BOOKS AND PERIODICALS.

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CONCERNING DOMINION AUTONOMY.

This book[1] was out of date before it reached the Editor's table. As the publishers were passing it through the press, time was making it historical rather than actual. And when in the evening months of this same year, the Imperial Conference has registered further important advances in Dominion constitutional status, the book will become a mere addition—a useful addition —to those others which depict still earlier stages in colonial development. It would almost seem as though, observing that the Dominions were on the verge of arriving at a status of perfect equality with the United Kingdom, Professor Keith hastened to indulge himself in one more, one last, depreciation of Dominion sovereignty. Of what service, during the twelve month interval between two London Conferences, is itemisation of the British parliament's "power to legislate for the whole Empire"—"the control of British subjects outside the British Dominions"; "foreign enlistment"; "prize jurisdiction"; British nationality"; "merchant shipping"? Had Professor Keith restrained himself for a few weeks, he would have known that, at the Conference meetings of last October-December, the following resolutions were passed:

> . . . the doctrine that it is the right of the Government of each Dominion to advise the Crown in all matters relating to its own affairs, and that consequently it would not be in accordance with constitutional practice for advice to be tendered to His Majesty by His Majesty's Government in the United Kingdom, in any matter appertaining to the affairs of a Dominion, against the views of the Government of that Dominion.
>
> It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.
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> The Colonial Laws Validity Act, 1865, shall cease to apply to any law made by the Parliament of a Dominion.
>
> No law and no provision of any law hereafter made by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England or to the provisions of any existing or future Act of Parliament, or to any order, rule or regulation made thereunder, and

[1] *Dominion Autonomy in Practice.* By Arthur Berriedale Keith, D.C.L., D. Litt. Toronto: Oxford University Press, 1929.

the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

It would be in accord with the established constitutional position of all members of the Commonwealth in relation to one another that no law hereafter made by the Parliament of the United Kingdom shall extend to any Dominion otherwise than at the request and with the consent of that Dominion.

Referring to the British Nationality Act:

It is fully recognized that this common status is in no way inconsistent with the recognition within and without the Commonwealth of the distinct nationality possessed by the nationals of the individual states of the British Commonwealth.

The new position will be that each Dominion will, amongst its other powers, have full and complete legislative authority over all ships while within its territorial waters or engaged in its coasting trade; and also over its own registered ships both intra-territorially and extra-territorially.

The existing situation of control in the United Kingdom of Admiralty Courts in the Dominions is not in accord with the present constitutional status of the Dominions, and should be remedied.

Our recommendation is that each Dominion in which the Colonial Courts of Admiralty Act, 1890, is in force should have power to repeal that Act.

Our general conclusions on the operation of the Colonial Laws Validity Act, 1865, and reservation and disallowance are applicable to the Colonial Courts of Admiralty Act, 1890. As soon as the legislation necessary to give effect to these recommendations is passed, each Dominion will be free to repeal, if and when desired, the Colonial Courts of Admiralty Act, 1890, in so far as that Act relates to that Dominion and may then establish Admiralty Courts under its own laws.

A British statute ought to be passed declaring as follows:

Be it therefore declared and enacted that no Act of Parliament hereafter made shall extend or be deemed to extend to a Dominion unless it is expressly declared therein that that Dominion has requested and consented to the enactment thereof.

Without prejudice to the generality of the foregoing provisions of this Act—

(1) Sections seven hundred and thirty-five and seven hundred and thirty-six of the Merchant Shipping Act, 1894, shall be construed as though reference therein to the Legislature of a British possession did not include reference to the Parliament of a Dominion.

(2) Section four of the Colonial Courts of Admiralty Act, 1890 (which requires certain laws to be reserved for the signification of His Majesty's pleasure or to contain a suspending clause), and so much of Section seven of that Act as requires the approval of His Majesty in Council to any rules of Court for regulating the practice and procedure of a Colonial Court of Admiralty, shall cease to have effect in any Dominion as from the commencement of this Act.

If the above recommendations are adopted, the acquisition by the Parliaments of the Dominions of full legislative powers will follow as a necessary consequence.

By the removal of all such restrictions upon the legislative powers of the Parliaments of the Dominions and the consequent effective recognition of the equality of these Parliaments with the Parliament of the United Kingdom, the law will be brought into harmony with the root principle of equality governing the free association of the members of the British Commonwealth of Nations.

The recommendations submitted have been framed with the object of carrying into full effect the equality of status established as the root-principle governing the relations of the members of the Commonwealth, and indicating methods for maintaining and strengthening the practical system of free co-operation which is its instrument.

