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OF JUDICATURE : A DIALOGUE

AUTHOR'S APOLOGIA: Readers of the *Canadian Bar Review* could not fail to respond to the stimulus of the article, "Concerning Lawyers", with which the Editor confronted us in the April issue of 1941. The pulse of its vitality continues to animate our meditative interludes. But its purpose can only be achieved by following those challenging lines of thought into particular fields of self-examination and reform. Yes, reform! So trite a word, for so great an experience! "Lawyers" is a comprehensive classification: within it is the distinct sub-division, "judges"; something needs to be said to lawyers concerning judges.

MINOR: O, Magnus, you have come most opportunely; we have been talking of judges: whether our present discontent with Ontario judicature is attributable to failure of particular judges or to the system under which they are appointed or to the general principles and methods of legal education. Will you tell us whether, in earlier times, this province has been better served by its judges than it now seems to be.

MAGNUS: I hope, dear Minor, I may not fall into the easy error of comparing our contemporaries with what we think was the quality of their predecessors. We know too little of the latter; even our biographical record is very sparse; and how can anyone know how other men would have served our time and generation.

MINOR: How then shall we judge the merit of a judge? The judge seldom, if ever, sees himself truly; the mirror into which he looks (usually, the faces of his wife and his intimate friends) distorts the image. It is difficult, even for lawyers, to realize that their colleagues do not change character or natural endowment or acquire some new quality or skill upon assuming judicial office. As for public opinion, an atmosphere surrounds a judge which refracts the line of popular vision, so that the observer sees his ideal, rather than the actual person in the judge's seat. How then may we know him?

MAGNUS: Obviously, only objectively, by his reported judgments. These present a more open and enduring record than does the work of some other professions. Neither the physician, the cleric, the lawyer nor the undertaker is subject to such scrutiny or review as is the judge. He is more like the architect or engineer, whose work manifests him.

If one measures merit by the frequency with which reasons for judgment are cited as authorities in our courts to-day, there are few great names among our provincial judges of any period. We have not yet produced a Mansfield, a Jessel or a Macnaghten. Our legal biography may be deficient. And, of course, estimates of contemporaries are bound to be distorted by personal contacts.

But, if any period of our judicature is noteworthy, I would say that the earlier period of some judges now living is the brightest portion of the record. Consider the period 1905 to 1914, and mark whether the quality of Ontario lawyers has ever been so good as then. For, be it remembered, the judicature of any period depends upon the quality of the Bar as much as upon the quality of the Bench. On the Bench of that time, were Chief Justices Sir Charles Moss and Sir William Meredith, Chancellor Boyd and Chief Justice Falconbridge and Justices Osler, Anglin, Garrow, Meredith, Riddell and Middleton, and among the leaders of the Bar were Shepley, Aylesworth, Johnston, McCarthy, Nesbitt, Hellmuth, Bicknell, Moss, Rose, Armour, Gibbons, Watson, Cowan, Lynch-Staunton, Lefroy, Blackstock, Dewart, Rowell, Denison, Masten, Osler, Robertson, Henderson, Tilley, Cassels and McKay. Remember too, the service in statute and practice revision rendered by judges, 1909 to 1914, as a time when reform of statutes companioned intelligent service of the Common Law.

Perhaps our judicature might have excelled all prior attainment, if those men whose names are inscribed in the stone memorial of the Great Library, had lived to lead the Bar and Bench of the Province. There are found the names of Gibson, Hoyles, Kylie, Langstaff, and Moss, among others of notable lustre still in the eclipse of time. There was abundant promise of high quality in the performance already shown. The "lost generation" is a fact material to your enquiry. We have not yet regained for Ontario judicature, generally, its point of departure in 1914.

But, what, Minor, is this discontent to which your question refers?

MINOR: O Magnus, it is common talk among us that our judges are ill-instructed in the Common Law, and their decisions more unpredictable than our teachers promised in the hypothesis upon which all our legal education is based. Indeed, among ourselves, it is said the most successful advocates are those who, making no pretence to learning in the law, employ the predilections of personality, as a gull does the currents of variant air, so that without obvious effort other than shrewd adjustment of wing, they bring their causes home to success. We are concerned to know, O Magnus, whether this condition was ever so, and only our discovery of it is new to us or whether, in other times, the rule of decision was otherwise.

