SOME OBSERVATIONS ON THE ART OF ADVOCACY*

I have chosen a spacious subject this evening, so spacious that you will find it hard to convict me of irrelevance. But I promise to exercise within reasonable limits the *jus spatiandi* which it confers on me and to explore with you only a few of the vistas which it opens up.

In its widest sense the art of legal advocacy is the art of so presenting a case to a tribunal in writing or in speech as to secure if possible a desired decision. I should be disposed briefly to call it "the art of persuasion," the earliest classic definition of rhetoric, were it not that Quintilian, that great master of our science, protests that this definition is both too wide and too narrow. And besides, there is perhaps truth in the criticism that it suggests that to persuade at any price is the aim of the advocate, a view certainly open to serious ethical objections. Subject, however, to all reservations on the score of morality, a topic which I am not going to discuss on this occasion. I think we may accept the statement of the Greek grammarian Apollodorus that the first and all-important task of forensic oratory is "to persuade the Judge and lead his mind to the conclusions desired by the speaker." (*Quintilian*, II. xv. 12).

If I were to select the rule which in my estimation above all others should govern the presentation of an argument in Court it is this—always keep steadily in mind that what the Judge is seeking is material for the judgment or opinion which all through the case he knows he will inevitably have to frame and deliver at the end. He is not really interested in the advocate's pyrotechnic displays; he is searching all the time for the determining facts and the principles of law which he will ultimately embody in his decision.

I remember a friend of mine on the Bench once discussing with me the advocacy of a certain counsel. He came into Court briskly, spoke well and vigorously and at reasonable length, and indeed exhibited all the outward evidences of what is known as "a good appearance." He left the Court receiving the congratulations of his junior and the thanks of his client. All seemed well. "But," said the Judge, "when I came to write my judgment in my study at home that night I found I had a blank note book. The speech apparently so successful had contributed just nothing to assist me

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in my task. On analysis I found it to consist chiefly of robust commonplaces and confident assertions." On the other hand how often a halting address, delivered with every fault of manner and diction but manifestly the result of careful thought and thorough research, will command the respect of the Bench and provide the Judge with the very material he wants. Counsel's task is to help the Court—to help the Court to reach a decision in his client's favour. I used always to have before me the vision of the Judge sitting down at his desk to write his judgment after all the stir and excitement of the debate was over. Extreme propositions confidently advanced at the Bar do not help him then. He wants the clear phrase, the moderately-stated principle, the dispassionate array of facts which may appropriately find a place in his judicial finding. It is a good exercise to think out how, if you were the Judge and not the advocate of your client's cause, you would yourself frame a judgment in your client's favour. Then model your speech on these lines. You will be surprised to find how often the grateful Judge when he comes to give judgment will adopt the very words of an argument so presented. You have furnished him with the materials of judgment; he will be predisposed to use them because they are at hand and the more so if your opponent has adopted a less helpful though possibly more showy method of advocacy.

After all, the problems of pleading are all problems of psychology. One mind is working on another mind at every point and all the time. The judicial mind is subject to the laws of psychology like any other mind. When the Judge assumes the ermine he does not divest himself of humanity. He has sworn to do justice to all men without fear or favour, but the impartiality which is the noble hall-mark of our Bench does not imply that the Judge's mind has become a mere machine to turn out decrees; the Judge's mind remains a human instrument working as do other minds, though no doubt on specialised lines and often characterised by individual traits of personality, engaging or the reverse. It is well, therefore, for the advocate not only to know his case but to know his Judge in the sense of knowing the type of mind with which he has to deal. *Mores quoque si fieri potest judicis velim nosse*—I should also wish, if possible, to be acquainted with the character of the Judge, says Quintilian (IV. I. 17). And he adds—"For it will be desirable to enlist their temperaments in the service of our cause, where they are such as are like to be useful, or to mollify them, if they are like to prove adverse, just according as they are harsh, gentle, cheerful, grave, stern or easy-going." I used to find "Who's Who" quite a useful volume to consult before

addressing a Parliamentary Committee with whose members I was unacquainted. It is unwise to attack too violently the practices of land-owners when that invaluable manual has informed you that a member of the Committee owns 30,000 acres, or to assail the methods of a trade in which it tells you that another member is engaged, or even to deride a recreation in which another member has artlessly confided to the public that he indulges.

