

Spring 1963

Book Reviews

Follow this and additional works at: <http://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Book Reviews, 28 MO. L. REV. (1963)

Available at: <http://scholarship.law.missouri.edu/mlr/vol28/iss2/10>

This Book Review is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized administrator of University of Missouri School of Law Scholarship Repository.

Book Reviews

JUDICIAL ADMINISTRATION AND THE LEGAL PROFESSION: A Bibliography. Compiled by Fannie J. Klein. Dobbs Ferry, New York: Oceana Publications, 1963. Pp. xxxii, 650. \$30.00.

This book published for the American Judicature Society and the Institute of Judicial Administration is a useful guide to provide informative access to the literature on judicial administration and the legal profession published during the last twenty-five years. This has been a period of great change and improvement in court administration and procedure, in judicial organization and in legal education. During this time a considerable number of states, by constitutional amendments, have reorganized their judicial departments to give them unity and flexibility under centralized administrative authority, permitting them to be operated as a unit rather than continuing as a group of isolated, unrelated courts without provisions for effective use of judicial manpower. During this time, the very effective office of administrator of the courts was conceived and established for the Federal courts and for the courts of most of the larger states. During this time also the Federal rules of procedure, both for civil and criminal cases, were established and have served as models for improvement of procedure in many states. Furthermore, during this time, standards for legal education and admission to the Bar and procedure for effective disciplinary action against those who fail to comply with the ethics of the profession have been greatly improved and strengthened. The development of all of these improvements appears from the articles listed in this book.

Most complete lists of articles that have been written on all these subjects and helped to bring them about, as well as suggestions for further improvements, will be found in this book, well indexed as to subjects and authors. The book is arranged in two parts; Part One: The Courts; and Part Two: The Lawyers. Part One consists of seven main sections. Section I deals with Court Systems, Section II with Court Personnel, Section III with Administration and Operation of Courts, Section IV with Court Procedure, Section V with the Trial Process, Section VI with the Appellate Process, and Section VII with Delay in Court. Part Two covers Bar Organization, Education and Practice of Law. This book will be of great aid to researchers in all fields of judicial and bar organization and administration by furnishing ready reference to the best writing on these subjects. Mrs. Klein is Assistant Director and Librarian of the Institute of Judicial Administration and, since its founding in 1952 under the leadership of Chief Justice Arthur T. Vanderbilt, has assembled its unique library of books and materials on the courts and the legal profession. This book will make available to legislators, lawyers and judges the wealth of literature of the greatest quarter century of improvement in the Courts and the Bar that this country has ever seen.

LAURANCE M. HYDE*

*Judge, Missouri Supreme Court.

APPELLATE COURTS IN THE UNITED STATES AND ENGLAND. By Delmar Karlen. New York: New York University Press, 1963. Pp. 180. \$6.00.

This book is a comparative study of the appellate court systems of England and the United States. In July, 1961, an American team, headed by Mr. Justice William J. Brennan, Jr., and consisting of four judges, the Solicitor General, a state attorney general, and the author, a professor of law at New York University and now Director of the Institute of Judicial Administration, went to London for two weeks of observation and discussion of the English method of appellate procedure. In January, 1962, an English team, led by Lord Evershed, Master of the Rolls, and made up of two Lords of Appeal in Ordinary, two judges of the High Court, the Permanent Secretary to the Lord Chancellor, a barrister, a solicitor, the editor of the *Law Quarterly Review*, and a director of the British Institute of Comparative & International Law, paid a return visit, observing the United States Supreme Court, the United States Court of Appeals for the Second Circuit, the New York Court of Appeals, and the Appellate Division, First Department, of the New York Supreme Court. Each team briefed the other, assisted by other judges, barristers and solicitors in England, and by other judges, lawyers, professors, law school deans, and the president of the American Bar Foundation in the United States. The teams engaged in mutual criticism of the respective systems, each man reducing his critical observations to writing. This book is a composite result of the thoughts and observations of all who took part in the project.

