REVIEWS AND NOTICES.

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APPEALS TO THE JUDICIAL COMMITTEE.

With the enactment of the Statute of Westminster near at hand, and with the conventions and implications connected with it, it would seem that serious attention must soon be given to the problem of appeals from the Dominions to the Judicial Committee of the Privy Council. The recent Imperial Conferences shelved the question; but it is obvious that its settlement cannot be postponed *sine die*. Mr. Hector Hughes's book[1] is thus opportune. Writing in singularly dispassionate tones, and with remarkable restraint when we recall the influences at work to force the appeal on the Irish Free State, his essay will form an admirable basis for discussion. Beginning with the acceptance of a *de facto* sovereignty in the Dominions, he surveys in turn the nature and principles of the Judicial Committee, the rights and wishes of the Dominions, the Privy Council's infringements of Dominion sovereignty and the legislative and other efforts to preserve it, the utilitarian objections to and inherent defects in the Judicial Committee, juridical evolution, suggested solutions. It will thus be seen that the book goes to the heart of the problem, and that there emerge necessarily situations which demand serious consideration. Mr. Hughes's approach is through a sane realism to practical politics. He is on firm ground when he insists that institutions, legal or otherwise, have no value *per se* among the forces making for unity, and that "the cultural value of grouping to the associated nations of the Commonwealth is both a reason for its existence and its strongest link." He is clear that each Dominion should have final judicial authority, but that the "*ad hoc* Commonwealth Tribunal" adumbrated at the Imperial Conference of 1930 will, if accepted, carry out an excellent function in "justiciable" differences between the Britannic nations.[2]

In our opinion the point at issue is one of legal facilities for change rather than uniformity in legal change. I have long advo-

[1] *National Sovereignty and Judicial Autonomy in the British Commonwealth of Nations*. By Hector Hughes, K.C., of the Bar of the Irish Free State, and of Gray's Inn, Barrister-at-Law. London: P. S. King and Son. 1931. 9*s*.

[2] Report of the Imperial Conference (Cmd. 3717, 1930).

cated an Act of the Parliament of the United Kingdom allowing any Dominion power to bar appeals if it wanted to. Such an Act would satisfy any Dominion concerned; and I regret that the recent Conferences have not seen their way to suggest the inclusion of such a power in the Statute of Westminster. I am not so sure, however, if they have not in fact done so; for it may be possible for any Dominion (other than the Free State) with its new position in relation to the Colonial Laws Validity Act, to nullify for iself the effect of the Judicial Committee Acts, which I am inclined to believe effectively control the prerogative. Indeed it is interesting to recall the emphasis laid on them by Cave, L.C., in *Nadan* v. *The King*.[3] I have no doubt that we are face to face with an interesting legal issue: A Dominion (other than the Free State), acting under the authority of the Statute of Westminster, nullifies the Judicial Committee Acts. When then is the position occupied, in relation to that Dominion, by the prerogative? I submit: (i) appeals in such a situation could be effectively barred by a properly framed statute of the Dominion; or (ii) the Dominion, failing the first submission, could legislate to prevent proceedings or documents from being removed from its Courts, and that an opinion of the Judicial Committee should have no effect within its jurisdiction. I refrain from discussing the question whether the prerogative is controlled by the Judicial Committee Acts, and thus within the principles laid down by Lord Dunedin.[4] Such a discussion would, for purposes of this review, be academic. If the prerogative is controlled by statute, the action above suggested by a Dominion leaves the field clear; if it is not, the Dominion can so act as to make its will effectual.[5]

In addition to raising the broader issues Mr. Hughes's book renders a valuable secondary service in connexion with the Free State. Everyone knows the threats under which appeals were forced on that Dominion; but Mr. Hughes, with singular good taste and not a little wisdom, does not mention them. Whatever the reasons, appeals were apparently preserved by the singularly inconclusive words "and otherwise" of Article 2 of the Anglo-Irish Treaty of 1921, thus apparently assimilating appeals from the Free State to those from Canada. This slipshod method of introducing an entirely new system of appeals is not to be commended. In addition, the Constitution of the Free State, implemented by a Statute of the

[3] [1926] A.C. 482. See specially pp. 492-493.
[4] *Attorney-General* v. *DeKeyser's Hotel Co. Ltd.*, [1920] A.C. 508, at p. 526.
[5] See the opinion of Mr. St. Laurent on the effect of the Statute of Westminster in relation to appeals to the Judicial Committee in 9 C.B.R. at pp. 534-535.

