REVIEWS AND NOTICES

Judicial Review in the English-Speaking World. By EDWARD MCWHINNEY, Barrister-at-Law, Associate Professor of Law, University of Toronto. Toronto: University of Toronto Press. 1956. Pp. xiv, 201. ($8.50)

The purpose of this interesting and provocative book is to describe the activities of the courts as interpreters of the constitutions of Commonwealth countries and to attempt some comparison with the rôle of the Supreme Court in interpreting the constitution of the United States, although the comparison is mainly contained in one short chapter (9). The author is led to the conclusion that each country should develop a national constitutional jurisprudence and that to this end the judges should be selected less on account of their professional expertise than of a broader training and experience in public life.

Until recent times most of the task of interpretation of Commonwealth constitutions has fallen to the Judicial Committee of the Privy Council. In the submission of the author there was no very definite line of demarcation between the decisions of the Privy Council and those of the local appellate courts, in particular the Supreme Court of Canada and the High Court of Australia, in respect of those matters concerning the constitution which they have been called upon to determine. Professor McWhinney's conviction is that interpretation by the Privy Council has resulted in constitutions being construed as if they had been enacted in ordinary statutes. Judges, so the argument runs, have preferred the positivist approach rather than the rôle of judicial statesmanship; to this tendency there have been notable exceptions, such as Lords Watson and Haldane, whose influence was by no means always transient. According to the approach by the majority, the British North America Act, 1867, has been just another statute to be considered according to the ordinary canons of interpretation. Dean Cecil A. Wright, who contributes a foreword, agrees with the author at least in this respect (p. x).

Professor McWhinney has not confined himself to the evidence derived from the various judicial dicta in constitutional cases. His examination of the law reports of the major jurisdictions has

lead him on to consider the background of the personnel who comprise the various courts. He is persuaded that training at "the property and equity bar" leads the judges, alike in the Judicial Committee and in the Supreme Court of Canada and the High Court of Australia, to "approach the adjudication of constitutional law with a predisposition towards cabining and confining the governmental powers set out in the constitutional instruments" (p. 28). He points to the suspicion of common lawyers in the United Kingdom when the legislature intrudes upon the sacred soil of the common law and prays in aid the late Professor Laski to support the proposition that obstruction or delay on the part of the English judiciary may take place under the guise of interpretation of statute law (p. 46).

In the chapter (9) on the United States Supreme Court Professor McWhinney finds a reason for the judicial statesmanship accepted by the judges of that court in the fact that professional expertise has been less in evidence there as a qualification for a judgeship. To an English lawyer the "incurable positivism" of the judges which the author so warmly condemns is not without its merits. Against the failure to analyse conflicting interests which such an approach involves may be set the reflection that for judges to confine their task to literal interpretation may be a stabilizing influence, particularly in a State which is struggling with conflicts of policy. The independence of the judiciary is so precious that it ought not to be imperilled by mixing law and policy. There is surely something to be said in favour of the positivist interpretation of the law by the judges in a world which accepts the popular representative legislature as the basis of its form of government. Judges are better at answering purely technical legal questions to which there is a definite answer than at moulding their answers so as to create formulae for giving effect to legislative policy. But it would perhaps be surprising if the author accepted this view. As one who has spent his life in States where constitutional changes cannot easily be achieved by ordinary legislation, he is convinced that the interpretation of constitutions should not follow the same method as that of ordinary legislation, and, as Dean Wright points out in his introduction, that even in interpreting ordinary legislation judges have a creative rôle of a sort.

Professor McWhinney has made his case with clarity, if at times with a tendency to over-emphasis. His conclusion is that in each country there is a place for a national constitutional jurisprudence. He considers that the rôle of judicial statesmanship is hindered by the practice of a single opinion, as in the Judicial Committee; he would achieve flexibility by allowing separate and therefore divergent opinions which he feels would keep open the

door for court revolutions, such as that which occurred in the United States Supreme Court in 1937.

