

## BOOK REVIEWS

**COURTS OF INJUSTICE.** By J. P. Callison. New York: Twayne Publishers, 1956. Pp. xxi, 760.

The administration of justice in an advanced civilization is an ordering of conduct and adjustment of relations by the systematic application of the force of politically organized society. It has always created and probably always will create much general dissatisfaction. Those whose conduct is ordered are irked by the process, and those for whose security or protection it is ordered in particular cases are likely to be irked by mitigations in the ordering urged by the opinion of their fellow men. Also, in the adjustment of relations, it is likely either that one of the parties will be defeated in or fall short of his demands or that neither will obtain all that he conceives he ought to have. At least one of them and frequently both will be dissatisfied with any result public authority imposes on them. But this intrinsic cause of discontent does not relieve us of a duty of making of this difficult process the best that can be made in the time and place.

Unhappily the administration of justice, as it went on in the United States in the latter part of the nineteenth century, was very far from what it might have been made, and despite many far-reaching improvements in the present century, still calls for much improvement—more in some localities than in others. Any book which sets out the deficiencies of the regime as it stands and considers how to meet them is worth while, and in the movement for law reform, which has been active in the present century, is timely. But the problem of making American administration of justice what it should be is complicated as well as difficult. As Lord Coke explained to James I, law is “an art which requires long study and experience before that a man can attain to the cognizance of it.” Few problems of the social sciences admit of a single simple solution. Mr. Callison, however, is satisfied that he has one for this problem. His single simple solution is: Abolish the lawyers. This is not a new one. It has been preached from antiquity. But I am afraid that in action it would mean abolishing the law. It is too single and too simple.

That the law and administration of justice in the United States require much improvement is beyond doubt. To make improvement effective, however, we must see what causes have brought about the conditions of which we complain, and how they have operated. There is no one single simple cause, the lawyer. The movements and conditions which had made our administration of justice what it was in the last quarter of the nineteenth century had a like effect upon the lawyer. Political ideas of democratic equality along with the pioneer idea of versatility—that any man, merely

as such, was equal to any office and any public task—reinforced by frontier modes of thought in the Jacksonian era, which reduced the common-law judge to an umpire, no more than an equal of the advocate, and gave extravagant power to juries, and put the courts and the whole machinery of justice into party politics, deprofessionalized the professions, in substance did away with effective requirements for training and character of those admitted to practice, and all but eliminated control of the conduct of practitioners. The consequent abuses have left their mark upon the administration of justice in varying degrees in almost every state.

If we leave out of account products of the author's anti-lawyer complex, there is much in the book well worth thoughtful consideration both by layman and by lawyer. He has read much and pondered much and often shows real insight into abuses and remedies. But appraisal of some of the institutions of continental Europe demands more than may be expected of any one but a thoroughly trained student of comparative law, and understanding of the present-day English system demands a better understanding of the organization of the profession and its history than an American lay reader is likely to have.

Perhaps the best way to approach the book is to take up in order the seventeen points in his program of reform as he puts them in the summary in the last chapter. (c. 42).

(1) Points 1 and 2 of the book's program may be summed up as *elimination of the lawyer*. As he puts it as point 1, "in order to rid the law and its administration of partiality, both the function of lawmaking and the function of administering the law must be restored to the people as a whole." (p. 753). By this sensationally phrased proposition he does not mean administration of justice by referendum and recall of judicial decision. He conceives that the lawyers make and administer the laws in their own selfish interests and should be excluded from any part in lawmaking, judicial decision or advocacy.

(2) As he puts the same idea in point 2, the "matter with the American system of justice is the American lawyer. No reform will be effective which fails to grapple with and solve this problem." (pp. 566, 753).