Four chapters deal with the United States courts. A chapter is devoted to each of the following English courts: the Divisional Courts, the Court of Appeal, the Court of Criminal Appeals, the House of Lords, and the Privy Council. These chapters describe the place of the various courts in the judicial hierarchy of their respective countries, personnel, volume and scope of work, right of appeal, documents on appeal, scope and nature of review, oral argument, assignment of cases, the *modus operandi* of decision-making, conferences of judges, opinions, publication of opinions, precedent, and finality of decisions.

In England, there are only twenty-one judges devoting full time to appellate work, twelve on the Court of Appeal and nine in the House of Lords and Privy Council. Other appellate work, as in the Court of Criminal Appeal and the Divisional Courts of the High Court, is done by judges most of whose time is spent trying cases *nisi*. These courts sit in panels of three to five members, at the direction of the Lord Chief Justice, not ordinarily *en banc*. Most courts in the United States sit *en banc*, and not in divisions or panels. Also, in the United States more than six hundred judges are engaged exclusively in appellate work.

In England, all appellate judges are appointed by the Crown, on the recommendation either of the Lord Chancellor or the Prime Minister, to hold office during good behavior. Political considerations play a very minor role. For example, during his long tenure as Lord Chancellor, Lord Jowitt appointed only one member of his own party. The prestige of judicial office is so high that it is rarely refused by a practicing barrister, no matter how successful his practice

or how great his income. While American judges sometimes resign their offices to re-enter private practice, such a course would be regarded as shocking in England. Almost all English appellate judges have had previous experience as trial judges, and before that as distinguished barristers. Barristers appearing before appellate courts (less than 2,000 in number) are highly specialized in their field of litigation and are specialists in the art of advocacy. Frivolous appeals are discouraged by high costs, which are imposed on the losing party, including his opponent's counsel fees. In America, any one of the 250,000 lawyers may appear in any appellate court in any type of litigation. While American appellate judges ordinarily receive less help from lawyers appearing before them than do English judges, in the United States most appellate judges have law clerks, a practice unknown in England.

English appellate courts specialize in particular types of cases. Only Oklahoma and Texas follow the English system of separating criminal and civil appeals. The English scope of review is broad, with the Court of Criminal Appeal having power to review determinations of fact and revise sentences both up or down.

No briefs are filed in English appellate courts, except in the House of Lords or Privy Council, where an abbreviated paper of six or seven pages is required. This is not an appellate brief in the sense in which that term is used in the United States. It is intended only as a preliminary outline of the oral argument to be made later. On the other hand, English appellate judges have the advantage of having a carefully reasoned opinion by the trial judge, outlining the evidence, summarizing the authorities relied upon, and the reasons for the decision.

While in the United States oral arguments are of secondary importance to the briefs and are rigidly limited in duration, oral arguments in England are all-important and never arbitrarily limited in extent. An oral argument may go on for days, even weeks; they average a day and a quarter. Perhaps half the time is spent by counsel in reading aloud what happened below, what errors are complained of, and the authorities relied upon. Ad hoc suggestions from the court may reduce the time, where the judges are satisfied as to a certain proposition. If by the time appellant concludes his argument the court is not persuaded that the decision should be reversed or modified, the court informs counsel for respondent that it does not wish to hear from him at all, and proceeds forthwith to deliver judgment.

In the United States nearly all decisions are reserved and rendered in written form; in England, few decisions are reserved or written (only in the House of Lords and Privy Council). In the Court of Appeal, each judge expresses his individual views orally and extemporaneously at the close of argument. In the Court of Criminal Appeal, a single opinion is customarily announced, also orally and extemporaneously. Most of the time of English appellate judges is spent in court, listening and talking, rather than writing. United States appellate judges spend the least time in court, devoting most of their working hours to reading, writing, and conferring with their colleagues. In England, one case at a time is considered by the court. American judges, however, are required to

shift their attention from one case to another, because cases are heard in batches and several await decision at any given time.

