REVIEWS AND NOTICES

☞ Publishers desiring reviews or notices of Books or Periodicals must send copies of same to the Editor, Cecil A. Wright, Osgoode Hall Law School, Toronto 2, Ontario.

The King and the Imperial Crown. By A. BERRIEDALE KEITH. London and Toronto : Longmans, Green and Co. 1936. Pp. xiv, 491. ($6.50)

This is a study of the position of the Crown in the light of modern conditions. There is no question but that such a book was badly needed. The British constitution is plainly so much a matter of custom and usage that it is from the practices actually followed rather than from the legal forms in which these practices are cast that an understanding of its working is to be derived. The gap, therefore, between the text-books on constitutional law in which the concern is to state the formal legal rules governing the action of the Crown, and the mass of biographical and historical material which throws light on the way in which the legal powers have been used in the last one hundred years, has become a serious one, and Professor Keith has put us in his debt by making the effort to bridge it by a volume which is at once fully informative and penetrating.

The early chapters give a brief description of such matters as the title to the throne, the royal family, and the forms of and responsibility for royal acts. A point that seems especially well made is that when the incapacity of a monarch occasions the appointment of a Council of State, the Council should include only royal personages. It is plainly unwise for the Prime Minister of Great Britain, for instance, to be appointed as one of the representatives of the Imperial Crown without reference to the rest of the Empire.

The account of ministerial responsibility is a model of compression. The King's consent to the Roman Catholic Relief Act, 1829, is seen as "symptomatic of the end" of royal power, as it undoubtedly was, and the return of the Melbourne ministry to power on its own terms in 1835, after having been, if not dismissed, at least forced from office by royal pressure, finally established the principle that the ministry decides policy; from that time on royal action becomes a matter of influence and not of power. That the line between influence and power can become an exceedingly fine one, however, is revealed by the examination which the author makes of royal action with respect to the formation of ministries. Queen Victoria characteristically did not fail to exert herself mightily in seeing that those congenial to her were given the chance of office, especially after 1868. Her attempt in 1880 to prefer Lord Hartington to Mr. Gladstone was, as the author says, unconstitutional, as likewise was her attitude in 1886 and in 1892. In the succeeding reigns the matter has become clarified, and is now largely one of support of a particular leader in such circumstances as existed in 1905 when there was a dispute within the majority party over its leadership and the summoning of Sir Henry Campbell-Bannerman by the King defeated an insurgent cabal. Another instance was in 1922 when the King's choice of Mr. Baldwin was justified by the doubt over leadership which the party itself was unable to resolve. Of the much debated

formation of the National Government in 1931 the author takes the decided view that the result was inevitable because of the plight of the country and that the action of the King in aiding Mr. Ramsay MacDonald was fully in accordance with accepted constitutional principles.

The position of the King with respect to the dissolution of Parliament has followed much the same development. For a time Queen Victoria made use of the grant of dissolution to aid a favoured ministry and also on occasion, as in 1852 and 1886, entertained the notion that she would be within her right in refusing a dissolution to a ministry with which she was not in sympathy. But in both cases, as the result of the advice of Lord Aberdeen and of Lord Salisbury respectively, she was dissuaded from taking so indefensible an attitude and this has now become the established convention. The author does, however, suggest that the Crown has not lost all power in this regard and could, for example, properly demand a dissolution if a ministry proposed to make a fundamental change in the constitution, such as the abolition of the Upper Chamber, or the repeal of Parliament Act of 1911, without a clear mandate from the electorate. The criterion suggested is that the King, as the guardian of the constitution, has the duty of seeing that the will of the people has been adequately expressed on an issue of that kind. Related to this, in the author's view, is the responsibility which rests on the King to force the resignation of a ministry which takes no steps to maintain law and order when rebellion threatens the existence of the state.

