

Articles — Articles

LAWYERS AND THE PUBLIC TODAY: CHALLENGE AND ANTIPHON¹

It is an honour to be allowed to address you this evening, an honour intensified by the distinction of those who have preceded me in delivering an address under the auspices of the Manitoba Law School Foundation. I come before you as a visiting English judge who has only once before been in Winnipeg, and then for a bare twenty-four hours in much colder weather; and now I am here for only three days. How, then, as a mere visitor, with such a woefully inadequate knowledge of Manitoba, can I say anything useful to you on the topic "Lawyers and the Public Today: Challenge and Antiphon"? What, indeed, is the challenge, and what is the antiphon or response to that challenge? Yet although my task is difficult, I must make the attempt. Human nature, I should have thought, is much the same throughout the Commonwealth, though with enough variation to make it even more interesting. There are strong links, too, between lawyers throughout the common law world. If, then, someone is going to look at how things are moving today between the public on the one hand and the legal profession on the other hand, it might as well be someone from the outside whose knowledge of local detail is slender but who has had the advantage of having seen how lawyers and the public get on together in other parts of the world. I doubt whether the problems differ much in essence, and so on that footing I shall make my attempt.

Where does one begin? My point of departure would be a basic proposition, namely, that a civilized and efficient state of the law is of the essence of civilization itself. If the laws are not good laws, or if the machinery of the law does not work well, then civilization itself is not worthy of the name. Suppose that all law were suddenly to be swept away; what then? Would there be a glorious free-for-all, or would there be a terrible free-for-all? The prospect is not altogether a novelty, for something like it happened in Arkansas in 1945. A statute was passed then, Act 17 of 1945, dealing with first and second class cities, and giving them certain rights to vacate public streets and alleys in the public interest. I accept that this does not sound a very promising place for a really revolutionary change in the law. However, the Act contained a most powerful section, section 8. This should have read:

"All laws and parts of laws in conflict herewith . . . are hereby repealed." In fact, three words were omitted, and so the section read: "All laws and parts of laws . . . are hereby repealed."

1. An edited version of the seventh annual Manitoba Law School Foundation Lecture delivered in Robson Hall at the University of Manitoba, on September 13, 1971; the full text is available on tape in the Archives of the Faculty of Law, University of Manitoba. Copyright R. E. Megarry, 1971, 1972.

I regret to say that two years later the Supreme Courts of Arkansas failed to take the statutory language very seriously, and in a single sentence in a judgment² in effect said that the words that were enacted did not really mean what they quite plainly said. It is not easy to imagine a state of affairs in which all law has been swept away. As Lord Buckmaster said, on his visit to this city for the annual meeting of the Canadian Bar Association in 1925, "You cannot without the influence of the law enable a mere group of sheds to become a great city throbbing with life."³ Our daily lives are all founded on an assumption that the law exists, and that it is fundamentally a reasonable body of law, reasonably enforced, whatever minor quirks there may be. Under this law we can all live out our daily lives, not too much interfered with by the law, and not too much at liberty to interfere with the lives of others.

That is my basic proposition. I do not think that I need say more about it. But it leads me to my subsidiary proposition, and it is this that I wish to discuss this evening. This proposition is that it is an essential of civilization that anyone who is in any difficulty concerning the law should be able to employ a lawyer, and know that he has someone skilled on his side. We must have that, for otherwise I do not think that we can call ourselves truly civilized. Yet the proposition, like most propositions, has its difficulties. "Able to employ a lawyer": what about the word "able"? "And know that he has someone skilled on his side": what about the word "know"? There are great difficulties there. And "on his side"; how far is a lawyer really on your side when you are in difficulties and go to him for help? Let me dissect that subsidiary proposition into those three elements of difficulty; and in so doing, I hope to cover most of the ground that I wish to put before you this evening.

"Able to employ a lawyer", then: is every citizen able to employ a lawyer? There are two limbs to that, the citizen's ability to employ the lawyer, on the one hand, and the lawyer's willingness to serve, on the other hand. There must be both, an able client and a willing lawyer. I begin with the client's ability.

A citizen's ability to employ a lawyer is primarily a matter of money. For this purpose, one may broadly divide people into three financial categories, the rich, the poor, and those who are neither. The rich pose no problem. Few of the rich find any difficulty in employing a lawyer, and few lawyers find much difficulty in accepting a rich client. Many a lawyer has gratefully received a rich client, and in due course has gratefully sent him an account with a few lovely figures on it, duly receiving in exchange a beautiful cheque. There is no problem with the rich.

2. *Cernauscas v Fletcher*, 201 S.W.2d. 999 at 1000 (1947), per McHaney J.

3. (1925) 10 *Proceedings of the Canadian Bar Association* 85. (For convenience, I have substituted "You cannot" for the "Nor can you" of the original).

