LEGAL COBWEBS

BY HARRY HIBSCHMAN

JAMES HARRIS, a gentleman of color, was indicted in the State of Delaware in 1841 for having stolen "a pair of boots". But at the trial it appeared that, in the excitement of acquiring new footwear in violation of the law, he had seized and asported, not two boots that were mates, but two that were both for the right foot. He was convicted as charged in the indictment; but on appeal the high and honorable Superior Court reversed his conviction on the ground that a charge of stealing a pair of boots could not be sustained by proof of the stealing of two boots that were not mates. "The object of certainty in an indictment," said the court, speaking didactically, "is to inform the defendant plainly and precisely of what offense he is charged. This certainty must be not merely to a common intent but to a certain intent in general, which requires that things shall be called by their right names." (*3 Harrington 559.*)

To be sure, that was ninety years ago. But the rule applied in the Harris case has not yet been sent to limbo. In fact it still works. For, in law, rules and precedents are like musty bottles in old wine cellars—they are esteemed for their age. In 1881, for instance, the Kansas Supreme Court decided with all due judicial solemnity that evidence of the stealing of a gelding would not sustain a charge of stealing a horse. (*State v. Buckles, 26 Kan. 237.*) In 1912, the Alabama Supreme Court held that a charge of a violation of a statute making it a felony to steal "a cow or an animal of the cow kind" could not be sustained by evidence of the stealing of a steer. (*Marsh v. State, 57 So. 387.*) And in 1917 it was decided in Missouri that a conviction under an indictment charging a man with stealing hogs would have to be reversed where the evidence showed that the hogs were dead when taken. The august appellate tribunal that handed down this illuminating decision went across the seas for its main precedents and cited three English cases as authority, two of them decided in 1823 and the other in 1829. It reached the conclusion that "the carcass of a hog, by whatever name called, is not a hog." (*State v. Hedrick, 199 S. W. 192.*)

A very recent example of a reversal of a conviction because of "variance", as the courts call the vice condemned in the cases already cited, is the Texas case of Prock v. State (*23 S. W. (2nd) 728*), decided last year. Here the complaint on which the defendant was arrested and bound over for trial described him as a "male person," and the information filed against him and on which he was tried described him as an "adult male". It was held that this difference required the reversal of his conviction of aggravated assault on a female, though where the harm to him lay is beyond the imagination of an ordinary man.

Another Texas case was reversed in 1910 on the ground that the indictment in which the defendant was accused of

burglary described the burglarized premises as being occupied at the time of the crime by six Japanese mentioned by name, while the evidence was to the effect that there were only five. (*Grantham v. State, 129 S. W. 839.*) In 1917 the Illinois Supreme Court reversed a conviction for embezzlement because of a mistake in the name of one partner out of more than thirty named in the indictment as the injured parties. (*People v. Dettmering, 116 N. E. 205.*) And in 1919 it similarly upset a conviction in a liquor case because in one count out of forty-nine, under all of which the defendant was found guilty, his name was spelled *H*oldburg instead of *G*oldburg. (*People v. Goldburg, 123 N. E. 530.*)

Judges whose morning prayer is, "Keep my feet in the paths of Coke and Blackstone, for precedents' sake!" may, of course, find complete satisfaction for their souls in such decisions. But if one dares to be captious and ask what difference it can make to a defendant—what rights of his are jeopardized—if two unmated boots are described as a pair, a gelding as a horse, a steer as of "the cow kind", or a dead hog as a hog, or if he is proved to have burglarized the premises of only five Japanese instead of six, or embezzled from thirty men properly named and one misnamed, or has the first letter of his last name given wrongly in one count out of forty-nine, one is moved to repeat with the Oklahoma Criminal Court of Appeals that a technicality is "a microbe which, having gotten into the law, gives justice the blind staggers" (*Ryan v. State, 129 Pac. 685*), and to exclaim with the Wisconsin Supreme Court that "there is little wonder that laymen are sometimes heard to remark that justice is one thing and law is another!" (*Gist v. Johnson-Carey Company, 158 Wis. 204.*)

With many American appellate tribunals the point of view, regardless of the breakdown of the judicial machinery and the increase of serious crime, is still that expressed long ago by the Supreme Court of Massachusetts in the case that is said to have driven William Cullen Bryant from law to literature as his life's work. "In a matter of technical law," said the court, "the rule is of more consequence than the reason for it." (*Bloss v. Tobey, 19 Mass. 320.*)

II

American courts have been especially fearsome of permitting one jot or tittle to be taken from, or changed in, indictments. This attitude is due to the supposedly sacred character of the Grand Jury as an institution and of the indictment as its solemnly begotten child.

