REVIEWS AND NOTICES.

☞Publishers desiring reviews or notices of Books and Periodicals must send copies of the same to the Editor, care of THE CARSWELL COMPANY, LIMITED, 145 Adelaide Street West, Toronto, Canada.

A CRITIC OF THE LAW.*

The post war era has been a period of intense social criticism. Scarcely an established institution has escaped a questioning not only of its method, but also of its fundamental assumptions; and the older the institution, the more widespread the attack has generally been. Despite the current scepticism, however, the legal profession and the practice of law generally, at least within the British Commonwealth, have survived with very little alteration in essential procedure from that which was established centuries ago, and without even being the object of any considerable movement for reform. This may be due to the intrinsic worth of our inherited legal machinery—but on the other hand it may be due to the absence of self-criticism amongst members of the legal profession and to its peculiarly entrenched position in society. Mr. Mullins' book makes it difficult not to accept the latter explanation.

In Quest of Justice is an enquiry into the administration of justice in the present day working of the English law courts. The author spends no time in abstract definitions of justice; he is content to assume that it means the enforcement of the law and the uniform settlement of disputes with the minimum of expense and delay. From his own experience as a practising barrister, and from a wide study of the history of English law and its previous critics, he reveals the weaknesses in the existing administration of justice and suggests ways and means of overcoming them. He is far from being a radical; indeed he errs if anything on the side of caution, so great is his desire not to appear the young visionary. He ventures no suggestions that are not immediately practicable without much disturbance of the existing order; such changes as he advocates are changes "in the style of the original building." For example, after amassing compelling arguments to show the valueless expense of juries in civil cases, he does not, as might be expected, ask for their abolition, for he recognises that in the present state of English public opinion this would be "tilting at windmills"; instead he proposes to make the expense of actions before judges alone so much less

**In Quest of Justice.* By Claud Mullins. London: John Murray. 1931. 12s. net.

costly that civil juries will become obsolete through public preference for the simpler procedure.

It would be quite impossible to attempt, in the course of a mere review, an estimate of the wisdom of Mr. Mullins' specific remedies. In the belief that at the moment—and certainly for this country—it is more important to stimulate critical thinking than to reply to such criticism as exists, the easier task of outlining the main proposals of the book will be undertaken. One of the most suggestive of Mr. Mullins' ideas is this. Laws are made by parliament and declared by judges for the use of citizens. It is right that the private litigant should pay something to the courts for the work they do for him. But what if, as all too frequently happens, parliament has provided an ambiguous law so that none can discover what it means, or different courts and judges have interpreted the same law in different ways? Why should the litigant who was misled pay the entire cost of telling parliament what it meant to say but did not say, or of obtaining a final pronouncement from the highest court on a legal point about which the lower courts could not agree? In such cases the individual citizen is being mulcted in damages through extra costs because the state legal machinery has functioned badly; the state is not providing him with law as it should, but he is rather providing it for the state. Mr. Mullins is consequently inclined to agree with those who would make the community bear the cost of arguing a successful appeal. He also suggests ways in which the number of appeals can be reduced and their expense lessened. He thinks that one court of appeal is enough and that the House of Lords should abandon its appellate jurisdiction, as was intended by the original Judicature Act of 1873; and he would do away with argument by counsel on appeals unless both parties agreed to its retention. His objections to the cost and delays of unnecessary appeals apply all the more to a Dominion like Canada in which the unfortunate litigant may be carried through his provincial court of appeal, the Canadian Supreme Court and the Privy Council before his case is finally settled.

A number of lesser evils occupy Mr. Mullins' attention. Juries in civil matters, as has been intimated, ought to be made to die out by increasing the opportunities and advantages of doing without them. With the discouragement of the jury should go a revision of the existing laws of evidence, which were for the most part evolved as a consequence of having a group of laymen in the jury box who had to be informed of every item of fact necessary to build up the case. These rules are now so complicated and exacting that they

add greatly to the expense and length of trial without an equivalent gain in the production of truth. Mr. Mullins prefers the simplicity and informality of the German procedure, where the judge decides what witnesses shall be called and the trial is an inquiry into the truth rather than, as with us, a battle between parties. He thinks a lesson should be learned from the success of the Commercial Court of the High Court, where commercial cases of a certain sort are determined cheaply, quickly and justly despite a greatly simplified procedure; there seems no reason why the practice should not be greatly extended. He would overcome the expense consequent upon the uncertainty of the exact date of trials by spacing out the cases on a particular roll in such a way as to make postponement extremely unlikely. He would, of course, fuse the barrister and the solicitor into a single profession. And he would break the tradition of judicial terms, letting the courts sit with reasonable continuity. Justice is a public utility; why should the supply be cut off for three months of the year?

