

1940

Criminal Appeals in America

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Recommended Citation

Ernst W. Puttkammer, "Criminal Appeals in America," 53 Harvard Law Review 898 (1940).

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nor is there a reference anywhere to the amendment of § 74(a) of the Bankruptcy Act of 1933, which was held to provide for proof of damages for loss of future rent in compositions. Therefore, it is not surprising to find no reference to the Bankruptcy statute, as codified in June 1938,⁴ by which such damages for not more than the rent for one year from surrender or reentry are provable, from which it follows that the tenant's obligation is discharged.

Other errors and inconsistencies could easily be pointed out to lengthen this review but perhaps enough has been said to support the disapproval of the book. There is an appendix of forms some of which are taken from authoritative sources and may be helpful.

SAMUEL WILLISTON.*

CRIMINAL APPEALS IN AMERICA. By Lester Bernhardt Orfield.¹ Boston: Little, Brown & Co. 1939. Pp. 321. \$5.00.

A book appearing as one of the new Judicial Administration Series of the National Conference of Judicial Councils and in addition carrying the honor of an introduction by Dean Roscoe Pound will awaken high hopes and expectations in the reader. It is no small praise, then, to say that Mr. Orfield richly fulfills such hopes and expectations. He has produced a full, carefully prepared and lucid treatment of his subject, looked at from every angle and approach. As Dean Pound says, the path toward improvement in our appellate system is made signally clearer and hence easier by this book.

It opens by setting the stage by means of a lucid description of the history of appellate review in England. This is followed by a number of chapters all concerned with the extent to which review today is desirable. Thus there is an excellent canvassing of the arguments, pro and con, regarding the entire abolishing of all possible review, followed by a similar treatment of the opposite extreme, universal, automatic review. Noteworthy in this part of the book is the chapter on the Scope of Appeal, particularly as to review of questions of fact. The factors involved are carefully analyzed and the desirable points, or more accurately the undesirable points, of any possible solution are equally carefully set forth. A less thorny subject, just as well handled, is that of the scope of the reviewing court's authority to modify judgments and sentences. Finally, among these chapters on policy problems, that on the greatly neglected subject of Petty Criminal Appeals should not be overlooked. There is an ocean of talk about the importance of the first offender. There is also usually a complete lack of interest in the area where he is most likely to be found—the petty offense. Just as parole reformers are generally too busy with felons to concern themselves with the much more promising material in the jails, so it is too easy to forget that there is a very serious appeal problem in every petty offense. Fortunately Mr. Orfield has not forgotten.

From these problems of broad policy the author turns to the reviewing machinery as it is actually set up and working in this country. The resultant

⁴ 52 STAT. 873, 11 U. S. C. § 103a (Supp. 1938).

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survey inevitably is much less interesting in nature than are the pages given to policy. It brings out, however, the presence of numerous defects which individually should be easy of correction but which nonetheless survive generation after generation. High among them in importance is that hardy perennial, delay. Thus, says Mr. Orfield,² the law grants the defendant, in some states, as long as two years in which to seek review by writ of error.³ Truly this is altogether too long a period in which the matter is kept in abeyance. To some extent, however, delay is inevitable if we wish to have severe sentences. Whatever may be possible theoretically, delay is, and always will be, part of the purchase price of severity, just as reduced certainty of punishment is also part of the purchase price. Of course delay is vicious. But procedural changes will not entirely cure it. If we really wish to reduce it we must curb the prevailing American practice which makes our scale of punishments the most severe of any country in the civilized world. One means of reducing delay which Mr. Orfield apparently favors is to have the reviewing court sit in divisions and thereby increase its output (p. 133). But the rather obvious objections to such a procedure are scarcely touched on.

A similar concentration of emphasis on one side of the argument characterizes the treatment of the highly controversial subject of review in behalf of the state. Mr. Orfield is strongly opposed to any such review and urges the resultant "harassing" of the defendant, while at almost the same time he claims the needlessness of providing for it as shown by the very few cases in which, in states where it is permitted, the state avails itself of the privilege. The arguments for such review seem to be somewhat cavalierly treated. But perhaps the reviewer is merely revealing his own bias.

