

Spiritualism in good round terms in the celebrated case of *Lyon v. Home*.² Mr. Serjeant Ballantine in his reminiscences³ gives us a description of the libel suit by Naval Lieutenant Morison (publisher of Zadkiel's Almanac) against Admiral Belcher, who had charged Morison with fraudulently pretending to show spirits in a crystal ball. The trial was before Chief Justice Cockburn. The case was hard fought. Witnesses testified as to what they saw in the ball. The plaintiff got a verdict for twenty shillings. Lord Lytton, who was present but did not testify, complained of the levity of some of the witnesses.

Mrs. Morris' trance and the action of "Power" seem to be in the nature of real evidence, bearing upon the question of fraudulent intent. An interesting legal question arises if Mrs. Morris had at first offered to go into trance and to produce "Power" in court. There are some early decisions, not of high authority, that such evidence would not be admissible, because it would be impossible for such testimony to be genuine.⁴ He is a wise Judge who knows the limits of the possible, as wise as he is just when he fails to give an accused person a full and fair chance to defend himself. I have read of a judge who refused to allow a defendant to undertake to do in court the things which he had

been charged with fraudulently representing that he, the defendant, could do. The judge said it would make him ridiculous, but surely not as ridiculous as he made himself. There is a Scotch case of a fortune-teller being prosecuted in which the defendant was allowed to present evidence that she had the power she claimed by showing various successful prophecies, but she failed to convince the court.⁵

Lawyers who are curious about Spiritualism, that strange but firmly set facet of human nature, will find interesting the recent English book, "Talks with Spirit Friends, Bench and Bar, by a Retired Public Servant" (Brentano's). Older members of the American Bar Association will recall the wit of that prince of lawyers, Sir Frank Lockwood, sometime Solicitor General, and the high-mindedness of Lord Justice Kennedy, both of whom figure on the list of "Communicators" along with other jurists just as eminent. Sir Frank appears to be the chief of the group, and not to have deteriorated, nor indeed have the others, for that matter. But as to whether they are really still carrying on in manner and form as alleged in the book, I must leave to those who knew them better. Perhaps

Your bright Promise, withered long and sped
Is touched; stirs, rises, opens and grows sweet
And blossoms and is you, when you are dead.

2. (1868) L. R. 6 Eq. 655, 682.

3. Some Experiences of a Barrister's Life (Am. Ed. 1882) 337-8.

4. Status of Psychic Facts in Courts of Law (1890) 24 Am. Law Rev. 1008 (Article by Francis J. Lippitt, severely criticizing such rulings.)

5. Laing v. McPherson, 1918 J. C. 70, 74.

THE REPORT ON CRIMINAL PROCEDURE*

Three Objectives within Reach of the Commission, with the Limited Time at Its Disposal, All of Which Were Attained in the "Report"—Attitude of That Body towards Preparation of Document—Conclusions and Recommendations—Constructive Suggestions for Improvement Which Merit Attention

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REPORT No. 8 on Criminal Procedure, issued by the National Commission on Law Observance and Enforcement under date of June 9, 1931, is one of the smallest in bulk of any of the reports of the Commission, consisting as it does of only 51 pages, including the dissenting report of Monte M. Lemann. The value of the report is critically challenged by Mr. Lemann in the opening paragraph of his "dissent" and provides an interesting basis upon which to evaluate the information, conclusions and recommendations presented by the other ten members of the Commission. Mr. Lemann begins his statement as follows:

"The Commission has heretofore found that in the past discussion of the subject of Crime and the offender a relative

over-emphasis has been given to procedural questions. Such questions have received wide and, upon the whole, adequate attention in professional and lay discussions. The more important of them are adverted to in the Report on Prosecution and Mr. Bettman's study appended thereto. In view of these facts, it has seemed to me that no useful purpose could be served by a report on criminal procedure, unless the Commission had some important new proposals to make, adequately supported by factual data and study. The report submitted by the Commission does not seem to me to contain such proposals."

If one were disposed to agree with the assumptions made, he could easily reach the conclusions stated in the paragraph quoted above. As a matter of fact, however, it is submitted that the Commission had much more to accomplish than could be accomplished only by new proposals supported by factual data and study. No doubt, many people expected that this Commission would be able, in

*Report No. 8, on Criminal Procedure, issued by the National Commission on Law Observance and Enforcement.

the relatively short time in which it was given to do its work and with the relatively small amount of money provided for that purpose, to make extensive studies, to obtain by scientific methods large quantities of factual data, and as a result thereof, propose important new proposals. That those persons were bound to be disappointed was easily predictable before the Commission began its work. We read, from day to day, in scientific journals, of the years of laboratory work and experimentation and of the millions of dollars which are devoted to research work in connection with the physical sciences, and no one would suppose that even a small problem in chemistry or physics could be worked out between sessions of Congress upon a specified appropriation. For some strange reason, it seems to be assumed that such work can be done upon a scientific basis in connection with the solving of the problem of crime, even though it be deeply rooted in every instinct and emotion of mankind and pervasive of every social interest and institution.