United Kingdom, after approval by the law-officers, narrows the width of Article 2, and preserves the prerogative only in relation to the Supreme Court of the Free State. Whether in its broadest sense under the Treaty (which would apply the Judicial Committee Acts *in toto*), or in its narrower sense under the Free State Constitution as based on the Treaty, it is clear that the Judicial Committee has the right to grant leave to appeal at least from the decisions of the Supreme Court of the Free State. It would thus appear that, if strictly construed, the Treaty imposes on the Free State a condition which any other Dominion can get rid of under the procedure suggested, after the Statute of Westminster becomes law. The Free State has anticipated action. Eleven years ago I advised that, in the light of the width of the suggested terms of the Treaty, there was folly in haggling over the phrase "and otherwise," and that the great thing to get clear was that the relationship "shall be that of the Dominion of Canada." "Dominion status," I advised, was not static, and that once accepted, especially in close connexion with the premier Dominion, nothing could limit its content. Fortunately my advice was taken; but unfortunately the Judicial Committee were not content to act with wisdom and along the generous lines of statesmanship suggested by Lord Haldane in the earliest applications for leave to appeal.[6] The result was that the Free State was driven to take such action as would preserve its legal system. Much uninformed criticism has been directed to the attitude of the Free State; and ignorant and perhaps malicious statements have been made, even in circles supposedly learned in the law, in connection with *Lynham* v. *Butler*;[7] *Wigg and Cochrane* v. *The Attorney-General of the Irish Free State*;[8] *Performing Right Society* v. *The Bray Urban District Council*.[9] Opinions may indeed differ on policy, but at least there is no excuse for not following the rule *andi alteram partem*. Mr. Hughes's discussion ought to serve an excellent purpose. For the future, it is clear that, when the Statute of Westminster is passed, one of two things must happen. There must be a new Treaty changing Article 2 of the Treaty of 1921, or the Judicial Committee must be prepared to accept action fully legal by the Free State which will render the Judicial Committee ludicrous. Mr. Hughes suggests none of these things. He neither fulminates, nor threatens, nor abuses. It is not indeed necessary to do so. The road is ahead, and there are legal ways and means of travelling it which will reflect public opinion in

[6] *Hull* v. *M'Kenna*, [1926] I.R. 402.
[7] [1925] 2 I.R. 231.
[8] [1925] I.R. 149; [1927] I.R. 285; [1927] A.C. 674.
[9] [1930] I.R. 509; [1930] A.C. 377.

the Free State. With all this history added to the painful history of the question of appeals to the Judicial Committee in connexion with the creation of the Commonwealth of Australia and to the treatment of its opinion in that Dominion, it is extremely hard to see how "appeals to the Judicial Committee constitute one of the strongest links of Empire." Let us be "linked," but let us not be silly.

Mr. Hughes's book is singularly free from error, and this fact adds to its suggestive and constructive value in calm and cold statement. It will doubtless reach a new edition, and we would, with great respect, draw the learned author's attention to some points. It is surely unwise for a lawyer (p. 6) to say that the sovereignty of the Dominions "became a juridical fact of international law" through the Imperial Conference of 1926. How a *conference*, which had no authority to bind any nation, could perform such a juridical feat passes understanding. The learned author later on (p. 43) states the true position: that the pronouncement of 1926 "has the force not of law but of a constitutional declaration." My distinguished friend, Mr. H. J. Schlosberg, ought not to be quoted, and he would not desire to be quoted, as an authority on the attitude of Quebec. "Attitudes" are hard things at which to arrive, and, at any rate, opinions of French Canadians ought to be sought. In this connexion Mr. Hughes would do well to read Mr. St. Laurent's Presidential Address to the Canadian Bar Association.[10] The remarks of Lord Haldane (pp. 42 and 55) ought to be clearly referenced. I cannot trace them in the book to their exact source.[11] Mr. Hughes has a weakness for the much overrated writings of Mr. Duncan Hall in connexion with "attitudes" towards the Judicial Committee. Whatever the worth of Mr. Hall's opinions, it would be well in relation to them to refer, for Canada, to Sir C. H. Tupper,[12] and, for Australia, to Sir J. H. Symon,[13] who submit them to adverse criticism. Mr. Stokes's opinions (*passim*) have no weight whatever. We venture to submit that the opinion in *Nadan* v. *The King* (*supra*) did not turn on whether the Canadian Criminal Code was or was not worded with sufficient precision to restrict the prerogative (pp. 31, 43). In connexion with this case, Mr. Hughes might suggest, without transgressing good taste, why the Attorney-General

[10] 9 C.B.R., pp. 526 ff.

