Reviews and Notices

Law and the Executive in Britain: A Comparative Study. By BERNARD SCHWARTZ, New York University School of Law. New York: New York University Press. 1949. Pp. viii, 388. ($5.50)

A. V. Dicey in his *Law of the Constitution* proudly asserted that the concept of the "rule of law" left no room in England for a system such as the "droit administratif" of France. In 1915, in an article on "The Development of Administrative Law in England", he drew attention to and viewed with alarm the increasing power of the executive "in matters which in their nature belong to the law courts". The fact that Dicey even used the term "administrative law" with reference to England was of interest. It is less than twenty-five years since Lord Hewart, then Lord Chief Justice of England, referred, in *The New Despotism*, to "the system of so-called administrative law in this country" and characterized it as "administrative lawlessness"! He urged that it "is not really a system at all, but is simply an exercise of arbitrary power. . . ".

The exercise of so-called "arbitrary" powers by the "bureaucracy" continues to be a matter of political controversy in Great Britain and in America. Lord Hewart's condemnation of modern administrative law is frequently reiterated. It is reiterated sometimes by persons who are sincerely concerned with the protection of the liberty of the subject through the maintenance of the rule of law. It is more frequently reiterated by persons whose concern is not the liberty of the subject or the rule of law or the powers of the "bureaucrat", but opposition to governmental policies flowing from the social and economic developments of our time. As Thurman Arnold has said: "Few words have been more effective in creating opposition to any form of institutional change among the intelligent and conservative people of America than the term 'bureaucracy'."

In his valuable and interesting comparative study of administrative law in Britain and the United States, Dr. Bernard Schwartz is not concerned with the current political controversy. He accepts the fact that: "The change from government as a negative factor to government as a positive force in society, i.e., from the Laissez-faire to the Public-Service State, has necessitated a tremendous expansion in governmental authority. The new role of the state could only be fulfilled through the use of far greater power than has heretofore been concentrated in government. The repository of such power has been that branch of government which, by its very nature, is the one suited to carry out the social-service functions of the state, namely the Executive branch. Institutionally, the increase in Executive power has manifested itself in the growth of administrative authorities, in the rise of

the administrative process. Legally, the result has been the development of administrative law."

Dr. Schwartz recognizes that the complex problems of modern government call for delegated legislation and administrative justice, that is, the conferring of quasi-legislative and quasi-judicial powers upon the executive. His concern is that adequate safeguards be provided to prevent administrative excesses. He urges the assertion of judicial control not to substitute judicial for executive justice but to preserve the rule of law through judicial review to ensure: "(1) *ultra vires* — that the administrative action or determination was within the powers conferred by the legislature; (2) *natural justice* — that what the Supreme Court [of the United States] has called the 'fundamentals of fair play' have been preserved; (3) *substantial evidence* — that the administrative determination is based upon rational evidence of a probative value".

The author examines the leading English cases arising from the exercise of administrative powers and comparable American cases. He points to many parallels in the development of administrative law in the two countries. But there are also important variations arising from the basic difference in constitutional structure — the supremacy of Parliament in Great Britain and of the Constitution in the United States. The exercise of administrative powers is perhaps subject to more safeguards in the United States. Whether the safeguards are such as to protect the citizen and at the same time allow for the effective exercise of the powers of the executive remains to be seen.

Writing some twenty years ago, Mr. Justice Felix Frankfurter pointed out that "the manifold response of government to the forces and needs of modern society, is building up a body of laws not written by legislatures, and of adjudications not made by courts and not subject to their revision. These powers are lodged in a vast congeries of agencies. We are in the midst of a process, largely unconscious and certainly unscientific, of adjusting the exercise of these powers to the traditional system of Anglo-American law and courts. A systematic scrutiny of these issues and a conscious effort towards their wise solution are the concerns of administrative law." Mr. Schwartz has made an important contribution to this end.