MAGNUS: If, O Minor, such disparagement of judges was among yourselves only, less injury would be done the cause of sound judicature thereby. But I have observed that what you say is common talk among lawyers is not so confined. In the offices of attorneys, clients who consider litigation are repeatedly warned that litigation is unpredictable in result. Whether it be the attorney's ignorance of the law, his preparation of an excuse for failure, or a lack of confidence in the judges, this uncertainty is so notorious that few men of affairs are now willing to submit important matters to adjudication; in consequence, litigation languishes and the service of the courts is a last desperate recourse of parties ill-conditioned to bear its risks. Very little remains among the profession or the public of that ideal of civil justice in which the courts are a convenient and satisfactory resort for settlement of disputes. Have not the lawyers themselves created the situation from which they also suffer by dissemination of such derogatory allegations respecting judges?

MINOR: You may, O Magnus, safely rebuke us as you have done, for we stand self-convicted of criticism; but you have not answered our question nor shown us how we can do otherwise than we have done if we would fulfil our duty to clients who must face the hazards of litigation. Our first duty to clients is honesty and frankness and if, among ourselves, such opinions prevail, those by whom we are employed as advocates or counsel must learn those opinions and be guided by them. Reassurance must come among lawyers before it can establish confidence among laymen.

MAGNUS: There, Minor, you do indeed put my argument in check, but before we discuss the facts and causes of judicial failure, you should examine how such discontent as you allege arises. Is not the disappointed party and his counsel always

discontented with an unfavourable decision? And does he not always regard his own defeat as a result, unpredictable in the beginning; how often is complaint against the Court the cover or excuse for his own defeat?

MINOR: No, Magnus, I cannot admit that that explains our present condition. Lawyers are sensitive in failure and do not over-advertise their own lost causes. Moreover, many lawyers, having lost their cause, distrust their own judgment of its merits, suspecting themselves of prejudice or bias. The discontent of which I speak has a wider base. It is expressed by lawyers who are disinterested observers of the causes of others and the conduct of judges therein who see honest claims defeated and fair advocacy overborne. These are many more than the causes of any single advocate and are the main basis of lawyers' opinions. I urge that there is sound reason for complaint.

If one reviews only the period within our common observation, must we not admit that judges represent a fair average quality of the profession from which they are drawn? It is not those best qualified for judicial office who are selected to fulfil it.

MAGNUS: That, Minor, is easier to explain than to remedy. It remains true, as heretofore, that the lawyers best qualified for judicial office do not seek it. This is because they understand better than others the responsibility of judicial office and the extraordinary qualities of mind and spirit with which a lawyer must be endowed if he is to be a good judge. Sensitiveness of perception is essential to distinguish truth from falsehood; keenness of analysis is required to separate the material considerations from the irrelevant; delicacy and patience condition all true courtesy. These qualities, rare in themselves, are usually associated with a conscience to which the responsibility of judging a fellow-man is a burden almost intolerable.

How much more onerous is the duty of the judge than that of the advocate! The advocate need undertake only such responsibilities as he wishes to assume. He may choose the client and the causes he will serve. He has only to do his best in his client's cause to be discharged of all responsibility. Hence, I say lawyers who perceive the true nature of judicial duty are reluctant to undertake it and do not seek the office. Nevertheless, for every appointment or vacancy the Minister receives scores of applications from lawyers who do seek the office and from their friends who recommend them. It is not surprising that appointments, made as they usually are from the list of aspirants, do not include the best judicial material

of the Bar. That is why I agree when you say that, with particular exceptions, we have a fair average of the quality of the Bar rather than its best in judicial office. But I believe this has always been so in our Province and I cannot encourage you to believe that other times were different from the present.

MINOR: Is it not unfortunate, Magnus, that we have no school for judges in Canada? I have learned that in certain jurisdictions appointments to the Bench are made only from lawyers qualified by special study and experience for the judicial function. Does it not seem that such preparation and the selection on merit after test of those best qualified to serve as judges is the more efficient manner in which to qualify judges for office? Why should we think that an office so important may be filled by such random methods as are now applied!

MAGNUS: There is much force in your suggestion but we have inherited our method of appointment of judges and have done very little to improve our inheritance. Yet in England, more bound by legal tradition than ourselves, more careful planning is applied to judicial appointments than in Canada. Of course salaries paid to judges in England give a wider range of selection but in general it is true in England that the office seeks the man. Not that this is by any means an assurance that it always finds the right or best man — often it does not; but at least the effort is made. Furthermore, a practice obtains there which we might well adopt. Lawyers are appointed judges *ad hoc* to take work outside London, on circuit, in substitution for regular judges and in this manner the quality of his judicial performance is tested and he, himself, afforded a taste of judicial duty. Your moderns might call it, "companionate marriage"; but it seems to have better results, or shall we say less hazard, than trial marriages. After such experiment, both Minister and lawyer can better decide whether the appointment should be offered or accepted.