The "key remedy," however, and the most necessary reform, in his opinion, is the creation of a permanent authority to watch over the development of the law and to supplement the work of the judges in litigation. Here Mr. Mullins revives the idea put forward by John Stuart Mill in his "Representative Government," and supported also by the late Professor T. E. Holland. The judicial members of the House of Lords, freed from their present appeal work, might well perform this service. They could supervise the progressive codification of English case law; keep a watchful eye on the rules of procedure; and whenever doubtful points of law arose as a result of new cases they could settle them in advance of litigation by private parties. Thus law reform would become a continuous service performed by experts, and would not be left as at present to the spasmodic and highly unreliable activities of private interests or private reformers.

In Quest of Justice is a stimulating book, and though its author is concerned solely with the situation in England most of his criticisms and even his remedies have point for the Canadian reader. The essential problem of administering justice is the same in both countries. There is, moreover, entertainment as well as profit in the book, for Mr. Mullins enlivens his account with a variety of stories from odd corners of English legal history. Those who find his ideas worth following may be interested to know that he contributed a study of the problem of perjury to the Quarterly Review for April, 1931.

Montreal. F. R. Scott.

The Equity of Redemption.*

This book is the seventh in the series of Cambridge Studies in English Legal History. To state that it is second to none among its companion volumes is to pay no mean tribute to it, for in the list there are *The History of Conspiracy and Abuse of Legal Procedure* by Percy Henry Winfield, *Statutes and their Interpretation in the First Half of the Fourteenth Century* by Theodore F. T. Plucknett and *Interpretations of Legal History* by Roscoe Pound. This volume has an appeal both for the practitioner and the law teacher, and there is a two-fold enjoyment in store for the reader of the book. Besides the treatment of the nature and history of the equity of redemption, Harold Dexter Hazeltine, of the University of Cambridge, contributes a general preface of sixty-three pages in which he contrasts the Roman *fiducia cum creditore* and the English mortgage. He reaches the conclusion that, while there is an outward resemblance between the two, the English mortgage is not Roman, and although it displays the influence of Roman juristic thought, it represents, not alone in its basis—but also in much of its superstructure, ideas that are foreign to the types of securities known to the Romans.

Mr. Turner's monograph is not only a scholarly and clearly written contribution to the literature of the law of mortgages but it also throws new light upon the relationship of trustee and *cestui que trust.* The author handles the available case material with scientific impartiality. He has not been guilty of the fault, frequently found in doctoral theses and prize essays, of straining to support a certain theory or to reach some predestined conclusion. The first chapter, dealing with the common law conception of an "estate," may appear to some readers as foreign to a consideration of the nature of the equity of redemption and to others it may smell of the student's lamp, but surely it does lay the ground for the subsequent discussion of the changing attitude of the successive Chancellors towards the interest of the mortgagor. In the next three chapters we are told that the first known case of the Chancellor granting a decree for a reconveyance was in 1456, and that the first case of foreclosure occurred in 1629. Then we are led up to the case of *Thornborough* v. *Baker,* 1 Ch. Ca. 484, of 1676, in which Lord Nottingham decided that the interest of the mortgagee was personalty. The term "equity of redemption" first appeared in the report of a case which was decided in 1654. The growing content of the term is traced until

* By R. W. Turner. Cambridge: At the University Press: 1931. Pp. lxxii, 198.

it is given definitely, in 1738, its modern connotation by Lord Hardwicke to whom the ownership, and apparently the same estate as he had before the mortgage conveyance, remained in equity in the mortgagor.

Mr. Turner has dealt with the jurisprudential setting of the equity of redemption in the chapter on the equity of redemption and rights *in rem* and *in personam.* After reading his scholarly analysis, one must appreciate the truth of Dr. Hazeltine's observation (p. lix) that "in determining the nature of equitable rights, within the sphere of the law of property, it would seem that everything depends upon the definition of the terms 'right *in personam*' and 'right *in rem.*'" In a vigorous critique of what may be called the Maitland theory of the nature of equitable interests, the author concludes that the truth is that the mortgagor is owner of the land subject to the payment of the debt. As the classification of rights *in rem* and *in personam* has been recognized by the courts, a discussion of it must be something more than an "academical tourney with no real bearing upon the practice of the law." The decision of a judge upon, as, for example, a problem of priorities may well be dictated by his conception of the nature of equitable interests.

In the last chapter, he considers, *inter alia,* the theory of clogging the equity of redemption. It is to be regretted that he evaded any attempt to reconcile the *Kreglinger* case, [1914] A.C. 25, with *Northampton* v. *Salt,* [1892] A.C. 1, both decided by the House of Lords, by a complacent confession of the difficulty involved. Difficulty has not daunted the author in the other parts of the book.

SIDNEY SMITH.

Dalhousie Law School.