Montreal H. CARL GOLDENBERG

* * *

American Administrative Law. By BERNARD SCHWARTZ, LL.M., Ph.D. With a foreword by PROFESSOR E. C. S. WADE, M.A., LL.D. London: Sir Isaac Pitman & Sons, Ltd. Toronto: The Carswell Company, Limited. 1950. Pp. xv, 144. ($5.25)

Administrative Tribunals At Work: A Symposium. Edited by ROBERT S. W. POLLARD. With a foreword by WILLIAM A. ROBSON. Published under the auspices of The Institute of Public Administration. London: Stevens & Sons Limited. 1950. Pp. xx, 154. ($4.50)

Dr. Schwartz in the first chapter of his book has quoted the following paragraph from an address given by Elihu Root in 1916:

> "The powers that are committed to these regulatory agencies and which they must have to do their work carry with them great and dangerous opportunities for oppression and wrong. If we are to continue a government of limited powers these agencies of regulation must themselves be regulated. The limits of their power over the citizen must be fixed and determined. The rights of the citizen against them must be made plain. A system of administrative law must be developed."

In the years between 1916 and 1950 a system of administrative law has been greatly developed in the United States. The purpose of the first book under review is to describe that system for the instruction of the English lawyer, because it has been developed in the solution of problems that "are basically the same on both sides of the Altantic".

The book is not in itself a study in comparative law, although occasionally there is some account of an English rule that varies from the American rule dealing with the same problem; it is rather an invitation to non-American lawyers to inform themselves of the rules of American administrative law and then to engage in the comparative study of their own rules and those developed in America. In fairness to Dr. Schwartz, I should say that he is not proselytizing; his attitude is not that the American system is best and that non-American lawyers should study it for enlightenment. Indeed, it is his opinion that the lawyers of his own country, the United States, should be equally informed of the English experience and of the solutions worked out in England; and to that end he has previously published a book describing English administrative law (*Law and the Executive in Britain*).

The first chapter, entitled the Administrative Process, briefly sets out the history of the growth of regulatory commissions and other administrative bodies in the United States and explains how that development was inevitable as the community passed from simple to complex conditions. It is interesting to note the statement at page 9 that "the basic economic policy of the federal Government has . . . been the promotion of free competition; but this, paradoxically, has led it to take an increasing role in the regulation of the economic system. . . . This policy of maintaining free competition has been perhaps the chief motivating factor behind the growth of the administrative process in America." It is not often that one finds such a noble function attributed to the administrative body!

Chapter II deals at some length with the constitutional problems involved in the delegation of legislative powers by Congress. Being peculiar to American law, these problems are not of great interest to the non-American lawyer. Chapter III is more important. As Professor Wade wrote in his foreword, "attention should in particular be paid to chapter III dealing with procedure and safeguards in delegated legislation". The various techniques of control used in the United States are discussed: consultation with interested parties before rule-making is undertaken; antecedent publicity; adversary hearings; publication of rules; the "laying" procedure; and judicial review. On the powers of the court to control delegated legislation, there is the statement at page 50 that "American courts can invalidate administrative rules and regulations not only because they are *ultra vires* the enabling Act in the strict sense, but also because they are unreasonable". That is a very wide power. A statement from Wade and Phillips, *Constitutional Law* (3rd edition, 1946), at page 277, is then quoted to establish that the English

courts too may declare by-laws made by subordinate bodies invalid because they are unreasonable. I submit that English and Canadian courts do not have this power to hold regulations invalid on the ground of unreasonableness when such regulations are intra vires. Our courts from time to time have used language indicating that the regulations in question before them were unreasonable and therefore invalid; but a close examination of the authorities suggests that the basis of the decisions is the doctrine of ultra vires. There is almost a presumption that Parliament does not intend to confer the power to act unreasonably and, therefore, unreasonable actions are ultra vires and invalid. No one can deny that Parliament can confer powers wide enough to sanction any action no matter how unreasonable.

Chapter IV is a description of the American agencies exercising judicial functions. It contains this statement (at page 61):

> ". . . The prime aim of administrative justice is, paradoxically, not justice at all, but the execution of the legislature policy embodied in the enabling Act".

