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The statements which preface the preceding chapter, under the head of "Historical Notes on Mexico," are also applicable to the present paper, as it is the second of the articles based on my remarks delivered at Saratoga on the 5th of September, 1895.

The subject to which this paper refers I consider of special importance, because my experience has shown me that a want of knowledge of the criminal jurisprudence of Mexico has often been the cause of irritation and misunderstanding in this country, as American citizens, when arrested in Mexico for any crime committed there, have frequently complained bitterly of Mexican criminal legislation, considering it unfair, unjust, and even inquisitorial, and alleging that the rights granted the accused by all civilized countries were denied them in Mexico. I believed it would further a good understanding between the United States and its Southern neighbors to show how mistaken these conclusions were, and I have no doubt that a clear statement of the case would prevent in the future the misunderstandings and dangers arising from such mistakes. This result will also affect most of the Latin-American States, as they all have similar criminal jurisprudence, derived from the Roman law. I, therefore, revised my remarks on the subject and put them in the shape of an article, which was published in the *North American Review*, for July, 1896, and later on in the *Green Bag*, of Boston, for October of the same year.

Before publishing this article I submitted it to various distinguished lawyers of this country, some of whom had occupied high official positions, because I feared that I might have fallen into some error in treating of a subject with which I was not entirely familiar, and I was, of course, very anxious to avoid any inaccuracy. I received different opinions—most of them highly favorable to the jury system; but the one that differs most from mine and contains the strongest reasons against my views, as expressed in my paper, comes from a very able gentleman from New York, the editor of one of the leading newspapers of that city, and as my purpose is to present both sides of the question, I have concluded to insert that letter, for whose publication I have been authorized by the author.

THE ANGLO-SAXON AND ROMAN SYSTEMS OF CRIMINAL JURISPRUDENCE.[1]

I have often heard, during my official residence in Washington, comparisons made between the Anglo-Saxon and Roman systems of criminal jurisprudence, generally very disparaging to the latter system, and this leads me to believe that our own, which is based on the Roman, is not quite well understood in this country. This, and not a desire to indulge in odious comparisons between the two systems, is my apology for writing a brief paper intended to show that our system is not so defective as some believe. I think that in doing this I render a service to the good understanding between the United States and its Southern neighbors.

This subject has always had a great interest for me. Having been educated at home as a lawyer, I have desired to study and practically to compare the various systems of jurisprudence of different countries, as one of the best ways to understand the philosophy of that science. I regret, however, that the public duties which have devolved upon me during my whole life, and my long absence from home, depriving me of the opportunity of practicing law in Mexico, have prevented my becoming better acquainted with all its provisions and my making a specialty of the study of jurisprudence. The same cause has prevented my studying fully the practical workings of the Anglo-Saxon system of jurisprudence, as existing in the United States. It is therefore with great reluctance that I approach such a difficult subject, believing, as I do, that I am not fully competent to treat it as thoroughly as I should like.

While I would not attempt to depreciate the Anglo-Saxon system of jurisprudence, I think the Roman system is also entitled to some regard. The most remarkable of the Roman institutions, and the one which we might say survived the downfall of the Roman Empire, and the incursions of the barbarians with their feudal system, was the civil

[1] This article was originally published by the *North American Review* of New York City for July, 1896, and with some additions in the *Green Bag*, of Boston, for October of the same year. The present edition has been revised and somewhat enlarged.

law; it contains all that was best of former ages and peoples. The advancement of old Etruria, the wisdom of Solon and Lycurgus, the principles of the legislation of Minos, and all that was of permanent value to Egypt, Phœnicia, Chaldea, and the foremost nations of the ancient times, were incorporated into the laws of the ten tables, which were engraved four hundred and fifty years before Christ; and therefrom was developed the wonderful legal system which culminated in the Institutes of Justinian in the year 534 of our era, a system which did more than anything else to assimilate to the Roman Republic the many dissimilar nations which became its provinces, and which were held together by the wonderful Roman civil law. The Roman law was really the result of freedom and free intellectual development, carried on during several centuries under the benign influence of republican institutions. On the other hand, the common law was the natural result of the feudal or military system of the Northern barbarians. The foundation, therefore, of the one is justice; the basis of the other is force.

