BOOK REVIEWS.

Lives of the Lord Chancellors 1885-1940. by R. F. V. HEUSTON. Oxford: The Clarendon Press. 1964. pp. xxiii, 632 (including index). $9.45.

Professor Heuston (as he now is), in this admirable set of twelve biographies of Chancellors from the Earl of Halsbury to Viscount Caldecote, has produced for us a worthy successor to the eight volumes of Lord Campbell's *Lives of the Chancellors* and the two volumes of Atlay's *Victorian Chancellors.* In his graceful preface the author pays tribute to the "remarkable industry and talent" displayed by Campbell and the "felicity in portraiture and literary grace" of Atlay. He has matched Campbell's industry with his own, for there seems to be no accessible source, whether publicly available in print or accessible only through the courtesy of the holders of private papers, which he has neglected to consult in the course of writing this work; and the book is written with all the care and lucidity which we have come to expect from him. The twelve biographies, indeed, are models of their kind.

Inevitably some of the ground has been worked over before. Thus, as he tells us in his preface, Heuston has chosen to begin with Lord Halsbury, although Atlay had included both him and Herschell his successor in his second volume, because at the time this appeared Herschell had been dead for only nine years and Halsbury was still alive, and this must have affected what Atlay could say. Again, both Haldane and Birkenhead have become well-known through both autobiographical and biographical writings, Cave has been the subject of a biography by Sir Charles Mallet, Buckmaster of one by Johnston and Viscount Maugham wrote his own memoirs. But for the other five subjects the present work presents the first substantial biographies.

The book begins with a short but valuable introduction which reviews the nature of the office, and the constitutional position, of the Lord Chancellor, and ends with a brief general survey of the twelve men who are the subjects of the book. In answer to the question "How far did the men who occupied the office change over the period 1885-1940?" The answer is clearly "very little". All but two came of a background which was, in the author's words "solidly middle-class". All but one were University men, and all but two of these gained either a First or a Second. None (except perhaps Viscount Hailsham, who came of a wealthy family) died a rich man; four indeed died

comparatively poor men. The statement of the gross amounts at which their estates were valued for probate makes vivid contrast with the £700,000 which Lord Eldon was worth when he died. Herschell was perhaps materially the most successful; his estate was proved at £153,000 (in 1898)—a remarkable performance, as Heuston observes, for one who began life as a "penniless and friendless barrister."

Each of the biographies follows the same general form. There is a short statement of the subject's family background, a description of his early life and particularly of his education, and a sketch of his beginnings at the Bar. Then follows an account of his legal and political career, with some attention to landmark cases or political crises; a description of the circumstances surrounding his elevation to the Woolsack, and a review of his period of office; finally, an account of his subsequent activities as an ex-Lord Chancellor. It is remarkable to note, from the table at the beginning of the book, how short a period of a man's life is usually spent at what is generally regarded as the apex of a man's legal and political career. Halsbury is a notable exception, as he held the Great Seal for a total of seventeen years and two months; apart from this, the longest tenures in the period with which the book is concerned were those of Loreburn (6 years and 6 months) and Sankey (6 years), while Buckmaster, Maugham, Cave and Hailsham held office for 1 year and 7 months, 1 year and 6 months, 1 year and 3 months, and 1 year and 2 months respectively, and Viscount Caldecote's tenure of office was only eight months. The biographies are of uneven length. Halsbury's occupies 82 pages (not surprisingly, in view of the length of his tenure of office). The next longest, rather surprisingly at first sight, is that of Lord Buckmaster, which occupies 70 pages, although some of this is accounted for by some extensive quotations from previously unpublished papers of Buckmaster's, it seems that something about the man himself has caught the author's fancy. But it is not easy to detect what this is, for the biographies are finely objective, and Heuston shows no tendency to "play favourites". The later biographies are the shorter; the last two (those of Maugham and Caldecote) are only 32 pages each. Perhaps the author felt some of the inhibitions which (as indicated above) he conjectured that Atlay felt when dealing with Lord Herschell.

