REVIEWS AND NOTICES.

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MR. GOODHART'S ESSAYS.*

This book consists of a collection of reprinted articles and addresses, a fact which gives it a slightly "spotty" character. The address, however carefully prepared, is not the best mode of conveying ideas. It is generally an attempt to cover in small space a large subject, and it is aimed at a particular audience. In most cases, therefore, it lacks leisure and it lacks objectivity. The result in the present instance is that one finds, alongside such excellent studies as "The Ratio Decidendi of a Case" and "Liability for the Consequences of a Negligent Act," a badly knit and inconclusive series of observations on "Recent Tendencies in English Jurisprudence." The contrast is the best possible demonstration of the perils of a doubtful practice, namely the publication of casual speeches.

It is perhaps owing to the compressed and unleisured style of the paper read to an audience that, in his discussion of "Case Law in England and America," Professor Goodhart hardly does justice to his predecessor in the Corpus chair of Jurisprudence. In his "Law in the Making," Professor Allen of course accepts the view that precedents are binding on English courts, but his qualifications of the rule are so important that, if he accurately describes English practice, the contrast between that practice and the conduct of American tribunals is not so sharp as Professor Goodhart makes it. If it be true of England that "the Judge follows 'binding' authority only if and because *it is a correct statement of the law*,"[1] then it becomes difficult to establish a difference of kind rather than of degree between the American and British use of precedents.

"Three Cases on Possession" brings into strong relief the absurdities that follow upon any attempt to build a consistent theory of possession whether upon *animus* or upon *corpus*. The Roman jurist Paul has approximately twenty centuries of vain logic-chopping to

**Essays in Jurisprudence and the Common Law.* Arthur L. Goodhart, M.A., LL.M. London: Cambridge University Press, 1930. 295½ pp. Price 15*s.* net.

[1] "Law in the Making," 2nd ed., p. 176.

answer for, and Savigny's "rationalization" has only helped to preserve what the layman may well regard as a reproach to the law. This article (together with "Liability for the Consequences of a Negligent Act" and "The Palsgraf Case," which might well have been merged in one essay) shows the author at his best. He has a special gift for the neat isolation of the real basis of judgment and for the polite but ruthless exposure of the inaccuracies and *non sequiturs* of judges and jurists.

P. E. CORBETT.

McGill University,
May, 1931.

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ELEMENTS OF THE LAW OF CONTRACTS.*

The announcement of the Oxford University Press, in the summer months of 1930, that Arthur Berriedale Keith was writing a book upon the Elements of the Law of Contracts brought to mind the prolific energy of Edgar Wallace. It was merely a case of association of ideas. There was, and still is, a mystery about the production and its causes. It is truly said that the twentieth century is an age of specialists, and therefore it is difficult to understand how this Professor of Sanskrit and Comparative Philology, editor of Dicey's Conflict of Laws, author of Responsible Government in the Dominions, author of Sovereignty of the British Dominions, author of Dominion Autonomy in Practice, author of Constitutional History of the First British Empire, and withal self-appointed dictator of Imperial policies and relations, was particularly qualified to write upon the law of contracts. Moreover, although the reviewer has not an intimate knowledge of the English market for law books, it seems inconceivable that there was an insistent demand for a book on contracts of this nature from general readers, students-at-law, or practitioners. If words mean anything, one may gather from the preface that the book was written with the hope that it might serve as an introduction to the study of the standard treatises of Anson, Pollock, and Salmond on the law of contract. An introduction to an introduction, such as Anson on Contracts is, may well be considered as a novel product of the ripe scholarship which has been attributed to Professor Keith. When it is realized that the law concerning not only the formation, the operation, and the dissolution of contracts, the capacity of parties, but also the evidence and interpretation of contracts, the law of

* By Arthur Berriedale Keith, D.C.L., D.Litt., 134 pp. and Index. Oxford: at the Clarendon Press, 1930.

