// THE CANADIAN BAR REVIEW

Vol. VIII. TORONTO, JANUARY, 1930. No. 1

JUDICIAL APPOINTMENTS.[1]

I intend to make a brief reference in no critical but in a sympathetic sense to two notable addresses made before the Canadian Bar Association at Quebec last week, one by its respected President, Mr. Wallace Nesbitt, and the other by the Hon. Mr. Taschereau, the brilliant Premier of Quebec.

Both referred to the state of the Bench of Canada. Mr. Nesbitt considers that it is being weakened and degraded by political appointments. Mr. Taschereau's view is that the salary paid a Judge is so inadequate that the able men of the profession no longer aspire to a place on the Bench, and that if the Bench is to be kept at a proper level of efficiency the salaries must be increased or a policy of conscription adopted, commandeering the services of capable men.

We all want an able and respected Bench for Canada. There is wide-spread solicitude for this object. The implied or express criticism of the Bench in these addresses should be welcome if it leads the Profession to take a deep and helpful interest in judicial appointments. Lawyers in Canada are born in the purple and bred in the great traditions of the English Bar and Bench. Nothing of a lesser mould will content us.

Conditions in England are ordered and devised to produce a strong Bar and Judiciary, devoting itself exclusively to the single interest of administering justice. No distractions or collateral preoccupations in other branches of professional work are permitted to interfere with this ideal. The separation of the profession into its mutually exclusive departments of Barrister and Solicitor is

[1] An address by the Honourable Mr. Justice Trueman, of the Manitoba Court of Appeal, at the Annual Dinner of the Manitoba Bar Association, September 13, 1929.

due to this overruling consideration. The system is perfected by the rule that a Barrister's retainer must come from the solicitor and not from the client. This rule is ruthless. A Barrister in London to make outstanding headway and gain prominence and leadership must raise himself above a ring of competitors to catch the approving eye of solicitors. The law of the survival of the fittest has inexorable play and takes its relentless toll. Here is the explanation of why the men who come to the top are the pick of the profession. Going hand in hand with this idea, that work at the Bar is for experts, is the insistence that a Junior shall be briefed with a leader. It puts a Junior in fast company, and requires that he shall know the case, and be prepared to take charge in the event of the leader's absence. Haldane in his Life attributes his quick advance to eminence to the opportunity that was given to him on the occasion of an application to the Judicial Committee for leave to appeal by the Government of Quebec in important litigation. Sir Horace Davey was Haldane's leader. The night before the application was to be heard, Davey informed Freshfields, the firm of solicitors, that he would be unable to act owing to a prior engagement in the House of Lords, and advised that the matter be put in Haldane's hands, who was thoroughly able to take care of it. The solicitors strenuously objected and complained to Sir Horace that though they had briefed in their time the most eminent leaders they had never been so shabbily used. Sir Horace admonished them that they were needlessly disquieted, and though the application was a difficult one, Haldane would carry it off as well as he (Davey) could. Haldane was unknown to the Law Lords, and Mr. Wiseman, Clerk for Freshfields, was stricken with the foreboding that the Committee would make short work of the Junior Counsel. Haldane in short time had the attention of the Board and the application was granted. Neither the Solicitor-General for Quebec, who was in attendance, nor Wiseman, gave him a word of congratulation. Mr. Freshfields, the head of the firm, took the trouble to read a shorthand report of the proceedings. He was so impressed that in the course of a few days Haldane was waited upon by Wiseman with a brief in another Canadian case. From that time he never was without lucrative business. In his fifth year of practice his earnings were over £1,000.

There is another circumstance that accounts for the efficiency of the English Bench and the men in large business. London is the headquarters for the law work of the whole country, or for 40,000,000 people. There are 33 Judges (I speak from memory). To

get through their dockets they have to work at high pressure, calling for daily attendance in their courts. Scrutton, L.J., recently stated that the English Court of Appeal is the hardest worked court in the world. The business has to be disposed of not only accurately but with despatch. It is quite the common thing for judgments to be delivered orally in cases which only minds of the most skilled training would attempt to summarily deal with. Mr. Justice Hamilton (now Lord Sumner) when a puisne Judge never reserved a judgment, and, it is said, was never reversed.

