Reviews and Notices

Freedom Under the Law. By THE RIGHT HONOURABLE SIR ALFRED DENNING. The Hamlyn Lectures, First Series. London: Stevens & Sons, Limited. Toronto: The Carswell Company, Limited. 1949. Pp. viii, 126. ($2.00)

Perhaps the two most discussed of recent cases in England are the *High Trees* decision [1] and the *River Douglas Catchment Board* case.[2] Both are decisions of Sir Alfred Thompson Denning, the former when he was a trial judge, the latter after he was appointed to the Court of Appeal. His vigorous and purposive approach to law may be seen from his terse comment in the *Catchment Board* case in reply to an argument of counsel that a third party beneficiary could not sue for want of privity. He said: "That argument can be met either by admitting the principle and saying that it does not apply to this case, or by disputing the principle itself. I make so bold as to dispute it. The principle is not nearly so fundamental as it is sometimes supposed to be." This straightforward approach is precisely what is required of a lecturer who is asked, as Sir Alfred was under the terms of the Hamlyn Trust, "to speak, as it were, to the common people of England and to further amongst them the knowledge of their laws, so that they may realise their privileges and likewise their responsibilities". He responded with four lectures in which he disclaims any attempt to produce a "scholarly discourse replete with copious references". Nevertheless he has produced a provocative series of talks worth the serious consideration of thoughtful lawyers in all countries enjoying the flexibility of law permitted under the British constitution. In the brief time at his disposal, and before the kind of audience he addressed, it was inevitable that important matters be passed with little more than a reference, but with some exceptions, which I shall mention presently, the important matters are directly approached and their importance is not ignored.

In his first two lectures, Sir Alfred Denning deals with personal freedom and freedom of mind and conscience. He treats realistically the procedures and remedies whereby individual liberty of thought and action is secured. The parts played by *habeas corpus*, trial by jury, judicial control of police powers, the significant wartime exceptions, induced confessions and promises of pardon, and equally familiar matters are discussed with a true sense of their importance and their dependence on the "eternal vigilance" of those common people of England to whom the remarks are addressed. Comparisons, or contrasts, are made throughout with the French and Soviet systems, but a final caveat is entered: ". . . we ought always to remember that it is the system which suits the temperament of our people. It would

[1] *Central London Property Trust Limited* v. *High Trees House Limited*, [1947] K.B. 130.
[2] *Smith* v. *River Douglas Catchment Board*, [1949] 2 All E.R. 179.

not necessarily be the best for other peoples. Remember that the jury system has proved a failure in France. But one thing is quite clear. The system which has been built up by our forefathers over the last 1000 years suits our people because it is the best guarantee of our freedoms. The fundamental safeguards have been established, not so much by lawyers as by the common people of England. . . ".

I suggest only two criticisms of any seriousness. Freedom does not mean merely the absence of handcuffs, gags, blindfolds and hobbles. It seems to me that Lord Justice Denning has depended a little too much on too gross a conception of freedom: he seems to underestimate economic pressures, which weigh heavily in my conception of freedom — and cause me the greatest trouble. Throughout, the author has relied on the courts as the guardians of liberty. He does not discuss the high cost of litigation,[3] in England as elsewhere, a fact or forcibly brought to our attention when the late Mr. Harold Laski lost a defamation suit against some newspapers, with a resulting award of costs against him, costs alleged to have amounted to £20,000. In another traditional area of freedom, freedom of association, about which nothing is said in this book, economic pressures have been very significant. Freedom of association is indeed a barren freedom when few can afford to hire a hall and police can drive on those who obstruct public passage. More subtle questions arise in problems of freedom of association for trade union purposes, striking, and, on the other side, for combinations in restraint of trade.[4]

Economic pressures are recognized in part in the third lecture dealing with justice between man and the state. Lamenting the failure of the common law to recognize and enforce positive moral duties, Sir Alfred says: "Oh, what abuses were not covered by this catchword 'freedom of contract'! It mattered not to the judges of that day [1875] that one party had the power to dictate the terms of a contract and the other had no alternative but to submit. If he had submitted to it, however unwillingly, he was bound. . . . Have you not heard of a landlord saying to a prospective tenant, 'Take it or leave it,' which is equivalent to saying 'pay my price or go on the streets'. What freedom is there for the tenants there?" Oddly enough, and despite *Donoghue* v. *Stevenson*,[5] which he mentions in another connection, the author here denies that the judges of today can do anything to reform the law: "the law is settled". One might expect so bold a judge to take a stronger stand. He retires however, gracefully, before the advancing legislature.

