A Book for Judges

by

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O. C., Q.C., LLD.

Written at the Request of the
Canadian Judicial Council

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Foreword

The Canadian Judicial Council is proud to be the sponsor and publisher of *A Book for Judges* in separate English and French versions. The idea for such a book germinated about four years ago. It was the conviction of the Council that a systematic presentation of the legal and ethical problems that confront Judges, especially newly-appointed ones, in the administration of the functions of the judicial office and suggested solutions for such problems (some solutions being governed by statute) would assist them in carrying out their duties. Responsibility for bringing the idea to fruition was assigned by the Council to its Research Committee whose chairman is the Chief Justice of Manitoba, the Honourable Samuel Freedman, subject to the direction of the Executive Committee of the Council and, ultimately, to that of the Council itself.

The Research Committee was fortunate to be able to persuade the Honourable J.O. Wilson, O.C., a retired Judge, to undertake the preparation of the English version. He was uniquely qualified by reason of rich experience as a County Court Judge, then as a Judge of the Supreme Court of British Columbia (the trial division), subsequently as a member of the British Columbia Court of Appeal, and ultimately as Chief Justice of the Supreme Court of British Columbia (the trial division).The Executive Committee and the Council approved wholeheartedly the appointment of Mr. Wilson and as well his secondment of Professor George Curtis, former Dean of the Faculty of Law of the University of British Columbia, to assist him. The Council is grateful to both Mr. Wilson and Professor Curtis for what they have produced.

Early drafts of the Wilson-Curtis text were used by the Honourable Ignace J. Deslauriers, now a supernumery Judge of the Superior Court of Quebec, in preliminary work on the French version.

The Council had made it clear that it did not want merely a translation of the English version into French but, rather, an independent French version which would, however, parallel the English version as far as possible. I invite comparison of the two versions which will reveal the degree to which the common law focus and the civil law focus of the respective versions coincide.

The Research Committee and the Council were as fortunate in finding as highly qualified an author for the French version as for the English version. The Right Honourable Gérald Fauteux, P.C., C.C., my predecessor as Chief Justice of Canada, and previously a member of the Superior Court of Quebec, and a member of the Supreme Court for almost twenty-five years, agreed to prepare the French text. He was able in the course of his work to obtain progressively the approval of the Chief Justice of Quebec, the Honourable Edouard Rinfret, the Chief Justice of the Quebec Superior Court, the Honourable Jules Deschênes, and the two Associate Chief Justices of that Court, the Honourable James Hugessen and the Honourable Gabrielle Vallée. The Council expresses its gratitude to the former Chief Justice of Canada for the excellent work he has produced, *Le livre du magistrat*.

It must be emphasized that *A Book for Judges* is not an official directive of the Canadian Judicial Council to federally-appointed Judges. Although comments and suggestions were made by various members of the Council in the successive drafts produced by Mr. Wilson and Mr. Fauteux, the final product is that of each of them as an independent author. The fact that the two books were prepared under the auspices of the Council does not impair their character as personal presentations.

Finally, I wish to record on behalf of the Council, my deep appreciation of the work of the Research Committee and especially of its Chairman, in guiding and bringing this venture of the Council to a successful conclusion. Having examined the two books, I have no doubt of their usefulness to both new and not so new members of the federally-appointed Judiciary. I think that provincially appointed Judges, although not connected with the Canadian Judicial Council, would find most of the material in the two books equally useful for them.

BORA LASKIN
Chairman

Acknowledgements

I am very greatly indebted to Dean George F. Curtis who has rendered me, through the depth and universality of his knowledge of law, invaluable assistance in this work.

The Right Honourable Gérald Fauteux, formerly Chief Justice of Canada, has written a book for Québec judges. I am vastly heartened by the fact that, where we have written on the same subjects, our views concur.

The Research Committee of the Canadian Judicial Council, headed by the Honourable Samuel Freedman, Chief Justice of Manitoba, has greatly helped me by wise counsel.

Table of Contents

Introduction

This book is not a set of diktats from above but friendly advice from experienced judges to brother judges. Many of the points covered may seem to some of you to be obvious, but experience, our own and that of other judges, has shown that there have been disgressions in respect of most aspects of judicial life dealt with in this short volume.

The book begins with some general observations on judicial conduct in and out of court. Later there are, under the headings of "Trials" and "Judgments", brief excursions into some fields of law, arbitrarily selected by the editors as being lively and currently debated subjects upon which some guidance should be helpful, particularly to newly appointed judges. But these expositions do not pretend to the stature of texts fully covering the subjects discussed and fully buttressed by the citation of all applicable authorities. They are intended only to provide rather elementary guidelines, pointing the way to such further exploration as may be necessary in any given case. For instance, *Stare Decisis* and the allied subject of *Obiter Dicta* are briefly discussed. But for a better understanding of these subjects there is a copious literature available.

Chapter 1

Part 1

JUDICIAL CONDUCT

A. *General*

The aim here is to discuss the practicalities of judicial conduct and judicial work, the new life which confronts each judicial appointee, in court and out of court. Necessarily we do not purport to cover every problem of judicial conduct that may arise. But we shall attempt to state the general principles which should govern judicial conduct and to deal with their application in certain more or less familiar situations.

Throughout this work there will be discussion of standards of judicial conduct in and out of court. But these headings are not mutually exclusive; the accepted rules of judicial demeanour and conduct are as applicable in the one situation as in the other. So, initially we propose to set forth a general principle governing all aspects of judicial behaviour. That principle is best stated in Lord Hewart's famous dictum in *Rex v. Sussex Justices*, [1924] 1 K.B. 256 at p. 259:

> "(It) is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

This pronouncement, so simply stated, so profound in its sagacity can never, how often repeated, become a cliche. In its application to judicial conduct one might say that what a judge does must not only be proper, it must appear to be proper. Justice, of course, comes first but the appearance of justice is also of major importance.

Let us consider a homely application of this rule. During the course of a trial the presiding judge is seen by a litigant in earnest conversation out of court with his opponent's counsel. Any lawyer versed in the ethics of our profession would place an innocent construction on such a happening, would think that the subject of

the conversation must be unrelated to the trial. Not so, or not necessarily so, the less sophisticated litigant. He is bound to wonder why, in the middle of a hearing of vital importance to him, the judge is talking to his opponent's advocate, and what they are talking about. And equally so, in a court room his concern will arise if the conduct of the judge even suggests partiality, if the judge is brusque with one advocate, courteous to another, if he shows any sort of disposition to prejudge the issues before him.

Lord Hewart's precept applies not just to the conduct of the judge in relation to litigation, but generally. If a judge behaves badly in public, if he is crude, arrogant, unmannerly, intemperate, the ordinary observer may well think, "What manner of justice can we expect from that man?" From this may follow not only distrust of the work of that particular judge but some loss of faith in the whole judiciary.

The standard of personal conduct required of a judge must inevitably be higher than that expected of an ordinary citizen; his conduct should be free from impropriety or the suggestion of impropriety; it should be, as far as is humanly possible, beyond reproach. As an instance, a traffic offence may be a minor, if distressing, incident in the life of a layman; in the career of a judge it will be a serious matter because the public, quite properly, expects those who administer the law to obey the law. These requirements of proper behaviour go far beyond such major instances as breaches of the law. W. S. Gilbert has a judge sing:

> "The Law is the true embodiment
> Of everything that's excellent
> It has no kind of fault or flaw
> And I, my Lords, embody the Law."

The last line of this jingle contains a great deal of truth, for, to many citizens, the judge does indeed embody the law and those persons' opinion of the law, their respect for the law, will be largely affected by what they observe of the behaviour of judges, not only when they are on the bench, but in their private lives. The sort of licence of act or speech that may be tolerable in the conduct of another person may well be unacceptable in the behaviour of a

judge. In order that Lord Hewart's precept may be observed, in order that justice may be seen to be done, it is necessary that the judge be a respected and respectable figure in our society presenting a picture of dignity without arrogance, probity without excessive protestations of virtue; an example of good conduct and mannerliness.

Good conduct does not involve pomposity or unapproachability; on the contrary it requires humanity and courtesy. The judge is set apart; but not always behind a barbed wire fence; the barbs only appear when an improper approach is made to him, and even then, if the approach is the innocent product of ignorance, the rejection, though firm, should be courteous.

B. *In the Beginning*

You should impress on your immediate staff, your secretary and law clerk, and others who serve you, the need for complete secrecy as to all aspects of your work. One particular danger contemplated is that any knowledge of how you intend to decide a case should leak out before judgment is pronounced.

See your Chief Justice or Chief Judge at once and other members of your court as soon as possible and try to establish rapport with them.

C. *Investments*

It is wise at once to review your investments. It might be advisable to dispose of securities or shares issued by a corporation which is frequently involved in litigation, for instance, a local public utility. More will be said on this subject when we come to consider the disqualification of a judge from conducting a trial or hearing by reason of his financial interest in the outcome of the litigation.

The investments of your wife and of your immediate family should, we think, be subjected to a similar review, because you should not, we suggest, sit on a case the outcome of which might benefit such persons.

Consideration might be given to such plans as have been utilized by political figures in the United States whereby an independent manager or trustee is given complete control of personal and family investments. Such a scheme must, we think, have an absolute requirement that the judge be not aware at any time of the nature of such investments, of the names of the corporations on which he has, through his manager, an interest. And we must add this caveat—In the absence of any Canadian or English judicial pronouncement on the subject we cannot firmly recommend such plans; we can only suggest they might be investigated.

And we are concerned by an opinion stated at page 64 of *Reporters Notes to Code of Judicial Ethics*, a publication sponsored by the American Bar Association and the American Law Foundation, strongly critical of the use by a judge of a "Blind Trust" for his investments.

D. *Associations—General*

On appointment a new judge should consider his associations, professional, political, business, charitable, public service and general.

This review should not be made with the preconception that all associations must be eliminated. A judge cannot be expected to live in isolation from the society of which he is such an important member nor indeed should he.

The search should only be for such relationships as are or may be inconsistent with the requirements of his new position.

E. *Section 36, The Judges Act—Associations & Activities*

Section 36 of the *Judges Act* says this:

> "No judge shall, either directly or indirectly, as director or manager of any corporation, company or firm, or in any other manner whatever, for himself or others, engage in any occupation or business other than his judicial duties, but every judge shall devote himself exclusively to his judicial duties, except that a district judge in Admiralty may continue to perform the duties of a public office under Her Majesty in right of Canada or of a province held by him at the time of his appointment as a district judge in Admiralty, R. S., c. 159, s 37."

This makes clear the requirement that, on appointment, the judge must not only cease to practise law but that he must further dissociate himself from any other "occupation or business" he may have been involved in; any corporate directorship, any association with the management of a business, must be eliminated.

It has been recognized in England that it is improper for a judge to hold a directorship in a commercial undertaking and a judge is expected to resign any such directorship on appointment to the bench. This is in line with the provisions of s. 36 of our *Judges Act*.

The dissociation from legal partnerships, from all aspects of the work of barrister and solicitor must, of course, be immediate and final. No judge may allow his name to be carried by the firm with which he was associated.

No judge should at any time after his appointment give legal advice to any person. You will often find yourselves innocently solicited by friends and former clients for opinions. They may be surprised, even affronted, when you refuse to help them. You must be firm, even at the risk of offending old friends and associates. Tell them to consult a lawyer. The dangers of acting otherwise are great and obvious. Even your lightest statement of the law will be cherished and repeated, not as the opinion of a lawyer, but as that of a judge, as that of one in authority.

The requirement of complete severance from all political associations is absolute. No intelligent and thoughtful man can be expected, on appointment to the bench, suddenly to shed all his interest in the affairs of his community and his country, or to avoid retaining old political opinions or acquiring new ones. But he must not at any time be associated with any political group and he must refrain from the public expression of political opinions.

Section 36 is not intended to compel a judge to sever all relations with the very numerous organizations which work, gener-

ally, for the welfare of society. It is impossible to categorize all these organizations; they may be educational, conservational, charitable, sociological, literary, historical, regional, or of many other classifications. Continued membership in many of them will probably be not only unobjectionable but desirable. But at least some things should be avoided, specifically membership in organizations whose purposes include exerting pressure on any level or levels of government, either for the expenditure of monies or the changing of legislation, and membership in bodies which are likely to be involved in litigation. Membership in professional bodies such as the Canadian Bar Association has never been regarded as objectionable.

The growing intervention of government in all affairs of our society involves an increasing involvement of government in constitutional and other litigation. In this, of course, as in all other litigation you must not only be impartial, you must be above any possible suggestion of partiality. Membership in any organization which aggressively seeks governmental action, and necessarily, therefore, is critical of governmental or legislative action or inaction in any field may impute to you partiality.

Many judges have in the past been usefully and honourably associated in various capacities with the management of universities. Unexceptionable as such conduct may have been in the past, we suggest that in the context of today, with universities largely dependent on government for support, with the inevitable consequent solicitation of government for funds by managing bodies of universities, with the always existent possibility of a clash between solicitors and solicited, perhaps such associations should be avoided. Another possibility, perhaps almost a probability, is that disputes will arise between universities and labour unions and like organizations representing their employees as in the recent case of *The Faculty Association of the University of St. Thomas* (1976), 60 D.L.R. (3d) 176. It is undesirable that a judge should be associated with one side or the other in such a situation. It might be a wise rule for a judge to follow that in association with universities the judge will accept only appointments to positions ceremonial in nature and which are not in any way involved in the university's administration.

In whatever association you may decide to participate no matter how laudable the object, you should refrain from the solicitation of funds. It is not in keeping with your position as a judge that you should ask for gifts from anyone, or for any person or organization.

A judge should not receive from any person, corporation or organization, gifts, favours or benefits, the acceptance of which could cast the least doubt on his impartiality.

This ban extends not just to gifts from litigants or their counsel; it includes the larger area of gifts or favours from persons or corporations who or which may in the future be expected to be involved in litigation or materially interested in the results of litigation by others. Any gift to a judge from an unexpected or unfamiliar source must at once be suspect.

An excessive involvement or set of involvements which will engage so much of your time as to interfere with your judicial work is certainly to be avoided.

F. *Section 36, Writing about and Teaching Law*

We do not think that s. 36 creates any real departure from the rules which have traditionally, without statutory pronouncement, governed the conduct of English judges.

Shimon Shetreet in *Judges on Trial* says at p. 325: "One important feature of English judicial ethics is that, except for royalties from books, dividends from shares, rent from property he owns, and reasonable honouraria and expenses for lectures, a judge may not receive any remuneration, other than his judicial salary. This is not left to the discretion of the judge." At p. 326 he says: "Judges cannot teach regularly at a university or other educational institution for a salary. A judge may teach regularly for no remuneration, provided it does not interfere with his official functions . . .
Judges receive royalties for their writings . . ."

The *Code of Judicial Conduct* issued by the American Bar Association in 1975 says, in Canon 4, that:

> "A judge, subject to the proper performance of his duties, may engage in the following quasi-judicial activities, if, in doing so, he

does not cast doubt on his ability to decide impartially any issue that may come before him.

He may speak, write, lecture, teach and participate in other activities concerning the law, the legal system or the administration of justice."

Canon 6 permits a judge to receive "compensation and reimbursement of expenses for Canon 4 activities if the source of such payments gives no indications of impropriety." In Canada, we are more strict.

Canadian judges have taught at law schools and have written legal text books and articles for publication in legal periodicals.

It appears to us that a judge who, in his spare time, not required for the performance of his judicial duties, performs tasks, such as the teaching of law or writing about the law, is not engaging in another occupation or business but is fulfilling his traditional role as a judge by adding to the knowledge of others while at the same time he is enlarging, to the public benefit, his own knowledge of the subjects on which he writes or discourses.

An occasional exposition, written or oral, by a judge of the law is not a business caught by the Act; it is an activity associated with the occupation of judging. The examples set by exemplary judges are overwhelming; in England, Bracton, Fortescue, Sugden, Lord Hailsham, Lord Devlin, Lord Denning and Megarry, v.c.; in Canada, Mr. Justice Mignault of the Supreme Court of Canada, Mr. Justice Russell, Mr. Justice Clement and Sir Francois Langelier and George F. Challies, both formerly Chief Justices in Quebec.

If a judge devotes what is legitimately his spare or leisure time to writing or lecturing about law rather than to golf or bridge, surely he has not offended against the provisions of s. 36. The restriction to be applied is that he must not let these activities interfere with his work as a judge.

Section 36 says nothing about emolument and we conclude from what we have already written that a judge may accept pay for writing done in his spare time on legal subjects. A fortiori he may retain during his tenure as a judge, royalties for writing done before his appointment and revisions after his appointment.

As to lectures to law students or others we suggest that the better practice is to accept expenses but no remuneration.

G. *The Judge as Executor*

Should a judge act as executor of a will or administrator of an estate?

Generally speaking, No. But in the special case of the death of a close relative or intimate friend, where only a simple and immediate distribution is involved, where no question may be required to be asked of a court, where there is no likelihood that there will be disputes leading to litigation, a judge may, we think, act as executor. For a judge to make a practice of acting as executor, or to accept pay for his work, would strongly suggest that he was offending against the provisions of s. 36 of the *Judges Act*.

The thing to remember is that executors and trustees perform their work subject to judicial direction and correction. Even where a judge has already embarked on an executorship, he should retire from it and be replaced if a situation later develops which indicates that recourse will be had to a court.

H. *Speeches*

You will be asked to make speeches to legal and other organizations and you may properly accept such invitations and comment fairly freely on the law as it is, less freely on the law as you think it ought to be. Any criticism, direct or implied, of current legislation or of delivered judgments is generally to be avoided in statements made off the bench, lest your hearers infer criticism of a legislature, federal or provincial, or of a court and hence, perhaps, political bias, or disrespect for other courts. The judge may perhaps be allowed more freedom of comment when speaking to a select professional group than when speaking to public gatherings. We do not think that s. 36 of the *Judges Act* forbids the acceptance by a judge of travelling and living expenses when he is asked to speak at some other place than his place of residence, but we suggest he should not accept remuneration for such speeches.

I. *Sections 37 & 38, The Judges Act—Commissions & Inquiries*

Section 36 of the *Judges Act* forbidding extra judicial employment has already been discussed. Sections 37 and 38 are equally important. Section 37 forbids your acting as "commissioner, arbitrator, adjudicator, referee, conciliator or mediator on any commission or any inquiry or other proceedings unless:

> (a) in the case of any matter within the legislative authority of Parliament, the judge is by an Act of the Parliament of Canada expressly authorized so to act or he is thereunto appointed or so authorized by the Governor in Council; or
>
> (b) in the case of any matter within the legislative authority of the legislature of a province, the judge is by an Act of the legislature of the province expressly authorized so to act or he is thereunto appointed or so authorized by the lieutenant governor in council of the province.
>
> (2) Subsection (1) does not apply to judges acting as arbitrators or assessors of compensation or damages under the *Railway Act* or any other public Act, whether of general or local application, of Canada or of a province, whereby a judge is required or authorized without authority from the Governor in Council or lieutenant governor in council to assess or ascertain compensation or damages."

Section 38 says that if you do act in the instances permitted by s. 37 you must accept no pay beyond travelling and living expenses save in the unusual circumstances set out in ss. 2.

There is a respectable body of opinion which opposes the involvement of judges even in the class of work permitted by s. 37. But there is under s. 20 of the *Judges Act* included in your remuneration by the Federal Government a sum of $3,000.00 per annum paid to each judge in part for the performance of the work provided for by s. 37. It would be, perhaps, unseemly to accept the pay and reject the work. By reason of the difficulties raised by the different considerations the Canadian Judicial Council has resolved that:

> "The Chairman communicate with the Minister of Justice and the Attorney-General of each province to inform him that, in the view of the Canadian Judicial Council, every request by the executive government that a Judge perform a task outside the work of the Court be made by the Minister of Justice or the Attorney-General, as the case may be, to the Chief Justice, or other Judge having the administrative responsibility, and that such request be accompanied by the proposed terms of an appointment under appropriate authorizing statutory authority (e.g., a statute authorizing a public inquiry) as required by s. 37 of the *Judges Act*, and be made in time that the Chief Justice, or other Judge having the administrative responsibility, can consult with the Judge concerned and other members of the judiciary."

And,

> "The following guidelines be adopted, for the assistance of a Chief Justice, or other Judge having the administrative responsibility, and a Judge in respect of whom an invitation is addressed by a Minister of Justice or an Attorney-General to perform a task outside the work of the Court:
>
> (a) no invitation to carry on work that falls outside a Judge's judicial functions should be accepted by a Judge unless the invitation falls squarely within s. 37 of the *Judges Act*;
>
> (b) no such request should be accepted unless
>
> (i) the Chief Justice or other Judge having the administrative responsibility is satisfied that the probable effect on the work of the Court of the loss of judicial time involved in the acceptance of the invitation will not unduly impair the effective operation of the Court; and
>
> (ii) the circumstances giving rise to the invitation are so grave as to outweigh potential serious long run damage to the judiciary;
>
> (c) subject to sub-paragraph (b), a Judge should feel bound to accept such an invitation;
>
> (d) the Chief Justice, or other Judge having the administrative responsibility and the Judge in respect of whom the invitation is addressed should feel free to seek the aid of the other members of their Court and the Chief Justices or other Judges of other courts before reaching an answer to a question arising under sub-paragraph b(ii)."

We do not interpret this resolution as affecting the right of the judge whose services are solicited to make not only to his Chief Justice but to government his own representations as to whether he should be appointed.

