

LAW AND LANGUAGE*

SIR REGINALD CROOM-JOHNSON
London, England

I have considered carefully what I should speak to my brethren of The Canadian Bar Association this evening. I have, as you have heard, been privileged to attend these meetings in former years, before the last war set back the careers of so many of our younger practitioners: I have, therefore, some idea of the precedent I might follow. In 1943, I believe, you had the advantage^{of} of one of those brief and breezy entertainments to be expected from our Lord Wright; last year you had an instructive address from my brother judge, the Lord Chief Justice of England, well illustrated, I have no doubt, by stories from his capacious memory and repertory for which he is becoming increasingly famous.

I shall not attempt to follow the example of any one of my distinguished and fortunate predecessors. I propose instead to offer you some practical observations on some aspects of one of my own everyday problems as a judge in the hope that they may help my younger brethren who have so recently returned to practice after gallant and arduous years in another field. The heavy lecture is apt to defeat its own object by producing a state of mental indigestion; the lessons of the light one to be lost in the gusts and mists of laughter. I hope that by speaking a few sentences in plain, simple language, something of what I say may remain and be of practical utility when the voice of the speaker and his presence have long faded from your minds.

We were all taught, I suppose, from the moment when we first began our pursuit of that handsome but elusive damsel, Justice, the vital necessities of logical reasoning and deduction, careful and accurate marshalling of facts, the acquisition of a full grasp of legal principles, and ultimately putting the right law into the right case. It was a lazy lawyer who said take care of your facts and the law will take care of itself: it is a dangerous half truth but there is more than a little in it. We have all met the legalistic enthusiast who develops in his opening speech his law first—how often do we find in a case that we never get to the law—that is, if it is not income tax. Facts must come first and in order of date since events have a habit of happening chronologically. I am going to offer you a few thoughts of my own leading towards the better elucidation of facts, with some illustrations. For

*An address delivered on August 28th, 1946, to the Twenty-eighth Annual Meeting of the Canadian Bar Association.

over fifty years, as student, practitioner and judge, I have been trying to serve the twin ideals of justice and—myself; and I can at least claim to have served a long probation; and some of you may think that I am now beginning to be qualified to offer help and instruction. For the last eight years as judge, and for ten happy years before that as Recorder of the ancient city of Bath, I have had the task of listening to and observing others continuing the chase.

Advocacy is essentially an ephemeral art. The voice of the speaker dies down and fades from human memory: his very efforts are forgotten—the result of his work may last a while at least in the mind of the loser or the winner (I put them in that order). The raw material of the advocate's art, words and yet more words, is remembered least of all. But it is those words upon which we depend to create an atmosphere to make an impression upon the minds of our tribunal, whether judge or jury, and to get a verdict. Please do not think that I am forgetting the need for the essential justice of the Cause, but it is with words that we must put it across and get it across. A cynic once said that language was given us to conceal our thoughts, and that may be why some of our best advocates have learned when to keep their mouths shut and say little or nothing. A still tongue shows a wise head, but the bulk of cases are not won by emulating Brer Rabbit, "laying low and saying nothin'".

How necessary to be mindful of our words! The draftsman does not labour under our disadvantages. He can watch his sentences grow on his typewriter or under his pen. He can correct, revise, erase, and even then when so much is dictated, some of it is mis-heard by the stenographer, misunderstood, or even occasionally mis-typed, and drafting is not always what it should be. The draftsman is perhaps better trained in the use of words and their meanings—notice that plural—but the spoken word once used cannot be recalled and an oral correction can rarely wholly eliminate the effect of the original use of the wrong word. On the other hand, undue preparation of speeches may destroy spontaneity, while of necessity preparation of questions, certainly by way of cross-examination, is a practical impossibility.

Law in its daily administration cannot be as precise as a proposition of logic or of Euclid, but, nevertheless, as our aim is to apply reasonably precise principles, we should use precise language. This does not mean that we should speak in archaic words or words not understood of the people, particularly to juries; on the other hand, in trying to keep the common touch we

must not slip into the use of ambiguous expressions, degenerate into slang or fail to use the right word in the right place.