This welcome of modern legislation bringing government intervention as a cure of common law deficiencies is a relatively unusual phenomenon in our judiciary. The welcome inevitably brings with it an examination of modern remedies against the Crown, and here the author's observations are worth particular reflection. He is, of course, happy to be able to point to the Crown Proceedings Act, 1947, one of the contributions of the Labour Government that must have surprised the doctrinaires, both capitalist and socialist. But the more significant observations relate to the administrative tribunals. It is reassuring to find a member of the Court of Appeal openly admitting the usefulness and necessity of these tribunals: one is the more inclined to listen

[3] For a recent discussion of this touchy matter, see C. P. Harvey, Law Reform After the War (1942), 6 Mod. L. Rev. 39.

[4] For discussions that emphasize the economic aspects, see Wooton, Freedom Under Planning (Chapel Hill, 1945, The University of North Carolina Press), a relatively impartial discussion; and Justice in England, by A Barrister (London, 1938), a more "legal" discussion but with a distinctly socialist bias.

[5] [1932] A.C. 562.

sympathetically to his wise counsel for making them more effective and more just. He does not recommend abolition and a return to traditional courts; he says, in answer to the question why Parliament has preferred tribunals to courts: "The reason is — we must face it squarely — that the ordinary courts are not suited to the task — or, if you will, the disputes are not suitable for decision by the courts". Sir Alfred's proposal for strengthening the system is to follow, with modifications, the French system of administrative courts, but to weld these courts into a Supreme Court of Judicature rather than have two separate systems, as in France. "It will then be apparent to all that the new tribunals administer the law just as much as the other courts of the land." Whether these appellate bodies are to be traditional courts or hybrid bodies is not always clear. But it seems clear that the end in view is judicial review, that is, some form of appeal, perhaps of limited scope, although the language here is not always reassuring: "There should be a Superior Court, which is able, not only to see that the new tribunals keep within their jurisdiction, but also to review their decisions on points of law and, in proper cases, on questions of fact".

Once again there appears this faith in judicial review and control; it is not surprising in a Lord Justice of the Court of Appeal. But the faith in courts may be carried too far, which I respectfully suggest has been done when Lord Justice Denning says: "In these days no reproach can be levied at the judges that they have not kept pace with the times. The judges of England have no politics and always carry out the intentions of Parliament as expressed in the Statutes or to be inferred therefrom." I think the author has put his finger on the real question: To what extent ought the courts of law to interfere? But I cannot think that he has here given a definitive answer, much as I sympathize with his general approach to the question. Judicial review, appeal to the courts, yes — sometimes, in some types of cases, and on some questions. But the real reform and improvement must come within the framework of the tribunal itself, in a system of internal appeals to internal, independent officials; and in the greater rôle of the watchdog of both freedom and efficiency — a well-trained and responsible lawyer.

The final lecture deals with the powers of the executive. Here again the approach of the author is realistic and objective, and with the same emphasis on the judicial power to relieve abuse of police or executive action. It is to the few pages headed "Non-use of Power" that I suggest special attention. Lord Justice Denning is rightly concerned with problems of administrative apathy and negligence. We overemphasize the dangers of bureaucratic aggressiveness, but what remedies are available to enforce the performance of statutory powers not coupled with a duty? *Mandamus* is no answer. The author is properly alarmed at the decision of his superiors in *East Suffolk Catchment Board* v. *Kent*,[6] where the House of Lords found no statutory duty on the Catchment Board to use reasonable care and skill, once it had undertaken to mend the banks of a flooding tidal river. Lord Atkin vigorously dissented. The problem cannot be dismissed lightly. It is clear that the abuse and non-use of power are still serious problems to be taken under review along with the other reforms the author suggests. "We have in our time to deal with changes which are of equal constitutional significance to those which took place 300 years ago. Let us prove ourselves equal to the challenge."

