REVIEWS AND NOTICES

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Trade Union Law in Canada. By MARGARET MACKINTOSH, Department of Labour, Ottawa. Ottawa: The King's Printer. 1935. Pp. 114. (50c).

The author of this valuable pamphlet has done much to clarify the law relating to trade unions in Canada. Although she is not a member of the legal profession, she displays a comprehensive knowledge of her subject and of legal terminology and technique, which one rarely finds in a layman. Indeed, there are surprisingly few of those vague and often misleading generalizations which one is accustomed to find in books intended for a lay audience, and the only error in citation of cases appears on page 22, footnote 3, where the citation should be 16 O.R. 704.

The pamphlet summarizes the common law and the legislative enactments in Great Britain and in Canada on the subject, and deals chiefly with the status of trade unions in the courts. There is also a discussion of collective bargaining and of picketing. The author fails to deal with the law relating to strikes, and her summary of the legal principles upon which the action of conspiracy rests is too meagre to be of any assistance either to the lawyer or to the layman who wishes to ascertain the consequences of action taken in the course of a trade dispute. The author dismisses this matter by saying that "individual members of a trade union are, of course, liable for wrongs for which they are responsible. Only actions against all the members of a trade union as a society are considered here. It is unnecessary to discuss the nature of the acts that may render trade unions liable to civil proceedings under the common or civil law" (at p. 32). It is submitted, however, that the nature of the liability of a trade union and of its members is just as important as the formal manner in which trade unions may be sued. Indeed, it is difficult to understand this omission in view of the fact that Miss Mackintosh has devoted considerable space to one form of trade activity, namely, picketing. Perhaps one should not be too critical of this omission, for the decisions of the courts, and especially of the Canadian courts, are of little assistance in any analysis of this subject and the task of reconciling the various conflicting decisions is one which has deterred many lawyers.

The legal status of trade unions, that is to say, their capacity to sue and be sued, is dealt with at length in the Bulletin. The author indicates that Canadian courts are reluctant to permit trade union members to be sued in tort in a representative action. There is a good deal of authority for this view and the majority of English writers favour it. But there is something to be said on the other side. The rules of procedure relating to such actions in the various common law jurisdictions do not mention the point upon which most of the decisions seem to turn, namely, the existence of a common fund to which the plaintiff seeks recourse. On the other hand, if the real objection to such a form of action is that there is no common interest, that some members of the union may have defences not open to the

proposed representative defendants, it would seem that that is a matter of fact which may well be left to be determined in each case, and, if the plaintiff fails to establish the common interest of *all* the members, he should fail on that part of his case which rests on the representative character of the defendants. Indeed, if the principle of *Barrett* v. *Harris* (1921), 51 O.L.R. 484, is generally accepted, it would mean that the statutory rule as to representative actions has by judicial interpretation been made narrower than the equitable rule upon which it was modelled.

In discussing the doctrine of restraint of trade Miss Mackintosh has quoted the vital portions of *Chase* v. *Starr*, [1924] S.C.R. 495, and *Polakoff* v. *Winters Garment Co.* (1928), 62 O.L.R. 40, but she refrained from expressing her own views on the matter. The curious thing which must strike any person who reads the judgment of Raney J. in the *Polakoff Case* is that throughout his judgment he seemed inclined to accept the arguments adopted in *Chase* v. *Starr*. Nevertheless, in view of the decision in *Robins* v. *National Trust Co.*, [1927] A.C. 515, he felt he was bound by the rules as to restraint of trade laid down in *Russell* v. *Amalgamated Society of Carpenters and Joiners*, [1912] A.C. 421. It is submitted, however, that there is a way out of the difficulty. The *Robins Case* requires us to follow the House of Lords in interpretation of legal rules, but surely we are not bound by interpretations of public policy laid down by a court in cases which do not take into account conditions in Canada, especially since conditions in Great Britain may and often do differ in a marked degree from those in this country.