Then, too, in England there is an advance planning in appointment of judges which we in Canada seem to omit. The appointment of the present Master of the Rolls is a case in point. The Presidency of the Court of Appeal fell vacant and Mr. Wilfred Greene, then at the height of his career at the Bar, was thought best qualified for the post, though he lacked any judicial experience. He was asked to leave his practice, said to be the most remunerative in the Kingdom, to undertake judicial office; he agreed to do so. Lord Wright, a member of the House of Lords and Judicial Committee, was asked to fill the office

temporarily while Mr. Greene prepared himself for such responsibility by sitting as a member of the Court of Appeal. In due course, Sir Wilfred was appointed to his present high office and Lord Wright returned to his work in the House of Lords. Certain aspects of this example might be difficult to reproduce in Canada, but it is perhaps sufficient to illustrate the point that careful planning for the organization of personnel in our courts rather than selection of one from a list of aspirants is the better method of providing for sound judicature, than which no department of government is more important.

MINOR: But would not the promotion of judges from junior to senior responsibility give assurance of selection of the best material for the more important judicial posts?

MAGNUS: Alas, Minor, have you not observed that in matters of personality there is no rule or formula by which one attains a desired result with certainty? High expectations are sometimes disappointed and unsuspected excellence is only discovered by opportunity of demonstration. Nevertheless, one should find that method or rule of procedure which in the long run and over many cases may be expected to achieve the best results, even in a field of such uncertain response to formula. But in the principle of promotion of judges there are inherent weaknesses. It is only natural that, in such a system, seniority of appointment comes to weigh so heavily in the scale that it is increasingly difficult to depart from such a rule of thumb to obtain recognition of real merit. Moreover, in regard to the independence of judges, which is the only firm foundation of sound judicature, hope of favour is as dangerous as insecurity of tenure. It is of the essence of judicial duty that it should be performed as regardless of hope of promotion as it is free from fear for tenure of office. It is the glory and pride of our judicial system that independence of judges has been established. This is one of the greatest of our inheritances from England, the Mother of the Common Law, and this at least must be maintained unimpaired if we pursue the destiny of a free people. In the natural course, work well done brings more work to do and responsibility well discharged opens the way to higher responsibility. With this process none would wish to interfere but it can operate apart from any rule as to promotion of judges or any limitation of the appointing power.

MINOR: But, Magnus, do you not see how the Court of Old Men outstays its welcome and the angel of death withholds his stroke? Is it not a scandal that by such persistence judges

grown old in service not only bring impaired intellectual powers to the service of judicature but also deprive lawyers of the next generation of the responsibility of judicial office who would be better qualified by age and capacity to fulfil that function?

MAGNUS: Well, Minor, once more I warn you against generalization in dealing with personalities. There are, of course, cases in which advancing age impairs the faculties, especially memory and physical energy, and for such cases adequate provision for retirement is essential. Nevertheless, in this as in other aspects of the subject, one must walk warily and without preconception in particular cases. "An old man does not do what young men do; but he may do better and greater things." Judgment is particularly a matter in which old men excel. Have you found among younger judges any who in wisdom, discrimination and steadiness can match these veterans? You have observed these younger judges with whom, perhaps too hastily, you would replace aged councillors. Have you found their judgments sounder, their perspicacity more keen, their diligence more eager or their learning and intelligence more profound? I think not.

Much has been made in recent years in industry, in finance, in education and in politics, of youth in leadership. Look around you and see the consequences — are they what you hoped for? I think not. Finance, confused and unprincipled, industry, unsteady and inexperienced, education, misled by untried theory, and politics betrayed by the rash — are not these the fruits of the time and the methods? I say with the orator of ancient Rome that if you read the history of nations you will find that states have been undermined by young men, restored and maintained by old men. "Say, how lost you so great a state so soon?" to which the answer comes, "A brood came of new leaders, foolish striplings." Vigour and rashness indeed belong to youth, but judgment and prudence to age. If the angel of whom you have spoken should swing wide his scythe, I sorrow to think of the prospect of succession. I think you would be hard put to it to maintain the excellence of that Court, especially when, as now, your best lawyers are reluctant or unwilling to leave the excitement and the rewards of the Bar for the laborious duty and inadequate remuneration of the Bench.

