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Work of England's Court of Criminal Appeal

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WORK OF ENGLAND'S COURT OF CRIMINAL APPEAL*

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I.

England, by common consent, is the outstanding country of the world today in coping with the problems of enforcing the criminal law. Among the elements that contribute to this result none is more important than the belief that time is of the essence in disposing of the criminal business of the courts.

Nowhere is this belief better exemplified in practice than in the work of the English Court of Criminal Appeal. An appeal must be filed within *ten days* from the date of conviction unless time be extended by the court;[1] the average time between the receipt of the notice of appeal and its determination by the court is *five weeks;* and in *99%* of the appeals the cases *are decided on the day of argument.*[2]

"In a very few cases the courts have reserved judgment from one day to the next or even to the next court so as to put the reasons for their decision into writing. But the decision itself is almost invariably given at the end of the arguments. In very few long cases the argument may extend over more than one day. As a rule the court sits once a week (except during vacations) but it sometimes sits more frequently and on successive days according to need."[2]

The effect of such expeditious disposition of the appellant work of the country in criminal matters cannot be over-estimated; as was said by the Lord Chief Justice of England, Baron Hewart of Bury:

"Competent observers in general perceive not merely the utility of the court but indeed its necessity. It is not so much that a conviction is sometimes quashed, or a sentence is sometimes reconsidered. What matters, and matters profoundly, is that *everybody engaged in administering the criminal law* upon whatever rung of the ladder he may be, throughout the whole hierarchy, *is well aware that Court of Criminal Appeal is in existence.* The consequences of that diffused and abiding knowledge are quite incalculable. * * * Speaking for myself at any rate, I have not the smallest

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*This article, written by the Chairman of the New Jersey Judicial Council, was first published in the sixth annual report of that body and later reprinted in the October, 1936, issue of the Journal of the American Judicature Society. So much has been written in non-legal publications in this country concerning the efficiency of the English administration of criminal law and procedure that it will undoubtedly be of interest to the bar to be informed more exactly on the subject by the more detailed and exact research and comment of a member of the legal profession. With that idea in mind, the editors have procured the consent of the Journal of the American Judicature Society to publication of this article. In this publication, the appendix to the original article has been substantially curtailed. The portion of the appendix included should suffice to show the celerity with which the English court operates and the results attained in a typical group of appeals.—*Editors.*

[1]Criminal Appeal Act, 1907; 7 Edw. 7, C. 23, Sec. 7.

[2]Memorandum of C. E. Ross, Registrar of the Court of Criminal Appeal, to the writer, dated December 10, 1935.

doubt that, among the many duties which belong to the Lord Chief Justice of England, there is none more important than his duties connected with the Court of Criminal Appeal."[3]

So essential, indeed, to the welfare of the country is the work of this court regarded by its judges that they have not hesitated to break in upon the long vacation (the months of August and September, during which, from time immemorial, all possible business of the courts has been suspended) to convene the court to dispose of any accumulation of appeals;[4] and the fact is always heralded in the daily press as a matter of public importance.

There is perhaps no better way of illustrating the interest of the public in the work of the court, the nature of the cases presented to it and the methods by which they are disposed of than to indulge in a rather lengthy quotation from one of the newspapers. Thus, we find the *London Daily News* of August, 1935, recording:

"THREE JUDGES RETURN FROM HOLIDAY TO SIT FOR ONE DAY—
CONDEMNED HUSBAND ABANDONS APPEAL—4 YEARS
TAKEN OFF SENTENCE ON MAN OF 84

"Three judges—Mr. Justice Swift, Mr. Justice Finlay, and Mr. Justice Humphreys—interrupted their summer holiday to come back to London and put on wig and robes for one day's judgment on the appeals of a murderer, a receiver, several house-breakers, and a penitent handbag-snatcher of 84, before leaving the court once more to the silence and dusty sunbeams of August and going back to the country.

"This one-day court has an odd flavor of unreality—though solemn and real enough to the convicted prisoners whose last appeal against death or gaol falls on this August day, when the courts are echoing and empty and only the hesitant footfall of an occasional tourist disturbs the long stone corridors and stairs.

"Young Philip Quarry, a 22-year-old Kensal Rise joiner, condemned to death in June for the murder of his wife by throwing a knife at her, was to have made his appeal against the sentence yesterday, but at the last minute the appeal was abandoned, and the judges turned their attention to the consideration of less serious crimes.

"This august court is held every year so that criminal appeals may not be too drawn out.

"THE THREE JUDGES

"It happens every now and then—as it would have happened had Quarry not decided to cancel his appeal—that a murder appeal comes up to be heard in this curious doldrums of the legal year, but for the most part the hearings concern petty thieves and embezzlers, the common grist of the criminal court's mill.

"Yesterday long shafts of sunlight, dancing with motes of summer dust, as in a deserted room, struck down through the high windows of the court on to the three grey wigs of the judges—Mr. Justice Swift, rosy-faced and slow-speaking, Mr. Justice Hum-

[3] 8 Canadian Bar Review, 564, at 572 (October, 1927).
[4] See tables of work of Court under dates of August and September *Infra*, p. 67.

phreys (a little relaxed from the grim tenor of the Old Bailey where I last saw him with the black cap on his head facing young Percy Stoner), Mr. Justice Finlay, grave and quiet—on the dusty black grown of the one counsel present; on the idly expectant faces of the tourists who had dropped in for an authentic glimpse of British justice.

"The voices droned on, and the constable on duty fidgeted a little with his feet. No one could have been surprised if a bee had started buzzing on the hot windowpanes, or if the whole scene had vanished suddenly like a stage setting, leaving the court as shrouded and undisturbed as it had been earlier in the day.

