

## REVIEWS AND NOTICES.

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*The Law of the Taxing Power in Canada.* By W. P. M. Kennedy, M.A., Litt.D. and D. C. Wells, M.A. Toronto: University of Toronto Press. 1931. Price, \$3.00.

In this short volume the authors deal with the law of the Canadian constitution relating to taxation. They take in turn the various bodies—Imperial, Dominion and Provincial—in whom the taxing power may be vested, discuss the extent of their capacity, and, in the light of the now voluminous case-law upon the subject, lay down the rules at present followed by our courts in determining the boundaries between the Dominion and Provincial fields.

In the general arrangement and presentation of the material in the volume there is little for the reviewer to criticise. The argument is stated simply and is always easy to follow; the conclusions are clear and definite. It may be doubted, however, whether in these days of Dominion status it is necessary to spend an entire chapter proving that the Imperial Parliament has the legal right to impose taxes upon us if it so desires, but that the exercise of such a power, unless requested by Canada herself, would be contrary to constitutional convention. Lengthy argument in favour of so obvious a proposition would be more in place in a Ph.D. thesis. Similar criticism may perhaps be levelled at portions of Chapters III and IV, where we find a revival of the old debate regarding the extra-territorial effect of Dominion legislation, and a further historical review of the practice of the Dominion is disallowing provincial statutes. The conclusions alone are relevant to the subject-matter of taxation; the re-opening of the discussion does not add anything to what has already been written on the questions themselves.

The body of the work is devoted, of course, to the problem of what constitutes "direct taxation within the province." Here the cases are conveniently reviewed and arranged. Mill's classic definition of direct taxation is given a critical examination, and its present value as a criterion of validity is restated. With all deference, it is submitted that the authors have not accorded full weight to the decision in *City of Halifax v. Fairbanks' Estate*, [1928] A.C. 117. This is surely the most important taxing case of recent years, yet it is referred to only in footnotes. Until that decision the customary procedure in testing the validity of a tax was this; the incidence of the tax was first considered, and if it was found to be certain, pay-

able by the very person who it was intended should pay it, and with no obvious and direct method of passing the burden, then it was considered a direct tax; if not, it was indirect. This appears to be the line of approach which the authors believe still proper. And yet, if we are to apply the Fairbanks' holding, the first step must be, not the Mill test, but the classification of the tax according to the accepted understanding of men in 1867. The use of Mill's criterion lies mainly in its application to "new or unfamiliar" taxes which cannot be so classified. (See Berriedale Keith in *Journal of Comparative Legislation*, 3rd Series, Vol. X, pp. 104-5). Thus the definition is merely to be kept in reserve, as it were, to be used when an investigation into the minds of economists at the time of the passing of the B.N.A. Act has failed to indicate the true nature of the tax. Whether or not this decision is sound it at least deserves more attention than it has received.

The book gives us a particularly admirable statement of the rules to be applied in determining the situs of property for taxation purposes—a problem of great difficulty which this monograph will do much to elucidate. The application of these rules to the various sorts of death, probate and succession duties is especially interesting. One can only wish that the authors, besides discussing in general terms the effect of the rule that intangible movables are situate in the province where they can be effectively dealt with, had gone on to show how the rule has been applied to specific forms of such property. As it is, the reader will not easily be able to discover whether the situs of any particular sort of intangible movable has ever been considered by a court. For example, such a case as *Crosby v. Prescott*, [1923] S.C.R. 446, regarding the situs of negotiable instruments, is nowhere referred to. The book will thus appeal more to the student of general principles than to the busy lawyer anxious to make a quick decision on a special problem.

In conclusion, there is one aspect of taxation which has been omitted from the book, and on which it would have been desirable to have had some comment. This is the question of excise taxes. On page fourteen the authors declare that section 122 of the B.N.A. Act is of a temporary nature, and need not be discussed. And yet this section in effect states that the Parliament of Canada has the legislative power over customs and excise laws. Must not this mean "exclusive" power? And if so, does it not immediately become of immense importance to discover just what are excise laws? Applying the Fairbanks case again, it would seem that whatever was considered to be an excise tax in 1867 is a tax which the Dominion is

alone competent to enact to-day. We are familiar with taxes on tobacco and alcohol imposed by the Dominion as excise taxes; we are also familiar with Provincial gasoline taxes. What is the difference in the nature of these taxes which makes them fall into different classes? These are live questions which might have been answered.