Cambridge, Mass. J. B. MILNER

[6] [1941] A.C. 74.

Legal Philosophy from Plato to Hegel. By HUNTINGTON CAIRNS. Baltimore: The Johns Hopkins Press. 1949. Pp. xv, 583. ($7.50)

This is the third in a series of four jurisprudential volumes which Mr. Cairns intends to complete by a concluding volume on legal theory. Mr. Cairns is rightly convinced of the importance of a philosophical foundation for jurisprudence. The present volume, which is mainly historical, is an attempt to show what the greatest theoretical philosophers of Western civilisation, from Plato to Hegel, have thought on legal philosophy. This self-imposed limitation accounts for the great merits as well as for some weaknesses of the book.

The account of the legal philosophies of the thinkers treated in this volume, taken by themselves, is masterly. Mr. Cairns is obviously not only a jurist, but a classical scholar, and he is widely read in philosophy and sociology. The main merit of the book consists in the detailed treatment of theories which few but specialists would otherwise have an opportunity of studying. It gives, for example, in greater detail than is generally available Plato's theories on legislation. It shows how Aristotle anticipated utilitarianism, it gives in considerable detail Bacon's views on legal interpretation, and Leibniz' views on legal education. The treatment is lucid and as simple as a presentation of complex theories can be made without over-simplification or distortion.

Another great merit of the work is the frequent connection between the theories of the philosophers and modern legal problems as they have confronted courts, especially American courts. Thus, the views of Locke and Hegel on private property are linked with modern American decisions on the power of a patentee to suppress inventions.

In the present reviewer's opinion, the power of Mr. Cairns' analysis weakens as he approaches modern times. This is perhaps connected with his reluctance to follow up the political implications of the legal philosophies of such men as Hegel, although it is obvious from a number of observations that he is well aware of these implications. The analysis of the philosophies of both Kant and Hegel is weakened by some major omissions. It is almost impossible to understand Kant's legal philosophy unless it is appreciated that his philosophy of right formed part of his system of practical, not of pure, reason. His definition of law, his views on family, private property, state, and international law, are matters of volition, not of theoretical perception. Kant thus avoided the pitfalls of Stammler, and other Neo-Kantians who attempted to deduce practical legal solutions from a theory of law based on Kant's theory of knowledge, not on his theory of law. Yet this very vital distinction is omitted in Mr. Cairns' analysis.

The description of Hegel's legal philosophy leaves out the theory of state entirely because Mr. Cairns considers that it is a matter of politics rather than of jurisprudence. But it is surely impossible to understand and criticise Hegel by omitting what was to him the most vital part of his entire moral and legal philosophy, namely, the state as a rational integration of the individual's will and reason. Nor is it possible to understand Hegel's theory of international law — which Mr. Cairns includes — without a knowledge of his theory of the state. Many years ago Benedetto Croce pointed out the cardinal fallacy of Hegel's confusion between logical opposites, appropriate to the theory of logic, and historical or political contrasts which Hegel mask-

ed as logical opposites. By trying to deceive himself and his readers that wrong is a synthesis of property and wrong, or that family and civil society are opposites in the same way as being and nothing, Hegel attempted to mask his nationalist and conservative views under the cloak of apparent logical necessity. The use of the dialectic system in the whole of Hegel's legal philosophy is tortuous and sometimes grotesque. His views on marriage are perhaps not more absurd than those of Kant (who defined marriage as a mutual lease of sexual organs) or Fichte (who thought that males may legitimately satisfy their sexual impulses, but women must never confess to them). But Hegel had to prove to his own satisfaction that all his prejudices were part of the unfolding of the Spirit which is Reason. By failing to bring all this out, Mr. Cairns has, I believe, missed the essential weakness in Hegel's legal philosophy.

