The Legal Research Foundation Inc.

LECTURES ON ADVOCACY AND ETHICS IN THE SUPREME COURT

delivered by

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Foreword

When, early in 1977, I was invited to deliver this series of lectures, I accepted the invitation with almost indecent alacrity because I felt that I was bursting with the experience and knowledge accumulated (a lot of it the hard way) over the preceding 50 years. The problem was how to impart this knowledge and experience to students in such a way as to save them from some of the disastrous mistakes that I had made. I had no natural gifts for advocacy. Poor voice production, a halting delivery and a lack of the confidence necessary to ignore trivialities and concentrate on essentials made me an indifferent advocate. Eight years of practice as a barrister only, the last four years as a Queen's Counsel, taught me a good deal, but when I was appointed a judge at the end of 1962 I was no more than competent, and far from proficient, in the skills of advocacy. During the next 14 years on the Bench I was able to observe some of the best — and the worst — advocates at the Bar and I learnt then that really outstanding advocates are born, not made, but most can become adequate by avoiding elementary mistakes. My object in these lectures was, therefore, the limited one of trying to show how to avoid the mistakes.

The next problem was what to teach and how to do it. There are many fine books on the art of advocacy, but they all had two major drawbacks for my purposes. The first was that they were far too long to be compressed into five one-hour lectures, and the second that they did not apply to New Zealand conditions. In resolving this difficulty, I was greatly helped by the loan of the lecture notes of two of my predecessors, Sir Alfred North and Sir Trevor Henry. I decided that if I were able to compress the essential instruction into the available time, it would be impossible to deliver the lectures at a speed that would enable note-taking. In any event, continuous note-taking distracts the student from the substance of the lecture. For that reason, note-taking *during* the lectures was forbidden and *after* the lecture copies of these notes were distributed to provide a record for study. The result is that these notes were designed to be spoken, not read.

Instruction in the advocates' ethics suffer from the difficulty that there is no comprehensive code. The rules have evolved as occasion required rather than as the result of any conscious plan. To teach ethics as a number of individual rules seemed wrong to me because it encourages the belief that any conduct that is not expressly forbidden is permissible — which is the antithesis of ethical behaviour. In the search for a basic principle to which resort could be had in those circumstances not yet covered by an express rule, it was perhaps inevitable that, as a professed Christian and a traditional Anglican, I should find it in the Bible and the Book of Common Prayer.

Howick, 1979 *Nigel Wilson*

INTRODUCTION

Advocacy is the art of putting one's case in the most persuasive manner. More shortly, it is the art of persuasion. It involves the proper ascertainment and presentation of the relevant facts and principles of law, so arranged as to have their maximum impact on the mind of the tribunal with a view to attracting a favourable decision.

In this country, where the professions of barrister and solicitor have been fused almost from the beginning of organised law, the distinction of the functions of barrister and solicitor in the field of litigation which has been so clear in England has become blurred. In England it is the solicitor who (so to speak) prepares the arms and ammunition for the battle and the barrister who exercises his special skill in using them against the enemy. Here it is far more common for the barrister who will eventually conduct the case in Court to take the client's instructions, prepare the pleadings (the statement of claim or defence etc.), interview the witnesses and make a note of the evidence they can give (called a "proof" in England, but more commonly referred to here as a "brief"), arrange for their attendance at the trial, obtain discovery of documents and administer interrogatories, research the relevant law, set the case down for hearing and obtain a fixture. At that stage the English solicitor would deliver a brief (properly so called) to counsel. The brief would consist of a copy of the pleadings, the statements of witnesses, answers to interrogatories, copies of relevant documents and notes on the relevant law.

Scope of lectures: The lectures which I shall deliver will deal mainly with the work of the barrister from that stage, in cases in the Supreme Court. Another lecturer will deal with advocacy in the Magistrate's Court. Although advocacy, strictly speaking, relates to the presentation of the case in Court, I propose to enlarge the subject by including some advice and instruction on the proper preparation of a case for trial, because in my experience (both at the Bar and on the Bench) many cases are jeopardised by inadequate or inept work at that stage. It is probably true to say that the time effectively spent at the trial bears the same relationship to that profitably spent in preparation as the tip of an iceberg bears to the remainder.

These lectures, therefore, will deal with the following topics:

(1) Preparation for trial.
(2) Presentation of evidence (including examination-in-chief, cross-examination and re-examination of witnesses).
(3) Addresses.
(4) Interlocutory applications.
(5) The ethics of advocacy.
(6) The use of words and examples of advocacy.

1

PREPARATION FOR TRIAL

Classification: At this stage it is necessary to differentiate between cases in which the evidence is given orally and those in which it is given by affidavit. Cases in which no oral evidence is usually taken are still known as "banco" cases (a Middle English word referring to the bench on which the judges sit). Cases involving oral evidence used to be described as "nisi prius" but that term is rarely used today. It originally referred only to cases heard before a judge and jury when the judges travelled from London to the circuit towns, and derived from the words of the writ commanding the sheriff to summon citizens for jury service.

In this lecture I propose to discuss preparation for trial in the Supreme Court in (a) criminal trials, (b) civil trials and (c) banco hearings.

Criminal trials: Most of you will be engaged as counsel for the accused person, so I shall take that case first. (In the Supreme Court he is never referred to as "the defendant" — always as "the accused".)

Preparation for the defence of an accused person has one great advantage — the evidence against him is known because it is available to the defence in the form of either depositions or signed statements by the Crown witnesses taken or presented at the preliminary hearing in the Magistrate's Court. Your first task is to examine these carefully with a view to deciding whether *that* evidence (if accurate) constitutes prima facie proof of your client's guilt of the offence charged. If you consider that it does not you should file a notice of motion to the Court to discharge him under s.347 of the Crimes Act 1961. Such a discharge has the same effect as a verdict of acquittal *on that charge.* (The fact that the committing Magistrate or Justices must have found that a prima facie case had been made out is not a circumstance that weighs with the Court in deciding these applications.)

If a prima facie case has been made out, your next consideration should be whether the evidence adduced is admissible. If a vital link in the Crown case depends on evidence that is plainly inadmissible (such as hearsay) an application under s.347 is obviously warranted.

If you cannot get your client discharged by this means you should direct your attention to the extent to which it may be possible to contradict the Crown evidence by defence witnesses or to challenge it by cross-examination. This will involve interviewing witnesses and taking statements of the evidence they can give (and stick to) honestly. Wherever possible you should get them to sign their statements. A really vital but reluctant witness may have to be subpoenaed to ensure his presence at the trial.

With knowledge of the Crown case and the evidence available to meet it, you will then prepare notes for cross-examination of Crown witnesses and examination-in-chief of the defence witnesses, notes for your opening address, and notes on any question of law that seems likely to arise. Then,

and only then, are you prepared for trial. How you will arrange and present your argument in your addresses will be discussed when I deal with advocacy at the trial itself.

Preparation by prosecuting counsel is in some ways easier and in others more difficult than in the case of defending counsel. It is easier in that his evidence-in-chief has already been prepared in the shape of depositions or signed statements of the Crown witnesses, but he must carefully examine these and prepare an indictment charging those offences which this evidence will prove — not necessarily the same as those upon which the accused has been committed for trial. He must look for gaps in the chain of proof or absence of corroboration (where that is necessary), try to anticipate the defence and ascertain from the police officer concerned whether evidence will be available to make good deficiencies thus appearing. Notice of any such additional evidence must, of course, be given to the accused. The prosecuting counsel's task is more difficult in that he does not know in advance what evidence will be tendered for the accused.

Civil witness actions: In civil cases in which evidence is to be given orally there is little difference between the preparation required in jury actions and those before a judge alone, except that in jury actions you should secure a copy of the jury list and confer with your client regarding the likely sympathies of individual jurors so as to make the best use of the right of challenge. This also applies in criminal cases.

In preparing for the trial of a civil action in which the evidence is to be given orally your first step should be to make up for yourself the brief which an English solicitor would hand to counsel and which I have already described. To recapitulate, this consists of the pleadings (the statement of claim, statement of defence, counterclaim, third party notice and any defence thereto), statements of witnesses and answers to interrogatories, relevant documents held by your client and copies of those disclosed on discovery by the opposite party, and notes on the relevant law. It is also wise to include in your brief copies of the affidavits of documents.

After assembling your brief you should critically examine *your* pleading to ensure that you have properly pleaded all causes of action or all defences and all essential facts on which your client's claim or defence rests. If any really important omission or mistake is discovered it will be necessary (the case having been set down for trial) to apply to the Court for leave to amend. This should be done at once, and only if absolutely necessary because if leave is granted it will probably be on terms of payment of costs to the other side and removal of the action from the list, involving setting it down again and paying the very considerable fees incurred in doing so a second time — which will not please your client. If you are very lucky you may secure an adjournment and so save this expense. All this underlines the need to check your pleading before you sign a praecipe to set down for trial.

Having satisfied yourself that your pleading is in order the next step is to compare it with your opponent's. If they have been properly drawn this comparison will highlight the facts that are in dispute and therefore need to

be proved by evidence at the trial. From here you will proceed to check your documentary evidence and statements of witnesses to satisfy yourself that they cover all disputed facts. Any deficiencies revealed by this check you will do your best to make good; but there will be times when this final analysis will show you the need to confer with your client on the advisability of seeking (even at this late stage) a negotiated settlement. Where you need an important document which is held by the other party you should serve on him a notice to produce it at the trial. He is not obliged to comply with that notice but, having given it, you are then in a position to put in a copy of the document if it is not produced. If it is essential that the document itself be produced to the Court (for instance, to prove a signature or to prove an unauthorised alteration) you must issue a subpoena *duces tecum* to ensure that this will be done.

Issue and serve subpoenas to all necessary witnesses unless you are sure that they will attend voluntarily (in which case they must be informed by letter of the time and place of trial), prepare notes for your opening address and a list of legal authorities that you propose to cite, with copies for the Court and your opponent, and you are ready for trial.

It is obvious from what I have said that proper preparation cannot be left for the day before the trial. Whenever possible it should be done at least a week earlier.

Banco cases: These cases fall into two main classes: (1) appeals and (2) proceedings commenced by originating summons (e.g. under the Declaratory Judgments Act or the Family Protection Act), by originating motion (e.g. under the Matrimonial Property Act), by an application for ancillary relief under the Matrimonial Proceedings Act, or by petition under the Companies Act or the Insolvency Act. (Petitions under the Matrimonial Proceedings Act are normally decided on oral evidence and the advice I have given regarding preparation for witness actions applies *mutatis mutandis*.)

