BOOKS AND PERIODICALS.

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BUREAUCRACY AND THE COURTS.[1]

When addressing the American Bar Association at Buffalo in 1927, Lord Hewart referred to

a marked and increasing development of bureaucratic pretentions, the essence and aim of which are to withdraw more and more matters and topics from the jurisdiction of the court and to set them apart for purely official determination.

This mischievous purpose showed itself in three ways, one was to

provide in express terms by statute that the decision of certain questions belongs to this or that government department, that the departmental decision is to be final and binding upon all parties, and that that decision is not to be questioned in a court of law.

Another way was to confer upon a government department power to make rules and regulations having the force of law, and a third way was

by statute to empower a government department to make orders for the removal of difficulties, as it is pleasantly called, and actually for that purpose even to modify the provisions of the statute itself.

Lord Hewart has now made the theme of his American address the subject of a volume entitled "The New Despotism", where it is developed with an amplitude of illustrative detail.

Professor Dicey, in his "Law of the Constitution", emphasised, as outstanding merits of the English system, the sovereignty of parliament and the rule of law. By rule of law, he said

we mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or in goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. . . In the second place . . . every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

[1] *The New Despotism.* By the Right Honourable Lord Hewart of Bury, Lord Chief Justice of England. London: Ernest Benn Ltd.

Finally,

> we may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as, for example, the right of personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts.

Such being the traditional principles of English constitutional government, how do we find them reflected in modern practice? First, as to the sovereignty of parliament. During the last twenty years parliament has, in many instances, delegated to ministers and departments the right to make rules and regulations dealing with all kinds of matters affecting citizens in their persons and property and having the force of law. These rules are passed without the safeguards furnished by parliamentary procedure, such as public notice, public examination, criticism and discussion in parliament and in the press. They are prepared by departmental officers whose business it will be to apply and enforce them in the course of their official duties. Frequently it is provided that these rules shall have the same force and effect as if enacted in the statute; that is, their legal validity cannot be questioned. And, finally, when disputes arise under their provisions, they are to be decided by a minister or by departmental officials to the exclusion of the courts.

Lord Hewart furnishes some striking examples of the kind of legislation which he denounces. Thus, under section 10 of the London Traffic Act, 1924, the Minister of Transport has power to make regulations to have effect in the London Traffic Area for relieving and facilitating traffic in and near London. Such regulations may provide for the suspension or modification of any Acts of Parliament, by-laws, or regulations made by the minister, or of any Acts of Parliament, by-laws, or regulations dealing with the same subject matter as the regulations made by the minister, or of any Acts conferring powers of making by-laws or regulations dealing with the same subject matter. Sub-section (3) of the section provides that:

> Any such regulations may provide for imposing fines recoverable summarily in respect of breaches thereof, not exceeding in the case of a first offence twenty pounds, or in case of a second or subsequent offence fifty pounds, together with, in the case of a continuing offence, a further fine not exceeding five pounds for each day the offence continues after notice of the offence has been given in such manner as may be prescribed by the regulations.

And by sub-section (6):

The making of any regulation under this section shall be conclusive evidence that the requirements of this section have been complied with.

The Small Holdings and Allotments Act, 1908, The Rating and Valuation Act, 1925, and the Housing Act, 1925, contain similar provisions. The result is that

the whole scheme of self-government is being undermined. . . There is in existence a persistent and well contrived system, intended to produce, and in practice producing, a despotic power which at one and the same time places government departments above the sovereignty of parliament and beyond the jurisdiction of the courts.

When the rights of a citizen come before the courts, he is protected in person and property by the nature of their constitution and procedure, e.g. (1) the judge is identified and is personally responsible for his decisions; (2) the case, subject to rare exceptions, is conducted in public; (3) the result is governed by the impartial application of principles which are known and established; and (4) all parties to the controversy are fully and fairly heard. These features — personal responsibility, publicity, uniformity and the hearing of the parties are in sharp contrast with

the edict, however benevolent, of some hidden authority, however capable, depending upon a process of reasoning which is not stated and the enforcement of a scheme which is not explained.

The extent to which legislation by departments of state has grown is illustrated by an answer given by Mr. Baldwin to Sir John Marriott in the House of Commons on March 4, 1929, in reply to a question as to a proposal to set up joint committees to scrutinise all statutory rules and orders issued by His Majesty's Privy Council and by public departments. The Prime Minister stated that the suggestion was impracticable,

owing to the large number of statutory rules and orders made in every year, to the variety and complexity of the subjects with which they deal and to the fact that many of them are issued during the parliamentary recess.

