REVIEWS AND NOTICES

Freedom Wears A Crown. By JOHN FARTHING. Toronto: Kingswood House. 1958. Pp. xx, 175. ($3.50)

I found this book by the late John Farthing to be very stimulating. Most Canadian readers will, I think, agree with its emphasis, on the Queen in Parliament, as being our symbol of sovereignty, in contrast to the American concept of sovereignty residing in the people.

This latter concept has an attractive simplicity about it, but it would appear to create more problems than it solves. In the first place, it does not answer the vital question of the relationship between the executive and the legislative branches of government. An American President always has a very difficult time when the opposite party controls Congress.

In the second place, it inevitably overemphasizes a static basis of public opinion. The American constitution, of course, seeks to guard against this by its entrenched clause protecting freedom of expression. But the very conception of the sovereignty of the people, necessarily has in it a static element. This is illustrated very clearly by a plebiscite. It gives us public opinion at the present time, but tells us nothing of what public opinion will be a year from now.

In contrast, our conception of sovereignty residing in the Queen in Parliament, the latter in turn dependent on public opinion, has in it a dynamic element. The Prime Minister has to consider not only what public opinion is today, but what it will be in the future. The generally accepted view would now appear to be, that it took the Conservative Party about seventy years to recover from Macdonald's error in allowing the execution of Louis Riel.

But our system of government will only work effectively if the Prime Minister has the support of a majority in the House of Commons; without this, it would seem inevitable that it would degenerate into the type of group government that has been the bane of France.

If, however, the Prime Minister has the support of a majority in the House of Commons, then he is a very powerful individual.

As head of the executive, he has all the power of the President of the United States, and in addition, he dominates the exercise of the legislative power as well. This power has been great in the past, it is still greater in our own age, as the government assumes more and more of the responsibility of ensuring our material prosperity.

It is a power which France was never willing to concede, but which Britain has conceded quite freely, and we think the author is right in emphasizing the role which the Crown has played in Britain as a restraining force on any abuse of power by the Prime Ministers, not only directly in the Sovereign's power over the choosing of the Prime Minister, and in the granting of dissolution, but indirectly as the symbol of a constitutional morality which transcends party politics. Whence is derived the title of the book, *Freedom Wears A Crown.*

The author is I think very disturbed that the position of the Crown is not duplicated in Canada, and cites the Byng incident as illustration of this. In all this, I would agree, but I would disagree with the exclusive virtue the author attributes to the system of government in Britain.

It is, of course, true that Britain was the only first-class power in Europe which progressed from medieval to modern society, without passing through the convulsions of a revolution. How she was able to do this, will always no doubt, be a matter of argument; but I do not think any person seriously contends that she had the formula handed down to her on tablets of stone.

My own view is, that one of the important factors was the development of her commercial interests relative to the rest of the country during the times of the Tudors and the Stuarts, so that when James II abdicated and William and Mary became parliamentary monarchs, power passed not to a monolithic aristocracy, but to an aristocracy divided between the Tory and Whig parties, the former representing the landed, and the latter the commercial interests. Over the centuries, this government by alternative parties, has become instinctive with the British people, so that in the last fifty years, we have seen the virtual disappearance of the Liberals and the emergence of Labour as the alternative party.

It seems to me, therefore, that while there were many principles and many persons who contributed to the British system of government, these worked within a certain environment, and it is impossible to say what the development would have been if the environment had been different.

The fact that the Crown does not occupy the same position in Canada as in England would seem inevitable in the Canadian environment, made up as it is by diverse races and constantly under American influence.

And I suggest that what has developed in Canada is a vigorous federalism, which is a co-protector with the Crown of our freedom. It is doubtful if such a development was foreseen by the Fathers of Confederation; indeed several of the most influential among them favoured in theory a legislative union and regarded a federal union as a necessary political compromise in order to overcome the racial and geographic difficulties involved. A hundred years ago of course, one would have had to have been clairvoyant to have foreseen the vast extent of governmental activities in our modern society.

Yet there can be no doubt, that federalism does assist in the protection of our freedom, not only by directly limiting the power of the Dominion, but also by preventing any tendency toward the development of a monolithic state. It is very difficult to say what would have happened to the Conservative Party during its long years of federal opposition, if it had not been in power in some of the provinces.

Since I believe that federalism has become an essential ingredient of our Canadian system of government, I am not sympathetic with the author's criticism of Keynes, because I think Keynes gave federalism a new lease on life. It is because it is now generally conceded that it is through monetary and fiscal policies, that the federal government should manage our economy, and not through direct controls, that we hear little of the necessity of subordinating the provinces to the Dominion for effective state planning.

