THE SEVEN LAMPS OF ADVOCACY

WHAT THE JUDGE THOUGHT

By His Honour Judge Edward Parry.

Table of Contents

TO

THE NORTHERN CIRCUIT

WHERE I LEARNED

THESE THINGS

I
THE LAMP
OF HONESTY

I
THE LAMP OF HONESTY

THE great advocate is like the great actor: he fills the stage for his span of life, succeeds, gains our applause, makes his last bow, and the curtain falls. Nothing is so elusive as the art of acting, unless indeed it be the sister art of advocacy. You cannot say that the methods of Garrick, Kean or Irving, Erskine, Hawkins or Russell, were the right methods or the only methods, or even that they were the best methods of practising their several arts; you can only say that they succeeded in their day, and that their contemporaries acclaimed them as masters.

Inasmuch as their methods were often new and startling to their own generation, the young student of acting or advocacy is eager to believe that there are no methods and no technique to learn, and no school in which to graduate. Youth is at all times prone to act on the principle that there are no principles, that there is no one from whom it can learn, and nothing to teach. Any one, it seems, can don a wig and gown, and thereby become an advocate. Yet there are principles of advocacy; and if a few generations were to forget to practise these, it would indeed be a lost art. The student of advocacy can draw inspiration and hope from the stored-up experience of his elders. He can trace in the plans and life-charts of the ancients the paths along which they strode, journeying towards Eldorado. True, these figures of forgotten advocates are dim and obscure—only to be painfully seen through the dusty gauzes of forgotten years, pictured for us in drowsy voluminous memoirs, or baldly reported in mouldering law reports; but if we search these

records diligently we gradually discern a race of worthy men—see them haunting the old libraries, pacing the ancient halls with their clients, proud of the traditions of their great profession—advocates—advocates all.

It is in an endeavour to recapture something of the lives of these great ones, and the principles upon which they built their success, that I have struggled through forbidding masses of decaying biography in hopes to catch a faint whisper here and there of the triumphant works and days of my professional forbears.

For a race of moderns, that, maybe, care for none of these things, I have lighted again the old lamps which burned so brightly in the days that are gone, which I myself have seen lighting the darkness of our courts, and guiding the footsteps of the judges in the paths of justice and truth. For without a free and honourable race of advocates the world will hear little of the message of justice. Advocacy is the outward and visible appeal for the spiritual gift of justice. The advocate is the priest in the temple of justice, trained in the mysteries of the creed, active in its exercises. For this reason Wyclif in his translation of I John ii. 1 sanctifies the word in the text: "We haue auoket anentis the fadir, Jhesu Crist just." Modern versions retain "advocate," but unhappily substitute "righteous" for "just". Advocacy connotes justice. Upon the altars of justice the advocate must keep his seven lamps clean and burning brightly. In the centre of these must ever be the lamp of honesty.

The English Bar is a society of advocates, though, as Blackstone tells us, we generally call them counsel. The Scots retain the name in their Faculty of Advocates. The word must be insisted upon for its ancientry and meaning. The order of advocates is, in D'Aguesseau's famous phrase, "as noble as virtue." Far back in the

Capitularies of Charlemagne it was ordained of the profession of advocates "that nobody should be admitted therein but men mild, pacific, fearing God, and loving justice, upon pain of elimination." So may it continue, world without end.

From the earliest, Englishmen have understood that advocacy is necessary to justice, and honesty is essential to advocacy. The thirteenth century *Mirrour of Justices* may, as modern jurists hold, be a contemptible legal compilation. It is said to have been written by one Andrew Horn, a fishmonger; and what could he have known, say the learned ones, about the origin and history of legal affairs? Nevertheless, to the reader of to-day the views of the man in the street, the common citizen of a bygone age, about the place in the world of the advocate is more precious than many black-letter folios of crabbed juridical learning.