agency and the conflict of laws with respect to contracts are discussed in one hundred and thirty-four relatively small pages, it must be appreciated that the statements must be very summary, a mere catalogue of conclusions. It is impossible in a book of this size to present that rationale of any principle of law always so indispensable to an understanding of it. If the book had been designed for use in schools the author might have hoped, if not expected, that the instructor into whose hands it came would supply this lack and endeavour to develop in his students the capacity to reason from fundamental premises. The book would be more intelligible to students if the text were illustrated by apposite examples. One fears that a layman, after reading this treatment of the law of contract, will be more convinced than ever that man was made for law and not law for man. Professor Keith's style in his larger books is at best heavy and involved, and in this book he has not been successful in his attempt, if any, to achieve that felicitousness which is to be expected of an introduction.

The fact that the book was printed by the Oxford University Press makes it hardly necessary to add that its outward appearance is excellent. From the standpoint of good English usage, if not philology, one is bound to remark that the wording "in respect to" (p. 20) and the word "farther" in the particular context (p. 56) must have escaped the notice of the learned author.

An anonymous reviewer in a recent number of an English legal periodical has remarked that the book "is a most useful and eminently readable summary well designed to inspire the reader with a desire to penetrate further." On the other hand, Professor Williston of Harvard has stated that, "A layman reading the book would have little conception of the law of contracts when he laid it down; a law student would much better spend the same amount of time in a more exhaustive study of a smaller field; a lawyer would find that its brevity and lack of citations made the book useless for his purposes." A careful perusal leaves no doubt concerning the object, style and content of the book in the mind of the reviewer.

SIDNEY SMITH.

Dalhousie Law School.

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MUHAMMADAN LAW.*

This "abridgement" has for its primary function courses in the law, history, and institutions of Islam for probationers entering the

* *Muhammadan Law: An Abridgement according to its various Schools.* By Seymour Vesey-Fitzgerald. Toronto: Oxford University Press. 1931. Pp. xvi, 252. $4.50.

civil service of the tropical African dependencies. The author has then kept in mind, not practitioners, but administrators, who will come into contact with Moslems of every school of law, every shade of religious thought and in every stage of civilization. Hence the book is a handy work of reference, which will be useful during a period of administrative experience. It is fortified, in its discussions, with careful references to all the relevant East African and Privy Council decisions, with illustrations drawn from the courts of India and of Cyprus. This additional material will serve to make the book of some service to practical lawyers and judges. In admirable chapters the author surveys in clear terms the general scheme of Moslem jurisprudence; schools of law: certain aspects of custom, of conflicts, of intention and form, of courts and the application of law; marriage; divorce; change of religion; paternity; guardianship; inheritance; administration of estates; property and obligations; ownership and possession; loans and security; gift. There merges an interesting picture, with a value far beyond those for whom the book has specially been written. And it is all the more useful in that, in the past, students who wished information in these fields of Muhammadan law were frequently at a loss for some ready reference. In addition, outside British Indian developments, it was for the inexpert almost impossible to obtain accurate information. Doubtless a review of the substantive law could only be given by a reviewer trained in the field; but where it has been possible to test the author's accuracy and conclusions—for example in relation to marriage and change of religion and conflict of laws—there is every evidence of thorough legal scholarship. This evidence warrants a reliance on the author's work as a whole, especially as he brings to it not only experience in the Indian Civil Service, but because he holds the position of lecturer in Hindu and Muhammadan law to the Council of Legal Education. We know of no other available book which can more admirably fulfil its function.

