The English common law is simply the law of usage and custom. Whatever is sanctioned by general usage becomes common law. Hence it is that in suits at common law the rights of parties are often determined by proof of custom. Upon this theory is based the idea of what is called a common-law marriage, which prevails in New York, and perhaps some other States of the Union, that cohabitation as husband and wife and public reputation as such, are sufficient *prima facie* proof of marriage. While this system has the great advantage that its provisions are in accordance with the tendencies and habits of the people, it also has the disadvantage that its provisions are uncertain, as habits may change on one side, and on the other they may not be so settled as to have the sanction of a rule under the common law. Under the civil law the good result of the common law is practically the same, but under a more systematic method, that is, the rules established by habit and justice combined, are collected into a Code of Laws, after they have been established by long years of practice, and have the advantage of being more precise on one side and more just on the other.

One of the most conclusive proofs that the Roman civil law is not inferior to the English common law is that England, the very country where it had its birth, was obliged to establish two systems of civil jurisprudence, one the common law proper, which was administered through the older and ordinary courts, and the other the Roman law, administered through the chancery or equity courts. Law is supposed to be the perfection of justice and the best expression of human reason; it should, then, embrace not only equity, but the very essence of justice itself. If, therefore, a particular law or system of laws fails to include equity, that law or system cannot be perfection. The very idea that equity can be a thing outside and different from law seems contradictory and absurd.

Although the chancery or equity courts were in the beginning estab-

the unprincipled lawyer, and the speculating knave, are ever loud in their demands for trial by jury; for only upon the prejudices, the passions, the ignorance, or the corruption of juries can they base their hopes of success. This is the experience of every man who has had to do with courts of law, and it speaks volumes to the discredit of the system. Then the divided responsibility of court and jury, the necessity of immediate decision by the former of questions of law upon which appellate tribunals often deliberate for weeks and months without coming to a satisfactory conclusion, the consequent necessity of repeated trials before a final decision is reached—all contribute to render the system exceedingly unsatisfactory in its methods, no less than its results.

"We think we are fully justified in the assertion that there is no one feature of our jurisprudence that tends more in practice to a denial of justice than the system of trial by jury. It may, perhaps, have done well enough in a barbarous age, when judges may not have been more intelligent than juries, and may have been, in fact, the tools and minions of despotic power; but in this age and country it is nothing more than a relic of feudal barbarism."

lished in England for the purpose of trying such cases as could not be reached by the common law, or in which the processes of the common-law courts afforded no adequate remedy, the Roman law came finally to be in reality the law which was intended to fill the gaps and remedy the defects of the common law. The common-law courts were always very jealous of the equity courts; but after the decision of King James I., in the controversy between Sir Edward Coke, on the one side, representing the common-law courts, and Lord Ellesmere, the Lord Chancellor, and Lord Bacon, on the other, representing the equity, or Roman-law courts, it was established that a man might have recourse to a court of equity in many cases after his rights had been adjudicated at the common-law courts. The establishment of this principle was equivalent in fact, though not in form, to giving an appeal from the courts of common law to the courts of equity, thus recognizing the superiority of the Roman over the common-law system. It is true that the equity courts could not reverse the decision of the common-law courts, but if, in the trial of the same case an equity court reached an opposite or different conclusion, the judgment of the common-law court could not be executed, and became therefore, in fact, nullified.

I am well aware that a common-law lawyer will not admit that the equity courts can reverse the judgment of the common-law courts, because legally and technically that cannot be done; but, as a matter of fact, such is the practical consequence of the system as it now exists. If a common-law court, for instance, decides a case against the defendant, and if after that decision the defendant finds proofs to establish his contentions, he may still go to the equity court, present his proofs, and ask that the plaintiff be enjoined from executing the judgment against him; and in such cases the equity court has jurisidiction to grant such an application. In a case like the one cited the equity court does not pretend technically to revise or reverse the judgment of the common-law court; but by granting the injunction against its execution it practically effects its reversal; and such a system therefore actually produces the same result as though the equity court were a court of appeals.[1]

[1] The following letters explain themselves and make this subject more clear:

"Chicago, July 17, 1896.

"Señor Don Matias Romero,

"*Minister of the Republic of Mexico, Washington, D. C.*

"Dear Sir,—I have read with deep interest your valuable article in the current number of the *North American Review*, contrasting the systems of criminal jurisprudence in force in your own country and in this, and am happy to say that I have gained from it much information which I had not before possessed, and of which very, very few of our American lawyers, and publicists even, have any adequate knowledge, and I desire, therefore, to sincerely thank you.

"May I, however, take the liberty of correcting a misstatement contained in the

The American people, with their practical common sense, have remedied a great many of the defects of the common-law practice in civil cases, changing it gradually to such an extent that now it can hardly be said that the English common-law system, as expounded by Blackstone, is in force in the United States. It is still called the common law, but for all practical purposes it is almost superseded by the Roman law.

