

THREE ALBERTA JUDGES

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Since the publication of the last issue of the Review, the Honourable Clinton J. Ford of Calgary, retired Chief Justice of Alberta, died at the age of eighty-two. His death was followed early this year by that of Mr. Justice Hugh John Macdonald of the Appellate Division, of Edmonton, and whose age was sixty-six. A short time later, the Honourable Frank Ford of Edmonton, retired Justice of Appeal, died at the age of ninety-one.

Each of these three men as a member of his profession and of the judiciary made a valuable contribution to the administration of justice in Alberta. All three were good friends of the Faculty of Law and the University of Alberta generally, each of them holding the University's honorary degree of Doctor of Laws.

It will be convenient first to refer to the Honourable Frank Ford. Born in Toronto in 1873, he received the degree of Bachelor of Civil Law from Trinity University and was medallist in his class. He also attended Osgoode Hall. Later, in 1909, the University of Toronto granted him the degree of Doctor of Civil Laws. After his call to the Bar of Ontario in 1895, he was associated as a junior with a distinguished Toronto counsel, Dalton McCarthy, Q.C. He later served in the Ontario government and then went into practice in Toronto. Coming West in 1906, he was Deputy Attorney-General of Saskatchewan for four years and then came to Edmonton to practise. Three years later, he was appointed King's Counsel in Alberta, having already received that appointment in Saskatchewan (1907) and Ontario (1910).

He was in fact as well as in name a leader of the Bar, and had a large practice in Alberta courts and the Supreme Court of Canada. In 1926 he appeared in two cases before the Judicial Committee of the Privy Council. In *Nadan v. The King* he succeeded in his argument that the Criminal Code did not effectively exclude the prerogative right of the King in Council to grant special leave to appeal to the Judicial Committee in a criminal case. Of course, the Statute of Westminster 1931 enabled Parliament to abolish all appeals, and Parliament did so in 1949. In the second case, *Attorney-General for Alberta v. Cook*, Mr. Ford contended successfully that the Supreme Court of Alberta had no jurisdiction to grant a divorce to a wife who lived in Alberta where her husband had not an Alberta domicile. This is the case that confirmed the rigid rule that the wife's domicile is always that of the husband. It has attracted criticism, and Parliament in 1930 gave some relief from the consequences of the rule by permitting a deserted wife to sue for divorce in the province in which the husband had been domiciled before deserting her.

In 1926 Mr. Frank Ford was appointed to the Trial Division of the Supreme Court of Alberta. As a trial judge, he was meticulous and exacting both as to matters of substance and form. An undefended action for divorce was no perfunctory matter. Undoubtedly, his strictness with young practitioners was in the long run good for them. One had to be

careful in his presentation of evidence and to have his documents in order and correct as to form. On one occasion in Chambers, when a practitioner turned to another beside him to swear his affidavit, a spirited discussion occurred between His Lordship and the person administering the oath as to the proper formula to use when the deponent is sworn in the Scottish manner. Several of his judgments set out the correct form for documents, and there is a reported case in 1927 prescribing the formal parts of an Originating Notice of Motion.

Of the many trials he conducted during his ten years on the Trial Division, the Corona Hotel case (*London Guarantee Company v. Northwestern Utilities*) is noteworthy. After a lengthy trial on contested facts, His Lordship found the gas Company not negligent; but in finding the City of Edmonton to blame for the subsidence of the Company's gas pipe he made the comment, almost parenthetically, that the Company must have known that the City's operations were going on. The plaintiffs seized on this finding of fact as the main ground of appeal, and succeeded in the Appellate Division and the Privy Council.

Another action that attracted wide attention was one by a divorced wife to have the divorce set aside as having been obtained through collusion. The careful judgment is characteristic of His Lordship (*McPherson v. McPherson*, [1933] 2 W.W.R. 513). This is the case in which the decree nisi had been granted in the Judge's library. The issue as to the validity of a decree given elsewhere than in open court ultimately went to the Privy Council, but Mr. Justice Ford had no part in the disposition of that question.

He was especially interested in Conflicts and Domestic Relations and, indeed, had taught these subjects during the early years of the Faculty of Law. His interest in Domestic Relations was, doubtlessly, related to his familiarity with ecclesiastic law.

His appointment to the Appellate Division coincided with the beginning of a stream of cases in which the validity of provincial legislation was in question. This was in the first years of the Social Credit government, and the impugned statutes were designed to protect debtors and to reduce the interest rate on government bonds. Mr. Justice Ford made an important contribution to these decisions. One can say that he resisted the tendency to hold legislation bad merely because it seemed drastic.

