for law than that it is an expression of the popular will). The pithy conclusions found at the end of each chapter are not always very accurate and do not always do justice to what has been discussed. The book seems to be the transcript of a course of lectures in that it contains numerous asides designed, no doubt, to titillate students (e.g., "The discovery of oil in Oklahoma made many of the Indians of the reservation rich men."[6] and "The first English courts followed the King as he and his entourage moved from place to place consuming the available food there.")[7] but which frequently are of little relevancy. As well, there are frequent references to problems in the Conflict of Laws which are not always apt.[8]

Finally, more careful editing would have avoided such whoppers as "Lawyers have to work within a pre-ordained legal order; it is their duty to see that such a system works with the minimum of injustice and it is not normally their job to alter it."[9] (A comfortable attitude but perhaps a little irresponsible?), or

"A good virtuous judge will be a man in the habit of acting virtuously; . . . ."[10] (Perhaps this is incontrovertible?)

—MARVIN G. BAER*

6 At 34.
7 At 71.
8 E.g., at 164-171.
9 At 303.
10 At 355.
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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. xvii and 242. $7.50).

To publish in 1967 a book on the "Interpretative Scheme for the Distribution of Legislative Powers" devised by the Judicial Committee of the Privy Council for the Canadian constitution is a venture in an already well explored field. Many writers have assessed the performance of that august body as may be gathered from a rapid look at the index of any prominent law review published in Canada and there is a real danger to repeat what has too often been said. Professor Browne's book is stimulating in both the main thesis it advances and the method it uses to explain the complicated scheme applied by the Judicial Committee to the Canadian constitution.

I: Main thesis.

The book is a well reasoned defence, from a strictly technical point of view, of the interpretative scheme applied by the Judicial Committee. Such appraisal, coming from a man who seems preoccupied by the reduction of the federal legislative sphere with which this scheme is associated, gives the whole book a certain quality of gratuitousness.

A study of the various assessments of the Judicial Committee's work made by Canadian constitutionalists reveals that two main currents have, each in its turn, gained high credit among "Canadians" (as dis-

tinguished from, or opposed to "Canadiens", to refer to the terminology of Professor Michel Brunet). According to the first,[1] which was at its peak in the forties, such work amounted to nothing less that a reframing of the constitution without real basis in the text and even against the clear meaning of words. According to the second,[2] which is at this very moment making progress in the legal community, the same work was a mere rationalization of bad political choices made in a state of quasi-total ignorance of the Canadian problems, which rationalization, although consistent with the text, was only one of many paths of equal value offered to the constitutional interpreter.

Mr. Browne's book constitutes sharp departure from those currents since its main thesis may be summed-up in two fundamental proposals: (1) The Judicial Committee has grounded its scheme of construction in the text of the B.N.A. Act; (2) That scheme was almost unavoidable.

By doing so he disassociates himself of those who see the Judicial Committee as having betrayed the true intent of the Fathers as it was clearly expressed in the constitution and of those who accuse the Committee of having freely (since "our leading constitutional cases could just as well have been decided the other way"[3]) made bad choices and of having thereby betrayed the Canadian people.

II: Method.

Professor Browne considers that there are four relevant aspects to be studied if we desire to get a comprehensive view of the constitutional adjudicative process. He has therefore divided his book into four parts, corresponding to those aspects: "Jurisprudential Assumptions", "The Compartment Problem", "The Ambit Problem" and "The Consignment Problem".

In the first one, which comprises chapters I and II, he reminds us of the choice made by the Judicial Committee to respect in fact, even in constitutional matters, the rule of *stare decisis* even if it was not strictly bound to do so. He is also careful to recognize that the Committee has sometimes changed its mind through distinction, partial acceptance or ignorance of awkward precedents.

He also contends, and no one may seriously argue the contrary, that, despite secondary exceptions, the Committee has kept strict adherence to the rules of statutory interpretation in construing the B.N.A. Act and rejected the "Constituent Statute argument".

