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Book Review: Appellate Courts in The United States and England, by Delmar Karlen, with forwards by Lord Evershed and Justice J. Brennan Jr.

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Appellate Courts in The United States and England. By DELMAR KARLEN. WITH FOREWARDS BY LORD EVERSHED AND JUSTICE WILLIAM J. BRENNAN JR. NEW YORK: NEW YORK UNIVERSITY PRESS. 1963. Pp. x, 180.

Professor Karlen in this work gives a careful and detailed description of the appellate procedures in the United States and in England. It is the final product of a unique experiment in which distinguished American and English jurists, including William J. Brennan Jr., Associate Justice of the United States Supreme Court; Walter V. Schaefer, Chief Justice of the Illinois Supreme Court; Archibald Cox, Solicitor-General of the United States; Lord Evershed, Master of the Rolls (since appointed a Lord of Appeal in Ordinary); Lord Morris of Borth-y-Gest, a Lord of Appeal in Ordinary and Professor Arthur Goodhart, Master of University College, Oxford, studied the appellate courts of each other's countries. Surprisingly, perhaps, this book is of much pertinence and interest to the Canadian jurist as it brings to the fore once again the fact that the Canadian legal system is a hybrid, combining some of the characteristics, both good and bad, of the English and American systems.

One difference between the two systems which occasions reflection on our own system is that of the roles of the House of Lords and the Supreme Court of the United States. Professor Karlen points out that the Supreme Court of the United States frankly recognizes its lawmaking function, freely discussing social policy in its opinions, and offering no pretense that all of its decisions are derived solely from pre-existing legal rules. He comments that the House of Lords on the other hand, maintains a strict adherence to its past decisions and in practice limits its lawmaking function. This is exemplified by the differing approaches to the use of legislative history. The House of Lords avoids its use, whereas it is an important aid to the United States Supreme Court in interpreting statutes. Professor Karlen attributes these differing approaches largely to the fact that the House of Lords is itself a legislative body and that, through the office of the Lord Chancellor and the law reform committees, the law lords are usually well informed as to the intended effect of statutes as well as having efficient machinery for amendment. In the United States, however, there is a strict division between the legislature and judiciary in format, and as well the Supreme Court is faced with the rigidity of a written constitution under which, apart from correction by the Court, past decisions can only be cured by a very cumbersome process of constitutional amendment. The first thought that comes to the mind of the Canadian lawyer is that in Canada, we have a written constitution which is difficult to amend and a judiciary separate and apart from the legislative body, not dissimilar to the American system, but the Supreme Court of Canada seems to view its lawmaking function as being similar to that of the House of Lords.

The comparison of the advocacy and decision making processes in the United States and in England gives the Canadian lawyer cause for introspection. The English system in which the legal profession consists of two branches, barristers and solicitors, has resulted in a very skilled and expert practice before the appellate bar. The usual practice in the English appellate courts is to have no written argument; the cases are simply argued orally and at their conclusion, oral judgment is delivered by one or more of the members of the court. The English judges, all former barristers themselves, rely heavily on the argument of counsel and generally have no research assistants or law clerks as have their American counterparts. The process in the United States' appellate courts is altogether different. The American judges rarely give oral judgments and oral argument has become largely supplanted by the submission of briefs. Professor Karlen attributes this to several factors. Firstly, he states that the fusion of the two branches of the legal profession has resulted to a considerable degree, in inexpert, inefficient, and unreliable oral argument. Secondly, the background of the judges is not solely that of the practising bar. Many are office lawyers or law teachers. As a result the American appellate judges rely less on the oral argument of counsel for their sources of law in forming decisions. Rather, the American judges spend more time in their chambers studying the briefs submitted, researching the law with the assistance of law clerks, and drafting their opinions which are usually handed down in written form. In Canada, where all lawyers are entitled to appear before the appellate courts, and the bench is less expert being composed of former solicitors as well as former barristers, full oral argument is heard. As well, the general practice is to render judgment with written reasons but without the assistance of research assistants or law clerks. Thus the disadvantages of long oral argument by a comparatively inexpert bar is further compounded by the judges generally not having law clerks to assist them in research and drafting judgments. Thus, to some extent our system includes the drawbacks of both the American and English systems without the compensating factors of either.

Another point of difference between the American and English systems of interest to the Canadian lawyer is in the reporting of the courts' decisions. In the United States very few trial decisions are reported, whereas all appellate court opinions are, without editorial changes being made. In England, the procedure is otherwise. There, the editor of the *Law Reports* with the assistance of his reporters, decides what judgments are of sufficient interest and importance to go into the *Reports*. Only about twenty-five percent of the cases from all courts are reported annually. This results in a far less unwieldy set of reports, but as Professor Karlen mentions, the unpublished decisions are lying around like unexploded land mines, ready to do damage, and often this happens. Also, Professor Karlen comments that under the English system, where there is a much

stricter adherence to precedent, the fewer precedents reported allow the courts greater flexibility in making decisions. However, it might be argued that this limited reporting process could hamper the court's flexibility. Where only some of the decisions are reported it would sometimes be difficult to observe the actual progression and change in a rule or principle case by case. The court at a later date when faced with a case which in reality would only be a minor step from the last of the unreported decisions, might refrain from so holding on the basis of an earlier but quite different reported decision. The American system, on the other hand, is burdened by a massive collection of cases, albeit only appellate decisions. In Canada there are many reported, but one wonders what percentage they are of the total cases decided. Precedents are created, in effect, by the reporting of decisions, and it would be much more certain if all decisions, whether oral or written, were submitted to the editor of reports, and if not reported in full, perhaps noted in each volume of the reports. At the very least, Professor Karlen brings to the readers attention the very heavy responsibility of the editor of reports in England and Canada.

One further point of interest is Professor Karlen's observations as to the elaborate editorial work done on the English decisions. He comments at page 103 as follows:

> Once a decision has been made to report a given case, heavy work for the reporter lies ahead. His task is not merely to collect and transmit to the printer a document which is ready for publication but to do an editorial job of great delicacy and importance. The first thing he does is to order from the shorthand writer a transcript of the decision after it has been seen (and perhaps revised) by the judges. Then he sets to work. He verifies all names, dates, and places mentioned; he checks all citations to statutes, cases, and other authorities; he restates the facts clearly and concisely; and he rewords the judges' opinions in such a way as to preserve their meaning but improve their style by eliminating redundancy and polishing grammar. His object is clarification without alteration of substance. If the case is one destined to be published in the *Law Reports,* the reporter also prepares a summary of the arguments of counsel on both sides, with an indication of any significant comments and questions interposed by the judges. In doing all of this work, the reporter is aided not only by whatever notes he has made while listening to the case, but also by a borrowed copy of the record and by access to the notes, papers, and recollections of counsel.

Further he states:

> The net result of the editorial process just described is that published reports sometimes bear little resemblance to the judgments, delivered orally and extemporaneously, upon which they are based. What sounds in court like a long, rambling discourse, with incomplete sentences and doubtful syntax, may turn out in print to be a polished composition, just as if the judge himself had taken the time and trouble to write it out in full.

All in all, *Appelate Courts in The United States and England,* is a thoroughly interesting and enjoyable book. The differences which emerge, from the comparison of the English and American appellate systems, raise many interesting questions as to the functioning of

the various appellate courts in Canadian jurisdictions. Any law student, or lawyer interested in the judicial processes will find Professor Karlen's observations very illuminating.

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