In the course of these twelve biographies Professor Heuston has provided us with much new and interesting information. There is a valuable chapter on Halsbury's judicial appointments, which effectively deals with the mass of critical comment and speculation which has grown up round Halsbury's appointments to the Bench. The author's

careful examination of all the relevant information enables him to establish conclusively that most of the criticism, contemporary and subsequent, was unjustified. Halsbury, in his long tenure of office, made 30 appointments to the Bench of the High Court; of these Heuston selects seven as "dubious" (Grantham, J. C. Lawrance, Ridley, Darling, Kekewich, Bruce and Sutton) and concluded that of these only four can be described as mistakes. Ridley, whom Pollock described in a letter to Holmes as "by general opinion of the Bar the worst High Court judge of our time, ill-tempered and grossly unfair" was one of these; but as Heuston points out, on his previous record he should have been excellent. Kekewich seems to have been another; but the author's final verdict on him is that "he seemed to be dogged by misfortune," and the revelation in the biography of Lord Loreburn that in 1906 Loreburn asked Campbell-Bannerman to honour Kekewich by appointment to the Privy Council, describing him as being "in the most important part of a Chancery Judge's duty, such as looking after wards and management of business affairs, he is quite admirable, . . ." though "in the decision of law points, though learned and good, he has been surpassed by other Judges, . . ." may help readers towards a fairer assessment of that unfortunate butt of so many after-dinner stories.

The publication of this particular letter is an example of one of the most valuable features of the work, the industry with which the author has delved into hitherto unpublished papers and brought to light much that helps to throw fresh shafts of light on the legal and political scenes of the period. Such disclosures as that of Lord Cave's memorandum, when Lord Chancellor, advising King George V of his constitutional position in respect of the prerogative of dissolution (of which Heuston says "[it] is well worthy of taking its place amongst the state papers on English constitutional practice"), of Lord Dunedin's private opinion (in a letter of 1935 to Hailsham) concerning the then Lords of Appeal in Ordinary, of Buckmaster's memorandum of October 13, 1915, which the author thinks may well have influenced Cabinet to abandon the proposal to help Serbia, and his long memorandum of January 1917 in which he sets out the circumstances surrounding the replacement of Asquith as Prime Minister by Lloyd George, (and there are many other such) are likely to be of great interest to many readers.

Again, Heuston's eye for interesting detail is acute, as readers of his other books (and those who have been fortunate enough to hear his lectures) have learnt to expect. In the course of the various biographies we are given, for example, details of the nature of the Great

Seal, and its fate when a new Great Seal is made (this both in Halsbury's biography and in that of Hailsham); of the fate of the Lord Chancellor's purse (which, we learn, now never contains the Great Seal); we learn the old form of oath of office to be taken by the Solicitor-General, as taken by Cave; we are given details of the swearing-in of Herschell as Lord Chancellor, and (in the biography of Viscount Finlay) an account of the correct practice to be followed in the swearing-in of a Lord Chancellor. Great legal and political causes make their appearances in these pages. The ghost of Roger Casement stalks through three of the biographies, those of Birkenhead (who led for the prosecution when he was Attorney-General), Buckmaster (with a copy of the letter he received from the then Archbishop of Canterbury, Dr. Randall Davidson, asking that Casement be reprieved) and Cave, who, as Home Secretary, was asked whether he would show the notorious Casement diaries to an Irish cleric if his integrity were vouched for by the Chief Secretary for Ireland (Cave's reply was "Yes"). The General Strike of 1926 is seen, briefly, from two points of view. Munich is viewed through the eyes of both Viscount Caldecote (who, as Sir Thomas Inskip, was to bear not a little of the obloquy later attached to that settlement) and Viscount Maugham, who, though an ardent supporter of Chamberlain's policy, was, in his own words "at no time an intimate adviser in the matter." There are some shrewd judgments on the subjects. Referring to the wording of the plaque which the London County Council has placed on the house at Queen Anne's Gate at one time occupied by Haldane, describing him as "Stateman, Lawyer, Philosopher," Heuston comments "The various facets of Haldane's massive talent are placed in the correct order." Viscount Caldecote's career is summed up as "an example of unostentatious Christian integrity in a series of high public offices." Some comments on the political scene in Great Britain which Heuston reproduces, induce wry reflections in the antipodean reader, notably the statement of F. E. Smith that "Parliament, after all, is the microcosm of the talent of Great Britain, and no man of great ambition, conscious of great powers, will willingly throughout his career be excluded from its arena." Nervous young barristers with ambitions may take comfort from the fact that when young Hardinge Giffard (later to become the Earl of Halsbury) first appeared before Lord Campbell, L.C.J., he was the victim of so acute an attack of nervousness, hesitation and stammering that the Lord Chief Justice, "never the most patient of men," leaned down from the Bench with the remark: "For God's sake get on, young man." (He did, in more senses of the phrase than one.)

