BUREAUCRACY.

"At this moment, in England, there is a sort of leaning towards bureaucracy—at least among the writers and talkers." So wrote Walter Bagehot about sixty years ago. This partiality toward bureaucracy Bagehot thought was due to "the triumph of the Prussians—the bureaucratic people . . . *par excellence*."

It is extremely doubtful if the learned author of *The English Constitution*, if he were with us to-day, would say that this form of government is favoured in England or in any part of the Empire. And yet a well-developed system of bureaucratic government has grown up in England—of all places in the world to foster such a system.

The Lord Chief Justice of England in his recently published work *The New Despotism* has shown us to what an extent the system has grown.

The book has created a sensation.[1] The prepublication notices were sufficient to stir the English Government into action and a committee has been appointed: "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 is in an insidious way that bureaucracy has crept into the system of English Government. "Much toil, and not a little blood" says Lord Hewart, "have been spent in bringing slowly into being a polity where the people make their laws, and independent judges administer them. If that edifice is to be overthrown, let the overthrow be accomplished openly. Never let it be said that liberty and justice, having with difficulty been won, were suffered to be abstracted in a fit of absence of mind."

The Government in appointing a Committee, the Lord Chief Justice of England by his book and the reviewing newspapers and magazines agree that Bureaucracy with its attendant evils exists in England to-day.

What is the cause or what are the causes of its existence? Why does Parliament delegate to the Executive Government, to ministers and to their departments, such broad powers and authority?

[1] EDITOR'S NOTE.—It is reviewed at p. 77 *ante*.

"There is no limit," says Bagehot, "to the curiosity of Parliament."

But unfortunately it seems that Parliament does not direct its attention to the dangers that are created by a statute which for instance "empowers the minister 'to do anything' which he may think expedient, to make orders which 'may modify the provisions' of the Act of Parliament."

The Law Journal[2] some time ago said that, "A Bill is sent to Parliament 'E. & O.E.' . . . . the draftsman's Bill gets through Parliament, and the Department then proceeds to vary the Act at leisure."

Parliament interests itself only in the principle of a Bill. It is not at all curious—at least in these days—as to the details by which the objects of the proposed Act are to be carried out.

The draftsman as a rule is a member or an employee of the Bureaucracy and knows the temperament of the "Legislator."

The creed of the Bureaucrat (and the answer to it) is illustrated by Lord Hewart[3] in a conversation by a member of the Civil Service with the Chancellor of the Exchequer. "Seriously," he asked, "could not this country be governed by the Civil Service?"

"Undoubtedly it could," replied the Chancellor of the Exchequer, "undoubtedly it could. And I am quite sure that you and your colleagues would govern the country remarkably well. But let me tell you this, my young friend, at the end of six months of it, there would not be enough lamp-posts in Whitehall to go round."

It would seem that Lord Hewart's suggested remedy will be of use—not the remedy of wholesale hanging, but another remedy, namely, that there should be a committee in both Houses of Parliament "whose task it should be to examine every Bill as it is introduced, for the purpose of observing, whether and in what respects its provisions may have the effect of increasing the power of bureaucracy, and whether and by what contrivance that power is to be made irresponsible."

But undoubtedly Lord Sankey's committee, which I refer to above, is also necessary in order to deal with legislation already enacted.

It is submitted that we are in a worse position in Canada. We have some ten legislatures to deal with and whereas in England they are troubled only with what may be called "legal" bureaucracy, we in Canada have a greater grievance arising from the passing of Orders-

[2] Vol. 67, p. 309.

[3] *The New Despotism*, p. 15.

in-Council, and the making of departmental rulings and regulations that are not even authorised by Parliament.

An order-in-council or departmental regulation or ruling is passed that may be *ultra vires* of the Government or Department requiring of the subject something to be done under a penalty for failure to comply with the requisition. The subject must comply or submit to a police court prosecution or an information at the suit of the Attorney-General.

