# RECENT LITERATURE.

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*Points of View.* By Viscount Birkenhead, Lord High Chancellor of Great Britain. In two volumes: Hodder & Stoughton, Limited, London.

There is one disadvantage in dealing with the luminaries of the English Bar, and that is the mutability of the proper nouns bespeaking their identity from the cradle to the grave. In this country it is looked upon rather as a matter of dishonour for a member of the profession to be constrained to change his name; in Britain, on the contrary, it is a matter of honour. Coming to particulars it would be difficult for the uninitiated to recognize under the name of Viscount Birkenhead one who in his amazing youth was known as Frederick Edwin Smith, President of the Oxford Union in his twenty-first year and Vinerian Law Scholar when two years older. Nor would the uninitiated be likely to identify Lord Birkenhead, L.C., with Sir F. E. Smith, Kt., who, in his early prime, became His Majesty's Attorney-General in 1915. How true it is, then, in England that—

"New-made honour doth forget men's names."

*Points of View* is an important book if only because it is written by a Lord Chancellor. That is an adventitious distinction. But it has inherent qualities that place it in the category of books concerning which a greater Lord Chancellor said they are "to be chewed and digested." For instance, the opening paper—a defence of Lord Kitchener against the detractions of Lord Esher—is a noble tribute to the memory of one of England's great soldiers whose poignant fate finds a parallel only in Greek tragedy. We quote the following from the final paragraph:

"Who knows what pictures raced through that driven brain in the dreadful moment of realised doom? Many, I

> suspect, of the fierce blue skies and scorching deserts of the East; some, perhaps, of Broome and the roses, where never should be pleasaunce for their master; most of all, to be sure, of that England which he steadfastly and ardently loved . . . and then the black icy breakers of the Western Orkneys . . . and a great and valiant heart extinguished forever."

Infinite variety marks the outpouring of Lord Birkenhead's thought, and in the nineteen papers that make up the content of the two handsome volumes before us there is much to interest and plenty to instruct divers minds. There is every proof that he has strictly meditated the muse, but he has not permitted her to be thankless. The fine audacity with which he delivers his views persuades us that for him at least there is no great difficulty in realizing Blake's aspiration to hold infinity in the palm of the hand.

Let us illustrate this. After advising us that the two essays, "A Ministry of Justice" (Vol. I., p. 92), and "Judges and Politics" (Vol. II., p. 147), should be read together, he observes:

> "There has been much undigested talk among those who are unaware of, or have not sufficiently considered, the difference between Latin systems of legal organization and our own, as to the necessity of a Ministry of Justice. I am sanguine enough to believe that in impartial and competent minds, the views under consideration will not survive the study of these articles."

Take another example:

> "I shall not be suspected of any personal vanity, if I say that to attain such success as leads either to the Woolsack or to the Judicial Bench requires, in addition to intellectual gifts of the highest order, inborn qualities of vigour, courage, determination, and perseverance, hardened and sharpened by long years of labour and of conflict." (Vol. I., p. 114).

From these, and like passages to be found throughout the work, it is reasonably clear that St. Philip Neri's maxim *Spernere te ipsum*, forms no part of Lord Birkenhead's philosophy of life.

The Bar will find sound and practical suggestions as to needed reforms in the law, both in its substantive and adjective aspects, in such papers as "Should a Doctor Tell?" and "Codification

and Consolidation," in the first, and "Law Reform" in the second volume. While the lover of limpid prose within and without the profession will not regret a reading of the brief surveys of the lives of Lord Salisbury (Vol. II., p. 65), Neil Primrose (*Ibid.*, p. 124), Jack Scott (*Ibid.*, p. 136) and Edward Horner (*Ibid.*, p. 142); nor will he find lack of requital for his reading of "The Oxford Union Society" (Vol. I., p. 77). If one be interested in British politics, "A New Party" (Vol. II., p. 192) will prove instructive to him. We doubt, however, if any student of world politics would consider himself the loser if the distinguished author's speech at the London Conference of the International Chamber of Commerce on "The Reconstruction of Civilization" had not been included in the book.

C. M.

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*The Problem of Proof.* By Albert S. Osborn. Matthew Bender & Company: New York and Albany.

