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EDITORIAL COMMENT.

The Problem of the Perpetual Drunkard.

A brief item in a recent issue of the *London Times* states that Mr. Justice Darling sentenced a woman to three years of penal servitude for stealing a door mat, on the ground that within the last fourteen years she had been convicted eighteen times of petty theft and fifty-seven times of being drunk. This brings up a typical case of a very large class of offenders in our police courts, for whom there is as yet in few countries adequate legal machinery. This is the class of alcoholic "repeaters." In every city of any size there are individuals of this class who are convicted of public drunkenness, or some petty offense intimately connected therewith, from five to twenty times a year. In Utica, N. Y., there is a man who has appeared before the police court over one hundred and sixty times within the last thirty years. Cases of such "repeaters" being convicted from thirty to sixty times within ten or twenty year periods are comparatively common. Evidently the expense of prosecuting these individuals, keeping them in jails or workhouses, or sending them to alcoholic wards, becomes very considerable in the course of time. It is also evident that if wise measures could be devised to eliminate this class of offenders it would be a great saving to the community in every way, as well as a humanitarian work worth while.

The truth is that no serious scientific attempts have been made either in this country or in England to solve this problem. Our whole system of dealing with drunkards is wrong. In the first place, the drunkard should never be committed to jail except perhaps for purposes of detention. Those who are not hardened and fixed in their habits should be released upon probation under the supervision of specially trained probation officers. The commitment of such persons to jails and workhouses upon short sentence is largely responsible for the condition of affairs which we have just described. The institution should be resorted to only in case other means of reformation have been exhausted. If such is the case, then the person should be sent to a special hospital for inebriates, where he can receive proper medical care and treatment, upon indeterminate sentence, to be released only when there is evidence of return to normality, and when he can be placed in suitable surroundings. If there are decided

criminal tendencies in addition to the habit of excessive use of alcoholic liquors, then he should be sent to a special reformatory institution for inebriates and given an indeterminate sentence, though possibly with a minimum period of one year and a maximum period of three years. C. A. E.

President Taft on Reform in Judicial Procedure.

Of all our Presidents, Mr. Taft has shown the deepest concern in the improvement of our methods of judicial procedure. In public speeches and in the law journals, he has asserted that the administration of the criminal law in many parts of this country is a shame and a reproach to our civilization. He has made the subject of reform a part of his constructive program as President, and has devoted a part of both his annual messages to a discussion of the subject. In the May number of the Journal we commented on the recommendations contained in his first annual message. In his recent message of December 6, 1910, he again returned to the subject, saying:

"One great, crying need in the United States is the cheapening of the cost of litigation by simplifying judicial procedure and expediting final judgment. Under present conditions the poor man is at a woeful disadvantage in a legal contest with a corporation or a rich opponent. The necessity for reform exists both in the United States courts in all state courts. In order to bring it about, however, it naturally falls to the general government by its example to furnish a model to the states."

Speaking of the proper method by which procedural reform should be brought about, he says:

"I am strongly convinced that the best method of improving judicial procedure at law is to empower the Supreme Court to do it through the medium of rules of court, as in equity. This is the way in which it is done in England, and thoroughly done. The simplicity and expedition of procedure in the English courts to-day make a model for the reform of other systems. Several of the Lord Chancellors of England have left their lasting impress upon the history of their country by their constructive ability in proposing and securing the passage of remedial legislation effecting law reforms. I cannot conceive any higher duty that the Supreme Court could perform than in leading the way to a simplification of procedure in the United States courts."

In this connection we are glad to be able to say that the bill to improve the administration of justice in the federal courts was favorably reported by the House Judiciary Committee on January 1, with a recommendation that it be passed.[1] This bill was summarized and commented upon in the May (1910) number of the Journal.

[1]Since the above was written the bill has passed the House and is now before the Senate.

In brief, it provides, first, that no judgment shall be set aside or reversed, or a new trial granted by any court of the United States in any case, civil or criminal, upon technical grounds without reference to the merits, and unless in the opinion of the court, after an examination of the entire cause, it shall appear that the error complained of has injuriously affected the substantial rights of the parties; second, that the trial judge may submit to the jury the issues of fact, and may reserve any question of law for subsequent argument and decision, and that such judge, or any court to which the case may be taken on writ of error, shall have the power to direct judgment to be entered either upon the verdict or upon the point reserved, if conclusive, as its judgment upon such point reserved may require. The desirability of such rules of procedure has been more than once recommended by the American Bar Association.