*The Law of the Taxing Power in Canada* illuminates many difficult constitutional questions, and will stimulate the reader to much fruitful investigation.

McGill University.

F. R. SCOTT.

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#### THEORY OF LEGISLATION.\*

The lawyer who picks up this book expecting to find a treatise on statute-making will be disappointed; he is likely upon further examination to be put off by an arid metaphysical style which affords nothing in the way of forms of visual imagery upon which the mind may fix; here are no summaries, no references even; no concessions,—the reader must stay with the author from chapter to chapter from beginning to end, or read him not at all: but the reader, if he persevere, will find here the impress of a strongly independent mind, working, in unorthodox method, upon problems as old as law itself.

Professor Jordan has given the term "legislation" a wide content. It is "a question of any and every agency of life through which purpose as imaged end finds implementation and embodiment. This broad conception will justify our allocating the legislative will within the social and industrial and religious and economic institutions, in all practical groupings, whose relations, both functional and frictional, are observable in the facts of social experience. Legislative right and authority will be found, therefore, wherever there is found constructive social or corporate action, however humble may be the instance in which such a public life is thus recognized."

Here, then, is another challenge to the so-called orthodox theory of law and the state, another contribution to the already abundant literature upon the vexed problems of sovereignty and of legal personality.

The author is at considerable pains to affirm his independence. There is a complete absence of references or bibliography but one may hazard a guess that Bosanquet's well-known works on indi-

\* An Essay on the Dynamics of Public Mind. By E. Jordan, Professor of Philosophy, Butler University. Indianapolis: Progress Publishing Company, 1930, pp. xx + 486, \$3.75.

viduality and the theory of the state have done much to direct the author's thinking, and the author is obviously well informed as to modern trends of continental jurisprudence more particularly as these are discussed by Duguit and Saleilles.

The present volume is essentially a continuation—one hesitates to say, a practical application—of the thesis elaborated in Professor Jordan's earlier *Forms of Individuality* (1927). In that book the author attacked the doctrine of subjective interest, the doctrine that society and the state have grown up to satisfy the demands and desires of individuals; and, in its place, sought to set up a new principle of corporate interest related to personality as a corporate entity. Corporateness, in Professor Jordan's view, is not a real personality in the sense with which continental jurists, from Von Gierke onwards, have made us familiar, but rather an order or organization of fact in accordance with a definitely determined principle. This principle, which is what the author seems to mean by "legislation" is the practical realization of the process of speculative thought in exploring all the possibilities in the social life of mankind. The present volume is an attempt to explain the means which exist to realize such ends.

The key, therefore, to all the problems of juridical philosophy, (using that term in a sense far wider than any to which we are accustomed), is a view point of corporate mind as the ultimate practical postulate. "Under this postulate the practical categories, right, freedom, beauty, God, order, justice, find their synoptic unity in Law as the act of thought in which order is realized in a factual world." Law, then, as the act of the corporate person finds positive realization in the Public Order. The instance of embodied personate will is the corporate personal object such as the cultural implements of ordinary life, the physical, the industrial, the religious, the aesthetic object, the emphasis being, in each case, upon the natural objects and institutions around which values tend to collect. The group which is the synthesis of all these objects and institutions is the state; hence: law creates the state. The author forestalls a certain amount of obvious criticism by claiming "It is not the process of the formulation of law that we propose to study; not the details of law but the substance of law. This book is, however, not a treatise on law, nor is it a philosophy of law; but it is built around the concept of law as the basic concept of practical philosophy."