And he gave figures in support of his contention:

Taking the last three years, which were quite ordinary years in both respects, the average number of Acts passed was 50.6, the average number of pages in the official volumes being 539; but the average number of statutory rules and orders issued was 1,408.6, the average number of pages in the official volumes (which are more closely printed than the statute volumes) being 1,844.

It is obvious and, indeed, it is admitted by Lord Hewart, that government would be impossible if a large power of making rules for implementing statutes were not granted to subordinate bodies.

It is impossible, if only for want of time, for parliament to deal adequately and in detail with all the matters calling, or supposed to call, for legislation. Indeed, without a drastic alteration of its methods of procedure, it would be impossible for Parliament to deal adequately with even a comparatively small part of the present-day volume of departmental legislation. It is not the system but the abuse of the system that calls for criticism, and the greatest abuse, and the one most likely to lead to arbitrary and unreasonable legislation, is ousting the jurisdiction of the courts.

Neither the evil nor the controversies to which it gives rise are things of yesterday; we are merely facing an old problem in a new form. Professor Holdsworth, in the fourth book of his History of English Law, describes the growth of the powers of the King's Council in the sixteenth century when, in England as in France, a strong central government was being established. Under the Tudors the powers of the council, legislative, administrative and judicial, were increased at the expense of the older assemblies, courts and officials.

Again, under Charles the First the King's ministers and even his humbler servants were declared not to be amenable to the law for acts done under the authority of the King. "It is clear," says Holdsworth, "that this immunity was causing the rapid development of the system of administrative law which had been coming into existence under the Tudors." There was a conflict of jurisdiction both in England and in France but the results were different in the two countries.

In England the victory remained with the parliament and the courts of common law, and the jurisdiction of the council in England was abolished. In France the King triumphed finally in 1661. The jurisdiction of the *Conseil du Roi* and that of its agents were consolidated in a system of administrative courts and administrative law which grew and increased at the expense of the ordinary courts of law.

The principles which triumphed in England were those of the common law and of Magna Charta:

No free man shall be taken or imprisoned, or disseised, or outlawed, or exiled, or any ways destroyed: nor will we go upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land.

In former ages it was the Crown which encroached upon the liberties of the subject but in our day, as Lord Hewart shows, the danger is from the executive.

Various remedies are suggested for the growing disorder. In the first place, while administrative departments must be given the right to make rules for carrying statutes into effect, it is by no means necessary that they should be enabled to add to, vary or suspend the operation of the enactments. Then, again, the objectionable provision that regulations, when duly promulgated, shall have statutory force might be omitted. To ensure publicity, adequate notice to interested parties, and an opportunity for stating objections, a procedure similar to that laid down in the Rules Publication Act, 1893, and the regulations made thereunder might be prescribed before departmental rules or regulations are allowed to take effect. Some sort of parliamentary control over subordinate legislation should be retained. Finally, an end should be put to the system under which one of the parties to a dispute, the one, moreover, who framed the law governing the case, is allowed to decide the question at issue without any right of appeal to the courts.

Lord Hewart has made a strong case, presented in a trenchant and forcible manner, and there has been general agreement with his views in authoritative quarters. There is, of course, something to be said on the other side. Professor Dicey, in his introduction to the eighth edition of "The Law of the Constitution," observes that

> recent Acts have given judicial or quasi-judicial authority to officials who stand more or less in connection with, and therefore may be influenced by, the government of the day, and hence have in some instances excluded, and in others indirectly diminished, the authority of the law courts.

He goes on to explain, in a measure, how this state of things has been brought about:

> It must, however, in fairness be noted that the invasion of the rule of law by imposing judicial functions upon officials is due in part, to the whole current of legislative opinion in favour of extending the sphere of the State's authority. The inevitable result of thus immensely increasing the duties of the Government is that State officials must more and more undertake to manage a mass of public business, e.g., to give one example only, the public education of the majority of the citizens. But Courts are from the nature of things unsuited for the transaction of business. . . The transaction of business, in short is a very different thing from the giving of judgments. The more multifarious, therefore, become the affairs handed over to the management of civil servants, the greater will be always the temptation, and often the necessity, of extending the discretionary powers given to officials, and thus preventing the law courts from intervening in matters not suited for judicial decision.

