Reviews and Notices

Canadian Income Tax: A Treatise on the Income Tax Law of Canada. By JOHN G. MCDONALD, LL.B., LL.M. Associate Editor: STUART D. THOM, B.A., LL.B. Toronto: Butterworth & Co. (Canada) Limited. Pp. xxx, 794, 45. ($35.00, inclusive of service to December 31st, 1955)

This volume carries the sub-title "A Treatise on the Income Tax Law of Canada". According to the Shorter Oxford Dictionary, a treatise is "A book or writing which treats of some particular subject; now always, one containing a methodical discussion or exposition of the principles of the subject; formerly occas., a literary work in general". The author himself in the preface says that his work "does not follow the numerical sequence of the sections of the Act; to do so would require an abandonment of the orderly exposition of each subject".

He implements his proposal by dividing the subject into a series of chapters dealing with basic aspects of income tax law in Canada. There are ten chapters, entitled in this order, "Income Tax Procedure", "Gross Income", "Net Income", "Taxable Income", "Income from Natural Resources", "Income Tax Rules and Accounting Practice", "Partnership Income", "Family Income Distributions", "Corporate Distributions" and "Non-Residents' Income". Each chapter has an introduction, which in itself constitutes a summary treatise on the subject of the chapter. The introduction is followed by sections containing a discussion of, or at least a reference to, all pertinent Canadian cases and a number of leading English cases. The summaries of cases are concise, clear and always pertinent.

Although the volume is written in the manner of a text writer, in form it has many of the characteristics of a "tax service". Provision is made for incorporating changes in the statute and case law by the use of a loose-leaf binder, to which not only cumulative supplements may be added but in which whole chapters may be replaced. There are frequent and lengthy quotations from the statute, regulations and reported cases. Perhaps it might be suggested that the model of the tax service might have been followed in one

other respect, by incorporating the Income Tax Act and Regulations in full in an appendix. No matter how complete the quotations from the statute and regulations may be, there are of necessity many occasions on which only references are given, thus putting the reader to the inconvenience of thumbing through the volume for the text, unless he happens to have a copy of the Income Tax Act and Regulations at hand.

Each chapter is preceded by an excellent summary of its contents, so that it is not difficult for the reader to find the particular phase of the subject in which he is interested. On this question of indexing, the convenience of the treatise as a book of reference would be still further improved if (1) the summary of contents immediately following the preface, which merely lists the chapter headings, were expanded to cover the main section headings of the summary of contents preceding each chapter; and (2) the list of cases at the beginning of the volume adopted the practice of the English and Empire Digest and of Halsbury and gave references to all the series of reports in which a case appears.

Mr. McDonald's volume contains one of the most detailed discussions of all relevant cases, particularly those of the Tax Appeal Board, applicable to the particular sections of the act or regulations dealt with. He expresses his own views more freely than the editor of the usual type of service or digest and does not hesitate to express his disagreement when he thinks it called for. Whether or not the reader agrees with the writer's opinions, they are always thought-provoking, logically developed and thoroughly documented. Occasionally, he even hints at methods of avoiding the strict words of the legislation.

The author's arguments are particularly persuasive when he deals with the wording of the sections of the taxing statute and analyzes their intent. He gives a clear exposition of the principles involved as, for example, in his treatment of residence (although he might have covered not only the residence of the individual but the residence of a corporation, which latter topic he deals with only in a footnote in chapter IX); the difference in principle between payments in respect of loss of office and damages for dismissal; the distinction between business income and capital gains; the principle lying behind income from a property; the nature of capitalization of undistributed earned income under the provisions of section 105 of the Income Tax Act; the legal principles affecting the deductibility of expenses; tax avoidance and tax evasion; accounting principles and practice; and the substance of "non-arm's length transactions" (although he might usefully have developed more fully the effect of the last amendment to the definition).

It is difficult to place Mr. McDonald's volume in any one compartment—a treatise, a digest or a tax service. It contains the

elements of all three. Whatever category it does fall into, Mr. McDonald's work is painstaking, thorough and exhaustive, and fulfils one of the tax practitioner's largest requirements, that of correlating the different sections of the Income Tax Act relevant to a particular problem.