The Jury System.—It is generally considered that the corner-stone of the Anglo-Saxon criminal jurisprudence is the system of trial by jury; and yet it appears from recent researches that the jury system was not indigenous to the common law of England, but was borrowed from the Franks.[1] In fact, the original idea of the jury system appears to have been borrowed from the Roman law.

The advantages of this system have been much enlarged upon by various writers, both in England and America, as well as upon the continent of Europe. I do not care to criticise it, even though it seems to me, at least under existing conditions, to be open to grave objections. I will only remark that when, eight hundred years ago, England was oppressed by a tyrannical king, the successful efforts of the English barons to wrest from him the Magna Charta, which gave to England no more than was already the common right of all the other nations of Central and Western Europe, were commendable, yet the concession was such that it was justly regarded as a most important step in securing human liberty. Even so, we know that the charter then granted was repeatedly violated by each and all the subsequent kings of England down to the accession of the Stuarts. The Magna Charta was procured from King John by the barons mainly for themselves, but it inured to the benefit of the Commons, since it secured to them the right to be tried by their peers. Now, however, that the power of the Commons has so greatly overshadowed that of the barons that the two classes are rapidly merging into one, the changed conditions do not warrant any undue laudation of the Great Charter. Cer-

[1] *History of English Law before the Time of Edward I.*, by Sir Frederick Pollock and Frederick William Maitland, Cambridge, 1895, vol. i., p. 117.

tainly, in the United States, where all differences of class have disappeared since slavery was abolished, there is no reason to fear oppression of the people by those in authority, since the people themselves by their representatives are in power; as a consequence, trial by jury of one's peers has no longer the significance which it might have had under Magna Charta. The arbitrary power of arrest and detention residing in the sovereign, and against which it was the purpose of Magna Charta to guard, has never existed in the United States, where the power of the President to order the arrest of a civilian exists only when the writ of *habeas corpus* is suspended in cases of rebellion, invasion, and other great public danger, and in extradition cases, as provided in the respective treaties.

While I should not like to express any decided convictions on this subject, I may safely say that the conditions under which the jury system was established or adopted, do not prevail at the present time, even in the country of its supposed origin; it cannot, therefore, have the importance it once had.

The jury system, as applied to criminal cases, is undoubtedly more favorable to the accused than to society.[1]

Up to this century the English people may be said to have regarded those of its members who were criminally prosecuted as in danger of becoming the victims of despotic power. It is proper to consider whether the changed relations of the people to the government have been accompanied with proper modifications of the common-law procedure. The criminal law of England is not less severe than that of the United States, but capital crimes and executions are far less frequent there than here. Yet in England there have been hardly any criminal appeals. Conviction before the trial court has been final, while in the United States there are appeals upon appeals, with a final resort to a writ of *habeas corpus* to the Supreme Court of the United States. In the State of New Jersey the Court of Errors and Appeals may be compelled to examine all the proceedings in a capital case, including the evidence, even if no exception has been taken, and although it does not have the prisoner before it or hear the witnesses or hear them testify, it must try the case to discover manifest errors like a court of equity balancing affidavits.

[1] From data contained in a report from the Committee on the Judiciary of the House of Representatives (No. 108, 54th Congress, 1st Session), presented by Mr. Thomas Updegraff of Iowa, on January 22, 1896, which contains several tables, compiled by the Department of Justice, of homicides perpetrated in the United States of which cognizance was taken by the Federal judicial authorities, stating the number of indictments, convictions, and acquittals, appears (Table No. 2) that in the year 1892, from twenty-nine judicial Federal districts, the Federal judicial authorities took cognizance of 112 homicides, of which 96 were indicted, 24 of the accused being convicted, 37 acquitted, and only one execution having taken place.