"Old George Watson, an 84-year-old man sentenced at Dudley Borough Sessions to five years' penal servitude for stealing a woman's handbag with £2 10s. in it, was the only prisoner to come before the judges.

"REDUCED SENTENCE

"The others' applications to appeal were one by one dismissed or refused in a succession of grave legal phrases and even Watson cannot have heard very much, for he is almost completely deaf, and everything Mr. Justice Swift said to him from the bench had to be roared into his anxious ear by a warder.

"He had some satisfaction, though, for being in that sultry and half-empty court, for his five years' penal servitude was reduced to 12 months' imprisonment.

"Five years, said Mr. Justice Swift, was—despite the old man's known character—in the opinion of the court excessive.

" 'There is no reason,' he said, his slow, precise words dropping like pebbles from the bench, 'for sentencing a man to five years' penal servitude for stealing £2 10s.'

"With something like a smile hovering round his mouth, the old man was led away to his year of gaol.

"RUSE THAT FAILED

"Two brothers, thieves many times convicted, were trying to appeal against their latest sentence. When arrested they had pretended that they had never before seen each other, and this fact Mr. Justice Swift rehearsed from the Bench in his slow dispassionate voice, going methodically over the chief points of the case.

" 'It was unfortunate that the—ah!—extremity in which they found themselves should have compelled these two brothers to deny any knowledge of each other, for brothers, in fact, they were . . . in blood as well as in crime. . . .'

"An urgent whispering with the constable at the door of the court turns the judges' eyes for a second on two breathless American women, pleading to be allowed to listen to the proceedings for a moment, 'just here in the vestibule, officer. . .'

"They are allowed to slip inside and discreetly vanish into the witnesses' benches. By the time they have found seats another application is being heard—this time for bail, and a young Jewish lawyer is instructing the pleading counsel and a Scotland Yard detective giving brief and expert evidence.

"THE PERFECT WITNESS

" 'Yes, my lord . . . no, my lord . . . I do, my lord . . .' He is such a perfect witness that Mr. Justice Swift makes a little gesture of depreciation and turns to Mr. Justice Humphreys.

" 'Go on, you ask him,' he says, and the second judge takes up the questioning, regarding the detective with some humor over the tops of his spectacles.

"By mid-afternoon the solitary one-day court itself has melted into the Strand sunshine, the appellants gone back to their cells and the judges gone back to the country."

This newspaper quotation is by no means unique; rather, it is typical of the interest of the press and of the public generally in this colorful court, with its justices in their red robes, its gowned and bewigged barristers, and, quite different from American appellate tribunals, with the prisoner generally present in the dock instead of being represented merely by counsel.

During the period of twelve months ended September 30, 1935, the court disposed of 582 matters,[5] being substantially all of the criminal appeal business in a country of 37,794,003 people.

II.

What are the jurisdiction and composition of the court and the methods employed by it?

The Court of Criminal Appeal was created in 1907. Prior thereto there was no right of appeal from the verdict of a jury on the facts of a case; neither was there any appeal on a point of law, unless the trial judge saw fit to reserve the question for the upper court (originally the Court for Crown Cases Reserved and from 1873 the King's Bench Division of the High Court of Justice). All of this was changed by the criminal appeal act, 1907, which provides that a person convicted on indictment may appeal to to the court created thereby:

"*(a)* against his conviction on any ground of appeal which involves a question of law alone; and *(b)* with the leave of the Court of Criminal Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the court to be a sufficient ground of appeal; and *(c)* with the leave of Court of Criminal Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law."[6]

The act also applies:

"in the case of convictions on criminal information and coroners' inquisitions and in cases where a person is dealt with by a court of quarter sessions as an incorrigible rogue under the vagrancy act, 1824, as it applies in the case of convictions on indictments, * * *"[7]

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[5] See table of cases *infra*, pages 67-69.
[6] Criminal Appeal Act, 1907 (7 Edw. 7, C. 23, Sec. 3).
[7] See Act, Sec. 20-(2).

but it expressly excludes charges against any peer.[7] The act abolishes writs of error, but reserves the jurisdiction under the crown cases act, 1848,[8] though the old procedure has become entirely obsolete.[9]

The court consists of the Lord Chief Justice of England and the judges of the King's Bench Division of the High Court. The Lord Chief Justice is president of the court; and in his absence the senior member of the court acts as president. The court must be made up of at least three judges and of an uneven number of judges. The opinion of a majority of the members of the court controls.[10] Criminal appeals are thus determined by the same judges who try indictable offenses in the regular criminal courts, but it is arranged as a matter of practice that a trial judge does not sit on the appellate tribunal in any case in which he presided below.

When a person convicted desires to appeal, he must apply to the court within ten days of the conviction, although in all cases, except convictions involving the sentence of death, the time for appeal may be extended by the court;[11] such extension of time may be a matter of weeks, months, or even a year.[12]

The act provides that the appellant may present his argument in writing;[11] but, on the other hand, he has the right, if he wishes, to be present at the hearing of his appeal unless the argument involves legal questions only.[13] "In practice all appellants in final appeals are allowed to be present, if they wish, but not in applications for leave to appeal."[14] The sight of the prisoner in the dock in the presence of the red-robed justices is indeed an impressive one. The power of the court to pass any sentence, however, may be exercised notwithstanding that the appellant is, for any reason, not present.[15]

The trial judge is required to furnish the registrar of the court with his notes of the trial, as well as a report giving his opinion upon the case or upon any point arising therein. The record is not printed as it generally is in this country. It is the duty of the registrar to "lay before the court in proper form all documents, exhibits and other things relating to the proceedings. * * * which appear necessary for the proper determination of the appeal or application."[16] This includes a transcript and a carbon

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[8]See Act, Sec. 20-(4).