English case law grows slowly, perhaps at the rate of three volumes a year. Not all cases are reported (seventy-five percent of those decided by the House of Lords and Privy Council; Court of Appeal, twenty-five percent; Court of Criminal Appeal, ten percent). English judges do not feel free to overrule their previous decisions, but are more free to decide cases as they feel justice demands. They do not have the task of ferreting out similar fact patterns from the welter of reported cases and comparing minutely these fact patterns with the one before them. The English report only cases which announce rules of law having precedent value; cases applying well settled principles to similar fact situations are not considered worthy of preservation in the Law Reports.

In England, statutory interpretation tends to be literal, and legislative history is not considered. Statutes are not invalidated, for there is no written constitution or doctrine of judicial supremacy. The appeal is an extension of the trial; in the Court of Appeal and Court of Criminal Appeal new evidence may be taken; questions of fact as well as of law are reviewed; and on the criminal side the propriety as well as the legality of sentences is considered, with litigants often appearing when the appeal is argued. Rehearings are not permitted, and, while new trials may be granted in civil cases, new trials are prohibited in criminal cases. If an error is found that is not harmless, there is no alternative; the accused must be set free, notwithstanding that there is no question as to his guilt. Once a problem is decided, relitigation is pointless, so rigid is the doctrine of precedent, with the result that the citizen's only relief is corrective action by Parliament.

This book reveals more contrasts than similarities between the two systems, and provokes thought as to how each system might be improved. It is one of the Judicial Administration Series, published under the auspices of the National Conference of Judicial Councils. Others in this series are: *Criminal Appeals in America*; *Organization of Courts*; *Appellate Procedure in Civil Cases*; *Traffic Courts*; *The Selection and Tenure of Judges*; *Criminal Procedure from Arrest to Appeal*; *Minimum Standards of Judicial Administration*; and *Civil Procedure of the Trial Court in Historical Perspective*.

NORWIN D. HOUSER*

*Commissioner, Missouri Supreme Court.

FREEDOM OF ASSOCIATION. By Charles E. Rice. New York: New York University Press, 1962. Pp. xix, 202. \$6.00.

In 1958, Mr. Justice Harlan, speaking for a unanimous Court in the case of *NAACP v. Alabama*,¹ stated,

It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.²

What the United States Supreme Court did in the *NAACP* decision was to recognize and proclaim in unequivocal terms a freedom which had been latent during many years of constitutional development. Nowhere in the Constitution is freedom of association, or the right to associate, expressly mentioned. But, as the language of the Court implies, freedom of association is nothing new. The right to associate for the advancement of ideas has been recognized implicitly in the past, and it has underlain important decisions which have been formally ascribed to the application of other freedoms.

This recent recognition of and emphasis upon the "right to associate" has resulted in several books dealing with the subject,³ including this volume by Mr. Rice, assistant professor of law at Fordham University.

The purpose of the study, as stated by Mr. Rice,

is to examine this newly articulated freedom of association, with particular emphasis upon the right, and sometimes the duty, of the individual to associate, and his correlative right or duty not to associate. Only incidentally, and as far as necessary to the central inquiry, will the rights and duties of associations themselves be discussed.⁴

While men form various types of associations (*e.g.*, commercial corporations and partnerships, trade associations, and fraternal organizations), the author limits himself to four associational situations in which the underlying norms of this newly recognized freedom have been formulated—religious groups, associations affecting livelihood, political parties and pressure groups, and subversive associations. Religious, political, and subversive associations were chosen by the author because "they present most clearly the problem of freedom to associate for the purpose of promulgating ideas, which is a central constitutional issue of our time." Associations which directly affect the livelihood of their members are pertinent "because they are ones in which both the right to join and the right not to join have been squarely and exhaustively challenged."

Two background chapters lay the groundwork for an understanding of the deep historical and philosophical roots of the concept. Chapter one, "Juris-

1. 357 U.S. 449 (1958).

2. *Id.* at 460.