[11] Lord Haldane is quoted as implying that Canada could limit appeals by "sufficiently precise words assented to by the sovereign." It would be hard to find more precise words than Section 1025 of the Criminal Code; and yet Cave, L.C., stated in *Nadan* v. *The King* (*supra*) at p. 393: "If the prerogative is to be excluded, this must be accomplished by an Imperial Statute."

[12] *Journal of Comparative Legislation*, (3 series), iii, at p. 186.

[13] *Ibid.*, iv, at pp. 137 ff.

of the United Kingdom intervened. The intervention and the date are significant. References to the writings of the Hon. J. G. Latham (*passim*) ought to be supplemented by references to the Hon. W. A. Holman's Macrossan Lectures.[14] There was a "saving of the rights and prerogatives of the Crown" in the Colonial Act under discussion in *Cuvillier* v. *Aylwin*;[15] and Coltman (*arguendo*) drew attention to this fact. Australia has done much more than allow "State Supreme Courts to adjudicate on constitutional questions only on condition that any appeal should be to the High Court alone" (p. 69). This was the rule under the *Judiciary Act, 1903*. Act No. 8 of 1907 excluded the Supreme Court of any state from deciding any question as to the constitutional powers *inter se* of the Commonwealth and a State or States or of two or more States, whether in first instance or appeal. When such a problem arises the case is *ipso facto* removed to the High Court.[16] Mr. Hughes might well discuss a further matter. Australia has general powers to limit the matters in which leave to appeal to the privy Council may be asked, subject to the rule that proposed laws containing any such limitation shall be reserved.[17] Is that limitation capable of change in Australia by constitutional amendment?[18] If not, what effect will the report of the Imperial Conference of 1929 have on the limitation?[19] In other words, does the doctrine of that Report render unnecessary the special provision for reservation? Mr. Hughes examines with astute criticism the oft-repeated statement that it is the function of the Judicial Committee to protect minorities (pp. 107ff.). In this connexion we would direct him, for Canada, to an important discussion of this point by Professor F. R. Scott, of the Faculty of Law, McGill University.[20] In a new edition, in the section dealing with the claim that it is the function of the Judicial Committee to help in securing uniformity of interpretation and of law, reference should be made to the remarks of Lord Dunedin in *Robins* v. *National Trust Company Ltd.*[21] His Lordship's remarks were not essential to the judgment and were strictly speaking *obiter dicta*, but they presented Mr.

[14] *The Australian Constitution: Its Interpretation and Amendment* (University of Queensland, 1929).

[15] 2 Knapp 72. Cf. *Journal of Comparative Legislation*, (3 series), viii, at p. 131.

[16] Australia's action is fully constitutional under section 77 (2) of the Commonwealth of Australia Constitution Act (63 and 64 Vict. c. 12).

[17] 63 and 64 Vict. c. 12, s. 74.

[18] Under *ibid.*, section 128.

[19] Report of the Conference, (Cmd. 3479, 1929), section 33.

[20] "The Privy Council and Minority Rights" (*Queen's Quarterly*, Autumn, 1930, at pp. 668 ff.).

[21] [1927] A.C. 515.

Justice Ford with a nice dilemma lately.[22] Indeed they are likely to go down to history as the cause of unnecessary confusion along with the Privy Council's early diversions into John Stuart Mill's economic theories.

Mr. Hughes's book is thoroughly documented and is well indexed. The style is clear and practical, but there are some unnecessary repetitions. The book ought to be in every library and ought to be read by everyone interested in a matter of growing importance. The tone is admirable. The essay is fully worthy of Mr. Hughes's reputation as an author and a lawyer.

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FALCONBRIDGE ON MORTGAGES.*

The second edition of this book deserves to be received with favour by students and practitioners throughout Canada. The whole book has been revised, notably the chapters dealing with the *Registry Act* and the *Land Titles Act*. The chapter with regard to the doctrines of subrogation and marshalling has been virtually rewritten and, as a result, the reader cannot find elsewhere a clearer and more concise statement of the principles relating to this troublesome division of the law of mortgages. One of the fruits of Mr. Falconbridge's recent investigation in the field of conflict of laws is a new chapter on this topic in so far as it is related to mortgages. It includes the first adequate treatment of the Canadian case material in this field. The author's adaptation of the continental writers' "theory of qualifications" in his method of *characterization* of the subject-matter, in order to determine its juridical nature as a necessary preliminary to selecting the proper law, definitely promotes the clarity of his analysis (see page 734). This addition will serve both the conveyancing counsel and the student of private international law. The book is more than a digest of the statute and case law. It contains as much historical treatment of the topics as is commensurate with the size of a book prepared for, and to be sold to, the practitioner The reader who desires to delve more deeply into the development of some of the modern principles of mortgage law will find, moreover, references to historical works.