Since the book is published in Canada, it is probably the chapter on the Canadian constitution under the impact of judicial review that will attract particular interest. The key to this chapter is to be found on page 62, where the author states, as most people would agree, that the most controversial aspect of modern Canadian constitutional history since 1867 has been the rôle played by the Privy Council, which he examines in the immediately preceding chapter (3). This chapter in its turn is preceded by one on the Rule of Law in the United Kingdom, where it is argued that the rule of law in England has been used to obstruct or delay progress in the field of public law. The familiar examples of the trade union cases in the early years of the present century are cited in illustration. In *Liversidge* v. *Anderson* the author finds some signs of a change of heart in the majority findings, which he describes as something of a "presumption of constitutionality" of legislation passed by Parliament. But in the years that have passed since that case was decided there has been a disposition to explain it as a wartime decision. On the Judicial Committee the author criticizes the failure fully to make use of the provisions allowing for the representation of Commonwealth judges. This is a point with which there will be considerable sympathy, especially in federal States where the problems presented are often new territory for the vast majority of English or Scots law lords.

In the chapter (5) on legal positivism and judicial review in Australia, the essential weakness of the purely positivist position is examined. The point is validly made that it fails to recognize that the choice to be made is "not between judicial policy-making and absence of judicial policy-making, but between policy-making based on a full investigation of the alternatives and policy-making in the dark" (p. 77). The positivist approach requires, of course, that unacceptable judgments should be put right by legislation. Professor McWhinney is not impressed with the attempts by the British Parliament to bring the common law into line with current social and political conditions and notes the tenacious judicial opposition "before Parliament could off-set by further legislation the worst rigours of harsh judicial interpretation of the original statutory corrections of the common law". There is, of course, something in this argument, and it is in particular valid where, as in Canada and Australia, constitutional decisions cannot readily be overridden by legislation. But it must always be remembered that the reluctance with which judges face a statutory amendment of the common law may be due to their fear lest the new law may work hardly on a community which has grown accustomed to the previous understanding of what the common law was.

The constitution of the Union of South Africa is discussed, particularly in the field of race relationship (chapter 6). The author puts forward a thesis, which he associates with the name of Dean Griswold of Harvard, that the constitution of the Union has a fundamental character which is due to its local origin and its contractual nature. The argument is perhaps hardly sustained by the latest decision of the Appellate Division of the Union—*Collins* v. *Minister of the Interior,* [1957] 1 A.D. 552, which was decided after the book had gone to press. This decision has resulted in setting aside the entrenched provisions despite their local origin and contractual nature. The court upheld the power of the legislature to provide for the constitution of the Senate by legislation enacted bicamerally under section 25 of the South Africa Act, 1909, thereby rejecting the argument that the power to revise the composition of the Senate was to be read subject to the proviso of section 152, which relates to the amendment of the South Africa Act and requires a two-thirds majority at a joint sitting for the amendment of entrenched provisions. The effect of the decision is that the Senate Act, 1955, has been upheld, thus enabling the legislation relating to the coloured voters at long last to be passed by the requisite majority at a joint sitting of Parliament. But was not the intention of the South Africa Act to give effect to a local agreement that self-government could not imperil the coloured vote by exposing it to legislation enacted by simple majority in each house?

The book contains interesting chapters on fundamental rights in the constitutions of the Asiatic states of the Commonwealth and in the Republic of Ireland; in the latter case social rights are examined against the background of the Roman Catholic religion.

Some may disagree with the author's conclusions; few can fail to appreciate that his arguments are presented with conviction and, it must be admitted, sustained by full references to authority. Portions of the work have been submitted to scrutiny and criticism by a number of leading authorities, and the whole manuscript has benefited from the criticism of Mr. Justice Vincent MacDonald and Professor Paul A. Freund. The result is a scholarly treatise from which the author emerges as the unrepentant advocate of a legal philosophy which should secure the constant adjustment of legal doctrine to changing conditions of society.

E. C. S. WADE*

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Government under Law: A Conference Held at Harvard Law School on the Occasion of the Bicentennial of John Marshall, Chief Justice of the United States, 1801-1835. Edited by ARTHUR E. SUTHERLAND. Cambridge: Harvard University Press. Toronto: S. J. Reginald Saunders and Company Limited. 1956. Pp. xi, 587. ($9.00)

The present collection of essays originally formed the subject of papers delivered at the Harvard Law School in the fall of 1955 to commemorate the two hundredth anniversary of the birth of John Marshall, the great Chief Justice of the United States Supreme Court and originator of many of the basic doctrines of judicial review and federalism, as these terms are understood in the English-speaking world. The Harvard celebrations provided a happy opportunity for bringing together the chief justices of the United States, Canada, Australia and the Union of South Africa; and the addresses given by them, together with papers by Mr. Justice Frankfurter, Sir Raymond Evershed, distinguished members of the United States circuit and district courts, and leading figures from the law schools and professional practice in the United States, are reproduced in full in the volume, subject only to some careful and unobtrusive editorial pruning by Professor Arthur Sutherland.

