

5

To the Court of Appeal: Judges and the Law (1960–62)

Canadian Pacific TELEGRAM
World Wide Communications
OTTAWA ONT
1960 MAR 11 PM 4 20

HONOURABLE MR JUSTICE SAMUEL FREEDMAN LAW COURTS
WINNIPEG MAN

YOU HAVE BEEN APPOINTED A JUDGE OF THE COURT OF APPEAL
FOR MANITOBA EFFECTIVE IMMEDIATELY.
WRITING
W R JACKETT DEPUTY MINISTER OF JUSTICE

In early March, 1960, I received a telephone call from E. Davie Fulton, then Minister of Justice in the Progressive Conservative government led by John Diefenbaker, inviting me to go on the Court of Appeal. I was immediately happy to accept.

I had previously had an inkling that this appointment might well be in the works. There were often rumours about candidates for filling judicial vacancies, and around that time a number of names had been reported in the press as possible appointees, my name among them. These things are largely a matter of judicial reputation. Over the years within the profession certain views gradually become crystallized in the form of people saying, “This judge is good, this judge is very good, this judge is hopeless,” and so on.

Legally the decisions for these appointments are in the hands of the cabinet, which acts on the recommendation of the minister of justice. For the chief justices of the country, the cabinet acts on the recommendation

of the prime minister. It is understood that the appointment of a chief justice is the special prerogative of the prime minister. That doesn't mean that an active prime minister who himself has a background in law will sit and accept docilely any recommendation that is made. They tell me that in the Conservative regime of John Diefenbaker, no judicial appointment was made that did not have the approval of the prime minister. So that even if it came formally on the recommendation of the minister of justice, you may bet your boots that it had been previously cleared with John Diefenbaker.

I had been a trial judge for eight years, and had enjoyed the work. The drama of the unfolding case has a special fascination of its own. You are presiding over a living case. The Court of Appeal would be somewhat duller. There are no witnesses in the appeal court—you don't get the thrust and parry of counsel and witness. The Court of Appeal, though, is the more authoritative body, not because the judges there are better than the Queen's Bench judges, but because it's a multiple court. There are at least three judges on every case, very often five judges, enough to constitute a quorum of sufficient strength to review the decision of a trial judge. As a result, a decision made by that kind of tribunal, taking the second bite of the apple, is likely to be sounder and more authoritative than the judgment of a court of first instance. I strongly believed that one could make a greater contribution to the administration, and perhaps even the advancement of law and the judicial process, as an appellate court judge than as a trial judge, and when the opportunity came to go on the Court of Appeal I felt that my years on trial court would the better equip me to handle appellate court work.

In the Court of Appeal we worked not with live witnesses, but with the transcript of the record of what they said in the court below. We heard arguments of counsel, but without the drama and the emotional impact of the trial.

It was for that reason that at one point in my career I questioned whether I would accept an appellate court appointment. Finally I decided that I would indeed accept it, if offered. My son Martin was then a law student, and he said, "Would you go to that dull court?" I said, "Martin, you're taking law. You're exposed to cases. How many cases in the work you do are the cases of a single trial judge?" He had to admit that they were numerically few. Appellate court judgments are more authoritative.

They are the ones that find their way into the legal textbooks, into the legal literature.

The cases in the appellate court take up much less time than those in a trial. A trial may go on for three days, but the Court of Appeal might dispose of the appeal from the judgment in that trial in two hours. There is a power in the court to hear additional evidence either *viva voci* (by word of mouth) or in affidavit form. It is a rule to which we resorted rarely and sparingly. In almost all cases we decided on the basis of the record that was before the trial judge. If you can't decide the case from the Bench on the day it is heard—and there are many cases when you can't decide—you *reserve judgment*, which means actively thinking about it, actively reviewing the facts, actively researching the law, and then putting down the judgment in the most readable and most persuasive form possible.