"Some there be," says our fishmonger very shrewdly, "who know not how to state their causes or to defend them in court, and some who cannot, and therefore are pleaders necessary; so that what plaintiffs and others cannot or know not how to do by themselves they may do by their serjeants, proctors, or friends. Pleaders are serjeants wise in the law of the realm who serve the commonality of the people, stating and defending for hire actions in court for those who have need of them. Every pleader who acts in the business of another should have regard to four things:—First, that he be a person receivable in court, that he be no heretic, nor excommunicate, nor criminal, nor man of religion, nor woman, nor ordained clerk above the order of sub-deacon, nor beneficed clerk with the cure of souls, nor infant under twenty-one years of age, nor judge in the same cause, nor open leper, nor man attainted of falsification against the law of his office. Secondly, that every pleader is bound by oath that he will not knowingly maintain or

defend wrong or falsehood, but will abandon his client immediately that he perceives his wrong-doing. Thirdly, that he will never have recourse to false delays or false witnesses, and never allege, proffer, or consent to any corruption, deceit, lie, or falsified law, but loyally will maintain the right of his client, so that he may not fail through his folly or negligence, nor by default of him, nor by default of any argument that he could urge; and that he will not by blow, contumely, brawl, threat, noise, or villain conduct disturb any judge, party, serjeant, or other in court, nor impede the hearing or the course of justice. Fourthly, there is the salary, concerning which four points must be regarded—the amount of the matter in dispute, the labour of the serjeant, his value as a pleader in respect of his (learning), eloquence, and repute, and lastly the usage of the court."

Note how from the earliest days the advocate may in no way maintain or defend wrong or falsehood. It is the right of his client he is there to uphold, and the right only. Nevertheless, although an advocate is bound by obligations of honour and probity not to overstate the truth of his client's case, and is forbidden to have recourse to any artifice or subterfuge which may beguile the judge, he is not the judge of the case, and within these limits must use all the knowledge and gifts he possesses to advance his client's claims to justice.

Many good men have been troubled with the thought that advocacy implied a certain want of honesty. Boswell asked Doctor Johnson whether he did not think "that the practice of the law in some degree hurt the nice feeling of honesty?" To whom the doctor replied: "Why no, Sir, if you act properly. You are not to deceive your clients with false representations of your opinion: you are not to tell lies to a judge." *Boswell*: "But what do you think of

supporting a cause which you know to be bad?" *Johnson*: "Sir, you do not know it to be good or bad till the judge determines it. I have said that you are to state facts fairly; so that your thinking, or what you call knowing, a cause to be bad must be from reasoning, must be from your supposing your arguments to be weak and inconclusive. But, Sir, that is not enough. An argument which does not convince yourself, may convince the judge to whom you urge it: and if it does convince him, why, then, Sir, you are wrong, and he is right. It is his business to judge; and you are not to be confident in your own opinion that a cause is bad, but to say all you can for your client, and then hear the Judge's opinion." *Boswell*: "But, Sir, does not affecting a warmth when you have no warmth, and appearing to be clearly of one opinion when you are in reality of another opinion, does not such dissimulation impair one's honesty? Is there not some danger that a lawyer may put on the same mask in common life, in the intercourse with his friends?" *Johnson*: "Why no, Sir, everybody knows you are paid for affecting warmth for your client; and it is, therefore, properly no dissimulation: the moment you come from the bar you resume your usual behaviour. Sir, a man will no more carry the artifice of the bar into the common intercourse of society, than a man who is paid for tumbling upon his hands will continue to tumble upon his hands when he should walk on his feet."

I like the rough English common-sense of this; but the Irishman in the dock had an inspired vision of the same truth when, in answer to the Clerk of the Crown, who called upon him with the familiar interrogatory, "Guilty or Not Guilty?" he replied with a winning smile, "And how can I tell till I hear the evidence?"

When Lord Brougham, at a dinner to M. Berryer, claimed in his speech that the advocate should reckon everything as subordinate

to the interests of his client, Lord Chief Justice Cockburn, "feeling that our guest might leave us with a false impression of our ideals," set forth his views of an advocate's duty, concluding with these memorable words: "The arms which an advocate wields he ought to use as a warrior, not as an assassin. He ought to uphold the interests of his client *per fas*, and not *per nefas*. He ought to know how to reconcile the interests of his clients with the eternal interests of truth and justice."