Let me turn to the other extreme, the poor. That is a different matter; and yet in England today there is no real problem about them. This is due to the Legal Aid and Advice Act 1949, and the Legal Aid Acts 1960 and 1964; the Act of 1949 is the main Act, and the Acts of 1960 and 1964 were primarily concerned with making improvements to an already successful revolution in legal aid. How does the system work? England and Wales have a population of nearly 50 million, and rather over half that population is eligible for legal aid. That must embrace all the really poor, and a great many of the nearly poor. It is not all easy to translate English financial terms into Canadian financial terms, but I must try; for the legal system works on the basis of an assessment of financial means. This assessment is carried out according to a fairly elaborate system, in which a number of assets have to be disregarded. One of the most important of the "disregards" is the subject-matter of the dispute. You may be making a claim to property of considerable value, which you say is yours, so that if you are right you are a person of some means; yet it would be unfair to take it into account in assessing your means, since your claim to it might fail. It is therefore left out of account. Again, your house, up to a value of \$25,000 (after deducting any mortgage on it), and your furniture and clothes, are all disregarded. Allowances are made for the size of your family, and finally there emerge figures of your "disposable capital". Taking an average family man, and putting matters in Canadian terms, if his gross annual income is about \$10,000 and his disposable capital (after excluding the "disregards") is about \$2,500, he is at the top limit for getting legal aid.⁴

Legal aid, however, is by no means necessarily free legal aid. For some it is, for others it is not. An applicant makes his application, and if he is within the proper financial limits, his case is considered by a committee of lawyers. If the committee decides that he has reasonable prospects of success, he is given a legal aid certificate. This certificate specifies the applicant's "maximum contribution", a figure based on his means. The maximum contribution may be £10, or £50, or £150, or whatever is the figure appropriate to the applicant's means. The effect is that the applicant cannot be called upon to contribute more than the stated sum towards his costs of the litigation; the balance, so far as it is not recovered from the other side, is borne by the Legal Aid Fund. Furthermore, his maximum contribution is normally payable (if it has to be paid) by twelve monthly instalments, so that the burden is spread out. From the applicant's point of view, this system removes one of the greatest fears of litigation, namely, that the litigant does not know how much he is

4. I have assumed a man with a wife and three children; and I have taken a rate of exchange of about \$5.00 to £1, in an attempt to reflect comparative prices and the cost of living, though this may put the Canadian figures a little too high.

going to have to pay by way of costs. The legally aided litigant knows before he begins that his liability to his lawyers cannot exceed the figure stated as being his maximum contribution in his legal aid certificate. However, that is not the whole picture, for it covers only the legally aided litigant's own costs. If he loses, he may be ordered to pay some or all of the winner's costs. This liability will be assessed by the judge, but it is not to exceed a reasonable amount; and in considering this, the maximum contribution stated in the legal aid certificate is usually an important factor. If, as is often the case, the maximum contribution is stated to be Nil, then it will rarely be reasonable to make an order for anything more than nominal costs against the legally aided litigant.

What are the services that a legal aid certificate brings to the recipient? There is no State Legal Service, but instead the holder of the certificate can go to any firm of solicitors which has put itself down for the legal aid scheme for the type of work in question. That firm of solicitors can brief any barrister who has put himself down for the legal aid scheme. It is a matter of honour with the legal profession that the great majority of lawyers, both barristers and solicitors, should participate in the legal aid scheme. I do not know the exact figures, but I believe that over 80 per cent of the legal profession do legal aid work. The range of choice for the client is thus not far short of that available to the wealthy. Both the solicitors and the barristers charge their usual fees for the type of work in question. These are scrutinized by the appropriate taxing officer of the court, who disallows anything improper or excessive, and then in most cases 90 per cent of what remains is paid to the lawyers. There is in effect a ten per cent discount because the Legal Aid Fund is certain to pay the lawyers, whereas the same cannot be said of every ordinary client. Such a discount does not seem unreasonable.

That, then, is a very brief sketch of how the legal aid system works. One most important feature is that the client has the solicitor of his choice, and the client and the solicitor, putting their heads together, have the barrister of their choice. The whole scheme is organized and run by the legal profession through legal aid committees, usually comprising three or four solicitors and one barrister; and these committees consider each application in order to see that the case is not obviously hopeless. If it is, then legal aid will not be given. But if it has a fair running chance, then the client is entitled to have his day in court, and he should get as good a legal service from the profession as a rich man would. The Government comes into the scheme mainly for the purpose of feeding the legal aid fund: the State pays, the legal profession runs the scheme. For the twenty years or so that the scheme has been in full operation, the record is one of very considerable success, with relatively few criticisms.