Had Professor Keith restrained himself for a further few months —Well, he would not have written such a book as the one he hurried to issue.

JOHN S. EWART.

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TREATIES AND THE AMERICAN SENATE.

Professor Fleming, of Vanderbilt University, has given us an instructive work on "The Treaty Veto of the American Senate."[1] A reading of its lucid presentment of the Senate's progressive enlargement of its powers in respect of treaties induces us to discover some hyperbole in the remark of an ex-President of the United States that the American constitution is "the greatest government God ever made." Anyone who is aware of the incidents surrounding the adoption of that constitution must entertain some doubt as to its celestial origin. But all said and done, it does seem odd that the Fathers—learned as they were—turned away from "the image of the King" in modelling the executive head of the American government, unmindful of Plato's opinion that the perfect State to which civilisation tended would be governed by a King.

By Article II, (sec. 2) of the Constitution of the United States the President is given power "by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." Professor Fleming points out that the Fathers were here departing from the beaten paths of government and they could not hope to have "everything work out just as they guessed it would." But to put the treaty-making power under the control of two independent branches of government was a hazardous venture

[1] New York and London: G. P. Putnam's Sons, 1930.

as experience has time and again demonstrated. The great obstacle to a logical working out of the constitutional position of the President was fear of trusting any single hand with sovereign power. To study the literature surrounding the Draft Constitution of 1787 is to be reminded of the immortal Mr. Dick, who could not get his "memorial" shut of King Charles's head. The average American of the time suffered from a tyranny complex. He saw red at the mention of the name of George III. Hamilton, the sanest of the Fathers, wrote thus in *The Federalist:*

> Calculating upon the aversion of the people to monarchy, the writers against the Constitution have endeavoured to enlist all their jealousies and apprehensions in opposition to the intended President of the United States, not merely as the embryo but as the full-grown progeny of that detested parent. . . . He has been seated on a throne surrounded with minions and mistresses, giving audience to the envoys of foreign potentates in all the supercilious pomp of majesty. The images of Asiatic despotism and voluptuousness have scarcely been wanting to crown the exaggerated scene. We have been taught to tremble at the terrific visages of murdering janizaries, and to blush at the unveiled mysteries of a future seraglio.

Admitting some overstatement of the case by Hamilton there is no doubt that his compatriots at the time of the founding of the republic were obsessed by a stubborn resolve to put all absolute power out of the hands of their President—hence the defects in fashioning an equilibrium of powers between the constituent units of the government.

The origins of the Senate's constitutional share in the making of treaties are traced in the first chapter of the book in hand. We learn there that the leading minds of the founders of the republic fully understood that secrecy and despatch lie at the very core of diplomacy, and that the fewer the ears open to its secrets the greater the despatch that would mark the attainment of its ends; yet "the whole theory of checks and balances required a counterpoise to the President" in the business of treaty-making. The power could not be shared between him and the direct representatives of the people unless secrecy and despatch were to be thrown to the winds. Then the Senate, a smaller and select body with "the accumulated wisdom of the Madisons and Franklins" safeguarding its action, must co-operate with the President in this delicate business. Thus was made possible the usurpations and encroachments upon the constitutional power of the President in the premises which have caused the rest of the world to stare and gasp in recent times. From the start, in Professor Fleming's opinion, the treaty-making machinery "did not

result in the orderly association of the best minds that had been anticipated."

It is a far cry from President Washington's unsuccessful attempt to make the Senate his "Council" in the negotiation of treaties to the action of the Senate, in 1901, when it undertook to alter the Hay-Pauncefote Treaty with England relative to the Isthmian Canal, and the subsequent assertion by Senator Henry Cabot Lodge of the Senate's right to participate in the negotiation of treaties. No wonder there was then "considerable irritation aroused in English circles." Not until then did Great Britain realize that the Senate could not only "continue the negotiations" but offer "new or modified propositions" to the other party to the contract. This, of course, is extruding the President from his constitutional position with a vengeance.

Professor Fleming does not hesitate to combat the position of the Senate as above set forth, and to declare it unconstitutional. He denies that the Senate can "negotiate" a treaty at any time. That is the business of the President alone. "He is at all times the maker of the treaty, even at the time the Senate is engaged in amending it." If the Senate lays down conditions which impair his purposes in making the treaty he can abandon the whole project. "Then certainly the Senate has done no treaty-making. Neither has it when it refuses its consent to a proposed treaty entirely. The power to make treaties remains in the Executive from first to last." The author adopts Senator Spooner's interpretation of the words "advice and consent of the Senate" as used in the Constitution to mean "ratification" as the term is popularly used.