"It is almost impossible," says the committee which reported the bill, "even with a judge of long experience and of great learning and of almost unerring correctness, to get a verdict on a first trial of a protracted and perplexing case which will stand the test of an appeal. Frequently cases are tried a great many times and are dragged through nearly a quarter of a century before a trial is had so free from all technicalities as to meet the approval of the appellate courts, although such technicalities did not in the least affect the substantial rights of the parties, the real merits of the case having been properly adjudicated upon the first trial. This means a substantial denial of justice to the litigant of small means, and should, in the opinion of your committee, be promptly remedied."

The committee calls attention to the case of *Williams v. The Delaware, Lackawanna & Western Railroad* (reported in 155 N. Y., p. 158), which was tried seven times and was in litigation twenty-two years, when the plaintiff finally succeeded.

The case of Hillman (reported in 45 U. S., p. 285, and on a later appeal in 188 U. S., p. 208) was reversed on the second judgment twenty-three years after the new trial.

Chief Justice Marshall, in *Church v. Hubbart* (2 Cranch, 232), laid down the rule which should guide all courts, federal and state alike, in disposing of their cases, when he said: "It is desirable to terminate every cause upon its real merits, if those merits are fairly before the court, and to put an end to litigation where it is in the power of the court to do so." J. W. G.

The Parole System.

There is practically world-wide agreement as to the wisdom, humanity and protective value of the parole system, whether as a part of the indeterminate sentence or as a modification of the traditional penalty. There is, of course, a strong reactionary party opposed to the very principle of the parole system, and this party is by no means inactive. Its arguments are made somewhat more plausible because of certain manifest defects in the administration of the parole system. These defects relate partly to the constitution of the parole board which administers the law, and partly to the measures employed and the agents intrusted with the responsibility. It will be remembered that the Eighth Annual Prison Congress at Washington recently favored the principle of the indeterminate sentence, but passed a very strong resolution relating to the constitution of the board of control which is to administer conditional release. They said that this body should "be so constituted as to exclude all outside influence, and should consist of a commission made up of at least one representative of the magistracy, at least one representative of the prison administration, and at least one representative of medical science." These requirements will bear study, and the method would doubtless be found efficient in practice.

Just now perhaps the most vitally important requirement in our parole system is the appointment of a larger number of parole officers. The paroled men are either wicked or weak, or both. They are just as much under the sentence of the court as if they were within the prison walls, and their own reformation as well as the public security of life and property demand that there should be at least one parole officer for every fifty persons out on conditional release. These men, after a long period in prison, require a gradual adjustment to the atmosphere of liberty. Men who are working in compressed air at high pressure suffer greatly, and sometimes are even killed by too sudden transition to the ordinary atmospheric pressure, and therefore they are put through what is called a "hospital lock," in which they gradually become adjusted to the regular pressure. So also men who come from the strain of prison into an entirely different world should be put through the hospital lock of state watch care. The enemies of the parole system catch at the occasional instances of paroled men who are guilty of burglary, and even murder, and who are in bad associations without a regular industry at a time when the board of parole is receiving regular reports on the regular form with counterfeit signatures. This sort

of supervision is tragically wrong, and public opinion will either insist upon a more careful administration of the system or its abolition. Abolition would mean a return to the medieval principle of the fixed sentence without a period of preparation for entire liberty. Therefore the friends of the different methods must work together and vigorously for the steady improvement of the administration of the system. C. R. H.

Conviction of Murder on Finger-Print Evidence.

A negro was convicted of murder recently in Chicago on practically the evidence furnished by his finger prints alone. The deceased was shot by a burglar, who entered his house at night, apparently through a rear window, and on a freshly painted porch railing below were finger prints, presumably of the intruder. A comparison of these finger prints taken of the defendant was relied on to identify him as the murderer. Doubt has been expressed as to the sufficiency of such evidence to remove a reasonable doubt as to identification. Footprints and shoeprints have frequently been compared with the foot or shoe of a person to show identity; but in the case of finger prints the comparison is so much a matter of skill that it must be made by experts.