Although the task proposed by Mr. Lemann is one of tremendous importance and one which well merits being done, when a proper organization and sufficient funds shall have been found for that purpose, still there were several objectives within reach of the Wickersham Commission which were well worth achieving although they fell far short of that set by the dissenting member thereof. In the first place, the Commission could perform a useful service by bringing together and publishing under the authority of its name, the result of the work of many investigators in this field during past years, thus giving stability and authority to that work which had been well done and to those conclusions which had been properly drawn, and providing a basis upon which others might go forward in their investigations.

In the second place, the Commission could emphasize, through its report, certain proposals heretofore made and certain ideas heretofore expressed which are entirely valid but which have lacked vitality because of the fact that they have not been sponsored by persons of sufficient authority.

In the third place, by the publication of its report, the Commission could gain wide public consideration of such ideas and such proposals through newspaper publicity, through the discussion of politicians and statesmen, through magazine articles, even though such discussions and comments might be highly critical in character. These objectives the Commission has achieved, even in this little report on criminal procedure, although it is quite true that no few proposals are made and that such as are made are, generally speaking, inadequately supported by factual data and study.

Certainly when consideration is given to the importance of criminal procedure it would have been very unfortunate if no report had been made upon this subject by the Commission. Clearly it was called upon to make some kind of report, even though it be superficial and sketchy in character. No doubt the members of the Commission were impressed with this fact and no doubt this is largely responsible for this report. For even though it is true that in the discussion of the subject of crime a relative over-emphasis has undoubtedly been

given to procedural questions, nevertheless, criminal procedure is a matter of tremendous importance and one which must have proper consideration, in a general survey such as this, even though other phases of the subject may not have been properly emphasized in the past. The need is for greater emphasis upon other phases of the subject rather than for less emphasis upon the subject of criminal procedure.

In spite of all this, however, it must still be admitted that this report is of much thinner substance than are most of the rest of those issued by the Commission. Much of it could have been dictated offhand by Dean Pound and perhaps by other members of the Commission. At the bottom of page 23 we find this statement: "Moreover, the jury in a homogeneous pioneer or rural community functioned under circumstances much more favorable for good results than those which obtain in the heterogeneous diversified urban industrial community of today." This language has been used so frequently in the writings of Dean Pound that it has become almost ritualistic in character and could not fail to be identified by anyone who is familiar with his writings. The attitude of the Commission towards the preparation of this report is clearly expressed on page 1, where it is said: "As the subject was one with which a majority of the members of the Commission had an intimate acquaintance from many points of view, from experience on the bench, or as public prosecutors, or in the trial of criminal cases, or in teaching criminal law and procedure, or in more than one of these capacities, it was not thought necessary to employ experts to make special investigations."

Considering the personnel of the Commission, this was probably more true of criminal procedure than of any other subject which it considered. With such a background of experience the expressions of opinion contained in the report are perhaps as valuable as could be expressed by any other group in the United States, without the expenditure of tremendous sums of money and a great deal of time, in further investigation, in order to prove, by factual data, matters which are well known, or generally assumed to be true, by those who are engaged in the actual administration of the criminal law. Moreover, the Commission lists twelve sources of information which it used, in addition to this first-hand knowledge possessed by its members. There can be no doubt that richer material is generally available, relating to criminal procedure, than is available in connection with any other branch of the law involved in the administration of criminal justice. The commentaries which accompany the code of criminal procedure of the American Law Institute are in themselves a highly valuable and complete collection of information so far as the purely legalistic phases of the problem are concerned. The surveys of criminal justice and reports of crime commissions, which are referred to, also contain material of great value, the duplication of which, by the Commission, would have served no particularly useful purpose.

Ten pages of the report are devoted to a consideration of "Petty Offenses and Inferior Courts." Much of the discussion of the subject relates to administration rather than procedure. On page seven

is an admirable summary of the administrative problem involved:

"The legal profession has very little interest in petty prosecutions which today are chiefly the concern of the lowest stratum of the profession. Also the public has assumed that a petty judge is good enough for petty cases. But what is of little profit to the lawyer may none the less be of much profit to the law. The importance of petty prosecutions for the sum total of criminal justice can not be measured by the amount of the fine or duration of imprisonment in the average of such cases. They must be looked at with reference to their place in the scheme of criminal justice as a whole and the part played by them and by the offenses to which they relate in the whole process of urban life."