Another doubt relates to the scope of the book. The choice of the philosophers indicates that to Mr. Cairns legal philosophy means the legal theories of professional philosophers. This provides a most interesting study, and up to the 19th century — when the jurist-philosophers began to take over from the philosopher-jurists — it is probably true that the most important legal philosophies were those of theoretical philosophers. But by thus limiting himself, Mr. Cairns has deliberately left great gaps in the history of legal philosophy, in so far as it concerns the jurist. He has included Spinoza, whose legal philosophy represents scarcely any advance on that of Hobbes, but he has omitted men like Grotius and Rousseau, whose influence on legal theory and jurisprudence has been very much greater. The inclusion of Bacon and Leibniz is most valuable, but the importance of their views on law derives from their experience as lawyers and statesmen rather than their philosophical teaching. In the period covered by the author, there have, of course, also been the theories of the historical school and of the rationalists, which do not contribute much to the theory of knowledge, but are much more important to the interrelation of legal ideas and jurisprudence than some of the theories analysed by Mr. Cairns.

It is perhaps characteristic of Mr. Cairns' tendency to exaggerate the philosopher's theoretical contribution to legal theory, as distinct from his actual place in the evolution of legal theory, that he contrasts Hobbes and Hegel. Hegel, like Plato, thinks that law may be found by reason. Hobbes, on the other hand, holds "that man makes and constitutes the truth of the first principles on which our reasoning depends". In effect, however, Hegel's philosophy leads to a glorification of the power of the state as absolute as that of Hobbes, and much more dangerous, because it masquerades as objective reason. In short, the attempt to separate legal from political philosophy cannot but end in failure. Legal philosophy is a formulation of political values in terms of legal categories. It stands half-way between philosophy and political theory.

Given its self-imposed limitations, this book is masterly, but because of these limitations it can make only an incomplete contribution to the theory and foundations of jurisprudence.

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A Liberal Attorney-General: Being the Life of Lord Robson of Jesmond (1852-1918) with an Account of the Office of Attorney-General. By GEORGE W. KEETON, M.A., LL.D. With a foreword by THE RT. HON. VISCOUNT SIMON. London: James Nisbet & Co. Ltd. 1949. Pp. vii, 241. (15s. net)

The reading of biography is said to be the easy road to a knowledge of history. When the biography is that of a political lawyer, this historical gain is augmented by a review of decisions that refreshs the mind and a relish of forensic tales that delights the palate.

And so it is with this book. It deals with the legal and political problems that were the aftermath of the Industrial Revolution, and the part played by a devoted liberal in solving them. The year 1906 in Great Britain was nearly as good a year to stand as a Liberal as 1949 proved to be in Canada. In that year there was swept into office W. S. Robson and, incidentally, John Simon, a younger contemporary destined for the highest judicial office. Mr. Robson had, however, been in and out of office for some years. First elected in 1885, he was defeated in 1886 and spent ten years out of parliament, an interregnum during which he was in very active practice at the Bar. It was only natural, therefore, that in 1906 he was made a law officer and, in the following year, appointed Attorney-General in the able Campbell-Bannerman Government. In this administration, and that of Asquith which succeeded it, he was the unflagging supporter on the floor of the House of that social legislation which was so explosively controversial at the time.

The success with which he did this is measured by the enviable record that Liberal Ministry holds in history. It is said that his day and night toil at the elbow of Lloyd George, presenting the 1909 Budget that was rejected by the Lords, and the consequent 1910 Parliament Bill, was the direct cause of his death in 1912. And this in spite of the fact that he spent the last years of his life in the relative quiet of the Court of Appeal.

But it was the years immediately before his appointment as Attorney-General that are of greatest interest to the lawyer. The cases in which he was engaged are today the footnotes in the legal treatise, if not the bold type in the text. *Smith* v. *Baker* (1891), 60 L.J.Q.B. 683, *Temperton* v. *Russel* (1893), 62 L.J.Q.B. 412, *Allen* v. *Flood* (1895), 64 L.J.Q.B. 665, *Taff Vale* (1900), 70 L.J.Q.B. 219 — in all these he held briefs. The labour disputes in which he was, in the main, engaged were at once for him an opportunity to fight for liberal principles and a lucrative field of endeavour to support a career in Parliament. The author deals fully with the arguments and decisions in these and many other cases, and they consequently well repay reading by the practitioner today.