Even as regards the jury system, and notwithstanding the fact that this has been considered the corner-stone of common-law criminal jurisprudence, some States of this country have, as I understand,

paragraph commencing at the bottom of page 88? It would seem that you regard the power of a court of equity to restrain the enforcement of a common-law judgment as equivalent to the power of a court of appeal. As a matter of fact, it is not so. A court of equity has no power whatever, under our system of jurisprudence, to interfere where an appeal would be the proper remedy. But where there has been fraud, or where it appears that judgment has been entered, when, in fact, no summons has been served on defendant, although the record recites that summons has been served, a court of equity may act, provided the question could not have been raised in the common law-suit, by reason of want of knowledge on the part of the defendant, until after the expiration of the term of court, or some similar reason. In addition, the defendant who seeks the aid of a court of equity in such case must show that the plaintiff had no cause of action; but, if an appeal can be taken, an appeal must be taken, or defendant cannot complain.

"The error into which you have inadvertently fallen is, perhaps, a natural one, and does not detract in the least from the value of your article, for which I again express my appreciation.

"I trust you will not consider my remarks as impertinent, even though your attention has already been called to your error.

"I am, respectfully, your obedient servant,

"Edwin I. Felsenthal, *Attorney-at-Law*."

"Washington, Aug. 7, 1896.

"Mr. Edwin I. Felsenthal, *Attorney-at-Law, Chicago, Ill.*

"Dear Sir,—In answer to your kind and appreciative note concerning my article in the *North American Review*, contrasting the criminal systems of the Roman and the English law, I have to say that I am entirely aware that, under the English or Anglo-American system of jurisprudence, there is technically no appeal from the courts of common law to the courts of equity, but that the concurrent jurisdiction of courts of common law and equity, and the power of courts of equity in many cases to annul or restrain the judgments of courts of law, had the practical effect of an appeal from the latter to the former. Probably I did not use the term appeal in the strict technical sense which it has in your jurisprudence, but rather in the common sense. However, your great commentator, Sir Edward Coke, in his famous controversy with Lord Bacon, concerning the jurisdiction of equity would seem to have regarded the exercise of the jurisdiction assumed by equity as an attempt to give an appeal to the courts of chancery from the courts of common law.

"Thanking you for the kind expressions concerning my article contained in your letter,

I am very truly yours,

"M. Romero."

changed the foundation of that system by not requiring a unanimous verdict for the conviction of the accused.

The very country which established and for years maintained the common law has practically superseded it by the Roman jurisprudence. In one of the acts of the British Parliament passed in the years of 1873, 1874, and 1875 the whole system of English Courts of Justice was remodelled after the systems prevailing in countries which had adopted the Roman law, and it was provided that when the rules of common law and those of equity come into conflict, the latter shall prevail. Such a provision is almost equivalent to repealing the common law itself.

Literal Application of the Law.—The literal application of the common law is, I think, another of its disadvantages. A common-law judge is bound to apply the law in its literal meaning, even in cases when doing so may involve a denial of justice, while a Roman-law judge applies the letter of the law to the case where it fits exactly, and has some discretion to be guided by the meaning and object of its statute, rather than by its literal words, when its words conflict with justice or equity.

A result of the literal application of the statute, and of the strict observance of the formalities established by the statute, is the reversal of judgments upon the ground of purely technical errors, which in some States, like Texas, is carried to an excess, very difficult to understand by a Roman-law lawyer.[1]

Precedents and the Common Law.—American lawyers in arguing cases, and judges in deciding them according to the practice under the common-law system, are controlled almost entirely by precedents, and while considerations of justice and equity are sometimes indulged in, they have legally but little weight. Such a system is very unsatis-

[1] During the last meeting of the Bar Association of Texas, from which I have already quoted, it was mentioned that a robbery was committed in Groveton, the only town of that name in the State of Texas, and the county seat of Trinity County in said State. The robber was detected, tried, and convicted. There was no question either as to his guilt or as to the fairness of the proceedings against him in the court where he was arraigned. The case was carried up on exceptions to the Court of Appeals, and that tribunal set aside the verdict on the ground that the indictment only specified the crime as having been committed in the town of Groveton, State of Texas, instead of the town of Groveton, County of Trinity, State of Texas. It seems that the Court of Appeals is required by the Statutes to rule in that way. When the present appellate system was established by the Legislature of Texas, as originally submitted, the measure contained an article providing that, "if the court of civil appeals shall be of the opinion, in considering all the facts of a case, that the trial court failed to do substantial justice, it shall reverse the judgment, but it shall affirm the case if substantial justice has been done, though there be errors committed not affecting the merit of the case." This article provoked more debate in the Senate than any other in the bill, and it was passed by a large majority, but in the House it was stricken out without debate, and apparently without any apprehension of its importance.