The section of the Bulletin dealing with collective bargaining was unfortunately written just before *The Industrial Standards Act* was passed in Ontario and we are therefore deprived of discussion on a matter which concerns every trade unionist and every employer in the Province. The author's introductory comments and the discussion of the common law on the subject are informative. In this connection, it is interesting to note the extent to which the judicial attitude agrees with that of industry as to the nature and binding effect of the collective agreements. A short note on "yellow dog" contracts, citing American decisions which hold such contracts to be invalid, is especially interesting in view of recent occurrences in Canada.

The section dealing with provincial legislation relating to trade unions is valuable not only for the information which it contains, but also because it discloses how backward the provincial legislatures are in dealing with the situation. It may be that until the last few decades, the provinces deferred to the Dominion in view of the existence of the federal *Trade Unions Act*. There is, however, little doubt at the present time that *The Trade Unions Act* is *ultra vires* of the Dominion, and in consequence most labour organizations in Canada are tolerated, but they have neither the legal status nor the protection accorded to them in Great Britain by *The Trade Union Act* of 1871, or *The Trade Disputes Act* of 1906. *The Professional Syndicates Act* of Quebec confers a quasi-corporate status on certain trade unions, but this may be a burden rather than a benefit since the civil law of conspiracy remains unaltered in that province. On the other hand, *The Trade Unions Act* of British Columbia, which was presumably enacted to deal with the liability of a trade union in an action for conspiracy, is defective as the case of *Schuberg* v. *Local International Alliance of Theatrical Stage Employees, &c.*, [1927] 2 D.L.R. 20, discloses.

The section on picketing is one of the most comprehensive in the Bulletin and should prove of great assistance to all persons interested in the subject. We should like to point out, however, that the author has failed to distinguish clearly between a criminal prosecution for picketing and a civil action to retrain picketing or to recover damages for loss ensuing from such activities. The criminal prosecution is based on section 501 of the *Criminal Code;* the civil action depends on the common law of tort, unless the plaintiff can establish a conspiracy to violate the provisions of sec. 501 of the *Criminal Code.* The *Criminal Code* in itself confers no right of action for damages, and the common law does not confer a right of action in every case in which a crime has been committed. It is submitted further, that the Canadian courts have failed to note this distinction, except to the extent to which they have refused an injunction to restrain a threatened injury where the plaintiff alleges only a violation of sec. 501 of the *Criminal Code,* as in *Robinson* v. *Adams* (1924), 56 O.L.R. 217, and *Stewart* v. *Baldassari* (1931), 37 O.W.N. 431. Finally, it is clear that the central issue in the interpretation of sec. 501 of the *Criminal Code* is as to the effect to be given the words "wrongfully and without lawful authority". This problem has not been eliminated by the amendment of 1934, and it seems desirable that the Canadian legislation should be brought into line with British legislation on the subject.

The author's conclusion gives much food for thought. The condition of trade union law in this country is "peculiar". It is primarily a field of law in which jurists would leave a great deal of discretion with the judge, and yet a large measure of certainty is essential, for, not only must labour be capable of ascertaining what it may legally do, but it should also be possible for the judge to explain clearly to a trade union litigant why a decision has gone against it. The words of Lord Hewart C.J. in *Rex* v. *Sussex Justices: ex parte McCarthy* (1924), 93 L.J.K.B. at p. 131, apply with particular force to this field of law. "There is no doubt that it is not merely of some importance, but of fundamental importance, that justice should not only be done, but manifestly and undoubtedly seen to be done." However, before this admonition will apply to trade union litigation much research must be undertaken. We are indeed fortunate in that the beginning has been made by a student versed in the intricate economic and social problems involved as well as in the relevant legal principles.

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Daly's Canadian Criminal Procedure and Practice Before Magistrates. Third edition by A. E. POPPLE, LL.B. 1936. Toronto: The Carswell Company. Pp. xlviii, 879. ($10.50)

The third edition of Daly's Canadian Criminal Procedure is not a text-book in the ordinary sense. Indeed it is not ordinary in any sense. It is a book prepared to be used, rather than read, and the editor and the publishers have succeeded in presenting an amazing amount of information in a manner that cannot fail to appeal to those persons who have to discover

—and usually discover quickly—how to weave their way through the most complicated procedure known to our law.

