BOOK REVIEWS
REVUE DES LIVRES

The Allocation of Taxing Power under the Canadian Constitution. By GERARD V. LA FOREST. Toronto: Canadian Tax Foundation. 1967. Pp. 169. ($3.00)

Students of Canadian constitutional law despair at the lack of any clear, comprehensive, contemporary and convenient textual reference material. Apart from some sadly dated treatises[1] and notes and articles[2] there is very little of the detailed analysis that is characteristic of some other branches of the law. Professor Gerard V. La Forest deserves our gratitude for his successful attempt at filling, in part at least, this doctrinal gap. He has produced a lucid and thoroughly researched analysis of the constitutional guidelines prescribing the legitimate exercise of the power to tax at all levels of government in Canada.

The book is organized in such a manner as to permit the reader quick access to the desired material. An historical introduction is followed by a description of the federal taxing power, then by three chapters, each of which deals with one of the three prerequisites for a valid provincial taxing enactment,[3] and by a chapter concerned with the companion provincial power to raise revenue by licenses. Succeeding chapters give consideration to the relationship between the federal and provincial taxing powers and to the express constitutional limitations on the power of both authorities to tax. The study is concluded by a chapter which evaluates the existing allocation of taxing powers.

The analysis of the cases is clearly presented and considerable assistance is offered to those faced with the problem of describing the limits of overlapping federal and provincial power, assistance which goes beyond the use of slogans like "pith and substance", "true nature and purpose", "necessarily incidental" and so on. For

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[1] See for example, Clement, The Law of the Canadian Constitution (3rd ed., 1916); Lefroy, A Short Treatise on Canadian Constitutional Law (1918); Kennedy, The Constitution of Canada (2nd ed., 1938).

[2] Some of these are conveniently collected by Lederman, The Courts and the Canadian Constitution (1964).

[3] The tax must be "direct"; it must be "within the province"; it must be for the "raising of revenue".

example, in discussing the question of the application of the *Mill* test for direct and indirect taxation, Professor La Forest proposes a distinction between economic recoupment and the passing on of the tax itself in a recognizable form.[4] Similarly, the problem of determining the circumstances under which provincial taxing or licensing enactments offend the rule that preserves the status and capacity of Dominion companies is discussed in terms of a distinction between legislation which "discourages" a company from doing business and legislation which "disables" it from doing business.[5]

The framework for evaluation of the allocation is functional rather than conceptual. The author's major criticism of the judicial treatment of the topic is that it has been based on narrow conceptualistic considerations without sufficient consideration of the need for redressing the economic imbalance between different provinces.[6] In dealing with the rules with respect to the location of property for the purposes of taxation, Professor La Forest suggests that to redress the imbalance there should be a general judicial policy favoring the location of intangible property in the poorer provinces.[7] For example, he argues that the "power" theory which locates shares in the jurisdiction where they can be most effectively dealt with favors the wealthier provinces possessing a disproportionately larger number of registry offices and that this effect could be reduced by judicial acceptance of the *mobilia sequuntur personam* rule.[8]

Although Professor La Forest regards the fair distribution of tax resources as the principal policy consideration that should be taken into account in evaluating the work of the courts he provides no argument that this objective is constitutionally enshrined apart from the implication which follows from the fact that provincial expenditures have far exceeded those contemplated by the Fathers of Confederation imbued with the *laissez-faire* philosophy of the time. It may be noted, however, that the provincial accounts can be, and have been, supplemented by federal initiative and that a measure of economic equality as between provinces need not necessarily be accomplished solely through an increase in the scope of the provincial taxing power. This criticism is probably unfair in view of the author's judgment that the best method of allocating taxing power is to give "both levels of government ample and overlapping powers of taxation, leaving the actual distribution to be made in accordance with political reality".[9] His framework for criticism of the courts then becomes one of assessing the judicial

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[4] P. 65. [5] P. 141. [6] P. 167.
[7] P. 96. [8] P. 105. [9] P. 161.

allocation of taxing power in terms of the extant political, economic and social conditions.[10]

Any study of the proper allocation of taxing power in Canada in terms of political and economic realities would be incomplete without considerable attention being paid to the claims of the Province of Quebec. It is in this regard that the reviewer would express some criticism. The author makes an unargued assumption that a Canada without Quebec is unthinkable and irrespective of whether or not the reader agrees or disagrees with this proposition he is perhaps entitled to a more detailed consideration of the problem than is provided by Professor La Forest who concedes that the existence of a broad provincial taxing power may diminish the ability of the central government to direct the course of the economy but argues that this may be the price that has to be paid to keep the country together.[11] Professor La Forest's attitude towards the means by which Canadian unity is to be preserved is also clear from his admission that the "opting out" principle, the present framework of tax decentralization, could quite legitimately be expressly limited to Quebec insofar as none of the other provinces has any compelling reason to demand separate treatment.[12] The author thus appears to echo the cries of the associate statehood theorists and, insofar as this would involve a fundamental political re-orientation of Canada's constitutional structure, a study which avowedly evaluates the allocation of taxing power in terms of political factors would be more complete if it contained a fuller consideration of these factors than is offered.

In view of the author's thesis that the allocation of taxing power should reflect the need of the poorer provinces, it is significant to note critically that relatively little consideration is given to the ability of the central government to achieve this objective through its power to effect an equitable redistribution of resources. In so far as the main thrust of the argument is directed at accomplishing this through expanded provincial taxing power, the exercise of the federal "lending" and "spending" powers is approached negatively from the point of view of describing the limits to which the federal government may regulate matters falling to the provinces rather than positively from the point of view of outlining the extent to which federal tax policy can produce the desired fair share of resources.[13] This comment betrays what is probably a philosophical divergence of view between the author and the reviewer on the proper character of Canadian federalism. However, it is not as much intended here to take issue with Professor La Forest's thesis

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[10] See for example: "Increased provincial activity naturally put pressure on the courts to stretch the elastic features of direct taxation." P. 21.

[11] P. 164. [12] P. 163. [13] Pp. 36-41.

as it is to ask for a fuller presentation of what surely is a rational alternative.

Practitioners, teachers and especially students of law will find this book a useful addition to their libraries and a significant contribution towards the relief of the famine which characterizes doctrinal scholarship in the area. It is, indeed, welcome.

GREGORY J. BRANDT*

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The Judicial Committee and the British North America Act—An Analysis of the Interpretative Scheme for the Distribution of Legislative Powers. By G. P. BROWNE. Toronto: University of Toronto Press. 1967. Pp. 22, 246. ($7.50)

This book is a history professor's doctoral dissertation. The author has made a thorough study of the Privy Council's decisions on the Canadian constitution, with a view to discovering whether they display any consistent interpretative patterns. In the process he undoubtedly taught himself considerable constitutional law, but he has not produced anything of great value to anyone else.

I think that a person not already familiar with Canadian constitutional law would find Professor Browne's book very difficult to read. His style is graceless, and the path of his reasoning frequently winds through forbidding forests of direct quotation. The reader who begins with some knowledge of the subject will find the going a little easier, but, once he adjusts to the author's habit of giving new names to old ideas, he will soon discover that he is travelling over very familiar territory.

Professor Browne's chief concern is the significance of the general "Peace Order and good Government" clause with which the bestowal of federal legislative jurisdiction in section 91 of the British North America Act begins, and its relationship and relative priority to the specifically enumerated heads of jurisdiction assigned to the provinces by section 92. He claims that the "currently orthodox interpretation",[1] which he dubs the "two compartment" theory, treats the Peace Order and good Government power as being in the same category as the subsequent list of "enumerated" federal powers, and therefore as having the same "paramountcy" that those powers have over the provincial heads of jurisdiction in case of conflict. The Privy Council, on the other hand, consistently

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[1] P. v.

followed a "three compartment" approach, in which the Peace Order and good Government power was held to be distinct from the federal enumerated heads, and inferior in rank to those of the provinces, taking effect only when no applicable head of provincial jurisdiction can be found. The purpose of the book is to show that the Privy Council's approach was the proper one.

It is interesting, in view of the fact that Professor Browne is not a lawyer, that the reason he gives for supporting the Privy Council's interpretation is that it is the *legally* correct one. The Privy Council's position was not, in his view, chiefly caused by any philosophy of federalism; rather, ". . . . those solutions were directly obtained by applying the Rules of Statutory Interpretation".[2] Jurisprudentially, Professor Browne is very conservative. In his opinion, "There is still something to be said for stability and certainty in the law",[3] and ". . . the law should not be bent in the interests of either policy or history, and can be interpreted in the light of neither".[4] He is frank to admit, however, that he believes a restrictive interpretation of the Peace Order and good Government clause is "conducive to certainty and stability"[5] in constitutional law. By a happy coincidence, therefore, the "solution" that he believes to be dictated by law also satisfies Professor Browne on policy grounds.

While it is hard to disagree with Professor Browne's rejection of of the "two compartment" argument, I doubt that it is as widespread a heresy as he believes. Those who seek to enlarge the scope of Peace Order and good Government have a more plausible argument open to them: that since problems of truly national dimension cannot be said to concern Property and Civil Rights (or any other head of provincial jurisdiction) "in the Province", they therefore cannot be appropriately dealt with by any province, and must fall under the jurisdiction of the residual Peace Order and good Government clause. Professor Browne discusses this argument as a possible new approach for the future[6] without apparently recognizing that it has always been the main weapon of those who favour an expansion of Parliament's power to deal with matters of great national concern.

DALE GIBSON*

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[2] P. 78. The capitals are Professor Browne's.
[3] P. 169. [4] P. v. [5] P. 84. [6] P. 164.
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Abortion and the Law. By B. DICKENS. London: MacGibbon & Kee. 1966. Pp. 219. (30/-)

It is axiomatic that social changes do not immediately or automatically bring about change in the law. Yet when the law is so far out of harmony with contemporary values and standards that it is neither respected nor enforced then change is imperative. Nowhere is this more self-evident than in the English and Canadian abortion laws. The legacy of our Victorian forbears, reflected in the relevant sections of the English Offences Against the Person Act[1] and the Canadian Criminal Code[2] simply do not mirror the social changes that have occurred in the twentieth century.

