Mr. Justice Dysart

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With judges, as with poets or politicians, some are for their own time, and some few are for all times. In the nature of things only a few among the many leave a legacy of permanent significance in the history of the law. Leaving strictly out of account the limitations imposed on them by nature, most judges, because of the stage on which they play their part, have little opportunity of joining the company of the few who have extended the frontiers of legal thought, or made substantial contributions to the development of law. But though they may not add greatly to the growth of the law, some of these judges carry out their duties with a charm and distinction that add greatly to the common man's appreciation of the law and his respect for the judicial office. In this category belongs Mr. Justice A. K. Dysart, who occupied the bench in Manitoba for thirty-one years—twenty-six years as a judge of the Court of Queen's Bench, and five as a member of the Court of Appeal.

Andrew Knox Dysart was born in Cocagne, New Brunswick, on November 15th, 1875, the second son of Andrew Knox and Henrietta Mirian (Cutler) Dysart. The name Andrew Knox was a tradition in his family. There has been an Andrew Knox in every generation as far back as the family can be traced: a fact which betrays one of his ancestral strains. His paternal grandfather came to Canada during the great migration from Scotland following the disbandment of the Scottish regiments after the battle of Waterloo and settled on the coast of New Brunswick, where he followed the then profitable trade of shipwright. On his mother's side, Dysart was descended from United Empire Loyalists of English origin, who crossed the border, from Boston, before the American Colonies had won their independence from the British Crown. His

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maternal grandfather, Robert Cutler, sat in the Canadian House of Commons, as Liberal member for Kent County, during the administration of Alexander MacKenzie, which began auspiciously in 1873, with Sir John A. Macdonald's resignation over the Pacific Scandal, but ended abruptly when the Conservative Party returned to power in 1878.

Dysart's father was appointed a Collector of Customs by MacKenzie's regime in 1873, a position he held, through successive administrations, until his retirement in 1910. A man of open mind and tolerant disposition, he believed in making his own decisions on the important questions of life and in allowing others, his children included, the same right. As they reached the age when they stood upon their own intellectual feet, the members of his large family of eleven—six sons and five daughters—were nicely divided: as to religion, between Protestant and Catholic, and as to politics, between Liberal and Conservative. Deciding these problems for himself, Andrew Knox became a Roman Catholic and took the Conservative side in politics.

Dysart came from an intellectual stock that prized learning. The modest salary of a Collector of Customs was hard put to meet the demands made upon it by a family of eleven children. At an early age he realized that his future was in his own keeping, and at school he was a serious, hard-working student. An active boy, with an abundance of energy, if occasionally he gave way to high spirits, there were not many pages of youthful follies that he had reason to wish erased from his memory. During his school days his studies were not directed toward any particular end, for he was still undecided as to his career. The choice lay between journalism and law. Husbanding his earnings over several years from any odd job that was offered him, in 1897 he entered St. Joseph's University, in Memramcook, New Brunswick. Here he did not neglect the opportunity his own exertions had made possible. During his last two years at St. Joseph's, he taught English and Mathematics to the junior year to help finance his own studies.

In later life, he used to say that his experience as a teacher had been invaluable to him, for it had crystallized his knowledge of the mechanics of language and had given him critical standards by which to judge his own use of words. He dissented from the dictum: "Those who can't, teach", holding the conviction that the surest way to gain a practical mastery of any subject is to try to explain it to others. In his judgment no one gets more benefit from teaching than the teacher. When he was a judge he recommended

to several young lawyers that they seek experience in teaching in order to add to their practical knowledge of law. The cross-fertilization of teaching and practising, he always contended, produced fruitful results for the lawyer.

In 1900, Dysart graduated from St. Joseph's with the degree of B.A., taking top honours in his class and gaining special distinction in the two subjects he had been teaching. In recognition of his scholastic attainments, his classmates elected him valedictorian. Following his graduation in arts, he had a brief career as a teacher of English. Then he became managing editor of the New Freeman, a Roman Catholic weekly published in St. John.

After a year in journalism, he decided that the law—"that strange calling", to appropriate Lord Radcliffe's apt words, "which is neither so masterful as a craft, nor so precise as science, nor so imaginative as art, and yet which mixes the elements of all three"[1]—had more fascination for him. Attracted by its commanding position in legal scholarship, he entered Harvard Law School in 1901. At that time the Big Four on the law faculty at Harvard were Dean Ames and Professors Thayer, Gray and Smith, each of whom made an outstanding contribution, not only to teaching, but to the development and progress of law. Dysart always regarded his good fortune in studying under these men as one of the chief blessings of his life. The case system of teaching law had but lately been introduced at Harvard. This system sought to acquaint the student with the weapons in the legal arsenal and to instruct him in their use. Its primary concern was not to burden the student's mind with a great weight of theoretical legal learning, but to train him so that he could solve practical legal problems. Dysart's own experience at Harvard convinced him of the effectiveness of the case system and he remained firmly of the mind that there is no better system of legal study.