[9]"It is interesting to observe, however, that while there have been few cases stated under that Act in the whole period which has elapsed since the Criminal Appeal Act was passed, in recent years there have been no such cases." (Address by Lord Hewart, *op. cit.*, p. 568.)

[10]See Act, Sec. 1-(4).

[11]See Act, Sec. 7.

[12]Memorandum mentioned in Note 2. This accounts, according to the Registrar, for the long time between the date of trial and the date of the hearing of the appeal in certain cases referred to in the table of cases, *infra*.

[13]See Act, Sec. 11.

[14]Address by Lord Hewart, *op. cit.*, p. 569.

[15]See Act, Sec. 11.

[16]See Act, Sec. 15-(1).

copy of the shorthand notes of the proceedings at the trial.[17] In fact, the chief reason for the delay of four or five weeks in the disposition of appeals is that "some shorthand writers send in their transcripts more promptly than others."[18]

The court may assign a solicitor or counsel "if it appears desirable in the interests of justice that the appellant should have legal aid, and that he has not sufficient means to enable him to obtain that aid,"[19] though legal aid is not usually granted on appeals against sentence only.[20]

The proceedings on the argument of the appeal are simple. After counsel have been heard (it may be remarked here that printed briefs are infrequent because the barristers have come to realize that they are useless) the court as hereinbefore remarked, generally disposes of the case by oral opinion from the bench.[21] The act provides:

> "Unless the court direct to the contrary in cases where, in the opinion of the court, the question is a question of law on which it would be convenient that separate judgments should be pronounced by the members of the court, the judgment of the court shall be pronounced by the president of the court or such other member of the court hearing the case as the president of the court directs, and no judgment with respect to the determination of any question shall be separately pronounced by any other member of the court."[22]

In practice, separate opinions are delivered orally in all important cases involving questions of law. No official shorthand notes are taken of the proceedings or judgments of the Court of Criminal Appeal; in fact proceedings are never taken stenographically unless a shorthand reporter is directed so to do by some person interested in a particular case.[23]

According to the Lord Chief Justice, the number of appellants is barely seven per cent of the total number of convicted persons who have the right to appeal:

> "The highest number of appellants was, I think, in the year 1910 when there were 712 appellants. An examination of the record shows that the number of appellants has ranged from 712 to 420 or thereabouts in a year, with an average of something like 520, while the number of cases in which the conviction was quashed has ranged from 39 to 14, and the number of cases in which the sentence was reduced has ranged from 47 to 17 in a year."[24]

On an appeal against conviction the court shall allow the appeal:

> "if they think that the verdict of the jury should be set aside

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[17]See Act, Sec. 16.
[18]Address by Lord Hewart, *op. cit.*, p. 570.
[19]See Act, Sec. 10.
[20]R. v. Crawley (1908), 72 J. P. 270.
[21]See Note 2 *supra.*
[22]See Act, Sec. 1-(5).
[23]Address by Lord Hewart, *op. cit.*, p. 571.
[24]Address by Lord Hewart, *op. cit.*, p. 569.

on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal: provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favor of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."[25]

If they allow an appeal against conviction, the court shall quash the conviction and direct judgment and verdict of acquittal to be entered.[26]

On an appeal against sentence, the court shall:

"if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal."[27]

The power to increase sentences has not often been exercised; the Lord Chief Justice says that in nineteen years sentences have not been increased in more than fourteen cases.

"And in every case of increase of sentence an appellant has always been expressly warned by the court beforehand of its power, and the appellant has therefore had the opportunity of abandoning his appeal. The experience gained by the Court of Criminal Appeal in England in the matter of frivolous appeals has led to an interesting provision in Sect. 2 (3) of the Criminal Appeal (Scotland) act 1926, which provides that on an appeal against conviction the court may quash the sentence passed at the trial and may substitute another sentence, whether more or less severe. That is a power which the English court does not yet possess. There have been many instances where an appellant has made a frivolous appeal against his conviction and, though the court has been clearly of opinion that the sentence passed at the trial was inadequate, it has had no power to deal with the sentence at all, for the reason that the appellant did not appeal against the sentence. It is hoped that the power of the court in Scotland to increase an inadequate sentence may in Scotland prevent some frivolous appeals against convictions."[28]

In the interests of substantial justice: Other broad powers are granted to the Court:

"If it appears to the Court of Criminal Appeal that an appellant, though not properly convicted on some count or part of the indictment, has been properly convicted on some other

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[25]See Act, Sec. 4-(1).
[26]See Act, Sec. 4-(2).
[27]See Act, Sec. 4-(3).
[28]Address by Lord Hewart, *op. cit.*, p. 571.

count or part of the indictment, the court may either affirm the sentence passed on the appellant at the trial, or pass such sentence in substitution therefor as they think proper, and as may be warranted in law by the verdict on the count or part of the indictment on which the court consider that the appellant has been properly convicted.

"Where an appelalnt has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Criminal Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity.

"Where on the conviction of the appellant the jury have found a special verdict, and the Court of Criminal Appeal consider that a wrong conclusion has been arrived at by the court before which the appellant has been convicted on the effect of that verdict, the Court of Criminal Appeal may, instead of allowing the appeal, order such conclusion to be recorded as appears to the court to be in law required by the verdict, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law.

"If on any appeal it appears to the Court of Criminal Appeal that, although the appellant was guilty of the act or omission charged against him, he was insane at the time the act was done or omission made so as not to be responsible according to law for his actions, the court may quash the sentence passed at the trial and order the appellant to be kept in custody as a criminal lunatic under the Trial of Lunatics act, 1883, in the same manner as if a special verdict had been found by the jury under that act."[29]

"For the purpose of this act, the Court of Criminal Appeal may, if they think it necessary or expedient in the interest of justice—

"(a) order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to them necessary for the determination of the case; and

"(b) if they think fit order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of court before any judge of the court or before any officer of the court or justice of the peace or other person appointed by the court for the purpose, and allow the admission of any depositions so taken as evidence before the court; and

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[29]See Act, Sec. 5.