Although, as is inevitable in a series of biographies concerning the holders of an office which is as much political as legal, and which has almost always required as a qualification for appointment a substantial political career, there is much emphasis on the political and constitutional affairs of Great Britain during the period in question, the purely legal aspects of the work of the Lord Chancellors in question, before, during and after their terms of office, have not been neglected. In addition to the references in the text, there is a brief appendix to each biography giving details of the most important of the judgments delivered by each man, and a brief assessment of their importance. To some these may appear as a rather hasty afterthought, and to break the continuity of the text; but they provide starting-points for further inquiry for those interested, and a reminder to lawyers of the purely legal achievements of the subjects (the cases are usually those with which lawyers will be thoroughly familiar). The book would have been poorer and less comprehensive without them.

The book is produced with the usual high standards of care and accuracy which characterize any production of the Clarendon Press. There are the few, apparently inevitable, slips. On p. 202 Haldane is described as walking with "a cat-like treat" (for "tread", one presumes). Twice on p. 260 Sir Samuel Griffith, the first Chief Justice of the High Court of Australia, is referred to as "Griffiths". (He is recorded as expressing the opinion that an argument which Buckmaster addressed to the Judicial Committee when he was sitting on it was "the best argument I have ever heard in a court of law.") On p. 501, in a reference to *Trim School Board v. Kelly*,[1] appears the sentence: "Sankey agreed that 'nobody out of a Court of Law would describe an injury which resulted from a deliberately planned assault as the result of an accident'." "Agreed" should surely be "argued". "Jucidial" for "judicial" appears on p. 443; and in the index Gutteridge's name is spelt with two "r's" as well as two "t's". Incidentally, the index, which contains as its primary entries only personal names, under which incidents and cases are then indexed, is a little frustrating to use when one is seeking for details of some event in which more than one of the subjects was involved; but this is a small complaint, and one which detracts hardly at all from this valuable collection of biographies of those who, for however short a time, have attained the summit of any man's politico legal position, the high and unique dignity of Lord High Chancellor of Great Britain.

E.K.B.

[1] [1914] A.C. 667.

Private International Law, 7th ed. By G. C. CHESHIRE. 1965. lxi + 628. Butterworths. £3.17.6 stg.

It is difficult to know how to review the seventh edition of a work which was, before the reviewer was even born, already recognised as a great contribution to English legal literature. One could, I suppose, write one of those reviews which derive their justification, not to mention their quaintness, from an exhaustive and exhausting compilation of misprints and erroneous citations of law reports; that way one would, at least, avoid giving the appearance of bestowing accolades that long ago were bestowed by others more appropriately placed to do so. Or one could, in the manner of so many American law journal reviewers, seize the slender excuse of someone else's book being before one to write a monograph of elephantine proportions, heavy, doubtless, with "isms" and "ologies", setting out one's own views on the entire subject; here the broad pattern is that the more puny the reviewer the more verbose the review. Hoping to avoid either of these alluring alternatives, I would like to comment in general on two or three broad characteristics of the book and in more detail on some of the sections which have been rewritten for this edition.