3. ABERNATHY, *THE RIGHT OF ASSEMBLY AND ASSOCIATION* (1961); FELLMAN, *THE CONSTITUTIONAL RIGHT OF ASSOCIATION* (1963); HORN, *GROUPS AND THE CONSTITUTION* (1956).

4. P. xviii.

prudential Background," shows the abiding interest in the area of philosophers from Aristotle to Rousseau. Chapter two, "American Background of Freedom of Association," examines the conditions and institutions of these four types of associations during pre-Revolutionary America and then the changes in attitude effected by the Revolution and the adoption of the Constitution. A brief section discusses the astute observations of Alexis de Tocqueville concerning various aspects of the right to association in American society. Even in his day, de Tocqueville found that, "In no country in the world has the principle of association been more successfully used, or more unsparingly applied to a multitude of different objects, than in America."⁵

Professor Rice then devotes a chapter to each of the four types of associations mentioned above. Regarding freedom of religious association, he makes clear that the right to *join*, and the right *not* to *join*, a religious association are constitutionally inviolate. However, the right to *practice* the tenets of a religious association, and to *support* it, are subject to *reasonable* regulations in the interest of the public welfare. Further, the *negative* rights not to practice the tenets of a religious association and not to support a religious association are subject to limitations of an uncertain degree, through sumptuary laws enacting the precepts of some religious groups where such laws are also justified on a secular ground, and through public subvention of the activities of some religious associations.

Freedom of association as it relates to earning a livelihood presents some very interesting and controversial questions, particularly those of compulsory union membership and the "integrated bar." At the federal level and in many state jurisdictions, public policy has dictated certain compulsions relative to one's associations. Of course, there exists a clear constitutional right to join an association which exists to facilitate access of its members to a livelihood. Nevertheless, one's mere presence in the same economic unit may subject an individual to representation by such an association even though he does not choose to join it. There may be imposed, in some situations, a duty to join an association which exists to facilitate access of its members to a livelihood, and a correlative duty not to join a competing association. However, an association to which an individual is compelled to belong, as a condition of earning a livelihood, may not infringe upon his right of free political association by using his dues for political purposes of which he asserts his disapproval.

Anyone who has a reasonable familiarity with American political institutions will find little new in the author's brief treatment of the freedom to associate in political parties and pressure groups. The major recent development in this area has to do with the legislation involving the NAACP in various southern states, and Mr. Rice fully discusses this litigation. A general conclusion which might summarize this chapter is that there is a constitutional right to form, join and support political parties and pressure groups, which right is subject to regulations reasonably designed to insure the integrity of governmental processes.

The longest and most interesting chapter examines the very difficult and con-

5. P. 38.

troversial question of freedom of association and subversive associations. The author readily concedes that there is no constitutional freedom of subversive association, but he talks in terms of a "reflected right of subversive association." His own words would best summarize his views concerning this right:

Although there is a fundamental general freedom of association, there is no constitutional freedom of subversive association. There is, however, a reflected right of subversive association which is of a subconstitutional order. This reflected right appears to exist only because the fundamental guarantees of liberty in the Constitution, especially due process and the freedoms of speech and press and from self-incrimination, prevent the government from interfering arbitrarily with the members of subversive groups. The government may restrict or penalize the members of subversive associations, at least those which seek to overthrow the government, in any way it sees fit, subject only to the restrictions imposed on it by those fundamental constitutional guarantees. In dealing with subversive associations and their members, therefore, the government is not further restrained by the fundamental freedom of association. It must be remembered, however, that the fundamental guarantees of individual liberty which do inhibit the government in its dealings with subversive associations and their members work genuine and substantial restraints upon the exercise of official power. Often they are as effective in restricting the government as would be a fundamental freedom of subversive association.⁶

Professor Rice is to be commended for a very readable, well-organized, and scholarly analysis of this new, yet old, freedom of association, and the book deserves a wide reading public.

