THE BOOK WAS DRENCHED

PROFESSIONAL CONDUCT AND ADVOCACY

PROFESSIONAL CONDUCT AND ADVOCACY

being a series of lectures delivered to apprentices-at-law

BY

K. V. KRISHNASWAMI AIYAR
Advocate, High Court, Madras

WITH FOREWORDS BY

SIR MAURICE GWYER
Formerly Chief Justice of India

AND

SIR LIONEL LEACH
Chief Justice, High Court, Madras

INDIAN BRANCH

HUMPHREY MILFORD
OXFORD UNIVERSITY PRESS

OXFORD UNIVERSITY PRESS
AMEN HOUSE, LONDON, E.C. 4
Edinburgh Glasgow Bombay
Calcutta Madras Melbourne
New York Toronto Capetown
HUMPHREY MILFORD
PUBLISHER TO THE
UNIVERSITY

First edition, published by the Madras Bar Council, 1940
Second edition, April 1945

PRINTED IN INDIA
AT THE BASEL MISSION PRESS, MANGALORE, ON PAPER MANUFACTURED BY
THE MYSORE PAPER MILLS, AND PUBLISHED BY HUMPHREY MILFORD, BOMBAY

FOREWORD TO THE SECOND EDITION

I AM very glad that a second edition of Rao Bahadur K. V. Krishnaswami Aiyar's most admirable book is to appear, and it gives me great pleasure to contribute this Foreword to it. I remember that when a copy of the original edition first came into my hands and I began to read it, I found that I could not lay it down until I had read it right through; and I do not doubt that many others could say the same. The new edition is even better than the old. It is a book which should be in the hands of every law student and young practitioner; and many older practitioners would derive much profit from studying its pages.

Here is to be found information and advice of the greatest practical value united with a lofty idealism. The standards on which the author insists are high and exacting but neither too high nor too exacting for a profession which is an essential part of the administration of justice. He concedes that of late the profession has, as he puts it, lost much ground, though he is unwilling to discuss the reasons which have led to this. That his statement is only too true admits, I fear, of no dispute; and the value of books like this, in which young men who are about to enter, or who have just entered, the profession are reminded of the duties and responsibilities of a lawyer, is that they reassert standards sometimes in danger of being forgotten. I have heard Indian friends of my own, themselves distinguished lawyers, deplore in no uncertain terms this lowering of standards; and it seems clear that one cause of it at least is the great overcrowding of the profession and the struggle for existence among its less fortunate members, since the weaker brethren are thereby exposed to temptations which they are not always able to resist. This is a matter which affects the public as well as the profession itself: for any diminution in the respect felt for lawyers as a whole must affect prejudicially the whole administration of justice. It is therefore worth while to consider whether there is any effective means of preventing these excessive numbers.

I think that all would regret any artificial restriction on entry into the profession, which might have the effect of

making it a preserve for the well-to-do and shut out young men of small means but great promise. I have, however, often thought that it is too easy at the present time to become a lawyer and that the standards of law examinations are in many cases far too low. To raise those standards and thus to ensure that only properly equipped young men are able to enter the profession would, as it seems to me, be not only a legitimate but an extremely beneficial step. Nor do I think the teaching of law in India is all that it might be, and I should like to see some united effort among the different law schools with a view to its improvement generally. The High Courts might themselves play a very useful part in this.

A learned friend and former colleague of mine has often reminded me that English rules cannot be applied without qualification to India, where conditions are different. That is of course true, for in England the professions of barrister and solicitor are distinct and each has its own code and rules of professional conduct. In India a practitioner may be acting, as it were, as a barrister one day and as a solicitor the next; but he belongs to one profession and not to two, and the rules of conduct which govern a barrister in England, who never comes into contact with his lay client at all, unless his solicitor brings him to a conference, are obviously inapplicable to Indian conditions. It is therefore always necessary to apply English authorities with caution; and the author of this book seems to me to have been very happy in his treatment of such borderline cases.

I note that the author appeals to Bar Councils 'to enlarge the scope of the earning activities of the lawyer and to permit him to take up other remunerative employments that will not derogate from the dignity of the profession'. There are some occupations, certain kinds of journalism for example, or teaching, in which it has always been recognized that advocates might engage for the purpose of adding to their income in their early days; but I should be sorry if the list were unduly extended. I doubt whether in this matter it is possible to lay down any hard-and-fast rule, and perhaps the matter should be left to the judgement and good taste of the profession itself, so long as it is remembered that where there is doubt there is danger. On the other hand, I think that the

idea of partnerships between advocates deserves closer examination than it has yet received. I do not mean a partnership in the ordinary commercial sense, but the partnerships described by the present learned Chief Justice of Madras (who had considerable experience of them before he ascended the Bench), in a passage quoted for the first time in this edition, as one 'where an advocate puts nothing in when he joins it and takes nothing out when he leaves it'. They are, as is well known, to be found in some of the Dominions and, so long as no distinction is recognized between the barrister and solicitor branches of the profession, they have always seemed to me very suitable for conditions in India. And they have this incidental advantage, that the young advocate who enters one works directly under the eye of an older and more experienced man and is thus subject to a friendly discipline at the time when it may be most useful and valuable to him.

The author touches upon the relations between seniors and juniors, often a sore subject. I have heard it said, and certainly the testimony of my acquaintances among members of the junior Bar is to the same effect, that senior advocates are apt to monopolize more of the available work than they should and that juniors suffer accordingly. When I presided over the Federal Court, we tried to draw a clear distinction between senior and junior advocates, assigning to each what seemed to us his appropriate work; and I have reason to believe that the experiment was not unsuccessful, though it would have more scope in trial courts than in a final Court of Appeal. And here I might add that I had hoped that our senior advocates in the Federal Court might later on have developed into an order of King's Counsel, or by whatever name it might have been known; in which case many of the present difficulties would have disappeared. Circumstances prevented me at the time from pursuing this idea, but I should like to think that it might one day be revived. Before the establishment of the Federal Court, there were many obstacles in the way; but with an all-India Court and Bar these no longer have the same weight.

I seem to have wandered beyond the permitted limits of a Foreword; and I cannot do better than conclude with a sentence which is to be found in Chapter XII of this new

edition : 'Every member of the Bar is a trustee for the honour and prestige of the profession as a whole.' The student or young advocate who reads this book will learn why that is so. He will also understand better than he did before that the law is a great and noble profession, whatever its critics may say, and law itself a great and noble science, the king of kings, as the sacred books of this country call it; and he will, I hope, determine that never by any act or word of his will he show himself unworthy of the great tradition which he has inherited and which the author of this book puts so plainly and convincingly before him.

Delhi
December 1944

MAURICE GWYER

FOREWORD TO THE FIRST EDITION

If my recollection serves me correctly, that famous member of the English Bar, Sir Edward Clarke, K.C., once said that success in the profession depended on three factors. The first was to have an infinite capacity for hard work; the second was to have no money, and the third was to be very much in love. A capacity for hard work combined with such powerful incentives will no doubt carry one far towards success, but other qualifications are necessary to attain it. These are to be gathered from the lectures which Rao Bahadur K. V. Krishnaswami Aiyar has delivered at the request of the Bar Council of this province to the apprentices-in-law and are published in this volume.

Mr Krishnaswami Aiyar has dealt with all matters concerning professional conduct and advocacy. He commences with the legal profession and its responsibilities and, having spoken of the equipment of the lawyer and given hints for law studies, he proceeds to advise, in turn, on the training grounds for young lawyers, the meeting of the client, the preparation of the case, the drafting of pleadings, the examination of witnesses, conduct in court, professional conduct, the duty of the advocate to the court, and his duty to the profession, to his opponent, to his client, to himself, and to the public and the State. Mr Krishnaswami Aiyar has also dealt with the lawyer's privileges and discussed problems which concern the future of the profession.

Mr Krishnaswami Aiyar has given the young advocate the benefit of his great experience and has done so in language which makes his lectures most readable. Those who read and digest what Mr Krishnaswami Aiyar has here to say and persistently follow his advice may well count on success in the profession notwithstanding that it is so overcrowded. The Bar Council is indeed to be congratulated on its decision to publish this volume.

Madras
February 1940

LIONEL LEACH

MADRAS BAR COUNCIL'S FOREWORD TO THE FIRST EDITION

THE Bar Council of Madras has great pleasure in presenting to the profession the course of lectures on *Professional Conduct and Advocacy* delivered by Mr K. V. Krishnaswami Aiyar, a leading member of the Madras Bar, to the apprentices of the year, under the auspices of the Council. The Council has every reason to congratulate itself on the selection of the lecturer. The lectures are couched in a trenchant style and breathe an earnestness of purpose and loftiness of aim. In the course of his lectures, Mr Krishnaswami Aiyar has put in a forcible plea for the maintenance of the highest standards in the practice of the advocate's art in consonance with the best traditions of the profession both in England and in India and has set before the young practitioners the illustrious examples in the profession from the earliest times in legal history.

Madras
March 1940

A. KRISHNASWAMI
Chairman, Bar Council

AUTHOR'S PREFACE TO THE SECOND EDITION

THE main scheme of the lectures as they were delivered in 1940 has been retained, but there is hardly a chapter in this second edition that has not been thoroughly revised and substantially enlarged.

New appendixes have been added, one called 'The Judge', another giving an account of the recent case of *Myers* v. *Elman* which is discussed in the body of the book, and the third consisting of a select bibliography.

I am greatly indebted to the Oxford University Press for the extreme care and thoroughness with which they have seen the book through the press. They have acted not merely as publishers but as advisers at every turn in bringing the text of this edition to its final form. Such detailed co-operation calls for my grateful thanks.

Madras
January 1945

K.V.K.

AUTHOR'S PREFACE TO THE FIRST EDITION

THE Bar Council deserve to be congratulated on their choice of the title for these lectures: *Professional Conduct and Advocacy*. I refer particularly to the expression 'professional conduct'. The title under which topics of this kind are usually discussed is either 'Legal ethics' or 'Professional ethics'. Many English and American lawyers and Judges have spoken or written under the title 'Legal ethics'. Our own Judge, the late Justice Sundara Aiyar, addressed the apprentices of 1910-11 and inaugurated this series of lectures under the title 'Professional ethics'.

The word 'ethics' etymologically means 'character or that which relates to it', as distinct from what relates to the intellect. The word soon acquired, it is said, a restricted sense and was used to denote, not character simply as character, but character with its good or bad qualities indicated by the use of the antithesis, good or bad.

There is also another point and Fowler draws attention to it. The words 'ethics' and 'morals', once synonymous, began to acquire meanings complementary to each other. 'Ethics' is the science of morals and 'morals' are the practice of ethics. To illustrate: a man's ethics may be sound; but his morals may be bad.

Reputed, as we lawyers are, for accuracy of thought and expression, it was well that the word 'ethics'—of such uncertain significance—was dropped. The purpose of these lectures is not merely to determine what the science is, but to indicate the practice that should be kept up. By discarding that expression we also disprove the charges of conservatism and over-subtlety that are levelled against us. The word 'conduct', a plain, blunt word, is thus a well-chosen substitute.

Then referring to the word 'legal', the predominant and accustomed sense of that word is 'of or pertaining to law'. In this sense, the word 'legal' in 'legal ethics' is strictly a misnomer; for the subject of these lectures has nothing to do with law as law. Seeing that these lectures have to do only with the professional conduct of those who practise the law, the title *Professional Conduct* seems to me to be an accurate and scientific one.

I should then like to say a word about the scheme of my lectures. I have chosen those topics that, from my experience and observation of more than thirty-two years at the Bar, I felt ought to be treated. I have also arranged them in the order that appears to me to be logical. I therefore say something about matters—like the drafting of pleadings, the preparation for and methods of argument in an appellate court, for the appellant as well as for the respondent—which are not usually covered in a series of lectures of this kind. My only objective is to tell young men in the profession all that I know and have seen about matters which I feel they should know or would find it advantageous to know.

In dealing with the duties and privileges—more of the former than the latter—of the lawyer, I have adopted the customary classification, 'Duty to the court', 'Duty to the client', etc., as, in my opinion, this helps to cover the whole field. A learned writer, however, takes exception to this method of classification on the ground that it does not give free scope for discussion. But as he has devised no new arrangement and merely entitled his chapters 'Relations with client', 'Relations with the court', etc., there is little to choose between the two. In any event, we are agreed that we cannot get rid of the client, the court or the Bar!

In my treatment of the many duties of lawyers, I have made an attempt to analyse them and bring them under appropriate heads. Where the same point or theme presented different phases or aspects, I have separated them and endeavoured to assign to them their proper places.

I have also dwelt upon the problem of the future for entrants to the Bar. I do not deal with the economic problem of how to make money, but have tried to answer the question recently raised by two of our learned leaders, the Hon'ble Sir S. Varadachariar, the Federal Judge, and Sir Alladi Krishnaswami Aiyar, our Advocate-General—whether our young men should not, for their own sake and for the sake of the profession itself, enter public life even at the early stages of their careers.

Madras
March 1940

K. V. K.

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CHAPTER I

THE LEGAL PROFESSION AND ITS RESPONSIBILITIES

Introductory — The legal profession, a great profession — A learned profession — Law, a science — Practice of it equips for pre-eminence — An independent profession — Gives leadership in society — Creates consequent enemies and detractors — Criticism that the lawyer has an over-prominent place — That he promotes strife — That he is dishonest and untrue — The politician's antagonism — An uneconomic and unessential profession — Profession, however, essential in complex society — Legal profession compared with medical profession — A cheap gibe, venality, answered — Measure of criticism is measure of greatness — Equipment needed to maintain the position

BEFORE I talk to you on professional conduct and advocacy, I think I must say a few words about the legal profession, its place in the order of society and its responsibilities. For one thing, the lawyer is, we find, a much-maligned person. For another, by virtue of his attainments and qualifications in the profession, he has to discharge duties and responsibilities in society which no other citizen has to do. An inquiry is necessary to clarify both these points.

The profession of law is a great profession, the most brilliant and attractive of the peaceful professions, with responsibilities, both inside and outside it, which no person carrying on any other profession has to shoulder. It is a great controlling and unifying institution which places upon each his duties, gives to each his rights, and enforces from each his obligations. It is composed of a body of men with a high sense of honour and marred by far less mutual jealousy or ill will than any other. In the words of Mr Justice McCardie: 'The spirit amongst counsel is one of generous emulation and not the spirit of embittered and petty rivalry. The brotherhood of the Bar is a notable and felicitous fact.'

It is, in the first place, a learned profession. It is a learned profession not merely in the sense that learning is displayed in the practice of it, but that it calls for the high and noble conduct which is a corollary and consequence of all true learning. As Burke observed, 'Law is a science which does more to quicken and invigorate the understanding than all other kinds of learning put together'. Blackstone, in the introduction to

his commentaries, spoke of it as 'a science which distinguishes the criterion of right and wrong; which teaches to establish the one and prevent, punish or redress the other; which employs in its theory the noblest faculties of the soul, and exerts in its practice the cardinal virtues of the heart; a science which is universal in its use and extent, accommodated to each individual, yet comprehending the whole community'.

Then the practice of the profession, in which the lawyer has to deal with the greatest possible variety of human relations and has his mettle constantly tried from every point, gives special opportunities to him to equip himself with those qualities which count for pre-eminence in society. The capacity to analyse and sift facts, to penetrate the inmost recesses of the human mind and to discover there the sources of men's actions and their true motives, and to perceive and present them with directness, accuracy and force, are qualities which the practice of the profession both demands and develops. His genius in achieving results and his peculiar gift of mastering and disentangling complex situations have won for the lawyer the reputation that he can achieve anything.

Again, the legal profession is, amongst all the learned professions, the most independent one. Its independence, which can never be lost sight of, is the bed-rock upon which its claims to lead the country are based. No member of the legal profession ever hesitates to condemn injustice or tyranny. More than the Judge he stands for Justice as he pleads for it.

These qualities which he possesses by education and by training make him the leader of society as a matter of course. It is wholly wrong to assume, as some do, that he owes his leadership to traditional or class prestige. As has been observed, 'No dignity of office can secure men's respect for itself continuously unless it can show a worthy character in those who hold it'. Where judgement and a spirit of independence are required the lawyer easily takes the lead. He exercises great influence, acquires rank and reputation and largely contributes to the most responsible and distinguished services of the State. Perhaps no class of men earns greater social and political distinction.

This place of pre-eminence which he acquires in society creates many enemies for him. In cases where human passion

is excited and great interests are at stake, the lawyer is further apt, in winning a case, to make a lifelong enemy. He is one of the most suspected of men, and detractors of his rank and worth are never wanting at any time or in any country. Lawyers are looked upon 'as defeaters of the law and mockers of its majesty'. A good example of this spirit is afforded by the words that Swift puts into the mouth of Gulliver, who tells his master, the Grey Horse, that 'there was a society of men among us, bred from their youth in the art of proving, by words multiplied for the purpose, that black is white, and white is black, according as they are paid. To this society all the rest of the people are slaves. It is likewise to be observed, that this society has a peculiar cant and jargon of their own, that no other mortal can understand, and wherein all their laws are written, which they take special care to multiply; whereby they have wholly confounded the very essence of truth and falsehood, of right and wrong, so that it will take thirty years to decide whether the field left me by my ancestors for six generations belongs to me or to a stranger three hundred miles off.'