[22] *Will* v. *Bank of Montreal*, [1931] 3 D.L.R. 526. See "annotation" 9 *C.B.R.* at pp. 578 ff.

**The Law of Mortgages of Land.* By John Delatre Falconbridge, M.A., LL.B., K.C., Dean of The Osgoode Hall Law School. 2nd edition. Toronto: Canada Law Book Company, Limited, 1931, pp. 807.

Recognizing that the law of mortgages is a synthesis of the law of property and contract and equitable principles, the author refers to the standard works on these subjects and to articles and comments in the leading periodicals of England and this continent.

The author states in the preface that he has allowed himself a "certain liberty of criticism," for the exercise of such liberty is "legitimate and desirable in a text-book, and not less so, though it may ultimately appear that in some instances the author is wrong and the court right." With this object in mind, Mr. Falconbridge has set a new standard for Canadian text-book writers. The present edition is characterized by a vigour and boldness grounded in a sound knowledge of the subject-matter. The exercise of a "liberty of criticism" under these conditions is not only "legitimate and desirable" but is necessary if a text-book in any field is to serve fully the student, the practitioner or the member of the Bench. Instances of constructive criticism are to be found in the treatment of the vexing problems arising out of the interpretation of the priority sections of the *Registry Act*. The profession, particularly in Ontario, will welcome the discussion of the cases of *Heney* v. *Kerr*[1] and *Thomson* v. *Harrison*.[2] After reading the text relating to the *Registry Act*, one wonders why a statute which has given rise to doubts and inconsistencies remains unaltered year after year, and why it re-appears in the same form in the periodic revision of the statute law. But these doubts and inconsistencies usually endure until some harassed litigant finances an ascertainment of the law for the community, as well as for himself. If certainty were to be found in statute law, one would surely expect to find it in the registry acts which deal with priorities in respect of real property. In the chapter dealing with the *Land Titles Acts* there is described the struggle between the legislatures and the courts in respect of the recognition and protection of trusts and other unregistered interests. The courts have showed a marked tendency to attempt to escape from the letter of the statutes and to protect these interests, and read into the statutes the equitable doctrine as to the effect of actual notice. The "liberty of criticism" is probably best manifested in the discussion of the mass of case law concerning the application of sections 6 and 7 of the *Interest Act*,[3] to be found in the reports since the decision of the Ontario Court in *Singer* v. *Goldhar*.[4] The analysis of the judgment of Smith, J., speaking for

[1] (1914), 30 O.L.R. 506.
[2] (1927), 60 O.L.R. 484.
[3] R.S.C. 1927, c. 102.
[4] (1924), 55 O.L.R. 267.

the Supreme Court of Canada in *London Loan and Savings Co.* v. *Meagher*,[5] is noteworthy. It is not only with respect to the major topics that the author uses the critical faculty. For example, he questions the validity of the decision in a more or less isolated case, *Gowland* v. *Garbutt*.[6]

After discussing or citing the relevant authorities upon the much-debated subject relating to the nature of an equitable interest, Mr. Falconbridge defends Maitland's thesis that it is a right *in personam*. The scholarly work of R. W. Turner, entitled *The Equity of Redemption*, published by the Cambridge University Press, since the appearance of Mr. Falconbridge's book, confirms the opinion of the reviewer that the preferable view is that the mortgagor or *cestui que trust* has proprietary rights in the mortgaged or trust property. The author, with admirable conciseness and commendable ingenuity, in distinguishing between the legal estate and an equitable interest, says, at page 95, " . . . law imposes limitations on a title which would otherwise be absolute, and equity extends to other persons, so far as is conscientious, an obligation which is primarily personal to one person." One's admiration for this conclusion, however, may be marred by the fear that, in so far as it has reference to the present state of the law, it involves a *petitio principii*.