A great part of the contributions by the academics and practising lawyers has been said by them before, and often with greater detail and thoroughness. However, the opportunity for a chief justice to expound his general conceptions of the proper rôle of a supreme court exercising judicial review is sufficiently rare, outside perhaps the United States, for this volume to be both timely and significant.

The papers by the chief justices in fact offer interesting opportunities for comparisons of judicial techniques, styles and basic philosophies of law. In general the chief justices from the three Commonwealth countries can be distinguished sharply from Chief Justice Warren and the other American judges in their greater caution of utterance and also in the essential positivism of their approach to law. Thus it is interesting to observe Chief Justice Centlivres of South Africa enthusiastically embracing the ideal advanced by Chief Justice Sir Owen Dixon of Australia of a "strict and complete legalism" and insisting that courts are not in any way concerned with the policy of an act—with the merits or demerits of legislation challenged before them (pp. 426-427). Chief Justice Centlivres was the main author, only five years back, of two of the most notable decisions of Commonwealth constitutional law (and certainly most courageous politically), in which, rejecting existing judicial precedents in South Africa and also prevailing South African and Commonwealth juristic opinion, the

South African Supreme Court invalidated successive legislative measures whereby the Nationalist government of South Africa had sought to remove the so-called "coloured" voters (voters of mixed blood) from the common electoral rolls. So rigorously positivist an official philosophy of law—in the best Austinian sense, in fact—as that advanced in the present volume by Chief Justice Centlivres must necessarily inhibit any policy-oriented approach (pro-civil liberties, for example) to constitutional-law adjudication. The complete, and no doubt painful, retreat from the decisions of 1952 represented by the recent judgment of the South African Supreme Court in *Collins* v. *Minister of the Interior and Another*, [1957] 1 S.A.L.R. 552 (A.D.), in which the Nationalist government's programme was finally upheld against legal challenge, with Chief Justice Centlivres himself writing the opinion of the court, must be regarded in that light as having been almost inevitable.

I am happy to report, as one who was himself present at the Marshall bicentennial celebrations, that Chief Justice Kerwin's address was very well received, the predominantly American audience appreciating particularly his gracious references to the influence of American constitutional jurisprudence in Canada. Chief Justice Kerwin observed (p. 453) that Chief Justice Marshall's time-honoured judgments are "so often quoted not only in the United States, but in many other countries and not least in Canada. Throughout the length and breadth of Canada his opinions are from time to time referred to and particularly those dealing with the construction of the Constitution of the United States." It would be an act of supererogation here to remind ourselves that in the *Saumur* case, [1953] 2 S.C.R. 299, involving a fact situation much canvassed judicially in the United States, counsel's learned and detailed presentation of Amercan authorities was dismissed as irrelevant by the Supreme Court of Canada—explicitly by three of the judges and implicitly by the rest—or that the judicial opinions in the recent *Padlock Act* case are unrelieved by reference to the decisions, in the same general area of subject matter and policy, by the United States Supreme Court or, for that matter, by the supreme courts of the other federal countries of the Commonwealth. Those of us who believe that, in the task of elaborating a distinctively Canadian jurisprudence, the comparative-law approach, if used intelligently and with discrimination, can be a most fertile source of legal ideas may well hope that Chief Justice Kerwin's sage remarks on the relevance of comparative law will be properly noted in the law schools and not least, perhaps, among the Chief Justice's distinguished colleagues.

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Constitutional Law: An Outline of the Law and Practice of the Constitution, including Central and Local Government and the Constitutional Relations of the British Commonwealth. By E. C. S. Wade, M.A., LL.D., and G. GODFREY PHILLIPS, C.B.E., M.A., LL.M. Fifth edition by E. C. S. WADE. London, New York, Toronto: Longmans, Green & Company. 1955. Pp. xxx, 538. ($6.75)

American Constitutional Law. By BERNARD SCHWARTZ. With a foreword by A. L. GOODHART, K.B.E., Q.C. Cambridge: At the University Press. Toronto: The Macmillan Company of Canada Limited. 1955. Pp. xiv, 364. ($4.25)

These two books are reviewed together not because they have anything in common but rather because each reflects a comparable aspect of the Canadian constitution, that which is unwritten and that which is written. However, the validity of the comparison is affected in each case by vital differences between Great Britain and Canada on the one hand, so far as relates to the unwritten part of Canada's constitution, and between the United States and Canada on the other, so far as relates to the written part.