A diligent, sparkling personality arises from these pages; here is no blind slave of the law. He appeared before the Chief Justice (Coleridge) to defend the normal charge of 4d. a folio for copies of legal documents admittedly made simultaneously by a modern instrument called the typewriter. The Chief Justice would have none of it, and directed a reference to the Master to consider a more reasonable scale of allowances for carbon copies. Mr. Robson was consoled perhaps by winning a competition held in the popular press of a dozen champagne for the most handsome man at the bar under 50! One time he kept the Commons sitting on Derby Day to debate his Education Bill. Perhaps his most famous case was the trial of Lord Russell

by the House of Lords for bigamy. This trial of a peer for felony by his peers was the last recorded until that of Lord de Clifford in 1935. The right was finally abolished by the Criminal Justice Act, 1947.

Of great interest to Canadians is the North Atlantic Fisheries Case over the inshore fisheries of Newfoundland in which the United States enjoyed privileges under the Treaty of 1818. The United States had imposed a tariff on fish brought to the American market by Newfoundland fishermen, which resulted in a depression in that Dominion's most important industry, and the Prime Minister of Newfoundland, Sir Robert Bond, was forced to introduce retaliatory legislation. Canadian interests also were involved. High feeling arose, but through the efforts of Lord Bryce in Washington, the United States and Great Britain, on behalf of the two Dominions, agreed to submit the dispute to arbitration. The American counsel were led by Senator Elihu Root. Attorney-General Robson had with him a sparkling array of legal talent, Sir Robert Finlay, Hon. A. B. Aylesworth, Sir James Winter, W. N. Tilley and others. The proceedings lasted forty days and Robson's argument was the greatest of his career. Aylesworth himself, then Canadian Minister of Justice, had no hesitation in saying that the credit for the Dominions' success must go to the Attorney-General.

This is a delightful book. It is in keeping with tradition that Professor Keeton should turn his pen from Extra-territoriality, Jurisprudence, Contracts and Equity for a while, and write a volume on a man who, great in his day, is little known to the generation that came after him.

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The South African Constitution. By HENRY JOHN MAY. Second edition. Capetown: Juta & Co., Ltd. Toronto: The Carswell Company, Limited. 1949. Pp. viii, 447. ($14.50)

The first edition of this work appeared under the names of Dr. W. P. M. Kennedy and H. J. Schlosberg; the latter author is the present editor of this new edition. As he explains in the preface, the great changes in the constitutional law of the Union have necessitated an almost complete re-writing of the text. Much new matter has been added, particularly on the government of the non-European population and the delegation of powers generally. On the other hand, over 150 pages of historical material in the first edition have had to be omitted. The result is to make the text more technical and topical, but to deprive it of some of its former depth.

It is always refreshing for students of the Canadian constitution to compare their law with that of a sister nation in the Commonwealth. Nor does the fact that South Africa is a legislative union make her experience less valuable. The provinces of that country, though fully subordinate to the Union Parliament, nevertheless possess sovereignty within their defined areas, and to them also has been applied the doctrine of *Hodge* v. *The Queen* Their legislative powers follow closely the wording of section 92 of the British North America Act; J. S. Mill's definition of "direct taxation" binds them as it binds Canadian provinces. The Crown in South Africa has been made

subject to suit in ordinary actions, in a manner that makes Canadian procedure look very antiquated. Problems of administrative law, of natural justice and of judicial control over the executive, arise there as they do here, with the same principles applying. South African constitutional law is a more fruitful source of ideas and analogies for the Canadian lawyer than is that of the United States; it is only the greater accessibility of American law books and case reports that makes us turn more readily to them for comparisons. Mr. May's volume will help to make South African public law more available.

In the index to this edition there is the intriguing title "Topical Controversies". Under it are listed as sub-heads such subjects as "compact between provinces", and "senate, waste of time in". But perhaps enough has already been said to indicate how many similarities there are between our own and South Africa's constitutional situation.