A cursory examination of the text may leave one with the impression that the book has been prepared solely for the Ontario practitioner because Ontario legislation relating to mortgages is set out in full. Having regard to the market for law books in Canada and the lack of uniformity of provincial legislation upon this subject, it is practically impossible to quote from the various statutes. The author, however, in any case where there is a real divergence from the Ontario statutory provisions has referred to, or separately discussed, the statutes of other provinces, as, for example, the *Land Titles Acts* of the western provinces, and the *Limitation of Actions Act*. Another instance is to be found in Chapter XXVII, in which there is a separate section upon foreclosure and sale in Nova Scotia. It is correct to state, as Mr. Falconbridge has done, that "the so-called order of foreclosure and sale in Nova Scotia is substantially equivalent to an interlocutory judgment for sale followed by a final order of sale in Ontario." By statute in Nova Scotia the mortgagee may be the purchaser at the sheriff's sale. It has been held that the mortgagee, notwithstanding that he has bought in at the sale, may claim thereafter payment of the deficiency from the mortgagor who was a party to the foreclosure and sale proceedings without neces-

[5] [1930] S.C.R. 378.
[6] (1867), 13 Gr. 578.

sarily re-opening the foreclosure. The sale in Nova Scotia is a public sale conducted by a court officer, the sheriff, and it is difficult to follow the author when he states that the Nova Scotia practice is anomalous and that "it would appear that the mortgagee may get more than he is entitled to on equitable principles." It is submitted that the decision of the Judicial Committee of the Privy Council in *Gordon Grant & Co.* v. *Boos*,[7] lends more than "some sanction" to this practice. Lord Phillimore in the *Grant* case said: "Now, if . . . the mortgagee . . . asks the Court for a sale. . . . The sale ascertains the value of the property, the mortgagee gets no more from the property than what the sale brings to him. If the property realizes more than what is due to him, the mortgagor gets the balance. If the property realizes less, the mortgagee is *pro tanto* unpaid and should be allowed to sue on the personal covenant. . . . It was a judicial sale which is not impeached. . . . The mortgagor, who could have made a bid or procured a bid, must take the consequences."

The Nova Scotia case of *Kenny* v. *Chisholm*,[8] affirmed by the Supreme Court of Canada,[9] evidently was not cited to the Supreme Court of Canada in the case of *Sayre* v. *Security Trust Co.*,[10] because, if it had been, Anglin and Mignault, JJ., would have been less positive in condemning a practice which had been approved by their own Court.

A review of this book would be incomplete without a comment upon the literary merits of the production. The estimate of Shirley Denison, K.C., in reviewing the first edition (55 Can. L.J. 205), expressed in the words, "the book is good literature," is even more apt with respect to the second edition.

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THE LAW OF SALE OF PERSONAL PROPERTY.[1]

The appearance—after an interval of ten years—of a new edition of this standard work on the important subject of the sale of goods is an event of considerable interest to the profession. That this book hastily compiled by Mr. Benjamin, in 1868, within two years

[7] [1926] A.C. 781.
[8] (1883), 19 N.S.R. 49.
[9] See 32 N.S.R. 458 at p. 463.
[10] (1920), 61 Can. S.C.R. 109.

[1] Benjamin on Sale, 7th Edition. By His Honour Judge A. R. Kennedy, K.C., London; Sweet & Maxwell, Ltd., 1082 pp. Price $18.75.

of his admission to the Bar of England, and only once revised by him, survived the codification of the subject and has reached its 7th edition is a testimony to the remarkable ability of its author and to the skill of those who have successively carried on his work.

The task which confronts one charged with the obligation of bringing out a new edition of such a work at fourth hand and of dealing with a text overlaid by the accretions of fifty-seven years of subsequent decisions as added by other pens is one of great responsibility and delicacy. Judge Kennedy's conception of his function is briefly set out in his unpretentious preface in the statement that he has "added two hundred and twenty-five decisions, but by cautious elimination [he has] been able to effect an appreciable reduction in the size of the book." His technique of "cautious elimination" has manifested itself in the deletion of old or unnecessary cases from the footnotes, the mere citation of many of the recent cases in the footnotes, the deletion of obsolete cases or redundant matter from the text or their condensation in footnotes. Indeed, he has scrutinized the text with anxious eye for every *minor* deletion possible and made numerous small emendations with great skill. Without subjecting the corpus to a single major operation he accumulated such a surplus of saved space as to permit of the insertion of the decisions of ten years and still leave a net reduction of 100 pages in bulk. On the negative side it may be said with confidence, after exhaustive examination, that the work has been improved by every stroke of His Honour's blue pencil. To this one qualification should, in this reviewer's opinion, be stated. In more than one instance he has seen fit to omit the critical or expository observations of his predecessors on important and difficult decisions set out in the text. Every practitioner knows the value of such observations by text-writers. Those in Benjamin are relatively infrequent but informative; it is a pity that any of them were jettisoned.

