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Criminal Appeals in America—A Book Review*

BY JAMES J. ROBINSON†

The right of a human being to appeal to a higher court for the full and fair review of a criminal conviction depriving him of life, of liberty or of good name would seem to be a fundamental human right. Federal and state constitutions in the United States, however, do not guarantee such a right in their bills of rights. Legislatures, moreover, both in England and in the United States, have been indefensibly slow to provide for it. It was not until 1907 that parliament finally secured to defendants in English courts an adequate right of appeal. It was not until 1933 that Congress, by giving to the supreme court of the United States the power to make rules governing criminal appeals, provided for the securing eventually of an adequate right of appeal for defendants in the federal courts. Even at the present date in state courts the provision for appeals in criminal cases are generally very inadequate. As one result, there is frequently said to be a lack of equal justice as between rich and poor defendants with respect to criminal appeals. The work of the trial courts, moreover, is frequently said to be nullified by appeals which make for long delays and for other unjustifiable interferences with the due execution of the judgments of the trial courts. To examine the facts of the situation with regard to criminal appeals in the United States, and to consider the possibilities of improvement are the purposes of the book which is the subject of this review.

The book is the first of the Judicial Administration Series sponsored by the National Conference of Judicial Councils. The sponsoring organization announces that it presents the series "in the cause of improving the American administration of justice by bringing together what has been thought and written, what has been proposed and what enacted throughout the English-

speaking world, and by making concrete suggestions for future action."¹

This first book of the series seems to the reviewer to perform very effectively for the field of criminal appeals the services proposed by the National Conference of Judicial Councils for the whole field of the administration of justice.

The chief service of the book is to describe clearly the provisions and the operation of the English criminal appeals act of 1907, and of the American supreme court rules for criminal appeals adopted in 1934. The English provisions are much more comprehensive than the American rules. The author believes that "virtually every significant principle of criminal appeal in England" should be adopted in both the federal and the state procedure in this country. Both the English provisions and the federal rules for criminal appeals are shown to be simple, flexible, and economical of time and expense.

An outstanding service of the book is to show American lawyers and legislators the methods by which these English and American improvements in criminal appellate procedure were achieved. The record in each case is one of intelligence and of persistence. The English act of 1907 was enacted only after seventy-five years of agitation and education. During this period twenty-eight separate bills were introduced in parliament only to be defeated. Judges, lawyers and prosecutors took part in the prolonged discussion, some for the movement and some against it. The American rule-making provisions were the result of more than thirty years of advocacy begun by Dean Pound and advanced by Chief Justice Taft and many others. Here as elsewhere throughout the book there is

1. Most of this announcement is quoted from the introduction to this book as written by Dean Roscoe Pound. The author of the book acknowledges "deep indebtedness" to Dean Pound. Frequent references and citations throughout the book refer to "what has been thought and written" by Dean Pound during the years of his now long-continued leadership in the improvement of criminal law administration. The author's preface acknowledges also the aid of Arthur T. Vanderbilt, chairman of the executive committee of the National Conference of Judicial Councils.

*Criminal Appeals in America, by Lester Bernhard Orfield, with an introduction by Roscoe Pound. 1939. Boston: Little, Brown and Company. \$5.00.

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a wealth of citations referring to both English and American statutes, decisions, books, addresses and articles.

The recommendations of the author concerning certain details of criminal law administration are such that they attract interest and consideration. (1) Petty appeals from justices of the peace, it is proposed, should be ended by abolishing justices of the peace and by replacing them with trained trial justices appointed by the judges of the trial courts of general jurisdiction. (2) Appeal by the state from a verdict of acquittal is not favored by the author. If it is to be allowed, however, the author says that the state should make good to the accused the expenses resulting from the appeal; the appeal should lie only in the discretion of the appellate court; and the appeal should be taken promptly. He shows that double jeopardy is no basis for objection to such an appeal. His objection is that such appeals are undesirable as a matter of policy. It is possible that he does not give due weight to the potential usefulness of a right of appeal by the state as a deterrent to those defense lawyers who capitalize on their immunity from reversal, and to those trial judges who, under the protection of that same immunity, rule too readily against the state. (3) Methods of selection of appellate judges and their work are discussed. The author makes suggestions about the oral argument. He suggests that the appellate judges should read the record and the lawyers' briefs by way of preparation, and that the appellate judges hearing the argument "should feel free to ask questions and to direct the argument." Lawyers with experience in oral argument before appellate courts might feel that for some appellate judges the latter suggestion is really an unnecessary invitation and the first suggestion is futile! (4) Neglect of criminal law and criminal procedure by the law schools is condemned. Research in these subjects in law schools and research institutes is declared to be an imperative necessity.

The reviewer believes that the title of the book is inaccurate in using the word "America" instead of the words "the United States." The reasons for the order in which the chapters are placed, and the principles of organization of the materials within some chapters are not readily understood. There is considerable

overlapping and repetition in the chapters. No omissions are observed, unless it would seem that the increasingly popular writ of error *coram nobis* might well have been considered. On the whole, the book is a compact, comprehensive and very useful guide in exploring heretofore uncharted labyrinths of the criminal appeal.

