REVIEWS AND NOTICES

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Criminal Appeals in America. By LESTER B. ORFIELD, with introduction by ROSCOE POUND. (Published under the auspices of The National Conference of Judicial Councils.) Boston: Little, Brown and Company. 1939. Pp. 321. ($5.00)

Canadians are very prone to regard the administration of justice in the United States from a rather superior attitude. There is no doubt that from many standpoints, procedure in this country, following in the main the English system, has outstripped some of the more primitive types of procedure which are to be found in many American states in much the same form as they existed at the time when the American States decided to sever their connection with the British Empire. There is, however, a widespread feeling in the United States that while, in many respects, American substantive law has been developed beyond the insular bounds of the English common law, the procedure and organization of courts in the United States is in crying need of overhaul. Differing from this country the better law schools in the United States have established full time chairs dealing with procedure, and it may be a surprise to many Canadians to discover that the history and background of English procedure, both civil and criminal, is probably better known and better developed in law teaching in many law schools than it is in this countfy.

The present volume by Professor Orfield is an attempt to examine the problem of criminal appeals from every conceivable aspect with a view to improvement of American administration of criminal justice. The history of criminal appeals in England naturally forms the introduction to this volume and the system there adopted is, throughout the book, held forth as an example of what might be done in the United States. It is interesting to observe that the problems which the United States is now facing are identical with those which have arisen in England, and the discussion by the author cannot fail to be of material assistance to those concerned in improving judicial administration since it should prevent that common error of tampering with procedure without a full appreciation of the dangers and pitfalls involved in the fundamental problems.

In view of the present movement in Ontario regarding procedural reform on the civil side, and particularly the use of the jury in civil actions, it is of more than passing interest to note that one of the main problems that has perturbed every jurisdiction dealing with criminal appeals is the extent to which a court of appeal should override the finding of a jury. In the introduction of Professor Pound he states: "Excessive powers of juries are partly a remnant of pioneer conditions in which there was something like contempt for scientific methods and technical skill, and over faith in versatility — in the ability of any man to do anything." Professor Orfield points out in various passages that in England, as well

as in the United States, the whole history of jury trials has involved efforts at controlling verdicts of juries. From observations in the press, as well as from observations of members of the legal profession, one might think that any effort to curtail jury trials in civil actions was striking at the foundations of our civilization. Why this should be so in civil actions when we have been quite accustomed to complete review and reversal of the actions of juries in criminal trials remains a mystery.

Two points of particular interest to this country appear from a reading of the present volume, namely the right of a court of appeal to direct a new trial and secondly the right of the Crown to appeal from an acquittal. In Canada the Crown may, and frequently does, appeal from acquittals; further, on a criminal appeal the court has power to direct a new trial. In England neither procedure is open — the idea of "double jeopardy" apparently being so strong as to dictate that on an appeal by an accused he should be discharged if the appeal is allowed, and the idea of an appeal by the Crown is apparently believed to be repugnant to the same doctrine. In view of the talk of which we hear so much these days regarding despotic powers of executive officials, it is interesting to quote the conclusions of Professor Orfield in considering the possibility of appeals by the State. He says: "To give the state the right to appeal from a verdict of not guilty is to take a step in the direction of despotism. Trial by jury is one method of obtaining popular and local participation in the administration of the criminal law. If laws out of harmony with public opinion have been passed, it gives an opportunity for such public opinion to assert itself. It is true that a defendant may appeal from a verdict of guilty. But since he himself is appealing he cannot object that the jury is being ignored; and it is possible that jury trial was developed more to protect the rights of individuals than to safeguard society at large."

We notice that The National Conference of Judicial Councils is presenting two further volumes, both by Roscoe Pound, one on "The Organization of Courts", the other on "Appellate Procedure in Civil Cases." We look forward to reading these volumes, perhaps with even more interest than the present, since, while our criminal procedure in the main seems to have been worked out on a satisfactory basis, our civil procedure is unduly complicated and expensive and, in the reviewer's opinion at any rate, is in danger of remaining so, due largely to antagonism of the legal profession itself. There is nothing new in such antagonism since the legal profession was one of the strongest opponents to the sweeping changes made in English procedure by the Judicature Act. What is needed in this country just as much as in the United States is a dispassionate and objective survey of the problems involved, and the objects to be sought by a simplified procedure. Until we have studies made of procedure in the exhaustive and scholarly manner as is now being done in the United States, it seems to the writer that we are in danger either of making ill-advised changes without regard to past experiences or, what is more likely, we will change nothing, being overawed by the worst characteristic which the legal profession has exhibited throughout the ages, fear of any change and undue reverence for the existing state of things, simply because it now exists.

Professor Orfield's book deserves serious attention because it canvasses things which we are prone to take for granted, such as the function of appeals, the scope of appeals, the extent to which facts may be or should

be gone into on appeals and many kindred topics. Professor Pound states in his introduction: "There need be no step in the dark in view of Professor Orfield's full presentation of what has been said and done and is to be said on every detail of the subject."

C.A.W.

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Holmested and Langton on the Judicature Act of Ontario with Rules of Practice and Procedure. Fifth Edition. Editor D. A. MACRAE. Toronto: The Carswell Company. 1940. Pp. cclxxi, 1961. ($25.00)

The Judicature Act, which effected a complete revolution in the procedure in civil proceedings in Ontario, came into operation in 1881 beyond the memory of all but a few members of the profession now living, but for many years thereafter repercussions of that upheaval were still evident in our practice.

