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THE ADMINISTRATION OF CRIMINAL LAW.*

One of the most useful results of our recent territorial expansion for those who have had to do with uniting our new possessions with this country and adjusting certain of the Spanish codes which we found in force in Porto Rico and the Philippines to the new American sovereignty, has been the comparative study made necessary of the two great systems of law—the Roman, or Civil Law, and the Anglo-Saxon, or Common Law. It must be admitted that those of us who have been educated in the principles of the common law and have not extended our study much into general jurisprudence, are apt to be narrow in our prejudices in favor of the common law and are prone to think that there is very little for us to learn from the civil law which can be usefully adopted by a government in which the liberty of the individual is held so sacred and the power of the government towards the subject or the citizen is restrained by such careful regulations as in England, in America or any of the popular self-governments for which either of those countries is responsible.

But certainly when in actual practice the common law lawyer is brought to the study of the beautifully simple and exactly comprehensive language of the civil code governing the rights between individuals, he begins to feel the veneration that comes from consciously viewing the work of twenty centuries of jurists and law-givers who have been struggling during all that period to simplify and make lucid the rules of law and to reduce it to the science that under the civil code it certainly has become. When he comes to an examination of the political or govern-

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mental theory of the civil law, he finds more reason for his pride in, and love of, the common law in this, that under the civil law the state seems a separate entity, different from the people who constitute it, different from the individual who comes into contact with it—an entity whose interest is to be more guarded and protected than that of any other in the community and for the welfare of this entity it is the principle of the civil law that the interest of the individual must yield, while at the common law the theory is that the state is but an aggregation of the individuals, a great partnership in which he has a voice. In the common law, the spirit manifested in the rule *caveat emptor*—that every man must look after himself—leaves blunt and harsh results (where actual and affirmative fraud is not committed) which the civil law would ameliorate by requiring one individual to treat the other with more equity, with more morality one may say, with more care that the other shall not by his own neglect, lose his rights. There is more of paternalism in the civil law—more care for the subject by the government—less disposition to let individuals work out their rights between them. The common law stands for the utmost liberty of the individual, and as a price of this liberty it imposes upon the person enjoying it, the burden of looking out for himself.

When we leave the subject of civil rights and come to the punishment of the individual for offenses against the state, we find in the civil law greater anxiety that the state should be protected against crime, than we do in the common law. The civil lawyer looks at the crime more from the standpoint of the government than from that of the individual, and more from the importance to the community that crime shall be not only punished but prevented, while there runs all through the common law the anxiety that the prosecution of crime may not be used by the government to oppress the individual, and that there shall be thrown about the individual safeguards so great as to give impression that at common law the liberty of the individual is on the whole of greater importance than the safety of the community from crime. Of course, between the trend of the one system and the trend of the other is the golden mean of the legislator and government maker by which shall be secured the protection of society without the oppression of the individual.

When the common law lawyer faces the problem of reforming the criminal laws and procedure of a country that has heretofore been governed by the civil law, he feels certain that here at

least is room for a wholesome change and the introduction into the patient of a very large dose of the principles which lie at the foundation of the prosecution of crime and are supposed to involve the protection of the rights of civil liberty in the individual.

The institution of the writ of *habeas corpus* which, though a civil process, and not a criminal action, is generally used to test the validity of some pretended criminal process, is attended with unmixed good. The principle that no man shall be confined save under due legal process is as well known to the civil as to the common law, but the difference between the two systems from a political and practical standpoint, is well illustrated in respect to the enforcement of the principle. At the civil law the rule that no man shall be illegally confined is operative upon the conscience of the judges and the jailors, and if their consciences do not move them, the poor prisoner and his friends are without a remedy. At the common law the prisoner or his friends has the practical remedy of the writ, which being of high privilege he may obtain for the asking of any judge, who runs the risk of incurring the heaviest penalty himself if he refuse. This is but one of the many instances in which our Anglo-Saxon ancestors hammered out their civil liberty by securing from their would-be royal oppressors not general declarations of principles of freedom like a French constitution, but distinct and definite promises that certain rules, not of substantive, but of adjective law should obtain. To them, it was the securing of the means by which they could themselves secure their liberty, that must be preserved, for with the machinery at hand, with the procedure available there was no difficulty in maintaining the ultimate object, civil rights and liberty. Run through the Magna Charta of 1215, the Petition of Right of 1625, and the Bill of Rights of 1688, the great charters of English liberty, and find in them an insistence not on general principles, but on procedure. Take the most comprehensive—"No man shall be deprived of life, liberty or property without due process of law"—this does not attempt to define the cases in which a man shall be entitled to life, liberty and property, but points to, and insists upon the necessity for a legal procedure by which it shall be done.