In the case of appeals the evidence recorded in the tribunal appealed from is (subject to certain exceptions set out in the relevant statute) treated as the evidence on the appeal. If you wish to have the evidence re-heard by the Supreme Court or to adduce additional evidence you must apply to the Court for an order to that effect, bringing your application within the statutory grounds, and if you succeed you will need to prepare for the hearing in the same way as in a witness action. If, however, you have to proceed on the evidence given in the tribunal appealed from your preparation will be limited to making notes for your address and a list of authorities. If your client is appealing against a decision of fact you will need to show that the evidence given did not really prove (to the appropriate standard) the allegation upheld by the tribunal appealed from. In this connection it must be borne in mind that an appellate Court should never substitute its own view of the credibility of witnesses for that of the tribunal that saw and heard them. Your preparation should be done in time for you to file in the Court two clear days before the date of hearing a memorandum of the propositions (known as Points on Appeal) that you propose to submit, with

appropriate reference to the legal authorities on which you rely.

In other banco cases the evidence is given by affidavit (or, where the facts are not in dispute, by an agreed statement of facts). If the facts are in dispute and you wish to cross-examine your opponent's witnesses on their affidavits you must give notice to your opponent requiring him to produce the witness at the hearing for that purpose, so it is necessary to reach an early decision on that point. My advice to you is to exercise this right to cross-examine very sparingly because if your cross-examination should prove unsuccessful your client will be faced with having to pay costs and witnesses' expenses. Before you give such a notice, therefore, you should consider (a) whether the disputed statement relates to an essential fact, (b) whether it is likely to be believed in spite of your witnesses' affidavits contradicting it, and (c) whether you are in possession of material which makes it probable that your cross-examination will succeed. Unless all these conditions are fulfilled it is unwise to cross-examine. Moreover, by giving notice you are liable to provoke a cross-notice from an opponent with a better chance of success than you have. There are few cross-examinations more futile or dangerous than one consisting of, or finishing with:

> "So, in spite of the affidavits to the contrary filed on behalf of my client, you adhere to your version?"

It is very likely to provoke a cool, steady stare from the witness and a firm, laconic "Yes" which boosts his credit with the Court.

In this class of banco case your preparation will normally consist of notes for your address and a list of authorities for the Court.

Conclusion: It is impossible to overestimate the value of thorough preparation for trial. It should enable you to see clearly what the real, crucial issues are, to appreciate the questions of law that will arise and to have the relevant principles of law firmly in your mind, with the supporting authorities at your finger tips, and to plan your general strategy at the trial with a flexibility that allows you room to manoeuvre when necessary.

I shall close on a theme which will recur throughout these lectures. It is this: Laying a firm foundation of *fact* is essential to an advocate's success. Principles of law do not change much and they are dependent on the facts for their application; but factual situations are infinitely various, so that knowing what they are and *proving* them is a pre-requisite to the application of legal principles. I have heard some very good legal arguments from inexperienced counsel which have failed for want of support from the evidence.

It is natural that after four or more years of studying the principles of law you should be conditioned to think them all-important. They are not. It is very rare indeed for a litigant to have acted so as to conform with a principle of law. He acts as he sees fit at the time and then enlists the services of a lawyer to justify in law what he has done. If you are to succeed in doing this you must find out all the relevant facts so that you can call in aid the appropriate principle of law.

2

PRESENTATION OF EVIDENCE

Introduction: In my last lecture I dealt with the very important topic of preparation for trial. I then stressed the need for adequate and timely preparation and attempted to show how this should be done and what it should cover. I concluded by emphasising the need for a thorough grasp of the issues (i.e. disputed matters) and the necessity for laying a solid foundation of fact.

This lecture will deal with the means by which the facts are put before the Court and how a skilful advocate adduces the evidence in the way best calculated to persuade the Court to give a decision favourable to his client. In witness actions this is done by examination, cross-examination and re-examination. In banco cases (other than appeals) it is done by way of affidavits.

It is timely to remind you that the keystone of our system of trials is the conviction that justice is best served by each side putting his case fearlessly, and in the best possible way, and then leaving it to the judge or the jury to decide after hearing addresses.

I shall deal first with the techniques involved when the evidence is given orally and secondly with evidence by affidavit.

Order of calling witnesses: Before I discuss how you should examine your own witnesses it is desirable to give some advice on the order in which you should call them. The rule is that the parties to a civil action and the accused in a criminal trial, must, if they are to give evidence at all, be called before their supporting witnesses. The reason for this is that they are entitled to remain in Court even when an order is made excluding witnesses and the purpose of such an order would be defeated if the accused or the party were to give his evidence after hearing what his witnesses had said. Even if no order excluding witnesses has been made, non-compliance with the rule invites adverse comment from your opponent and from the judge which may depreciate the value of the evidence. Moreover, the Court and jury reasonably expect to hear *first* from the person most concerned with the case and it is not good advocacy to disappoint that expectation unless for very good cause. If it is necessary to call another witness before the accused or the party, permission to do so should be obtained from the judge immediately after your opening address. In seeking this permission you will explain why the normal order has to be varied (such as the imminent departure overseas of the witness, or hospitalisation) and, if he is to give evidence corroborating evidence to be given by your client, it will help to disarm criticism in a civil action if you offer that your client will remain out of Court while the witness gives his evidence. If the evidence to be given by the witness deals with matters upon which your client cannot give evidence that should be stated. In a criminal trial, of course, the accused must be present throughout, so no offer to send him out of Court is possible.

In a civil action the plaintiff should always be called, even if only to depose that he has no relevant evidence to give, except in defamation actions where the onus of proof may render this unnecessary and his bad character renders it inadvisable to expose him to cross-examination. The case of the defendant is different. If he *can* give evidence that is relevant but may be vulnerable in cross-examination you will have to balance the risk of his being demolished by the cross-examination against the damage the case is likely to suffer from adverse comment on his failure to give evidence. In the criminal trial, of course, the accused is not a compellable witness and no comment on his failure to give evidence is allowed from anyone except the judge — and judges are properly very conservative in exercising this right. They may feel compelled to make the comment by savage attacks on the credibility of Crown witnesses in cross-examination, on a matter the truth of which is obviously known to the accused who elects to remain silent. When counsel press the Crown witnesses with questions such as "I put it to you (so and so)" but call no evidence that "so and so" was the case, the judge is bound to tell the jury that what counsel put to the witnesses was not evidence and, where this sort of questioning is carried to extreme, the judge may very well add, "If that were the case, the accused would know it; but he (as is his right) has chosen not to give evidence about it".

Subject to the rule that the accused or party who is giving evidence must be called first, counsel has a free hand as to the order in which he calls his witnesses. As a rule it is best to call them in the order in which the events to which they depose occurred, because that is the easiest for the tribunal to follow; but it is a good plan to keep an impressive witness until last, so as to finish on a high note, if possible.

Examination-in-chief: I take it that you are all well aware of the fundamental rule that you must not ask your own witness "leading" questions. In case you are in any doubt on what constitutes a "leading" question I shall define it for you. It is a question that suggests to the witness the answer he should give. Today, in order to save time, leading questions *are* allowed, as a rule, when the witness is giving evidence that is not in dispute — such as his name, address and occupation.

No doubt you also know the second fundamental rule — that you may not cross-examine your own witness. That means that if he gives you an answer that you don't like you cannot press him with other questions designed to show that his answer is incorrect. If he has made an honest slip, don't show dismay, but pass on to something else. It may have been nervousness that caused him to become confused and say something that he did not really mean, and if you give him time to settle down and come back to the topic later there is a good chance that he will himself correct the mistake. Then you can gently point out that he had previously given a different reply to a similar question and invite him to say which answer is correct. If, however, he really meant his unfavourable answer you are in trouble. If you have a statement signed by him in which he has said what you expected him to say in evidence you may ask the judge for leave to

treat him as hostile. In support of your request you should pass up to the judge his signed statement, drawing the judge's attention to the signature and to the relevant passage. If leave is given — as it usually is — you must hand the witness the statement and ask him to admit his signature to it. When he has done this you should ask him to read the passage contradicting the hostile answer. If he refuses you can say to him, "Does not that statement say ("so and so") ?". Having got him to admit that you can then say to him, "And is not that the truth?". If he admits that, then that is his sworn evidence. If he denies it, his evidence remains as he first gave it, but by this time the judge or the jury will probably have a low opinion of his credibility. On no account ask him why he has given different versions — his answer could go far to re-establish his credit. Your opponent will almost certainly ask the question. If he does, you can challenge the explanation in re-examination; but if you ask it you are stuck with his answer. If you are lucky you will have other (and more reliable) evidence on the point in question. If you have not, and you failed to get the witness to sign his statement in the course of your preparation for trial, your client will probably suffer for your failure.

It is a mistake to think that examination-in-chief is easy. To do it properly calls for considerable skill and a lot of preparation so that the evidence given will have the best possible impact on the tribunal. Some simple rules are applicable in all cases, bearing in mind that your object is to present the witness as an honest, reliable person and to bring out his evidence as clearly as possible and in an order that can be easily followed by the tribunal.

The first rule is to introduce your witness properly. This is usually done by a composite question — "Is your full name John Doe, do you live at 18 Paradise Parade, Pakuranga, and are you a fitter by occupation?", which is leading, but acceptable. If the witness is to give expert evidence you then invite him to give his qualifications in the particular field. If he is a party to the proceedings he should say so. If he is closely related to or on terms of close friendship with your client, bring this out at this stage. It may affect his standing with the tribunal but it is far better for you to bring out the relationship than to have it extracted in cross-examination. If the witness is nervous — and most of them are — try to help him gain confidence and composure by asking a few questions on a non-vital topic that he can answer easily. For example, invite him to explain how he came to be in a position to give his evidence.

The next rule is to get out his important evidence in the most effective order. In most cases this will be chronological order, because it is the easiest for the witness to adopt and for the tribunal to follow. This order should not be departed from in examination-in-chief except for the most compelling reasons.

The third rule is to keep your questions as short and as simple as possible. Long, complex questions are very likely to confuse the witness, and sometimes even the Court.