You can appreciate that no lawyer not of the highest qualification could be thought of for judicial preferment in England. An incompetent man to face a masterful and expert Bar is unthinkable. The Lord Chancellor can do nothing else but make a sound appointment. The merits of the men fitted for the position mark them out in the mind of a powerful profession for place on the Bench. To appoint a weak or incapable man would involve the Lord Chancellor in a scandal and a parliamentary inquiry.

The high character of the English Bench is due to the great esteem in which the judicial position is held not only by the profession but by the whole public. A lawyer regards promotion to the Bench as a crowning distinction to his career, and as an opportunity for adding to it its brightest lustre. Men earning infinitely more in practice than the salary of a Judge willingly sacrifice their income for a place on the Bench. Mr. Justice Clauson is said to have had an income of £20,000 from his practice when he retired from the Chancery Bar. So highly is judicial distinction in England regarded that expressions of regret are frequently met with that lawyers who made great names in English public life had not devoted themselves to their profession and become great figures on the Bench. This lament I have noticed more than once expressed concerning Asquith, the intimation being that his genius would have been better served had he taken his rank in the legal hierarchy as the successor of Hardwicke or Bowen.

Looking at what has been said by Mr. Nesbitt and Mr. Taschereau, how stands the matter in Canada?

It is not to be denied that compared with the environment and conditions that exist in England the Bar of Canada is at a disadvantage.

The profession in Canada is not assembled at a central point that is the headquarters of the judicial and legal work of the Dominion. It is divided into nine Provincial Bars, and the Bench in

each Province is recruited from the local Bar. It cannot be expected that in Provinces with a population of a few hundreds of thousands there will be a considerable group of men with the efficiency of the leaders of the English Bar. There is not the body of work to keep them immersed in the daily toil and conduct of litigation before Judges equally busy and made equally competent by the same experience.

I sometimes think when comparison is made of the Bench in Canada to-day with what it was a generation or so ago that allowance is not made for the great evolution that has taken place in the class of professional work since then. Two or three decades ago the best legal minds devoted themselves to litigation. Solicitor's work was limited to conveyancing, debt collection, probate work and the care of estates. The leaders held aloof from office work of this kind. They were essentially Court men and they associated with their legal careers an interest in politics. Whether they entered public life or took an influential part in elections they were by reason of their position at the Bar undoubtedly qualified for judicial preferment and when they went on the Bench as a rule they proved themselves able as well as industrious. When people recall those men they weigh them with present-day judges to the disadvantage of the latter. What I am concerned to point out is that those men, by reason of their preoccupation with litigation, both at common law and on the Chancery side of the Court, had something of the training, though of course within narrower limits, of the English Barristers. In the past few years there has been a considerable falling off of important litigation, and men who, if former conditions had continued, would have sought eminence and a career in Court work have devoted themselves to a marked extent to solicitor's work. This change has been facilitated by the advent of corporation work. When big business made the discovery that it could secure unlimited capital through the sale of stocks, and was no longer dependent on capital supplied by creditors or banks or by bond issues, organization and expansion on an unparalleled scale brought to lawyers a source of business that has given the profession an earning power and an outlook unknown in the days when litigation was its chief means of support.

One result of this change is that the men who would be leaders in Court work are very seldom in Court. They prefer the greater financial rewards that are obtained from company organization, stock issues and mergers and the thousand and one details that are incidental to keeping corporation transactions on a proper con-

tractual footing. The income of these men is much larger than was earned by the lawyers of previous decades, and in contrast the judicial salary is small. Mr. Nesbitt and Mr. Taschereau have expressed disappointment that the men who have a leading place in professional work are not being put on the Bench. Well, where is the fault if they stand aside and the appointments go to other men? It is of no avail to protest that political considerations have governed their appointment. Whether they did or not I need not stop to consider. The point is that men who are regarded as leaders of the Bar because they are heads of firms with profitable corporation connections prefer to remain in practice. Unlike the English lawyer, who will abandon a £20,000 income for judicial preferment, the view of the Canadian lawyer with a $20,000 income is that it is preferable to remain in practice.