The whole subject is to be investigated by a strong committee, appointed by the Lord Chancellor, under the chairmanship of Lord Donoughmore, whose instructions are:

> To consider the powers exercised by or under the direction of (or by persons or bodies appointed specially by) Ministers of the Crown by way of (a) delegated legislation, and (b) judicial or quasi-judicial decision, and to report what safeguards are desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the law.

It may be taken for granted that the questions involved will be thoroughly explored, and that means will be taken for erecting barriers against what the *Law Journal* calls "the flood-tide of Administrative Law."

Regina. R. W. SHANNON.

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INTERNATIONAL LAW DIGEST.

The book[1] before me at present for review is a selection of decisions illustrating the development and application of principles of international law by international and national courts and tribunals. It aims at supplying the practitioner and the student with a ready means of access to the growing body of international case law. This volume which covers the years 1925 and 1926 is the first to appear. It contains digests of about 200 decisions of some 34 countries, and more than 150 digests of international cases decided by the Permanent Court of International Justice, the Mixed Arbitral Tribunals established under the Treaties of Peace after the World War, the British-American Claims Tribunal, the American-Mexican and American-German Claims Commissions, the Ottoman Debt Tribunal, the Upper Silesian Mixed Tribunal, the Arbitrator in the Tacna-Arica dispute and many others. The digest of each case consists of a summary of the facts as presented to the court or tribunal, and a summary of, or extracts from the decision itself.

This project, undertaken under the direction of the Department of International Studies of the London School of Economics and Political Science would seem at first glance to be impossible of achievement—so vast is its scope. But, thanks to the learning and industry of the editors assisted by a very able advisory board and an imposing list of contributors, the immediate results have been excellent. They

[1] *Annual Digest of Public International Law Cases Years 1925 and 1926.* By A. D. McNair, C.B.E., LL.D. and H. Lauterpacht, LL.D., Dr. Jur., Dr. Sc. Pol. Toronto; 1929. Longmans, Green & Company. Pp. XLV., 497. Price $12.00.

envisage a digest of all the decisions of national and international courts and tribunals from 1919 onward, and if the forthcoming volumes are as satisfactory as the present one, they will prove of inestimable value to lawyers and students in all parts of the world. As the editors point out, their immediate worth lies in the fact that "in any field of human activity it is impossible for one mind faced with the task of solving a problem not to give weight to the solution of a similar problem which has commended itself to another mind elsewhere. That is not a principle of law but of common human experience." To date, the difficulty has been to get access to the opinions and decisions of others in dealing with problems of international law. Dr. McNair and Dr. Lauterpacht are on the way to a complete elimination of this difficulty. If one might make a suggestion it would be, that the list of contributors be enlarged, so that there is some one individual in every national jurisdiction responsible either to the editors directly, or to a member of the official list of contributors (as published) for information on every decision and award affecting international law, within their jurisdiction. If the digest is to fill the place that the authors intend, and the profession hope, nothing must be overlooked. Then along with the list of abbreviations should go an explanation of the meanings of the various lines—changes in type, etc., that appear in the volume. These are explained in the preface it is true, but they should also appear among the abbreviations and with them a note on the system of cross references. The classification under headings (p. xxxi *et seq.*) would be more useful if the pages in the volumes, dealing with each heading were indicated. Apart from that the general arrangement is convenient and in conformity with the standard treatises on international law. The material collected has been well handled giving as it does the facts in issue, and a summary of the decisions or awards. If space and policy permit, an occasional brief note by the authors or their advisors as to the soundness of the decisions of national tribunals on points involving international law would be more than welcome, particularly where there may be differing decisions on substantially the same facts. There does not appear to be any reference to the cases decided by the International Joint Commission. This body deals with a great many disputes of an international character, and has in it possibilities of much greater usefulness. Its proceeding and decisions are not as accessible as those of the ordinary courts, but if the proper steps are taken, they can be obtained, and should certainly be included.

Altogether "Annual Digest 1925-1926," is an excellent and much needed volume, and the originators of the plan, the editors, the advisory board, and the contributors deserve the thanks of the whole legal profession.

NORMAN MACKENZIE.

Toronto University.