With the rich and the poor (and sometimes not so poor) thus dealt with, what of the man in the middle? It is here that the picture in England is far from rosy. Let us suppose somebody who is just outside the legal aid financial limits, with a gross income of, say, \$11,000 a year. What is he to do if he is faced with the prospect of litigation against, perhaps, a powerful and wealthy corporation? The answer is that he must usually get his solicitor to get the best terms for him that he can. He is the man who is left out in the cold, the man who earns too much and yet too little. But those of his kind are not without hope. Over the years, the financial limits of the legal aid scheme have been extended by more than the fall in the value of money. In other words, today more people are within the legal aid limits than there were when the scheme began: the limits are creeping up. The day may yet come when more and more of the men in the middle are embraced by the wonderful certainty of knowing that their maximum contribution cannot exceed what is stated on their legal aid certificate. For them, it is this certainty rather than the prospect of having to pay a fairly substantial maximum contribution that really matters. But that day is not yet, and the man in the middle is the main flaw in the English picture. What the position is in Manitoba I know not: I report merely on England. But of the importance to a civilized life of the client's ability to have skilled legal assistance there can be no doubt.

I turn to the other limb of this first head, that of the lawyer's willingness to serve. This is the other side of this particular penny. Will lawyers take on as their clients those who are unpopular? Suppose a man who is widely disliked because of his violent politics, or because of the dreadful crimes that he is accused of, or his appalling record, or a dozen other things. He may be a despicable creature; lawyers do not fight to represent him but instead seek to avoid him. How far is it proper for a lawyer to say No to a prospective client? In England, there is a distinction between the two branches of the profession. The solicitor has a discretion. He has to have a discretion because he is usually in partnership, and his partners may have clients whose interests are in conflict with those of the would-be new client; and even a solicitor in practice without partners may have many long-term clients, and one or more of these may have conflicting interests. So the solicitor must have the right to refuse to take on a new client. But although he has this right, it is not generally considered honourable for him to refuse to accept a new client without some good reason. He will not say No merely because he does not like the look of the new client, or the length of his hair, or his politics, or his alleged crimes, or any of the other things that so often tend to build up a dislike between human and human. For the Bar, on the other hand, the position is even more simple. It is unprofessional conduct, the subject of complaint, for a barrister who is offered a proper fee to refuse to appear for

a client in a case of the type which the barrister is accustomed to conduct, unless there is some good reason. Conflict of interest with other clients is rare: the barrister is employed for each particular case and does not have long-term clients in the way that solicitors do. Of course, the work must be of the type that the barrister normally does. This is in the interests of everybody. A Chancery barrister, an expert in matters such as trusts and wills, or perhaps company law, could not be expected to appear in a murder trial at the Old Bailey. But if somebody wants to be defended by a criminal barrister (you will know what I mean), then if that barrister is physically able to appear and he is offered a proper fee, it is his duty to accept the brief for the defence, no matter what his feelings may be about his proposed client.

Those, then, are the two sides of the first penny of civilization, the ability to employ a lawyer. I turn from that to the second part of the proposition. It is essential to a civilized society that anyone in trouble should know that the lawyer that he has gone to is on his side. You must be able to go to your lawyer, tell him your troubles and problems, and know and believe that even though he may not agree with the course that you are taking and think it unwise, and even though he advises you against it and finds his advice rejected, nevertheless he will be on your side and do the best that he can to get for you what you want, within the limits of propriety. Now how far is this a part of the system as it actually works today? Largely, of course, to "know" is, and must be, a matter of faith. It is impossible for the lay client to have visible proof of how far his lawyer is really on his side, and how far he has striven to achieve the desired result. Much of what a lawyer does is done behind the scenes, in the privacy of his office or chambers. Suppose that your lawyer tells you that your case involves a difficult problem. How can you know just how difficult that problem is, or how long your lawyer has spent trying to solve it? Has he merely taken a perfunctory look at it, said to himself "This looks tricky", and then gone into court hoping for the best? Or has he spent days and nights and week-ends exploring every avenue, reading cases and statutes and law review articles, and following up a score of leads that looked promising and turned out hopeless? What has he done? You cannot know. It is a matter of faith; it must be a matter of faith. And so I turn to the question of what it is that builds up this element of faith.

Years ago I remember seeing in an American periodical (it may have been the *Readers' Digest*) a story of a somewhat unusual vacation taken by two young radio engineers. They had a radio shop of their own, and they took with them a radio set in perfect working order. They disconnected one of the leads to the loudspeaker so that the set would not utter a sound. They then toured a number of radio shops with this set.

playing the innocents. They took the set into a shop and asked to have it repaired. The shop assistant would then look at the inside of the set, and then say something to the two young men; and they tabulated these pronouncements. I wish that I could remember the percentages; I wish even more that I had the article; but I well remember that it was illuminating. In something like 10 or 15 per cent of the cases, the assistant said at once "Oh, you've got a lead disconnected", restored the lead to its proper position, screwed on the back of the set, and answered the question "What do we owe you?" with "You're welcome". The next 15 or 20 per cent did much the same, but charged a dollar, I suppose on the footing that nobody could touch a screwdriver for less. After those two honest categories, there was a progressive scale down the hill until one reached the real rogues who said that the transformer was burnt out and the set needed new tubes, and that this would be at least \$45.00 but might be much more. No doubt many of you have little knowledge of the working of your radio sets, and simply have to trust your repairer to be honest with you. In the same way clients have to trust their lawyers. Whether they really do depends partly on their impression of the particular lawyer and partly on their impression of the legal profession as a whole.