In the opinion of many outside the profession, the lawyer holds a much too prominent place, more prominent than the service that he renders to society deserves. Very mixed feelings lead to this complaint. The critics feel that the lawyer sets too high a value on his services and, what is much worse, that that valuation is accepted by those to whom the services are rendered, while their own equal or superior contributions do not obtain the same recognition.

A belief sometimes expressed is that lawyers promote strife. That, I should say, is an absolute untruth. The work of the legal profession is not to create disputes; but when disputes arise lawyers are called in to settle them, and in truth, they are the greatest peacemakers. The person most ready to promote a compromise will be the lawyer himself. Law is concerned only with preventing disputes. Most of our enactments, for instance, are intended to stop the creation of new strifes. Unless it can be said that law itself, codified or otherwise, tends to promote strifes, because disputes arise as to its construction or application, the lawyer does not create or promote strife. It is further unfortunate that the lawyer is blamed for all the defects of the law, for most of which he is not responsible.

Next it is said against him that the practice of the profession is inconsistent with a stern sense of moral obligation and involves an amount of dishonesty and untruth on the part of the practitioner. This again is a misconception. The art of advocacy, which is assumed to be the art of making 'the worse appear the better reason', is one which to many lay minds appears incompatible with truth and justice. Whatever the profession, it can be practised well or ill. It would be in the highest degree visionary to expect that, amidst the numbers who crowd the ranks of the profession, no individuals should be found insensible to the dignity of their vocation. Such must always exist in every widely extended class and the guilt of a few cannot be regarded as the disposition of the many. It would be most unfair to judge the character of the profession by such rare and melancholy exceptions. 'As there are spots in the sun so may there be blemishes in the Bar.' Oftentimes there is honest disagreement on facts between parties and the advocate is bound to present his client's case in the best possible aspect. I am certain that the practice of the profession involves nothing which can be said to be in disregard of truth. Lord Macmillan says: 'Once the vital point is realized that the advocate in court is engaged not in expressing his own views of the case but is presenting and marshalling all that can be said of his client's view of it, all room for the charge of insincerity against the advocate disappears.' It does not impair one's honesty to affect warmth when one feels none, and present on behalf of a client an opinion different from one's own. A client is entitled to say to his counsel, 'I want your advocacy and not your judgement'. There is the high authority of Lord Atkin that an advocate may urge freely a view with which he does not himself concur, for 'it often happens that the opinion of the Judge differs from our own'. An argument that may not convince us may convince the Judge before whom we urge it; and after all, it is his business to judge. Lord Bramwell said, in *Johnson* v. *Emerson*, *L.R.* 6 *Exch.* 329, at p. 367: 'A man's rights are to be determined by the court, not by his attorney or counsel. It is for the want of remembering this, that foolish people object to lawyers that they will advocate a case against their own opinions.' On the same point, Samuel Johnson is reported to have said: 'Everybody knows that 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.' Forsyth explains that 'such an unfavourable opinion has arisen from confounding two things totally distinct—the duty of the advocate and the office of the Judge. It must never be forgotten that, in the case of pleading at the Bar, these duties never coalesce'. Having regard to the honour and rectitude of the great majority of its members, it is worthy of any man's ambition to be recognized as a loyal member of the Bar, be he successful or unsuccessful in it. The lawyer has every reason to entertain a more just pride in his profession than most of his assailants seem to realize.

Sir Walter Scott, himself a lawyer of experience and no mean judge of human nature, puts in the mouth of the Antiquary this truer estimate of a lawyer: 'In a profession where unbounded trust is necessarily imposed, there is nothing surprising that fools should neglect it in their stupidity and tricksters abuse it in their knavery. But it is more to the honour of those, *and I will vouch for many*, who unite integrity with skill and attention and walk honourably upright where there are so many pitfalls and stumbling-blocks for those of a different character. To such men their fellow-citizens may safely entrust the care of protecting their patrimonial rights and their country the more sacred charge of her laws and privileges.'

Then, the politician thinks that there is rivalry, even antagonism, between himself and the lawyer. This belief is as unfounded as it is unfortunate. Both are engaged in the selfsame task of securing justice and freedom for the community. We have the celebrated paradox of Cicero, 'We are slaves of the law that we may be free'. In their activities, they supplement each other. The task of both is that of reconciling freedom with compulsion, the freedom of the individual to enable him to give of his best to the country, and the compulsion which is a necessary adjunct of the very existence of the community in which the individual has to enjoy and exercise his freedom. As L. P. Jacks puts it: 'Hitherto the conception of liberty and the conception of discipline have stood opposed to one another. What civilization has now to do, and will perish if it fails to do, is to reconcile them, to bring the conception of discipline under the conception of liberty, to make discipline a vital element of liberty, thereby

winning for ourselves a liberty broader, deeper and richer than we now know or our fathers knew before us—the liberty of the orchestra.' Temporary disagreements and a call to the politician for cautious procedure, engender unpleasant feelings, which find expression in a doubt as to whether the legal profession need exist at all and whether society would not be better without lawyers. With the growing power of law in the evolution of society, the classes that are too often hostile to its restraints dislike the lawyer because he stands pre-eminently for the enforcement of law and the consequent limitation of licence. I was amused to read that in the Union Debating Society of Wellington, New Zealand, there was a serious discussion on the subject 'That the legal practitioner is a parasite, infesting the community, and ought to be extirpated'.

Again, the criticism is levelled against the legal profession that it does not serve to add to the wealth or economic prosperity of a nation; it merely helps to transfer wealth from one person to another inside a country; and consequently the lawyer is not an essential member of society.

There is, however, no doubt that the profession of law is an essential one in a complex society, that those who follow it are good citizens performing a duty which is essential, if the machine of civilization is to move. As Forsyth says in *Hortentius the Advocate*: 'As the relations of society continue to grow more varied and complex, so will the lawyers' profession become correspondingly more essential in the adjustment of any differences that may arise.' 'There can be no civilization without order; there can be no order without law', and, I would add, no law without lawyers to interpret it. As Mr Justice McCardie says, 'The alternative to the reign of law is the chaos of the jungle'. Imagine what would be the state of things if every litigant were to plead his own cause. Conceive, if you can, a court without a Bar. Conceive the situation of a Judge set to try causes and administer legal rights between party and party without the aid of professional advocates. As Sharswood says, 'It is one of the most striking advantages of having a learned profession, who engage as a business in representing parties in courts of justice, that men are thus brought nearer to a condition of equality, that causes are tried and decided upon their merits, and do not depend upon the

personal characters and qualifications of the immediate parties'. So long as there are quarrels to settle between parties, so long there should be tribunals to settle them. And so long, then, are lawyers and the legal profession necessary in a well-ordered society. Destroy the Bar and you will destroy a bulwark of civil and criminal justice, nay, you will destroy the very foundations of security and liberty. 'A government of law is the supreme manifestation of civilization', and, as Lord Bacon said, 'law is the great organ through which the sovereign power (of society) moves'.

Sir John Davys puts the legal profession higher than the medical profession: for, he says, 'why may we not proceed further and affirm confidently, that the profession of the law is to be preferred before all other human professions and sciences, as being most noble for the matter and subject thereof and the most meritorious for the good effect it doth produce in the commonwealth? . . . Neither is the profession ennobled in regard of the dignity of her employment, but she is to be honoured so much the more for the necessity and continuous use of her service in the common weal. For, if we must honour the physician *proper necessitatem*, as the wise man prescribeth, much more must we honour for the same cause the professors and the ministers of the law. For neither do all men at any time, nor any one man at all times, stand in need of the physician; for they that are in health (which are the greatest number of men) *non egent medico* saith the great physician of our souls and our only Advocate which is in Heaven. But all men, at all times and in all places, do stand in need of justice; and of law which is the rule of justice and of the interpreters and ministers of the law, which give life and motion unto justice.'

A gibe which is cheaply made by persons who ought to know better, that the lawyer is a venal person who prostitutes his talents for money, is as malicious as it is untrue. If this were a true picture, the profession would not contain those great men who do the country most credit. Let it also be an answer to them that the character of the Bar is but a reflex of the character of the community and that an unscrupulous Bar cannot continue to exist in a high-minded community. As Forsyth says, 'It would indeed be a humiliating reflection

to think that the splendid triumphs of the Bar have been achieved by a venal prostitution of the intellect, that the stream of its eloquence is polluted at the source, and that the wonderful ingenuity and skill which mark the higher efforts of forensic oratory are little better than elaborate perversions of fact. . . . Success in such a conflict has no ennobling feature, and happily mankind are so constituted as to value the heart more than the head, and withhold approbation from those whose powers of argument are better than their principles.'

It is but human to dislike superiority, and the criticisms levelled against the lawyer themselves declare the eminence of his position in society and his popularity. At the same time they ought to awaken the lawyer to the measure of the responsibility that lies on him in the conduct of his profession. If the profession of law is a great calling, it is a calling in which we have great responsibility.

To discharge that responsibility adequately the lawyer must make himself equal to the task. The profession calls for great knowledge, high mental capacity and wide culture. Forsyth says that 'it is well to erect a lofty standard' in view of 'the momentous questions which are confided to his skill, involving all that is dear to man' and remembering 'that when life or property is at stake, or the poisoned shaft of calumny is quivering in the heart, his office it is to stand forth and shield the person or vindicate the character of those who are assailed and who fly to him for protection or redress'. He adds that 'without an adequate conception of the requirements of his office, it is utterly impossible that the advocate can perform the duties, which, by its very nature, he stands pledged to society to fulfil. How can he hope to thread the mazes of intricate argument, if his mind is not disciplined by the habit of accurate reasoning? or to advise safely in some perilous emergency, if he has not thoroughly digested and made himself master of legal principles?'. You should endeavour therefore to attain this level as nearly as you may. You should be a *Vidyarthi* all your life, always like Ulysses, seeking knowledge 'like a sinking star, beyond the utmost bound of human thought'.

CHAPTER II

THE EQUIPMENT OF THE LAWYER

First equipment, learning and wide knowledge — Success in examinations, no good, nor capacity to talk — Depth and wide range of ideas required — Moral excellence more important — Industry, essential to success — Example of Mr S. Srinivasa Iyengar — *The Seven Lamps of Advocacy* — An eighth lamp, Tact

I NOW proceed to deal with the equipment that is needed. The following passage which Forsyth quotes from a French writer shows how wide and varied it should be. 'What treasures of science, what variety of erudition, what sagacity of discernment, what delicacy of taste it is necessary to combine to excel at the Bar! Whoever shall venture to set limits to the knowledge of the advocate has never conceived a perfect idea of the vast extent of his profession.' Lord Brougham once said that a 'lawyer must know everything about something and something about everything'.

The first essential is equipment in legal learning. What you require is learning, accurate learning, wide knowledge and the courage born of it. Do not argue that a lawyer is no library of law, that he has only to find the law, and that he can always do that. You may call to your support the royal dictum of George III who said that if he asked a legal question of a layman he found that he neither knew the law nor where it could be found; whereas if he asked the same question of a lawyer, he observed that he also did not know the law, but that he did know where to find it. No doubt you may be right in a way, but without learning as a background you can never frame your questions aright and never locate the source of the answer to your questions as they arise. It may seem paradoxical, but it is true that you must know the law to some extent in order to know where to find it. Firstly, without it you cannot see the subject in its true colours. Secondly, you cannot find what you want unless you know where to find it, which again requires that you must possess sufficient learning for that purpose. As the authors of *The Work of the Advocate* put it, 'Before going to his books, the investigator must have a definite conception in his own mind of what he goes there to find'. 'Learning begets courage and wise self-confidence can only be founded

on knowledge.' An eminent American lawyer, W. R. Ruddle, referring to the courage needed by a lawyer, said: 'This courage is not the courage of a prize-fighter, nor of the bully, but is the courage that will tackle every problem or question presented, investigate it, find out the whys and wherefores, the ins and outs, the pleasing features as well as those that are disagreeable and then stand by your guns.' In no profession is it more certain that 'knowledge is power' and that 'cowardice is the result of ignorance'.

There is, however, a belief that knowledge of law as exemplified by distinction in law examinations is sufficient in itself to secure success at the Bar. Far be it from me to underestimate credentials obtained at an examination; but the more comprehensive and more thorough the knowledge of law is, the better; and such knowledge cannot be mastered in the couple of years spent at a law college. It is natural that the young lawyer should be anxious to get business at once but he should remember that 'a little learning is a dangerous thing' and that he should not wait to learn by his mistakes, at the sad expense of his clients, his own reputation and oftentimes his conscience. There are few young men that join the Bar who cannot find time to devote to a complete acquisition of the science of law if they are conscious of the need for it and resolve to attain it.

It is very often said that a boy must go to the Bar because he talks so much or argues everything. But 'talking so much' is not a first-rate qualification and many members of the Bar have suffered from an excessive facility in that direction.

Let us not, therefore, suppose that because you can talk well on a platform, you will make a successful lawyer. Ability to talk fluently may be an aid to success. But that, by itself, is no guarantee of success nor is it a *sine qua non*. To be a great and successful lawyer you need not begin by being a great speaker. What is required is power of argument and that can be acquired by constant habit and exercise. You need not begin with it. Where there are ideas, words will flow. Socrates said to the young Greeks that if they had something to say they would know how to say it. What is wanted is ideas, a wealth of fresh ideas, a world of information and a ready capacity to recall to mind what you know and put it to use.

More important than intellectual is moral equipment. In his book, *Legal Ethics*, G. W. Warvelle writes: 'Because of the magnitude of the interests placed in the hands of its members, the responsibilities which they assume and the confidence with which they are entrusted, there is demanded of them in the exercise of their duties, an exemplification of the highest qualities of moral excellence.' Moral excellence is in fact an indispensable element in all forms of human greatness. John Stuart Blackie says: 'A man may be as brilliant, as clever, as strong and as broad as you please and with all these, if he is not good, he may be a paltry fellow; and even the sublime which he seeks to reach in his most splendid achievements, is only a brilliant sort of badness.' He quotes the scriptural text, 'One thing is needful', and adds: 'Money is not needful; power is not needful; liberty is not needful; even health is not the one thing needful; but character alone—a thoroughly cultivated will—is that which can truly save us.' Character is vital in all professions and walks of life, and in the legal profession particularly the maintenance of the honesty of the lawyer is a matter of the first importance. There is in fact no other profession in which so many temptations beset the path of the novice, enticing him to swerve from the line of strict integrity. There are snares and pitfalls at every step. 'High moral principle is his only safe guide; the only torch to his way amidst darkness and destruction.' The most worthy and effective advertisement possible for a young lawyer, especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust.

Sir Edward Coke bears testimony to the necessity of integrity and virtue: 'Cast thine eye upon the sages of the law that have been before thee, and never shalt thou find any that hath excelled in the knowledge of these laws, but hath sucked from the breasts of that divine knowledge, honesty, gravity and integrity; for hitherto I never saw any person of a loose and lawless life attain to any sound and perfect knowledge of the said laws: and on the other side, I never saw any man of excellent judgement in these laws, but was withal honest, faithful and virtuous.' We speak of professional ethics, but what is it but an abstract denomination for an honest and truthful life? The code of ethics for the

lawyer is not any different from that for a moral man generally. The same test applies to your conduct and acts both inside and outside the profession. Test your acts by standards of common honesty and you will always be right. Make your own conscience your guide and remember that nothing that is morally wrong can be professionally right.

It would be useful here to quote the appeal that Sharswood makes. 'Let it be remembered and treasured in the heart of every student that no man can ever be a truly great lawyer, who is not, in every sense of the word, a good man. A lawyer, without the most sterling integrity, may shine for a while with meteoric splendour; but his light will soon go out in blackness of darkness. It is not in every man's power to rise to eminence by distinguished abilities. It is in every man's power, with few exceptions, to attain respectability, competence, and usefulness. The temptations which beset a young man in the outset of his professional life, especially if he is in absolute dependence upon business for his subsistence, are very great. The strictest principles of integrity and honour are his only safety. . . There is no profession in which moral character is so soon fixed as in that of law; there is none in which it is subjected to severer scrutiny by the public. It is well that it is so. The things we hold dearest on earth—our fortunes, reputations, domestic peace, the future of those dearest to us, nay our liberty and life itself—we confide to the integrity of our legal counsellors and advocates. Their character must be not only without a stain, but without suspicion. From the very commencement of a lawyer's career, let him cultivate, above all things, truth, simplicity and candour; they are the cardinal virtues of a lawyer.'

A *sine qua non* for success is that you must put forth infinite industry. As Lord Eldon put it, you must 'live like a hermit and work like a horse'. Lord Atkin said that one thing was essential, the capacity for hard and regular work; and that nobody had ever risen in the legal profession by doing a few hours' work here and there when the mood came upon him. You have heard it said that 'Industry is Fortune's right hand'. It is not in that sense that I am referring to industry. A great man said: 'The longer I live, the more I am certain that the great difference between man and man is invincible energy.' 'Diligence', maintains Cicero, 'is capable of effecting almost

everything.' It is the one virtue 'in which all other virtues are comprehended'. You may have learning, you may have intellect, you may have the good fortune to secure your first clients, but do not believe that you can secure abiding success without industry. As a learned writer puts it: 'The genius of success in the contests of the forum is the genius of hard work.' I would say that industry can supply even the lack of learning or intellect, for genius itself is but the infinite capacity for taking pains. I can say with confidence that no man has succeeded in the legal profession merely by his intellect and without industry. Let industry, then, be the motto of your professional life. Even for the learned profession of law, you need not be great in intellect or in learning, but if you are a giant in industry you are likely to be a giant in the profession. Without industry 'the armoury of the advocate will lack weapons on the day of battle'. A learned lawyer said: 'Luck generally comes to those who look after it and my notion is it taps once in a lifetime at everybody's door, and if industry does not open it, away it goes.'