On the positive side it may be said with equal confidence that the learned Editor has interpolated in the text brief but adequate statements of the more important new decisions. He has cited those of lesser importance in the appropriate places. With respect to this latter, it is matter for wonder that he has been able to find so many pegs on which to hang his citations with so little alteration of text. Of the inclusiveness of his additions one can only say that a very real test has revealed no omission of importance.[2]

[2] The following omissions may be mentioned: *Pearce* v. *Brain,* [1929] 2 K.B. 310 (Infant's Relief Act); *Lloyd del Pacifico* v. *Board of Trade,* 35 LL.L. Rep. 13 (fitness for particular purpose); *Medway Oil and Storage Co.* v. *Silica Gel Corporation,* 33 Com. Cas. 195 (same).

Measured by his conception of his editorial function the verdict must be that Judge Kennedy has discharged his task with much skill and that neither by way of omission or addition has he marred the utility of Benjamin on Sale, while to the extent that he has modernized its text and reduced its bulk, he has improved it. In short he has done a thoroughly workmanlike job according to the conventional idea of the function of an editor of a legal text of age and reputation.

It is pertinent here, however, to inquire whether the prevailing editorial attitude is correct? Should editors of classic legal texts take such a narrow view of their tasks? Many standard texts are to-day extant a generation or even a century since their authors relinquished the pen to a succession of learned editors, who have preserved the master's text with the minimum of alteration or excision whilst adding their quotas of statement and citation. Ever the bulk is swollen, ever the price increases. Symmetry of outline and continuity of exposition are lost; obsolete statements rub elbows with tentative speculations as to recent decisions, readability and utility are sacrificed, confusion and uncertainty and inaccuracy result. (*Vide* Salmond on Torts, 7th Ed., p. vii.)

This reviewer adds his voice to those of many others in pleading that the editors of such texts may in future take a far more liberal attitude towards the texts bequeathed to them—that they may cease to allow their reverence or their sense of their own inferiority, to paralyze their judgment—but that, appreciating that texts like men grow defective with the passing decades, they may view with critical eyes the work of their predecessors. Such an editorial conception will relieve the profession of the weary business of having presented to it, books the successive editions of which may be gauged as one gauges the age of a tree.

It is in this view that one regrets that the learned editor of Benjamin failed to make it a better book than he has. In the Preface to the 6th Edition, 1920, the then editor remarked that it had been desired that the size of the book should be reduced but that this had "unfortunately been found to be impossible consistently with the preservation of the author's work. It remains for some future editor to consider whether a portion of that work should not be sacrificed." Judge Kennedy voluntarily elected—or mayhap was instructed—not to take the hint and pursued instead a policy of nibbling at the text.

Two considerations—one general and one specific—may be suggested as indicating that the book should, and conveniently could, have been materially reduced.

Between the 4th and 5th Editions the subject on which Mr. Benjamin wrote in moderate compass in 1868 was codified.

The plain letter of the Act governs and resort is to be had to the antecedent law only in case of ambiguity or omission. Without being so naive as to believe that Codes reduce the body of succeeding case law one may hazard the view that each year of the operation of the Code should lessen the necessity of reference to the preceding decisions codified. Yet the bulk of Benjamin grew to 1025 pages in the edition of 1906, and to 1154 pages in that of 1920, and now remains at 1054.

More specifically it may be said that there are whole topics or chapters unnecessarily discussed in Benjamin or discussed at quite disproportionate length. For example, it is submitted that there is little in the chapter on *Mutual Assent* (50 pp.) or in the four chapters on *Avoidance* (135 pp.) which is peculiar to the law of Sale of Goods, and that it can hardly be said that the subjects of *Mistake, Failure of Consideration, Misrepresentation, Fraud* and *Illegal Contracts* treated under the latter head are so inadequately dealt with in other more specialized treatises that such extended treatment is required. Some glimmering of this idea was indeed present in the learned editor's mind for in the Chapter on Misrepresentation at p. 454 he ventures to omit some seven pages—the longest deletion discovered by the reviewer—of argument by the previous Editor as to the identity of the legal and equitable rules on the subject, etc.[3]

In short it is submitted that the editor of the next Edition can vastly reduce and vastly improve Benjamin on Sales if he will but approach it with less reverence and a freer mind.