factory, because each case being different from the other, the decisions in the one cannot be made to exactly fit the other. Moreover, it entails a herculean task upon the lawyers and judges, making it obligatory for them to search for precedents not only in the courts of their own country, but even in those of England. With the justices of the Supreme Court of the United States, this work is still more arduous, since they must examine and be familiar not only with all cases decided by the various Federal courts, but by all the courts of the forty-five different commonwealths which form this Union, each with its own distinct legislation, and with the Roman law also, adopted by the State of Louisiana; entailing besides the need of keeping a very large library. Doubtless, no public functionaries under the Federal Government have more arduous work imposed upon them. The day is not long enough to permit its completion, and I have personally known more than one who has broken down under that tremendous strain.

This condition of things shows that the common law is still in its rude and primary state, viz. : setting precedents. After sufficient precedents have been collected to form a code, they should be codified, if the United States shall not previously have accepted in its entirety the Roman law. The Roman law had to pass through these different stages, and it had passed them all, when it assumed the shape in which it is at present. It has been fully digested, and its principles formulated into simple rules, while the common law is yet in process of development, still passing through the primary stages.

Conclusion.—I hope that these few remarks, which have been written without preparation, will assist in dispelling the misapprehension which exists in this country regarding the criminal jurisprudence of Spanish-American nations, and in that way contribute to the better understanding between the United States and her sister Republics. A careful study of the Roman system of jurisprudence by Anglo-Saxon judges, lawyers, and statesmen has resulted in the adoption of many features of the Roman law, and a careful and comparative study of both systems would very likely lead to a conclusion in favor of an eclectic one which would combine the best features of each.

Mr. Godkin's opinions on the Jury System.—My desire to state facts correctly in this article, and hear opinions from different sources on the subject treated in the same, made me submit my paper to prominent gentlemen of this country in different stations, and hear their views and their criticisms. One of them, Mr. E. L. Godkin, a very able gentleman, a very forcible writer, and the editor of one of the leading New York papers, expressed views which entirely differed from mine, and as my object is to present the question in an impartial way, so that it can be well understood and considered on its merits, I take pleasure in inserting his letter on the subject:

"New York, March 22, 1896.

"Dear Señor Romero:

"Although I read your article on the Roman and Anglo-Saxon Systems of Criminal Jurisprudence several days ago, I have retained it until I could find time to say a word or two about it.

"I think it will be useful in dissipating some popular prejudices here about your system which were painfully prevalent and influential at the time of our last dispute with Chili *apropos* of the attack on the American sailors in the streets of Valparaiso. I think your account of the real differences between the two systems will be most enlightening for the American public. But if I might venture to criticise, I should say that you do not do full justice to our jury system, and for these reasons: It was adopted in England as a protection against judges controlled or influenced by the Crown. It is used here for a similar reason. Judges who tried criminals in serious cases would have to be of a far higher character if their decisions were to command public confidence, than those which are given us by the elective system. If, for instance, I were tried in this city for criminal libel, before a Tammany judge without a jury I would stand no chance. It is almost of as much importance that the judgments of a court should command public confidence, as that they should be fair. People in this country would hardly ever acquiesce fully in the verdict of a single man. He would shrink from giving it on every side that seemed unpopular or seemed likely to affect his re-election. This democracy, which we have to take as we find it. Yours with all their faults have not this fault in so great a degree at least.

"In the next place, I should take exception to your ascribing lynch law to the imperfections of the jury system. I do not think lynching is due nearly as often to the faults of juries or to the faults of our system of procedure, than are the delays in the trial, or the failure of justice, caused by the chicane, corruption, and purposely defective preparation of the prosecuting officer. These would be just as great if not greater under the Roman system than ours. The efficient pursuit of crime depends far more on the vigilance, tenacity, and honesty of the District Attorney than in the way in which the criminal is tried.

"I should question, too, whether your account of the distinction between common law and equity either in this country or in England was correct. In this country certainly the two systems have long been merged, and I should doubt whether it was possible, in this State at least,[1] in either to arrest the execution of a common-law judgment by

[1] The code of procedure of the State of New York made a complete fusion between the two systems of common law and equity, and codes of other States have been modelled upon that basis ; but in the courts of the United States the two systems are separately administered on separate dockets and on distinct lines of procedure ; while in some of the States separate courts of chancery (equity) are still kept up.

an equity injunction, for the reason that the plaintiff in submitting his suit must always then select his remedy and ask for it. He must say, for instance, whether he seeks damages or equitable relief; whether the suit is one in equity or in common law is determined by the form of the complaint. Certainly this is the practice in this State, and unless you have done so already, I would suggest further inquiry among professional men on this point.