Five chapters (cc. 11-15) are devoted to abuse of lawyers. We are told that they resist all reform measures for "fear of loss of power and the consequent loss of income" (p. 61); that "the common every-day practices of the 'respectable members of the profession' have brought about judicial failure" (p. 226); that the integrated bar is no remedy—there are too few "ethical practitioners" to control the organization (p. 226); that the people of England "arose and in 1873 hurled the lawyer from his throne of privilege" (p. 201); that the lawyer "all down the ages has been a prolific breeder of discord" (p. 31); that legislative bodies are made up of lawyers all out of proportion to their ratio in the population, and that the people should assume control and throw them out (pp. 251-52); and more of the same in almost every chapter. The lawyer as the root of all evil turns

up on page after page as persistently as King Charles's head in Mr. Dick's memorial. One would not suspect from the writer's account of it that the Judicature Act which "hurled the lawyer from his throne" was the work of a great lawyer, Lord Selborne, and that for so doing he was awarded the gold medal of the American Bar Association. It is unfortunate that the effect of many good things in the book is likely to be lost or lessened by the author's antipathy to lawyers.

(3) *Unification of the courts.* Chapter 30 is devoted to this subject. Beginning with the plan I outlined in my paper read before the American Bar Association in 1906 and subsequent committee reports and in my book, *Organization of Courts*, in 1940, he discusses other plans which have been proposed, and in the end lays down that "unification of the courts in each state is a must" (p. 755), although elsewhere he seems to advocate a separate organization for criminal cases. (p. 227). Those who have studied the system in Oklahoma and in Texas will probably agree in his final proposal.

(4) *A "judicial manager."* He proposes as a part of the plan of a unified court, a judicial manager with power to handle the judicial work of the state efficiently. What he says as to this is well put and sound. But why not call the official "Chief Justice"? Possibly because that suggests a lawyer rather than a lay business executive?

(5) *An "administrative executive"* to be selected by the judicial executive. (p. 755). This too is a sound proposal, already tested by experience, notably in the federal court system. He urges life tenure for this official and for the "judicial manager."

(6) *Prosecution.* Two alternative plans are discussed: (a) To commit it to the unified courts and (b) to put it in a unified body of law enforcement agencies under the Attorney General. (p. 755). Separation of civil and criminal jurisdictions with no common reviewing tribunal has not proved wise when it has been tried and the principle of a unified judicial organization should be maintained. But the proposal for a unified system of enforcement of criminal law is sound. Anglo-American experience vindicates separation of investigation and prosecution from adjudication. On the other hand, want of cooperation in the policing, investigating and prosecuting agencies, an inheritance from pioneer, frontier America, is a persistent anachronism. Lack of cooperation among independent detecting and investigating agencies in the same locality is a common phenomenon, although not so common as it was a generation ago. In the typical American state polity, police or sheriff's office, coroner's office and district attorney's office are independent. Each may and often does conduct its own separate investigation of the same crime. They may cooperate or they may cross each other's tracks and get in each other's way, as they like. Each is independently responsible: the police to a municipal authority or to a state commission; the sheriff, the coroner and the district attorney

to the people. Each is likely to be quite willing to score at the expense of the other, and is sometimes unwilling to aid the other as a rival candidate for publicity. In the same spirit there is frequent and characteristic want of cooperation between the investigating and prosecuting agencies in the same locality. A prosecutor may work with the police or not, and vice versa. Recent surveys have shown many examples of these public agencies at cross purposes, or at times even actively thwarting one another, with no common head to put an end to such unseemly and wasteful proceedings. The simple remedy in our polity is to await the next election and perhaps vote against both parties to the clash. But, as things are, both are likely to feel that the publicity has a distinct value towards re-election.

(7) *Inferior or small-cause courts.* The author urges that the "so-called inferior courts" are of the first importance, should be part of the unified system, and should be manned by the ablest, most upright and most experienced judges at the command of the state. (p. 756). He makes this a "fundamental point" in his program and his discussion is sound and well put.

(8) *Training for judicial office.* He urges special training for judges as a class apart from practitioners, as in continental Europe. I doubt this. English experience, the experience of our federal judiciary, and of the judges who molded the eighteenth-century English common law into a law for America in our formative era indicate that to make judging a separate career from the beginning is unnecessary and inexpedient in our system.