FREDERICK C. SPIEGEL*

6. P. 177.

*Associate Professor of Political Science, University of Missouri.

MY LIFE IN COURT. By Louis Nizer. Garden City, New York: Doubleday & Company, Inc., 1961. Pp. 524. \$5.95.

This book, which ranks high on the lists of non-fiction best sellers, is authored by a distinguished New York lawyer. Its subject is the account and discussion of some extraordinary cases in which the author, by thorough preparation and skillful technique, secured victory for his clients, sometimes against tremendous odds. The names of the parties are indicated in a number, though not all, of the case stories presented, but there are no official case citations given,¹ probably because of the fact that this book is principally destined for the lay reader. It is, nevertheless, not only most interesting, but also most useful reading for the lawyer, since it presents striking object lessons in the art of advocacy, consultation outside of court, preparation for trial, and conduct of trial, especially in the area of cross-examination. Moreover, some of the cases involve unusual problems of law.

While the book is well written throughout, the stories at times become too detailed and thus tiring. This probably applies to the first, otherwise highly interesting, chapter entitled "Reputation," dealing with the libel litigation between two famous literary personalities, the celebrated war-correspondent Quentin Reynolds, author of a book on the New York Judge Leibowitz,² and the columnist Westbrook Pegler, known for his acrimonious way of writing. Nizer, representing Reynolds, secured an extraordinary triumph. The jury awarded Reynolds punitive damages against the three defendants in the total amount of \$200,000, but only one dollar compensatory damages.³ The decision was affirmed on appeal.⁴ The theory followed in certain jurisdictions, that nominal damages are not a sufficient predicate for punitive damages and that punitive damages must stand in some reasonable relation to compensatory damages, was not applied. Perhaps also too detailed, though very interesting, is the chapter entitled "Honor," the account of another libel suit in which Nizer successfully represented the plaintiff, Professor Friedrich Foerster, against the newspaper editor Victor F. Ridder.⁵

Most of the case recitals in the book, however, are written without an excess of particularization, are fluent, dramatic, and sometimes even suspenseful. One such story is the last chapter, entitled "Proxy Battle," which renders a most vivid, factually, as well as legally, account of an internal fight for control of one of the leading film production enterprises, Loew's Incorporated. The contest was for the control of the management, with the Vogel group, advised and represented by Nizer, as the protagonist, and the Tomlinson group on the opposite side. Since Loew's Incorporated is a Delaware Corporation, the battle took place before the Chancellor and the Supreme Court of Delaware. The crux of the

1. The citations in the following footnotes are not from the book, but supplied by the reviewer on the basis of his research.

2. See REYNOLDS, COURTROOM (1950).

3. Reynolds v. Pegler, 123 F. Supp. 36 (S.D.N.Y. 1954).

4. 223 F.2d 429 (2d Cir. 1955), cert. denied, 350 U.S. 846 (1955).

5. Foerster v. Ridder, 57 N.Y.S.2d 668 (Sup. Ct. 1945) (remitting award of \$100,000 to \$50,000).

legal issue was the construction of a controversial clause in the firm's articles of incorporation. Nizer persuaded the Delaware courts to adopt an interpretation which the Tomlinson group claimed was contrary to a prior decision of the Delaware Supreme Court,⁶ and thus secured a victory of extraordinary magnitude for the Vogel group.⁷

Two suits concerning alleged infringement of artistic property rights are mentioned in the book. In one of them Nizer represented Konrad Bercovici in his suit against Charles Chaplin, for alleged plagiarism in Chaplin's film "The Great Dictator." The case is only incidentally referred to in the book as illustrative of the author's theory of the important role which the rule of probability may play in an advocate's preparation of his client's case.⁸ Apparently this litigation was settled prior to judgment, as there is no full recital of the facts and law involved. However, the other plagiarism case, forming the subject matter of the chapter "Talent," is fully recited. The case is the suit of Maurice Baron, represented by Nizer, against Leo Feist, Inc. and other defendants for alleged copyright infringement in publishing and copyrighting the song "Rum and Coca-Cola," which plaintiff claimed was substantially identical with a song previously copyrighted by him. Nizer had to overcome forceful adverse expert testimony, but he was nevertheless successful in the trial court and the decision was affirmed on appeal.⁹