The influence which the monarch exercises in the fields of foreign policy and defence, and in the matters of the Church and the Empire is carefully assessed and is seen in each case to depend largely on the personality of the sovereign. The interest in foreign affairs which was sometimes embarrassing in the case of Queen Victoria became of unalloyed help when coupled with the discretion of King Edward VII and King George V. The author challenges the view of those who hold the authority to initiate or obstruct foreign policy has passed entirely from the hands of the King. He suggests on the contrary that the monarch may intervene legitimately when there is dissention in the cabinet such as there existed in the early days of Victoria's reign. It is conceded that dissent of this nature is not likely to occur now that the Prime Minister wields a power unknown before the days of Mr. Gladstone; but we are reminded that this state of affairs may change, especially if we are visited with a three-party system.

The book closes with a chapter of very direct interest to Canadian readers — the King and the Empire. On the subject of the internal sovereignty of the Dominions, the author is definite in his opinion that even where the power to reserve or disallow exists — as in the case of Canada — imperial control is gone by reason of the fact that the power can now only be used on the advice of the Dominion ministry. But in respect of external affairs, it is made clear that autonomy is much less complete. The acceptance by His Majesty in 1931 of the advice of his ministers of the Irish Free State concerning the striking of a great seal and a signet for the Free State has clearly altered the position of the King, but how far it has altered it is a matter of doubt. Can it be now said that the Crown is divisible? It is noted that the Union of South Africa contends that it is and has sought to give the view legislative confirmation by the Royal Executive Functions and Seals Act, 1934, which not only

provides for a new seal and signet but gives the Governor-General the power to use it in lieu of the King. The Irish Free State of course makes the claim to be republican, and is therefore "not interested in asserting her right to be regarded as a separate kingdom". The author states that the opinion of Great Britain is that the limits of divisibility were reached in the Locarno pact which expressly exempted the Dominions from any active obligation. The point is stressed also that the thesis of divisibility creates special difficulties over such matters as treaties of naval limitation. If quantitative ratios are fixed by such treaties do they apply only to Great Britain or do they cover building by the Dominions as well? The cognate question of the right of neutrality raises similar difficulties. South Africa has been the most forward in asking for the recognition of such a right, but the author, besides questioning its theoretical existence, presses strongly the view that the claim could not be maintained in view of the agreement between the Union and Great Britain by which the Union is to defend the port of Simonstown against land attack. Such an obligation, it is said, would be regarded as within the modern definition of an unneutral act. This observation has special relevance to this country in the light of the disclosure at the last session of the Canadian Parliament that there is an agreement existing between Great Britain and Canada concerning the use of the ports of Halifax and Esquimalt by the British navy. The final remark in this section that it may be held that a declaration of neutrality would virtually mean secession, even though true, ought, we think, to be expanded somewhat; the contrary view has at least enough adherents to merit mention. Concerning the right of secession itself, the treatment which the point gets here, though necessarily limited, is put with marked fairness. It would, however, have conduced to the clarity of the argument if the reason why Canada has not the right in law to secede were given. However this is only a small point and the chapter on the whole displays the same insight and learning as is manifest throughout the book.

G. F. CURTIS.

Dalhousie Law School.

* * * *

The Science of Judicial Proof. By JOHN HENRY WIGMORE. 3rd edition. Boston: Little Brown & Company. 1937. Pp. xxiii, 1065. ($10.00)

In our review of the second edition of this scholarly treatise we ventured to characterize it as a renewal of the call to the Bar for repentance and amendment respecting judicial procedure made by Jeremy Bentham a century ago. We then congratulated the author on his courage in undertaking to clothe in scientific dress the principles of judicial evidence as they have come down to us—*rudis indigestaque moles*—from the past. The attention we gave to the book at that time persuaded us that the author's aspiration to have his work regarded as a "*novum organum*" for the study of its subject-matter was justified by its excellence of achievement. Like Bacon's famous *Novum Organum* the book in form and substance is a "new instrument" for the advancement of learning; and as Bacon's purpose was a practical one in setting up a better method of interpreting Nature

than the syllogism of scholastic tradition, so is Wigmore's purpose in formulating a method whereby a science of Judicial Proof may be substituted for the congeries of artificial rules which now make up what is commonly known as the Anglo-American Law of Evidence.