(9) *Selection of judges.* He advocates selection of judges by the "judicial manager," and selection of the judicial manager by a Committee on Selection to be composed of "leading citizens of the state." (p. 256). He does not approve of the mode of selection of federal judges, considering appointment by the executive "illogical." (p. 540). But an extreme analytical separation of powers has had to be given up in our constitutional law. Chief Justice Marshall showed long ago that the criterion was largely historical—what was for the Crown, what for Parliament, and what for the courts in the English polity at the time of colonization. Hence it was an appropriate function of legislation to assign a power of doubtful classification, such as regulation of procedure in the courts, or rate-making by public utilities, to an appropriate department. As to selection of the head of the judicial organization and of the judges, the crucial point is to repose the power in a conspicuously responsible person who can be held accountable. On the whole, the selection of federal judges by the President, and of judges in Massachusetts and New Hampshire by the Governor, has worked well, and it is significant that of the nine conspicuously outstanding judges in American judicial history all but one was appointed by the executive, and that one, at the height of his powers and of his fame, was displaced by popular election in a political landslide. The author rightly feels

that confirmation by a legislative body is no secure safeguard against partisan political appointments. He wishes selection of the Chief Justice to be free from "lawyer domination" (pp. 539-40), and so objects to nomination by bar associations or nomination or election by committees of which lawyers are among the members. On the whole, he advocates popular election of the head of the judicial system, which, I submit, is to commit the choice to direct primaries or party conventions—and there can be no agencies more irresponsible. (p. 545). As to the suggested committee of "leading citizens" it may be remarked that citizens may be "leading" according to many different standards. Their leadership may involve little opportunity of knowing the qualifications of able lawyers well fitted for the bench, but whose professional experience has not given them reputation in the press, though they be highly regarded by the judges and their fellow members of the bar.

(10) *Tenure of judges.* He rightly insists that the judge's tenure of office should be for life during good behavior. He has no objection to submission of the name of the judge to the electorate at intervals of not more than two terms. The proposal of life tenure is sound. But can it be good policy in a polity like ours, in which so many legal questions are political and so many political questions are legal, for the judge to have the threat of a recall election along partisan political lines hanging over him? The case of Judge Cooley is instructive in this connection. The author considers that removal should only be by judicial action. (pp. 123-24). But the main point is not provision for removal of bad judges. It is rather effective provision for not putting them on the bench.

(11) *A ministry of justice.* He advocates some disinterested body with the duty of carrying on a continuous study of the laws and the courts in their actual operation. This is in effect the proposal for a ministry of justice, urged in England by Bentham, Lord Westbury and Lord Haldane, and, in order of time, by me and Justice Cardozo in the United States. The author would have it composed entirely of laymen or at least dominated by laymen. Undoubtedly there should be a strong lay membership. But a strong element of well-trained experienced lawyers would be needed to insure that the work of the ministry was directed intelligently to realities.

(12) *The rule-making power.* He urges that the power of making rules of procedure, as distinguished from rules of substantive law, be given up by the legislature and turned over either to the judges themselves or to the judicial council. (p. 757). Experience has proved amply that legislative prescribing of details of procedure is unwise. The first part of his proposal is sound and in accord with the settled course of reform of procedure since the Federal Equity Rules of 1912. But the author advocates committing the rule-making power to a lay judicial council. In view of the excellent work in the Federal Rules of 1938 and in New Jersey since the Constitution of 1948, there seems no reason for the lay council beyond

the author's anti-lawyer complex. The reasons urged by many for lay membership in judicial councils are based on experience that legislative carrying out of recommendations of judicial councils must depend upon the influence of the lay members. If legislation ceases to be required the lay-membership influence will also cease to be needed. That laymen can contribute to the details of practice is not even a plausible theory.