It is thought that the epidermic ridges of the fingers and palms, as well as the soles of the feet, are a survival of the pads or permanent callosities of the mammalian paw which bear the weight in walking. In the typical paw there are five pads at the ends of the digits and five on the surface of the palm or sole. In monkeys, where the habit of climbing instead of walking makes requisite a delicate organ of touch, the pads have flattened and their hard covering replaced by a soft epidermis, whose lines and ridges show the positions of the pads by scroll and whorl patterns. In man, the arrangement of these ridges has become of secondary importance; a standard form is no longer maintained, and individual variation has enormously increased. It is this high degree of individual variation which is important from the standpoint of identification. It is, practically speaking, infinite. Not less important is the fact that the patterns are formed in the embryo, and from the sixth month of uterine life remain unchanged until the destruction of the bodily tissues.

A system of classification of the digital ridges was first devised by Galton, and has been elaborated by many workers, notably the Argentine, Vucetich. In some form dactyloscopy, so called, has

largely superseded the Bertillon system in police work. It requires, however, study and experience as well as intelligence in operation. An American, Dr. H. H. Wilder, has proposed the extension of the observations to the palm of the hand and to the sole of the foot. The advantage of this is that the variation in these surfaces is greater and the details larger and more obvious. His system is described in two articles in the *Popular Science Monthly*, "Scientific Palmistry," Vol. 62, page 41, and "Palm and Sole Impressions," Vol. 63, page 385. From the scientific standpoint, therefore, finger prints offer strong evidence of identity, though only properly available in trials through expert testimony. E. L.

Trial by Newspapers.

One of the acknowledged evils in the administration of the criminal law in America is the unbridled license of the press in commenting upon and often trying in advance cases in the public prints. In England it has long been a serious contempt of court to publish during the course of a trial an opinion as to the guilt or innocence of the accused, or other statements calculated to prejudice the case. In the recent case of the London *Chronicle*, whose editor was fined $1,000 for publishing certain statements in regard to Crippen, the King's Bench Division extended the rule so as to cover publications made not only during the course of the trial, but statements published any time after the accused has been taken into custody.

One of the statements complained of was that a sensational discovery had just been made that a deadly poison had been purchased some time before Mrs. Crippen's death, and the police were investigating the purchase and the identity of the purchaser. The other was, in effect, that Crippen, who was then in Canada, had confessed to having killed his wife, but denied that the act was murder. No suggestion was made in the dispatch that it was Crippen who had bought the poison. Moreover, the editor of the *Chronicle* was away on a holiday at the time of publication, and though technically liable for the offense, was in fact entirely innocent. Every effort had been made by the assistant editor to verify the truth of the dispatches from Canada, and the chief editor expressed great regret for what had happened. The defense contended that on the date of the publication, namely, August 5, legal proceedings had not begun against Crippen, and hence there could have been no contempt of court. This proposition was denied by Mr. Justice Darling, who said: "To say after a magistrate had performed a judicial act and

issued a warrant upon a sworn information under which a person was in custody, that no proceedings were pending and that any one was at liberty to say what he liked about the matter would be to narrow the jurisdiction of the court very greatly. If that were the law, a prisoner or his friends could easily take steps to bring the whole prosecution to a futile end.

"In the present case, after the man was in custody, the newspaper commented upon the case as to whether he had committed the crime, not to assist in unraveling the case. It was merely an attempt to minister to the idle curiosity of people as to what was passing within the prison before the trial took place." This was a very grave contempt, said the court, and nothing more calculated to prejudice a defense could be imagined. It was most important that the administration of justice should not be hampered and that trial by newspaper should not be substituted for trial by jury.

Commenting on this case, the editor of *Green Bag* remarks that in this country the power to punish such offenses is rarely exercised, but it pertinently adds: "A few heavy fines might do something toward lessening the abuse of the trial of cases in advance of the actual determination of the merits, by our great metropolitan press, and would lend increased dignity to the administration of the criminal law in this country."

Many members of the bar in this country have complained of the evil referred to, and bar associations here and there have suggested remedies. Mr. Samuel Untermeyer, in a recent address before the American Academy of Political and Social Science at Philadelphia, declared that the abuse was most prejudicial to the rights of the defendant and was a prolific source of the miscarriage of justice. It creates, he said, a sentiment in the community as to the guilt or innocence of the accused, which makes it well nigh impossible to secure an impartial jury, and the atmosphere and sentiment thus created affect not only the jury, but the courts as well. Mr. Untermeyer suggests the enactment of laws similar to those in England, prohibiting newspapers from publishing anything concerning a case in court other than a *verbatim* report of the proceedings in open court; prohibiting newspapers from commenting, either editorially or otherwise, upon the evidence until after final judgment, and forbidding, under penalty of removal and fine, any prosecuting officer from expressing or suggesting for publication an opinion as to the guilt or innocence of an accused person, or from disclosing the proceedings of a grand jury, or from publishing any evidence in his possession bearing upon any case which he is prosecuting.