When he entered Harvard Law School, Dysart was twenty-six years of age. He had come to the law after mature consideration with the fixed purpose of mastering its principles, not merely of qualifying himself to practise by acquiring the necessary "academic luggage labels". To this end, he submitted himself to the rigorous discipline of his classes and the aggressive competition of his classmates. Some idea of the competition he had to contend with is suggested by the fact that in his classes he rubbed shoulders with graduates from sixty-three colleges and universities. He received

[1] Some Reflections on Law and Lawyers (1950), 10 Camb L J. 361, at p. 369.

his L.L.B. in 1904, taking honours in all subjects. As an honours graduate of Harvard, he had several attractive offers from Boston law firms, which he resisted because of his affection for his native country. He once confessed that Sir John A. Macdonald's rhetorical remark, "A British subject I was born, a British subject I shall die", struck a responsive chord in him.

Before settling down to practise his profession, Dysart took a year's post-graduate work in constitutional law at Oxford University. While in England he indulged a passion for architecture. Almost every week-end he would set out on a walking tour to visit one of the great mediaeval cathedrals. With the same purpose in mind, he managed to make several brief trips to the continent. To the end of his life he retained his interest in architecture. Any intimate friend, who had been visiting abroad, expected upon his return to be subjected to a cross-examination beginning with the question, "Did you see any interesting buildings while you were away?"

When Dysart finally entered upon his career in the law, his native talents rested upon a sound academic foundation. He was called to the bar of New Brunswick in 1905. While looking around for an opening in his native province, he became attracted to Western Canada, largely through the activities of Sir Clifford Sifton, who, as Minister of the Interior in the Laurier government, was then promoting a vigorous campaign to stimulate interest in the West. After canvassing the situation, he decided to settle in Winnipeg, where a number of New Brunswick lawyers had already established themselves in the profession. He joined the Manitoba Bar in 1906, and entered the firm of Tupper, Phippen & Tupper.

When Dysart came West, Winnipeg was still basking in the afterglow of its pioneer days. A friendly feeling pervaded all levels of society. It was not hard to make friends and he was soon moving in prominent Conservative circles, counting among his intimates Sir Rodmond P. Roblin, Premier of Manitoba, and several members of his cabinet.

In 1909 he formed his own law firm, in association with two of his younger brothers, Arthur L. and Harrison. Of the six boys in the Dysart family, four became lawyers. The fourth legal member of the family, A. Allison Dysart, was leader of the Liberal Government in New Brunswick from 1935 until 1940, and is now county court judge for Kent and Westmoreland Counties in his native province. He is the only member of the family who was ever elected to political office.

Shortly before he established his own firm, Dysart was married to Claire Helen Forrester, a daughter of Charles Forrester, a prominent citizen of Winnipeg. Ten years later tragedy darkened his life. His wife was the first victim in Winnipeg of the epidemic of Spanish influenza that raged through large sections of the world after the 1914-1918 war. Two sons and a daughter were born of his marriage. His elder son, Andrew Knox, followed in his father's footsteps and is now practising law in Vancouver.

During his years at the bar, Dysart built up a modest general practice. He spent most of his time at his office desk and was not considered an outstanding court lawyer. After sixteen years in practice, he was appointed a judge of the Manitoba Court of King's Bench by Mr. Meighen's first administration, an appointment that was hardly received with general acclaim by the profession. It was feared that his limited experience at the bar was not a sufficient guarantee that he would make a good judge. He himself never had any doubt of his ability to do credit to his judicial office. When asked by his good friend Mr. (now Senator) John T. Haig what he thought of his own appointment, he replied, "It's a good appointment, John, I will make a better judge than I did a lawyer". Senator Haig, who felt a doubt or two, confesses that one of the pleasantest surprises of his life was the realization, which came to him shortly after Dysart took his seat on the bench, that his friend had not over-estimated his own potentialities. As Senator Haig says today, those who, like himself, temporarily doubted Dysart's judicial capacity were discounting his solid academic background: a reflection of his studious nature and his interest in intellectual pursuits.

The idea that an active career in advocacy is the only training for the bench has been exploded, surely, by the outstanding success of the appointments made in recent years to the American bench from the teaching staffs of the great law schools. If a newcomer to the bench has industry and a passion for legal scholarship, he will rise to the challenge of his judicial duties, and soon overtake any handicap he may be under by reason of his lack of experience at the bar.