Let me in this respect hold up to you the living example of one of our greatest lawyers of the present day, my master, Mr S. Srinivasa Iyengar. For accurate and intensive learning, for deep and wide knowledge, for a keen and powerful intellect, original as well as subtle, he stands unsurpassed. He had ancestral wealth in abundance and did not need to earn for himself. He was associated intimately with the greatest and the most eminent lawyer that Madras has produced, the late Sir V. Bhashyam Iyengar. His family was reputed in the Madura and Ramnad Districts, and amongst Zamindars and Nattukottai Chettiars, and he himself was well known to them all. Clients flocked to him even from his earliest days. With these advantages he could easily have made a few thousands a month without any effort at all. Another in his position would have been tempted to indolence and laziness. But Mr Srinivasa Iyengar's industry from the very start was unparalleled. I have known him sit at his table for long hours, forgetting even his food, engrossed in his papers or his books. He would not be content with looking into textbooks alone or digests alone. He would not merely look into the index or the contents of the relevant books but study them whole. I know that in one

case, when he had to prepare a plaint on a branch of the law of trusts, he studied by way of preparation the whole of Lewin, Godefroi, Story and others. He would not stop because he had collected ample and unquestionable authority in his favour. His research must be exhaustive. There must be nothing left unexamined. That is the kind of intellectual ambition that I desire you should emulate. As an example of his type of research, I may tell you that once I was directed by him to examine the facts of all the cases on 'purchasers for value without notice'—and there are heaps and heaps of them—and to find out the case most approximate on the facts to the case we had to establish. Imagine the magnitude of the work to be done when most of the cases were reported in the old English reports describing quaint forms of pleading. My own strong belief is that it was neither his intellect by itself nor his learning alone nor merely his knowledge nor his brainpower, nor his influential associations that brought him his brilliant success at the Bar, but the infinite industry of which he was capable.

I may also here mention what a biographer of Rufus Choate, the famous American advocate, says, referring to him: 'So let no man seek to follow in his footsteps, unless he is ready to demonstrate in his own person that infinite work is the only touchstone of the highest standing in the law, and that the sluggard and the slothful who enter must leave all hope behind.'

Judge Abbot Parry, in an admirable book entitled *The Seven Lamps of Advocacy*, refers to the qualities that make for success at the Bar. He mentions Honesty, Courage, Industry, Wit, Eloquence, Judgement and Fellowship, as the seven lamps.

He deals with them in order and illustrates his remarks from the lives of the giants at the Bar. Dealing with Honesty, he says that 'the best advocates of all generations have been devotees of honesty', and cites the case of Abraham Lincoln 'who founded his fame and success on what some called "perverse honesty" '. Speaking of Courage, he says: '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.' He quotes Charles Hutton's characterization of Jeffreys: 'He hath in perfection the three chief qualifications of a lawyer: Boldness, Boldness, Boldness.' About Industry he quotes the graceful alliteration of Charles Lamb, 'the dry drudgery of

the desk's dead wood'. 'Advocacy', he says, 'is indeed a life of industry' and 'an advocate must study his brief in the same way that an actor studies his part. Success in advocacy is not arrived at by intuition.' The Lamp of Wit is needed 'to lighten the darkness of advocacy'. 'Often the wit of an advocate will turn a Judge from an unwise course, where judgement or rhetoric would certainly fail.' Referring to Eloquence, he says 'eloquence of manner is real eloquence' and there is 'a physical as well as psychological side to advocacy'. As regards Judgement, I invite your attention to this statement: 'In nothing does the advocate more openly exhibit want of judgement than in prolixity.' He ushers in the lamp of Fellowship with the words of FitzJames Stephen about the English Bar, that it is 'exactly like a great public school, the boys of which have grown older, and have exchanged boyish for manly objects. There is just the same rough familiarity, the general ardour of character, the same kind of unwritten code of morals and manners, the same kind of public opinion expressed in exactly the same blunt, unmistakable manner.' He concludes that by keeping the lamp of Fellowship burning, we encourage each other to walk in the light of the seven lamps of advocacy.

I may be permitted to add an eighth lamp and that is 'Tact'.

> What boots it thy virtue,
> What profit thy parts,
> While one thing thou lackest—
> The art of all arts?

It is not easy to describe tact but its absence is easily noticed. Men of unquestioned ability have suffered for quarrelling with the tribunal or for standing on their dignity over trifles, forgetting their clients, or for losing their tempers; they are men of parts but without tact.

Judge Abbot Parry has referred to Judgement as one of the seven lamps; but he refers to it essentially as an intellectual capacity, 'the inspiration' which enables a man to translate good sense into right action, e.g. 'seeing the right point of his case' and the like. Tact involves and is in reality founded on judgement but more properly refers to the human side of putting into action the result of one's judgement.

CHAPTER III

HINTS FOR LAW STUDIES

Law, a vast science — Study, not read, law — Repetition in studying — Research should be in spirit of inquiry — Type of memory required and how acquired — Quick to learn and quick to forget, explained — Intensive and classified study — Lord Mansfield's dictum — Study law thoroughly, when engagements come — Utilize leisure hours — Peruse important textbooks — Keep in touch with current law — Acquire legal phraseology — Study House of Lords and Privy Council decisions — About owning law libraries — Know what books exist — Know system of law-reporting—Know how to cite and make reference to old *English Reports*— Study *Evidence Act* and observe its application in court — Read Insolvency Law, Company Law and certain other useful statutes like the *Limitation Act*, etc. — Appellate and original side rules — Know generally what unrepealed statutes exist

I HAVE mentioned generally that you need equipment along several lines. Let me now give you some practical hints on the study of law.

You have studied law for two or nearly three years. But that is only a preparation. I believe that you have thereby earned the capacity to understand the different topics of law in their proper bearings.

Law is a vast science and though there may be as much of certainty in it as in any other science, its boundaries, like the horizon, seem to recede as we advance. Its acquisition is more than the labour of a life, and it can be with none the subject of unshaken confidence. In the language of a learned writer, the knowledge that we acquire is 'but as a torch flung into an abyss, making the darkness visible and showing the extent of our ignorance'.

You have therefore to bear in mind that you have to study law and not merely read it. I have heard students declare that they have read Ameer Ali's *Evidence Act* or Gour's *Transfer of Property Act*. I am merely amused by such statements. I might rather be tempted to conclude that they have gathered no definite ideas on anything. You are not reading a novel, but studying law. What you study you must study with precision and accuracy and know where to draw the exact line. It is no good knowing the law vaguely or inaccurately. You may then be led into pitfalls out of which you cannot climb.

I wish to stress the need for studying a thing not once, but many times. Never believe that because you have read a thing

once or twice you know it. If you read it a third time, I am certain you will know it better, and a fourth still better. The practice of a great lawyer may serve you as a guide. For example, most lawyers believe that they are quite familiar with Section 47, *C. P. Code*. But it is said that whenever a reference to that section was made the late Sir V. Bhashyam Iyengar used to insist on its being read.

This leads me to a third idea, that you should study the law in a spirit of inquiry. There should never be a feeling of satisfaction that you already know it and that there is nothing more to know. The inquiry must be in a spirit of doubt. Law in that sense may be compared to the Infinite, whom you seek after with the words '*Neti, neti*' at every step. That should be the spirit of the lawyer, a spirit of unsatisfied research. I do not mean by this that you should have no conclusions or desist from presenting them. As an advocate you have to present conclusions with force, even when you are in doubt. You must therefore never take anything for granted, but examine it and satisfy yourself what it is or is not. You must always take the attitude of a *prativadi* against yourself and know the opposite side as well as your own.

The next point I want to emphasize is the cultivation of memory. Professor Blackie has said: 'It is of no use gathering treasures if you cannot store them, it is equally useless to learn what you cannot retain in the memory.' But the memory that I speak of is not the faculty of the mind which is improved by exercise, gained by repetition and aided by artificial bonds of association. It is not the memory of wholesale reproduction, but the memory that will help you at the hour of need to put your hand in the proper place, one that is cultivated and gained by system, order and classification, as the result of intensive study. You will then not only know what you have learnt, accurately and in its proper setting, but you will also be able to draw upon it when you need it. As has been said, 'a man does not carry heavy bullion in his pocket, which may as well be locked up in his chest, provided always that he himself keeps the key in his own custody'. The Elliotts put the matter in trenchant form thus: 'A man who depends upon his memory of cases cannot successfully make his way through a contest where the real test of superiority is not so much what a man

has in memory as what he can do with what he has. A mechanic may have in his shop a great number of the best tools in the world, but if he has not the skill to use them they are of little benefit to him; and so with the lawyer. He may have in memory many cases, but if he has not the skill to use them they are of no benefit to him . . . To be available, the law of the case should be condensed into compact mental judgements, and in that form woven into the mind, and not simply stored up in memory.'

I would advise you that, in addition, you make notes of the new ideas that you gather. A written record always supplies a sure aid and should not be despised. Let your notes be taken methodically and classified and arranged in an intelligible manner. Notes huddled together will be worse than useless.

Sir Charles Russell is reported to have given the following advice: 'No man can get through a great leading practice at the Bar unless he not merely learns quickly but also learns to forget quickly what he learnt.' The lawyer's profession is so wide and all-embracing that he may have to equip himself with many matters for temporary use. He may have to study the principles of medicine or of engineering in order to cross-examine a doctor or an engineer and to present his case in relation to their evidence. But it is not intended that the knowledge on these subjects then gathered should be abiding. 'Quick to learn and quick to forget' should therefore be the rule in regard to such matters. You must provide against needless mental congestion.

So, in addition to wide learning, you should cultivate the habit of intensive study. No one can hope to remember what he only vaguely and indistinctly apprehends. Whatever you study you must study with precision and accuracy, which are the distinguishing characteristics of a sound lawyer. Arrange and classify your ideas as you pick up and put them on the shelf of the mind in their appropriate places. If, for example, you come across a decision of the Privy Council which strikes you as giving a fresh idea, make an effort and learn how far antecedent law is varied or modified or excepted or added to by the decision.

Lord Mansfield has expressed the view that as 'the law does not consist of particular cases, but of general principles, which

are illustrated and explained by those cases, the study of cases, to the exclusion of good textbooks, will not make a good all-round lawyer'. I am not therefore advising you, as some may do, to begin with the study of all the volumes of Moore's *Indian Appeals*, the two big volumes of Smith's *Leading Cases* and of White and Tudor's *Leading Cases*, and so on. It will certainly pay you to do all or some of these things, if you can. But I doubt if you can be expected to undertake the task at this stage. You have entered professional life, possibly having spent a good deal of your patrimony. Your anxiety will now be to earn and you cannot therefore possess the peaceful and unconcerned mind with which to pursue studies irrespective of any other consideration. Therefore what I would advise you to do is this. Do not in any event waste your time; and when you are not otherwise occupied, have your books at hand and turn to the study of law, in preference to light literature. If fortunately you get a client who pays you, take it that the payment is to make you study law. Take hold of the opportunity so afforded and make a thorough and exhaustive study of the branch of law that you have to prepare for that case. Do not be content with getting one or two or even many cases in point in your favour. Pursue the inquiry, study the history of the development of that branch of law and exhaust all available decisions and textbooks on the subject to such an extent that you can lay your hand upon your heart and say 'I know the law on this topic up to this date'. Such a study will not only give you confidence, but will also help you to appreciate in its proper perspective any new decision or opinion on the topic that you may later come across. An orderly and classified study will also permanently fix it in your memory. A process like this, repeated several times, will enable you to store up a great deal; and, as law abounds in analogies and is oftentimes interrelated, your possession will be a respectable one. That is the way in which I would ask you to add to your learning and knowledge. I have always held and advocated the view that your period of apprenticeship would be more fruitful of good results by way of training if you were permitted to accept engagements and fees from clients, but without audience in courts. I find that similar proposals have been made in some of the American States.

Studying thus all the law connected with each case as it comes, the attraction of legal subtleties will furnish you the necessary incentive to pursue research even when you may not have a fee. As I have said, in your earlier days, ban light literature and spend your leisure in the study of law which is to give you a living. There are standard books on many topics, like Lindley on *Partnership*, Leake on *Contracts*, Story on *Equity Jurisprudence*, Tudor on *Charities*, Lewin on *Trusts*, Jarman on *Wills*, etc. Turn over their leaves in leisure moments and pick up what you can out of them. I would advise you to read Broom's *Legal Maxims*. Like axioms, they can help to form your basic knowledge and stand you in good stead; for to attempt to prove their principles by other citations would not be easy. The citation of an appropriate maxim adds force and dignity to an argument. At page 89 of 48 *Madras Law Journal* there is a recorded instance of the effect produced by the citation of an appropriate maxim. When the late Sir S. Subramania Aiyar was Government Pleader, the then Mahant of Tirupati was charged with the misappropriation of the valuable treasure usually buried under the flagstaff. There was no denying the fact that the treasure was put in when the flagstaff was erected. The application was to remove the flagstaff and examine the site. Mr Norton on behalf of the Mahant strenuously opposed the application, invoked the religious sanctity of the flagstaff and appealed to the court to avoid a sacrilege which would shock the whole orthodox world. Mr Subramania Aiyar argued *contra*, and wound up his speech by quoting the maxim '*Fiat justitia ruat coelum*', which means 'Let justice be done even though the heavens fall', and concluded that justice should not be denied because a flagstaff would fall. The application was granted.

I should also advise you to keep in touch with the growth of the law by reading the current law reports. Read the critical notes of cases when they appear, not so much for the criticism as for the possible aspects that will be exposed to your view. As a learned writer says, you will 'often find in them suggestions that will lead to a train of thought which will clear away doubt and perplexity and light up more than one dark corner'. It will be greatly helpful if you attempt to draw up head-notes for the reports that you study, as that will clarify your ideas and give you accurate knowledge.

I should advise you not to miss reading the reports of the House of Lords and of the Privy Council published by the Incorporated Council of Law Reporting in England. There is a great purpose to be served by reading judgements of that kind. It is very necessary that you should learn to speak in legal parlance and use legal phraseology. Just as poetry has a structure and a phraseology peculiar to itself, so has law a form and language of its own. To a purely literary person, it may be jargon; but the same effect cannot be obtained by using any other common expression. You must read the judgements of the House of Lords and of the Privy Council and learn to make your own the bold, free and unfettered form of expression employed in them. 'A man's vocabulary depends very much always, and in the first stages perhaps altogether, on the company he keeps.' Do not pass over pages in the Reports of the House of Lords, after merely looking into the short title, because the case reported deals with a shipbuilding yard of which we have none to speak of in India, or because it interprets a special enactment peculiar to the conditions obtaining in England, or because it has no direct bearing on conditions in this country. I advise you to read the current volume of *Appeal Cases* from cover to cover, whatever the nature of the cases reported may be. It will widen your horizon, broaden your outlook, suggest new lines of approach to legal questions, help you to cultivate the art of perceiving distinctions and furnish you with a stock of forceful vocabulary.

Pertinent to the topic that I have been dealing with is the question whether you should try and build up a library of your own. It is a problem for the young enthusiast in law, particularly for one who can afford it, whether he should not possess his own law library. Upon this matter I will first recall to your mind the words of Dr Rabindranath Tagore who said that to possess a library without using it is to be like a child who wants a light burning all the time he is asleep. That 'books are for use' is the first law of library science; and do not think of a library of your own until you have come to a determination to make full use of your books. Some of you may think that the possession of books will itself furnish an incentive to read. My own view is that it is often just the opposite. The possession of a library may lead to an ill-considered postponement of your

study until you are unprepared even against the arrival of the hour when you should be prepared. If you have to rely upon the books of another which you have to borrow, the time for use is limited. You will then be compelled to read them. I say all this not to dissuade you from possessing a law library but only to call forth your determination to make use of the books.

This leads me to another idea: before you seek to possess books you should first know what books exist. It is good for a young lawyer to be familiar with the names of the standard law books on the different subjects and with the names of their authors. You must know what authoritative and useful books exist on different subjects amongst Indian, English and American publications. You must also know, generally, their contents. You ought to know, for instance, that Benjamin on *Sales* does not deal with Real Property, for which you must refer to Williams or Dart on *Vendors and Purchasers*, that Lewin deals with Private Trusts while Tudor deals with Public Trusts. You will also make an effort to know what books on Hindu Law, including the *smritis* and special treatises, exist.

It is also necessary for you to know what law reports of Indian and English courts exist. There was once a craze for the citation of American decisions, but that is now gone and you need not trouble yourself about them. But you must be familiar with Indian and English reports. You must also know the various private reports that exist for the long period prior to 1865 when the Incorporated Council of Law Reporting issued their series. You ought to be able to distinguish *Queen's Bench Reports* from *Law Reports, Queen's Bench Cases* and *Law Reports, Queen's Bench Division*. You ought to know the system that is adopted in the law reports. You ought also to get familiar with the private reports that I have mentioned. You must know that B. & S. means Best and Smith, that C. & P. is Carrington and Payne, and so on. You had better familiarize yourself with the chart issued by the publishers of *The English Reports*. I would expect you to know even from the colour of the volume of *The English Reports* whether it is Privy Council Reports, or Rolls Court, or Vice-Chancellor's Court, or King's Bench Court. There are also certain old Irish Reports which come up in use like the reports of Schoales and Lefroy. When you come across any such in your research, acquaint yourself with them

then. The tables in the *Revised Reports* will help you to know some of these.