One of our difficulties is that English is what is called a rich language—we have a number of words to describe the same thing but in many instances the different words give us different shades of meaning. There is every reason for the client in the haste of business, speaking over the telephone, dictating a business letter, writing to a girl friend or sending a memorandum to his wife, faultily failing to convey the exact meaning he intends, or perhaps no meaning; there is no excuse for the lawyer, even in the spoken word, falling into slipshod expressions. We need not speak in plums, prunes and prisms to the irritation of the Bench or jury, but although the richness of our tongue furnishes us with an ample choice of words sloppiness of expression is no more to be forgiven us than sloppiness of thought. Unless we understand the precise meaning of the word we use how can we be certain that we use *le mot juste*, and rightly convey the exact proposition of law or fact which we desire to submit. Those of you who are so fortunate as to be able to use and are allowed to use French in court may not find this difficulty so great as when speaking English since French is a more precise and more scientific tongue, yet it was the French language which gave us *le double entendre*, for which there is no equal expression in English! A failure to define our terms is another defect from which I suppose we have all suffered occasionally, and what is that but another aspect of the problem of language and the law? A failure to pay sufficient attention to the precise shade of meaning we intend to convey and failure to choose the exactly proper word to do it will make the very elucidation of truth less easy and give rise to misunderstandings in leading the evidence or in assessing its value when it is out.

A recent number of *The Reader's Digest* tells me that a beautifully adorned young woman was recently congratulated on the beauty of her new pair of shoes. Her reply was: "Yes, and they make street walking more easy." What did she mean? Another example may illustrate my theme. Fifty years ago I was present at Hereford assizes where the once celebrated Mr. Justice Hawkins was the presiding judge. A superior advocate who cultivated to excess what used to be called the Oxford manner was cross-examining a seaman who had deposed to having seen a fellow seaman in his bunk light a light in the nighttime and commit a theft. The cross-examiner, to discredit the story, was trying to find out if the seaman objected to the light in the night

season, and essayed to do it by asking why he had not intervened. One question was, "Did you tell him to extinguish the luminary?" "Eh!" said the witness. "Did you tell him to extinguish the luminary?" "Eh!" said the still puzzled witness. They made no progress. "Mr. Gwynne-James," said the judge at last, "Would it not be better to speak to the witness in the vernacular?" The advocate himself looked puzzled. "See here, my man," said Justice Hawkins, "Did you tell him to douse the glim?" "Aye, aye," said the old seaman, and all was well. I may add that Gwynne-James, in after years, became the County Court Judge at Bath; I practiced before him and he became a private friend of mine, and a man who was noted on the Bench for the plainness of his language and the directness of his message.

One more illustration: An old lady, a strict Presbyterian, met on a social occasion two clergymen—one a High Episcopalian, celibate, who was referred to as "Father. . . ." To the second one the old lady turned on introduction and said, rather grimly, "Are you a Father too?" "No," he said, "You see, I am a married man with five children."

Use simple words; use plain words for plain things, use plain words for ugly things, and for unpleasant things with which we oftentimes have to deal in court. We cannot control the language of our witnesses but we can control and should be able to control our own. Avoid words of uncertain meaning. During the war a silly vague word has crept into use in England: witnesses are sometimes asked in my Court, "Did you contact Mr. So-and-so?" I usually intervene by asking which of the possible meanings of that word is intended since it opens the door to equivocation, uncertainty or doubt. Does it mean telephone to, telegraph to, speak to, go to see, send a message to, write a personal letter to, televise, or even physical contact? I expect the people in my Court think I am a tiresome and out-of-date old fellow: but what do we gain by using words of uncertain meaning? We must not be mealy-mouthed. Familiarity or intercourse, when sexual intercourse is meant, for example, gives room at least for misunderstanding and even for evasion. Use words that your witness should understand and thus deprive him in advance of the excuse that he has not understood the question when caught out as what G. H. Lorimer, the American writer, described in his "Letters of a Self-Made Merchant to his Son", as "a kettle rendered liar". Short words are generally better than long ones to the same effect: do we gain anything by calling an eye doctor an ophthalmologist? In scientific and technical cases we must use

the vocabulary of the science or technique with which we happen to be dealing provided our terms are mutually or tacitly defined; but there is no advantage to be gained in displaying pseudo-learning by using sesquipedalian words in ordinary work. Use the shortest word available. Why use twelve words when two will do. Possibly you do sometimes, but watch, not your step but, your tongue.