Once when Boswell heard a speaker of shallow eloquence he was promptly impressed, but Dr. Johnson cautioned that they should wait to see if the speaker's stream of oratory was fed by a pump or by a spring. Dysart's knowledge of law was fed by a perpetual spring, not by a pump that required frequent priming. He was not one of those judges whose "notion of their duty [to borrow

Mr. Justice Cardozo's words] is to match the colors of the case at hand against the colors of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule."[2] He cut through the shifting sands of decided cases to get down to the granite rock of first principles. Reading his judgments one is struck by the infrequent use he makes of citations. He shunned the tonsorial or agglutinative type of judgment, "so called [to lean again on Mr. Justice Cardozo] from the shears and the pastepot which are its implements and emblem".[3]

As a writer, a common law judge has an advantage over most writers. The frowns of uncharitable editors, the iron demands of time and space, the whirligig of public taste, leave him unmoved. His wares do not have to be put on the open market. No hazards lie in his path to publication. With the present multiplicity of law reports, he has a reasonable assurance that some of his judgments, at least, will achieve the dignity of print.

But if he has an advantage, he also labours under a disadvantage. Once his judgment is handed down, he is committed to his written word. He cannot say with regard to a case he has once decided that, after further study and reflection, he is of a different mind today than he was yesterday. He has no opportunity of correcting in a second edition of the same judgment the errors of the first. This is not to suggest that judges are held irrevocably to their first opinions. A judge of humility and courage, if the same problem ever comes before him a second time, may admit his mistake: as did several judges of the Supreme Court of the United States in the second flag-saluting appeal brought before the court by Jehovah's Witnesses.[4]

I have found one reported decision in which Mr. Justice Dysart had second thoughts about one of his own judgments. In *Re Gasston (No. 2)* he held that, "as between the Crown and a subject, costs could not be allowed in the King's Bench either for or against the Crown".[5] This point was later discussed by the Court of Appeal in *The King* v. *Thomas* and, as a member of that court, he agreed that the *Gasston* case ought not to be followed and that, by reason of the English Crown Suits Act of 1855,[6] costs may be awarded against the Crown.

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[2] The Nature of the Judicial Process (1921) p. 20.
[3] Law and Literature (1931) p. 10.
[4] *West Virginia Board of Education* v. *Barnette* (1942), 63 Supreme Court Reporter 1178.
[5] (1943), 51 Man. R. 197.
[6] (1948), 56 Man. R. 232, at p. 255.

Because of the price others may have to pay for his mistakes, a judge is placed under the burden of taking pains that he is right the first time. It has been said that the three injunctions an advocate must always obey are boldness, boldness and boldness. It may be asserted with greater truth that the three injunctions a judge must always obey are care, care and care. He must never write with a careless pen; or slip into the mood of the poet who, with carefree abandon, dashes off a sonnet before breakfast. As Mr. Justice Robert H. Jackson suggests, he must not speak in the bold generalizations of popular literature, but with the caution of men who have mastered their subjects.[7] He must write his judgments in full dress (as Gibbon did his history), conscious always of his obligation to himself and others never to do anything less than his best.

Mr. Justice Dysart never forgot this obligation. He laboured over his judgments with infinite patience, writing many a draft for his waste-paper basket before the finished product left his hand. Mr. Justice J. E. Adamson, his colleague for thirty years, first on the Queen's Bench and later on the Court of Appeal, says that his chief characteristic as a judge was his thoroughness: that he never rushed to hasty conclusions, but reached his decision only after an anxious consideration of all relevant circumstances.

Explaining his method of writing a judgment to former editors of the Manitoba Law Reports, Mr. Justice Dysart said that he tried to deal first with the facts, then with the law, and finally to drive straight through to his conclusion, aiming at brevity and endeavouring to hide the doubts and hesitations that beset his mind as he struggled with the problem presented to him.

Though he was concerned in several important cases in their early stages, none of Dysart's own judgments looms as a permanent legal landmark. One of his trials did develop into a leading case frequently cited in Canadian courts. He presided over the jury which gave the plaintiff in *Geel* v. *Winnipeg Electric Co.* a verdict which was later upheld in the Privy Council. This case decided that the statutory onus placed on the driver of a motor vehicle to satisfy the court that he was not negligent never shifts but remains on him to the very end of the case. Lord Wright, speaking for the Privy Council, held that the position of the defendant under the statute is analogous to the position of the defendant in a case to which the principle often called res ipsa loquitur applies.[8]

[7] Foreword to Jurisprudence in Action (1953) p. vi.
[8] [1932] A.C. 690, at p. 699.

Though overruled by higher authority, his judgment, in the Court of Appeal, in the case of *Canadian Pacific Railway* v. *Winnipeg (City)*[9] is a monument to his industry and ability. This judgment runs to twenty-six pages and does not lend itself to brief quotation. For an appreciation of his power of reasoning and clarity of expression, it should be read in full.