This book presents a discussion of various phases of the proof of facts in a court of law, with some general comments on the conduct of trials. In the course of a brief Introduction to the work, Dean Wigmore—one of the greatest of our legal writers now living—tells us that there is wisdom on every page, and that he would like to have written (although he declares that he could not!) a particular portion of it. Now the poet tells us that—

"A Dean is just, a Bishop juster still."

So, notwithstanding the absence of any corroborative evidence from the episcopate, we are quite prepared to accept the learned Dean's word as to the quantum of wisdom pervading the book. Before the chapter on "Advocacy" (the portion of the work he would like to have been able to produce himself) Dean Wigmore stands—

"Breathless with adoration."

We have read it carefully; and, without confessing the same poignancy of emotion, we are happy to say that it is an excellent presentation of the standards of behaviour that ought to be observed by every advocate in his practice before the courts. This is a day when the shafts of criticism are being busily launched against the Bar. Most of them would be turned aside

if professional conduct responded in every respect to the tests of propriety outlined by Mr. Osborn.

Possibly the author will permit us to make a slight animadversion on his text. He says (p. 234): "The first requirements of the great lawyer are a *good working conscience* (italics ours) and a strong personality." What are we to understand by the phrase "good working conscience?" Does it connote the Pauline conscience "purged from dead works?" Surely we are not to regard it as a parallel to such a phrase as "good working knowledge" for that is not knowledge unqualifiedly good. Lawyers no more than other mortals can be content with a conscience good only in a pragmatic sense.

Chapters XI. and XII. deal with cross-examination from the standpoints of witness and counsel respectively, and we especially commend them to the study and meditation of the Junior Bar. Indeed the work as a whole is a valuable contribution to the technical literature of the law.

C. M.

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*The Canada Year Book, 1921.* Published by authority of the Honourable J. A. Robb, Minister of Trade and Commerce. The King's Printer, Ottawa.

In a foreword Mr. R. H. Coats, Dominion Statistician, states that Mr. S. A. Cudmore, M.A. (Oxon.) F.S.S., has acted as the editor of this issue of the Year Book. We wish to congratulate Mr. Cudmore on the success that has attended his work. We come to feel now that we have at our hand a book of reference to which recourse may be had with every assurance of finding what we want. An examination of the contents of the book for the purposes of this notice reveals only two matters upon which we are inclined to comment. On p. 18 Mr. Cudmore, quoting from the 72nd Psalm as it reads in the Vulgate—*Et dominabitur, etc.*, says "There is a tradition that the Fathers of Confederation derived the designation 'Dominion' from this verse." For the benefit of the general reader it would have been well to supplement that statement by a reference to Pope's "Correspondence of Sir John Macdonald," p. 451, where it appears that in the draft of the Canadian Constitution as submitted to the Imperial authorities the designation of the united provinces of Canada was "Kingdom," and that it was changed to "Dominion" at the instance or request of Lord Derby. Again, on p. 8 it is stated that "The decisions of the Supreme

Court (of Canada) and of the Judicial Committee of the Privy Council constitute the case-law of our constitution." That excludes the decisions of the courts in the provinces, and the reports show that cases involving constitutional questions are continually coming before such courts and that their decisions in these matters are not always carried to appeal.

C. M.

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*Digest,* XLI, 1 and 2, Translation and Commentary by F. de Zulueta, D.C.L.: (Oxford University Press).

Most educated lawyers to day are agreed as to the value, both cultural and practical, to be derived from an intelligent study of the Roman Law. To the practitioner the Digest is more interesting than the Institutes, but unfortunately the Digest is a closed book to all except the very few who have acquired and kept up a youthful enthusiasm for Latin. The profession is therefore much indebted to Professor de Zulueta for providing in a convenient and inexpensive form a scholarly translation of the two important titles which deal with acquisition and possession.

To Quebec lawyers the first title is of especial interest, since it forms the foundation for the law as laid down in Articles 399-442 and 583-595 of the Civil Code. The whole title is full of rulings upon points which are continually arising under the conditions of life throughout Canada. For example, we may notice the case of *Charlebois* v. *Raymond* (1867), 12 L. C. J. 55, where Berthelot, J., preferred to follow the doctrine of Trebatius rather than that officially sanctioned by Justinian. The case was one where the plaintiff wounded and pursued a bear, which was killed and captured by the defendant. The court held that ownership was acquired by the plaintiff.

