there is any point that can be stretched in favor of the accused, they will give him the benefit of it. The consequence of wrongly convicting an innocent person is most serious. Suppose a person were convicted and sentenced to death for the crime of murder of which he was innocent, and an appeal to Peking resulted in the reversal of the decision. All the officials who had any-

thing to do with the trial of the case, from the Governor of the province down to the sub-magistrate of the district, would be degraded and subjected to the severest punishment. Thus, apart from other reasons, the dread of punishment for giving a wrong decision acts as a check on the judges and makes them extremely careful and painstaking in deciding a case.

The statute law of China is the most important result of legislation. Its foundation was laid over twenty centuries ago, and since then successive dynasties have built upon it by addition, amendment, abrogation and amalgamation, as circumstances required. The standard work, which is now in use over the whole Empire of China, is called *Ta Ching Luli*, generally known as the Penal Code. It contains not only the fundamental statutes, but also the supplemental laws. It is arranged under seven headings, viz.: General, civil, fiscal, ritual, military, criminal and that relating to public works, and is subdivided into four hundred and thirty-six sections. It also contains a collection of important cases which have been decided by the proper authorities and approved by the Emperor, with notes and comments illustrating the practice and theory of the law appended. The first edition was published in 1647, only three years after the accession of the present dynasty. A new edition is generally issued every five or ten years, with summary reports of important cases that deserve notice. The principles on which the work is published will be better understood by referring to the original preface of the Code. After remarking upon the inconveniences arising from the necessity of aggravating or mitigating the sentence of the magistrates, who, previous to the re-establishment of an authentic Code of Penal Laws, were not in possession of any fixed rules upon which

they could base a just decision, His Majesty, the Emperor Shunchi, goes on to describe the manner of revising the Code as follows:

“A numerous body of magistrates was assembled at the capital, at our command, for the purpose of revising the Penal Code formerly in force under the late dynasty of Ming and of digesting the same into a new Code by the exclusion of such parts as were exceptionable and the introduction of others which were likely to contribute to the attainment of justice and the general perfection of the work. The result of their labors having been submitted to our examination, we maturely weighed and considered the various matters it contained, and then instructed a select number of our great officers of State carefully to revise the whole for the purpose of making such alterations and emendations as might still be found requisite. Wherefore, it being now published, let it be your great care, officers and magistrates of the interior and exterior departments of our Empire, diligently to observe the same, and to forbear in the future to give any decision or to pass any sentence according to your private sentiments or upon your unsupported authority. Thus shall the magistrates and the people look up with awe and submission to the justice of these institutions as they find themselves respectively concerned in them; the transgressor will not fail to suffer a strict expiation of his crimes, and will be the instrument of deterring others from similar misconduct; and, finally, both officers and people will be equally secured for endless generations in the enjoyment of the happy effects of the great and noble virtues of our illustrious progenitors.”

It will take up too much time and space to go into a minute description of the Code, but it may not be

uninteresting to give an outline of it. Under the heading of general laws are forty-six sections, laying down principles and definitions applicable to the whole. The description of the five ordinary punishments; the definition of the ten treasonable offenses; the rules for the mitigation of punishment; the description of the eight privileged classes, and the general directions regarding the conduct of officers, offenses of astronomers, artificers, musicians, and women, and indulgence to offenders in consideration of age, youth or infirmities, and to offenders for the sake of their parents, are all minutely given under this head. It may be asked how mercy is to be shown to an offender for the sake of his parents. Here is the law on the subject:

“When any offender under sentence of death, for an offense not excluded from the contingent benefit of an act of grace, shall have parents or grandparents who are sick, infirm or aged above seventy years, and who have no other male child or grandchild above the age of fifteen to support them besides such capitally-convicted offender, this circumstance, after having been investigated and ascertained by the magistrate of the district, shall be submitted to the consideration and decision of his Imperial Majesty. Any offender who, under similar circumstances, has been condemned to undergo temporary or perpetual banishment, shall, instead thereof, receive 100 blows, and redeem himself from further punishment by the payment of the customary fine.”

