An Address to Newly Called Members of the Bar*

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First let me add, to those of the Treasurer, my own most sincere congratulations and good wishes to each one of you. My first message to you is my hope that you will be in all respects happy in your calling: and that, I assure you, is no mere perfunctory observation. You live only one life—at least, there is no reliable evidence to the contrary—and it will therefore be a poor thing for you if you do not find happiness in the profession you have chosen. More than that, as was said by Emerson, no success is possible without enthusiasm. For that reason I am sure that unless you are happy in the work you do, you will not give to yourself or to others the satisfaction which you should.

Let me tell you not to be unduly oppressed at any time by what may be said to be the cynical view of our profession. There will be many who will say that a lawyer is but a parasite; and if they have read even small parts of the works of Shakespeare and Dickens, they will no doubt add to what they themselves say pungent quotations from those writers. A less cynical view is—and you may have heard it—that the function of a lawyer is to protect people who have been persuaded by other people, whom they do not know, to enter into contracts, which they do not understand, to buy goods which they do not want, with money that they have not got. You may, on some occasion, find that some such experience comes your way; but—and I use the language of Sir Richard Livingstone—though the evils that society still owes to lawyers are great, the legal profession is a civilizing agency and represents at least the triumph of reason and education over caprice and brute force.

In truth, in these somewhat anxious days, I think you can

*An address delivered by the Rt. Hon. Sir Raymond Evershed, Master of the Rolls, to new members of the bar at a Convocation for Call to the Bar in Osgoode Hall, Toronto, on September 14th, 1951.

and should assume that you have an important and highly responsible part to play. It is all very well to suggest that the law is highly artificial and complex, and that we should all be much better off if juries of our fellow beings were able to say on a given occasion: *A* was right and *B* was wrong. But any such system is, in truth, a return to palm-tree justice and the methods of barbarism. In a society which is complex, it is unavoidable that the law also should be complex.

The value of the law is in its impartiality and in its certainty. It provides, or it should provide, that the consequences of a particular activity will be certain and foreseeable. It requires that you, as members of the profession, should be partakers in the administration of a known body of established doctrine. If you do that job properly, you will find that you are a part of a great profession which in truth provides for society its stability and coherence. Let it therefore be your aim to do so.

In order that you may achieve that end, it is quite plain that you must retain the confidence of the rest of humanity. And to do that, it is right that you should avoid allowing the law to become a great mystique. I am quite sure that you will find that, complex though some of its rules and principles may appear to be, they are in truth well established on the basis of commonsense and on what society, for century after century, has regarded as the just standard. Furthermore, in order that you may retain the confidence of the rest of humanity, you must in no regard whatever depart from your professional independence and integrity. Remember always that you are members of a learned profession and as such claim to grasp at, even if you cannot reach, the integrity of scholarship; and there is no higher integrity.

Having said that much, may I suggest to you six short sentences of advice, to each of which I will venture to add a word or two of explanation. From what I have already said you will, I am sure, appreciate that my first principle is that never in any circumstance whatever must you deliberately deceive the court. Observance of this principle is your first duty not only to yourselves and to your consciences but also to your clients and to the whole profession of which you have now become members. I need hardly add that to deceive the court is a futile thing for a man to do in any event. The man at the bar who is known to be likely to deceive the court is regarded with suspicion by the court; and that state of affairs is good neither for the man nor for his clients. But leaving aside that material consideration, I put it to you that the most fundamental duty of all which you owe to your profes-

sion and to yourselves is that you should never deliberately deceive the court. That is my first sentence.

My second point is that, subject to the prior consideration which I have just mentioned, your whole duty is to fight for your clients to the utmost of your ability. No personal consideration, no offer of a more highly paid brief, no matter of convenience, no consideration of feeling unwell, no other like consideration whatever must stand in the way of your whole duty to do your best for your clients.

Those are two quite obvious things, but there are perhaps occasions when the obvious is worth stating. At any rate, I have now stated them and you will, I hope, forgive me if you regard them as platitudinous. Indeed, you may perhaps think all my six points, of which four now remain to be stated, to be somewhat of that character.

My next point is, on the face of it, perhaps the most obvious of them all. It consists of the two words: Speak up. It is a most remarkable thing that there are many who appear not to appreciate the fact that the best argument ever thought out is quite futile if nobody at all can hear it. There will no doubt be times when you will feel some irritation at the behaviour of the judge. You will regard him as obtuse, impatient, deaf, old, and otherwise unfitted for the job. It is possible, though not by any means certain, that you will be right. But you must remember that your remedy is the higher court. Your duty is to win the case for your client. In order to do that, it is really most important to note whether the judge hears what you are saying.