This remark will not fail to disturb those who feel that the growth of administrative tribunals threatens the rule of law and is the precursor of arbitrary government. Indeed, the potential dangers inherent in a system of administrative tribunals devoted to the "execution of legislative policy" have contributed much to the development of an admirable system of adjudicatory procedure in the United States, culminating in the Administrative Procedure Act, 1946, which is set out in full in an appendix. This Act contains many important provisions and is worth close study. To give one example, an attempt is made to place the hearing officer in an administrative proceeding in a position of independence similar to that of a judge and thus avoid the charge, and the chance, of bias. These officers are to be removable by the agency that appointed them only for good cause established and determined by the Civil Service Commission after opportunity for hearing and upon the record. These matters of adjudicatory procedure are fully discussed in chapters V and VI.

The last chapter, VII, deals with judicial review, in particular the scope of review. The American courts possess a wide power of review. It even extends to a review of the fact findings in order to determine whether there was "a rational basis for the conclusion" reached by an administrative body. Decisions of these bodies must be based on "probative and substantial evidence".

Dr. Schwartz's book is an excellent introduction to the study of American administrative law because it presents a clear and well balanced picture of that important subject. Let us hope that non-American lawyers will read it. There is much to learn from American experience in the field.

Administrative Tribunals At Work is a collection of seven studies describing the actual working of seven different administrative tribunals in England. There is a foreword by Dr. W. A. Robson and an introduction by Robert S. W. Pollard, the editor of the collection. The tribunals studied are: Tribunals for Conscientious Objectors, by Robert S. W. Pollard; The Administration in 1945 of Some Tribunals Appointed by the Minister of Labour, by D. Scott Stokes; Appeal Tribunals under the National Assistance Act, 1948, by George Lach; Furnished Houses Rent Tribunals, by Adjutor; Valuation for Rates, the Existing and the Proposed New Local Tribunals, by Noel A. D. Willshire; Appeals in Town and Country Planning,

by S. A. de Smith; and The Professional Discipline of Solicitors, by Thomas G. Lund. The general plan of study is to describe in some detail the constitution, practice and procedure of each tribunal and then to consider the tribunal and its working in the light of a number of principles which have been proposed by Dr. W. A. Robson in his *Justice and Administrative Law* as suitable standards by which all administrative tribunals may be tested.

The result of this investigation is to show an amazing lack of uniformity in the constitution, practice and procedure of administrative tribunals, the extent of which has not perhaps been fully appreciated. They conform to no common standards. The purpose of this book is to give an accurate account of the present state of affairs and thus to provide a basis for reformation on a rational basis. There is no good reason why there should be such variety in administrative tribunals; there ought to be some common standard applicable to them. That is the burden of Mr. Pollard's introduction, which is by far the most valuable part of the book. He sets out there a number of rules that should apply to all tribunals in which policy is of little account. These suggestions are important and interesting and may be found at pages xiv-xx. He suggests, for example, that "an administrative judiciary of full time independent and properly paid chairmen of administrative tribunals with security of tenure equivalent to that of judges" be established; that one member of every tribunal should have knowledge of law; that members of tribunals should be appointed, not by the departments interested, but by the Lord Chancellor. He also recommends that "an Administrative Appeal Tribunal should be set up with the status of the High Court to hear appeals . . . on matters on which the minister's policy is not the overriding consideration". These are merely indicative of the stimulating contents of the introduction.

The dominant impression gained from reading this book is that the legal profession has an important rôle to play in our system of administrative justice and that it is not playing it. So far lawyers have been mostly concerned with the right of representation before administrative tribunals and, as Dr. Robson points out in his foreword, they have not taken "an objective or scientific interest in the improvement of this vital part of the machinery of adjudication". There is great opportunity for lawyers to make a significant contribution in this field; but advocates appearing before a tribunal must realise that they are in a new environment and must adapt their advocacy to it. They must not try, in the words of Mr. Pollard, "to twist the growth of these bodies into the patterns of the ordinary courts '.

The book is objective and scientific and, one feels, a valuable contribution to the improvement of administrative justice.

C. B. BOURNE

Faculty of Law,
University of British Columbia

* * *

Patentgesetz und Gesetz betreffend den Schutz von Gebrauchsmustern. By DR. EDUARD REIMER. Detmold: Albert Nauck & Co. 1949-1950. Two volumes. Vol. I, pp. 671; Vol. II, pp. 717.