We call the attention of the readers of the JOURNAL also to what Judge Lawlor says on the subject in his article in this number. Such legislation as he and Mr. Untermeyer suggest must commend itself to all men who desire to see criminal cases determined by jurors whose minds are uninfluenced by newspaper opinion. J. W. G.

THE ADMINISTRATION OF THE LAW AS THE LAYMAN SEES IT.

In a recent address before the New Jersey Bar Association, its president, Mr. Samuel Kalisch, defended the common law rule of judicial procedure as the perfection of reason and the collective wisdom of the ages. "A more complete, wise and excellent structure of criminal legal procedure than that furnished by the common law for the protection and security of the individual and the punishment of evildoers is," he says, "not to be found in the code of any nation upon the face of the earth. It does not contain a single requirement that has not been the direct result of the experience of ages."

It may well be questioned whether our experience justifies this somewhat extravagant praise of common law procedure. In our judgment, much of it is worn out and unsuited to the conditions under which we now live. Long ago, a large part of it was abandoned for more modern methods by the country where it originated, and is tolerated in America largely because it was inherited from England and has the sanction of long usage. But everywhere there is a crying demand for a more efficient, simple and modern system. Jurists like President Taft, Justice Brown, and others who have a right to speak on such matters, have declared that in many parts of our country the existing procedure for the punishment of criminals has perilously near broken down. This is the opinion of intelligent laymen almost without exception. But Mr. Kalisch tells us that the opinions of laymen are false and erroneous, because they "view the administration of the law from a place too far removed for accurate observation." Only "we of the inner circle," he says, are entitled to have opinions on questions connected with the administration of criminal law. We readily admit that there are many fine points of criminal procedure upon which the majority of laymen are not fitted to express opinions, but upon general principles and results the views of intelligent laymen are entitled to respect. We fear the members of the bar too often underestimate the value of lay opinion in such matters. When weeks and months are required to select juries, when years intervene between the arrest of

a criminal and his punishment, when notorious criminals who have been convicted by juries are discharged or granted new trials by appellate courts upon hair-splitting technicalities, when the convictions of trial courts are reversed because of the misspelling or the omission of unimportant words in indictments and criminals are given their liberty, it does not require a mind legally trained to see that something is wrong with a system which permits such delays and miscarriages of justice. As Chief Justice Pennewell of Delaware recently said in an address before the Pennsylvania Bar Association, it is not sufficient to answer the criticism of the layman by saying that he does not understand the situation or that his point of view is different from that of the lawyer. Successful business men who are accustomed to doing things quickly and economically rightly complain of our treadmill methods of administering justice with their cumbersome, antiquated and useless forms. The intelligent laymen of the medical and other learned professions that have made such marvelous strides rightly criticize their brethren of the legal profession for clinging to outworn and ineffective methods.

But it is not laymen alone who criticize. A careful examination of the proceedings of the bar associations all over the country for the past two or three years shows that the leaders of the bar are reproaching their own profession and arraigning it for lagging behind the other learned professions. Many of their addresses have been summarized in the pages of this JOURNAL, and they speak for themselves. No layman has ever criticized our methods of administering justice with more severity than the members of the bar have themselves done. We may refer particularly to the addresses of Prsident Taft, Justice Henry B. Brown, Attorney-General Wickersham, Frederick W. Lehmann, Everett P. Wheeler, Roscoe Pound, Samuel Scoville, John D. Lindsay, Judges Lindley, Sloss and Hillyer, Professors Wigmore and Lawson, Frank B. Kellogg, Edgar A. Bancroft, not to mention scores of others. Mr. Bancroft, president of the Illinois State Bar Association, in his annual address before the association last June, after dwelling upon the marvelous progress of the medical and other professions, frankly told his colleagues that their profession alone remained untouched by the spirit of modern life; that it alone retained the antiquated methods, appliances and standards of the past, and that the time had come for cutting out dead branches and useless parts and substituting simple, efficient and modern methods.

The truth is, as another distinguished member of the bar has pointed out, the effort now being put forth in the interest of more

efficient methods is not a layman's movement. It represents the dissatisfaction of thoughtful men the country over, lawyers and laymen alike—a movement in which the ablest and most candid members of the bench and bar, be it said to their credit, are the foremost leaders. J. W. G.