(13) *Simplification of procedure.* This is necessary in varying degree in many states, but has been well achieved in the Federal Rules, in New Jersey, has made progress in Michigan, Pennsylvania and New York, and is steadily going forward elsewhere. The author, however, has a speedier and simpler remedy: "Elimination of the private advocate as he now functions . . . where the lawyer does not appeal, procedure involves no serious difficulty." (p. 757). One might suggest that if he did not appeal on questions of fact or on questions of law there would be no difficulties of review in appellate courts and no need of laws—the decision of each case at first instance would be law for that case. Undoubtedly that would save much trouble and expense in seeking to ascertain and maintain a general system of law. He is quite right, however, in objecting to intermediate and double appeals and in much of what he says in his chapter entitled "Our Impractical Appeal System." (c. 24). The American Bar Association began to urge reform of appellate procedure in 1909. I published a book on the subject in 1941. The Federal Rules and practice acts and rules of court in a number of states have made great progress in recent years, yet much remains to be done in many jurisdictions. What is chiefly needed in most states is a modern organization of courts. Until this is had, much of which complaint is made will persist. In the meantime it is still useful to urge modernizing of the procedure of review in many states.

While he does not make it a point of the program in his summary, the author thoroughly and rightly approves of pre-trial practice as developed in New Jersey (pp. 191-97) and the federal courts, to which he devotes a chapter. (c. 51). It is proving to be a real contribution to common-law procedure in all types of civil cases.

(14) *Training, requirements of admission of practicing lawyers and removal of judges and practitioners.* He would impose more comprehensive requirements both as to training in law and training in the general sciences for admission to practice. He would have these requirements set up and rigidly enforced under state control. He would require grounding in the social sciences, economics and politics. Also he would have the highest ethical and moral qualifications "religiously guarded by the state." Dismissal, since the practitioner would be a public officer, should be the result of "any serious lapse." He would also require a period of probationary training. He asserts that such a period is an essential feature of the English system and obtains everywhere but in the United States. (pp. 757-58). But in England this is true only of the solicitors. The barrister is a full-fledged advocate when he is admitted as barrister by his Inn. In chapter

8 he argues for special training for those who are to be judges, after the manner of continental Europe, where judges and practicing lawyers are distinct professions with distinct training to which the student must attach himself from the first. This presupposes bureau judges and bureau lawyers. Soviet experience of such a regime does not recommend it.<sup>1</sup> As to the training of lawyers in the United States, very great progress has been made since 1900. Although the author does not approve of the integrated bar, that institution, now existing in more than half of the states, is likely to be the best remedy in the long run for assuring high standards of admission and ethical conduct.

(15) *Doing away with jury trial in civil cases.* (c. 23). He says: "The use of the jury should be limited to serious criminal cases if not outlawed entirely." (p. 758; see also p. 191). Undoubtedly jury trial in civil cases is productive of delay, expensive to the public and to litigants, and inconvenient to the busy city-dweller who has to serve often at no little sacrifice. But would judges decide questions of fact promptly or in a few hours after hearing evidence and argument? Do they habitually do so in equity cases? In commercial cases jury trial probably may well be given up. But in tort cases there is much to be said for lay judgment, experience and common sense on the questions of applying standards of conduct to facts of every day life. The author rightly condemns the legislation of the formative era in the United States which took away the powers of the trial judge and led to what Wigmore called "the sporting theory of justice." But the subject demands a less sensational discussion and one much less prejudiced against the trial lawyer. In truth, the circumstances of social, economic and political development at the end of the nineteenth century, which brought about the conditions in court organization, selection and tenure of judges, deprofessionalizing of the profession, and putting the administration of justice into politics, affected the lawyer too. It is not that the lawyer is the cause of the conditions of jury trial and other unhappy features of law in action of which complaint is made throughout the book. The conditions of administration of justice and practice of law so vigorously denounced are paralleled in municipal government and much of state administration and for the same reasons.