* * * *

THE LAW OF MASTER AND SERVANT.*

The extent and comparative lateness of the development of this highly important subject is indicated by the Preface to the first edition in which the author remarks that the profession has been long accustomed to refer to works of general application such as treatises on contracts, agency, etc. when seeking guidance on the subject of Master and Servant. It is safe to say that the time is now past when lawyers can content themselves with a similar method. Indeed one has but to peruse this excellent work to realize the wide scope of the subject and the necessity of a systematic and detailed treatise there-

*Smith's Law of Master and Servant, 8th edition by C. M. Knowles, LL.B. London: Sweet and Maxwell. Price 25*s.* net.

on. The competency of parties to enter into the contract of service, the requisites and interpretation thereof, the mutual rights and duties arising therefrom, the liability of Master and Servant, in crime and in tort, to third persons affected by acts of the servant in the course of his service, and numerous incidental topics, all receive adequate treatment. Smith on Master and Servant is too high in repute as an authoritative practitioner's text to require any eulogy or appraisal of merits at this late date. The present edition embodies over one hundred cases and statutes decided and enacted since the last edition in 1922. No significant omission has revealed itself to the reviewer. The section on covenants in Restraint of Trade and the chapter on Testamentary Provisions Relating to Servants appear to have been fully revised and accurately to embody recent pronouncements of the House of Lords on those subjects.

In short the present editor has succeeded admirably in preserving the utility and vitality of this standard text.

VINCENT C. MACDONALD.

Dalhousie Law School.

NOTICES BY THE EDITOR.

The Criminal, The Judge and The Public. By Franz Alexander and Hugo Staub. New York: The Macmillan Company, 1931. Price $2.50.

This is the joint production of a German psycho-analyst and a German lawyer, and is translated into English by an American medical man. The book will, therefore, lack intimacy of appeal to the Canadian Bar. However, it has been received with much approval by physicians and social workers in the United States, and is well worthy of attention by the legal profession everywhere, even if it be approached with bias against the present encroachment of psycho-analysis upon the doctrine of criminal responsibility in law. There is the inevitable element of disjointedness in method to be expected where two authors of different professions collaborate in a piece of scientific literature, and the translator is hard pressed with the job of putting the German jargon of psycho-analysis into its English equivalents.

* * * *

Annual Survey of English Law, 1930. This is the third issue of an annual that has won its way into the good opinion of the legal profession on both sides of the Atlantic. There is no substantial

departure in this issue from the method that marked its predecessors, but there is a new section consisting of reviews of books which the editors regard as intensifying or dimming, as the case may be, the 'gladsome light of Jurisprudence.' The practical lawyer will find the sections dealing with legislation, case law and literature in the fields of Contract and Tort of service to him.

CORRESPONDENCE.

THE EDITOR, CANADIAN BAR REVIEW.

SIR,—In the December issue of the CANADIAN BAR REVIEW is an article referring to the case of *Leitch* v. *Leydon*, [1931] A.C., 90, and in discussing the criticism made by me of the report of that case in a former issue of the REVIEW, the following statement is made:

"It must be pointed out that it is trite law that the Dominion Parliament in legislating in relation to criminal law has no jurisdiction to create new civil liability, a subject-matter committed exclusively to the provincial legislatures."

I am not aware of any such trite law as stated. On the contrary, there are many decisions holding that Dominion legislation in respect of any of the matters mentioned in Section 91 of the B.N.A. Act can and does affect civil rights, sometimes by taking away rights and sometimes by creating new rights. Many cases might be cited, but I will give only a few. In *G.T.R.* v. *Attorney-General*, [1907] A.C. 65, it was held that Dominion legislation rendering invalid contracts to relieve the Railway Companies from liability for accidents was valid, because it was in substance railway legislation. So in *Tennant's case*, [1894] A.C. 31, the Privy Council upheld Federal legislation giving Banks power to accept and hold warehouse receipts as collateral security for loans made to the holders thereof, because the Statute was in substance banking legislation. The books are full of cases in which Railway Companies have been held liable for damages for breach of Dominion statutory regulations. It would have been a short defence in these cases to say that Dominion legislation could not create civil rights, but no person has ever thought of putting forward that defence. See also *Clement's Canadian Constitution*, 3rd Edition, 818 to 820.

It has been held that Section 734 of the Criminal Code, providing that no action will lie for an assault after a conviction has been had for the offence and the accused has paid or suffered the penalty, is valid.

Bankruptcy legislation affects civil rights, in many respects taking away some civil rights and creating new civil rights, but that fact does not make the legislation invalid. In *Cushing* v. *Dupuy*, 5 A.C. 409, it was held that bankruptcy legislation which took away a right of appeal was valid, notwithstanding that it affected property and civil rights. The same thing could be said about many other features of the bankruptcy legislation which create new rights.

"Section 236 (3) of the Criminal Code, which provides that property obtained by a lottery is liable to be forfeited to any person who sues for the same by action, is an example of criminal legislation which creates a new civil right."