BOOK REVIEWS

How to Conduct a Criminal Case (3d ed.). By William Harman Black. Prentice-Hall, Inc., New York, 1935. Pp. lxxvi, 483. Price: $6.50.

This work describes in chronological form the various legal stages through which a criminal case may pass under New York criminal procedure from the commission of the crime to the execution of the sentence or the acquittal of the defendant. The author is Honorable William Harman Black, Justice of the Supreme Court of the State of New York, former Acting District Attorney of New York City.

The author makes no pretense to having written a scholarly treatise. He expresses the hope that his experience as Acting District Attorney, and his thirteen years experience in the supreme court have enabled him to write a "practical book." This aim was fully realized in the favorable reviews and the response the work received in its earlier editions. The present edition includes references and is adapted to legislative changes made in the criminal law in New York since the last edition in 1929. It also contains citations to and quotations from recent leading federal and New York decisions.

As each step in the progress of a criminal case is described, appropriate forms are inserted. Very little use is made of footnotes; the citations are in the body of the text. Occasionally, where a quotation follows a citation of cases, it is difficult to determine the case from which the quotation was taken. One feature of the book is a large graphic chart which is helpful in obtaining perspective of the various contingencies which may arise in the course of a criminal proceeding. The work is well indexed, albeit the indices are all in the front, for subject materials, forms and citations to statutes and cases.

This is the sort of book a person in the novitiate stages of criminal practice might well dream of having. It tells him what to do in simple language, and gives him skeleton forms which he can animate with the living facts of his case. It should also be very helpful to the law student as collateral reading in his course in criminal procedure. It must not be taken, however, that the book is only for the tyro; the procedure-wise practitioner would find it profitable to read it for perspective on the three hundred contingencies that may arise in a criminal case in New York. It will be of interest primarily to New York lawyers and students of New York criminal procedure.

Albert J. Harno.†

Legislative Loss Distribution in Negligence Actions. By Charles O. Gregory. University of Chicago Press, Chicago, 1936. Pp. xiii, 200. Price: $2.00.

There are two distinct proposals in this little book. One is for contribution between tortfeasors, and the other is for a system of comparative negligence recovery. The proposal for contribution is not the traditional one by separate action, but defendants are permitted to file and litigate claims in the plaintiff's action. The author stresses the administrative aspect of loss distribution, and makes a critical analysis of the attempts made at common law. He examines all the important statutory provisions and the decisions interpreting them; he gives the reader an abundance of illustrative material, discussing the weaknesses of the

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various methods that have been used, and proposing a contribution statute which seems to avoid all the complications that may arise. The technique is admirable and the exposition is exemplary for thoroughness and clarity. Any judge who might be called upon to apply the suggested statute, although it is as clear as it seems possible to make it, would frequently find the exposition which accompanies the statute very helpful. The proposal with respect to contribution is that each co-tortfeasor is liable equally with each other.

The portion of the book dealing with comparative negligence, though much more complicated, is equally well done, and the same excellent technique is pursued. Each state statute providing for recovery on a comparative negligence basis is examined. The author thinks the Ontario statute is the best existing legislation with respect to comparative negligence, and draws on it considerably, but even it, he points out, is defective. His comparative negligence system goes to the limit and provides for a finding by a jury of the percentage of fault each co-tortfeasor is guilty of with respect to the whole. Thus the jury would be authorized to find a plaintiff guilty of 20 per cent., defendant A of 30 per cent., and defendant B of 50 per cent., where the injury resulted from their concurrent negligence. Although each co-tortfeasor suffers a different damage from that inflicted upon his fellows and contributes an amount of damage different as to each injured person and different from the amount contributed by each of the others and the fault proportion of each is different, the author works out the result with clarity and conclusiveness. Verily his system and his handling of it is an intellectual achievement of high order.

It is to be noted that this comparative negligence scheme not only does away with the defense of contributory negligence as a complete defense, and with the doctrine of last clear chance, but it also provides for contribution between the co-tortfeasors. This is to be worked out in a single action. To this feature of the plan, while there are many advantages, looked at from an ideal point of view, many will object because of the improper burden it throws upon the unwilling defendants. A partial answer to this is that some possible contribution under this plan is better than the none he will have without it.

