award benefits but applies to the formation and variation of the award itself.

The author is most open to criticism when he leaves a discussion of legal powers and ventures into the sphere of "so-called" industrial relations. Most of his comments, particularly those concerning the functioning of conciliation and arbitration, take the form of rather superficial generalisations. It is difficult, with accuracy, to generalise on industrial relations, each industry, and indeed each plant, having its own particular industrial relations problems. No amount of knowledge of awards or even of what the judges say will give an understanding of the actual industrial relations problem at any particular time. A more fruitful approach, which has been undertaken on several occasions in recent years,[13] is to develop a case study of a particular industry or industries.

Unfortunately the style of *Industrial Conciliation and Arbitration in Australia* does not make for easy reading. There are far too many lengthy extracts from judgments and from sections of Acts, which should have been curtailed or placed in the footnotes. On the other hand, the footnotes appear to be too copious. Granted that they may be useful for reference, there is still much repetition which could easily have been avoided.

Yet, despite these criticisms, this book is informative and well-documented, and a welcome addition to the various studies in this field.

D. C. THOMSON.*

Judicial Review of Administrative Action, by S. A. de Smith, M.A., Ph.D., Professor of Public Law in the University of London. London, Stevens & Sons Limited: New York, Oceana Publications, 1959. xlvii and 486 pp. and Index. (£4/17/6 in Australia).

Even before the appearance of this work, Professor de Smith had established himself through his many contributions to legal journals as a scholar of distinction and as one of the foremost students of administrative law in Britain today. Prepared originally as a doctoral thesis, *Judicial Review of Administrative Action* can only enhance that reputation and earn for its author the gratitude of all those concerned with the teaching and practice of administrative law both in Britain and in this country. Although the case materials upon which this work is based are predominantly British, regard has been paid to some of the relevant decisions of other Commonwealth courts and also significant differences between administrative law in Britain, on the one hand, and on the other hand, administrative law on the Continent and the United States. Professor de Smith is clearly not one of those British lawyers who is "tempted to discount the value of studying American administrative methods by exaggerating the differences due to the role of the Judiciary in the Federal Constitution".[1] While recognizing the differences due to different constitutional complexes, he has recognised also that there is a sufficient area of identity for useful comparisons to be drawn and that the leading features of judicial review in Britain may be best demonstrated by reference to the different approach of American courts to similar administrative problems. Although more limited in its scope, the book serves as an admirable complement to Professor Bernard Schwartz's *American Administrative Law* and certainly the best point of departure for any foreign lawyer wishing to learn something of the British apparatus for judicial scrutiny of administrative acts.

The utility of the work for comparative purposes derives in part from the

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[13] M. Perlman, *Judges in Industry* (1954); K. F. Walker, *Industrial Relations in Australia* (1956).

* B.A., LL.B. (W.A.) Senior Lecturer in Law, University of Sydney.

[1] E. C. S. Wade in Foreword to B. Schwartz, *American Administrative Law* (1950) v.

breadth of Professor de Smith's conception of administrative action, a term having no standard legal connotation but in the context of this monograph comprising not only those administrative decisions arrived at after adversary hearings, but also "a vast miscellany of administrative acts, orders and decisions affecting individual rights"[2] which are subject to judicial control. The only aspect of the administrative decision-making process which is excluded is subordinate legislation. While such a limitation in scope is open to the objection that legislating is a function which merges imperceptibly into other kinds of decision-making and that the criteria for distinguishing between legislative and non-legislative powers are vague and often productive of seemingly inconsistent characterizations, Professor de Smith has at least anticipated the objection, first, by discussing briefly the tests applied by the courts in classifying administrative authorities' powers, and secondly by explaining the different legal consequences flowing from different characterizations.

The question remains, however, whether there is anything so distinctive about the principles and procedure for judicial review of delegated legislation as to warrant its exclusion from a monograph on judicial review of administrative acts. It is true that certiorari will not lie in respect of legislative acts, that unreasonableness *per se* does not invalidate subordinate legislation[3] and that the means whereby rules, regulations and by-laws may be impugned differ in some respects from the means whereby non-legislative acts may be impugned. But it is also true that the broad grounds upon which subordinate legislation and non-legislative administrative action may be reviewed include the common ground of *ultra vires* the enabling or empowering Act, and that the exercise of ministerial, administrative and legislative powers alike are open to challenge on erroneous findings of law and fact, which is so to a much more limited extent in the case of judicial functions. Although your reviewer would defend separate consideration of judicial review of delegated legislation and judicial review of non-legislative acts of administrative authorities, the degree of overlap between types of governmental functions and the principles and procedures for judicial scrutiny thereof requires an author who deals with one to the exclusion of the other, to say something of the relationship between the two a little more specifically than does Professor de Smith. This is but a minor criticism and the exclusion of delegated legislation has not detracted from the comprehensiveness or quality of his analysis.