Part of the process, of course, was discussing the case with the other judges on the Appellate Bench. We would come into court with a tentative approach towards the case in question, formed as a result of what we had read ahead of time. Usually the judges sitting on the case would discuss these preliminary impressions with their colleagues. Our work practice was to read the material pertinent to the case ahead of time—certainly as much of it as we could. Sometimes that work would be done right in the judge's chambers in the law courts building. Very frequently it would be done at home. In my years on the Court of Appeal I seldom went home without a briefcase containing a factum or a transcript of evidence. During the sessions of the court, law cases, transcripts of evidence, factums, arguments—keeping up to date with the judicial caseload—these are the things I had to be content with over the possibility of reading a nice novel.

As for the procedure of the cases, there is a prescribed and understood ritual. The appellant's counsel speaks first. He presents his argument. The respondent's counsel—the respondent being the victor in the courtroom below—presents his arguments next. The appellant's counsel then has the right of reply—it is indeed almost like the process of a debate. Then the judges will retire to see if we can decide, or settle, the argument then and there. We go into our conference room, where first we pour ourselves a cup of coffee—our secretaries have arranged for that, along with a few cookies. As we're drinking we're talking, and if it becomes perfectly plain that there are divided views, and no one is clearly of a set, determined

opinion, there is only one thing to do, and that is to come back into court and say, “We want to give further study. The matter is reserved.”

The judicial process works in a remarkable way. Time and again, under the impact of a persuasive argument, we would have to overrule our tentative impressions. You read a factum, you get one impression of it. You hear that same argument vigorously developed by an astute counsel, and its effect upon you in detaching you from your preconceptions is sometimes quite extraordinary.

As judges we would of course have our disagreements, our dissents, but in public, particularly in open court, it is always good policy not to appear to be arguing with a colleague. Occasionally a point of view is expressed from one end of the bench, and the judge at the other end of the bench will say, “I am not sure about that, I would like that aspect gone into in somewhat more detail.” And thus we would proceed.

We all understand that we’re entitled to express our individual opinions. One might think privately that, here I am, as one judge, showing them the right path to follow on this matter, and they don’t see it. But you take care to step delicately.

In the earlier history of the court—after I became a lawyer—it was common knowledge that if Mr. Justice Truman said “black,” Mr. Justice Robson would say “white.” These two men unfortunately allowed their differences of opinion to be publicly aired, which was not a good thing. This can be destructive, because the public gets the idea sometimes that the judge is not expressing his well-informed opinion on the case, based on the facts. Instead he is taking an obviously biased approach, attacking the opinion of the judge he happens to dislike.

If we announce our judgment then and there, we write out a short judgment later, probably within a few days of the event. If we reserve judgment, that is a more serious matter. It can mean that there is possibly some dissent, or simply that the case is so complex that everyone involved wants to spend some time thinking about it. In my experience we aimed at writing reserve judgments within not more than three months after the hearing of the case. If we maintained that schedule, the work of the court would be kept up to date. If we piled up too many reserve judgments we could clog the court calendar. What happens then is that we have new cases coming up, they give rise to additional reserve judgments, and you’ve got cases of a month ago or two months ago to dispose of. Indeed, we dispose of many cases the day we hear them. What that usually means is

that we are dismissing the appeal because we find that the judgment appealed from is basically sound. We are in agreement with the trial judge and we feel that he has set forth his reasons in a way that is acceptable. We do not need to reserve and write a long judgment. We can deal with the matter by writing a page or two indicating our concurrence. In some cases there may be a need for a qualification, and we may write a short judgment dismissing the appeal but safeguarding the qualification. Quite frankly, unless we dispose of a number of these cases at the time without reserving them, our workload would be impossible.

The cause of justice wouldn't be measurably advanced if we reserved judgment on these cases and then wrote something that didn't add very much to the judgment of the trial judge or to the development of the law in general. I don't think there is ever an instance in which we would dispose of a case simply because we want to avoid researching and writing a reserved judgment that in our hearts we thought was necessary.