Most judges, however decrepit they may be, are still capable of giving some sort of sign that they cannot hear what you are saying. I think most judges are kindly men who rather dislike having to say in open court: "Mr. So and So, I am sorry but I cannot hear what you are saying". Hence they are inclined to give well-known signs to indicate that they are not hearing. I accordingly suggest that you watch the judge because, for better or for worse, he is going to decide the case. For that reason keep in his good books, if you can. You will succeed in doing so in direct proportion to the extent to which you make yourself audible.

Do forgive me for having mentioned that matter. I am now a judge of seven years standing; and it is indeed astonishing to me to note how apparently lacking in sensitiveness some members of the bar can be: for it is lack of sensitiveness which allows a man to address any person or group of persons without himself being

aware of whether he or they can hear him. Thus my third point is: Speak up.

My fourth point is like unto the third in that it also consists of two words: Stand up. You may perhaps think this is a foible of my own: but I may tell you that I have consulted my brethren on the bench about the matter. I think that all judges would agree that the counsel who adopts a sloppy attitude — one who, if you like, puts his hands in his trousers pockets, his feet on the desk, and so on — is far less attractive to listen to than one who stands upright. And I think there is great good sense in the point, for those who are far better qualified than am I to speak on such matters have told me—and I think they would tell you the same—that if you stand upright, in what used to be called a soldier-like position, all your physical and mental qualities will be at their best and keenest.

A man who looks tidy and stands tidily probably has a tidy mind and a tidy argument. Again, it is perhaps a matter of doing what will please the judge. But again, that is what you are there to do. However much you may think you are superior to the judge, intellectually or otherwise, that consideration will be no satisfaction whatever to your client if he loses his case.

So much for the fourth point. My fifth point I will perhaps expand more fully, though you may think that the title of it is small recommendation for any expansion. The title is: Be brief. Again I fear I am repeating, but let me say that it is no good to go on and on just for the sake of doing so. If you cannot make your argument good by putting it clearly and properly, it is on the whole unlikely that you will make it good by a process of attrition. In that respect I believe that advocacy differs from the science of advertising: for I am told that if you tell people often enough that they ought to buy somebody's pills or somebody's salts they will ultimately be persuaded that that is the thing to do. But judges, by and large, are not quite so susceptible.

It may, of course, be most desirable to put your point more than once; in that event, it will be all the better if, in putting it the second time, you can make the approach by a slightly different route from that taken when putting it the first time. But repetition more than once ceases to be prudent and is apt to be regarded as insulting. Therefore try always to formulate your argument precisely.

Nothing is more likely to lead to prolixity than a failure to have formulated in your own mind the point you want to make. I have often had the thought — and I give it to you for what it

is worth — that the time is well spent in writing down your opening and closing observations in a speech and in studying each word in the sentences. If you can start your speech with a clear and attractive presentation of the point in the case, the effect will last throughout the argument: unless, of course, you go on for so long that the beginning is forgotten. I remember a man who, after repeating an argument for the n'th time, eventually observed that perhaps their Lordships would remember that he had put the point before. To this observation the president replied: "Yes, we remember it quite well; but it was so many days ago we were afraid *you* might have forgotten". In all seriousness, however, I am sure you will find that the writing out of the first and the last sentences of your speech, and a careful study of them, will produce such good results as to be well worth the trouble taken. How many times have you heard people who are never quite able to sit down because, through having failed to formulate their sentences precisely, they are never satisfied with those they have just spoken and must therefore put the matter all over again in order to pick up something they have forgotten?

What I have said as to speeches is generally true also as to examinations and cross-examinations. Let me say just a word about cross-examination. To the layman, of course, that has the greatest and the most histrionic appeal. Nothing is so tremendous in its effect or so attractive to the hearer as a really brilliant cross-examination. Brilliance in cross-examination is a desirable objective, but it is not given to all to be able to achieve it. Indeed it may be achieved only by long years of experience. I cannot suggest any particular method. Everyone's own individuality will eventually emerge as he develops his style of cross-examination. We cannot all be great cross-examiners.

