LAW AND PRACTICE.*

As this is the first occasion on which I have presented myself as a speaker before you, I should like to begin by saying how keen is my sense of the honour it is to address you in this great gathering, and I may add my grateful thanks to your Chairman for the kind words which he has said. I would ask you, however, to bear this in mind that the waves of kindness and hospitality which have swept over my head in the last few days in this sea of friendly faces, familiar and unfamiliar, have left my mind in somewhat of a maze, and I trust you will of your indulgence remember that when you come to criticise the few words which I am going to address to you.

On an occasion such as this, when members of one profession have gathered from many quarters to take counsel together, and to strengthen the bonds of unity between them, there arises in the mind a natural desire to dwell upon and stress those features of our common calling which give it, in our view, a claim to the respect of mankind.

But eulogy is a delicate matter to handle, not least when it is eulogy of ourselves rather than of others. "Praise," said an old worthy, "is like ambergris, a whiff of it and by snatches is pleasant enough, but if a man should place a lump of it under your nose it is a stink and knocks you down."

In addressing you to-day, therefore, I shall not venture upon eulogy, but it is, I hope, permissible and perhaps profitable to say a word not about what we are but about what, with all modesty, we aspire to be and to do.

We have at the outset to recognise that affection for lawyers is not deep-rooted in the hearts of the laity, law-abiding though they may be. The law suffers from the repugnance which every necessary thing is apt to create in the breasts of those whom it serves. As one learned writer has observed, the law has been the ass which has borne the burden of humanity through untold generations, and when reviled it might well respond with the words, "Am I not thine ass upon which thou hast ridden ever since I was thine unto this day?"

*Address delivered at the Fifteenth Annual Meeting of the Canadian Bar Association, in Toronto, in August, 1930, by the Right Honourable Lord Tomlin.

It is, perhaps, a point worthy of notice that while on the one hand the development of democratic institutions seems to induce in the public a belief in the efficacy of legislation as a cure for all ills and in the desirability of controlling or regulating by means of it all the activities of man, leaving the freedom of the individual ordered and restricted within narrow limits, yet on the other hand the lawyer, the necessity of whose presence is increased by the very circumstances, to which I have referred, does not appear to advance in public regard.

This may in part be due to a lack of appreciation of the important and necessary part which the profession plays in many fields. Lack of appreciation of the facts is the probable explanation of the public attitude, because most people desire to be fair, although all do not instinctively grasp the significance of the injunction *audi alteram partem.*

It has been noted that the Anglo-Saxon race by affinity possess, or by long contact with the management of their own affairs have developed, an unusual instinct for forming fair and reasonable judgments. It may well be that the law itself has contributed largely to this result.

The view was once expressed to me by an eminent English divine of shrewd judgment that the instinct of the race for forming a commonsense judgment was due in part at any rate to the existence of our jury system. Year by year over the centuries many thousands have passed through the witness box or sat in the juryman's seat and listened to the proceedings in court. It does not seem extravagant to conclude that this continuous process has had some real effect upon the habit of mind of the people.

It cannot, therefore, be amiss, and indeed it may be fruitful of good, that lawyers should attempt from time to time to review their own position for the purpose of defining more closely their standards of conduct and examining the nature of the work legitimately open to them and the manner in which it can properly be executed. Whatever be the popular misconceptions, the duty of those who claim to be servants of the law seems to stand out with reasonable clarity.

The lawyer may, I think, be regarded, and his conduct may be usefully examined, in four different aspects at the least: First, as one taking part in public life; secondly, as private adviser; thirdly, as advocate; and fourthly, as judge.

Now there is one observation which may be made generally with

regard to the lawyer, whatever be the branch of activity to which he is devoted. He is trained to observe and weigh facts and to learn their value.

In an age when the propounders of theories are many, and when facts are apt to be regarded as things which may be ignored or even moulded to fit theories, the maintenance of the intellectual honesty of lawyers is a matter of the first importance. For them there is no ignoring or moulding of relevant facts. Those facts must be ascertained and faced before the theory or principle to be applied is sought. The upholding and display of that attitude of mind cannot fail by practice and example to be of value to the community as a whole.