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The Commerce Clause in the Constitution of the United States. By M. RAMASWAMY, B.A., B.L., Advocate, the High Court of Mysore, Bangalore. With a foreword by the HON. MR. JUSTICE ROBERT H. JACKSON. New York and Toronto: Longmans, Green and Co. Ltd. 1948. Pp. xxiv, 648. ($6.75)

This work is essentially an exhaustive review of the decisions of the Supreme Court of the United States on the clause of the American constitution that confers upon Congress legislative authority over foreign and interstate commerce.

Two long historical chapters are devoted to a study of successive changes in the judicial outlook on this subject. At first the preoccupation is with the negative aspect of the clause: its implicit prohibition against the use of state power to obstruct the free flow of foreign and interstate trade, one of the cardinal objectives of federalism. Towards the end of the nineteenth century attention is being focused on the positive features of the clause and is mainly directed to the extent of permissible federal regulation. Here the author also enters upon a consideration of the legislative outlook; he reviews at some length the evolution of federal regulation of utilities, communications, etc., and especially anti-trust statutes. Important decisions on the construction of these laws are dealt with from all angles, besides the strictly constitutional point of view.

In the last twenty years of the historical review labour problems hold the limelight. At first the Supreme Court adheres to the view that "The Federal Government being a government of enumerated powers cannot claim to exercise any powers which do not flow from the specific grants made to it" (p. 223). New Deal legislation is "torpedoed". Interstate commerce is held not to include the local production of commodities that have not yet become the subject of trade. But, a few years later, it is held that "even if . . . [an] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of

whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect' " (p. 256).

In his foreword, Mr. Justice Jackson remarks that "One might have wished that an author enjoying such perspective and disinterestedness, as well as maturity of judgment, had given more of his own personal and critical judgment upon the judicial development of the Commerce Clause than he has seen fit to do". However he adds, "Perhaps he believes that the most just criticism is a simple recital of the facts". With these observations I am inclined to agree. The essential fact is that in the eyes of the present members of the United States Supreme Court the Commerce Clause confers unlimited power upon Congress.

Says Mr. Ramaswamy (p. 278): "The recent pronouncement of the Supreme Court speaking through Mr. Justice Murphy in *American Power and Light Co.* v. *Securities and Exchange Commission* (1946, 67 S. Ct. 133) that the federal commerce power was as broad as the economic needs of the nation and that Congress had power under the commerce clause to solve national problems directly and realistically carries that clause to a high pinnacle of glory as the greatest unifying force in the United States Constitution".

With that expression of opinion I find myself in complete disagreement. I cannot agree that potential centralization of all legislative power is a triumph for federalism. Neither can I agree that the direct and realistic solution of all problems of construction in a federal constitution is to disregard all rules and to read an unlimited meaning into a limited grant of authority. Despite the failure of the "Court-packing plan", circumstances no doubt made it inevitable that a majority of the judges should come to be men who "read election returns".

The chapters in which Mr. Ramaswamy reviews the decisions touching the extent to which state power is curtailed by the commerce clause are specially interesting. Taxes on gross receipts from interstate commerce are generally held unconstitutional as being equivalent to an excise duty; however percentage taxes on iron ore, coal or gas are held valid as levies on goods not yet in interstate trade. The author points out that "The pronouncements of the Supreme Court on the question of the extent of the police power of the States to retain for their own use or consumption local products . . . are hard to reconcile" (pp. 567-568). A Connecticut law prohibiting the export of game birds is held valid, but a Louisiana statute restricting the export of shrimp is declared invalid. New Jersey is found entitled to prevent water from being supplied to New York, but West Virginia is not allowed to limit the flow of natural gas to Pennsylvania.

(Mr. Ramaswamy's comment: "Mechanical consistency in the pronouncements of the Supreme Court can hardly be expected . . .". My comment: "Let us not abandon *stare decisis*".)

I feel compelled to say that the plan of the book is such that the same case is reviewed, from various angles, again and again. Although tedious, this is probably inevitable in a reference book notable for the painstaking thoroughness with which cases are analyezd.

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