There are few words in the English language that evoke as many emotional responses as does the word abortion. Despite these inherent difficulties Mr. Bernard M. Dickens in *Abortion and the Law* has examined the subject with an admirable sense of detached reflection and has produced a scholarly work. The subject matter is divided into two principal sections, the legal and the moral, and both are examined in the light of the principal societal factors that operate upon them. As stated in the Preface, the purposes of the book are to analyze the content of the law and to enquire into its effectiveness and enforcement.

Mr. Dickens achieves his first purpose with deceptive ease. All the English legislation regarding abortion, both past and present, is analyzed and the historical collation of the relevant case law reveals in detail the present state of the English law. For the Canadian reviewer, the author's interpretation of *R.* v. *Bourne*[3] and *R.* v. *Newton and Stungo*[4] are of particular interest. Both of these cases highlight the deficiencies in the Offences Against the Person Act[5] and the Infant Life (Preservation) Act.[6] Strikingly similar deficiencies are found in the Canadian abortion law.

Criticism of the Canadian law with respect to abortion is almost superfluous since it has been subjected to prolonged and well documented analysis.[7] In addition to suffering from the basic flaw of inelegant drafting, nowhere are the key words "life" or "health" defined and the effect of the exculpatory clause in section 209 to a charge laid under section 237 of the Criminal Code is not yet

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[1] English Offences Against the Person Act, 1861, 24 & 25 Vict., c. 100, ss. 58-59.

[2] R.S.C., 1953-54, c. 51, as am.

[3] [1939] 1 K.B. 687, [1938] 3 All E.R. 615.

[4] [1958] Crim. L.R. 35.

[5] *Supra*, footnote 1.

[6] 1929, 19 & 20 Geo. V., c. 34.

[7] Lederman and Parker, Therapeutic Abortion and The Canadian Criminal Code (1963-64), 6 Crim. L.Q. 36; Lederman, The Doctor, Abortion and The Law: A Medicolegal Dilemma (1962), 87 Can. Med. Ass. J. 216.

known. Clarity may be effected by the uncertain method of using test cases. If such a case is brought, then perhaps by analogising the relevant English legislation,[8] together with the above cases, the Canadian courts will decide in a manner similar to the fairly liberal English findings. We can but speculate as to the result.

The author's tracing of the moral position towards abortion reveals that communal morality has not remained static. With a fluid and trenchant style that would grace his erstwhile namesake, Mr. Dickens canvasses the gamut of personal and institutional attitudes towards induced abortion. Because fundamental questions concerning the origin and nature of human life are raised, the various positions taken by the churches towards abortion are scutinized. The principal objections to any abortion are derived from religious teachings. Accordingly, the way churches currently view abortion is of extreme importance to any reform moves in this area of the law.

All of the churches with the exception of the Catholic Church have adopted a fairly liberal attitude towards abortion.[9] Yet the law does not correspond with the predominant moral position. Unless we wish to allow particular theological views to determine public secular policy, how a particular theology views the matter seems irrelevant. As Mr. Dickens states, "a social rather than a theological judgment is called for if the law is to have the respect and obedience of society".[10]

Apart from being out of touch with contemporary values the laws with respect to abortion suffer from a much more serious malaise. They are manifestly unenforceable. In his chapter on "Breach and Enforcement" Mr. Dickens describes the application of the abortion laws by the police, by the courts and by the medical profession.[11] On each of these levels the law is ineffective.

One of the basic premises of all legislation is that it must command widespread support and respect to be effective. Law should require a minimum of enforcement. The author cogently describes the problems faced by the police. When the police, the primary law enforcement arm, are manacled by the difficulty in obtaining evidence, by the lack of a "victim" and by the wall of silence that so often accompanies the failure to report abortion as a crime, it is scarcely surprising that police enforcement of the law is minimal. Police toleration and not merely police failure as in other

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[8] *Supra*, footnotes 1 and 6.

[9] See Sands, The Therapeutic Abortion Act: An Answer to the Opposition (1966), 13 U.C.L.A. Rev. 285, at pp. 293, 294. The Roman Catholic position is examined and contrasted with other religious views.

[10] P. 154.

[11] P. 73.

crime[12] is readily apparent and, as the author demonstrates,[13] even with vigorous enforcement the laws can never be really effective.

Enforcement by the courts of unpopular or unenforceable legislation raises a number of important jurisprudential issues. Ultimately the courts are the final enforcers of all law. Yet, as here, where the purposes of the law are largely frustrated, where they no longer act as a deterrent and where the law is completely unresponsive to present societal needs, should the courts refuse to enforce these laws? The bench may treat unpopular or unenforceable legislation in a number of different ways. It may resort to judicial non-action. Although there are precedents[14] this is unlikely as well as being undesirable. The courts may heap judicial scorn[15] upon the law in the hope of spurring the legislature into embarrassed action. Or, the courts may follow the strict letter of the law. If they do this and employ a policy of severe sentencing, sufficient public outcry may be raised to bring about law reform. However, this is at best a temporary expedient and the underlying cause for dissension, the unenforceable legislation, must be changed.

The medical profession is currently caught between the cross currents of the law and the demands of professional ethics. "Medicine and law appear in practice to operate in different spheres regarding abortion, each applying esoteric criteria of propriety and functioning separately from each other."[16] Partially because these conditions exist we have witnessed the introduction of abortion review committees as protective devices against the law's uncertainty and arbitrary implementation. These collective impersonal shields, together with the difficulty of distinguishing between spontaneous and induced abortion, have partially lifted the burden of possible prosecution from an individual doctor's shoulders. This results in various legal and extra-legal forces working to mitigate the harshness of the recorded law. Nevertheless, "it is one more example of social hypocrisy, legal condemnation that appeases our Puritanism and silent non-enforcement which accepts the reali-

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[12] Bishop of Woolwich, lecture delivered October 22nd., 1966 to a meeting of the Abortion Law Reform Association, entitled Abortion Beyond Law Reform.

[13] P. 83. ". . . the law is extensively disregarded, being enforced in well under one per cent of the cases which must occur, at the very minimum."

[14] See *R.* v. *Cawood* (1723), 2 Raymond 1361 and the relevant cases cited by Berry, Spirits of the Past—Coping with Old Laws (1966), 29 U. of Florida L. Rev. 24.

[15] *E.g.* in *Reg.* v. *Thomas Hall* (1845) quoted by McGregor, Divorce in England (1957), p. 17, Mr. Justice Maule's ironic and caustic comments led to a Royal Commission into English Divorce Law. The Commission's recommendations were largely enacted.

[16] P. 100.

ties".[17] "Most unenforced criminal laws survive in order to satisfy moral objections to established modes of conduct. They are unenforced because we want to continue our conduct, and unrepealed because we want to preserve our morals."[18] Because there exists this wide gap between the statutory and decisional abortion law on the one hand and the "living law"[19] on the other we can either close our eyes to the realities or advocate law reform.

It is in the chapter on law reform that Mr. Dickens demonstrates his most penetrating analysis of the law relating to abortion. He reveals[20] that England's century old abortion laws have simply failed to resolve the problems attendant upon abortion and are completly unreflective of the mores and community standards of present day society.

The legislative lag between governmental decree and societal interest is assumed to be reduced to a narrow margin in our political system. In theory this is brought about by a method of popular election of legislative bodies under which the primary obligation of the elected representatives is seen in the faithful representation of the interests of the governed.[21] In fact, not even in the most democratic societies is there automatic reproduction of the wishes of the majority in all circumstances.

Nevertheless, elected representatives are meant to distil our folkways, customs and practices and pour the essence into a legislative mould. If a gap does occur between the decreed law of the government and the "living law" of the people then the democratic process seems to expect our legislators and not our judges to reduce that gap. While the judges may be instrumental in bringing about law reform, controversial changes in statutory law should be made by our elected representatives.

The converse situation may also exist. A government may refuse to accept the prevailing folkways yet attempt to alter them by legislation. These laws will be implemented and imposed by force if necessary. This educative and persuasive role that the law must play in society is seen most vividly in the American anti-segregation laws.[22] Unfortunately, in the context of the abortion laws there has been legislative inaction. There has not been any attempt to elevate the ethical standards of the community or to remedy a retardation

[17] Schwartz, Paper delivered to Conference on Fertility and Contraception, Buffalo, New York, October 31st, 1966, entitled Legal Aspects of Therapeutic Abortion.

[18] Arnold, The Symbols of Government (1935), p. 160.

[19] The "living law" is a sociological type of legal theory founded by Eugen Ehrlich. The adherents to this theory regard law as being dependent upon popular acceptance and that each group creates its own living law which alone has creative force.

[20] P. 165 *et seq.* [21] Bodenheimer, Jurisprudence (1962), p. 222.

[22] See *e.g. Brown* v. *Board of Education* (1954), 347 U.S. 483.

of development caused by stubborn adherence to obsolete custom.[23]

For a variety of reasons, all documented by Mr. Dickens,[24] England has experienced legislative atrophy for a century in this area of the law. The Canadian situation is almost identical. While there are numerous difficulties in reforming a law as politically "hot" as abortion, the compelling reasons that the author advances for law reform greatly outweigh the factors militating against reform. Each of the various abortion reform bills that have been laid before the English Parliament is scrutinized[25] and opposition is gradually being reduced. It would appear to be only a matter of time now before reform takes place in England.

Law reform must also be implemented in Canada. This should be done not only to introduce clarity and to remove some of the ambiguity from existing legislation but also to bring the law more closely into line with communal practice. The law governing personal human relationships should not act, like the present abortion laws do, as an irrational impediment to human happiness rather they should strive to maximise personal freedom within the confines of public order.