The part which lawyers can usefully play in public life has many aspects: I will only dwell upon one. I have already referred to the increase in legislation. In my own country, and I do not doubt here in Canada, an examination of the law reports will reveal a marked change in the character of the cases which come before the courts. The most notable feature of that change is the increase in cases involving the construction of statutes—statutes affecting private rights and duties, statutes regulating the functions and powers of local government authorities, statutes relating to public utility undertakings, statutes codifying complex branches of the law such as joint-stock companies or patents, and statutes of many other kinds. This means that, apart altogether from the resultant forensic work, the field of usefulness for a lawyer as a public man in assisting in legislative work, whether local or general, has enormously widened and is not likely to diminish.

Our legislators have not hitherto always attained to Plato's ideal and framed their laws in words "which wing their way to the hearts of men," and the lawyer should be well qualified to assist both in keeping legislation within the frontiers proper to positive law and in framing enactments in terms of sufficient clarity to carry the minds of reasonable men if not to win their hearts.

In England the great part which was in the past played by lawyers in helping to mould our constitution has been luminously expounded by Professor Holdsworth. Analogous and not less important services are being rendered by distinguished lawyers today, and the lawyers of the future will continue, I do not doubt, to steady the ship of theory with the ballast of fact and common sense, and exercise their influence in favour of sane and orderly thinking.

In his capacity as private adviser the lawyer with his high sense

of honour should be a safe guide to those whose sense of the niceties of conduct is less well developed than his own, or who do not recognise that many things which are lawful are not expedient or even permissible among fair-dealing men. Thereby will the standard of conduct in affairs generally tend to be raised.

In this connection it would not perhaps be out of place if, for the benefit of the younger members of the profession, I say a word or two upon some points which as the result of experience I believe to be of importance to those who are seeking to build up a practice.

A beginner is apt to fix his eyes upon the triumphs of forensic eloquence and to forget the importance of establishing first of all a reputation for wise and prudent counsel. Whether promotion cometh from the east or from the west, it cometh but rarely to him who has not by patience and industry built up for himself a reputation for sage advice in the office or chambers.

The young practitioner may sometimes be driven by the necessities of the moment to go into court comparatively unprepared. There, notwithstanding this disadvantage, he will probably have an opportunity of picking up the threads and holding his own. It will be very different if he is unprepared in consultation. In the closet he will have to answer searching questions which will expose the nakedness of the land, with perhaps unfortunate results to his future. My first advice to beginners would therefore be, where opportunity for preparation has been given, never go into conference unprepared. It is upon conduct in conference that reputation can be most securely based. Well-rooted in such a reputation, the flowers of forensic eloquence may later blossom with effect.

My second piece of advice would be this: When asked to give an opinion give an opinion which is definite. A great Scotch Judge once said to a young advocate (my friends from Scotland will forgive me if I do not give it in their native wood notes wild), "You are paid for your opinion not for your doubts." That is sound advice. It is better to be wrong sometimes than never to have a mind of your own.

The importance of the advocate's work no one will seek to minimise. It is essential to the impartial administration of justice. Probably only those whose privilege it has been to sit upon the judicial Bench can realise its full value. A good Bar makes a good Bench.

The advocate has a duty with a double aspect. He has his obligation to the client and his obligation to the court. The old

fallacy that the advocate is guilty of some moral obliquity in presenting to the court a case in which he does not believe has been sufficiently often exposed, and by none better than by our old friend Dr. Johnson, who pointed out that an argument unconvincing to the advocate may convince the Judge, and if it does, the advocate is wrong and the Judge is right, for it is the latter's business to judge. Baron Bramwell also said, "A client is entitled to say to his counsel, 'I want your advocacy, not your judgment. I prefer that of the court.'" Indeed, it is well recognised that the advocate is not entitled to express to the court his own personal opinion of his client's case.

The obligation of the advocate to his client was expressed almost in extreme terms by Lord Brougham in his defence of Queen Caroline. "An advocate," he said, "by the sacred duty which he owes his client, knows in the discharge of that office but one person in the world—that client, and none other. To save that client by all expedient means, to protect that client at all hazards and costs to others, and among others to himself, is the highest and most unquestioned of his duties, and he must not regard the alarm, the suffering, the torment, the destruction which he may bring upon any other."