Criminal Justice in Ohio.

The decision of the Supreme Court of Ohio in the case of *Goodlove v. State* (92 N. E. 491), rendered June 28, 1910, furnishes another example of the sort of slavish adherence to technicality in criminal procedure that is doing so much to destroy confidence in our methods of administrating justice and to impair popular respect for the higher courts in some of our states. The defendant in this case had been sentenced to the penitentiary for a term of fifteen years, and the judgment of the trial court had been affirmed by the Circuit Court. The indictment charged the defendant with the murder of one Percy Stuckey, alias Frank McCormick. The Supreme Court, upon a writ of error, reversed the judgments of the trial court and of the Circuit Court and *discharged* the prisoner on the ground that the prosecution failed to show that the person killed was in fact Percy Stuckey, although the evidence showed that the defendant had killed some person known either by one name or the other. The omission to show that the real name of the victim was Stuckey, was, we are told, a mere oversight on the part of the prosecuting attorney, whose attention was not called to the fact during the trial. There is a provision in the Ohio penal code which provides that "a variance in the Christian or surname, or both the Christian and surname, or other description, of any person described in the indictment, shall not be deemed ground for an acquittal of the defendant," unless in the opinion of the trial court such variance goes to the merits of the case or is prejudicial to the rights of the accused. The Supreme Court of Ohio held in this case that the claim of error must be resolved in favor of the accused, that the rule of law which requires the name of the injured party, if known, to be stated, is too well settled to admit of controversy, and when stated must be proved. "In the case now before us," said the hair-splitting tribunal, "not only is there a total absence of evidence that Percy Stuckey and Frank McCormick were one and the same person, but there is not in this case from beginning to end a scintilla of evidence even tending to show or that would suggest that any such person as Percy Stuckey ever had an existence." In short, the allegation that they were one and the same person must be

proved as any other essential fact. As this fact had not been denied during the course of the trial, the prosecuting attorney had not taken the trouble to produce the proof in support of an allegation the truth of which had not been drawn in question.

The all-important and essential fact which had been established, namely, that the person discharged had murdered *some man,* either Stuckey or McCormick, seems to have been entirely overlooked by the court in its blind adherence to technical rules of procedure. The court admits that it was unable to find any authority in the decisions of other courts of last resort for such a judicial refinement, though it found abundant support in the "reasoning" of the authorities cited in the briefs of counsel. It is refreshing at least to know that such a ruling finds no support in the decisions of other states. The truth is, if the court had fully appreciated the effect such a decision must have upon popular confidence in the administration of the criminal law, it would have pursued its investigations further. Exactly the same question has, as a matter of fact, been passed upon by the Supreme Court of Alabama in at least two cases (*Faulkner v. State,* 44 Southern Rep. 409, and *Evans v. State,* 62 Alabama 6), and in both it was held sufficient to prove that the person mentioned in the indictment was known by the alias stated therein. Honest lawyers may differ in regard to the necessity of proving that a person who is known by two or more different names is one and the same person, even when the fact is never denied, but there ought not to be any difference of opinion on the proposition that the prisoner in this case should not have been *discharged.* Why should not the case have been remanded for a new trial, or why should the state have been denied the right to amend the indictment so as to conform to the proof? The outcome of it all was that a convicted murderer was turned loose by the Supreme Court, not upon the merits of the case, but through a process of reasoning that sacrificed the ends of justice to mere form.

Such decisions are shocking to intelligent laymen, and are deplorable in their results upon the popular esteem in which the courts should be held. It is no answer to say that the accused in this case had been denied any substantial right. He had received a fair trial and had been convicted, and the conviction had been affirmed by the Circuit Court. If the accused was really guilty of killing a man known by two different names, as the jury found him to be, what did it matter whether the real name of the victim was Stuckey or McCormick? The essential fact to be proved was whether the accused was guilty of killing a certain man, and this fact was

clearly established. Whether Stuckey or McCormick was his real name, especially when he was known by both names, was not essential. No murderer convicted after a fair trial, with all the opportunities which our procedure allows for establishing his innocence, should be turned loose upon society for such errors as this. We are glad to know that the decision in this case is being generally condemned by fair-minded members of the bar. J. W. G.

Substantial Justice Versus Technicality.