A few miscellaneous observations and this review will terminate.

In the 6th Edition it was said that "some reference has also been made to Canadian and Australasian Cases." The references to Canadian cases were indeed few but rather welcomed as a start in the right direction. No evidence has been discovered of many or any references to recent Canadian decisions. Perhaps no effort was made to include these. In that event the utility of meagre and scattered citations is doubtful. If such references were intended then it is remarkable that no mention is made of *MacDonald* v. *Princess*[4] in the discussion of the conditions applicable to goods sold by description and by sample. Again, in the chapter on Illegal Contracts considerable reference is made to contracts illegal as contrary to public policy and *inter alia* to smuggling contracts.

[3] An unfortunate excision of a very important and original contribution to the jurisprudence of the subject.

[4] [1926] S.C.R. 472, [1926] 1 D.L.R. 718; Falconbridge's Cases, p. 353.

It is remarkable, however, that while *Foster* v. *Driscoll*[5] is set out at p. 527 no reference is made to the recent and important series of Canadian Cases on the subject.[6] Several of the standard English treatises have begun to cite Canadian decisions fairly generously, e.g. *Odgers, and Gatley on Libel and Slander; Mayne on Damages; Porter on Insurance.* It is hoped that this tendency may increase.

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THE MAIN INSTITUTIONS OF ROMAN PRIVATE LAW.*

This book is not simply a summary of Professor Buckland's more extensive treatises; it adds to the already huge total of his work in the field of Roman Law. The author states in his preface that he is addressing those "who have read the Institutes and little more." But they will have to have read with more care and understanding than the vast majority bring to the task. It is often said that Buckland, in spite of repeated attempts, has never contrived to write a really elementary manual. Certainly any teacher in close contact with the raw beginner in Roman Law will realise at once that this is meat for what we must regretfully describe as the "advanced student."

But to the small minority who wish to grasp the substance and significance of a system which is much more admired than known, this latest product of Buckland's industrious learning will be a boon of the first magnitude. It is a good book. Moreover, its appeal reaches beyond the "bright young man" to the professional Romanist. For everywhere Buckland's presentation of familiar institutions is illuminated by new suggestions, hypotheses and details of information. To mention only three of many points, I am indebted to this essay for an original and stimulating analysis of *jus gentium* and *jus naturale,* for what is to me a new explanation of *leges imperfectæ* and *minus quam perfectæ;* and for a fresh idea on a doubtful passage of Justinian's law of adoption.

The treatment of sources of law seems to me skimped in one particular. The authority of decided cases merits more attention,

[5] [1929] 1 K.B. 470.

[6] *Westgate* v. *Harris,* [1929] 4 D.L.R. 643, 64 O.L.R. 358; *Walkerville Brewing Co.* v. *Mayrand,* [1929] 2 D.L.R. 945; 63 O.L.R. 573; *Harwood & Cooper* v. *Wilkinson,* [1930] 2 D.L.R. 199, 64 O.L.R. 658. See also Article, "The Courts and the Rum-Running Business" (1930), 8 C.B. Rev. 413, wherein these cases are discussed, and note (1929), 7 C.B. Rev. 326.

*By W. W. Buckland, LL.D., F.B.A. London: Cambridge University Press, 1931.

and the student will fare better in this connection if he goes to a work not specifically devoted to Roman Law, namely, C. K. Allen's *Law in the Making*. But it is difficult to quarrel with Buckland: he is so willing to admit other views. Only once in this book have I been nettled by a dogmatic statement of doubtful validity. On page 60 he lays it down that no text gives any effect as marriage to a union in conflict with the *Lex Papia Poppæa*. *Fragmenta Vaticana* 168 is a garbled passage, but one legitimate restoration and interpretation makes Ulpian assign to the issue of such a marriage the status of *justi liberi*.

I have kept for a final word what I regard as the outstanding contribution which Buckland here makes to the study of law as a whole. That is not a matter of detail, but one of general knowledge and attitude. His sympathetic understanding, strong common sense and vast equipment enable him to knit the legal system to Roman life and mentality with rare success. Throughout, he is more concerned with the informing spirit of the institution than with its exact technical form, and the result is a compact masterpiece of comparative law.

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Notices By The Editor.