Then the requirement that no man shall be convicted save by a jury of his peers. That again is mere procedure. So, too, that he shall be informed of the accusation against him, that he shall be confronted by the witnesses, that he shall not be compelled to testify in a criminal case against himself, that he shall

not be convicted of treason save by evidence of two witnesses to the overtact; that he shall not be subject to unreasonable searches; that he shall not be put twice in jeopardy for the same offense; that the right of petition shall not be denied—all these are but instances of judicial or other procedure, by which general and ultimate rights could be maintained and protected. An Anglo-Saxon had but little use for declarations of abstract principles that rested for their preservation on the consciences of their rulers.

The means for securing civil rights and preserving the individual from the oppression of the government which I have mentioned above, have been embodied by the Federal and State constitutions and as they served their purposes so well in ancient times when the battle for civil liberty was fought and won, the first impulse of the American lawyer is to apply them all as a panacea to the government and criminal procedure of our new possessions. But further investigation, with a deepening sense of responsibility for the government of a body of people whose welfare has been forced upon us as a sacred trust, leads to a much more conservative attitude in respect of the needed changes in the existing procedure. We cannot escape a re-examination of the reasons for the constitutional limitations I have been discussing. We must cease to regard them as fetishes to be worshipped without reason, and simply because they are. We must follow them to their source, trace their development and elaboration or modification due to contemporaneous needs, and determine whether their existence to-day is due rather to a veneration for the great use they served in the past than to any present utility. We have no right to force on the Porto Ricans or the Filipinos, institutions of our own which have proved of the highest benefit to us, unless we can see, on other than mere sentimental grounds connected with our own history, that such institutions will now prove beneficial to them in their present condition.

The great bulwark and protection of the individual at common law against the power of the government and the king, exerted through judges removable at will in criminal prosecutions for political offenses, was trial by jury. I have no time, even if I could do so, to trace the growth of this venerable tribunal from a mere collection of individuals in the vicinage who were generally witnesses of the facts they were assembled to adjudge, to the present body of twelve persons selected from the community in which the crime is committed, but required to be impartial and so wholly without knowledge of the facts as witnesses.

Suffice it to say that as an effect of the trend toward civil liberty and popular rights in the French Revolution and the uprisings of 1848, the trial by jury in criminal cases was adopted in France, in Belgium, in Germany, in Norway and Sweden, in Spain, in Italy, and Russia except in trials for political offenses, and is now in use in those countries. This constitutes a tribute to its value as an institution in countries in which it did not have its beginning and growth, and perhaps would furnish a solid reason for our adopting it in Porto Rico and the Philippines. It has been adopted in Porto Rico. It has not been adopted in the Philippines. I do not think it too much to say, however, that it has proven to be a failure thus far in Porto Rico.

The first question was in the Philippines, shall it be adopted in civil cases? No civil law country, I think, has adopted it for this purpose. Shall we do so? It would seem unwise. In the first place, it is by no means clear that in our own jurisprudence trial by jury in civil cases is an unmixed good. It is true that in the Federal Constitution the right of trial by jury in cases at common law involving more than twenty dollars is secured by fundamental mandate in all courts of the United States. But when we examine as a whole the civil litigation in our courts, we find the tendency is toward trial without a jury in all cases but suits for personal injury against corporations. In respect to jury trials in civil actions in Anglo-American law, we find one of those anomalies, entirely illogical, but easily explainable on historical grounds, that would disgust a civilian, which only endears the system to one of Anglo-Saxon origin and education.