In order not to frighten my hearers who are opposed to corporal punishment, I will explain that a sentence of 100 blows is nominal. A reduction of sixty per cent is allowed, which means, in this case, only forty blows; and these forty blows can, according to the Code, be

commuted to a pecuniary payment. The reason for such special grace, shown to an offender who is the only child of his parents, is based upon the obligations of a man to support and take care of his parents and grandparents, for these old folks would have to suffer if their only child should be executed.

The six remaining main divisions of the Code pertain to the six administrative boards of the government in Peking. The second division, which treats of civil laws in twenty-eight sections, has two books, one relating to the system of government and the other to the conduct of officials, etc. The hereditary succession of rank and titles is regulated, and punishments are laid down for those who illegally assume such honors. The second book provides punishment for failing to execute an imperial edict; for destroying or discarding edicts and seals of office; for neglecting to make full reports to superior officers, as required by law; for omitting to use an official seal when necessary, etc. A knowledge of the law is a great advantage, for it is enacted that all officers and others in the employ of the government ought to study diligently and make themselves perfect in the knowledge of the law, and that all private individuals, whether husbandmen or artificers, or whatever else may be their calling or profession, who are found capable of explaining the nature and comprehending the objects of the laws, shall receive their pardon in all cases of offense resulting purely from accident or imputable to them only from the guilt of others, provided it be their first offense.

The third division, which has eighty-two sections, is devoted to fiscal laws. It is subdivided into seven books. The first book, containing fifteen sections, deals with matters relating to the enrollment of

families and individuals, to succession and inheritance, to levy of taxes and personal services and to the care of the aged and infirm. The second book, with eleven sections, treats of the subject of lands and tenements. There is one section which prohibits officers of the government from purchasing lands within the limits of their jurisdiction. It runs thus:

“The officers in any of the departments of government which possess a territorial jurisdiction shall not, during the exercise of their authority therein, purchase, or hold by purchase, any lands or tenements within the limits of such jurisdiction; whoever is convicted of a breach of this law shall suffer fifty blows, and be removed from his office, but shall not thereby be rendered incapable of holding office under the government elsewhere; the lands and tenements so unlawfully held shall be forfeited to the government.”

The reason for this enactment is that, if Governors and other officials were permitted to buy and sell lands, etc., they would be competing with the people in their business. The third book, with seventeen sections, prescribes rules for marriages between different classes of society. The law provides various degrees of punishment for a man or woman who marries during the legal period of mourning for a deceased parent, and for a widow who marries again within the legal period of mourning for her deceased husband, the period of mourning in each case, I may state, being twenty-seven months. This law could never be passed or enforced in Europe or in this country where every man or woman after coming of age can marry whenever he or she likes. But our law goes further. “Whoever marries a wife or husband, having a father, mother, grandfather or grandmother at the same time under confinement in prison

for a capital offense, shall be punished with eighty blows. Nevertheless, if any such person enters into the marriage state at such period by the express command of his or her parent or grandparent in prison, no punishment shall ensue, provided the usual feast and entertainment is omitted; otherwise a punishment of eighty blows shall be still inflicted." The prohibitions as to marriage between persons on account of consanguinity and other relationships are more numerous and general than those in this country or in Europe. Section 107 provides that "whenever any persons having the same surname or family name intermarry, the parties and the contractor of the marriage shall each receive sixty blows, and, the marriage being null and void, the man and woman shall be separated, and the marriage presents forfeited to the government." Generally speaking, names of families in China are numerous, but they are few in proportion to the immense population. It can be easily understood that the prohibitions imposed by this section has often been found embarrassing and inconvenient. In the interior of China there are many villages and towns, nearly all of whose inhabitants bear the same surname. Great hardship is felt, if they be not allowed to contract marriage among themselves. This difficulty renders it necessary to relax the stringent enforcement of that prohibition in those places.

Section 108 forbids marriage between parties related by marriage in these words:

"All marriages between persons who, through another marriage, are related to each other in any of the four degrees, and all marriages with sisters by the same mother, though by a different father, or with the daughters of a wife's former husband, shall be considered as incestuous. A man shall not marry his father's or

mother's sister-in-law, his father's or mother's aunt's daughters, his son-in-law's or daughter-in-law's sister, or his grandson's wife's sister, on pain of receiving 100 blows for such offense. Whoever marries his mother's brother's or mother's sister's daughter shall receive eighty blows, and in these, as well as the foregoing cases, the marriage shall be annulled."