The book can be divided into three parts. The main part, or text, covers 548 pages, and contains chapters on all forms of procedure from laying the information and arrest, to appeals. In addition there are chapters on Habeas Corpus, certiorari and mandamus, on prosecutions under various statutes, on actions against justices, constables, etc. Every effort has been made by the use of heavy leaded "boxes" to indicate at a glance the forms to be used, and the device of listing problems and individual points under alphabetical headings within each chapter should help the practitioner to snatch his law "on the run". Thus, for example, in the chapter on trials by jury, indictments, etc., under "Counts in the Indictment" we get "Alternative Counts", "Dates", "Defective", "Describing Offences" and on through "Unknown Owner" to "Wrong Act, Statute, etc." This plan is followed wherever possible in the text. Other aids are condensed tabulations such as the double page table of situations in which a magistrate has absolute jurisdiction and consent jurisdiction in summary trials (pp. 280, 281).

The second part of the book, of about 165 pages, gives a most complete alphabetical list of crimes and offences with indications as to the procedure by which they can be disposed of, whether by indictment, summary trial, summary conviction, etc., the court having jurisdiction and the penalty attached. In addition this table contains information regarding the possibility of arrest without warrant, whether there is a form of charge in the forms given in the book, what statute and section governs the offence and whether a fiat is necessary before prosecution. As a model of a maximum of information (often extremely difficult to find) in the shortest space possible it is unequalled.

The next part contains over three hundred forms of informations and charges on specific crimes. This is followed by the forms from the criminal code, while the index to the whole takes about one hundred pages and is most complete.

While the foregoing shows the care which has been taken to render service to the reader, there has been a certain amount of duplication which is not particularly desirable. For example page 87 reproduces three or four paragraphs on search after arrest, which have already been given at page 75. This is probably a mere clerical error. The same cannot be said, however, of finding the evidence of children dealt with at pages 129, 335, 494 and 531. Surely some scheme could be devised whereby a complete discussion could be found at one place. Other instances of the same thing could be given.

In certain places the reviewer believes that statements of principles involved, rather than cataloguing hundreds of cases without stating what they are about, might be of more assistance to counsel. For instance, in the chapter on appeals there are lists of cases under the general head of a wrong decision on a question of law. One of the sub-heads is "Intent". Nothing more is said, but a dozen cases are cited. This does not seem helpful. Similarly, if the alphabetical system requires "res gestae" to be listed in the chapter on Evidence, it is a little naive to find the following sole comment: "This means 'part of the thing itself'. See *Phipson* etc., etc." Similarly, it seems a little dangerous to cite *Maxwell* v. *Director of Public Prosecutions*

(1935), 24 Cr. App. Rep. 152 for the proposition that you can not cross-examine an accused as to a previous acquittal. This may be the law in Canada—in any event it should be—but there are certain differences between the English and Canadian Statutes and the cases of *Rex* v. *Mulvihill* (1914), 22 Can. Cr. Cas. 354, and *Rex* v. *Dalton* (1935), 9 M.P.R. 451, are *contra*. Neither of these cases are cited at page 507 where the *Maxwell Case* is given.

Despite a few criticisms of this nature the new edition of Daly should receive a warm welcome as an efficient tool in the lawyer's working library.

C. A. W.

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Administration of Workmen's Compensation. By WALTER F. DODD. New York: The Commonwealth Fund. 1936. Pp. xviii, 845. ($4.50)

This volume is a very extensive and painstaking review of the subject of workmen's compensation as affecting various states of the Union, with some references to the law as administered in England.

Its interest to Canadian readers is very much limited by reason of the fact that there is no reference to the compensation laws and administrative practices of the various Canadian Provinces, whose system and administrative practice is largely founded upon the Ontario system. This omission is hard to understand, as the United States Department of Labor thought it worthwhile to issue an entire bulletin on the Ontario procedure in settlement of workmen's compensation claims, and the Ontario system has been considered somewhat of a model for other compensation jurisdictions, and the compulsory state system of Ohio is very similar to our Ontario system.

Mr. Dodd opens his book with a history of the workman's condition at common law in 1910 where the workman injured in the course of his employment under the general principles of common law was faced with three principal defences to any action for recovery of damages, viz.: The fellow-servant doctrine, the doctrine of assumption of risk of the employment and contributory negligence, and with the settlement of claims largely in the hands of the insurance companies. Under these conditions the workman's chances of recovery were limited. This condition was practically the same both in England and the United States.