An appellate court judge is a figure who, it has been said, is at once both a soloist and a member of the orchestra. As a member of the orchestra, so to speak, you are a member of a multiple court. You can't be a stubborn, pigheaded crank. You are committed to your judgment, true enough, and if your conscience demands that you adhere to every word, so be it and let the heavens fall. But the situation may be such that on the second look you might be able to delete the paragraph in question without any intellectual impoverishment of our society.

But a judge is a soloist too, especially if he is writing in dissent. Many cases, of course, result in dissent on the part of one or more members of the court. It has been said that the dissenter, knowing that the present cause is lost, speaks to the future. Sometimes that may be the early future, particularly if his dissenting judgment, when reviewed by the Supreme Court of Canada, receives the approval of that court. In my years on the Court of Appeal I occasionally played the role of the dissenter.

One of those cases, for instance, involved a refusal of a man to take a breathalyzer test.¹ He instead requested that he be able to consult a lawyer.

¹ *Regina v Jumaga* [1974] 5 WWR 580, aff'd [1977] 1 SCR 486.

That dissent gained the unanimous concurrence of nine judges of the Supreme Court on that particular point.

Another case in which I dissented, *Montcalm v Lafontaine*,² concerned a woman who was the recipient of welfare payments from a municipality in which she lived. One day this woman had the great good fortune to be hit by a motorcar. As a result, in very short time, she became entitled to an award of about \$3,000. Well and good, but at this point the municipality stepped in and said, “You owe this money to us, because we have been paying out welfare money to you. We are going to take it.” The case came to court, and when it reached our court and minds were made up, I was the sole dissenter. In my judgment I reviewed the history of the common law relating to welfare payments. It seemed perfectly plain to me that the receipt by a welfare recipient of moneys did not constitute a debt repayable to the municipality. That was the common law. Unless the statute in explicit terms changed the common law, the old common law should be applied. I found that the statute did not in express terms constitute the welfare payments as a debt, hence the money was not repayable by the woman to the municipality, and the bonanza she had received as a result of her very unfortunate automobile accident redounded only to her benefit and not to that of the municipality.

I was alone in our court on that view. An appeal was taken to the Supreme Court of Canada, which concurred with my dissenting judgment and reversed the Manitoba decision.

In the Supreme Court of Canada, the Honourable Judge Emmett Hall, writing for the Court, quoted paragraphs 2-5 of Freedman’s dissenting judgment and added, “Freedman accepted this submission and, in my opinion, correctly.”³

On the matter of these judgments I had a pretty good record with the Supreme Court of Canada. Indeed, at one point I had a long and unbroken string of successes without a single reversal by the Supreme Court. Once in those years I was speaking somewhere and was introduced by a lawyer who had gone into statistics and pointed out to the audience that here was a judge who was still batting a thousand, who had never

² 43 WWR 219.

³ *Regina v Jumaga*, in Cameron Harvey, ed, *Chief Justice Samuel Freedman: A Great Canadian Judge* (Winnipeg: The Law Society of Manitoba, 1983) at 94.

once been reversed by the Supreme Court. When I rose to speak I thanked him for the high compliment, but I said, “As you and I know, this can’t keep up. One of these days the Supreme Court of Canada is bound to make a mistake.” Eventually, of course, they did make that mistake, and more than one after that as well.⁴

In a key speech in 1962, Sam Freedman provided a summary of his vast experience in, and knowledge of, the law and its practice to date. His approach, though as always cautious and somewhat understated, was not without its controversy. At the time the practice of Canadian judges from the highest court to the lowest tended to the “technical” side—in which, as he puts it early in this address, the judge takes on “no function except to state or to expound the law”—usually avoiding any hint of law-making, leaving that to elected legislatures.