MINOR: In this respect, O Magnus, I know your speech is supported by authority which centuries of scholarship have approved, but surely there is still within your principle some-

thing useful to be done to make retirement easy for those whose best work is done. If the judges' pension provision were sufficient, a judge might willingly retire while he was still able to employ his leisure thus obtained in study and writing from which great benefit might accrue to the profession and his own days be extended in happy industry.

MAGNUS: Yes, Minor, but there is another consideration besides the financial which affects this matter. When you are as old as I, it will be plain to you that release from labour and responsible duty is not always desired by one habituated to steady employment. Such release is actually a prohibition from all that is normal and regular in the daily routine of many years. Old men dread this break with what is familiar; fear suggests to the mind that lack of occupation or responsibility shortens life or that one does not long survive the interruption of an accustomed regimen. Such fear holds many men in the office, the pulpit, on the Bench and in the teacher's chair beyond the natural limits of physical powers if no *vis major* overrules their wills. No doubt it is desirable that a statutory limit to the term of service should be imposed with adequate pension arrangements, so that a judge may plan while still in office how he will happily employ in fruitful labour those faculties and that rich experience which then remain.

But now, Minor, I have submitted to your questions, founded upon an allegation of discontent without challenge of your assumption. Perhaps you will not think me unsympathetic if I ask you to state with some particularity the nature of the complaints giving rise to the discontent you have alleged.

MINOR: That is indeed, O Magnus, a fair challenge which I am glad to answer if you will remember that I admit particular exceptions to all generalities, but still seek to generalize where generality may be imprudent. The following seem to be the principal points of dissatisfaction:

First: The inability or unwillingness of judges to listen understandingly and sympathetically to the pleas of both parties to an issue before forming their opinions. Long ago it was said,

> Patience and gravity of hearing is an essential part of justice and an overspeaking judge is no well-tuned cymbal. It is no grace in a judge first to find what he might have heard in due time from the bar or to show quickness of conceit in cutting off evidence or counsel too short.

It seems this rule of propriety was lost in time, for now the wheels must turn rapidly whatever the quality of the meal they grind. The grace of patience to hear and consider (not merely to endure) is too rare.

Second: Failure of the judge to apprehend the importance to litigants of the questions in issue before him or to satisfy the parties that he comprehended them. Justice should be seen to be done as well as done. It is as if the cause were not a search by the parties for ultimate truth and justice, but rather a game which mercenaries are employed to play according to intricate rules incapable of being understood by the original parties.

> Such be the double verdicts favoured here
> Which send away both parties to a suit
> Nor puffed up nor cast down,—for each a crumb
> Of right, for neither of them the whole loaf.

Third: Lack of understanding of the rules of evidence resulting in acceptance, "subject to objection", of irrelevant and unproved allegations, with the easy but false assurance by the judge that he will not be influenced by such testimony. Under this loose practice nothing is too absurd, malicious or irrelevant to be heard by the Court so that the decision when rendered is an integer of the irrelevancies by which the issue is confused.

Fourth: Lack in the judge of discrimination in the use and relevance of authorities; the acceptance as authoritative of words uttered in other cases which sound appropriate to his purpose, irrespective of their original context or the facts to which they relate.

Fifth: Willingness to ignore or discredit facts inconvenient or prejudicial to a decision he is resolved to make and shoring-up a decision by biased statements or selected facts, so found as to prejudice appeal, and omitting reference to arguments and authorities relied upon by the party against whom the decision is rendered.

Sixth: Failure to distinguish between counsel and clients so that the cause, badly presented, suffers as little as possible from prejudice thereby. Or, as has been said,

> So when there appeareth on either side . . . great counsel . . . then is the virtue of a judge seen, to make inequality equal.

Seventh: A willingness to please what may seem a popular opinion without too close an examination of legal principle,

forgetting or rejecting the rule that only what is right is also expedient.

Eighth: Or, to sum up the charge in one all-embracing count, the absence of a philosophy of justice which sees the present in due relation to all that has gone before, but sees history and tradition not as a fetter binding the future to an unchangeable past, but as an inspiration to that progress and development which is dependent on the eager spirit of the ageless pioneer.

MAGNUS: Well, Minor, you have presented a formidable catalogue of complaints. An indictment is of little weight without evidence and some of these counts require proof. Before we examine them, we can perhaps agree that not all of these items are fairly chargeable to all our judges, as indeed you have stated in your opening sentence. I think of one at least who stands, *sans peur et sans reproche*, exhibiting none of these faults, at least one who in character and judicial quality is like the topmost mountain peak clear in the sunlight above the clouds that obscure the the lower range, to whom *noblesse oblige* is a practical rule of life, one whom all lawyers regard with respect and affection as unstinted as it is spontaneous and unsought — the Chief Justice of the High Court.

