

Book Review

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Book Review

CRIMINAL APPEALS IN AMERICA. By Lester Bernhardt Orfield. Boston. Little, Brown and Co., 1939. Pp. 321. \$5.00. Published in the Judicial Administration Series, under the auspices of the National Conference of Judicial Councils.

This extremely informative and forward-looking book by Professor Orfield of the University of Nebraska College of Law is the first in the "Judicial Administration Series" which is being sponsored by the National Conference of Judicial Councils. Two other books in the series have been announced to follow Mr. Orfield's one, both to be written by former Dean Roscoe Pound of the Harvard Law School, who is serving as Director of the Conference. These forthcoming books are to deal, respectively, with "The Organization of Courts" and "Appellate Procedure in Civil Cases."

Mr. Orfield acknowledges his indebtedness respectively for assistance and encouragement to Dean Pound (who wrote the ten page introduction to the book) and to Hon. Arthur T. Vanderbilt, currently chairman of the Executive Committee of the Conference, and former President of the American Bar Association. He also points out that he began the project while holding the Brandeis Research Fellowship at the Harvard Law School, that he there profited by the advice and assistance of Professor Sam Bass Warner, and that the Carnegie Corporation made a grant which made the book possible. Many of the chapters had already appeared in the form of law review articles.

This book is definitely not, and does not purport to be a treatise on the detailed law of Criminal Appeals. Rather, it is by plan a survey of the general Anglo-American criminal appellate scene which inquires into the various aspects, always with a view to finding wherein there is room for improvement in the ends of justice and efficiency. One definitely gets the impression that the author has, for his facts, relied on the legal periodical material, bar association proceedings, and books similar to his, rather than on a detailed survey of the cases and statutes which lay down the "law" of criminal appeals. This point is made, not to be hyper-critical, but to give the book its proper setting. Such a survey of the *minutiae* of criminal appeals would have been an intolerable task and would have resulted in an entirely different kind of (and much longer) book than the one under review.

One would really have to write fifty books, one for each system of courts, to give the detailed law of criminal appellate procedure for all the jurisdictions of continental United States. Such a study would be useful both for clarifying the law of each jurisdiction as to its own procedure, and for purposes of comparison of one's own local law with that prevailing elsewhere in the country. The present reviewer (as a teacher of Maryland Criminal Law) would be interested to know, for instance, exactly how many other states (few, he suspects) restrict the scope of appeal in criminal cases as narrowly as Maryland does by its rules which deny appellate review of the sufficiency of the evidence to support the verdict and which permit trial judges to refuse to grant instructions to criminal juries on the law.

That the author purposely refrained from attempting to "count noses" on all points raised is indicated by his omission to mention two Maryland peculiarities. Thus, in the course of a rather thorough chapter on the organization of state appellate courts he made specific mention that, in former times, certain appellate judges also had *nisi prius* duties, and that certain vestiges of this survive today, but failed to mention that which, to a Marylander, seems the rule, rather than the exception, that today, as for almost seventy-five years, the Court of Appeals of Maryland is principally composed (except for one member) of judges who are also trial judges, and that the seven former devote some of their time (and, for some, a considerable amount of it) to their trial functions.

The other omission concerns the point mentioned above, the Maryland rule (one of the *sequelae* of our Constitutional rule that criminal jurors are judges of the law as well as of the facts) completely denying appellate review of the sufficiency of the evidence to support a verdict of guilty. In his chapter on the scope of appeal the author goes at length into the extent to which it is desirable to allow appellate review of the evidence, without giving any inkling of approximately how many American jurisdictions adhere to the one or the other type of review. That Maryland is, without question, with the very strictest among American states in this regard (by completely denying any, or even the most limited review) would seem to make germane some mention of its rule, or at least of that of some other state having the same strict rule.