This impression of the legal profession as a whole seems to me to be a matter of high importance, not only to lawyers but also to society in general. The profession builds up faith or it builds up distrust; and this is done not so much by remarkable performances in important trials, but far more by the way in which lawyers live their daily lives. It is as much, or more, by all the little things that a lawyer does and says each day of his life to all the people that he is in contact with, than by the more formal part of his life when performing his lawyerlike functions, that feelings of faith and trust are built up in others. Gradually the impression is built up that A and B and C are persons of integrity and trustworthiness on whom reliance may be placed; and at the same time the impression is being formed that D and E and F are not in the same class. I do not know how far down the alphabet one has to go; but that there is an alphabet I do not doubt. A realisation of this, an appreciation that in one sense a lawyer is never really off duty, is, I think, one of the essentials for any society of lawyers in any community. Today, this is more important than it has ever been. These are days of instability, of cynicism, of sneers and of trying to "take the mickey" out of everyone and everything; and it is all too easy for members of the public to say and think that lawyers are in the law merely for what they can get out of it. The idea of lawyers being in the law and in the society of today for what they can put into it more than what they can take out of it is one that does not command easy acceptance. Today, more than ever, it is of importance

both to lawyers in particular and to society in general that there should be an image of the profession in the public eye that is not only clear but also right. The less worthy members of the profession will always be with us; but at least we can do whatever is possible to curb their activities and their influence. The profession of the law must stand and go on standing as a rock of reliability in a shifting world.

I say "profession"; yet familiar though that word is, it is not one which readily lends itself to definition. If one looks in the books, one may find some sort of description of the essentials of a profession. There must be a body of knowledge, or art; there must be some educational process; there must be some standard of professional qualification, duly enforced; there must be some standards of conduct, duly enforced; there must be some recognition of status by colleagues and the State; and there must be some form of professional organization. These together provide the formal badges of what is a profession; and they do duty for all professions save the oldest. But there is something more, something to which the books seem to pay far too little attention, and something which is of especial significance to the legal profession. There are two aspects, and together they seem to me to be far more important than the formal badges. The first is that the life led by any member of a profession, and especially the lawyer, is essentially a vicarious life. The second is that of the brotherhood of the professions, and especially the legal profession. Need I add that as anything masculine embraces anything feminine, the brotherhood is of all lawyers, whatever their sex?

A lawyer's life, then, is a vicarious life. He lives and works not for himself but for his clients. He must do all that he properly can for his clients. He is not in trade, business, industry or commerce, trying to make the biggest possible profit for himself. He is there to serve his fellow men by doing the best for them that he properly can. It is in this way that he earns his livelihood; and of course the better he does his job the more likely it is that adequate financial rewards (and perhaps more) will pour in upon him. But the essential thrust of his life is that of the interests of his clients. I do not think the point has been put better than by Dr. Johnson in about 1778:⁵

"A lawyer is to do for his client all that his client might fairly do for himself, if he could."

You will notice the word "fairly"; to that word I must return later.⁶

5. Boswell, *A Journal of a Tour to the Hebrides* (ed. 1888) p.212.

6. Its absence mars Lord Macmillan's formulation, namely, that it is an advocate's business to present to the court "all that his client would have said for himself if he had possessed the requisite skill and knowledge" (*The Ethics of Advocacy* (in *Law and Other Things* (1937) p.181)).

This vicarious mode of life is the great river that the law student has to cross when he leaves law school and goes out into the practice of the law. I am not saying that there are no other rivers for him to cross; there are many. Law as taught and law as practised are by no means the same animals.⁷ But the greatest of the rivers is that of the life vicarious. Over the last ten years or so, with the spread of permissive ideas, and not least in the universities, this great river has become broader. Look at the law student who has just graduated and is entering upon articles. Yesterday he was a happy, carefree, irresponsible and selfish person. He was essentially selfish because he had to be selfish. He was engaged in the immense task of turning an ordinary human being into a lawyer. He had to concentrate upon himself, understanding how the rich complexities of the law worked, seeing how it all related to the other parts of itself. There was, of course, a blot on his otherwise carefree life, in that he could never forget that in due time he would be required to satisfy the examiners. But subject to that, the law student was carefree and selfish. Today he is in a law office, whether serving his articles or as a young lawyer; and at once he has to wrench the focus of his thoughts from himself to his firm's clients. The selfish must become selfless. If as a student he irresponsibly failed to do the work that he was supposed to do, his failure would recoil upon his own head alone; now it will recoil on his client's head as well. The change on passing from the law school to the law office is sudden, drastic, and dramatic; the happy, carefree, irresponsible and selfish creature must at a blow become staid, sober, responsible and selfless.