As to marriage with relations by blood or with the widows of such relations, it is enacted as follows:

"Whoever marries a female relation beyond the fourth degree or the widow of a male relation equally remote, shall be punished with a hundred blows. Whoever marries the widow of a relation in the fourth degree or of a sister's son shall be punished with sixty blows and one year's banishment. Whoever marries the widow of any nearer relation shall be punished according to the law against incestuous connections with such persons. Nevertheless, when the connection has been broken up by a divorce or an intervening marriage with a stranger, the offense shall, in general, be only punished by eighty blows. Whoever marries his brother's widow shall be strangled. Whoever marries any female relation in the fourth or any nearer degree shall be punished according to the law concerning incest, and all such incestuous marriages shall be null and void."

There is a provision against the marriage of priests. If a Buddhist or Taoist priest shall marry, he shall be punished with eighty blows and be expelled from the order to which he belongs, and the marriage shall be null and void.

The law sanctioning divorce gives seven justifying causes; namely, barrenness, lasciviousness, disobedience to her husband's parents, talkativeness, thievery, jealousy and

leprosy. This is, however, almost annulled by the other part of the same section, which declares that, although one of the seven above causes of divorce can be chargeable upon the wife, yet if any of the three reasons against a divorce should exist, namely, (1) the wife having mourned three years for her husband's parents; (2) the family having become rich after having been poor at the time of the marriage, and (3) the wife having no parents living to receive her back again, then none of the seven afore-mentioned causes will justify a divorce, and if the husband should put away his wife upon such grounds, he shall be punished and obliged to take her back.

The fourth book of the third division contains regulations concerning coinage and collection of revenue, and for guarding granaries and treasures. The fifth book contains provisions for the prevention and punishment of smuggling. The salt trade in China, the duties on which form a considerable source of revenue, is a regulated monopoly, carried on by a limited number of merchants, to whom licenses are granted by the Crown, and whose proceedings are at the same time subjected to the inspection and control of public officers, specially appointed to that service in each province. It is not to be wondered at that severe measures are provided against smuggling in salt.

The sixth and seventh books deal with usury, license of commercial agents, and false weights and measures. It may be noted that the legal rate of interest is three per cent per mensem, but in practice it is considerably lower.

There is a provision against monopolists and unfair traders which is worth quoting. Section 154 reads:

“When the parties to a purchase or sale of goods do not amicably agree respecting the terms, if one of them,

by monopolizing or otherwise using undue influence in the market, obliges the other to allow him an exorbitant profit, or if artful speculators in trade, by entering into a private understanding with the commercial agent and by employing other unwarrantable contrivances, raise the price of their own goods, although of low value, and depress the prices of those of others, although of high value, in all such cases the offending parties shall be severally punished with eighty blows, each for his own misconduct. When a trader, observing the nature of the commercial business carried on by another, contrives to suit or manage the disposal or appreciation of its own goods in such manner as to derange and excite distrust against the proceedings of the other, and thereby draws unfairly a greater proportion of profit to himself, than usual, he shall be punished with forty blows."

There are no trusts in China yet; but if there should be such, I fear the local authorities will put them down under the law.

The fourth main division of the Code in twenty-six sections contains the regulations for state sacrifices and ceremonies and other ritual laws. The provisions concerning the duties of mourning are minute and severe.

"If a son, on receiving information of the death of his father or mother, or a wife, on receiving information of the death of her husband, suppresses such intelligence, and omits to go into lawful mourning for the deceased, such neglect shall be punished with sixty blows and one year's banishment. If a son or wife enters into mourning in a lawful manner, but, previous to the expiration of the term, discards the mourning habit, and, forgetful of the loss sustained, plays upon musical instruments and partakes in festivities, the punishment shall amount for such offense

to eighty blows. Whoever, on receiving information of the death of any other relation in the first degree than the above-mentioned, suppresses the notice of it, and omits to mourn, shall be punished with eighty blows; if, previous to the expiration of the legal period of mourning for such relation, any person casts away the mourning habit, and resumes his wonted amusements, he shall be punished with sixty blows. When any officer or other person in the employ of the government has received intelligence of the death of his father or mother, in consequence of which intelligence he is bound to retire from office during the period of mourning; if, in order to avoid such retirement, he falsely represents the deceased to have been his grandfather, grandmother, uncle, aunt, or cousin, he shall suffer punishment of 100 blows, be deposed from office and be rendered incapable of again entering into the public service."