When an Anglo-Saxon wished to mend his structure of jurisprudence, he merely added a room where it was needed without any regard to the general symmetrical appearance of the building, and with the addition of many rooms for various reasons, other parts have become useless, but remain to testify to the history of the growth of the structure. Much more than half the civil suits now brought are what would have been called actions in equity before the modern state codes of procedure had united common law actions and equitable actions in one form called a civil action. Equity, as you know, was a system of remedial procedure which grew up side by side with the ordinary common law practice and was instituted in early days by the King to whom appeals were made against the rigors and injustices of his own courts. He delegated to the Lord-keeper of his great seal, then usually an ecclesiastic, the power to moderate the severity and inelasticity of the

common law methods, and the ecclesiastic statesman, nothing loath to exercise power for the glory of his masters, Divine and temporal, introduced methods of remedial justice which he derived from the canon law and the ecclesiastical courts. With this beginning came the great body of equity jurisprudence which, as I say, is the basis for a large majority of the civil suits brought to-day, certainly if suits for personal injury against corporations are excluded. In suits in equity the Judge hears and decides the issues of fact. The issues may be, and often are, very similar to those arising in suits at common law, the genuineness of a signature, the existence of fraudulent motive, the identity of an individual, damages to business by violation of patents, trade marks or contract rights and all the variety of issues presented in civil litigation. Now the Federal Constitution requires that such issues arising at common law shall be tried by a jury, but if in an equity suit the court may try them. Since the abolition of the distinction between law and equity in civil actions in our codes of procedure, it requires a lawyer to tell whether a suit brought is in equity or law. Certainly a constitutional mandate that requires a jury in less than half the civil issues, and only in those when in a certain form of action, distinguishable only by a lawyer, can hardly be said to rest on any very broad and sound principles. Of course, in suits for personal injury against corporations, the plaintiff relies on the supposed sympathy of twelve laymen with the poor plaintiff against the rich corporation, both to find the facts in favor of the plaintiff and also to swell the damages to a large sum. But this hardly constitutes a reason for maintaining the jury in a system which is supposed to dispense justice to all, whether rich or poor, impartially. The abolition of the jury in civil cases would relieve the public of a great burden of expense, would facilitate the hearing of all civil suits and would not, I think, with proper appeal deprive any litigant of all he is entitled to, an impartial hearing. Of course, it will never be done in courts of the United States, and perhaps never in any of the states, although in some of them the tendency is strong in that direction. However this may be in view of present conditions, we are not called upon to introduce the jury in civil cases into the Philippines.

In the matter of the criminal procedure, the question is very different.

In a country where a part of the judges are aliens it would add much to the satisfaction of the people if a part of the judicial

tribunal were made up of a jury of natives, and, if this were consistent with the safety of the community, those responsible for the new government would certainly introduce the jury system in the trial of crimes. The whole theory of the trial by jury is that, out of the body of the community, you may select at haphazard twelve men who will be so deeply impressed with the necessity of punishing crime on the one hand and of allowing innocent defendants to escape on the other hand, that they will decide truly and justly as between the community and the defendant. The system assumes a sense of responsibility in the ordinary citizen subject to jury duty for the good working of the government and for the interests of society at large, which will overcome the natural disposition to avoid inflicting punishment on another, and will enable the jury to find the verdict as the law and evidence shall require. Manifestly such a tribunal would have no place among an ignorant people, or indeed, even among a people who are somewhat educated, if they have not inculcated in them a sense of responsibility for, and of sharing in, the government. Such people are likely to prove unworthy jurors and to be affected in all their verdicts by their emotions and by every other motive than that which should control them, to wit: the well-being of society. It is this sense of justice which is implanted naturally in the Anglo-Saxon breast, but which is absent in the Porto Rican and the Filipino. Its absence disqualifies either from filling the measure of stiffness and conservativeness of character required to make a proper jurymen.

Another difficulty involved in introducing the jury system into the Philippine Islands, and, indeed, into any civil law country, is the absence of a code of evidence without which the jury system is not likely greatly to promote just findings on issues presented. In the Anglo-American law there is an extensive series of rules governing the admission of evidence, which now may almost be called a code of evidence, which has its origin, as Professor Thayer of Harvard so clearly shows, in the necessity for protecting the jury in its consideration of issues brought before it, from being led astray and misled by evidence of a kind likely to have greater power of persuasion than judges and men of affairs from wide experience thought it ought to have. Some of the rules of evidence seem arbitrary, but generally the rules of relevancy and competency are based upon long experience in human affairs. It is judge-made law which has been worked out, as Professor Thayer shows, to meet the exigencies of a trial by