So many things change. No doubt the law student plays his full part in all those happy exchanges of gossip and scandal which make life more interesting. Law students, after all, are still human beings. Yet when he gets into the law office, he begins to hear all sorts of hitherto unsuspected things. Did Dr. Jones and Mrs. Smith really . . . ? Who would have thought that Company X would get into such difficulties and be on the point of being bought up by Company Y? And so on. Society and the newspapers would be all agog at the news about Dr. Jones and Mrs. Smith, and tremors would pass through the Stock Exchange at any whisper about Companies X and Y; yet the former law student will have shed his former freedom of speech, and hug to his bosom all that he has heard in the office. Not by the tremor of an eyelid will he reveal to anyone outside that he has ever heard of Dr. Jones, Mrs. Smith or either of the companies. The sacred bonds of an inviolable professional secrecy have descended upon him the moment that he entered the doors of his law office. Rumours affecting a client are to be listened to and reported

7. See my *Law as Taught and Law as Practised* (1966) 9 *Journal of the Society of Public Teachers of Law* (N.S.) 176.

within the firm but never passed on outside. There is a complete reliability of deed and speech, too. The ex-student never says that he has done something unless he really has done it, in truth and in substance; there is no attempt to wrap something up in an evasive answer that seeks to mislead without an actual falsehood. There is complete frankness within the office, however much there may be politic speech outside. I sometimes wonder whether the magnitude of the transformation is fully realised by those about to graduate, or whether practising lawyers really appreciate the burden that lies on the new recruits, and do enough to help them at this vital stage of their career.

The brotherhood of the law is a different matter. This is something which laymen often fail to understand and appreciate. They see opposing barristers in court, saying most unkind things about each other's pleadings and clients, and then the midday adjournment comes. Off go the barristers together; they sit at the same table, and may be seen conversing pleasantly together, and laughing. Is it to be wondered that some laymen think bitterly that this shows that the legal profession is a "carve up," and that their lawyers are engaged on selling out to each other? The laymen want the lawyers to fight, not to laugh in unison. There are many other things, too. In England, there is a rigid convention that any member of the Bar will always call any other member of the Bar by his surname, with no "Mr.," unless, indeed, they are on first-name terms. If the most recent recruit, called only yesterday, is speaking to a most distinguished Q.C. of over thirty years standing at the Bar, they will be "Jones" and "Smith" to each other from their first meeting. It is a small matter; but it counts. Nor will they shake hands with each other. All are brothers at the Bar, and they no more shake hands with each other than would blood brothers coming down to breakfast together in the morning. If there is a procession of people into a Q.C.'s room for a consultation, he will shake hands with the solicitor, the lay client, the expert witness and any others, but not with the junior barrister who is in the case with him; for the junior, there is merely a friendly nod of the head and "Hullo, Jones", even if the silk has never seen him before. These are small things. But they all remind us of the brotherhood of the Bar, and help to make the practice of the law a civilized process.

I return, then, to civilization once again. It is vital to maintain to the full the standards of decency and fairness and friendliness in the daily administration of the law. We live in civilized communities, not in jungles. The mark of the tiger should not appear on any lawyer. It is essential for the good of the community as well as that of the profession that these standards of honour and decency should be cherished and maintained to the full. It is not enough that the tiny trickle of rogues to be found in any profession should be uprooted. Surgery is for the extreme

case. What matters even more is the maintenance of the standards by all these things, both great and small, which contribute in our daily lives to the realization that the law is an honourable profession, to be practised vigorously but with decency and fairness. The law is no place for shabby little tricks; and to stand high in the estimation of his fellows is and always should be one of the greatest rewards that any lawyer can hope to claim.

I come to the third element, that of the citizen knowing that in his lawyer he has someone skilled "on his side". Again there are difficulties for the layman. I have already mentioned Dr. Johnson's proposition, and I now turn to the word "fairly" that it contains; the lawyer is to do for his client "all that his client might fairly do for himself, if he could." It is the word "fairly" that brings in the lawyer's duty to the court and to the law itself. The lawyer's duty is towards his client, but this is subject to his paramount duty to the court. He must wholeheartedly advance the cause of his client, but always within the four corners of his overriding duty to the court. An advocate is no mere tool for his client, to do skillfully everything that his client wants done, regardless of fairness and honour. He has to work within the bounds of what is proper, and then within those bounds do all that he can for his client.