On psychological grounds it is well established that punishment, to be efficacious as a deterrent, must be prompt.[1] Some legislatures of the United States have gone so far as to provide that no one shall be hanged for a year after his conviction. In almost all of them a murderer may be sure of a year, perhaps several years, of life, after his arrest. He knows, the friends and family of the victim know, the

[1] Since this paper was written, the New York *Journal* of November 28, 1897, published the opinion of the Hon. Frederick R. Coudert, one of the most eminent lawyers of the city of New York, giving his views on the imperfections of criminal trials in the United States and England under the common-law system, as compared with the system prevailing in Continental Europe under the Roman system, from which I insert the following extract:

"I regard the present methods of our criminal law about as Jerry Bentham, the eminent English jurist, regarded the English criminal law, which, by the way, is much like the criminal law of this country. Bentham said: 'The English law of evidence is admirably adapted to the exclusion of truth.'

"There is no doubt to my mind that the methods used by criminal justices in getting jurors is deficient in many respects. One of the greatest deficiencies is that it excludes men from juries who read newspapers and have any knowledge of the case. Then, under the present system lawyers are allowed to wrangle and bring out all sorts of unimportant evidence. This only causes delays, and these delays are unfair to the person on trial, often keeping an innocent man in prison for months, and even years, before he gets a fair trial. In foreign countries, with the exception of England, the court will not listen to any evidence not important to the case. Lawyers are made to question the person on trial not hurriedly, but sufficiently fast to keep the case from dragging. If any question comes up which causes a wrangle, the justice before whom the case is being tried takes the witness in hand and questions him impartially, and to the point. By this practice the Continental methods reach rapid results, the guilty are punished more quickly, and the innocent do not suffer as they do under the system in vogue in America and England. When trials are delayed for months, and even years, it is a very costly thing to the State. Whenever there is a great criminal trial it takes weeks to get the jurors, and even after the jury box is filled the trial drags on, while lawyers are allowed to fight between themselves.

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"One of the greatest hindrances to rapid trials in criminal cases is the *habeas corpus* proceedings, which are allowed in the majority of instances. The *habeas corpus* was the outgrowth of the clash between the classes in England, and was intended to protect the persons not high in favor with the crown. In those days the crown practically owned every judge and jurist, and a person who had caused offence to the king could be imprisoned and held as long as he lived, without any recourse. Crowns do not own judges and jurists in these civilized days, and every man can feel certain that he will get a fair and impartial trial as soon as he is arrested. Under the present system every judge in the State can be gone to for *habeas corpus* proceedings, and when they are granted they only serve to delay trial and hasty conviction or acquittal. *Habeas corpus* proceedings give an impetus to crime, and should be done away with. The Supreme Court, in its last three or four decisions regarding *habeas corpus* proceedings, has decided that the writs were not an appeal from the judge's decision, and were only to be allowed in rare cases.

"Do away with *habeas corpus* writs entirely and criminals will be brought much more quickly to trial."

people at large know, that before that time has passed many chances of escape may present themselves. The prisoner may break jail. Material witnesses may die or disappear. Resentment may be softened by the lapse of time; sympathy for the victim who has passed out of this world gives place to sympathy for the prisoner who is struggling to save his life. The longer punishment can be postponed, the greater the possibility that it may be evaded altogether; the greater the certainty, we may say, that it will be mitigated and eventually remitted. Such delays are dangerous, for in cases of atrocious crimes, particularly when violence is done to women, popular passions are always difficult to restrain, and if the penalty provided by law is uncertain or insufficient, the conservative element in the community finds itself deprived of its best argument for letting the law take its course.

That the jury system, as applied to criminal cases, has faults is evident from the fact that some of the States of this Union, like Maryland, for instance, have enacted statutes allowing the accused to select whether he shall be tried by jury or by a judge, and this notwithstanding the constitutional provision on the subject. I regard the Maryland statute as the first step to undermine the jury system.[1]

[1] The Bar Association of Texas held an annual convention at Galveston in 1896, and both the speeches delivered and the resolutions adopted show very clearly the inefficiency of the criminal system of jurisprudence in that State; and the remarks then made apply also to the criminal jurisprudence under the common law.