I must not omit to draw your particular attention to an important statute, the *Indian Evidence Act*. You have taken a course as well as an examination upon it. But I do not think you can have understood all the sections of the *Act* in their proper bearing by a mere study of them in the abstract. Experience alone can help you to realize the exact import and delimitations of the several rules of the *Evidence Act*. You must therefore be in frequent and intimate acquaintance with all the provisions of that *Act* and watch how they work in practice. I need not add that this is particularly important to those of you that intend to practise in the mofussil trial courts.

You must also become familiar with the *Limitation Act*, the several exemptions and the many articles. The branches of law in which work in courts is rapidly increasing are Insolvency and Company Law. You would be wise therefore in studying these branches of the law carefully. You must also know enough at least of the *Registration Act*, the *Stamp Act*, the *Suits Valuation Act* and the *Court Fees Act*, to make swift and accurate references to them. All these are imperative matters of study for those of you that settle in the mofussil, where you have to start the litigation. Do not expect your clerk to affix the proper court fee, for then your client might consider you to be a person of defective knowledge. So likewise is the case of a person who practises in the High Court, appellate or original side; he must be familiar with the rules of the court. In short, you should be equipped to do all the work of a clerk without flaw or error.

Last, but by no means the least important, is the necessity for you to acquaint yourself with all unrepealed statute law. Study the contents of the *Civil Court Manual* and the volume of the *Madras Acts* and follow any new legislation that may take place. You must know what law is available to you for guidance on any matter.

CHAPTER IV

TRAINING GROUNDS

Attend chambers of a senior — Method of working there — Put forth best efforts — Court-house as training ground — Utilize special opportunities there

I HAVE dealt with the equipment required for your success. Let me now refer to the training grounds.

I would advise every young lawyer who starts work to attend the chambers of a senior practitioner. Blackstone mentions 'the practice of learning the mechanism of legal business at the desk of some skilful attorney'. To the same effect Sir Frederick Pollock says: 'Reading in counsel's chambers has for more than a century been the most approved method of becoming acquainted with the practical work of the Bar.' There is no doubt that you should acquire the courage to stand on your own legs; but I am suggesting this as a preparation for it. There are very many advantages to be gained by such a course. There is first the atmosphere of law. You will learn to live in it. Then, by conversation and discussion with comrades, you will be prevented at any rate from getting rusty. You may also perhaps get inspiration from your senior's mode of dealing with his cases, his way of drafting pleadings and conducting the examination of witnesses in court. You will further have opportunities to compare your own views on developing particular cases with the ways of an experienced senior. Above all, there is the important matter of the traditions of the Bar, which are best imbibed in the chambers of senior counsel. Says an American writer: 'For the forming of the complete lawyer, as of the complete orator, is not the Roman method the best, by placing the student with some great lawyer, and in his leading? The contagion of his example—some of the master secrets of his art—may they not leave a permanent impression on his follower?' If you study his cases at home and intelligently watch his performance in court, it will be a great education.

An important matter in working in a senior's office is this. If you happen to study a case of his, either requested by him so to do or on an engagement by the client, you should so prepare the case that you make yourself indispensable for the

further conduct of it. That is the surest way to speedy success. Both the client and the leader must be made to realize the value of your services and if that is done there is no greater advertisement needed for you. Engagement will follow engagement and you will soon rise in the estimation of the profession itself. Other leaders also may seek your assistance in difficult cases. You will soon make your mark.

When opportunities of this kind are presented to you, you should put forth your best efforts. You should go into the matter thoroughly without putting it aside because you find it dull or uninteresting or inadequately remunerative. Prepare notes of the case just as you would do if you had to conduct it yourself, setting out the facts and referring to all the authorities. Also make an effort to think outside beaten tracks and discover, if you can, a new point or a new aspect. A reputation that you can scintillate new legal ideas is undoubtedly coveted. Therefore be always prepared to 'devil'; success is bound to follow you.

The other training ground is the court-house. Do not absent yourself from court because you have no work to do therein. Always be in attendance in court, fully dressed; for you must get accustomed to wearing robes. Watch and study the proceedings that go on. That will help you not only to learn many things, but also to get rid of possible initial nervousness. This training is particularly important to those of you who intend to settle in the mofussil. A careful study of a trial as it proceeds is a great education. You will learn by the mistakes of others.

Your presence in court may, in addition, open to you special opportunities for making yourself known. Such opportunities, if they occur, are never to be missed. They have exceptional value. Your friend in court may be in trouble on a point of difficulty or the court may require further elucidation on some matter. A recent decision or a decision in point on the matter at issue within your knowledge may have been overlooked. That is the opportunity for you. You have only to whisper it across the Bar. All eyes will be turned to you, those of the clients, the presiding Judge, the members of the Bar, the visitors and all. What better opportunity can you have to become at once known? But be sure that you really have something of value to whisper to your comrade.

CHAPTER V

MEETING CLIENTS

Receive them well and listen to them fully — Make inquiries — Do not trust all they say — Your conduct must inspire confidence — About offering opinions — Settling fees — Certain guiding factors therefor

LET me now refer to your conduct towards a client who comes to you for help. Receive him with kindness and listen with sympathy to all that he has to say. He may repeat himself, but do not snub him. Allow him to have his say in full. It may be declamation, it may be invective and abuse of the other side. He may speak, not as if he were confiding to his lawyer, but as if he were addressing a jury on whom he desires to impress the strength and truth of his case. But it is well that you should hear the whole tale; for it is desirable that you should not miss even one relevant fact though you may have to get it by a process of sifting many irrelevant ones. It is less inconvenient to listen to superfluous facts than to stand the chance of missing what may be essential. Do not interrupt your client in his narration, but reserve your questions to the end, when he makes a pause. The following advice given by Lord Bacon is apt and may be usefully cited here: 'Give good hearing to those that give the first information in business, and rather direct them in the beginning than interrupt them in the continuance of their speeches, for he that is put out of his own order will go forward and backward, and be more tedious, while he waits upon his memory, than he could have been if he had gone on his own course; but sometimes it is seen that the moderator is more troublesome than the actor.' Quintilian adds: 'Nor should he be content with hearing only once; the client should be required to repeat the same things again and again; not only because some things might have escaped his memory at the first recital, especially if he be, as is often the case, an illiterate person; but also that we may see whether he tells exactly the same story.'

Having heard him, it is well you proceed cautiously. There are clients and clients. You cannot take for granted everything that your visitor may represent to you. It may be an imagina-

tive picture or one in the truth of which the client has worked himself up to believe. He may be honestly under a delusion, or he may be pretending in order to make you believe in a false case. You should not, therefore, take everything for granted. Pursue your inquiry, examine the facts and then come to your own conclusion.

The client may promise you a host of witnesses and a heap of documents in support of his case. Do not be misled by such statements. If the client produces documents, examine them carefully and read them from beginning to end yourself. Do not rely upon the client's statements of their contents. The positiveness and confidence of the client may have to be discounted. Never be satisfied with anything but the originals, or, if these cannot be had, insist on copies carefully made and properly certified.

You should not, however, avoid a discussion with the client. Though clients may have no knowledge of the law, and their opinions have no value as such, yet it is always wise, if the client be a person of intelligence, to get his theory of the justice of his case. As the client will have formed strong opinions of his rights, he will state them in a homely yet forcible way, on a foundation of natural justice. I have derived light from clients on many occasions and new useful lines of inquiry have thereby been opened to me. They may found their claim of right on minute distinctions of fact which might otherwise escape your attention.

I would also add that it is well that you take written notes, in all cases, of the instructions which the client may give. It is not safe to rely wholly on your memory.

Your conduct in every respect should infuse confidence and attract the client to you. If, as a result of the examination, you find that the client's case is hopeless, it is far better that you make him understand this at once without allowing him to be fed with delusive hopes for a while, at last to be taxed with fees and costs which he cannot but feel heavy, oppressive, and unjust, particularly when he loses the matter in controversy. Let it be remembered that a practitioner stands to gain in the long run by advising caution.

But in giving that opinion and advice do not throw it at your client like a bomb. He confides in you and expects you to be as anxious as himself about his case and it is not desirable

that you should so conduct yourself as to destroy that confidence.

I must here say a few words on the question of the settlement of the fee. This is always a very difficult question, particularly for juniors. As soon as they get a client, and it is an excellent trait in our young men that they do so, they set to work, take instructions, study the papers, write up the necessary pleadings, affidavits and the like, do everything that is necessary without whispering a word about the fee. Unlike senior members of the Bar, who make the settlement of the fee a condition precedent to starting work, junior members generally do the work without thinking of the fee. That no doubt gives the upper hand to the client and places the junior in an awkward situation. Nothing is so disheartening as to execute some difficult piece of legal work for a client who calmly tells you when you claim the fee that the charge is exorbitant and that he expected the work to be done for a nominal fee. The junior may not have made a reputation yet and the client may not have any particular attachment to him. The client may have gone to him by chance or because his name had been mentioned by somebody. The junior has thus to take the risk of an unscrupulous client beating down his fee. He would therefore be well-advised to moot the question of the fee at the earliest possible opportunity. I am sure that when the client gets to appreciate the work done for him, he will make adequate amends and thereafter the junior may not have to ask for his fee which will be voluntarily paid. But, as I have said, the difficulty is in the initial stages. In fact, you do not know how to value your own work or what fee to ask. You should not ask for too small a fee lest the client should get the impression that you are not worth much. On the other hand, you should not ask for too large a fee for fear that the client may seek another lawyer; in which case all the work that you had done would go for nothing. The situation is a really puzzling one. It must be left to each person's judgement and capacity to study men. It would be cleverness on your part if you could make the client suggest the fee in the first instance. You would know then how far he is prepared to go and this would furnish a basis for you to go on working it up. If you cannot do that, collect relevant information by putting general questions as to whether he is

well-to-do and can afford to pay a decent fee or whether he is a court-bird in the habit of cheating lawyers, what he paid on former occasions to others, and so on, so as to obtain an idea of his estimate of a lawyer's worth. But one thing I should ask you to remember, and that is to make your fee neither oppressive nor too low in a desire to get work. Neither overestimate the value of your advice and services nor underrate it. An eminent lawyer once advised me thus: 'By all means ask for a heavy fee; but accept whatever the client is willing to pay. Let not a client who enters your office go to another on the question of the fee.' I must say that I am not prepared to give the same advice to you. Each lawyer must maintain a standard of his own and stick to it firmly and at any cost. But when you reject an engagement do it with determination and courage; never brood over the loss or make yourself miserable over it. It is a lesson in contentment which you must cultivate.

There may also be occasions when for strong and valid reasons you may have to make concessions. The poverty of a client or the circumstances of his litigation, which may evoke sympathy, may influence you to accept a reduced fee. The reasonable requests of brother lawyers should also receive special and kindly consideration. It may be encouragement to you to be told that it is reported that the fees of the great lawyer, Rufus Choate, were ridiculously low, and that he often defended cases for nothing when he saw that a client had little property.

As guides to assessing the value of your service it is proper to consider, according to the rules of the American Bar Association: '(1) The time and labour required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude your appearance for others in cases likely to arise out of the transaction and in which there is a reasonable expectation that otherwise you would be employed, or will involve the loss of other business, while employed in the particular case, with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the character of the employment, whether casual or for an established and constant client.'

CHAPTER VI

THE PREPARATION OF A CASE

Litigation compared to warfare in strategy and tactics — Forming a plan — The selective faculty — Eye for details — Chronological arrangement — Study documents, pursue inquiries — Then look up the law — Do not pick out from index but study whole chapters — Trace from a known decision backwards and forwards — Also look up digests — Do not study head-notes only — Exhaustive preparation needed — Value of Stroud's *Judicial Dictionary* — Prepare for side issues also — Make record in notes — ORIGINAL TRIAL — Adopt procedure of interrogatories, discovery, etc — Plan to construct your case and shatter opponent's — Shattering by examining witnesses — Preparation for evidence — Take proof of your witnesses — Mark demeanour of your own witnesses — Complete your proof so as to satisfy legal formalities — Do not call certain witnesses — Preparation for cross-examination —Elicit matters necessary for you from witness for other side — Keep questions ready prepared for cross-examination — Local inspections —Commissions — Keep your papers well arranged — APPELLATE HEARING — Planning, same principles — Preparation for arguing — How to study judgement of lower court — Repeated study and thinking — Study originals — Prepare complete notes — Be well prepared even in plainest case — About Choate and Burr — Initial obsession, nothing wrong — Rehearsal of arguments

Now I proceed to deal with the preparation of a case. It is relevant here to state that litigation has been compared to warfare, which calls for definite plans and the marshalling of forces before action begins. Wise anticipation and strenuous preparation enable one to foresee and provide for things to come. There is in a trial scope for both strategy and tactics; strategy in the preparation before the commencement of the trial and tactics in the conduct of the litigation in court. Just as strategy plays an important, and often decisive, part in war, where the position is otherwise equal, so likewise careful study and preparation, with intelligent anticipation and foresight, will bring success in a trial in court. It is in the preparation of the case that the genius and, more than genius, the toil of the lawyer have full scope. Success in litigation largely depends upon thorough preparation of the case and the lawyer owes that duty as much to the court as to his client.

Referring to the methods of the late V. Krishnaswami Aiyar, Sir P. S. Sivaswami Aiyar writes in his reminiscences in 50 *Madras Law Journal*, p. 1: 'He had great faith in .... forensic strategy and tactics, that is the art of forming a plan of campaign beforehand and of adaptation to the exigencies of the moment' and that he perfected 'the habit of circumspection'.

This was also the predominant characteristic of the late Sir V. Bhashyam Iyengar's mental equipment, and which he describes as implying 'a careful reconnaissance of your whole ground, not leaving any one nook or corner unsurveyed, a preliminary survey of the whole ground of action and a careful forecast of all the contingencies that are likely to arise and the pitfalls before you, or the stumbling-blocks that you may encounter and a previous mental preparation to meet these various contingencies'. You must pursue the conscientious and studied art of presenting a case by focussing attention on how best to marshal your facts and arguments, what the weak points of the adversary and what your own strong points are, and how to produce the best impression and that in the shortest possible time. There are few things that tend to put a Judge out of temper so much as to have the whole case both as to facts and law thrown at him, as it were, 'with a pitchfork as a farmer handles his fodder'.

You must also acquire the selective faculty, which grows with study and experience. As you prepare the case, you should learn to select the more important facts, remembering them with accuracy, and know the less important ones merely in outline. A careful preparation is one that will enable you to build up your case with confidence and be ready to supply facts or details of facts which the presiding Judge may desire to know. Your capacity to construct your arguments without faltering and your readiness to answer the Judge on the questions put to you are the tests of the soundness of your study.

Accurate knowledge of the details of a case is always helpful, and some cases can be won only on details. In the words of Arthur Helps, the successful lawyer 'must have an ignominious love of details'. You must never therefore shirk studying details; on the other hand you must learn to revel in them. That the task is tedious should never deter you from perseverance in unravelling complicated matters. Your distinction as a lawyer will depend upon your capacity and preparedness to master details. It will be a delight too to work them up, the same delight that the photographer feels when images slowly appear on a photographic negative when he washes it. Possession of details furnishes a ground of vantage in meeting the adversary.

If you once form the habit of sitting down and mastering details, you will thereafter find that you are not pleased until you have studied them thoroughly.

I must also impress upon you the great advantage, in preparing cases, of arranging the narrative of events in the order of dates. Sir Charles Russell, afterwards Lord Chief Justice, said that it is 'a simple rule not always acted upon, but which enables you to unravel the most complicated story and to see the relation of one set of facts to another set of facts'.

Having ascertained the facts from the client, make a study of the documents and pursue inquiries regarding other related facts and the existence of other documents. This you have to do with an intelligent anticipation of your opponent's case, with the object of crippling him and abridging his advantages. Then follows the study of the law on the matter.

When you consult a textbook, I ask you never to confine yourself to looking up the particular narrow point from the index at the end. It is better for you to turn your attention to the contents of the book and study all the relevant chapters that have any bearing on the subject. A topic is best studied when you study it from all angles with reference to all aspects that lead to it or flow from it. Such study alone will make you understand the subject-matter with exactitude and you will then be able to reason it out in court with confidence.

As regards the study of relevant decisions, you may start from a decision cited in a textbook or otherwise known to you and go backwards and forwards from it carefully following it in its course through the textbooks and reports. Make it your duty to study all the cases cited in the judgement and in the arguments, to understand the history of the development of the subject and all its variations and limitations. You may also take up the digests and look up authorities. You may do either or both, and in any case you must adopt a method which will give you the satisfaction of knowing you have studied the matter exhaustively. It is always best to arrange the decisions in chronological order. There is always an art in doing any work, the pursuit of which is never in vain.

In studying case-law it is the habit of the indolent to be content with reading the head-notes. That you should never be. The head-note may be inaccurate. It may be imperfect.

Anyhow, that is not the way to study the decision. A decision is closely related to the facts of the case and your application of it to those of another must depend upon the similarity in the situations which you have to establish. You should therefore study the whole report from beginning to end, master the facts of it and appreciate precisely how the question of law arose on the facts and how it was decided in relation to them. You should never allow yourself to be humiliated by having the cases that you cite turned against you and used as weapons by the opposite side. I have myself seen the late Sir V. Bhashyam Iyengar asking a junior to read a report to him. He would insist on his reading from the very beginning, from 'Appellate Civil' in bold type at the top to the words 'Appeal dismissed or allowed' at the end, and that many times over.