The law of compulsory mourning for a fixed period, during which the mourner has to give up his office, frequently works great hardship; but it has to be observed, especially in the case of an official.

In connection with this subject, I may mention a case that has happened to come under my notice, in which the custom of mourning for the nearly related dead was utterly ignored. Some years ago a highly respected Englishman in China lost his mother. When the news reached him, he was deeply affected for he loved his mother dearly. But whatever his inner grief might be, there was no outward sign of it. He would not put on mourning in any form. There was no change in the color or material of his garments, nor did he wear any crape on his hat. In his correspondence he continued to use the ordinary

stationery without the regulation black border to indicate that anything unusual had passed upon his daily life. His conduct seemed to me at the time to be nothing less than scandalous, and I remonstrated with him. He explained that he felt the deepest grief at the death of his mother; but as he did not believe in the conventional mode of mourning, he considered all outward signs as superfluous, inasmuch as they could not add anything more to his sorrow. Whether such conduct is, or is not, consonant with the sentiment of this country, I have to leave to others who are moralists to decide.

The fifth main division, which treats of military laws in seventy-one sections, makes provisions for the protection of the imperial palace, the government of the army, the guarding of frontier passes, the management and rearing of horses and cattle for military or imperial use, and the forwarding of dispatches by couriers. There is a section dealing with vicious and dangerous animals, according to which, if such animals should not be properly tied and confined, and any person should be killed or wounded by them, the owner thereof would be obliged to redeem himself from the punishment incurred for manslaughter by the payment of a fine or by making suitable compensation. The rarity of cases of biting or killing by ferocious dogs in China is mainly attributable to the severity of this law.

The sixth main division, which deals with criminal laws, is most important. It contains 170 sections, arranged in eleven books. They treat of robbery, of theft, of homicide, of murder, of quarreling and fighting, of abusive language, of indictments and informations, of bribery and corruption, of forgery and fraud, of incest and adultery, of arrest and escape of criminals,

of imprisonment, of execution, and lastly of miscellaneous offenses. Under the head of robbery is included high treason, which is considered the gravest crime in Chinese law. To it are attached the severest penalties imaginable with the view not only of punishing the offenders, but also of deterring others from following their evil example. It is described in these terms:

“High treason is either treason against the State by an attempt to subvert the established government, or treason against the sovereign by an attempt to destroy the palace, in which he resides, the temple in which his family is worshipped, or the tombs, in which the remains of his ancestors are deposited. All persons convicted of being principals or accessories to the actual or designed commission of this heinous crime, shall suffer death by a slow and painful execution. All the male relations in the first degree, at or above the age of sixteen, of persons convicted as aforesaid, viz., the father, grandfather, sons, grandsons, paternal uncles and their sons, respectively, shall be beheaded. All the other male relations at or above the age of sixteen, however distant their relationship and whether by blood or marriage, shall likewise suffer death by being beheaded, if they were living under the same roof with the treasonable offender, at the time the offense was committed. The male relations in the first degree under the age of sixteen, and the female relations in the first degree of all ages, shall be distributed as slaves to the great officers of State. The property of every description belonging to treasonable offenders shall be confiscated for the use and service of the government. All persons who, privy to the commission, or to the intent to commit the crime of high treason,

wilfully conceal and connive at the same, shall be beheaded."

It will be seen that when a person commits such an enormous crime as high treason, not only he himself will be severely punished, but his wife, his family, and all his relations also will have to suffer; hence this crime is very rarely committed in China.