When Lord Brougham at a later stage of his career repeated something to the same effect at an assembly where Chief Justice Cockburn was present, the latter indicated a qualification which he thought should be made upon Lord Brougham's expressions. The words of Chief Justice Cockburn, which are cited by Mr. Justice McCardie in his address to the Middle Temple on the Law, the Advocate and the Judge, express in eloquent terms the obligation of the advocate to his client. Here is what the Chief Justice said:

> My noble and learned friend Lord Brougham, whose words are the words of wisdom, said that an advocate should be fearless in carrying out the interests of his client, but I couple that with this qualification and this restriction, that the arms which he wields are to be the arms of the warrior and not of the assassin. It is his duty to strive to accomplish the interest of his clients *per fas* and not *per nefas*. It is his duty to the utmost of his power to seek to reconcile the interests he is bound to maintain and the duty it is incumbent upon him to discharge with the eternal and immutable interests of truth and justice.

There is besides the advocate's obligation to the court owed by reason of his being engaged in assisting the court properly to perform its functions. It is an obligation of frankness and candour founding that confidence reposed by the Bench in the Bar which is

the most effective of all accelerators of the quick flow of justice. By virtue of this obligation the advocate must with regard to facts be careful to display accuracy in his description of the materials before the court, while presenting them in the light which seems to him most favourable to his client.

The advocate's obligation of disclosure on matters of law has not always been so clear. At any rate it can I think be said to-day that it is the duty of the advocate to call the attention of the court to any case or statute which is clearly against him. This doctrine recently received support from the words of a distinguished member of the House of Lords. It satisfies the conscience and is in accordance with the view of the advocate's position which I have already indicated.

Of Judges I hesitate to speak. I will content myself with quoting to you one or two passages of authority which are none the worse for being of some antiquity.

"Judges," says Francis Bacon, "ought to be more learned than witty, more reverend than plausible, and more advised than confident. Above all things integrity is their portion and proper virtue."

And again he says:

> Patience and gravity of hearing is an essential part of justice and an overspeaking Judge is no well-tuned cymbal. It is no grace to a Judge first to find that which he might have heard in due course from the Bar, or to show quickness of conceit in cutting off evidence or counsel too short or to prevent information by questions though pertinent.

Edmund Burke spoke of "the cold neutrality of an impartial Judge," yet may it not be that in the perfect Judge the neutrality, without changing its quality, will with advantage lose its chill in a mind touched to kindliness by broad knowledge of the world?

I should like to add one word upon our general attitude towards the substance and forms of the law:

Mr. Justice Holmes has truly said that the law embodies the story of a nation's development, and cannot be dealt with as if it contained only the maxims and corollaries of a book of mathematics. The law is not and never has been a static thing. It is like a growing tree which from time to time requires to be pruned and trained in order that it may yield fruit best suited to the times. To watch and assist in the proper cultivation of that tree is no small part of our duty as a profession.

What I have said is, I think, specially true of adjective law. The practice and procedure of the courts is a matter which needs con-

stant watching to ensure progressive improvement, the aim being to secure a system by which every question falling for decision can be determined with reasonable speed and with the minimum of expense, having regard to the circumstances of the case. Therefore simplicity should be sought so far as it can be utilised without plunging into looseness and without loss of precision.

I have endeavoured to indicate the high and responsible nature, as it seems to me, of our common calling. The consideration of the nature of our calling leads directly to the question how new entrants into the profession can best be prepared and qualified for the responsibilities which they have to undertake. That is a large question. You will recollect how in England the value of the lawyer and the position which he was able to take was in earlier times due largely to the fact that he was trained in the Inns of Court, which then constituted a real university. Here he learned his law, but also manners and morals. One writer says:

> Religion and Morals were cared for as well as learning, and the younger men did not lack the social training which was to be acquired from a daily association, in an atmosphere of good fellowship and respect for authority, with others of their own standing.