Undoubtedly the common law is defective in allowing a plaintiff to throw all the loss on one of several co-tortfeasors and in denying this one a remedy over against the others. So, too, the rule which denies a plaintiff who is only slightly negligent recovery from a grossly negligent tortfeasor seems harsh. But does the harshness of these rules argue a comparative negligence loss distribution worked out on the basis of a percentage of liability in accordance with a determined percentage of fault? Two men collide on the street and the car of one is knocked against a pedestrian, and all three suffer damages. Are each or any of them guilty of fault and in what proportion? Is it not impossible for any fact determining body short of omniscience to state the percentage of fault that should be ascribed to each? Indeed, is there any such quantitative relation with respect to fault, existing in the transaction? There may be differences in kinds of negligence involved which might be of greater significance than this quantitative measurement and which might be capable of being ascertained. The law has not yet exhausted the possibilities along this line. And may it not be true that what is said in respect to the illustration just given is true in much the larger number of concurrent negligence cases? Can any jury, or judge for that matter, even in the easiest cases do more than say one of the parties was guilty of only slight negligence while the others were guilty of greater negligence, or that some were more negligent than others? If this is the limit of any human trier of facts' capacity to judge, then to provide a refined system, built upon the assumption that he can and must measure off a proportion which cannot be measured, is a farce. Further it is not at all clear that fault is so important a

factor in liability as the scheme of comparative negligence loss distribution assumes it to be. Perhaps some liability insurance scheme, after the manner of workmen's compensation acts, would be sounder.

At any rate, this much can be said for the book, if any legislature is considering adoption of any modification of the common law system of loss distribution, it should find the analysis and the materials presented in this book invaluable.

Charles E. Carpenter.†

LOCAL DEMOCRACY AND CRIME CONTROL. By Arthur C. Millspaugh. The Brookings Institution, Washington, D. C., 1936. Pp. xii, 263. $2.00.

Unless the reader has been forewarned when he opens "Local Democracy and Crime Control", he is likely to be astonished to find that the subject of crime control is not the major emphasis of the book. It is true that Dr. Millspaugh states many of his conclusions in terms of the crime problem, but this function of government serves primarily as a vehicle in which to carry a broad analysis of the problem of county-state relations.

The book does not purport to be an exhaustive treatise. It is simply an essay which seeks at least to throw doubt on many of the assumptions through which lawyers, political scientists, and the public generally have viewed proposals for the reform of county government in the United States, and to indicate some criteria for the evaluation and reform of county government. The author seems to have little doubt that the city will continue as a unit of local government and that its present relation to the state does not require drastic change. With respect to the county, however, he sets out some very pertinent inquiries.

In a vigorous analysis the book challenges the assumption that the county is at present contributing anything to the fortification of democracy in the United States. Its main objective seems to be to point out the need for intensive further study of the problem, but the author does give full consideration to the possibility of county reorganization. He takes up the problem of regional adjustment—geographical expansion or consolidation, primarily—in the light of applicable criteria such as the community, the service unit, the self-financing unit, and the area of convenience, and he finds little hope for the future of the county from this approach. The subject of internal reorganization, particularly through the county-manager plan, receives the attention of a chapter, and is found desirable but wanting. Insofar as the data presented tends to show that the manager plan is financially impracticable for one-half or three-fourths of American counties, there can be no quarrel with the conclusions, but when the author implies that the county manager is objectionable because it would impede coordination of state and county activities, the argument is not clear. He seems to say that, assuming the present division of functional responsibilities between state and county, the manager would make it more difficult to coordinate the work of state and county in any particular field of administration than under the present decentralization of county government. To quote: "If county officials are appointed and directed by a county manager, they cannot also be directed by state departments." Perhaps I misunderstand Dr. Millspaugh's argument, but this all seems rather absurd. It ignores the competence, the imagination, and the devotion to the public interest which the manager plan has brought to our cities, and any state official ought to find this type of service easier to meet than the

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assortment of retired blacksmiths and practicing morticians who monopolize our county offices today.

The major thesis of this book is that any effort to make the county more efficient in the performance of its present functions is a waste of time, and that the public interest demands that these functions be integrated as direct administrative responsibilities of the state. For example, except for the continuance of a few municipal police forces, the author would centralize all prosecution and policing in the state. With the transfer of these present functions to the state, the county would be free to serve as the unit for many strictly local activities which are more informal and social than political, and which might serve to incubate new functions of government. Space permits no elaboration of this outline, but whether one may agree or disagree, there is no doubt that Dr. Millspaugh offers a provoking challenge to many who may think that they know most of the answers on reorganization of county government.