In this book we have the first attempt in the literature of English law since Bentham's time to call attention to the principles of Judicial Proof (apart from the rules of Admissibility) as a whole and as a system. The work is divided into five parts, the first four constitute a sort of propaedeutic to the fifth part which embodies a method enabling us, as the author puts it, to "Lift into consciousness and to state in words the reasons why a total mass of evidence does or should persuade us to a given conclusion, and why our conclusion would or should have been different or identical if some part of that total mass of evidence had been different." The method proceeds along the lines of chart and symbol, a technique requiring sedulous study for its mastery as the author very frankly admits. But if an understanding of his method may not be had at a glance, he is persuaded that it is workable. After quoting Jevons to the effect that the conditions arising in judicial proceedings are too intricate to allow them to be expressed adequately in mathematical formulas, he asks "If we can set down and work out a mathematical equation, why can we not set down and work out a mental probative equation?" Possibly, a refutation of Jevons's opinion and an affirmative answer to Wigmore's question may be found in the judgment of Lord Hewart, C.J., in *Rex* v. *Taylor* [1928] 21 Cr. App. R. 20, where, speaking of circumstantial evidence, he said: "It is the evidence of surrounding circumstances which, taken together by undesigned coincidence, is capable of proving a proposition with the accuracy of mathematics."

Doctor Wigmore looks upon the study of the principles of Evidence as properly resolving itself into a dichotomy. In the first place it is necessary to consider PROOF in its broad signification—"the part concerned with the ratiocinative process of contentious persuasion"; secondly, attention must be directed to the subject of ADMISSIBILITY—"the procedural rules devised by the law, and based on litigious experience and tradition, to guard the tribunal (particularly the jury) against erroneous persuasion." In his opinion the latter has absorbed the studious attention of lawyers and led to the neglect of the former which is of greater importance. Proof is the dominating concern of counsel at the trial, and to persuade the tribunal that the evidence he has adduced establishes his case he must know and must use those logical processes which men naturally use in reaching a conclusion, and must also be familiar with the classes of inferences commonly called for in legal trials. "Here," says the author, "he [counsel] has no use for the artificial rules of Admissibility. Those have been disposed of, at the outset, by the Judge. The evidence is in, and the question now is, what is its effect? All the artificial rules of Admissibility might be abolished; yet the principles of Proof would remain so long as trials remain as a rational attempt to seek the truth in legal controversies."

Doctor Wigmore, now Dean Emeritus of the Northwestern University School of Law, during his long career as a professional teacher of law has shown by example that the usefulness of that vocation need not, and indeed should not, be confined within college walls. His activities as a text-writer on various legal themes have been of practical value to the

Bench and Bar in all countries where the English system of law prevails; but it was reserved for his book on Evidence to become a classic and give him enduring fame at home and abroad. Concerning it Sir William Holdsworth has said that "the more it is studied the more its readers marvel that it could be written by one man. . . . . Judges who are adjudicating difficult points in the law of evidence can no longer complain that they are deprived of their right to the conclusions of a specialist. They have the assistance of a great book."

The "Science of Judicial Proof" in no wise derogates from the reputation of the author as so established.

CHARLES MORSE.

Ottawa.

* * *

Comparative Commentaries on Private International Law or Conflict of Laws. By ARTHUR K. KUHN. Toronto : The Macmillan Company of Canada. 1937. Pp. xii, 381. ($5.00)

It is not an uncommon thing in continental Europe for an author to write on the subject of conflict of laws from the point of view of comparative law. Indeed the medley of legal systems there existing often compels a writer in one country to compare the doctrines applied in his own country with doctrines applied in other countries. In the United States of America, on the other hand, while it is true that one hundred years ago Story wrote a book on the conflict of laws in which copious extracts were made from foreign writers, the subsequent tendency has been in the direction of confining any discussion of comparative law to a comparison of doctrines developed in Anglo-American countries, or even to a comparison of doctrines developed in different states of the United States. The culmination of this tendency is manifested in the Conflict of Laws Restatement and in Beale's Treatise on the Conflict of Laws, in each of which is to be found an exposition of a strictly "common law" system of the conflict of laws, singularly lacking in the cosmopolitan outlook which, it is submitted, should distinguish the treatment of the subject, and frequently adopting solutions which are strictly domestic in their outlook in the sense that they may be suitable in the case of conflicts arising between states of the United States, but not suitable in the case of conflicts arising between a state of the United States and some foreign country. (*Cf.* Yntema, *The American Law Institute* (1934), 12 Can. Bar Rev. 319, at p. 345; Falconbridge, *Contract and Conveyance in the Conflict of Laws* (1933), 81 U. of Penn. L.R. 661, at p. 663.)