It is impossible to legislate abortion out of existence. The attempt to do so with a law that is neither enforced nor capable of enforcement brings about nothing but disrespect for the law. Respect for law answers to what is deep rooted in human nature, but it also serves to pillow the inertia of the legislators. It is in the hands of our elected representatives that reform must eventually lie. Let us hope it is not too long coming. Mr. Dickens' book should be prescribed reading for all legislators.

ROBERT H. MILLER*

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The Zoning Game. By R. F. BABCOCK. Madison: University of Wisconsin Press. 1966. Pp. xvi, 202. ($5.75 U.S.)

Writers in the field of land planning law rarely discuss the dynamics of bias, motivation and myth which are ever present in the planning process. This book seeks to uncover some of these unarticulated determinants of the shape and direction of land use policy. The work does not purport to be a scholarly one, in the generally accepted sense of the term. Indeed, the author makes the point that his observations are based on "hunch and gut reaction",[1]

[23] *Bodenheimer, op. cit.*, footnote 21, p. 223.
[24] P. 151 *et seq.* [25] Appendix A.
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[1] P. xiii.

supported by a series of interviews. This he justifies on the questionable[2] assumption that statistical analysis "just does not happen to be meaningful in the fractured area of zoning".

Stylistically, the book is very readable, is expressed in simple language, and is understandable to professional and layman alike. For the academic, however, the large sections of anecdotal and personal references are distracting.

It is not for the reviewer to criticize the writer's frame of reference. In this case, however, one cannot avoid the feeling that with the omission from the work of the influences of municipal taxation and local government structure, and with the writer's failure to emphasize urban rather than suburban activity, the most significant legal problems facing contemporary urban decision-makers have been neglected.

Given the above reservations, the structure of the book is promising, the content disappointing. In Part I, Mr. Babcock describes the genesis of zoning in nuisance, culminating in contract zoning and planned unit development. The author then identifies the participants in the zoning game. First the layman, both in his capacity as an elected or appointed public official, and in his capacity as a developer. Next are described the roles of the professional planner, the lawyer and the judge. Part II of the book seeks to elucidate the purpose and principles of zoning, the various interests to be considered in zoning litigation, the weaknesses of the system, and finally the basis upon which decisions ought to be made.

With respect to the attitudes of local decision makers and neighbourhood pressure groups, Mr. Babcock describes how typical suburban middle class social biases are translated into land use decisions. Implicit is the suburbanite's concern with *who* will be attracted to the area rather than *what* is to be developed. The inn is desirable as the sign of smug respectability; the motel discouraged as a source of immorality. Department and specialty stores are welcomed as dependable merchants; discount stores are excluded as fly-by-night purveyors of second-rate merchandise. Recent sociological studies[3] indicate however, that the classical portrait of suburbs as significantly homogenous areas with uniformly accepted sets of values grossly oversimplifies and obscures the vital differences between suburbs. The rural village overrun by

[2] An application of the technique of content analysis to zoning tribunal decisions would permit meaningful statistical inferences to be made about the zoning process. An analysis of the various economic, social, political, and legal assertions made by the participants before the tribunal, and the degree to which their position is upheld would probably be a better basis for prediction than "hunch and gut reaction".

[3] W. M. Dobriner, Class in Suburbia, Spectrum (1963), p. 12.

the urban sprawl of the adjacent metropolis manifests significantly different traits from the new suburbia set up in the wheat fields.[4] Both in turn are very different from the industrial suburb. In his selection of examples, the author confuses suburban patterns with middle class values, an identity which has seriously been called into question.[5]

Of greater interest, however, is the chapter dealing with the role of the planner. Here Mr. Babcock's insights are of considerable assistance to the lawyer plagued by the inconsistencies of professional recommendations. The author shows that the conflicting roles assigned to the planner, and the uncertainty of the correct limits of his professional responsibility contribute significantly to the planner's professional schizophrenia. To dismiss the planner as unimportant would, however, constitute a serious error. There are indications that, in spite of his uncertain status among the professions, he wields considerably more influence as a public official than is commonly attributed to him.[6]

The author views the appropriate role of the lawyer as one primarily concerned with procedural due process, with special regard to the limiting of local bodies in their use of financial and other exactions as the price of expediting their decisions. In addition, Mr. Babcock complains that the bar has failed to challenge the validity of many unconstitutional policies contained in zoning by-laws due to the immense costs involved in preparing background material for trial. While these criticisms are partly justified, Mr. Babcock gives undue weight to them. He ignores the negotiation function which the lawyer fulfills. More often, it is not the constitutional validity of the by-law which is in question, but rather its application to a particular parcel of land. Without undermining the validity of the legislation as a whole, a certain amount of give and take may be necessary to accommodate affected interests. In emphasizing the lack of due process the author has forgotten that the municipal council is performing a legislative rather than a judicial function.

To repair the deficiencies in the present zoning process Mr. Babcock makes the following recommendations:

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[4] W. M. Dobriner, The Natural History of a Reluctant Suburb (1959-60), 49 Yale Rev. 399.

[5] B. Lazerwitz, Metropolitan Residential Belts (1960), 25 Am. Soc. Rev. 245.

[6] An empirical pilot study of the City of London (Ont.) Planning Board undertaken by students at University of Western Ontario Law School indicates that out of 76 planning decisions, the professional staff have succeeded in having their views accepted by the Board in over 75% of the cases. The planning staff itself conservatively estimates only 60% success over the years.

(a) Legislation requiring administrative procedure at the local level;
(b) The need for the state to articulate policy criteria against which the validity of the zoning by-law can be measured; and
(c) The creation of a state wide administrative tribunal.

Of the three, (b) and (c) merit some comment. The suggestion that the State articulate criteria is advanced on the author's premise that the history of judicial supervision of zoning by-laws has demonstrated that the courts have failed to consider interests beyond those of the land owner and the municipality; regional interests have been neglected.[7] Accordingly the author sets out local and regional considerations which the municipality should take into account in legislating. The difficulty in using such general external criteria as transportation, water, and development density to test particular ordinances, as suggested by Mr. Babcock, is that they are more appropriate in and consistent with, an overall regional master plan. The reviewer surmises that the author has this in mind, but he nowhere states it. In the absence of such a plan, the tail would appear to be wagging the dog.

The proposal for a State-wide administrative tribunal has already been advanced in American planning literature,[8] and has been independently implemented in a number of Canadian provinces.[9] The author suggests that the tribunal be charged with the responsibility of enforcing the local procedural standards, applying the State's policy criteria, and be given jurisdiction to award compensation for loss of potential development rights. With respect to the award of compensation, the basis for this recommendation emerges from the "all or nothing" decisions naturally inherent in the judicial adversary process. A tribunal faced with conflicting land use policies is in a better position than a court for formulating a more just and flexible solution. The author suggests, by way of example, that a tribunal could give effect to a municipality's desire to limit the land for residential use, while compensating the owner for his loss of potential industrial use, similar to the British proposal. Unfortunately, this example serves more to confuse than to clarify. The issue of compensation for loss of development

[7] See *National Land and Investment Co.* v. *Kohn* (1966), 215 A. 2d 597, at p. 612 where Roberts J. raises the issue of the municipality's responsibility to persons who do not yet live in the township but who are part of the population expansion of the suburbs. See also note Regional Impact of Zoning (1965-66), 114 U. Pa. L. Rev. 1251.

[8] J. W. Reps. Pomeroy Memorial Lecture: Requiem for Zoning, [1964] Planning 56, at p. 61.

[9] Alberta: S. A., 1963, c. 43; Manitoba: R.S.M., 1954, c. 267; Ontario: R.S.O., 1960, c. 296; Prince Edward Island: R.S. P.E.I., c. 163. The provinces of Saskatchewan, Nova Scotia and Newfoundland require ministerial approval. Provincial approval is not required as yet in British Columbia, Quebec and New Brunswick.

rights is peripheral to, and not dependent upon, the problem of resolving conflicting land use policies. The central question is the desirability of creating a supervisory institution with jurisdiction to order amendments in the by-law such as to minimize incompatabilities in land use and to promote or even initiate appropriate compromises. Such compromise would often avoid the claim for compensation. However, the mere substitution of a tribunal for a court is unlikely to produce any real solution unless the proceedings in the former are significantly different from those in the latter. On the assumption that the tribunal has the necessary expertise, would not the adoption of the civil law inquisitorial method for eliciting evidence do much to mitigate the hardships inherent in the present system?

While the book is informative on a factual level and entertaining, for the Canadian lawyer it makes little contribution to the planning literature, even as a zoning primer. As is true of a large segment of American law, the constitutional overtones colour not only the type of problem but also the solution. While a number of Canadian provinces have adopted the American structure of planning administration, reflecting the dominance of home rule and the constraints imposed by the due process clauses of the American constitution, there seems to be little reason for us to adopt solutions which are designed to mitigate the constraints of the American system.

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Interim Report of the Select Committee of the Ontario Legislature on Company Law. Toronto: Queen's Printer. 1967. Pp. xi, 116, 28. (Free)

In 1965 the Ontario Legislature appointed a Select Committee on Company Law[1] with such gargantuan terms of reference that its task, even for ten men aided by a battery of research workers, could be likened to that of Hercules in cleaning the Augean stables. The Committee solved their problem not by diverting any major river of light on their task but by producing an *Interim Report* which did not cover, *inter alia,* "mergers or amalgamations, the rights of dissenting shareholders in the event of various fundamental corporate changes, the purpose, function and scope of the annual return, the field of corporation finance and the possible

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[1] Hereinafter referred to as either the Committee or the Report.

strengthening of the protection of the creditor".[2] The *Report*, however, indicates that with one or two exceptions the initial cleansing job of those areas covered was less than satisfactory.

