¶"Justice is one thing and law is another"—

LEGAL COBWEBS

JAMES HARRIS 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, not two boots that were mates, but two that were 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 rule applied in the Harris case has not yet been sent to limbo. For, in law, rules and precedents are like musty bottles in old wine cellars—they are esteemed for their age. In 1912, for instance, the Alabama Supreme Court held that violation of a statute making it a felony to steal "a cow or an animal of the cow kind" could not be proved by evidence of the stealing of a steer. 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 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."

A recent example of a reversal of a conviction because of "variance" as the courts call such difficulties, is the Texas case of Prock vs. State. 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.

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. 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 Holdburg instead of Goldburg.

If one dares to ask what difference it can make to a defendant—what rights of his are jeopardized—if two unmated boots are described as a pair, or if he is proved to have 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 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!"

American courts have been especially fearsome of permitting one jot or tittle to be taken from, or changed in, indictments.

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." 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 second 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 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.

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."

The strange thing about American adherence to outworn 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.

The fundamental difference between present-day English 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, 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 defendant's homicidal act."

If England and Canada have been able to modernize and simplify indictments and other elements of their criminal jurisprudence, why can't we? We have already made a beginning in some states. California, despite the Mooney case, is perhaps the most striking example.

In 1911 the following section was added to the California constitution:

No judgment shall be set aside or new trial granted . . . 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.

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.

The short form has also been adopted in Maryland, Massachusetts, Alabama, Iowa, New York, and other states. So we are making some progress. But before we can travel very far, the enlightened members of the bar who are striving for a better judicial system must be supported and reinforced by an awakened and insistent laity. Tradition, the self-interest of certain groups, indifference, and a reactionary judicial psychology constitute barriers to even the degree of reform attained in England. And a sane system, truly modernized and humanized, must carry us far beyond that.—*Harry Hibschman, condensed from The American Mercury.*

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Slang over England

THE perennial bout between the King's English and the American vernacular was revived in London last November. American won, two to one.

Sydney F. Markham, Oxonian M. P., expressed fear in Commons that King George VI might come home speaking American. He singled out as special danger "sez you" and the Goldwynism "include me out." English-speaking countries, Markham said, can agree on everything except how to speak English.

Next day Prime Minister Neville Chamberlain took that notion for a ride. He declared on a world broadcast from the lord mayor's dinner: "The Americans have an expression—doubtless you are familiar with it—which, as the American terms so often do, conveys its meaning without explanation. They talk of a 'go-getter.' Well, I want the government to be a go-getter for peace."

Also, the American-born Lady Astor objected to a wisecrack by Sir Stafford Cripps, Laborite M. P., about her "Cliveden set" of pro-Hitler friends. "Set? What set?" she cried. Cripps retorted: "I withdraw the word 'set' and apologize for it, and substitute for it the word 'gang'."—*Newsweek.*