To lawyers, to legislators and to leaders of bar associations and of judicial councils the book is invaluable in showing what to do in improving criminal appeals and how to do it. For the distinctive public service of making this book available, Professor Orfield, Dean Pound and Mr. Vanderbilt are entitled to the appreciation of the members of the legal profession who want to help criminal justice to be equal and efficient.

Criminal Procedure Reform Proposals Ignored

Under date of July, 1938, Chairman Frank W. Ruth, of the joint legislative commission to report on criminal law administration, submitted to the governor of Pennsylvania a report of 157 pages in which a number of recommendations for legislation were presented. The succeeding legislature acted on only one recommendation, amending the act of 1907 which permitted one accused of a felony, who wished to plead guilty, to waive grand jury indictment. It is now possible for one who intends to plead not guilty to waive indictment.

One of the recommendations most emphatically endorsed by the commission was for creation of a judicial council. Prior to the submission of the report the Pennsylvania supreme court rules committee had begun its important work, making unnecessary a judicial council so far as civil justice is concerned. The rules committee has powers concerning court administration generally, as well as rules governing practice and procedure. Probably an ideal step in advance would be to have a legislative delegation of criminal rule-making to the supreme court, which could utilize in that field its present committee, or create an additional committee. The Ruth commission proposals should not be lost. It is not uncommon for such commissions to submit numerous excellent proposals which are at first ignored and later made the basis for significant legislation.

Washington's Small Claims Court Remarkably Successful

The first annual report of the small claims and conciliation branch of the District of Columbia municipal court demonstrates success beyond the expectations of the most sanguine of its proponents. As the months went by the court increased its usefulness, and has proved beyond every doubt that such a court is needed in every large city. The success is attributable to several factors, chief of which are competent supervision, and an act which affords wide scope for simple, inexpensive and efficient procedure.

The court's jurisdictional limit is fifty dollars. A measure of the branch court's legal, social and economic value is afforded by the following brief facts: the increase in cases under fifty dollars in this first year was 54 percent, and these cases constituted 62 percent of all debt actions brought in the municipal court. While the average claim involved only \$25.48 the total amount of claims was \$531,832.03. Although the fees are low the total of fees amounted to \$25,782.75, and was sufficient to make the branch court self-supporting.

The court clerk interviewed 6,223 persons and prepared the original filings for 2,350 plaintiffs, but there were only 410 claimants who were unable to deposit costs. For them advance fees were waived. Service was by registered mail as to 18,810 defendants, and 76 percent were served, while service by the marshal as to 4,135 defendants succeeded in 52 percent of the cases.

More astonishing figures are presented. There were only ten demands for jury trial and but three cases were so tried. Only one case in 11 involved a continuance, and usually then for settlement. There were only 11 applications for writ of error; one was granted and was later dismissed. Stay of execution was granted to permit installment payment of judgment in 2,184 cases and in only 18 percent of these cases was the order vacated for failure to pay judgments.

Perhaps the least expected of all these results was the high percentage of actual trials; conciliation was effected without trial in only 261 cases and there were 1,810 contested trials, with only one judge. All other contested cases in the municipal court amounted to 1,235 (including 238 jury trials). Nine cases were submitted voluntarily for arbitration and 38 for conciliation.

Night sessions of the branch were held every Wednesday evening.

There was a prolonged struggle to prevent enactment of the bill in congress, and one argument was against permitting corporations to sue, on the theory that they could afford to pay the higher fees in one of the accustomed branches. This argument has been advanced in other jurisdictions. But, as Judge Cayton, the chief proponent of this procedure, has said, the defendants of limited means who are sued for installment payments and other small items are far better served in a court in which costs are so light.

Earlier comment on this court will be found in this JOURNAL, 21:188, 22:133, 23:10. In the recent August number there is a report concerning the rehabilitation of the people's court in Baltimore, which is now provided with full-time, well paid judges and a procedure which will enable these judges to render justice as promptly and inexpensively as the Washington court, and with a jurisdiction to \$100.

Pennsylvania Institute of Criminology

The notable services performed in recent years by officers of the Federal Bureau of Investigation show that formal instruction in criminology and penology is needed widely to provide experts for state and city police departments and reformatories. The police and the prisons need trained men, and the country has a surplus of competent young men who seek education which will fit them for public work. The Criminology Society of Philadelphia now comes to the front with announcement of an institute which will train students in all branches. From October to May both afternoon and evening classes will be held and instruction will include both theory and practice and fit students for a new profession. Dr. W. Nisson Brenner, secretary of the Criminology Society, will direct the institute, and be assisted by several experts, including Harry J. Myers II, founder of the footprint system of identification.

Universities have greatly diversified their curricula in recent years and we hear not only of classes in golf and swimming for girl students, but even, in Oklahoma, of classes in the use of cosmetics. It would seem to be timely for such universities to give their sociology departments opportunity for training students for practical professional service aside from teaching.