In his preface, the distinguished author tells us that this work was begun shortly before the outbreak of war in 1939. The first volume appeared ten

years later and now in 1950 the work has been completed by the appearance of the second and final volume, at a time when the author expresses his hope in a revival of the German law for the protection of industrial property.

The first of the two volumes provides us with the text of the German Patent Law of May 5th, 1936, and the Law of July 8th, 1949, concerning the Protection of Industrial Property. Then follows a very full commentary (some 600 pages) on sections 1 to 16 of the law on patents and utility models (Gebrauchsmuster).

The second volume contains a commentary on sections 17 to 60 of the law on patents and sections 1 to 26 of the law on utility models. It discusses the law of May 5th, 1936, together with the changes that have been made by the law of July 8th, 1949, and their application in each particular. In addition, all laws and regulations concerning patents, utility models, the rights of inventors and patent lawyers, which have not been covered in the text, are included in an appendix. Each volume contains a full index and the arrangement and printing of the text is such as to assist in readily finding the relevant discussion on any desired subject.

The work is, in the main, the product of Dr. Eduard Reimer, but the contribution of Dr. Ernst Reimer, in annotating and elaborating upon section 9 of the Patent Law, should not be overlooked. This section, which deals with questions, among others, of devolution, assignment, licence, contracts, patent pools, execution and bankruptcy, is evidence of the felicity of the result that flows from a combination of two brilliant minds. Like the rest it is a model of completeness.

Throughout the work the collected jurisprudence of the German Supreme Court, the superior provincial courts and the German Patent Office on patent law from 1891 to 1945 has been considered and the literature on the subject drawn upon. The author has, in his own words, endeavoured to write as well for the inexperienced person and the student as for the lawyer who specializes in this branch of the law, a branch unfamiliar to most lawyers. One may sympathize with the student who is offered a work of this magnitude on a subject the learned author himself admits to be "dieses den meisten Juristen etwas fremden Rechtsgebiets", but for the practitioner and the specialist it is a work of the utmost utility. No facet of the subject is neglected and the thoroughness of the treatment throughout commands respect. Both collaborators in the production of this admirable and satisfactory work are to be complimented on the labour and scholarship displayed throughout. It is not only a practical text-book on the German patent system; it is, in addition, a valuable contribution to the study of comparative law.

Toronto HAROLD G. FOX

* * *

The Customs Union Issue. By JACOB VINER. New York: Carnegie Endowment for International Peace. 1950. Pp. viii, 221. ($2.50)

This is an authoritative and timely study of a subject which is of major interest to every student of international economics and international affairs. Dr. Viner is one of the continent's foremost authorities in tariffs and international trade. He has long been associated with the U.S. Tariff Commission,

the U.S. Shipping Board, and the Treasury Board. Since 1943 he has served as consultant to the State Department. He is another Canadian gone south of the border.

In recent years, especially since the inception of the Marshall Plan, customs union for Western Europe has been discussed widely. In fact, the United States has put considerable pressure on European countries to integrate their economies through customs union. Viner's book is a welcome commentary — welcome because of its realism, and welcome for its considered conclusion that customs unions do not offer any permanent solution in the reduction of trade barriers, but, on the contrary, almost inevitably operate ultimately in the opposite direction. It is hoped that the U. S. State Department will take careful heed of what he has to say, and why he has said it.

The book is well arranged, dealing in sequence with the compatibility of customs union with the most-favoured-nation principle, exemption from most-favoured-nation obligations, the economic and political aspects of customs union, the Havana ITO Charter, and the outlook for customs union.

Dr. Viner states on page 5 that a perfect customs union must meet the following conditions:

(1) the complete elimination of tariffs as between the member territories;
(2) the establishment of a uniform tariff on imports from outside the union;
(3) apportionment of customs revenue between the numbers with an agreed formula.

He then examines the problem of compatibility of customs union with the widely used most-favoured-nation principle. In most useful fashion he sums up the diplomatic controversies arising out of most-favoured-nations obligations in the case of the Prussian Zollverein over a century ago, as well as under the customs union treaty of 1857 between Austria and Modena, the Bulgaria-Serbia treaty of 1904, and the Austro-German Anschluss of 1931.