Using abusive language renders the speaker liable to punishment, for the law provides that "persons abusing each other shall be punishable with ten blows respectively." But much more severe punishment is imposed for using abusive language to a parent, paternal grandfather or grandmother. It is provided that any person who is guilty of addressing abusive language to his or her father or mother, or father's parents, or a wife who rails at her husband's parents or grandparents shall be strangled; provided always that the persons so abused complain themselves to the magistrates, and had personally heard the language addressed to them. I find this provision is similar in terms to the injunction of Moses as given in the ninth verse of the twentieth chapter of the book of Leviticus: "Every one that curseth his father or mother shall be surely put to death; he hath cursed his father or his mother; his blood shall be upon him."

The seventh main division has thirteen sections relating to public works, such as the preservation and repair of public buildings, roads and bridges; the proper officials of the government are charged with the duty of keeping all such in good order.

From the above summary of the statute law, it will be noticed that the Code comprehends a great variety of subjects and goes into many details. It was foreseen by the compilers that there might be still some

offenses beyond the reach of any of the express provision in the Code. Not wishing that such offenses should go unpunished, they have added this very comprehensive section: "Whoever is guilty of improper conduct, though not expressly prohibited, shall be punished at the least with forty blows, and, when it is of a serious nature, with eighty blows." Under this section, all offenses imaginable, not expressly provided for, are considered as coming within its purview, and punishable in accordance with this provision. I fear that such a general law would not be tolerated by the people of a free country, nor approved by lawyers, who naturally wish to secure as much freedom and liberty for their clients as possible. I must not omit to state that besides the laws and regulations contained in the Code, every high provincial officer has the right to issue proclamations having the force of law within his own jurisdiction to meet local requirements and unforeseen exigencies. Such orders affect the welfare of the people, and sometimes prescribe severe penalties in case of violation. But all official acts of this character must be reported to the proper board at Peking, as well as the Emperor, for approval.

Competent foreigners, who have long been in China and are acquainted with the customs and laws of the people, are of the opinion that "a broad survey of Chinese legislation, judged by the results and the general appearance of society, gives the impression of an administration far superior to other Asiatic countries." Let me quote the comment of the Edinburgh Review on this subject. It says:

"By far the most remarkable thing in this Code is its great reasonableness, clearness and consistency, the business-like brevity and directness of the various pro-

visions, and the plainness, and moderation, in which they are expressed. There is nothing here of the monstrous verbiage of most other Asiatic productions, none of the superstitious delirium, the miserable incoherence, the tremendous non-sequiturs, and eternal repetitions of those oracular performances—nothing even of the turgid adjulation, accumulated epithets, and fatiguing self-praise of other eastern despotisms—but a calm, concise and distinct series of enactments, savoring throughout of practical judgment and European good sense, and, if not always conformable to our improved notions of expediency, in general approaching to them more nearly than the Codes of most other nations. When we pass, indeed, from the ravings of the Zend-Avesta or the Puranas to the tone of sense and business in this Chinese collection, we seem to be passing from darkness to light, from the drivings of dotage to the exercise of an improved understanding; and redundant and absurdly minute as these laws are in many particulars, we scarcely know any European Code that is at once so copious and so consistent, or that is so nearly free from intricacy, bigotry and friction. In everything relating to political freedom or individual independence, it is, indeed, woefully defective; but for the repression of disorder and the gentle coercion of a vast population, it appears to be equally mild and efficacious.”

The system of procedure for the administration of the law is peculiar, and essentially different in many respects from that which prevails in America and Europe. In the first place, we have no such thing as a jury. The judge, or magistrate, as the case may be, tries the case alone, and has to decide it according to law and equity. He has not only to sift the evidence thoroughly, but to find more in case of insufficiency to secure a convic-