By judicial review, Professor de Smith means not only "judicial scrutiny of and determination of the legal validity of acts, decisions and transactions"[4] but also the making of declaratory orders and those judicial determinations by which administrative acts are held, not void, but voidable. The criminal and civil liability of public authorities is not treated as part of judicial review, an omission the reasons for which will be more obvious to the lawyer than perhaps to civil servants and students of public administration. In a book on the role of the judiciary in the administrative process as a whole such an omission would be less defensible than in a book which is legal in its orientation. The omission in this instance is a proper one, especially in view of the existence of adequate monographs on the civil liability of governmental authorities.[5] In British law the civil and criminal liability of public officers and authorities is governed to some extent by rules applying only to public authorities, yet these rules have developed within the context of the general law of contracts, torts and crimes, and from the lawyer's point of view, are still best dealt with in that framework.

Judicial review thus defined has been obtained in Britain principally

[2] Book under review, at 7.
[3] *Id.* at 219-21.
[4] *Id.* at 16.
[5] H. Street, *Governmental Liability: A Comparative Study* (1953), J. D. B. Mitchell, *The Contracts of Public Authorities: A Comparative Study* (1954).

through extension of the prerogative writs and the equitable remedies of injunction and declaratory judgment. Direct review of administrative acts and statutory review provisions have been far less common than in the United States, and as a general proposition there has been far less reluctance in Britain than in the United States for statutory restrictions to be imposed upon judicial review. While adaptations of the prerogative writs and equitable remedies have produced a wide variety of remedial procedures, there is still room for dispute, depending upon one's opinions as to the desirability of judicial scrutiny and the adequacy of existing procedures, whether these remedies provide ample enough protection for the aggrieved citizen. Professor de Smith has not firmly committed himself to any one point of view, but one may infer from his remarks on the features of judicial review in Britain and on the future of equitable remedies that he is not one of those who feel that the scope for control by the ordinary courts should be minimal.

The observation that in Britain judicial self-restraint in the matter of judicial review of administrative action has won a "decisive victory over judicial activism"[6] may be open to dispute but it does have validity compared with American experience and clearly it is American experience which Professor de Smith has in mind when he offers several explanations for the attitude of British courts. One of these is "a partly concealed policy decision—a decision that ministerial responsibility to Parliament shall be deemed by the courts to be an appropriate safeguard against the erroneous exercise of widely framed statutory powers".[7] Such a diagnosis merits further attention for although the American constitutional system knows nothing of ministerial responsibility legislative oversight of the administration is not entirely lacking. In American legislatures it is less easy to expose individual and isolated cases of erroneous exercise of statutory powers than in parliamentary systems where Ministers of State are confronted regularly with questions from back-benchers and the Opposition. On the other hand, congressional investigatory and watchdog committees, together with such periodic comprehensive reviews of the workings of the whole administrative process as the Hoover Commissions, the President's Conference on Administrative Procedure (1953) and the Attorney-General's Committee on Administrative Procedure (1941),[8] have brought into focus the kinds of erroneous exercise of statutory powers which commonly occur and the safeguards needed, probably better than the haphazard mode of surveillance provided by ministerial accountability. Certainly the Federal Administrative Procedure Act of 1946 represents a much more vigorous attempt by the United States Congress to impose minimum standards of adjudicatory procedures upon administrative authorities than any step taken by the British Parliament up to the enactment of the Tribunals and Inquiries Act, 1958.[9]

Fundamental to an understanding of the differences between the attitudes of British and American courts to administrative decision-making and its controls is the different constitutional settings in which they work. It is only to be expected that the judiciary charged with the duty of keeping legislatures within the bounds set by a fundamental instrument of government and discharging that duty with reference to socio-economic values as well as legal norm, will carry over the same spirit of adjudication into the scrutiny of the acts of other

[6] At 18.
[7] *Ibid.*
[8] Report on Legal Services and Procedure: Commission on Organization of the Executive Branch of the Government (second Hoover Commission) 1955. The inquiries and recommendations of the American Bar Association during the 'thirties might also be mentioned. The Association has also sponsored a Federal Administrative Practice Act: see K. C. Davis, 1 *Administrative Law Treatise* (1958) 27-33.
[9] 6 & 7 Eliz. 2, c. 66. The Act provided for the establishment of a Council of Tribunals to keep under review the constitution and operation of specified administrative tribunals, and for new rights of appeal from statutory tribunals to the High Court of Justice on points of law.