Viner concludes that the most-favoured-nation obligations are not a serious barrier to customs unions, and points out a century-long record of customs unions which were permitted to operate without successful protest, that many commercial treaties have contained an express exception of customs union from most-favoured-nation obligations, and that the League of Nations Secretariat repeatedly urged the general acceptance of compatibility between the two. It is stated (page 14) that "It was the most-favoured-nation *principle* rather than most-favoured-nation *pledges* that constituted the important barrier to preferential tariff arrangements in the past".

So far as the economics of customs unions are concerned, there is a most curious agreement among economists, non-economists, free-traders and protectionists that customs unions are desirable as an approach to meeting the tariff problem. Viner states (page 41) that "It is a strange phenomenon which unites free-traders and protectionists in the field of commercial policy, and its strangeness suggests that there is something peculiar in the apparent economics of customs unions. The customs union problem is entangled in the whole free-trade-protection issue, and it has never yet been properly disentangled." His chapter on this point is admirable, but I do not see that he has accomplished any real disentanglement.

Chapter V deals with the problem of political aspects of customs unions, and his conclusions have import for any Canadian who may think in terms of a customs union with the United States. It is stated on page 83 that "When

customs union occurs between states of greatly disproportionate size, the predominant member usually insists upon complete authority over customs and administration for the entire customs union territory and upon the power of appointment for the entire customs staff". Again, on page 91, Viner says that "Of the more serious movements which involved a great power and a small country or a number of small countries, it appears to have been the case without exception for the great power that political objectives were the important ones, while the economic consequences of customs union were regarded without enthusiasm or even accepted only as a necessary price which had to be paid to promote a political end".

Chapter VI is devoted to a detailed analysis of the Charter of the International Trade Organization drawn up at Havana on March 24th, 1948. The ITO Charter gives verbal encouragement to the formation of customs unions. By freeing them from most-favoured-nation obligations, even when they are in an interim stage, it facilitates their establishment. This relaxation is, of course, logical once customs unions and free-trade areas are accepted as desirable. The trouble is that there is little agreement over what areas should become free-trade. "Many of these provisions", writes Viner (page 127), "are written in terms of hearty encouragement." It is one thing to seat international delegates around the table at a conference and hammer out a statement of principles. It is quite another matter, however, to get these principles ratified by national governments whose domestic interests may be prejudiced by the implementation of those principles. The ITO Charter, still to be ratified, is a case in point.

In examining the prospects for customs unions, Viner states that the difficulties in the way are formidable, and if progress is to be made, it is certain to be gradual rather than climactic. He believes that "On economic grounds, there can be little basis for reasonable doubt that the formation of a customs union embracing all or most of Western Europe . . . would, in the net, contribute both to the economic recovery of Western Europe . . ." (page 133). There are, however, other considerations which have important bearing on policy, not the least of which are the political effects of customs union.

The economic argument has been the official United States line in Western Europe, and whilst it may be sound on purely economic grounds, the political considerations should not be ignored. Paul Hoffman, as Administrator of the Economic Cooperation Administration, indicated in Paris a year ago his disappointment at the failure of the Marshall Plan countries towards customs union. He advocated, no doubt with full approval of the State Department, that "economic integration" of Western Europe was the American objective. In his words, "this is a vital objective". It was made quite clear that unless substantial progress was made along these lines there would be danger that the United States would abandon the Marshall Plan.

One wishes that Dr. Viner had gone more critically into the ramifications of the United States policy of integrating all Western Europe economically. There is a considerable body of opinion in Britain and Western Europe opposed to any precipitous integration of these old countries, which have economic and political institutions that may not be completely understood in the Western World.

Viner concludes his study with the following solemn words:

> "In the international economic field, as in the field of international politics, this is a period of crisis. Effective solutions for crises are

> rarely easy to adopt or to execute. But if one looks only to the day, an apparently promising path to a solution can often be found whose first stages, if token in character, are fairly easy to pursue and whose later stages are pleasant to contemplate, though what is at its ultimate end is but a mirage. This, I fear, is the present-day role of customs union. Whether used as mere incantation against the evils resulting from present-day economic policy or vigorously prosecuted, it will in either case be unlikely to prove a practicable and suitable remedy for today's economic ills, and it will almost inevitably operate as a psychological barrier to the realization of the more desirable but less desired objectives of the Havana Charter — the balanced multilateral reduction of trade barriers on a non-discriminatory basis."