Looking at the Supreme Court judges of the 1950s, legal historian Ian Bushnell found “unmistakable evidence that the judges were not of a mind to reform the law.” And looking at the following decade he noted: “The solidly conservative majority judges of the Supreme Court who heard the qualified privilege appeals in the 1960s, Kerwin, Cartwright, Martland, Judson, and Ritchie, refused to accept the reform of the law, and reached back 123 years to 1837 for the law and its inherent values that should be applied.”⁵

By the late 1990s critics were saying that the pendulum of judicial activism had swung too far in the other direction, with judges overplaying the role of lawmaker, especially in their tasks of interpreting the *Charter of Rights and Freedoms*, and Quebec’s right to succession from federalism.

⁴ In the end Sam Freedman had a somewhat mixed record. A study of Manitoba appeals that went to the Supreme Court of Canada from 1970 to 1989 shows that, of sixteen Freedman decisions that went to the higher court, six were reversed and ten were accepted. That is, his batting average was about .625. As a whole, decisions by the “Freedman court”—the Manitoba Court of Appeal during the period 1971–83, when Freedman was Chief Justice—succeeded 57.5 per cent of the time. Peter McCormick, “A Tale of Two Courts: Appeals from the Manitoba Court of Appeal to the Supreme Court of Canada, 1970–1990” (1990) 19:3 *Man LJ* 357 at 370, 372..

⁵ Ian Bushnell, *Captive Court: A Study of the Supreme Court of Canada* (Montreal and Kingston: McGill-Queen’s University Press, 1992) at 334–35.

JUDGES AND THE LAW

[*Canadian Bar Journal*, June 1962⁶]

Of judges then I will speak, and of the law, of the role of the one in the development of the other, of the method and manner of the judicial function. Not in the spirit of counsel for the defence do I speak, nor indeed as the devil's advocate, but rather as one who has a deep reverence for law and the judicial process, for this ancient and honourable profession.

Some would deny to the judge any role in the making or development of law. On that view—and it is one which in every generation has had the support of at least some judges—the judge has no function except to state or to expound the law. This is not a point of view that I share. I would ascribe to the judicial function a more creative role. This is in no sense, of course, a novel or revolutionary approach. Rather it has had the endorsement of many distinguished writers, scholars, jurists, and judges. In their number I include the name of Benjamin Cardozo. That great American judge was a person in whom law and literature were wedded in a most felicitous union; a man of whom it could have been said (as it was said of Lord [John] Morley)—that he was sometimes on the losing side, sometimes on the wrong side, but never on the side of wrong.

When, for instance, the question of choosing a successor to the great Mr. Justice [Oliver Wendell] Holmes had to be resolved, the existing composition of the court called for an appointment of a Westerner and hence militated against Cardozo's chances. But President Hoover on good advice none the less took Cardozo from his post of Chief Judge of the Court of Appeals of New York and elevated him to the Supreme Court—an act which evoked the observation that President Hoover ignored geography and made history. I make no apology for selecting an American judge for tribute in this context, for in the words of Pericles, all the world is the sepulchre of great men.

Forty-one years ago Cardozo illumined this whole subject with a series of lectures known as "The Nature of the Judicial Process." There Cardozo declared that there was an area—not great in extent but vital in significance—in which the judge functioned as a legislator, in which the true nature of his enterprise was not discovery but creation. In a large number of cases, he said, both the law and its application are plain; that in a second category of cases the rule of law was certain, its application alone doubtful; and that these two

⁶ This is a slightly revised version of an address made on "Judges' Night" to the Lawyers Club of Toronto; the original speech was published in "Judges and the Law" (1962) 5 *Can Bar J* 208; reprinted in Mark R MacGuigan, ed, *Jurisprudence: Readings and Cases* (Toronto: University of Toronto Press, 1966) at 658.

categories together involved perhaps 90 per cent of the matters with which a judge would have to deal. He then pointed out that the residue of 10 per cent represented the serious business of a judge. "It is when the colours do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins." It is here where a decision one way or the other will advance or retard the law.