Thus, it has been held within the last five years that a Federal court is absolutely without power to amend an indictment—even to strike out by stipulation of the defendant's counsel the words "and feloniously" as surplusage. (*Stewart v. U. S., 12 Fed. (2nd) 524.*) The leading Federal case on the subject was decided by the Supreme Court in 1886, when it was held that, if a change is made in the indictment, "the power of the court to try the prisoner is as much arrested as if the indictment had been dismissed or a *nolle prosequi* had been entered." (*In ex parte Bain, 121 U. S. 1.*)

Applying this rule, our appellate courts, both State and Federal, have handed down decisions that seem the height of folly if justice is really the end sought by the judicial process and if individuals are expected to retain a modicum of respect for the law and for the tribunals established to administer and interpret it.

Among the most notorious are the "the' and the "did" cases. Of the former the best known is a Missouri case, decided in 1908, in which a verdict of guilty was set aside because the indictment read "against the peace and dignity of State of Missouri" instead of "the peace and dignity of *the* State." (*State v. Campbell, 109 S. W. 706.*) But there had been a similar holding in Texas as far back as 1883. (*Thompson v. State, 15 Tex. App. 39.*) The leading "did" case was decided in Mississippi in 1895, when a conviction was reversed because the word was omitted from the indictment. Then in 1907 this original case was followed as a precedent in a murder case. In the murder case the fact that the word had been omitted in the indictment before the words "kill and murder" was discovered in the lower court at the time of the trial, and its insertion was permitted by the trial judge. In spite of this amendment, the defendant's conviction was reversed and the case ordered dismissed. (*Cook v. State, 17 So. 228;* and *Hall v. State, 44 So. 810.*)

The "the" cases have been overruled in Missouri, and there have been no recent "did" cases; but that does not mean that the technical approach to the consideration of indictments has been rejected, not by any means. That reversals still continue in many jurisdictions as of old will be evident from a few cases out of many decided during the year 1930.

In South Carolina, for instance, it was held that, where an indictment for murder charged that death occurred in the same county as the assault but the evidence showed that death occurred in another county, though the assault causing death occurred in the county in which the trial was being held and, therefore, the defendant was properly brought to trial there, still it was error to permit the indictment to be amended at the trial to show that death occurred in the other county. (*State v. Platt, 151 S. E. 206.*) In Louisiana an indictment charged the defendant with forging a certain order for $6 on a corporation and, on motion of the State's attorney, the indictment was amended to give the value of the forged order as $4 instead of $6. This was held to be reversible error. (*State v. Sylistan, 125 So. 859.*)

In Illinois a conviction was set aside because the indictment charged an attempt to open a showcase with intent to steal its contents but failed to allege that the attempt was unsuccessful. (*People v. Donaldson, 173 N. E. 357.*) In Texas an indictment was held fatally defective because it alleged that the defendant deserted his complaining wife "unlawfully and willingly" instead of "unlawfully and wilfully". (*Carter v. State, 27 S. W. (2nd) 821.*)

And in a New Jersey case, where an indictment for larceny was amended by striking from it the name of the party found by the grand jury to be the owner of certain alcohol alleged to have been taken and by substituting the name of another as owner, the appellate court held that the trial judge was without authority to permit such change, saying: "There can be no conception of the crime of larceny without ownership of the property alleged to have been stolen being in some one. It is therefore quite clear that the allegation of ownership in an indictment is a matter of substance and not of form." (*State v. Cohen, 147 Atl. 325.*)

But there are a number of late cases in which it is held that such amendments as those just mentioned are permissible. The substitution of a different name for that given in the indictment in connection with the ownership of the property taken, for instance, was upheld in Iowa in 1922

and in Mississippi in 1929. (*State v. Luce, 191 N. W. 64;* and *Wood v. State, 124 So. 353.*)

The difference of opinion in these cases lies largely in varying conceptions by the courts of what is a change in substance and what merely a change in form. That is the rock on which they split, one stream of decisions flowing in the most ancient channels and the other breaking through the banks of hoary precedent and cutting new passageways through the legalistic débris of the centuries.