In what I have said so far I have assumed that you have a "proof" of your witness's evidence. The most difficult examination-in-chief that I ever

conducted was in a case where I was seeking specific performance of an oral contract made between my client and the solicitor and authorised agent of the other party. My client was dead when the case came to trial and the other party's solicitor had firmly, but politely, declined to give me a statement of the evidence that he could give or even discuss it with me. All I had was my dead client's proof of evidence (inadmissable, of course) and a few indecisive letters. I knew the solicitor to be a man of integrity, so I subpoenaed him and, with my opponent watching me like a hawk, I examined him in chief. I managed to do this without effective objection from my opponent, and so successfully that he settled as soon as the solicitor's evidence ended.

Cross-examination: The object of cross-examination is to destroy — or at least minimise — the effect of the evidence given by the other party's witness *in so far as it is detrimental to your case.* That qualification is important. The first decision to make after your opponent's witness has completed his evidence-in-chief is whether *any* cross-examination is necessary. Like matrimony, cross-examination should not be "enterprised, nor taken in hand, inadvisedly, lightly or wantonly" because, like that holy estate, it is full of hazards. Only the possession of decisive material or the skill and experience of an exceptional advocate offers any real confidence of a successful cross-examination, and a really unsuccessful cross-examination can do a lot of harm to your case by fortifying the witness's evidence.

The first rule, therefore, is — if you don't *have* to cross-examine, don't. A serene expression and a confident "No questions" will go some distance towards minimising the effect of the witness's evidence. But, more often than not, you will have to cross-examine either because the witness's evidence is vital and not to cross-examine him would be, in effect, to concede its truth, or the witness has given evidence (or is in a position to do so) contrary to that which will be given by your own witness. In the latter even it is *your duty* to put to the witness the conflicting version which your witness will give. If you do not you will not be allowed to adduce the conflicting evidence except on terms that the witness who could have contradicted it is recalled to do so.

How you cross-examine will depend on a number of considerations, such as the importance of the evidence that you must attack, the strength of the material in your possession to discomfort the witness, and your estimation of his honesty and reliability. An honest but mistaken witness can often be persuaded to correct his evidence when his mistake is firmly but politely pointed out whereas if he is attacked strongly he may become pig-headed. Most witnesses fall into this category, so it is good tactics to begin (at least) your cross-examination gently, suggesting the possibility of mistake rather than perjury in the light of the contrary evidence given or to be given by your witness.

The rule that you follow a chronological sequence in questioning your own witness emphatically does not apply in cross-examination. Letting the witness anticipate your questions is surrendering your best (and

sometimes only) weapon — surprise. Your object should be to keep him off balance by switching from topic to topic. If he is cunning and dishonest this is your only chance of success.

As the witness is being examined in chief you will have made notes of those parts of his evidence on which you must cross-examine. With the ordinary honest witness it pays to start your cross-examination by coaxing favourable answers from him whenever this seems most likely. I have found a quiet friendly approach (sometimes with a subtle touch of flattery) to be very effective to this end, and with a little bit of luck, by the time you come to the area of conflict, his fear and suspicion of you will have gone. With the cunning, dishonest witness, however, these tactics are seldom successful. If you are in a position to attack his credit, you should lose no time in doing so and then keep up the momentum of your attack by switching from topic to topic in the hope that he will drop his guard and enable you to deliver the coup-de-grace.

Perhaps the most difficult thing to learn about cross-examination is when and how to stop. Ideally this time arrives with the extraction of the admission which destroys the effect of his evidence in chief — but, alas, that rarely happens. In general you will have to be satisfied with adopting the principle of guerrilla warfare — break off the engagement as soon as the attack has lost impetus. Don't let it peter out and don't prolong it by fruitless questions just because you don't know *how* to stop. Try to end on a question which the witness cannot easily answer except in your client's favour, or which he will answer in a way that proclaims his bias. So you may retire with at least the appearance, if not the substance, of being ahead on points. At the end of this lecture I shall give you an example from Shakespeare of a most effective cross-examination.

Re-examination: The object of re-examination is to repair the damage done in cross-examination, and it *must* be restricted to matters raised in cross-examination. As in cross-examination the first consideration is, is it necessary? Perhaps the damage done is too trivial to worry about, or perhaps it is irreparable and attempts at repair would only highlight the damage. Perhaps no damage has been done. If you decide not to cross-examine the important thing is to conceal your dismay (if the worst has happened) from the Court and from your opponent by dismissing your unhappy witness with a warm smile and a hearty "Thank you, Mr Jones", just as if he had emerged with flying colours.

If there are fences to mend and you are confident that the damaging admission made by your witness was due to a slip or misunderstanding you should try to retrieve the situation by re-examination; but if it is clear that his answer in cross-examination represented what he really considered to be the truth re-examination will be useless and you must rely on other evidence (if you have any) to prove the fact in issue. If the witness has obviously changed his evidence dishonestly you may get leave to treat him as hostile by producing his signed statement, but probably it is wiser not to try and to write him off in your address as a witness who will agree with anyone.

It is necessary to remember that re-examination, besides being limited to matters raised in cross-examination, is subject to the same rules against leading questions and discrediting your own witness as examination-in-chief.

Evidence in undefended proceedings: This evidence includes evidence of character in mitigation of sentence and evidence in undefended actions where the rules do not allow judgment by default to be entered without a hearing. The most common example is the undefended divorce petition. Other common examples are the undefended bankruptcy and company winding-up petitions. In these cases the judges allow considerable latitude in the use of leading questions except with reference to proof of the statutory ground, in which the strict rules for examination-in-chief apply.

Evidence by affidavit: When the evidence in a case is given by affidavit it should be remembered that the affidavit is really the evidence-in-chief of the deponent, recorded and sworn before the hearing and it is governed by the same rules as to its admissability, such as the exclusion of hearsay and irrelevant evidence. The general rules are fortified by a special rule (R.185) of the Code of Civil Procedure which specifically requires that "affidavits shall be confined to such facts as the witness is able of his own knowledge to prove" and directs that the costs of affidavits which unnecessarily set forth matters of hearsay, or argumentative matter, shall be borne by the party who files it. This rule is more frequently infringed by inexperienced practitioners than any other in the Code, especially in proceedings involving domestic and family disputes.

A classical cross-examination: Now I come to the example of effective cross-examination given by Shakespeare, which I promised earlier in this lecture. Shakespeare was not a lawyer but, as the following passage from the Trial Scene in the Merchant of Venice shows, he had little to learn in the art of cross-examination. I expect that you are all familiar with this famous scene (Act IV Sc i), so I invite you to concentrate your attention on the superb technique with with Portia is vested, first gaining Shylock's confidence, then, by appealing in vain to his compassion, driving him to an excess of malicious cruelty that alienated the Court's sympathy, and finally springing the trap that destroys him utterly by constraining him to take flesh without spilling blood. (Lest any of you are attracted by the theory that this play was written by Bacon instead of Shakespeare, let me draw your attention to the fact that Portia, as a judge, had no business to be cross-examining anyone, and that it is a mistake that Bacon would not have made.)

The passage opens with Portia's introduction to the Duke and to the parties, followed by Antonio's confession of the bond and her invitation to Shylock to be merciful and, when he truculantly rejects the suggestion, her superb speech on the quality of mercy. It is a perfect example of the advocate's art — a two-pronged attack which, if it moves him, will achieve her end there and then but, if it does not, is the first step in showing him in his true colours — not as a business man collecting a debt, but as a

vengeance-crazed, would-be murderer. He thrusts aside Bassanio's offer to pay the debt many times over and Bassanio's plea to Portia to "bend the law" is sternly rejected by her, thereby earning the acclaim and confidence of Shylock. Slowly she moves towards her alternative goal —

Por. I pray you, let me look upon the bond.
Shy. Here 'tis, most reverend doctor, here it is.
Por. Shylock, there's thrice thy money offer'd thee.
Shy. An oath, an oath, I have an oath in heaven:
Shall I lay perjury upon my soul?
No, not for Venice.

Por. Why, this bond is forfeit;
And lawfully by this the Jew may claim
A pound of flesh, to be by him cut off
Nearest the merchant's heart. Be merciful:
Take thrice thy money; bid me tear the bond.

Shy. When it is paid according to the tenour.
It doth appear you are a worthy judge;
You know the law, your exposition
Hath been most sound: I charge you by the law,
Whereof you are a well-deserving pillar,
Proceed to judgement: by my soul I swear
There is no power in the tongue of man
To alter me: I stay here on my bond.
Ant. Most heartily I do beseech the court
To give the judgement.

Por. Why then, thus it is:
You must prepare your bosom for his knife.
Shy. O noble judge! O excellent young man!
Por. For the intent and purpose of the law
Hath full relation to the penalty,
Which here appeareth due upon the bond.
Shy. 'Tis very true: O wise and upright judge!
How much more elder art thou than thy looks!

Por. Therefore lay bare your bosom.
Shy. Ay, his breast:
So says the bond:—doth it not, noble judge?—
'Nearest his heart:' those are the very words.
Por. It is so. Are there balance here to weigh
The flesh?

Shy. I have them ready.
Por. Have by some surgeon, Shylock, on your charge,
To stop his wounds, lest he do bleed to death.
Shy. Is it so nominated in the bond?
Por. It is not so express'd: but what of that?
'Twere good you do so much for charity.
Shy. I cannot find it; 'tis not in the bond."

After Antonio's farewell speech and some by-play, Portia moves in for the kill —

Por. A pound of that same merchant's flesh is thine:
The court awards it, and the law doth give it.
Shy. Most rightful judge!
Por. And you must cut this flesh from off his breast:
The law allows it, and the court awards it.
Shy. Most learned judge! A sentence! Come, prepare!
Por. Tarry a little; there is something else.
This bond doth give thee here no jot of blood;
The words expressly are 'a pound of flesh:'
But, in the cutting it, if thou dost shed
One drop of Christian blood, thy lands and goods
Are, by the laws of Venice, confiscate
Unto the state of Venice.
Gra. O upright judge! Mark, Jew: O learned judge!
Shy. Is that the law?
Por. Thyself shalt see the act:
For, as thou urgest justice, be assured
Thou shalt have justice, more than thou desirest.
Gra. O learned judge! Mark, Jew: a learned judge!
Shy. I take this offer, then; pay the bond thrice,
And let the Christian go.
Bass. Here is the money.
Por. Soft!
The Jew shall have all justice; soft! no haste:
He shall have nothing but the penalty.
Gra. O Jew! an upright judge, a learned judge!
Por. Therefore prepare thee to cut off the flesh.
Shed thou no blood; nor cut thou less nor more
But just a pound of flesh: if thou cut'st more
Or less than a just pound, be it but so much
As makes it light or heavy in the substance,
Or the division of the twentieth part
Of one poor scruple, nay, if the scale do turn
But in the estimation of a hair,
Thou diest and all thy goods are confiscate.