You must also study decisions with the definite aim of understanding their precise scope and effect and their proper limitations with their distinctions. A laborious effort without a discriminating study of this kind is of no use and may prove even dangerous. You might consider from a broad study that a particular decision that you come across is opposed to the view that you desire to present. But studied with care and understood with its proper limitations that decision might not only be distinguishable but might also strengthen your case by establishing other important phases in the scheme of your arguments of which the view that you present may be one narrow aspect. The close and intensive study that you make must enable you to perceive the distinctions at once and when later you find, as you must, that the same distinctions are noticed by learned Judges, you acquire self-confidence and courage. Self-confidence, earned by confirmation of this nature, will give you the needed courage to step out of the beaten path, plan new schemes and carve out new lines of thought, which should be the ambition of every lawyer.

Yet another word in the matter of preparing the law for your case. Always remember that a peep into Stroud's *Judicial Dictionary* will bring you ample reward. It will give you great help in solving any knotty problems that may confront you. 'The book is unique. It had no predecessor and has no rival.' It is a carefully analysed and suggestive treatise which will supply you with material on all conceivable legal topics. Wherever

relevant, an examination of the book will furnish you with ample food for thought and a reliable basis for developing legal positions.

Then, in making preparation, you should look up authority and precedent for everything. Do not take any position for granted. Do not also imagine that you have read a case before and know it or that you are familiar with a statute. Read it again, for the same case may give you new inspiration when you study it again from a different angle and with a different perspective. Likewise you may not realize the force of particular words in a statute until you scan them from a particular viewpoint.

Then you should so prepare your law and facts that you are fully posted on all side-issues that may be suggested or raised. It is a sound rule never to underrate the power of your adversary. In short, your preparation should be such that you can never be surprised in court. Whatever point is raised by your opponent should be a point for which you are already prepared.

Sir Edward Coke said that the advocate must always be prepared for what he calls the 'occasion sudden and the practice dangerous'. In the midst of trials questions may unexpectedly arise. Preparendness to deal with them can bring well-merited fame to a lawyer, while his inability to meet the situation will not only cause disappointment to the client and ruin his case but will also create a distrust of his abilities in the mind of the Judge and other members of the profession.

It is desirable that you should make a note of all the decisions that you study. Your notes may save you a good deal of labour when a similar point arises on another occasion.

I must now refer to a few matters peculiar to an original trial. First I advise you to make full use of the provisions in the *Civil Procedure Code* on Interrogatories, Discovery and Inspection. These are provisions which, I am afraid, are not taken full advantage of in mofussil courts. They help you to know your opponent's case with greater clearness and enable you to prepare your case better. This procedure also shortens the trial by dispensing with many of the technical forms of proof. It is necessary that you should divine the purposes of the opponent so as to be prepared against them. You must make him disclose his hand, without, however, using discreditable artifices or tricks.

You should have made notes of inspection of the documents on your opponent's side and obtained copies of them. Get copies of your own documents also and put all these in a list in chronological order and make a note of the witnesses to prove them according to law. It is very important to know the sequence of events in order to construct your case. The documents will give the clues to its landmarks. Fixing the main points from them, you should intelligently construct your whole case and evolve a consistent plan. Your plan should include all the points in the best possible way for you, taking correct note of the strong and weak parts of your side and those of the adversary. In other words, think out a scheme of the true facts of the case, explaining and reconciling them all. It is a process akin to what palaeontologists do, for instance, when reconstructing an extinct bird or animal from such of the bones of its body as they may get. You will then be able to picture in your mind's eye the entire drama of the transactions of the parties. Do not start without a definite theory about the case as a whole. Without a theory of the facts and the law there can be neither system nor certainty in the progress of the case through the courts. As Dr Warton says: 'The facts are meaningless unless they fit into a hypothesis.' This process alone will help you to discover the missing links upon which you will have to direct your further inquiry and which you should seek to supply by oral or documentary evidence. You will also then be in a better position to scan the case that the other side may present, put it to test and shatter it.

This shattering you do not only by the production of documents on your side destructive of your opponent's case but also by the successful cross-examination of witnesses produced by the other side. I shall give some hints regarding the examination of witnesses in another place, but here I want to say a few words about the preparation therefor.

When a witness is brought to you to give evidence on your side, do not take it for granted that he will say everything that your client tells you he will speak to. You had better examine him yourself and take a proof of his evidence. This gives you an opportunity to sift his statement thoroughly in the privacy and leisure at your command. You can also correct erroneous statements of his impressions, which you can never do after he

has made a statement in open court, when his tendency will be to stand by his statement and to avoid any deliberate or inadvertent departure from it for fear of contradicting himself in the witness-box. You can further commit and fasten him to his narrative.

You can always take proof as a junior and when you become a senior with heavy work you will have others to do it for you. As you take the proof study the witness, his attitude and demeanour and his readiness and willingness to give evidence. A person who has promised to give evidence on your client's side might, under influence, become lukewarm in the witness-box, or he might even become actually hostile. You must determine for your client whether you consider the individual a reliable witness who can with confidence be put into the box. Never agree to examine, on your side, a witness whom you have not met before and therefore know nothing of what he will say. Get your proof signed by the intended witness and keep it as the basis for the examination.

The following advice which a learned writer gives is worth citing. 'On the ground of prudence, if on no other, it is better not to make suggestions to the witnesses that may lead them to give false testimony, or corruptly colour their statements. The witness who feels that an advocate, even though friendly to him, knows that he is testifying falsely, has not and cannot have that consciousness of safety that gives strength to the testimony of a witness who feels that his wrong is known only to himself. But no advocate ought to be guided by the mere dictates of prudence in such a matter; his sole guides should be honour and integrity.' There are matters, however, about which the witness may honestly and with propriety be cautioned.

I must caution you here to take care that in drawing up the proof you do not omit any fact that must be elicited in order to establish the cause of action, or any essential fact leading to it, according to strict legal requirements. Suppose you have to establish a mortgage and for that purpose have to prove its proper attestation. You must not omit to elicit that the attesting witnesses attested the document in the presence of the executant. It is a very small and formal matter after all. But if, by oversight, you omit to elicit the fact in your

examination, the whole suit may fail. You will have no opportunity to rectify the error afterwards.

Do not put into the box straightaway a witness who has never before been within the precincts of a court. Sometimes persons unaccustomed to courts of justice get alarmed and are unable to give evidence in a proper manner. You will be well advised, therefore, in making such persons attend court for a day or two before they are called as witnesses. Let them observe the demeanour of other witnesses and get used to the atmosphere.

Also, never think of tendering as your witness a person whom the other side is certain to call; for thereby you will be losing the great advantage of cross-examining him.

You have to prepare not only for the examination-in-chief of the witnesses on your side but also for the cross-examination of your opponent's witnesses. You have a list of witnesses and your client will be able to tell you for what purpose each one is being called. Inquire into his antecedents, his relations with the other side, the possible motives that may actuate him to give evidence and any other matter which may tend to discredit his testimony or help to draw out contradictory statements from him.

You should not stop there, however. Think for yourself on what matters you can elicit information from him for your side. You may have a document but no witness to prove the signature on it and this may be the only witness to prove it. Do not forget to make a note of it.

In addition, note down in full all the questions that you want to put to each witness. Do not trust to your memory or to your general capacity, at least in the first few years of your professional life. Have the questions ready framed and in sequence as bearing on the facts that you seek to elicit. It is not possible to advise you as to how you should conduct the examination in court, but it is clear that preparation will help you to examine witnesses in court better and with confidence. Do not consider it derogatory to have elaborate notes in your hands when you examine witnesses while your senior at the Bar whom you seek to emulate does it all off-hand and without any notes. You will be able to do the same in due time.

There will be cases, especially where questions of water rights and easements arise, in which a local inspection will

enable the Judge to understand the controversy in all its bearings and appreciate the evidence tendered in its full significance. Do not forget in such cases to take the necessary steps early enough to invite the Judge to inspect the locality in the presence of both parties.

Another point that I want to remind you about is to apply at the earliest opportunity if you desire to have any witnesses examined on commission. You are in certain cases entitled to have a commission, but that does not mean that the court is bound in all cases to wait for the return of the commission to take up the trial. The order for a commission in your favour may be illusory and may become infructuous.

If from any cause there is reason to fear that the testimony of a witness may be lost, take prompt steps to secure his deposition *de bene esse*.

One other minor instruction is to have your papers all well arranged, so that you can take out at once the very one you want. It upsets you and everybody else in court, including the presiding Judge, if you have to search many times through the papers in your bundle, from one end to the other, before you can take out a single paper and eventually find it to be missing! You may consider this a trivial matter not worth expatiating upon. But listen to what Lord Macmillan has to say upon it: 'I have seen more trouble in court over disorderly papers than from any other cause . . . Which of us has not seen the discomfort and confusion produced by a paper going amissing just at the time when it is wanted? The thread of the argument is interrupted, tempers are upset, and half the effect of a good speech may be irretrievably lost. All this can be avoided by a little forethought and system . . . Where the mechanical apparatus of a case works easily and well, the mind of the Judge is inevitably favourably impressed.'

I must also remind you that the notes that you make of the facts or of the law of the case should be well made and in clear form. They should be such that another lawyer could, after making a short study of them, conduct the case almost as well as you would have done yourself.

Now that I am on the preparation of the case I may also say a few words about the preparation for an appellate hearing. The scope for you here is limited; but it will always do you

credit to discover a new aspect or a new point. Much of what I have said about the preparation for the original trial will also apply to this. Your main objective should be to picture to yourself a whole panorama of actions, with the motives that influenced them. Construct a theory into which every fact and every document will fit; otherwise you may at one stage give an interpretation of a document which contradicts you when you take up another. Present a connected story which will take in all the evidence and which will expose the inadmissibility of the case for the other side. Study the chronological index of documents again and again so that the sequence of events will be impressed on your mind. I can still recall how the late Sir K. Srinivasa Iyengar, the unquestioned leader of the Bar in his time and one of our foremost advocates, sitting in his chair in the Advocates' Association, used to study the index of documents over and over again.

I desire to say a few words more specifically on the mode of preparing to argue an appeal. The first inclination of the young lawyer will be towards despondency: how can he argue that a judgement given presumably by an impartial Judge who had examined all the matters in controversy is wrong? He reads the judgement through; it is all right, perfectly reasoned and palpably flawless. How then to attack it and show that it is wrong and deserves to be reversed? These are the first feelings of a young lawyer.

The best way to prepare to argue an appeal is to take the judgement of the trial court and scan every word that the Judge says. I have already told you that the lawyer's spirit of inquiry should be characterized by this, that he should take nothing for granted. That is the line of pursuit for you now. Question the accuracy of every sentence in the judgement and verify its correctness. If the Judge writes that the plaint in paragraph 5 says so-and-so, turn to the plaint and satisfy yourself about it. If he says that Ex. Q says something, turn to Ex. Q. If he argues that P.W. 7 says something else, verify that. In this manner test every statement and make a note of every mistake or misstatement that the Judge makes. This is a tiring and difficult mode of preparing a case, but it is both necessary and paying. By the time you have finished reading the judgement in this manner, you will have read through every material

document and every material deposition; for the Judge in the trial court must have referred to them all. You will have collected material and gained confidence to make the attack. Now make the chronological study that I have adverted to and you are thorough in your preparation.

It is a habit with some lawyers to read the judgement through independently and then to study the documents and other evidence independently. It requires experience to understand the facts in all their bearings by this process and also it cannot ensure accuracy of ideas. You may have to read the judgement and the papers many times over to get an accurate and comprehensive view. On the other hand, to study the papers once through in the manner I have suggested, though it may take time, will fix the case in your mind with all its strength and all its defects and you then need only to complete it by reference to the chronological tables.

I should not fail here to impress upon you again the value of repeated study and thinking. I referred to this in Chapter III, but it is equally to be recommended in the studying of facts and in the preparation of your plan, whether it be an original trial or an appeal. A first reading might persuade you that you have no case, a second might show that you have a weak case, a third might improve it, a fourth suggest new aspects, a fifth a definitely arguable one, and so on, until you feel that the case is one that must be won. I can vouch for this from my own experience at the Bar. I have won cases which at first sight I considered as hopeless. That is the metamorphosis which incessant and strenuous thinking over a subject brings about. Even in the face of circumstances altogether unfavourable, persistency will carve out a way to unexpected success.

One other matter with special reference to appeals in the High Court. You should not rest satisfied in all cases with the translations that are furnished by the court translator. The translator may not be familiar with a special local usage of a word, nor can he, in all cases, get into the spirit of the language he is translating. He has no free hand and has to produce a literal translation; and that will, in some cases, kill the very life of the original expression. Where it is a question of construing a document in an Indian language, I am sure you

will study that document in the original. Apart from that, wherever you do not feel happy over any translated portion, you must look into the original document. A study of the original, I have found, always gives one a new outlook. You feel as if you breathe fresh morning air. I may particularly warn you that entries in Chetti accounts are as difficult to translate as they are to unravel. A single entry of credit or debit will narrate the history of a transaction between a third and a fourth party and may indicate a mere adjustment in accounts. You must always get the originals and understand them.

It is also advisable that in the first few years, at any rate, of your professional life you keep complete notes of the arguments that you intend to present. It does not matter how long such notes are; the longer they are, the more sure you are of detail. Let your notes be in some order, preferably in chronological order, referring to the documents and the particular witnesses, showing both date and page, so that reference in court may be quick and easy. I also advise juniors at the Bar to write out their first few sentences in argument to ensure accuracy of expression and order of presentation. Any nervousness is only at the start and once you get over it you will find yourself steady throughout.

I feel here that I should draw your attention once again to the necessity of being well prepared even in the plainest of cases. Remember that your adversary may have a bomb for you which you never anticipated. A biographer of Rufus Choate says of him: 'And yet what laborious and careful and plodding preparation he made in the plainest of cases.' It is recorded of another successful barrister that 'while there was an authority to be examined, while there was evidence to be produced, while there was an expedient to be devised, his efforts were never relaxed. And he gave no rest to his adversary, pursuing him with notices, motions and appeals, improving every advantage and exhausting all means of annoyance; until from very weariness and despair, sometimes, the enemy has capitulated.' That is the happy warrior of the trial court, Aaron Burr. The narrative continues that he would not even give rest to his juniors, but would wake them up at midnight with slips and instructions to look up this point or that.

In fact it would be nothing wrong if younger members became obsessed by their early engagements. That is an encouraging proof of attunement to work and I shall not be surprised if you get feverish over your first briefs and feel a sense of almost physical oppression till the case is finished. Where the result of the case is adverse, the feeling may continue and lead to introspection as to whether all that could have been done was done. We may welcome these qualities as good symptoms of a promising future—provided, however, that they do not result in an undue identification of oneself with the client and his cause. A lawyer should and will acquire aloofness and detachment in due course of time.

In conclusion, let me refer to a helpful and effective method by which junior counsel can test the soundness and accuracy of his preparation, viz. by discussing his points with a brother practitioner or even with a lay friend. Discussion always clears thought and a rehearsal tells you where you are not clear yourself. We often deceive ourselves that we know something though we do not know it with clearness but only vaguely and indistinctly. You may not perceive the weak spots in your exposition unless you go through a rehearsal, as it were, and seek to convince a friend of all your points; and this will at once reveal the defects and lacunae in your arguments. You will then be provoked to further inquiry and research to strengthen your position and get into a stage of thoroughness. In doing so, put your case with exactitude; for you are prone to be affected by the same weakness as the client. As Reed puts it: 'A lawyer had better by far learn habitually to overstate his own weakness and the case of his adversary, and tax himself with the additional inventiveness necessary to meet the imaginary dangers, than cultivate a disposition to sleep in a false security.'

The junior at the Bar will find an added advantage in this procedure. It oftentimes happens that we are later painfully reminded of a new argument which we omitted to mention at the proper hour in the stress of the discussion. Occasions for such regrets will be far fewer if only we go through the training which a rehearsal gives.

CHAPTER VII

DRAFTING PLEADINGS

Justification for including topic — It has practical value — Previous preparation — Pleading compared to painting a picture or erecting a structure — Cause-title, and parties — The plaintiff — Joint or alternative plaintiff — The defendant — Alternative defendant — Include all claims — Proper descriptions of parties — Must have settled a plan and looked up the law as prerequisites for beginning allegations — To state a logical and connected story — Some Don'ts — No needless history — No argument — No rhetoric or passion — Selection of salient and leading features — Analogy of hill-tops — To be reasonable and logical — Necessary allegations to explain opponent's case — Alternative cases — Pleading fraudulently — Estoppel — Custom — Oral will, etc. — *Code* and *Rules* to be consulted — Statement of cause of action — Jurisdiction — Conditions precedent — Valuation, court-fee — Reliefs — Written statement — Cross- or counter-claim — Another don't — Making admissions — No false pleading — The ten commandments of Eustace — About drafting affidavits — About drafting grounds of appeal

THOUGH it is not customary in a course on professional conduct and advocacy to give a place to the subject of drafting pleadings, I consider it necessary to treat of it here. Pleadings are the foundations on which the superstructure of the trial and arguments is erected and we know from common experience that it is folly to disregard foundations. From this point of view, the drafting of pleadings must find a place in any organized effort for the training of legal architects. If preparation at home or in the office, the taking of notes, and the taking of proofs for the examination of witnesses have a place in a course on advocacy, I fail to see any reason for omitting the preparation of pleadings. There are also rules of conduct which a lawyer should bear in mind when preparing pleadings.