I might just tell you the old story — you probably have heard it — about Sir Edward Carson; for in England, as in Ontario, the name of Carson has been a badge of great advocacy. When I began my career, Edward Carson was the most formidable advocate of the day. Of him it was said that he built around his client a shield which it was impossible to penetrate. This particular and notable cross-examination to which I have made reference consisted of two questions. The witness had really nothing much to contribute, but he was of a somewhat pontifical character and Carson desired to prick the bubble. His first question was: "Sir, are you a habitual drinker?" To this question the witness, in great indignation, was foolish enough to answer: "That, sir, is my business". Quick as a flash Sir Edward said: "And have you any other business?"

Not all of us can achieve that particular brevity and style. I can say this, however, and it is relevant to the heading under discussion: if carried on for a long enough time, any cross-examination can utterly destroy itself. I have heard people cross-examine a witness on the other side for such a length of time that, eventually, the witness has succeeded in bringing out every single point that had been omitted in his examination in chief; mere wordiness destroyed all possible points which the cross-examiner had gained. So, in cross-examining, always err on the side of brevity. It is also not a bad rule never to ask any question in cross-examination unless you know, or have good reason to think you know, what the answer to that question really is.

Now, I venture to recommend that you pay to examination in chief more attention than is commonly given to it. That is your opportunity for doing your client the greatest service that you possibly can do him. Do not forget that the client is probably in a wholly strange atmosphere, that he is nervous, that he is finding that questions are being put in language with which he is quite unfamiliar. If his own counsel, looking severely at him over the top of his spectacles, simply puts a series of questions in stilted language, it is quite likely that the witness will not do himself anything like justice and that he will indeed get more and more nervous and agitated as the examination proceeds. If the worst comes to the worst, you can only hope that the man on the other side will cross-examine him for such a great length of time that he will do what you yourself ought to have done.

Try then always to remember that the witness is in an unfamiliar situation. There are many people — and this is one of the justifications for your profession — who, great though their education may be and great though their intelligence may be, are themselves quite inarticulate. It is your duty to try to get your witness to tell his story in a way which is natural to him. Take great pains to do that; for if the witness gives a good impression from the start, that is something which the ordinary mortal judge will appreciate and it is something which the other side will find it quite difficult to overcome. Accordingly, as I say, take great trouble with your examination in chief. Remember that you are there to do your client justice and, if possible, to let him do himself justice.

My sixth and final sentence of advice is: Argue and do not quote. Sometimes there is a temptation to quote long passages from judgments, but such quotations are apt to be somewhat disturbing to the judge. You may think that I am here as a kind of

protagonist of the society for the protection of judges, but really I am not. I am merely telling you what I have already told you, namely that your duty is to persuade the judge.

Judges must try to make an intelligible note of what is said by counsel and to apprehend the point that is being made. A good argument should stand up on its own legs without the necessity for any references from authorities. You do not need to cite decisions of the House of Lords or of the Supreme Court of Canada in order to make good the proposition that the night follows the day, although you will probably find that many judges, at some time or another in some of their judgments, have so asserted.

Make your argument sound and satisfactory in itself, and present it. If the judges are good ones — as are all the judges in Ontario — they will tell you whether the proposition is one which, to their minds, requires the support of authority, and you will be prepared to deal with it. But let the argument speak for itself and persuade of itself.

You will find that such a practice has this great advantage. I know not to what extent in this province the judges of the high court or of the appeal court are apt to intervene in the course of counsel's argument by the asking of questions, pertinent or otherwise. Should you be asked questions, if your argument has been thought out and if you are satisfied that it is sound, you will find no difficulty in answering. But if, on the other hand, your argument consists of a series of quotations, you will find that the effect of questions is very seriously to put you out of your stride. That is another reason for doing what I suggest is the obvious thing to do. Present your case as an argument which will stand up and persuade of itself.

You may find that judges will, in the course of your argument, say to you: Then is your point so and so? I have often done that myself. It is a very good way of communication between the bench and the bar designed to shorten proceedings. Many judges can never resist the temptation — and I myself am guilty often enough — of putting a point to counsel in order to demolish the argument and to show how much more intelligent are those on the bench than are those at the bar. But on the whole, if you put such a question, it is unlikely that counsel will fall flat upon his face and say, "I never thought of that before; of course that is the end of my case". On the other hand, it will often be extremely useful, both to the arguing counsel and to the bench, if the question is put: If I get your argument correctly, is it so and so?