3
ADDRESSES

Introduction: In the last lecture I described how the facts of a case should be brought out in Court. I shall now try to indicate what counsel should say to the Court (or jury), how he should say it, and when. Once again there is a difference between actions in which the evidence is given orally and those in which no oral evidence is given except when deponents are cross-examined on affidavits which they have sworn. For brevity I shall describe these as "witness actions" and "non-witness actions".

WITNESS ACTIONS

These include criminal trials and civil actions with a jury or before a judge alone.

In these cases each party is allowed two addresses, an opening address and a closing address, except that a party who calls no witnesses is not entitled to an opening address.

Opening Address: For the prosecutor or the plaintiff the purpose of the opening address is to tell the judge or jury what the case is about, the remedy sought in civil actions (damages, injunction, specific performance etc.), the evidence that will be presented, and the main principles of law that will be relied upon. It should also, in civil actions, briefly refer to the defence pleaded so that the Court is informed of the area of the dispute. In England, in civil actions, junior counsel usually "opens the pleadings" — that is to say, summarises the statement of claim and statement of defence, but in New Zealand this is usually covered in describing what the case is about.

In civil cases plaintiff's counsel's opening might run something like this:

"May it please Your Honour — In these proceedings the plaintiff claims $________ as damages for breach of contract. The contract was in writing, which the plaintiff says was signed by him and the defendant and dated 1st April 19____ . Under the contract (which will be produced) the defendant undertook to deliver ____________ not later than ____________ and the plaintiff agreed to pay for the goods on delivery. The plaintiff'a case is that the goods were not delivered on the due date (or at all) and that (as the defendant well knew) the plaintiff needed them in order to fulfil a contract that he had made with X. The plaintiff will say that, as the result, he lost the profit he would have made from this contract, amounting to $________ and has had to pay compensation to X for his own failure to fulfil X's order. These sums make up the amount claimed by the plaintiff. The defendant in his defence denies having made the contract with the plaintiff at all, and, alternatively denies that the plaintiff has suffered any loss.

The plaintiff must, therefore, prove the defendant's signature to the contract (which will be sworn to by A who will say that he was present when the defendant signed it) and the loss he has suffered (as to which

his own evidence will be supported by X and by a chartered accountant who has prepared an account showing how the loss is calculated).

With Your Honour's permission I shall deal with questions of law in my final address."

As you will have noticed, this gives a synopsis of the plaintiff's case sufficient to enable the judge or jury to follow the evidence as it is given and to fit the various parts into place like the pieces of a jigsaw puzzle. It is not necessary to open on the law unless it has some unusual features and even then it should not be discussed in opening more than is necessary to enable the evidence to be followed and its relevance appreciated. In jury trials it is the judge's responsibility to tell the jury what the law is and he will not be pleased with counsel who (as often happens) usurps his function, even though he tells the jury that what he says is subject to the direction of the judge.

The prosecutor's opening in a criminal trial follows the same general lines but he is expected to make it clear that the onus of proof is on the prosecution and that the standard of proof is proof beyond reasonable doubt. He usually summarises the evidence that each witness will give. If the evidence of a Crown evidence requires corroboration he should point this out.

If the evidence of a witness is of doubtful admissibility it should not be mentioned in opening. When the witness is called and comes to the doubtful part the question of admissibility will be argued as soon as objection is taken and (in a jury trial) in the absence of the jury.

The opening address for the defence is made at the conclusion of the evidence for the prosecution or for the plaintiff (as the case may be): but is allowed only if the accused or the defendant is calling evidence. If you intend to move for the discharge of the accused on the ground that there is no case to answer or to move for a nonsuit in a civil action this must be done before you open the defence. In jury trials, argument on these motions is heard in the absence of the jury. Unless the nonsuit in a civil case is a very clear issue, the judge will usually reserve the question until the defence evidence has been given and may require you to elect whether or not you will adduce evidence. Once evidence is given for a defendant the right to move for a nonsuit in a civil action is lost, unless the motion has been made and reserved. In this connection it is necessary to remember that putting a document in as evidence in the course of cross-examination of plaintiff's witness is adducing evidence for the defendant and results in the loss of the right to move for a nonsuit.

If the accused or defendant is adducing evidence his counsel's opening address should state clearly and concisely what the defence is and should summarise the evidence that will be given to support it. In judge-alone actions it should include a brief reference to any principle of law that is relied upon. In jury trials this should be done only so far as it is necessary to explain the relevance of the evidence which will be given. You are entitled in opening for the accused or defendant to comment on the deficiencies of the prosecution or plaintiff's evidence even if you are not moving for the accused's discharge or for a nonsuit, but this should be done sparingly. If

the deficiencies are glaring, a brief, pungent reference to them can be very effective at this stage, otherwise it is better to keep your comments for your closing address and to say, simply, "In my closing address I shall have something to say about the evidence given for the Crown (or for the plaintiff), the deficiencies of which are no doubt apparent."

Closing Address: In criminal trials the accused has always the right to address last. (He no longer has the right to make an unsworn statement from the dock — a relic of the days when he was not allowed to give evidence in his own defence.) In civil actions the plaintiff has the right of addressing last, unless the defendant has adduced no evidence at all, in which case the right of last address passes to him. It will be remembered that in that case he will not have had an opening address. Up until the last 20 years or so counsel placed so much value on the right of last address in jury trials that they would sometimes refrain from calling a witness in order to ensure this. I have always thought this strategy to be bad and I do not think that it is ever adopted now. Conceit in the power of one's oratory must be tempered by the fact that the *judge* always has the last word to the jury. Moreover it seems logical that a defendant derives benefit from having *his* version put to the jury at the earliest possible stage in the trial, namely, in the opening address.

What should be comprised in a closing address? To begin with it should begin with a re-appraisal of the facts in the light of the evidence that has been given. In opening one is dealing with the facts that are expected ("hoped" may be a more appropriate word) to be proved. In the closing address one must face up to the evidence that has, in fact, been given and must submit, as persuasively as possible, that its effect supports the case that one is advancing. Now is the time to argue for the credibility of one's own witnesses and against that of the other party. In jury trials do not indulge in any comments to the jury on the law. That is the judge's province. If the legal situation is complex or difficult you are entitled to see the judge in Chambers (with the other counsel, of course), and make submissions to him on how he should direct the jury, and most judges welcome this assistance. It is far better than blurting out your view of the law to the jury (as is too often done) and risking a public snubbing from the judge. In a judge alone case, however, questions of law should be argued fully.

NON-WITNESS ACTIONS

In these cases there is no opening address but counsel who addresses first has a right of reply. This is limited to submissions in respect of legal authorities cited by the other counsel which have not been discussed by counsel who begins. Addresses should include submissions on the facts (when these are in dispute) and on the law, and in general cover the same ground as final addresses in witness actions.

ADVOCACY IN ADDRESSES

Let me remind you that advocacy is the art of persuasion. The object of the advocate is to present his material in the way best calculated to

achieve a result favourable to his client. Basically, of course, this means emphasising the strong points of fact and law in your case and minimising the effect of the bad ones. The ideal is to start with something that cannot be contested and to proceed logically, step by step, through the debatable areas, making each step a natural and apparently inevitable advance from the one that preceded it until the desired result is reached and appears to be the only possible one. The late Mr Justice Cleary, one of the original members of the Court of Appeal in its present form, was a master of this technique when he was at the Bar, and he did it with such apparent lack of effort as to make it look easy. In fact, as you will find, it is very difficult. It requires a clear, logical mind, a thorough knowledge of the case, the ability to perceive the essential point and to work on that, shedding the non-essential and the irrelevant, and the ability to convey one's own clarity of thought to the audience by the apt choice of words and arrangement of the available material, whether it be fact or law. This technique requires intensive study and practice and considerable experience and sound judgement to perfect, but he who perfects it has no master in the art of advocacy.

There are other attributes of the good advocate. He must strive for frankness and sincerity and a reputation for absolute integrity. These will add potency to his words. Judges and juries are quick to sense the lack of these qualities. He must learn to assess the character and foibles of the tribunal and attune his language accordingly, but whether it be the Privy Council, a jury or Justices of the Peace, the use of simple language is the most effective, so long as it expresses precisely the thought that you wish to convey. Never be guilty of "talking down" to laymen — it insults and offends them and arouses hostility to you which may brush off onto your client — and that is bad advocacy. Whatever the tribunal try to avoid colloquialisms on the one hand and obscure pedantry on the other. However much laymen pretend to despise lawyers, they expect them to be of superior education and respect them for it, unless it is forced down their throats.

For most of your address an easy, conversational but respectful tone is appropriate. Avoid dramatics — they have an unfortunate habit of sounding and looking phony. Be firm when it is necessary, but let your firmness be the strong resilience of the pine tree, not the inflexible rigidity of a brick wall. Be invariably courteous and respectful to the judge or jury — rudeness always provokes hostility — and never lose your dignity or your temper, nor convey by word or look any annoyance or dismay caused by the rejection of your argument. If you think that it has not been understood or has not been appreciated put it another way; but do not go on reiterating the same submission in the same words after it has been rejected.

An occasional touch of humour (if you have a gift for it) helps to relieve the tedium of an address and to retain the attention of your audience — but don't overdo it. Humour is usually out of place in Court. Always remember that your client's liberty or fortune is at stake. Occasionally counsel for a defendant is able to ridicule the plaintiff's case, but ridicule, too, must be

used with caution. Sometimes it backfires and arouses sympathy for the plaintiff.

When you cite legal authorities in support of your argument make a wise selection from those available. If your principle has been established in the Privy Council, it is a mark of the novice to add citations from lower Courts, but is is appropriate to refer to a recent New Zealand case where it has been folllowed. Always cite first the decision of the Court of highest authority. Make sure that you know thoroughly the facts of the case that you cite and that those facts are sufficiently like those of your case to make the principle decided applicable to your case. After citing the case and the principle that it establishes, give the Court a brief summary of its facts sufficient to enable the Court to appreciate its relevance.