The usual meticulous scholarship of this economist is evidenced by a most impressive bibliography, pages 171-211, which in itself is a contribution to the student of this problem. In addition there is a comprehensive list of conventions, decrees and the like concerning customs unions from 1815 to 1948 (pages 141-169). I consider this to be an outstanding volume, and it should be read by everyone interested in one of the most important questions confronting Canada — how to cope with our international trade problems.

Toronto J. R. PETRIE

Recent Judicial Appointments

Henry Aldous Aylen, Esquire, K.C., of the City of Ottawa in the Province of Ontario, to be a judge of the Supreme Court of Ontario and a member of the High Court of Justice for Ontario, and *ex officio* a member of the Court of Appeal for Ontario.

Walter Little, Esquire, of the City of North Bay, in the Province of Ontario, to be a judge of the District Court for the Provisional Judicial District of Parry Sound and a local judge of the High Court of Justice for Ontario.

Roger Brossard, Esquire, K.C., of the City of Montreal, to be a puisne judge of the Superior Court for the District of Montreal in the Province of Quebec.

Valmore Bienvenue, Esquire, K.C., of the City of Quebec, to be a puisne judge of the Superior Court for the District of Quebec.

Maurice Lalonde, Esquire, of Mont Laurier, in the Province of Quebec, to be a puisne judge of the Superior Court for the District of Montreal.

Books Received

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

Arthur Currie: The Biography of a Great Canadian. By HUGH M. URQUHART, C.V.O., D.S.O., M.C. With a foreword by FIELD MARSHAL JAN CHRISTIAN SMUTS, C.H. Toronto and Vancouver: J. M. Dent and Sons (Canada) Limited. 1950. Pp. xix, 363. ($5.00)

The Assignment of Choses in Action. By O. R. MARSHALL, M.A. (Cantab.), Ph.D. (Lond.). London: Sir Isaac Pitman & Sons, Ltd. Toronto: The Carswell Company, Limited. 1950. Pp. xxiv, 216. ($7.75)

Canadian Forms of Wills (Annotated). By TERENCE SHEARD, C.B.E., K.C. With a foreword by the Honourable E. K. Williams. Toronto: The Carswell Company, Limited. 1950. Pp. xl, 310. ($9.25)

A Comparative Survey of Anglo-American and Latin-American Law. By PHANOR J. EDER. New York: New York University Press. 1950. Pp. xii, 257. ($6.00)

The Elements of Drafting. Bu E. L. PIESSE and J. GILCHRIST SMITH. London: Stevens and Sons Limited. 1950. Pp. xvi, 132. (10s. net)

A Federal Judge Sums Up. By W. CALVIN CHESNUT. Baltimore: Privately Printed. 1947. Pp. vii, 274.

A History of Canada. By JEAN BRUCHESI, F.R.S.C. Translated from the French by R. W. W. Robertson. Toronto: Clarke, Irwin & Company Limited. 1950. Pp. xiii, 358. ($3.50)

International Crime and the U.S. Constitution. By OLIVER SCHROEDER, JR. Cleveland: The Press of Western Reserve University. 1950. Pp. iii, 75. ($1.00)

International Law. The collected papers of SIR CECIL HURST, G.C.M.G., K.C.B., K.C. London: Stevens and Sons Limited. 1950. Pp. ix, 302. (30s. net)

Philanthropic Giving. By F. EMERSON ANDREWS. New York: Russell Sage Foundation. 1950. Pp. 318. ($3.00)

Questions and Answers about Adult Education in Canada. Toronto: Canadian Association for Adult Education. 1950. Pp. 29. (No price given)

Taxation of Compensatory Payments: A Treatise Dealing with Income Tax Liability of Unusual Receipts. By CARL H. MORAWETZ, LL.M., D. JUR. With a preface by the HON. SENATOR G. PETER CAMPBELL, K.C., and a foreword by E. S. MACLATCHY. Toronto: The Carswell Company, Limited. 1950. Pp. xiv, 116. ($4.75)