Appended to the Act was a Schedule of Rules taken from the English Act of 1873; but as these were quite inadequate to cover the ground, it was enacted that where no other provision had been made, the existing procedure and practice was to remain in force. This naturally enough led to confusion, for it was often difficult to say which of the Common Law Rules and Chancery Orders were still in force.

In 1887, to overcome this confusion, the judges were called upon to revise, classify and consolidate the Rules. After several false starts, the Consolidated Rules of 1888 came into force. Many of these Rules, however, still contained references to the practice existing prior to the Judicature Act.

In 1895 it was decided to make another attempt, and members of the Bar were called in to assist. The Commissioners appointed to wrestle with the problem included, among others, Chancellor J. A. Boyd, Chief Justice W. R. Meredith, N. W. Hoyles, Q.C., Principal of the Law School, and the following practising lawyers:—Charles Moss, Q.C., John Hoskin, Q.C., G. H. Watson, Q.C., George A. Shepley, Q.C., Charles H. Ritchie, Q.C., and Thomas Langton, Q.C. But their Consolidation, brought into force in 1897, still betrayed the patchwork origin of the Rules.

In 1913 a great stride was made. Under instructions of the Hon. J. P. Whitney (acting Attorney-General), the Hon. Mr. Justice Middleton, the most competent authority in Ontario, set to work to simplify the practice and formulate a complete code. His Consolidation, brought into force during the same year, still governs the practice in our Courts, for the Consolidation of 1928 — the work of the Judges of the Supreme Court — brought few changes.

The history of the work of annotation and explanation of the Judicature Act and the new procedure is less lengthy. This annotation and explanation was originally contained in various books published by James Maclennan (1881), Thomas Langton (1884) and G. S. Holmested (1881, 1884 and 1885), but after 1890 its history is almost entirely that of a single book. In that year G. S. Holmested and Thomas Langton collaborated in the production of the first edition of "The Ontario Judicature Act and

Rules of Practice" familiarly known to us as "Holmested and Langton" Successive editions were published in 1898, 1905 and 1915, and now, after the book's half century of existence as the standard work on the subject, the fifth edition — long and eagerly awaited by the profession — makes its welcome appearance.

"Makes its appearance" is, however, hardly the phrase to describe the publication of this brobdingnagian volume, for it gives no inkling of the vast amount of labour which preceded its appearance. Several lawyers in succession undertook the work and revision in the past, but it is only since Dr. MacRae took charge seven years ago that the herculean work was successfully tackled and brought to completion. The words of G. S. Holmested in the Preface to the original edition are in point: "No one who has not undertaken a work of like magnitude will be able to fully appreciate the immense amount of hard and persistent labour which it involved."

The work of Dr. MacRae and his associate editors has been admirably done. The heavy type used for the sections of the Judicature Act, for the names of cases and for the headings of paragraphs is conducive to clearness and facilitates quick reference. To each section of the Act and each rule is appended its individual history, carried back where necessary to the days before the Act, information in many instances extremely helpful to a correct understanding of its provisions. The matter of the book has not only been revised and brought up to date — it has in many instances been entirely recast and rewritten. 15016 cases are cited — there are 461 pages of index and citations — 1709 pages deal with the Act, the Consolidated Rules and the Rules respecting the conduct of Matrimonial Causes— the pages total 2233. The enormous volume defies review in the ordinary way.

The only suggestion — an obvious one — is that there might have been made available a number of copies printed upon thin paper: the same paper which enables the publishers of the English "Supreme Court Practice" to compress into one comparatively light volume some 3915 pages.

Dr. MacRae has long been recognized as one of the best of our law lecturers. His article on Evidence in the Canadian Encyclopedic Digest is a masterpiece. He helped to edit that Digest and also the Canadian Abridgment. But of all his labours — including others unmentioned — the one which will earn for him the largest meed of gratitude of Bench and Bar throughout Ontario is this monumental book.

H. W. A. FOSTER.

Toronto.

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Maclaren's Bills, Notes and Cheques. Sixth edition by FREDERICK READ. Toronto: The Carswell Company, Limited. 1940. Pp. lviii, 612. ($8.00)

Professor Read has performed a useful task in bringing up to date the late Mr. Justice Maclaren's standard Canadian work on bills, notes and cheques, the most recent edition of which appeared twenty-four years ago. The sections of the *Bills of Exchange Act*, R.S.C. 1927, cap. 16, are

completely annotated. The original manner of presentation of the subject-matter has been retained as well as the convenient schedule of cases overruled, questioned or distinguished, in addition of course to augmented annotations and subsequent cases. To the cases cited in the fifth edition have been added some eight hundred, of which half, equally divided, are Ontario and Quebec decisions. These include cases published in the reports up to October, 1939.

There is a note regarding Revenue Stamps, and in view of the war in progress at the time of preparation there has been included a memorandum regarding Regulations respecting Trading with the Enemy. A concordance table shows where the various sections of the *Bills of Exchange Act, 1890*, and of amending Acts, are to be found in R.S.C. 1906, cap. 119 and in the present Act.

The text of the *Negotiable Instruments Law*, enacted by the State of New York in 1897, is published, together with a list of the States and territories which have adopted it. While the law as to bills and notes in many States differs in some respects from that of England and Canada and also from that in other States, an examination of the New York Act indicates that it coincides substantially with the English and Canadian Acts. This should be borne in mind in considering American cases.

The book should be useful to all practitioners as there is probably not a solicitor who is not at some time consulted on the subjects considered. It will also be welcomed by banks and financial houses generally.

It is not necessary to comment on the appearance of the book, the reputation of the publishers for good work in this regard being too well known.

J. RAGNAR JOHNSON.

Toronto.