In modern times not much has been written in the United States by way of expositions of foreign systems of conflict of laws. One notable exception is afforded by Lorenzen's series of articles on French and German rules of conflict of laws, in volumes 36, 37, 38, 39 and 40 of the Yale Law Journal; and the author of the book now under review himself wrote, twenty-five years ago, on the *Doctrines of Private International Law in England and America Contrasted with those of Continental Europe* (1912), 12 Columbia L.R. 44. The appearance of a book of 381 pages devoted to a comparison of the rules of conflict of laws of various countries is therefore especially interesting, possibly symptomatic of an awakening interest in foreign systems of conflict of laws.

When it is considered that the author gives some account of the rules of conflict of laws prevailing in England and the United States, and of the rules prevailing in France, Germany, Italy, Switzerland and South America (with special reference to the Bustamente code) and some account of the Hague conventions relating to the conflict of laws, it is obvious that it would be unreasonable to criticize the book on the ground that it does not give an adequate account of the rules of conflict of laws of any country. The treatment is necessarily concise, and concise statements of rules of conflict are apt to be impeachable. We may regret that the book is far too small for an adequate comparison of different systems, but we should at least be grateful to the author for giving us what he has given us, that is, a summary comparison of different systems under each of the usual subdivisions of the law. So far as the present reviewer has been able, or is competent, to form and express an opinion as to the summaries of foreign law, it would appear that the author has succeeded in stating clearly and accurately many of the striking contrasts between the Anglo-American and the foreign modes of approach to similar problems, and in the case of a reader who finds a statement too summary has at least given him a good start on the way to further investigation. For example, the chapter on Status and Capacity of Persons is instructive, in that it at least draws attention to the difficulties which present themselves in the comparison of different systems of law. Again, in the chapter on Succession upon Death there is an interesting discussion (pp. 320-323) of the applicability of the *lex domicilii* to succession to movables in French conflict of laws, notwithstanding the provision or article 3 of the French Civil Code making the national law apply to status and capacity. (The author fails, however, to note on pp. 49 and 51 that the French rule of conflict of laws relating to succession was misstated in the cases of *In re Tallmadge* (1919), 181 N.Y. Supp. 336, and *In re Annesley*, [1926] Ch. 692, as the present reviewer has pointed out elsewhere: (1937), 53 L.Q.R. at p. 553; (1930), 46 L.Q.R. at pp. 471-472; (1931), 47 L.Q.R. at p. 280; [1932] 1 D.L.R. at pp. 8, 32.)

It is rather strange that the author does not appear to have made use of Bartin as to French law or Pachioni as to Italian law. As to English law the author cites Westlake, Foote, Dicey and Cheshire in the course of the book, but does not mention them in the text of chapter 1 under the heading "Development in England", although under the heading "Later Writers" he mentions Wharton, Minor, Goodrich and Beale. He might well have extended his investigations to the province of Quebec, which has a system of conflict of laws of its own, compounded of old and modern French law and modern English law and defined in part by certain conflict provisions of the Civil Code of Lower Canada. The field is a fruitful one for a comparative lawyer, any any excuse for ignorance on the subject has been removed by the publication of Johnson's Conflict of Laws with Special Referance to the Law of the Province of Quebec, published at Montreal· Vol. 1 (1935), reviewed 11 Can. Bar Rev. 647; vol. 2 (1934), reviewed in 12 Can. Bar Rev. 696; vol. 3 (1937).