The practice of the Senate in offering amendments to treaties negotiated by the President is also discussed with much acumen by Professor Fleming; and while he concedes that the right to propose them is deeply grounded in custom and difficult to attack in law, yet the constitutionality of such action should not outweigh its grave effects upon international relations.

The central part of the work embodies much valuable historical material relating to the international relations of the United States, and the concluding portion (Chapter XII) concerns itself with the important subject of the Legislative Control of Treaties. We have no hesitation in saying that Professor Fleming has executed the task he essayed in a very profitable way to all who are interested in constitutional studies and international law.

CHARLES MORSE.

Ottawa.

FIFTH ANNUAL REPORT OF PERMANENT COURT OF INTERNATIONAL JUSTICE.—This volume covers the business of the Court transacted between June 15th, 1928, and June 15th, 1929. It contains much material that will prove of service to all those who are interested in the evolution of international law. Perhaps the most important portion of the volume to lawyers is that devoted to summaries of the judgments by the Court; but if the judgments themselves—or at least the principal parts of them—were printed instead of reporters' summaries of them their value as precedents would be enhanced. There is a lack of system in the volume which impairs its usefulness.

C. M.

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The following periodicals have been received:

1. The Journal of the Royal Institute of International Affairs. This number (March, 1930), contains an address by General the Right Honourable J. C. Smuts, C.H., K.C., delivered at a meeting held at Chatham House on Tuesday, January 28th, on the subject of "The British Empire and World Peace." An address by André Géraud on "British Policy as seen by a Frenchman." A paper on "Great Britain as a European Power" by the Right Honourable Sir Austen Chamberlain, K.G.; one on "The Third Biennial Conference of the Institute of Pacific Relations at Kyoto" by Professor A. J. Toynbee, and other valuable papers.

2. Volumes II and III of "Bases of Discussion drawn up for the Conference for the Codification of International Law by the Preparatory Committee." Volume II relates to "Territorial Waters," and volume III to the "Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners."

3. Die Bereicherungshaftung im anglo-amerikanischen Rechtskreis in Vergleichung mit dem deutschen bürgerlichen Recht. Von Dr. Wolfgang Friedmann. Berlin und Leipzig: Walter de Gruyter & Co., 1930.

4. Die Haftung des Verkäufers einer fremden beweglichen Sache in den Vereinigten Staaten von Amerika in Vergleichung mit dem deutschen bürgerlichen Recht. Von Dr. John Wolff. Berlin und Leipzig: Walter de Gruyter & Co., 1930.

5. Die völkerrechtliche Stellung Irlands. Von Dr. Jur. Michael Rynne, B.A. (University College, Dublin) und Barrister-at-Law (King's Inns, Dublin). München und Leipzig: Verlag von Duncker & Humblot, 1930.

6. Rapport fait à la séance d'inauguration de la session de 1929 à La Haye sur Le Rôle d'un Congrès International de Droit Comparé en l'an 1931, par Edouard Lambert, Directeur de L'Institut de Droit Comparé de Lyon. Paris: Marcel Giard, 1929.

7. Columbia Law Review. Vol. XXX, No. 4 (April, 1930). This number contains a portentous article by Professor K. N. Llewellyn of the Columbia Law School on "A Realistic Jurisprudence—The Next Step." The substance of the article was presented to a meeting of the American Association of Political Science held in December last. We present a sample paragraph from the conclusion of the article, which we hope will prove intelligible to our readers:

> In conclusion, then, may I repeat that I have been concerned not at all with marking a periphery of law, with defining "it," with *excluding* anything at all from its field. I have argued that the trend of the most fruitful thinking about law has run steadily toward regarding law as an engine (a heterogenous multitude of engines) having purposes, not values in itself; and that the clearer visualization of the problems involved moves toward ever-decreasing emphasis on words, and ever-increasing emphasis on observable behaviour (in which any demonstrably probable attitudes and thought-patterns should be included).

8. The Law Quarterly Review. Vol. XLVI, No. 182 (April, 1930). We were attracted to the following articles in this number: "The Judge as Man of the World," by Professor C. K. Allen, and "Consultation of the Judiciary by the Executive," by E. C. S. Wade. Mr. Wade's article was read as a paper before the Cambridge Law Club on December 5th, 1929.