Earl H. DeLong.†

CASES ON FEDERAL PROCEDURE. By Armistead M. Dobie. West Publishing Co., St. Paul, 1936. Pp. 803. Price: $6.00.

Dean Dobie's textbook on Federal Procedure which appeared in 1928 proved to be an extraordinarily useful handbook upon a very technical subject. It had the merit of thoroughness without attempting to be exhaustive. The subject was well analyzed, each of the various topics received a proper but never an excessive share of attention, there were no important omissions, and the notes were full enough to point the reader in the right direction if a further search for material became necessary.

In supplementing this text with the casebook on Federal Procedure which has recently come from the press of the West Publishing Co., Professor Dobie has employed the same analysis and followed the same method. The order in which the various topics are treated and the relative amount of material assigned to each corresponds closely with the model set by his textbook, and the subject matter is equally complete, accurate and well balanced.

The casebook, however, is not merely a presentation of the same material in another form. A statutory legal system like that of the federal courts involves a difficult problem for the casebook maker. Many features of such a system are more or less arbitrary regulations, based upon no fundamental principles of law or policy and giving rise to no difficult problems of construction. They require only to be stated, and the meticulous and minute analyses found in the cases are too elaborate for classroom use. Other features of the system have produced highly refined theories of interpretation, which can be understood only by case analysis. Those of the former type should be dealt with by explanatory text, those of the latter type by cases. To use case material where text would be adequate is a waste of the students' time, while to use text where the problems could only be adequately demonstrated by case analysis is to devitalize the subject. Maintaining a proper distribution and balance in the use of these two forms of material is the chief desideratum.

Generally speaking, the result attained by Professor Dobie seems to be highly satisfactory. He has made use of the text of his prior book where such material appears to be called for, and has presented an excellent selection of cases where the solution of problems depends upon varying fact situations.

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The several provisions of the federal statutes, upon which the practice rests, are fully set forth in convenient relation to corresponding text and case material, so that the student will have constantly before him the precise language of the legislation under consideration. The effect of this arrangement is to make the treatment extremely systematic, definite and easy to follow.

The tendency to which a writer upon federal jurisdiction and procedure would inevitably be subject, namely, to make his discussion of some of the problems more complete by including principles common to both federal and state courts, has been successfully resisted in most instances. As an exception one might point to the section on appellate jurisdiction over the district courts, where the cases dealing with the question as to what is a final order seem to involve nothing peculiar to federal jurisprudence. The same is true with some of the cases on habeas corpus. But such exceptions are rare.

The amount of material seems adequate for any purpose. Probably the limited time allowed in an ordinary law school curriculum would make some eliminations necessary, but the excellent arrangement, the numerous headings, the convenient presentation of statutes and the liberal use of descriptive text, would undoubtedly make it possible to enlarge the lesson assignments beyond the customary limits without overburdening the students.

Edson R. Sunderland.†

BOOK NOTE

JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS. Edited by Harry C. Shriver. Central Book Co., New York, 1936. Pp. xiii, 280. Price: $3.00.

This posthumous volume is divided into three distinct sections. Part I includes a representative selection of Holmes' book notices, published when he was an editor of the American Law Review (*circa* 1870). Part II contains some heretofore uncollected writings, most of which were written subsequent to 1920. Part III consists of his letters to Dr. Wu [1] (1921-1932).

The value of this collection lies chiefly in the fact that it presents a kaleidoscopic view of more than sixty years of a colorful and brilliant career. The reader is afforded glimpses of the great justice's thoughts on such varied subjects as philosophy, jurisprudence, law books, constitutional law, labor law, criminal law, and the Civil Law, and there is portrayed an intimate picture of his philosophy of life. Even before he was called to the bench he observed: "The very considerations which the courts most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. We mean, of course, considerations of what is expedient for the community concerned." [2] This illustrates his remarkable perspicuity, which he carried with him throughout life. An ability to express abstruse thoughts in a lucid style, combined with keen analysis of complex problems, made Justice Holmes eminently deserving of the title: "The Completely Adult Jurist".[3]

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1. Dr. John C. H. Wu (1899-), formerly judge of the Shanghai Provisional Court, Principal of the Comparative Law School of China, Member of the Law Codification Commission.

2. At p. 10. Written in 1879, this is a quotation from a book notice.

3. FRANK, LAW AND THE MODERN MIND (1930) 253.