But I was thinking of larger matters, not of mere prejudices or predispositions, when I said that the judicial mind is subject to well-known psychological laws. One of the most conspicuous, and perhaps one of the most creditable, of the instincts of all intellectual minds is a tendency to assist anyone who confesses that he is struggling with a difficulty. I call it the instinct of rescue. There are occasions when it is worth enlisting on your side. When you know that your case is confronted with a serious difficulty in the shape of an awkward passage in the evidence or an embarrassing precedent, do not shirk it. Read the awkward passage with all emphasis or quote the authority without flinching, and point out the difficulty which it creates for you. You will almost invariably find that the first instinct of the Judge is to assist you by pointing out that the evidence is less damaging to you than you represented or that the precedent is on examination distinguishable. The Court is favourably disposed by the absence of all concealment of the difficulty and is attracted by the very statement of the difficulty to address itself to the task of solving or alleviating it. A good man struggling with adversity always makes an appeal to the judicial as well as to every other generous mind! A solution which the Judge himself finds for a problem, too, is always much more valuable to the advocate than one which he himself offers to the Court, for the Court is naturally tenacious of its own discoveries and your opponent who ventures to challenge its solution finds his adversary, not in you, but in the Court—a much more serious matter! But there is another reason for adopting the course I have recommended. It is sound tactics, as Quintilian pointed out over eighteen centuries ago, *Non inutilis etiam est ratio occupandi quae videntur obstare*—it is a good plan to anticipate the points that you think are going to be made against you (IV. I. 49). You will now probably tell me that my disquisition on this aspect of advocacy is superfluous for it is already part of our proverbial philosophy, and that I might have expressed my advice with much greater simplicity in the homely recommendation "take the bull by the horns." I should, however, add that the expedient of disarming your opponent by anticipating him is one to be used with discretion; it is not always

possible to adopt it, nor is it always desirable to resort to it. Circumstances alter cases. Nor is it always well to dwell too emphatically on the bad points of your case—you may defeat your object by satisfying the Judge that they really *are* fatal to you. I only desire to indicate the utility of these methods of advocacy in suitable instances.

One principle, however, is of universal application. There can be no good advocacy that is not orderly in its presentation. An exasperated Judge is reported to have said to a counsel who was presenting his argument in hopeless confusion: "Do adopt some method in your exposition—if you can't be logical at least be chronological, or if you can't be even that, well, you might at least be alphabetical." It is a well-known fact that a skilful exposition of a case often largely supersedes the necessity for argument. I have indeed heard it said of an artist in advocacy that he never argued his cases; he merely stated them. So orderly and adroit was his arrangement of his statement that the conclusion which he wished to be drawn appeared inevitable. The colloquial retort—"I'm not arguing with you, I'm telling you"—has a subtler application than its users generally appreciate. In this connection I venture to impress upon all whose ambition it is to be successful advocates that they should not neglect the mechanical side of preparation. Orderliness in the arrangement of the documents in a case has far more importance than is generally realised. Which of us has not seen the discomfort and confusion produced by a paper going amiss just at the moment when it is wanted, or the irritation of the Judge when he finds his copy of documents differently paged or arranged from counsel's copy? The thread of the argument is interrupted, tempers are upset, and half the effect of a good speech may be irretrievably lost. All this can be avoided by a little forethought and system. I shall give you an example of what I mean. I remember once having to give before a tribunal a long historical explanation of the development of an important chapter of our administrative law. It necessarily involved constant references to a whole series of statutes and to a mass of blue books and Government Reports. I knew what would happen if some uniform system of arranging all this material were not devised. No two members of the tribunal would ever be looking at the same document, half the time would be occupied in looking for missing copies, and before I was done a general state of confusion would have resulted. So I told my instructors to obtain from the King's Printer a complete set of all the Acts I was going to refer to and to bind them up in a single collection, paged consecutively with a cover of a distinctive colour, and to do the same for all the Blue

Books and reports. I prepared my notes with these before me. The result was that I had only to tell the tribunal to look at the red volume page so and so or the blue volume page so and so. If I may say so without disrespect, the system was fool-proof. Consequently the minds of the tribunal were never diverted from following the case by futile fumblings among a pile of disordered productions, and the argument proceeded in comfort. All this, you may say, is very elementary, not to say menial. But, believe me, it is of real importance. Attention to these apparently trivial details has a much greater effect on the fortunes of a case than is imagined. When what I may call the mechanical apparatus of a case works easily and well, the mind of the Judge is inevitably favourably impressed. He follows easily what is presented to him in orderly fashion and he is predisposed to accept as sound what is so well-ordered. Even the judicial mind is not immune from the attraction of the path of least resistance. There is also the satisfaction and ease enjoyed by counsel in handling his case, which in turn results in a better and more effective address. I speak from the fullness of my heart when I say that I have seen more trouble in Court over disorderly papers than from any other cause. So I decline to treat as a triviality beneath counsel's notice this matter of the tidiness and accessibility of the documents in the case.