"(c) if they think fit receive the evidence, if tendered, of any witness (including the appellant) who is a competent but not compellable witness, and, if the appellant makes an application for the purpose, of the husband or wife of the appellant, in cases where the evidence of the husband or wife could not have been given at the trial except on such an application; and

"(d) where any question arising on the appeal involves prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in the opinion of the court conveniently be conducted before the court, order the reference of the question in manner provided by rules of court for inquiry and report to a special commissioner appointed by the court, and act upon the report of any such commissioner so far as they think fit to adopt it; and

"(e) appoint any person with special expert knowledge to act as assessor to the court in any case where it appears to the court that such special knowledge is required for the proper determination of the case;

and exercise in relation to the proceedings of the court any other powers which may for the time being be exercised by the court of appeal on appeals in civil matters, and issue any warrants necessary for enforcing the orders or sentences of the court: provided that in no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at the trial."[30]

Pending the appeal the prisoner is accorded certain privileges, being "specially treated as an appellant"[31] while in prison, but unless the court gives a direction to the contrary this period of time does not count as part of his imprisonment. "The result is that in most cases of appeals or applications that have no merits the appellant is kept in custody about four or five weeks longer than he would have been if he had not appealed or applied for leave to appeal. That circumstance contains really the only check which the court has on frivolous appeals or applications for leave to appeal."[32] Out of fairness to the prisoners the court sits generally once a week, and it is expressly provided in the act[33] that the rules of court shall provide for sittings during vacation, if necessary.

On the certificate of the attorney general, obtained by either the prosecution or the defendant, that the decision of the court "involves a point of law of especial public importance, and that it is desirable in the public interest that a further appeal should be brought" an appeal may be taken to the House of Lords, but, subject to this proviso, the determination of the Court of Criminal Appeal is final.[34]

While the Criminal Appeal Act provides that nothing therein "shall affect the prerogative of mercy", it expressly authorizes the

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[30]See Act, Sec. 9.
[31]See Act, Sec. 14.
[32]Address by Lord Hewart, *op. cit.*, p. 570.
[33]See Act, Sec. 1-(8).
[34]See Act, Sec. 1-(6).

secretary of state to refer to the court questions raised in petitions to him with reference to convictions or sentences (other than a sentence of death).[35] The reference may involve an entire case, in which event the court considers it exactly as it would a case on appeal;[36] or it may relate only to a single point arising in the case, which the court may determine in private.[37]

Strange as it may seem, no costs are allowed to either side.[38] The expenses of a solicitor or counsel assigned to an appellant, of the witnesses attending on the order of the court, of the appearance of an appellant on the hearing of his appeal, of the examination of any witnesses directed by the court, or of any reference to a special commissioner appointed by the court, or of any expert appointed as an assessor by the court, are paid out of public funds, as well as all payments to stenographers for attending the trial and supplying the transcripts. Notwithstanding all this, the "expense of the Court of Criminal Appeal is very slight."[39]

Much of the success of the court depends upon the power to make rules accorded to it by the Criminal Appeal act[40] with the advice and assistance of a committee composed of a chairman of quarter sessions appointed by a secretary of state, the permanent under secretary of state for the time being for the home department, the director of public prosecutions for the time being, the registrar of the Court of Criminal Appeal, and a clerk of assize, and a clerk of the peace appointed by the Lord Chief Justice, and a solicitor appointed by the president of the Law Society for the time being, and a barrister appointed by the General Council of the Bar.

The work of the court is further expedited by the fact that section 17 of the Criminal Appeal Act permits any judge of the court to exercise the power of the court, to give leave to appeal, to extend the time to appeal or to apply for leave to appeal, to assign legal aid to an appellant, to allow the appellant to be present where he is not entitled to be present without leave, and to admit any appellant to bail. If a judge refuses such an application to exercise any such power, the appellant shall be entitled to have the application determined by the court. Lord Chief Justice Hewart has summarized the practical effect of this provision of the act:

> "In practice applications for leave to appeal are usually, but by no means always, in the first instance determined by a single judge. Many cases never reach the full court at all. Appellants at present have the absolute right to abandon their appeals or applications, and many exercise that right. Sometimes they abandon their appeals before their case is considered at all, either by a single judge or by the court, sometimes after the single judge has refused leave to appeal. During the last year,

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[35]See Act, Sec. 19.
[36]See Act, Sec. 19-(a).
[37]See Act, Sec. 19-(b); address by Lord Hewart, *op. cit.*, p. 569.
[38]See Act, Sec. 13-(1).
[39]Address by Lord Hewart, *op. cit.*, p. 571.
[40]See Act, Sec. 18.

for example, 101 appellants abandoned their appeals or applications, 57 before their cases had been considered at all by either the single judge or by the court, 44 after the single judge had refused leave to appeal."[41]

It remains only to speak of the work of the registrar, whom the Lord Chief Justice has termed "indispensable" and whose services he has characterized as "invaluable". The registrar has the duty of taking all necessary steps for obtaining a hearing of all appeals or applications and of laying before the court the record.[42] If an appeal of a conviction involves a question of law alone, which, in the judgment of the registrar does not involve a substantial ground of appeal, the registrar may refer the appeal to the court for summary determination, and if the court consider the appeal frivolous or vexatious, dismiss it summarily without calling on any persons to attend the hearings.[43] He is the custodian of all documents, exhibits and other things connected with the proceedings.[44] He shall furnish the necessary forms and instructions with reference to notices of appeal and the like to any person demanding them and to officers of courts, governors of prisons and such others as he thinks fit,[45] and he shall report any case in which it appears to him that, although no application has been made for the purpose, a solicitor or counsel ought to be assigned to an appellant.[46]

A study of the work of the English Court of Criminal Appeal leaves one with a deep impression of the administrative simplicity with which its functions are carried on by judges especially trained for this type of judicial business. One is bound to conclude that the broad, comprehensive powers accorded by the act not only to the court but also to its judges and its registrar are exercised not only with dispatch and with an eye intent on promoting the best interests of the body politic, but also that at the same time the rights of the individual defendants are adequately, indeed solicitously, safeguarded.