(16) *An entirely new pattern of administering justice, excluding lawyers and contentious procedure.* Chapter 23, "The Courts of the People," deals with what had become perhaps the worst feature of our administration of justice. Improvements are being made. But very much remains to be done everywhere. The basic remedy is thoroughgoing organization of the court system as a whole, a subject requiring a book in itself. Here much has been done in New Jersey, in the federal court system and, to a lesser extent, is being urged in some states. But the ideal of our pioneer rural agricultural society—a separate court at every farmer's door

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1. See Pound, *Soviet Civil Law*, 50 MICH. L. REV. 95, 108-11 (1951).

and a benevolent old farmer, taking time off from plowing and having to settle the disputes of his neighbors—has saddled us with what are grave abuses in the urban industrial society of today, which are not easy to get rid of. He considers it demonstrated that conciliation and arbitration are “incomparably more wholesome, more constructive, more economical, and in every respect more satisfactory than contentious court procedure.” (p. 501). Conciliation (pp. 403-07) seems to work best for small causes where the traditional kindly magistrate may do much toward settling neighborhood disputes. But conciliation procedure in continental Europe has achieved little beyond a formal preliminary step in everyday litigation. Nor was I impressed with it when I studied it in action in a survey of the administration of justice in three provinces and six cities in China in 1947-1948. One might ask whether contentious procedure has had a fair chance under the court organization devised for a pioneer, rural, agricultural society, a regime of politically chosen judges for short terms, a procedure which grew up in the Middle Ages, was over-refined in the era of formal ceremony in the seventeenth and eighteenth centuries, and was spun out in excessive detail by legislative tinkering in the nineteenth century—especially where the bar was deprofessionalized, unorganized, with no one responsible for the conduct of individual practitioners. This is what had come down to us in the last century.

A chapter is devoted to administrative justice and other non-contentious procedures. (c. 27). The author believes in a non-contentious procedure with lawyers eliminated. For contentious procedure in civil litigation, he would substitute investigation by administrative agencies. I have made some study of the redress of accidental injuries in the highly mechanized life of today and am satisfied that it ought not to be left to investigation by administrative agencies with lawyers excluded from any part of the process. Administrative agencies not stimulated by zealous lawyers are no substitute for the courts, where so much is contentious and the facts demand such critical examination. The remedy is to modernize the process, not to do away with it.

(17) *An official Public Counselor.* He considers that the present system of advocacy is unsound and “must be torn up by the roots.” (p. 225). In order to put injured persons on an equality with the public utility with its well-manned legal department and the insurance company with its corps of lawyers, adjusters and investigators, he would have a body of official investigators and deny lawyers any part in the process. He would have in the civil tribunal, in addition to the judge, an official corresponding to the English Master or Roman Praetor (!) and such number of investigators and experts as are necessary to handle the business efficiently and expeditiously. (p. 227). There would be also a Public Counselor, something like the “friends of the court” in some of the small cause courts, to whom the aggrieved could go for advice and narrate the wrongs done them. If the Public Counselor finds probable cause, the Praetor (he seems to have in mind the function of the praetor in the old



Roman formulary procedure of settling the issue to be tried by the *judex*), in cases actually requiring judicial treatment, is to diagnose them and send them to a proper department. If it appears that conciliation is possible the parties are to be sent to a Public Conciliator. If conciliation is not possible, it would be the duty of the Praetor to define the issues, carry out the simplest possible pretrial procedure and send the case to the appropriate court for trial. (p. 227). On the basis of experience of legal aid societies he believes that litigation will be reduced in this way so that not more than five to ten per cent of the cases now brought to the courts will go to them. But the law office no less than the legal aid society screens cases. By no means every one who consults a lawyer is taken to court. Moreover, the relatively simple controversies that confront the legal aid organization are no criterion for the complicated situations of accident litigation today, nor of the complexities of business relations, involving many parties and claims, cross demands, impleader, interventions, receiverships, corporate reorganizations, accountings, judicial sales, which take up the time of the courts today. There would have to be as many Public Counselors as there now are law offices in active practice, and a host of "Praetors" to carry out the plan proposed. Experience of the way things are done in perfunctory fashion by bureaus does not indicate that all this would be as well done as it is even with the present defective machinery of the majority of state courts.