III

The strange thing about American adherence to outworn doctrines and practices is that we claim to have inherited them from England. And yet England and her dominions have long since cast most of them overboard as so much rubbish. The judge who sits in an English criminal court may wear an ancient garb, but the procedure he follows has been modernized until an American hardly recognizes its semblance to what we are supposed to have derived from the same source. Since 1851 such defects in the indictment as have been discussed above have been of no importance whatever in English jurisprudence. The insertion of words like "the", "did", and "against the peace and dignity", or amendments to show true ownership or description of property or identification of persons are permitted as a matter of course.

The fundamental difference between present-day English criminal jurisprudence and American criminal jurisprudence may be graphically illustrated by quoting the indictment in the famous Sacco-Vanzetti case and comparing it with a similar indictment in Canada. The Sacco-Vanzetti indictment read as follows:

> COMMONWEALTH OF MASSACHUSETTS.
>
> *Norfolk, ss.*
>
> At the Superior Court, begun and holden within and for the County of Norfolk, on the first Monday of September in the year of our Lord one thousand nine hundred and twenty, the Jurors for the Commonwealth of Massachusetts on their oath present That Nicola Sacco of Stoughton in the County of Norfolk and Bartholomeo Vanzetti of Plymouth in the County of Plymouth on the fifteenth day of April in the year of our Lord one thousand nine hundred and twenty at Braintree in the County of Norfolk did assault and beat Alexander Berardelli with intent to murder him by shooting him in the body with a loaded pistol and by such assault, beating and shooting did murder Alexander Berardelli against the peace of said Commonwealth and contrary to the form of the statute in such case made and provided.

In Canada that indictment would have read:

> *In the Supreme Court of Ontario*
>
> The Jurors for our Lord the King present, that Nicola Sacco and Bartholomeo Vanzetti murdered Alexander Berardelli at Ontario on April 15, 1920.

Compare this last, too, with an indictment returned by a grand jury in the District of Columbia in 1891. It charged that the defendant

> did cast, throw, and push the said Agnes Watson into a certain canal then situate, wherein there then was a great quantity of water, by means of which casting, throwing, and pushing of the said Agnes Watson in the canal by the aforesaid Frederick Barber, in the manner and form aforesaid, she, the said Agnes Watson, in the canal aforesaid, with the water aforesaid, was then and there mortally choked, suffocated, and drowned.

This indictment was held defective on the ground that it did not allege that Agnes Watson died by reason of "the de-

fendant's homicidal act." (*U. S. v. Barber, 20 Dist. of Col. 79.*)

If England and Canada have been able to modernize and simplify indictments and other elements of their criminal jurisprudence, why can't we? Do our inflexible constitutions stand in the way? Are we helpless in the face of the rising tide of criminality?

The answer is that what our co-heirs of the English common law and English jurisprudence have done, we can do. And we have already made a beginning in some States. California is, despite the Mooney case, perhaps the most striking example; and her accomplishments are worth noting as proof that we are not altogether helpless.

California's record of reversals in criminal cases, while not among the highest, was formerly, unlike her climate, nothing to brag about. In the period extending from 1900 to 1909, for instance, 22.5% of all criminal cases appealed were reversed. True, the record for Illinois for the same period was 37.3%; but that of New York and Massachusetts was under 15% each.

The old attitude of the California courts is evidenced by a case decided in 1880. It involved an indictment charging "entry into a stable to commit *larcey*." This was held not to describe any offense because of the simple omission of the letter *n*, notwithstanding the fact that there was a provision in the Penal Code, reading: "No indictment shall be deemed insufficient, nor shall the trial, judgment, or other proceedings thereon be affected by reason of any defect or imperfection in matters of form which shall not tend to the prejudice of the defendant." (*People v. St. Clair, 55 Cal. 524; 56 Cal. 406.*)

All of which goes to show that judges, like horses, may be led to the trough but can't be made to drink by mere legislative enactment. Judicial reform by statute can be, and repeatedly has been, thwarted and prevented by the wrong kind of men on the bench. One thing the layman groping for something better in the field of law needs to realize is that in the end, regardless of what the law-makers may say, it is the judges who determine what the law is and how, if at all, it shall operate.

But in 1911 the following section was added to the California constitution:

> No judgment shall be set aside or new trial granted in any criminal case on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure unless, after an examination of the entire cause including the evidence, the court shall be of an opinion that the error complained of has resulted in a miscarriage of justice. (*Constitution, Art. VI, Sec. 4½.*)

The first case involving this provision to reach the Supreme Court of the State seems to have been approached somewhat doubtfully and apprehensively. The court did, however, go so far as to say that "Section 4½ of Article VI must be given at least the effect of abrogating the old rule that prejudice is presumed from any error of law." (*People v. O'Bryan, 130 Pac. 1042.*)

That was in 1913. But by 1924 the Court had become bolder, and now it laid down this rule: "It is now incumbent upon the complaining party to make an affirmative showing that prejudice followed from the error relied upon." (*People v. Mahach, 224 Pac. 130.*)

The result of the recognition and application of this new constitutional provision is manifest from the fact that, while from 1910 to 1912, over 23% of the appeals in criminal cases were reversed, the percentage from 1916 to 1918 was only 12 and from 1918 to 1920 only 11.