"What you say about the disadvantages of the precedent system as a body of law will be approved, I think, by most lawyers, but you will find much difference of opinion as to the value as well as possibility of a code. But on this point I think you would find much to interest you in one or two pamphlets written by Mr. James C. Carter, the leader of our bar here. His address is 271 or 277 Lexington Avenue, New York.

"With these small criticisms, I return you the article with many thanks for having given me the opportunity to read it, and with entire confidence in its usefulness.

"Yours very sincerely,

"EDWIN L. GODKIN."

MISTAKES OF MR. P. M. SMITH ABOUT JUDICIAL PROCEEDINGS IN MEXICO.[1]

The following article by the Hon. Matias Romero, Minister from Mexico at Washington appeared some years back in the *North American Review:*

It is truly lamentable to see the mistakes often made by able men of this country visiting Mexico regarding our institutions. I recently noticed a serious one about our judicial system, which appeared in the Lisbon, Ohio, *Leader*, of February 18, 1897, in a speech delivered by the Hon. P. M. Smith, in answer to a toast, "The Lawyer in Mexico," at a banquet of the Lisbon Bar and county officials, which took place in that city on Wednesday, February 2, 1897. It seems that Mr. Smith had visited Mexico, and seen the holding of a court, very likely in a very small Indian town, where the court "met in an adobe structure, containing a table, three chairs for the judge and lawyers, and a mud bench along the wall covered with cement, without books or file cases." He noticed that no oaths were administered to the witnesses, and without understanding the reason of this omission, he allowed his imagination and humor to get the better of his judgment, and offered the following explanation, showing not only his ignorance of the matter,

[1] This paper was published in the May, 1867, number of the *North American Review* of New York, in the "Notes and Comments" section.

but his undaunted courage in attempting to explain the meaning of something which he did not understand:

"Oaths were not administered on the theory, I assume, that an oath would add nothing to the natural truthfulness of the Mexican, and, if you are liable to be defeated by false testimony of two witnesses, for a small consideration you can secure three to contradict the two, and thus possibly win your case, and aid in securing justice to a worthy litigant."

If Mr. Smith had been better acquainted with the judicial system of Mexico he would have found that prior to 1873 we did administer oaths, as is now done in this country, in all judicial proceedings, and to all public officials on being qualified for their respective offices, and that in that year the oath was replaced by a formal promise to tell the truth. What we called our Laws of Reform, which had been enacted from 1855 to 1859, and which established full liberty of conscience and free exercise of any religious belief, and a complete separation between Church and State, were incorporated in our Constitution in 1873 as an amendment to the same, which made it necessary to suppress the oath, as the oath is a religious act, in which God and the Holy Scriptures are invoked in witness of the truth of a statement made, and it ought not to be required in judicial and other official matters, when some men might consider themselves forbidden by their creed to take an oath, and others look upon it as meaningless. When the oath was replaced by a formal promise to tell the truth, the law provided that said promise should have the same effect as the oath, its breach being punishable as a perjury. That promise is not only required in judicial proceedings, but in every case in which the oath was before administered, that is, in the qualification for public offices, and so forth. Had Mr. Smith taken the pains to understand the subject, he would have avoided the gross mistake alluded to.

Mr. Smith is also mistaken when he asserts "that whenever the authorities in Mexico want to get rid of a person who is obnoxious but does not violate any law that justifies his extermination, he is sentenced to the penitentiary for some criminal act, and while on his way to the prison he is advised by his guards to escape, and that when he attempts to do so, he is shot and reported lost on the road." In disturbed and lawless times, assassinations might have taken place in that manner, as they often do in other countries, because, unfortunately, men invested with authority, are sometimes apt to abuse it; but Mr. Smith may be sure that one or two cases that may have occurred in peaceful times could not justify his assertion, and that any person violating the laws in Mexico is always liable to trial and to suffer the proper punishment for his offence.

Another of Mr. Smith's errors, although one of less consequence,

is his assertion that there is a Constitutional provision in Mexico guaranteeing a jury in criminal trials, but that in practice it is unknown. Our Constitution has no such provision, and it is only in the Federal District, by an Act of Congress, that we have established the jury system, which is now in force, notwithstanding Mr. Smith's statements. It is a fact that Article VII. of our Constitution provided that all offences committed through the press should be tried by a jury, who should decide as to the facts, and, if the accused was convicted, another jury should apply the law and fix the penalty; but the practical result of this system was that no offence of that kind could ever be punished, because the jury always acquitted the accused, and our Constitution was amended on May 15, 1883, abrogating the jury system and submitting the offenders to the common courts, so that now offences committed through the press are tried and punished like crimes of any other character. It is not likely that Mr. Smith could have referred to this occurrence, but even in case he had, his information was incorrect.

THE MEXICAN FREE ZONE.