Formation and powers of companies: Most of the Committee's recommendations on these topics are of a self-evident nature. With respect to incorporation procedure it recommended that incorporation should be made a matter of right provided, of course, there has been "compliance with the relevant provisions of the Act",[3] and that the statutory minimum requirements for the number of directors and shareholders be reduced to one. However, where a company has fifteen or more shareholders it should have at least three directors. It is difficult to appreciate the reason for this latter recommendation. There does not appear to be any valid objection why the question of the number of directors a company should possess cannot safely be left to the decision of the shareholders. The Committee did not consider it desirable, rightly it is submitted, to revive the inert corpse of the *ultra vires* doctrine but recommended that it be given an expeditious burial.[4] The recommendation that companies be empowered to purchase their own shares should, if adopted, prove beneficial. Provided adequate safeguards are established this reform should solve many of the problems pertaining to the transfer of interests in private companies and should also facilitate the establishment of profit sharing schemes and pension plans.

Pre-incorporation contracts: The muddled position with respect to pre-incorporation contracts has long been in need of clarification.[5] To achieve this the Committee recommended that a company on formation should be capable of adopting pre-incorporation contracts and, until it does so, the promoter will remain personally liable. Two criticisms can be made of these proposals. First, no explicit provision is made for the payment of incorporation expenses. The Committee does recommend that where the company fails to adopt the pre-incorporation contract it should be required "to restore to the promoters, in specie or otherwise, any benefit acquired by the company".[6] However, this does not go far enough. It seems but fair and equitable that a company should be made to pay for incorporation expenses incurred by either a promoter or a third party. The drafting of such a provision could easily be accomplished without running the risk that a company will be burd-

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[2] P. X. [3] P. 4.

[4] This has already been done by the English Court of Appeal in *Bell Houses Ltd. v. City Wall Properties Ltd.*, [1966] 2 All E.R. 674 (C.A.).

[5] See Note, Personal Liability of An Agent for an Unformed Company —*Kelner v. Baxter Limited* (1967), 30 Mod. L. Rev. 328.

[6] P. 12.

ened at its inception with improvident liabilities.[7] The second point is that the Committee in making these recommendations appeared to be directing its attention to the situation where a third party contracts with a promoter under the mistaken belief that the company is formed or where he appreciates that it is in the process of formation. In these circumstances he cannot be heard to complain if the promoter is relieved from personal liability on adoption of the contract by the company. However, it may be that the outsider actually considered that he was contracting with the promoter personally and was unaware of the latter's intention of forming a company. In this situation the promoter should not be allowed to escape personal liability by having the company adopt the contract and the statute would have to be carefully worded to prevent this from eventuating.[8]

The Committee goes on to recommend that where a company declines to adopt a pre-incorporation contract "a contracting party may make an application to a judge of the High Court of Ontario . . . for an order that the promoters and the company will be jointly and severally liable under a pre-incorporation contract if, under the circumstances, it is just and equitable in the interests of the contracting party for such liability to be imposed".[9] While this recommendation lacks "that touch of Puritan courage of conviction"[10] it is perhaps the only way in which provision can be made for the situation where a promoter, who is also a majority shareholder, votes his shares against adoption of the pre-incorporation contract.

Classification of companies: The Committee recommended that the distinction between private and public companies be discontinued. In view of the peripheral nature of the special exemptions accorded to private companies by the Ontario Corporations Act no strong argument can be made for their continuance. Functionally, however, there is a distinction between the large public company and the small private company and obviously these types of corporation have differing needs. It would have proven useful had the Committee investigated the adequacy of norms developed with respect to the public company in regulating the affairs of the private company. In the United States there has been a steady stream of learned articles on this topic[11] and both the legislatures[12] and the

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[7] See Kessler, Promoters' Contracts: A Statutory Solution (1961), 15 Rut. L. Rev. 566.

[8] *Ibid.*, at p. 573. [9] P. 12.

[10] Llewellyn, The Bramble Bush (1960), p. 17.

[11] The most exhaustive treatment to date has been O'Neal, Close Corporations (1958, supp. 1966).

[12] See note, Florida Legislature Enacts Close Corporation Law (1964), 77 Harv. L. Rev. 1551.

courts[13] have responded to the special needs of the private company. Such a case as *Motherwell* v. *Schoof*[14] indicates that these problems are not alien to Canadian soil. In addition to the matters unsatisfactorily dealt with in *Motherwell* v. *Schoof*, namely the enforceability of, (1) an arbitration agreement to cover management disputes, and (2) agreements between directors on the appointment of corporate management, other problems remain, (3) the respective jurisdictional competence of shareholders and directors in running the corporate business and the possibility of the former directly selecting corporate management, (4) a guaranteed income for shareholders and the whole problem of "squeeze outs".

Title to shares: With respect to the transfer of title to shares the *Report* recommends the adoption of article 8 of the Uniform Commercial Code the purpose of which is to provide "a negotiable instruments law dealing with securities".[15] As the Committee noted, such a reform would bring the law into line with practice in the securities industry which considers it essential for the free and easy transfer of securities that issuer defenses and adverse claims be curtailed. Article 8 has, on the whole, received a favourable press from the commentators in the United States.[16] An exception has been the section dealing with the problem of the overissue of securities.[17] Where for some reason there is an overissue (this would occur, for example, where the issuer negligently registers a transfer and is subsequently required to issue new share certificates to the true owner) the issuer can be compelled to purchase and deliver equivalent securities if such should be "reasonably available for purchase". Where no shares are available the issuer is liable in damages. For this rather unwieldy and unsatisfactory remedy it is recommended that the simpler and fairer remedy, that the overissued shares be validated, should be substituted.[18]

Directors duties: The Committee considered that it would be both difficult and unwise to attempt to codify the law relating to directors' duties. It recommended, however, that the standard of care imposed on directors be upgraded so that they be required to "exercise that degree of care, diligence and skill which a reasonably prudent director would exercise in comparable circumstances".[19] This phrasing still leaves open the question of whether or not positive duties of management should be imposed on directors.

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[13] See *e.g.*, *Galler* v. *Galler* (1965), 203 N.E. 577.
[14] [1949] 4 D.L.R. 812 (Alta S.C.). [15] Comment, U.C.C. § 8—101.
[16] Israel, Investment Securities as Negotiable Paper—Article 8 of the Uniform Commercial Code (1958), 13 Bus. L. Rev. 676; Folk, Article Eight: A Premise and Three Problems (1967), 65 Mich. L. Rev. 1379.
[17] U.C.C., § 8—104.
[18] Folk, *op. cit.*, footnote 16, at pp. 1413—1416.
[19] P. 53.

Nor did the Committee direct its attention on the question of "for whom are corporate managers trustees".[20] While this question has hitherto only agitated the writers of articles for law reviews there are signs that it is now causing problems in the more pragmatic world of corporate practice.[21] Directors themselves give at least lip-service to corporate social responsibilities[22] and even some socialist theorists are willing to concede that corporate management is motivated by considerations other than that of profit maximisation.[23] While it is doubtful if management accountability can be guaranteed by giving either consumers, employees, or the government representation on the board of directors the recent case of *Parke* v. *Dailey News Ltd.*[24], which in all probability would be followed by the courts in Ontario,[25] indicates that at least the interests of employees must be given some recognition by company law. The failure of the *Report* to shed any light on this problem is unfortunate.

One of the major problems with respect to directors' duties is guaranteeing their enforcement. To facilitate this the *Report* proposes such alterations of the rule in *Foss* v. *Harbottle*[26] as would enable a shareholder to enforce "any rights, duties or obligations owed to the company which could be enforced by the company itself".[27] A shareholder should be empowered to bring such an action where (i) he establishes that he was a shareholder of record at the time the wrong took place and (ii) obtains, on an *ex parte* application,

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[20] Dodd, For Whom are Corporate Managers Trustees? (1931-32), 45 Harv. L. Rev. 1145.

[21] See Gower, Corporate Control: The Battle for the Berkeley (1955), 68 Harv. L. Rev. 1176; Pennington, Terminal Compensation for Employees of Companies in Liquidation (1962), 25 Mod. L. Rev. 715.

[22] See, Have Corporations a Higher Duty Than Profits, Fortune, Aug. 1960.

[23] C.A.R. Crosland, The Future of Socialism (1966), pp. 14-19.

[24] [1962] Ch. 927.

[25] It is submitted that s. 22(g) of The Ontario Corporations Act, R.S.O., 1960, c. 71, as am., would not apply to the situation in *Parke* v. *Dailey News Ltd.* which was concerned with the rights of employees to participate in the distribution of corporate assets on dissolution. Also, of course, s. 22(g) would have no application to the situation where the selection of a particular business policy was motivated by employee interest as in *Hogg* v. *Cramphorn Ltd.*, [1966] 3 All E.R. 420.

[26] (1843), 2 Hare 461, E.R. 189.

[27] P. 63. It is at this point in a section entitled "Enforcement of Duties and Responsibilities of Directors" that the Report discusses the desirability of introducing a section equivalent to s. 210 of the English Companies Act, 1948, 11 & 12 Geo. 6, c. 29. It is difficult to appreciate what relevance s. 210 has to the problem of enforcement of directors' duties on behalf of the company. In fact this whole section of the report displays a certain confusion between wrongs done to the company and those perpetrated on minority shareholders. The section also contains some dubious statements on English law. Compare para. 7, 3, 5, at p. 57, with Gower, Modern Company Law (2nd ed., 1957), p. 123.

an order to do so from a judge of the High Court. It is submitted that the first requirement is an unnecessary limitation. Situations are foreseeable where an individual, who did not possess the status of shareholder at the time the wrong was perpetrated, would still be indirectly injured. Such would happen where a person purchases shares in the open market relying on a corporation's external symptoms of economic good health while in reality it has been reduced to the brink of insolvency by directorial mismanagement. If the Committee inserted the first provision to curtail the incidence of strike suits then surely it would be better to make it a factor for consideration, as did Professor Gower,[28] by the judge when deciding whether or not to grant an order permitting the plaintiff to initiate a suit on behalf of the company. It would also improve the present position if the court were given discretionary power to order payment, if recovery be granted, to some of the members or prior members of the company.[29]

The Committee also recommended that section 70 of the present Act be amended to indicate that only a director acting *bona fide* in the best interests of the company is saved from accountability. In its proposed re-draft of section 70, the Committee deleted section 70 (3) which permits a director to furnish general notice of his interest in other business enterprises as satisfaction of his obligation to disclose. This deletion is to be favored as no great hardship is imposed on directors by the requirement of disclosure each time a transaction, in which they are involved, comes up for consideration by the board. Because there is, at present, no time limit placed on the effectiveness of a general declaration of interest such declaration may have little effect if the transaction takes place a long time after it has been made.