Some, fearful of admitting that judges ever make law, would deny to them even in this relatively limited area the right of judicial creativeness. If law is to be moulded, reshaped, or altered, the legislator and not the judge is the proper instrument for the process. Judicial innovation, they tell us, is a threat to the stability of the law. These fears, I believe, are not soundly based.

In the first place, whenever the judge encounters a case on which the law has not yet spoken—cases of first impression, that is to say—the judge cannot escape the role of adaptation or creation. So it was when the aeroplane first appeared on the scene, necessitating a consideration for the first time of air law; so it might be today with respect to damage through nuclear fallout.

In the second place, the dangers of judicial creativeness can be too easily magnified. If [Frederick] Pollock was right that judges are of two kinds, those marked by judicial caution and those possessed of judicial valour, I venture to say that caution will usually win the day. As a group judges have traditionally been characterized by a certain conservatism, an attitude of mind which is a kind of built-in safeguard against excessive innovation. Judges are not famous for reform. When, a century and a half ago, there was a movement to cut down the shamefully large number of offences punishable by death, it was the judges—Lord Eldon and Lord Ellenborough, to name two—who tried to block the way. In 1836 for the first time in England a full right to have counsel was afforded to accused persons. We are told that the measure was opposed by twelve of the fifteen judges. In our own century the establishment of the Court of Criminal Appeal in England in 1908 was opposed by the judges, fortunately without success. So I do not think that we need be greatly apprehensive that to acknowledge the right of judicial creativeness will open the way to its undue exercise.

Surely the decisive answer to those who insist upon judicial caution at all times and in all circumstances lies in the nature of the common law itself, in its organic character as an instrument which is capable of growth, and which in fact has grown and developed through wise judicial use. I take one instance among many that could be cited to illustrate my point. The case of *Donoghue v. Stevenson*⁷—the snail in the ginger beer bottle—is assuredly one where the law

⁷ [1932] AC 562.

was advanced by the courage of judges in breaking new ground. So the manufacturer is held liable to the consumer with whom he did not deal and whom he did not even know. It was enough, said the judges, that he ought to have had her in contemplation. "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour," said Lord Atkin; and in the exigencies of modern commercial life the consumer of the ginger beer must be regarded as the manufacturer's neighbour. How easy it would have been to deny the claim as involving a new basis of liability, as opening up a new area of negligence. If the law is to be changed, let parliament do it, the judges could have said. Instead Lord MacMillan asserted the view that "the categories of negligence are never closed," and so helped to create a milestone in the development of the common law.

So I say that we should end the pretence that judges never make law. Let us instead have the candour to admit that judges can and do make law and that within limits it is proper for them to do so.

A second aspect of my subject is the value of precedent and whether *stare decisis* should be accepted as a rigid and inflexible doctrine. Here we come face to face with the perennial conflict between stability and certainty on the one hand and the need of keeping law fresh and up-to-date on the other.

In certain spheres the problem does not even arise. I have in mind the compulsion upon a judge to give effect to a validly enacted statute, whether he agrees with it or not. Then too, there is the binding authority of an applicable precedent upon a lower court. If binding it must be dutifully followed, even if the tribunal does not agree with it. As Baron Alderson said: "I accede to the authority of that case It does not convince me, it overcomes me." Sometimes lower courts refuse to be so overcome. In such cases they will seek to escape the effect of the precedent by techniques of evasion, a process which may take various forms, one of which has been called "distinguishing undistinguished precedents."