Whatever we may say as to some of the author's seventeen proposals, his final paragraph is sound and well put:

"If success is to be attained in the administration of the law, two conditions are absolutely essential: (1) The courts of the state must be integrated thus forming one great court. (2) The integrated court must be provided with a competent judicial executive." (p. 760).

A thoroughgoing survey of the administration of justice is much needed and the present book may serve a purpose in vigorously calling attention to that need. But it is marred by sensational—often extravagantly sensational—style. For example:

"We send the defenseless unfortunate to jail for stealing the price of a meal while the lawyer who legalizes the stealing of a King's Ransom is a 'great advocate.' We load a selfish interest with practically unlimited power and turn it loose in the judicial system to plunder and debauch, hoping that justice will somehow result. We lock the high court judge in his chambers and tell him, alone and unaided, he may make law to his heart's content." (p. 363).

Also there are inaccuracies, *e.g.*, the meeting of the American Bar Association which began the movement culminating in giving full rule-making power to the Federal Supreme Court and to the Federal Rules is said to have been at St. Louis (p. 332); Professor Kales appears as "Judge

Kales" (p. 331) and we are told that he was "a former justice of the Supreme Court of Minnesota" (p. 751); he cites "Judge Storey" (p. 585) but the context does not enable us to say whether he means Joseph Story, the eminent judge, or Moorfield Storey, the eminent advocate. (p. 585). He tells us of an article by a "leading lawyer of New Jersey" (p. 359) later termed a "distinguished practitioner." (p. 640). In fact this distinguished leader of the bar was one year out of law school when the article on the rule-making power to which he contributed was published.<sup>2</sup> Likewise the section "no judge-made law in France" (p. 721) in which the French *jurisprudence* (course of decision in the courts) is compared with the Anglo-American doctrine of precedents, is misleading and superficial. Nor is the cogency of the author's discussion added to by such crudities as: "It brightens the mysterious abodes where dwell the ogres of *Certiorari*, *Voire Dire*, *Stare Decisis*, *Nisi Prius*, *Stet Processus*, *Demurrer*, *Obiter Dictum* [sic] *Praecipe*, *Habeas Corpus*, and the most terrible of ogres, *Nolle Prosequi*." (p. 545). This is reminiscent of the reformers of the Jacksonian era who, when substantive improvements were sorely needed, thought it more important to require elimination of all Latin and Law-French terms from the law books.

Yet there is much in the book that can be pondered profitably by lawyers and laymen.

*Roscoe Pound* †

**BENEFIT OF CLERGY IN AMERICA AND RELATED MATTERS.** By George W. Dalzell. Winston-Salem: John F. Blair, 1955. Pp. 299. \$4.50.

This is a curious book about a curious subject. Benefit of clergy is one of those historical accidents which became embedded in the English legal system, survived for many centuries because it served a purpose far different from that for which it had been devised, and was transported to America as part of an indiscriminating adoption of English legal practices which followed the pioneer generations of colonial history. Originally introduced to keep the royal courts from exercising jurisdiction over clerics charged with crime, the privilege was extended to laymen as well as clergy, ultimately to women as well as men, because it was found a useful device to ameliorate the rigors of a harsh paper criminal code. That it would have been more sensible to change that code occurred to relatively few persons responsible for the administration of criminal justice. The privilege has a long history, from the medieval period in England to the Reconstruction period in the United States, and the late Mr. Dalzell essayed to tell all of it, with special emphasis on the use of the privilege in this country.

2. See Note, 51 HARV. L. REV. 135 (1938).

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From the start the author disarms criticism. He is avowedly writing, he tells us, for "slipped readers rather than academicians," and therefore has left out his documentation. However, he admonishes both reviewer and reader, "take my word for it, all statements have been verified." There is no question that Mr. Dalzell based his book on other people's writings, for he has read very widely indeed, but the real weaknesses of the book are its failure to discriminate in its use of sources and its tendency to digress far from the topic, with the result that the reader often loses the thread of the story. He explores such interesting but irrelevant bypaths as the sexual morality of our colonial ancestors and the practice of bundling, and in his treatment of these subjects confuses ignominious punishments imposed by the Puritans with the benefit of clergy which in law, if not in fact, was not considered a punishment at all.