As an outstanding American authority on the subject has well said:

"No feature of the English administration of justice throws into relief more clearly the fundamental differences between the juristic institutitons of that country and those of our own than the conduct of criminal appeals. Speed of determination, brevity of opinion, paucity of judicial rhetoric, concentration on the main issues of the fairness and legality of the defendant's trial and the reasonableness of the jury's verdict—these are the salient characteristics of the work of the Court of Criminal Appeal."[47] The only criticism of the court that thirty years' experience has elicited seems to be that the act was de-

[41]Address by Lord Hewart, op. cit., pp. 569-570.
[42]See Act, Sec. 15-(1).
[43]See Act, Sec. 15-(2).
[44]See Act, Sec. 15-(3).
[45]See Act, Sec. 15-(4).
[46]See Act, Sec. 15-(5).
[47]Howard, *Criminal Justice in England* (1931), p. 405.

fective in failing to give the court power to grant new trials.[48]

The experience of thirty years of activity in a jurisdiction numbering three times as many inhabitants as our largest state furnishes a standard for measuring the success or lack of success of any of our appellant courts in criminal matters. In how many of our states must an appeal be taken in ten days? is an appeal reached for argument in five weeks? or decided on the day of argument? In how many states are the steps in an appeal so few? or the methods of presentation so simple? the costs to the litigants entirely eliminated and very slight to the state itself? In how many of our states is the clerk of the appellate court authorized to render real service to the judges in attending to all the mechanical and preliminary work, thus conserving their time and energy? In how many states is the appellate court free to ground its decision on substantial justice, free from all technicalities? Finally, in how many of our states is it the opinion of the judges or of the bar or of the public that of the many duties of the judges, to repeat the language of Lord Chief Justice Hewart, "none is more important" than the work of the appellate criminal court.[49]

III.

Not only does the Criminal Appeal act in actual operation have significance for us, but the story of its adoption has its lesson for all interested in improving the administration of justice. The act itself is so simple and its provisions so obvious that it comes as a shock to learn that it took seventy years of persistent agitation to bring about its passage.

A quick glance at the situation as it existed prior to the enactment of the Criminal Appeal act, 1907, reveals an intolerable condition. To summarize it briefly:

1. A writ of error questioning the decision of the Criminal Court was originally granted only at the decision of the Crown.[50] In 1705 it was decided in Paty's Case[51] that the Crown could not deny the writ in cases of misdemeanor where the error was probable. The procedure, however, was cumbersome; only the formal record was reviewed. Evidence and the judge's charge were not regarded as part of the record; and hence the writ was of little value. It was abolished by the Criminal Appeal act.

2. In contrast to the practice of granting new trials in civil cases, the development in the criminal courts was slow and incomplete. After 1673 a new trial might be granted in the case of a misdemeanor on the ground of evidence improperly admitted, error in the judge's charge or verdict against the weight of the

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[48] "Only a brief reference is possible to a question which may in a sense be considered outstanding. Rightly or wrongly, Parliament declined to give the court the power of ordering a new trial. No doubt from time to time the tribunal has felt great inconvenience through this disability and in its early days often said so." 164 Law Times, 153 (Aug., 1927).

[49] See note 3, *supra*.

[50] Holdsworth 1, *History of English Law*, 215.

[51] 1 Salk. 504.

evidence;[52] but no right existed in the case of a felony, a lone precedent to that effect in 1851 not having been followed by the Privy Council and having been disapproved by the King's Bench Division.[53]

3. From an early date it became a practice for the judge to respite decision or sentence in border-line cases and to discuss the problem informally with the other judges. This practice crystallized in statutory authority for the establishment of the court of Crown Cases Reserved in 1848.[54] But only points of law were reserved and the question as to the reservation was entirely in the discretion of the trial judge. Weak and incompetent judges, either by reason of personal pride or sheer ignorance of the law, frequently refused to reserve points of law. The size of the court, moreover, made it unwieldy[55] and tended to interfere with the administration of justice in the other courts.

4. From the magistrates courts and recorders courts, where laymen frequently presided, there was no appeal at all.[56]

5. The result of these defects was that the office of the Home Secretary became a court of pardons which afforded some degree of relief to the unfortunates who were wrongly convicted. The proceedings here, however, were necessarily informal rather than judicial. From the standpoint of the dissatisfied defendant they involved the defect of being secret.

The agitation for the establishment of a criminal court of appeal can be traced back to 1836, when the need of reform was urged at a meeting of the Law Amendment Society.[57] From then on to 1907 no less than twenty-eight separate bills on the subject were introduced in Parliament.[58] Among the more prominent persons who introduced the outstanding bills were Chief Baron Kelly, in 1840; Sir John Holker, who was successively Solicitor General, Attorney General and Lord Justice of Appeal, in 1879; Sir Henry James, who was Attorney General and later as Lord James of Herford served on the Judicial Committee of the Privy Council, in 1883; Sir John Simon and Sir Albert Rollit, in 1888; Sir Henry James and Mr. Asquith, in 1890.