Occasionally sweeping statements are made that cover a little too much ground⁴ or are only partially valid.⁵ Occasionally, too, inconsistencies creep in, or at least positions that seem hard to harmonize; for instance, the implication⁶ that it would be desirable entirely to abolish briefs, as in England, and the statement⁷ that briefs can be of great service to the reviewing court. There are very few such inconsistencies, however—indeed surprisingly few in view of the fact that most of the chapters of the book originally appeared as separate law review articles, revised and brought down to date.

² P. 124.

³ Citizens of Illinois will look wistfully at even a two year limit. In *People v. Sprague*, 371 Ill. 627, 21 N. E.(2d) 763 (1939), decided less than a year ago, the delay amounted to a mere eleven years.

⁴ E.g., the statement on page 35 that motions for a new trial should be abolished. Granted that they are abused and that weak courts yield to the abuse, is the remedy so drastic a pouring out of the baby with the bath? Surely they frequently can and do serve a useful purpose. Or the statement (on page 21) that the court at common law had the power to suspend indefinitely the imposition or execution of sentence.

⁵ Thus in discussing the fixing of sentences and their review by the appellate court he argues convincingly of the inadequate job likely to be done by both upper and lower court, and concludes (p. 120) that this function should better be intrusted to a specially created "disposition tribunal." True—so far as it goes. But what of the device of indeterminate sentence, whereby no one, trial judge, appellate court, or extra-judicial tribunal, is given the nearly impossible task of setting a fixed sentence based on an impossible foreknowing of what the prisoner is going to be in the future?

⁶ P. 129.

⁷ P. 159.

This origin of much of the book in law review articles is sometimes rather evident. For instance some chapters have black letter paragraph headings; others do not. Likewise there is a tendency, now and then, to go over the same ground and repeat. For instance, the beginning of Chapter IV goes rapidly over the same subjects dealt with in Chapter I. A more marked instance of such repetition appears in the concluding chapters on Federal Appeals and the American Law Institute Code respectively which are taken up without even cross-references to the earlier and fuller general treatment of the successive stages in the appeal process. It is at least possible that it would have been more desirable to print the Code (and perhaps also the federal rules) in an appendix, with footnote references to the place of text discussion. The space saved by avoidance of duplication would have been more than ample for such an appendix.⁸

Actual errors of statement are, so far as the reviewer has been able to ascertain, few and inconsequential. The list of states in which the state has no appeal whatsoever⁹ should no longer include Illinois.¹⁰ Similarly that state should not be listed among those using commissioners.¹¹ Mere misprints and textual errors are likewise extremely rare. In fact Mr. Orfield has dealt very harshly with the reviewers, who are, of course, expected to show their assiduity by turning up a series of such inconsequential errors—he has left almost none to give them comfort.¹²

Returning to more substantial matters, the author deserves special praise for the remarkable thoroughness with which he has run to earth every article, speech or other source of material for his subject. None seems to have been too brief or too far afield to gain his notice. And no aspect of his subject has appeared to him too slight to get this same painstaking care.¹³ There is no slipshod let-down where the author's interest wanes.

In summary, the faults of the book are few and of no great consequence. Its merits are numerous and substantial. It should richly justify the useful future which Dean Pound prophesies for it.

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⁸ Occasionally this duplication is not confined to the repetition of the same idea, but goes so far as to involve repetition of identical passages. For example, pages 173 and 272 have identical passages, and pages 100 and 274 ones nearly so. Footnote 53 on page 195 is largely repeated, word for word in footnote 92 on page 277. At least one statement actually appears three times, on pages 172, 257 and 272. Obviously these not very important slips are due to the separate appearance of the chapters in different law reviews. Editing, with such care as the book deserves, would have eliminated them.

⁹ As given in the footnote on page 55.

¹⁰ See ILL. REV. STAT. (Smith-Hurd, 1939) c. 38, § 747.

¹¹ Commissioners are still used in disbarment proceedings. They were discontinued for all other purposes in 1929, although, curiously enough, the names of the former holders of the office appeared on the title pages of the official reports for another four years.

¹² The present reviewer hastens to demonstrate his own assiduity by the following exhibits: On page 37, in footnote 20, line 1, the meaning is distorted by the omission of "not." On page 278 in one place the word "reversal" has crept in where it should be "change of venue." On page 190, in footnote 34, *State v. Adkins* is cited as *State v. Atkinson*. The most satisfying discovery was that "review" is spelled "reweiv" on page 296. No doubt this will be quite sufficient.

¹³ An excellent example is the detailed analysis of the arguments for typewritten appeal papers as against printed ones.

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