BOOK REVIEWS

THE ADVOCATE'S DEVIL

C. P. Harvey, Q.C. with a foreword by Lord Monckton

TORONTO: THE CARSWELL CO. LTD., 1957

Just before his recent appointment to the High Court in England, Mr. Justice Elwes said that a thing is not right because it is done in Court. Now comes the author of this provocative and stimulating little book to give common lawyers another salutary jolt out of that complacency which is probably their most besetting sin. (By the time this is in print the 48th Conference of the International Law Association will have been held in New York, at which we of the common law tradition cannot fail to become aware of the fact that there are other systems of law which have their virtues too.) Mr. Harvey is a highly successful member of the English Bar who has two virtues that are infrequently found among his kind: he can write good lucid English, and he can stand back, look at his profession and make an unprejudiced appraisal of its merits or lack of them. Not necessarily a just appraisal; Mr. Harvey is surely too cynical and disillusioned by half. But he brings home one truth: the law and its administration can never be any better than those who practise it. "Here below", he says "the judge, jury and advocate are all born of Adam, the flesh is weak, and every now and then the devil has his way." He gives instances of some shocking English judges. Stories are told of Lord Darling, a man who, incidentally, had a microscopic practice before being elevated to the Bench. Very topical for the English lawyer is his scathing but just condemnation of Lord Chief Justice Hewart, one of the worst holders of his office. It comes when the retirement of one of the greatest Chief Justices, Lord Goddard, has occasioned a discussion amongst thinking people — lawyers and laymen alike — that may end the tradition (which Goddard C.J. first broke) of treating the office as a plum for a politician-lawyer.

Canadians used to the fused professions of barrister and solicitor may well see the advantages of a divided profession after reading this book. They should note the importance of the English rule that "a barrister offered a brief in the class of work in which he normally practises, marked with a "proper" fee, is bound, unless otherwise engaged, to accept the brief whoever may be the client." In the U.S.A. it appears, a lawyer need not make a fool of himself by taking up what seems to him to be a hopeless case. But the poor client may find himself going the rounds of careerist lawyers' offices in the vain hope of finding someone to defend him. And in the long run the English

Bar has a higher repute than its American counterpart — thanks partly to the rule quoted. This in turn is reflected in the greater esteem and confidence enjoyed by the English judiciary. A weak Bar means poor judges — and therefore poor justice. In this connection Canadians may be interested in Mr. Harvey's defence of the apparent sycophancy with which English counsel are wont to treat the judges. But the embryo advocate of any nationality under any system of law should read this book if only for Mr. Harvey's warning of the danger of asking the one question too many. I say "embryo" because the older advocate is usually too far gone to profit from the warning anyway.

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THE OFFENDERS

Giles Playfair and Derrick Sington

SIMON AND SCHUSTER, (1957) PP. VIII, 305. $3.95

The *Offenders* is divided into two parts. Part I, labelled "The Cases" outline the stories of six men and one woman convicted of crimes, and Part II, entitled "The Summing-up," sets down the authors' conclusions regarding the problem of crime and punishment. The first offender is Neville Heath, an ex-R.A.F. officer who murdered two young women. As with each case Heath's life, crime, conviction and punishment are described. Lawyers, however, will be particularly interested in the detailed report of the proceedings at his trial. Despite Heath's original reluctance, his counsel argued that he came within the terms of the McNaghten rules. The traditional impatience of British courts with psychiatry, and all that it implies, is interestingly revealed. The prosecution, instead of calling psychiatrists, was content to rebut the psychiatric evidence given for the defence with the testimony of two ordinary physicians. The psychiatrist who testified on behalf of the accused certainly did little to enhance the reputation of his branch of medecine. He submitted that the accused suffered from "moral insanity" and "moral defectiveness". As the authors point out these are terms originally devised in the Nineteenth century and since abandoned by most psychiatrists in favour of psychopathy. In fact in the United States an effort is now being made to discard psychopathy in favour of different and more precise terminology. The jury rejected the insanity plea and found the accused guilty. Heath was accordingly hanged in October of 1946.

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The contrast between the procedure and approach of the court in the Heath case with that of the Baltimore Criminal Court described in the Brettinger case is very interesting.

Rudi Brettinger, from age three onward demonstrated abnormally agressive and destructive tendencies. All forms of punishments failed to alter his behaviour. At the age of eleven he was found delinquent and sent to the Maryland Training School. In 1950, when he was twenty, Rudi was charged with armed robbery. A committee of interested persons decided to make this into a test case. His counsel maintained that the accused was: "1. Not guilty by reason of insanity at the time of the commission of the crime; 2. Not guilty by reason of insanity now." Three psychiatrists gave evidence on behalf of the accused, and one psychiatrist appeared for the prosecution. They all agreed that Rudi was a psychopath. The issue was whether the accused came within the terms of the McNaghten rules. The case ultimately revolved about the meaning of the word "knowing". The defence argued that *knowing* "however the law might once have interpreted it, could no longer be regarded as solely a function of the intellect; they held that it was just as much an emotional function". The jury apparently agreed with this contention and returned a verdict of "Not guilty by reason of insanity".

