These obvious remedies, which prevent specific fraudulent and wrongful practices, whether they occur in the smallest concerns or in the largest trusts, have proved, in Germany and England, a complete solution of the trust problem.

In the United States, trust evils have been increased and intensified by foolish statutes, which prohibit every form of combination. As President Roosevelt said of the Sherman Anti-Trust Act: 'It is a public evil to have on the statute-books a law incapable of full enforcement, because both judges and juries realize that its full enforcement would destroy the business of the country; for the result is to make decent men violators of the law against their will, and to put a premium on the behavior of the willful wrongdoers.' Until American anti-trust legislation ceases to prohibit all combination in restraint of trade, and seeks merely to prevent specific wrongful practices, which through fraud, coercion, or force violate legitimate business competition, the trust problem of America must continue to embroil politics and business.

CODDLING THE CRIMINAL

BY CHARLES C. NOTT, JR.

Let us suppose that to a man hesitating on the verge of committing an embezzlement, the following statement should be made as to the certainty or uncertainty of punishment following upon the commission of that crime:—

'If you commit this crime, you may or may not be found out. That will depend largely upon you. If you are found out you will be taken into custody (if caught), and later, if sufficient evidence against you is obtained, you will be put to trial. In this legal encounter your adversary will, figuratively speaking, have one hand strapped behind his back and will be governed by Marquis of Queensberry rules. You will have both hands free and will not be governed by any rules, but may strike below the belt or kick or trip. Should you win, you will be free, and no appeal will lie from any decision by the judge in your favor. Should you lose, you may or may not be sentenced. If you are, you may take an appeal. Upon this appeal, no conduct of yours or of your attorney during the trial is brought up for review, but any infraction of the law of evidence, unfavorable to you, by the judge or district attorney, will set aside the result of the trial, and give you another chance. If the conviction should be affirmed and you can then be found, you will have to go to prison, but in all probability need not stay there long if you behave yourself while there.'

To most people this would savor more of an invitation to commit crime than of a warning against so doing; yet as a matter of fact it very fairly states the chances.

The fact is that our administration of the criminal law has as nearly reached perfection in guarding the innocent (and

guilty) from conviction as is possible for any human institution; but in securing the safety and order of the community by the conviction of the guilty it is woefully inadequate.

While figures are but dry mental food, the following will illustrate very well the safeguards which the law throws around persons accused of crime. In the year 1909, 6401 cases of felony were disposed of in the county of New York. Let us see what the chances were that out of this large number an injustice could have been done *as against a defendant* — not as against the state. The grand jury in that year dismissed 1342 cases, leaving 5059, no defendant as yet having been wronged. Of these 5059 cases the district attorney recommended the discharge of defendant, or dismissal of the indictment, in 928 cases, leaving 4131 cases, and no defendant wronged as yet. Of these 4131 cases, 481 were disposed of in various ways (such as bail forfeitures, discharges on writs of habeas corpus, etc.) favorable to defendants, leaving 3650 cases, and no defendant wronged as yet. In 2602 of these 3650 cases, the defendants pleaded guilty, leaving 1048 cases, and still no possibility of injustice to a defendant. In 585 out of these 1048 cases, acquittals, either by direction of the court or by verdict, resulted, leaving only 463 cases out of 6401, in which any mistake against a defendant could have been committed. These 463 cases, winnowed out of 6401, were invariably presented to juries under instructions by the court that twelve men would have to be convinced as one man, *beyond a reasonable doubt*, of the defendant's guilt before convicting; and in each of these 463 cases, twelve men were so convinced, and returned a verdict of guilty. The law still further safeguarded the rights of these defendants. While the state was allowed no appeal in any of the 585 cases in which it was unsuccessful, each defendant convicted had an absolute right of appeal, and 104 appeals were taken during the year, resulting in eleven reversals of convictions, and leaving 452 cases, in the final result, in which there *could* have been any chance of injustice to a defendant. Of these 452 defendants many received suspended sentences, and to the remainder an application for executive clemency, or action in case of injustice, is always open.

When we come, however, to consider the rights of the state and the punishment of the guilty, the above figures are not calculated to inspire confidence in the effectiveness of the criminal law.