The Committee proposed that a director be exempted from this duty to disclose "unless the interest and the contract or transaction are *both* material".[30] This limitation in its proposed form could prove very difficult to apply. To determine a director's obligation to disclose on the materiality of either the transaction or his interest requires the difficult assessment to be made of at what point a conflict of interest reaches such proportion as to tempt the average director. While line drawing is not an art uncommon to lawyers it is submitted that in this situation it is not only extremely difficult but wholly unnecessary. It would be more desirable if directors were made to disclose their interests no matter how infinitesimal. If, because of a *bona fide* oversight, a director should fail to do so he

[28] Final Report of the Commission of Enquiry into the Working and Administration of the Present Company Law of Ghana (1961), p. 151. (Hereinafter referred to as the Gower Report.)

[29] *Ibid.*, p. 151. [30] P. 66.

can always be exonerated by a vote of approval at a general meeting of the shareholders.

Shareholder control and enforcement of shareholders' rights: The *Report* contains the following statement with respect to the enforcement of shareholders rights:[31]

> Earlier in this Report reference has been made to individual shareholder's rights and some examples of such rights were enumerated. This class of rights is to be distinguished from what Palmer would call corporate shareholder rights, that is, rights which the shareholder has agreed to submit to the lawfully expressed will of the majority. In respect of those rights the rule of majority, to which we have earlier referred, applies. The individual shareholder faces no unusual impediments in cases where he wishes to enforce his individual shareholder's rights; here there are no substantive or procedural rules comparable to the Rule in *Foss* v. *Harbottle* where "corporate shareholders rights" are involved.

This is an over simplification. The problem of what injuries are ratifiable by the majority and what are not is one of the most contorted problems in company law. Professor Gower in his report considered it "one of the most intractable problems in the whole field of Company Law to distinguish clearly between those irregularities which can be put right by an ordinary resolution and those which cannot".[32] As the Committee recommended that a section somewhat equivalent to section 20 of the English Act be introduced[33] it would be simple to give an aggrieved shareholder an automatic right to sue where a breach of the corporate constitution has taken place. The majority could still carry out its wishes provided there is compliance with the company's constitution.[34]

The Committee rejected the introduction of a section equivalent to section 210 of the English Companies Act on the grounds that this section constituted a complete "dereliction of the established principle of judicial non-interference in the management of business companies".[35] This lacks persuasiveness. The doctrine of judicial non-intervention is premised on a hyper sensitivity of the bench to involvement in matters which require the exercise of business judgment. However, where such intervention is authorised by legislation and general guide lines for its exercise are laid down, then objection on the basis of inexpertise disappears. If what is meant by judicial non-intervention is that the state via the courts should not interfere in the internal affairs of companies then this reflects a much too doctrinaire approach to the problem of law reform. Surely the Committee should have approached its de-

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[31] P. 69, footnotes omitted.
[32] See, Gower, *op. cit.*, footnote 28, p. 159.
[33] P. 69. [34] See, Gower, *op. cit.*, footnote 28, p. 159. [35] P. 60.

liberations in a more pragmatic and reasoned manner? It is also submitted that the laissez-faire doctrine adopted is completely inadequate to provide a philosophical underpinning for company law in the second half of the twentieth century.[36]

The recommendation of the Committee that a remedy fashioned on section 210 should not be provided has one quite ironical result. Section 210, as presently drafted, only permits a court to intervene to relieve oppression where "otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up". At present an Ontario court can make an order to wind up a company where "it is just and equitable to do so".[37] From this one must infer that the Committee somehow approves of judicial intervention when it terminates the life of a company but not when it results in the company's continued existence. Although, the actual wording of section 210 has been criticised[38] it has improved the lot of the minority shareholder. It is unfortunate that the Committee did not approach an evaluation of the section on this basis instead of dismissing it out of hand because it did not jell with its *a priori* views on the legitimate extent of state intervention in the internal affairs of companies.

The Committee also concluded that it would be undesirable to introduce a provision making cumulative voting mandatory as it was difficult to evaluate whether or not it would be "a necessary or desirable feature of Ontario law" until the Committee's other recommendations are implemented and put into practice. It is doubtful if any argument on the merits of cumulative voting will be settled solely by an appeal to experience. Basically such argument boils itself down to whether or not corporate democracy is a good thing. The Committee did not extensively canvass the pros and cons of shareholder democracy but made a number of recommendations to strengthen the hand of the shareholder. It recommended that section 66 of the present Act be amended to enable shareholders by a simple majority to vote directors from office before the expiration of their term irrespective of the fact that the letters patent or by-laws do not contain such a provision. In addition, the Corporation Act should permit a general meeting of shareholders to be called by "shareholders holding not less than 1/20 of the issued voting shares of the company or by any shareholder on application to a judge of the High Court, . . . on notice

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[36] See *e.g.*, Report of the A-G's Committee on Securities Legislation in Ontario (1965).

[37] Ontario Corporations Act, *supra*, footnote 25, s. 256(d).

[38] Report of Jenkins Committee, Cmmd 1749 (1962), paras. 190-212.

to the company, who may make an order requiring the company to call a general meeting of the shareholders".[39]

One of the impediments facing a shareholder who suspects irregularities in the management of the company is the difficulty of obtaining reliable information even with access to the company's books. To facilitate a shareholder in overcoming this hurdle the Committee recommended that section 321 of the present Act be amended to empower a single shareholder to make an application to the High Court for an order appointing an inspector to investigate the affairs of the company. A similar right should be accorded the Provincial Secretary. The Committee refused to adopt sections 164 and 165 of the English Act as they manifested a philosophy of judicial interventionism. There is, however, very little difference between the Committee's ultimate recommendations and the above sections except that their recommendations do not contain any equivalent to section 165(b) which enables a creditor to prompt the Board of Trade to appoint an inspector. This is an unfortunate omission as creditor interests in the internal affairs of a company are often as legitimate as those of a shareholder. Hopefully, however, as the Committee pointed out, the power given to the Provincial Secretary will "prove to be a useful means of guarding the public interest in special cases".[40]

From these recommendations it would appear that the Committee did consider corporate democracy a good thing. Conceding that corporate democracy is to be encouraged and the Corporations Act is structured to enable shareholders to actively and effectively participate in the corporate affairs, there are certain practical limitations which may not make this feasible. The lack of expertise of the average shareholder, his lethargy, and the feeling of the "typical shareholder, at least in public-held companies" that he is more an "investor rather than a proprietor"[41] all militate against effective corporate democracy. The position of shareholders would be much improved if attention were concentrated not so much on their democratic rights, but on creating conditions to enable them to extricate themselves from the company without suffering severe economic loss. In other words "the most important individual right accruing to the shareholder of an Ontario company" is *not* "his right to elect the board of directors"[42] but the liquidity of his position. If this emphasis be given to the direction of future reform then attention would be focused on corporate practices which depress share values and which either hinder a shareholder from sell-

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[39] P. 78. [40] P. 81. [41] P. 73.

[42] P. 75. The Committee considered that this was perhaps a shareholder's most important single right.

ing his shares or compel him to sell at a loss. In other words attention would be directed on what Americans colorfully call "squeeze out" techniques. More importantly, however, it would concentrate reform on the problems of determining what controls, other than those of the shareholders, should be placed on management. The Committee, by structuring its recommendations around the concept of corporate democracy, may have left directors in unfettered control and virtually accountable to no one because of the limitations of this device for guaranteeing accountability.

Meetings of directors and shareholders: The Committee recommended the adoption of section 39A of the American Model Business Corporation Act to enable "directors to act by consent in writing without the necessity of holding a meeting".[43] A similar procedure is recommended with respect to shareholders' meetings. In the recent case of *Walton* v. *Bank of Nova Scotia*[44] the Supreme Court of Canada considered that "a corporation, when a matter is *intra vires* of a corporation, cannot be heard to deny a transaction to which all their shareholders have given their assent even when such assent is given in an informal manner or by conduct as distinguished from a formal resolution at a duly convened meeting". Any alteration in the rules relating to the validity of shareholders' meetings would have to take account of this decision and it is submitted that such alteration should recognize the validity of a shareholders' meeting constituted in the informal manner as in *Walton*. It would be possible to draft a provision protecting outsiders where they rely on the informal conduct of shareholders and yet deprive that conduct of any effect on the legal relations among shareholders.

Auditors and publicity of accounts: The Committee made a number of recommendations to enable auditors to report more adequately to the shareholders on corporate financial statements. To guarantee that the close liaison which often develops between the auditor and the company's management does not infringe upon the former's independence, the Committee recommended that the auditor should have the right and be compellable to appear before a directors' audit committee. This audit committee is only required where the company's shares "have been distributed in the course of primary distribution to the public" and should be "composed of not less than three directors, of whom a majority shall not be officers of the company or any affiliate of the company".[45] Also, if the management does not intend to re-appoint the incumbent auditor it must so inform him and provide him with the opportunity to make written representations to the company which should then

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[43] P. 83. [44] (1966), 52 D.L.R. (2d) 506, at p. 519. [45] P. 92.

be forwarded to the shareholders. The Committee made a number of recommendations which should go a long way in solving the problem of the degree to which the auditor of a parent company can rely on financial statements prepared by the auditor of a subsidiary.[46] The Committee recommended that the auditor of the parent company be responsible for "all aspects of the financial statements of the parent company including those relating to the subsidiaries".[47] So that the auditor of the parent company can execute these responsibilities he should be given the right to investigate the books and accounts of the subsidiary company.