Without attempting an analysis of the many judgments he wrote on the Appellate Division, several characteristics appear. He was a strong judge, and not infrequently dissented. Sometimes his dissent has pointed the way, as in his rejection of the "strict" meaning of collusion, and in his holding that a person with a general power of appointment exercisable by deed may exercise it in his own favour. In other cases his dissent, though supported by authority, has not prevailed, as in his opposition to the notion of a "divisible" divorce. (*Re Plummer*, [1941] 3 W.W.R. 288.)

In 1941 he wrote for the Appellate Division an important judgment holding that a corporation may be guilty of a crime that requires mens rea. Five years later, on reading in the Law Quarterly Review an article analysing three 1944 English decisions to the same general effect, His Lordship commented "We were ahead of them here." His judgments

are not full of long quotations but draw heavily on English and Ontario precedent. Often he referred to cases and principles in a casual manner and elliptically, and he frequently discussed points that he found it unnecessary to decide. He said, for example, in 1940 that he thought an oil lease was a profit à prendre rather than a lease, though it did not matter for the purposes of the decision whether it was one or the other. In later years this question was often before the courts, until the Supreme Court of Canada held in 1957 that the typical oil lease is a profit à prendre.

The Honourable Frank Ford was a great admirer of English legal institutions and valued greatly the association he enjoyed with British judges and barristers. He approved of their traditions, rules of protocol and etiquette, and his own Court was formal—though he was most convivial and animated in social gatherings. He believed that a lawyer's first task is to steep himself in the law, and it is doubtful that he considered it necessary for a good lawyer to be active in public affairs or an authority on all related disciplines. Indeed, he was fond of quoting the remark made of Lord Brougham "If he knew a little law he would know a little of everything."

His Lordship was a prominent Anglican layman and for many years Chancellor of the Diocese of Edmonton. He became proficient in the French tongue. For his interest in French language and culture, Laval University awarded him the Honorary degree of Doctor of Laws in 1946. Always closely interested in the University of Alberta, he was Chancellor from 1941 to 1946; and, long before that, had been one of the four or five people who brought about the establishment of the Faculty of Law in 1921. He taught part-time in the first years and was a close friend of the first Dean, John Weir. He always maintained close contact with the Faculty and its students. Indeed, he continued to attend the meetings of the Law Faculty Council as Honorary Professor and also the students' annual banquets until about the time of his retirement from the Bench in 1954, when he was eighty-one.

The next of the three Justices, The Honourable Clinton J. Ford, was not related to the Honourable Frank Ford, though both were from Ontario. Clinton Ford won the Prince of Wales Gold Medal on graduation from the University of Toronto in 1907, and then studied law at Osgoode Hall. He came to Calgary and was admitted to the Alberta Bar in 1910. On his Bar Examinations, he won the prize presented by Chief Justice Harvey. In 1913 he became Calgary's city solicitor, and in 1922 went into private practice. He had considerable counsel work and a respected position as a leading solicitor. His first judicial appointment was to the District Court in 1942. Three years later he was elevated to the Trial Division, and in 1950 to the Appellate Division. In 1957, on the death of the Honourable George O'Connor, he became Chief Justice of Alberta, retiring in 1961 when the age limit came into effect.

As District Court Judge, he had much to do with applications under The Farmers' Creditors Arrangements Act and Wartime Rental Regulations. Then, later, when he became a member of the Trial Division of the Supreme Court, his cases ran the usual gamut. His written judgments invariably have a clear, precise, and often detailed statement of

the facts followed by a lucid discussion of the legal issues. He did not quote at length from judgments and had the capacity to formulate principles clearly. His application of rules was marked by great common sense. Sitting on appeal he was not hesitant about dissenting, though of course he often wrote the judgment for the court. As to deportment, he was mild in manner, gentlemanly, kindly, and he had a simple dignity.

A good judgment of His Lordship's is his dissent in the famous *Turta* case in which he held that the exception to indefeasibility in case of a prior certificate of title operated in favour of the C.P.R. True, his dissent was approved by only a minority of the Supreme Court of Canada; but, nevertheless, it remains a strong statement on a difficult issue.

He wrote a substantial number of judgments on the law of property and the law of succession. All of them show a familiarity with the subject and soundness of judgment. The same can be said of his decisions on municipal and motor vehicle law. As for criminal law, he had not had an extensive criminal practice; and, yet, in the decisions he rendered in criminal cases he showed a marked concern to ensure fairness to an accused. Thus, he was willing to permit a change of plea from guilty to not guilty; he insisted on maintaining the distinction between criminal negligence and non-criminal; and he declined to increase a ten-year sentence for manslaughter where the accused had beaten his twelve-year old child and death resulted.

