North Dakota Law Review

Volume 41 | Number 1 Article 8

1964

Book Reviews

James T. Brennan

BOOK REVIEWS

Appellate Courts In The United States And England. By Delmer Karlen. New York University Press,* 1963. 159 p., $6.00.

In recent years interest in the field of judicial administration has been heightened by the formation of the Joint Committee for the Effective Administration of Justice and its project, Effective Justice, under the leadership of Mr. Justice Tom C. Clark, and with the increasing activity of the numerous supporting organizations[1] which are concerned with one or more aspects of this wide field of study.[2] The organization of the appellate court systems of England and the United States is the object of this comparative study.

In 1961 a distinguished group of American jurists and practitioners visited England to study their appellate courts. The following year a comparable group of English judges and barristers visited the United States to observe our appellate process. Each group met with the other to prepare and exchange papers as to their observations. Professor Karlen, the academic member of the group, subsequently continued the study and produced this volume.

Four American[3] and four English[4] appellate courts are individually analyzed as to administration and organization, volume and scope of work, documents required on appeal, oral argument, the decisional process, court opinions, finality of judgment, and a party's right to appeal. Finally the two national court systems are compared as to these various elements. Surprisingly, for two nations which share the common law traditions, the difference in the functioning of their respective appellate courts is striking.

Perhaps we are a more litigious nation, for we have over six hundred full-time appellate judges to only twenty-one for the English.

Our national pattern emphasizes the written brief, with reference to the supporting record; oral argument is limited and of secondary importance. The court usually reserves decision after all argument, and later, after study and conference in chambers,

---

*Washington Square, New York 3, New York.

1. The National Council of Judicial Conferences sponsored the study. Professor Karlen is director of the Institute of Judicial Administration.
2. Judicial education, judicial selection, tenure, compensation and retirement, organization and administration of court systems, rules of practice and proceedure, court congestion, and administration of criminal justice.
3. A state intermediate court, the Appellate Division of the New York Supreme Court, First Department; a state court of last resort, the New York Court of Appeals; a federal intermediate court, the United States Court of Appeals, Second Circuit; the highest tribunal, The United States Supreme Court.
4. Civil cases, the Court of Appeal; criminal cases, the Court of Criminal Appeal; ultimate review, the House of Lords and the Privy Council; other appellate courts, the Divisional Courts.

writes a formal opinion in support of its decision. In England the written brief is virtually unknown. Oral argument is unlimited and includes reading from the record and from citations. The appellate court does rely upon the trial court's opinion; and immediately upon completion of oral argument, the judges will render an oral decision in open court.

In the United States one appeal is usually allowed as a matter of right and further appeals are discretionary and must be requested. In England even one appeal is discretionary and is granted in only about ten per cent of the cases. When allowed, the appeal is more thorough, for the English courts may review questions of fact and the propriety of the sentence. Apparently the English courts are more concerned with the justice of the case, whereas the American courts are more concerned with the law.

In England the appeal, if allowed, results in finality of judgment. In a criminal case a prejudicial error results in an acquittal and not a new trial for the defendant. We allow re-hearings, new trials, and collateral attack, and never really achieve finality of judgment. In England the jurisdiction of each appellate court is limited by subject matter, namely civil, criminal, and matrimonial cases, whereas in the United States the jurisdiction of each appellate court is general and limited only by geographic boundaries.

Generally our appellate courts sit only en banc in contrast to the English practice of sitting in panels. Their appellate judges also conduct trials, where ours are restricted to appeals. England has a specialized bar which handles only appellate cases; we lack such specialization, and the expertise which accompanies it.

In the United States an appellate court is free to overrule its own previous decisions; but in England it is not, and change must come from Parliament. But, as the volume of English case law is small compared to our own, English judges are freer than their American counterparts to decide cases according to notions of justice rather than rules of law.