R. DEWOLFE MACKAY*

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Snow's Criminal Code of Canada: Informations, Complaints, Charges, Statutes, Criminal Law, Procedure, Forms. Sixth edition by A. E. POPPLE, LL.B. Toronto: The Carswell Company Limited. 1955. Pp. clix, 1040. ($13.50)

An Analysis of and a Guide to the New Criminal Code of Canada: Designed for the Use of Peace Officers, Constables, Justices of the Peace, Magistrates, Family and Juvenile Courts and Probation Officers. By AUSTIN O'CONNOR, Q.C. Toronto: The Carswell Company Limited. 1955. Pp. viii, 356. ($7.50)

There is room in the field of criminal law for texts of various types: summaries for students, compendious works such as *Tremeear, Crankshaw, Archbold, Williams* and the like, quick reference books, citators; and, on the other hand, monographs on procedure, evidence and even more restricted topics all have a place and a market. The current demand, however, is mainly for two classes: one, books that deal with the history of the new Criminal Code and the changes it makes in the former law; the other, what might be called "intelligent citators". Texts that discuss the code in relation to the case law with any pretence of thoroughness are lacking, and will be until the jurisprudence has settled.

The new *Snow*, like the old ones, does not pretend to deal with the case law in detail. What it does, and does well, is to put the cases under proper headings in relation to the applicable provisions of the code, in sufficient detail to enable them to be found easily. It also gives enough of the content of the cases to permit the reader to distinguish what he wants from what is not pertinent. In other words, *Snow* puts the practitioner in touch with the case law he wants, gives him a concise statement of what it is, and enables him to do his further research expeditiously. It is thus admirably suited for use in court, especially in the inferior courts where adjournments for argument are easy to get.

This edition seems to be a fairly complete rearrangement of the cases according to the new scheme of things. To some extent

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the reorganization is merely mechanical, but that is not a defect in a book of this type, considering that almost all provisions of the code have suffered some verbal change. It will take the courts perhaps twenty years to determine what these changes mean, and it would be unfair to expect a critical reappraisal of the existing case law now.

Not that the work has been done uncritically. On the contrary, a patent effort to deal with the changes has been made and the results are more than satisfactory. The only objection this reviewer has to the new *Snow* is one he had also to the old, and in fact to most of the standard annotated codes. The text of the law is sometimes so buried in notes that it is hard to find. A personal preference would be a loose-leaf code with the statute in a separate part and the notes on different coloured pages. Such a volume has been supplied to the Mounted Police, with notes by Mr. J. C. Martin, and I hope it will become generally available. This is a matter of taste, however, and does not detract from the fact that the new *Snow* is a very useful companion for the busy criminal lawyer.

Can the like be said for Mr. O'Connor's "Guide"? Does it fall into any of the categories previously mentioned? At first blush, reading only the title, the table of contents and the advance publicity, it would seem to be intended to deal with the background of the new code and the changes in the law. Or it might be taken to be a Canadian analogue to Kenny's *Outlines*. But closer examination reveals that it is meant primarily as a practical manual of procedure for justices and peace officers.

Because of its elementary nature, citations, except of code sections, are not given, and for this reason also, while lawyers may read it through with benefit, it is not suited to be a reference book. The lack of authorities means that the reader is thrown back on the authority of the author, and though he, as an experienced magistrate, is entitled to respect for his views, they will have merely persuasive force.

As an "Analysis" of the law, the book is barely adequate. Much space is, perhaps necessarily, given to guidance rather than analysis and the author does not seem to be aware of many changes which have been noted in other publications. For example, he does not mention the far-reaching changes in powers of amendment that have crept into the law, and he does not treat the new offences of Contradictory Testimony and Illegal Possession other than cursorily. Many other instances might be cited.

On the other hand, as a "Guide" the book has some value for magistrates and peace officers. Although not always legally sound because of careless statement, it is usually safe, since most of the mis-statements err on the side of caution. And it does contain some excellent ideas and suggestions, especially in those topics,

such as police duties, pleas, punishment and probation, where the law allows much leeway for the refinements of practice that the author's experience and high sense of justice suggest. The sections on punishment and probation are particularly good.