But what of the situation in which a long-standing precedent confronts a court that is free to follow it or not, as it may decide? Here, too, there is conflict of opinion. Some say that even if the court thinks the case was wrongly decided it ought still to follow it. For the old case may have been treated as an authority for fifty or a hundred years. On the faith that it correctly expressed the law and in reliance upon it people may have entered into contracts, or made wills, or otherwise ordered their affairs. If, now, the court should refuse to follow that case it would be undermining the certainty and stability of the law. Admittedly there is something to be said for this point of view. But we must not overlook the other side of the case, namely, that it is

no part of the function of any court to make error perpetual. Unfortunately some inconvenience and dislocation will result whichever point of view is adopted. There is no perfect answer. My own preference—and I do not delude myself into thinking that it is in any sense universally shared—is for the second viewpoint, that which gives the demands of justice a priority over those of stability or certainty. There is not much to be said, in the words of Lord Wright, for the certainty of injustice.

Do you say to me that the adoption of the second point of view will introduce confusion into the law and make it impossible for lawyers to advise their clients intelligently? Not so, I answer, or at worst, seldom so—and even then defensible. For in the first place, it will only be in the rare case, rather than in the general run of cases, that the problem will arise at all. Secondly, a precedent is seldom overruled in a sudden dramatic and unexpected way. Usually it first becomes the subject of discussion, of anxious doubt, and of criticism—both on the part of legal writers and of judges. In a word, the case is now recognized as ripe for overruling. Thirdly, and perhaps most important of all, is the fact that lawyers will themselves understand that the law must keep pace with a changing society; that precedents should assist the court, not enslave it; that old rules may sometimes have to be reshaped or discarded. They will recognize, with Roscoe Pound, that the law must be stable and yet it cannot stand still, and so recognizing will take that into account when they advise.

But even if in an exceptional case a lawyer's confidence in and reliance upon a particular decision should in the ultimate result not receive the sanction and endorsement of the court; if the old decision should be rejected, is not the inconvenience that results to the particular litigant simply the price that must be paid for keeping law responsive to the needs of a society that is not stagnant? I have no doubt that for forty years many lawyers gave advice to many clients on the question of damages in accordance with the *Polemis* case. Such advice was probably given to the plaintiff in the fairly recent *Wagon Mound* case. But was that sufficient reason for the court to adhere to a rule that it now believed to be wrong? No, said the Privy Council, and I can only add that to have yielded, in the name of certainty, to the authority of a decision which the court could no longer accept, would have been to hold back the progress of the law. In the words of a legal scholar, we must use the past to press beyond it.

As for the methods and the difficulties of arriving at a judgment: How do judges reach the conclusions they do?

There are various kinds of judges, and they do not all work in the same way. Indeed there is a suspicion that some do not work at all—or at least, not enough. But, as we say to juries, suspicion does not amount to proof.

It seems to me that every judge has to pass through two stages in order to arrive at his final result. The first is deciding what his decision will be; the second is to express that decision, whether orally or in writing. Both stages have their own difficulties, and often the hardest part of the judge's task just begins when the case has been concluded by counsel. Then comes what is sometimes referred to as the "agony of the decision," and the phrase is not always just a colourful overstatement. How do judges meet the situation? If I may apply the remarks which Mr. Justice Frankfurter made in another connection, "Some do it with ease, some do it with anguish. Some do it with great wisdom, some have done it with less than great wisdom."

Concerning the first stage of the judge's task, at least three methods are acknowledged to exist, and I am sure they are not exhaustive.

One is "*the hunch theory*"—the phrase originating, I believe, with Judge Hutcheson, a well-known American judge. On this theory the judge acts in accordance with an intuitive sense of what is right or wrong for that cause. It is a gift whose secret is concealed from most of us.

A second, which flows naturally out of the first, is *the result-oriented decision*. Here the judge, not intuitively, but on consideration, reaches a conclusion either that the plaintiff should win, or that the defendant should win, and then shapes the judgment to the result. Here the process of judicial reasoning is often backward, from conclusion to argument in support of that conclusion. Let us not condemn the method out of hand. It is the source of many decisions that are rooted in simple justice and morality. The danger to be avoided is the formation of a conclusion before adequate study of the case and then sealing off one's mind to contrary argument.