The federalism enshrined in Canada's written constitution gives a different emphasis to the unwritten constitutional principles derived from Great Britain. Thus, in considering the constitutional conventions relating to responsible government and to parliamentary supremacy, account has to be taken of the distribution of legislative power (and the consequent distribution of executive power) under the British North America Act; to the bicameral structure of the central government (and the constitutionally-protected position of the Senate); and to the unicameral (save for Quebec) organization of the provincial governments. Even though reservation and disallowance are relatively dormant as between the provincial and federal governments, they are still operative in law, and hence qualify the principles of responsible government in a way that is unknown in Great Britain.

Books on the constitutional law of the United Kingdom are becoming more and more descriptive because in the refinement of the subject, through the hiving-off of administrative law, the issues of function as contrasted with structure are being treated as part of administrative law rather than constitutional law. Professor Wade concedes the convenience of the separation (p. 3) and contents himself with a 75-page treatment of the main features of administrative law (a little enlarged over the 66 pages devoted to the subject in the preceding edition). The relevance of function at two levels of governmental operations, namely, at the level of enactment (where the distribution of legislative powers

is controlling) and at the level of administration, is what marks off in law the federalism of Canada and the United States from the unitarism of the United Kingdom. It may be acknowledged that the differentiation is somewhat arbitrary, because function at the level of enactment, while formally a problem in the distribution of legislative power in a federal state, is no less a question of the choice of political and economic policies in the case of a unitary state than in the case of a federal one. Yet the legalism of the distribution of powers in the latter case, as contrasted with legislative omnipotence in the former, exhibits the persisting distinction between the two.

Professor Wade is alone responsible for this, the fifth, edition of what is now the standard outline work on the United Kingdom constitution, as he was responsible for the fourth edition in 1950. The fourth edition was reviewed by Dean W. P. M. Kennedy in (1951), 29 Can. Bar Rev. 801, and it is enough to point out here the changes that have been made in the new edition. In truth, there have been no substantial changes but additions of detail consequent upon the enactment of new legislation, such as the Visiting Forces Act, 1952, and there has been some enlargement or contraction of explanations of particular portions of the text. Thus, there has been a little expansion of Part VIII, dealing with "The Citizen and the State", and a few changes in Part X, "The British Commonwealth". At the time of the fourth edition, abolition of appeals from Canadian courts to the Privy Council had just been accomplished and was there noted quite briefly. The same short treatment is given in the fifth edition. Nothing has happened in the intervening five years to justify any more extended consideration, short of a close look at how far the Supreme Court of Canada is hewing to or departing from Privy Council decisions, and this is perhaps outside the scope of such a general book as the one under review. Professor Wade may be allowed his judgment of the great contributions made by the Judicial Committee "towards moulding the constitutions of the older member States of the Commonwealth remote from the local political background". It may be churlish to question it in the twilight of the Judicial Committee's appellate jurisdiction, but one may wonder whether, when adjudication in England has always taken place against its political background, there is any reason why this should not be equally good for member states of the Commonwealth, old or young. The sentiment for continuation of appeals to the Privy Council was not a unanimous one even in the earliest days of the Canadian confederation.

Professor Schwartz's book, unlike that of Professor Wade, is an episodic rather than a rounded treatment of its subject. This is especially true of the second of the two main divisions, which

are entitled respectively "Structure" and "Modern Developments". It is in the second part that comparisons are apt between the written constitution of the United States and the written part of the Canadian constitution. Professor Schwartz has addressed his book to a British audience and he gives it a contemporary emphasis by dealing, for example, with the *Steel Seizure* case, the Negro and the Law, and Civil Liberties and the Cold War, which constitute three of the seven chapters in Part II. A Canadian audience will find particular interest in two other chapters in this part, named by the author "The New Federalism" and "The Changing Role of the Supreme Court". The New Federalism, in its story of the constitutional revolution of the 1930's, bears interesting comparison with the failure of a Canadian constitutional revolution in the same period. Since the abolition of Privy Council appeals there has been some deflection by the Supreme Court of Canada of the course of Privy Council decisions, and it may be possible in time to write a chapter on the new rôle of the Supreme Court of Canada to match the theme of Professor Schwartz's narrative of the changing rôle of the United States Supreme Court.