This needs to be said, as many readers may be repelled by faults of language and arrangement. Much of the content is worthwhile: it is the way it is set out that is deplorable. The language is careless, full of inconsequences, with an attempt at simple speech that does not come off, and yielding an air of stodginess and pedantry likely to discourage those not determined to give the book a fair reading. There is an excessive amount of repetition, especially in the lengthy secular sermons that the author occasionally launches at his destined readers. No doubt, a certain amount of repetition must be, if each section is to be self-contained, but there is no excuse for it within a section. One irritating habit is the use of "*i.e.*" where "*e.g.*" is obviously called for, and this is curious, as "*id est*" is defined in the glossary appended. And Mr. O'Connor is a master of the art and mystery of the split infinitive.

In addition to such defects of style, the reviewer noted about one hundred questionable statements, some in matters of moment, and most of them likely to mislead the average justice or policeman. Many are not true as they stand, and one or two contradictory pronouncements are made in fairly close proximity. All seem to be due to careless and inaccurate writing or to failure to find out whether a former provision has been retained in the new law.

If this book is to reach a second edition, it is suggested that the author revise it thoroughly, eliminate the verbiage, divide the sections into meaningful subsections, organize his matter more systematically and submit the revision in manuscript to some of his colleagues for criticism. In that way what is valuable in his work (and that is a good deal) will be presented in a more digestible and reliable form.

P. J. O HEARN*

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Sir Edmund Head: A Scholarly Governor. By D. G. G. KERR, with the assistance of J. A. GIBSON. Toronto: University of Toronto Press. London: Oxford University Press. 1954. Pp. xi, 259. ($5.00)

When many of those who read the Bar Review were young almost no Canadian history was taught in school and very little at the university—and that little was made extremely dull. Perhaps it is only in recent years that Canadians have commenced to realize that the

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real history of their country is a thrilling as well as significant story. Popular Canadian histories by journalists in the press and local periodicals currently emphasize this. At the same time it is encouraging to see the number of serious studies being made today by scholars of phases of our Canadian past. Just as encouraging is that when they are reduced to writing and published they can be made as interesting as this short volume.

The biography under review has as its sub-title, "A Scholarly Governor". The book itself is scholarly (with abundant footnotes of authorities), but it is also an intensely interesting story of a great public servant, whose influence on the constitutional and political development of Canada was quite remarkable. Yet probably the average Canadian has difficulty in distinguishing between Sir Francis Bond Head and Sir Edmund Walker Head. In fact they were distant cousins with the same family motto: "Study Quiet". Sir Francis, because of his prominence in Upper Canada during the rebellion of 1837, is perhaps better remembered. But it is Sir Edmund whose impact on the history of Canada more richly deserves to be recalled by present-day Canadians. The reasons for this are clearly and in an entertaining way brought out in this biography.

Sir Edmund Head was not a lawyer—though his father was that curious combination of an English barrister, a clergyman of the Church of England and a baronet. Nevertheless, the son was always a student of the law and eventually in Canada had a great deal to do with the principles, and even the drafting, of some of our more important statutes. The book should accordingly be of particular interest to the Canadian law student and practising lawyer.

The subject of this biography was educated at Winchester and Oriel College, Oxford, became an accomplished linguist, something of an authority on German, French, Dutch and Spanish art and an author remarkable in his day for his clear thinking and precise, accurate use of the English language—while in Canada he wrote and published a learned treatise on that old problem of the grammarian, "Shall and Will". As a young man he entered the civil service in the administration of the Poor Law of 1834 and in 1841 became one of the three chief Poor Law Commissioners of England. As a result he soon acquired a sound working knowledge of public law and of the impact of legislation on private rights. Most significant "is the experience he gained from being plunged into the midst of a raging torrent of controversy and obliged to deal with the most complex and delicate administrative and political problems and with all types of people, frequently in the harsh glare of hostile publicity". This was to stand him and Canada in good stead when he crossed the Atlantic.