The shorter your question in cross-examination, especially when you are nearing the vital point, the better. Snap then is better than involved sentences tending to length and confusion. Moreover, one point in a question at a time and not two or three strung together, lest the witness give an assent to the whole when only the last part of it has possibly registered with him at all. This is not a plea for so-called basic English in the courts. The ordinary man's vocabulary, it has been said, rarely exceeds one thousand words or so, but as life becomes more complicated and the subjects with which our so-called civilization is intertwined increase in number, language and expression is bound to become more complicated too. Basic English, as it is called, may be good enough for ordinary and essential things: the courts deal with the extraordinary and oftentimes with the abnormal.

There are cases, however, in which it is advisable and even helpful to justice to use words which acquire particularized meanings. People in special industries and trades acquire a vocabulary of their own to describe things of common use and of everyday occurrence with them. Not to use their words is to make them feel that you, the counsel, do not know what you are talking about! To use their words may happily convey to them the impression that you know more than you do, make the witness more careful in his testimony, and prevent him trying to pull the wool over the eyes of the cross-examiner, besides impressing the clients: after all, to impress the client with the wisdom, knowledge and ability of his chosen counsel is not a bad thing! Do you mind sending your client happy away, or less unhappy—if he loses—, than he might have been had you handled the case less adroitly?

Thus on English railways the travelling public speak of the guard van, which is the conductor's own compartment: the railwaymen call it the brake van, or shortly, the brake. The roof over separate station platforms is called the verandah; the steam engine is, or used to be, called the locomotive; what you call the tracks, the public call the railway line, and the old-fashioned workers call it the permanent way. I learned, in a number of

cases involving the use of railway expressions and in which railwaymen were likely to be called as witnesses, to use the right expression from the start, and I always felt that by so doing I was gaining an advantage.

It is not always easy to elicit testimony even from the willing witness. Many of the people you examine have probably never been in a law court before in their lives. They need humane, sympathetic handling: rarely in my experience does over-firmness or bullying pay or succeed. How do you expect the witness to express in apt words even the truth that is in him if you add to his nervousness or his fright language which is not plain to him? Here he is, dragged from his native village maybe into the unwonted publicity of a public court, placed in a prominent position on a witness stand to be gazed at by a lot of strangers and asked questions in unfamiliar or ambiguous words and expected to produce answers with the celerity and accuracy of a hair-trigger gun? It will be understood that I am dealing with a supposititious, honest witness: but he may well be honest and inaccurate. Help him out by your language. To my mind the greatest enemy to justice is more often the witness of inaccurate expression or inaccurate sloppy thinking than the liar, however expert, or who answers some question which has not been asked. There is the witness who adds to faulty observation at the time of the happening of an event a poor memory or a trick or habit of inaccurate expression, rushing his fences without clear thought. He deposes faultily to all that he remembers of what he has only half observed, plus what he has unconsciously imagined or deduced. He is an enemy of truth indeed! He is most often met with in street accident cases, where opportunity of observation and duration of observation are limited. Your words, in such a case, indeed, had better be few and precise.

I will digress for a moment in warning you of the danger of pressing a witness too much. There is a story told of a once famous counsellor on my old beloved circuit, the Western. An old lady, years ago, had furnished the one essential connecting link in a case by deposing to a particular date. It was essential to destroy that piece of evidence if the prisoner was to be saved—it was in the days when prisoners in England could not give evidence in their own defence. The counsellor, as they were called in our West, having tried in all ways to destroy the witness, had failed to do so and at last he fell back on the device of asking her what made her remember that particular date. The old lady said, "Oh, well, I just remember". She was pressed. She

repeated the answer, then she evaded the question several times, and finally refused to answer. She was told that she must answer the question. Upon that she appealed to the judge, "Must I answer that question, my lordship?" "Well," said the judge, "if Mr. Carter insists, I am afraid you must." "Very well," said the old lady, turning to the cross-examiner, "if you will have it, you must. I remember because it was the day you ran away with your brother's wife."

