


## REVIEWS AND NOTICES

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*What is the Verdict?* By FRED L. GROSS. New York: The Macmillan Company. 1944. Pp. ix, 311.

A. P. Herbert's *Misleading Cases* have become a by-word to the Canadian and English Lawyer. The present volume, written by a former president of the New York State Bar Association, may be said to provide an American counterpart to Mr. Herbert's disclosure of the foibles of English law. The present series of sketches centres around the activities, largely forensic, of the firm of Trumpp, Swift and Hall. The description of the members of the firm and the manner in which the work of a large American office is divided into departments, will be perhaps more familiar to a Canadian lawyer than is the English bifurcation of the profession, which we follow in terminology, while adhering to the American in fact.

While the senior partners appear only at rare intervals in this series of forensic triumphs and scandals, through which the junior partner Ed Hill winds his heroic and ingenious way (ultimately ending up as a judge of a superior court after a highly amusing and instructive dissertation on a judicial campaign) the description of Swift, the second senior partner is one that indicates the tempo of the book:

Swift was in charge of the departments which handled the estates, corporation matters and appeals. He was an able lawyer. He read all the latest decisions of the courts and most of the current legal periodicals. He knew practically all the law there is. In fact, he knew so much law that whenever some desirable transaction for a client had reached the point of apparent consummation, Swift could think of at least half a dozen confusing legal obstacles which might possibly arise in the future. He could always fill the minds of all concerned with the gravest apprehensions. In short, he knew so much law that he was thoroughly impractical.

Every large office in Canada has its Mr. Swift and every large office has its Mr. Hill.

The author has chosen the common types of litigation such as the rights of a wandering mule as against a railroad, litigation over wills, divorce, etc., and the problems presented in all their ingenuity and tomfoolery are well within the recognition and knowledge of Canadian practitioners.

Mr. Gross has, however, not only sought to amuse but to use this vehicle as showing some of the weak spots of the law in a manner which could be emulated to advantage, at least in part, by some of the more learned of the teaching profession. Thus, discussion of the distinction between general and specific legacies can be a pretty dull and dreary pastime. Any lawyer knows that it is full of nonsense, but the extent to which that nonsense can be cloaked in an aura of respectability and legal

jargon is admirably brought out in the tale of *The Vanished Legacy*. Likewise, many dull books have been written on the improvement of the elective system of judges in the United States, but the highly amusing discussion of the judiciary campaign which resulted in Ed Hill's election points a moral with a laugh.

We particularly like the dicta of Mr. Justice Chesty which the author reproduces on the philosophical — and quite meaningless — expression that "all men are created equal".

Counsel refers us to the historic declaration that "all men are created equal." It is not stated to what they are supposed to be equal. That principle, like oysters, must be regarded as having merely a seasonable popularity which usually begins its crescendo in September and drops off perceptibly soon after the November election, while the stability of the oyster survives until the following May.

Any lawyer who would like to take his law and law reform with gusto and élan, can look forward to an evening's good fun and no inconsiderable profit by reading the present volume which, while ostensibly written for amusement, contains many a shrewd observation and considerable jurisprudential material, the latter so cloaked in the guise of the familiar and everyday life of a lawyer as to prevent the reader from even knowing that he is touching the outskirts of that suspect field. All of which may prove that the only people who really believe in a thing sincerely are those who can afford the liberty of making fun of it.

C. A. W.

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*Canadian Government and Politics*. By H. McD. CLOKIE.  
Toronto: Longmans, Green & Company. 1944. Pp. viii, 351.

This recent Canadian volume presents an extremely difficult problem to a reviewer — particularly if such a reviewer be a lawyer. Lawyers are notorious for their ability to pick on flaws, point out discrepancies, or, as some would have it, just plain "quibble". Professor Clokie provides ample scope for lawyer's "quibbling"; and of legal flaws there is an abundance. Some legal reviewers might attempt to "devastate" by saying that "the book is clearly not written for lawyers". We should imagine that the writer would treat this as a compliment — and, in many ways, so it is. If it is not written for lawyers it should at least be read by them because notwithstanding certain parts which may have a bad influence on the legal blood-pressure, there is much in this book which a lawyer *should* know, even although it may be that type of knowledge which will enhance only his reputation as a citizen and earn him not a cent in the pleading of "constitutional" issues before courts.