The author hopes that the volume will be of interest to students of comparative law, and he promises a further volume in which the relations between Muhammadan and Roman law will be reviewed. We await these promised discussions with interest. In this connexion we would suggest, with respect, a point of view. Many years ago Lord Bryce had some valuable criticisms to make about the value of comparative legal study, and time and experience have brought, since then, additional questionings. There is a grave danger that the study of comparative law may become as barren as those mischievous and soul-destroying courses on "comparative gov-

ernment" which, alas, consume so much time, especially in North American universities, and are nothing more than methods for loading up the minds of students with information which is unloaded, "spoiled in transit" in the annual examinations. In the past, and to a large degree in the present, the study of comparative law has been equally futile, in that there has been sought merely the law in this field or that field here or elsewhere. Now pure information on law may have a value; but, as long as one knows where to find it, there is no need to cumber the memory with it. On the other hand, in seeking how law functions, comparative law has an extremely valuable place for any serious lawyer. It is here that we hope the author will help us out of his professional and administrative experience. We want to know not merely the law, but *how* it came to be the law, *why* it remains the law, *what* end it serves. In so far as comparative law aids us in these pursuits it must have a genuine place in proper legal training. And one of the reasons why the study of comparative law has not progressed or brought forth greater benefits is because it has remained the unfruitful handmaiden of impotent teachers. Legal facts are like bricks and mortar—not much use until built into some structural conception. Mr. Vesey-Fitzgerald's book raises many important and fascinating comparisons with the common law and with modern civil law, and suggests reasons for the differences. It is these suggested reasons which can give any work of this nature a value outside the immediate readers for whom it is intended. We would welcome these further discussions from the learned author along the lines which we have, with respect, ventured to suggest, with conclusions of sufficient import to disclose how the complicated systems which he surveys actually work in the social life of the peoples who live under them.

The book is admirably indexed and referenced, and is written in a singularly attractive way. It deserves a public much wider than that to which it will primarily appeal.

W. P. M. KENNEDY.

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THE PRINCIPLES OF JUDICIAL PROOF.*

In this volume Professor Wigmore has given us a revised edition of a work published by him in 1913 which, to quote from his

* By John Henry Wigmore, Professor of the Law of Evidence in North Western University, Boston: Little, Brown, and Company, 1931.

introduction, aspired "to offer, though in tentative form only, a *novum organum* for the study of Judicial Evidence." It was well said by a reviewer of the first edition that there was then no one living who possessed such qualifications for the undertaking as Professor Wigmore. We venture to say that no person who acquaints himself with the contents of the new edition will entertain a different opinion from that; he will rather be disposed to say that it correctly expresses the situation today.

The author's purpose is to direct the attention of the present generation of lawyers to the necessity of setting up a science of Judicial Proof as distinguished from the artificial rules of procedure as they now obtain in the Courts. It is a renewal of the call to the Bar for repentance and amendment respecting judicial procedure made by Jeremy Bentham a century ago. "The law adjective," said Bentham, "takes from the citizens the means of obtaining what the law substantive promises to them. The two tables of the law are in opposition to each other." Indeed, Professor Wigmore regards his present work as the first attempt since Bentham's time, at a presentation of the English principles of Judicial Proof *as a whole and as a system.* Yet he frankly admits that such an undertaking is still a tentative one. It is a problem akin to that confronting the physician when the osteoblasts become too active in his patient. The conservative mind of the practical lawyer looks askance at the "rationative processes" required to be exercised in the formulation of a scientific system of proof to take the place of the present conventional rules of evidence. Judges, too, while they have been known to claim that they are "philologists of the highest order" (Pollock, C.B.) yet have confessed that "metaphysical reasoning is too subtile" (Willes, J.) for them. They prefer to stick to what Sir Paul Vinogradoff called "firm pegs for deductions in the responsible task of sifting evidence."

