

REVIEWS AND NOTICES

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The Interstate Commerce Commission. Part III. Volume B.
By I. L. SHARFMAN. New York: The Commonwealth Fund. 1936. Pp. xiv, 833.

We have often wondered why the violent denunciations of the new administrative processes which flow from the pens of Lord Hewart and his followers have not been countered by equally vehement defences. Surprisingly few of the writers on administrative law who are convinced of the inevitability of recent developments in administration trouble to reply to the attacks which have appeared in the volumes bearing such lurid titles as *The New Despotism*, *Bureaucracy Triumphant*, *Our Wonderland of Bureaucracy*. Professor Sharfman's study goes far towards solving our perplexities in this regard. The best answer to the critics of administrative law is provided not by arguing heatedly that "justice" and the "rule of law" are preserved under the new forms of adjudication, but by analysing the operations of administrative authorities to show that such is, in fact, the case. The "preservers of our constitutional liberties" hold a technical advantage in the battle, since they appeal to established traditions. Theoretical arguments designed to prove that benefits may be derived from the apparent sacrifice of traditional principles are of little avail against the bogey of "despotism" in a world where democratic institutions have already in many cases given way to those of dictatorship. Thus, it is only through a dispassionate analysis of what has actually taken place and through a scientific demonstration of the benefits, if any, which may accrue to the citizen as the result of the efforts of administrative authorities that legislators may be led to weigh the advantages and disadvantages of the new processes on their merits, rather than to measure their value by an emotional and usually prejudiced standard. In this respect, Professor Sharfman's contribution ranks high in the literature of administrative law.

The volume under review is beyond doubt the most important and most valuable which has so far been issued in this study of the Interstate Commerce Commission. It consists of an analysis of the rate-making process and as the author points out, it "provides the most enlightening evidence of the character of [the Commission's] performance as a functioning tribunal". This volume, therefore, submits the activities of the Commission to the crucial tests—how well does it work? how far does it achieve the purpose for which it was created?

Rate regulation, the author declares, involves two distinct, though interrelated tasks: first, the adjustment of the general level of transportation charges, in the interest of preventing extortionate levies and maintaining an adequate flow of carrier revenues; and second, the adjustment of specific charges between different persons, places, commodities, and types of traffic, in the interest of preventing discriminatory practices

and maintaining equitable rate relationships. The present volume is devoted to a detailed discussion of these two problems. In the first part, the learned author outlines the steps by which the Commission arrived at its decisions as to general rate levels. He describes for us the initial stages, when "the Commission was groping, not ineffectively, for guiding principles", and he traces the development at length through all the major issues which confronted the Commission. Through his eyes, even the person who has little acquaintance with rate making problems can learn how the Commission approached its task. The railways appear "at one and the same time, as an essential social instrument requiring healthy preservation, as one among a number of agencies contributing to the progressive performance of transport functions, as a vital factor in the productivity and development of the areas and enterprises served, and as an important member of the aggregate of industries sharing a common fate in a dynamic economic system". The reconciliation of these considerations represents the task of the Commission—a task rendered much more difficult by the exceptional instability of the period. An examination of this chapter makes it easy to agree with the author that "the Commission has sought and achieved a practical administration of its task, and the outlook is promising for increasingly fruitful activity."

The picture which Professor Sharfman builds up for us is not that of a group of bureaucrats, disregarding traditional forms in order to give scope to the prejudices and whims of its members, but rather of a group of administrators anxiously endeavouring to fulfil in good faith the functions entrusted to them. We would not like to leave the impression that the decisions of the Commission go unchallenged. Each decision and the grounds upon which it rests are subjected to the most searching criticism. Often the author disagrees with the Commission's findings—not, however, in a mood of captious criticism, but as the result of conclusions and convictions derived from the fullness of his observations and research.