The appalling amount of crime in the United States, as compared with many other civilized countries, is due to the fact that it is known generally that the punishment for crime is uncertain and far from severe. The uncertainty of punishment is largely due to the extension in our criminal jurisprudence of two principles of the common law which were originally just and reasonable, but the present application of which is both unjust and unreasonable. This change is due to the fact that under the common law an accused was deprived of many rights which he now possesses, and was subjected to many burdens and risks of which he is now relieved. But, although the reason and necessity for the two principles referred to have long since ceased to exist, the principles are not only retained, but have been stretched and expanded to the infinite impairment of the efficiency and justice of our criminal law. The two principles are: that no man shall be twice put in jeopardy of life or limb for the same offense; and that no man shall be compelled to give evidence against himself.

Under the common law as it existed long after these principles originated, every felony was a capital offense, and every misdemeanor was punished with

branding, mutilation, or transportation. There were no prisons except those for detention for trial. After conviction the defendant was hanged, or his ears were cropped, or he was transported to the colonies. At his trial he was not entitled to counsel. He could not take the stand and testify in his own behalf, even if there were no witnesses available to him. If convicted he was allowed no appeal.

This being the state of the law, the justice of the two principles referred to is obvious. Should a man be acquitted after having run the risk of death through such an ordeal, common humanity required that he should not again be subjected to it, nor have a new trial granted against him after an acquittal when he could not obtain one for himself after a conviction. And it was manifestly unfair to compel a man, who could not testify in his own behalf, to give evidence against himself.

But the original situation no longer exists. Capital punishment is abolished in most states, save in cases of murder in its first degree, and mutilation and transportation no longer exist as punishment for crimes. The accused is entitled to the advice and services of counsel. He may take the stand in his own behalf. The right of appeal is granted him, *while denied to the state.*

Taking up now the consideration of the present interpretation of the principle forbidding a second 'jeopardy of life or limb,' and remembering that at the common law *neither* side could appeal, it is obvious that the rule was intended to prevent a defendant's being arbitrarily re-tried after an acquittal—a purpose with which no one can find fault; and it is no less obvious that the rule never contemplated that a re-trial should be granted to a defendant after the reversal on appeal of a conviction, but should be denied to the state after a reversal of an acquittal on appeal. In other words, the common law said to the state, 'As neither side can appeal, a verdict either way shall settle the litigation, and you shall not continue trying a defendant over and over again until you obtain a favorable verdict.' It did not say, 'A re-trial after a reversal of an acquittal is duly had in an appellate court constitutes the forbidden second jeopardy.'

The fact that a defendant can appeal from a conviction, and can review on appeal all errors committed by the trial judge or any misconduct on the part of the district attorney, while the state can take no appeal from an acquittal, no matter how glaring may be the errors of the trial judge or the misconduct of the defendant's attorney, has an enormous practical effect on the conduct of the trial; none the less so for all that it is not commonly understood or appreciated.

When a judge who is timid as to his 'record' of cases appealed has only to rule consistently against the prosecution to avoid any *reversible* error, the temptation is so strong as to be resisted by but few. There are some judges who rule on a question of law purely as such in a criminal as in a civil case; and some who even hold that as the state is remediless if an error of law be made, while the defendant is not, the state should have the benefit of a doubt on the law, even as the defendant has the benefit of a doubt on the facts; but the number of such judges is all too small.

On the other hand, the great number of judges take refuge in the helplessness of the prosecution when any question that strikes them as at all doubtful arises; and some judges take advantage of the situation to act as if the prosecution had no rights at all that the judge is bound to respect, and as if it were for the judge to decide whether he would be bound by

any law of evidence whatever. Thus recently a judge in New York County, when the prosecutor handed up 'requests to charge the jury,' informed him that the district attorney had no right to request the court to charge anything, and refused to receive them. Another judge in the same county recently, in reply to a perfectly proper objection made by a prosecutor to a speech the defendant was making from the witness-chair, remarked that the district attorney had no right to object, that this man was the defendant and could say anything he wanted to; while another stated that he knew certain evidence offered by the defendant was incompetent, but that he (the judge) would 'suspend the rules of evidence' — in so far only as they applied in favor of the prosecution, of course. Indeed the trial of a criminal case often degenerates into a proceeding which cannot be dignified by the name of a trial in a court of law, but which amounts simply to a hearing conducted arbitrarily in defiance of all rules of law, and in accordance with the whims of a judge who has taken an oath of office to do justice 'according to law,' and not according to his own whims.