Earlier it was stated that, because of the natural impediments to making shareholders an efficient organ to control the directors, some alternative mechanism for guaranteeing management accountability would have to be devised. It may be that the auditor could fulfill this role by means of a "management audit".[48] As the Committee rightly points out the auditor is not "required or encouraged to comment upon the efficiency or inefficiency of management"[49] but to obligate him to fulfill that role would not require any major transition and thus has the advantage of not departing too radically from the status quo.

While it is doubtful that the creation of a directors' audit committee, as recommended by the *Report*, will greatly enhance the independence of auditors, what is of significance is the stipulation that the majority of the audit committee be composed of "outsiders". This recommendation impliedly recognizes the existence of professional management, a group which hitherto has not been explicitly recognized by company law. It would appear that in large public companies the necessity for informed and expert decision-making has resulted in professional management being the wielder of considerable power and it is "wholly consonant with experience to consider management as a third organ of the company, acting together with the board and general meeting but having independent and separate spheres of authority".[50] Perhaps the Committee's recommendation on the use of outside directors is a harbinger of the specific recognition of management as an organ of the company separate and independent of directors and shareholders.

It is unfortunate that the Committee did not recommend that all companies be compelled to file their accounts in some office of

[46] See McPherson, Reference to Work Done by Other Auditors (1958), 72 Can. Char. Acc. 554; The Canadian Institute of Chartered Accountants have issued guide lines on this matter. See Report, at p. 97.

[47] P. 98.

[48] See, Evolving Responsibilities of the Corporate Director (1966, U. W. O. School of Business Administration), p. 108.

[49] P. 89.

[50] Willett, Conflict Between Modern Managerial Practice and Company Law (1967), 5 U. of Melb. L. Rev. 481, at p. 486.

public record. This provides useful information to prospective creditors[51] and investors. The fears of owners of small incorporated businesses of the competitive disadvantage of having to make public their accounts appear to be "much exaggerated"[52] and disclosure of accounts does not seem to be an exorbitant price to pay for the privilege of corporate status.

The only other major recommendation of the Committee is that an act equivalent to the American Trust Indenture Act 1939 should be introduced. If introduced this should go a long way in guaranteeing that the indenture trustee will impartially and conscientiously execute his responsibilities.

The Committee recommended the creation of a Companies Court to deal exclusively with matters coming under "The Securities Act 1966 and The Corporations Act as it is to be amended".[53] While this no doubt will improve the quality of the disposition of problems arising under these Acts it is not by itself sufficient to guarantee that company law is kept up to date. The judges are obviously limited by the legal frame-work in which they operate. To a certain extent the *ad hoc* committee can supplement this deficiency but it lacks the necessary element of continuity. Perhaps the most desirable scheme would be to delegate to some governmental body responsibility to maintain a continued surveillance of the field and to make periodic reports and recommendations to the legislature. In this way the necessary spade work would be done for the legislators instead of the present system which burdens them with this task.

D. D. PRENTICE*

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Principles of Public International Law. By IAN BROWNLIE. Oxford: Clarendon Press. 1966. Pp. 646. (63/-)

As the author points out in his Preface, this is not a textbook or manual which says something about all aspects of international law. Its concern is rather to emphasize some of the technical aspects of the discipline and to discuss major issues of legal principle.

It is not an easy book to read nor is it easy to review. A great deal of scholarship has obviously gone into it. It also has the great merit that it contains long sections dealing with topical aspects of international law, like human rights and self-determination to which he devotes a chapter of forty-one pages.

[51] Jenkins, *op. cit.*, footnote 38, para. 60.
[52] Gower, *op. cit.*, footnote 28, p. 193. [53] P. 116.
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The author accepts, possibly somewhat uncritically, the proposition that there exists in international law a body of fundamental principles (identified by him and others as the *jus cogens*) which qualify the effect of more ordinary rules. One has only to think of the rule, *pacta sunt servanda* (not mentioned by him, however, in his discussion of the theory) to realize that the proposition may be correct although it might be argued, as some members of the Austrian school have, that this is the fundamental norm of all international law and not simply part of a body of fundamental rules, the so-called *jus cogens*. In any event, the difficulties begin to show themselves as soon as any attempt is made to identify the content of the *jus cogens*. Professor Brownlie recognizes these difficulties. "Such classifications", he tells us "have not had much success".[1] "More authority exists for the category of *jus cogens* than exists for its particular content".[2] And then he goes on to say that "certain portions of *jus cogens* are the subject of general agreement, including the rules relating to the use of force by States, self-determination and genocide".[3] The difficulties are now compounded; for the question immediately arises whether all of these rules are even part of international law, let alone part of the *jus cogens*. That the rules relating to the use of force and genocide are part of international law is clear: the United Nations Charter[4] and the Convention on the Prevention and Punishment of the Crime of Genocide[5] are explicit in the matter. But how about self-determination?

Professor Brownlie has no doubts on the subject. "The present position," he tells, "is that self-determination is a legal principle".[6] But he does not tell us how this has come about. By treaty? As part of the customary law of nations? The right to self-determination has been written into article 1 of both the Covenants on Human Rights which were adopted by the General Assembly in 1966; but both of these instruments have yet to be ratified by a sufficient number of States to bring them into force; and in both cases there exists the possibility of reservations. Professor Brownlie probably thinks that the right to self-determination is part of the customary law. For he tells us[7] that the Declaration on the Granting of Independence to Colonial Countries and Peoples is an example of a "law-making" resolution of the General Assembly. This Declaration expressly says, in article 2, that "all peoples have the right to self-determination".[8] It is however a fact that when this Declaration was voted in 1960, the most interested States members of the United Nations, namely, the administering powers and their sup-

[1] P. 417. [2] P. 418. [3] *Ibid.* [4] Art. 2, para. 4.
[5] 1948, 1949 Can. T.S. No. 27. [6] P. 484. [7] P. 11.
[8] Declaration 1514 (XV) of December 14th, 1960.

porters, abstained. In these circumstances, the "evidence of the opinions of governments" in the matter would seem to be inconclusive, to say the least. It is interesting to note in this context that Professor Brownlie does not include the Universal Declaration of Human Rights in his list of "law-making" resolutions. But the arguments in favour of its inclusion would seem to be at least as weighty. The only States members which abstained when this Declaration was voted on December 10th, 1948, were the communist States of Eastern Europe, Saudi Arabia and South Africa. Moreover, all of these countries, with the exception of South Africa, have subsequently taken positions in the United Nations and elsewhere which imply an acceptance of the Declaration. To prove this, reference need only be made to the Declaration on the Granting of Independence to Colonial Countries itself, article 7 of which says that "all States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration . . .".[9] Similar language is used in article 11 of the Declaration on the Elimination of All Forms of Racial Discrimination, which was unanimously adopted by the General Assembly in 1963.[10]

JOHN HUMPHREY*

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Legal Aspects of International Lending and Economic Development Financing. By GEORGES R. DELAUME. Dobbs Ferry, N.Y., Oceana Publications. 1967. Pp. 371. ($15.00 U.S.)

The title of this book, while not wrong, is not accurate. Perhaps a better title would have been "Comparative Legal Aspects of International Loan and Economic Development Contracts". Dr. Delaume examines international loan contracts between private persons, private and international persons, and international persons. What authority is needed before lenders and borrowers can undertake international loan transactions? What provisions are put into the contracts by lenders in order to safeguard their rights—provisions dealing with the administration of the loan, the legal system applicable to the loan, the jurisdiction in which the loan is justiciable and so on? These are the sorts of questions with which the author deals in the book. As Lester Nurick, Deputy General Counsel of the International Bank for Reconstruction and Development, puts it in his Preface: "The result is a work which should prove to be a manual for both the lawyer and the inter-

[9] *Ibid.* [10] See (1964), 58 Am. J. of Int. L. 1081.

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national banker."[1] The student of international transactions will find this an extremely valuable reference.

Dr. Delaume has studied a great number of loan contracts, including bond issues, and explains the legal and practical reason for the provisions in these contracts. The benefits of his research are passed on, not only in the very lucid text, but also in the copious footnote references to the actual contracts. These references make the book a later researcher's delight.

The title of the book points out the growing importance of economic development financing in the field of international loan transactions. More and more the lender is becoming a person or government of an already developed nation while the borrower is an underdeveloped State. In fact, some people now prefer to use the terms "capital-exporting" and "capital-importing" States instead of developed and underdeveloped States for fear that the latter terminology will imply some inferiority on the part of the new State. These State borrowers, new to the international community are not often possessed of the same sense of responsibility that is characterized by the older members of the community, with the consequence that contractual obligations are not treated as highly as the lenders would like them to be. In his Introduction, Dr. Delaume accepts as a major premise "The assumption that all international loan transactions are legally binding on the parties".[2] This permits him to leave out of his book a consideration of measures necessary when the contract is deliberately breached by a borrowing State and there is no practical remedy though a contractual one is possible. In other words, the protection of the lender's interest through extra-contractual measures is not within the compass of this book. This is particularly noticeable at one point where Dr. Delaume considers the contractual provisions included to prevent the problems ensuing when the borrower ceases to exist.