departments of government. In the British constitutional system, the judiciary has scrupulously maintained a role of political neutrality, passing neither on the validity of legislative acts nor on the validity of acts considered as falling within the allotted sphere of the executive. Although policy considerations cannot be excluded entirely from the judicial process, the scope for policy choices is limited and where administrative acts are impugned the courts have carefully avoided seeming to usurp the functions of policy-working and enforcing instrumentalities. Professor de Smith has detected in British war-time decisions on the exercise of discretionary powers a reluctance to protect the individual by restrictive interpretation of the executive power lest such interpretation work contrary to the public interest. But war-time precedents continue to influence adjudication of similar issues in times of peace thereby strengthening the tendencies towards judicial self-restraint.

The weight of precedent has not borne so heavily upon British courts as to produce either consistent doctrine regarding the grounds for judicial review or the circumstances in which remedies are available. One of the theses Professor de Smith is continually pressing is that there are striking inconsistencies in decided cases, absence of authority or judicial equivocation on some points. Such features of this branch of the law have posed peculiar difficulties in exposition and at one point the author confesses that because of "the heterogeneity of the subject-matter upon which judicial review operates and the variety of conditions under which it is invoked", accuracy might be better served "by a succession of commentaries on the interpretation of individual statutes and statutory instruments".[10] In the interests of advancement of administrative law as a body of law *sui generis* and as a branch of public law dealing with a distinctive area of government, it is fortunate that Professor de Smith has preferred to approach the subject as a search for principles and trends, by principles meaning the classes of grounds upon which the courts will award relief for administrative action.

Part two of the work on the "Principles and Scope of Judicial Review" comprises five chapters, dealing with juridictional excesses of administrative authorities, failure of administrative bodies exercising judicial functions to observe the rules of natural justice, review of discretionary powers and judicial responses to attempts by Parliament to restrict the scope of judicial review. It is of interest to note that the rules of natural justice have been subsumed under two heads, only, the *audi alteram partem* rule and the requirement of lack of interest or bias on the part of the administrative tribunal. Throughout these chapters the reader is ever impressed with the impossibility of disjoining the analysis of the principles of judicial review from the remedial apparatus through which the courts have come to exercise surveillance. "In private law", we are reminded, "the forms of action may still rule us from their graves; in administrative law they retain a conspicuous vitality and long expectation of life."[11]

The several chapters on remedies are comprehensive in the coverage and in no way subsidiary to the section on principles. To the reviewer's knowledge nowhere else does one find such an exhaustive and carefully documented account of the origins and development of the prerogative writs of certiorari, mandamus and prohibition, and no other work serves so admirably as a work of reference on the circumstances in which these remedies and the equitable remedies of injunction and action for declaration are available at the present time. Professor de Smith has not attempted a detailed history of the use of equitable remedies in public law: this is a matter which is clouded by obscurity and a task left for legal historians to complete.

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[10] At 25.
[11] At 17.

Read in conjunction with an introductory chapter on classification of functions, the chapter on certiorari and prohibition demonstrates convincingly the futility of attempting to find in the cases any consistently or universally applied criteria for determining whether the functions exercised by a governmental authority are judicial or non-judicial. Professor de Smith illustrates how the meaning of "judicial" differs in different legal contexts and how, even with the limited context of the conditions upon which certiorari and prohibition are available, the courts have indulged in incompatible characterization of functions which can be explained only by the fact that the process of characterization has taken place as an *ex post facto* rationalisation of a decision to intervene (or not to intervene) reached on policy grounds. What such policy grounds might be Professor de Smith has not elaborated, but he is far from suggesting that policy alone dictates the characterization, a conclusion which would imply that judicial pronouncements on the factors to be considered in determining whether a body is acting judicially are of no predictive value at all. Some judges, he emphasizes, do defer to precedent and have not been unknown to express regret at being unable to find grounds upon which judicial intervention could be justified.

Attended as they are by greater flexibility than the prerogative writs, the equitable remedies of injunction and declaratory judgment offer the means for greater judicial activism in review of administrative acts, irespective of the manner in which the functions exercised by the administrative authority are classified. Possibly encouraged by the extent to which equity has assisted in the development of public law remedies in the United States and Australia, Professor de Smith predicts—[12]

> that in the general field of administrative law the tendency will be for the role of the injunction and declaratory order gradually to increase in importance, not only in those areas of administrative activity that lie within the ambit of certiorari, prohibition and mandamus, but also in the areas that lie beyond. This expectation is qualified by a reminder that in the present climate of judicial opinion it is unlikely that the common law remedies will be superseded or that equity provides alternative remedies where the common law already provides appropriate procedures.