Within the sphere of his judicial authority, Dysart never had the opportunity for the final word in restating any great legal doctrine from the contemporary point of view, but the law reports contain many competent contributions made by him to the practical administration of the law.

From his numerous judgments, I have selected two brief passages which suggest something of the man behind the judge and illustrate the judge's sturdy commonsense and broad approach to legal problems. My first passage comes from the case of *Rex* v. *Oak Bluff S.D.* decided in 1937:[10]

> This transportation provision should, in my opinion, be construed, not strictly nor literally—absurdities would follow such construction, and absurdities in legislation should be avoided—but broadly and liberally. The spirit of the Act, rather than the letter, should be noted and observed Not only the section, but the whole Act and scheme of education should be looked to as a background for the interpretation. The Act sets up a common school system, designed to afford to all children educational facilities that are virtually free; it goes further and insists that children have not only the privilege of attending school, but the obligation to do so. In other words, that school children should not only have the right to attend, but the duty to attend school at all reasonable times. The underlying principle is that education is necessary, not only for the good of children, but is good for the present community and future society. And the education aimed at includes the development of character, strength, ability and spirit. It cannot intend to pamper our children into weak, effeminate, spiritless creatures, weaklings in a country where courage, hardihood and robustness are required. It cannot be intended to foster the pernicious system that would encourage each individual to get all that he can from the 'state', and give as little as possible in return. If this application succeeds, it will have a tendency to encourage children, not only to insist upon being clothed to go to school, to be carried to and from school, to be supplied with free books and teaching, but might almost lead them to expect wages for the time spent at school

The second of my passages is taken from *Blanchett* v. *Hansell et al.* decided in 1944:[11]

> There is a maxim in equity, that he who comes into court should

[9] (1950), 58 Man R 230, at p. 270.
[10] (1937), 45 Man. R. 409, at p 416
[11] (1945) 52 Man. R. 1, at p 7.

come with clean hands In the moral sphere the same is true. As was said of old to the crowd gathered together to stone to death a woman taken in adultery — 'Let him who is without sin cast the first stone.' That group of self-appointed avengers of immorality slunk away, and the woman went free — to sin no more. Why not here?

A legal maxim declares that where competing claimants are both guilty of fraud, the law will leave them where it finds them. And in equity, there is a principle that where the equities are equal the law shall prevail. If these guides are applied here Nellie Blanchett will not be dislodged from her position of designated beneficiary.

Moreover, I think these by-laws should be read in the light of the benevolent intentions of this fraternal society. I cannot believe that the society ever intended to 'strain at a gnat and swallow a camel' — to withhold its benevolences from a needy housekeeper concubine in order to bestow them upon a faithless wife.

Mr. Justice Dysart's judgments have a flavour of their own. They are enlivened by many delightful individual touches. Referring to a litigant of doubtful honesty, he once said:

> He may have been a dupe — he stoutly maintains that he was; but to accord him that degree of gullibility to which he lays claim, is to deny him that degree of intelligence and business experience which he undoubtedly had.[12]

Distinguishing *Stearn* v. *Prentice Bros. Ltd.*[13] from the case before him, he remarked:

> This case went chiefly on the ground that rats being *ferae naturae* have a roving commission, as it were, and are free to go where they will, and that the defendant had done nothing specially to attract them to his premises, nor to stimulate their procreative or predatory activities.[14]

"With all due respect for this ingenious and obliging official", he said of a witness who did violence to the truth, "I cannot but think that his recent examination of the wall not only refreshed his recollection as to what he did in 1917, but so stimulated his imagination that it enabled him to 'give to airy nothing a local habitation and a name,' involving him at the same time in the unfortunate necessity of propounding a theory which if not absurd, is at least fantastic."[15]

His quotation from A Midsummer Night's Dream was a favourite with him. He used it again in a case in which he struck a note of sarcasm: "This Institute [Cancer Relief and Research Institute] is composed of nothing. It is based on nothing. It is nothing. While we must concede to the Legislature of this province

[12] *Williams* v. *Rice* (1926), 36 Man. R. 266, at p. 287.
[13] [1919] 1 K.B. 394.
[14] *Madder* v. *McKenzie & Co.* (1931), 39 Man. R 348, at p. 353.
[15] *O'Leary* v. *Smith* (1924), 34 Man. R. 386, at p. 389.

great powers in creating corporations in certain fields, it can exercise its creative powers only upon material out of which corporations can be made. Without such material it cannot create a corporation. It may, like the poet, 'give to airy nothing a local habitation and a name,' but it cannot give to nothingness a corporate personality with corporate powers. It cannot do the impossible. The purported creation of the Institute is merely an attempt at the impossible."[16]