The chapter entitled "Divorce" contains, in addition to general discussions of matrimonial law, the recital of three interesting cases in all of which Nizer represented the female party. Since one of the cases involved a husband who was a foot fetishist, it is easy to understand why the names of the parties are not indicated. One of the cases is significantly called "War of the Roses," since it concerned the matrimonial conflicts between Billy Rose and his second wife, Eleanor.¹⁰ But the most fascinating part of this chapter is the elaborate recital of the labyrinth of matrimonial litigation between Dolores Fullman Astor and John Jacob Astor through both the Florida and New York courts.¹¹ The case involved numerous difficult legal problems, such as the question of estoppel to prevent a party who has secured a Mexican divorce from pleading its invalidity. Dolores, a bride of six weeks, was successful in all phases of the procedural battle against bitter opposition.

6. In re Chelsea Exchange Corp., 18 Del. Ch. 287, 159 Atl. 432 (Ch. 1932).

7. Tomlinson v. Loew's Inc., 134 A.2d 518 (Del. Ch. 1957), *aff'd per curiam*, 135 A.2d 136 (Del. 1957). See also Campbell v. Loew's Inc., 36 Del. Ch. 533, 134 A.2d 852 (Ch. 1957), 36 Del. Ch. 563, 136 A.2d 191 (Ch. 1957).

8. See Reader's Digest, March 1962, 195, reprinting as *Help on the Witness Stand* part of Nizer's *Prologue*.

9. Baron v. Leo Feist, Inc., 78 F. Supp. 686 (S.D.N.Y. 1948), *aff'd*, 173 F.2d 288 (2d Cir. 1949). See also Baron v. Leo Feist, Inc., 7 F.R.D. 71 (S.D.N.Y. 1946).

10. For parcels of this litigation see *Rose v. Rose*, 115 N.Y.S.2d 68 (Sup. Ct. 1952); *Rose v. Rose*, 3 Misc.2d 753, 117 N.Y.S.2d 32 (Sup. Ct. 1952).

11. *Astor v. Astor*, 7 Fla. Supp. 29 (Cir Ct. 1955), *rev'd in part*, 89 So. 2d 645 (Fla. 1956); *Astor v. Astor*, 107 So. 2d 201 (Fla. Dist. Ct. App. 1958), *reaff'd*, 120 So. 2d 176 (Fla. 1959), *cert. denied*, 364 U.S. 862 (1960); *Astor v. Astor*, 6 Misc.2d 967, 160 N.Y.S.2d 103 (Sup. Ct. 1957), 162 N.Y.S.2d 87 (Sup. Ct. 1957), 9 Misc.2d 645, 165 N.Y.S.2d 767 (Sup. Ct. 1957).

Only a small part of the book is devoted to negligence cases. The two cases of this kind form the chapter entitled "Life and Limb." One is a malpractice case in which Nizer secured a very advantageous settlement from the defendant's insurer, while the other is a wrongful death case where Nizer was similarly lucky in procuring a high settlement from the defendant railroad's insurer for his widow client. The settlement in both cases came after a trial in which Nizer, by very clever advocacy, had badly weakened the adversaries' case.

What can be learned from this book is that thorough preparation of a case is at least as important for a great advocate as brilliancy in brief writing or oral argument. Indeed, the red line running through Nizer's successes is his painstaking study of even the remotest factual and legal aspects of his clients' cases. Among the concrete hints contained in the book is the one that "where there is no likelihood of contradiction, aimless cross-examination only produces repetition of the harmful story, and heightens its effect." To this Nizer adds the following epigrammatic words: "Nothing is more ungainly than a fisherman pulled into the water by his catch."¹²

MAXIMILIAN KOESSLER

12. P. 79.