Professor Karlen has refrained from evaluating the differences in the respective national patterns. He has clearly set forth the practice in each national system as to each aspect of the appellate process. He makes no recommendation as to what aspects are preferable, or in what way each may improve its system. Perhaps in the future this should be done; and the information compiled by Professor Karlen and his distinguished colleagues could be influential for reform in this area.

The book is compact, well written, appropriately annotated, and an important addition to the growing literature in the field of judicial administration. To date the appellate court has been relatively immune from study and reform; but even at this late date we can still learn from our English brethren.

H. ELLIOT WALES**

THE CONTEMPT POWER. By Ronald L. Goldfarb. Columbia University Press,* 1963. 308 p., $7.50.

This book is a must on the reading list of every judge and practicing attorney. It is to be hoped that after reading this book many judges will be more thoughtful and discerning in their use of this arbitrary power. For the practicing attorney the book is a wonderful source of logical, practical, and constitutional agruments concerning the contempt power. If this reviewer had to write a brief in a contempt case tomorrow, there would be no better place to start than with this book. Unfortunately it is a published doctorate thesis, and in keeping with academic requirements, it drones on for 308 dull, dry, dusty pages of logical, rational, analytical deduction, seasoned intermittently with the author's personal views.

However, the author undertook a monumental task to imprison the full scope and extent of the contempt power within an inch-thick volume. The author examines the history of the contempt power; he discusses the various types of contempt, the governmental organizations which enjoy the contempt power and the limits of their contempt powers, the constitutional limits of the contempt power, both in the decisions of the courts and in the author's opinion, and finally the necessity for defining the scope and the limits of the contempt power in a free and democratic society.

The views of the author concerning the contempt power are: (1) that it is unnecessary in many areas because there are other alternatives, equally or more effective, which might be employed instead of the contempt power, which would be more in keeping with the democratic nature of our society, and (2) that there is a limited need for the existence of the contempt power to prevent the individual from frustrating the law of the land. Here, in the author's mind, the fault is not with the existence of the contempt power, but rather with the unrestricted nature of the contempt power as it is wielded today. The proper solution in the author's opinion is to establish by statute procedural safeguards around the

---

**Member of the New York Bar; Adjunct Assistant Professor of Political Science, Long Island University; Ford Foundation Fellow in Legal Education, New York University School of Law.

*2960 Broadway, New York 27, New York.

exercise of the contempt power and to provide for a maximum penalty for contempt. The author includes a draft of a statute which he believes properly balances the interest of the government in compelling obedience to its orders with the interest of the public in being safe from arbitrary and indeterminate imprisonment at the hands of an irate judge.

The abstract, logical approach of *The Contempt Power* is unfortunate, for the contempt power stirs up more drama and emotion than the exercise of any other governmental power in a democracy. The pages are unfortunately barren of the little old Polish man speaking only broken English who is cast into jail by a judge after he has failed to comply with a court order to convey his property. Nowhere in its pages does one see the mixture of fear and hate and disbelief in the eyes of the husband who is adjudged in contempt of court for failure to comply with an unrealistically high alimony order. Nowhere does one see the screaming man being dragged to a cell by two sheriffs because he failed to put out his cigarette before he walked through the courtroom door. These cases are handled in the book in the manner of Gray's description of the human anatomy. Just as the black and white pages of that dull tome fail to capture the vividness and stark reality of an autopsy, so too this book fails to portray the dramactic and emotional nature of the contempt power.

It is perhaps because of the lack of specific examples and the concentration on the analytical approach that the author may leave the reader with some false impressions as to the scope and extent of the use of the contempt power by the courts today, particularly in the areas of family and labor law where the development of the contempt power has been in reality the development of the substantive law of these areas.

But this book should not be criticized for its approach or what it fails to do; nor should the author be unduly criticized for the inevitable lack of detail in a work of the size and scope of his book; but rather he should be praised for his short, excellent, craftsmanlike, analytical study of the contempt power.

JAMES T. BRENNAN**

**Visiting Assistant Professor of Law, University of North Dakota; B.A. Yale, 1958; LL.B. Harvard, 1963; Member of the Connecticut Bar.