In 1848 Head was appointed Lieutenant-Governor of New Brunswick, then a small British colony for the most part thick in

forest, with widely-separated small communities. The special duty set the new governor by the Colonial Office was the introduction of responsible government in the colony. Soon after his arrival he realized he must steer a middle course between the vested interests of local family-compacts and allay local fears by avoiding the creation of a Governor's party. Fortunately, for the times Head was a moderate liberal, which in his case meant, in the words of his biographers: "the attitude of a scholar who is at the same time a practical administrator, sympathetic with reform but suspicious of revolution, and inclined rather to build on foundations already laid than to break new ground". The names of the local New Brunswick leaders at the time have a familar ring to Canadian lawyers of today: Chipman, Hazen, Odell, Tilley, Wilmot, Carter and Ritchie.

One thought above all seems to have been Head's guiding star during his twelve years of service in what is now Canada—that all parts of British North America must remain British in allegiance and in the direction of their political development; that no part must break away into the American Union. To that end he was an early supporter of the proposal for a railway to link the maritime colonies and the Canadas, which he realized would be a step towards the eventual union of all British North America. He constantly emphasized to those in authority in England the importance of supporting the maintenance of Imperial ties, lest the colony become American. With the same thought in mind he did all he could to assist immigration from the United Kingdom and continually urged closer economic ties between the British colonies in North America (locally he was against the existing forest exploitation and fostered scientfiic agricultural development).

At the time, unfortunately, colonial policy in Britain was undergoing a change. There the plan for a railway was turned down. About the same time differential duties in favour of the colonies were abolished by the United Kingdom, with a disastrous effect economically in the colonies. One does not wonder that in New Brunswick the inhabitants, many of whose recent ancestors had come as Loyalists from New England during the American Revolution, turned their thoughts to the United States as a ready market for their goods and products. The advantages of trade reciprocity inevitably led to a movement for political incorporation with the American republic. These thoughts were freely expressed in Head's Executive Council about the same time as a future Canadian Prime Minister, Abbott, was signing the Annexation Manifesto at Montreal. Head was quick to warn the Colonial Office of what might result in New Brunswick from neglect in England.

Local conditions in New Brunswick were leading to a political crisis by 1850-1851. A contributing cause was the resignation of the Chief Justice and an attempt to make the appointment of his suc-

cessor political. Recent efforts of the Canadian Bar Association to improve judges' salaries and pensions make Head's counsel of more than a century ago still timely: "According to my ideas of English institutions, one of their most valuable and cherished characteristics is the stability and independence of the Judiciary". It was during this crisis that the Governor, in a memorandum laid before his Council, set out his understanding of responsible government, together with specific recommendations for the changes needed to make it workable locally. His view was that the Executive Council must consist of men competent to advise, paid adequately by the state, at hand when action was required and with power commensurate with their responsibilities. He considered that the heads of governmental departments must be members of Council, as in a modern cabinet, and that the initiative for money votes must be surrendered to the Council, while the elective feature was retained for municipal institutions. At the same time he made very clear his views of the relationship which should exist between the governor, the home government in Britain and the local authorities: these were more modern in conception than was usual in those days of colonial government from the Mother Country.

Above all, Head constantly studied relations among British North America, Britain and the United States. Frequently travelling throughout the colony, he also visited the United States and the Canadas, and kept his ear to the ground. Openly he advocated a North American union of the separate colonies; one flag, "the Union Jack with a difference of some kind"; a single currency; customs union; an exclusively British North American coasting trade; a railway for physical connection; and strict enforcement against the Americans of colonial fishing rights off the Atlantic coasts. But with the fall of the government in the United Kingdom his strong report was not properly studied. When his term as Lieutenant-Governor of New Brunswick came to an end, he refused the governorship of British Guiana and, late in 1854, accepted the Governor-Generalship of British North America, succeeding Lord Elgin.

On his way to Spencer Wood at Quebec, Sir Edmund spent two months visiting Boston, New York and Washington, always with that ear to the ground to find out how Americans in authority were thinking about the British colonies to the north. Technically he was now governor of all these colonies, but in practice it had become usual for the Governor General to confine his activities to the administration of the United Province of Canada, not in detail as he had had to do in New Brunswick (where he had been his own prime minister), but as an interpreter between the colonial and imperial governments and as a designer of long-range policy.