> Loans made to private entities frequently provide that the borrower, usually a foreign corporation, shall maintain its corporate existence and take, or cause to be taken, all such action as may from time to time be necessary to maintain, preserve or renew such corporate existence in accordance with the applicable laws.[3]

A suit in breach of contract after the borrower has gone out of existence, perhaps because of his government's interference, would be difficult to maintain indeed! It is mentioned that:[4]

> Sometimes, as in the case of loans to private companies operating under a governmental license or concession or to autonomous public agencies engaged in public works, transportation or industrial production, attempts are made to obtain additional assurances from the grantor of the license

[1] P. xx. [2] P. xxi. [3] Pp. 45-46. [4] Pp. 46-47.

> or concession or from the governmental or other authorities having jurisdiction over the borrower that they will not interfere with its affairs.

He goes on:

> As a rule, none of the above covenants are (*sic*) found in agreements relating to loans made to foreign governments or international organizations.[5]

Of course, the real point is that no contractual provision will really help when a borrowing State decides that the contract should be breached. In such a case, only extra-contractual measures will help. These are slowly being developed by States through a growth of international economic law. There is, for instance, the recent effort of the International Bank for Reconstruction and Development to establish a system of international conciliation and arbitration. The initial stage is the Convention on the Settlement of Investment Disputes between States and Nationals of other States[6] which established the International Centre for the Settlement of Investment Disputes. As of June 30th, 1967, fifty-two States were parties to the convention.

The prospective reader should be aware that, in large measure, the international law framework which is growing up around international loan transactions is not dealt with in this book. The problems arising out of sovereign immunity are mentioned briefly.[7] Chapter VIII on "The Political Risk" deals with the rules concerning contractual obligations when there is a change in the form of government or a change in the sovereign control of a debtor State and the effect of war on contractual obligations.

The person interested in the conflict of laws will find the chapters on "The Quest for a System of Law" and "The Quest for a Forum" extremely valuable. Dr. Delaume's treatment of the applicable law and jurisdiction in international loan situations is in much greater depth than one could find in any treatise on private international law. And, of course, this is a comparative study which discusses the rules obtaining in many countries.

The index is not extensive. Anyone wishing to know the French law on some topic covered in the book would not find a reference in the index. He will have to read the whole section in the text and consult the footnotes. But the practices of certain international persons are briefly indexed. For instance, one is referred to the places where appear the borrowing procedures, capital structure and immunities of the Inter-American Development Bank and the International Bank for Reconstruction and Development.

Dr. Delaume writes with exceptional clarity and simplicity. This is all the more helpful when one considers the thorny prob-

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[5] P. 48. [6] ICSID/2. [7] Pp. 204-208.

lems and contract provisions he discusses. With a modicum of thought, even the rankest of novices to the world of international finance could understand the words of Dr. Delaume. He has made simple the very complex.

J. W. SAMUELS*

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Répertoire Français de Droit International Public. Vol. 2. By A. KISS. Paris: Centre National de la Recherche Scientifique. 1966. Pp. xii, 674. (Frs. 92)

Annuaire Français de Droit International. Vol. X. Edited by Mme. PAUL BASTID. 1964. Paris: Centre National de la Recherche Scientifique. 1964. Pp. xiii, 1237. (Frs. 72)

Volume 2 of Professor Kiss's compilation is in fact the fourth of the *Répertoire Français* to be published. From it one can obtain the views of France as to the legal status of subjects of international law. The volume is divided into the State, specific international personalities, and the individual.

The inclusion of the individual under subjects of international law reflects the changes that have taken place in international law since the Second World War, and if the volume had been published before 1945 there is some doubt whether the individual would have been included within this rubric. This view gains weight from the fact that under the heading of General Principles there appears the statement: "En principe, l'individu n'apparaît pas directement dans les relations internationales, notamment lorsqu'il s'agit d'un dommage qu'il a subi".[1] For the rest, this part of the volume deals with the fundamental rights of man. It is pointed out that the Universal Declaration of Human Rights has no obligatory character, although "sa violation peut être la base d'une protestation diplomatique".[2] There is also a short section on individual criminal responsibility which is really concerned with war crimes and the extent to which French law has embodied some of the principles of the Nuremberg Judgment.

From a historical point of view, perhaps the most interesting part of the volume are the thirty odd pages[3] dealing with the French Union. It is fascinating in this connection to see how difficult it was for France to recognize the realities in Indo-China after the Geneva Conventions of 1954.[4]

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[1] P. 623. [2] P. 649. [3] Pp. 524-566. [4] Pp. 566-567.

While there is discussion of the status of Germany after 1945—France, like Britain in the *Kuechenmeister* decision, despite the unconditional surrender, continued to regard the French Zone as foreign territory[5] there is nothing to show France's attitude to the Democratic People's Republic, other than to point out that France, like her Allies, refused to recognise such a government[6] although denying that the Federal Republic constituted a government for the whole of Germany.[7] In the same way with Berlin, France agrees with her Allies. In view of current Franco-German developments and the French *rapprochement* with the East, later volumes of the *Annuaire Français* might indicate that this is no longer so.

At a time when the new States are anxiously contending that the democratic right of self-determination is part of positive international law, it is interesting to note that France has traditionally recognized the right of peoples to dispose of themselves, to be consulted about their destiny when changes in their legal status are being considered, and to enjoy freedom of choice as to their methods of government, but "Il a été soutenu que le droit des peuples à disposer d'eux-mêmes ne comprennait pas la faculté pour un peuple de se supprimer en tant qu'Etat et ne devrait ni porter atteinte au droit des peuples voisins, ni mettre la paix du monde en danger"[8]

The trouble with volumes like the *Répertoire* is that the evidence used to substantiate statements tends to date. It is one of the values of the *Annuaire Français* that it has a concluding section[9] devoted to international legal problems affecting France, including summaries of both judicial and State practice. In view of the fact that the Centre National de la Recherche Scientifique is responsible for publishing both the *Annuaire* and the *Répertoire* it is a pity that there is no cross-referencing from the former to the latter and no attempt made to co-ordinate the systems employed.

None of the articles in the 1964 volume specifically refers to France, but two deal with matters that have an interest for that country. Professor Bardonnet of Tananarive has a lengthy paper on the Asian minorities of Madagascar in which he points out that the Malagasy Republic is "condemned" to pluralism, that municipal legislation acknowledges this fact in so far as the Indian and Chinese minorities are concerned, and that the problems of these minorities and their guarantee of equality and assimilation depend, as with other places in Asia and Africa, upon the economic, social and cultural development of the society in which they find themselves.[10] Another French ex-colonial territory is looked at by Pro-

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[5] P. 497. [6] P. 504. [7] P. 502. [8] P. 273.
[9] In volume 10 this extends to 300 pages. [10] P. 224.

fessor Nguyen Quoc Din who is concerned with the problem of international control in Laos in the light of ideological conflict.

Two articles are of historical interest. That contributed by Professor Zourek analyses the project for a European peace organization propounded by King George of Podiebrad (the modern Podebrady) in 1464, which failed because of its historic environment. In the light of Ango-French differences on the Common Market and European Union, one comment is perhaps of interest: "La 'respublica christiana' était déjà morte, mais l'Europe des Etats nationaux n'était pas encore née. . . .[L]e Projet . . . restera comme un monument en l'honneur de la pensée humaniste, source d'inspiration et réconfort pour tous ceux qui aujourd'hui travaillent pour une meilleure organisation du monde d'où la misère et la guerre seraient à jamais bannies".[11] The other "historic" paper is by Dr. Monconduit on Khruschev's Note of December 31st, 1963 concerning the pacific settlement of territorial disputes.

Dr. Fischer has a short paper on technical assistance in the field of international law, an issue which is becoming of growing importance with the increase in the number of new States lacking international experience and frequently short of "technicians", while Professor Salmon deals with "clean hands" as a condition for the receivability of international claims. He takes as his text the pleadings on the preliminary objection in the *Barcelona Traction* case, the final judgment in which has not yet been delivered by the International Court.

There is but one article in international economic law which is contributed by Professor Focsaneanu, who gives a somewhat factual account of some of the problems concerning commercial restrictive practices and international law.

Of late, there has been a new interest in "ABC" weapons, and the two remaining papers deal respectively with psycho-chemical weapons and the threat of nuclear radiation. Dr. Meyrowitz contends that the former fall within the concept of chemical weapons and, as such, are covered by the Geneva Protocol of 1925 and therefore are illegal. On the other hand, customary law while it enjoins chemical weapons as such does not forbid psycho-chemical warfare,[12] but he feels that even non-lethal arms of this kind should be regarded as intrinsically evil. In so far as these weapons act neuro-psychologically they are lawful, but he believes that they too should fall under the general interdict. Dr. Fornasier's short paper is devoted to a brief comment on the Conventions relating to liability for nuclear damage with a view to suggesting that what has been proposed for Europe and in connection with nuclear vessels might serve as an example for a more general convention.

[11] Pp. 35-36. [12] P. 124.

The *Annuaire* continues to maintain its high level shewing what French writers regard as current vital topical issues in international law. Often their papers have a French context and with the specialist appendices on French judicial and State practice serve as a complement to the *Répertoire* in enabling one to ascertain the French view of modern international law.

L. C. GREEN*

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Jurisprudence: Readings and Cases. Second Edition. By MARK R. MACGUIGAN. Toronto: University of Toronto Press. 1966. Pp. xx, 666. ($15.00)

Professor MacGuigan's selection of excerpts and cases of jurisprudential interest is an excellent and welcome contribution to the study and teaching of jurisprudence. This work first appeared in mimeograph form in 1963, and its popular reception by Canadian law schools as a teaching aid necessitated a hard-cover edition.