So much for general comparisons. But it may be well to add that the scope and content given to the federal commerce power in the United States as compared with the present treatment of the equivalent Canadian power, and the difference stemming from an expressed bill of rights in United States and the absence of one in Canada, are two of the main contrasts in the day-to-day operation of the constitutions of the United States and Canada. The paper contrast between the reposing of reserved powers in the states in the United States and in the central authority in Canada cannot be taken too seriously, as is quite well known by anyone who has looked into the adjudicative results of the construction of the respective paper stipulations.

Professor Schwartz's book should appeal to anyone outside the United States who seeks a general introduction to the subject of which it treats. It does not, except in dispersed spots, pretend to great detail or canvass doctrinal distinctions; rather its style is expository of general principles. Thus, for example, in the discussion of the *Steel Seizure* case there is no exposition or examination of the dissenting judgments. In the understandable attempt to find analogies in British or other experience to significant United States decisions, he sometimes leaps lightly over the crucial difference in adjudication under a written constitution and adjudication in a unitary state with no fundamental law: an illustration is in his reference to *Liversidge* v. *Anderson*, [1942] A. C. 206; and equally he sometimes tends to slur over important distinctions in federal constitutions, as where he compares the treaty-making power in the United States and Canada relative to federal

competence in implementing legislation. Again, the book contains copious and, indeed, an excessive number of quotations from a wide assortment of authors, as well as quotations from judgments, and, while they are skilfully introduced to maintain textual continuity, they are nonetheless distracting. Professor Schwartz is quite capable of supplying his own text in most if not all of the instances in which he has relied on others; and it seems a pity that he should have used a "tonsorial" method (to adopt an expression of the late Justice Cardozo), as if to emphasize that he is not trying to be original. I cannot believe that the quotations add anything to objectivity.

Professor Schwartz's volume may be regarded as a mild effort at comparative constitutional law. A good case can be made for encouraging further work along this line among the United States, Great Britain and Canada, and, indeed, other federal states of the Commonwealth. In this country, if one may judge from Chief Justice Kerwin's address at the Marshall bicentennial celebration at Harvard Law School (reproduced in *Government under Law* (1956) p. 453), the way is open for the reception and consideration of United States constitutional doctrine in Canadian courts. It may provide us with valuable leads in easing, if not solving, our problems of federalism, no less than our reliance on English cases has given us material that we have used in treating problems of our unwritten constitution.

BORA LASKIN*

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Miscellany-at-Law: A Diversion for Lawyers and Others. By R. E. MEGARRY. London: Stevens & Sons Limited. Toronto: The Carswell Company Limited. 1955. Pp. xvi, 415. ($4.75)

My difficulty in reviewing this most entertaining book is to be adequate to its merits without indulging in that high-pressured extravagance which so often characterizes the publisher's dust-wrapper.

It seems to me that no profession in the world enjoys talking shop more than lawyers. Physicians, it is sometimes said, are worse offenders, and of course schoolmasters are notorious. In humbler walks of life undertakers are much given to the practice, as witness the macabre and horrifying stories that sometimes reach even judicial ears. Admitting the fault, if fault it is, I nevertheless think that there is a sound reason for it in these callings, for those who engage in them have brought to their attention the very warp and woof of life as it is woven by men and women out of their passions and prejudices, their fears and hopes.

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One thing however is plain—that, of all these kinds of talk, the lawyer's is by far the best. Generally it is wise, frequently witty, and almost always it is learned. If sometimes sympathy seems to be lacking, the lawyer's talk shows pre-eminently an understanding of life and of human beings.

In *Miscellany-at-Law*, Mr. R. E. Megarry, Q.C., who has long been known for his work as assistant editor of the Law Quarterly Review and, at the bar, for his encyclopedic knowledge of the intricacies of the rental regulations in Britain, has collected from sources spanning several centuries a great mass of fascinating material. Very politely he calls his book a collection of the wise and witty sayings of the judges, but, with great respect, he covers an even wider and more interesting field than that. Intriguing as judicial wisdom and wit may be, this book is a collection, an amazing collection, of curious incidents connected with the law in many of its phases.

One always hopes that the law, which is made for man, by man, is a rational and sensible system. In any event, a discussion of it must start with mankind itself, and on that foundation the author, whose learning is as wide as his discrimination is exacting, has started on his journey. He commences with a discussion of the fortunes and misfortunes of judges, and from that proceeds to a consideration of contempt of court, what judges are presumed to know, and then by a natural declension to the responsibilities of counsel in drafting and advising on pleadings. I cannot possibly mention all the things he discusses, but they are such indefinite quantities as the Chancellor's foot, the idiosyncrasies of men making their wills, the foibles of litigants, and many strange and incredible cases. He even ventures to tackle the difficulties of husband and wife, which he follows, by an easy transition, with a discussion of a subject not entirely unconnected—personal freedom and freedom of expression.