The second portion of this volume is devoted to the rate structure and its scope is indicated by the sub-headings which appear in this chapter—the problem of rate relationships, reparations for past maladjustments, personal discriminations and the principle of equality, guiding principles in the control of rate relationships, adjustment of commodity relationships, adjustment of distance relationships. In dealing with the guiding considerations in the control of rate relationships, the author stresses the fact that nicely articulated theories of rate making should not be expected of such a tribunal. "The Commission has repeatedly denied the feasibility of establishing any rigorous rules or formulas or the legitimacy of recognizing any mathematical treatment of relevant factors as of conclusive significance; on the contrary, it has uniformly insisted, with judicial sanction, upon the possession of a flexible limit of judgment." And yet, in spite of vague standards, flexible limits of judgment and a veritable kaleidoscope of economic and social conditions to be considered, the judicial character of the Commission's decisions compares very favourably with the judgments of our courts, surrounded though the latter be by traditions of justice which almost remove them from the realm of human affairs.

Professor Sharfman has brought to the analysis of the problems dealt with in this volume the same painstaking care that was disclosed in earlier

volumes. His study has already achieved the status of a classic in the literature of administrative law and we await eagerly the concluding volume, which the publishers promise us in the near future.

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Federal Subsidies to the Provincial Governments in Canada. By J. A. MAXWELL. (Harvard Economic Studies, Vol. lvi.) Cambridge: Harvard University Press. 1937. Pp. xi, 284. (\$3.00)

This volume presents a good resume of the financial relations between the federal and provincial governments from the date of the Quebec resolutions in 1864 to the year 1936. The recent appointment of a Commission to investigate the relations between the federal and provincial governments from 1870 to the present day makes this work of interest to students of Canadian history and economics, although it is quite certain that the majority of readers may not agree with the author's criticism of the settlement of many problems which have arisen since the early days of Confederation.

The author divides the subject between unconditional and conditional subsidies. The former consist of debt allowances or assumption of provincial indebtedness by the federal government, grants per capita to reimburse provincial governments for loss of revenues assigned to the federal government, grants in support of provincial governments and exceptional grants to take care of special circumstances in the different provinces. Conditional subsidies are those grants to the provincial governments over which the federal government exercises some measure of control, the amount and application of funds being dependent upon the provincial governments providing defined services, such as grants in aid of agricultural education, technical education, employment bureaus, health and old age pensions.

It is quite true that since Confederation very few years have elapsed without some readjustment being made in the financial relations between the federal government and one or more of the provinces. However, the author's repeated charges of political skullduggery in practically every such adjustment and his statement that "The history of the natural resources question is concerned largely with unedifying and intricate political legerdemain" seem quite unwarranted. To anyone at all familiar with Canadian history the readjustments in financial relations between federal and provincial governments have, with few exceptions, been quite logical steps in the development of the country.

The author approves in principle of conditional subsidies but for unconditional grants he has not a good word and, in fact, seems to lose sight of their origin and purpose. His solution of the latter problem is for the federal government to assume the capital indebtedness of the various provinces to the amount of the unconditional subsidies capitalized at 3%. It is difficult to understand how such a mere bookkeeping device could in

any way assist those provincial governments which are hard pressed to maintain long established and much needed services, unless it were simply a means of temporarily improving their credit in order to permit the addition of further capital obligations. Further additions to federal indebtedness at a time when its 3% bonds are quoted in the market at only 87 would hardly seem to be good business.

The material is well presented, although at times the author falls into that disconcerting academic habit of putting into foot-notes matters of substance which really would be better included in the text.

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The Law of Peace. By C. VAN VOLLENHOVEN. Translated by W. HORSFALL CARTER. With preface by JONKHEER W. J. M. VAN EYSINGA. London: Macmillan and Company. Toronto: The Macmillan Company of Canada. 1936. Pp. xvi, 261. (\$3.50)

As Jonkheer Van Eysinga points out, "the man who wrote this book discovered, explored and described in masterly fashion in the period 1901-1931 the Indonesian customary law prevailing from Madagascar up to Formosa and containing many international elements of its own; the man also who, already in 1898, had discerned the element of police in international law and who never tired of pointing out the necessity for such policing in modern international organization; and who finally, after forty years of uninterrupted hard work, at last considered—in 1933, which was to be the last year of his life—that he might start lecturing on comparative law, so as to cover all law throughout the ages."