The practical lawyer who acquires Professor Jordan's "Theory of Legislation" for his working library will be just about as widely misled as was the juvenile entomologist who saved up his pennies to

buy "Hints for Young Mothers." He will look in vain for any technical grasp of the details of law as a system administered from day to day in courts of justice. But this book is richly worth the reading. One may disagree with a thesis which seems to belittle, and indeed to deny, the uniqueness of individual personality; which outlines a concept of legislation as an experimentation in the realm of pure idea rather than a grappling with problems of concrete fact; but one is bound to recognize a fresh and stimulating contribution to philosophical thought which in the hands of jurists may be turned to practical and useful ends.

F. C. AULD.

University of Toronto.

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#### CRIME AND THE CRIMINAL.\*

There is a great deal of intensely human interest in this volume. The author had the unique opportunity of coming into close personal contact with prisoners from all walks of life for two years while he was a prison visitor at Wormwood Scrubs Prison. He has attempted within the limited scope of 223 pages, to place crime in general and the prisoner in particular on a modern scientific basis. He speaks, page 205, of the "vast gulf which exists between traditional and scientific thinking concerning the behaviour of the lawbreaker and its causes." Each prisoner, whether a first offender who has been caught snatching a lady's bag or the confirmed master crook, who has planned the holding up of a first-class carriage on the P.L.M. express train, is a human being who has gone wrong, but who, according to Mr. Gardner, may be redirected into the "straight and narrow" path, without being actually confined for a season (short or long) behind prison bars.

The author has consulted eighteen books on criminology, of which a list is given on the last page. Many of his illustrations and examples are taken from these publications, but perhaps the more interesting chapters contain his own personal experiences with men who have just come out of prison, whom he befriended. Of them he writes in an interesting and friendly manner, although in many cases he had to pay dearly for his experiences.

His conclusions are given in the last chapter ("L'Envoi"), page 218:

That public opinion in this country will gradually accept the idea that many of those lawbreakers at present sent to prison for fixed periods of

\**Prisoner at the Bar*. By Arthur R. L. Gardner. London: Philip Allan & Co. Ltd. 1931.

punishment had better be dealt with by other means, seems to the author probable enough.

He looks forward to the day when prison visitors may be reasonably sure of finding no sexual offenders among the occupants of the cells, and no prisoners whose infringement of the law has been due merely to a youthful love of adventure, to poverty, to misfortune, or to mental defect or to worries, deep seated and perhaps forgotten, yet capable of being dissipated when treated with skill and tact.

He hopes to see some better solutions of the problems raised by youthful misconduct than those at present in vogue, and in accordance with which troublesome lads are sent to reformatory schools, boys' prisons and Borstal Institutions.

We have noted only a single error, "prescribed" for "proscribed," page 53.

Readers who wish to be simultaneously instructed and entertained will find much to gratify their desires in this book.

It is dedicated "To all my friends, straight, crooked and composite," and should give Magistrates and Judges food for thought.

A. MacM.

J.C.

Toronto.

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#### MUNICIPAL LAW OF ONTARIO.\*

Practically every lawyer has more or less to do with the law of governing Municipal Corporations, and the desirability of having at hand a really good text-book upon the subject is manifest. The present writer has for many years back been in peculiar touch with Municipalities throughout the Province of Ontario and their legal advisers, and has for some time felt the need of a really well arranged text-book which would enable the average lawyer to readily cope with the problems which confront his clients in this field. No good purpose would be served by adverse criticism of the books which were available; they were not satisfactory to the profession, and in any event there have been so many municipal developments, even in the last decade, that a new book had become a necessity. On that account the announcement of the Editors of the C.E.D. (Ont. Ed.) of the preparation of an article on the subject by F. B. Proctor, K.C., the experienced Solicitor for the City of Ottawa, was one of great interest.

Mr. Proctor had demonstrated his ability as a text-book writer some years ago, when his work on *Municipal Drainage* appeared. It was remarkably well done, and one naturally hoped that his contribution to the C.E.D. (Ont. Ed.) would be of the same calibre.

\*Canadian Encyclopedic Digest, Ontario Edition, Article by F. B. Proctor, K.C., on *Municipal Corporations*: Toronto, Burroughs & Co. (Eastern), 1931.