J. *Reading Law*

Every lawyer must be aware of the need to keep abreast of current law. This need can ordinarily be met by reading the law reports and articles in legal publications. In the case of a judge something further is required. Not all written judgments are reported; in fact, only a small fraction is. The very possibility of a clash between judgments contemporaneously rendered in the same trial court, by different judges, or a similar conflict between judgments of an appellate court, sitting in different sections, must be avoided. Therefore a judge must try to know what his brother judges are currently deciding. Much of this may be learned in discussion, in the talks between judges, so indispensable a feature of a good working court. But a further precaution should be taken: ideally all current written judgments delivered by other judges of your court should be read, or at least scanned, so as to avoid the possibility of rendering later inconsistent opinions. There should, when possible, be a special file kept of such judgments, available to all judges.

K. *Judicial Discussion*

The need for the new judge to establish and maintain a good, communicative relationship with his Chief Justice and with the other members of his court cannot be over-emphasized. Once you move into action as a judge you cannot talk about problems arising from your work with any persons except brother judges. The old, casual discussions of current work with fellow lawyers are finished with. But you can of course depend on members of your own court to keep secret your confidences and to help you from their own learning and experience. Such talks may serve a further purpose, that of maintaining uniformity of judicial opinion on your bench. Instances, but by no means the only instances, are sentencing of convicted criminals and quantum of damages. It is an unusual, but not a unique experience, when you outline a problem to a brother judge, to find that he also is confronted with a problem so similar that your two opinions should conform. More of this when we come to consider *stare decisis*.

Part 2

FORMALITIES AND INFORMALITIES

A. *General*

We have been asked to write a section on etiquette. We have before us a standard authority *Styles of Address* by Mr. Measures, formerly Chief of Protocol in our Department of External Affairs. We have also been helped by a treatise *Legal Etiquette and Court Room Decorum* written for the guidance of the bar by S. Tupper Bigelow and published by Carswells in 1955. This useful book deals extensively with etiquette and also, in Chapter 5, with "The English Language in our Courts." While we generally agree with and accept what Judge Bigelow has written we think that some of his rules should be relaxed to accord with the usages of a less formal age. For instance, he writes on page 10, that a formal letter to a superior court judge should end:

> "I have the honour to be, my Lord, Your Lordship's obedient servant"

We suggest that this phrase smacks of an archaic servility and that "Yours respectfully" or even "Yours faithfully" will serve. Similarly we do not agree that, on an envelope, a superior court judge should always be addressed as "The Honourable Mr. Justice Jones" and never as "The Honourable Mr. Justice John Jones" except where there are on a court two judges with the same surname. We can see no reason why any Canadian judge should be affronted by the latter form of address.

When we use the term "Superior Court" we include the Supreme Court of Canada, the Federal Court of Canada, all final provincial appellate courts and all provincial superior courts of general civil and criminal jurisdiction. When we write "County Court" we include "District Court" and vice versa.

B. *Forms of Address—Written*

To the Chief Justice of Canada:
The Right Honourable the Chief Justice of Canada, or
The Right Honourable John (or Mary) Jones, Chief Justice of Canada.

To the Chief Justice of the Federal Court of Canada:
The Honourable the Chief Justice of the Federal Court of Canada, or

The Honourable John (or Mary) Jones, Chief Justice of the Federal Court of Canada.

To the Chief Justice of a Province:
The Honourable the Chief Justice of Assiniboia, or
The Honourable John (or Mary) Jones, Chief Justice of Assiniboia.

To the Chief Justice of a Superior trial court:
The Honourable the Chief Justice of the Court of Queen's Bench (Supreme Court) of Assiniboia, or
The Honourable John (or Mary) Jones, Chief Justice of the Court of Queen's Bench (Supreme Court) of Assiniboia.

To puisne judges of all superior courts:
The Honourable Mr. Justice Jones, or The Honourable Madam Justice Jones, or
The Honourable Mr. Justice John (or Mary) Jones.

Letters to Superior Court judges may open:

Dear Chief Justice
Dear Madam
Dear Sir
Dear Mr. (or Madam) Justice Jones,
or informally,
Dear Judge

and should end, we suggest,
Yours respectfully, or
Yours faithfully.

In some Canadian jurisdictions all written communications to a judge by counsel concerning a matter before the Court are addressed to the Registrar to be brought to the attention of the judge, with, of course, copies to other counsel involved. We are told that this practice is not followed in all Canadian courts but we see much to commend it.

C. *Forms of Address—Spoken*

In a court room or in the precincts thereof, any superior court judge must be addressed as "My Lord" or "My Lady". But this usage is not to be followed in other places, where a chief justice should be saluted as:

Chief Justice Jones, or
Chief Justice,
and a puisne judge as,
Mr. Justice Jones, or Madam Justice Jones.

But "Judge" remains an honourable appellation and we do not think a Canadian superior court judge should be offended if addressed thus in conversation.

A chief justice will be addressed, generally, by colleagues and often by old intimates as "Chief". We think that only a rather captious chief justice will, in these days, object to the use, as contrasted with the abuse, of this now familiar salutation.

"Sir" imputes respect and may be used in talking to any male judge in any place other than a court room. "Madam" is the female equivalent of "Sir".

D. *Invitations, etc.*

Invitations to superior court judges and their wives are addressed to:

The Honourable Chief Justice Jones and Mrs. John Jones, or
The Honourable Chief Justice Jones and Mr. Jones
The Honourable Mr. Justice Jones and Mrs. John Jones.
The Honourable Madam Justice Jones and Mr. Jones

The words "The Honourable" should be omitted from acceptances of such invitations which should begin:

"Mr. Justice Jones and Mrs. John Jones accept" or
"Madam Justice Jones and Mr. Jones accept"

Similarly, an invitation from a superior court judge should begin "Mr. Justice Jones and Mrs. John Jones invite" or "Madam Justice Jones and Mr. Jones invite"

Again, calling cards should omit the prefix "The Honourable".

Invitations by judges to intimate friends to attend informal parties may be from "John and Mary Jones" without any reference to rank.

Your more intimate friends will probably, after your appointment, address you on informal occasions as "John" or "Mary" and why not, particularly if you call them "Bill" or "Jane".

But it is a good rule not to call anyone by his or her first name unless you are willing to be similarly addressed. Thus, with your staff, familiarity invites familiarity and the use of the prefixes Mr., Mrs., Miss, (or Ms., however you pronounce it) is preferable. In Canada, although not in England, a person addressed simply by his or her surname "Brown" or "Robinson" may resent such usage.

E. *The County or District Courts*

Addresses on envelopes:
His or Her Honour the Chief Judge of the County Court of Athabaska,
His or Her Honour John or Mary Jones, Chief Judge, The County Court of Athabaska,
His or Her Honour Judge Jones, or
His or Her Honour Judge Jones or Mary Jones.

Letters may open to chief judges:
Dear Chief Judge Jones, or
Dear Sir or Dear Madam (less formal)
Dear Judge

To other judges:
Dear Judge Jones
Dear Sir or Madam, or (less formal)
Dear Judge

In a court room or the precincts thereof, County Court judges are spoken to as "Your Honour". This form of address is not used in other places where it is correct to say "Sir", "Madam", "Judge Jones", or, informally, "Judge". They may be introduced and referred to as "Judge Jones".

Letters to them may end, "Yours respectfully", "Yours faithfully", or in personal matters, "Yours sincerely".

Invitations to County Court judges and their wives should be addressed to "His Honour Judge Jones and Mrs. Jones", or "Her Honour Judge Jones and Mr. Jones". Acceptances, calling cards and invitations from the judge should omit the appellation "His or Her Honour".

F. *Precedence*

1. *In each province*—Provincial statutes set out the order of precedence among judges, beginning, in each case, with the chief justice of the province.

2. *In Canada generally*—The table of precedence for Canada is set out at p. 853 of the 1980 *Canadian Almanac and Directory* and includes all Canadian superior court judges.

Chapter II

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Part 1

TRIALS

Disqualification for Bias—General

Bias, or the reasonable apprehension of bias, disqualifies a judge from hearing a case.

Some usual grounds upon which a judge may be disqualified to sit on a trial or appeal are these:

A. A pecuniary interest in the outcome of the litigation.

B. A family relationship or a close friendship with a litigant or a witness.

C. The expression by the judge of views reflecting bias regarding a litigant or the matter to be litigated.

D. A previous professional connection with the litigation or, in some cases, with the litigant.
But a judge, apparently disqualified, may sit:

E. If the situation is such that there is no other way in which the trial or appeal may be heard; the rule of necessity.

F. If, knowing of the judge's disqualification, all parties to the litigation consent.

G. Disclosure
We shall discuss under this heading whether a judge having knowledge of possible grounds of disqualification, should record them before embarking on the hearing.

A. *Pecuniary Interest*

If the judge has a pecuniary interest in the case to be tried there comes into effect the ancient rule that no person can be a judge in his own cause. In England the law has been that any

pecuniary interest, however small, will disqualify a judge. This was said by Blackburn J. in *The Queen v. Rand* (1865), L.R.1. Q.B. 230 at 232. In *Dimes v. Grand Trunk Junction* (1852), 3 H.L.Cas. 759, 10 E.R. 301, it was held that a decree made by the Lord Chancellor, Lord Cottenham, was voidable and should be reversed because at the time the Lord Chancellor made the decree he held shares in the Canal Company. In the House of Lords, Lord Campbell said: "No one can suppose that Lord Cottenham could be in the remotest degree influenced by the interests that he held in this concern" but nevertheless concurred in reversing the decree.

So we think it may be said that, in English law at least, a financial interest imputes bias and disqualifies. What constitutes a financial interest is often a debatable point but the *Dimes* case appears generally to establish that the ownership of shares in a corporation involved in the litigation is such an interest and disqualifies a judge.

The *Dimes* case is the only English decision relating to the disqualification by reason of pecuniary interest of a High Court judge; other cases deal with disqualification of magistrates, arbitrators and members of administrative tribunals. While, in England, the *Dimes* judgment stands unchallenged, the following words from p. 309, of *Judges on Trial*, a very modern work (1976) by Dr. Shimon Shetreet, while citing no authority, do state the author's opinion of the modern approach in England to disqualification of a judge by pecuniary interest:

Interest in the Proceedings

"The crux of the problem in cases of interest in the proceeding is the ownership of shares or other personal association with a corporation (e.g. having a bank account). Unless a strict view is taken on the matter, that a judge should disqualify himself no matter how small and trivial his share-holding, the matter does not admit of an unqualified rule. The English practice does not take the strict view and allows a judge to sit when the interest is minor or minimal provided that he always discloses it. Whether or not the shareholding would be regarded as minor would depend on

the number of shares, when compared with the total capital; the amount involved in the litigation; whether the company is a public or private company; whether the judge has shares in the company which is party to the proceedings or in another company which has an interest in it, and how much interest it has in it; to what extent the issue under adjudication would have any effect on his interest. These and other considerations would determine the matter. If the judge's wife is a shareholder, this is considered in the same light as if the judge himself was a shareholder, and he has to disqualify himself or disclose, as the case may be. If he knows about a near relative who is a shareholder, he would equally be expected to disqualify himself or disclose. Similar considerations will apply if a judge held shares as a trustee, if he has a bank account or was otherwise associated with a corporation.

As the judges are very careful to disclose every interest however small, shareholding has not as yet presented any difficulties in England as it has in the United States. A High Court judge said that should a judge sit in a case in which he has an interest without having disclosed the matter, he would have to resign."

In Canada, Cartwright J., as he then was, referred to the *Dimes* case in *Ghirardosi v. Minister of Highways*, [1966] S.C.R. 367 at p. 373 as did Smith J. A. of the B. C. Court of Appeal in *O'Krane v. Alcyon S. Co.* (1960), 32 W.W.R. (2d) 178 at p. 181. In neither reference is the ratio decidendi in the *Dimes* case used as a basis for the judgment subsequently given.

So we cannot say that the rule in the *Dimes* case disqualifying a judge by reason of a pecuniary interest, however small, has been directly applied in Canada or in any Canadian province.

B. *Relationships or Friendships*

Going to family relationships, we assume that no judge would embark on a hearing where his wife, a parent, a brother or sister, or a child of his had an interest but one might doubt the correctness of the decision in *ex parte Jones* (1888), N.B.R. 552 where a Justice of the Peace was held to be disqualified because the

grandfather of the justice was a brother of the defendant's great grandfather.

In another New Brunswick case, *R. v. Bigger, ex parte McEwen* (1906), 37 N.B.R. 372 the Court of Appeal said: "The test of the disqualification is: 'Are the relationship and knowledge of the justice such as would reasonably create bias in the mind of the justice?' "

In *R. v. Langford* (1888), 15 O.R. 52 it was held that the fact that the convicting magistrate was the father of the complainant disqualified him.

The practice of law tends to be an hereditary profession; very often sons of judges are lawyers and it is a ground for disqualification if counsel in any case is a near relative of the trial judge (third degree of relationship).

But what should be done if the relative, say the son, of the trial judge is a partner of a lawyer who is counsel, or an employee of the firm of which counsel is a member?

If the judge knows, as he probably will, that his son is a partner in or employed by the firm of which counsel is a member it will be wise to disclose such a fact at the opening of the trial and this even in cases where the judge does not think he is disqualified. We here cite from p. 119 of *Hamlyn Lectures* of R. E. Megarry, now Vice-Chancellor

> "Judges are most scrupulous, too, about revealing to litigants any possible connection they have with any party to an action."

We think the same scrupulosity would involve disclosure of any relationship with counsel or with associates of counsel.

Shetreet in *Judges on Trial* says, on p. 308

> "When the kinship is not such as would require disqualification, the judge would always disclose, and counsel would not normally raise objections".

In *Reporters Notes to Canons of Judicial Behaviour*, by E. Wayne Thode, sponsored by the American Bar Association and the American Law Foundation, this is said, at p. 67

> "The disqualification standard was expanded to include not only a relative within the third degree as a party, but also any relative within the third degree who is a director or officer of a party, or who is known by a judge to have a substantial interest in the subject matter or in proceedings, or who is a lawyer in the proceeding . . . however, the fact that a relative of a judge is affiliated with a law firm that is involved in the proceeding does not automatically disqualify the judge . . . . Of course, either a breach of the general impartiality test or a judge's knowledge that his lawyer-relative's interest in the law firm could be substantially affected is a basis for disqualification."

We add this: that knowledge by the judge that his lawyer-relation had taken any part in the preparation or presentation of the case before him should probably persuade him to disqualify himself.

And, we add, "affiliation" may mean employment or it may mean partnership. In a case where the lawyer-relation was a partner of counsel involved we think there would be required a more careful examination of the judge's position than if the lawyer-relative was a salaried employee.

We favour, in either case, disclosure by the judge and we refer to the statement of Dankwerts L.J. in *Metropolitan Properties Ltd. v. Lannon*, [1968] 3 All E.R. 304, cited *infra* at p. 30.

Halsbury (3rd ed.) Vol. 11 at p. 67 says: "Where the interest is not pecuniary, the order [of disqualification] will not be granted unless it is shown that his interest is substantial and of such character that it will give rise to a real likelihood of bias." More recently Lord Denning M. R. has said in *Metropolitan Properties Ltd. v. Lannon*, [1968] 3 All E.R. 304 at p. 310: "The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, he should not sit".

C. *The Expression of Biased Views*

In *Blanchette v. C. I. S. Ltd.*, [1973] S.C.R. 833 Pigeon J. speaking for the majority of the Court held a trial judge disqualified because (p. 842):

> "The judge had actively pressed claims against the company defendant on behalf of members of his family and expressed strong dissatisfaction with the manner in which this particular insurance company was dealing with its insured.
>
> In my view the principle to be applied is the same for judges as for arbitrators. A reasonable apprehension that the judge might not act in an entirely impartial manner is ground for disqualification, as was held in respect of an arbitrator in *Ghirardosi v. Minister of Highways for British Columbia,* [1966] S.C.R. 367."

D. *Professional Relationships*

The *Ghirardosi* case merits comment in that an arbitrator was held by the Supreme Court of Canada to be disqualified because he was, at the time of the arbitration, retained as a solicitor by the defendant Minister in another similar matter and this fact was unknown to the appellant at the relevant time. Which brings us to this statement by Laskin C. J. C. at p. 113 of the judgment in *Committee for Justice and Liberty et al v. National Energy Board et al* (1976), 68 D.L.R. (3d) 716 at p. 730:

> "Lawyers who have been appointed to the Bench have been known to refrain from sitting on cases involving former clients, even where they have not had any part in the case, until a reasonable period of time has passed. A fortiori, they would not sit in any case, in which they played any part at any stage of the case."

This statement may be an obiter dictum, but it comes from an august source and sets a proper standard of conduct, and in the latter part of the statement, a possible ground for disqualification. A newly appointed judge, formerly associated with a law firm, should not sit on a case in which the action had been commenced while he was still associated with the firm.

E. *The Rule of Necessity*

We go now to consider circumstances under which a judge or judges may sit, although disqualified. The first case to be referred to in this connection is *Dimes v. Grand Junction Canal,* previously cited. In that proceeding two decrees were before the House of Lords, one by the Lord Chancellor, already referred to and another by the Vice-Chancellor. As we have already said the Lord Chancellor's decree was held voidable and was reversed. The Vice-Chancellor's decree was required to be enrolled by the Chancellor and was so enrolled by him under his signature. It was argued that the Vice-Chancellor's decree thus became that of the Lord Chancellor and was tainted with interest. The House of Lords asked the opinion of the judges on this point and Baron Parke for the judges said at p. 787: "For this [the enrollment by the Lord Chancellor] is a case of necessity, and where that occurs the objection of interest cannot prevail". The Law Lords agreed with the advice given by the judges and held the Vice-Chancellor's decree valid.

In *Boulton v. The Church Society of the Diocese of Toronto* (1868), 15 Grant 450, three judges of the Court appealed to were disqualified by membership in the defendant society, but seven judges were required to constitute a quorum and that number of judges was not available without the inclusion of disqualified judges. The ex necessitate rule pronounced by Baron Parke in the *Dimes* case was applied to require that disqualified judges must sit on the appeal, which, incidentally, was decided against the society. Another case of necessity was *Re The Constitutional Questions Act: Re The Income Tax Act* 1932, [1936] 2 W.W.R. 443, [1936] 4 D.L.R. 134, affirmed, [1937] 1 W.W.R. 508, [1937] 2 D.L.R. 209 (P.C.). There the judges of the Saskatchewan Court of Appeal sat on a case to decide the constitutionality of an Income Tax Act as applied to judicial salaries, a question in which, of course, they had a pecuniary interest, but which they were the only tribunal required or qualified to decide. It is interesting to observe the general uniformity of American with Canadian and British opinion in this matter as demonstrated by the judgment of the *U.S. Court of Claims in Atkins et al. v. The United States* (Court of Claims—May 18, 1977).

F. *Consent by Litigants*

Another situation in which disqualification may be overcome is one in which the litigants have before the hearing full knowledge of disqualification and yet elect to proceed. In *Re Hanlan* (1921), 50 O.L.R. 20 Orde J. at p. 25 said this:

> "When bias is alleged and the party is aware of it, he must take objection to the Magistrate's jurisdiction at the outset. If he raises no objection until after the hearing the objection is waived, and cannot be raised afterwards".

The same subject is discussed by Norris J. A. in *Canadian Air Line Pilots Assn. v. C.P. Air Lines* (1966), 57 D.L.R. 417 at p. 429 where he held that there had been "sufficient waiver by the appellants of partiality".

Cartwright J., as he then was, in the *Ghirardosi* case, *supra* said at p. 473 of the S.C.R. report:

> "There is no doubt that, generally speaking, an award will not be set aside if the circumstances alleged to disqualify an arbitrator were known to both parties before the arbitration commenced and they proceeded without objection".

G. *Disclosure of Interest*

McDermid J. A. in *Arsene v. Jacobs* (1964), 44 D.L.R. (2d) 487 discusses a state of affairs where a judge revealed in open court that he had formerly held shares in a company incidentally involved in the litigation and the parties had consented in writing to his proceeding with the trial; McDermid J. A. having held there was no disqualification thought it unnecessary to decide on the binding effect of the consent. The case is mentioned because of the action of the judge in revealing his connection, a course of action which was recommended by Dankwerts L. J. in *Metropolitan Properties Ltd. v. Lannon,* [1968] 3 All E.R. 304 at p. 311 and which, according to Shetreet, already cited, is the English practice.

The modern English approach is stated by Megarry, now V. C., at p. 119 of his *Hamlyn* lectures:

> "Judges are most scrupulous too, about revealing to litigants any possible connection that they have with either party to an action, whether by holding some shares in a litigant company or by having in the past been lulled into unconsciousness by a litigant anaesthetist; and if either side objects the case will be heard by another judge".

We cannot cite any Canadian common law decision stating a duty to disclose but we do suggest that it may be better, in the public interest, for a judge, before beginning a trial to disclose any grounds known to him upon which he may be disqualified. He then can declare himself disqualified or not disqualified. If he holds himself disqualified the parties may yet agree to his proceeding with the trial, and he may safely do so, although, of course, he must not try to persuade the litigants to agree. But prudence may prohibit him, despite the consent. If he holds himself qualified and any counsel disagrees then we think he is still bound to hear argument on the subject before making a final decision. It appears to us more seemly that the judge should freely make such disclosure than that the possible grounds for disqualification known to him may first come to light when an appeal is heard.

We realize that this matter may raise problems, particularly in appellate courts, and we do not presume, in the absence of Canadian authority, to lay down any rule.