tion. No sentence can be passed without the confession of the accused. Hence the cruel practice of extorting confession by torture, I am sorry to say, is often resorted to. But the consequence of convicting the wrong person is very serious. In some cases, the magistrate has to suffer the same punishment that has been inflicted upon the innocent victim. This has the effect of causing all magistrates and judges to be extremely careful in the investigations of cases. I shall give an illustration of how a case is tried from beginning to end. Let me first define the duties, powers and responsibilities of a magistrate in a district. Though a magistrate holds a comparatively low rank, *i. e.*, only the seventh in the official hierarchy, the responsibilities of his position are exceedingly varied and heavy. He is considered as a father to the people and held responsible for their welfare and good behavior. If a crime is committed within his jurisdiction, he is bound to discover and arrest the offender. He has under him a body of police and detectives, whom he can dispatch on missions of this character. If the offender cannot be found, he is liable to be degraded; so he has good reason to exert himself to the utmost to bring the guilty to justice. In case the offender is duly captured, he has to summon the complainant and witnesses and hold court for the trial of the case. He has no jury or assessor to assist him in the discharge of his duties. All that he can do is to spare no pains to get at the merits of the case and decide accordingly. There is no lawyer in court to help him in the examination of witnesses either for the prosecution or for the defense or to give him points of law bearing upon the case. He has, however, in his yamen or office, law secretaries, who are of great assistance to him. As I have said before, there are no lawyers

in China corresponding to those in this country and in Europe. But there is a class of men who are well versed in the technicalities and intricacies of the law, and in every yamen are always two or three such men, who have exclusive charge of legal matters. They are not only law secretaries, but also jurisconsults to their chiefs. No case of importance is decided in court without their having been first consulted and their opinion obtained. They are extremely skilful in sifting and weighing evidence and in applying the law to the case in hand. Instances are not wanting, in which they have been, to their credit, instrumental in reversing erroneous decisions of judges and magistrates. Now to return to the case in question, the magistrate, as a matter of course, has to show the law secretaries all the testimony taken and to consult with them not only as to its sufficiency and insufficiency, but also as to the law to be applied under the circumstances. If they consider the evidence insufficient for conviction, then he must get more evidence or dismiss the case. In important cases, such as burglary and murder, after the offender is duly convicted, the magistrate has to forward all the evidence with his report of the case, to his immediate superior, the prefect, for approval. The prefect, in his turn, has to report the same to the provincial judge, who, in his turn, has to report the same to the governor or the viceroy, as the case may be. It is absolutely necessary that all these high officials should confirm the sentence pronounced by the magistrate before it can be carried out. In case of a death sentence, the governor has to transmit to the board of punishments at Peking, full copies of all papers pertaining to the case with his report, and at the same time

memorialize the throne for approval before the murderer can be executed. If the emperor or the board of punishments considers the sentence as unsupported by the weight of the evidence, the execution will be stayed, and the case remanded for a new trial.

Not many years ago, a man and a woman were charged with the murder, by poisoning, of the woman's husband. The case was first tried by the magistrate of the district where the alleged murder was committed. The parties were found guilty and sentenced to death according to law. The case was successfully reviewed by the prefect, the provincial judge and the governor, all of whom confirmed the sentence. Finally an appeal was taken to Peking, and the Emperor granted a new trial. Then the case was reopened. After a searching examination, it was found that the woman's husband did not die of poisoning, as certified by the different provincial officials and the sentence was set aside. For this miscarriage of justice, all those officials, from the governor to the magistrate, were punished; the judge and the magistrate suffered the most. Thus it will be seen that, though the provincial authorities have great powers still they cannot escape severe punishment if they are found to abuse or improperly exercise those powers.

There are several features in the judicial proceedings of a Chinese court which must seem peculiar and strange to a western observer. A witness is not treated in the same way as he would be in this country; that is to say, after giving his testimony, he is allowed to go home. In a Chinese court he is generally detained, and only in minor cases is he allowed to go away on bail. As a rule, all witnesses, especially in serious cases, are confined and deprived of their liberty until the ter-

mination of the case. For this reason, it is very difficult to get people to go voluntarily to court to give evidence. Persons who have reached the age of eighty, or are under ten years of age, or are grievously infirm, are exempted from being called upon to give evidence. An official also has the same privilege. He is not compelled to give his testimony in open court. Even when he is the plaintiff or the defendant in an action, he need not appear in person, but can send some one to represent him. If his testimony is absolutely necessary, he can draw up a statement at home and send it to court.

Another peculiarity in the Chinese system is that a judge or magistrate can delegate another official to try a case for him. When the deputy holds court he exercises all the powers of his principal, and, if he renders a wrong decision, he and his principal are equally held responsible.