I must assume that from your Moots you will have learned the proper way to cite cases and all I now propose to do in that regard is to deal with mistakes that I have found to be common. For instance, you do not refer to "Wilson, J", but to "Mr Justice Wilson": not to "Bankes L.J." but to "Lord Justice Bankes": not to "Denning M.R." but to "Lord Denning, Master of the Rolls" — and so on. Next you must remember that a judgment does not become a precedent until it is published in a recognised series of law reports, so you should not cite as an authority an unreported judgment (even of the highest Courts) nor a judgment reported only in Recent Law. There is a good reason for this, namely, that not all judgments are reportable because sometimes they are decided on very special facts and because sometimes judges (even the best of them) make mistakes and deliver judgments that run counter to well-established principles, and it is the duty of the editors of Law Reports to let these judgments lapse into well-deserved oblivion. If you wish to make use of an unreported judgment in your argument the only way in which you can do so with propriety is to submit the principle that it declares and say that you respectfully adopt the reasoning that led to this conclusion in the unreported case of (giving its name, where it was heard and when, and the name of the judge), and tendering a photocopy of the judgment.

At the commencement of your address you should hand up to the judge (through the Crier) a list of the authorities that you intend to cite, and give a copy to your opponent. Number the authorities and make sure that the references to them are correct.

Perhaps one of the worst solecisms counsel can commit is to express his submissions in his own opinions. His manner should convey his sincerity but it is utterly wrong for him to assert any fact as being his own belief or any proposition of law as being his own opinion. "I believe", "I think", "in my opinion" must be completely eschewed. "It is submitted" is the proper formula.

Finally, let me urge you to make your addresses as short as you can, while omitting nothing of real importance. Even experienced judges — let alone juries — find it difficult to maintain full concentration for a long time and very few advocates are such gifted speakers as to be able to capture and hold an audience's attention for more than a short time.

To conclude this lecture I shall give you (again from Shakespeare) two contrasting examples of closing addresses. They are taken from the celebrated Funeral Scene from Julius Caesar (Act III Sc.ii).

The scene is laid in the Forum, shortly after Caesar had been stabbed to death in the Senate. Brutus had persuaded his fellow conspirators to allow Anthony to speak at Caesar's funeral on the condition (which Antony accepted) that Antony should not blame the conspirators and, to make assurance doubly sure, he stipulated that he should speak first to the people who were in turmoil following the news of Caesar's death.

Brutus opened what might fairlv be called the final address for the defence and employed all his great skill as an orator to good effect. Listen for the beautiful cadences, the magnificently balanced phrases, the skilful and obviously sincere appeal to principle.

> "Romans, countrymen, and lovers ! hear me for my cause, and be silent, that you may hear: believe me for mine honour, and have respect for mine honour, that you may believe: censure me in your wisdom, and awake your senses, that you may the better judge. If there be any in this assembly, any dear friend of Caesar's, to him I say that Brutus' love to Caesar was no less than his. If then that friend demand why Brutus rose against Caesar, this is my answer: not that I loved Caesar less, but that I loved Rome more. Had you rather Caesar were living, and die all slaves, than that Caesar were dead, to live all freemen? As Caesar loved me, I weep for him; as he was fortunate, I rejoice at it; as he was valiant, I honour him; but as he was ambitious, I slew him. There is tears for his love; joy for his fortune; honour for his valour; and death for his ambition. Who is here so base that would be a bondman? If any, speak; for him have I offended. Who is here so rude that would not be a Roman? If any, speak; for him have I offended. Who is here so vile that will not love his country? If any, speak; for him have I offended. I pause for a reply.

All. None, Brutus, none."

So Brutus departs, confident that he has secured the allegiance of the crowd who, in their enthusiasm, want to carry him in triumph to his home, but he begs them to stay to listen to Antony who has just arrived with the corpse.

In his role of quasi-prosecutor, Antony could not hope to match Brutus as an orator, but he was something much more formidable — a brilliant advocate. He realises that the crowd, captivated by Brutus' eloquence, is hostile to Caesar and hostile to him, and knows that to attack Brutus immediately would only further antagonise the mob — so, slowly and patiently, with apparent respect for Brutus but increasing irony as they respond, he undermines their respect and affection and seizes on the one vulnerable point in Brutus' speech — Caesar's alleged ambition. This enabled Antony to make the breach and then go on to inflame the mob until it became the instrument of his revenge on the conspirators and of his own seizure of power. Here is how it was done —

First Cit. Stay, ho! and let us hear Mark Antony.
Third Cit. Let him go up into the public chair;
We'll hear him. Noble Antony, go up.
Ant. For Brutus' sake, I am beholding to you.
[Goes into the pulpit.
Fourth Cit. What does he say of Brutus?
Third Cit. He says, for Brutus' sake,
He finds himself beholding to us all.

Fourth Cit. 'Twere best he speak no harm of Brutus here.
First Cit. This Caesar was a tyrant.
Third Cit. Nay, that's certain:
We are blest that Rome is rid of him.
Sec. Cit. Peace! let us hear what Antony can say.
Ant. You gentle Romans, —
All. Peace, ho! let us hear him.

Ant. Friends, Romans, countrymen, lend me your ears;
I come to bury Caesar, not to praise him.
The evil that men do lives after them;
The good is oft interred with their bones;
So let it be with Caesar. The noble Brutus
Hath told you Caesar was ambitious:
If it were so, it was a grievous fault,
And grievously hath Caesar answer'd it.
Here, under leave of Brutus and the rest, —
For Brutus is an honourable man;
So are they all, all honourable men, —
Come I to speak in Caesar's funeral.
He was my friend, faithful and just to me:
But Brutus says he was ambitious;
And Brutus is an honourable man.
He hath brought many captives home to Rome,
Whose ransoms did the general coffers fill:
Did this in Caesar seem ambitious?
When that the poor have cried, Caesar hath wept:
Ambition should be made of sterner stuff:
Yet Brutus says he was ambitious;
And Brutus is an honourable man.
You all did see that on the Lupercal
I thrice presented him a kingly crown,
Which he did thrice refuse: was this ambition?
Yet Brutus says he was ambitious;
And, sure, he is an honourable man.
I speak not to disprove what Brutus spoke,
But here I am to speak what I do know.
You all did love him once, not without cause:
What cause withholds you then to mourn for him?
O judgement! thou art fled to brutish beasts,
And men have lost their reason. Bear with me;

My heart is in the coffin there with Caesar,
And I must pause till it come back to me.

First Cit. Methinks there is much reason in his sayings.

Sec. Cit. If thou consider rightly of the matter,
Caesar has had great wrong.

Third Cit. Has he, masters?
I fear there will a worse come in his place.

Fourth Cit. Mark'd ye his words? He would not take the crown,
Therefore 'tis certain he was not ambitious.

First Cit. If it be found so, some will dear abide it.

Sec. Cit. Poor soul! his eyes are red as fire with weeping.

Third Cit. There's not a nobler man in Rome than Antony.

Fourth Cit. Now mark him, he begins again to speak.

Ant. But yesterday the word of Caesar might
Have stood against the world: now lies he there,
And none so poor to do him reverence.
O masters, if I were disposed to stir
Your hearts and minds to mutiny and rage,
I should do Brutus wrong and Cassius wrong,
Who, you all know, are honourable men:
I will not do them wrong; I rather choose
To wrong the dead, to wrong myself and you,
Than I will wrong such honourable men.
But here's a parchment with the seal of Caesar;
I found it in his closet; 'tis his will:
Let but the commons hear this testament —
Which, pardon me, I do not mean to read —
And they would go and kiss dead Caesar's wounds
And dip their napkins in his sacred blood,
Yea, beg a hair of him for memory,
And, dying, mention it within their wills,
Bequeathing it as a rich legacy
Unto their issue.

Fourth Cit. We'll hear the will: read it, Mark Antony.

All. The will, the will! we will hear Caesar's will.

Ant. Have patience, gentle friends, I must not read it;
It is not meet you know how Caesar loved you.
You are not wood, you are not stones, but men;
And, being men, hearing the will of Caesar,
It will inflame you, it will make you mad:
'Tis good you know not that you are his heirs;
For if you should, O, what would come of it!

Fourth Cit. Read the will; we'll hear it, Antony;
You shall read us the will, Caesar's will.

Ant. Will you be patient? will you stay awhile?
I have o'ershot myself to tell you of it:
I fear I wrong the honourable men
Whose daggers have stabb'd Caesar; I do fear it.

Fourth Cit. They were traitors: honourable men!
All. The will! the testament!
Sec. Cit. They were villains, murderers: the will! read the will.
Ant. You will compel me than to read the will?
Then make a ring about the corpse of Caesar,
And let me show you him that made the will.
Shall I descend? and will you give me leave?
All. Come down.
Sec. Cit. Descend. *[He comes down from the pulpit.*

Third Cit. You shall have leave.
Fourth Cit. A ring; stand round.
First Cit. Stand from the hearse, stand from the body.
Sec. Cit. Room for Antony, most noble Antony.
Ant. Nay, press not so upon me; stand far off.
All. Stand back. Room! Bear back.
Ant. If you have tears, prepare to shed them now.
You all do know this mantle: I remember
The first time ever Caesar put it on;
'Twas on a summer's evening, in his tent,
That day he overcame the Nervii:
Look, in this place ran Cassius' dagger through:
See what a rent the envious Casca made:
Through this the well-beloved Brutus stabb'd'
And as he pluck'd his cursed steel away,
Mark how the blood of Caesar follow'd it,
As rushing out of doors, to be resolved
If Brutus so unkindly knock'd, or no:
For Brutus, as you know, was Caesar's angel:
Judge, O you gods, how dearly Caesar loved him!
This was the most unkindest cut of all;
For when the noble Caesar saw him stab,
Ingratitude, more strong than traitors' arms,
Quite vanquish'd him: then burst his mighty heart;
And, in his mantle muffling up his face,
Even at the base of Pompey's statue,
Which all the while ran blood, great Caesar fell.
O, what a fall was there, my countrymen!
Then I, and you, and all of us fell down,
Whilst bloody treason flourish'd over us.
O, now you weep, and I perceive you feel
The dint of pity: these are gracious drops.
Kind souls, what weep you when you but behold
Our Caesar's vesture wounded? Look you here,
Here is himself, marr'd, as you see, with traitors.

First Cit. O piteous spectacle!
Sec. Cit. O noble Caesar!
Third Cit. O woful day!
Fourth Cit. O traitors, villains!

First Cit. O most bloody sight!
Sec. Cit. We will be revenged.
All. Revenge! About! Seek! Burn! Fire! Kill! Slay!
Let not a traitor live!"

