THREE VIEWS OF CONSTITUTIONAL LAW.

It is not too much to say that for many years constitutional law has been under a shadow. Many reasons for this might be advanced. The practical lawyer professed to find in it little that was connected with his daily work, and, *more suo,* dubbed it academic. The student at law tended to neglect a subject, which, when not descriptive or informational, seemed to him to overflow into the minutiæ or unrealities of legal or constitutional history. In addition, the text-books were incomparably dull—so much so that, where the subject continued to live and to thrive, it was in the hands of faithful students who drew illustration and inspiration from the public problems of contemporary life. More unfortunate still, while the educational processes in modern England were opening up to average citizens avenues of interest in constitutional questions through such organizations as the Workers' Educational Association and the Adult Education Movement, students such as these organizations served lacked the type of book common in France and Germany, and were often driven to abominable productions on "civics" or "government," which obscured the problems either through ignorance or wilful perversity, and frequently tended to strengthen the eristic and not the judicial sense.

Within the last few years there has been a remarkable and significant revival in interest and in the literature of constitutional law. Students are beginning to put Ridges, Dicey and even Anson on their shelves within at least hailing distance of Blackstone and Bagehot, and are seeking to view the entire subject from newer and more urgent angles. Vain hours are not spent over the descent of the crown, peerage law, the obfuscations of parliamentary privileges, and such barren gustations; while the older structural emphasis is taking on reality in intimate association with administrative function. In other words, much of the older constitutional law is being handed over to the historians to make way, in the domestic aspect, for public regulations, nationality, treason, trade unions, blasphemy, combinations, libel, slander, the doctrine of *ultra vires,* and all the ramifications of delegated authorities. Indeed, at times one wonders if there is not a danger that constitutional law may become the residuary legatee of pedagogical exigences. In its wider aspects, points of view drawn from both public and private international law are rapidly coming within its ambit. Generally speaking, all this is due to the insistent demands of modern life; but one would like to be-

lieve that there is in it something symptomatic, and that in one field of law at least the social interests are tending to crush out—*debellare superbos*—the authoritative and Sinaitic. Be all this as it may, no one can fail to notice the revival of interest and to catch the living notes in the newer constitutional law.

Of the smaller and more elementary recent books, Professor Keith's will at once command the attention of the general reader and of the class of students already referred to.[1] Indeed, the latter cannot do better than discard the misleading "political" and "governmental" texts for a little book which, while sound in law and solid in learning, challenges further reading and investigation. Professor Keith does not neglect the older normal aspects of constitutional law, but, paying special attention to present day relations between the executive, the legislature and the judiciary, he confronts his reader with actual modern issues. Throughout, too, there is a sense of history, eminently needed for the special type of reader to whom the book is addressed; and, above all, there is a demand made, almost on every page, for consultation of the Reports. The final chapters dealing with church and state, the dominions, the colonies, the protectorates, the mandates, the Indian empire illustrate at once the widening modern interest and the growing demands of intelligent citizenship. A first-class detailed index, with the usual table of cases, makes the volume easy for consultation and reference.

More important, however, than providing for this class of reader is the necessity to appeal to a wider public, both professional and lay, and to emphasize those tendencies in constitutional law of which Lord Hewart, C.J., recently wrote in an emphatic if sensational and journalistic manner. Professor C. K. Allen, while not avoiding a journalistic title and the modern rush in not compiling an index, has added to his reputation as the distinguished author of *Law in the Making* by reprinting from the journals four of his well-known essays dealing with administrative problems and procedure.[2] There is abundant evidence that "the rule of law" is not functioning as the average man and the average lawyer interpret and understand those words. The stream of equity and of justice is no longer watering, in cleansing and purifying movement, the public life of England. It has become so sluggish, so drained off into bureaucratic ditches, that we find it difficult to trace those waters over which

[1] *An Introduction to British Constitutional Law.* By A. Berriedale Keith, D.C.L., D.Litt. Toronto: Oxford University Press. 1931. Pp. xii. 243.

[2] *Bureaucracy Triumphant.* By C. K. Allen, M.C., M.A. Toronto: Oxford University Press. 1931. The Clarendon Press. Pp. 148.