One grave omission in a book devoted to a comparative statement of the conflict of laws consists in the failure of the author to say anything about the doctrine of characterization, (qualification or classification) which has been discussed intensively on the continent of Europe for a considerable period of years, although its importance has begun to be recognized in Anglo-American countries only in recent years. (See references to some of

the literature of the subject in the present reviewer's *Characterization in the Conflict of Laws* (1937), 53 L.Q.R. 235 at p. 239). In this respect the author does not give an adequate account of continental theories of the conflict of laws. Similarly, the author does not discuss the theory of the recognition of foreign created rights or its relation to the doctrine of the *renvoi*.

Osgoode Hall Law School. JOHN D. FALCONBRIDGE.

* * *

Elements of International Law. By HENRY WHEATON. The Literal Reproduction of the Edition of 1866 by RICHARD HENRY DANA, JR., Edited, with Notes by GEORGE GRAFTON WILSON, Professor of International Law, Harvard University, Membre de l'Institut de Droit International. Oxford: At the Clarendon Press. London: Humphrey Milford. 1936. Pp. 642.

This is the nineteenth volume of the series of "Classics of International Law" published under the auspices of the Carnegie Endowment for International Peace. The republication of these Classics has been undertaken principally on account of the difficulty of procuring the texts in convenient form for scientific study. Those works are selected for inclusion in the series which can be said to have contributed either to the origin or to the growth of International Law; the term "classic" is thus used in a broad, rather than a narrow sense.

"Elements of International Law with a Sketch of the History of the Science" by Henry Wheaton was first published in 1836 and many editions have appeared over the past hundred years. Intended as an elementary work for the use of persons engaged in diplomatic and other forms of public life, the book has long been regarded as a leading exposition of the system of rules by which civilized nations have professed to be bound in their mutual intercourse. Striking evidence of its value, not only to diplomatists but to lawyers engaged in the study of problems of international law, is afforded by the series of translations into foreign languages which have been made both during the author's lifetime and after his death. These include translations into French, Italian, Chinese (this for general circulation among Chinese officials for their general guidance) Japanese and many other languages. Numerous English editions have appeared, the last of which was issued in 1929, under the editorship of A. Berriedale Keith.

The general rule of the series that the last edition appearing during the author's lifetime should be reproduced as being most likely to contain the text which had his final approval, is departed from in this volume. The edition of 1866 with the notes of Richard Henry Dana, Jr., is chosen as being the most famous of the many editions of the work and the one most frequently cited by other authors and in legal decisions. The present edition has been prepared by George Grafton Wilson, for many years professor of international law at Harvard University. In its preparation, the present editor has taken great care to reproduce without alteration both Wheaton's text and Dana's notes, inserting in foot-notes such editorial corrections as appeared necessary.

Toronto. R. M. FOWLER.

Books Received

The inclusion of a book in the following list does not preclude a detailed review in a later issue.

The Folklore of Capitalism. By Thurman W. Arnold. New Haven: Yale University Press. 1937. Pp. vii, 400. ($3.00)

Neutrality of the United States. By Edwin Borchard and William Potter Lage. New Haven: Yale University Press. 1937. Pp. viii, 380. ($3.50)

Restatement of the Law of Restitution (Quasi-Contracts and Constructive Trusts). As adopted and promulgated by the American Law Institute at Washington, D.C., May 8, 1936. St. Paul: American Law Institute Publishers. Pp. xxv, 1033. ($9.50)

Notes on Restatement of Restitution. By the Reporters, Warren A. Seavey and Austin W. Scott. 1937. St. Paul: American Law Institute Publishers. Pp. ix, 208.

Cours de Droit Industriel. Par Léon Mercier Gouin, C.R. Tome I. 1937. Montréal: Ecole des Hautes Études Commerciales de Montréal. Pp. 234.

The Law of Gaming. By Howard A. Street. London: Sweet and Maxwell. 1927. Pp. lxiii, 760. (£2.2s)

The Law of Nations. By Herbert W. Briggs. New York: F. S. Crofts & Co. 1937. Pp. xxix, 984. ($8.00)