In the November number of the Journal we commented on the decision of the Supreme Court of Alabama in the case of West, where a conviction for stealing hides was set aside because the indictment did not describe the stolen articles with greater particularity; that is, did not declare whether they were the skins of cattle, mules, sheep or goats. It is refreshing to find a lawyer like Everett P. Wheeler of the New York bar adding his protest against a decision which so grossly sacrifices justice to technicality. An allegation which charges the accused with stealing hides, says Mr. Wheeler, contains sufficient information to enable the accused to prepare for trial, and that is all that should be necessary. And he rightly adds, "There is certainly no difference in moral or legal guilt between the stealing of cow hides and the stealing of mule hides. Nor could there be any difference in the preparation a man would make to meet either charge." "The claim that a man convicted of stealing hides could be tried twice for the same offense because he would not be permitted to 'eke out the charge in the previous indictment by parole showing that the hides were the same in the latter as in the former prosecution,' is," says Mr. Wheeler, "untenable," and he cites Greenleaf in support of his proposition.

The fundamental fallacy in such an argument, he goes on to say, is the failure to realize that society has an interest in the prosecution of the guilty. "The law does throw safeguards around an accused, but the object of these safeguards is to protect the innocent; when used as they were in the Alabama case they shield the guilty and defeat justice. The inevitable result of this is lynching.

"If the orderly administration of the law does not protect these rights, the people will inevitably take the law into their own hands. It is because of the danger to be apprehended from such lawless acts, that the American Bar Association is seeking to reform the system which permits these technical rulings on appeal."

The Supreme Court of Alabama has an unenviable record for

reversing the decisions of trial courts on such technicalities as these. In the last number of the JOURNAL (pp. 818-819) we reviewed an address delivered before the State Bar Association of Alabama by Mr. C. B. Verner of the Tuscaloosa bar, in which this charge was made and the evidence produced in support thereof. "I have examined," says Mr. Verner, "about seventy-five murder cases that found their way to the Supreme Court and reported in random volumes 100 to 160 of the Alabama reports. More than half of these cases were reversed, and not a single one of them on any matter that went to the merits of the case; and very few of them upon any matter that could have influenced the jury in reaching a verdict." In the same address we are told that more homicides were committed last year in the single county of Jefferson, Ala., than were committed in all England, Scotland, Ireland and Wales combined, and that the men who committed these murders for the most part went unpunished largely because the courts failed to properly discharge their duties to society.

Yet we are told that the dissatisfaction with the administration of the criminal law is not well founded, and that the outpouring of criticism to which the system is being subjected is nothing but a "hue and cry" of uninformed laymen, who do not understand the situation. But the testimony of the lawyers themselves abundantly disproves this charge. J. W. G.

SIMPLIFICATION OF INDICTMENTS.

The first step in the simplification of judicial procedure should be the abolition of the existing method of framing indictments and the substitution of a simpler form more in keeping with modern business-like methods of framing legal instruments. The form now religiously followed in most of our states is essentially the same as that employed in England in the time of the Tudors, though strangely enough it has long ago been abandoned in the country where it originated. The excessive particularity commonly required in the allegation of a crime not only unnecessarily encumbers the records, but frequently results in gross miscarriages of justice. The practice of overloading indictments with verbose and antiquated phrases and meaningless circumlocution, alleging over and over again obvious facts, is not necessary to apprise the accused of the charge that he is to meet. Why, for example, should it be necessary in an indictment charging a man with the theft of a horse to state the color of the horse? For, if the color is specified, the fact must

be proven. Or why should it be necessary, in charging the accused with assault with a heavy stick, to describe the weight and dimensions of the stick, as has been insisted upon in the Supreme Court of California? Chief Justice Mayes, in a sensible paper before the State Bar Association of Mississippi last year, addressed himself to the need of modernizing our antiquated practice of framing indictments and of eliminating the grotesque and pedantic verbiage, which more often results in the subversion of justice than in the protection of innocent persons. He pertinently asks why an indictment which charges the defendant with murder is not sufficient without the necessity of stating that the offense was willfully, maliciously, unlawfully and feloniously done, when the offense charged is declared to be murder? How could the case of the accused be prejudiced by the omission of the sacrosanct phrase "then and there," or the word "did?" Yet Mr. Mayes cites cases in his own state in which reversals have been made for these very omissions.

Ex-Governor Thomas of Colorado, in an address before the Iowa Bar Association at its last annual meeting, hardly exaggerated the evil when he declared that "indictments which vary the breadth of a hair from the established formula in statement, punctuation, the use of a capital for a small letter, the omission of an article, upset the most carefully conducted trials, reverse verdicts of unquestioned integrity, cheat justice of its dues and defeat results fairly obtained through infinite labor and expense."