This is a very significant and interesting decision, one that has not received the attention it deserves. It is the first time in the knowledge of the reviewer that a psychopath has successfully raised insanity as a defence. The authors certainly deserve commendation for bringing this case to the attention of a wider audience.

The next two cases are notable for the way they illustrate how the psychopath, convicted of murder, is dealt with in the United States (Minnesota), and the way a similar person, convicted of a similar offence, is handled in Sweden. Redenbangh, an American, is at the present time serving a literal life-imprisonment. Despite the fact of a remarkable self-rehabilitation he is still confined after forty-one years. The Swede, however, after nine years at a special prison for psychopathic offenders, and at a semi-open prison for abnormal criminals, has been allowed to return to a normal and successful civilian life.

The final two cases, those of Irma Grese and the Rosenbergs, achieved international notoriety. Grese was a German SS concentration camp wardress who was convicted and executed for crimes committed while a staff member at Belsen concentration camp. The Rosenbergs came to public attention as the result of being tried and executed for espionage activities in the United States on behalf of the Soviet Union.

As presented in this book the last three cases are, in my opinion, of less interest to lawyers than the first three, due no doubt to the fact that the first three were written by Playfair who is a former English criminal lawyer. He emphasizes the legal arguments and tactics used at the trials of Heath, Brettin-

ger and Redenbaugh. Sington, however, who is not a lawyer, tends to gloss over the legal issues in his presentations.

In Part II, "The Summing-up", the authors maintain: "1, That all punishment by killing is wrong", and "2. That to demand the abolition of the death penalty for one crime while advocating its retention for another . . . is illogical and self-defeating." They bring out the interesting fact that only twelve British members of Parliament are against capital punishment for all offences. The overwhelming majority of M.P.s who would abolish capital punishment as the sanction for murder, would still retain it for treason.

The authors urge "That abolition should not be fought for, as it mostly has been, merely as an end in itself, but rather as the first essential step in a program of penal reform." They maintain that the best protection for society is ultimately provided by a clinical or curative approach.

There are a number of criticisms that can be directed at this book. For example the authors attack both the McNaghten rules and "the practice of leaving the question of a criminal's sanity to be decided in courts of law". This is inaccurate because courts in criminal matters do not decide insanity, they only determine whether the accused is criminally responsible. Insanity and criminal irresponsibility are not always equatable. Since they do not believe the issue of responsibility is one that should be left to the courts they can therefore avoid the difficult problem of suggesting a suitable alternative to the McNaghten rules. The authors in their next paragraph reject the notion that the question of responsibility should be left to a panel of medical experts. They argue that "Medical experts are as fond of passing moral judgements and as sensitive to public pressure as anyone else". There is no attempt, however, to offer alternative solutions.

Perhaps the above criticism illustrates the reviewer's over-all impression that the book was somewhat hastily composed. The authors, however, have made a number of good points and reach, in my opinion, several sound conclusions. Increased attention to detail, better organization, and more developed argument, however, are needed to make their case really convincing.

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ANATOMY OF A MURDER

Robert Traver.

THE MACMILLAN COMPANY OF CANADA LTD., 1958 —
437 PAGES. PRICE $4.50

Anatomy of a Murder is one of the current best sellers. This novel, by a former district attorney and later a defence attorney and now a Justice of the Supreme Court of Michigan, has been described as a "suspense of the highest and most delicious quality." The plot is simple. It concerns the trial of a soldier charged with murdering a man who had just raped his wife. But, it is a skillful account of the technique and craftsmanship of a resourceful defence attorney from the time he is retained to the verdict of the jury. In fact, the revelation of the workings of the mind of the lawyer in constructing his "anatomy" of the murder with motives, state of mind, irresistable impulse and insanity, is so astute and penetrating, that a lawyer reading this novel may feel that now the layman has learned all the "secrets of the trade."

Although the trial takes place in Michigan, the Canadian lawyer can benefit from the comprehensive discussion of the medical and legal definitions of the defence of insanity, the skillful introduction by the defence lawyer of the results of a lie detector test (even though such evidence *per se* is inadmissible), and the strategy of the cross-examination. Despite the fact that this novel is to be filmed in Hollywood, it is a vivid presentation of real courtroom scenes with technical legal procedure.

In brief, this worthwhile novel underlines the role of the lawyer and law in society: "The law is society's safety valve, its most painless way to achieve social catharsis; any other way lies anarchy." But most of all, this is a jury trial, "a small daily miracle of democracy in action". Rarely does a novel discuss the proper use of a peremptory challenge and the challenge for cause, but even rarer still is the study of a jury as made up of individuals and not just an oracle to be heard at the end of the trial.

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