The best advocates of all generations have been devotees of honesty. Abraham Lincoln founded his fame and success in the profession on what some called his "perverse honesty." On his first appearance in the Supreme Court of Illinois he addressed the court as follows: "This is the first case I have ever had in this court, and I have therefore examined it with great care. As the court will perceive by looking at the abstract of the record, the only question in the case is one of authority. I have not been able to find any authority to sustain my side of the case, but I have found several cases directly in point on the other side. I will now give these authorities to the court, and then submit the case."

There have been advocates who regard such a course as quixotic. The late Joshua Williams was asked whether, if an advocate knows of a decided case in point against him which he has reason to believe is not known to the other side, he is bound to reveal it, and gave it as his opinion that "in principle this is no part of his duty as an advocate." It must be remembered that this opinion was given when a host of cases were decided against their merits on purely technical points of law; but there is no doubt what the practice ought to be, and what among English advocates the practice is.

If an advocate knows the law to be *x*, it is not honest to lead the court to believe that it is *y*. Whether the advocate does this by directly mis-stating the law, or by deliberately omitting to state it fully within the means of his knowledge, it is equally without excuse, and dims the lamp of honesty.

For the advocate must remember that he is not only the servant of the client, but the friend of the court, and honesty is as essential to true friendship as it is to sound advocacy.

II
THE LAMP
OF COURAGE

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ADVOCACY needs the "king-becoming graces: devotion, patience, courage, fortitude." Advocacy is a form of combat where courage in danger is half the battle. Courage is as good a weapon in the forum as in the camp. The advocate, like Cæsar, must stand upon his mound facing the enemy, worthy to be feared, and fearing no man.

Unless a man has the spirit to encounter difficulties with firmness and pluck, he had best leave advocacy alone. Richard Bethell, Lord Westbury, in early life took for his motto: "*De l'audace et encore de l'audace, et toujours de l'audace*." In advising on a case he was always clear and direct, saying that he was "paid for his opinion, not for his doubts." Charles Hatton, writing as a layman of Jeffreys in his early days at the bar, shrewdly notes his best quality: "He hath in perfection the three chief qualifications of a lawyer: Boldness, Boldness, Boldness." A modern advocate kindly reproving a junior for his timidity of manner wisely said: "Remember it is better to be strong and wrong than weak and right."

The belief that success in advocacy can be attained by influence, apart from personal qualifications, is ill-founded. There was never a youngster with better backing than Francis North, afterwards Lord Keeper to Charles II., yet, as his biographer says, "observe his preparatives," his earnest attendances at moots, his diligent

waiting in that “dismal hole” the “corner chamber, one pair of stairs in Elm Court.”

In the same way his younger brother, Roger, though born in the ermine, so to speak, had to plod his way up like any other junior. It is good to be the brother of a Lord Chancellor, but it does not make a man an advocate.

Roger North’s autobiography is full of interest to the student of advocacy. His memory of his first appearance is vivid and entertaining. “I was immediately called,” he writes, “to the Bar, *ex gratiâ*, not having standing, although I had performed such exercises as the house required, save a few. My first flight in practice was the opening a declaration at *Nisi Prius* in Guildhall, under my brother, which was a crisis like the loss of a maidenhead; but with blushing and blundering I got through it, and afterwards grew bold and ready at such a formal performance; but it was long ere I adventured to ask a witness a question.”

Roger North would never have attained the eminence he did in his profession by merely hanging on to the gown of his greater brother. Hard work and dogged courage, not patronage, earned him the dignities he achieved. The description of his early beginnings is full of encouragement for the young advocate. “During my practice under Hale,” he says, “at the King’s Bench I was raw, and not at all quaint and forward as some are, so that I did but learn experience and discover my own defects, which were very great. I was a plant of a slow growth, and when mature but slight wood, and of a flashy fruit. But my profession obliged me to go on, which I resolved to do against all my private discouragements, and whatever absurdities and errors I committed in public I would not desist, but forgot them as fast as I could, and took more care

another time. My comfort was, if some, all did not see my failings, and those upon whom I depended, the attorneys and suitors, might think the pert and confident forwardness I put on might produce somewhat of use to them."