I have here only skimmed the surface of the many interesting topics with which the book deals from the earliest times to the present. One could quote passages for pages. I prefer to suggest that you read the book. It is a book to pick up and lay down and pick up again. It is a book to read in that delicious half-hour before sleep overtakes one, a book to savour when cheer must of necessity be within.

Most of us have known counsel, old, amusing and learned, whose conversation is a delight to their juniors on the rare occasions when they can be persuaded to recall the days that are gone. This book is of the same stuff—wise, witty and learned—always entertaining—instructive, with a great deal of useful information even in these somewhat brusque and businesslike days. Reading it makes you more at one with those who have preceded us in the practice

and study of the law. The problems have not changed so materially: it is merely that they are now set in a different context.

Mr. Megarry's book is lawyer's talk of the best quality. It is to be hoped that edition will follow edition and that it will be long preserved to amuse, edify and instruct succeeding generations of lawyers.

DALTON WELLS*

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The Law of Restrictive Trade Practices and Monopolies. By R. O. WILBERFORCE, Q.C., ALAN CAMPBELL, M.A., and NEIL P. M. ELLES, M.A. Consulting editor: R. GRESHAM-COOKE, C.B.E., M.P. London: Sweet & Maxwell Limited. Toronto: The Carswell Company Limited. 1957. Pp. xxiv, 677. ($15.00)

When I reviewed, for the February 1957 issue of the Canadian Bar Review,[1] a trilogy of books about the new (to apply a Canadian expression) "anti-combines' legislation" of the United Kingdom, I noted that a fourth work had already been advertised, which was "designed to be the definitive work on the subject". That work, *The Law of Restrictive Trade Practices and Monopolies* by R. O. Wilberforce, Q.C., Alan Campbell and Neil P. M. Elles, with R. Gresham-Cooke as consulting editor, is the subject of the present review.

This is a formidable volume running, with appendices and index, to some seven hundred pages. If so much can be said by so many before the first restrictive agreement has been hailed before the new Restrictive Practices Court, one may surmise that the "new special subject" which the Restrictive Trade Practices Act, 1956, "adds . . . to the modern law of England, Scotland and Northern Ireland" (p. 1) is going to have a very great impact upon trade and industry, bench and bar, in the United Kingdom. The length is, however, justified, for the book reviews, within 122 pages, the common and statutory law of England on monopolies and restraints of trade, before it gets into the subject proper of the United Kingdom legislation. The appendices, which set out the texts of the new "anti-combines" and related legislation, summaries of the reports of the United Kingdom Monopolies and Restrictive Practices Commission and selected material on the laws of other countries account, together with the index, for 233 pages more.

To summarize, briefly, the background material contained in the February review, it may be noted that in 1948, as a result of concern about the effects upon the economy of restrictive trading

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[1] (1957), 35 Can. Bar Rev. 233.

practices, the United Kingdom Parliament enacted the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948. The approach of this act was empirical: the Monopolies and Restrictive Practices Commission inquired into industries or practices specifically referred to it by the Board of Trade and, in determining whether the monopolistic situations or restrictive practices it encountered operated or might be expected to operate against the public interest, it was directed, in section 14, to take into account "all matters which appear in the particular circumstances to be relevant", including the "need, consistently with the general economic position of the United Kingdom, to achieve" maximum efficiency in the production and distribution of goods for home and export markets, encouragement of new enterprise, the fullest use and best distribution of men, materials and industrial capacity, the development of technical improvements and the expansion of existing, and opening up of, new markets. If an industry was reported upon adversely, remedy was sought, first, by negotiation between the industry and the appropriate government department and, if that failed, a statutory order might issue, breach of which was punishable as a contempt.