Defence was a pressing problem when Head arrived in Canada. It was the period of the Crimean War and the Indian Mutiny. Imperial troops had to be withdrawn from Canada for service in

these campaigns and Her Majesty's Government in the United Kingdom felt, with some justification, that those who had been given responsible government for local affairs in the colonies should assume the expense of military protection locally. This, to Head, was only partially true, so long as a colony was involved in war or peace not by the wish of its own people but by action of the Imperial authorities. Moreover, he was on the spot and knew at first hand how anti-British the feeling still was in the United States, and the American tendency to take over as much adjoining territory as possible in pursuit of their loudly acclaimed theory of "manifest destiny". Sitting in Quebec or Toronto, he was wiser than the British Ambassador in Washington, who openly during a depression fostered recruiting in the United States for the British armies! Head was more cautious not to offend the Americans and later it strengthened his hand when he refused help from Canada to the North on the outbreak of the Civil War.

Long before this, however, the defence problem in Canada had to be met. When responsibility for some local defence was assumed by the Province of Canada it was Head who persuaded the Imperial Government in return to give up ordnance lands in Canada. When the Militia Act of 1855 came into force, the Governor General used his influence to ensure that appointments to commissions in the new Canadian force were non-political. It was at his suggestion that a clause was inserted in the act prohibiting volunteers from taking their arms across the American border—the excuse he was able to use later for refusing militia arms from Canada to the federal army in the War between the States. Head realized nevertheless the seriousness before the Civil War of rumoured plots in the United States to take over undefended Canada as a "free state" and at the end of the war the threat to Canada of the large forces of men then under arms. He approved therefore the return of British regiments to Canada at the end of the Crimean War and helped in the raising of a British regiment in Canada for general service. This regiment was the 100th Foot, the first Royal Canadian Regiment, which was only disbanded in recent years, after distinguished service round the world. But its name has been carried on to the present day in the oldest infantry regiment in Canada's regular army.

Other urgent questions arising in Canada early in Head's governorship were "the double majority" principle in legislation; where the growing colony's capital should be; and how the rights of the Hudson's Bay Company were to be dealt with in the face of a population pushing steadily westward. That a government of the United Provinces of Upper and Lower Canada, to remain in power, should have a majority of votes overall, as well as in each of the previous separate colonies, seemed ridiculous to Head, and he used his influence accordingly. At first he considered that a capital alternating between Quebec City and Toronto might free English- and French-

speaking citizens from some of their local prejudices, but he soon found it impracticable, and it was at his suggestion that the controversy was referred to the Crown for decision. At the same time he strongly recommended, unofficially, that the Queen choose Ottawa as the new capital.

The future of the old charter company was more difficult. Bound up with it was the question of eventual confederation of the British North American colonies and the company's properties in the West. Head for some time made a careful study of the rights and administration of the Hudson's Bay Company in the West, as a result of which his first report to the Colonial Office recommended maritime union on the Atlantic coast and either one or two new western colonies to be governed under commission (the prairie colony, he suggested, might be called "Manitoba", in spite of the fact that the word was said to mean "Evil Spirit"). In a later report Head went even further and suggested British North American union if after consultation with the local governors the time seemed ripe. By 1858, in his speech from the throne, he urged speedy confederation, but all the colonies were still not ready and his term as Governor General came to an end in 1861.

Head returned to England to receive honorary law degrees at Oxford and Cambridge; to be made a Fellow of the Royal Society; and to become a Civil Service Commissioner. He refused the governorship of Ceylon but, when the financial control of the Hudson's Bay Company changed, he accepted the post of its governor. Local troubles in the Canadian West and his own studies made him realize that the time had come for the Crown to establish its authority there. Head accordingly proposed to Her Majesty's Government that the company give up its exclusive rights in the North West Territories for a money payment and that a new crown colony be established in place of the company's rule.

Sir Edmund Walker Head died in January 1868, soon after the Canadian confederation he had advocated came into effect. A memorial tablet in Rochester Cathedral describes him in words which this well-written biography show to be throughly justified:

> As a Colonial Governor sagacious, firm, just, conciliatory, earnest in the advancement of the Provinces under his charge: in industry, wealth, arts and sciences;
>
> Gifted with rare accomplishments, a scholar versed in the literature of all ages and many languages. With an exquisite judgment in the fine arts;
>
> In manners genial, in conversation easy, rich and various; beloved by many, most loved by those who knew him best.