Finally, we suggest, problems of disqualification can often, perhaps usually, be dealt with before a trial comes on. If a judge has been assigned a case, for the trial of which he thinks he may be disqualified, he can go to his Chief, explain the situation, ask that the trial be assigned to some other judge, and that some different work be given to him.

Part 2

PREPARATION FOR TRIAL

A. *In Civil Cases*

You should read the pleadings. You should not read examinations for discovery lest you should be influenced by some testimony therein which is not subsequently put in as evidence by counsel. See *Tecci v. Cirillo*, [1968] 1 O.R. 536.

You read the pleadings in order to familiarize yourself with the issues. At the opening of a trial it may often be advisable to outline those issues as they appear to you to have been disclosed in the pleadings, and invite comment by counsel. The ensuing discussion should result in a clear definition of the issues and may shorten the trial.

B. *Pre-Trial Conferences*

The pre-trial conference is a concept American in its origins first used in the Federal Courts of the United States. Rules providing for pre-trial conferences exist in Quebec, Nova Scotia, Alberta, British Columbia, and Newfoundland. New Brunswick, we are informed, has no rule covering the subject but such conferences are sometimes held in cases in which the presiding judge thinks one necessary. Ontario, we are told, is now experimenting with the process. In provinces where rules exist for pre-trial conferences the rules are in each province much of the same pattern, owing their common origin to the rules in the U.S. Federal Courts. Therefore we do not cite them, but rather cite the procedure used by an experienced trial judge who has conducted many such conferences:

> "1. Read the record prior to the pre-trial appointment.
> 2. Ask counsel at this stage what a reasonable estimate is for the length of the trial.

> 3. Enquire whether examinations for discovery have been completed, and if not, whether they will be before trial.
> 4. Ask whether there are any problems over documents. In the event that there are, we discuss the problems in an effort to resolve them.
> 5. Could any admissions be made on either side to facilitate the trial.
> 6. In an action for personal injuries whether the claim for special damages has been agreed upon.
> 7. What other problems exist which might delay the action proceeding to trial, or extend the length of trial.
> 8. Are the pleadings in order, or is anyone considering amendments, and if so, what amendments.
> 9. Is anyone considering any other applications before trial.
> 10. Are counsel agreed that this action is going to proceed on the trial date, or is anyone considering making an application to adjourn.
> 11. What possibility of settlement exists.
> 12. Is the action to be tried with a jury.
> 13. In the event a settlement should occur I request counsel for the plaintiff to notify the Registry immediately, and not wait until trial day."

The rules in each province provide that such conferences may be asked for by counsel or may be decided by the Court or a judge. The general experience appears to have been that counsel seldom ask for such conferences, but that they are often ordered by the courts and that the general experience with them has been that they are useful, particularly in difficult cases, where long trials are expected. Results, such as shortening of trial time, settlements, must be balanced against the judge's time required to conduct the conference and the cost to the litigants of the conference, not, in these days, a negligible item.

While a settlement is a gratifying result of a conference, pressure should not be used by the judge to achieve settlement.

C. *In Criminal Cases*

There is a difference of opinion among judges as to whether, where there has been a preliminary hearing, a judge who is to take

the subsequent trial should read beforehand the transcript of evidence in the preliminary hearing.

Those who oppose such a procedure argue, with some force, that the judge may be prejudiced by reading evidence which is not adduced at the trial, or that he may, at the trial, unconsciously confuse the preliminary hearing testimony with that presented at the trial.

On the other hand the judge has a natural desire to be forewarned of difficult points that must arise during the trial, points as to the admissibility of evidence, particularly of confessions or statements by an accused person to others before the trial. If he is to conduct a sittings in a small town where the law library is insufficient, he may well want, by some reading in a good library, to prepare himself beforehand to deal with the point. By such preparation he may, without prejudging the point, be in a better position to rule on it quickly and correctly. And, the proponents of preliminary reading contend, any capable judge should be able to avoid the dangers pointed out by those taking the opposite view.

In cases where the judge is to try the case without a jury the argument against what we have called preliminary reading is stronger than in jury cases, but not conclusive.

There are no reported decisions on this matter and, in view of the difference of opinion that exists between competent and experienced judges, this book can only leave the subject at large for decision by the various judges who conduct trials.

D. *In Courts of Appeal*

We have known of appellate judges who refused to read, before the hearing of an appeal, the transcript of proceedings in the court below, lest they should be influenced to prejudge the appeal. They are, of course, entitled to do their work as their reason and consciences dictate, but their approach is exceptional and the very great majority of justices of appeal consider the

reading of transcripts and factums a necessary and vital preparation for dealing with the appeal and one which should shorten the hearing.

Part 3

DELAY—ADJOURNMENTS

Expedition is required in the actual hearings. Busy counsel may sometimes ask for adjournments for no other reason than to suit their own convenience, to fit in with their own engagements. Regard must be given to such applications but long delays, in beginning or concluding hearings, are to be avoided, and it is not always right to re-adjust a court calendar so as to suit counsel. The court, not the lawyer, will usually be blamed for the delay and most litigants want their cases dealt with quickly. In some cases, where one counsel presses to go ahead and opposing counsel, on the basis of other engagements, seeks delay it is proper for the judge to say that the case must go ahead, even if this involves the retaining of other counsel.

Reasonable speed is particularly required in the disposition of criminal matters where delay is sometimes, regrettably, a defence tactic. Delay frustrates the honest litigant. It may result in the unavailability of witnesses, in forgetfulness by witnesses. The press and the public, always suspicious, sometimes properly, of the law's delays may have another instance to confirm their suspicions. Last minute adjournments, where judge, counsel, witnesses and often a jury panel are assembled are particularly objectionable.

The difficulties which the Courts have in this area is shown by the division of judicial opinion in *Spataro v. The Queen* (1972), 26 D.L.R. (3d) 625.

There the trial judge refused an adjournment. Counsel who had represented the accused at the preliminary hearing applied on the first day of the trial for a severance of counts and for a change of venue. These applications were not granted, and counsel, on the morning of the second day of the trial, indicated that the accused wished to discharge him. The trial judge refused to accede to this,

and the trial continued, with counsel continuing to act for the accused. The accused was convicted and appealed.

The Court of Appeal divided.

Jessup J.A. held the trial judge in error in not allowing counsel to withdraw; but held that no substantial wrong or miscarriage had resulted.

Kelly J.A. held that there had been no unequivocal discharge of counsel; had there been, there would have been error.

Brooke J.A. held the trial judge in error and that there had been a mistrial.

In the Supreme Court of Canada, the majority dismissed the appeal. The case is said by Judson J. giving the majority judgment to be "unique on its facts." It was held (a) there was no unequivocal discharge of counsel; (b) the request was a manoeuvre to frustrate the rulings against severance and change of venue; (c) there was a reaffirmation of the retainer.

Spence J. and Laskin J. dissenting, held the accused had suffered by having counsel forced upon him.

Perhaps the line to be drawn is whether the request for an adjournment is, or is not, in good faith. This view seems supported by the B.C.C.A. decision in *Johnson infra* where the Court is at pains to point out a lack of fault on the part of the accused.

Note, also, this sentence in the judgment of Judson J. (at p. 629):

> "(The trial J.) obviously decided that the application was not made in good faith but for the purpose of delay, and I agree with him".

Additional recent cases are:

Regina v. Johnson, [1973] 3 W.W.R. 513; (1973), 11 C.C.C. (2d) 101 (B.C.C.A.).

The principle is that the granting or refusal of an adjournment lies in the discretion of the trial judge and unless shown not to have been decided judicially or to have been decided on wrong

principles, the exercise of the discretion will not be disturbed on appeal.

The refusal of an adjournment to an accused who, on the morning of the trial dismissed his counsel because serious differences had risen between them, and sought time to retain other counsel, was held to be in error. The record showed the trial judge had not given full consideration to the situation but had determined to proceed notwithstanding that the request for adjournment was not made for the purpose of delay nor occasioned by fault on the accused's part.

Regina v. Martens (1976), 24 C.C.C. (2d) 136.

Munroe J. adopts the statement of Bull J.A. in *Johnson* that the question of adjournment is within the discretion of the trial judge; and, unless the discretion was not exercised judicially, will not be disturbed on appeal.

The Crown had asked that, by reason of lack of court space, the trial be adjourned for one month, and thereafter that the trial should proceed only at intervals of one week. This request was held to be unreasonable and to have been properly rejected by the provincial judge.

Regina v. Pickett (1971), 5 C.C.C. (2d) 371 (Ont. C.A.).

On the morning of the trial, counsel for the accused was occupied with an unfinished case in another court. An inexperienced junior attended to seek an adjournment. This request was refused; and the trial proceeded with the inexperienced junior acting for the accused.

A majority of the C.A. (Jessup and Brooke JJ.A.) held that an adjournment should have been granted ... "When reputable counsel ... is unavoidably engaged in another Court ..... an adjournment should be granted."

Kelly J.A. dissented—"The difficulty really arose from the selection of the counsel who was sent to represent the appellant".

A recent case on the problem of adjournment in civil matters is *MacInnes v. Leaman* (1976), 8 N.R. 297 (S.C.C.).

The case was twice entered for trial by the defendant. On each occasion the plaintiff changed solicitors and asked for an

adjournment. On the case being called a third time, again the plaintiff changed his solicitor and the latter asked for a further adjournment. This was refused and the action dismissed.

On appeal, the New Brunswick Court of Appeal dismissed the appeal from the bench. On further appeal to the Supreme Court of Canada Laskin C.J.C. (for the Court) said:

> "We all agree that we should not interfere with the discretionary power which the trial judge exercised and which the Court of Appeal affirmed".

Part 4

JUDGE'S NOTES

For practically all Canadian courts there now exists a system of reporting, manually by shorthand notes made by expert reporters or mechanically by tape machines. These records are necessary, in case transcripts of evidence be required on appeal. They can also be resorted to during the trial if a jury requests a repetition of certain evidence, or if any difference of opinion develops in the course of a trial as to what had previously been said by judge, counsel or witness.

But a transcript of the evidence is not normally available to a trial judge during or after the trial and, at the end of the trial, the judge must be prepared, if conducting a jury trial, to epitomize or sum-up the evidence for the jury or, if there is no jury, to deliver an oral or written judgment. Therefore he must make his own notes as the trial proceeds. These notes will record the evidence of each witness, any rulings made during the trial and the argument and authorities cited.

Obviously a verbatim record is impossible, first because the judge, not often a shorthand writer, could not perform such a task without very long delays in the trial, second because the making of such a record would so entirely engross the attention of the judge

that he would be unable to give instant and necessary thought to the relevancy and meaning of what was being said and to observe the demeanour of the witnesses.

So the judge's notes must be epitomizations of what has been said, recorded in a manner intelligible to him, if not to others. He will, with experience, probably develop a system of abbreviations which will shorten his writings.

The length or brevity of such notes, the manner of this recording depend entirely on the thought of the judge and, perhaps, on his faith in his memory. In making notes he must have in mind two factors already mentioned, the necessity, in a jury trial, of a compendious review of the evidence in his charge to the jury and the requirement, in non-jury trials, of the delivery of oral or written reasons for judgment. The importance of both factors is such as to compel any judge to consider note taking a grave responsibility.

Part 5

COURTESY

"Manners makyth man" said William of Wykeham 600 years ago.

This pleasing alliteration may overstate the case; the rough diamond with kindly instincts is a favourite figure in our folklore. But the bench is no place for rough diamonds. One prime reason for this is that the persons whom the judge addresses roughly cannot rejoin in kind and the judge should, by his conduct, set an example of the sort of courtesy he must require from others. The requirement of courtesy in a court room must be observed by the judge, by counsel and by litigants and witnesses. The ordinary citizen involved as witness or litigant may often be bewildered and frightened by the unfamiliar atmosphere of a courtroom. The judge should do all he can, by example and by control, to put him at his ease. Bullying and hectoring cross examinations, the undue

exploitation by counsel of the advantages given him by that process, must be restrained. Too often, in the past a witness who has given an intemperate answer to an unnecessarily offensive question has been rebuked while counsel has escaped unscathed.

A trial under our adversary system is of course a contest; it is not, as Mr. Justice Rand has observed, a tea party. But it is a civilized contest governed by rules of civility. It will often be difficult for persons involved in these contests to keep their tempers but the judge must, whatever the provocation, keep his and restrain others from unseemly exhibitions.

Exchanges between counsel sometimes transgress the rules. Strong statements are native to advocacy but passion must be controlled, and if control is not exercised by the advocates it must be imposed by the judge.

Example remains the best teacher and a judge who is moderate, disciplined and courteous in his intercourse with advocates, litigants and witnesses is far less likely to be exposed to any immoderate conduct on their part.

Part 6

CONTEMPT EX FACIE

Ordinarily a competent judge will be able to control conduct in his courtroom by example, by direction and, where necessary, by rebuke. In rare instances the conduct of counsel, litigant, witness or spectator may be so outrageous as to require punishment.

Usually the sort of behaviour falling into this category is a course of conduct, rather than an isolated outburst.

Therefore there usually arises an early opportunity for the judge to admonish and to warn the offender that any repetition or continuation of his misdemeanour may involve proceedings against him for contempt of court. It is certainly desirable, if the initial misconduct is not so glaring as to demand contempt proceedings, that such a warning should be given.

If the offender remains obdurate and continues his offensive conduct he may properly be cited for contempt. However, this may, to an extent, depend on who is involved; in the case of a spectator, ejectment from the court room may meet the case. In the case of an advocate, while he may be warned that he will be cited, often the best course is to defer the contempt proceedings until after the case is disposed of. In some circumstances it may be wise to ask another judge to handle the subsequent contempt proceedings. At p. 220 of the American Judicature Society's *Handbook for Judges* there is this statement:

> "7.5 Referral to another judge.
>
> The judge before whom courtroom misconduct occurs may impose appropriate sanctions, including punishment for contempt, but should refer the matter to another judge if his conduct was so integrated with the contempt that he contributed to it or was otherwise involved, or his objectivity can reasonably be questioned."

There must be some reservation as to whether a judge who feels that his conduct contributed to the contempt should cite any one for that contempt, whether for trial before himself or before another judge. It might, we think, more properly be said that, if the judge thinks that such an issue may be raised, he may refer the matter to another judge. In Canadian courts the proper step would probably be to refer it to the Chief Justice or Chief Judge for assignment to himself or another judge.

Recent cases on contempt *ex facie* are *McKeown v. The Queen*, [1971] S.C.R. 446, *R. v. Hill*, [1974] 5 W.W.R. 1, *R. v. Hill*, [1975] 6 W.W.R. 395 (affd. *Hill v. R.*, [1977] 1 W.W.R. 341). These cases all had to do with the apparently contumacious failure or refusal of counsel to appear before a court when ordered by a trial judge to do so. The second *Hill* case, [1975] 6 W.W.R. 395 is interesting because the barrister involved was *ex mero motu* cited for contempt *ex facie* by one judge of the County Court but the hearing of the matter was conducted by another judge of the same court in the presence of Mr. Hill and his counsel and of counsel appointed by the Attorney-General to prosecute the charge made in the citation.

One difficulty that might conceivably arise in such a process might be the need of hearing evidence from the first judge as to what occurred in his court room. In the *Hill* case this problem did not arise because the court record of the proceedings before the first judge provided the necessary evidence. In the *McKeown* case the judge before whom counsel had failed to appear when ordered initiated proceedings *ex mero motu* and thereafter, without counsel to conduct the prosecution, called and examined witnesses, cross examined witnesses for the barrister accused and acted on his own asserted knowledge of facts bearing on the contempt proceedings.

Although in the *McKeown* case the appeal was dismissed by the Supreme Court of Canada on the ground that there was no statutory right of appeal from such a conviction, it appears to us that the procedure adopted in the *Hill* case may be preferable to that used in the *McKeown* case in most matters where there may arise on the hearing a dispute as to the facts, and the court record ought, as in the *Hill* case serve to prove what occurred in the court room, obviating the necessity of calling a judge to give evidence. The court record may, as in the *Hill* case, be that of the Clerk of the Court, or corresponding functionary.

The dissenting judgments in the *McKeown* case appear to clash with the opinion of Lord Denning M. R. expressed in *Baloch v. St. Alban's Crown Court*, [1974] 3 All E. R. 283 at pp. 287-288 as to just what constitutes contempt in the face of the court. Since neither the dissenting judgments or the English decision are strictly binding on Canadian Courts, the matter may be regarded as open.

In *Regina v. Swartz*, [1977] 2 W.W.R. 751, Freedman C. J. M. for the Manitoba Court of Appeal reversed a ruling of a provincial judge who had found a barrister guilty of contempt because, when the barrister's motion for adjournment was refused, he withdrew from the case, despite the judge's order that he must not do so. Freedman C.J. M. said at p. 755:

> "On the appeal before us Crown counsel advanced the submission that just as a defence lawyer who absents himself from a trial, knowing that his non-appearance will necessarily prevent the proceedings from going on, may be guilty of contempt of court, so too a lawyer who withdraws or attempts to withdraw from a hearing, with similar consequences thereto, may also be guilty of contempt. But the two situations are not quite parallel. In contempt proceedings the attitude or intent of the actor is all important. The lawyer who deliberately and of set purpose frustrates the due carrying on of court proceedings by a wilful act of non-attendance is surely on a different footing from the lawyer who, like Mr. Swartz here, impulsively reacts to an adverse and rather shattering ruling of the court by attempting to withdraw. The first is a case of wilful and contumacious conduct. The second is at worst an error of judgment."

and, at p. 757, he quoted from Shetreet's *Judges on Trial* (p. 247) this passage:

> "Sometimes counsel cannot divert the judge from a course of conduct, which makes it very difficult for him to discharge his duties, and renders it impossible for his client to have a fair trial. In those cases courageous counsel have sometimes withdrawn from the case and walked out of court in protest. The traditions of the Bar do not exclude such an extreme measure. The following ruling was given by the Bar Council in 1933:
>
> " 'If counsel is unfairly interfered with to such extent as to defeat the course of justice it may be necessary for counsel to withdraw from the case or to leave the matter to be dealt with on appeal. Counsel should always remember that his paramount duty is to protect the interest of his client.'
>
> "Naturally, this measure has been taken by counsel only in exceptional cases."

It further appears from the judgment that the barrister's application for an adjournment should have been acceded to and that he had, in the circumstances, good reason to withdraw from the case because justice could not be done to his client when the adjournment was refused.

If any person is to be tried for contempt he must, of course, be informed of the nature of the alleged contempt, even where it is *ex facie* the court, and allowed full facility to defend himself personally or through counsel.

Part 7

TROUBLESOME ACCUSED

We cite part of s. 577 of the *Criminal Code*:

"577 (1) Subject to subsection (2), an accused other than a corporation shall be present in court during the whole of his trial.

(2) the court may

(a) cause the accused to be removed and to be kept out of court where he misconducts himself by interrupting the proceedings so that to continue the proceedings in his presence would not be feasible."

This, of course, has not to do with proceedings for contempt but does provide a method for dealing with an unruly accused.

Part 8

JUDICIAL INTERVENTION

A. *General*

That extraordinary man Francis Bacon, who wrote so many admirable precepts for judicial behaviour, so many ethical and moral pronouncements was eventually, when Lord High Chancellor of England, impeached for taking bribes from suitors. He had a gift for striking phrases and one of the best remembered is this: "Patience and gravity of hearing is an essential part of justice; and an overspeaking judge is no well-tuned cymbal". There are instances in which the "overspeaking" judge has been publicly reproved by a higher court for persistent, unnecessary and sometimes offensive intervention in a trial.

But the rule is not against any intervention; it is against excessive intervention. Edmund Burke said: "a judge is not placed in that high position to be the mere arbiter of parties. He has a further duty, independent of that, and that duty is to ascertain the truth".

The duty to ascertain the truth not only justifies but, on occasion, requires judical intervention. We give some instances.

B. *By Questioning Witnesses*

In general a judge should allow counsel to conduct examinations or cross examinations of witnesses uninterrupted. If some necessary question appears to have been omitted a judge should not too readily jump to the conclusion that it will not later be asked. As a rule, a general rule, he should wait until all counsel have concluded their examinations before himself questioning the witness. But there then can be no question of his right, his duty, to attempt, through questioning, to ascertain the truth about a circumstance germane to the litigation, and left in the air through the failure of counsel to ask proper and necessary questions.

There is considerable case law to guide us in this field. The judgment of Lord Denning, then L. J., in *Jones v. National Coal Board*, [1957] 2 All E.R. 155 is authoritative in England and fairly recent. We cite from p. 158 and p. 159:

> "No one can doubt that the judge, in intervening as he did, was actuated by the best motives. He was anxious to understand the details of this complicated case, and asked questions to get them clear in his mind. He was anxious that the witnesses should not be harassed unduly in cross-examination, and intervened to protect them when he thought necessary. He was anxious to investigate all the various criticisms that had been made against the board, and to see whether they were well founded or not. Hence he took them up himself with the witnesses from time to time. He was anxious that the case should not be dragged on too long, and intimated clearly when he thought that a point had been sufficiently explored. All those are worthy motives on which judges daily intervene in the conduct of cases and have done for centuries.
>
> Nevertheless, we are quite clear that the interventions, taken together, were far more than they should have been. In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England, however, a judge is not a mere umpire to answer the question 'How's that?' His object above all is to find out the truth, and to do justice according to law."