By 1956, the commission had reported upon some seventeen individual trades and industries and upon a group of restrictive practices (which it called "collective discrimination"), such as collective action on the part of sellers to boycott particular buyers or to deal with them only upon terms less favourable than the terms accorded other buyers, and collective action on the part of sellers to enforce resale price maintenance. Price fixing *simpliciter* and resale price maintenance as the independent policy of an individual supplier were not within the terms of reference for the "collective discrimination" inquiry. The practices investigated were ones which the commission had from time to time encountered in its earlier inquiries into particular trades and industries and it drew upon its previous reports for assistance. The "collective discrimination" inquiry was therefore an inductive procedure, by which the commission sought to synthesize the experience it had gained from examining successive cases into some general principles. In the result, the majority report recommended that Parliament proscribe the practices by criminal law, subject to certain exceptions: for example, where final consumers are not able to judge the standard of service which it is in their interests to demand from distributors and the subject cannot conveniently be dealt with by legislation, it might be desirable, the commission said, to permit manufacturers to act collectively to determine the standards they would require from their dealers.

The resulting act, the Restrictive Trade Practices Act, 1956, falls short of the recommendations in some respects and exceeds them in others. It does not adopt the criminal-law approach. It

does sweep into its embrace a wider range than the report on collective discrimination refers to: for example, price rings and uniform tendering, which the commission did not comment upon because they were not within its terms of reference. The method the new act adopts is to set up a Registrar of Restrictive Trading Agreements and a Restrictive Practices Court composed of superior-court judges[2] and of laymen "qualified by virtue of [their] knowledge of or experience in industry, commerce or public affairs" (s. 4). Restrictive agreements which, generally speaking, limit production, restrict distribution or fix prices are required to be registered with the registrar and brought by him before the new court. A restriction is deemed to be contrary to the public interest unless the court is satisfied of the existence of one or more of seven specific circumstances and unless the court "is further satisfied . . . that the restriction is not unreasonable having regard to the balance between those circumstances and any detriment to the public or to persons not parties to the agreement (being purchasers, consumers or users of goods produced or sold by such parties, or persons engaged or seeking to become engaged in the trade or business of selling such goods or of producing or selling similar goods) resulting or likely to result from the operation of the restriction" (s. 21). The most general of such circumstances is

> (b) that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction itself or of any arrangements or operations resulting therefrom;

The other relieving circumstances relate to restrictions reasonably necessary to protect consumers against injury; or to counteract other restrictive measures; or to place the parties in a fair bargaining position compared with those with whom they deal; or to prevent serious and persistent adverse effects on employment; or to prevent a substantial reduction in export business; or to support some other restriction found by the court to be justified.

If the onus thus placed upon the parties is not discharged, the court may declare the restriction contrary to the public interest, whereupon the agreement containing the restriction becomes *pro tanto* void; and the court may also make an order restraining the implementation of the agreement, in respect of the restriction, and the making of other agreements to the like effect. Failure to abide by such an order is punishable as a contempt. The act also prohibits the collective enforcement of resale price maintenance and this prohibition may be enforced by injunction at the suit of the Attorney

[2] The president of the court is Mr. Justice Devlin (Sir Patrick Arthur Devlin) of the Queen's Bench Division of the High Court of Justice.

General or, presumably, an injured party. The statute facilitates the enforcement of resale price maintenance as the independent policy of an individual supplier by making the price prescription, in effect, run with the goods, as against all persons having knowledge of it. The commission is reconstituted as the "Monopolies Commission" and it will henceforth be concerned chiefly with single-firm monopolies and with arrangements affecting export trade.

The first order of the Board of Trade under the new act, calling agreements up to be registered, came into operation on November 30th, 1956. It refers to agreements fixing prices and other terms and conditions of sale or of applying a process of manufacture to goods, and agreements which limit the parties to whom goods will be supplied or for whom a process of manufacture will be applied or from whom goods will be acquired. According to The Economist for April 20th, 1957, when the registries opened at London, Edinburgh and Belfast on Monday, April 15th, 1,424 agreements had been received by the registrar, 1,003 of which were already on file and open to public inspection. The staff of the registrar is reported, by the press, to comprise 122 persons.

Obviously, such a piece of legislation raises many questions of substance and procedure. "The specialty of this enactment", to quote from the introduction to the book, "so far as can be foreseen at the present time, is likely to consist in the introduction into the law, as the basis for decision by legal courts of justice, of considerations of economic and social policy which have formerly, in this country, been the concern of the administrator. The legislation has, it is true, attempted, so far as possible, to limit the field within which such considerations are to operate but nevertheless, as an examination of the Act will show, they have not been and cannot be relegated to the background." This is a sound observation: the act, as was suggested in the previous review of books on the same subject, obviously commits a large measure of economic policy-making to the courts. It may be true, as Sir Frederick Pollock has observed, that "our lady the Common Law is not a professed economist", but the same thing can scarcely now be said of her statutory counterpart.