These conditions finally resulted in England in the passing of the Workmen's Compensation Act of 1897 based upon two principles. First, that the workman is entitled to a moderate reasonable compensation for all industrial accidents. Second, that such compensation should be a part of the expense of protection chargeable upon industry.

Agitation was carried on in the United States for several years and commissions appointed by various States before relief was given the workman. The finding of the New York commission of 1910 is taken as typical of the findings of these various commissions. Four main objections were reported to the system of employer's liability as it had existed. Firstly: insufficient compensation, settlements made by insurance companies were most inadequate, and a large percentage of cases not compensated at all. Secondly: wastefulness of the system which was costly to the employers and of small benefit to the victims of industrial accidents. Thirdly: delay

in bringing actions to trial so that it took from six months to six years for the matter to be fought out to the Courts of ultimate resort, thus leading to small settlements owing to the necessity of the workman who required immediate relief and was unable to pay the expense of litigation carried on from court to court. Fourthly: the antagonism that the system bred between employer and employee.

As a result of these commissions, compensation laws were enacted in different States commencing in the year 1910 and continuing to the present. It might have been noted that the first Canadian Act, that of Ontario, was passed in 1914. The constitutionality of the first Acts was brought in question and it was not until 1917 that the United States Supreme Court passed on the constitutionality of an entire Compensation Act, holding the law was a valid exercise of the State's power and from the time of this decision on, both compulsory and elective types of statutes were passed, the majority being elective.

The principle governing the various Acts securing workmen's compensation for injuries arising out of and in the course of their employment was liability without fault of employer, and while the workman lost his chance of securing large damages by action, he was compensated for this by the promptness and certainty of payment.

Three questions fixed the grant of compensation. First: did the injury arise out of or in the course of the employment. Secondly: what is the character or nature of the injury. And, Thirdly: what compensation should be paid. While the principle was the same, many variations existed in different States as to injuries compensated, benefits awarded and occupations covered. The law governing these matters in the different States is given.

Discussion also follows as to the advantages of administration under the courts as in England and in some of the States, or administration by a committee or commissioner dealing solely with compensation matters. Investigation of the matter in England where the administration of the Act was entirely in the hands of the court was had by a departmental committee in 1920 and it was found by this committee that agreements for a large proportion of industrial accidents were never presented to the court for registration as provided in the Act and if they had been the courts could not possibly have dealt with them. That the administration in the law courts caused delay and considerable expense to the parties. That there was excessive costs in administration of the Act through the necessity or supposed necessity of employment of solicitors and, if the case was contested, a very high cost for medical testimony, and the county judges reported that so long as they were going to have counsel, solicitors and medical witnesses, they did not see how costs could be reduced. There was also considerable delay and lack of uniformity in the decisions of the county courts and the committee recommended the appointment of a commissioner but this suggestion has not been carried out in England. In the United States, after trial of the Court System it was indicted for delay, cost, unfitness of courts to settle compensation claims, lack of uniformity of decision and the workman's fear of being discharged if court proceedings were instituted, with the result that in the United States, there are only six of the States in which compensation Acts are now administered by the courts and they are of very minor importance industrially. So that it

would appear that the administration of the Act by a commission as opposed to administration by the courts has turned out to be quite preferable.

Mr. Dodd proceeds to consider the question of hearing in contested cases, the status of lawyer and expert witness, and provisions for judicial review or appeal as exemplified in the various States.