This biography should make him better known to modern Canadians.

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Executive Discretion and Judicial Control: An Aspect of the Conseil d'Etat. By C. J. HAMSON. Published under the auspices of the Hamlyn Trust: Sixth series. London: Stevens & Sons Limited. Toronto: The Carswell Company Limited. 1954. Pp. x, 222. ($2.75)

French Administrative Law and the Common-law World. By BERNARD SCHWARTZ. With an introduction by ARTHUR T. VANDERBILT. New York: New York University Press. 1954. Pp. xxii, 367. ($7.50 U.S.)

Together these two books constitute probably the best introduction available in the English language to the nature and work of the great French administrative tribunal, the Conseil d'Etat. They are both excellent examples of comparative legal method and the critical insights it is capable of furnishing, even in the field of public law where institutions and customs are so much a product of particular historical circumstances. They are especially valuable at a time when public-law students in the English-speaking world are asking themselves with ever greater insistence whether the only escape from the comparatively feeble and inadequate thing which judicial self-limitation threatens to make of judicial control is not the establishment of special administrative courts.

It is more than twenty-three years since Professor W. A. Robson's suggestion of an "administrative appeal tribunal" was rejected out of hand by the Committee on Ministers' Powers on the rather thread-bare ground that it was "inconsistent with the Sovereignty of Parliament and the supremacy of the Law".[1] Since then Professor Robson has persisted in his view[2] and there have been other proposals of a similar nature.[3] Even Sir C. K. Allen appears to have modified his original opposition to the idea.[4] Now these two books come along with their carefully documented analysis of French administrative law to reassure us of what most students have suspected since Sir Ivor Jennings published his criticism of Dicey,[5] namely, that a system of administrative courts is not incompatible with the rule of law. On the contrary, French administrative law is seen to offer much greater safeguards than our own.

Despite their admiration for the Conseil d'Etat, however, neither Professor Hamson nor Professor Schwartz would favour the establishment of administrative courts in their respective

[1] Report of the Committee on Ministers' Powers (Cmd. 4060, 1932) p. 110.

[2] Robson, Justice and Administrative Law (3rd ed., 1951) pp. 459 ff.

[3] *E.g.*, Richard C. FitzGerald, Safeguards in the Exercise of Functions by Administrative Bodies (1950), 28 Can. Bar Rev. 538.

[4] See his foreword to Government by Decree by M. Sieghart (1950) p. xiii; also Allen, Law in the Making (5th ed., 1951) p. 578, note 1.

[5] Jennings, The Law and Constitution (3rd ed., 1946) pp. 210 ff.

countries because of the conflicts, uncertainties and delays, not to speak of expense, which a dual system of justice seems inevitably to produce. It is difficult to say just how serious this objection need be, but it does not seem to have been considered up to now by the advocates of separate courts.[6] It should not be necessary to reproduce the unwieldly complexity of the French system, which requires a third jurisdiction (the *Tribunal des Conflicts*) to resolve the conflicts between the other two, but it might simplify things a good deal if Sir Ivor Jenning's proposal to create an administrative sub-division within the present judicial structure were followed, rather than that of Professor Robson to set up an entirely separate and autonomous tribunal.[7] At any rate, in view of the French experience, the question is one which deserves more thought than appears to have been given to it so far.

There are other organizational problems as recent French developments show. The establishment of administrative courts may be expected to result in a very large volume of cases and the eventual need to decentralize, as was done by the reform of September 30th, 1953, in France, when most of the Conseil d'Etat's first-instance jurisdiction was transferred to regional tribunals. What effect this change will have on the future development of French administrative law is difficult to say, but as most students of the French system would agree, the constant, dynamic and systematic development of the Conseil d'Etat's jurisprudence, or case law, over the last one hundred and fifty years was due in no small measure to the fact that it exercised a universal jurisdiction as a court of first instance as well as appeal and *cassation*. But even the French system broke down under the sheer weight of work which flowed into it, and in recent years the great prestige of the Conseil d'Etat was being threatened by the intolerable delays which a huge back-log of cases was causing.