Nor have I much sympathy with the author's criticism of the older economists. I agree that the implementation of the theories of Adam Smith pulverized society, so that the members thereof became like so many iron filings, completely dominated by the laws of magnetism. It is also true that medieval society protected the individual by tying his productive function into the social framework, either by the ownership of land or the monopolistic protection of the guilds. But that type of society was essentially static and lacked any capacity for change. Bad as may have been some of the Enclosure Acts, I doubt if many people would advocate going back to the open field system of agriculture.

What the problem of the diesel firemen made all too clear, is that in spite of all the advances of our modern age, we have not yet found any guiding principle by which we can seek to reconcile the desire of the producer for security with the demand of the consumer for the latest products made possible by the continuous advances of science.

The author is right, I think, in emphasizing that the foundation of our western society is our belief in the unique worth of the individual; yet this in itself will not answer the question of how the individual can be protected and integrated in society and at

the same time, that society can be dynamic and absorb constantly changing methods of production.

The author is also right, I think, in emphasizing the effectiveness with which the British system of government has been able both to protect and support the unique value of the individual. My difference with him is one of emphasis; I do not think we are ever going to have in Canada an exact duplication of that system, and we are, therefore, going to have to adopt its essence to the Canadian environment.

I believe, that in that environment, federalism in spite of the disadvantages of its rigidities, which the author rightly emphasizes, is a desirable protector of our freedom. And since we are going to have to live with those rigidities in any event, I can see many advantages and no disadvantages in having federalism protect our individual liberties as it does in the United States.

As recent judgments in our Supreme Court indicate, it is a very interesting question whether a reasonable protection for the individual is not inherent in federalism. Does not federalism by its very nature, prohibit the Dominion from destroying a free expression of opinion in the provinces, just as it prevents the Dominion from taxing provincial property; if this latter were permitted it would allow the Dominion to tax the provinces out of existence.

Until this question is answered by our Supreme Court, I am not too enthusiastic about a Dominion Bill of Rights, because this might actually impede the Supreme Court in arriving at its own answer. If the Supreme Court's answer were in the affirmative, it would immediately create an entrenched clause, but a Dominion Bill of Rights could always be repealed by a subsequent Parliament.

Actually, I think the most desirable change in our federal structure at the present time, is an amendment to the British North America Act, which would limit any increase the Dominion could make in the number of judges in our Supreme Court. The conflict in the United States over court packing should make us very conscious of the fact, that a simple amendment to our Supreme Court Act would permit a government to increase at will the number of judges. And I doubt if any Governor General who refused his assent to such an amendment, would prove any more fortunate in the ensuing conflict than did Lord Byng. We need, I believe, more than the Crown to ensure the long term protection of our freedom in the Canadian environment.

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The Sanctity of Life and the Criminal Law. By GLANVILLE WILLIAMS. With a foreword by WILLIAM C. WARREN. New York: Alfred A. Knopf. Toronto: McClelland and Steward Limited. 1957. Pp. xi, 350, xi. ($5.50)

The legal profession is well acquainted with the writings of Dr. Williams. This new book is addressed not merely to the profession, but to what the publishers call "the general reader". While it is doubtful that "the general reader" will be able to tolerate such a searching examination of his beliefs, it is certain that the book will have an impact far beyond the reaches of religion, medicine and law, to which it is in its nature directed and where it will probably have most effect.

The book is concerned with what might be called the obverse side of the capital punishment argument. The author is not directly concerned with the taking of life as a punishment; he is concerned with the equally important question of the taking of human life for other purposes. The chapter headings give the clearest idea of what the book is about: Ch. I, The Protection of Human Life; Ch. 2, The Control of Conception; Ch. 3, Sterilization; Ch. 4, Artificial Insemination; Ch. 5, The Law of Abortion; Ch. 6, The Problem of Abortion; Ch. 7, The Prohibition of Suicide; Ch. 8, Euthanasia. Indeed, Dr. Williams is so quotable, that a quotation from his own preface would not be out of place:

"This, then, is a book of legal argument, of social history, of philosophy and biblical texts. It is a book about the conflict between the ideals of happiness and holiness; about the way in which morals become entangled with semantics; about the humanitarian impulses of medical men, and the anxiety neuroses to which these give rise in the sister professions of theology and law; about the alternate fears of mankind that the human race will dwindle out of existence or fill the planet to bursting point. It treats of monsters and morons, reproduction and repression, eugenics and euthanasia, original sin and the origin of the soul. The connecting thread is the extent to which human life, actual or potential, is or ought to be protected under the criminal law of the English-speaking peoples."