He once characterized a defendant's claim, which as a mere volunteer she sought to enforce against a beneficiary for value, as one "conceived in dishonesty and ingratitude, and brought forth in naked technicality". In the same case, he commented on the conduct of a husband who sought to shirk his responsibility to a wife to whom he was deeply indebted:

> We discover this man displaying for the financial well-being of his daughter, a degree of generous concern which, had he been either able or hopeful of indulging it out of his own resources, would have been highly commendable, but which depending as it did for its realization, on this insurance policy was neither commendable nor honest. It illustrates that the conduct of some men is marked by this superb spirit of liberality only when they deal with the property of others. In the conflict between uxorial duty, and paternal sentiment, he turned from his obligation to the one to indulge his bounty to the other. 'To him who hath, much shall be given, and from him who hath not, even that which he seemeth to have shall be taken away'. So it has been written of old, and so it is practised even to this day.[17]

Mr. Justice Dysart never enjoyed popular acclaim. His true worth as a judge may not have been appreciated by those "whose ears are opener to Rhetorick than Logick", but his judgments earned the respect of legal scholars who have accepted the intellectual challenge of the law. I summon as witnesses Professor Frederick Read and Mr. W. Kent Power, Q.C., who stand high among the learned lawyers of Canada and who as editors and authors of legal texts have won a high regard for their opinions. Both speak well of Dysart's judicial labours. "He was a cultured gentleman", says Professor Read, "a profound student of the law, and an incisive thinker on legal matters. I shall ever cherish his memory." "Not all judges write sound, lucid and terse English", says Mr. Power. "Mr. Justice Dysart did; what is more, his reasons are notable for what is rarely discovered in Canadian judgments, a touch of humour, when appropriate, delightfully expressed."

As Mr. Power suggests, Dysart had a keen sense of humour,

[16] *Hague* v. *Cancer Relief* (1939), 47 Man. R. 325, at p. 333.
[17] *Henderson* v. *Stafford* (1922), 32 Man. R. 336, at p. 339.

which sometimes overflowed into his judgments. One of his reported decisions, *Mitchell* v. *Martin and Rose*,[18] has refreshed many a law student as he came to first grips with his legal studies, and re-assured him that the law is not without a tincture of humanity. In this case, the plaintiff, a girl of twenty, spent a brief holiday with a friend in his summer tent on the banks of the Red River. A lively couple, she and her friend, with other kindred spirits, "filled the great open spaces of the night with sounds that echoed far and wide". Residents of the district, robbed of their nightly rest, kept the telephone wires humming with complaints to the police. Mr. Justice Dysart described the defendants in lively terms:

> The defendant Rose is the chief of police for St. Vital, a flourishing suburb of Winnipeg; and is apparently a man of discriminating vigilance in enforcing a due and wholesome regard for the decencies of life within his bailiwick. The defendant Martin is a police magistrate for the same suburb, a well-intentioned man, willing upon occasion to stretch his magisterial authority far enough to embrace and to bring back to the straight and narrow path, an erring maiden whose venturesome feet have carried her out upon the wide and easy way.

One paragraph of the judgment suggests the zeal with which the defendants handled the delicate problem presented to them by the outraged residents:

> Prompt at the call of duty, the defendant Rose set out to find the offenders, and at 4.00 o'clock on a summer's afternoon, he found the tent, and in it, the plaintiff, recumbent on a bed — in extreme dishabille. On an adjoining bed lay her host, renewing his energy by 'tired nature's sweet restorer — balmy sleep'. To the indulgent eye of the law this scene was not offensive, but to the virtuous eye of Chief Rose it was highly reprehensible. He sought information from the couple, but information was not given him — at least not the sort calculated to satisfy his then inquiring turn of mind. In the circumstances, being in doubt as to what he ought to do, he of course arrested the plaintiff, and led her off in captive bonds to the police station. There he detained her for more than one weary hour till Magistrate Martin could be notified and brought upon the scene. With the magistrate's ready assistance he laid an information charging the plaintiff for that she 'was found in a tent — undressed on a bed — without employment — ' for all of which — with other acts of commission and omission — he termed her a 'vagrant'. She was immediately put upon her trial. There was no defence, nor attempt at defence. The magistrate wavered. He dimly saw his legal duty to acquit her; but he strongly felt a fatherly desire 'to save her' from something or other. He ended by expressing the view that she ought to be confined with hard labour, and in order that she might be so confined, he convicted her. Upon the same night, before the sun went down, she was carried off to the place appointed for her

[18] [1925] 1 W W.R. 500.

confinement, and was there delivered, into the safe keeping of the Salvation Army Home, for a period of six months.