In Dominion revenue matters there is no protection for the subject such as in England and in some if not all of the Provinces of Canada, which permits the aggrieved subject to bring a declaratory action as was done under Order XXV, Rule 5 of the Judicature Act in the case of *Dyson* v. *Attorney-General.*[4]

In that case the plaintiff Dyson as the owner and occupant of certain premises was required by the Commissioners of Inland Revenue to furnish certain information in respect of his property on forms provided for the purpose. The Commissioners in requiring this information purported to act under the provisions of the Finance Act. Mr. Dyson was of the opinion that he was under no obligation to comply with such requisition and brought his action against the Attorney-General for a declaration to that effect. The Attorney-General took out a summons under Order XXV, Rule 4, to strike out the statement of claim as disclosing no reasonable cause of action, and Lush, J., affirming a previous decision of the Master made an order in terms of the summons. The plaintiff appealed.

Sir John Simon, S.G., supporting the order appealed from argued that in all cases where the rights of the Crown are the immediate and sole object of the suit the application must be by petition of right. There was no justification or precedent for the form of action taken by the plaintiff and it was a very inconvenient way of obtaining a decision as to the plaintiff's liability to the penalty in default of compliance with the notice. He suggested that the plaintiff should wait until the Attorney-General should proceed by way of information to recover the penalty.

The appellant was successful in his appeal. The "absence of any precedent did not trouble" Cozens-Hardy, M.R., who held that the plaintiff was not bound to proceed by petition of right.

Farwell, L., said: "It would be a blot on our system of law and procedure if there is no way by which a decision on the true limit of the power of the inquisition vested in the Commissioners can be

[4] [1911] 1 K.B. 410.

obtained by any member of the public aggrieved, without putting himself in the invidious position of being sued for a penalty."

Dealing with the further argument of the Solicitor-General, Farwell, L.J., said (at p. 423):

> The next argument on the Attorney-General's behalf was "ab inconvenienti." It was said that if an action of this sort would lie there would be innumerable actions or declarations as to the meaning of various Acts, adding greatly to the labors of the Law Officers . . . there is no substance in the apprehension, but if inconvenience is a legitimate consideration at all, the convenience in the public interest is all in favor of providing a speedy and easy access to the Courts for any of His Majesty's subjects who have any real cause of complaint against the exercise of statutory powers by Government officials, having regard to their growing tendency to claim the right to act without regard to legal principles and without appeal to any Court. . . . If ministerial responsibility were more than the mere shadow of a name, the matter would be less important but as it is, the Courts are the only defence of the liberty of the subject against departmental aggression.

But as mentioned above, there is no such right in Canada for a subject to bring such an action in respect of matters between the Crown in right of the Dominion and the subject.

A provision in the Exchequer Court Act or rules thereunder similar to Order XXV, Rule 5 of the Judicature Act, might very well be made. The adoption of such a rule would give the subject a convenient method by which he might in proper cases test his rights and liabilities under the various revenue Acts, and would curb to some extent the vicious practice of the making of departmental rulings *ultra vires* of the department but which cannot be attacked conveniently by means of the existing procedure.

If any one doubts the existence of bureaucracy in England, let him read Lord Hewart's book, and having read it he will see at once that we have the same, if not a worse condition in Canada.

To quote again from *The New Despotism*.[5] "There may be many unsustainable reasons, but there is no good reason, why departmental officials should have, or seem to have, the power to legislate without Parliamentary Authority, or of giving a decision which an aggrieved person is unable to submit to the test of judicial inquiry.

Is it too much to ask that committees of both Houses of Parliament in Canada should be named with duties as outlined by Lord Hewart for the prevention of further encroachments of bureaucracy, and that a Committee such as that appointed by the Lord Chancellor

[5] P. 149.

should be set up in Canada, to enquire into and report upon existing statutes conferring broad and bureaucratic powers upon departmental officials?

J. J. FRASER WINSLOW.

Fredericton, N.B.

THE HONOURABLE WALLACE NESBITT, K.C.—At the opening of the sittings of the Judicial Committee of the Privy Council on the 8th April, the Lord Chancellor said:

"Their Lordships have heard with great regret of the passing of the Honourable Wallace Nesbitt, whose advocacy before this Board in past years in many important Canadian cases was much appreciated.

He was for long a prominent leader of the Canadian Bar, one of His Majesty's Counsel and for a time a Justice of the Supreme Court of Canada.

He had a genius for friendship—some of his friends are sitting at this Board to-day—and his frequent visits to this country were always looked forward to.

He has left behind him a high ideal both in professional and private life.

Canada and the Empire will not easily forget the services he rendered and the high example he set during a brilliant career."