In Canada a recent authority is found in a criminal case, *R. v. Torbiak and Campbell* (1974), 26 C.R. (N.S.) 108. The *Coal Board* case finds and defines impermissible intervention. The *Torbiak* case finds and defines permissible intervention. At pp. 109-110 Kelly J. A. says this:

> "The proper conduct of a trial judge is circumscribed by two considerations. On the one hand his position is one of great power and prestige which gives his every word an especial significance. The position of established neutrality requires that the trial judge should confine himself as much as possible to his own responsibilities and leave to counsel and members of the jury their respective functions. On the other hand his responsibility for the conduct of the trial may well require him to ask questions which ought to be asked and have not been asked on account of the failure of counsel, and so compel him to interject himself into the examination of witnesses to a degree which he might not otherwise choose. Since the limits of the allowable conduct are not absolute, but relative to the facts and circumstances of the particular trial within which they are to be observed, every alleged departure during a trial from the accepted standards of judicial conduct must be examined with respect to its effect on the fairness of the trial."

Kelly J. A. refers with great respect to the judgments of the B. C. Court of Appeal in *Regina v. Pavlukoff* (1953), 17 C.R. 215 and of the Québec Court of Appeal in *Regina v. Denis*, [1967] 1 C.C.C. 196. At pp. 223-224 of the *Pavlukoff* report Sloan C. J. B. C. adopts what was said by Lord Greene M. R. in *Yuill v. Yuill*, [1945] 1 All E. R. 183 (at p. 185):

> "... it is of course, always proper for a judge—and it is his duty—to put questions with a view to elucidating an obscure answer or when he thinks that the witness has misunderstood a question put to him by counsel. If there are matters which the judge considers have not been sufficiently cleared up or questions which he himself thinks ought to have been put, he can, of course, take steps to see that the deficiency is made good. It is, I think, generally more convenient to do this when counsel has finished his questions or is passing to a new subject. It must always be borne in mind that the judge does not know what is in counsel's brief and has not the same facilities as counsel for an effective examination-in-chief or cross-examination. In cross-examination, for instance, experienced counsel will see just as clearly as the judge that, for example, a particular question will be a crucial one. But it is for counsel to decide at what stage he will put the question, and the whole strength of the cross-examination may be destroyed if the judge, in his desire to get to what seems to him to be the crucial point, himself intervenes and prematurely puts the question himself."

In the *Denis* case Rivard J. who wrote the leading judgment, cited passages from the transcript which, he held, showed improper intervention by the trial judge. He summarized his opinion at p. 208 of the C.C.C. report thus:

> "I have the very distinct impression that from the beginning of the trial the learned Judge realized the difficulties facing the Crown which was forced to bring in its evidence through friends and relatives of the accused, and, being obsessed throughout the course of the trial with this thought, the Judge felt it necessary to assist the Crown. But with all due respect, I feel he went beyond what the law will allow."

A degree of intervention which might be justifiable if the nature of the questions asked maintained the judge's neutrality would be objectionable if the general tone of the judge's questions and comments portrayed partiality. As Bird J. A. said in *R. v. Darlyn* (1946), 88 C.C.C. 269, 3 C.R. 13, at p. 278 of the C.C.C. report:

> "If the Judge finds it necessary or desirable to intervene in the examination of a witness with observations or questions, I think he should not thereby disclose his conviction of the guilt of the accused and so convey to the jury the impression that there can be no question of his guilt. To do so is improperly to influence the jury in the exercise of its function to find the facts: *R. v. McCarthy*, [1941] 1 D.L.R. 623, 74 Can. C.C. 367, 57 B.C.R. 155".

Simple instances of what we consider to be permissible intervention by a judge are:

1. In a rape case, if counsel have not asked the complainant whether she is married to the accused, the judge may properly do so.

2. In a civil case relating to a motor vehicle accident, if it has not been established who was driving a motor vehicle involved in the accident, a judge may properly ask the necessary question.
3. If, in a criminal case, counsel has overlooked proof of the county in which the crime is alleged to have been committed, the judge may ask necessary questions.

The reported cases do not deal with such brief interventions, but generally with more complicated ones where there has been more patent and prolonged judicial intervention.

An instance of a case, in which the trial judge in effect took over from counsel the conduct of at least part of the trial, is provided by *Phillips v. Ford Motor Co.*, [1971] 2 O.R. 637 at p. 659, Evans J. A. said:

> "There is unquestionably a right to intervene for the purpose of clarification of the evidence, and when the case is highly technical the interventions may be more frequent. No doubt the trial Judge was actuated by the highest motives, but his zealous participation, irrespective of motive, unfortunately caused him to transgress and he lost sight of the issues raised by the parties and launched into an investigation on behalf of Canadian motorists".

There is really nothing we can add to the guiding words of these judgments except this brief epitome: Do not too soon assume that you know more about the case than counsel—he may have planned all along to ask the very question that springs to your lips but to defer it to a later time in his examination or cross-examination.

C. *By Calling Witnesses*

May a judge call witnesses other than those produced by the parties to the proceedings?

In criminal cases the answer is "yes" subject to the rules laid down by Avory J. speaking for the Court of Appeal in *R. v. Harris*, [1927] 2 K. B. 587, (1927), 96 L. J. K. B. 1069. We quote this passage from p. 1072 of Law Journal Report:

> "On the first point, it has been clearly laid down by the Court of Appeal in *Enoch and Zaretsky Bock & Co.*, [1910] 1 K. B. 327

that in a civil trial the Judge has no right to call a witness not called by either side, unless he does so with the consent of both parties. It also appears to be clearly established that the rule does not apply at a criminal trial or in a criminal Court where the liberty of the subject is at stake and where the sole object of the proceedings is to make certain that justice is strictly done between the Crown and the accused. The cases of *R. v. Chapman* and *R. v. Holdin*, in 1838, established that in a criminal trial a presiding Judge has the right to call a witness and without the consent of either the Crown or the accused, if in his opinion it is necessary that that witness should be called in the interests of justice. It is also quite true that there has been laid down no definite rule limiting the point in the proceedings at which the learned Judge may exercise that power. But it is obvious that injustice might be done to an accused person unless some limitation is put on the exercise of that right, and for the purposes of this case we adopt the rule laid down by Tindal, C. J. in *R. v. Frost*, where the Chief Justice said (4 St. Tri. (n.s.), at p. 386; 9 C. & P., at p. 150): "Where the Crown begins its case like a plaintiff in a civil suit, they cannot afterwards support their case by calling fresh witnesses, because they are met by certain evidence that contradicts it. They stand or fall by the evidence they have given. They must close their case before the defence begins; but if any matter arises *ex improviso*, which no human ingenuity can foresee, on the part of a defendant in a civil suit, or a prisoner in a criminal case, there seems to me no reason why that matter which so arose *ex improviso* may not be answered by contrary evidence on the part of the Crown." That rule applied only to witnesses called on behalf of the Crown, but we think that the rule should also apply to cases where the Judge calls a witness in a criminal trial after the case for the defence is closed, and the right of the Judge to do so should be limited to a case where some matter arises *ex improviso* which no human ingenuity could have foreseen. Otherwise, as I have said, it appears to us injustice may be done to the accused. In this view we have the support of so great a Judge as Bramwell, B. in 1859, in the case of *R. v. Haynes*. There, after witnesses had been called for the defence and counsel had replied on behalf of the prosecution, counsel for the Crown proposed to call another witness. Bramwell, B., said it was quite clear that counsel could not call such witness as the cases were closed, and to allow it would necessitate two more speeches. Having with him Crompton, J., he said (1 F. & F., at p. 666): "We are both of

> opinion that it is better to abide by the general rule, and that it would be inexpedient to allow this fresh evidence to be gone into after the close of the whole case."

In civil cases a judge may not call witnesses save with the consent of all parties. A leading case is *In re Enoch and Zaretsky Bock & Co.*, [1910] 1 K.B. 327. Later cases are *Jones v. National Coal Board,* [1957] 2 All E.R. 155 where, at p. 159 Lord Denning said: "So firmly is all this established in our law that the judge is not allowed in a civil dispute to call a witness whom he thinks might throw some light on the facts". So also Cross J. in *Yianni v. Yianni,* [1966] 1 All E.R. 231 at p. 232. In Canada, Riddell J. A. in *Harwood & Cooper v. Wilkenson,* [1930] 2 D.L.R. 199 at p. 203 said: "Counsel, not the Judge, is to determine what witnesses he is to call in support of his case; and, while the Judge has the right to comment upon and base his judgment *pro tanto* on the non-production of any witness or witnesses, he has no right to criticize the discretion observed by counsel in so deciding—there may be a score of things that the counsel knows which the Judge cannot know that determine his decision, and he, not the Judge, is *dominus litis*".

Usually, in practice, a suggestion to counsel by a presiding judge in a civil case that a further witness be called will meet with acquiescence by counsel, as, apparently, it did in *Coulson v. Disborough,* [1894] 2 Q. B. 316, referred to in the *Enoch* case, supra.

D. *To Prevent Disorder*

Too often, during a trial, bickerings will develop between counsel and witnesses in which several people are speaking at once. The unfortunate court reporter cannot hope to get on paper all that is said. The judge must intervene at once to restore order and see that only one person speaks at a time and that he speaks only to the Court.

E. *Intervention—Courts of Appeal*

It is natural and inevitable that an argument in a Court of Appeal may rather frequently be interrupted by comments and questions from the bench. But this, also, may be overdone.

Megarry V. C. at p. 145 of his *Hamlyn* lectures on Lawyer and Litigant in England says this:

> "The bench, indeed has not shown itself to be unconscious of this feeling. In 1927 Lord Justice Scrutton wryly observed of a court consisting of Lord Hanworth, M. R., himself, and Mr. Justice Romer, that 'the court, with occasional assistance from counsel, took more than a day in discussing the case'."

Notwithstanding this extreme example, we think it must be generally accepted that on the hearing of an appeal there will be more judicial intervention, more questioning of counsel, than at a trial. The appellate process is an entirely different one and necessarily involves much more discussion than does a trial.

F. *Defective Pleadings*

In civil cases it is not unusual for a judge to be confronted with a situation where one counsel, through inexperience, inadvertence or just plain incompetence has failed properly to state his claim or his defence. For instance he may have sued in contract and it may appear to the judge that his best or only hope of success is in tort, say a *Hedley Byrne* situation.

If counsel, however belatedly, comes to realize his error and applies to amend, no problem of conduct arises and the judge can apply the well-known rules of practice and reported decisions, generally and properly highly favourable to necessary amendments at any state of the proceedings; and it has frequently been said that there can be no injustices to the other side if it can be compensated in costs. In *Frobisher Ltd. v. Canadian Pipelines* (1959), 10 D.L.R. (2d) 338, sustained [1960] S.C.R. 126, a most vital amendment was allowed after all evidence was in but before argument.

But suppose that erring counsel does not realize his error and plows ahead without seeking to amend. Is it proper for the judge at that stage to point out the probable mistake and to suggest to counsel that he might apply to amend?

If he does so, opposing counsel, confidently awaiting victory, will probably be annoyed. But we think that the primary duty of

the judge is to litigants, not to lawyers, and that the judge should consider the position of the litigant, confidently awaiting justice. Therefore we think that a judge in such a situation has not only a right but a duty to warn the erring counsel and to entertain, though not necessarily to accede to, any subsequent application to amend.

However, there may be grave injustice if an amendment is allowed at any stage of the proceedings without giving to the other side opportunities of

(a) further discovery;

(b) further preparation for trial;

(c) an adjournment of the trial and (or)

(d) a re-opening of the trial on the new issues created by the amendment.

It is essential to justice, therefore that counsel be heard not only as to whether the amendment be allowed, but also, if it is to be allowed, as to the terms on which it should be allowed.

Part 9

DISCUSSIONS WITH COUNSEL AND OTHERS

A. *Ex Parte*

No judge should talk with one counsel about any case in the absence of other counsel. The one probably unavoidable exception to this rule is that, before the opening of a criminal assize or sittings, it may be necessary to have Crown Counsel advise you of the order in which he has arranged the various trials to be heard and it may not be practicable to have all defence counsel present at this time. The discussion should be strictly confined to trial dates or priorities already arranged with defence counsel and if any disagreements have developed, the date or priority can only be settled in court in the presence of all necessary counsel. Any arrangement made is always subject to change by the judge who is in charge of the list. The arrangements agreed to should be stated by the trial judge at the opening of the sittings.

B. *Other Discussions with Counsel*

Discussions with all counsel involved in a case out of a court room and in the absence of a court reporter ought, in general, to be avoided. All proceedings in a trial are matters of record and it is improper that agreements or rulings should be made and not recorded. There also exists the danger that such agreements or rulings may be misunderstood, or, in rare cases, deliberately misrepresented in a court room before a jury. Litigants must have a natural and proper distrust of any proceedings in the case which are not open to their hearing.

We cite part of the judgment of Lord Parker L. C. J. from p. 285 of *R. v. Turner,* [1970] 2 All E. R. 281. The words cited are in a passage dealing with plea bargaining in a criminal case, but we have selected therefrom only such part as we think applicable to any out of court discussions between counsel and judge in any case, criminal or civil:

> "There must be freedom of access between counsel and judge. Any discussion, however, which takes place must be between the judge and both counsel ... This freedom of access is important because there may be matters calling for communication or discussion, which are of such a nature that counsel cannot in the interests of his client mention them in open court. Purely by way of example, counsel for the accused may by way of mitigation wish to tell the judge that the accused has not long to live, is suffering maybe from cancer, of which the accused is and should remain ignorant ..... It is, or course, imperative that, so far as possible, justice must be administered in open court. Counsel should, therefore, only ask to see the judge when it is felt to be really necessary and the judge must be careful only to treat such communications as private when, in fairness to the accused person, this is necessary."

The Lord Chief Justice has given instances of situations where it is permissible for counsel to talk to the judge in the absence of litigants, but says they are only given by way of example. We find it hard to think of other situations which would justify such a course and which are not of the same nature as the examples cited above.

We suggest, respectfully, that the initial statement, "There must be freedom of access between counsel and judge" is too broad

and that there should not be freedom of access by counsel to a judge in his chambers during a trial except under very unusual circumstances. Under the heading "Plea Bargaining", beginning at page 64 of this book there are further, we hope, temperate criticisms of Lord Parker's statement, in *R. v. Turner*.

We respectfully agree with the following statement of Branca J. A. at p. 304 of *Regina v. Johnson*, [1977] 1 B.C.L.R. 289:

> "It appears that during the course of the trial the learned trial judge called counsel into his chambers to discuss certain aspects of the trial as the trial progressed. It appears also that this was done in the office of the learned trial judge and in the absence of the respondent. This is a practice which must be discouraged. It is a cardinal principle of our jurisprudence that a trial, whether with or without a jury, is a public trial except in certain statutory cases, and that the members of the jury, the accused and the public are entitled to free access to the law courts and the trial and to see and to hear the totality of the full drama of the trial. The jury, accused and the public are entitled to see and hear the examination and cross-examination of every witness called to testify, all objections made by counsel and to hear and see the rulings made by the trial judge. It is of great importance not only that justice should be done substantially but that it must appear to be done, and it cannot appear to be done where the learned trial judge has many conferences with counsel in his chambers. There may be exceptions but, if so, the substance of the discussion in his chambers should be disclosed in open court and recorded, and the assent of counsel involved should likewise appear on the records".

C. *Attempts to Influence a Court*

It may safely be assumed that every judge will know that such attempts must only be made publicly in a court room by advocates or litigants. But experience has shown that other persons are unaware of or deliberately disregard this elementary rule, and it is likely that any judge will, in the course of time, be subjected to ex parte efforts by litigants or others to influence his decisions in matters under litigation before him.

There is a recent instance of such an endeavour by a Minister of Government. There are many other unrecorded instances of

such improper communications to judges by litigants and other persons, often well-meaning busy-bodies, sometimes persons materially interested in the outcome of litigation.

Regardless of the source, ministerial, journalistic or other, all such efforts must, of course, be firmly rejected. This rule is so elementary that it requires no further exposition.

On page 57 of this work we dealt with the proceedings for contempt of court which may arise from the publication of prejudicial matter during the course of legal proceedings.

D. *Settlements*

Sometimes a judge may think that a case should be settled. It is always wrong for him to force a settlement on persons who want to litigate. If he thinks the case is so exceptional that it is his duty, in the interests of the litigants, to suggest settlement he should say so in open court and not in his chambers.

Part 10

JURY TRIALS

A. *General*

It is not within the scope of this work to discuss largely the law applicable to trial by jury and to cite the numerous authorities governing that procedure. Here are a few simple precepts.

On the first day of a jury trial, the jury should be told:

1. that they must not talk to anyone not on the jury about the case before them and must not let any person not on the jury talk to them about it;

2. that they may discuss the case among themselves but should avoid forming any definite conclusions until they have heard all the evidence, the arguments and the judge's instructions;

3. that after the trial is over they must not reveal to other persons, certainly not to the lawyers or to the news media, the secrets of the jury room. In criminal cases such revelations by a juror are, by s. 576 (2), made an offence punishable on summary conviction;

4. that all their requirements should be stated to the sheriff's officers in whose charge they are, including any request for advice or instructions from the judge.

Some judges add to these preliminary instructions some information on the trial process: opening, evidence, argument and on the jury function. Such advice if given must be carefully expressed because it is as much a part of your instructions to the jury as is your charge or summing up at the end of the trial.

B. *Charges to Juries*

The aim, of course, is for simplicity and clarity. It is usually better to formulate your thoughts in your own words than to cite extensively from the judgments of higher courts. Since our instructions to juries are, to use the English phrase, "summings up", and not, as in the United States, bare recitals of law, it is wise, as a rule, to associate instructions on any particular phase of the law with the evidence before the jury relating to that subject. If you are defining circumstantial evidence tell them what, in the case before them, may be circumstantial evidence. If drunkenness is argued as a defence, associate with your instructions on the law on that subject a summing up of evidence before them related to the alleged drunkenness of the accused.

It is inevitable that in composing your instructions to the jury you will have in mind rules set by higher courts and will frame your charge so as to conform with those rules. But your primary task is to guide the jury in an unfamiliar field and the explanations of law you address to it must be comprehensible not just by a select audience, such as a Court of Appeal, but by a jury of twelve laymen. The task thus imposed is a hard one. Indeed, we think that in a complicated case the composition of a fully comprehensible

and yet "appeal-proof" charge to a jury is a high intellectual feat. But you must not, in your effort to be "appeal-proof", sacrifice comprehensibility—you are the only source of guidance to those twelve men and women and what you say must be so stated that they can understand it.

We have used the phrase "appeal-proof". The effort to have your words to the jury conform to judgments of higher courts should not be allowed to lead you into such intricacies of elaboration as may confuse the jury.

Part 11

PREJUDICIAL PUBLICITY

A. *Publicity—the News Media*

Except in the rare cases where a statute or the public interest may require secrecy, every step in every proceeding must be publicly taken and open to legitimate and proper reporting. But co-existent with this necessity for complete disclosure is another need—the requirement that no prejudicial words be spoken or written out of court during the course of the litigation. In a recent case before the House of Lords *A.G. v. Times Newspapers Ltd.*, [1973] 3 All E.R. 54 Lord Diplock said at p. 72:

> "The due administration of justice requires first that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; secondly, that they should be able to rely on obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based on those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and thirdly that, once the dispute has been submitted to a court of law, they should be able to rely on there being no usurpation by any other person of the function of that court to decide it according to law. Conduct which is calculat-

ed to prejudice any of these three requirements or to undermine the public confidence that they will be observed is contempt of court".

This passage, we think, fairly states both English and Canadian law on this subject.

B. *Publicity—Litigants, Counsel and Others*

The rule against prejudicial pronouncements during the course of legal proceedings does not, of course, apply to news media alone, but to all other persons, particularly to counsel and to litigants. In cases where the media have published statements made by other persons, both the original maker of the statement and the medium reporting it may be in contempt.

The practice, common in some other jurisdictions, of the making of prejudicial statements to the press regarding pending litigation should not be countenanced here and counsel or others who violate this rule should be, at least, admonished by the court, and, in grave cases, cited for contempt. For a judge to indulge in such a practice is almost unthinkable.

The media have few inhibitions about asking questions of judges concerning trials before them or current legal problems. It is hard to conceive of circumstances which would justify a judge answering them. If the questions asked suggest that there is a lack of public understanding of some part of the proceedings before him, a judge may, when he deems it necessary, elucidate the matter in a public court room, not elsewhere. This restraint applies not just to proceedings before the judge, but to comments on any legal matter. Reporters will unabashedly ask a judge to give an opinion on new legislation or on current judicial decisions. "No comment" is the only answer. The reporter will not condemn but will respect your firmness.

Under this heading we may consider the use of sound tapes in court rooms by persons other than court reporters to record the proceedings.

It has been argued that this process is no more objectionable than would be the taking of full shorthand notes to be rendered into a transcript for the use of any interested person.

There is, we think, an important difference. The recording of the living voice is a different thing than a recording in cold print. As an instance, some pervert might record the evidence of a distressed complainant in a rape case, merely to provide himself and other like-minded persons with the sorry pleasure of hearing the hapless woman recount in detail the story of her misfortune.

We think that the use of devices for recording for reproduction of the actual voices heard in the court room should be under the complete control of the judge and subject in all cases to his permission; otherwise, forbidden. That permission should be given when the recording is required for a legitimate purpose, but never when it is wanted for public reproduction, or even for private reproduction by a person who has no legal interest in the proceedings. Any order giving leave to tape the proceedings should embody a clause forbidding such misuse of the recordings.

C. *Photographs*

We think that no one should be allowed to take photographs in a court room during a trial or hearing.

On ceremonial occasions, such as the swearing in of a new judge, or the court proceedings incidental to the call and admission of barristers and solicitors we think the court may allow photographs to be taken.