He refuses to explain the resort to the federal principle to a provincial bias and insists that "it is just as likely that the "federal principle" was not imposed on the British North American Act, but derived from it."[4]

The second part (chapters III, IV, V) deals with the often debated question of determining whether there are three types of legislative powers distributed by sections 91 and 92 of the B.N.A. Act, or two types

1 This school of thought might be said "literalist" in view of its contention to root its argument in the letter of the B.N.A. Act.
2 This current may be said "sociologist" since its basis of protest is the Canadian reality.
3 Bora Laskin, *Test for the Validity of Legislation: What's the "matter"*, (1955-56) 11 University of Toronto Law Journal 114, 124.
4 At 32.

only. Chapter III mainly concerns itself with textual source of the doubt about the illustrative or supplementary character of the enumerated heads of section 91, and the consequences of a choice.

The latter part is particularly interesting. The author lists certain consequences of either choice and indicates the possible effects on the classification of laws. Thus, having enumerated four effects of a choice for the "supplementary" view of the enumerations of section 91 (three compartments; an order of priority; a three steps procedure; the residuary character of the Peace, Order and good Government clause) he writes:

"Such an interpretation could induce a tendency to regard the Peace, Order, and good Government clause in the light of a last resort—to be invoked only when it proved impossible to consign a law to one of the enumerated lists. However, if the court of final appeal tried to fit as much legislation as possible into those lists, it could enlarge the ambit of the subjects comprised within them. Indeed, since the "subject" most susceptible to such enlarging is probably the one described in head 13 of section 92 ("Property and Civil Rights in the Province") the ultimate effect could be an enlargement of the legislative sphere of the provinces, at the expense of the federal parliament. Nor would this effect be lessened if the court were also determined to safeguard the "federal" character of the Canadian Constitution or at any rate, to establish the principle of "co-ordinate and independent authorities"."[5]

This tendency to indicate "possible" or "likely" results, at other levels, of choices made at one level of the decisional process, is surely one of the most striking features of Professor Browne's approach and surely the most valuable one.

Chapter IV concentrates on the illustration, by jurisprudential references, of the choice made by the Committee of a supplementary characterization of the heads of section 91. Chapter V contains an "exposé" of the arguments of the O'Connor Report for a two compartment view, and to their rejection.

The third part concerns the ambit of the legislative spheres. The author starts with a description of the problem facing any constituent body when it comes to the distribution of powers. It may proceed to a delimitation based either on the "general description of the nature" or on the "size or ambit" of these spheres. But such a choice in reality has some consequences. A delimitation according to "nature" creates an organic instrument adjustable to the circumstances, while a delimitation by size or ambit reduces such a possibility to almost nothing.

Mr. Browne then reminds us of the rather meagre success of those who contended that the B.N.A. Act had distinguished legislative spheres according to their scope, noting that scope considerations have made their way, with unequal success, in the "Dimensions" and "Emergency" doctrines.

In the same chapter he acknowledges that the provincial heads were generously construed. But, here again, he refuses to explain this result by a provincial bias. Thus he writes: "In fact, those solutions were

5 At 38-39.

directly obtained by applying the Rules of Statutary interpretation."[6]

The rest of chapter V illustrates such application. Chapters VI and VII describe summarily the ambits of the most important heads of sections 91 and 92.

The last part of the book deals with the consignment problem. The author notes that the question is related to the "disposition of impugned law" rather than to the interpretation of the B.N.A. Act. He however considers that, since both problems are inextricably interwoven, he cannot avoid studying the consignment of laws. The chapter contains some illuminating remarks concerning the relationship between the compartment solutions and the search for the "matter" as well as its classification within the categories of subjects of sections 91 and 92. Thus Professor Browne thinks that the "matter" would signify primarily "scope" if a two compartment view was adopted while it would mean primarily "subject" in a three compartment approach. He also thinks that the different orders of priority arising from either solution of the compartment problem would affect the consignment of laws. Thus, if a two compartment view prevailed "the courts might tend to presume in favour of federal statutes."[7]

On the other hand, a three compartment solution would turn to the advantage of the provincial power at the consignment level, since the most expansible category is section 92 (13). But he suggests that the federal sphere would then be in a better position at the earlier stage (of search for the "matter") since the enumeration of section 91 would be preferred to that of section 92 because of its priority.