laymen not experienced in hearing cases, who could not, with everything allowed to be presented to them, winnow the wheat from the chaff. The civil law has no such code. The question whether evidence is relevant to an issue and will assist in its decision, is largely a matter in the discretion of the judges in hearings at the civil law. We can well remember the astonishment and almost horror that thrilled this country during the second trial of Dreyfus before the court martial, when witnesses were allowed to testify to all sorts of hearsay tending to show Dreyfus guilty, and French generals were allowed to go before the court and testify with their hands on their hearts of their conviction that Dreyfus was guilty, without really having any personal knowledge on the subject at all. I am not prepared to say that the Dreyfus trial did not go beyond what is ordinarily permitted in a French court. I think it did. But I am very certain that no such rules of evidence as obtain in our procedure are known to the civil law countries of Europe, unless adopted within very recent years. It has been necessary for use in the Philippine Islands to introduce a code of evidence for the trial of crimes even without a jury, which is also applicable to the trial of civil cases. By order of President McKinley all the constitutional protections to the defendant in a criminal case were extended to defendants in criminal cases in the Philippines, except the right of trial by jury.

I am not certain that in a new country this was entirely wise. When examined as an original proposition, the prohibition that the defendant in a criminal case shall not be compelled to testify seems, in some aspects, to be of doubtful utility. If the administration of criminal law is for the purpose of convicting those who are guilty of crime, then it seems natural to follow in such a process the methods that obtain in ordinary life. If anything has happened and it is important to discover who is the author of it, the first impulse of the human mind is to inquire of the person suspected, whether he did it, and to cross-examine him as to the circumstances. Certainly this is the domestic rule by which your wife or your mother proceeds to find out who it is that broke the window, who it is that stole the jam from the pantry, or why it is that the sweeping has not been done by the person charged with that duty. She goes to the suspected culprit and asks the questions natural under such circumstances, to see whether her suspicion of guilt is well founded. Now the proposition that it is unjust to call upon the person suspected of a crime to tell of his

connection with it is at first sight untenable. Why is it unjust? If he is not guilty will he not have the strongest motive for saying so, and, if he is guilty and seeks to escape liability, will he not use every effort to make his conduct consistent with his innocence? Why, then, does it expose the defendant to improper treatment if an officer of the law at once begins to interrogate him concerning his guilt. But the answer is, he has the right to consult counsel. He should not be hurried into statements which he may subsequently desire to retract. In other words, he should be given an opportunity after he has committed the crime to frame in his mind some method by which he can escape conviction and punishment. I am inclined to think that the expression, "No person shall be compelled to testify against himself," if traced back to its original source, had reference to a system of torture which did prevail in the time of the early English kings, and which was intended to denounce, not the mere calling of a defendant to testify and inviting him by questions so to do, but the actual compulsion of evidence by physical means. Now, as Bentham shows, the principle does not include compulsion; it is construed to mean that, before the jury or tribunal trying the defendant, he may not be called upon to answer questions. Bentham's criticism of this rule is well known. He says it can only be supported by the fox-hunter's reason—that it is right that the criminal or the fox should have a little start, and this advantage in the beginning, in favor of the defendant and against the state, is the refusal of the law to allow the state to call the defendant to prove its case. It makes the conviction of the criminal a game which is played out under certain rules, and the interests of society are lost sight of. At common law, the defendant was not allowed to testify, even if he would, but that rule was found to work harshly against innocent men who, going on the stand, might explain the suspicious circumstances connecting them with the crime and show their innocence, so that the rule for years in this country; and very recently in England, is that the defendant may take the stand if he will, but, if he fails to take the stand, the counselor for the prosecution may not comment on his failure to do so. The result of the change has been, I think, to lead to more convictions than before, for a jury may be charged as explicitly as possible to disregard the fact that the defendant does not go on the stand, but it is impossible to eradicate in the minds of sensible men the impression that, if one who is charged with the crime, refuses to explain by his own evidence that he was

not guilty, that the reason for his so doing is because he is afraid he cannot so explain.

Another principle of the law of evidence embodied in the constitutional limitations is that the defendant must be confronted with the witnesses who testify against him. This seems to impose unnecessary hardship upon the government, because it certainly would not injure the defendant if depositions were taken and the defendant or his counsel were permitted to cross-examine. It is a case of undue tenderness toward the defendant. There is no such restriction upon the defendant when he is seeking to prove his innocence, for he may use depositions without number.