There have been a number of excellent books on capital punishment within the last few years, perhaps the best of which is Sir Ernest Gowers, *A Life for a Life*, published in London in 1956. They make interesting complementary reading to Dr. Williams' book. Indeed, *The Sanctity of Life* has already been favourably compared with what is alleged to be the usual emotional writing on the subject of capital punishment.

However, the reproach most likely to be directed at Dr. Williams is that his book unlike Sir Ernest's, is amoral if not

immoral. This is to confuse objectivity with amorality. Further, as the author himself points out, being objective does not mean being impartial. On the other hand, that to which the author is partial could scarcely be called dogma. This reviewer, being something of an old-time rationalist, is not fitted to discuss the theological aspects of the book. It is enough to say that there is ammunition for many a fight.

Similarly, little can be said about the strictly medical aspects save that the author's observations on medicine are as well documented and supported by authority as are those on religion. It can safely be said, however, that there is valuable medico-legal learning in the book which a doctor will find of great interest and practical value as for example, the discussion of the legality of a sterilization operation performed with a patient's consent, the problems of a doctor in relation to abortion and euthanasia.

As for the lawyer, no recommendation should be necessary for a book by Dr. Williams. Lest, however, there be some members of the profession who feel that the scope of the book is too wide for it to be of practical value, it must be pointed out that over one hundred cases, English, Canadian and American and a comprehensive selection of books and periodical articles are referred to. For example, there is a most penetrating comment on the *Donovan* case, [1943] K.B. 489, where the English Court of Criminal Appeal revived the discredited distinction between acts wrong in themselves (*mala in se*) and acts wrong only because prohibited (*mala prohibita*). It will be remembered that this was the case where a sex pervert had caned a girl for the purpose of sexual gratification and on being charged with assault set up the girl's consent as a defence. The court held that if an act is *malum in se*, consent cannot convert it into an innocent act. While it is difficult to reconcile the decision in *Donovan* with section 230 of the Criminal Code, the following passage based on *Donovan* appears in Martin's Criminal Code:

> ". . . although consent will ordinarily be a defence, consent will not excuse an act that in itself constitutes an offence" (1955, p. 430).

That this might be a matter of great importance in a criminal prosecution based upon the performance of a sterilization operation for reasons of convenience (for instance contraception), is clear from the *obiter dicta* of Denning L.J. (as he then was) in *Bravery* v. *Bravery*, [1954] 1 W.L.R. 1169 (C.A.) that sterilization is an offence when done to enable a man to have the pleasure of sexual intercourse without shouldering the responsibilities attached to it. (If the doctor were prosecuted, he could not rely upon the consent of the patient.)

This book is based on a series of lectures delivered at Colum-

bia University in April 1956 and the author's discussion of the legal problems arising from euthanasia is of particular interest in view of the famous case of *Regina* v. *Adams* in the following year. Dr. Adams was charged with the murder of an elderly patient by administering an overdose of drugs. The defence was *not* that Dr. Adams was legally justified in taking an incurable patient's life but that he was justified in pursuing a course of treatment intended to promote the comfort of the patient even though such treatment incidentally *may have* shortened her life. That such would afford a defence to a charge of murder is clear from the much admired summing-up of Devlin J. In other words, where the treatment *may* lead to death, the doctor is legally justified if, on proper medical grounds, he takes that *risk*. It was on this basis, apparently, that the case was disposed of although it appears clear from the learned judge's review of the evidence that once a patient, such as Dr. Adams's, had entered what was referred to as the spiral of drug addiction there was not merely a risk but a certainty of death if the treatment was continued. Indeed, as Dr. Williams points out, it would be extremely artificial to say that the last dose of drugs administered upon the same principle as all the previous ones, is alone unlawful. The doctor's excuse for administering the final fatal dose, the author suggests, rests upon the doctrine of necessity there being no way of relieving pain without ending life. (p. 324) That necessity will justify the ending of a life is however, doubtful in view of the statement of Devlin J. that ". . . no doctor, . . . no more in the case of the dying than the healthy, has the right deliberately to cut the thread of life." From this it would apparently follow that a doctor may risk the life of a patient in order to promote his comfort but when the risk of death increases to a certainty of death if the treatment be continued, he must stop the treatment leaving the patient even in dreadful agony. It is doubtful if the medical profession would accept such a proposition and, if it is the law it should be changed.

Apart from the very great value of strictly legal matters there is a great deal here for the criminal lawyer who is aware of the impact of non-legal materials on the outcome of his case. Even if he is not permitted during the trial to make reference to Dr. Williams's researches into the social background of a particular offence, this material must surely be of great assistance in preparing an address going to sentence.