Professor Browne proposes that the various doctrines used to consign laws could be related to what he calls the "aspect principle". Thus the doctrines of Ancillary Powers, Occupied Field, and Cooperation apply the aspect principle to conflicts between heads of section 91 and 92, while the Dimensions and Emergency doctrines apply the same principle to conflicts between section 92 and the Peace, Order and Good Government clause. This view seems to fit with the facts and we are inclined to share the point of view of Professor Browne.

In his conclusion, the author insists on the basic congruity of the interpretative scheme. He indicates that the Dimensions doctrine cannot be used to enlarge federal jurisdiction because it is rooted in a distribution of legislative powers on the basis of "scope".

Professor Browne reveals in the preface of his book an intent to relate the levels of the interpretative scheme. By doing so he has brought a new vision of the work of the Judicial Committee of the Privy Council. The main trait of that vision is its focusing on the not-so-free position of the constitutional interpreter. Given certain quasi-postulates, as the *stare decisis* doctrine and the judicial restraint, certain conclusions ensue, as a preference for an approach by subjects, which approach can prevail only in a three compartment distribution by legislative powers.

Although the author is making deductions at a pace which appears a little excessive at certain times, and displays astonishing scepticism in

[6] At 78.
[7] At 121.

judges' ability to rationalize political preferences, his work is an important step on the road to a total account of the Judicial Committee's construction of the Canadian constitution.

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INTERNATIONAL CIVIL PROCEDURE. By István Szászy. 1967. Leiden: Sijthoff. Pp. xi and 708. Dfl. 58.50.

The growth of the European Community and the impact of British Membership in it upon English law and procedure, together with the increase in the number of new States since 1947 has drawn attention to the need for increasing study of comparative law. Usually, such comparative studies are confined to western oriented writers and to liberal European legal sytems, or those of the new States which still base their law upon the common or civil law. Professor Szászy's study of *International Civil Procedure* breaks entirely new ground from this point of view. The learned author is an Associate of the Hungarian Academy of Sciences and of the Institut de Droit International, as well as a member of the British Institute of International and Comparative Law and his study deals with both western and eastern—in the political sense of the term—approaches to law. Instead of the condemnation of western doctrine which one frequently finds in the writings of Marxist lawyers, this volume has more citations of Battifol, Cheshire, Morelli, Nussbaum, Wolff and Yntema than it does of Lenin and Marx. It is equally pleasant to find an east European lawyer writing in easy English on his own system instead of being presented with a commentary which, except in the case of John Hazard or Albert Kiralfy, is usually the result of second-hand interpretation of somebody else's translation.

It is interesting to discover that, as in western countries, so in socialist societies, lawyers differ in their approach to comparative law and its value, but the author feels that in the realm of conflict of laws there can be no question as to the basic value of the comparative approach. It is submitted, however, that only slight alteration of the words used will reduce what Professor Szászy believes to be a fundamental difference in the approach adopted by Marxist lawyers to such studies. It is undoubted that different principles prevail in respect of the application of the comparative method in socialist jurisprudence on the one hand, and in western legal science on the other. In socialist legal science the Marxist method of comparison, which is based on the tenets of dialectical materialism, is applied. The socialist method of comparative law does not rest content merely with juxtaposing various legal institutions, legal problems, statutes in force in various countries, or with simply listing their similar or different features; it strives to discover the social, historical, economic and ideological grounds of similarities and differences; it points out the class content of legal institutions and the differing functions thereof which are discovered even under similar or identical characteristics.

International Civil Procedure is not only a careful analysis of pro-