To a layman, such insistence upon wornout and useless forms seems as absurd as it would have seemed to Goldsmith's Chinese Traveler if he had been told that a certain murderer had escaped punishment because, in the course of the proceedings, the clerk of the court, in affixing the seal, had committed the error of moistening it with a sponge instead of following the time-honored and strictly legal method of licking it with his tongue. At bottom, the absurdity is as great in one case as in the other. It is impossible for a layman to understand why it should be necessary to state, for example, that the grand jurors have been duly empaneled, charged and sworn, that the weapon used to take the life of a man was a firearm of a certain make, that it was loaded with gunpowder and leaden balls, that it was had and held in the right hand of the defendant, that it was discharged and shot off against and upon the victim, and that by reason of the force of the gunpowder aforesaid the bullet did strike and penetrate his body upon his upper right side and produce a mortal wound of the depth of so many inches and the width of so many inches. Professor Lawson, in an article entitled "Tech-

nicalities in Procedure," published in the May, 1910, number of this JOURNAL, cites the following case in illustrating the absurd particularity sometimes insisted upon in formulating indictments: S was convicted of the murder of E. The Supreme Court reversed the conviction because the indictment was not properly drawn. It declared that on a certain day S "did feloniously, purposely and with malice aforethought, kill E by firing a Colt's revolver loaded with gunpowder and leaden balls, which he, S, then and there had and held in his hands." "We cannot see," said the hair-splitting tribunal, "that the pistol was shot at E; it may have been fired into the air or at a flock of birds. Nor can we see that E was hit; he may have been a feeble man who died of fright at the discharge of the pistol, for anything the indictment contains."

For the sake of comparison, we insert here the copy of an indictment for murder recently found in a middle western state (it is taken from one of the current Reporters, and is fairly typical of indictments found in most of our states), and following it we publish the same indictment as it would be drawn in England. It is as follows:

The state of —, W County—ss.: In the court of common pleas, W County, —, of the term of October, in the year of our Lord one thousand nine hundred and eight. The jurors of the grand jury of the County of W and state of —, then and there duly impaneled, sworn, and charged to inquire of and present all offenses whatever committed within the limits of said county, on their said oaths, in the name and by the authority of the state of —, do find and present that J. F. G., late of said county, on the sixth day of August, in the year of our Lord one thousand nine hundred and eight, at the County of W aforesaid, in and upon one P. S., alias F. M., then and there being, did unlawfully, purposely and of deliberate and premeditated malice make an assault, in a menacing manner, with intent, him, the said F. M., unlawfully, purposely, and of deliberate and premeditated malice, to kill and murder; and that the said J. G., a certain pistol then and there charged with gunpowder and leaden bullets, which said pistol he, the said J. F. G., then and there in his right hand had and held, the and there, unlawfully, purposely, and of deliberate and premeditated malice, did discharge and shoot off to, against and upon the said F. M., with the intent aforesaid, and that the said J. F. G., with the leaden bullets aforesaid, out of the pistol aforesaid, by the force of the gunpowder aforesaid, by the said J. F. G., then and there discharged and shot off as aforesaid, him, the said F. M., in and upon the upper right side of the back of him, the said F. M., then and there, unlawfully, purposely, and of deliberate and premeditated malice did strike, penetrate and wound, with the intent aforesaid, so as aforesaid discharged, and shot out of the pistol aforesaid, by the said J. F. G., in and upon the upper right side of the back of him, the said F. M., one mortal wound of the depth of four inches, and of the breadth of half an inch, of which mortal wound he, the said F. M., then and there died; and so the jurors aforesaid, upon their oaths and affirmations aforesaid, do say that the said J. F. G., him, the said F. M., in the manner

and by the means aforesaid, unlawfully, purposely, and of deliberate and premeditated malice, did kill and murder contrary to the statutes in such cases made and provided, and against the peace and dignity of the state of —.

In the above indictment the names of the defendant and his victim are each repeated nine times; the phrase "in and upon," four times; the phrase "then and there," five times; the phrase "unlawfully, purposely and with premeditated malice," five times, and the words "said" and "aforesaid," twenty-five times.

We are informed by Dean Lawson of Missouri that the same indictment in England would have read as follows:

"County of ————. The jurors of our Lord the King upon their oath present that J. F. G., on the sixth day of August, 1908, feloniously, willfully and of his malice aforethought, did kill and murder one F. M., against the peace of our Lord the King, his Crown and dignity."