The difficulty of reviewing the present book does, however, lie in attempting to determine for whom the book really was written. According to the author it was "designed for those commencing the study of Canadian public affairs" and for this reason it is said to be "elementary". So far as the book is purely descriptive the author has done an admirable job — and one that has long needed doing — and kept pretty well within his avowed objects. The descriptive chapters on "Political Parties and the Electorate", "The Parliament of Canada", "Administration of the Dominion of Canada"

(Chapters IV – VI) contain material with which every thinking citizen of the Dominion — and elsewhere — should be, and is not, familiar. We believe that the description of the various Ministerial Departments in Ottawa, the way they overlap, the tendency, particularly noticeable during the present war, of one or two Departments to assume predominance and control, is the best thing we have seen on this extremely important aspect of Canadian constitutional development. Similarly the chapter on “Local Government in Canada” explains a field which has been much too neglected in our writings and is in every way excellent.

It is when Professor Clokie ceases to describe, and attempts to analyse, criticise, and compare what might be called “fundamental” or underlying notions of Canadian government that he becomes anything but “elementary”. In fact, in our opinion, at times his book might, in the hands of persons “commencing” the study of Canadian government, be misleading and, perhaps, dangerous. This may, indeed, be inevitable in a book of the present size. Certainly for the development of some of the criticisms and comparisons, and the attempts to separate “fictions” and “facts”, that the writer takes on himself, a much more elaborate and, we might add, better documented, treatment is required. It is in the attempt to do too much in one small volume that we fear the writer may have laid himself open to criticism. Certainly to the readers of this REVIEW there can be no doubt that Professor Clokie did not need to lend himself to that criticism as the papers we have published demonstrate.

At times the author credits the reader with a knowledge which we are sure a “beginner” does not possess. Thus, mere casual reference to the Colonial Laws Validity Act (pp. 37, 194) without saying what it was all about, or to the Industrial Disputes Investigation Act of 1907 (p. 213) without mentioning its purpose, must be baffling to a neophyte. Throughout the author draws parallels with the American system which not only presupposes a working knowledge of the latter but adopts interpretations of that system which are, to say the least, highly arguable. Thus, at p. 52 a description of the House of Commons, as “the Canadian ‘electoral college’,” cannot be said to be particularly helpful to either the American or Canadian reader. Further, to say (p. 65) that “American courts exercise their powers of ‘judicial review’ because it is their right to do so under the Constitution”, and to contrast the Canadian situation as one where the courts’ function in this regard rests on “parliamentary acquiescence”, seems to ignore or misrepresent a large and important constitutional struggle in the United States centering around the “nullification” doctrine, which eventually led to the American Civil War. Perhaps in a book of this size one should not expect a detailed analysis, but if fundamentals of this nature are to be touched on at all, the generalities should at least be accurate.

Of chief concern, however, to the present writer is the manner in which the author constantly contrasts “federalism” and “parliamentary government”. Thus, for example: “Canadian federalism . . . rests upon an entirely different foundation from parliamentary government” (p. 55); “a federal state thus seems the very opposite of a parliamentary state” (p. 57); “neither parliamentarism nor federalism has yet effaced the other” (p. 62); “the American constitutional system is of a non-parliamentary type” (p. 205). If, as would appear to be the case, the author is contrasting a unitary system of government, such as prevails in the United Kingdom,

and a system of divided governmental or legislative powers, which of necessity prevails in any federation, we cannot understand why the obvious should be obfuscated. Perhaps all the author implies in this many times repeated antithesis is that in Canada "parliamentary supremacy" merely means that "there is no bill of rights imposed on the legislature in addition to the limitations arising out of federalism" (p. 56). Even this is doubtful to many persons who will argue that once the courts have jurisdiction to declare legislation invalid we are in practice, if not in theory, faced with a judicial "bill of rights" (see Willis, *Administrative Law and the British North America Act* (1939), 53 Harv. L. Rev. 251). Just what he does mean, however, we are still somewhat at a loss to know although we have tried hard to grasp the significance of a contrast insisted on so heavily.