Let me take an instance. A lawyer goes into court to argue a case for the plaintiff, conscious that there is a relevant decision of the Court of Appeal which stands athwart his path on a vital point. He has his argument ready, in which he will attempt to distinguish that decision from the case that he has, but he is conscious that his grounds of distinction are somewhat tenuous. The lawyer makes his opening speech and calls his evidence; and he then listens to the evidence for the defendant and the speech for the defence, waiting to see how the defence put the argument based on the decision of the Court of Appeal, and how best to meet that argument. Slowly it dawns on the lawyer that neither the defence nor the judge seem to have heard of the decision of the Court of Appeal. What, then, does the lawyer do when the speech for the defence ends without any mention of the case? Does he too say nothing? After all, it was for the defence to cite to the court all the authorities that supported the case for the defence. Yet it would be unthinkable for the lawyer to remain silent; of course he must tell the court about the uncited case. If there is an authority fairly bearing on the point before the court, and it is not brought to the attention of the court by the other side, the lawyer's duty to the court requires him to cite the case to the court, and then, of course, his duty to his client requires him to do the best he can to persuade the court that the case does not apply to the facts of the case being argued. Could it possibly be right for the lawyer, knowing of the case, to stand silently by while the court makes a fool of itself by deliver-

ing a judgment which ignores a decision binding the court to reach a contrary decision? To clients to whom this ethical approach offers little attraction (and there are such), there are other considerations with a more earthy appeal. After a case has been decided without reference to a relevant decision of the Court of Appeal, somebody is likely to discover the decision. There will be an appeal, the appeal will succeed, and the victor in the court below will not only lose but also will probably have to pay the costs of both sides in both the trial and the appeal. There is a certain practical virtue in bringing the decision out at the trial. But it is not on such considerations that I rest the point; I rest it on the paramount duty that every lawyer owes to the court, and ultimately on the simple principle of doing what is right.

Again, suppose a lawyer goes into court and finds that the other side is not represented by a lawyer, but is appearing in person. What does the lawyer do then? Does he simply present his client's case and leave the litigant in person to flounder, with what help the judge can give him? That may not be great. No judge has at his finger tips all the law that there is on every subject, whereas the lawyer has looked up all the law, both for and against him, before coming to court. Again, the answer must be plain, when you reflect on it. The lawyer is under no duty to think up elaborate arguments or analogies for the other side, such as he has been constructing for his own argument. But he must at least call the attention of the court to any authorities or matters of fact which would help the other side and which a litigant in person might never know of or realize. All lawyers owe a duty to the court in the interests of justice according to law. Justice is not administered as if in a vacuum, with the advocates arguing and the judge giving his judgment, all in neat water-tight compartments. Justice is a composite process. Judge and lawyers join together in a series of discussions, with each contributing a quota of ideas; and if this is done properly, out of the process should arise justice according to law. If one side has no lawyer, the process cannot work as it should unless the lawyer who is there helps the judge to see what can be said on both sides, and not only on one.

From the client's point of view, this is apt to seem rather hard. He has employed a lawyer, and here is his lawyer citing a case against himself which the other side has been too lazy or incompetent to find, or putting forward an argument against himself just because the litigant on the other side has saved himself the expense of hiring a lawyer. The question "Whose side are you on?" springs to the client's lips when he sees his lawyer; and although sometimes the question remains unspoken, it is always likely to be there. It is because the lawyer's paramount duty to the court is so little known to the public that so much misunderstanding is generated.

Once one thinks about it, I doubt whether the public would have it otherwise. Even on a crude materialistic basis, the lawyer's code of honour sometimes works to the advantage of a particular client and not against him; without that code, his position might have been worse rather than better. But I am sure that you would base it on higher standards than mere materialism. Yet there have been strange oversights, even in high places. On November 8, 1864, a dinner was given in Middle Temple Hall in honour of M. Berryer, a great French lawyer of the day. One of the speeches was made by Lord Brougham, who had been Lord Chancellor some thirty years before. In that speech he said that the first great quality of an advocate was "to reckon everything subordinate to the interests of his client".⁸ Well, fortunately Sir Alexander Cockburn, the Lord Chief Justice, also spoke; and he put things right. He said that the advocate ought to use his arms "as a warrior, not as an assassin. He ought to uphold the interests of his clients *per fas*, but not *per nefas*. He ought to know how to reconcile the interests of his client with the eternal interests of truth and justice."⁹ To that there could be no answer.

The lawyer is thus bound by a high standard of honour in his practice of the law. Within the bounds of that standard he does the best that he can for his client. One result of this approach is that the judges place a heavy reliance upon the lawyers that appear before them. I would as readily take the word of any practising member of the Bar about anything that has occurred in the course of his practice as I would take the word of a bishop. The courts trust counsel, and the trust is not betrayed. Very occasionally there is someone about whom one feels certain reservations; but this is very much the rare exception.