But apart from the scientific there is also a practical reason in support of this view. The act in doing which a junior at the Bar feels most diffident is drafting a pleading. He might attempt a written statement in the hope of safely denying the several allegations in a plaint, but he would not easily venture on the plaint itself. I know people of many years' standing at the Bar who feel nervous over the drafting of a plaint. While I am sure that every junior could with facility criticize or improve upon a plaint presented in framework, he would not readily dare to make the framework himself. This is my justification for offering a few ideas on the subject.

Pleadings are statements to the court made in writing wherein

the grounds of claim or of defence for one side or the other are presented. They generally consist of the plaint and the written statement. There are rules in the *Civil Procedure Code* and the *Civil Rules of Practice* relating to pleadings and I am sure you are thorough in them and remember them for observance.

Before you begin to draft the pleading, you will have met your client, made notes of his instructions, studied the records he has furnished you with, contemplated in your mind the points for the adversary, reconciled them all in a plan and pictured the whole scene in your mind with due reference to the law on the subject.

Now, if you are for a plaintiff and drafting a plaint, you have only to put your plan on paper in well-arranged order, as you have thought it out, omitting the statement of the case for the adversary which you have in your mind. Your plaint will then be a narrative, a continuous and consistent narrative leading to a conclusion. This is the bird's-eye view, and you should bear in mind that the pleading should be artistic in form and structure, a picture so to speak. An ill-drafted pleading is like daubing on canvas with valuable paint. Now to the details of the picture.

You begin with the cause-title, the form of which you know by reference to the *Rules of Practice* and the *Civil Procedure Code*. The next step is to determine who the parties are or should be. First you fix as the plaintiff the person aggrieved by the cause of action that you seek to enforce. There may be doubts, sometimes, as to which of two or more persons has the right to sue. In such cases the *Civil Procedure Code* gives you liberty to name alternative plaintiffs and you can ask for relief to be given to one or the other of them as may be found entitled to it. A plaintiff may have to sue in his personal or other capacity. You had better make that clear. If it is a partnership action, you must find out and know how you should describe the plaintiff. As I have said, you should never rely upon your memory, however strong, for any of these matters. Look into the books every time you have to do them.

You have to remember here that if the cause of action is a joint one and one of the number is not available to join or does not join as plaintiff you must make him a defendant.

Then you have to fix the defendant. This calls for more care and circumspection. You have to think out the persons who are answerable to you and fix the liability on them. You should not omit any necessary defendant. If, for example, you omit a puisne mortgagee the mortgage suit is conducted in vain. You can also sue defendants in the alternative.

You are going to incur court-fee and other expenses in the trial. Take care that you make the most of them. Always refer to the *Civil Procedure Code* and other authorities on the topic to satisfy yourself that you are safe and correct. Plaintiff can combine causes of action; but be careful to avoid a misjoinder of parties and causes of action. Consistent with that, and taking advantage of the elasticity of procedure that is allowed, bring in all claims against the defendants that you can.

You have now fixed who the suitor is to be and whom he sues. Now describe them in your plaint, remembering that you have to describe them in the character appropriate to the relief you are seeking. If either is a trustee, describe him as trustee, and so on.

Then begins the plaint proper, the allegations. You should have made notes in chronological order of the history and facts of your litigation and of the relevant documents. You should have contemplated the possible defences on the facts and thought out how to readjust your facts (remember it is only to be a readjustment, not a re-creation), possible explanations thereof, and any other facts by way of rebuttal which you can prove. In fact, you should be ready with your plan or scheme.

You must also have studied the law relevant to the litigation, from the point of view of the attack you intend to make and of the repelling of it by the other side, and studied it accurately, with precision, and made notes thereof. For example, the examination of the law may tell you that the averment of certain facts is necessary to give you a complete cause of action in certain classes of cases. Take a case arising under S. 70 of the *Indian Contract Act*. You have to allege that you did something lawful, not intending to do so gratuitously, and that the other person enjoyed the benefit thereof. You cannot omit to allege any of these things. In some cases an averment of notice or tender or demand may be a condition precedent to the cause of action. The omission of any of these necessary allegations might

throw out your suit on demurrer. The fault would be entirely on your own head if you were responsible for such a plaint; for it only means lack of circumspection and care and lack of industry on your part in the preparation of the plaint or in the advice that must have preceded it.

Now you know the parties. You know the story as it should be presented. You have a plan fixed in your mind. You know the law and the essential averments that you should make. You can now begin your third paragraph, paragraphs 1 and 2 being descriptions of plaintiff and defendant.

From paragraph 3 onwards, up to the paragraph wherein you formulate where and when the cause of action arose, is one whole picture. Observing chronological order in the statement of events you narrate a connected story, logical in its developments and leading to the conclusions that you seek to draw. In doing this there are some 'Don'ts' which you should remember.

Don't narrate needless history. Don't begin with the origin of man, if I may say so. For example, in a suit for a scheme don't begin by stating that a Chola King, So-and-So, built and endowed the temple. It may be interesting history; but it serves no purpose in the suit. Do not go beyond where you need start to understand your case, or explain that of the adversary as you anticipate it. I would not have referred to this but for the fact that I have seen plaints beginning 'In days long gone by'—which is a better opening for tales and legends than for plaints.

Don't expose your arguments in the plaint. The plaint must state facts and not arguments or law. Later you may have to shape the line of your arguments differently towards the same conclusion. I am mentioning this, because your mind will be so full of your plan and the reasoning which led to the shaping of it that you may unconsciously lug arguments in. Be always on guard to keep out arguments and legal disquisitions.

Then don't be rhetorical or strong or passionate in your expression. Indulging in rhetoric you may be led away from an accurate statement of the facts. Your client may, in your opinion, have been grievously wronged; but do not show your indignation on paper. You will have avenged the wrong when you get a decree. And this is important, that your draft should be shorn of adjectives. I know the first thing that the Hon'ble

Justice Sir S. Varadachariar, accurate lawyer that he is, used to do when a pleading or affidavit was taken to him for revision : he used to strike out all the adjectives. You can introduce all that are necessary on a second reading, when you are calmer.

Again, don't fill your plaint with a statement of all the evidence that you propose to let in. It is indeed a difficult matter to decide how far you can trespass into the region of evidence. It requires the exercise of judgement to differentiate between what you should say and what you should not. Some items there will be which will definitely denote or lead to the cause of action, though the cause of action may not be founded upon them. There may be others which merely make probable a fact in issue or a relevant fact. You must include the former and exclude the latter. We come across pleadings in which the entire evidence is set out, making them read more like the draft of an address for opening a case. There are others where, for want of reference to certain facts or documents in the pleading, parties have suffered in the trial, and non-mention of a fact at the earlier stages has made the story improbable. It is wholly a matter of judgement. Make up your mind, therefore, never to mention a fact or a document in a pleading, or to exclude it therefrom, without first considering the question carefully and deciding upon it. This self-imposed restraint upon your pen will save you from the danger of hasty action.

If you prepare your first few pleadings with this care, thereafter you will develop an instinct that will warn you what to say and what not to say. Let me picture it to you in this form. Imagine that you are seeking to reach a far-off hill-top, passing over many others. Remember all the peaks that you cross and forget the slopes and the sides, because if you have reached a top it implies that you must have passed the slopes also. Mention the peaks in your plaint—the salient facts or documents which mark developments in the story—but keep out all mention of the slopes and sides, all other allegations subordinate thereto which will be covered by the mention of the salient points. That is the only general way in which I can describe the matter to you. Just as there is danger in saying too little, omitting to mention a fact which may later be discredited for that reason, there is equal danger in stating too much. You may find your hands tied at a later stage when you wish to have freedom.

You will also be needlessly exposing all your cards to your opponent at too early a stage.

I said that you should narrate a connected story. It should be a complete story, reasonable and logical in its developments, persuasive in form and naturally leading to the conclusion, so that if by evidence you substantiate all that you have said, judgement in your favour must follow. Estee, one of the early writers on pleadings, says: 'If the pleader would but tell the story of his client's wrongs upon paper as he would in private conversation, very few of his pleadings would be demurrable.' A perusal of the pleading without more must itself create an impression in your favour.

In the narration of events, take care to refer to facts or circumstances that suggest sufficient explanation of any adverse situations and circumstances which you have anticipated in drawing up your plan. Make the necessary allegations, but without notifying your adversary of how exactly you have anticipated him. Notify him that you are armed for attack, but do not tell him that you are waiting for him at a particular place so as to enable him to get round you.

I must remind you not to forget to present an alternative case, and the grounds thereof, if you have one. For this purpose you need not make one set of allegations leading to one relief first and then begin making another set of allegations for the alternative relief. It should always be possible to intertwine them; for your alternative reliefs will be founded only on alternative facts or aspects of them or the law.

Let me add instructions on a few other matters in respect of which pleadings are often defective.

Do not allege 'fraud' vaguely and half-heartedly. The nature of the case should be distinctly and accurately stated and the charge pleaded with the utmost particularity. It must be shown in what the fraud consisted and how it has been effected.

Do not state merely 'estopped'. You know what 'estoppel' means. Satisfy the requirements of the law by making the necessary allegations of fact.

If you plead a custom, quote it in all its details and with all its limitations and consequences. Any omission in the pleading will seriously tell against the proof of it.

If you allege an oral will, oral arrangement, oral authority to

adopt, or the like, depending wholly upon proof by oral evidence, allege it with all circumstances of place, time, persons present, and so forth, so that you may clinch it when you prove the details.

I trust that these general remarks will be of some help to you. I have not referred to many other matters which you must gather from a careful study of the *Civil Procedure Code* and the *Civil Rules of Practice.*

You have now practically finished the plaint—the statement of your case. The next paragraph will contain the statement as to when and where the cause of action arose. You should also state therein how the cause of action subsists. If you have any ground of exemption, or any other reason why you are not barred by limitation, you must state it here.

Then you must state how the court can take seisin of the matter and has jurisdiction to try and adjudge the cause. This is sometimes mentioned in the opening paragraphs.

Thereafter you show that you have satisfied any conditions precedent to institution, like notice to Government in a suit against Government or the Advocate-General's sanction in a scheme suit.

The statement of valuation follows. You must know that there are two different valuations, one for purposes of jurisdiction and another for purposes of the court-fee that you will have to pay. You must be familiar with the *Court-fees Act* and the *Suits Valuation Act*—familiar enough to find out what you want and to have the satisfaction of knowing that you have not overlooked anything. Take care that you do not needlessly mulct your client of heavy court-fees. Personal interest ought to warn you that you should value it carefully in accordance with law and so as to pay the minimum court-fee.

Then comes the important paragraph which asks for reliefs. In framing reliefs, ask for such as the court has jurisdiction to grant. Don't ask for partition of immoveable property in Ceylon, outside British India, for instance. Ask for all the reliefs that you can ask for. Remember the *Specific Relief Act* on the one side and the provisions of the *Civil Procedure Code* on the other which penalize the omission to sue for appropriate reliefs in whole in relation to the cause of action. Ask for alternative reliefs, if any, and state expressly 'in the alternative'

Last, but not least, do not depend on the clause for 'general and other relief', and do not imagine that you can claim under this clause any relief that you have omitted to ask for specifically.

Now to the written statement of a defendant. I expect you to go through the same process of distilling facts and ascertaining the law. You follow the same method in drafting also. Your case may be simply a case of denial, in which case the matter is easy as you have only to note how to deny. The *Civil Procedure Code* gives you help in this matter and you need only follow it, remembering that a general denial, in the form of restating the plaintiff's allegations with the negative added, is no proper denial. But you may have a case in which you have a different story to tell. Draft the written statement, then, as you would draft a plaint and add sentences in the appropriate places denying the plaint allegations wherever they contradict yours. In the same paragraph there will thus be a statement of your facts and a contradiction of your adversary's.

If you have any cross- or counter-claim, allege the necessary facts therefor.

There is also a special 'Don't' in respect of written statements, in addition to those already mentioned which apply alike to plaints and to written statements.

Don't make allegations merely on the offchance of something happening which may never happen. Don't say in every suit that it is barred by limitation, or that it is bad for misjoinder of parties and cause of action, or that the court-fee is insufficient, or that the suit is barred by *res judicata* when there is not even a prior litigation on the matter, as if these were matters which every written statement should contain. Don't start your written statement in all cases with the allegation 'The plaintiff's case is wholly false and fraudulent', as many mofussil pleadings drafted by vakils' clerks do.

I have to add only one more matter. When you make any admissions be careful about your statement of them and be accurate and precise. Do not find yourself later hampered by an unguarded and ill-stated admission, beyond intendment or expectation. You cannot easily release yourself from its grip. Note that an admission is nearly conclusive of the matter.

It remains for me now only to ask you to bear in mind an injunction that I shall again refer to in its proper place here-

after, a matter of ethics: it is that you should never persuade yourself to incorporate in your pleadings any statement that you know to be false. This means that you should never suggest to your client a new story, different from what the facts disclose, as putting his case on a stronger basis.

The Bar Council, Madras, have given the following advice, regarding allegations of fraud in pleadings:

'Counsel is expected to exercise due care and caution before settling pleadings especially in cases involving allegations of fraud. He must satisfy himself that there is some foundation for the allegations as to fraud contained in the pleadings. It is difficult to lay down any hard and fast rule in regard to the degree of care to be exercised. Each case depends on its own facts.'

In a book entitled *Practical Hints on Pleading*, the author, A. A. Eustace, a member of the English Bar, mentions the general principles in the form of Ten Commandments, as he calls them. Here they are, with my comments on them:

1. Be brief, i.e. you should avoid prolixity; Order VI, rule 1, of the *C. P. Code* says the same thing.

2. Be positive, i.e. don't leave any fact in doubt or to be inferred.

3. Be precise: I take it that this means that you should be accurate and not vague.

4. Be relevant, i.e. avoid unnecessary statements of fact.

5. Plead fact, not evidence. You must state conclusions and not the process by which you reached them or the bases you had for doing so.

6. Plead fact, not law. You must remember, however, that foreign law has to be pleaded.

7. Don't plead what the law or the court takes for granted or what the other side has to prove. Under this head come matters of which the court should take judicial notice. It is also obvious that one need not plead facts which have to be proved by the other side to make good their case. Holt, C.J., compared a pleading of such facts to 'leaping before you come to the stile'. But Eustace adds that the performance of a condition precedent need not be pleaded and bases his conclusion upon *Cooke* v. *Oxley* (1790), 3 *T.R.* 653 S.C. 100 *E.R.* 785. This, however, is a mistake. *Cooke* v. *Oxley*, as ultimately decided, was not a

case of a condition precedent, but one of a condition subsequent. Our pleadings are governed in this respect by the provisions of Order VI, rule 6, *C.P. Code*.

8. Give particulars of fraud, etc. This instruction is contained in Order VI, rule 4, *C.P. Code*.

9. Don't change your terminology and don't use fine language or words that you don't understand.

I do not think that anybody does the last mentioned. There can certainly be no objection to a pleading being in elegant language. But we ought to understand this injunction to indicate that accuracy of facts should not be sacrificed to fine language. It is a piece of good advice that we should follow the practice adopted in drafting statutes—not to change the terminology unless we wish to convey a different idea.

10. Don't use the passive voice, participial phrases, pronouns, or any sort of periphrasis or ambiguity.

The author refers his readers to Chapter VIII of Odgers on *Pleading and Practice* for an exposition. That chapter deals with the necessity for denials being specific, not evasive or ambiguous, etc. The suggestion is that the use of the passive voice, participial phrases and the like, leads to the perpetration of these improprieties which ought to be avoided. An illustration may be added. Where, in an action for slander, a plaint alleged 'the foregoing words being spoken in the presence of So-and-So', the court held that a plea of demurrer was sustainable for the reason that the pleading did not state in terms that the slanderous words *were* spoken in the presence of So-and-So, but assumed that they were so spoken.

In view of the reference to *Cooke* v. *Oxley*, I will add an eleventh commandment: that conditions subsequent, that is conditions in discharge of the defendant, need not be negatived in the plaint, and that as regards conditions concurrent the plaint must allege performance or a readiness to perform them.

Though not strictly 'pleading' I desire to say a few words about the drafting of affidavits. I advert to the subject only to sound a note of warning. And I do so because it is peculiarly within the province of the junior at the Bar. I fear that that attention is not paid to it which it deserves. Affidavits are sworn statements, as efficacious as testimony in court and subject to the same sanctions; but they are prepared as if the required allega-

tions have only to be made to be sworn to as a matter of course. It is ignored that they are solemn documents to be scrupulously drawn up to avoid possible moral peril and liability to public disgrace. I am reminded of the usual remark of a late learned Judge: 'Have you put in the necessary lies?'! I am sure you will agree that this impression must go, and it is up to the junior Bar to remove it. It is incumbent on the profession to encourage and maintain the public sentiment on this all-important matter—the sacredness and inviolability of the oath. Remember that you cannot excuse yourself even in cases where the client brings you a sworn affidavit to be filed in court and that your responsibility for the statement contained in it stands. Drafting affidavits is a training-ground where you may learn to draft pleadings, so why not take full advantage of it?