It is a safe assertion that, under our present system, fully seventy-five per cent of judgments of acquittal could be reversed on appeal for errors committed against the prosecution. If the state could take an appeal, this percentage would at once drop enormously, even if the right to appeal were but seldom resorted to, and such arbitrary acts as those just cited would practically cease.

If the principle, as it was originally intended to be applied, were reasonable and just, namely, that a defendant (who, if convicted, had no right of appeal) should not arbitrarily be put on trial again, if acquitted; and if the present extension of the principle be unreasonable and unjust; namely, that a convicted defendant can appeal and secure a new trial, but that the state is precluded from so doing in all cases where acquittal results; it may properly be asked: What objection can there be to placing parties litigant upon an even footing to the extent of allowing an appeal by the state, with a re-trial where a judgment of acquittal is reversed for errors of law?

It may be urged that an impecunious defendant would be unable to bear the expense of an appeal and would have to let it go by default. But the court could always assign counsel to defend upon appeal, as the courts now do to defend upon trial. The state, being the appellant, would be obliged to incur the expense of preparing and printing the record on appeal; and the state, having taken the appeal, should bear the expense of the printing of the defendant's brief, the only expense to be incurred by the defendant.

Should the objection be taken that defendants, having been necessarily liberated upon acquittal, would rarely be apprehended again upon a subsequent reversal of an acquittal, the answer is that the object of the change is to secure fair trials by giving both sides equal rights, and it is of small importance whether any particular defendant escapes or not. If the state were given the right to appeal, the character of criminal trials would so improve that the right would only have to be availed of in comparatively few instances.

When we turn to the second principle of the common law, that no man shall be compelled to give testimony against himself, the same condition of things confronts us, — a principle just and reasonable in its original application, warped and stretched out of all reason and justice.

This principle was originally intend-

ed to prevent the use of the rack and thumb-screw to wring a true confession from a guilty man, or a false confession from an innocent man. The fact that a defendant was precluded from testifying in his own favor also enhanced the justice of the rule. But why should the rule be stretched further than to the prevention of confessions by force or improper means of any sort? The extent to which it is stretched is well illustrated by the present law, which forbids all reference by the prosecution to the failure of the defendant to take the stand, and entitles the defendant to have the jury charged that no inference can be drawn against him because of such failure. This is done on the theory that if the failure of a defendant to take the stand could be used against him, he would be *compelled* to testify and give evidence *against* himself. What objection is there in reason to calling, through a magistrate, upon a defendant immediately upon his arraignment, to state his explanation, upon pain of being precluded from testifying upon the trial, if he refuse to give such explanation when required by the magistrate?

It cannot be too firmly kept in mind that the present practice is *solely* for the benefit of the *guilty*. The innocent man is always eager to give his explanation and does so at the first opportunity, and it is always to his interest so to do. But the guilty is now enabled by the law to remain mute, to learn the evidence against him, to concoct his defense pending trial, and to come into court fully acquainted with the case against him, while the district attorney only knows that the defendant has pronounced the two words 'not guilty,' under which he may prove an *alibi*, self-defense, insanity, or any other defense applicable to the case.

It requires no argument to show that no system could be better adapted than this to encourage and promote concocted defenses, *while giving nothing of any practical advantage to the defendant with an honest defense*. Moreover, if a public and orderly inquiry into the defense were held before the committing magistrate, the abuses in obtaining information from defendants, known as the 'third degree' system, and popularly supposed to be very prevalent, would at once disappear. The prisoner on arraignment before the magistrate would be informed of his right to counsel, that whatever he might say would be used against him, and that, should he decline to answer the questions put to him, he would not be allowed thereafter to testify in his own behalf when put on trial. Such a procedure no more compels a man to testify against himself than does now the fear that a failure on his part to take the stand may result unfavorably. *It merely calls upon a defendant to make an earlier choice whether to testify or not*, and calls upon him to make that choice before he has had the chance (in criminal vernacular) to 'frame up' a defense.

A somewhat similar proceeding has long been one of the most important and distinctive features of the administration of the criminal law in France. There the accused is at once brought before the *juge d'instruction*, who examines him at length, remanding him from time to time in order to afford opportunity for verifying his statements. In case of refusal by a defendant to answer, the judge has a wide discretion in detaining him and endeavoring to break down his silence. It would certainly be inadvisable to import into our criminal procedure this power of detention in a committing magistrate; but, in the method advocated above, the magistrate would have no such power, being obliged, upon the defendant's refusal to answer, either to discharge him or hold him for the grand jury as the case might require.