Speaking of the dual domicil doctrine by which capacity to marry is tested, Cheshire states (on page 277): "A doctrine which can work such havoc with human happiness and which is so out of harmony with what the reasonable man would expect is suspect. It is not common sense and for that reason alone is probably not part of the common law." Beset on every side by such gems of the common law as *D.P.P. v. Smith*,[1] *Sykes v. D.P.P.*,[2] *Shaw v. D.P.P.*,[3] *Associated Distributors Ltd. v. Hall*,[4] *Lee Cooper Ltd., v. C. H. Jeakins Ltd.*,[5] and *Myers v. D.P.P.*,[6] to mention only a few at random, one can but gasp at his impudent optimism; but having done so one must put aside one's cynicism, because this is, for the author, a sincere and true statement. It is no accident that Cheshire so often quotes Lord Denning and Lord Denning so often quotes Cheshire (or Cheshire and Fifoot); for each, a stupid decision shows not the failure of the common law to have regard to common sense but a temporary impairment of the ability of fellow lawyers to perceive the omnipresent com-

1 [1960] 3 All E.R. 161.
2 [1961] 3 All E.R. 33.
3 [1961] 2 All E.R. 446.
4 [1938] 1 All E.R. 511.
5 [1965] 1 All E.R. 280.
6 [1964] 2 All E.R. 881.

mon sense of the common law. Each is temperamentally prepared and intellectually equipped to mark a path through a minefield of authority so that others may follow, if they will. Because of this, occasional passages of Cheshire's book are skilful bits of special pleading on behalf of his own humane and common sense view of a particular problem. The discussion of the law to which capacity to marry is referable is itself an example of this (see pages 276-288); so, too, is his discussion of common law marriage (pages 296-306). Broadly, Cheshire's view is that, apart from circumstances of military occupation, the doctrine should only be available in cases where there was some insuperable difficulty in complying with the local form *and* where the parties' most intimate legal connection (domicil, not nationality) was with a common law country. Otherwise, he says, the question of the formal validity of a ceremony not satisfying the *lex loci celebrationis* should be referred to the conflicts' rules of the legal system with which the parties have their most intimate legal connection. The sense of this choice of law is that, adopted uniformly, it would produce uniform results, a purpose of conflicts' rules very important to Cheshire. In support of this view he accordingly cites the New South Wales case of *Maksymec v. Maksymec;*[7] his view could be more fairly assessed, not just on principle but also on authority, had he likewise cited the South Australian case of *Savenis v. Savenis,*[8] which is utterly opposed to it.

The mention of *Savenis v. Savenis* leads one on to another characteristic feature of Cheshire's approach to private international law. For that case typifies the approach to conflicts' problems which permits the forum a dominant role for no better analysed a reason than that it *is* the forum. Such an approach is anathema to Cheshire; the most appropriate attitudes with which any forum can come to a conflicts' problem are those of humility and diffidence. Thus Cheshire twice (on pages 135 and 242) quotes with evident approval the famous statement of Cardozo J. in *Loucks v Standard Oil Co.,*[9] in which he denounces the judicial tendency to equate different foreign law with law contrary to the forum's public policy. In the careful, common sense evaluation of reasonable expectations, chauvinism has no legitimate part to play. Thus is explained his former preoccupation, pruned somewhat in this edition, with the doctrine of *renvoi;* thus, too, his distaste for the first part of the rule in *Phillips v. Eyre.*[10] This

7 (1956) 72 W.N. (N.S.W.) 552.
8 [1950] S.A.S.R. 309.
9 (1918) 224 N.Y. 99.
10 (1870) L.R. 6 Q.B. 1.

fundamental attitude of Cheshire is extremely attractive, a refreshing antidote, certainly, to the more contemporary theories of Ehrenzweig and his ilk. But, even so, he does not always question the validity of this attitude quite enough. For instance, speaking of assumed jurisdiction under Order XI, he states (at page 80): "It is obviously undesirable to claim a wider jurisdiction than is conceded to the courts of other countries" (when considering whether to afford recognition to their judgments). So it is, if one's only concern is that uniformity of result should be produced by uniformity of jurisdictional and recognition rules; but a forum does not assume jurisdiction under Order XI primarily that its determination shall be recognised abroad, but rather because it judges that it has a sufficient interest in the situation to order it insofar as it affects rights, liabilities and assets within the forum. Under Order XI, a forum is not always claiming a primary or a dominant interest, it is often claiming a partial one; pro tanto, perhaps, should it be recognised. However, it is a small enough point; by and large, Cheshire's attitudes, such as the one mentioned here, manage to be both firm and free from dogmatic inflexibility.