A variety of arguments was urged against the reform. Many people believed that very few innocent persons were convicted and accordingly they considered the old procedure adequate. They feared that the establishment of a court of appeal would lead all criminals to grasp at this "last straw", thus delaying their punishment and lessening the deterrent effect on other criminals. They objected that the judges would be burdened with new labors, that the already overcrowded courts would suffer still further, and

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[52]Holdsworth 1, *History of English Law*, 216.

[53]id., p. 216.

[54]11 and 12 Vict., c. 78, s. 1.

[55]The court consisted of all of the judges; five, of whom the Lord Chief Justice must be one, to form a quorum; if the five differed, any one might require the matter to be referred to all the judges. Holdsworth 1, *History of the English Law*, 217.

[56]10 Law Times, 255.

[57]64 Law Times, 105.

[58]Howard, *Criminal Justice in England* (1931), 275.

that great expense would be involved. It was also the feeling that juries would become irresponsible when they knew that their decision was not final. It was thought that it would be highly improper to allow a few judges to substitute their majority opinion for the unanimous verdict of twelve men who had had the advantage of seeing and hearing the witnesses and judging their testimony from their appearance and demeanor. The delay occasioned by appeals and the granting of new trials, they claimed, moreover, might result in the death or disappearance of witnesses or tampering with them and thus the guilty might escape.[59] In the light of the experience of the Court of Criminal Appeal these objections seem almost fantastic, and yet they were urged in their day by men of standing.

For three-quarters of a century successive leaders of the movement for the reform of the criminal law eagerly exploited each of the sensational cases where defendants were improperly convicted. The history of these successive attempts to remedy an obvious defect in criminal jurisdiction may be traced in the *Law Times*. One of the early articles, in February, 1844, noted the circulation of a report that the government intends to establish a court of criminal appeal and discussed the great need of such a court to correct the mistakes of judges and juries. After citing various cases of wrongful conviction, it concluded:

> "What a strange anomaly! What monstrous inhumanity! What crying injustice it is, that if the trial, instead of affecting some paltry amount of money or property, *affects his life*, all such redress is denied him; and if the judge has made a mistake, or the jury has returned an unfair verdict, no redress is to be had—the mistake cannot be rectified—the result of the trial is final—the man must be hanged, or an apparent violation of justice done by an unexplained pardon."[60]

In commenting bitterly on the failure of Parliament to pass Sir Fitzroy Kelly's bill it observed:

> "Ministers have found other more absorbing occupations, humanity has continued to be wronged, and injustice has taken, as it were, a new lease on life."[61]

and at the same time excoriated the Home Secretary for failure to grant a pardon in the case of a young man convicted, apparently unjustly, for rape:

> "A man, most probably innocent, certainly convicted under circumstances that call for further investigation, is transported for life, and there is no help for him, although all engaged in the case are satisfied of his innocence; while if instead of liberty for a whole life, property to the amount of £20 had been in dispute, upon a tithe of such doubts a new trial might be had."[62]

In discussing the announcement of Mr. Ewart's proposal to introduce a bill in Parliament, the *Law Times* said:

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[59] On this subject generally see Sibley, *Criminal Appeal and Evidence* (1908), pp. 38-45.

[60] 2 Law Times, 363.

[61] Oct., 1846; 8 Law Times, 14.

[62] *Ibid.*

"Surely the fallibility that renders an appeal necessary when they sit on one side of the hall does not quit them when they cross to the other; and if there be no change in the judge, why should there be a difference in the checks provided against his errors?

"Baron Platt *refused* to reserve the point raised on the trial of the Brazilian pirates, although, upon argument, a great majority of the judges held the point to be a good one, and the learned Baron wrong. But for the interference of the secretary of state in this case, seven men, innocent of any legal crime, would have been hung! Surely the occurrence of one such case should be enough to require the instant amendment of a law capable of producing such a wrong, and to make that appeal dependent upon some other authority than the will of the judge against whose opinion it is asked."[63]

In announcing the passage of Lord Campbell's act establishing the court of Crown Cases Reserved, the *Law Times* said:

"But the grievance of incorrect decisions upon the law was the least part of the wrong asserted to be done by the denial of an appeal. That which had been most strenuously contended for as being the most urgently required, because productive of substantial as well as of technical injustice, was an appeal upon questions of *fact*, in the form of a new trial. That is still denied; this is still demanded; and every week's experience strengthens the argument in its favor by producing new instances of the fallibility of juries, and the mistakes of witnesses."[64]

It then proceeded to narrate the facts of the recent unjust conviction and subsequent pardon of one Barber, observing:

"Nor is this an isolated case. During the last twelve months we have had occasion to record some half dozen instances, at least, of persons convicted through mistakes of witnesses and juries; who were afterwards proved beyond all doubt, to be innocent. * * * how many must there be in which convicts equally innocent, in fact have been unable, for want of friends, or funds, from adducing evidence that will satisfy the secretary of state?"[65]

These references are typical of a series of articles and notes in the *Law Times* from 1836 to 1907.[66] The movement gathered

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[63]Dec., 1847; 10 Law Times, 255.

[64]March, 1849; 12 Law Times, 523.