Chapter 8 of the work deals with the "public interest", which of course is the heart of the matter. As the authors point out, the new act does not contain any *definition* of the "public interest". It merely lists a number of matters, which, if proved, will remove the presumption that a given restriction is contrary to the public interest. In arriving at its conclusions, moreover, the new court will have to weigh many things that have no common denominator, for example, the possibly adverse effect upon local employment of removing a restriction, against the general price enhancement which may ensue if it remains. The immediate interest of the employees

is clear and so is that of the consuming public; the problem is to strike a balance. Such problems can only be solved, in the authors' view, if the new court approaches the enforcement of the act with some basic assumptions about its underlying purposes. Consequently, they suggest (with diffidence) that conclusions might be reached by making the following assumptions:

(a) the general purpose of the act is to modify the existing structure of trade and industry by the infusion of a greater element of competition;

(b) the severity of this principle is mitigated in specific instances to prevent injury to the social structure or to individuals not parties to the restriction;

(c) the court should adopt a hard attitude toward these exceptions, insisting that they be unambiguously established;

(d) in balancing an advantage to some against a detriment to others, the standard of values to be applied is the degree of contribution to, or hindrance of, competition;

(e) certain exceptions, injury to consumers, employment or exports, if established, should ordinarily be overriding (as against the final "balancing" operation);

(f) in the cases of the other restrictions, the establishment of some very clear and specific advantage should be established.

Chapter 8 also contains, in sections 822 and 823, a summary of most of the principal economic arguments that are usually advanced in favour of and in opposition to restrictive trade practices.

The introduction and chapters 1 and 2 deal with the legal history of monopolies and restraints of trade and with their treatment at common law (and equity) and by the legislature. Here are discussed such questions as: What is the relationship between the "public interest" to which the act refers and that "public policy" by which the enforceability of contracts in restraint of trade was judged at common law? How do these concepts react upon each other? To what sources will the courts turn for assistance to supplement the criteria the act contains, since these criteria, despite an appearance of detail, leave wide margins within which economic desiderata can have play? May the reports of the Monopolies and Restrictive Practices Commission, under the 1948 act, be resorted to for guidance? Will United States anti-trust cases be cited? In this last respect there appears to be no doubt in the authors' minds that United States cases will be cited to the new court and to the High Court, within whose jurisdiction certain questions of interpretation lie, and the authors refer to a large number of such cases.

For the remainder, the book reviews the work of the Monopolies and Restrictive Practices Commission under the 1948 act, and describes its residual functions, as the "Monopolies Commission", under the 1956 act. It makes a survey of the types of restric-

tive practices shown by inquiries under the 1948 act, and earlier inquiries, to be extant in the United Kingdom and considers the impact upon them of the 1956 act. It considers in detail the operative sections of the 1956 act and deals in a separate chapter with the historical, common-law and legislative aspects of resale price maintenance. The inclusion in the appendices of summaries of the reports of the commission under the 1948 act is a useful feature.

The authors in their introduction make a point of explaining, and to some extent defending, the relevance of the background material they supply, including historical antecedents and the operation of the common law. The short answer to any objection that might be taken to this background material would appear to be that, even if it were to turn out to be irrelevant, in a positive sense, it would still have been necessary to demonstrate the irrelevancy in detail. No lawyer would care to plead before the new court, at least in the early stages of its existence, unless he had carefully, even though in vain, explored all possibilities of deriving assistance for his argument from some such material. Furthermore, and fortunately, it has not usually been considered necessary to apologize in a book of this kind for a moderate amount of scholarly inclusion. But the fact is that the authors have sufficiently demonstrated that the background material does have a measure of positive relevance. Beyond this, they have gone some distance towards showing the historic relationship of this field of law to the contemporary economic scene. The book should, therefore, interest not only the lawyer but also the political economist.

A more detailed criticism of the work would be impossible at the present time and beside the point. It must wait until the book has been put to work and improvements or corrections are suggested in the course of applying it to practical problems. Perhaps, at the stage of the second edition, the authors may wish to consider whether some parts, for example, the introduction and chapters 1 (Historical), 2 (The Common Law) and 7 (Registration and Procedure), are not a little over-classified and repetitive. Such defects, if they exist, are minor ones and the Canadian lawyer who wishes to have at hand a comprehensive treatment of the United Kingdom law on restrictive practices will find it in this book.

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