In Ontario, this matter is covered by s. 68 of the *Judicature Act* which reads thus:

"68a—(1) In this section,

(a) "judge" means the person presiding at a judicial proceeding;

(b) "judicial proceeding" means a proceeding of a court of record;

(c) "precincts of the building" means the space enclosed by the walls of the building.

(2) Subject to subsection 3, no person shall,

(a) take or attempt to take any photograph, motion picture or other record capable of producing visual representation by electronic means or otherwise,

(i) at a judicial proceeding, or
(ii) of any person entering or leaving the room in which the judicial proceeding is to be or has been convened, or
(iii) of any person in the precincts of the building in which the judicial proceeding is to be or has been convened where there is reasonable ground for believing that such person is there for the purpose of attending or leaving the proceeding; or

(b) publish, broadcast, reproduce or otherwise disseminate any photograph, motion picture or record taken or made in contravention of clause a;

(3) Subsection 2 does not apply to any photograph, motion picture or record taken or made upon authorization of the judge;
(a) where required for the presentation of evidence or the making of a record or for any other purpose of the judicial proceeding;
(b) in connection with any investive, ceremonial, naturalization or similar proceedings; or
(c) with the consent of the parties and witnesses, for such educational or instructional purposes as may be approved by the judge.

(4) Every person who is in contravention of this section is guilty of an offence and on summary conviction is liable to a fine of not more than $10,000 or to imprisonment for a term of not more than six months, or to both, 1974, c. 81, s. 3"

But it will be noticed that this provision appears only to deal with visual representations, not with tape recordings of words.

Part 12

COUNSEL AS A WITNESS

At some time in your judicial career you will probably be confronted with a situation where counsel for one of the litigants will want to doff his robe and go into the witness box to testify on behalf of his client.

We cite first some general observations by D. C. McDonald J. in *Rottacker Farms Ltd. v. C. and M. Farms Ltd.*, [1976] 2 W.W.R. 634 at p. 655:

> "As I have mentioned, Mr. Hope acted as counsel for the defendant until midway through the trial. He then was replaced by a partner in the same firm of solicitors, and Mr. Hope testified. The code of Professional Conduct of the Canadian Bar Association, pp. 28-29 says:
> 'The lawyer should not submit his own affidavit to or testify before a tribunal in any proceedings in which he appears as advocate, save as permitted by local rules or practice or as to purely formal or uncontroverted matters. This also applies to the lawyer's partners and associates: generally speaking they should not testify in such proceedings except as to purely formal matters . . . . . If the lawyer is a necessary witness he should testify and the conduct of the case should be entrusted to another lawyer.'
> Mr. Hope is a prominent member of the bar of Alberta. His professional qualifications and ethics are beyond reproach. His record of service to the legal profession is exemplary. I do not criticize him. I am satisfied that in preparing the defendant's case for trial he was unconscious of the possibility that, in order to establish what occurred in the telephone conversations with Mr. Ouellette, he would have to testify. That realization came to him only during the trial. I have nevertheless considered it desirable, for the guidance of members of the profession in the future, to draw attention to this occurrence as an illustration of the need to consider, when planning the conduct of a client's case at trial, whether the lawyer may have to testify. In such case, the lawyer should not act as counsel. Indeed, there is a point of view that his client should be represented by counsel from outside the lawyer's own firm."

The subsequent reversal by the Court of Appeal of this judgment ([1976] 6 W.W.R. 601) does not deal with or disagree with the statement cited.

We respectfully agree with what the learned judge has said. Counsel should usually be able to foresee the necessity of testifying and should arrange to have other counsel act for his client. The wording of the last sentence of the judgment makes it clear that the judge states therein only a point of view, not a rule universally accepted.

MacFarlane J. A. speaking for a unanimous quorum of the Court of Appeal of British Columbia in *Phoenix v. Metcalfe* (1975), 48 D.L.R. (3d) 631 has held:

> 1. There is no rule of law which denies a litigant the right to have his counsel testify as a witness on his behalf.
>
> 2. While as a matter of propriety counsel should generally not give evidence, it is not within the authority of a trial Judge to require counsel to elect either to give evidence or to continue as counsel.

MacFarlane J. A. at p. 633 cites Cartwright J. (as he then was) in *Stanley v. Douglas*, [1951] 4 D.L.R. 689 at p. 695 as having "concluded that in Canada the evidence of counsel is admissible and that his having testified does not deprive the client of the right to have that counsel continue to represent him. He disapproved strongly, however, the adoption of such a course". And cited with approval this statement of Ritchie C. J. in *Bank of B.N.A. v. McElroy* (1875), 15 N.B.R. 462 at p. 463:

> "It is the privilege of the party to offer the counsel as a witness but that it is an indecent proceeding, and should be discouraged, no one can deny".

Similar rulings by other courts were made in:

Bell Engine Co. v. Gagne (1914), 7 W.W.R. 62, 20 D.L.R. 235 (Sask. C.A.)

Ward v. McIntyre (1920), 48 N.B.R. 233, 56 D.L.R. 208 (N.B. C.A.)

Parry v. Parry, [1926] 2 W.W.R. 185 [1926] D.L.R. 95 (Sask. C.A.)

Davis v. Can. Farmers Mutual Ins. Co. (1876), 39 U.C.Q.B. 452 (Ont. C.A.)

Grady v. Waite, [1930] 1 D.L.R. 838 (P.E.I. Chancery Court).

In Alberta in *National Trust v. Palace Theatre Ltd.*, [1928] 1 W.W.R. 805 Harvey C.J.A. expressed what is perhaps a different viewpoint when he said at p. 806:

> "Though we heard Mr. Barron as counsel, notwithstanding that he had been a witness, it should not be taken as a precedent for a disregard of the rule—a most salutary one—that a barrister who has been a witness should not thereafter act as counsel, which rule should not be departed from unless for special reasons".

In Manitoba, in the case of *R. C. Archiepiscopal Corp. v. Rosteski* (1958), 13 D.L.R. (2d) 229, Coyne J. A. at pp. 235-6 said:

> "The point here is not whether counsel can become a witness in a case which he is conducting. He can although such a course is strongly deprecated except in very special circumstances, and even in such circumstances he should cease to act as counsel unless his retirement would imperil his client's case. The point here is different, namely, whether having given evidence in the primary Court he can act as counsel in an appellate Court upon an appeal from the decision of the lower Court"., and, at p. 238:
> "Plainly, it is established, at least in the Prairie Provinces and the Supreme Court of Canada, that a person who has been a witness below will not be allowed to act as counsel on appeal".

Coyne J. A. refers at p. 237 to the case of *Kuchma v. Tache R. M.*, [1945] 2 D.L.R. 13, [1945] S.C.R. 234. In that case the Supreme Court of Canada refused to hear counsel who had made an affidavit which was placed in evidence in the primary tribunal. He retired and other counsel took over. We are informed that the rule that a counsel will not be heard to argue an appeal based on his own affidavit is in force in both the Saskatchewan and B.C. Courts of Appeal, but that there is no such rule in the Supreme Court of Ontario.

It appears that the rule in some appellate courts differs from that applicable in trial courts. The difference may, we suggest, arise from the fact that in a Court of Appeal the question will present itself before the appeal is embarked on and the substitution of other counsel will create no real problem. In trials, on the other hand, the problem almost always arises in mid-trial and the substitution of new counsel may cause a real hardship to the litigant.

As a practical matter the decisions are so highly critical of counsel filling the dual role that a trial judge need have no hesitation in warning counsel of the impropriety of such a course; "indecency" is the word used by Ritchie J. and approved by Cartwright J.

Part 13

PLEA BARGAINING

We shall first refer to the literature, rather than to the authorities on the subject. But, of course, in a court room one must be guided by the authorities, which we shall deal with later.

Plea bargaining in criminal cases appears to be an attempt to adapt to criminal proceedings the sort of procedure that may lead to a settlement in a civil case.

Crown counsel and defence counsel negotiate out of court, and reach an agreement. Without purporting rigidly to limit the area on which agreements may be made, we say that usually such agreements are:

1. That Crown counsel will, if the accused pleads guilty to a lesser charge, withdraw a major charge. A common instance is the acceptance of a plea of guilty of manslaughter made on condition that a charge of murder be withdrawn.
2. That Crown counsel, in return for a plea of guilty by the accused to a charge, will recommend to the Court the imposition of some lenient form of sentence, say probation. Or there may be a bargain which embraces both the above factors.

In most jurisdictions in the United States plea bargaining between counsel is now an accepted practice. We cite from page 251 of the *State Trial Judge's Handbook*, 2nd Edition:

> "It is common knowledge that most convictions in criminal cases result from pleas of guilty. It is also generally known by members of the legal profession that there is a long-time practice of "plea bargaining". This refers to the discussions engaged in between prosecutor and defense counsel with a view to the defendant offering a plea of guilty in the hope that certain understandings between the attorneys will be carried out by the court. The practice has been criticized. Yet it has been tolerated because of the need to dispose of accumulated criminal business. It is recognized that if each defendant insisted upon trial of his case, the courts, with existing resources, would not be able to cope with the problem".

The apparent acceptance of the idea that the richest country on earth does not provide adequate facilities for the ordinary process of trial is interesting.

In the *Handbook for Judges* published by the American Judicature Society, there is, at page 168, a long article on plea bargaining by Arnold Enker, a professor of law. He concludes that the process of plea bargaining is acceptable but should involve judicial participation and supervision.

The Law Reform Commission of Canada has come out, in *Working Paper no. 15*, strongly against plea bargaining and particularly against judicial participation in the process (see pages 44 to 48).

The whole process has been explored and condemned by Ferguson and Roberts in an article published in [1974] 52 Can. Bar Rev. 497.

In 1969, at Osgoode Hall, in the course of a discussion of plea bargaining by a distinguished group of judges and lawyers (*Law Society of Upper Canada, Special Lectures, 1969*), Chief Justice Gale said:

> "it seems to me that if a judge allows himself to get into the arena he may do some good in the odd case, but in the long run he disparages himself and he disparages the administration of justice".

Thereafter the panel unanimously agreed that "judges should not participate in the plea discussions of counsel and should not be part of the team negotiating a sentence".

We go now to case law on the subject and the first thing we note is that all the reported cases we have discovered are decisions of courts of appeal in cases in which the existence of a plea bargain has only been discussed at the appellate level and not dealt with in the court below. We have not found a reported case in which a trial judge has dealt with a plea bargain.

First comes *R. v. Turner*, [1970] 2 All E.R. 281, in which case Lord Parker L.C.J. said this (at p. 285):

> "Before leaving this case, which has brought out into the open the vexed 'plea bargaining' the court would like to make some obser-

vations which may be of help to judges and to counsel, and indeed to solicitors.

"1. Counsel must be completely free to do what is his duty, namely, to give the accused that best advice he can, and if need be advice in strong terms. This will often include advice that a plea of guilty, showing an element of remorse, is a mitigating factor which may well enable the court to give a lesser sentence than would otherwise be the case. Counsel of course will emphasize that the accused must not plead guilty unless he has committed the acts constituting the offence charged.

"2. The accused, having considered counsel's advice, must have a complete freedom of choice whether to plead guilty or not guilty.

"3. There must be freedom of access between counsel and judge. Any discussion, however, which takes place must be between the judge and both counsel for the defence and counsel for the prosecution. If a solicitor representing the accused is in the court he should be allowed to attend the discussion if he so desires. This freedom of access is important because there may be matters calling for communication or discussion, which are of such a nature that counsel cannot in the interests of his client mention them in open court. Purely by way of example, counsel for the accused may by way of mitigation wish to tell the judge that the accused has not long to live, is suffering maybe from cancer, of which the accused is and should remain ignorant. Again counsel on both sides may wish to discuss with the judge whether it would be proper, in a particular case, for the prosecution to accept a plea to a lesser offence. It is, of course, imperative that, so far as possible, justice must be administered in open court. Counsel should, therefore, only ask to see the judge when it is felt to be really necessary and the judge must be careful only to treat such communications as private where, in fairness to the accused person, this is necessary.

"4. The judge should, subject to the one exception referred to hereafter, never indicate the sentence which he is minded to impose. A statement that, on a plea of guilty, he would impose one sentence but that, on a conviction following a plea of not guilty, he would impose a severer sentence is one which should never be made. This could be taken to be undue pressure on the accused, thus depriving him of that complete freedom of choice which is essential. Such cases, however, are in the experience of the court happily rare. What on occasions does appear to happen, however, is that a judge will tell counsel that, having read the depositions

and the antecedents, he can safely say that, on a plea of guilty, he will for instance, make a probation order, something which may be helpful to counsel in advising the accused. The judge in such a case is no doubt careful not to mention what he would do if the accused were convicted following a plea of not guilty. Even so, the accused may well get the impression that the judge is intimating that, in that event, a severer sentence, maybe a custodial sentence, would result, so that again he may feel under pressure. This accordingly must also not be done. The only exception to this rule is that it should be permissible for a judge to say, if it be the case, that, whatever happens, whether the accused pleads guilty or not guilty, the sentence will or will not take a particular form, e.g. a probation order or fine or a custodial sentence. Finally, where any such discussion on sentence has taken place between judge and counsel, counsel for the defence should disclose this to the accused and inform him of what took place".

We do not criticize the pronouncement as to concealing from the accused evidence as to the state of his health, but we question the Lord Chief Justice's statement by way of example, of what may be done out of court, that:

> "Again, counsel on both sides may wish to discuss with the judge whether it would be proper, in a particular case, for the prosecution to accept a plea to a lesser offence."

Our *Criminal Code* s. 534 s.s. 6 says this:

> "Notwithstanding any other provision of this Act, where an accused pleads not guilty of the offence charged but guilty of an included or other offence, the court may in its discretion with the consent of the prosecutor accept such plea of guilty and, where such plea is accepted, shall find the accused not guilty of the offence charged. 1953-54, c. 51, s. 515; 1960-61, c. 44's s. 4; 1968-69, c. 38 s. 46".

This section certainly calls for the sort of discussion referred to by Lord Chief Justice Parker but does not provide that such a procedure should be followed in any other place than a public court room. With the greatest respect for the opinion of the Lord Chief Justice, but having in mind section 534 (6) we can see no reason why it should. It is a procedure prescribed by the *Code* and all such proceedings must be taken in public except in the situations described in s. 441 and 442 of the *Criminal Code*, and even

then the proceedings from which the public may be excluded are conducted not in the judge's chambers but in a court room with a reporter present. We would, however, agree that the jury should be excluded from the court room while the subject is discussed.

Whether a judge approves of plea bargaining or is against it, he will, on occasion, find himself confronted with a completed plea bargain. If the bargain is one involving accepting a plea of guilty to a lesser offence in return for the withdrawal of a major charge, s. 534 (6) applies and the bargain need not be accepted by the judge even if the prosecutor agrees to withdrawal of the major charge. Section 534 (6) appears to us to provide, in effect, that a plea bargain in this area is invalid unless approved by the court.

Of course, plea bargaining may take place before the indictment is actually preferred on arraignment. The prosecutor may have agreed to withdraw a major charge and prefer a lesser one. The drawing and filing of an indictment with the court are only administrative acts; it is the reading of it to the accused and the asking of his plea upon it in court that constitutes the preferring of an indictment (*Re Beeds and the Queen* (1972), 8 C.C.C. (2d) 462, [1972] 6 W.W.R. 44). So long as the indictment actually preferred is for only the lesser charge it appears that the judge has no control of the process—he cannot dictate to the prosecutor what form of indictment he must prefer. He can only act after arraignment and plea and in the circumstances set out in *C. C.* Section 534 (6).

We also, with respect, have some reservations in regard to Lord Parker's statement that it is permissible for a judge to say, apparently privately, to counsel, and in advance of plea that he will, whether accused pleads guilty or pleads not guilty and is convicted, impose the same sort of sentence. We suggest that no decision as to the form of sentence should be made in private or before the public presentation of such evidence as will bear on sentence and the public hearing of counsel's submissions as to sentence.

Judge Arthur D. Klein in 14 Criminal Law Quarterly 289 at 304, discussing *R. v. Turner*, says:

> "For all practical purposes it would seem that there would be very few cases in which a judge would care to indicate the type of sentence, such as suspended sentence and probation, that he would be "minded to impose" until after he had heard everything that was to be submitted and had read a pre-sentence report. There are very simple cases, such as a charge of "joyriding" against a 16 or 17 year old with no previous record, where a judge would be clearly of the opinion that the form of sentence would be suspended sentence and probation, but most counsel who had any experience in criminal law at all would realize that such a sentence would be the appropriate and the likely one without asking the judge".

We agree with what the learned author has written.

In *R. v. Plimmer* (1975), 61 Cr. App. R. 264, Ormrod J. speaking for a quorum of the English Court of Appeal said:

> "This Court, while not wishing in any way to depart from the case of Turner, feels that this practice of counsel going to see judges is in general an undesirable one".

In *R. v. Atkinson,* [1978] 2 All E.R. 460 Lord Scarman, speaking for the Court of Appeal of England, after condemning the act of a judge of the Crown Court who had, at a pre-trial conference, effectively promised the accused that, if he pleaded guilty, he would not be imprisoned and later, the accused having pleaded not guilty and having been convicted had sentenced him to six months imprisonment said:

> "It is not possible to lay down, neither would we think is it desirable to lay down, any general rule that there must never be any communication outside trial, either openly or privately, between judge and those representing the Crown and the accused. But we would emphasise that this exceptional course should never be taken beyond the limits set in *R. v. Turner*. Lord Parker C.J. giving the judgment of the court in that case set out a practice direction. It is unnecessary to repeat its terms, since they are well known".

With respect we do not think that this pronouncement detracts from what we have previously said as to the *Turner* judgment and its applicability in Canada.

The more modern Canadian cases are:

R. v. Agozzino (1969), 6 C.R.N.R. 147.

Gale C. J. O. at p. 148:

> "... prior to the trial Crown counsel intimated that he would not ask for a jail term and on the basis of such intimation counsel for the accused received instructions to plead guilty. There is evidence before us to indicate that had it had not been for this position taken by the Crown, which was subsequently adopted by the magistrate, the accused would not have pleaded guilty ... Crown counsel at the time represented the Attorney-General. He declared that he was not seeking a jail term, whereupon the accused and his counsel made a major decision as to how the trial should be approached. We believe it would now be quite unfair, not only to the magistrate but to the accused, for the Crown by means of this appeal, to change its position by asking for a major term of imprisonment. In effect the appeal repudiates the position taken by Crown counsel at the trial and we do not care to give effect to that repudiation".

To the same effect is another judgment of the same Court in *R. v. Brown* (1972), 8 C.C.C. (2d) 227.

In *R. v. Stone* (1932), 58 C.C.C. 262, a bargain was made with an accused person that if she gave certain information to the police and pleaded guilty a minimum fine would be imposed upon her. She gave the information, pleaded guilty and, the police standing by, was fined $200. The appeal court set aside her conviction as obtained by a promise that was not carried out. It appears to us, with respect, that a better course would have been to allow her to change her plea to not guilty and to order a new trial.

In *R. v. Mouffe* (1972), 16 C.R.N.S. 257 there was not evidence of plea bargain but Crown counsel, having at the trial recommended a light sentence, which was imposed, sought on appeal a heavier sentence. The Quebec Court of Appeal acceded to his argument and increased the term of imprisonment; *R. v. Kirkpatrick*, (1971) Que. C. C. 337 is a similar case.

In *Attorney-General of Canada v. Roy* (1972), 18 C.R.N.S. 89 Hugessen J., (as he then was), was confronted with a bargain made in the trial court between Crown and defence counsel whereby accused pleaded guilty in return for the promise of Crown counsel to ask for a light sentence, which was imposed. An appeal was taken by the Crown on the ground that the sentence was inadequate. The appeal was dismissed.

Hugessen J. after referring to *R. v. Turner, R. v. Agozzino* and *R. v. Kirkpatrick*, already cited, said this:

> "1. Plea bargaining is not to be regarded with favour. In the imposition of sentence the court, whether in first instance or in appeal, is not bound by the suggestions made by Crown Counsel.
> 2. Where there has been a plea of guilty and Crown counsel recommends a sentence, a court, before accepting the plea, should satisfy itself that the accused fully understands that his fate is, within the limits set by law, in the discretion of the judge, and that the latter is not bound by the suggestions or opinions of Crown counsel. If the accused does not understand this, the guilty plea ought not to be accepted.
> 3. The Crown, like any other litigant, ought not to be heard to repudiate before an appellate court the position taken by its counsel in the trial court, except for the gravest possible reasons. Such reasons might be where the sentence was an illegal one, or where the Crown can demonstrate that its counsel had in some way been misled, or finally, where it can be shown that the public interest in the orderly administration of justice is outweighed by the gravity of the crime and the gross insufficiency of the sentence".

Paragraph no. 2 deals with the situation whereby in return for a plea of guilty the prosecutor has agreed to recommend leniency. We respectfully agree that this is a correct way for a trial judge to deal with the matter when, as found by Hugessen J., there was evidence of plea bargaining.

Paragraph no. 3 refers only to the appropriate action to be taken in an appellate court where there has been a breach by the Crown of a bargain made by counsel on the trial court.

The recent case of *R. v. Wood*, [1976] 2 W.W.R. 135 contains a stern condemnation of any participation by judges in the plea bargaining process. This is stated in the dissenting judgment of McDermid J. A. but the two authors of the majority judgment concurred in that part which we cite of the judgment of McDermid J. A. at. p. 144:

> "All this must be done in open court. There is no place in the sentencing procedure for hole-and-corner bargaining. The Criminal Code provides when proceedings may be heard in a closed

court. There may be occasions when a judge is justified in receiving matters in private from counsel, but such seldom occur. An example can be found in *Regina v. Turner*, [1970] 2 Q.B. 321, [1970] 2 All E.R. 281, where it is stated that counsel would be justified in telling the judge in private that an accused was suffering from terminal cancer and it was not in the interests of the accused that he should know this.