The most important revision that has taken place for this edition is the whole of the chapter concerning torts. On at least two major matters the author shifts his ground. First, he attacks the decision in *The Halley*[11] and the first part of the rule in *Phillips v. Eyre* not just, as in the previous edition, because it "is open to the basic objection that it places undue emphasis upon the accident of the forum," (page 245), but because it is not, as is generally supposed, part of the *ratio decidendi* of Willes J. anyhow. In taking this stand, he adopts uncritically the argument of Yntema.[12] After a careful analysis of the actual language of the judgment, the effectiveness of which the reader can judge for himself, these gentlemen reach the conclusion that the first part of the rule was intended to be threshold jurisdiction test, not part of a choice of law test. Having crossed this threshold, the choice is to be found in what is generally regarded as the second part of the rule, namely the *lex loci delicti*, subject, of course, to defences which are regarded as procedural and those which are based upon public policy. There seem to be at least three fundamental objections to the theory as a statement of the law, though none to it as an euphoric dream. First, there is not even a whispered suggestion in the legal history of the time that anything more than personal service within the jurisdiction was necessary to found jurisdiction over tort

11 (1868) L.R. 2 P.C. 193.

12 (1949) 27 CAN. B. REV. 116. See also Spence, *Conflict of Laws in Automobile Negligence Cases*, (1949) 27 CAN. B. REV. 661.

cases in an English forum, unless the action fell within the ambit of the doctrine later summarised in *British South Africa Co. Ltd. v. Companhia de Mocambique*.[13] Second, if the theory were correct, the implication would be that, in those cases where an action fails because of the first part of the rule, the matter would not be *res judicata,* just as it is not in cases where the court declines to exercise jurisdiction because of a more conventional interpretation of the doctrine of *forum non conveniens.* So the unsuccessful plaintiff could try in another forum. Yet the regretful terms in which courts deny action under the first part of the rule would be surprising if they thought they had merely postponed the plaintiff's remedy.[14] Third, the theory is completely irreconciliable with a considerable line of cases where the substantive law of the forum is used to fill out and give shape to a liability which the *lex loci* and the *lex fori* both recognise in general terms. Two examples may make the point clear. If the *lex loci* gives an action for negligence but not for death, and the injured person has died in circumstances which, but for his death, would have justified an action in negligence according to the *lex loci* then the forum will permit a death action if it would have permitted a negligence action in the circumstances which would have existed but for his death.[15] Again, the forum has referred to its own law to see who can be sued once the *lex fori* and the *lex loci* agree that this particular plaintiff has an action against somebody, and has permitted an action against one who could not, in the very circumstances, be sued according to the *lex loci.*[16] These two types of case are utterly inconsistent with any view that the first part of the rule is merely a jurisdictional test. So the argument, though ingenious, is clearly untenable, and in adopting it Cheshire seems to be groping too uncritically for any way, no matter what, out of what is commonly agreed to be an archaic and anomalous rule.

The other main change in this chapter concerns Cheshire's view of how to decide where a tort has occurred. In the previous edition (pages 294-295) it was argued that the *locus delicti* "is the first place where the sequence of events is complete so as to create a cause of action"; now (page 257) it is argued that "it would not be inappropriate to regard a tort as having occurred in any country which is

[13] [1893] A.C. 602.

[14] See, *e.g.,* Anderson v. Eric Anderson Pty. Ltd., (1964) 82 W.N. (Pt. 2) (N.S.W.) 121, (1965) 39 A.L.J.R. 357.

[15] See Davidsson v. Hill, [1901] 2 K.B. 606; Schneider v. Eisovitch, [1960] 1 All E.R. 169; the alternative formulation of liability in Koop v. Bebb, (1951) 84 C.L.R. 629, at 641; Parker v. The Commonwealth, (1965) 38 A.L.J.R. 444.