These high standards bring with them certain difficulties. Drawing the line is sometimes far from easy. Perhaps I may give you two examples from the last two decades. The first was a case called *Tombling v Universal Bulb Co. Ltd.*,¹⁰ decided in 1951. In this, the plaintiff sued for damages for breach of an oral contract, and the defendant company denied that there ever was a contract. A Mr. Meikle was a witness of what happened at the interview at which the contract was alleged to have been made, and he gave evidence supporting the plaintiff. The plaintiff won. After judgment had been given, the defendant company discovered certain facts and applied for a new trial. The facts that were discovered, put shortly, were these. In 1938, and again in 1940, Mr. Meikle had been convicted of being drunk in charge of a car. Five days before the hearing, after pleading Not Guilty, he had been sent to prison for six months for the same offence. At his trial a doctor had given evidence

8. See also *ante*, n.6.

9. Earl of Selborne, *Memorials, Part I: Family and Personal* (1896), vol.2, p.473.

10. [1951] 2 T.L.R.289.

for the defence that in 1949 Mr. Meikle had spent five months in a mental hospital while he was in the early stages of general paralysis of the insane. At the hearing in *Tombling's Case*, Mr. Meikle had attended in plain clothes, with a warder in plain clothes as well. The first question put to him by counsel for the plaintiff elicited his full name, and then he was asked "Do you live at 96 Church Road, Stoneygate, Leicester?" He was next asked whether he was a qualified engineer, whether he had been a prison governor for five years, and whether he had later entered the employment of a particular company. To all of these questions the witness assented. The plaintiff's counsel knew that the witness had been brought from prison, but did not know the other facts that the defendant later discovered.

On those facts, the Court of Appeal was asked to order a new trial. Mr. Meikle had plainly been a witness of some importance at the trial, for in a sense he held the balance between the plaintiff in his assertion that a contract had been made, and the defendant company's representative in his assertion that no contract had been made; and the facts that had been discovered plainly threw some light on the weight that might be given to his evidence. Singleton L. J. would have ordered a new trial, but Somervell and Denning L.JJ. held that the application for a new trial should be dismissed. Denning L.J. said that there had been "nothing improper", and that "there is no duty on counsel to tell the judge that a witness comes from prison to give evidence, any more than there is to tell the judge that he has had previous convictions."¹¹ The duty of counsel to the court does not extend to requiring him to disclose to the court any frailties in his witnesses; and if the other side wish to make use of them, they must discover them in time for the trial.

Ten years later there were another case, which attracted much more attention. This was *Meek v Fleming*.¹² It arose out of the Guy Fawkes Night celebrations in Trafalgar Square in 1958. The plaintiff, Mr. Meek, was a press photographer; the defendant was a Chief Inspector in the Metropolitan Police. They had both been present in Trafalgar Square, and the defendant had arrested the plaintiff for obstructing the police in the execution of their duty. On this charge the plaintiff had been convicted and fined £5. The plaintiff considered that he had been wrongly arrested, and sued the defendant for damages for assault and false imprisonment. While the action was waiting to come on for trial, disciplinary proceedings were taken against the defendant in connection with another case. The defendant was found guilty of having arranged with a police constable for the constable to give evidence against a street

11. *Ibid.*, at p.297.

12. [1961] 2 Q.B.366.

bookmaker in place of the defendant, who in fact had arrested the bookmaker. For this, the defendant was reduced to the rank of sergeant. When *Meek v Fleming* came to trial and the defendant gave evidence, he was thus Chief Inspector Fleming no longer, but Sergeant Fleming. Of this, the plaintiff knew nothing.

The trial was by a judge and jury. All the police witnesses attended in uniform except the defendant, who was in plain clothes. Counsel for the defendant addressed his client throughout as "Mr. Fleming" and not "Sergeant Fleming;" and when the defendant began to give his evidence his counsel did not ask him the customary question of what his name and rank were. The judge, and counsel for the plaintiff, often addressed the defendant as "Inspector" or "Chief Inspector", or referred to him thus, without any correction being made by him or his counsel. In cross-examination, counsel for the plaintiff asked him:

"You are a chief inspector, and you have been in the force, you told us, since 1958?"

The defendant's reply was:

"Yes, that is true."

In his speeches, counsel for the defendant referred to the police as being responsible men, and spoke with commendation of police officers who had passed through the sieve and had been trained and had risen to any rank in the Metropolitan Police.

The result of the trial was that the plaintiff's claim failed and was dismissed. Later the facts about the defendant's reduction in rank were discovered by the plaintiff, who then applied for a new trial. Pearce, Willmer and Pearson L.JJ. were unanimous in holding that a new trial should be ordered. But there was another consequence of the application. Counsel for the defendant, a well-known Q.C., was brought before the Benchers of his Inn of Court on charges of professional misconduct at the trial. Two of the three charges were found proved, and the Q.C. was suspended from practice for three years. On appeal to the judges, the two convictions were in substance affirmed, but the period of suspension was reduced from three years to one year. The judges held that a three years' period of suspension was the maximum that in practice could properly be given, and that insufficient weight had been given to the Q.C.'s prompt assumption of full responsibility, his recognition that his conduct had been wrong, and the adverse publicity that he had received.¹³