The limitation upon unreasonable searches is another constitutional restriction which has been used to save men from conviction. Indeed, uniting that with the one preventing the court or prosecutor from interrogating the defendant as to his guilt, makes it impossible in some classes of cases to convict persons well known to be guilty. It is the great shield which the powerful and unlawful trusts and violators of the interstate commerce laws have to prevent their successful prosecution. It prevents the use of process to obtain books and papers in which the defendant has violated the law or has recorded statements showing guilt. Our Supreme Courts, generally, instead of restricting the operation of these constitutional limitations, have given them, whenever occasion arose, a wider scope than the letter of the limitation seemed to require, in the interest, it was said, of the liberty of the individual.

Then there is the general rule that the guilt of the defendant, in order to justify conviction, must be shown beyond a reasonable doubt. This is a fair and proper rule, and has usually been regarded as the other side of the rule that the defendant is presumed to be innocent. But the Supreme Court of the United States has recently carried it to such a point by construction as to treat the presumption of innocence not as being only the mere counterpart of this rule, but even as substantive evidence, and as the equivalent of a witness testifying affirmatively, and continuing to testify from the beginning to the end of the case in favor of the innocence of the defendant, a construction not sustained by Professor Thayer, and seemingly much enlarging the previous operation of the presumption of innocence, all out of tenderness to the defendant. These rules, and others, intending to make it as difficult as possible to convict a defendant, were the result of the savage character of the common law of crimes when the defend-

ant was not allowed counsel, and there were one hundred and sixty capital offences at common law. The judges, of course, being men and having pity, sometimes seized the opportunity themselves to act as counsel for the defendant, and introduced the rules which we have alluded to and maintained them in the interest of mercy. They have been moderated a very little, although the reason for them has long passed away. Defendants are now allowed counsel, and, if unable to pay counsel, the state employs counsel to defend them.

Therefore, I say that if a jurist from Mars were to come down to earth and be charged with the duty of framing a criminal code which should reach the golden mean between preserving the interests of society by punishing and preventing crime on the one hand and saving the individual charged with crime from liability of unjust conviction on the other, I think it doubtful whether he would adopt the constitutional restrictions which I have been discussing. The general law of evidence, especially that which excludes hearsay, can well be defended on grounds of general policy, for though hearsay at times might convict in proper cases where its exclusion acquits, cross-examination is such a searcher of the truth that the wisdom of ever admitting hearsay evidence as the basis for the conviction of crime may well be doubted.

In adopting a system such as we have been considering for the punishment of crime for a new country, the first and most apt question which can be asked is, "How have these so-called guarantees of liberty of the defendant worked on the whole." While in England—in which all these restrictions are still observed—crime is punished with as much severity and uniformity as the public weal demands, and this, although they have the trial by jury, although the defendant cannot be compelled to testify, and although all the other rules of evidence to which I have referred, have full application, how is it in this country? I grieve for my country to say that the administration of the criminal law in all the states in the Union (there may be one or two exceptions) is a disgrace to our civilization. We are now reaching an age when we cannot plead youth, sparse civilization, newness of country, as a cause for laxity in the enforcement of law.

What makes the difference between the administration of the criminal law in England and in this country? In the first place, while the jury has always been a sacred and untouched part of the tribunal constituted to try crimes in England, the judges upon the

court have always taken and maintained their part at common law in the trial of every defendant, and that part has been, first, the retention of complete control over the method by which counsel try the case, restraining them to the points at issue and preventing them from diverting the minds of the jury to inconsequential and irrelevant circumstances and considerations, and, second, the power to aid the jury by advising them how to consider the evidence and expressing an opinion upon the evidence, leaving, however, to the jury the ultimate decision. In this way the sophistical rhetoric and sentimental appeals of counsel are made to lose their misleading effect, and the jurors are brought to a sense of their responsibility in deciding the actual issues of fact as to the guilt or innocence of the defendant upon the evidence before them.

Another reason why English justice still maintains its reputation for certainty of punishment is the fact that there are no appeals allowed from the trial in the first court unless the judge presiding in the court shall deem certain questions of law of sufficient importance and doubt to reserve them to a court of crown cases reserved. When, therefore, after a long or a short trial the defendant is convicted, the conviction is final in ninety-nine cases out of a hundred.

A possible third reason is to be found in the ability of the English court to secure the best character of men in either a common or a special jury—men charged with the earnest responsibility for the enforcement of the law.