I should like also to emphasise the importance of citing your authorities clearly and accurately, a matter to which my friend, Mr. Singleton, draws attention in his recently-published lectures on "Conduct at the Bar." You should have on a separate sheet of paper a list of all the cases and text-books to which you are going to refer and when you are going to cite them you should announce them by name slowly and deliberately, giving the year, volume, series and page of every case quoted, so that the Judge may have time to take down the reference. I have seen much time wasted and much irritation engendered by a failure to observe this simple rule.

As you will have observed from one or two passing quotations which I have already made, I have recently been looking into Quintilian's *Institutio Oratoria* or *Institutes of Oratory*. Both that great work and Cicero's well-known dialogue *De Oratore* are amazing repositories of information and suggestion on the art of pleading. But they suffer to some extent from over-sophistication. An art is always decadent when it becomes too self-conscious, and the over-elaboration of the analysis of the pleader's art in the later classical period is an indication that it was losing spontaneity and becoming too artificial. All the same it is remarkable to find how

fully alive were these ancient experts to all the refinements of advocacy. There is no artifice practised by the pleader of today which you will not find discussed by them. And amid much that seems to us merely scholastic or pedantic there are many sound observations. One topic with which they deal at great length is the use of humour in debate. The Greek orators, too, devoted much attention to the topic "concerning laughter." *Urbanitas opportuna reficit animos* says Quintilian (IV. I. 49)—timely wit refreshes the mind. But it can do much more than merely refresh jaded spirits. As he says himself in another passage, *Rerum autem saepe maximarum momenta vertit ut cum odium iramque frequentissime frangat* (VI. 3. 9). It frequently turns the scale in matters of great importance, as for instance when it dispels, as it often does, hatred or anger. Even a seventeenth century Scottish Calvinist admits that "there is a faculty of laughing given to men, which certainly is given for use, at least at some times; and diversions are sometimes needful for men who are serious and employed in weighty affairs." (Hutcheson's *Exposition of the Book of Job*, 1669, p. 389.) I doubt if anyone has ever succeeded in defining humour, but we all know it when we hear it and it is certainly one of the most valuable parts of the pleader's equipment. It has a curious and almost incalculable psychological effect—I had nearly said physiological. Take a situation such as not infrequently arises in the course of a serious encounter in the Law Courts, when the atmosphere has grown tense and electrical and the nerves of Judge and counsel are alike on the stretch. Suddenly someone interposes a happy stroke of wit. The effect is instantaneous. *Solvuntur tabulae risu.* The tensity is relaxed and—an odd thing—cannot, at least immediately, recur. Laughter is invincible as a solvent. We use the phrase "irresistibly funny" quite correctly. What is truly humorous cannot be resisted—the laugh will out, however solemn we may be, indeed the more certainly the more solemn we are or are trying to be. The wit of the Law Courts is commonly derided as being of poor quality, appreciated when it comes from counsel because anything is a relief from the tedium of legal argument, and when it comes from the Judge because it is expedient to simulate an obsequious enjoyment. It is true that poor enough efforts sometimes pass muster and that much legal humour is esoteric and loses its flavour when transplanted from the purlieus of the law. But I am thinking of the really witty phrase and the really humorous sally which at a critical moment may save a situation from disaster and win more genial consideration for a case in jeopardy. Somehow or other the muscles of the grimmest judicial countenance, once they have

relaxed in genuine merriment, can never recover their stern tautness. So it is well to have in one's forensic quiver a few barbless shafts of humour to use at discretion.

My friend, Mr. Condie Sandeman, formerly Dean of the Faculty of Advocates in Edinburgh, whose recent death we all lament, was a master of the kind of epigrammatic wit I have in mind. I may recall a couple of instances of it. One afternoon at a quarter past three he rose to address the Court. The Lord President asked him how long he would take, "Three quarters of an hour," he replied. "Very good," said the Lord President, "we have just that amount of judicial time available for you this afternoon; pray proceed." As the Dean was speaking the Court interposed so frequently that at last the Lord President said—"It would hardly be fair, Mr. Dean, to keep you to your allotted forty-five minutes in view of the amount of discussion to which your interesting argument has given rise." "My Lord," replied the Dean, "I had allowed for that in my estimate"! On another occasion, this time in the House of Lords, one of their Lordships, employing a familiar judicial expedient, said to the Dean: "May I put your case for you thus—" and proceeded to state the Dean's case in such a way that it was difficult for him to say that it was not his case, though he knew that if he assented he would immediately find himself in difficulties. "My Lord," said the Dean, "while fully appreciating the benevolence which has prompted your Lordship to come to my assistance, may I be permitted, for reasons which your Lordship will understand, to state my case in my own way?" Alas, we cannot all turn a phrase so neatly.