A third method consists in the relentless pursuit of facts and the relentless application of law to whatever conclusion these may lead. The proponent of this method justifies it on the basis of logic. He hews to the line of the law and follows the facts to whatever conclusion they may take him. If that process should yield a result which seems harsh, and perhaps morally unjust to one of the parties—no matter. The law must be upheld. The court, he says, is not a court of morals or of sympathy.

As for the second stage in arriving at a judgment, I think it may be said that sometimes a judge finds his greatest trouble in writing his judgment, after he has made up his mind which way he will hold. Lord Tweedsmuir said of a certain judgment that "it was as flat as ditchwater and as ponderous as a tombstone." On the other hand Cardozo, whose own luminous judgments are

expressed in burnished prose, speaks with admiration of the judgments of English judges which to him were—as they are to us—“a mine of instruction and a treasury of joy.”

There are differences in method between the trial judge and the appellate judge. The trial judge’s effort is often greater in length. He must find the facts, and as Lord MacMillan said, “The first judgment rightly covers the whole ground.” May I suggest that the first essential—and this applies not alone to trial judges—is clarity. Happy the judge who can say, “I have been upheld, I have been reversed, I have been varied, but I have never suffered the ultimate indignity of being explained.”

With an appellate court the result is achieved by what Lord Evershed has called a “combined judicial operation.” Argument and discussion among the judges, marked by frank interchange of views, help to expose and define the real problem for determination. I am sure that every appellate judge has been a beneficiary of the process.

Where does the judge seek assistance in the law? In the law books, of course; but also in the writings of legal scholars, very often professional law teachers. I do not hold with the view that one should not cite the writings of living authors. The effect of believing that a jurist must be dead before he can become an authority is to deny the judge the assistance and support of current scholarship, which is often the best and most relevant of all. It is so often the legal scholar, trained in a particular specialty, writing objectively without fear except of error, who is able to situate a case in the context of the sphere of law with which it is concerned, and who can assess the trend of judicial decisions. Some see in him only an academic theorist. In my view such an estimate is inadequate and unjust. I do not hesitate to acknowledge the contribution of the research scholar in his study, and the debt which many of the practising Bench and Bar owe to his effort.

What impulses or motivations should animate the judge in coming to his decision? George Bernard Shaw gives as good an answer as any; and although his words are intended for the trial judge, especially in a criminal case, they truly have application at every judicial level: “Anger is a bad counsellor: cast out anger. Pity is sometimes a worse: cast out pity. But do not cast out mercy. Remember only that justice comes first.”

Whenever liberty is invaded from any quarter it is the judicial process which in the last resort alone stands forth as the instrument, the shield, and the protector of the freedom of the individual. If it be true that in this twentieth century the ideal to strive for is the free man in a free society, surely for lawyers that ideal should be more meaningful than to anyone else. For the

keystone of a free society is the rule of law. Upon it all freedom and security depend.

And have lawyers not all a role to play in the preservation of the rule of law? Whenever each of us performs a function of our great profession—the solicitor in his office securing the rights of his client, whether it be by written contract, or testamentary document, or oral advice; the barrister in the courtroom upholding the cause of plaintiff or defendant in a civil contest, or of Crown or accused in a criminal trial; the judge on the Bench seeking to resolve the issue by justice according to law—in all these cases each of us is moving closer to the attainment of what A.T. Mason called “the ideal of an enlarging liberty through a living law.” That we have not attained this ideal is true, and we must not be satisfied with what the law has thus far achieved. But our dissatisfaction should not carry with it a note of despondency or of cynicism. Rather it should be the dissatisfaction which is purposeful because the goal is high. But let us never lose sight of that goal. And as we strive to bring its attainment nearer and nearer, let us remember the great words of Thomas Wolfe: “This glorious assurance is not only our living hope, but our dream to be accomplished.”