As I have already said before, the judicial powers of a magistrate are very great. In every case that comes before him he has to follow the law, but where the code or statute law is silent, he is at liberty to decide according to the equity of the case. Thus his tribunal is not only a court of law, but a court of equity also. I would add that it has civil as well as criminal jurisdiction. In fact it takes cognizance of all sorts of cases, from a petit family quarrel to a divorce, from an assault to a murder, from a suit for ten dollars, to one involving millions.

It can be inferred from what I have said that the line of demarcation between criminal and civil cases is not clearly defined. Civil suits such as those relating to lands, mortgages, debts, etc., are tried by the same tribunal, the procedure being nearly the same as in criminal cases. Indeed, the penalties imposed for non-

fulfillment of the decrees of the court are not essentially different.

The laws and practices of China above described have now been enforced for many centuries. Generations of Chinese have lived, moved, worked and died under them. Time has proved that they are adapted to the needs and genius of the people. True it is that now and then they see a miscarriage of justice, but they believe that this is due to the incompetency or corruption of the presiding officer, and not to any defect or imperfection in their system. It was not till a mixed case occurred and had to be tried that the inequality of their laws and imperfection of their system became apparent to them. When I say a mixed case, I mean one in which the complainant or plaintiff is a Chinese and the defendant a foreigner, or *vice versa*. In the treaties which China has concluded with different countries it is stipulated that so long as the laws of China differ so much from those of other countries, "there can be but one principle to guide judicial proceedings in mixed cases, 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. The law administered will be the law of the nationality of the officer trying the case." By virtue of these treaty provisions, if a Chinese assaults a foreigner, he is to be tried and punished according to Chinese law; but, if he is assaulted by a foreigner, the case can only be tried by the foreigner's consul. If convicted, he is punished, not in accordance with Chinese law, but in accordance with the law of his own country; which is generally much more lenient than the Chinese law. The dissimilarity and inequality in the punishments inflicted on

offenders in mixed cases will at once be apparent, if we take, for an example, the case of homicide. Supposing a foreigner is killed in an affray by a Chinese, the latter will have to suffer death in accordance with section 290 of the Penal Code, which provides that "all persons guilty of killing in an affray, that is to say, striking in a quarrel or affray so as to kill, though without any express or implied design to kill, shall, whether the blow was struck with the hand or the foot, with a metal weapon or with any instrument of any kind, suffer death by being strangled after the usual period of confinement." But, if the case is reversed, that is to say, if a Chinese is killed by an European or an American, the accused will not, in any case, be sentenced to death. In all probability, he will be sentenced to a longer or shorter term of imprisonment according to circumstances, or, perhaps, let off with a fine. If the Chinaman is killed in play or purely by accident, no American or European court will convict the killer. But it is a very different matter with a Chinaman, if he should be the killer, in such a case. The consequences are serious, as he is surely to be convicted under section 292 of the Code, which reads:

"All persons playing with the fists, with a stick, or with any weapon or other means whatsoever which can be made the instrument of killing, and thus killing or wounding some individual, shall suffer the punishment provided by the law in any ordinary case of killing or wounding in an affray; otherwise any person who, being engaged in an affray, by mistake kills or wounds a bystander, shall be punished in the same manner, that is, shall suffer death by being strangled."

Now, let me take a civil case. Suppose a foreigner is sued by a Chinese merchant for the recovery of a

debt of \$10,000. The case naturally comes up before the consul of the country to which the foreigner belongs. The Chinese merchant has to produce strong evidence in support of his claim in order to obtain a judgment in his favor. Even then he is not sure that he can recover his money. If the foreigner has any goods or any other kind of property that can be seized, the Chinese merchant may, perhaps, be able to get possession of them and have them sold to satisfy his claim. But it is more likely that there is nothing he can levy on. In that case he has no further remedy. According to the law of some nations, a judgment-debtor cannot be put in jail. Furthermore, a foreigner, who owes other people money and is unable to pay his debts in full, can either go into bankruptcy under the insolvent law, or make a general assignment for the benefit of his creditors. If he resorts to either course in a straightforward manner without fraud, his whole indebtedness is wiped out, no matter how much or how little his creditors may get back in the settlement. Henceforth he can engage in business again without any old debts hanging over him.