The author writes with refreshing candor and straightforward, unabashed bias. The patriot leaders are mobsters. The Boston Massacre is the result of conspiracy. Bentham "accomplished nothing." The South Carolina legislature which drew up the "Black Code" comprised "responsible white citizens," whereas the legislature which modified the criminal code of the state and abolished benefit of clergy was "inflamed with passion, ignorance, avarice," and "corruption." Whether these qualities were conducive to adopting a legal reform which has stood, with few modifications, the test of time, and which subsequent legislatures have hesitated to tamper with, is a question which Mr. Dalzell chooses to ignore.

Mr. Dalzell traces the story of how transportation to America was used, as he sees it, as a substitute for benefit of clergy. In fact, it was a substitute for the prison term to which clergyable persons could have been sentenced. One cannot accept his uncritical acceptance of Wendell Phillips' roseate rhetoric to the effect that the convicts who settled in America were "men convicted of pure hearts, sane minds, and simple manners." According to the author, this "needs little modification from the data for the importation of felons." What data did he examine? Significant records are available of transportations to certain Maryland counties, including Kent and Baltimore. Elsewhere I have made available the results of my examination of this material. Of some sixty-five convicts transported to the former county between 1732 and 1734, one-third had been convicted in England to serve fourteen-year terms for offenses as serious as murder. The more extensive Baltimore County records for the years 1770-1774 list 655 imported convicts, of whom a surprisingly high number were convicted of murder, rape, highway robbery, burglary and grand larceny. But the author preferred to generalize without examining the sources and has given us a view of the social history of the period which is both uncritical and unrealistic.

One reason why the author assumed that the transported convict was usually a person not convicted of a serious crime was that he considered transportation to be an alternative to benefit of clergy. If one accepts his assumption, what can one do with the non-clergyable felonies for which

Parliament in 1718 authorized transportation for fourteen-year terms? Here, obviously, transportation and long servitude were considered penalties which were more practical and more humane than capital punishment. Certainly transportation did not provide the sole means of filling up the white unfree labor force. Mr. Dalzell seems entirely unaware of the practice in the colonies of selling into servitude persons convicted of such crimes as larceny who were unable to furnish the multiple restitution provided in the colonial codes. He suggests that transported insolvent debtors were found in Georgia's labor force, but is unaware of the fact that in many of the colonies defaulting debtors paid off their judgment debts by terms of service.

The author shows how the common law, by the end of the seventeenth century, brought about a fairly widespread acceptance in the original colonies of the privilege of benefit of clergy, and traces its survival in a few of the southern states, notably the Carolinas, down almost to the Civil War. In South Carolina it was not abolished until 1869. Here again, though, the treatment could have been more meaningful if the author had examined the records of inferior courts. This reviewer has found numerous instances where the courts of general sessions in South Carolina permitted persons convicted of manslaughter or grand larceny to plead the privilege, in some cases to be branded on the thumb and discharged, in others to serve a prison term or pay a fine. In treating the survival of this privilege in our national period, the author seems to miss a major point. The states in which benefit of clergy survived were slave states and a principal reason for such survival was economic. It afforded protection to planters that their valuable investment in slaves would not be forfeited through the operation of an extremely severe penal code. Hence, slaves were among the major beneficiaries of this privilege, as were, of course, their masters who profited from their labor.

In short, while Mr. Dalzell has performed a service to lawyers and historians in pointing out the persistence of this anachronistic privilege and some of the reasons for its survival, his treatment is much too sketchy, his generalizations too naive, his analysis too amateurish, to do more than point the way to others who might probe more deeply and come up with a more meaningful synthesis.

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