The golden age of the Inns of Court as a university was the first half of the sixteenth century. Their gradual fall from their high estate in this respect was due in part to the invention of printing and the availability of printed books for legal instruction, and in part to other causes arising out of the times. Today the Inns cannot claim to be a university, but they and the Law Society, whose President, Sir Roger Gregory, is here with us, have for some time past striven and are still striving to provide a sound training for the two branches of the profession.

But much yet remains to be done in England to improve and co-ordinate the existing instruments of legal education. Each country must solve the problem of legal education in the manner best suited to its own conditions, and we recognise how the problem is for you in Canada rendered more difficult by the vastness of your territory. In whatever country the problem falls to be solved there are some common features which cannot be overlooked.

We live in an age of complexity. There is no limit to the variety or the difficulty of the questions with which the lawyer has to deal, and unless he is able to address himself to his task with a mind not merely equipped with the technical knowledge of his profession but trained and broadened by a sound general education,

his power of discharging his functions in a manner worthy of the profession to which he belongs will be lamentably limited.

It must be one of the aims of any body which exercises control over legal education to secure that there shall be a sound base of general education upon which to erect the structure of professional knowledge.

In days gone by there were reserved in the English courts special seats for students, where they might hear what took place and thus familiarise themselves with the practice and methods of the courts. Today the students' reserved seats have disappeared, but we still recognise the importance for the student of contact with the actual; and, for barristers reading in barristers' chambers, and for solicitors, a period of articles, are encouraged, or required as part of the preliminary training. Knowledge of principle and theory is necessary and excellent, but, without more, it never made a successful practising lawyer.

The corporate spirit is of the highest value to the profession, and no system of legal education which does not succeed in inculcating a measure of it can be regarded as wholly successful. The presence of the corporate spirit renders comparatively easy the maintenance of that high standard of conduct and honour which is essential to the welfare of the profession and promotes the fellowship and absence of jealously which is its honourable characteristic. It is one of the great merits of your Association that it has sought and is seeking to create and stimulate that corporate spirit.

One other minor point I would mention, which has a special bearing upon the training of those whose inclination is towards advocacy. Sergeant Maynard is reported to have said that the law is *ars bablativa,* meaning that all the learning in the world will not set a man up in Bar practice without a faculty of a ready utterance of it. To induce facility of expression and nimbleness of wits, moots and disputations formed an important feature of the old system of the Inns of Court. The moot method has much to recommend it. With us it has been revived to some extent of recent years, and proves a valuable instrument in loosening the unready tongue and quickening the slower wits, and in teaching the proper method of presenting a case. How far it is possible for you to do something of the same kind I cannot tell, but I submit it for your consideration.

Now, I have said, I hope, not too much for your kindly patience, though I am aware that many of the matters upon which

I have touched deserve a more full and worthy treatment. I will only add this: Lawyers always remain students throughout their lives. I am sure that we who are fortunate enough to be your guests here today shall return to our homes not only with the happiest recollections of the hospitality and kindness received at your hands, but with a fuller knowledge and a wider outlook, and stimulated to resume our tasks with renewed zeal.

LAYMEN AND THE BAR.—In the course of Lord Tomlin's address before the Canadian Bar Association, printed in this number of the REVIEW, the distinguished Judge says: "Affection for lawyers is not deep-rooted in the hearts of the laity, law-abiding though they may be." Our personal experience of the layman's attitude towards the legal profession does not accord with the view of the Right Honourable Lord Justice, although, of course, he may speak from knowledge gained in a field of another and quite different habit of mind—although we would be disinclined to think that England would provide a field of the sort. The greatest panegyrics on the law have been uttered by English laymen. In Canada the body of intelligent citizens value the law as the safeguard against anarchy, and commend and befriend the lawyer whose conduct responds to the ethical standards of his profession. No doubt there have been Canadians who were numbered among those of whom the old poet sung:

"No man e'er felt the halter draw
"With good opinion of the law."

But when they were alive they were not classed among "law-abiding" citizens.

Perhaps the best test of the appreciation accorded to our lawyers by laymen inheres in the fact that we find so many of them in our legislatures. It is no answer to say that lawyers persistently seek the suffrages of the electors; they would seek in vain unless the law-abiding voter entertained the belief that probity went hand in hand with the lawyer's intellectual ability to answer the rigorous demands of public life.

THE EDITOR.