4

INTERLOCUTORY APPLICATIONS

Definition: An interlocutory application is usually defined as one made during the pendency of a suit, the result of which does not determine the result of the action; but for the present purposes this is not a very satisfactory definition because it excludes, for example, a motion for a new trial, a motion for leave to execute a judgment, and an application ancillary to an appeal, all of which are made after the action has ceased to be "pending". What I am talking about is the interlocutory application referred to in Part VI of the Code of Civil Procedure. It is any motion other than an originating motion. The test is, therefore, its form and function rather than its timing or result. Its form is a motion and its function is ancillary.

Motions and Notices of Motion: Throughout this lecture I shall be talking sometimes of "interlocutory applications" and sometimes of "interlocutory motions". The terms are interchangeable since under our Rules every interlocutory application must be made by motion. It was not always so. When I was a young lawyer motions were used for Court orders but a judge's order was obtained by a summons which began something like this —

> "Let the [opposite party] attend before [naming the Judge] at his Chambers Supreme Court House at [Auckland] on [Fri]day the day of 192 at o'clock in the [fore]noon To Show Cause why [the order sought] should not be made."

(See Form 33B First Schedule, Code of Civil Procedure).
Some interlocutory applications in those days had even to be made by petition, e.g. an application to admit a guardian-ad-litem. Happily these forms are now obsolete but a knowledge of their existence is helpful in understanding some of the earlier cases.

It is also important to understand the difference between a "motion" and a "notice of motion". A "motion" is made when the matter comes before the Court or judge, being either moved by counsel who appears and announces that he appears in support, or, in an *ex parte* motion, when the matter is considered by the judge. A "notice of motion" is the document filed in the Court and which gives notice that the application will be made. The "notice" is addressed to the Registrar of the Court and (except when the motion is *ex parte*) to the opposite party.

Court or Chambers: At present some interlocutory motions must be made to the Court and others must be made to the judge in Chambers. The course required to be followed is determined by the statute, regulation or rule that authorises the application. If these do not prescribe either Court or judge in Chambers the motion may be addressed to either. (R.395 of the Code of Civil Procedure). A motion wrongly addressed may, under R.396, be treated as having been properly made and R.397 enables a judge to sit in Chambers for Court in hearing any motion that is not required by law to

be heard in open Court, or in Court for Chambers. Most judges nowadays prefer to deal with all interlocutory motions in Chambers, but some of the older judges (including myself) preferred to hear all interlocutory motions in Court, even if addressed to the judge in Chambers, because of the educative value to young practitioners who were thereby able to benefit from others' mistakes as well as their own. That is how I learned my interlocutory applications procedure.

If you are appearing on a motion which is heard in Chambers it is not necessary to robe, even if the motion is addressed to the Court, and counsel arguing a motion in Chambers usually remain seated. If you are appearing on a Court motion, heard in Court, you must robe and, of course, you will stand when you address, or are addressed by, the Court. For a Chambers motion heard in Court robing is still not necessary but standing to address is. Because there is no uniform practice about whether interlocutory motions will be heard in Court or in Chambers you should find out from the Court office before-hand where it will be heard, so as not to be embarrassed by being improperly dressed.

The difference between a motion to the Court and one to the judge in Chambers is, however, far more important than a mere question of dress. The order made on a motion to the Court is an order of the Court, from which the only redress of the unsuccessful party is by way of appeal to the Court of Appeal. On the other hand, an order made on a motion to a judge in Chambers may be reviewed on a motion to the Court but cannot be made the subject of an appeal to the Court of Appeal, although the order made by the Court on such review *is* (naturally) appealable to that Court.

This is the factor which should influence you (where you have the option) in deciding whether you should draw your notice of motion so as to obtain a Chambers order or a Court order. In most cases where the order sought is merely one relating to some procedural step, such as leave to serve out of the jurisdiction, or to issue a third party notice, or to administer interrogatories, or for further particulars or for further discovery of documents, the notice of motion should be addressed to the judge in Chambers. Where, however, there is a likelihood of serious opposition and a question of some difficulty is likely to arise, it is better to seek a Court order. The reason for this is that Chambers orders are intended to be made quickly, on first impression, without elaborate argument, and that is why provision is made for a review of such orders by the Court.

Evidence: The evidence in support of or in opposition to an interlocutory motion is given by affidavit. No oral evidence or cross-examination of deponents is allowed except by order of the judge and such orders are made only in special circumstances: (R.184, as amended in 1976). Affidavits filed in interlocutory applications may contain statements of belief, but only if the grounds of belief are given: (Rule 185).

The facts deposed to in affidavits to be used in interlocutory motions should be kept to the absolute minimum necessary to give the essential factual background for the order sought, or to defeat the application, as

the case may be. Do I need to remind you that advocacy is the art of persuasion or that a judge faced with a long list is likely to be less than receptive to an argument after he has waded through prolix affidavits stuffed with irrelevant information? In a significant number of interlocutory applications all the relevant facts are already on record on the file and in those cases no affidavits are required.

Addresses: If the application is heard in Chambers or a Chambers order is sought the hearing is likely to be very informal. A judge who has a thorough knowledge of procedure and who has had time to read the file in advance will probably have formed a provisional view before the matter is argued. If that view is favourable to the application he will probably invite the opposite party to begin and unless counsel for the opposite party can raise a doubt in his mind he will make the order sought without calling on counsel for the applicant. For counsel for the opposite party this is a real test of his skill as an advocate. His best tactic is to play his best card immediately. If it is really good it will put the onus back where it belongs — on the applicant. Even if it is only *some* good, it will restore the equilibrium. Counsel in these hearings need to be on their toes mentally and very thoroughly prepared in all aspects of their cases because some judges switch from one to the other rather than preside over a formal hearing. You will remember that these applications (for Chambers orders) are intended to be decided quickly, on first impression.

An application for a Court order, on the other hand, is a more formal matter and the hearing is usually conducted on formal lines as in banco proceedings. The advice that I gave you on the presentation of banco arguments applies equally to interlocutory applications for a Court order.

Applications made ex parte: This means applications made without notice to any other party. The right to apply *ex parte* is very strictly controlled by R.400 of the Code. Under this rule the right is limited to —

(1) Cases where it is conferred by statute or by the Code; and
(2) Cases where the judge is satisfied —
  (a) that giving notice would cause delay that would or might result in irreparable injury to the applicant (e.g. applications for interim injunctions);
  (b) that no other party would be adversely affected by the order because the matter is purely routine or unimportant or seems to affect the applicant only (e.g. applications to correct an error in the name of a party as appearing in the pleading or to record any change of name (but not of identity) of a party).

An *ex parte* motion must be described as such on the backing sheet and must be certified by the applicant's solicitor or by counsel. Only a principal of the firm may give such a certificate — an employee even though admitted as a barrister and solicitor may not do so. RR. 404 and 405 of the Code place a very heavy responsibility on the certifier. In the first place he must refer the *Court* by a memorandum (either subscribed to the certificate or referred to therein and filed with the papers) to the enactment

and sections or other provisions thereof, and to any decided case or any passage in a recognised textbook, on which he relies in support of the motion: (R.404). In the second place he must satisfy *himself* of two things:

(i) that the papers are regular and in order;
(ii) that the order sought is one that ought to be made;

(R.405). This rule also states specifically that the certifier "shall be responsible to the Judge for the regularity of the papers on which the motion is founded."

These two rules (RR. 404 and 405) spell out the duties of the advocate in relation to *ex parte* applications which are implied in other similar jurisdictions. In theory, unless the memorandum draws attention to some doubt the judge should be able to grant the order, without considering the matter at all, simply in reliance on the certificate, and that is the standard of work and care to which you should try to attain. Regrettably, very few do, although it is not hard.

The *ex parte* motion is a composite creature. It combines the notice of motion, the evidence to support it, and the address. Save in very exceptional cases no oral evidence is given, so particular care is required in drafting the affidavits to ensure that they provide the essential background for fact. The limits on the use of hearsay must be kept in mind and the contents of the affidavits arranged, even more carefully than usual, so that the judge reading them can follow the evidence easily and appreciate the grounds for making the order. *In presenting the facts on an ex parte motion the practitioner is not entitled, as in other cases, to pick and choose, putting forward those which support the motion and ignoring those that do not. It is his ethical duty to put forward all the relevant evidence, favourable or not.* In this respect his duty with regard to the facts is the same as his duty with regard to the law.

The memorandum is, in effect, a written address. In it the advocate marshalls his facts clearly and concisely. Where they are contained in more than one affidavit he collates them so as to present the whole picture. If the evidence is conflicting he will make his submissions why that favourable to the application should be preferred. Similarly, in making his submissions on the law he will deal with any authorities that appear to be against making the order sought. On an *ex parte* application he has the additional duty of satisfying *himself* (as well as the judge) that the order should be made (R.405). If he has any real doubt about this he cannot properly certify the motion and the matter should be brought before the judge on notice to the other party.

Most *ex parte* applications, however, are very straight-forward, simple affairs. Where this is the case a single short affidavit is often sufficient to cover the facts, and the memorandum can generally be restricted to the bare reference to the relevant legal authority for the order sought.

5

THE ETHICS OF THE ADVOCATE

When I came to prepare this lecture I was faced with the difficulty of explaining what ethics are, so I went to my dictionary. This gave a primary and a secondary meaning to the term and it was the secondary meaning that supplied what I was seeking. It defined ''ethics'' as ''the basic principles of right action''.

There are two main reasons why observance of certain ''basic principles of right action'' is insisted on in the case of advocates. The first is that they have a monopoly of the right of audience in our Courts. The Courts will not permit anyone other than a practising barrister or solicitor to address them on behalf of a party to litigation, and monopolies (unless controlled) tend to become the source of abuse. The second — and, in my opinion, by far the more important reason — is that unless these principles were observed the administration of the law would rapidly become corrupt, respect for the judges (who, of course, are appointed from the Bar) as well as for the advocates themselves would disappear, the whole fabric of justice would crumble and basic freedoms would be lost. In the end, these basic freedoms depend upon the independence, competence and integrity of the judges and of the advocates who practise before them.