politicians, parliamentarians, election candidates, after-dinner speakers, journalists, school-boys and primrose-leaguers continue to wax ignorantly eloquent. The truth is that England is rapidly becoming a country of bureaucratic administration. "We have not so received Christ." To any one whose duty it is, week after week, diligently to read and study the English Reports, Professor Allen's strictures are none too strong: "the specious arguments"; "uneconomic as it is unscrupulous"; "not justice"; "methods of a bully with those of a casuist"; "sleight of hand"; "brutal cynicism"; "detriment of the subject"; "terrorization." These are some of the scathing and blistering phrases which the learned author deservedly applies to crown and departmental legal procedure, and to the processes to which the law-officers lend brazen support. Indeed, Professor Allen does well to point out that, while the older shibboleths of constitutional law still ring from the platform, their worth, such as it ever was, has long since departed. "The rule of law" is dead. Justice is outraged and violated in the secret chambers of the new despotism. Worse than all perhaps—the deepest aspect of the tragedy, perhaps—parliament has grown weary, if not cynical, in guarding its position as a representative institution. We respectfully consider this the central, the vital issue. Powers are delegated by parliament with an almost indiscriminate lavishness in such loosely worded statutes or in comprehensive largess that under them—whether verbosely obscure or magnificently general—secret procedure, ministerial or departmental finality, frank injustice wax fat and literally kick. The question is forced upon us whether parliament itself does not bear a heavy responsibility for that growing contempt for parliamentary institutions, which even the wayfaring citizen cannot fail to observe.

Professor Allen is, of course, not unaware that the complexities of modern life have increased the difficulties of government, and that they cannot be regulated and controlled along the lines of the older simplicity. He necessarily concedes the growth of public legal administrative controls. What he does protest against is not this growth, but its abuses, its injustices, its czarisms. He makes suggestions for reform: a complete change in crown procedure, long overdue; greater caution by parliament in delegation of powers; a parliamentary committee to review statutory orders and orders in council; a more careful respect for the doctrine of *ultra vires*; a system of appeals. It is, we believe, in the last connexion that reform must first come. Professor Allen does not favour a system of administrative courts, but not for the reasons which make the

average Englishman mistrust or sneer at them as "French." Indeed, the most illuminating pages of this little book for the general reader are those which disclose the justice, equity, reasonableness and purity of French administrative law and procedure, compared with which conditions in England stand out in violent and sorry contrast. Rather is the learned author a realist, who knows that Englishmen, nurtured and reared in the outworn creeds of confused and confusing political and legal philosophies—insular bequests from the sixteenth to the eighteenth centuries—have a singular capacity for setting up a false antithesis between the state and the citizen. An administrative judicial system outside the ordinary courts would begin under a shadow of suspicion. Professor Allen, however, strikes a deeper note of objection: "Where any considerable issue is at stake, it is far more important to bring to bear a trained judicial faculty than a particular kind of specialized virtuosity." We thoroughly agree. "Specialized virtuosity" is the gravest and most dangerous thing to let loose, with judicial powers, in the delicate and illogical world of human affairs; and any attempt to create a final administrative court under such auspices would not only be fatal in the light of our finest traditions but also in that of our human experience. Reform must come through appeals to the ordinary courts from tribunals which make primary judicial decisions. These appeals need not flood the courts. They could be regulated and differentiated; and could be conducted under such rules as would satisfy reasonable litigants and reasonable law. It would, however, be better that the courts should be flooded with cases than that a stream of discontent should be driven underground to flood and to loosen the foundations of civic faith. We regard Professor Allen's position as eminently sane, sound and practical.

In addition, his little book passes far beyond English legal conditions and is a definite challenge to all the British nations. There are already abroad in them more than the beginnings of administrative law; and the press of the British Commonwealth discloses ominous enough signs that representative institutions are under public scrutiny. We cannot afford "to be regulated out of our liberty." Nor can legislatures, built on British lines, afford to create administrative systems which may be exercised with an arbitrary disregard for the political and legal faith which we have received. If *England* is bureaucracy-ridden to-day, the *other* British nations would need to take heed lest, that seeming to stand, *they* fall. There is nothing eternally fundamental in law except common sense and a respect for the general social will. I suppose the

Stuarts and certainly "the family compact" and "the château clique" in the Canadas and Lord John Russell and Lord Metcalfe had quite a weight of law on their sides with results eloquent to the politically wise. Institutions—their fall and decay—we may often be well advised to seek causes in the stupidity of legislators and administrators. Parliaments must keep the faith if they are to continue to command anything like public respect—or, rather, if they are to regain it. The delegation of powers, whether it be to the national executive or to the municipal council of Little Puddletown, must be carefully scrutinized by the electorate, for eternal vigilance is today, as in the past, the price of liberty. We wonder how long parliamentary institutions can survive as machines for registering the rescripts of a cabinet—and "that way madness lies."