Beginning with the year 1150 the author follows the evolution of international law, in a positivist or factual sense, from that time down to the commencement of the disarmament conference in 1933. Throughout this period the author finds that this evolution—including retrogression as well as progress,—is governed by the interplay of two great forces, unselfish disinterestedness on the part of mankind rendering possible international organization, and the supremacy of the law of peace and, opposed to this, the selfishness of states that aim at unbridled sovereignty and so lead on to the supremacy of the law of war. In his survey the author finds three periods; (1) the latter half of the Middle Ages; (2) toward the time of the French Revolution; and (3) around 1900 and following the great war, in which the law of peace develops and gives promise of establishing itself, but on each occasion violence and war intervene and the structure of peace collapses. He concludes further that the world society is not, properly speaking, a legal society or system at all, but one "posited on the notion of the balance of power which was consecrated by the Peace of Westphalia in 1648", and he considers that "without a genuine revolution (in the attitude of men and nations toward the problem of peace) either of a pacific or a violent character, the law of peace cannot hold its own and for the third time we shall witness the triumph of the law of war". Another conclusion that the author reaches as a result of

his studies is that modern writers on international law have not made an appreciable contribution to its historical portrayal, in the positivist sense at least. The book contains chapters dealing with the periods 1150-1492, 1492-1780, 1780-1914 and 1919-1931, which it considers under the heads, "Mediaeval Portents of a Law of Peace; The Reign of War; The Law of War and the Law of Peace; The Law of Peace and the Law of War; and a final chapter on the future,—The Law of Peace. Each of the four chapters is divided into four parts (1) "Facts" (2) "Hopes Raised" (3) "A Critical Analysis" and (4) "Hopes Dashed", while the fifth gives the facts, achievements, the dangers ahead, and certain lingering hopes. Each chapter also contains a very interesting and varied set of references or footnotes. The value of the book is lessened, however, by the fact that it has no index.

The book itself is a most scholarly and interesting one, and Mr. Horsfall Carter has provided a good English translation. Professor Van Vollenhoven's principal thesis is, that there can be no enduring law of peace until there is an international police force strong enough to prevent or put down international violence wherever it may occur. Such a force would give that sense of security without which it is foolish to expect nations to disarm. Because of this conviction the author is particularly interested in Article XI of the Covenant of the League of Nations which declares that any war or threat of war concerns the whole League and that the League itself, shall take the necessary steps to safeguard the public peace. In contrast he criticizes and belittles the value and importance of Article XVI, which he states "first had its wings clipped, then its claws cut, and after that its eyes gouged out". This is the article which was invoked against Italy, and it is interesting that Professor Van Vollenhoven wrote as he did in 1933. The basis of his criticism of Article XVI is that such obligations as it contains are left to the interpretation or at least the will of each individual state, and that history has shown that nations are singularly backward in carrying out voluntary obligations of this kind. In other words he is very doubtful of the value of voluntary collective action and insists upon the need for the organization of an international force. The principal criticism of this proposal, is, of course the difficulty in giving effect to it. The author does not ignore this, but one is justified in wondering whether it may not be easier to get nations to co-operate in a collective way than persuade them to set up and submit to regulation and control by an international police force.

The book, however, is one that well repays the careful reading of it and one cannot but have the greatest regret that this great scholar and practical idealist will write no more.

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THE MODERN LAW REVIEW

THE CANADIAN BAR REVIEW welcomes this new English legal periodical, the first number of which appeared in June 1937. The Editorial Committee consists of five members of the law faculty of the University of London, the General Editor being Professor R. S. T. Chorley. In introducing the

new Quarterly to the profession, the Editorial Board point out that while English periodicals have dealt formerly with technical aspects of law, an approach which they by no means belittle, such an approach may have the effect of isolating law "too much from those contemporary social conditions in which it must always operate". The present journal is, therefore, launched with a view to deal with "the law as it functions in society and primarily with English Law in its relation to contemporary English conditions and problems".