Mr. F. W. Ball of Fort Worth read a paper before the association which was most emphatic in its arraignment of the existing system. "What can I say," he asked, "when I speak of our criminal law and procedure? Can I do aught but voice the general sentiment of the people, and say that it is a stench in the nostrils of every honest and law-abiding man in Texas?" He complained that "the solicitude of the courts for the Constitution and the bill of rights is such that they adjudge them to be invaded every time a red-handed murderer or a highway robber is convicted without observing all the formalities and niceties requisite under our beautifully complicated system of criminal procedure"; and he declared that the decisions of the criminal appellate tribunal in hundreds of cases, by which known and notoriously guilty persons have escaped punishment, "fully and completely demonstrate one or the other of these two propositions, namely, that our criminal law is entirely insufficient for the purpose of preventing and punishing crime, or that the courts who have delivered the opinions in these cases are utterly imbecile and ignorant."

In speaking of practice and procedure in civil cases Mr. Ball declared that proper words of denunciation failed him, for the reason that "every kind of proceeding that is obsolete, every kind of method that is expensive, every kind of device that is dilatory or open to trickery, every kind of pleading and writ that is confusing and incomprehensible, is here foregathered for the benefit of the shyster lawyer, the greedy official, and the dilatory judge, and to the complete destruction of the miserable litigant." Judge Simpkins showed that a large proportion of these evils would have been avoided, if the Legislature had done its duty when the present appellate system was established by that body.

A striking address was delivered by Judge E. J. Simpkins of Corsicana. He enunciated the central truth, so often overlooked, that "the great aim of all judicial procedure is to administer substantial justice," and he declared that, "when this result is accomplished, though errors are committed not injuriously affecting the real merits of the cause, the judgment ought to be affirmed."

Judge Simpkins held that it is of still greater importance in criminal than in civil cases that the controlling question should be the guilt or innocence of the defendant of the charge preferred, since criminal judgments more immediately affect the people, and therefore excite more comment than civil, and consequently whatever reasons exist for sustaining judgments in civil cases apply with tenfold force in criminal cases.

I was told by a very prominent United States judge, that one of the leading advantages of the jury system is of an educational character, as in small towns, where people have few opportunities for education, the fact that ignorant men are impanelled in a jury, allows them the opportunity of hearing able arguments of the counsel, and considering difficult questions of law and fact, thus diffusing learning and education. While I agree in so far as that advantageous result of the jury system is concerned, I do not see that its educational advantages should be enough, by themselves, to establish or maintain that system.

Lynch Law.—The insufficiency of the common-law system of criminal jurisprudence to punish criminals is made evident, I think, by its practical results, which have, unfortunately, brought about what is commonly called lynch law, and by the fact that these in their turn have given rise to a practice which is based upon a defect in the existing law, and which, therefore, comes to be, in fact, the complement of criminal proceedings under the Anglo-Saxon system. It is hardly necessary to add that lynch law is highly demoralizing, that it is open to great abuses, and that, when the victim is an innocent person, it amounts to a grave crime.

When a community is satisfied that a crime has been committed, that a particular person is the author of that crime, and that he cannot be punished under the regular proceedings of a common-law trial, they often take the law into their own hands, and they administer swift justice in a manner that is often barbarous, but is the only way available. Where, as it sometimes happens, the victim is not the real perpetrator of the crime, the practice is indeed atrocious.[1] In any

[1] As an instance of this, I will mention the case of Luis Moreno, who served in the Mexican army, was honorably discharged and came to California, where he worked in the Coggins Mill, near Sisson. On the night of the 5th of August, 1895, George Sears, the owner of a saloon at Bailley Hill, was mortally wounded in an affray, and Gaspar Mierhaus, a miner who was in the adjoining room to the saloon, came out to help Sears, there being no witness to that incident. Moreno and Stemler were suspected of having committed the crime and were consequently arrested. Mierhaus died of his wounds some days afterwards, and there was contradictory information as to whether he identified Moreno or not, as some said that he had, and others that he had said the assassin had a beard, Moreno having none. Before the preliminary examination took place, which had been fixed for the 26th of August, a mob attacked the jail, took out four prisoners, including Moreno, and lynched them all. When this lynch-