The emphasis on function, to which we have already referred, is admirably illustrated in the excellent volume by Mr. E. C. S. Wade, and Mr. G. G. Phillips.[3] Both are practical lawyers and eminent and experienced teachers, and they thus bring to their work invaluable qualifications. At the outset, we can say at once that their book will, we believe, immediately take its place as the best available text-book on the subject. First of all, the scheme is admirable. Beginning with a suggestive discussion of the nature and sources of constitutional law and of the general principles of the constitution, the authors, while preserving the older divisions of legislature, executive and judiciary, review their law with an admirable sense of proportion, in which historical developments are duly subordinated to the living system. The same treatment characterizes the discussions of local government, of the citizen and the state, of the forces and military law, of the church, of the British Commonwealth. Secondly, there is throughout a sense of life, of daily functionings. Thirdly, the reader is not wearied with overelaboration of the legal evolution, but is always brought face to face with present-day issues. Just as Professor Keith builds up an introduction to the demands which modern constitutional law makes in critical challenge and in the necessity to study contemporary tendencies, so the learned authors, fitting into their plan Professor Allen's point of view, present such an excellent survey that constitutional law takes on something of that fascinating insistence which ought to belong to it among a politically-minded people. In addition, description

[3] *Constitutional Law: An Outline of the Law and Practice of the Constitution, including English Local Government, the Constitutional Relations of the British Empire and the Church of England.* By E. C. S. Wade and G. G. Phillips. Toronto: Longmans Green & Co. 1931. Price $7.00. Pp. xxii, 476.

and information are made the foundations for critical analyses, for a certain amount of philosophical observation, although we are forced to admit that the legal philosophy is in places antiquated, or at least loosely expressed, while it seems to join hands with those decayed principles which, as we have said, still do duty in England for jurisitic realism. Be that as it may, it is something to get away from the older type of factual text-book. The volume, which we unreservedly welcome, is provided with every facility for rendering its use easy and convenient.

For the purposes of a new edition, there are some points to which, with respect, we venture to draw attention. The authors would be wise to quote and refer to statutes not merely by their short titles. It is well to note (*passim*) that under certain circumstances appeals to the Judicial Committee can go from Northern Ireland. Indeed, the section on Northern Ireland, loosely referred to as "Ulster," is quite inadequate, and it needs to be brought into line with recent legislation. There is some loose writing about the American Senate (p. 40); about Australian constitutional law (pp. 59, 353, 358, 359); about Magna Charta (pp. 86, 286); about "the state" (pp. 86-7). *Walker* v. *Baird*[4] is loosely used to prove too much (p. 62), especially as the authors state correctly (p. 78) the Judicial Committee's position in that case. The chapter on public meetings is admirable; and it is quite a relief to get away from Dicey's detail, for the simple reason that most cases on meetings go off on the facts, as certainly did *Beatty* v. *Gillbanks*.[5] In connexion, however, with that case it would be well to note that while the decision was given by Field, J., speaking for the court, a separate opinion by Cave, J., is of the greatest importance.[6] In connexion with *Wise* v. *Dunning*,[7] there might well be a further reference (p. 308) to *Lansbury* v. *Riley*.[8] In the section on military law, we miss a reference to the important case of *Heddon* v. *Evans*. The chapters on the British nations are excellent in tone, wise in moderation and judicial in spirit. We respectfully suggest, in the light of the words "law and *practice*" of the title of the book, that too much emphasis is laid on law at the expense of custom and convention. There are, too, several errors of fact. "Canada" is incorrectly used (p. 350). The section on the Dominion of Canada contains two egregious errors (p. 352), while Lord Haldane's unfortunate excursus into

[4] [1892] A.C. 491.
[5] (1882) 9 Q.B.D. 308.
[6] 15 Cox C.C. 138.
[7] [1902] 1 K.B. 167.
[8] [1914] 3 K.B. 229.

the nature of Canadian federalism apparently, if unconsciously perhaps, colours the next page. The paragraph on responsible government needs careful revision (pp. 354-5). In a new edition, the doctrine of the unity of the crown[9] ought in some way to be related to the announcement of March 27, 1931, that the Government of the Irish Free State would in future directly advise His Majesty in certain international matters where previously the King acted on the formal advice of the Secretary of State, and that a new Seal in such matters would take the place of the Great Seal. Here are two vital issues in constitutional law. It would seem first that, within the ambit of the Treaty of 1921, the relationship between the United Kingdom and the Free State is in fact a personal union; and secondly, the cabinet and not parliament has made the decision. We have grown somewhat accustomed to the courts accepting from the cabinet, or cabinet departments, declarations on such things as the status of foreign diplomats, the territorial bounds of the realm, the sovereignty of some petty principality;[10] but it is something new if the cabinet can decide the nature of the King's relationship to the British nations. However, the facts seem to be there; and they are hardly likely to be challenged in any court.

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[9] *Williams* v. *Howarth*, [1905] A.C. 551.
[10] *Engelke* v. *Musmann*, [1928] A.C. 433; *The Fagernes*, [1927] P. 311; *Duff Development Co.* v. *Kelantan Government*, [1924] A.C. 797; *Mighell* v. *Sultan of Johore*, [1894] 1 Q.B. 149.