In writing this judgment, Mr. Justice Dysart got a great deal of enjoyment, but some years later, when I made a passing reference to it,[19] he told me that he had since regretted it, as he did not think its light tone was quite in keeping with the severe standards of expression expected from a judge. But surely justice may sometimes present a smiling face without forfeiting its dignity. As Mr. Justice Frankfruter once remarked, "At least an occasional heartbeat ought to be found within law-sheep binding".[20]

While at the bar, Dysart had but a limited experience of the criminal courts. After he became a judge, he found no judicial task more engrossing than presiding over a criminal assize. Deeply interested in the pageant of humanity, he was at one with Burke in the opinion that "the annals of criminal jurisprudence exhibit human nature in a variety of positions, at once the most striking, interesting and affecting. . . . real culprits, as original characters, come forward on the canvas of humanity as prominent objects of our special study".

Of the many criminal trials that came to him, the one claiming the greatest public interest was *Rex* v. *Nelson*. Earle Leonard Nelson was born in California in 1897. In 1921, he was certified as insane and committed to a mental institution in the United States. He escaped and for some years earned a precarious living as a carpenter. Leaving behind him a trail of murder extending across the continent, he came to Winnipeg, in June 1927, and found lodging in a rooming house, where he masqueraded as a Bible Student. Soon he had committed two murders in Winnipeg, bringing his known total to over twenty. As his crimes were motivated by a sex instinct diseased since birth, his victims were always women. When it became known that he was in Winnipeg, the city was thrown into a state bordering on panic. Women were advised to keep off the streets and frequent radio broadcasts kept eager listeners aware of the danger lurking in the community while "that murdering monster, the Dark Strangler" (as a radio announcer described him) was at large. He was finally captured in Killarney, Manitoba, where he made the mistake of attempting to ride the rods of a train loaded with policemen who had set out from Winnipeg to search for him.

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[19] (1940), 12 Manitoba Bar News at p 75.
[20] Law and Politics (1939) p. 103.

R. B. Graham, K.C. (then Crown Prosecutor and later Police Magistrate in Winnipeg City Police Court) was placed in charge of the prosecution. When he learned that Nelson did not intend to engage counsel, he recommended to the Attorney-General that Mr. James H. Stitt (for many years Civil Service Commissioner of Canada and now in legal practice in Ottawa) be appointed by the court to defend him. True to the traditions of the bar, Mr. Stitt accepted this heavy assignment, though he had been only six years at the bar at the time. Putting aside all other work, he settled down to prepare the defence.

A few days before the opening of the assizes, as he was entering the law courts, he met Mr. Justice Dysart, who had been assigned to preside at the trial. Dysart gave him a benevolent look and said quietly, "Now, Stitt, I know you have a very difficult job and if there is anything you want don't be afraid to ask for it". Mr. Stitt, who had been working on the case for several weeks, was on the verge of exhaustion and, as he once confessed, it was this encouragement from the judge that gave him the heart to face the ordeal ahead of him.

Nelson was brought to trial in November 1927. Mr. Graham, assisted by Mr. T. W. Laidlaw (formerly Dean of Manitoba Law School) presented the case against the prisoner with great force but with a studied fairness. Mr. Stitt raised the plea of insanity. This defence had to be determined in the light of a law which descends directly from the M'Naghten Rules, about which Dr. Norval Morris recently offered the following comment: "The minutes of the evidence before the Royal Commission on Capital Punishment make it abundantly clear that the M'Naughten Rules can only be defended, even by their warmest supporters, as techniques whereby practical justice is reached, and not as absolute, precise legal rules".[21] The Strangler was hanged; but, let it be said, not because he was not given a fair trial, but because the law under which he was tried had not been brought into harmony with the scientific thought of the twentieth century.

Looking back, Mr. Stitt has the happiest recollections of Mr. Justice Dysart's conduct of the trial. "To me, he was everything that a judge should be", says Mr. Stitt. "He was learned, he was cultured, he was kindly and he was fair. He always went out of his way to assist young counsel. I remember his making the observation, at one of our bar dinners, that older counsel can always

[21] "Wrong" in the M'Naughten Rules (1953), 16 Mod L Rev. 435, at p. 437.

take care of themselves. I do not know of any judge who was more impartial, more learned and more friendly than Mr. Justice Dysart. I never expect to look upon his like again."

Mr. Justice Dysart served as a member of several important Royal Commissions, notably the commission appointed in 1929 to inquire into the Manitoba government's disposal of the Seven Sisters power site on the Winnipeg River, and the commission set up in 1934 by the Dominion government to deal with the natural resources of Saskatchewan and Alberta.