As to technical expressions, beware of the long Greek-derived names sometimes used by over-learned medical men to identify simple parts of the body, diseases or disorders. Let them use them, taking care to obtain their purely English equivalents, or else be certain that you understand them and that your judge does too! You may find it preferable to use the simple words rather than be betrayed into error by making a display of your learning and erudition: juries in my experience tend to mistrust those who use in a superior way long and unfamiliar words which they may think are intended to blind, mystify or mislead them.

And when the evidence has been clearly got out we must see that it is accurately recorded, not merely slavishly, as spoken, but to express the true meaning which manner or inflection of voice may give it. An answer accurately recorded in a shorthand note, literally, as spoken, may convey a wholly unintended result. I often hear a witness say "yes" to a question, not meaning to answer it affirmatively, but using that important word merely to express that he has understood the question so far, or is waiting for more, or as preliminary to his answer. I have, for years past, at the Bar as well as on the Bench, watched for that, and if I think there is doubt I break in upon the examination, to edit, as it were, in advance, the transcript of the shorthand notes, and so get the answer in its true perspective. When the case goes to appeal this might prevent fruitless controversy and unnecessary argument.

A curious example of the use of language is the citation of legal maxims in Latin. These maxims convey in short sentences the pith of legal propositions—concise, precise advice. With us they are spoken with the old English pronunciation. When I was young enough to struggle with the Latin tongue, in a long since receded youth, there was no other. My sons struggled with what is called the new pronunciation and now, I believe, there is a newer one still. We still use the old, maybe dog Latin, pronunciation in our courts—with us at home lawyers are an old fashioned race, with our wigs, our robes and our pseudo-Latinity. I would

not have those things changed. *Nisi prius* I understand when it is so said: *Neecee preeous* does not commend itself to my mind. Use the pronunciation, the words and the argument which you think your judge may prefer or possibly understand. Your task is to make an impression on his mind and not to demonstrate the superiority of your own. To get on good and understandable terms with your tribunal is the first step in all good and successful advocacy—and then having got over your argument—sit down!

JUDICIAL APPOINTMENTS

October 30th, 1946

- Hon. Orville S. Tyndale, of the Superior Court of the Province of Quebec, to perform the duties of Chief Justice of the Superior Court in the District of Montreal.
- His Honour James Boyd McBride, a Judge of the District Court of the District of Northern Alberta, to the Trial Division of the Supreme Court of Alberta, and ex-officio a Judge of the Appellate Division of the said Court.
- Hon. George Bligh O'Connor, a Judge of the Trial Division of the Supreme Court of Alberta, to be a Judge of the Appellate Division of the said Court and ex-officio a Judge of the Trial Division of the said Court.
- John B. Aylesworth, Esq., K.C., of Windsor, appointed a Judge of the Supreme Court of Ontario and a member of the Court of Appeal for Ontario and ex-officio a member of the High Court of Justice for Ontario.
- G. A. Gale, Esq., K.C., of Toronto, appointed a Judge of the Supreme Court of Ontario and a member of the High Court of Justice for Ontario, and ex-officio a member of the Court of Appeal for Ontario.
- Jean Genest, Esq., K.C., of Ottawa, appointed a Judge of the Supreme Court of Ontario and a member of the High Court of Justice for Ontario, and ex-officio a member of the Court of Appeal for Ontario.
- Hon. P. M. Anderson, a Judge of the Court of King's Bench for Saskatchewan, appointed a Judge of the Court of Appeal for Saskatchewan and ex-officio a Judge of the Court of King's Bench for Saskatchewan.
- His Honour William G. Ross, a Judge of the District Court of Moosomin, Saskatchewan, appointed a Judge of the Court of King's Bench for Saskatchewan.
- George M. Morrison, Esq., K.C., of Sydney, Nova Scotia, appointed a Judge of the County Court of District 7, in Nova Scotia.
- J. H. Sissons, Esq., Grande Prairie, Alberta, appointed a Judge of the District Court of the District of Southern Alberta.