It is quite impossible for a reviewer lacking the prodigious learning and analytical mind of Professor Wigmore to undertake a criticism of his organon for the reform of judicial procedure. A reviewer would be hard to find who could say to him *nos duo turba sumus.* Indeed, the most competent critic would require many pages of print to discuss its qualities in detail. Suffice it to say that we are disposed to find in Chapter III. of his work the axis upon which the whole structure of his thesis turns. There he suggests the application of the probative processes outlined in Chapter II to a mixed mass of evidence by means of a detailed scheme for analysis and synthesis. This scheme contemplates the employment

of types suitable for representing all kinds of evidence presented, and based on some logical system. The scheme with these types must include all the evidential data presentable in a given case. It must be able to show the probative relation of each evidential fact to each and all others; and the distinction between a fact as alleged and a fact as believed or disbelieved by the tribunal. It must be able to represent all the data as potentially present in time to the consciousness. Finally, it must be compendious and not too complicated in variety of symbols. As a working method for the attainment of the purpose of the scheme, the author furnishes an "Apparatus" in the form of a chart for symbols and a list for their translation.

All this, of course, sets up a highly technical method of turning Judicial Proof into a science instead of allowing it to remain, as at present, in the form of a congeries of artificial rules. Professor Wigmore concedes that "men's aptitudes for this use of such schemes vary greatly. Experience alone can tell us whether a particular scheme is usable by the generality of able students and practitioners who need or care to attack the problem."

We congratulate him on his courage and industry in endeavouring to remodel a loosely-constructed body of law whose roots are embedded in primitive juridical ideas. These ideas have given rise to a system of pragmatic rules of procedure, the texture of which is not woven in the loom of logical processes yet assumes the existence of them. The cause of this anomaly is to be found in the development of trial by jury. When the jury, in the course of the sixteenth and seventeenth centuries, entered upon its modern function as the judge of the facts presented in evidence, the Courts felt obliged to evolve certain procedural rules for the purpose of holding the minds of the jurors to the issues raised by the pleadings, and to keep them from considering evidence relating to those issues on a purely logical basis. With the increasing recession of the jury from civil trials the time may now be ripe for Professor Wigmore's *novum organum*.

CHARLES MORSE.

Ottawa.

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SOCRATES REVISITS THE GLIMPSES OF THE MOON.*

Reading men of the Bar who are disposed towards study in the great fields of philosophy and religion, and rejoice in a competent

* *Adventures in Philosophy and Religion.* By James Bissett Pratt. Toronto: The Macmillan Company of Canada. 1931. Price $2.00.

yet lightsome leadership in exploring any portions of them, will find Professor Pratt's little book entirely to their liking.

Milton in one of his earlier poems yearned to "unsphere the spirit of Plato" so that the philosopher might reveal to him the nature of the regions that hold

> Th' immortal mind that hath forsook
> Her mansion in this fleshly nook.

But Professor Pratt in the first chapter of his book would instruct the wise who inhabit Limbo of the unwisdom of our modern world and for that purpose recalls Plato's master from the shades to the cave on the Areopagus, where tradition says he drank the fatal hemlock, for the purpose of meeting certain English and American philosophers—still in this fleshly nook—and there to debate with them, in the form of dialogue, the soundness of the present day attack upon Philosophical Dualism.

The author's technique is wholly admirable. It sparkles with irony and dexterous play in dialectic. We learn at once that he would rather err with Socrates (and his pupil Plato) *quam cum istis vera sentire.* The author takes pains to explain that none of the characters in the first chapter with the exception of "Mr. Try-Everything-Once" (Earl Russell) and "Mr. New Realist" (Professor G. E. Moore, of Cambridge) are intended as individual representations but rather as "composite photographs." But whatever school they represent, and howsoever they disagree among themselves, they are united in the conviction that once you divide the nature of man into matter and mind, and get away from the monistic theory, you are face to face with sheer nescience. Socrates introduces himself to the group of neo-realists, pragmatists, behaviourists, and what not, as one they had probably never heard of. He confesses a wish to learn of them, courteously debates with them, and in the end shatters their theories with remorseless logic as supplied by the author. But, afterwards, two American psychologists who have wandered into the cave submit him to intelligence tests, and as he is not able to identify the machines in certain automobile advertisements, or give the name of a single movie actress, he is rated as a defective with a mental age of less than twelve years. The philosophers for the most part seem gratified by this finding, but before leaving them to return to Aristotle and Plato, and the other 'Has Beens,' Socrates cautions them in this wise:

> Be sure of this: no philosophy can long remain credible to man which would destroy man's faith in his own self. In spite of your Naturalism, your

behavioristic psychology, your monistic epistemology, philosophy shall once more teach the reality of the soul. And when philosophers shall have abandoned the vain attempt to interpret the psychical in terms of the physical or the physical in terms of the psychical, when they shall have returned to the inevitable human belief that individual selves are real and that the spiritual life means more than logical implication, there will be some hope of attacking with a fair chance of success the great problems of philosophy.

This, we think, fairly approaches the spirit of *The Phaedo.*

The whole content of the dialogue in the first chapter is in the vein of splendid fooling, reminding one in no small way of the genre—excluding the ribaldry—of Aristophanes in *The Clouds.*

The second chapter deals with the New Theology as related to the principle of Dualism, and presents a criticism, in dialogue form, of the Catholic position, as defined by such writers as Fr. Wilfrid Knox, Dr. Rawlinson, Bishop Gore and Dr. N. P. Williams, and of the movement called Humanism as it is now being put forward in America. In sum, "Mr. Layman" in the dialogue silences the assailants of Dualism by asking them "Can you name a single scientific fact that is inconsistent with the old dualistic view which recognizes the reality of individual selves, and refuses to identify the mind with the brain?" If there is an affirmative answer to the question, it was not furnished on this occasion.

In the third chapter the dialogue centres round the question of Immortality, in which we find materialists and absolute idealists, behaviourists and neo-realists all in discord 'about it and about' in the first scene, which is enacted in a mundane beer-garden; and in the second scene we find them translated to the Elysian Fields where "Professor Materialist" refuses to admit that he is in the hither world of consciousness (thanks to an accident which smashed his brain) because the admission would "deny the Conservation of Energy and the whole of the Naturalistic Philosophy."

The remaining chapters deal with Buddhism and its correspondence with Christianity as Professor Pratt surveys the matter.

As some of the old-time jurists have told us that the ultimate sanction of positive law resides in Christian morality we feel that no apology is due to our readers for bespeaking their attention to the discussions in Professor Pratt's fascinating book.

CHARLES MORSE.

Ottawa.

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Annual Survey of English Law (1929). Published by London School of Economics and Political Science, 1930. Price $3.25.

This annual from the start demonstrated its usefulness in providing the reader with a general view of the growth of English law in our time. In the present volume the opening section, dealing with Constitutional Law, contains an instructive epitome of the new legislation, case law and literature touching the subject. The section dealing with Mercantile Law justifies careful reading. The Companies Act, 1929, is referred to as "probably the most important statute of the year" because it has "very considerably modified the law of incorporated trading companies," and because it "puts an end to many practices which have in the past brought the law into disrepute." In speaking of the literature that enriched the field of Mercantile Law in 1929, the *Annual Survey* expresses the following opinion of the fourth edition of Dean Falconbridge's *Canadian Law of Banking and Bills of Exchange*: "It contains the best discussion which is available of the many knotty points arising in connection with the conflict of laws in the case of bills of exchange. Further, it is the only work extant which examines and criticises the English case law on the subject during the past five years."

The section dealing with Public International Law contains a review of the decisions not only in England but throughout the Empire. The English case of *Foster* v. *Driscoll*, [1929] 1 K.B. 470 is discussed with reference to the decisions in the Canadian cases of *Walkerville Brewing Co.* v. *Mayrand* (1928-9), 63 O.L.R. 5 and 573, and *Westgate* v. *Harris* (1929), 64 O.L.R. 358, and it is observed: "Although the expressions used by the Judges in these last two cases do not seem clearly to admit the general principle of *Foster* v. *Driscoll*, the Canadian decisions are distinguishable on the facts from the English case."