In 1935, he was paid a high tribute by Mr. Bennett's Conservative administration. During Mr. Justice Lamont's absence from the court because of serious illness, he was called to Ottawa to sit ad hoc on the Supreme Court of Canada. He held this appointment for a year and during that period wrote the judgment of the court on at least five occasions. One of the cases in which he spoke for the court, *Humphrey Motors Ltd.* v. *Ells*, was, in his own words, "of importance not because of the amount involved, but because it is in the nature of a test case".[22] A vendor, who sold a motor truck under a conditional sale agreement, repossessed the truck when the purchaser defaulted in his payments, and resold it for an amount less than the amount still owing under the agreement. He then sued for the deficiency on a promissory note taken as collateral. The Supreme Court held that, because the note was collateral to the agreement, it was rescinded as between the parties by the rescission of the agreement.

Rumour had it that Mr. Bennett wanted to make Dysart a permanent member of the Supreme Court, but there were certain considerations of "party, race, religion, occupation and geographical location" standing in his way. The two chief obstacles blocking the appointment seem to have been that he was an English-speaking Catholic, and tradition sanctions only one such member of the court, and that he was from Manitoba, and Ontario insisted in having her traditional representation.

Nature gave Mr. Justice Dysart one advantage not enjoyed by every judge: he looked the part. Like Chaucer's Clerk of Oxenford,

> . . . he has nat right fat, I undertake,
> But looked holwe, and thereto sobrely.

His great height, natural dignity and distinguished bearing would have set him apart in any company. His appearance stamped him,

[22] [1935] S.C.R. 249.

at once, as a man of intellectual power. The inner and the outer man were in perfect harmony.

Mr. John MacLean, Q.C., the first Rhodes Scholar from Manitoba, met him while they were both attending Oxford, and, in recalling his early impressions of him, says that the years did not bring much change in his appearance, except that his abundant hair became white and his scholar's stoop slightly more pronounced.

Sir Norman Birkett recently recalled Dr. Johnson's conversation with Jonathan Edwards, in which Johnson remarked: "You are a lawyer, Mr. Edwards. Lawyers know life practically. A bookish man should always have them to converse with. They have what he wants."[23] Sir Norman's immediate purpose in quoting these words was to repudiate the suggestion that lawyers and bookish men are in some degree opposites. "It would not be too much to say", he insisted, "that in the purely professional sphere of the law, or at the very least in some portion of it, the work of the law is inextricably intertwined with the world of books". There can be no serious disagreement with this statement. Books are an essential part of the lawyer's stock-in-trade, although there may be a few lawyers who treat them as distant acquaintances rather than familiar friends.

Dysart was of the goodly company of lawyers who are at home in the world of books. He read widely in legal literature, but his interest in reading was not limited by his professional horizon. He roamed at large in the provinces of biography and history and made frequent excursions into the kingdoms of poetry, philosophy and belles-lettres. A man is known by the company he keeps in literature as in life. Dysart's two favorite friends in the world of books were Abraham Lincoln and Daniel Webster: both lawyers, but it was not as lawyers that they won his affection. He admired Lincoln for his humanity, and Webster for his magic in the use of words.

Dysart believed that a man should find employment for his hands as well as his head. To that end, some years after his appointment to the bench, he took a course in wood-working. He became an enthusiastic wood-worker and when he had an important judgment to write would spend many hours in his workshop, keeping his hands busy, while sorting out his thoughts.

Law must never be allowed to lose touch with life. A judge must warm his hands at more than one fire, if he is to take to his

[23] The Use and Abuse of Reading (1951) p. 9.

judicial office the vision and experience required, not merely to occupy his seat on the bench, but to occupy it with credit to himself and satisfaction to the lawyers and litigants who appear before him. As Lord Kenyon remarked many years ago, judges must not be "men writing from their closets without any knowledge of the affairs of life, but persons mixing with the mass of society, and capable of receiving practical experience of the soundness of the maxims they inculcate".[24] Mr. Justice Dysart never divorced himself from the affairs of the community in which he lived. Though he gave his best energy, he did not give all his energy, to his judicial work. He held enough in reserve to enable him to play an active part in the wider interests of his community, particularly in the field of education, with the same distinction he took to his work on the bench. By his extra-judicial activities, he was able to nourish and enrich the contribution he made as a judge.

He began an intimate association with the University of Manitoba, in 1933, with his appointment as vice-chairman of the board of governors. The next year he became chairman of the board. In 1936 he was chosen to represent the university of his adoption at the tercentenary of the founding of Harvard University. "At that wonderful gathering", he once said, "representatives were present from nearly four hundred universities of the world. For the opening ceremony, these representatives formed in line of procession in order of the seniority of their respective universities. First in that procession were representatives from Egypt; next came representatives from Italy; third from France; and fourth from Britain — Oxford and Cambridge. My assigned place was slightly less than half way down the line indicating our position in age among the universities of the world."[25]

In 1944 the Lieutenant-Governor in Council appointed Dysart to the office of Chancellor of the University of Manitoba. He became the fourth in a distinguished succession. As he said, with characteristic modesty, in an address he delivered at convocation in that same year, when an honorary L.L.D. was bestowed upon him:

> This University, in the sixty-seven years of its existence, has had only three previous Chancellors: the first was the Most Reverend Robert Machray, Archbishop of Rupert's Land — a strong and generous leader whose name comes down to us with veneration; the second, the Most Reverend Samuel Pritchard Matheson, was also Archbishop of Rupert's Land, and later was Primate of all Canada — a striking and

[24] *The King against Waddinton* (1800), 1 East 143, at p. 157.
[25] (1944), 16 Manitoba Bar News p 34

picturesque personality whom most of us knew as a great Christian gentleman and friend of higher education; the third was John Wesley Dafoe — for nearly fifty years editor-in-chief of one of Canada's leading newspapers, a great student of world affairs, a man of power and influence at home and abroad. To this high office he brought the prestige of his own great name, and endeared himself to all members and friends of the institution by faithful and fruitful service. His memory will long be cherished by his numerous friends and admirers.

And now I am here — the fourth Chancellor. Do not wonder then that I feel humble as I stand in the shadow of these mighty names and assume with some misgiving the mantle which they wore with so much credit and renown.[26]

As chancellor, Mr. Justice Dysart took an active interest in the teaching staff, as well as in the administrative affairs of the university. There is a passage in one of his early judgments which indicates his high respect for the teaching profession:

College professors are men specially trained for special work. Their opportunities for suitable employment are rare, and if lost are not easily substituted by other congenial employment. Their special training unfits them for general service. In their chosen field, the material returns are relatively small In order, therefore, that this noble profession may still attract recruits, it is wisely acknowledged both in theory and practice that the employment of professors by colleges should be characterized by stability approaching to permanence. This involves fair, considerate and even indulgent treatment in all matters relating to general behaviour.[27]

Dysart did not regard a university as an assembly line (in Dr. R. S. K. Seeley's words) "along which students pass to be sprinkled with a coating of superficial knowledge". His influence was always on the side of higher standards of scholarship. He did not hold with the heresy, gaining increasing favour in some circles, that education should be a training for making a living, rather than a training for life. For several years he represented the University on the board of trustees of the Manitoba Law School, where again he kept a jealous watch over the claims of scholarship, insisting that a legal education should not be pursued solely for utilitarian ends.

After serving for twenty-six years as a trial judge, Mr. Justice Dysart was elevated to the Manitoba Court of Appeal in 1947. He took to his new office the qualities that had distinguished him in the trial court, but, perhaps, he was happier while sitting as a judge of first instance. He once confessed that he missed the stimulus that comes from direct contact with the men and women

[26] *Ibid.*, p 33.
[27] *Smith* v. *Wesley College* (1923), 33 Man. R. 477, at p. 485.

who occupy the witness box—that he found the typewritten page a poor substitute for flesh and blood.

His great capacity for work seemed to fail him during the sessions of the court in the spring of 1952. It became noticeable to anxious friends that his old fire was lacking and that the spring had gone from his step. Worried about his health, and hoping by a change of scene to renew his energies, he made plans for an extended vacation. He died suddenly, in his seventy-seventh year, on July 24th, 1952, while visiting family and friends in Moncton, New Brunswick.

Perfection is not an attribute of humanity and when we do not look for perfection in a man, as Burke reminds us, we find much that is excellent. No one familiar with the record will deny that there was much that was excellent in the long judicial career of Mr. Justice Dysart. During his thirty-one years on the bench, he performed his strenuous and exacting duties in the spirit of the man who finds a lasting joy in his work. He approached the solution of the multifarious legal problems on the calendar of his court in a workmanlike manner, rising to the level of each day's proper task: that surely is a sufficient memorial for any judge.

Someone has remarked that four qualities—health, manners, brains and character—are essential for a satisfying career in the law. These four qualities were the foundation upon which Andrew Knox Dysart built a truly satisfying career in the profession to which he was so firmly devoted.

L'avocat cultivé

On a fait observer quelquefois, avec une assez triste ironie, que le député d'une démocratie, moraliste, sociologue et législateur, doit tout savoir pour être digne d'exercer son mandat. Sans exiger que l'avocat sache tout, du moins conviendra-t-on qu'il doit être renseigné sur presque tout. Les tribunaux ont à connaître aussi bien du public que du privé, des procès politiques et sociaux comme des conflits relatifs aux intérêts particuliers. De procès en procès, l'avocat est conduit à s'occuper de questions qui touchent toute l'étendue des connaissances humaines. A l'improviste, et sans qu'il soit possible de s'initier immédiatement aux sujets les plus divers, le défenseur doit être capable de rappeler un précédent historique, de faire un rapprochement littéraire, de donner une appréciation artistique, d'expliquer une notion scientifique. (Maurice Garçon, Essai sur l'Éloquence judiciaire. 1941)