Insanity as a Criminal Defence. By William C. J. Meredith. With a Foreword by the Honourable Chief Justice Greenshields. Montreal: Wilson and Lafleur Ltd. 1931.

We are glad to share the view expressed in the Foreword to this small book on a big subject that it will be of great service to the members of the legal profession.

The very title of the book is provocative: it suggests the unenlightened age of our law which was inclined to treat insanity as an offence rather than a defence in criminal matters. There are many attempts now being made in print to convince lawyers that the "guilty mind" can only be adequately discovered by the tests prescribed by the psycho-analysts; and from the confusion arising from the hideous jargon (e.g. "the Ego and the Id," "ambivolence of feeling") by which they becloud their arguments, it is refreshing to turn to the clarity and forthrightness of Mr. Meredith's examination of the intricate subject. In elucidating his theme he very properly begins with a statement of the elements of Crime, the *actus reus* and the *mens rea* as embodied in the maxim *Actus non*

facit reum, nisi mens sit rea, and then proceeds to discuss the tests of insanity as applied by the Courts when it is relied on to establish immunity from responsibility.

The author's discussion of the rules laid down by the Judges in *McNaughton's Case* and the criticism they have been subjected to by the Courts in England, Canada and the United States will prove of value both to the practising lawyer and the student of criminology. The conclusion arrived at is that although the McNaughton rules were formulated in 1843 "they have continued to be and are still regarded as law in England, and (with certain minor exceptions) in Canada. They were also adopted, and in modified form are still in force, in several of the United States of America."

In his interesting chapter on "Insane Impulse," Mr. Meredith points out that in a line of decisions in the English Courts between 1848 and 1926 the Judges have declared that the law knew no such defence as irresistible impulse, and that while Lord Atkin's Committee of distinguished men of the law reported in 1923 that a modified recognition should be given to that defence, ten of the twelve Judges to whom the report was referred in the following year for their opinion, advised against the desirability of admitting any such defence.

We are prompted to say that while the Courts may be overtimid in refusing to subject the question of criminal responsibility to an analysis of the general mental phenomena of an accused person, on the other hand it is obvious that it is not in the interests of social security that psychologists should be allowed to make such analysis without taking heed of the limitations of judicial procedure. The Courts cannot be turned into debating societies for contending wits concerned with matters which have not purged themselves of the taint of pseudo-science. *Ubi jus incertum, ibi jus nullum.* Psychology has not yet reached the point where it may claim to be an exact science; indeed such certainty as it had erstwhile attained has been rudely shaken of late by the theories of the Freudians and Behaviorists.

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The World, the House, and the Bar. By the Right Honourable Sir Ellis Hume-Williams, Bart. P.C., K.B.E., K.C. London: John Murray. Toronto: The Macmillan Company of Canada, 1931. Price $3.65.

A book under such a title, coming from the hand of a man grown famous for his qualities of heart and mind, makes a tremendous appeal to the reader. One's interest is arrested in the opening sentences of the Introduction, where the author explains that his

family, originally Welsh, claimed descent from Oliver Cromwell, "whose grandfather changed his name from Williams, but was himself sometimes described in deeds as Cromwell, otherwise Williams." He comes honestly by his ability to write with wit and charm, seeing that he was the son of a man concerning whom he says:

> His spirits were irrepressible and his stories inexhaustible. At eighty-three he was knocked down by a 'bus. This accident brought on a stroke, and he died soon afterwards. One of his last acts before his accident had been to write a proposal of marriage to his sister, aged eighty-six, from the local curate (aged *circa* twenty).

Both at the Bar and in Parliament Sir Ellis Hume-Williams has been in contact with the leading men of his day in Great Britain, and the story he has to tell about them abounds in interest and vivacity of expression. The last sentence in the book discloses the spirit of the author as a man of the law: "There is no system of Justice in this world comparable to the English, and any man may be proud and thankful to be a member of the English Bar."

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The Permanent Court of International Justice. By Sir Cecil Hurst. London: The Solicitor's Law Stationery Society, Limited. 1931. Price 2*s.* net.

This is a Reading delivered before the Honourable Society of the Middle Temple during the present year. Sir Cecil Hurst, in virtue of his seat on the Bench of the Permanent Court, is unquestionably qualified to speak on the history, jurisdiction and practice of that tribunal. One gathers from his Reading that the Court has to pursue a tedious regimen in arriving at a majority-judgment, concerning which Sir Cecil naïvely says: "It excludes all possibility of some of the judges thinking that they do not count for as much as more active, or more overbearing, colleagues."