Since he lived in Calgary, his association with the University and the Law Faculty was not as close as that of the Honourable Frank Ford and Mr. Justice Macdonald. Five years ago, he showed his interest in the Faculty by offering the Clinton Ford Award to the two third-year students making the best argument in a Moot Court Final. This annual Competition has produced a high calibre of argument and indeed holds a central place in the activities of the Faculty. In 1961, four years ago, His Lordship presided at the hearing of the final argument. The case was an "appeal" from an English case on mental shock, *Schneider v. Eisovitch*. In presiding, the Chief Justice showed to counsel the courtesy and to their argument the care and attention that he always extended.

During his many years as practitioner and judge, he was active in community affairs. He was prominent in the work of the Y.M.C.A. and he was made a life member of the National Council. Brought up a Methodist, he was a prominent layman of the United Church of Canada, which he represented at the World Council of Churches at Amsterdam in 1948; and he was Chairman of the Board of Mount Royal College in Calgary.

Mr. Justice Hugh John Macdonald was born in 1898 in Massachusetts of a Cape Breton father. Coming to Edmonton as a boy, he was trained in this province both for teaching and law. His education was interrupted by a period of service in the United States army. After being principal of the Banff public and high school from 1923 to 1927, he came to Edmonton to practice law. During the next seventeen years as a member of an Edmonton firm, he became a busy solicitor acquiring solid experience in insurance law. Though not one of the leaders of the Bar so far as counsel work was concerned, he did appear in court frequently.

From the beginning he kept a Commonplace Book, in which he noted in alphabetic order points of law that he had encountered; and he maintained this book after becoming a judge.

He was appointed to the Trial Division in 1944 and to the Appellate Division in 1957. He continued to sit there until almost the day of his death which came suddenly in March of this year.

He enjoyed great respect as a trial judge and gained a reputation for care, courtesy, patience and fairness. Competent observers have, indeed, compared him to two of our great judges, the late Mr. Justice Walsh and the late Mr. Justice Ewing. He has indeed been described as an ideal trial judge. Interested in young practitioners, he was always helpful; and he was disappointed, though not censorious, when they made mistakes.

In preparing judgments, he worked hard both on the facts and law. Doubtlessly, his training as a school teacher stood him in good stead in framing his judgments. He did not sidestep hard legal issues. There was a tendency to quote lengthy passages from relevant cases rather than to extract the principles and sum them up. Whether or not many of his decisions become leading cases, he made a workmanlike and worthwhile contribution to our jurisprudence.

To illustrate, one can cite two cases that went to the Supreme Court: *Keyes v. Royal Bank*, [1947] S.C.R. 377 and *Patterson v. Burton*, [1950] S.C.R. 578. These are good examples of his judgments, not because they were upheld, but because they illustrate his care in handling evidence, finding the facts and dealing with difficult issues. In *Keyes* the bank was liable to its customer for mistakenly certifying his post-dated cheque and in *Patterson* shareholders were liable as contributors even though the shares had been sold to them in violation of the Sale of Shares Act.

His fine human qualities and, in particular, a strong sense of responsibility appeared in many forms. His deep interest in the University led him to serve on the Senate, the Board of Governors, and as President of the Alumni Association. At the time of his death, though retired from the Board of Governors after ten years' service, he was Chairman of a special committee that the Board established in 1964 to make recommendations for revision of the University Act.

For almost ten years after the War, he gave an annual talk to the graduating class in law. It consisted of hints and suggestions, kindly and earnestly given, of things to do and to avoid; and his example as well as his precept set high standards. Unfortunately, he had to discontinue these talks after illness in 1956. For the last years of his life he was frequently unwell and in pain, though an observer would not be aware of the fact.

A year before his death, he addressed the Catholic Lawyers Guild of Edmonton at a luncheon following a Red Mass. The subject of his talk was characteristic of the speaker: What Practitioners are Entitled to Expect from Judges.

While in practice, he served as City Alderman for six years and in the provincial legislature for four. Regardless of political differences, his colleagues invariably respected and liked him. It is a not insignificant fact that he was very fond of sports. He had been a fine athlete, playing

second base for years on a good baseball team in Edmonton. All his life, he continued to follow baseball, football, and hockey; and attended major league ball games whenever possible.

At his funeral in St. Joseph's Cathedral, a crowded congregation included the Lieutenant-Governor, the Premier, the Mayor, many members of the Judiciary, and hundreds of friends representing a cross-section of the community—a remarkable tribute to the wide esteem he enjoyed.