Now, let us see what a Chinese can do, or, rather, cannot do, when he is unfortunate enough to run heavily in debt. All that he can do is to call a meeting of his creditors and offer to settle with them on an equitable basis. But, if any of his creditors refuse to accept his terms, there is no Chinese court or insolvent law that can give him relief. If a judgment is obtained against him by a foreigner in a suit brought for the purpose, his property will be seized. If that does not realize enough to pay his debt in full, the property of his wife and children, and frequently of his parents and brothers also, is distrained. In the meantime he is

arrested and put under confinement until the full amount he owes the foreigner is satisfied. Let me give you a case in point. I have in mind a respectable Chinese merchant I knew, who, on account of his reckless, but perfectly legitimate, speculations in business, had the misfortune of becoming insolvent. Among his creditors was a foreigner, who, through the consular representative of his country, brought a suit against him. He was summoned to appear before the proper Chinese magistrate, and, as the amount of the claim was not disputed, he was at once confined in the yamen. In the meantime all his property was seized and sold, but it did not realize enough to pay the full amount of the judgment debt. I learned subsequently that he was kept in jail for several years, and could not regain his liberty until his relatives came forward and helped him to pay all that he owed the foreigner.

It may be urged, on the other hand, that, in the cases just cited, the parties were dealt with according to the laws of their respective countries, and that, if the parties had been all Chinese, they would have received exactly the same treatment. This, I admit, is, indeed, true. But the fact remains that, for the same offense committed in China, different punishments are imposed according as the offender is a foreigner or a Chinese. A Chinese offender is severely dealt with in accordance with the law of the land, but a foreign offender is tried by a different Code, which is more lenient in its provisions, and receives far less punishment from the consequences of his misdeeds. This state of things is anything but satisfactory. It often produces friction between the foreign and the local officials, and is a constant source of complaint among the natives. The Penal Code has now been in force for more than two

hundred and fifty years. Many of its provisions are taken from the Codes of preceding dynasties and embodied in it. At the time of its adoption it was, no doubt, suited to the circumstances of that period, for the Empire of China was then practically shut out from commerce and intercourse with the western nations. There were no ports opened to foreign trade, where hundreds and thousands of foreigners could reside and transact business with the natives as there are now. There were no treaties with other nations then in force, conferring ex-territorial rights and special privileges upon foreigners in the country as there are now. What is needed, in my humble opinion, is to recast and revise the Code to suit the requirements and circumstances of the present day. Many of its sections should be retained, while many others, which are not in keeping with the present state of society, should be considerably modified, if not entirely changed. I may say that efforts have been made in this direction on my part, but so far without success. In view of the many thousands of foreigners residing in various parts of China and the vast trade that is being daily carried on by millions of natives with them, it seems to me that there is an urgent necessity for the compilation of a commercial code, giving the laws relating to patents, copyrights, corporations, shipping and other kindred subjects, and also a Code of Procedure for the trial of mixed cases, both criminal and civil. The want of such Codes is severely felt. It seems to me that now is just the time for such a useful work. The power, which, through its advice and influence, is instrumental in bringing about so beneficent an undertaking as this will confer a great boon on foreigners and natives alike in China.

We have just passed out of an old century and entered the threshold of a new one. The nineteenth century has furnished many examples of noble achievements of men and nations for our admiration and emulation — such as the abolition of slavery, the emancipation of serfs, the extension of intercourse and commerce between peoples, the mitigation of the horrors of war and the gradual recognition of the principle of arbitration in the settlement of international disputes. Now, we are at the beginning of the twentieth century. He would be a bold man, indeed, who should predict that during this century the millennium would surely come. But I think it is not too sanguine to hope that the opening of the new century will be signalized by the erection of a grand monument of humane legislation, which, while providing just punishments for evil-doers, shall secure equal rights and liberty to both foreigners and natives in China without distinction or discrimination. In this noble work I trust that this great nation, with the advice and assistance of the eminent lawyers of the Empire State, will take a prominent part. Happy will be the day when uniform principles of law, based on justice and equity, shall prevail throughout the world.