In most compensation jurisdictions, medical aid is furnished as part of the benefits to which the workman is entitled. Mr. Dodd has devoted considerable space to this question as dealt with in different jurisdictions, touching on the methods of providing medical aid and its cost, and the dangers of its becoming commercialized, and states that the ideal solution of all the medical problems in compensation would give protection to the legitimate interests of the three parties most directly concerned, namely the employee, the insurer and the doctor. The employee should be guaranteed adequate and proper medical aid during the period of disability, and should be given some voice in choosing the doctor who treats him, so that he may feel confidence in the physicians and so that the relationship between them be not purely impersonal, and the insurer should be protected against the danger of padded bills and excessive charges by the doctors rendering treatment. Compensation practice should be open to all competent physicians qualified to give aid, and they should not have to resort to fee-splitting in order to secure cases of industrial injury nor should he have a primary pecuniary interest in whether the compensation is granted or denied. This solution is practically the course adopted in most of our Canadian jurisdictions where both the employer and the workman are supposed to concur in the appointment of the doctor. Any reputable doctor has a right to treat compensation cases if chosen in this way, and the medical bills are moderated by an officer of the Board, the whole control being left with the Board.

The author then deals with a very important feature and that is the security for payment of the compensation. Before the Acts were passed, the payment of any verdict recovered was dependent upon the financial ability of the employer alone. But under the compensation Acts, outside of some of the larger employers who are justified in being accepted as self insurers, the Government or State Board assesses the employers under the Act and assumes the responsibility for payment of the claims, where compulsory State insurance is in force. Under other jurisdictions, this responsibility is largely carried by insurance companies whose financial responsibility has to be satisfactory to the Boards. In these ways, the payment of awards made is either rendered secure or at least greatly improved as compared with the condition before such Acts were passed.

Mr. Dodd further discusses the measure of compensation, the computation of wages, the benefits awarded in various jurisdictions, which of course vary. One important principle observed in all jurisdictions however, is that the total benefits awarded should not equal the total cost as this might destroy the employees desire to return to work and encourage malingering and fraudulent claims. On the other hand, there should be an indemnity to the workman for the disability suffered. The varying conditions in the different States relating to these matters and to the desirability of combining accident prevention work and the encouragement of good accident experience of the employers by merit rating or bad experience by demerit rating, are dealt with. Also the question of widening the coverage given by workmen's compensation Acts is fully discussed, the tendency

being, in most jurisdictions, towards the increase of the coverage and also increase of benefits awarded. The desirability of extension of the Act to farming, domestic service and smaller industries now excluded is referred to. The extension of the Acts to cover a greater number of industrial diseases is receiving a great deal of attention everywhere, just now silicosis being most in the public eye in view of the number of actions for large amounts being entered against employers in States where no provision is made for including this disease under compensation. While in most jurisdictions there is a definite list or schedule of industrial diseases for which compensation shall be paid, a few States cover all industrial diseases which impair the working power of the workman engaged.

In comparing the costs to the employer and industry of the old Employer's Liability Acts and the Compensation Acts, the statistics given show that the total cost of workmen's compensation under a properly administered law is greater than the cost occasioned to the employer by industrial injuries before the adoption of workmen's compensation; that so far as lesser injuries are concerned they were substantially unenforceable if resisted by employers under the old law but now medical services and compensation for the lesser injuries are freely given; and that this total cost is steadily increasing with the liberalization of compensation benefits and the increase in medical costs. This cost although levied in the first place on employers, is supposed to be passed on to the consumer and to be paid by him as part of the costs of the services or goods purchased.

The author notes the various administrative difficulties and the necessity of proper personnel of the commissioners and officers who have to deal with this important question and the necessity for the continuity of service and non-political administration by a skilled and permanent personnel.

Mr. Dodd's book is the result of a most comprehensive study of compensation law and administration in all the various States and the law and practice in England and should be a most useful work for anyone desiring to make a comparative study of the compensation law as in force in different States, but so far as the ordinary Canadian legal practitioner is concerned there is not much of interest because of the fact that few general conclusions are drawn, and its usefulness is further limited by lack of reference to the Acts passed by the different Provinces of Canada or the problems and results of administration in Canada.

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Williams on Vendor and Purchaser. Fourth edition by T. CYPRIAN WILLIAMS and JOHN M. LIGHTWOOD. London: Sweet and Maxwell, Toronto: The Carswell Company. 1936. 2 Vols. Pp. ccviii, 744; 745-1446. ($29.50)

Since the publication of the third edition of Williams on Vendor and Purchaser in 1922 and 1923, English real property law was undergone fundamental changes at the hands of Parliament, beginning with the Property Acts of 1925 (followed by amendments in 1926 and 1929) by The Housing Acts of 1930 and 1935, and by the Law Reform (Married Women and Tortfeasors) Act, 1935. This legislative activity and consequent

judicial interpretation have necessitated the complete re-writing of many chapters and it is not to be wondered that the author from 1930 until his lamented death in 1932, and Mr. Lightwood unaided since that time, have been engaged in the task of bringing this valuable work up to date.