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STATUTE ANNOTATIONS[1]

One who has been in the habit of regularly using Snider's Annotations of the Revised Statutes of Ontario in his everyday work will not find it difficult to appreciate the value of a somewhat similar annotation of the Revised Statutes of Canada, and will welcome the book which has now appeared under the name of Tremeear's Canada Statute Citations. The preface tells us that it was commenced and carried on up to 1926 by the late Mr. W. J. Tremeear, who was so well known as the author of an Annotation of the Criminal Code and other legal works. This work has been taken up and carried to an apparently successful conclusion by Mr. John F. MacNeill of the Department of Justice at Ottawa, who was the Secretary to the President of the 1927 Statute Revision Committee, and who, therefore, was exceptionally well qualified to undertake the task. His preface is very modest, properly giving the greater part of the credit to the late Mr. Tremeear and frankly pointing out certain possible weaknesses which may be discovered in the course of time. This modesty rather tends to lead one to expect that the work is really well done, but even if the weaknesses do appear, it is an obviously useful book and one which can be commended to the attention of all lawyers in active practice.

G. F. H.

Ottawa.

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THE LAW OF DIVORCE AND SEPARATION OF ALIENS IN FRANCE.[1]

This admirable study upon the French law of aliens belongs to a rare class of law books. Not only is it of adequate service for lawyers in the British Empire and in the United States of America, who may be called upon to give professional advice on such prob-

[1] *Tremeear's Canada Statute Citations.* By John F. MacNeill. Toronto: Burroughs & Co. [Eastern] Ltd. 1929.

[1] *The Divorce and Separation of Aliens in France.* By Lindell Theodore Bates, Doctor of Laws. New York: Columbia University Press. 1929. Price $7.00.

lems, but it is written in such a way as to interest every student of jurisprudence and of sociology, especially as the latter class attempt more and more to grapple with problems of growing concern in the modern world.

The method of discussion is excellent. The author, realising the complications of his subject, has divided it into many short chapters, and these move along practical lines, in which social and legal theories, while not avoided, do not protrude. Throughout he discloses a wide acquaintance with the various authorities, and his knowledge of practice is clear on almost every page. In claiming the immunities due to being almost a pioneer in the field, Dr. Bates need have no fears. It is not often that a "pioneer book" carries with it, almost self-evidently, such erudition, conviction and modesty in conclusions. Readers of the CANADIAN BAR REVIEW may be specially interested in the discussion of the recognition or otherwise in England and in the United States of divorce judgments in foreign jurisdictions, which raise questions not unimportant in our practice. The whole book, however, will well repay examination, especially by any lawyer working in the law of domestic relations and its foreign ramifications.

There is an excellent bibliography, which is exceptionally valuable in that it contains references to pamphlets and articles which might easily be overlooked; and there is a good working index. We miss however, a Table of Cases. This ought to be provided in a new edition, and ought to be divided according to the jurisdictions concerned.

W. P. M. KENNEDY.

University of Toronto.

NOTES ON RECENT BOOKS.

BY THE EDITOR.

CONCERNING LEGAL STUDIES.—We have received a copy of the *Handbook of the Cambridge Law School,* 1929-1930, published by the University Press. It is full of useful information for law-students and law-teachers. Part I contains a brief but most interesting account of the beginnings of the study of law at Cambridge at the close of the twelfth century and its progress down to our own times. Degrees in Roman Law and Canon Law were granted there until the abolition of the faculties of Canon Law both at Oxford and

Cambridge by Henry VIII. There was compensation for this in the fact that the King established the Regius Professorship of Civil Law at Cambridge. Sir Thomas Smith, whose *De Republica Anglorum* is well-known to students, was the first holder of the Regius chair. It was not until the year 1800 that English law was formally taught at Cambridge, due to the founding of the Downing professorship in that year. When the famous F. W. Maitland held the Downing chair (1888-1906) the historical and judicial aspects of English Law became a special feature in Cambridge Legal Studies.

It is interesting to learn from Part IX of the Handbook that the cost of admission to the English Bar varies to some extent. It depends upon which of the Inns of Court the students selects. The minimum cost, however, seems to be £58 upon admission as a student and a further sum of £100 upon being called.

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PRINCIPLES OF MERCANTILE LAW.—Under this title W. J. Charlesworth, LL.D., has written a useful text-book "for commercial students with no previous knowledge of the law." Nine chapters of the book are taken up with a consideration of Contract *simpliciter*, and thereafter the text is devoted to the presentation of rules of law governing special matters within the domain of Contract together with proceedings under the English Bankruptcy legislation. The work is jointly published by Stevens and Sons Ltd. and Sweet and Maxwell Ltd., London. The price is $2.50 net.