13. See (1961) 105 S.J. 1041; (1962) 106 S.J.59.

Let me pause. There are the two cases; in one, there was nothing improper; in the other, there was professional misconduct. What are the distinctions? In *Meek v Fleming* the misconduct can be put under three heads. First, there were positive acts of deception. The defendant was addressed as "Mr." and not "Sergeant"; he was not asked his name and rank in the customary way; and there were the references to the responsible status of police officers. Second, there were acts of knowingly standing by while the court was deceiving itself by addressing the defendant as "Inspector" or "Chief Inspector". Third, there was the act of knowingly standing by while the defendant told a plain lie ("You are a chief inspector . . . ?" "Yes, that is true".) In *Tombling's Case*, on the other hand, nothing positive had been done in order to mislead. There was nothing more than the omission to reveal that the witness came from prison. There was apparently a discretionary practice for the warder bringing a prisoner to court to give evidence to be in plain clothes; at all events, this was not something that had been arranged by the lawyers. The majority in the Court of Appeal took the view that the question as to Mr. Meikle's address related to his permanent address, and was not a trick or intended to mislead, though Somervell L.J. said that it would have been better if this and the question referring to the witness's previous position as a prison governor had not been put.¹⁴

Well, there it is. The second case gave rise to much discussion, and there were some who thought that the Q.C. had been somewhat hardly treated for what was no more than an error of judgment in how far he could properly go in the interests of his client. Others said that the result was necessary and salutary in the interests of the law and the public. In this lecture I am not concerned to resolve these differing views; all that I seek to do is to illustrate the importance of the duty that the lawyer owes to the court, and the difficulty that there may be in drawing the line in the right place.

Time is marching on, and I must try to draw the threads together in what does not pretend to be more than the briefest of surveys of some of the salient features in the life of the law. To the public, I would say that it is vital to realize and remember that the profession of the law is an honourable profession, to be practised honourably. If at times this prevents a lawyer from doing something that his client, perhaps unworthily, wants to have done for him, the client should reflect, and after saying all that he wants to say, accept the judgment of his lawyer. He should remember, too, that on the other side there is also a lawyer, similarly bound in honour to his profession, and similarly refraining from soiling his hands with dishonour. Law is not a game, but it is also not a Mafia feud

14. See [1951] 2 T.L.R. at pp.293,298; contrast the views of Singleton L.J. at p.296.

or Borgia vendetta. Litigation is a contest governed by just rules which are observed not only visibly in court but also invisibly outside it, in the offices of the lawyers engaged in it.

To the legal profession I would say that, throughout the civilized world, today is a time of stress. We find ourselves surrounded by falling standards of morality on all hands. Our tasks have to be accomplished with the aid of staff and other assistance in which drooping standards of competence and reliability are all too visible. The changed attitudes of today, and not least the so-called permissive society, have created many new problems and have intensified many old problems. Some of the changed attitudes of today are changes very much for the better. The increased social awareness among students and others, with a very real solicitude for the poor, the sick and the oppressed, stands proudly on the credit side. Increased violence and destructiveness, and a strong upsurge in selfishness, stand all too prominently on the debit side. Amid these new and intensified problems one can see that there never has been a time when it has been more important for the legal profession to maintain to the full its standards of reliability, probity and integrity, and to serve the public with all its skill and responsibility. Law is a profession; indeed, a case may be made for saying that law is *the* profession. We must adhere more firmly than ever to the honourable standards that our ancestors have passed down to us. When we are accused of being "square" or "not with it", we should feel proud rather than ashamed. In the mouths of some, these terms become unintended accolades. In some important respects there is much virtue in being at least rectangular, and "from it" rather than "with it".

Being a lawyer is often tough; but it is thoroughly worth it. That is what I would try to say to students who find the law daunting. A practising lawyer leads an extended life. The law calls for everything that you have got, and everything that you can possibly give it. You lead a life in which the main thrust is that of seeing that those of your fellow men who are prudent enough to be your clients get their rights under the law. You live in an extraordinary atmosphere compounded of learning, logic, language, humanity, plain common-sense and a dozen other things besides, with always something new turning up; and you get paid for it. There could hardly be a better life than that. If your law school at times seems dull and remote from life, think of what lies beyond.

My time has run. The lawyer is an important part of the world today, and today we are all so much more dependent upon each other than was once the case. My thoughts turn towards my Inn, Lincoln's Inn, in the heart of London. There we have a custom which certainly goes back a century, and probably much more than that. Whenever news is received

that one of the Benchers of the Inn has died (they form the governing body of the Inn), the chapel bell is slowly tolled at about 12:30 p.m. Barristers who have not heard the news then sometimes send their clerk to find out who it is that has been gathered to his fathers. Recently it occurred to me to put two and two together. The famous Dr. John Donne was Preacher to the Inn from 1616 to 1622, and his *Devotions Upon Emergent Occasions* were first published in 1624. In these there occurs a passage that you will all know; and I now have some idea what may have prompted his thoughts. In modern spelling, the passage runs as follows. "No man is an island, entire of itself; every man is a piece of the continent, a part of the main; if a clod be washed away by the sea, Europe is the less, as well as if a promontory were, as well as if a manor of thy friend's or of thine own were; any man's death diminishes me, because I am involved in mankind; and therefore never send to know for whom the bell tolls; it tolls for thee."

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