MINOR: Yes, Magnus, I am glad you have said what is always in our minds in regard to one who is both a great lawyer and a just judge, but avoiding other personal references, can you say in respect of the foregoing enumerations whether our present condition is better or worse than in other times?

MAGNUS: Before I undertake to do that, consider that count in your indictment which concerns the adjustment of decision to please a popular view; it is number seven. I am not able to say that this does not occur. Indeed I have heard seriously propounded among the judges a theory that judicature must in general recommend itself to the opinion of the democracy which it serves. In certain aspects or interpretations this theory is true and just, if one believes, as I do, in the essential rightness of democracy and one has faith in the virtues and intelligence of the common man. But if the theory means the modification of principle to meet what appears to be the popular view or the desired result, then of course it is to be condemned and rejected with all possible force of character. Many of our judges would do so. On this there is an example of noble oratory in Lord Mansfield's speech in the Court of King's Bench on the reversal of Mr. Wilke's outlawry. I mention it

because it is not often remembered and with the hope that you will read it as it is found in 4 Burrows Reports, 2562.

But, Minor, does not your last item in summary point the answer to your question as to the times? Judicature is an aspect of justice in individual and social relationships. The love and practice of justice is a manifestation of the quality of the times and is not severable from other critical elements in them. Among lawyers, judges are the few whom the forces at work in the general body raise to places of special authority and influence. They and their work are the expression of whatever forces operate in this segment of our social relationships. These forces belong to and are characteristic of the period.

They are the same forces which in other segments of our experience, during the post-war period from which we are slowly emerging, have produced the confusion of mind, the futility of effort and the mediocrity of attainment for which our generation will hereafter be distinguished. How could such forces, operating in our segment, produce anything different in quality than they have produced in the fields of literature, politics, education, religion and government, 1918—1939.

It is easier to see the qualities these forces lack than to define their content. They were not energized by an unquenchable love of justice in the souls of lawyers. Lacking also is the insight which identifies justice with final truth and righteousness not yet attained or comprehended. Lacking is any ideal of progress to substitute for the discredited theory of automatic evolution. Lacking is the sense of continuity and succession in the long line of prophets and adventurers who lighted the beacons of the Common Law. In short, lacking is a philosophy of life in the law. The symbol of justice which surmounts our Bench, the blindfolded goddess with the scales and sword, ought in such case to make way for that of "The Man with the Hoe", who, grubbing in the earth of petty causes, sees not the world around him, the light on the horizon, nor feels the divine plan in which his work is set. But we now know that that period has ended although the new period has not disclosed its character fully. The negative forces I have described cannot live in a world dominated by the spiritual dynamics of this new world struggle for the maintenance of the rule of law.

MINOR: But what law, Magnus?

MAGNUS: Why, the common law of justice for every man, for every people and for every nation.

MINOR: Well, Magnus, it seems you have outrun my complaint in the promise of your reply. But you leave me uncertain that you have not evaded the particulars of the bill by your general plea. My slower wit lags far behind your eloquence and your figures of speech may mislead rather than illumine. Do you mean that rediscovery of principle and spirit, and not change of personnel or formula, is required to repair the deficiencies of our judicature?

MAGNUS: Yes, the rediscovery of principle and spirit will bring change of personnel and methods. The judges are foci of energy generated in the general body of lawyers. This energy will find its appropriate poles of concentration and release when its strength is sufficient to compel release.

MINOR: But, Magnus, you seem to agree that our criticism is just, yet you do not show us how we shall obtain reform. You have not encouraged our belief that the fault is in the judges rather than ourselves. You have not said, "Give us new judges for old". You have not said that the olden times and men were better times and better men. Now, what new form or rule would set us in a better way.

MAGNUS: Yes, Minor, that is doubtless disappointing if you have supposed that these things of which you complain can ever be remedied by an edict. They are more fundamental than that; they are of the essence of jurisprudence and judicature; they are of the spirit and not of the form nor material. Undoubtedly these faults exist and they cry for reform.

MINOR: Then how shall we obtain reform?

MAGNUS: By your own efforts and conduct. In your complaint you have set your ideals of justice and judicature on a high and true plane. If you believe what you profess, think on these things and talk of them. Set yourself to see that in your own advocacy and counsel you conduct yourself as one having faith in his own ideal of justice and judicature. Believe in the judges, all of the judges, always. Of course, they may fail you, as you too will fail them, being not yet perfect. But only out of such effort and from such faith can we make progress toward the ideal.

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