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THE POLICE AND THE CRIME PROBLEM.—This is the subject to which Number 235 of *The Annals of the American Academy of Political and Social Science* is entirely devoted. Part I is concerned with the organisation and functions of the police, and Part II deals with the problems of police personnel. We found Professor C. E. Merriam's paper on "The Police, Crime and Politics" instructive reading. It convinced us that the worst enemy of peace, order and good government in the United States to-day is the venal politician. To him primarily is due the corrupt administration of justice which enables the gangster to carry on organised crime and escape punishment.

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CRIMINAL PROCEDURE IN THE UNITED STATES. — The Prentice-Hall Inc., of New York, have published a book by William Harman

Black, a Judge of the Supreme Court of New York, under the title of "How to Conduct a Criminal Case." While it is primarily an explication of criminal procedure in that State it cannot fail to be of service to practitioners in other States of the Union. The work bears evidence of great care in its preparation, and the author speaks with an abundance of knowledge relating to his subject. It will be useful in Canada for reference purposes.

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THE AUSTRALIAN LAW JOURNAL.—In a foreword to the first number of this valuable periodical Mr. J. G. Latham, then Attorney-General of the Commonwealth, said: "The achievement and maintenance of a high standard in legislative and judicial work is greatly assisted by independent competent criticism of such work by members of the legal profession." In view of that fact he indulged the hope that the new publication would afford to the legal profession "an opportunity of discharging one of its most useful functions in providing legal, as distinct from political, criticism of the judgments and statutes which make the law under which the people of Australia live."

Having examined the first volume, we are glad to say that Mr. Latham's hope for the success of the periodical in its predestined sphere of usefulness has been realised.

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THE WORK OF THE UNITED STATES SUPREME COURT.—The Legal Research Service of Washington, D.C., has recently published a volume which is stated to be the first of "a system for giving to the members of the Bar and to the general public current information on the decisions of the Supreme Court [of the United States]." The editors of the work are Gregory Hawkin and Charlotte A. Hawkin, both members of the Washington Bar. They state in the preface that their enterprise has the encouragement of the Chief Justice, Judges and Clerk of the Court. The work is to be issued annually, and will review the decisions so as to give "the public an organised view of the entire work of the Court." It ought to prove useful to the constituency which it seeks to serve.

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A CHILD'S BOOK OF STORIES.—In this new era of ours, when the ears of Emancipated Woman are more attuned to the clamour of public affairs than to the sweet tumult of the nursery, it is pleasant

indeed to be reminded that childhood has not wholly lost its sanctuary in the female heart. Such a reminder we have in Miss Emma Lorne Duff's recently published "A Cargo of Stories for Children." Miss Duff holds the position of Directress of the Kindergarten Primary Department in Queen Victoria School, Toronto. That, of course, is a guaranty of her innate love for children and her skill in opening for them in the most attractive way the gates of knowledge; but, in addition to that, Miss Duff has the supreme talent of the story-teller for the young. That is to say, her imaginative power enables her to create a new tale, or refashion—perhaps recreate is the better word—a familiar one, while her gift for simple but dramatic narrative goes straight to the heart and understanding of those who read the tale or hear it recited.

In this book Miss Duff has written herself into an enduring place in our literature. So far as the Great Canadian Novel is concerned it seems to us that the prize still lies on the knees of the gods, but here is a literary performance of which it is no stupid praise to say that it makes the author free of the goodly company of those who have made stories for children because of their love for children since the dawn of civilisation. It would appear that Herodotus initiated this delightful enterprise in the western world by his account of the birth of Cypselus, afterwards tyrant of Corinth; but whensoever the art began for us the imagination of childhood has been abundantly fed upon it for a long period of time. Nor do we grown-ups so long as we keep our emotions unspotted from the world fail to respond to the myths and legends which stir the heart of the child. They afford us a blessed relief from the sordid realism which the spirit of the age has thrust upon us. Let us then betake ourselves to Miss Duff's stories of "The Little Seed Cake," "The King with the Donkey's Ears," "The Swineherd and the Swallow," "The Pot of Gold" and "Michael" —or rather all and every one of them—in this cargo of delightful things, for it is in and through such things that

> Our souls have sight of that immortal sea
> Which brought us hither,
> Can in a moment travel thither
> And see the children sport upon the shore.