How is it in our own country? We find that these constitutional limitations adopted centuries ago in tenderness to the defendant and which have to some extent outlived their usefulness, because the reasons for their adoption have ceased to be, have been elaborated in their scope and operation, not only by the court, but also by the legislatures, because thought to be in the interest of liberty. And this has made them greater obstacles in the conviction of the guilty. The institution of trial by jury has come to be regarded as fetish to such an extent that state legislatures have exalted the power of the jury and diminished the power of the court in the tribunal made up of both for the hearing of criminal cases. Although the judiciary of nearly all the states is now elective, legislatures have seemed to resent any intervention by the judge in the trial of the cause beyond a very colorless and abstract statement of the law to be applied to the case. It is manifestly impossible for a judge to instruct a jury in the law

well and possess it of the law as applied to the facts without discussing the facts in detail, and without commenting on them. But so jealous have legislatures become of the influence of the court upon the jury that it is now, in most states, made an error of law for the court to express his opinion upon the facts, although he leaves the ultimate decision, of course, to the jury. It frequently is the case that, under the statute, the judge is required to write his charge and discuss the abstract principles applicable in the case, and that then the counsel are permitted to discuss the law of the case in view of the judge's charge and apply the facts. The opportunity which this gives the counsel to pervert the law, and the wide scope which the system in restricting the judge gives to the jury of following its own sweet will, of course, doubles the opportunity for miscarriages of justice. The function of the judge is limited to that of the moderator in a religious assembly. The law throws the reins on the back of the jury, and the verdict becomes rather the vote of a town meeting than the sharp, clear decision of the tribunal of justice. The counsel for the defense, relying on the diminished power of the court, creates, by dramatic art and by harping on the importance of unimportant details, a false atmosphere in the court room which the judge is powerless to dispel, and under the hypnotic influence of which the counsel is able to lead the jurors to vote as jurors for a verdict which, after all the excitement of the trial has passed away, they are unable to support as men.

Another cause already alluded to is the difficulty of securing jurors properly sensible of the duty which they are summoned to perform. In the extreme tenderness the state legislatures exhibit toward persons accused as criminals, and especially as murderers, they allow peremptory challenges to the defendant far in excess of those allowed to the state. In my own state of Ohio for a long time the law was that the state was allowed two peremptory challenges and the defendant twenty-three in capital cases. This very great discrepancy between the two sides of the case allowed the defendant's counsel to eliminate from all panels every man of force and character and standing in the community, and to assemble a collection in the jury box of nondescripts of no character, weak and amenable to every breeze of emotion, however maudlin or irrelevant to the issue.

I do not think that the members of the bar can escape the responsibility for the demoralizing tendency of the legislatures to wrest from the judges in the criminal procedure the conserving

power which they ought to retain and which they had at common law and to exalt the jury's power beyond anything which is wise or prudent, and to extend to the defendant the opportunity to reject all good men from the jury and to select the weak, the unintelligent and the irresponsible. The perversions of justice in my own city of Cincinnati and state of Ohio in 1884, led to the appointment of a committee of the bar to visit the legislature to see whether it was not possible to rid our criminal code of procedure of those features which placed the prosecution at great disadvantage in the trial of capital cases. The indignation of the public had led to a mob and to the burning of our court house, and it was thought that the time had come for some more active members of the community to organize and see if reform could not be effected. I had the honor of being one of those who waited upon the judiciary committee of the Ohio legislature and preferred the request, that the twenty-three challenges allowed to the defendant be reduced to twelve, and that the state be allowed a similar number, but we found that there were upon that committee lawyers, a substantial part of whose practice consisted in acting as counsel for the defendants in important criminal trials. When I protested that twenty-three challenges was an outrageous number, the chairman of the committee leaned back with the remark, "Many a time have I seen when I would have given all my fee to have had twenty-four challenges for the defendant." I cite this instance because I believe that the unjust disposition to curtail the power of judges, to exalt the power of the jury, to subject them to influences that ought to control them, and to give opportunity to the defendant's counsel to manipulate the selection of juries by the use of peremptory challenges is due, more or less, to the intervention of some members of the bar whose practice is more or less beneficially affected, as they conceive, by these obstacles to the course of justice.