We leave it to the candid, intelligent members of the bar to say which of these forms is most in accord with common sense and reason. If anything can be said in defense of the cumbersome, verbose, grotesque form of which the above is a typical example, we should be glad to hear it. J. W. G.

UNEQUAL JUSTICE.

We publish in this issue of the JOURNAL an article by a member of the Mississippi bar, who discusses in a remarkably frank and convincing manner the actual inequality in the administration of the criminal law as between the rich and the poor, the white man and the negro. The proposition of the writer that the equality of all before the law is little more than a legal fiction, and that in practice the poor and friendless defendant is at a great disadvantage under our system of legal procedure, as compared with the rich and influential classes, is difficult to refute. This inequality does not necessarily mean that the judges are unfair or that the verdicts of juries are always determined by their prejudices rather than upon the basis of evidence, though it is well known that in cases in which members of the negro race are involved, the latter proposition is far less true than in cases in which white men alone are concerned. Much of the inequality is due to a system of procedure which often permits long delays, frequent appeals and new trials, the benefits of which the poor are unable to avail on account of the expense involved. The advantage which such a system gives the well-to-do litigant who can employ shrewd and skilled lawyers, who are frequently able to secure new trials for their clients upon technicalities

or points of practice, has frequently been pointed out by President Taft, notably in his addresses before the Virginia Bar Association in August, 1908, and at Chicago, September 16, 1909. The same point was emphasized by Mr. John D. Lindsay of the New York City bar in an address before the New York State Bar Association in January, 1910. He called attention to a number of cases coming under his observation, in which convictions had been set aside upon appeal, and then he pertinently inquired, "What would have occurred if any of these men had been penniless beggars, unable to take advantage of the right of appeal?" "Think of the irony of a statutory enactment," he said, "which confers a right of which only the man of substantial means may avail himself:" "The murderer who is able to command the resources necessary to present his case to a court of review always has a chance to obtain a reversal, while the poor man has none." Justice is not administered, he went on to say, under a system which, in fact, denies the poor man the right of appeal by reason of the expense involved, while the man of means is able to employ astute lawyers to take advantage of new trials and the additional opportunities for clearing himself, which are afforded by a record-worshiping, technical-ridden system of procedure.

The negro, as Mr. Brandon points out, is at an additional disadvantage on account of the popular prejudice against him because of his race. In the southern states juries are almost without exception composed exclusively of white men, and while it would not be fair to say that juries so composed always find for the white man and against the negro, it is notoriously true that in cases in which the negro is a party the rule of reasonable doubt is usually reversed, and the burden of proof shifted from the state to the shoulders of the defendant. Mr. Brandon, himself a native Southerner, declares that as a result of his observations he is convinced that a negro accused of crime during the days of slavery was dealt with more justly than he is to-day, and that a white man charged with the murder of a negro was far more likely to be found guilty and punished than he is to-day. Mr. Brandon goes even further, and declares that it is next to an impossibility to convict a white man of a crime of violence against a negro, even upon the most conclusive evidence, or to acquit a negro for a crime against a white man. There are cases to the contrary, of course, but they are exceptions rather than the rule. This is the testimony of so many frank and open-minded southern lawyers that the truth of Mr. Brandon's charges as a general proposition is undeniable. Substantially the same testimony was given by President Hatton W.

Summers of the District and County Attorneys Association of Texas, in an address before that body last year. Referring to the fact so often dwelt upon by President Taft, that under the present system the wealthy defendant enjoys a substantial advantage over the poor litigant, he said: "Upon the brutal negro rapist and the poor, friendless white man the keen sword of the law falls with quick vengeance—but mark the change when some rich defendant comes marching into the court room, surrounded by his coterie of lawyers, and throws down the challenge. * * * I ask those who take exception to what I have said to point to half a dozen men in the whole state of Texas who were able to employ the best legal talent in the state to defend them, who were punished adequately, or at all."

Mr. Brandon very wisely points out the effect which the continued discrimination against one class or race in the administration of justice must have upon the people among whom such standards prevail. In the end, he says, it will lead to general disregard for the majesty of the law and want of respect for those charged with its administration. The forms of law and procedure may be maintained for a time, but ultimately the living spirit will take its flight. We cannot continue to mete out one kind of justice to a poor and friendless man or to one of a different race, and another kind to the rich litigant or the white man without reaping the consequences.

J. W. G.