The author in the preface to the first edition stated that "this book is intended for the use of those engaged in the practice of conveyancing, whether as counsel or solicitors." For this reason, perhaps, through the various editions, he has assumed that the reader is acquainted with the elements of real property law and has omitted in the present edition any general description of the new land law. However, as the recent English property legislation has not been and is unlikely to be adopted in this country, Canadian lawyers will not find this edition of Williams as useful as the third edition, which was published prior to 1925.

The present edition will maintain, if not enhance, the reputation this book already enjoys among conveyancers for its thorough and practical treatment of the subject. It is, of course, impossible in a work of this size not to find points upon which one takes exception to the views put forward by the author. One cannot help regretting that the subjective rule on the formation of contracts is adopted in place of the more logical objective rule. The author in defending his conclusion speaks of "This rule of pure law (so pure that it rarely emerges from the region of abstract theory into concrete shape) . . .," and adds "This precept of perfection is almost always obscured by the operation of the qualifying law of estoppel by outward manifestation of consent" (p. 748). Surely such a "precept of perfection" might well be abandoned in favour of the more workable objective rule which at least has the merit of not requiring the assistance of the vague law of estoppel to make it acceptable. The reviewer also takes exception to the statement on p. 775, that before the court can rectify a contract on the ground of mistake "in the first place there must be an antecedent contract; no inconclusive negotiation or honourable understanding void at law is sufficient." This requirement would debar any party who had contracted by written agreement with a municipal corporation or other body, which could bind itself only by seal, from any relief by rectification where a mutual mistake has occurred in drawing the written agreement on the ground that there was no antecedent contract to which the written agreement could be rectified. It is submitted that the concurrent intention of the parties at the moment of the execution of the written agreement sought to be rectified is all that is required to give the court jurisdiction, as was decided in the recent case of *Shipley U.D.C.* v. *Bradford Corp.*, [1936] Ch. 375, and not an antecedent binding contract.

The size of this book and the extensive field covered by it has not prevented the author and Mr. Lightwood from stating the law clearly in a most readable form. The practitioner will find not only all the relevant authorities but also useful warnings against the pitfalls in the practice of conveyancing which await the unwary. The next time the reader poises with his pencil over a draft deed or mortgage sent to him for approval by another solicitor, he should recall that "It is a grave breach of conveyancing etiquette for one practitioner to amend another's draft in any point on which his client's interests would not really be affected if the instrument were to stand as originally drawn" (p. 707).

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BOOKS RECEIVED

Trusts on the Continent of Europe. By F. WEISER, DR. JUR. London: Sweet and Maxwell. 1936. Pp. viii, 103. (7s.6d.)

Roman Law and Common Law. By W. W. BUCKLAND and ARNOLD D. MCNAIR. Cambridge: At the University Press. Toronto: The Macmillan Company of Canada. Pp. xviii, 353. ($4.50)

Trial of Robert Wood (The Camden Town Case). Notable British Trial Series. Edited by BASIL HOGARTH. Toronto: Canada Law Book Company. 1936. Pp. vi, 268. ($3.50)

Apportionment in Relation to Trust Accounts. By ALAN F. CHICK. Second edition. London and Toronto: Sir Isaac Pitman and Sons. 1936. Pp. xxii, 236. ($3.00)

The Book of English Law. (As at the end of the year 1935). By EDWARD JENKS, D.C.L. Fourth, revised, edition. London: John Murray, 1936. Pp. xix, 460. (12 s.)

Handbook on the Formation, Management and Winding up of Joint Stock Companies. By the late SIR FRANCIS GORE-BROWNE. Thirty-ninth edition by HIS HONOUR JUDGE HAYDON and STANLEY BORRIE. London: Jordan and Sons. 1936. Pp. c, 916. (20 s.)