The third reason for the distinction between the enforcement of law in England and in this country is to be found in the right of appeal which is given in every criminal case and in many cases the appeal is to two courts. The code of evidence with its complicated rules, the technical statutory limitations supposed to be in favor of the defendant, and all used as a trap to catch the trial court in some error, however technical, upon which in appellate proceedings a reversal of the judgment of the court below may be asked. The rule which obtains throughout this country is that any error, how ever small, which it is impos-

sible to show affirmatively did not prejudice the defendant must lead to reversal of the judgment. The same disposition on the part of the courts to think that every provision of every rule of law in favor of the defendant is one to be strictly enforced, and even widened in its effect in the interest of the liberty of the citizen, has led courts of appeal to a degree of refinement in upholding technicalities in favor of defendants, and in reversing convictions that render one who has had practical knowledge of the trial of criminal cases most impatient.

In a case carried on error to the Supreme Court of the United States, the point was raised for the first time in the Supreme Court that the record did not show an arraignment of the defendant and a plea of not guilty, and on this ground the court, three judges dissenting, reversed the case. There was not a well founded doubt in that case that the defendant was arraigned and pleaded not guilty. The perusal of the record raised this as a presumption of fact and the judgment was reversed although there was not a pretense that the defendant had suffered any injury by reason of the alleged defect of the character in question. When a court of highest authority in this country thus interposes a bare technicality between a defendant and his just conviction, it is not too much to charge some of the laxity in our administration of the criminal law to a proneness on the part of courts of last resort to find error and to reverse judgments of conviction.

And now what has been the result in this country? Criminal statistics are exceedingly difficult to obtain. The number of homicides one can note from the daily newspapers, the number of lynchings and the number of executions, but the number of indictments, trials, convictions, acquittals or miss-trials it is hard to find. Since 1885 in the United States there have been 131,951 murders and homicides, and there have been 2,286 executions. In 1885 the number of murders was 1,808. In 1904 it had increased to 8,482. The number of executions in 1885 was 108. In 1904 it was 116. This startling increase in the number of murders and homicides as compared with the number of executions tells the story. As murder is on the increase, so are all offenses of the felony class, and there can be no doubt that they will continue to increase unless the criminal laws are enforced with more certainty, more uniformity, mere severity than they now are.

Certainly the result of the American criminal procedure as

distinguished from the English criminal procedure does not encourage us to think that it would be wise to introduce in the Philippine Islands a system of jury trial which now prevails in most of the states, especially under the restrictions of the power of the court which we find as we go west in this country. The cure for this growing cancer in the body politic is more practical and more available than most public evils because it may be found in statutory amendments. If laws could be passed either abolishing the right of criminal appeal and leaving to the pardoning power, as it is in England, the correction of judicial wrong, or instead of that, if appeals must be allowed, then if a provision of law could be enacted by which no judgment of the court below should be reversed except for an error which the court after reading the entire evidence can affirmatively say would have led to a different verdict, ninety-nine reversals out of one hundred under the present system would be avoided.

Second, if the power of the court by statute to advise the jury, to comment and express its opinion to the jury upon the facts in every criminal case could be restored, and if the state and the defendant were deprived of peremptory challenges in the selection of a jury, twenty-five per cent of those trials which are now miscarriages of justice would result in the conviction of the guilty defendant, and that which has become a mere game in which the defendant's counsel play with loaded dice, would resume its office of a serious judicial investigation into the guilt or innocence of the defendant. I presume it is useless to expect that courts will turn from their present tendency to amplify technicalities in behalf of defendants until legislatures shall initiate the change by the broad limitation already suggested upon the powers of the court to reverse the judgment of the court below. Our country is disgusted by the number of lynchings that occur both in the north and in the south, and excuses are sought for the horrible and fiendish cruelties perpetrated by mobs in such cases in some other cause than the delays of justice. Instances are cited of where the mob has executed men whom they had every reason to believe were about to be justly punished under the law, to show that an improvement in the criminal procedure would not prevent lynchings. But every man of affairs who has studied the subject at all knows that if men who commit crime were promptly arrested and convicted there would be no mob for the purpose of lynching. A mob, after it has organized, loses all conscience and cannot be con-

trolled, but it is the delays of justice that leads to its organization. Nothing but a radical improvement in our administration of criminal law will prevent the growth in the number of lynchings in the United States that bring the blush of shame to every lover of his country.

William H. Taft.