The importance and difficulty of the subject of possession need no emphasis. They are amply illustrated by such cases as *Elwes* v. *Brigg Gas Co.* (1886), 33 Ch. D. 562, and by the numerous Canadian decisions involving questions of the title to land in unsettled country.

H. A. S.

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Prof. J. G. Swift MacNeill contributes to *The Journal of Comparative Legislation and International Law* for February some thoughts on the constitution of the Irish Free State. He

considers this constitution as being, since the construction of the constitution of the United States, "the most momentous achievement in the history of the governing institutions based on the great prototype of the British constitution."

The most striking feature of this document, and one which takes up a large part of Prof. MacNeill's article, is the incorporation of many of the conventions of the British constitution, consisting of understandings and practices which have no place in positive law but are nevertheless regarded as binding upon governments and legislatures, these conventions being in some cases modified and varied, while in other cases the unwritten law of the English constitution is set aside and a different rule adopted.

Among the provisions exemplifying the above feature of the new constitution are these: that the Legislature shall meet once each year; that money shall not be voted for any purpose not recommended by the representative of the Crown; that there shall be a council, the members of which shall also be members of and responsible to the popular chamber, to aid in the government of the State, this council to be styled the Executive Council; that the president of the council is to be appointed by the Crown on the nomination of the popular chamber; that the cabinet is to be collectively responsible for the administrative acts of each minister; and that the ministry is to retire when it no longer possesses the confidence of the popular chamber.

The number of ministers is to be not more than seven nor less than five—under Lloyd George there were as many at one time as twenty-two. The greatest departure from the English system is to be found in the provision that "the legislature shall not be dissolved on the advice of an executive council which has ceased to retain the support of a majority of a Dail Eireann (popular chamber.)" This provision withdraws from the Government of the day a powerful instrument of discipline. Witness Mr. Fielding's threat at the beginning of the present session to appeal to the country if an amendment to the address in reply to the speech from the throne, moved by the leader of the Progressives, were carried.

Other marked features of the constitution are the establishment of the referendum and provisions for legislation by popular initiative. Through the referendum changes may be effected in the constitution itself provided they do not conflict with the treaty between Great Britain and Ireland of December 6th, 1921. The constitution of the Irish Free State, therefore, resembles

that of the provinces of Canada in being of the flexible as opposed to the rigid type, although in the one case the treaty, and in the other the power of disallowing provincial Acts vested in the Governor-General in Council, sets a limit to the flexibility. The British North America Act by section 92 enables the legislature of each province to make laws for "the amendment from time to time, notwithstanding anything in this Act, of the constitution of the province, except as regards the office of the Lieutenant-Governor." The constitution of the Dominion, on the other hand, is a rigid constitution. It cannot be altered by the Dominion Parliament, but only by an enactment of an outside body, namely, the Imperial Parliament.

Prof. MacNeill considers the constitution of the Irish Free State "a monument of brilliant, constructive statesmanship," and he evidently classes it above the fundamental laws of the Dominion of Canada, the Commonwealth of Australia and the Union of South Africa.

R. W. S.

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*A Dictionary of English Law.* By W. J. Byrne. Sweet & Maxwell Limited. London.

The profession will find in this volume a valuable addition to the department of reference books in the library of the law. We understand that in its beginnings this compilation was intended to be a new edition of the late Mr. Sweet's well-known dictionary, but in the course of preparation it was found to outgrow the compass of that work, and so was given an independent character. It is more than a dictionary and something less than an encyclopædia of the law. It affords adequate information on many subjects that are only lightly touched upon by the dictionaries, such, for instance, as ancient statutes that have become part of the fabric of what we call the common law. The development of the law of tenures is succinctly shown, and many old customs are explained; while the salient doctrines of modern law in its various branches are stated with all the particularity possible in such a compilation.

The work as a whole bears the impress of comprehensive research.

C. M.

## BOOKS AND PERIODICALS RECEIVED.

*Transactions of the Grotius Society,* Vol. 8. Problems of Peace and War. Sweet & Maxwell, Limited, London, 1923.

*The Constitution of Canada.* By W. P. M. Kennedy, M.A., Litt D. Humphrey Milford, Oxford University Press, London and Toronto.

*Chambers Encyclopædia,* New Edition, Volume 1, W. & R. Chambers, Limited, London and Edinburgh, 1923.

*History of English Law.* By W. S. Holdsworth, K.C., D.C.L. 3rd ed. Vols. II. and III. Methuen & Co. London.

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