These two studies of French administrative law, one by an Englishman, the other by an American, conclude with suggestions for strengthening our own system. They do not offer any radical cure for what ails Anglo-American judicial control (as a matter

[6] Professor Robson's evidence before the Committee on Ministers' Powers suggests that some jurisdiction in administrative matters would under his proposal be left to the ordinary courts: Minutes of Evidence, Vol. 2, p. 59, Q. 843, p. 60, Q. 868. FitzGerald's "Supreme Court of Administration" (see footnote 3, *supra*) would have jurisdiction over questions of fact and "would, together with the present Supreme Court of Judicature, be able to cover the whole field of matters in which administrative authorities should not have the final word". See also Sieghart, *op. cit.*, p. 317.

[7] Robson, *op. cit.*, p. 462. Professor Robson seems to have had something quite analogous to the Conseil d'Etat in mind. See his expression, "a sort of administrative Court grafted on to, or forming part of, the Privy Council . . .", in evidence before the Committee on Ministers' Powers, Vol. 2, p. 58, Q. 830.

of fact, one would judge that the authors are not in entire agreement on what the ailment is), but there emerge from them several useful suggestions for relatively unspectacular but necessary improvements. Both authors are impressed by the procedural simplicity of the French system (which is, of course, somewhat off-set by its jurisdictional dichotomy). Professor Hamson would like to see the development of a simple remedy to reach those administrative acts not presently amenable to certiorari; Professor Schwartz urges the complete elimination of the extraordinary remedies and the substitution of a simple petition for review. With respect to the scope and effectiveness of review, Professor Hamson emphasizes a fundamental weakness of our system: the rule that an administrative authority cannot be compelled to give reasons for its decision, and (although this may be changing, in Canada at least[8]) the right of a minister to oppose the production of files and documents on the ground of what he, as the sole judge, conceives to be the public interest. He contrasts the jurisprudence of the Conseil d'Etat, which requires the decision of every administrative tribunal to be a reasoned one on pain of nullity, and which now seems to be moving in the direction of requiring other administrative authorities to disclose the reasons for their decision and even to produce their supporting file when their decision is challenged.

Despite such useful observations, however, this part of Professor Hamson's book is slightly less satisfactory than the corresponding part of Professor Schwartz's study, for while Hamson's criticism of English judicial control seems to go much deeper his constructive proposals fall considerably short of his criticism. One suspects that Professor Schwartz (who is somewhat inclined to conceal his personal views behind the extensive quotation of others') would like to see some extension of judicial review to include a little more of the appreciation of fact, where statutory terms permit it, which now characterizes the control of the Conseil d'Etat, but he does not feel as strongly as Professor Hamson that the great need is to reach the administrative discretion, "to give to the citizen the possibility of justice against the administrative act which is within the *legitimate* powers of the administrator . . .".[9] It is difficult to see how Professor Hamson, who seems to be advocating a full review on law and fact, is content to leave things as they now are, with a few adjustments, in the hands of the High Court, particularly in view of what appears to be his rather narrow construction of the doctrine

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[8] See *Re Constitutional Questions Determination Act (B.C.); Regina* v. *Snider*, [1954] S.C.R. 479, [1954] 4 D.L.R. 483; and the comment by John Willis (1955), 33 Can. Bar Rev. 352.

[9] Hamson, Executive Discretion and Judicial Control (1954) p. 20.

of *ultra vires*. (Although it is true, as Professor Hamson says, that the term *ultra vires* cannot serve as a translation for the French expression *excès de pouvoir*, it is an exaggeration to speak, as he does, of the "enormity of the difference" [10] between the two theories of judicial control, unless one takes a much narrower view of the doctrine of *ultra vires* than its modern extension by judicial decision would seem to warrant. Up to a certain point the two theories of judicial control show very interesting parallels: the French doctrine of *excès de pouvoir* has pushed its conclusions from similar premises somewhat further. In theory both systems claim only the right to control the *légalité* and not the *opportunité* of administrative acts. Admittedly, they do differ to a considerable degree in the scope of the review which they consider necessary to make that control effective, but, in this reviewer's opinion, neither Professor Hamson nor Professor Schwartz does justice to the extent to which, in England at least, there is ample precedent for quashing administrative decisions on grounds which are comparable to the French *détournement de pouvoir*.[11] The difference between the two systems is as much one of professional attitude as legal theory.