Finally, the proposals for legislative reform of the provisions of the criminal law in regard to the preservation of life should be of great interest to any lawyer who acknowledges his particular responsibility in this respect.

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Legislative, Executive and Judicial Powers in Australia: Being a Treatise on the Distribution of Legislative, Executive and Judicial Powers of Commonwealth and States under the Commonwealth of Australia Constitution Act. By W. ANSTEY WYNES, LL.D. Second Edition. Sydney, Melbourne and Brisbane: The Law Book Co. of Australasia Pty. Ltd. Toronto: The Carswell Company Limited. 1956. Pp. lxi, 768. ($14.25)

This is a comprehensive text on the Australian constitution, now in its second edition. The first edition was published twenty years ago and it need hardly be said that much of the work has had to be re-written. Like its predecessor, it is well organized and well written. It is scholarly too. The author has not been content with an exhaustive examination of Australian cases; he also makes frequent references to authorities from Canada, the United States and other countries. And it is written by a man who has had many years of practical experience in the field as legal adviser to the Australian Department of External Affairs.

Dr. Wynes' approach is purely legalistic; he does not concern himself with the sociological reasons that may have influenced the courts. This approach has limitations, but it certainly makes for clarity of exposition of what the courts have said and done. This is especially true in Australia where the High Court has, since the *Engineer's* case in 1920, reversed the former attitude of closely following American precedents and adopted a very legalistic point of view towards the constitution.

It would be fruitless in a short review to catalogue the many matters with which the book deals and I will limit myself to indicating some of the material that may be of special interest to Canadian readers. It begins with an introductory chapter comparing the Australian constitution with that of Canada and the United States. This is very useful to a proper understanding of the subject because, as Dr. Wynes puts it, "Viewed generally, the Australian constitution appears largely as a compromise between the Canadian and American models." It resembles the American constitution, for example, in that the Commonwealth Parliament is one of enumerated powers, the states being vested with the residuary power. And it adopts the principle, in the national government, of the separation of legislative, executive and judicial powers. But the points of resemblance to the Canadian constitution are equally strong. The Commonwealth of Australia Constitution Act, like the British North America Act, is a British statute that gave to the central Parliament certain powers formerly vested in local legislatures, and both these constitutions have been read in the light of the common law and other British statutes, notably the Colonial Laws Validity Act and the Statute of Westminster.

Again, "The central characteristic of the Australian constitution is the predominance of the Crown in every aspect of governmental powers." This could be said with equal truth of the Canadian constitution. These matters also receive attention in the most interesting second chapter, "Interpretation of the Constitution."

Another chapter of especial interest to Canadians is Chapter IV, "Imperial and International Relations", because Canada and Australia have had parallel developments in these fields. Here are found excellent treatments of the Commonwealth connection, extra-territoriality and the Statute of Westminster. Also of interest (and this naturally constitutes a substantial portion of the book) is the author's treatment of conflicting federal and state legislation on the many heads of Commonwealth power that are the same or similar to those enumerated in section 91 of the British North America Act.

From what has been said, it should be apparent that Canadian lawyers could profitably resort to Australian authorities on constitutional problems that have not been fully explored in this country. To give one instance, the defence power has been subjected to a far more searching examination in Australia than in Canada. Dr. Wynes' book is a good place to turn to for this purpose. For in examining the extent to which Canadian cases may be used in Australia, he gives valuable assistance in determining the extent to which we may use Australian authorities here. The chief obstacle to applying Australian cases to Canada is that there is no double enumeration of powers in the Australian constitution. Only the Commonwealth Parliament's powers are spelled out. This, says Dr. Wynes, avoids consideration of the "pith and substance" of a statute, which, of course, is of the greatest importance in Canada.

Dr. Wynes' legalistic approach has some drawbacks. For example, the book would have been better if it had been prefaced with at least a short historical outline. For, as the author himself points out, recourse may quite properly be had to history if only to clear up ambiguities. Again, one does not like to be told in a comprehensive work of this kind to look elsewhere for the conditions under which the Governor General exercises the power of dissolution of Parliament. Surely this deserves some attention in a legal work on the constitution even though it has been adequately treated elsewhere.

The book would have profited too from more rigorous proofreading. True, there is an extensive corrigenda at the beginning of the work but this is hardly the best way to make corrections and it only includes a fraction of the many typographical errors. But these are minor flaws in a work that excites the envy of a

Canadian lawyer. It will, I fear, be many years before there is anything comparable on the Canadian constitution.

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