After stressing the importance of these petty prosecutions, the report states, on page 13, the rather startling conclusion that "As to procedure in the inferior criminal courts of the States, there is relatively little to be done." It is interesting to consider this statement in connection with the first recommendation which appears at the bottom of page 46 in the conclusion of the report, as follows:

"There should be a wider use of administration rather than arrest and prosecution with respect to police regulations. Those who have studied American police systems agree that too great a burden is put upon the police by leaving it to them to arrest or to ignore in such cases, with no provision for administrative adjustment."

Of course this recommendation is in line with present practices in the police departments. It is at least an open question, however, whether the administrative powers of the police should be extended so far as to permit the final disposition of cases. It is a fair question to ask whether a substitution of such administrative methods should not take place in the inferior criminal courts rather than in the police departments. If so, then clearly there is much to be done concerning procedure in the inferior criminal courts. Our experience in substituting administrative methods for judicial methods in connection with the work of the juvenile courts and in connection with the administration of the device of probation, suggests the possibility of a valuable extension of administrative methods into the inferior criminal courts. We have little factual basis, indeed, for suggesting a wide extension of administrative power in the police departments.

In spite of our success in using probation in the superior trial courts, there seems to be a natural reluctance upon the part of lawyers to advise a further extension of administrative methods even in that court. The report of the Commission speaks of the fact that we have burdened our courts too heavily with the tasks incident to judicial decision and suggests the importance of the extension of administrative methods, but does not suggest that the judges might themselves become administrators; a method which, because of its greater speed and summary character, would quickly relieve that burden.

The evil incident to the trial of criminal cases *de novo* on appeal from the inferior courts is properly condemned. The testimony of lawyers familiar with criminal practice would reveal that the continuance of the practice of trial *de novo* is justified by law-makers and practitioners on the ground that personnel, procedure and administration, in these inferior courts, are so disgracefully inadequate. In

order to secure relief from this evil as well as to extend preventive justice as distinguished from retributive justice the Commission's recommendation, for adequate judicial and administrative personnel in the inferior courts, becomes imperative.

Sixteen pages of the report are devoted to the title "Procedural Protection of the Accused." Brief consideration is given, in this section, to arrest; preliminary examinations; indictment and information; bail; jury trial; the presumption of innocence; exemption from questioning and from comment by counsel or court on failure to testify; review by the trial court; review by habeas corpus and review by appeal. Frequent references are made to the work of the American Law Institute. Three pages are devoted to "Criminal Pleading"; four pages to "Evidence in Criminal Cases"—of which two pages are given to "Expert Evidence." Obviously the discussion is entirely inadequate. Similar brief references are made to some of the problems arising in connection with the conduct of trials and the review of convictions. In the three pages devoted to "Review of Convictions", nearly two are concerned with motions for new trial and the recommendation is made that "the ultimate court of appeal should have plenary jurisdiction to *reverse the conviction and order a new trial whenever* it is satisfied that the defendant has not received a fair and impartial trial." Oddly enough, this recommendation follows, by only a page, a highly laudatory reference to the English appellate procedure, which gives the court of criminal appeal "full jurisdiction over questions of both law and fact, and authority to pass upon both the legality and the propriety of the sentence imposed." One looks in vain for any consideration of the best interests of society, as a whole, in this particular part of the report. No mention is made of the inadequacy of our present, generally prevailing laws governing appeals on behalf of the people or the state. Moreover, one might well suppose that in the Commission's opinion a wide increase of new trials, and a simplification of appellate procedure so that new trials can be more easily secured, is about all that is needed.

The report ends with five conclusions and fourteen recommendations. The conclusions call for (1) improvement in methods of selecting judges; (2) a recognition of the importance of the inferior courts; (3) a "modern organization" of these courts; and (4) an extension of power of judges and magistrates. (5) The fifth conclusion states that as to "details of procedure we make no specific recommendation, but as a general reform, applicable to the whole country, the details of procedure should be left to rules of court . . ." This conclusion, entirely unsupported by fact or argument, again indicates the inadequacy of the report in its attempt, so casually, to dispose of such a large and important field as criminal procedure and administration.

The fourteen recommendations follow generally the subjects considered in the body of the report and provide constructive suggestions for improvement, which well merit the attention of legislators and others who are interested.

1. Italics ours.