In this case I do not criticize counsel for approaching the Judge, for this question of "plea bargaining" has, I understand, been a matter of widespread consideration and argument amongst members of the bar and a considerable difference of opinion has prevailed. However, in my opinion, a judge should take no part in any discussion as to sentencing before a plea has been taken, and all the circumstances in regard to the particular case have been placed before him, then having listened to the submission of counsel he should give his decision. To take part in a discussion of sentencing prior to a plea being taken would constitute a grave dereliction of duty. The Provincial Judge was quite right in the attitude he took and Crown counsel was quite wrong in saying he had no objection to such a discussion on behalf of the Crown. For a judge in Alberta to take part in what has been called "plea bargaining" is, in my opinion, quite improper".

With this statement, we respectfully agree.

Ferguson and Roberts in a footnote at p. 503 of their article dealing with *R. v. Agozzino, Attorney-General v. Roy, R. v. Mouffe* and *R. v. Kirkpatrick* say this:

> "The above solution to the 'broken bargain' cases are unsatisfactory because one solution ignores the public interest in an appropriate sentence and the other solution is manifestly unfair to the accused. But there is another and better solution. The appellate courts could continue to review sentences and alter them when they are inappropriate regardless of a prior bargain. However, when a sentence is altered from what was bargained for at trial, the accused should be given the opportunity to withdraw his guilty plea if he so desires and have a trial".

As we indicated earlier we have not purported to deal with every possible sort of plea bargain but only with what we regard as the two commonest varieties.

The case of *Phillips v. The Queen* (1974), 24 C.R. (N.S.) 305 strongly suggests the existence of another sort of plea bargain.

Phillips had pleaded guilty to a criminal charge and, while in custody awaiting sentence, was called as a Crown witness against another accused person. His evidence did not implicate that person. Later, when sentencing Phillips the judge referred to his evidence as a factor in imposing a sentence to serve three years in the penitentiary. Nicholson J. for the Supreme Court of Prince Edward Island, in banco, said this at p. 308:

> "A review of the record of proceedings before the Magistrate leaves one with the distinct impression that if the appellant had given evidence at the trial of MacArthur which would have supported the conviction of MacArthur, the sentence would have been less than three years imprisonment. In circumstances such as this when the Crown proposes to call a convicted person as a witness against an alleged accomplice, the convicted person should be sentenced before he is called as a witness. The suggestion that a convicted person might receive a less severe punishment if he gives evidence implicating another accused person is repugnant to all the guiding principles to be followed in sentencing a convicted person. The suggestion that a more severe punishment has been given because his evidence has failed to implicate another accused person is equally repugnant. The nature of the evidence given by the appellant on the trial of MacArthur is a factor which apparently influenced the Magistrate in sentencing the appellant to three years imprisonment. In my opinion this was an improper consideration".

However much a judge may agree with strictures against plea bargaining he must, where it has already taken place, deal with it when it is discovered, as a fact, and this, of course, is what the appellate courts have done in the cases we have cited. It will be noted that of the Canadian cases cited, *Phillips v. The Queen*, supra, is the only one in which there is a suggestion of judicial participation in plea bargaining.

Chapter III

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Part 1

JUDGMENTS

A. *General*

Always give reasons for judgment. It is not good enough at the end of any trial to say "the action is dismissed with costs" or, alternatively, to say "the Plaintiff will have judgment for $5000.00 and costs". Counsel, litigants and possibly an appellate court will want to know "why".

So far as the litigant is concerned, particularly the defeated litigant, he should have expounded to him the reasons why his opponent prevailed, the reasons why he lost. It is very important (again, "let justice be seen to be done") that the defeated litigant, while naturally disappointed and probably discontented with the result, should at least know that his side of the case has been given real consideration and should know why it has been rejected. The reasons may also, although this is not so likely at the trial level, have value as a precedent. And, in case of an appeal, no Court of Appeal should be left in the position of having to guess at what findings of fact and law impelled the trial judge to make the decision he did make.

B. *Delay*

Magna Carta says "We will not deny or defer to any man either justice or right".

The complaints most frequently made in respect of the conduct of judges relate to delay in the delivery of judgments. Litigants expect, and rightly expect, that the judge will soon relieve them from the agony of uncertainty that prevails until judgment is delivered. This is not to say that it is better to be quick than right. That idea is, of course, unacceptable.

The aim is to be both quick and right.

Whenever possible judgment should he given orally from the bench at end of the trial or hearing and it should be possible for a trial judge to dispose of most trials in that way.

Some allowance must be made for differences in the mental processes of judges. Some highly capable judges are slower in their deliberations than other equally capable but quicker-thinking judges. But not too much allowance. The public has a right to expect of a judge decisiveness, one of the qualities for which presumably he was appointed, and the judge who reserves all, or too many of his decisions, for written judgment may sooner or later find himself snowed under and unable to get out his written reasons within a reasonable time.

The ability to dispose of cases from the bench can be expected to increase with experience.

Reserved judgments must be brought down with reasonable expedition. Nothing will more quickly bring a judge into disfavour than a continued failure to get his work done promptly. The reason for delay may be a scrupulous meticulosity; the public is more likely to ascribe it to lack of industry or to inability to decide.

On facts, particularly, it is desirable for a judge to get his opinions on paper promptly, before the evidence has begun to fade from his mind. Certainly this is more difficult in some complicated cases than it is in simpler ones, but the advice still stands—the longer the task is delayed the more difficult will be the accomplishment.

It is hard to state rigid rules as to time—naturally some decisions must be extraordinarily difficult and require more than the normal allowance of time, but in at least one trial court the rule is that a month's delay is normal, two month's delay is long, and three months is too long.

A judge who is troubled by indecisiveness and consequent delay should remind himself of what he is able to accomplish in a trial by jury, particularly in a criminal trial. There he has been faced with difficult questions of law, generally as to the admissibility of evidence, which require instant decision, and he

has made those instant decisions. This may hearten him to think that he can make other decisions, in other situations, more quickly than has been his habit.

Part 2

THE WRITING OF REASONS FOR JUDGMENT

A. *General*

Where judgment has been reserved, written reasons should be got out promptly while the evidence and argument are fresh in the judge's mind. Each day of delay makes the task harder.

A really first-rate written judgment in any but the most difficult and technical cases should generally be intelligible to an educated layman. You are not writing for a law journal nor are you writing entirely for the Court of Appeal. It is desirable that the defeated litigant should be able, on reading your judgment, to know why he lost. It is desirable that your writing should be comprehensible by news reporters. It is desirable that the workings of the law should not be a mystery, but clear to the public. This ideal may not always be attainable, but it is always to be attempted.

Usually it is a good idea to begin by following the method normal to all forms of literary composition; first to draw an outline of the matters you propose to deal with. In writing most judgments this general approach should serve:

1. state the nature of the litigation.
2. state the central issues to be resolved.
3. make your findings of fact.
4. state the law applicable to those facts and give your rulings.

Some judgments are too brief, many more are too long. To avoid prolixity these suggestions are made:

1. The quotation of long passages of evidence may in some cases be necessary, but in general it is not, and the purpose

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1 OF 2

of the judgment can be served by giving the purport or essence of the evidence.

2. It is not usually necessary to recite and discuss every authority referred to by counsel—normally the area of decision can be reduced to the consideration of what you find to be the effective authorities. If, out of politeness to counsel or to show due diligence, you want to name other cases considered and rejected as inapplicable this can normally be done compendiously by saying "I have also considered" and thereafter listing the citations.
   Also the excessive quotation of long passages from judgments relied on is to be avoided. Try to find shorter passages which express the meat of the matter.

A very experienced judge, Mr. Justice McFarlane of the B. C. Court of Appeal, has said this:

> "The first requisite must surely be clarity of thought. We should understand clearly what we intend to say before we start to say it, whether orally or in writing. This is of special importance in the case of oral judgments. An hour's concentrated study and thought is more valuable than a ready draft and any number of revisions. A pencil and a piece of paper provide no substitute for careful thought and for at least one simple reason; such scribbling invites too much attention to words and form and diverts the mind from critical analysis of facts and argument."

We must certainly agree that one must think before one writes but in our opinion it is best to get your thoughts, tentative as they may be at first, on paper as soon as you can because nothing better exposes any fallacies in your ideas than reading them in cold type—what appeared at midnight to be inspiration may, when read in the clear light of the morning, disclose itself as error. The process of writing a good judgment requires, generally, repeated corrections, deletions and additions as your ideas develop.

Arthur L. Goodhart in *Lincoln and the Law* said: "This practice in drafting illustrates the fact that the best form of education is to put one's thoughts on paper". Louis D. Brandies

said "There is no such thing as good writing, there is only good rewriting". William F. Strunk in *The Elements of Style* said:

> "Revising is part of writing. Few writers are so expert that they can produce what they are after on the first try. Quite often the writer will discover, on examining the completed work, that there are serious flaws in the arrangement of the material, calling for transpositions. When this is the case, he can save himself much labour and time by using scissors on his manuscripts, cutting it to pieces and fitting the pieces together in a better order. If the work merely needs shortening, a pencil is the most useful tool; but if it needs rearranging, or stirring up, scissors should be brought into play. Do not be afraid to seize whatever you have written and cut it to ribbons; it can always be restored to its original condition in the morning, if that course seems best. Remember, it is no sign of weakness or defeat that your manuscript ends up in need of major surgery. This is a common occurrence in all writing, and among the best writers".

Hyperbole, the extravagant use of adjectives and adverbs, is to be avoided. Look out for cliches; when you find yourself writing one try to find another method of expressing the same thoughts.

One regrettable phrase often used in judgments is "I have carefully considered". Surely it is assumed that all judicial opinions are the product of careful consideration; the use of the cited phrase implies that some are not and the adverb "carefully" should be deleted.

We quote a phrase from a purposely unidentified judgment: "The question would seem to be . . . " There are two weakening qualifications here, the words "would" and "seem". If the judge had not yet arrived at the state of mind where he could write "the question is", he was not ready to deliver judgment.

Do not preface a statement of judicial opinion by the words "I feel". The words are weak and are more fitting to introduce a description of a pain or an emotion.

We cite and approve this passage from the *American State Trial Judges Book* at p. 375 (2nd edition).

> "Limit the use of italics for the purpose of emphasis. Their frequent use implies that the reader is not alert enough to catch the point without special help".

We recommend against the extensive use of Latin phrases save such words as "prima facie" which are now part of our own language.

The *American State Trial Judges Book* says (p. 375) "Minimize the use of Latin phrases, it looks too pretentious". Pretentious or not, the use of such phrases is common in the judgments of the English Courts. English judges are normally the products of a classical education and the use of Latin comes naturally to them. This is not always true of Canadian judges, lawyers or laymen and the over-use of Latin is to be avoided not through fear of pretentiousness, but for the sake of comprehensibility. And in England, the excessive use of Latin has been deprecated by DeParcq L. J. in *Ingram v. United Automobile Services Ltd.*, [1943] 2 All E.R. 71 where he said, at p. 73:

> "... I think the cases are comparatively few in which much light is obtained by a liberal use of Latin phrases; ... Nobody can derive any assistance from the phrase '*novus actus interveniens*' until it is translated into English".

One of the purposes of written (or, for that matter, oral) reasons for judgment is to state the facts you have found and your reasons for finding those facts. In this process when credibility is a factor it is not ordinarily good enough just to say that you accept the evidence of witness A and reject that of witness B. You should give your reasons for the choice, and while demeanour may be an element it is not necessarily acceptable as the only basis. The gaps, the contradictions, the uncertainties in the evidence rejected should be stated, as well as the strength of the evidence accepted. (*Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 356 cited in *Phillips v. Ford Motor Co.*, [1971] 2 O. R. 637 at 645).

We suggest that, for a trial judge, the findings of fact may be even more important than his rulings on law. This is because, generally speaking, appellate courts will not overrule him on facts, but will not hesitate to do so on law. Thus it may be more important to the litigant that the judge should be right on fact than it is that his law should be correct. If his findings of fact are incorrect he may have done the litigant a wrong that cannot be righted by a higher court, as could an erroneous ruling in law.

Some judges, notably Lord Denning M. R., make frequent use of subject headings in their judgments, similar to chapter headings in books. There is merit in this usage, in long involved matters.

It will be noted also that such experts as Lord Denning do not always follow exactly the order of statement we have outlined. In *Thakrar v. Secretary of State*, [1974] 2 All E.R. 261 at p. 264 His Lordship begins a judgment, as it might appear, almost in *medias res* with this dramatic statement:

> "In 1972 a sword fell on the Asians living in Uganda. It was the sword of the President, General Amin".

But thereafter, it will be observed, the arrangement followed by the Master of the Rolls was the conventional one we have suggested.

This trenchant and useful paragraph is from an article by Lord Macmillan on *The Writing of Judgments* in (1948) 26 Can. Bar Rev. 491 at p. 499:

> "The judgment of a judge of first instance is properly framed on different lines from the judgments delivered in a court of appeal. The first judgment rightly covers the whole ground. In the court of appeal much is usually shed, but the first judge cannot foretell what points may commend themselves on appeal and he ought to provide all the material which may conceivably be regarded as relevant on a reconsideration of the case. In a court of appeal it is desirable if possible that there should be a single agreed narrative of the facts in the leading judgment and that the other appellate judges should not repeat them, but should confine themselves to dealing with any particular aspect of the case which they desire to emphasize or develop. The Law Reports are too often cumbered with unnecessary repetitions which add little of importance. A dissenting judge may of course find it necessary to give his own version of the facts as he sees them and to support his dissent by an independent argument".

We do not like the straight narrative style of writing a judgment which never really poses the question to be answered until near the end. Indeed, in some judgments, the question is never clearly stated but you are left to discover it from the

narrative and the answer. A judgment is not a detective story; it consists really of the posing of a question or questions and thereafter of findings of facts germane to the questions and the stating of the answers to those questions, based on applicable law.

You can, of course, from the bench or in a written judgment say what you think of a person's conduct without fear of being sued for libel. This power carries with it a responsibility to be careful and to be sure of your facts before you describe a person or his acts in perjorative terms. Harsh words are only to be used when fully justified by the facts and a recognition of the common frailties of mankind may often temper the denunciation.

But the judge need not fear to denounce when conduct has been so grossly wrong as to warrant severe words.

"In other words": is a phrase sometimes used in judgments, and sometimes misued. Often the words which follow it are merely a more dogmatic statement of an opinion already expressed. Sometimes they are used to introduce another approach to a subject. When so used they are inappropriate. As held in *N.S.W. Tax Commissioners v. Palmer*, [1907] A.C. 179 at 184 there may be two separate ratio decidendi in a judgment, each valid. But, when stating the second ratio decidendum, the writer is not expressing the same thought "in other words"; he is expressing a new thought.

For a more complete and authoritative statement of the rules for writing good English we refer judges to Fowler's *Modern English Usage* and to Strunk's *Elements of Style*. If you follow their rules, if you can manage to be lucid, concise and pungent, you will have done what is required of you and, perhaps, achieved what is called "Style".

B. *Citing of Text Books and Periodicals*

Vaughan Williams L. J. said in *Greenlands v. Wilmsjhurst* (1913), 29 T.L.R. 685 at 687:

> "No doubt Mr. Odger's book [on *Libel* and *Slander*] is a most admirable work which we all use, but I think we ought in this Court still to maintain the old idea that counsel are not entitled to quote living authors as authorities for a proposition they are putting forward, but they may adopt the author's statement as part of their argument".

A more modern outlook, Denning J. (as he then was), in (1947) 63 L. Q. R. 516:

> "The notion that academic lawyers' works are not of authority except after the author's death has long been exploded. Indeed, the more recent the work, the more persuasive it is".

We do not think that the death of an author confers infallibility on his works. The test is really inapplicable to most standard texts because, the original authors having long since died, the texts have been revised in numerous later editions by persons some of whom are still living. Archbold, for instance, is now the product of many minds but remains a great authority. So also Dicey.

The latest edition of a recognized text is to be preferred, not because of any belief in the superior sagacity of the later editors, but because the newer text will cite recent authorities not available to earlier editors.

Recent articles in legal periodicals analyzing and sometimes criticizing new decisions are often of great use to the writer of judgments.

In (1950) 28 Can. Bar Rev. there is an article *Legal Periodicals and the Supreme Court* by G. V. V. Nicholls, the writing of which was prompted by an observation made by the then Chief Justice of Canada in *Reference re Validity of Wartime Leasehold Regulations*, [1950] 2 D.L.R. 1. The Chief Justice said: "The Canadian Bar Review is not an authority in this Court."

Mr. Nicholls' article is critical of this statement insofar as it might purport to forbid the use of articles from such publications as the Bar Review in argument, not as authorities, but as reinforcing an argument. He cites examples of the increasing acceptance, in Canadian and English courts of the use of such articles in argument, the increasing references in judgments, not only to standard texts, but to treatises in legal periodicals.

Recent examples of this tendency are found in Canada, in the judgments of the Supreme Court of Canada in *R. v. Kundus* (1976), 61 D.L.R. (3d) 145 and in England by the House of Lords in *D.P.P. v. Majewsky,* [1976] 2 All E.R. 142.

In *Foundation of Canada Engineering Co. Ltd. v. Canadian Indemnity Co.*, an appeal heard by the Supreme Court of Canada in 1977, as reported in (1977) 13 N.R. 282, the report, in its preliminary statement, sets out citations under two headings:

1. Cases judicially noticed

2. Authors and works judicially noticed.

Under heading no. 2 are cited articles in periodicals as well as text books.

We cannot assume that this division of citations is made under any authority of the Supreme Court but the mere number of texts and periodicals considered by Grandpré J., who gave judgment for the Court, illustrates further the modern trend we have discussed.

Frequently the best way to begin research for the writing of a judgment is to read the texts and, where applicable, current essays in the periodicals. But, generally, the judge will next read the judicial decisions cited in the text or essay to satisfy himself that they support the opinions expressed by the authors. And the lowliest trial judge, while he may not reject a judgment of his own Court of Appeal or of the Supreme Court of Canada may still, if on a reading of the authorities he is convinced he is right, disagree with an opinion expressed by such august authors as Pollock or Goodhart.

C. *Uncited Authorities*

The process of study which produces a judgment will often involve the discovery by a judge of relevant authority not cited by counsel.

In *Rahimtoola v. Nizam of Hyderabad*, [1958] A.C. 379 the Lord Chancellor said, at p. 398:

> "My Lords, I must add that, since writing this opinion, I have had the privilege of reading the opinion which my noble and learned friend, Lord Denning, is about to deliver. It is right that I should say that I must not be taken as assenting to his views upon a number of questions and authorities in regard to which the House has not had the benefit of the arguments of counsel or of the judgment of the courts below".

Lord Reid, Lord Cohen and Lord Somervell of Harrow agreed with this statement. Lord Denning said, at p. 423:

> "My Lords, I acknowledge that, in the course of this opinion, I have considered some questions and authorities which were not mentioned by counsel. I am sure they gave all the help they could and I have only gone into it further because the law on this subject is of great consequence and, as applied at present, it is held by many to be unsatisfactory. I venture to think that if there is one place where it should be reconsidered on principle—without being tied to particular precedents of a period that is past—it is here in this House: and if there is one time for it to be done, it is now, when the opportunity offers, before the law gets any more enmeshed in its own net".

We think that the Lord Chancellor's statement, subscribed to by the majority, is one that must be considered in its applicability to the ordinary trial or appeal. It would be wrong to say that a judge is always limited in his consideration of the law to authorities cited to him. This could thwart the search for justice made by any competent judge in his deliberations.

But it is necessary to discuss what should be done by the judge who discovers a case not cited by counsel but which he thinks may be sufficiently relevant and authoritative to influence his decision. Should he proceed to render judgment relying on and citing the newly-found case, or should he recall counsel and give them the opportunity to argue the question of the applicability and authority of the case?

Megarry V. C. referred to uncited authorities in *Re Lawrence's Will Trusts,* [1972] Ch. 418 at p. 437 where at pp. 447-8 he said this:

> "I should add this. In the course of this judgment I have referred to certain authorities that were not cited in argument. A judge who, after reserving judgment, comes upon possibly relevant authorities not cited in argument is in a position of some difficulty. Naturally he wishes to avoid the expense and delay of restoring the case for further argument; yet the paramount consideration is that of avoiding any injustice to litigants or their counsel. It seems to me that a distinction can be made. If the authorities are such as to raise a new point, or to change or modify, even provisionally, the conclusion that the judge has already reached, or to resolve his doubts on a point, I can see no alternative to restoring the case for further argument; and, of course, authorities do not always wear the same aspect after they have been dissected in argument as they appeared to wear before. On the other hand, if the authorities do no more than confirm or support the conclusions that the judge has already reached on a point that has been fairly argued, then in most cases I cannot see that it is wrong for the judgment to refer to them without any further argument. A litigant to whom the authorities are adverse would have been defeated in any event, and a litigant whose cause the authorities support is not likely to object to the advent of reinforcements. Further, if an appeal is contemplated, or if the case is reported, the citation of the additional authorities may be of assistance in showing that they were not overlooked and in preventing them from being overlooked in the future. Similarly, I do not think that objection could fairly be taken to the citation of an authority which could not affect the result but merely, for example, provides an apt phrase or extraneous parallel".