In view of the still unresolved controversy as to whether the Supreme Court of New South Wales in *Trethowan's Case* properly granted an injuncton, Australian readers would have welcomed a less perfunctory analysis of the use of the injunction to restrain parliamentary processes. In fairness to Professor de Smith it should be added that in a monograph on administrative law this was not of direct relevance.

There can be little doubt that *Judicial Review of Administrative Action* represents one of the most outstanding contributions to the study of British administrative law that has appeared to date. Its distinction resides principally in the fact that for the first time a British author has attempted and succeeded in collating a rich variety of case materials and producing a readable, well-documented, and discriminating exposition of what the law actually is. In the past, British literature on this subject has been scattered through periodicals and there has also been a large amount of writing of a kind which Professor de Smith describes as "impassioned by mainly sterile controversies concerning the constitutional propriety of administrative tribunals and delegated legislation".[13] Possibly the paucity of scholarly works has been due to an ostrich-like shunning of the realities on the part of British lawyers overly impressed with Dicey's bland assertion that British law knew nothing of a *droit administratif*. But whatever the reasons, the lack of detailed doctrinal studies has retarded the development of British administrative law so that at the present time its

[12] At 324.
[13] At 10.

status is comparable to that of, for example, the law of contracts and torts in the middle of the last century. The influence of the classic text-book or monograph in the growth of our substantive law tends to be underestimated, but it may reasonably be predicted that Professor de Smith's book will assist greatly in the future development of a sadly neglected area of public law both in Britain and in the rest of the Commonwealth. As he himself is at pains to emphasize, this is a field in which many problems remain unresolved and in which judicial creativeness is not spent.

ENID CAMPBELL.*

Gentlemen of the Law, by Michael Birks, London, Stevens & Sons, Ltd., 1960. xi and 394 pp. (£1/14/6 in Australia.)

The role of the lawyer in society and his place in the social history of England are topics upon which comparatively little has been written, at least by serious historians.[1] With some exceptions—notably Cohen's famous *History of the English Bar*, which in any event is a study in legal, rather than social, history and, more recently, Dean Roscoe Pound's *The Lawyer from Antiquity to Modern Times*—what little that has been written has often been given a bias towards showing the lawyer either as a paragon of virtue and the protector of freedom, or as a parasite living off the misfortunes of others, his professional conduct as sharp as his scale of fees. Michael Birks, however, in *Gentlemen of the Law* has succeeded in giving an admirably balanced historical account of the contribution made by the solicitor's profession not only to English legal, but also to English social life; together with a short account of the introduction of the profession into the United States and Australia. In so doing he has shown a healthy, and often most amusing, cynicism, but one tempered by an intelligent respect for practical ideals and their solid achievement.

By the nature of things, the materials which Mr. Birks has used overlap to an extent Cohen's *History of the English Bar*, and, as the bibliographies which the author includes at the end of each chapter show, he has drawn on other secondary sources, or at least gained a mastery of them. But the book contains an original approach and a great deal of hitherto unpublished material.

The book sets out to tell the story of the solicitor, the attorney, from the thirteenth century to the present day, and the pattern which is evolved is an elegant balance between generality and detail. Mr. Birks has not set out to detail the lives of individual solicitors, or the histories of particular firms, although many established firms in England can be traced back to Elizabethan times and even beyond. This he regards, and rightly, as a task for local historians, and indeed there are a number of works in which this has been done, for example Reginald Hine's delightful *Confessions of an Uncommon Attorney* where the history of Hawkins and Co. of Hitchin is treated. For all that, the work is rich in detail, and episode; the dry bones are clothed with flesh, and they live.

In fact, the whole work is lively, and not unnaturally so because Mr. Birks has a fascinating tale to tell; but its liveliness is not due merely to the theme but also to the gusto of Birks' telling, his humour and gift for choosing the amusing anecdote. *Risqué* stories are not generally associated with works on legal history, it might be said perhaps that there are enough of those in the Law Reports, but the author has succeeded in including a number by the novel expedient of telling them in Latin. Two may be recounted as examples. The form of words to be entered on the court roll for the appointment of attorneys

* LL.B., B.Ec.(Tas.), Ph.D. (Duke, U.S.A.), Lecturer in Law, University of Sydney.

[1] See, however, recently Julius Stone, *Legal Education and Public Responsibility* (1959) (Association of American Law Schools), on which see the review by Hon. Sir John Barry *supra* pp. 486-491.