North held the sound opinion that "he who is not a good lawyer before he comes to the Bar, will never be a good one after it." It is very true that learning begets courage, and wise self-confidence can only be founded on knowledge. The long years of apprenticeship, the studious attention to "preparatives," are, to the advocate, like the manly exercises of the young squire that enabled the knight of old to earn his spurs on the field of battle. In no profession is it more certain that "knowledge is power," and when the opportunity arrives, knowledge, and the courage to use it effectively, proclaim the presence of the advocate.

The best instance of what is meant perhaps may be found in Sir John Hollams's account of the first appearance of Mr. Benjamin. He was a great lawyer before he addressed the court, but he sat down a great advocate. It was in a case which came on for hearing before Lord Justice James, then Vice-Chancellor, and "it appeared to be generally thought that, as usual at the time, a decree would be made directing inquiries in chambers. The matter was being so dealt with when Mr. Benjamin, then unknown to any one in Court, rose from the back seat in the Court. He had not a commanding presence, and at that time had rather an uncouth appearance. He, in a stentorian voice, not in accord with the quiet tone usually prevailing in the Court of Chancery, startled the Court by saying, 'Sir, notwithstanding the somewhat off-hand and supercilious manner in which this case has been dealt with by my learned friend Sir Roundell Palmer, and to some extent acquiesced in by my learned leader Mr. Kay, if, sir, you will only listen to me—if, sir,

you will only listen to me' (repeating the same words three times, and on each occasion raising his voice), 'I pledge myself you will dismiss this suit with costs.' The Vice-Chancellor and Sir Roundell Palmer, and indeed all the Court, looked at him with a kind of astonishment, but he went on without drawing rein for between two and three hours. The Court became crowded, for it soon became known that there was a very unusual scene going on. In the end the Vice-Chancellor did dismiss the suit with costs, and his decision was confirmed on appeal."

There have been many advocates whose courage was founded on humour rather than knowledge, and who have successfully asserted their independence in the face of an impatient or overbearing Bench through the medium of wit, where mere wisdom might have failed in effect.

Of such was Tom Jones, who startled Mr. Justice Byles into indignant attention by opening his case with bold impertinence: "No one, my lords, who looks at this case with common fairness and honesty, can hesitate for a moment in declaring that there ought to be a new trial."

Byles observed, "This is rather strong language to use to us, Mr. Jones. I hope you think that we, at the least, are commonly fair and honest."

"We shall see, my lord," said Tom; "we shall see."

Serjeant Robinson tells us a further good story of Tom's refusal to be hustled by the Bench.

"Our friend Tom Jones," he writes, "was a little lengthy sometimes in the exposition of his client's rights, and one day the chief baron

said to him, ‘Mr. Jones, this case has occupied a great deal of time, and we have a very long list of cases to get through.’

“‘My lord,’ said Tom, ‘I have carefully looked through that list, and I did not find there was a single cause in which I or my client was in the slightest degree interested.’”

But these sallies should never degenerate into mere incivility or abuse, in which there is little real courage, since a judge of sense will always refrain, if it be at all possible, from reply to such attacks, which only injure the reputation of the Bar and destroy the reputation of the advocate.

In the early days of American Sessions a certain judge was violently attacked by a young and very impudent attorney. To the manifest surprise of everybody present, the judge heard him quite through as though unconscious of what was said, and made no reply. After the adjournment of the day, and all had assembled at the inn where the judge and many of the attorneys had their lodgings, one of the company, referring to the scene in court, asked the judge why he did not rebuke the impertinent fellow.

“Permit me,” said the judge, loud enough to call the attention of all the company, among whom was the fellow in question—“permit me to tell you a story. My father, when we lived down in the country, had a dog—a mere puppy, I may say. Well, this puppy would go out every moonlight night and bark at the moon for hours together.” Here the judge paused, as if he had done with his story.

“Well, what of it?” exclaimed half-a-dozen of the audience at once.

“Oh, nothing, nothing whatever; the moon kept right on, as if nothing had happened.”