We respectfully agree that, if the newly-found authority is to influence the judgment to be delivered, counsel should be given the opportunity to be heard again. In some circumstances, the judge would order a further hearing, in others, we suggest, it might be sufficient for the judge to have the Registrar write to counsel telling them of the fresh authority, offering them the opportunity to re-argue the matter, and saying that if neither counsel notified the Registrar within a specified time that he wanted a new hearing the judge would give judgment, citing the new authority.

We suggest that when, as in the *Hyderabad* case, not only new authorities but "new questions" are involved, a new hearing should follow almost automatically, because the words "new questions" indicate to us a different approach, a different line of reasoning, not formerly canvassed, something more than the discovery of authorities in which the real "questions" discussed are the same as had previously been argued. But even when the new authority appears to the judge, at first sight, to follow the same line of reasoning as cases already cited, we think the safe course is to offer counsel the opportunity to present argument. To paraphrase Lord Melbourne we say that where it is not necessary to take a risk, it is necessary not to take a risk.

The alternative of "offering" instead of ordering a new hearing may save costs in cases where counsel do not think further argument will serve any useful purpose. But the judge will order rather than offer the new hearing in situations where the new found authority leaves him uncertain as to what he should decide.

D. *Unreported Judgments as Authorities*

The citing, as precedents, of unreported cases has, during the past few years, become a common thing in Canada, in both trial and appellate courts. The former English rule that no report of a case would be considered unless the report was the work of a barrister has, even in England, gone by the board.

In *Halsbury* 3rd, Vol. 22 p. 807, there is this statement:

> "If there is no report in any authorized series of reports a shorthand report may be looked at, and, since official shorthand notes of judgments have been taken, it is not uncommon for this to be done."

In Canada, of course, typescripts of oral judgments and of written reasons for judgment are always available.

There is an article on this subject by Sir Robert Megarry in 70 L. Q. R. 246 and a further note by him in 94 L. Q. R. 187. In the Journal of the Society of Public Teachers of Law, new series,

Vol. 14, No. 3 R. J. C. Munday writes of "New Dimensions of Precedent" and discusses the use as precedents of unreported cases. Both authors accept the idea that an unreported case can be a precedent. In Canada, the usage is well established. The practice is to obtain from the appropriate registry a certified copy of reasons for judgment to place before the court.

We suggest that a fair practice for judges to maintain in their courts would be to require counsel who intend to cite unreported judgments so to advise opposing counsel before argument and perhaps to provide opposing counsel with copies of the reasons for judgment to be cited. This could save the costs of adjournments to enable opposing counsel to study and analyze the unreported judgments.

E. *Manner of Citing Cases*

In the interest of uniformity in the citation of cases, we set out certain guide lines for judges.

(1) There is a complete list of the proper abbreviated citation of all law reports at the front of Vol. 1. of *Halsbury's Laws of England*, 3rd ed., pp. 31 to 53; 4th ed., pp. 23 to 48.

(2) Where the year is an essential part of the citation, the year is shown with square brackets, and the name of the case is followed by a comma, thus:

Jones v. Jones, [1926] A.C. 400.

Where there is more than one volume for that year, the volume number follows the square bracket, as in

Jones v. Jones, [1970] 2 Q.B. 400.

Where the year is not an essential part of the citation, its use is optional, but, if used, is shown in round brackets immediately after the name of the case, followed by a comma, and then the citation, thus:

Jones v. Jones (1926), 59 O.L.R. 400.

(3) In the following instances, the year is an essential part of the citation, requiring square brackets:

English: Official reports (A.C., Q.B., Ch., P., Fam.)
—all reports since 1891
All E.R.—all citations (1936 onwards)
W.L.R.—all citations
W.N.—all citations (series ended 1952)
T.L.R.—1951—1952 only

Canadian: O.W.N.—all citations 1933—1962 incl. (series ended)
O.R.—all citations 1931 to 1973 incl. Note: commencing in 1974, correct citations are: *Jones v. Jones* (1974), 2 O.R. (2d) 400.
D.L.R.—1923 to 1955 incl.
W.W.R.—1917 to 1950 incl. 1971 onward
S.C.R.—1923 onward
Ex. C.R.—1923 to 1970 incl.
F.C.—1971 onward
C.C.C.—1963 to 1970 incl.

For correct citation of other provincial and regional series, reference should be had to the *Canadian Abridgment, 2nd ed.*, Vol. 1 pp. xiii to xix.

These are the conventional rules but they must plainly yield to situations where square brackets are not available on typewriters.

Text books and judgments usually cite cases from nominate reports without referring to the volume and page at which they are cited in the English Reports. We suggest that in an age when most libraries, in Canada anyway, are only equipped with the English Reports, and when most lawyers in Canada are unfamiliar with the sequence of the nominate reports, all citations of cases in nominate reports should refer to the nominate citation and also to the volume and page in which the case is to be found in the English Reports.

Part 3

LAW CLERKS

In many jurisdictions the services of law clerks are made available to judges. These are usually young men or women who have been granted law degrees by universities but have not yet been admitted to practice. Their period of service to the bench is generally considered to be part of their apprenticeship.

Often, in Canada, a law clerk will serve several judges so that it is only occasionally that he can go into court and hear a whole case. Therefore normally his period of usefulness comes after the hearing and is confined to looking up and digesting in writing the authorities on such legal points as the judge may assign to him. It is certainly no part of his function to write all or any part of a judgment which must be in the judge's own words. The judge should himself check such authorities as are cited, and such opinions as are expressed by his clerk.

Part 4

STARE DECISIS

A. *General*

Discussions of difficult legal subjects are not generally attempted in this book. *Stare decisis* in Canada falls into this category. There are, as will be seen, differences of opinion regarding such important subjects as the duty of appellate and trial courts to follow their own judgments. But the subject of *stare decisis*, the rule of precedent, is so vital a matter to any judge that we feel we must deal with it.

Stare decisis, the doctrine which can require a court to follow its own previous decisions or those of other courts, developed over the centuries in England. Two reasons are commonly given for the existence of the doctrine:

1. Judicial comity

2. The desirability of uniformity in the application of the law so that B shall not on Tuesday lose a lawsuit based on the same facts and principles that have enabled A to win a lawsuit on Monday.

Comity means courtesy or politeness, a quality which we have extolled elsewhere in this book. But we do not think that the desirability of courtesy, standing alone, would require a judge to give a judgment he though was wrong. That would be to rank courtesy, the wish not to offend another court or judge, ahead of justice.

So we think that, while the word comity may be apt to describe the respect due from a lower court to one higher in the judicial hierarchy, the desirability of uniformity is the real basis of the doctrine.

As a beginning there should be some guidance as to the limitations upon the application of the doctrine of *stare decisis*, and we cite from two judgments:

G.T.P. Coast S.S. Co. v. Simpson (1922), 63 S.C.R. 361 per Anglin J. at p. 379, citing Viscount Haldane in *Kreglinger's* case, [1914] A.C. 25, at p. 40:

> "when a previous case has not laid down any new principle, but has merely decided that a particular set of facts illustrates an existing rule, there are few more fertile sources of fallacy than to search in it for what is simple resemblance in circumstances, and to erect a previous decision into a governing precedent merely on this account. To look for anything except for the principle established or recognized by previous decisions is really to weaken and not to strengthen the importance of precedent. The consideration of cases which turn on particular facts may often be useful for edification, but it can rarely yield authoritative guidance."

Lord Halsbury in *Quinn v. Leathem*, [1901] A.C. 495 at p. 506, as cited by Martin J.A. in *Douglas v. Addie*, [1929] 2 D.L.R. 401; [1929] 1 W.W.R. 610 at p. 406 of the D.L.R.:

> "... there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the

particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all".

A judge will sometimes be confronted by a decision of a higher court in which two separate reasons are assigned for arriving at a conclusion and may then ask himself "what is the *ratio decidendi?*"

There may be two *ratio decidendi* in one case; Lord Macnaghten in *N. S. W. Tax Commissioners v. Palmer*, [1907] A.C. 179 at 184 says:

"...it is impossible to treat a proposition which the Court declares to be a distinct and sufficient ground for its decision as a mere dictum, simply because there is also another ground upon which, standing alone, the case might have been determined".

There are two aspects from which *stare decisis* may be considered:

1. The hierarchical or vertical aspect which relates to the duty of courts and judges to follow the decisions of courts and judges higher in the judicial hierarchy.
2. The horizontal aspect which relates to a court following:
   (a) its own judgments
   (b) judgments of courts of equal jurisdiction.

B. *The English Hierarchy*

We are, of course, essentially concerned with the Canadian situation, but an understanding of the rules observed in England may still be useful to a Canadian judge.

In England the hierarchical situation is clear, lower courts must follow the Court of Appeal, all courts are bound by decisions of the House of Lords.

The House of Lords had followed its previous decisions until the year 1966 when Lord Gardiner L. C. speaking for the House made this historic declaration:

"Their lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs as well as a basis for orderly development of legal rules.

Their lordships nevertheless recognize that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

In this connextion they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.

This announcement is not intended to affect the use of precedent elsewhere than in this House".

—[1966] 3 All E.R. 77.

The English Court of Appeal from its beginning has strictly adhered to precedent following the decisions of the House of Lords and its own previous judgments not in conflict with those of the House of Lords.

The adherence so strongly re-asserted in *Young v. Bristol Aeroplane Co.*, [1944] 2 All E.R. 293, now must be taken to be firmly established by the ruling of the House of Lords in *Davis v. Johnson*, [1978] 1 All E.R. 1132 where, reversing a majority judgment of a panel of the Court of Appeal on this point, the House held that *Young v. Bristol Aeroplane Co.* correctly stated the law. The decision is, of course, applicable to civil and not necessarily to criminal cases.

C. *Must English Decisions be Followed by Canadian Courts*

In the days when the Privy Council was our court of last resort Sir Montague Smith, in *Trimble v. Hill* (1879), 5 A. C. 342, said that all "Colonial" courts must follow the House of Lords and the English Court of Appeal. There was some early rebellion in Canadian appellate courts against the concept that they must follow any decisions other than those of the Supreme Court of Canada and the Privy Council. Moss C. J. O. was very outspoken in *Jacobs v. Beaver* (1908), 17 D. L. R. 496 as was Martin J. A. (as he then was), in *Pacific Lumber Co. v. Imperial Timber Co.*, [1917] 1 W. W. R. 507, 31 D.L.R. 748.

In 1927 Lord Dunedin in *Robins v. National Trust*, [1927] A. C. 515 conceded that "Colonial" courts need no longer follow the English Court of Appeal but held they were still bound by decisions of the House of Lords.

In 1933 Duff J. (as he then was), in *London v. Holeproof Hosiery*, [1933] S. C. R. 349 accepting Lord Dunedin's concession as to the loss of authority of the English Court of Appeal, did not clearly reject Lord Dunedin's re-assertion of the final authority of the House of Lords.

This part of the dissenting judgment of Rinfret C. J. C. in the *Storgoff* case, [1945] S. C. R. 526 at p. 538 comes next in this chronology:

> "... the Supreme Court of Canada is now the court of last resort in criminal matters; and although of course, former decisions of the Privy Council or decisions of the House of Lords in criminal causes or matters, are entitled to the greatest weight, it can no longer be said, as was affirmed by Viscount Dunedin, delivering the judgment of their Lordships in *Robins v. National Trust Co. Ltd.*, that the House of Lords, being the supreme tribunal to settle English law—the Colonial Court, which is bound by English law, is bound to follow it".

These words relating to the transfer of final authority regarding criminal law are just as applicable to the transfer in 1949 of final authority in civil suits.

Lord Dunedin in *Robins v. National Trust* spoke before the enactment of the *Statute of Westminster* in 1931 and before the Supreme Court of Canada was made our Court of last resort.

The Manitoba Court of Appeal in *Anderson v. Chasney* and *Sisters of St. Joseph*, [1949] 2 W.W.R. 337 expressly rejected the authority of the House of Lords; see judgments of Coyne J. A. at p. 361, and of Adamson J. A. at p. 369. The same court in *Kerr v. Kerr*, [1952] 4 D.L.R. 578 was just as explicit. Coyne J. A. at p. 584 referring to a decision of the House of Lords said: "We are not, of course, bound by English cases". Dysart J. A. at p. 592 said: "I venture to express my opinion that Canadian Courts should follow Canadian precedents rather than decisions of English Courts, which are not binding upon us".

More recently the Supreme Court of Canada has, by a series of decisions, without expressly rejecting *Robins v. National Trust*, effectively entombed it and declared the independence of Canadian courts. In *Fleming v. Atkinson*, [1959] S. C. R. 513 the Supreme Court held that a decision of the House of Lords was inapplicable to Canadian conditions and refused to follow it. Again, in The *Queen v. Jennings*, [1966] S. C. R. 532 our ruling court refused to follow a decision of the House of Lords and finally in *Ares v. Venner*, [1970] S. C. R. 608 rejected the majority decision of the House of Lords and followed, in preference, the opinion of the dissenting minority. See also *Regina v. O'Brien* (1977), 76 D.L.R. (3d) 353.

Since the Supreme Court need not follow the House of Lords all inferior Canadian courts are similarly released.

Having traced the gradual attrition in Canada of English final authority, we hasten to add this. Apart from Quebec, with its Civil Law, always to be respected, Canada is part of what we call the Common Law world and England provided the fountain from which the Common Law emerged. Thousands of English decisions are now, by adoption, imbedded in our jurisprudence and the decisions of the House of Lords and other English Courts will continue, we think, to be cited in our courts and must be given the most careful and respectful consideration, as highly persuasive.

The ready acceptance, by Canadian courts, of the obiter dicta of the House of Lords in *Hedley Byrne v. Heller & Sons* may suggest that such an admonition is unnecessary.

The judgments of Australian and New Zealand courts may also have a highly persuasive effect and the similarity, not just of the legal system, but of conditions in the United States is such that many American decisions may too have a strong persuasive effect.

In one area the decisions of a British Imperial tribunal still have effect. We refer to judgments of the Privy Council in civil cases up to 1949, when it ceased to be our court of last resort, and in criminal cases up to 1933, when the Supreme Court of Canada became in criminal law the court of last resort.

All Canadian courts, notably the Supreme Court of Canada cite and follow the opinions of the Privy Council given in civil case before 1949, and in criminal cases before 1933, not as persuasive but as authoritative. Ruling judgments of the Supreme Court of Canada are also authoritative, but, as shown at page 101 *infra*, may now be overruled by that Court.

The Privy Council, while it was our court of last resort, had asserted its authority to overrule, in special circumstances, its own earlier decisions. Since the Supreme Court of Canada replaced the Privy Council as our final arbiter it has, as above stated, overruled a number of its own judgments (see p. 101, infra). It seemed logically to follow that the Supreme Court might also overrule decisions of the Privy Council made during that body's period of supremacy. That the Supreme Court can and will do so has now been established, clearly and definitely, by its judgment overruling, in *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198 the decision of the Privy Council in the *Crystal Dairies* case, [1933] A.C. 168. It will be noted that, although the court was divided on some points, it was unanimous in respect of the overruling, see Chief Justice Laskin at p. 1251 and Pigeon J. at p. 1291. The Chief Justice approved the sage observations of Rand J., pronounced in 1957 and cited at p. 101, infra.

D. *The Canadian Hierarchy*

The Canadian hierarchical system is, we think, clear; trial courts must follow their own courts of appeal, all courts must follow the Supreme Court of Canada and, we have suggested, earlier judgments of the Privy Council (dealt with on p. 98.) The hierarchical rule has been firmly stated by Rinfret C. J. C. in *Woods Manufacturing Co. Ltd. v. The King*, [1951] S. C. R. at p. 515:

> "It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence the administration of justice becomes disordered. The law becomes uncertain and the confidence of the public in it is undermined ... even at the risk of that fallibility to which all judges are liable, we must maintain the complete integrity of the relationship between the courts".

E. *The Inter-provincial Situation*

We now go to consider what we loosely call the horizontal position, whether Canadian courts should follow their own decisions and whether they should follow the decision of courts in Canadian provinces other than their own.

The latter subject can be dealt with briefly. In the earlier stages of the development of the concept of *stare decisis*, there were several courts in England of what was called coordinate jurisdiction, co-ordinate here meaning equal, and the general rule was that one English court would follow the judgment of another court of co-ordinate jursidiction. But those courts, their powers being equal, all operated in the same geographical and political area. This situation does not exist in Canada. The Court of Appeal for Manitoba is equal in power to that of British Columbia but operates in a different political entity. Therefore it has been recognized in Canada that the doctrine of stare decisis does not have inter-provincial effect, so as to require the courts of one province to follow the judgments of courts of equal or higher jurisdiction in other provinces.

In *Wolf v. The Queen*, [1975] 2 S.C.R. 107, at p. 109 the Chief Justice of Canada, speaking for a unanimous court, said:

> "A provincial appellate court is not obliged, as a matter either of law or of practice, to follow a decision of the appellate court of another province unless it is persuaded that it should do so on its merits or for other independent reasons".

Since it is settled that one court of appeal need not follow another it must follow that courts at the trial level are not bound by the decisions of appellate or other courts in other provinces. See *R. v. Beaney*, [1970] 1 C.C.C. 48.

However, the decisions of courts in other provinces will always be considered with respect and will have a strong persuasive influence particularly in fields like criminal law where uniformity is highly desirable.

F. *Must an Appellate Court Follow its Own Decisions*

The Supreme Court of Canada

In *Stuart v. Bank of Montreal* (1909), 41 S.C.R. 516, the Supreme Court of Canada declared firm adherence to the rule of stare decisis and said that it must follow its own judgment in *Cox v. Adams* (1905), 35 S.C.R. 393. We cite Duff J. (as he then was), at p. 535:

> "Some question is raised, whether or not we are entitled to disregard a previous decision of this court laying down a substantive rule of law. This court is, of course, not a court of final resort in the sense in which the House of Lords is because our decisions are reviewable by the Privy Council; but only in very exceptional circumstances would the Court of Exchequer Chamber or the Lords Justices, sitting in appeal, (from which courts there was an appeal as of right to the House of Lords), have felt themselves at liberty to depart from one of their own previous decisions. That is also the principle upon which the Court of Appeal now acts: Pledge v. Carr ([1895] 1 Ch. 51); and the Court of Appeal, in any province where the basis of the law is the common law of England, would act upon the same view. Quite apart from this, there are, I think, considerations of public convenience too obvious to require statement which make it our duty to apply this principle to the

> decisions of this court. What exceptional circumstances would justify a departure from the general rule, we need not consider; because there was, in the circumstances in which Cox v. Adams (2) was decided, nothing in the least degree exceptional".

It will be noted that the opinion above stated recites that our Supreme Court was not, in 1909, a court of final resort.

It has since become such and Rand J. in *Reference re Farm Products Marketing Act*, (1957), 7 D.L.R. (2d) 257, wrote these prescient words at pp. 271-2:

> "The powers of this Court in the exercise of its jurisdiction are no less in scope than those formerly exercised in relation to Canada by the Judicial Committee. From time to time the Committee has modified the language used by it in the attribution of legislation to the various heads of ss. 91 and 92, and in its general interpretative formulations and that incident of judicial power must, now, in the same manner and with the same authority, wherever deemed necessary, be exercised in revising or restating those formulations that have come down to us. This is a function inseparable from constitutional decision. It involves no departure from the basic principles of jurisdictional distribution: it is rather a refinement of interpretation in application to the particularized and evolving features and aspects of matters which the intensive and extensive expansion of the life of the country inevitably presents".

Three recent judgments of the Supreme Court of Canada show that there have been new and noteworthy developments.

The appeal in *Hill v. The Queen* was first heard by a court of eight judges ((1975), 23 C.C.C. (2d) 321) and later reheard by the full Court ((1976), 62 D.L.R. (3d) 193.) It is clear from a reading of all the judgments in both reports that the Court unanimously overruled *Goldhar v. The Queen*, [1960] S.C.R. 60. In *Regina v. Paquette* (1977), 30 C.C C. (2d) 417 the Court, per Martland J. overruled *Dunbar v. The King*, [1936] 4 D.L R. 737. Both the Hill and the Paquette decisions were in criminal cases.

Then, in *McNamara Construction (Western) Ltd. et al v. The Queen*, a civil case in which judgment was pronounced on January 25th, 1977, [1977] 2 S.C.R. 654, the Chief Justice of Canada, for the full Court, overruled *Farwell v. The Queen* (1894), 22 S.C.R. 553.

Thus it is now clear that both in criminal cases and in civil cases the Supreme Court of Canada may overrule its own previous decisions.

The effect of the overrulings we have referred to seems to us to be comparable to that of the declaration of the Lord Chancellor for the House of Lords in 1966 (*supra,* p. 95) and, of course, more important, to Canadian courts and lawyers.

Provincial Courts of Appeal

Many Provincial Courts of Appeal consider that they can and will overrule earlier judgments of their own courts when special reasons are shown for doing so. See *Wolfe v. CNR,* [1934] 3 W. W. R. 497 (Sask.); *Ex parte Yuen Yick Jun* (1940), 73 C.C.C. 289 (B. C.); *Rex v. Eakins* (1943), 79 C.C.C. 256 (Ont.); *R. v. Thompson,* [1931] 1 W.W.R. 26; (Man.); *General Brake & Truck Service v. W. A. Scott & Sons Ltd.* (1975), 59 D.L.R. (3d) 741 (Man.).