Professor Hamson's conclusion, that the "residuary function" exercised by the Conseil d'Etat—its subtle influence on administrative standards by its enforcement of the *principes généraux du droit public* and what he calls the "rules of due administration"—must be left in England to be carried out by the administration itself, is a trifle anti-climactic and even contradictory after some of his earlier remarks. For example, at one point he says that the minimum standard of conduct which should be required of the executive in England, as it is in France, "cannot be attained in a manner likely to win the confidence of the public unless it is manifestly enforced by a court—that is to say, an impartial body—sitting in public and able to entertain complaints made by persons claiming to have been injured by the non-observance of that standard".[12] But these criticisms cannot detract from what is truly a masterly performance at capturing and presenting within a comparatively small compass the complex and elusive spirit of an institution which even French students regard as slightly inscrutable.

It should perhaps be said in conclusion that Professor Hamson's is the more limited in scope of the two books: it concentrates on the chief recourse of French judicial control, the *recours en annulation pour excès de pouvoir*. Professor Schwartz's book, which is a comparative treatment of French, English and American ad-

[10] *Ibid.*, p. 7.
[11] G. E. Treves, Administrative Discretion and Judicial Control (1947), 10 Mod. L. Rev. 276; Griffith and Street, Principles of Administrative Law (1952) pp. 214-219.
[12] Hamson, *op. cit.*, p. 209.

ministrative law, also includes a survey of the principles governing the liability of the state and public officers in these three countries. Not the least interesting and instructive part of his book is his analysis of the law governing the personal liability of the public officer, a subject on which traditional Anglo-American ideas may be in for some change.

GERALD E. LE DAIN*

Law, the Bond of Society

But to know that our roots are deep does not necessarily mean that we will also know them to be good. Because, as Mr. [Walter] Lippmann indicates, the mediaeval concept of the college and university had its central base in religious doctrine, an integral part of its teaching was the prescription of what was good and what was evil. Our modern colleges and universities, however, while retaining many of the symbols and the sancta of the mediaeval form, have largely rejected the religious basis and thereby the frank dogma of right and wrong. As I understand it, Mr. Lippmann is not suggesting that this is not entirely in keeping with the purest freedom to pursue truth; what I am saying with Mr. Lippmann is that it has left a vacuum which needs filling. I think there is at hand a positive and powerful set of principles which may have real value for this purpose.

Why should not every college and university add to its curriculum an undergraduate course to be called something like "Principles of Anglo-Saxon Justice"? The object of course could be to present to every student attending our colleges and universities the fundamental principles of our legal and judicial system and to suggest the tone and the climate of our legal rules of fair play. It would give our students a 'feel' for the meaning of basic rights, for the right way and the wrong way of judging evidence, of sifting truth from untruth, of measuring liability or guilt, of making up one's mind.

Such a course could trace the need for law in society and the forces and rules which have shaped and nourished our legal system. It could try to impart a true understanding of those things which are the flesh and bones of our pattern of justice—freedom of speech, of religion, of the press; the right to be secure in our homes against unreasonable searches and seizures; the right to a jury trial in all criminal prosecutions; the right to counsel; the right of habeas corpus; the guarantees against double jeopardy, self-incrimination, ex post facto laws, and bills of attainder; and the right to protect person and property by due process of law. . . .

Mr. Lippmann might agree that there is a place—a vital place—in our structure of liberal education today for exposure of all students to time-tested principles of justice so that as many as possible may understand how rights are granted or acquired, how justice is administered, and what makes law and order secure in a republic. This would, it seems to me, at least bring a real conception of the meaning of Cicero's words that 'law is the bond of society'. It would inculcate a deep respect for the place of law and order in our Western tradition. It would in a small but immensely significant way restore Mr. Lippmann's public philosophy to its true place of honour. (Sol M. Linowitz, in a letter to the Editor of The Atlantic, May 1955, pp. 25-26)

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