For convenience we talk about the advocate's Code of Ethics (and, indeed, the New Zealand Law Society has published a booklet under that name which includes a section on Barristers), but it is a misnomer. There is no complete set of rules governing the advocate's conduct, such as would constitute a code. The real ''code'' is substantially an unwritten one, in the sense that it is not recorded in any statute, regulation or judgment. It has never, as far as I am aware, been completely formulated in any neat, systematic way and I think that the reason probably is that it is not capable of such formulation. Like the British Constitution and the Common Law it has evolved piece by piece as occasion required. Nevertheless, for your assistance in understanding and applying this ''code'' I shall try to reduce it to as logical and orderly a form as is possible.

I think that the cornerstone of the structure of advocates' ethics is the rule that, unlike the mercenary soldier, an advocate owes duties to others than his client and that the duties to these others may qualify his primary duty to his client. These others are the State, the Court, his opponent, and himself. Where these duties have been found to come into conflict specific rules have been worked out to resolve the conflict — and no doubt will continue to be worked out as the occasion arises.

Let us examine the various relationships and the duties attached to them in order.

The Advocate and his client: The first rule really precedes this relationship. It springs from the monopoly which he enjoys in the right of audience in the Courts. That right carries with it the absolute obligation to act for anyone who seeks the services of the advocate and is prepared to pay a

proper fee for these services. No question of personal dislike of the would-be client or what he has done or is alleged to have done, no consideration of personal unpopularity likely to arise from acting in a cause against which most people feel strongly, and no reluctance to appear on a losing side may properly influence an advocate's acceptance of a brief. Like the taxi-man on the rank he is bound to answer the first call. As long ago as 1532, the Court of Session in Scotland laid down this rule —

> "No advocate without very good cause shall refuse to act for any person tendering a reasonable fee, under pain of deprivation of his office of advocate."

I have just indicated some of the causes that do *not* qualify as "very good" under this rule. And Erskine, the great 18th century English barrister, put it thus:

> "From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject in the Court where he daily sits to practise, from that moment the liberties of England are at an end."

He was speaking of the defence of persons accused of crimes but the principle applies to all litigation.

No doubt you will wonder what counsel should do if he is offered a brief in a matter in which he holds strong personal views — say a member of an anti-abortion society who is asked to defend a person on a charge of illegally procuring an abortion. The answer is that he should frankly tell the would-be client of his views and ask him whether he still wishes to retain his services, assuring him that, if he does, it will be the advocate's duty to sink his personal feelings and use all his skill, knowledge and experience on his client's behalf.

That is, indeed, your duty towards your client once you have accepted the retainer. But he does not buy you body and soul, as Mephistopheles did Dr Faustus. The weapons that you use on his behalf are the sword of the warrior, not the dagger or poison of the assassin. You wear, so to speak, the uniform of the soldier, not the camouflage of the guerrilla or the disguise of the spy. Accordingly, the full exercise of your skill on behalf of your client has limitations which I summarise here as being a duty not *knowlingly* to mislead or deceive the Court or your opponent, not *wantonly* to attack any other person's character, not *actively* to seek to defeat justice and not to do anything which will tarnish your own honour. The best argument for the retention of the wig and gown in our superior courts is that they serve (or should serve) as a constant reminder of the high standard of conduct expected of the wearer. It is, in my experience, a fact that the donning of a barrister's (or judge's for that matter) robes tends to invest the wearer with a *persona* which in most oases is superior to that which he possessed before.

An advocate owes a duty to his client to present the client's case fully and fearlessly, regardless of any personal consequences to himself, however unpopular or personally distasteful that case may be. He *must* so present his client's case notwithstanding his own belief that it will certainly fail, if, having advised the client of his opinion, the client insists on pro-

ceeding. It is, after all, his right to obtain the judgment of the *Court*. But the ethics of the advocacy place limits on how the advocate may present the case of a client who on the basis of incontrovertible facts, or from his own lips, is clearly in the wrong. The general rule in this case has been stated thus:

> "He may not assert that which he knows to be a lie. He may not connive at, much less attempt to substantiate, a fraud."

The obvious example of this is the accused person who unequivocally confesses his guilt to his counsel, but is unwilling to plead guilty. In this case, if the confession is made at a time when it is possible for the accused to retain other counsel and no damaging publicity is likely to result from the change, the duty of counsel is to withdraw from the case. If this is not possible, counsel's duty is to continue to strive for an acquittal. He may properly do so, having regard to the defences of insanity or want of criminal capacity and the onus of proof which rests on the Crown, but not otherwise. The position is admirably summarised by W.W. Boulton in "Conduct and Etiquette at the Bar" p.57 in these words:

> "While, therefore, it would be right to take any objection to the competency of the Court, to the form of the indictment, to the admissibility of any evidence, or to the sufficiency of the evidence admitted, it would be absolutely wrong to suggest that some other persons had committed the offence charged, or to call any evidence which he must know to be false having regard to the confession, such, for instance, as evidence in support of an alibi, which is intended to show that the accused could not have done or, in fact, had not done the act; that is to say, an advocate must not (whether by calling the accused or otherwise) set up an affirmative case inconsistent with the confession made to him.
>
> A more difficult question is within what limits, in the case supposed, may an advocate attack the evidence for the prosecution either by cross-examination or in his speech to the tribunal charged with the ascertainment of the facts. No clearer rule can be laid down than this, that he is entitled to test the evidence given by each individual witness, and to argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged. Further than this he ought not to go."

It is perhaps unnecessary to repeat here that an advocate must *never*, either in the examination of a witness or in an address to the Court, put forward any matter of fact as being his own belief.

An advocate is often under pressure from his client to attack the character of witnesses or other persons. In cross-examining *on the facts in issue* "it is not improper for counsel to put questions suggesting fraud, misconduct or the commission of a criminal offence . . . if he is satisfied *that the matters suggested are part of his client's case* and has no reason to believe that they are only put forward for the purpose of impugning the witness's character". (Boulton, op.cit. at p.59.)

"Questions which affect the credibility of a witness by attacking his character, but are not otherwise relevant to the actual enquiry, ought not to be asked unless the cross-examiner has reasonable grounds for thinking that the imputation conveyed by the question is well-founded or true". (Boulton, ubi cit.)

Failure to observe these rules is a gross abuse of the privileged position of the advocate to make defamatory statements during the course of a trial without being liable for doing so, and will not be tolerated by the Court. It is a good example of the use of the assassin's weapons to which I have already referred.

Most of the other limitations on an advocate's performance of his primary duty to his client arise out of his duties to the State, the Court, his opponent, and himself, and I shall now proceed to consider them in that order.

The advocate and the State: The advocate, like every other citizen, owes a duty to the State to ensure that justice is done. His duty to his client to defend him when he is charged with having committed an offence precludes him from disclosing to the police information which he may acquire in the course of that duty which may tend to prove that his client is guilty, including of course, any confession made to him. On the other hand, the Crown Prosecutor is bound to inform the defence of the name of any witness who can give exculpatory evidence and whom he is not prepared to call as a Crown witness. A defending advocate, however, is bound to inform the Police of any crime which it is *proposed* to commit, whether by his client or by any other person. He must not, moreover, plan — or even suggest — a line of defence which is not open on the facts supplied to him. Whatever the nature of the case (criminal or civil) any attempt at the fabrication of evidence, oral or otherwise, is forbidden to the advocate, as well as to the ordinary citizen. It is, indeed, the crime of attempting to pervert the course of justice and a licence to practise as an advocate confers no licence to commit a crime.

The advocate and the Court: One hears a great deal about the Law's delays and many complaints are justified, but it is also a fact that the quick disposal of cases in places where the English legal system obtains is the admiration and envy of other States. A great many of the cases heard in our Courts are decided then and there by the presiding judge in an oral judgment and the vast majority of these oral judgments are accepted as correct. Judges are able to make these decisions because of the confidence they have in the competence and reliability of counsel. That confidence springs from knowing that counsel in English-style jurisdictions will observe certain ethical rules, which may be summarised as prohibiting any conscious misleading or deception of the Court. This has also its positive side in requiring the utmost candour in addressing on the law. Any decision binding on the Court and known to counsel which is contrary to the proposition that counsel is advancing *must* be brought to the Court's attention. If possible he will, of course, distinguish it or he may address argu-

ment why it should not be followed, but he *must* cite it and he owes a *duty* to the Court to research the relevant law thoroughly, so that the chances of his not discovering the adverse decision are minimal. A very high standard in this regard is required for counsel in matters in which no other party is required to be served or, being served, the other party fails to appear, because in these cases the Court must rely on the industry and integrity of a single advocate.

This is how, 130 years ago, an Irish judge summed up the duties of the advocate to the Court and to the State:

> "He will not knowingly mis-state the laws — he will not wilfully mis-state the facts, though it be to gain the cause for his client. He will ever bear in mind that if he be the advocate of an individual and retained and remunerated . . . for his valuable services yet he has a prior and perpetual retainer on behalf of truth and justice; and there is no Crown or other licence which in any case or for any party or purpose can discharge him from that primary and paramount retainer."

Mistakes will happen, misapprehensions occur, and in such cases judges will forgive and forget an isolated lapse but the professional life of the advocate whose candour, veracity and integrity are suspect is likely to be, like the life of the primitive man, "nasty, brutish and short".

The advocate and his opponent: I think that an advocate's duty to his opponent is best expressed in the words of the Golden Rule enunciated as one's duty towards one's neighbour in the Anglican Catechism "to do unto all men as I would that they should do unto me". And you should remember that in the brotherhood of the Bar your opponent ranks as a good neighbour. So you will never deliberately deceive him (although you are under no duty to prevent him from deceiving himself), you will never disclose or use anything that he tells you in confidence, and you will never go back on any promise or undertaking given to him. You may not, without his permission speak to any of your witnesses outside the Courtroom, once he has commenced to give his evidence, (for instance, during an adjournment), and, although neither party has exclusive rights to any witness, you will not interview any witness that he has subpoenaed without telling him of your intention and giving him an opportunity to be present.

The advocate and himself: The only really worthwhile asset that an advocate has is his reputation for absolute honesty and that other quality, so difficult to define, which we call integrity. Such a reputation cannot be eroded by inflation; it cannot be permanently tarnished by malicious lies; but it can so easily be surrendered, like the keys of a fortress, for gain. When I was a lad I read a lot of romances, preferably historical, in which the hero followed a pattern of chivalry and held his 'honour' (integrity) higher than life itself. The concept of integrity was, therefore, part of my early conditioning. But that sort of conditioning is now obsolete, so when I tell you that an advocate has a duty to himself to preserve his integrity inviolate I have to explain to you the meaning of something that I never really learned but rather absorbed subconsciously. For that reason I

needed someone else's words to explain this concept. Naturally, I thought of the advice given by Polonius to his son:

"To thine own self be true,
And it must follow, as the night the day,
Thou canst not then be false to any man."