[65]*ibid.*

[66]Sept., 1844, 3 Law Times, 454; 3 *id.* 489. Nov., 1847, 10 *id.* 118; Apr., 1857, 29 *id.* 57; May, 1857, 29 *id.* 74; June, 1858, 31 *id.* 170; March, 1859, 32 *id.* 278; Nov., 1859, 34 *id.* 109; Jan., 1860, 34 *id.* 201; Feb. 1860, 34 *id.* 268, 278; May, 1862, 37 *id.* 361; Jan., 1871, 50 *id.* 172; Jan., 1877, 62 *id.* 219; Dec., 1877, 64 *id.* 105; Sept., 1881, 71 *id.* 306, 307; May, 1882, 73 *id.* 3; Jan., 1885, 78 *id.* 209; Sept., 1888, 85 *id.* 307; 85 *id.* 313; Oct., 1889, 87 *id.* 404, 405; Jan., 1897, 102 *id.* 220; Apr., 1897, 102 *id.* 581; Aug., 1904, 117 *id.* 320; 117 *id.* 379; Sept., 1904, 117 *id.* 449; 117 *id.* 458; Oct., 1904, 117 *id.* 575; Dec., 1904, 118 *id.* 100; 118 *id.* 182, 207, 316, 346; Dec., 1905, 120 *id.* 133; 1906, 120 *id.* 505, 526; June, 1906, 121 *id.* 206; Apr., 1907, 122 *id.* 593.

popular support gradually until with the famous Edalji[67] case and the case of Adolf Beck,[68] the victim of a double who habitually violated the criminal law, the public was thoroughly aroused and a parliamentary investigation undertaken,[69], culminating in the enactment of the Criminal Appeal act of 1907.

In retrospect it is difficult to understand how intelligent men could have opposed such a necessry reform for three-quarters of a century. As Mr. Alexander says:

> "The number of cases in which convictions have been quashed or sentences reduced since this act came into operation has raised a very uncomfortable feeling in the minds of all thinking men as to what took place before the act was passed. During the nine months of 1908 that the act was in operation there were 29 appeals and 326 applications for leave to appeal of which 79 were granted. In 18 cases the conviction was quashed, and in 14 the sentence was reduced—a quite sufficient justification for the establishment of this tribunal."[70]

Such opposition of "thinking men" seems, however, to be the inevitable lot of all who attempt to improve the administration of justice. The story of the agitation for the creation of a Court of Criminal Appeal in England should have its lesson of courage for all who venture into this field of endeavor.

APPENDIX—Excerpt from Table of Appeals Decided in English Court of Criminal Appeal from October 1, 1934 to September 30, 1935. Each line represents one case. In column three "S" means that the appeal was on sentence; "C" means appeal on conviction; "S & C" means appeal on both conviction and sentence.

Nature of Crime	*Date of Trial*	*Nature of Appeal*	*Date of Decision of C. C. A.*	*Result*
Incorrigible rogue	Sept. 20	S	Oct. 29	Quashed
Larceny	Sept. 21	S		Abandoned
Officebreaking	Oct. 1	S		Abandoned
Conspiracy	Sept. 28	C & S		Abandoned
Conspiracy	Sept. 28	C & S		Abandoned
Housebreaking	Sept. 28	S	Nov. 12	Dismissed
Housebreaking	Sept. 28	S	Nov. 12	Dismissed
Garagebreaking	Sept. 26	S	Nov. 12	Dismissed
False pretences	Oct. 1	C & S	Nov. 12	Dismissed
Fraudulent conversion	Sept. 25	C & S	Nov. 13	Dismissed
Conspiracy to defraud	Sept. 11	C		Abandoned
Drunk in charge of car	Oct. 1	C & S	Oct. 29	Dismissed
Storebreaking	Oct. 1	C & S	Nov. 12	Dismissed
Larceny	Oct. 1	S		Abandoned
Larceny	Oct. 5	C & S	Nov. 12	Dismissed
Larceny	Oct. 2	C & S	Nov. 19	Dismissed
Larceny	Oct. 1	C & S	Oct. 29	Dismissed
Obtaining credit by fraud	Sept. 28	C & S	Nov. 19	Dismissed

[67] *The Case of George Edalji*, Parl. Pap. White Paper (1907) Cd. 3503.
[68] *Trial of Adolf Beck* (1924), Edited by E. R. Watson.
[69] *Inquiry into the Case of Adolf Beck*, Parl. Pap. (1904), Cd. 2315.
[70] The Administration of Justice in Criminal Matters, 124.