The book consists of five chapters and an appendix. Chapter 1 is introductory; the succeeding chapters deal with positivism, natural law thought, sociological jurisprudence, and the judicial process. Each chapter begins with a page or two of general comments by the author, followed by a series of cases illustrating the approach to be discussed. The succeeding readings are well chosen excerpts from the writings of great philosophers or jurisprudentialists, supporting or attacking the viewpoint under discussion. The appendix is entitled "Jurisprudence in Canada" and is thirteen pages long. It consists of an article by Professor Edward McWhinney and an address by Judge Samuel Freedman. It is doubtful whether the appendix serves any purpose, except perhaps to draw attention to the dearth of Canadian jurisprudential writing.

The introductory chapter contains *The Case of the Speluncean Explorers*, Professor Fuller's delightful parody of the judicial approach, covering a situation where four persons trapped in a mine without hope of rescue until a fixed time kill a fifth member of the group to avoid starvation. When rescued, the four are charged with murder, and the judgments of the five mythical but well-named judges provide an excellent introduction to the study of jurisprudence. However, one cannot read the case without feeling that all of the judges missed the real issues at stake, and perhaps Professor MacGuigan will one day fill the gap. The selection from Sir John

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Salmond on "The Names of the Law" serves only to indicate how bad some analytical writing really is, and could be deleted. Chapter 1 also contains an attack on legalism by Professor Judith H. Shklar, a defence of legalism by Professor John E. Coons, and Judge Oliver Wendell Holmes' monumental address, "The Path of the Law".

The chapter on positivism commences with four interesting judgments of the House of Lords dealing with the most basic problem in the legal system. Is it the function of the court to apply the law or to apply justice, or are the two identical? Perhaps the question is meaningless, because of its oversimplification, but the positivistic bent of the court is clearly revealed, Denning J. dissenting. Jurisprudentialists can have great fun by correlating the various Judges of the House of Lords with the members of the court in *The Case of the Speluncean Explorers*. The readings on positivism include the works of Hobbes, Bentham, Austin, Gray, Kelsen, Hart, Rawls and Ross, and are well selected.

The natural law material contains some disappointments. One would expect to find the Quebec Court of Appeal decision in *Chabot* v. *School Commissioners of Lamorandière*[1] but it is not there. The included case of *Kintz* v. *Harriger*,[2] of the Supreme Court of Ohio, represents the decision-making process at its best, and it is regrettable that it is edited so extensively in the second edition. The authors quoted include Aquinas, St. Germain, Blackstone, Dabin, Brown, d'Entrèves, Pope John XXIII, Fuller, and Margaret Mead. One would have thought that some material from Maritain's *Man and the State* would be more valuable than some of these excerpts. The treatment of Aquinas is surprising. Professor MacGuigan has changed Aquinas' question, objection, answer and reply approach to a prose form. The result is an emasculation of Aquinas' writing. A different—and inferior—translation has also been adopted in the second edition, and students reading Aquinas for the first time will find this excerpt most perplexing.

The last two chapters, on sociological jurisprudence and the judicial process, are extremely well done, and constitute the major contribution of the book. Most of the material is American, since Americans have been most interested in these areas of jurisprudence, and the book brings together much material that has been ignored for too long by Canadian and English lawyers. Readers should not be surprised to find, at the beginning of the sociological material, an excerpt from Savigny, the leading proponent of the historical school of jurisprudence, since Savigny emphasized the

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[1] [1957] Que. Q.B. 707, 12 D.L.R. (2d) 796.
[2] (1919), 99 Ohio 240, 124 N.E. 168.

importance of the common consciousness of the people as contrasted with the coercion or moral aspects of law. Other excerpts are from the works of Ehrlich, James, Dewey, Pound, Cardozo and Hand. It might be suggested that the article by Ehrlich entitled "The Sociology of Law"[3] is a better choice for student use, but this is only a personal preference.

The section on the judicial process contains material on precedent and its ascertainment, *stare decisis* in our courts, and legal reasoning. Judges who are prone to ancestor worship should read Judge Cardozo's judgment in *Hynes* v. *New York Central Railway*,[4] and judges who are prone to posterity worship, that is, too concerned about the future consequences of their decisions, should have a look at Judge Frank's decision in *Aero Spark Plug Co.* v. *B. G. Corporation*,[5] both of which are included. The point is well made by many of the realist authors quoted that the only meaningful certainty that law can achieve from a layman's point of view is the fulfillment of reasonable expectations.

Some comments must be made about the printing of the book. The book is very badly printed,—in fact I am not aware of any legal book which is more difficult to read. The intensity and size of the print, contrasted with the colour of the paper, is such that one cannot read it for very long. The spacing and indentation leaves much to be desired. The start of all judgments is block spaced and there is no space between judgments in a case, so that it is impossible to determine quickly where one judgment ends and another begins. Since one often desires to refer to specific passages in teaching jurisprudence, it would be helpful if the lines were numbered, as they were in the first edition. It is hoped that the author will discuss the style of printing with the publishers before the next edition is produced.

I know of no other work on jurisprudence which is better for teaching purposes than Professor MacGuigan's collection of material. It is more satisfactory to have students read directly the writings of great legal philosophers than to tell students what these men have said. The author's choices and his editing of material are excellent, and the cases bring into sharp focus the practical implications of various philosophical approaches. Most teachers will want to supplement the material by readings on the formal sources of law, as well as by readings in specific areas of personal interest, but will find this book an ideal text around which to structure a jurisprudence course. Any student who reads the book will have

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[3] (1922), 36 Harv. L. Rev. 130.
[4] (1921), 131 N.E. 898, 231 N.Y. 229.
[5] (1942), 130 F. 2d 290.

a thorough understanding of the main concepts and difficulties involved in the study of law in a grand sense.

DOUGLAS A. SCHMEISER*

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Treatise on Justice. By EDGAR BODENHEIMER. New York: Philosophical Library Inc. 1967. Pp. 262. ($10.00 U.S.)

Tides of Justice. By ROBERT A. LISTON. New York: Delacorte Press. 1966. Pp. xii, 171. ($3.95 U.S.)

The subject-matter of these two books is less of a piece than their titles suggest. For the second book is specifically engaged with the relationship in the United States of the Supreme Court and its decisions in various selected but widely representative fields to the constitution.

Professor Bodenheimer has produced an interesting book about justice—just that. It is a pity that one gets to page 114 before he discloses the general plan of the book, but this plan is a good one and consists in devoting two chapters to "observations on the nature and general postulates of justice" and the remaining four to specific areas. The overall result is a book not unlike C. L. Black's *Opportunities of Justice* but with a different range of selected fields and some interesting inclusions and omissions within the selected areas.

The notes, which are wisely put together at the end of the book, cover an enormous range of authorities, and it is their most pleasing feature that they cite so many writers whose approach is not that of the lawyer and whose subject is often sociological or religious rather than jurisprudential.

One might join issue with Professor Bodenheimer on many specific points. Some such clashes would merely demonstrate the value of the point he had made and add little to what he has said about it. There are however some more disturbing areas (it should be admitted they are also the disturbed areas of current jurisprudence), particularly in the first part of the book. Thus at pp. 46-47, Professor Bodenheimer is dealing with the difference between factual and normative statements, and he unfortunately gives the impression that in the former case we are dealing with clear-cut verifiability with which the other type of statement contrasts by virtue of its "fuzziness". Hence he fails to take the opportunity of

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drawing the line between what is observable and capable of description and what is regarded as normative and capable of prescription. The more positive contribution of analytical philosophy is thus insufficiently brought into focus at this point. Similarly, it is disappointing to find in a book whose authorities range widely a nonetheless narrow and somewhat one-sided approach to suicide and similar problem situations.[1] The moral issue in the suicide question is not dissipated by substituting "heroic"[2] for some other adjective of more doubtful validity when describing allegedly virtuous acts of self-killing. The discussion of family and social issues[3] would be strengthened if there were some more positive proposals for law reform or social reconstruction.[4]

In the second part of the book the high level of some passages is not maintained in others, so that for example there is a notable lack of references to the extensive case law on necessity as a defence. The second part of the book in general would be strengthened by reference to many more cases.

Mr. Liston's book is slighter, written by a non-lawyer. But it is, interestingly enough, in its handling of the actual judgments in the cases that the book is at its best. Perhaps good narrative treatment of case law is possible only for a man who says of himself that he "wouldn't want to be a lawyer"—certainly we are treated here to an example of expert and perceptive journalism at the highest level. Equality, segregation and individual liberties are all equally capably examined, with other things beside, and a copy of the *Brown* v. *Board of Education of Topeka*[5] judgment and the United States constitution are thrown in as appendices.

It would be interesting to speculate on the reasons why one's discontents (small though they are) with this book are of exactly the same kind as those in respect of the book reviewed above. The chapter on religious exercises in schools seems to overlook the place of religious education in education generally; it is not surprising from this omission that the writer concludes that "the real importance of the . . . cases is not their immediate effect on education or religion."[6] Some imbalance is the inevitable result of this approach, as is also the case where judgments are quoted extensively without any critical comment—for instance the clearly illogical passage in his dissent on *Escobedo*[7] in which Justice White attempted a *reductio ad absurdum* in the matter of access to a lawyer: "Under the rule (that in an inquiry 'focussed' on a particu-

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[1] P. 62 *et seq.* [2] P. 64. [3] P. 97 *et seq.*

[4] Compare the extensive library of North American literature offering "diagnosis without cure": Vance Packard, Mary McCarthy, Jules Henry, Paul Goodman, and to some extent David Reisman and J. K. Galbraith seem given to this.

[5] (1954), 347 U.S. 483. [6] P. 75. [7] (1964), 378 U.S. 478.

lar suspect he is entitled to consult a lawyer before answering further questions) one might just as well argue that [he] is entitled to a lawyer before . . . he commits a crime, since it is then that crucial incriminating evidence is put within the reach of the government by the would-be accused."[8]

But Mr. Liston's book should be widely read for its treatment of the many pointers to the future, its opportunities of justice and its inevitable problems.

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[8] P. 103. But see some comments on Justice White's general approach on p. 99.

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