To those so fortunate as never to have had any actual experience in the administration of criminal law, all of these proposed changes may appear theoretical and abstract. But they who have taken part in criminal trials and are familiar with the practical workings of our system, will appreciate the enormous practical difference that would be wrought by such changes. To-day we have a practice under which an accused is made acquainted with the case against him, even to being furnished with the names of the witnesses who have testified against him before the grand jury; the accused stands mute save for his plea of 'not guilty,' and comes into court with a defense unknown to the prosecutor, and with witnesses whose names are not known to the district attorney until they are called to the stand, when, of course, it is too late (in the ordinary criminal trial) to investigate them. The defense knows that it has everything to gain, and nothing to lose, by getting into the case anything and everything favorable to the defendant, whether competent or not, and by trying to keep out everything unfavorable to him, no matter how material, relevant, and competent; the defendant's counsel knows that no misconduct on his own part will be subjected to judicial review and criticism, and a large proportion of the criminal bar customarily resort to methods in the preparation of their defenses and the trial of their cases which would not be tolerated on the part of the district attorney.

All of this state of affairs would be practically reformed by two changes in the law: the first granting a right of appeal to the state, to review all errors of law committed upon the trial; and the second providing for an examination of the defendant by the committing magistrate, and forbidding the defendant to take the stand upon his trial in case of his refusal to answer. We should then have both sides coming into court apprized respectively of the cause of action and the defense, as has been the practice from time immemorial in civil cases; we should find the number of perjured defenses decreasing and the number of honest pleas of guilty increasing; we should have trials conducted with fairness to both sides, and due regard for the law of evidence; we should have the defendants' attorneys subjected to that wholesome regard for the consequences of evil and unprofessional conduct that now exists only upon the part of their opponents; in short, we should have a marked improvement in both the effectiveness of the criminal law and the moral tone of the courts and criminal bar.

MY FIRST SUMMER IN THE SIERRA[1]

BY JOHN MUIR

June 18, 1869. — Another inspiring morning; nothing better in any world can be conceived. No description of Heaven that I have ever heard or read seems half so fine. At noon the clouds occupied about .05 of the sky, white, filmy touches drawn delicately on the azure. The high ridges and hilltops beyond the woolly locusts are now gay with monardella, clarkia, coreopsis, and tall tufted grasses, some of them tall enough to wave like pines. The lupines, of which there are many ill-defined species, are now mostly out of flower; and many of the compositæ are beginning to fade, their radiant corollas vanishing in fluffy pappus like stars in mist.

June 20. — Some of the silly sheep got caught fast in a tangle of chaparral this morning, like flies in a spider's web, and had to be helped out. Carlo found them and tried to drive them from the trap by the easiest way. How far above sheep are intelligent dogs! No friend and helper can be more affectionate and constant than Carlo. The noble St. Bernard is an honor to his race.

The air is distinctly fragrant with balsam and resin and mint, — every breath of it a gift we may well thank God for. Who could ever guess that so rough a wilderness should yet be so fine, so full of good things. One seems to be in a majestic domed pavilion in which a grand play is being acted with scenery and music and incense, — all the furniture and action so interesting we are in no danger of being called on to endure one dull moment. God himself seems to be always doing his best here, working like a man in a glow of enthusiasm.

June 23. — Oh, these vast calm measureless mountain days, inciting at once to work and rest. Days in whose light everything seems equally divine, opening a thousand windows to show us God. Never more, however weary, should one faint by the way who gains the blessings of one mountain day; whatever his fate, long life, short life, stormy or calm, he is rich forever.

June 24. — Our regular allowance of clouds and thunder. Shepherd Billy is in a peck of trouble about the sheep; he declares that they are possessed with more of the evil one than any other flock from the beginning of the invention of mutton and wool to the last batch of it. No matter how many are missing, he will not, he says, go a step to seek them, because, as he reasons, while getting back one wanderer he would probably lose ten. Therefore runaway hunting must be Carlo's and mine.

Billy's little dog Jack is also giving trouble by leaving camp every night to visit his neighbors up the mountain at Brown's Flat. He is a common-looking cur of no particular breed, but tremendously enterprising in love and war. He has cut all the ropes and leather straps he has been

[1] An earlier portion of this journal was published in the January *Atlantic*. — THE EDITORS.