Now, if you have not thought out the argument you may, of

course, find that question to be an exceedingly dangerous one; you may feel embarrassed by it and you may find difficulty in answering it at all; or, what is worse, you may give an answer which you think will please the judge and find out, ten minutes afterwards, that you have prejudiced yourself beyond all possible recovery. Because I regard this point to be of such great importance, I repeat what I have said. Think out your argument and present it as an argument standing up of itself, having your authorities there to buttress any point which may seem doubtful to the bench or to you, or as a piece of ammunition with which to demolish the other side when their turn comes.

Those are my six suggestions. To recapitulate them, they are as follows:

(1) Never deceive the court;
(2) Fight for your clients;
(3) Speak up;
(4) Stand up;
(5) Be brief;
(6) Argue, do not quote.

As I have already said, you will probably think them all to be platitudinous, but forgive me if that is so. My own experience has impressed upon my mind more and more the value of these six quite simple propositions.

Now, by way of conclusion, I return whence I have strayed, to repeat to you my good wishes for a happy and successful career and, if I can, to impress upon you a realization of the great and responsible work for the happiness of society which it will be in your power to perform. As I have done on similar occasions previously, I should like to give a quotation from perhaps the greatest advocate there has ever been in my country. I refer to Erskine, who defended Tom Paine. It was murmured against Erskine that a man of his position should not so demean himself as to appear for a character so lacking in respectability. To that challenge, which in his opinion struck at the very root of the independence of our profession, Erskine made this magnificent reply:

> I will forever, at all hazards, assert the dignity, independence and integrity of the English bar, without which impartial justice, the most valuable part of the English constitution, can have no existence. From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the court where he daily sits to practise, from that moment the liberties of England are at an end. If the advocate refuses to defend, from what he may think of the charge or of the defence, he assumes the character of the judge;

nay, he assumes it before the hour of judgment; and in proportion to his rank and reputation, puts the heavy influence of, perhaps, a mistaken opinion into the scale against the accused, in whose favour the benevolent principle of English law makes all presumptions, and which commands the very judge to be his counsel.

Ladies and gentlemen, I wish you all possible prosperity.

On the Writing of Judgments

We arrive at the last endowment of the great judge — an endowment without which the exercise of the others is apt to be handicapped — I mean the gift of lucid and graceful speech. Without lucidity a judgment will not be understood with that complete accuracy which is necessary in so exact a science as law, and without grace it will not be effectively remembered. Some very great judges have been clear enough, but they have lacked grace, and the result is that they have not had that influence on legal history which they deserved. Eldon is a case in point. He is probably the greatest equity judge, except Hardwicke, that ever lived, but I have yet to meet the man who can read him with pleasure. Take the case of *Wykham* v. *Wykham* (18 Ves. 415), which laid down the distinction between law and equity in the case of contracts — a masterly and epoch-making judgment, but as flat as ditch-water and as ponderous as a tombstone.

. . . A wide culture will beyond doubt be of inestimable advantage to a man when he comes to the preparation of judgments, for no scholar, born with a love of good English, will content himself with the clumsy jargon which sometimes does duty for legal terminology. I am prepared to maintain that there is a surprising amount of fine literature in the Law Reports. Indeed, I am ready to assert that almost the best prose has been written by men who were not professional men of letters, and who therefore escaped the faded and weary mannerisms of the self-conscious litterateur. As an example I would point to the prose of Cromwell, of Abraham Lincoln, of a dozen explorers like Captain Scott and Captain Boyd Alexander, and of soldiers in the recent war like the Canadian General Sir Arthur Currie. It is the same with the great judges. Mansfield's prose has the massive dignity of the best Georgian manner. Bowen's is often as delicate and careful as an essay of Stevenson's. John Marshall was not, generally speaking, a master of style, as those who have tried to read his *Life of Washington* will bear witness. But he could rise at a great moment to a noble and restrained eloquence, as may be learned from his judgment in *M'Culloch* v. *Maryland*. I have sometimes had an idea of compiling a legal anthology of those judgments which are good literature as well as good law. It would be a fascinating book, and it would put most professional stylists to shame. There is only one rule for good prose, the rule which Newman and Huxley in their different ways enunciated and followed — to set down your exact, full, and precise meaning so lucidly and simply that no man can mistake it. That, and not flowers of rhetoric, has been the aim of the best judges, and small wonder that good prose has been the result. (John Buchan, "The Judicial Temperament", from *Homilies and Recreations*)