At this point in the author's treatment a limited attempt to delve into the actual statutory and case law rules of typical states would have been helpful for the better understanding of his readers, both lawyers and laymen, of what he advocates. Even aside from the question of classifying all the fifty jurisdictions, the author does not make quite clear the specific differences in the *types* of appellate review of the facts which variously prevail, ranging from absolutely no review (the Maryland rule); through power to review the sufficiency in law to "take the case to the jury" or to support the verdict (such as in the Maryland civil practice *via* the "demurrer prayer"); power to review the "weight of the evidence"; power to consider the trial court testimony *de novo* on appeal (as in the Maryland equity practice); all the way to power to do the last-named and also to have additional testimony taken on appeal (as in the modern English criminal appellate practice). At times the author leaves the reader in the dark as to just which of these he means when he speaks of or advocates "review of the facts."

The author is obviously enthusiastic about the simple, flexible, and extensive appellate procedure and powers of the modern English Court of Criminal Appeal. His first chapter consists of a history of criminal appeal in England, leading up to a description of the creation of the modern Court in 1907. Later separate chapters are also devoted to petty criminal appeals, Federal criminal appeals, and appeal under the American Law Institute's proposed Code of Criminal Procedure. There are separate chapters on the right to and function of criminal appeals,

and on the history and organization of state appellate courts. The treatment of the actual problems of criminal appeal ranges from Chapter Three through Chapter Eleven and the author breaks the discussion down into the topics of appeal by the state, the scope of appeal, review of the sentence, delay on appeal, the appeal papers, the oral argument, bail and stay of execution, appeal in forma pauperis, and technicality and prejudicial error.

This is a well written book. The author's style and mode of expression make the book hold the reader's attention longer than the subject matter would indicate. It is also a well documented book—within the limits, mentioned above, of the materials on which the survey apparently was based—and on this score there can be no complaint of locally relevant omissions, for both Chief Judge Bond's book "The Court of Appeals of Maryland—A History" and Judge Ulman's "A Judge Takes the Stand" are cited at appropriate places.

It is a locally relevant book in its own right. That, as the book demonstrates, an extremely liberal and extensive scope of review of criminal cases is permitted in England and in many American states, should be of interest to a Maryland reader when he considers the extremely limited—in fact almost entirely absent—power of review in Maryland. But it is not necessary to go so far afield in order to make odious comparisons—they may begin at home. In this respect a great discrepancy exists between the criminal and civil practices at law in Maryland.

Thus one may be hanged or given a long prison term without benefit either of appellate review of sufficiency of evidence or of accurate instructions from the trial court as to the law. In civil cases in Maryland, on the other hand, one is better protected against even such a relatively mild fate as an unjust verdict for a hundred dollars by being entitled to demand that the trial judge instruct the jury correctly on the law, and by being entitled to appellate review of the sufficiency of the evidence to take the case to the jury. The Maryland criminal appeal situation would seem to be aberrant, whether compared with the general trend, or with the local civil practice. That the local deviation from normal is based on the interpretation of a provision of the state constitution is a reason for its existence, though hardly one for its continuance. That there is no particular cry for reform may well indicate that tem-

porary efficiency in operation is mistakenly visualized as long-range justice.

On the various debatable points of extensive or limited scope of review, delay by appeal, bail pending appeal, who shall bear the expense, and reversals for technicality, the author gives the pros and cons in great detail, always in the vein of "there is a lot to be said for both sides." If anything, the author did not "take sides" often enough. Frequently was it suggested, rather naively, that the real answer lies in a better trained bar, prosecuting staff, and judiciary. This may be true, but, pending such achievement, it would seem appropriate to attempt to improve the machinery which the ordinary mortals currently have to operate.

In the last analysis, this is an excellent book, and one serving well the purpose of the series which it inaugurates, stated to be "the cause of improving the American administration of justice." The last part of the quoted phrase—"administration of justice"—presents a neatly balanced concept, for Mr. Orfield's book, with its dispassionate discussion of pros and cons on all the debatable points, indicates that efficiency of administration and achievement of substantial justice sometimes have to be balanced against each other.

This is particularly so in the Maryland scene, where a system of extremely limited review—potentially productive of injustice—apparently functions well, for there is lack of any current outcry against it. While the author delves into all the debatable aspects of criminal appeals, yet, for Maryland purposes, most of these problems are moot. Thus the problems of delay, bail, expense, and technical reversals are largely disposed of, and merged in the problem of scope of review, for they can hardly be troublesome unless there be a real opportunity to appeal. That last is the point which a reading of the book should raise in the minds of local readers.

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