Bathos above all things must be avoided. The classical instance is that of the advocate Glycon who to move the hearts of the jury produced a weeping boy as one of his witnesses. Unhappily for the success of this dramatic coup the boy, when asked why he was weeping, instead of giving the arranged answer blurted out that his pedagogue had pricked him. In Racine's inimitable comedy, "*Les Plaideurs*," you will find an admirable example of the failure of a similar artifice, but much too French for me to venture to rehearse it here. Theatrical appeals rarely succeed. There are great moments in great cases where some dramatic licence is justifiable, but they are rare and Quintilian wisely advises us to remember not to put the mask and buskins of Hercules on a small child (VI. I. 36).

Now let me say a little about the form as apart from the substance of pleading. I believe that no advocate can be a great pleader who has not a sense of literary form, and whose mind is

not stored with the treasures of our great literary inheritance upon which he may draw at will. The fortune of an argument depends much more than is commonly realised on the literary garb in which it is presented. A point made in attractive language sticks in the judicial memory. You must avoid the commonplace without falling into the bizarre. Originality is effective but eccentricity merely repels. There is much in the way in which a speech is started; as the French with their infallible instinct put it, *c'est le premier pas qui coute.* You want to arrest attention from the outset. And so we find Quintilian and the other ancient experts dwelling at length on the exordium. He is a bad pilot, he says, who wrecks his ship when putting out from the harbour (IV. I. 61). It is, perhaps, a moot point whether you should state your best point at the very outset—put your best foot foremost. Quintilian says—*Festinat, enim judex ad id quod potentissum sit* (IV. 5. 10). The Judge is always in a hurry to reach the most important point. But I am not sure that he should always be gratified. There is something to be said for keeping your best vintage till your guests have been duly prepared for its reception. But of this I am convinced, that you should make it your aim to interest your Judge from the very start. Even the driest topic can be made interesting with a little imagination and ingenuity. To be interesting is almost as important as to be logical. Let me in passing just mention a habit of some advocates which is peculiarly exasperating to the Judge. Who has not heard counsel when faced with a difficulty endeavour to postpone the evil day by the time-worn phrase "I'm coming to that"! You know and the Judge knows that he never will, if he can help it. There was one very eminent counsel who is said to have emitted more promissory notes of this kind than any counsel before him and to have redeemed fewer of them. The better course is to deal at once with the point put to you. The question indicates the train of the Judge's thought; he will not be diverted from it by your evasion. Have it out then and there, even although you may have to desert the progress of your argument for the moment. You can work back to your main theme with a little dialectic skill.

Let there be balance and proportion in your argument. Some advocates give as much time and trouble to the exposition of their bad points as they do to their good points. There is no worse fault. The Judge will soon be unable to see the wood for the trees. A counsel who used laboriously to argue before the Court every point, good, bad and indifferent, which was placed before him by his industrious solicitor, observed cynically that he had in consequence lost many cases but had never lost a client. I do not commend this policy. In the arrangement of your points you

ought not to exhaust all your best material at the beginning, or else you may decline to a lame conclusion, than which there is nothing less impressive. *Ne a potentissimis ad levissima decrescit oratio.* (Quintilian v. 12. 14). The natural order is to place first the points arising on the facts, displaying their salient features, then the points of law, and, finally, the general equitable considerations which tend to satisfy the conscience of the Court that justice is on your side.

It would be attractive to dwell on the manners of the advocate, the importance of courtesy to one's opponent, respect towards the Judge and fairness to all. But that is too large a region upon which to enter now. One other piece of advice, however, I may cull from Quintilian, as true today as ever it was; *Bonus altercator vitio iracundiae careat* (VI. 4. 10). The good debater must avoid the fault of temper. Calmness and coolness are his best equipment, if he is to serve his client well.

And now you will not resent it if I bring these desultory observations to a close on a more serious note. There are some who would malign the art of the advocate as dishonest and morally degrading. The taunt is as old as Plato, and so is its refutation. There is no calumny more unfounded. It is an art truly beset with perils but there is no sphere in which gifts of character and uprightness are more sure of recognition and reward. It has been practised by some of the noblest men in the long and glorious annals of our country. Practised with the high sense of honour which has always characterised the Bar in our country, it is the sure bulwark of justice and liberty. "I, for one," says Quintilian, "restrict the name of orator and the art itself to those who are good" (II. 15, I.).