But the Ontario Court of Appeal has held otherwise in *Delta Acceptance Corp. v. Redman* (1966), 55 D.L.R. (2d) 481. In that case Schroeder and McGillivray J J. A. adhered strictly to the rule set by the Supreme Court of Canada in *Stuart v. Bank of Montreal* (1909), 41 S.C.R. 516; Schroeder J. A. obviously did not approve of an earlier decision of his own Court but felt bound to follow it. He said at p. 483:

> "Holding these views I would be prepared to accord my ready concurrence to the (dissenting) judgment of my brother Laskin if I did not hold the opinion that we are bound by the doctrine of *stare decisis* to bow to the majority judgment in the Park Motors case, *supra* . . . Stuart v. Bank of Montreal, supra, is authority for the proposition that this Court is bound by its own decision provided they enunciate a substantive rule of law".

Laskin J. A. as he then was, did not consider that the principle of the previous decision applied to the instant case. He did, however, at p. 495 say this: "Even if *stare decisis* does not apply, this Court should not lightly depart from a previous decision: cf. *Stuart v. Bank of Montreal* (1909), 41 S.C.R. 516 at p. 535 (aff'd [1911] A. C. 1920). Moreover, it may be imprudent to

refuse to follow an earlier decision (which cannot be distinguished or otherwise explained away) where the decision has either stood for many years on the same bottom of circumstances, or has been reaffirmed by the Court in intermediate cases".

Where the liberty of the subject is involved the rule of *stare decisis* may be less rigidly applied. In Canada, the Court of Appeal for B. C. in *Ex parte Yuen Yick Jun* (1940), 73 C.C.C. 289 having decided that habeas corpus was never a criminal matter (overruled by the Supreme Court of Canada in *In re Storgoff,* [1945] S.C.R. 522), dealt with and overruled its own previous decision in a criminal matter, in *Re R. v. McAdam* (1925), 44 .C.C. 155. Many cases were cited by Martin C.J.B.C. at p. 291 to support the propriety of such an overruling. Most of the decisions relied on were decisions of the English Court of Criminal Appeal. That court has since asserted its opinion on the application of the doctrine of *stare decisis* in criminal cases in *R. v. Taylor,* [1950] 2 All E. R. 170 where, at p. 172, Lord Goddard C. J. said this:

> "I should like to say one word about the re-consideration of a case by this court. A court of appeal usually considers itself bound by its own decisions or by decisions of a court of co-ordinate jurisdiction. For instance, the Court of Appeal in civil matters considers itself bound by its own decisions or by the decisions of the Exchequer Chamber, and, as is well known, the House of Lords always considers itself bound by its own decisions. In civil matters it is essential in order to preserve the rule of stare decisis that that should be so, but this court has to deal with the liberty of the subject and if, on re-consideration, in the opinion of a full court the law has been either mis-applied or misunderstood and a man has been sentenced for an offence, it will be the duty of the court to consider whether he has been properly convicted. The practice observed in civil cases ought not to be applied in such a case, and in the present case the full court of seven judges is unanimously of opinion that R. v. Treanor (or McAvoy) ([1939] 1 All E.R. 330) was wrongly decided".

In *Regina v. Northern Electric Co. Ltd.*, [1955] O. R. 43 McRuer C.J.H.C. at p. 447 refers to *R. v. Taylor* but the decision in *R. v. Taylor* had no direct relevance to the *ratio decidendi* in the judgment of the Chief Justice. But in such cases as *R. v.*

McInnis, [1973] C.C.C. (2d) 471 at p. 481, and *R. v. Govedarov et al* (1974), 16 C.C.C. (2d) 238 at p. 251, the Ontario Court of Appeal clearly relaxes the strictness of the rule in cases where the liberty of the subject is involved.

Throughout the hierarchy, the general rule is that where a higher court has later decided that the law is otherwise, a court need not follow any previous ruling of a lower court. This is the purport of what Viscount Simon said at p. 169 of *Young v. Bristol Aeroplane Co. Ltd.,* [1946] A.C. 163 and its validity is not affected by what Lord Simon of Glaisdale said in the exceptional circumstances before him in *Miliangos v. George Frank Textiles Ltd.* (1975), 3 W.L.R. 758. We know of no Canadian judgments which conflict with this sensible rule.

G. *Stare Decisis as Between Trial Judges of the Same Court*

As between judges of the same trial court, there are quite wide differences of opinion as to the application of the rule of *stare decisis.*

In *Huddersfield, Police Authority v. Watson,* [1947] K. B. 842 Lord Goddard at p. 848 said this:

> "... I can only say for myself ... that a judge of first instance, although as a matter of judicial comity, he would usually follow the decision of another judge of first instance unless he was convinced that that judgment was wrong, certainly is not bound to follow the decision of a court of equal jurisdiction. A judge of first instance is only bound to follow the decisions of the Court of Appeal and the House of Lords and, it may be also, of the Divisional Court".

And in *Island Tug & Barge Ltd. v. Makedonia,* [1956] 1 All E.R. 236, Pilcher J. refusing to follow a judgment of Willmer J. of his court, at p. 240 cited the judgment of Lord Goddard, *supra.*

In Canada, Lamont J. in R. M. of *Bratt's Lake v. Hudson's Bay Co.,* [1918] 2 W.W.R. 962 approved at p. 966, these words from the judgment of Bray J. in *Forster v. Baker,* [1910] 2 K.B. 636 at p. 638:

> "I have always understood that one judge is not bound by the decision of another judge on a point of law at *nisi prius* and therefore I think I am bound to consider the case and decide it according to my own opinion, at the same time, of course, giving great weight to the opinion of Darling J".

We now cite some Canadian judgments reflecting a different attitude.

In *Canada Steamship Lines v. M.N.R.,* [1966] C.T.C. 255 Jackett, President of the Exchequer Court, having in mind two previous decisions by other judges of his court, said at p. 259:

> "I think I am bound to approach the matter in the same way that the similar problem was approached, in each of these cases until such time, if any, as a different course is indicated by a higher Court. When I say I am bound, I do not mean that I am bound by any strict rule of *stare decisis* but by my own view as to the desirability of having the decisions of this court follow a consistent course as far as possible."

Then in *R. v. Northern Electric Co. Ltd.* (1955), 3 D.L.R. 449 at p. 466 McRuer C.J.H.C. said this:

> "Having regard to all the rights of appeal that now exist in Ontario, I think Hogg J. stated the right common law principle to be applied in his judgment in R. ex rel. McWilliam v. Morris, [1942] O.W.N. 447 where he said: 'The doctrine of stare decisis is one long recognized as a principle of our law. Sir Frederick Pollock says, in his First Book of Jurisprudence, 6th ed. p. 321: 'The decisions of an ordinary superior court are binding on all courts of inferior rank within the same jurisdiction, and, though not absolutely binding on courts of co-ordinate authority nor on that court itself, will be followed in the absence of strong reason to the contrary'.'
> I think that 'strong reason to the contrary' does not mean a strong argumentative reason appealing to the particular Judge, but something that may indicate that the prior decision was given without consideration of a statute or some authority that ought to have been followed. I do not think 'strong reason to the contrary' is to be construed according to the flexibility of the mind of the particular Judge."

Cross, in *Precedent in English Law* says, at p. 141:

> "One High Court judge will not refuse to follow the decision of another High Court judge without good reason. Good reason may

be provided by such facts as the absence of argument or reference to relevant decisions in other cases".

Judgments of trial judges which have been accepted and followed in later cases may have a greater weight than those which have not been followed. Kerwin C. J. C. said in *Cairney v. MacQueen*, [1956] S.C.R. 555 at p. 559: "It cannot be said that one interpretation of a single judge is a clear judicial interpretation and certainly there is no course of judicial decision". The course of judicial decision referred to by the learned Chief Justice involves the acceptance and adoption by other judges and courts of the ratio decidendi in the decision of the single judge.

In *Laursen v. McKinnon,* [1913] 3 W.W.R. 717, 9 D. L. R. 758 Macdonald C.J.B.C., Martin J. A. concurring, said at p. 719 of the W.W.R.:

> "To say that a court ought not to perpetuate error is to give voice to a very pleasing and right sounding abstraction. The court ought not to perpetuate error but this maxim is controlled by a very salutary rule that constructions which have long been accepted though their correctness may be open to doubt, should not, save possibly by a higher court, be disturbed to the confusion of those who are entitled to rely upon such constructions".

We think it may fairly be said that when an appellate court overrules an earlier decision of a trial court or of a quorum of its own court, it settles the law. When one trial judge refuses to follow the decision of another judge of his own court the law is not settled but unsettled.

Three recent instances of the freedom exercised by English judges of first instance in following or not following decisions of other judges of first instance are:

1. *Metropolitan Police v. Croydon Corporation*, [1956] 2 All E. R. 785.
   Where Slade J. after a careful review of the subject, including consideration of the statements of Lord Goddard and Bray J. followed an earlier decision on the same point as the one before him, of Atkinson J. but Lynskey J. shortly afterwards refused to follow these decisions—
   Monmouthshire C. C. v. Smith, [1956] 2 All E. R. 800 at p. 815. The point of law on which the judges at first instance differed was put to rest by the decision of the Court of Appeal—[1957] 1 All E. R. 78.
2. *Esso Petroleum Ltd. v. Harper's Garage (Stourport) Ltd.*, [1966] 2 Q. B. 514.
   Where Mocatta J. (at p. 553) differs from an earlier judgment of Buckley J. in *Petrofina (Gr. B) Ltd. v. Martin*, [1965] Ch. 1073.
   (The division of judicial opinion was finally settled by the House of Lords—see, [1968] A. C. 269).
3. In *Randolph v. Tuck*, [1961] 1 All E. R. 814 Lawton J. did not follow an earlier decision of McNair J. (in *Bell v. Holmes*, [1956] 3 All E. E. 449).
   In turn, on the same point of law, Streatfeild J. in *Wood v. Luscombe*, [1964] 3 All E. R. 972 preferred the earlier decision of McNair J.

It will be noted that in two instances the differences of opinion were resolved by higher courts. In the third instance the difference is as yet unresolved. Perhaps the availability of a statutory provision such as exists in Ontario would have removed the uncertainty left by the third instance.

We suggest that other Canadian legislatures might well consider enacting provisions similar to s. 35 of the Ontario *Judicature Act* which reads thus:

> "35 (1) If a judge considers a decision previously given to be wrong and of sufficient importance to be considered in a higher court he may refer the case before him to the Court of Appeal".

or to s. 30 (3) of the Nova Scotia *Judicature Act* which reads thus:

> "30 (3) A Judge of the Trial Division shall decide questions coming properly before him, but may reserve any proceeding or any point in any proceeding for the consideration of the Appeal Division of the Court".

In the meantime we can go no further than to leave before you the differing opinions expressed in the cases we have cited.

There is an abundance of professional writing on the subject of *stare decisis*. Much of this writing deals with the value of precedent on a higher level than has been attempted in this book. It canvasses the arguments for and against a strict adherence to

precedent, the perpetual dispute between tradition and innovation. Such flights are inappropriate to a book of this nature and we have confined ourselves to citing the authorities which should, we think, guide Canadian judges in the practicalities of trial and appellate hearings. For those who wish to make a deeper study of the subject we can commend Cross, *Precedent in English Law*, Allen, *Law in the Making*, Chief Justice Freedman's article in 8 *B. C. Law Review* at p. 209 and the final chapter of Cardozo's *Nature of the Judicial Process*. All merit study, but this list by no means covers the field.

Part 5

OBITER DICTA

A. *General*

The following quotation is from C. K. Allen's *Law in the Making* at p. 247:

> "Certain well-recognized principles of interpretation apply throughout.
>
> 1. Any relevant judgment of any court is a strong argument entitled to careful consideration.
> 2. Any judgment of any court is authoritative only as to that part of it, called the ratio decidendi, which is considered to have been necessary to the decision of the actual issue between the litigants. It is for the court, of whatever degree, which is called upon to consider the precedent, to determine what the true ratio decidendi was. In the course of the argument and decision of a case, many incidental considerations arise which are (or should be) all part of the logical process, but which necessarily have different degrees of relevance to the central issue. Judicial opinions upon such matters, whether they be merely casual, or wholly gratuitous, or (as is far more usual) of what may be called collateral relevance, are known as obiter dicta, or simply dicta, and it is extremely difficult to establish any standard of their relative weight. We have already seen (ante, p. 205) that, as early as

> 1673, Vaughan C. J. attempted to define their place in the judicial process, but the task of assessing their nature and value is seldom easy and always, in great measure, subjective. Many protests against arguments founded on irrelevant dicta have come from the Bench, on the other hand, it is a mistake to regard all dicta as equally otiose and therefore equally negligible. Much depends on the source of the dictum, the circumstances in which it was expressed, and the degree of deliberation which accompanied it. Lord Sterndale M. R. observed in Slack v. Leeds Industrial Co-operative Society (1923), 1 Ch. 431, 451, (reversed (1924) 2 Ch. 475 and (1924) A.C. 851):
> 'Dicta are of different kinds and of varying degrees of weight. Sometimes they may be called almost casual expressions of opinion upon a point which has not been raised in the case, and is not really present to the judge's mind. Such dicta, though entitled to the respect due to the speaker, may fairly be disregarded by judges before whom the point has been raised and argued in a way to bring it under much fuller consideration. Some dicta, however, are of a different kind; they are, although not necessary for the decision of the case, deliberate expressions of opinion given after consideration upon a point clearly brought and argued before the Court. It is open, no doubt, to other judges to give decisions contrary to such dicta, but much greater weight attaches to them than to the former class.'

In *Hedley Byrne and Co. v. Heller Bros.*, [1963] 2 All E.R. 575, the members of the House of Lords in their speeches devoted most of their attention to elucidating, in *obiter dicta*, a new conception of liability for negligent misstatement of fact.

These *dicta* have been accepted and applied not only in England but in Canada, Australia and New Zealand so that what were *obiter dicta* in the House of Lords have been, by other courts, converted into *ratio decidendi*.

The *Hedley Byrne* speeches were unusual in that each of the Lords expressed, in lengthy and considered reasons, the same opinion, as *obiter dicta*. The unanimity of opinion was bound to carry great weight in lower courts, and, indeed, it would be a bold judge who would disagree with or disregard such *dicta*. But the

bold judge would not have offended against any rule of *stare decisis* by doing so at any time before the *dicta* had been adopted as *ratio decidendi* by a court whose judgment he must follow.

Hedley Byrne is a striking example of the use of *obiter dicta* by a higher court as a guide to lower courts. Conversely, *Produce Brokers Co. Ltd. v. Olympia Oil and Cake Co. Ltd.*, [1916] 1 A.C. 314 is a case in which the House of Lords approved of critical *obiter dicta* in a lower court, the Court of Appeal, as useful to the House of Lords in formulating its opinion. Lord Sumner at p. 332, said "I think that the Court of Appeal, though bound to follow the earlier decisions, were right in indicating objections to them, and further that in your Lordship's House those objections should prevail".

It must, however, be noted that the criticisms of which their Lordships approved were of decisions of the Court of Appeal and not of judgments of the House of Lords.

A judge may not criticize the judgment of a higher court which he is bound to follow. He may, however, we think, remark on the hardship which may be created by the application of the *ratio decidendi* of a ruling judgment to the particular situation with which he is confronted.

On another occasion Lord Sumner gave stern warning about the care to be used in relying on *dicta* to support a conclusion; "No guidance" he admonished in *Sorrell v. Smith*, [1925] A.C. 700 at p. 743, "is more misleading, no 'kindly light' is more of a will-o'-the-wisp than an *obiter dictum* sometimes contrives to be".

And Viscount Simon in *The Limits of Precedent* (The Holdsworth Club of the University of Birmingham, (1942-3)) said:

> "A wise judge, therefore, takes the greatest pains to guard against the dangers of laying down a proposition of law in too wide terms. For, if he does, the danger is that his broad proposition, which may have been perfectly correct when applied to the sort of case before him, may be quoted out of its context and sought to be used in a different kind of case which he was never thinking of at all".

Obiter dicta can be influential in procuring legislative reform of the law. In *Re Copeland and Adamson et al* (1972), 28 D.L.R. (3d) 26 Grant J. at p. 37 said:

> "It would appear therefore that there is a pressing need for legislation in Canada providing protection for the individual against such abuses and regulating the area within which such devices may be lawfully used".

Following this observation the relevant Part of the *Criminal Code* was amended.

Similarly, Spence J. of the Supreme Court of Canada in *Vaillancourt v. La Reine*, [1976] 1 S.C.R. 13 at p. 18 drew attention to the need of amending legislation. And Cartwright C. J. C. in *The Queen v. J. B. & Sons Co. Ltd.* (1970), 9 D.L.R. 345 said at p. 349:

> "if no such procedure is available I venture to suggest that it should be provided by appropriate legislation".

The weight of *obiter dicta* by high courts is emphasized by statements by several eminent judges: In *re Cust* (1915), 7 W.W.R. 1286, 21 D.L.R. 366 Harvey C. J. followed *obiter dicta* of the Privy Council. See also the observations of Duff C.J.C. in *Reference re Supreme Court Act Amendment Act*, [1940] S.C.R. 49. In *Ottawa v. Nepean*, [1943] O.W.N. 352, 3 D.L.R. 802 Robertson C.J.O. said at p. 804 of the D.L.R. report:

> "What was there said may be *obiter*, but it was the considered opinion of the Supreme Court of Canada, and we should respect it and follow it, even if we are not strictly bound by it".

Despite the examples given of useful *obiter dicta*, it remains true that a court should as a general rule decide only what it must decide to dispose of the case before it and refrain from expressing opinions on subjects irrelevant to the *ratio decidendi*. Appellate Courts, particularly, may, by such *dicta* more or less close the door on prospective litigants who may, in lower courts, want to argue the very point which was the subject of the *dictum*, and may have valid arguments to advance not dealt with by the higher court in its *dictum*.

B. *Gratuitous Comment*

Under this heading, which deals with judicial pronouncements, which make no pretensions to the status of *ratio decidendi*, we cite, with respectful approval, some words of Chief Justice Culliton of Saskatchewan spoken at a judge's seminar.

> "The temptation is often present, either in the course of a trial, or in delivering judgment, for a judge to make comments of a general nature which, while related to the issue before him, are not necessary in its determination. Such comments usually do no more than reflect the opinion of the judge. In this respect, the writer has in mind comments respecting the characteristics of a particular ethnic group, or of a particular segment of society; or comment respecting the policy as disclosed in legislation.
>
> In the writer's opinion, a judge should avoid unnecessary comments of a general nature. Such comments, when reported out of context, or when deliberately distorted by groups or organizations opposed to the so-called 'establishment', can only be a source of trouble and embarrassment to the judge who made them, and to the Court of which he is a member.
>
> Again, it is the writer's view that a judge should be very hesitant in expressing a critical view as to the policy or purpose of legislation. In this area it may be well to remember the words of Earl Loreburn, L. C., when speaking for the Privy Council, in *Attorney General for Ontario v. Attorney General of Canada*, [1912] A.C. 571, he said, at page 583:
>
> 'A Court of law has nothing to do with a Canadian Act of Parliament, lawfully passed, except to give it effect according to its tenor.'
>
> This does not mean, of course, that a judge is not entitled to point out that an Act has failed to accomplish what appears to be its purpose, or that there appears to have been a vital omission in its drafting."

To this we add a sage admonition pronounced by the late Chief Justice Sloan of British Columbia:

> "A judge's first prayer should be, 'God give me strength to button my lip' ".

FINAL WORDS

Equality before the law

It has been said that there is one law for the poor and another for the rich. Judges must administer the law in such a way as to leave no suspicion that there is truth in this saying.

For instance, in sentencing in criminal cases judges have, at times, where a person of standing in the community is to be punished, dealt with the suffering imposed on that person by his disgrace, his loss of reputation, as an element to be considered. The disgrace is no greater for an eminent, rich and hitherto respectable citizen than it is for an artisan or workman of previously good repute and is no more fit to be taken into account in sentencing. Previous good behaviour of the millionaire or of the labourer is always a ponderable element in sentencing, but the effect on the convicted person of the fall from grace is the same for rich and poor.

There is no such thing as an unimportant case

Let us compare two cases, one, a lawsuit between litigants of slender means over what is, in modern times, a small sum, say two thousand dollars, the other between two wealthy corporations over two million dollars.

Obviously the outcome of the small suit must mean more materially to the litigants one of whom may well be ruined by an unfavourable decision. Equally obvious the sum involved in the corporate litigation is much greater, giving it a superficially superior importance. Neither of these factors can have any bearing on the earnest consideration, the scrupulous application of the rules of law which must be given equally to each case if there is to be, as there must be, equality under the law.

A case can acquire a special significance to lawyers not through the affluence or the poverty of the litigants, not through

the magnitude of the sum of money or the value of the property involved but through the posing of some difficult and consequential legal problem. But the acceptance of this fact does not involve the acceptance of the idea that any litigation is unimportant.

Students forever

Chief Justice Culliton of Saskatchewan has said: "There is no calling that should more quickly engender in one a sense of humility than that of being a judge. If there is one fact of which a judge becomes more certain the longer he or she is on the bench it is not how much but how little of the law he or she really knows". And, of course, we have Chaucer saying: "The life so short, the craft so long to lerne".

These are not words of discouragement but of incentive. For, in a society which condemns many persons to lifetimes of monotonous, repetitious work judges are among the fortunate ones, confronted each day with new and often fascinating problems, students forever, learning new things. For on the day that you cease to be students, you lose your usefulness. The humility which the Chief Justice advises is not a counsel of despair, but a spur to effort if you are to discharge your great responsibilities to your fellow citizens.

END