Nature of Crime	Date of Trial	Nature of Appeal	Date of Decision of C. C. A.	Result
Shopbreaking	Oct. 3	S		Abandoned
Larceny	Oct. 1	S		Abandoned
Receiving	Sept. 28	C & S		Abandoned
Attempted Shopbreaking	Oct. 8	C		Abandoned
Larceny	Oct. 6	S		Abandoned
Housebreaking	Oct. 4	S		Abandoned
Shopbreaking	Oct. 8	S		Abandoned
False pretences	Oct. 10	S	Nov. 19	Dismissed
Housebreaking	Oct. 10	S		Abandoned
False pretences	Oct. 10	C	Dec. 4	Quashed
Sheepstealing	Oct. 10	C	Nov. 13	Quashed
Pavilionbreaking		C	Nov. 13	Quashed
Larceny	Oct. 9	C	Nov. 19	Dismissed
Burglary	Oct. 12	C & S		Abandoned
Larceny	Oct. 9	S	Nov. 12	Dismissed
Bankruptcy offence	Oct. 11	S	Nov. 19	Dismissed
Driving car under influence of drink	Oct. 4	C & S	Nov. 26	Dismissed
False pretences	Oct. 11	C	Dec. 4	Quashed
Burglary	Oct. 8	C	Nov. 26	Dismissed
Uttering forged document	Oct. 12	C	Dec. 10	Quashed
Larceny	Oct. 18	C & S	Nov. 13	Dismissed
Wounding with intent g. b. h.	Oct. 18	S	Nov. 26	Dismissed
Larceny	Oct. 18	S	Nov. 12	Dismissed
Housebreaking	Oct. 18	C & S	Dec. 3	Dismissed
Obtg. money on forged instrument	Oct. 18	C	Nov. 26	Quashed
False pretences	Oct. 20	S	Nov. 19	Quashed
Burglary	Oct. 20	S	Nov. 19	Quashed
Larceny	Oct. 16	C & S	Nov. 26	Dismissed
Wounding with intent to d. g. b. h.	Oct. 18	S	Nov. 26	Reduced
Larceny	Oct. 16	C	Nov. 26	Dismissed
Robbery with violence	Oct. 19			
Shopbreaking	Apr. 10 recd Oct. 24	C & S	Nov. 26	Dismissed
Receiving	Oct. 16	S	Dec. 10	Dismissed
False Pretences	Oct. 24	C & S	Dec. 3	Dismissed
Larceny	Oct. 17	C & S	Dec. 10	Dismissed
Assault with intent to ravish	Oct. 24	C & S	Dec. 10	Dismissed
Fraudulent conversion	Oct. 17	C	Dec. 4	Dismissed
Receiving	Oct. 23	S	Dec. 4	Dismissed
Receiving	Oct. 19	C	Nov. 19	Quashed
Conspiracy to commit arson	Oct. 17	C	Nov. 26	Quashed
Receiving	Oct. 16	S	Dec. 4	Quashed
Driving car under influence of drink	Oct. 24	S		Abandoned
Robbery with violence	Oct. 25	C & S	Nov. 26	Dismissed
Larceny	Oct. 26	C & S		Abandoned
Burglary	Oct. 20	S	Dec. 10	Abandoned
Receiving	Oct. 25	C & S	Dec. 10	Dismissed
Sodomy	Oct. 25	S	Nov. 26	Dismissed
Making counterfeit coin	Oct. 25	C	Nov. 26	Dismissed
Robbery with violence	Oct. 25	C & S	Nov. 26	Dismissed
Using instrument to procure miscarriage	Oct. 24	S	Dec. 3	Dismissed
Murder	Oct. 22	C	Nov. 19	Dismissed
Incorrigible rogue	Oct. 23	S	Dec. 10	Dismissed
False pretences	Oct. 24	C & S	Dec. 10	Dismissed
Warehousebreaking	Nov. 1	S	Dec. 17	Dismissed
False pretences	Oct. 24	C & S	Dec. 10	Dismissed
False pretences	Oct. 31	C & S	Dec. 10	Dismissed

Nature of Crime	*Date of Trial*	*Nature of Appeal*	*Date of Decision of C. C. A.*	*Result*
False pretences	Oct. 25	S		Abandoned
Garagebreaking	Nov. 1	C & S	Dec. 17	Dismissed
Demanding money with menaces	Oct. 29	C & S	Dec. 10	Dismissed
False pretences	Oct. 30	C	Dec. 10	Dismissed
False pretences	Oct. 30	C	Dec. 10	Dismissed
Manslaughter	Nov. 1	C & S	Dec. 21-22	Dismissed
Murder	Nov. 1	C	Dec. 3	Dismissed
Uttering counterfeit coin	Nov. 5	C		Abandoned
Larceny	Nov. 15	C	Dec. 10	Dismissed
Larceny	Nov. 16	S	Dec. 17	Dismissed
Larceny	Nov. 16	S	Dec. 17	Dismissed
Making counterfeit coin	Nov. 14	S		Abandoned
Larceny	Nov. 16	S	Dec. 17	Dismissed
Bigamy	Nov. 14	C	Dec. 17	Dismissed
Officebreaking	Nov. 13	S	Dec. 17	Dismissed
Killing sheep with intent to steal the carcass	Nov. 20	C & S	Dec. 17	Dismissed
Sodomy	Nov. 14	C & S	Dec. 17	Dismissed
Larceny	Nov. 20	S	Dec. 17	Dismissed
Larceny	Nov. 14	C	Jan. 26	Dismissed
False pretences	Nov. 21	C & S	Jan. 21	Dismissed
Burglary	Nov. 21	S	Dec. 17	Dismissed
Receiving	Nov. 13	C & S	Dec. 17	Dismissed
Receiving	Nov. 19	C		Abandoned
Larceny	Nov. 21	S		Abandoned
Obtaining money on forged instrument	Nov. 15	C	Jan. 7	Dismissed
Indecent assault on male	Nov. 20	C		Abandoned
Possessing housebreaking implements by night	Nov. 22	S	Feb. 4	Dismissed
False pretences	Nov. 20	S	Jan. 21	Dismissed
Receiving	Nov. 21	S		Abandoned
Attempted larceny	Nov. 22	S		Abandoned
Receiving	Nov. 20	C & S	Jn.28-Fb.4	Dismissed
False pretences	Nov. 20	C	Dec. 17	Dismissed
Murder	Nov. 21	S		Abandoned
Larceny in dwelling house	Nov. 23	C	Jan. 22	Quashed
Director of company trading to defraud creditors	Nov. 23	S	Jan. 21	Dismissed
Housebreaking	Nov. 26	C & S	Dec. 17	Dismissed
Housebreaking	Nov. 26	C	Dec. 17	Dismissed
Murder	Nov. 21	S	Jan. 28	Reduced
Receiving	Nov. 27	C & S		Abandoned
False pretences	Nov. 26	S	Jan. 21	Dismissed
Incest	Nov. 29	C & S	Jan. 28	Dismissed
Demanding money with menaces	Nov. 23	S	Jan. 22	Dismissed
Housebreaking	Nov. 23	S	Dec. 17	Dismissed
False pretences	Nov. 20	S		Abandoned
Fraudulent conversion	Nov. 26	S	Jan. 22	Dismissed
Bigamy	Nov. 28	S	Jan. 28	Dismissed
Fradulent conversion	Nov. 29	C & S	Jan. 28	Dismissed
Demanding money with menaces	Nov. 28	C & S	Jan. 28	Dismissed
Demanding money with menaces	Nov. 29	C & S	Jan. 28	Dismissed
Demanding money with menaces	Nov. 29	C & S		Abandoned