[16] Plozza v. South Australian Insurance Co., [1963] S.A.S.R. 122.

substantially affected by the defendant's activity or its consequences and the law of which is likely to have been in the contemplation of the parties." On such an approach, he admits, a tort could be regarded as having occurred in two countries (and, of course, be sued in a third). From the point of view of the operation of Order XI, this is sensible and far preferable to the solution reached in *Abbot-Smith v. University of Toronto*,[17] (which Cheshire does not refer to), where it was held that a tort only occurred in that place where *all* its elements occurred (*i.e.* it might occur nowhere); but to extend this approach to the working of the second part of the rule in *Phillips v. Eyre*, as he does, is ridiculous.

This chapter, then, is not an improvement; it is the greatest single weakness of the whole book. But, apart from this, Cheshire remains all that one would hope for and expect; it is waspish and whimsical, provocative and profound, a truly great contribution to the literature of private international law.

R. W. H.

The Constitution of the Australian States. 2nd ed. By R. D. LUMB. 1965. 133 pp. (including index). University of Queensland Press. $3.50.

In the preface to the first edition of his book Dr. Lumb carefully set out his aims in the following terms: "This work was written to fill a gap in the existing literature on Australian constitutional law. It has been written primarily for students and as such attempts to place in a general perspective those features of the Australian Constitutions which are considered to be of most importance." There can be no doubt that, judged by the standards so laid down, the author has achieved considerable success. The fact that a second edition of the book has been published within two years of the publication of the first speaks for itself. But, whilst it may not be entirely fair to criticise a work which fulfils so admirably the purpose which it set out to fulfil, it still remains a matter for some regret that Dr. Lumb has not attempted to treat his subject in more depth. His self-imposed limits have forced him, in many instances, to over-simplify and to ignore many of the areas of dispute. One can only hope that it will not be long before Dr. Lumb attempts a major work in this field.

The book is divided into two parts, the first dealing with the formation of the Constitutions of the Australian States, and the

[17] (1964) 45 D.L.R. (2d) 672.

second with the present structure of those Constitutions. To the first part, an interesting note on boundaries has now been added. In the second part, which deals with the legislature, the relationship between the legislature and the executive and the law-making power of the States, the last section has been expanded and a note added on the privileges of the Houses. In addition, five appendices have been added containing the Colonial Laws Validity Act, 1865, the Australian States Constitution Act, 1907, the Statute of Westminster, 1931, the Letters Patent of 1900 constituting the office of Governor of the State of Tasmania and the Royal Instructions of 1925 to the Governor of Queensland. Furthermore, it is quite clear that the remainder of the work has been carefully revised and a number of changes made in the text.

Dr. Lumb presents (at p. 95 *et seq.*) an interesting discussion of section 5 of the Colonial Laws Validity Act, in the course of which he criticises the reasoning of the members of the High Court in the *South Eastern Drainage Board Case*.[1] Quite clearly Dr. Lumb himself has had some doubts about his original criticism for, whilst in the earlier edition he accused the members of the High Court outright of erroneous reasoning he now maintains only that their process of reasoning may be questioned. One may still doubt, however, whether Dr. Lumb is correct in his view. In the *South Eastern Drainage Board Case* it was argued that section 6 of the Real Property Act expressed a formula which had to be followed in amending that Act and that the authority for imposing such a limitation was to be found in the substantive part of section 5 of the Colonial Laws Validity Act. In answer to this argument it was said that section 5 was concerned with laws relating to the constitution, powers and procedures of the legislature and that the provision in the Real Property Act was not of this nature. This appears to be the proper approach to the problem.

Dr. Lumb submits that a State Legislature has only a limited power under section 5 of the Colonial Laws Validity Act to control its successor, namely, with reference only to its constitution, powers or procedure, but he finds a wider power outside that Act.

It is noted that in citing *Tonkin v. Brand*[2] and *Munro v. Lombardo*[3] the reference is given as the Western Australian Law Reports. That series was, however, superseded in 1960 by the Western Australian Reports and the correct reference is to the latter series.

1 The South-Eastern Drainage Board (South Australia) v. The Savings Bank of South Australia, (1939) 62 C.L.R. 603.
2 [1962] W.A.R. 2.
3 [1964] W.A.R. 63.

This book is to be recommended for students as an introduction to the subject. It also serves as a most useful reference source for deeper studies. It must be said, however, that for the size of the work the price is high.

G. A. KENNEDY.