But that simply begs the question, so I have turned to that great source of ethical standards, the Bible, and I think that I have found what I seek in the 15th Psalm. I prefer the Coverdale version in the Prayer Book and this is how it reads:

"Lord, who shall dwell in thy tabernacle or who shall rest upon thy holy hill?
Even he, that leadeth an uncorrupt life and doeth the thing which is right, and speaketh the truth from his heart.
He that has used no deceit in his tongue, nor done evil to his neighbour, and hath not slandered his neighbour.
He that setteth not by himself, but is lowly in his own eyes, and maketh much of them that fear the Lord.
He that sweareth unto his neighbour, and disappointeth him not, though it were to his own hindrance.
He that hath not given his money upon usury, nor taken reward against the innocent.
Whoso doeth these things shall never fall."

That is the best description I know of a man of honour, such as every advocate must strive to be, and it is that character that he owes a duty to himself to preserve against the temptations to which his duty to his client may give rise. How well he does it will determine his true stature as an advocate.

6

THE USE OF WORDS

Introduction: I shall introduce this lecture with a story. Whether true or apocryphal, it has become part of the folklore of the Bar. This is how it goes:

A very learned Professor of Law in England was briefed to argue in the Court of Appeal a very abstruse question of law in his own special field. Not having attended my lectures on Advocacy he was unaware of the virtues of brevity, and throughout the first day he droned on with an historical outline tending to show how the problem had developed. It was marginally relevant stuff but not even marginally interesting and the Court of Appeal (gentlemen all) suppressed their yawns and kept awake by making copious notes. At the beginning of the second day the President, hoping to speed things up a bit, said to counsel, "Well, Mr Egghead, as the result of your address yesterday I am sure that the members of the Court are much wiser." Flattery got him nowhere. "No wiser, my Lord", replied Egghead, "but much better informed."

This reply showed two things — (1), that he had not learned the elementary rule of advocacy, not to offend your tribunal; and (2) that he possessed to a high degree another essential quality of an advocate, proficiency in the precise use of words so as to convey the exact shade of meaning intended.

It is surely elementary that words are the lawyer's tools of trade and that to be any good at all he must be expert in their use. Unlike the politician he cannot cover up his lack of skill with words by the use of cliches or by talking in vague generalities. His aim is to persuade his tribunal to reach a particular conclusion and to achieve this he must, first of all, have a very clear understanding of the fine shades of meaning of words, so as to be able to select the one that exactly conveys his meaning; but he must also be able to communicate *that* meaning — and no other — to his tribunal. It is obvious that the more words he has at his command — in short, the larger his vocabulary — the better equipped he is to select the word most apt for his purpose. How does he acquire such a vocabulary? By reading widely — all sorts of books — and checking with the dictionary any word the meaning of which is not clear. With a language as rich in words as English it will soon be obvious that many words have more than one meaning and that, chameleon-like, they take their complexion from their context — and that is a further complication in the way of mastery of the language. The structure of sentences and their arrangement into paragraphs also contribute to clear and precise communication of ideas.

Having regard to the basic function of the lawyer to express himself clearly, unambiguously, precisely and attractively in his client's interests I find it incomprehensible that it is now possible to be admitted to practise law without having studied English grammar and composition beyond the elementary stage. It is as bad as expecting a precision engineer to operate without a full training in the use of the instruments of his craft. Even the

most complete knowledge of law is useless to a person who cannot communicate its refinements lucidly and precisely.

Statutes, Regulations and judgments are carefully worded with due regard to the rules of grammar. In order to understand them himself and to expound them to others a lawyer needs to be well-grounded in these rules. Because they are now neglected even in the schools, the time must soon come when an intending lawyer's post-graduate training will have to include instructions in these rules and in composition. In my opinion that instruction should come in his intermediate year's study, at the latest, so that he may benefit fully from his instruction in legal theory, and practise the proper use of words in his written exercises and in his moots.

The Written Word: Letters, documents of all kinds, written submissions — these are the forms in which the lawyer demonstrates his mastery of words, or the reverse. The master avoids hackneyed expressions and circumlocutions in his correspondence, his letters gain impact from freshness of expression combined with economy of words. In drafting documents he realises the value of adhering to words and phrases that have achieved an established precise meaning, but he casts a critical eye over precedents to ensure that they are completely apt for his purpose.

Drafting pleadings and similar Court documents calls for the same kind of skill in the choice and use of words as other formal documents. In drawing affidavits he uses the deponent's own words whenever they are suitable, trims them by removing irrelevance, slang, colloquialisms and bad grammar, and arranges them in proper sequence. By this means he produces three-dimensional evidence in which the deponent's statements stand forth, groomed and orderly, but unmistakably *his* and correspondingly impressive. He never commits the grammatical solecism of writing (or saying) "between he and I" instead of "between him and me" (as so many do now) not only because he knows that it is wrong — however "acceptable" the modern teachers of English may consider it to be in ordinary conversation — but also because he knows that judges find it unpalatable, and therefore it is bad advocacy. Likewise, he avoids the stilted "legalese" of yesterday, because it has lost its impact. The simple words or phrase, if it is apt, is always the best. And he checks his typist's spelling to make sure that she hasn't committed the common mistake of spelling the possessive pronoun "its" with an apostrophe before the "s" (it's). These rules also apply, with any necessary modifications, to written submissions, although (as with oral submissions) they still begin "May It Please Your Honour".

Sir James Stephens, the famous legal draftsman of the 19th century, said this —

> "it is not enough to attain a degree of precision which a person reading in *good faith* can understand, but it is necessary to attain, if possible, to a degree of precision which a person reading in *bad faith* cannot *mis*understand. It is all the better if he cannot even *pretend* to misunderstand it."

That is no less true today.

My advice to you is not to attempt to dictate any important letter or document until you have, by long practice, gained this mastery. Writing it and revising what you have written, is very good training in the art of verbal expression, whether written or oral. (In passing, the words ''verbal'' and ''oral'' furnish a good example of what I have been saying about the precise use of words. To the ordinary citizen they are inter-changeable; but to the lawyer ''verbal'' includes both modes of using words while ''oral'' means ''spoken''.) (Cp. ''less'' and ''fewer''.)

The Spoken Word: Drafting a letter or a document or written submissions is relatively easy compared with the spoken word because in the former there is some opportunity for revision, refinement and polishing. When you are on your feet in Court this is seldom possible. Your questions to a witness and your addresses to the Court are often required to be framed without time for selecting the best word or phrase. If time *does* permit, you should write down and polish and re-polish important questions or vital submissions in order to ensure that when the moment arrives the words that you use are the best possible for the purpose. When preparing a case Mr Leary, Q.C. would sometimes spend hours doing just that — and he was a very experienced advocate who had a wide vocabulary at his command. For a beginner the need to do this is infinitely greater. Only practice in the right use of words and experience in their actual use will give facility.

Try to introduce variety into your speech by using synonyms. The frequent use of the same word or phrase becomes wearisome to the listener and tends to send him to sleep, or, at best, to lose concentration on what you are saying. For the same reason variation in tone or volume of sound in your speech, if used intelligently in relation to the thought that you are expressing, greatly adds to its attractiveness to the listener and hence to its cogency; but never let yourself become inaudible. Actors used to be trained in this, and the best advocates made it their business to learn voice control. Then, when they had captured the attention of their tribunal they could, as appropriate, drop their voices almost to a whisper, not a word of which was lost, or dominate the mind with the resonance of their words without arousing resentment by assaulting ear-drums.

In an earlier lecture I warned you against talking over the heads of the jury on the one hand and talking down to them on the other. This is a suitable time to enlarge on that precept and I begin by reminding you that jurors are much better educated than they were 100 years ago when they could be cajoled or bullied by an advocate's dramatics. Thanks (if that is the right word) to television they are also more sophisticated about courts. In these days they tend to respond more to clear, logical presentation of a case with an air of sweet reasonableness than to appeals to their emotions, although, of course, they do more often respond to an emotional appeal than do judges. But the emotion must be latent in the facts of the case before it can be evoked by counsel's eloquence.

It is a common mistake to generalise about jury reactions. Juries are as various as individuals, so part of an advocate's skill lies in assessing the kind of person who makes up the jury before whom he appears. Some help

in this regard can be derived from the occupations and addresses of the members of the jury but the best guide is their reactions as the case unfolds. Some appear bored — they are probably either prejudiced or too lazy to form an independent view, so it will pay to concentrate on those who show a keen, lively interest. Try to persuade these members that you and they have an identical interest — to see justice done — and that this will be achieved by finding in your client's favour. Talk to them in language that they can understand, which means ordinary, simple language. It does *not* mean using the language of the public-house bar — "There was this guy" sort of thing. On the other hand, you must avoid an air of condescension "what *we lawyers* call — ". The serious defect of this approach is that it opens a gulf between you and the jury, and that is bad advocacy.

How to Improve: One of the ways in which you can improve your advocacy is by critically watching television advertising. Advertising is another branch of advocacy, in that its object is to persuade. Look at the postures of the actors, their gestures, the words they use and how they use them. Learn from their mistakes. (Teachers, preachers and politicians are other kinds of advocates.) Listen critically also to radio and television reporters and learn from their blunders. Probably the most glaring mistake of the reporters (who, of course, are not supposed to be advocates) is the misplaced emphasis placed on prepositions. ("The youngest member *of* the team is Jim Smith." "Mr Smith was the first *of* the victims to be rescued.") This diverts attention from the most important word to the least. These exercises are, however, only supplementary. The only real place to learn advocacy is in Court, so you should lose no opportunity to be there and to learn (preferably from other's mistakes) how to make your points clearly and vividly.

I cannot do better than conclude by quoting perhaps the greatest of modern British advocates, Lord Birkett. Talking of jury cases, he said:

> "The first clear, incisive impression made upon a jury is beyond all price."

And, speaking generally, he said:

> "In my experience all the great advocates I have known were characterised by the element of direct, forceful, lucid, vivid speech — all with a simplicity that gave them strength."

I borrow from Sir Trevor Henry (himself an outstanding advocate) these comments:

> "To attain such heights requires the gift of clear thinking, cultivated and practised till it becomes second nature. Few can reach that pinnacle, but we can all improve our performance by keeping the pinnacle ever in our sights."