Nor, without considerably more elaboration than is possible within the compass of such a book, can we subscribe to speaking of "the fantastic legal doctrine of 'exclusive' powers" (p. 208). It may be undesirable, unnecessary or downright harmful, but the learned author is a courageous man to call it "fantastic". Perhaps it is because we are a lawyer that we wince slightly when the author disposes of the *Manitoba Initiative and Referendum* case by saying that "the most noteworthy point about the decision . . . is that it reveals the hazard of leaving constitutional interpretation to courts of law" (p. 195). That there are "hazards" in such a course may be true; that we, as well as the author, do not approve of many things the courts have done in connection with the constitution is also true; but surely we might, after such a withering remark expect some constructive alternative.

Professor Clokie has consistently failed — or refused — to differentiate between the "political" and the "legal" in connection with constitutional "law". Thus, to state that constitutional conventions or usages "are understood to be a background against which statutes and judicial decisions are to be interpreted", and that such usages "override the statement in legal terms of older rules of law" (p. 48), is enough to produce in many a constitutional lawyer a state of mental frenzy leading directly to apoplexy. Not that this in itself is a bad thing. It only seems unnecessary, and since we had thought this old battle settled long ago, we feel rather sorry that some more fitting reason — and there are many — might not have been forthcoming to induce the frenetic state in our colleagues.

Lest it be thought that we are being unduly severe in our strictures concerning this book we hasten to repeat that we believe it contains some of the best expository material of which we know concerning Canadian governmental institutions. The criticisms which we have made are perhaps inevitable in light of the wide scope of the book. We do not believe for a moment that, had Professor Clokie written an exhaustive critical analysis of the Canadian constitution, or even of parts of it, he would have exposed himself by making statements which, standing alone, must be objected to. The trouble is, our constitution — like most things legal — contains many half-truths. Thus, while we agree that fictions abound here, as elsewhere in the law, it is perhaps dangerous to label them as mere fictions. It is true that laws are enforced by provincial bodies but can we discard the "fiction" that "justice is meted out in the name of the King" (p. 51). Too many items of legal — and practical — import, not the least of which is the Crown's liability to the subject, render such a course dangerous. Fictions sometimes have a peculiar way of turning out

to be realities. It is because the author too frequently fails to make reservations of this kind that his book, in some hands, might be dangerous despite the excellent qualities of which we have spoken.

One or two specific illustrations which might be remedied in the future editions which can be expected are worthy of mention. At p. 54 the author states that "all Cabinet ministers must be members of parliament". This is clearly wrong, and at p. 132 it is stated that "with one or two exceptions" the Cabinet Ministers must be members of the House of Commons. Finally, at p. 160, it is stated to be "possible" for one to be a Minister or a Prime Minister without being a member of Parliament. To the "beginner" this is not helpful — and if he stops at p. 54 can not fail to be harmful.

Again at p. 67, the reader is left with the impression that any amendment to the B.N.A. Act will be made at the request of the Dominion Parliament. This is so argumentative as to be misleading and we note that at p. 206 it is admitted "there is not complete agreement" on the extent to which the provinces should be consulted on matters affecting them. In an elementary book — regardless of the author's convictions — should the doubts not be stated even more prominently? Further, one may query the statement (noting the omission of the word "in") on p. 57 that "it is [in] accord with usage" for the Dominion to veto provincial legislation. As a matter of practice we had thought, that the usage was today — contrary to the early days of Confederation — to the contrary. Whether Dominion action in connection with certain Alberta legislation can be said to revive a "usage" is more debatable, although it is undoubtedly legal as in accord with the B.N.A. Act.

We anticipate, and hope for, a wide public for Professor Clokie's book. It is undoubtedly an excellent, short, descriptive account of modern Canadian institutions. If we believe it could be better either by amplifying doubtful points of criticism or comparison, or by deleting them for consideration in a more exhaustive and definitive volume, that should not detract from the virtues of a book in so many other important respects, admirable.

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