Then in 1927 the Penal Code was amended so as to permit a short form of indictment or information and so as to make many other radical changes. The former crimes of larceny, embezzlement, false pretenses, and kindred offenses, for instance, were amalgamated into one crime, theft. And many of the old, technical rules were wholely abrogated. All these provisions have been sustained by the higher courts, and the spirit in which they were adopted was completely recognized in People v. Campbell, 265 Pac. 364, where the Supreme Court said:

> Much of the time of courts has been consumed in the consideration of technical objections to pleadings in criminal cases; yet it is probable that few judges are able to recall a single case in which a defendant was actually in the slightest doubt as to the crime with which he was charged. Modern legislation is endeavoring to cut the Gordian knot by which the trial of criminal cases has so long been fettered, and the courts ought not to thwart that laudable effort by an adherence to mere technical precedents which regard form rather than substance.

The short form referred to has also been adopted in Maryland, Massachusetts, Alabama, Iowa, New York and other States and has the endorsement of the American Law Institute. So we are making some progress, and there is some reason for hope. But before we can travel very far, the comparatively few enlightened jurists and members of the bar who are striving for a better judicial system must be supported and reinforced by an awakened, insistent and clamorous laity. Tradition, the self-interest of certain groups, indifference, conservatism, and a reactionary judicial psychology constitute almost insuperable barriers to even the degree of reform attained in England. And a sane system, truly modernized and humanized, must carry us far beyond it.

THE DOWNFALL OF ELDER BARTON

BY JAMES STEVENS

EVERY fourth Sunday there was preaching in the Hardshell Baptist meeting-house on the road to Hyattsville. When I was in my eighth year Elder Dewberry Barton of Tyrone rode our Southern Iowa circuit. Like all other preachers of his sect, he took no wages for his labors in the vineyard. Instead, he lived by horse trading. He was also a breeder of Morgans and an upright judge of rye whiskey, and in his youth he had traveled from Kentucky to the Territory of New Mexico. The elder was the first grand hero of my boyhood.

Moravia, a town of five hundred souls, was the trading center nearest the Baptist settlement on the Hyattsville road. On Summer Saturdays before his preaching dates Elder Barton would ride over from Tyrone in his box buggy, trailed by a string of trading horses. He drove two snorting hot-eyed Morgans as black and proud as sin. The boys in my neighborhood always watched for the elder. It was the richest sight outside of a circus parade, as the coaly horses pranced down the street, with leather shining and nickel gleaming, with a flash of red spreader rings and goat hair plumes, a clink and jingle of harness rigging, a dazzle of whirling wheels. Sometimes twelve horses would be trailing with a fine thunder. Above all this magnificent motion, noise and color loomed the black-bearded elder. There was glamour in town.

The boys who were free of Saturday chores trudged through the heat and dust for Repp's livery barn when the hero had passed. The parade was over, and now the dickering was the show of the afternoon. Up from the hollows and down from the ridges of the rolling prairie country the farm people had driven, to bargain, swap and gossip in the Moravia square. Horses and rigs were still coming as we started for Repp's barn. Dust drifted sluggishly from the ruts, settled on the board walks, and grayed the leaves of the volunteer timothy in vacant lots. Where the walks were unshaded the boards blistered bare feet, and oozing resin gummed unwary toes as we lazed on.

Generally the stricter Christian parents of Moravia prohibited their boys from loitering around Repp's barn. It was suspected as the town's lone haunt of the Old Nick. Pleas Repp himself had confessed religion; but he had backslidden twice; once from the Methodists, and again from the United Brethren. For two years or so he had considered giving the Holy Spirit another chance at him, this time through the Cumberland Presbyterians, but he was still holding back. Nearly everybody had lost hope for Pleas. People said he gassed with Jeff Biggle too much. Mr. Biggle was the one man in Moravia who came close to being an infidel. Stem Tracy was another sinful character who passed much of his spare time in Repp's barn. A boy was apt to hear profanity there and be tainted by a sight of cards and bottled beer. The