The article has now appeared, and it fulfils expectations. It covers 583 pages of the Digest, and when one considers that it does not contain the Municipal Act itself, and does not duplicate articles which would ordinarily be dealt with in a book on Municipal Law, but which are elsewhere in the Digest and are here referred to by cross-reference only, you find in the article a work of no mean proportion. Its arrangement is logical and convenient, and the Digest method of stating the law in the text, and collecting the authorities in the footnotes makes it the more easy to "find the law." In using it one must have a copy of the Statute at the elbow, but that is easier than looking up the section in another part of the book, and much easier than digging it out from under a mass of annotations.

There is one word of warning to those who use a work of this kind. As in his earlier book, Mr. Proctor has collected in his annotations not only the cases which directly support his proposition of law on a particular point, but others which may usefully be consulted when considering the proposition. The citations should therefore be studied when a brief is being prepared, and not simply thrown at the Court because they are cited. This is not adverse criticism of the work of the compiler of the article, but rather a compliment as indicating the exceptional thoroughness of his research.

Ottawa.

G. F. H.

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*County Court Costs.* By F. W. Broadgate. London: Effingham Wilson, 1931.

The avowed object of the author in the preparation of this little volume of 173 pages is to provide a guide to the practitioner in the preparation of his bills of cost in a county court action. It is not easy to prepare a compendium of all matters that lead the approach to a bill of costs, owing to the great bulk of statutes conferring jurisdiction or imposing some duty on the courts in England. The author appears to have done well in his effort at inclusion. Many precedents are shown, and there is a complete table of fees taxable in the county courts. The arrangement of the book is convenient and in addition to a general index to the work there is one especially made for the tariff of fees. The price of the book is \$3.25.

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*Problems of the German-American Claims Commission.*—By William Kiesselbach, D.Jur. London: Published by the Oxford University Press for the Carnegie Endowment for International Peace. 1931.

This is a translation, by Professor Zeydel of the University of Cincinnati, of the first part of Dr. Kiesselbach's "Probleme und Entscheidungen der Deutsch-Amerikanischen Schadens-Commission," which appeared in 1927. The present volume presents a survey from the German point of view of the problems which had to be solved by the Mixed Claims Commission at Washington in connection with the establishment of the American claims arising out of the Great War.

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## CORRESPONDENCE.

The Editorial Advisory Board of the Canadian Bar Association does not hold itself responsible for the opinions of Correspondents. Contributions to this department of the REVIEW must be accompanied by the genuine names of the writers, to be used in the discretion of the Editor.

### MOTOR-CAR OWNER'S LIABILITY.

THE EDITOR, CANADIAN BAR REVIEW.

SIR.—Adverting to your June, 1929 number, the brief by Mr. G. F. Henderson, K.C., under the above caption raises an intriguing question. The learned King's Counsel, going on to the bearing of the subject upon the liability of Insurance Companies, says: "The standard form policy indemnifies the insured car owner against loss or damage which he shall become legally liable to pay, and unless he is legally liable to pay the Insurance Company cannot be called upon to pay, unless the policy so provides further by what is commonly known as the "omnibus clause."

It may be agreed that none of the varying phrasings of the clause are very satisfactory, but the passenger may be held legally liable where he has control of the car but permits an incompetent driver to operate it.

The really interesting point, however, is the practical one "whether or not there is any contractual relationship between the third person and the Insurance Company, which would justify the third person in bringing an action against the Company."

I seek to reopen the matter in your columns because of an interesting case which has just come into my own practice, in which there is the further interesting complication of the claimant who holds a judgment against the passenger and the driver (neither of whom was the owner) threatening suit against the Insurance Company under section 85 of the Ontario Insurance Act.

It would appear, however, that a plaintiff with an unsatisfied judgment should not have any higher right against the Insurance Company than their debtors and, if it be the case that an 'omnibus' clause, looking to its nature, cannot be devised to constitute any legally binding contract, even the statutory extension of the Insurance Company's liability need not be feared, if such extended liability is derivable only through parties unnamed in the contract of insurance.

Very truly yours,

Montreal.

JAMES B. THOMSON.