In *Linwood v. Andrews and Moore*, 58 *Law Times* 612, the putting in of an affidavit false to the knowledge of the advocate was held to be contempt of court and professional misconduct. It was regarded as conniving at a fraud upon the court. In *Re James Gray*, 20 *Law Times* 730, in ordering the suspension of a solicitor, who had allowed a client to make an affidavit in which he swore to a false date known to both to be false, Lord Romilly said that it was impossible for the court to proceed with safety were it not that the solicitors connected with the court most carefully investigated and, as far as possible, corrected such statements of their clients as to dates. Again, in a very similar case, in *In re Davies*, 14 *Times Law Reports* 332, the Court of Appeal suspended a solicitor though he had warned the client against the untruth of a statement which the latter insisted upon swearing too. The court held that the solicitor should have withdrawn from the case.

A word may also be said here about drafting grounds of appeal, though they have not the same importance or value that pleadings have.

It need not be said that the judgement appealed against must first be studied with care. It may not be necessary to study it in such detail as would be necessary to present arguments on it to court; but it should be sufficiently full to enable the reader to come to grips with the reasoning that is contained in it. The inferences that are drawn should be tested as to their soundness and a note made of the different inferences that

should have been drawn. The relevance of the items of evidence on which the judgement is founded should also be examined and failure to refer to any others which might have influenced the judgement made note of. Care should also be taken to verify whether statements made as to facts or the contents of a document or the testimony of a witness are correctly made and reproduced. It should also be noted whether there were any irregularities in the procedure which influenced the conclusions. A preliminary investigation of this kind is the minimum requirement for preparing the grounds of appeal.

The form in which the result of the investigation should be embodied in the grounds is a matter for thought. An attempt should be made to produce an artistic effect both in the form of expression and in the manner of arrangement The principal grounds should be worded with such precision and care that, when you have to peruse them on a later occasion, a mere glance will be sufficient to recall to you the whole definite vista of law or of fact which you contemplated when you first drafted them. It should further be your ambition to impress them with a form and style of your own which will be their distinguishing feature.

One cannot avoid drawing attention here to a tendency—fortunately it has not spread—to multiply the grounds of appeal. Sometimes it happens that the grounds are even longer than the judgement appealed against, running up numerically to nearly three figures. Whatever the aim, whether it is to satisfy one's own client about the strength of his case or to overawe one's opponent, it is neither laudable nor effective. Moreover, there are obvious disadvantages in this course. One is left searching for a needle in a haystack if the Judge should ask whether a particular ground has been taken. There is also the danger of being shut out from arguments when amongst the multitude of grounds that are taken a specific aspect of a point which one desires to press has not been specifically mentioned by oversight. It is well, therefore, that the grounds of appeal are kept within bounds, are direct and to the point and avoid repetition or reiteration. Let the proportions and the significance of a work of art be maintained.

CHAPTER VIII

THE EXAMINATION OF WITNESSES

Study of *Evidence Act* no practical guidance — Hints for examination-in-chief — Lockwood on examination-in-chief — Keep questions framed — How not to begin — Witness who knows facts for and against — Paul Brown on examination-in-chief — An example of bad examination-in-chief — Purposes of cross-examination — Not confined to examination-in-chief — Hints for cross-examination — Keep full notes — No random questioning — When to avoid examining — Donovan's suggestions — Paul Brown's rules on cross-examination — Method of using a document for contradiction — No theatrical examination — Cautioning witness — Putting your case to witness — Re-examination — Examination, an art acquired by practice, thinking, feeling and acting — Treatment of witness — Examination as to character — Quintilian's advice — Never minister to malevolence

I OUGHT to say a few words to you upon the examination of witnesses in court. You have studied the *Indian Evidence Act* which contains the rules on the matter, undergone a course in it and also taken an examination. Despite all this, however, I am afraid you will not have gained that appreciation of the rules and that facility in applying them which practical experience alone can give you. You will know the full difficulty only when you endeavour to tackle a witness in the box.

Witnesses, as you know, are examined-in-chief, then cross-examined and then re-examined. Each of these examinations is different in scope from the others. The examination-in-chief is the examination of the witness by the party calling him, who intends to prove his case by the testimony of the witness. The case itself is formulated in the issues which arise upon allegations made in the pleadings and on such other statements as the parties may make to court. The examination-in-chief, therefore, must be confined to relevant facts. And that is what S. 138 of the *Indian Evidence Act* says. I advised you to take a proof of the statement of your witness. Your examination-in-chief will be founded upon that proof. But though you may have met the witness, taken his proof and talked to him outside the court touching the matters that he will speak to, yet it is not an easy matter to elicit from the mouth of that witness in court all that he could say in accordance with your proof. The witness is expected to give testimony untutored and you should not therefore question him in a manner that will suggest the answer; in other words, you are not allowed to put leading questions.

They tend to discredit the witness, and sometimes ensnare him into making incorrect answers. As often happens, he may reply counter to your suggestions which will be no advantage to you. Therein lies your difficulty. Without experience you will not find it easy to formulate questions which will not offend this rule. You will be permitted to put leading questions to elicit facts by way of introduction, but beyond that your opponent will at once object to the form of your questions.

Referring to the manner of conducting examination-in-chief, Birrell, in his biography of Sir Frank Lockwood, quotes from an address made by that eminent law officer: 'What they had got to do was to induce him to tell his story in the most dramatic fashion, without exaggeration; they had got to get him, not to make a mere parrot-like repetition of the proof, but to tell his own story as though he were telling it for the first time—not as though it were words learnt by heart—but if it were a plaintive story, plaintively telling it. And they had got to assist him in the difficult work. They had got to attract him to the performance of his duty, but woe be to them if they suggested to him the terms in which it was to be put. They must avoid any suspicion of leading the witness while all the time they were doing it.'

You should not at the same time frame your questions in a form suggestive of cross-examination; for you cannot cross-examine your own witness until you have the permission of the court to do so upon the court being satisfied that he has turned a hostile witness.

There is also a third difficulty. You must avoid the danger of your witness not understanding your question in its proper perspective or of his misunderstanding its scope and purpose, in the garb that you give to it. He may consequently get confused or give answers which may be irrelevant or adverse. It is obvious that your questions should be framed in clear and simple language and in short sentences. The witness and the court should easily understand and follow you. As the Elliotts say: 'The counsel who conducts the examination-in-chief must be cool, self-possessed, resolute, and deliberate. If he is alarmed, agitated, or nervous, he will embarrass and disquiet the witness, for, by a well-known psychological law, mind communicates to mind its feelings and emotions.'

In these circumstances, I would advise you, in the first few years of your career, not to be content with mere proofs of witnesses but leisurely to think out and frame at home the questions you will put to the witness in court. If the witness is a competent person you may simply ask him to tell the court what he knows of the matter; but such witnesses are very few. As a rule, you will have to elicit fact after fact by putting appropriate questions in a form which is not leading or cross-examining or confusing. Do not consider it derogatory to have in your hand questions already written out because you see some members of the Bar, senior to you, do the questioning off-hand without notes. You are certain to do so yourself after gaining experience on a few occasions. In some books on the examination of witnesses there are statements discountenancing the habit of looking down at the paper containing the proof while examining a witness. But that has reference to cases where counsel attempts, possibly for the first time in court, to understand a proof prepared by an attorney or a solicitor, and can have no application to cases where counsel has himself prepared the proofs and looks at them in court as an aid to his memory. It is more desirable that you should avoid these three dangers: the objection of your opponent that what you ask is a leading question, the laughter you may evoke by cross-examining, and the confusion you may create in the mind of your witness who may be struck dumb by ill-framed questions. When your witness omits an important detail in his narration and you are troubled about how to get it out of him without putting a leading question, follow the rule that Harris gives: 'A question without being leading should be a reminder of events rather than a test of the witness's recollection.' Cox admonishes that questions such as 'Did anything more pass between you?' 'Have you stated all that occurred?' are only put in vain.

When a witness is to speak to an incident, conversation, or other transaction, an erroneous way of examining is to begin by asking a first question like this: 'Do you remember the 5th of October 1943?' I mention this because I find it is common, and counsel adopt it as an easy method of opening a topic. But that is not the way to begin an examination and its incongruity will be apparent if you imagine such a question being put in a translated form to an illiterate or quasi-literate witness in

the mofussil. How can anybody remember a date? It is unnatural. Men forget dates but remember occurrences. Witness probably does not even know the date on which he is being examined. The proper form is to question the witness directly with reference to the incident or transaction. You may ask: 'Do you remember that some months ago there was an incident in which your servant was concerned?' Answer: 'Yes.' Question: 'Tell the court, please, all that you know about it.' And as the witness narrates the events you may direct him from straying into irrelevant paths by putting appropriate questions at the corners.

You may sometimes have to examine a witness on your side who knows facts favourable to you as well as other facts which may militate against your case. You may have to call him, nevertheless, for want of other available evidence. Questioning him in a form that does not permit of his straying and speaking to matters unfavourable to your case is an art that requires great care and experience. Even experienced counsel would be well-advised in having questions prepared beforehand in such circumstances.

It is good policy, sometimes, to elicit yourself some adverse facts which are unavoidable. This secures credit for the witness and an effective opinion of your fairness. It also has the advantage of taking the wind out of the sails of the cross-examining counsel.

Let me add to the points that I have sought to make in respect of examination-in-chief by citing some of what are known as the 'golden rules' of David Paul Brown, an eminent American lawyer, which are often quoted.

The third of his eleven rules is: 'If the evidence of your own witness be unfavourable to you—which should always be guarded against—exhibit no want of composure; for there are many minds that form opinions of the nature or character of testimony chiefly from the effect which it may appear to produce upon the counsel.' Upon this matter, Cox says: 'Let us warn you against the danger which experience frequently incurs, of being not only disconcerted by the witness failing to support his previous statements, but by exhibiting in the countenance or manner the disappointment you feel. Let nothing—not even a tone of your voice—betray surprise or it

will assuredly reveal your weakness to your lynx-eyed opponent, who may make use of the fact to discredit your witness and your cause, by the argument always powerful, that the witness has told two different stories.' The Elliotts follow up with the warning: 'In any event never suffer the witness on the stand, or your other witnesses, to suppose that the surprise has impaired your confidence, or weakened your self-possession.'

Brown's ninth rule is: 'Speak to your witness clearly and distinctly, as if you were awake and engaged in a matter of interest, and make him also speak distinctly and to your question.' 'Moderate your voice as circumstances may direct; inspire the fearful and repress the bold', is another rule. His last rule is: 'Never begin before you are ready and always finish when you have done. In other words, do not question for question's sake—but for an answer.'

It will be instructive to cite the illustration that Harris gives, which exemplifies how an examination-in-chief should not be done: 'Before Mr Justice Hawkins, some years ago, a junior was conducting a case which seemed pretty clear upon the bare statement of the prosecutor. But he was asked: "Are you sure of so-and-so?" "Yes", said the witness. "Quite?" inquired the counsel. "Quite", said the witness. "You have no doubt?" persisted the counsel. "Well," answered the witness, "I haven't much doubt, because I asked my wife."

'Mr Justice Hawkins: "You asked your wife in order to be sure in your own mind?" "Quite so, my lord." "Then you had some doubt before?" "Well, I may have had a little, my lord."

'This ended the case, because the whole question turned upon the absolute certainty of this witness's mind.'

It is a warning to the young practitioner at the Bar never to put in examination-in-chief questions like 'Are you quite sure?' 'Are you certain?'

I will now pass on to cross-examination. There you examine the witness for the other side. As Hardwicke puts it: 'The purposes of a cross-examination are three in number. The first is to elicit something in your favour; the second is to weaken the force of what the witness has said against you; and the third is to show that from his present demeanour or from his past life he is unworthy of belief, and thus weaken or destroy the effect of his testimony.' Cross-examination is intended to

test the truth of the story of the case in every way. You may elicit facts which reflect upon the credit of the witness, his reliability and his character; you may frame your questions in any form and it is usual to frame them in the leading form to entrap the witness.

There is an erroneous impression that cross-examination must be confined to matters spoken to by the witness in examination-in-chief. That is clearly wrong. If you can, you may elicit from a witness speaking to one point in chief any fact relevant to any other fact in issue in the case. But you should not hazard such a question without having good grounds for believing that the answer will be in your favour.

The testimony which a witness gives in examination-in-chief may belong to one of several categories. The version may be acceptable so far as it goes. It may be a mistaken one; or its force may be weakened by other means. That is to say, you do not attack the veracity of this type of witness. A third category consists of witnesses who are wholly unworthy of credit. But oftentimes cross-examining counsel act as if every witness on the opposite side belongs to the third category and is committing wilful perjury. The brow-beating style, which counsel may in this view adopt, might confuse the witness but will never carry conviction in the court. It is equally absurd to assume that a witness who may have stretched the truth inadvertently will be readily induced to acknowledge his mistake by direct questioning.

Wellman explains the sources of 'Fallacies of testimony' as follows: The state of attention of the witness at the critical moment; his desire or wish which makes him recollect what at first he believes must have happened; the inexactness of memory; 'unconscious partisanship resulting from the desire of victory for the side for which he is deposing or a 'sense of power to direct the conclusion or verdict. Different persons may give different interpretations of one and the same event. Interpretation of a sensation is the act of the individual and may unconsciously vary with previous experiences and mental characteristics. It is well that the cross-examining counsel bear in mind these several possibilities which sway human testimony.

From the point of view of the form of questioning, you have no difficulty. You have only to bear in mind the advice that

Witt gives, that your questions to the witness should not consist of 'rhetorical invective with a note of interrogation at the end of the sentence or of offensive comments on the answers'. It will always pay you to descend to the witness's level and converse in language familiar to him. But the trouble here is to decide what questions to put and in what order, and what lines you should pursue either to make the witness contradict a statement he made earlier in examination-in-chief or to speak to some other fact which will deprive the examination-in-chief of all value—for example, by eliciting that the witness only heard what he spoke to in chief and is not speaking from his own knowledge. You should endeavour to detect the weak spot in the narrative of the witness and open your cross-examination at that point. Do not adopt the fatal method of taking the witness over the same story that he has told in examination-in-chief in the fond hope that he may change it in the repetition. The witness may retell the story and thereby produce a deeper impression on the court. You can accomplish nothing unless you abandon the train of ideas he followed in narrating his main story. Follow Wellman's advice: 'Do not ask your questions in logical order, lest he invent conveniently as he goes along; but dodge him about in his story and pin him down to precise answers on all the accidental circumstances indirectly associated with his main narrative.'

It is always safe to take the line of showing that the witness has no direct knowledge or is mistaken or does not know everything about the subject. You may follow the line indicated by S. 144 of the *Indian Evidence Act* and seek to elicit that there is a document on the matter which renders oral evidence inadmissible. Cross-examination directed to show that a witness has invented the story wholly may result in a confirmation of his testimony. For example, if you seek to attack a witness to an alleged conversation at a particular place on the basis that he has never been to that place and question him on its topography, situation and arrangement, he may give you splendid answers; for he may have been there, though not on the particular occasion. The result will only be to strengthen the witness. In cross-examination, therefore, you have to adapt your attack to the varying demeanour of the witness in the box and his attitude in answering. If you find the witness a strong man,

your attempts to secure from him something in your favour may be of no avail. You may simply reinforce his former statements.

Witnesses commonly fall into two types. One of them makes up his mind to say 'I don't remember'. Put to him questions on points which he must know and thereby show to the court that he cannot be relied upon. You are knocking your head against a wall by questioning him and will have to leave him alone after putting the obligatory questions. Another type is the garrulous person who thinks it his duty to answer to every question, whether he knows anything or not. This person is easier to handle and you can always use him to your advantage. Great caution and experience are, however, needed. It is desirable that you should be cautious and should not make a lengthy examination. In your earlier years you may well prepare sets of questions in order, from various points of view, and have the notes in your hand to help you in putting questions. Here again you need not hesitate to do this; for the achievement by way of results will prove to your learned friends the success of your method. In a complicated case, particularly, you require a strong memory when cross-examining a witness. The way to get him into a trap, so to speak, in a case bristling with facts, is this. Begin from the middle of his story and then go quickly to the beginning and then to the end of it. Unlike in examination-in-chief, conscious disorder should be the foundation of your tactics. You take one point and cross-examine witness up to a certain stage and leave him there while you take another point. Then take a third, and so on. Then come back to the first or second point so that the witness may be unaware of the extent to which he has committed himself. But you must remember with precision what he has said and how far you have questioned him on each point. Such a memory, I am sure, you can get by experience. But till you have there is no harm—on the other hand there is immense good—in your having elaborate notes for purposes of cross-examination. There may be many effective cross-examinations which are purely extemporaneous, but they will always be the better for prior preparation. Make it a point never to put a question without an object or without being able to connect that object with the case. Serjeant Ballantine said that

'the reckless asking of a number of questions on the chance of getting at something is too often a plan adopted by unskilful advocates' and Baron Alderson is reported to have remarked: 'Mr . . . you seem to think that the art of cross-examination is to examine crossly.' Remember this also, that you should stop further questions on a point on which you have elicited a favourable answer; for an attempt to strengthen your position by further questions may result in a withdrawal of the former answer. Remember also that if the testimony of the witness in examination-in-chief discloses nothing that you deny or nothing that requires a fuller statement or explanatory particulars, make no cross-examination at all but dismiss the witness at once. There may also occasionally arise a case where the counsel examining-in-chief has by inadvertence omitted to put an essential question. Do not start cross-examining him lest you should supply the defect by your examination. There is no need to attempt to disprove what has not been proved, a step which may have the dangerous result of supplying the missing link in your opponent's chain of evidence. Cicero is reported to have said: 'It is my duty as counsel . . . often to abstain from putting any question at all, lest I should give an adverse witness an opportunity of damaging my case.' Do not be afraid that when you adopt such a course either the client or the court will suspect you of ignorance or inability to conduct a trial. Remember again that you should ever be on the alert for a good place to stop. 'Stop with a victory' is one of the maxims of cross-examination.