Mr. Taschereau's remedy is that the judicial salary should be increased. That is a subject upon which I am not free to speak. The observation may be permitted that the importance of the position is impaired in the public mind by the salary attached to it. The uncounted number of men in business whose incomes are several times that of a Judge cannot be blamed if they form the view that a lawyer is an undistinguished person of meagre ability where he withdraws from practice to substitute for its income the salary of the Bench.

While Mr. Taschereau is no doubt right that the position will be made more desirable by a substantial addition to the judicial income, I am not confident that it will have the effect in all cases of inducing leaders of the Bar to accept judicial office. In England the attractive power of the Bench is the commanding prestige and influence which belongs to the position both by the authority it wields and the knowledge the public have through the press reports of the importance of its work. Law in England is esteemed as a great national possession, in which everything that the liberty-loving Englishman holds dear, has its anchorage. He thinks of it in the terms of Magna Carta, the Habeas Corpus Act, and the other priceless charters of freedom, whether written or established in the common law. Upon the Bench he beholds men who worthily sit in the place of Hale, Mansfield, and Holt, and he finds in their unfailing independence and their inflexible devotion to duty that the great tradition which has made the English Bench respected as one of England's proudest institutions still holds fast. "Civil liberty in this Kingdom," wrote Hallam, "has two direct guarantees; the open administration of justice according to known laws truly interpreted

and fair constructions of evidence; and the right of Parliament without let or interruption to inquire into and obtain redress of public grievances. Of these the first is by far the most indispensable; nor can the subjects of any state be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise." Hear these proud words on the lips of the Lord Chancellor, Baron Sankey, spoken at the recent annual dinner to the Judges at the Guildhall: "The rule of law is the condition of liberty. Amid the cross currents and shifting sands of public life the law is like a great rock on which a man might set his feet and be safe."

There can be no doubt that it is in Court and counsel work that a lawyer finds the high intellectual side of the profession. It is there that he is brought into familiar intimacy and has his freedom of the learning and science of law. Mansfield, I think it was, who said that to be a master in this great profession was to find as constant a satisfaction as life can give. There is in it scope for the most powerful and original mind to exercise its vigor to the utmost. Reason, for law is the perfection of reason, is never more masculine and robust, than in the handling of legal problems. In insisting that the study of logic is a severer training for the mind than mathematics, John Stuart Mill declared,—I speak from memory—that while the one depended upon formulæ and granted premises the other had to establish itself by the defeat of its adversaries. It was the greatest orator of ancient times but one who said that it was not enough for him to be master of his own case and defend it. It was required that he should study with greater acuteness his opponent's case, for if he succeeded only in maintaining his own position and did not destroy the argument of his antagonist, he failed.

A responsibility is laid on the profession that it shall give of its best to the administration of justice. This is required of its members in exchange for the privileges conferred upon them by the State. The State has set up the tribunals of justice and has constituted the profession an essential part of them. Justice is the supreme interest of men. They have appealed to Caesar. To Caesar they shall go. If it is to be the attitude of the finest minds in the profession that they will apply themselves exclusively to the interests of big business there will have been a renunciation of the function for which the profession alone came into existence and that gave to it its greatness. In the United States the leading lawyers of this generation have, in large measure, withdrawn from the Courts that they may give their services to corporations. It has had the

effect of belittling the importance of litigation, and has handed it over to lesser men. A marked deterioration has ensued, showing itself in a lowered professional morale, and an admitted general sense of insecurity on the part of the public. It is well to be reminded that thoughtful lay minds have a vigilant outlook upon the course of justice and the place that it has in ordered society. When Dean Pound and Prof. Frankfurter, of the Harvard Law School, gave to the world their analysis of the proceedings in the trial of Sacco and Vanzetti and demanded that a new trial should be allowed, an Englishman, H. G. Wells, showed how much he thought was at stake. "I had rather assert my right to cry stop to the justice of Massachusetts when it grows harsh and unfair to such friendless men than reap all the material success that life can offer me."

The justification of our legal system depends upon the learning and integrity of the Bench. Everything that concerns the public interest as well as the well-being of the Bar turns upon this consideration. A strong Bench and a strong Bar re-act upon each other. That there may be a strong Bench the profession should always be willing to give of its best for judicial service.