In a delightful prefatory note, Lord Macmillan deals with this aspect in connection with the use of the word "modern". As he indicates, "modern" may give rise to some misgivings, due to the fact that it may be related in some minds to "a pert assumption that tradition and authority have nothing to teach us and that if we only use a new-fangled and sufficiently portentous vocabulary we are necessarily thinking new thoughts". On the other hand, he explains that the word "modern" is undoubtedly used "to serve as a reminder, in the words of Lord Asquith, that the Common Law of England 'is not a compendium of mechanical rules written in fixed and indelible characters, but a living organism which has grown and moved in response to the larger and fuller development of the nation.' 'To confine principles to circumstances peculiar to a past generation,' said Lord Stowell, 'is in effect to negative the application of those principles.'" It was in furtherance of this view that the present writer was prompted to make certain remarks in the present issue of this REVIEW concerning *Legal Reform and the Profession* (see *supra* p. 123). The appearance of this new journal is further indication of the revitalizing influence of the academic writer and teacher in England.

The first volume contains articles by Mr. Felix S. Cohen on "The Problems of a Functional Jurisprudence", by Mr. Richard O'Sullivan K.C. on "A Scale of Values in the Common Law" in which a wide range of topics is discussed with relation to the valuation of interests in property and personalty, and of Dr. W. Friedmann on "Modern Trends in the Law of Torts", who suggests certain new approaches and re-arrangements in the traditional classification of the Law of Torts.

Departments dealing with legislation, notes on recent cases and reviews of recent books, round out a legal journal to the success of which THE CANADIAN BAR REVIEW extends every good wish.

The Journal is published quarterly at an annual subscription rate of \$3.75, the price of a single issue being \$1.00. Subscriptions may be sent to The Carswell Company, Ltd., Toronto.

C. A. W.

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Modern Equity. By HAROLD GREVILLE HANBURY. Second Edition. London: Stevens and Sons. Toronto: The Carswell Company. Pp. 1, 814 (\$9.00)

The appearance of a new edition of Dr. Hanbury's *Modern Equity* within two years of its first publication amply bears out the prophecy made earlier in this REVIEW (14 Can. Bar Rev. 85) that the present text book would go far to "supplant the existing English text books on Equity".

In view of the fact that on the original appearance of the book the present writer gave his views at some length concerning the treatment of various topics by the author, little more need be said concerning the second edition. The present edition is, in essence, the same as the first edition, with the addition of changes necessitated by the intervening case law and legislation. The same criticisms, therefore, which were made of the first edition, apply equally to the present one. But such criticisms in no way deter the writer from recommending Hanbury as a book indispensable to every law student as a complete and charmingly written exposition of the traditional English treatment of Equity.

C. A. W.

BOOKS RECEIVED

The Inclusion of a book in the following list does not preclude a detailed review in a later issue.

- The Development of Dominion Status 1900-1936.* Edited by ROBERT MACGREGOR DAWSON, M.A., D. Sc. (Econ.) London and Toronto: Oxford University Press. 1937. Pp. xiv, 466. (\$5.00)
- The Practice of the Privy Council in Judicial Matters.* Third Edition. By NORMAN BENTWICH. London: Sweet and Maxwell. Toronto: The Carswell Company. 1937. Pp. xxiv, 353. (35 s.)
- An Autobiographical Sketch.* By John Marshall. Edited by JOHN STOKES ADAMS. Ann Arbor: The University of Michigan Press. 1937. Pp. xxiii, 48. (\$2.00)
- The Law of Trusts.* Second Edition. By GEORGE W. KEETON, M.A., LL.D. London: Sir Isaac Pitman and Sons. 1937. Pp. lii, 412. (25 s.)
- The International Law Association's Report of the Thirty-Ninth Conference.* London: Sweet and Maxwell. 1936. Pp. cxxxiv, 343. (£2)
- Law and Other Things.* By THE RT. HON. LORD MACMILLAN, G.C.V.O., LL.D. Cambridge: At the University Press. Toronto: The Macmillan Company of Canada. 1937. Pp. 284. (\$2.75)
- The Law Relating to Succession Duties in Canada.* Second Edition. By SAMUEL QUIGG, K.C. Toronto: The Carswell Company. 1937. Pp. xix, 446. (\$10.00)
- The Highway Traffic Act.* Third Edition. By AUSTIN O'CONNOR. Toronto: The Carswell Company. 1937. Pp. xxxix, 504. (\$7.50)