Donovan suggests some rules for guidance in cross-examination of which the first four are: '(1) Know what you need, and stop when you get it. (2) Risk no case on the hazard of an answer that may destroy it. (3) Hold your temper while you lead the witness, if convenient, to lose his. (4) Ask as if wanting one answer when you desire the opposite if the witness is against you; and reverse the tactics if he is more tractable.'

David Paul Brown gives a set of rules relating to cross-examinations also, to some of which I would now like to refer. His first rule is: 'Except in indifferent matters, never take your eye from that of the witness.' He enunciates a second rule: 'Be not regardless, either, of the voice of the witness. Next to the eye, this is perhaps the best interpreter of his mind.'

Another rule is: 'Be mild with the mild—shrewd with the crafty—confiding with the honest—merciful to the young, the frail or the fearful—rough to the ruffian and a thunderbolt to the liar. But in all this, never be unmindful of your dignity.' His eighth rule is: 'Never undervalue your adversary, but stand steadily on your guard.' His last and ninth rule is: 'Be respectful to the court, kind to your colleague, civil to your antagonist, but never sacrifice the slightest principle of duty to an overwhelming deference toward either.'

Wellman gives helpful advice on another important matter of daily occurrence. He says: 'If you have in your possession a letter written by the witness in which he takes an opposite position on some part of the case to the one he has just sworn to, avoid the common error of showing the witness the letter for identification and then reading it to him with the inquiry, "What have you to say to that?" During the reading of his letter the witness will be collecting his thoughts and getting ready his explanations in anticipation of the question that is to follow, and the effect of the damaging letter will be lost. The correct method of using such a letter is to lead the witness quietly into repeating the statements he has made in his direct testimony, and which his letter contradicts. "I have you down as saying so-and-so; will you please repeat it? I want to be accurate." The witness will repeat his statement. Then write it down and read it off to him. "Is that correct? Is there any doubt about it? For if you have any explanation or qualification to make, I think you owe it to us to make it before I leave the subject." The witness has none. That is the time for you to use the document and put it to him.'

I must advert to a form of cross-examination which some counsel adopt as effective—its only virtue is that it is theatrical—but which I should advise you to avoid as not consistent with high professional ideals. It is a quasi-bullying manner, and the sort of question sometimes put in this form is 'If So-and-So (one for whom witness has respect) had said so-and-so, would you venture to contradict him?' When such a question is purely hypothetical and not supported by the record of any prior statement, counsel deliberately misleads the witness which he is not entitled to do. I know of an instance where, in answer to such a question, the witness replied: 'He would not have said

so-and-so; show me where he has done it.' The cross-examining counsel was silenced and an effect was produced which was just the opposite of what counsel had intended to produce.

It is a device of some lawyers to ask a witness in cross-examination whether he did not discuss his testimony with his counsel or any other person. The effect of such a question upon a witness who is ignorant or simple is to embarrass him. He sees in the question an imputation that he has been coached for the occasion and consequently, in his anxiety to dispel that idea, he may answer in such a manner as to expose his own veracity to doubt. It is proper for you, therefore, when you meet the witness, to tell him that he need not feel nervous if such a question is asked and that he should frankly state the true facts. He might admit that he had even given a proof, if he had given one.

Now I am on this topic I might also mention that there is no impropriety in counsel advising his clients not to speak of certain matters unless specifically questioned about them. This will not be 'coaching' in the sense in which that term is ordinarily understood. The witness is under a duty to tell the truth only so far as he may be interrogated. There is, therefore, nothing improper in cautioning a voluble witness against saying too much or in urging a reticent one to tell all that he knows. A witness may also be properly instructed to perceive the difference between what he knows and what he merely infers.

I must add a few points more on the subject-matter of cross-examination. As defendant's counsel, it is always expected of you to put your case to the plaintiff's witnesses in cross-examination though you may only be recording denials. You must disclose your case through him and indicate, where you may, the witnesses that you will call on your side. You must also give to the witness an opportunity to explain any statements he may have made in documents on which you are relying. Take, for example, S. 145 of the *Evidence Act*. 'A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing is proved, be called to those

parts of it which are to be used for the purpose of contradicting him.' The topic is so wide and so enchanting that no justice can be done to it in the short space available here.

Then comes re-examination by the party calling the witness. It calls for an intimate knowledge of the facts and their relative bearing on the case and requires intensive watchfulness and care to know on what points you require to re-examine your witness, and to what extent. Re-examination demands much cleverness and skill. It is stated that in England, even in cases where the junior has conducted the examination-in-chief, it is usual for the leader to do the re-examination. 'Re-examination is intended to enable you to clear up a matter spoken to in cross-examination which may be equivocal or capable of being interpreted by the opposite side against you. Oftentimes leading questions put in cross-examination elicit answers requiring such explanation. In re-examination, you elicit an explanation or an interpretation or some new fact which will whittle down the effect of former seemingly adverse statements. In order to conduct this examination you will realize that you must know accurately what the witness has said, how exactly it impinges on your case, and what he knows on the subject which he has not, however, spoken to in his examination. You should have made accurate notes as the witness was being questioned and was answering in cross-examination, to enable you decide whether re-examination is necessary at all. And you must know, or anticipate correctly, the answer that the witness will give in re-examination before you put the question to him. The form of the question should be as in examination-in-chief. No leading question will be permitted; and it is useless to elicit an answer in that form, for the Judge will attach no value to it. You should also remember that you cannot use the re-examination to supplement the examination-in-chief and it must be confined to clearing up matters spoken to in cross-examination, elucidating doubtful points or tying up broken threads. You ought also to be careful that by putting an indiscreet or unnecessary question you do not elicit an answer strengthening a former unfavourable answer given in cross-examination. I find that, in practice generally, not much attention is paid to re-examination and we simply have a repetition of the two other examinations. This indicates that counsel consider dis-

cretion the better part of valour. Indeed, more than learning how to do re-examination, a young lawyer ought to learn how not to do it. Remember that as a general rule it is not good policy to re-examine for the purpose of explaining unimportant discrepancies which may do no harm.

The examination of a witness in court is thus an art and you can become an accomplished artist only by experience. But, at the start, industry can help you and it will soon enable you to attain distinction. There are many published books on the art of examining witnesses and they contain illustrations of how the examination was conducted in particular cases and in particular situations. A perusal of them should interest you and may possibly give you some inspiration; but they are like 'discourses on music to a person who has had no experience of sweet sounds'. Life, experience, personal thinking, feeling and acting are alone the original and proper sources of education.

I must give you a final word of advice to remember at all stages of the trial.

Treat the witness with fairness and consideration; do not lose your temper; never insult a witness or be rude to him. Do not bully or threaten him and never resort to browbeating. It may lead to reprisals. You may gain more by treating him kindly and taking him into your confidence and conversing with him in his own form of language. You may have to cross-examine a witness as to credit; you may have to remind him of some of his history which he would like forgotten. When it is necessary to do this, do it, and do it thoroughly. At the same time, remember that no good is done by making attacks upon a witness unless they are necessary for your case. Furthermore it is well that you make sure of your ground before making an attack upon a witness, for an attack which fails may recoil on you.

The above records Singleton's advice on the subject of cross-examination as to character. On the same topic Witt says: 'I know nothing so embarrassing to counsel as an instruction to ask questions derogatory to character. Suppose counsel has in his brief a sad record of the party to the suit against whom he is retained, or of the principal witness. It by no means follows that it is just to use it. You have to ask yourself many searching questions. Is the matter at issue so serious as to demand exposure with all its pain to the victim? Does the

record really impeach the veracity of the person, as distinct from his morality? Will justice be hindered or advanced by the question? Although the client may rub his hands with delight at the discomfiture of his foe, it is no part of the office of counsel to lend himself to that kind of warfare. The only justification for an interrogatory as to the past history of a witness is, that the answer must tend directly to show that he is not at all likely to tell the truth.'

Let me draw your attention to a speech delivered some time ago in London by Sir Walter Schwabe, our erstwhile Chief Justice, where he said: 'Cultivate a pleasant manner and get on as friendly terms as possible with the witness. Reproving, lecturing, bullying, were methods now recognized as belonging to a first generation. One should bring out the unpleasant facts with an air of condolence and regret, rather than with an air of triumph, which might raise sympathy.' It is said of Lord Abinger that 'the gentlemanly ease, the polished courtesy, and the Christian urbanity and affection with which he proceeded to the task, did infinite mischief to the testimony of witnesses who were striving to deceive, or upon whom he found it expedient to fasten a suspicion'.

Let me also bring to your notice the advice that Quintilian gave. He said: 'All questioning ought to be extremely circumspect, because a witness often utters smart repartees in answer to the advocate and is thus regarded with a highly favourable feeling by the audience in general.' On one occasion, I remember, counsel put a first question in cross-examination: 'You are an actor on the stage for wages?'—in those days the dramatic profession was not much favoured or regarded—and the witness came out with his answer: 'Yes, we are both actors for wages; only our stages are different'; and the entire court-house was in laughter.

A last word; and that is, never minister to the malevolence or prejudice of your client and annoy the witness for your opponent.

CHAPTER IX

CONDUCT IN COURT

GENERAL: Haste to be avoided — Maintain calmness — Do not interrupt Judge — Or opponent — Inopportune interruption — Do not argue across the Bar — Or contradict Judge — Answer directly — When not to argue — Do not lose temper if Judge disagrees — Present best point first — Look Judge in the face—Do not imagine Judge has prior knowledge — Do not narrate contents of documents and depositions from memory — Quote chapter and verse — Cite slowly — No loudness or assertion — Shun inaccurate expressions — Employ correct language — Employ language of judgements — Leave Judge to formulate the point — Do not press doubtful points — Assessing facts at proper value — Mode of citing decisions — Distinguishing decisions — Change of battle-ground — Do not conceal adverse points — SPECIAL TO THE TRIAL COURT: Deplorable absence of correct procedure in opening cases — How to open a case — Overprove your case — Guard against Judge being too readily favourable — Criminal trials — SPECIAL TO THE APPELLATE COURT: Difference in scope between High Court and mofussil court — Scope of appellant's arguments—Advantages of presenting both sides — Why two counsel—Method of presentation — Opening arguments — Building up a case — Trap for respondent — How respondent should act — Refer to pleadings — Documents and oral evidence — Read judgement and comment — Sometimes Judge requires judgement to be read first — Adjustment necessary — Respondent's arguments different —Broad presentation—Constructing one's own structure—Arguing for respondent more difficult — Arguing points of law — Formulation of law to be complete — Call a wrong decision wrong — Study facts of decision — Explain decision on principles

I NOW pass to the scene in court and propose to give you some hints on methods of advocacy.

When your case is called you ought not at once to jump up and begin your statement. That would rather indicate a state of excitement when you should be calm and composed. It may be the only case for you on which all your attention has been riveted. You may be full of it and impatient to get a speedy verdict in your favour. But you must remember that the Judge is not in the same position. This is one of the many cases which he has to dispose of that day. No one case is, from his point of view, more important than another. It is possible that by the time the clerk of the court calls your case the Judge has not yet switched his mind off the previous case. You must allow him some time to get ready for your case. It would therefore be well for you to wait till the Judge turns to you and signifies that you can proceed. You may even annoy a Judge by too hastily starting off with your story.

Always maintain calmness and self-possession and a pleasant humour. These qualities are perfectly consistent with the ut-

most modesty. You ought not to express annoyance or exhibit temper with the Judge, opposing counsel or the witness in the box. Passion, when given way to, destroys sound judgement. You may well presume that the Judge has some justifying cause for his conduct, though you may not be prepared to concede the same thing in favour of opposing counsel. But even against your learned friend you should not mar the decorum of the court by a rude retort. You may gently protest; but by losing your temper you will also be giving your opponent an incalculable advantage. You will have your opportunity outside the court to tell your learned brother what you think of him. Your demeanour in court must be such that it will evoke a general desire, as far as law and justice permit, that you should succeed.

Then it is an axiom that you should not interrupt the Judge when he speaks. You may probably guess, possibly rightly, what he is going to say before he concludes and you may be ready with your answer. But it is also possible that you may be wrong. Anyway it is proof of that calmness that you should possess, to wait for the Judge to complete his statement. A reply thereto, after the Judge has spoken, will be both dignified and weighty: the contrary might upset the equilibrium of the court. Take time, consider the question in all its aspects, and then give a well-thought-out reply. A hurried reply may lead you into a trap. We have it of the late Sir V. Bhashyam Iyengar that he always took time to answer questions from the Bench. He was most guarded and careful in making a statement and would never do so without considering its precise effect and whether it would tell in his favour or against him. On this subject Justice Williams of Pennsylvania says: 'Some men have a habit of running on in advance of a speaker and anticipating the course of his thought. Sometimes they may forecast correctly; but often they are quite wide of the mark. "Jumping at conclusions" is rarely helpful and when it lands one at the wrong conclusion it is quite embarrassing. It is more lawyerlike to wait till the conclusion comes.'

I said that you should not interrupt your opponent. Apart from your duty to the court and to your opponent, there is a great deal to be said against interruption from the point of view of advocacy. An ineffective interruption when your

learned friend is in possession of the court will not only give him an opportunity to explain away your point at once, but will also deprive you of the opportunity, when you have your turn, to present the point with effect. So an interruption which is not a complete answer and unassailable from every point of view is most dangerous to make. It is much safer not to risk an interruption. Not being in possession of the court you cannot explain your position fully, but your learned friend can give a full explanation of the matter from his point of view. The result will be that your point is lost for good and all; for when you attempt to refer to it again, in your turn, the Judge may well stop you from doing so as it has already been discussed. I know several instances in which good points, which could have been presented with force, lost their value and effect when feebly mentioned by way of interruption. An ineffective interruption, moreover, will not please the presiding Judge.

Beware always of an inopportune interruption at a point of time when the Judge feels inclined towards your learned friend, but has not quite made up his mind in the matter. An interruption at that stage is most dangerous. Your learned friend, if he is astute enough, has only to slip back into his seat, leaving you standing with the burden of continuing the arguments. By your own conduct you will have made up the mind of the Judge who, left to himself, might not have felt strongly enough to call on you to answer. But by standing up you leave him no option and you have only yourself to blame if you get into difficulties.

Akin to an interruption is arguing across the Bar which you must avoid. It derogates considerably from the dignity that counsel should maintain, and might, when continued, savour of a personal controversy. Where is the good in arguing with your learned friend on the opposite side when he is certainly not going to accept or confess defeat at your hands? You are to present your arguments to the Judge and he will not take any part in this controversy across the Bar. If it comes to his notice, he will very strongly dislike it, with the result that you will fall in his estimation.

I should remind you, too, that you should never contradict a Judge, even though he may not be quite correct. The chances are that he is right, for his statement will be founded upon a

definite fact which he has noted. He has no other way of knowing facts. You cannot in such cases complain if the Judge is irritated by your contradiction. Even though you may be right, it is your duty to present your point of view in the form of a submission, merely inviting the attention of the court to the situation which is not exactly in the form in which the Judge put it. It is a great mistake to risk antagonizing the court for the momentary satisfaction of 'scoring off the Judge'. Remember not to combat any matter advanced by the Judge or even to oppose it, except when you are perfectly certain that you can alter his opinion by the most inoffensive reasoning. In disagreeing with a Judge, counsel should not forget the advice of Lord Bacon : 'Let not the counsel at the Bar chop with the Judge.' But there is one occasion on which you should be firm : that is when, as sometimes happens, a Judge in the trial court comes to an early conclusion in your favour and stops the further trial and argument directly or indirectly. I shall, however, refer to this matter more appropriately and at length in another place.

It is your duty to answer directly any question that may be put to you by the court. Its relevance or its futility is no concern of yours. You cannot take it upon yourself to elaborate the correct position, leaving the Judge's question unanswered. Your duty is to give a straight answer to any question that is put to you from the Bench. You may follow it up with an explanation which will then have a hearing. It is a common trait of counsel, which Judges complain against, that questions are not fairly and squarely answered. You had better leave no room for such a complaint. It is possible that if the question has any remote bearing upon the points at issue your failure to give a direct answer will be a factor against your client. A remark from the presiding Judge that a practitioner is wasting the time of the court is the severest condemnation that the court can pass.

My next point is that you should neither offer to argue when you are not called nor continue your arguments when the Judge is in your favour and is not anxious to hear more from you. If you act to the contrary you may expose your case to serious danger. I know of a case where the Judges, after hearing the appellant, were considering on what grounds

to dismiss the appeal when, without any call from the court, the respondent's counsel began his arguments. The ultimate result was that the Judges changed their minds and allowed the appeal. You may consider a particular fact to tell very strongly in your favour. It may, however, have the opposite effect on the mind of the Judge. Do not, therefore, continue arguments after you are stopped, in the foolish expectation of reinforcing your position. In some cases the Judge may call you merely to help him to write a judgement. Lord Macmillan has said: 'What the Judge is seeking is material for the judgement or opinion which all through the case he knows he will inevitably have to frame and deliver at the end. He is not really interested in the advocate's pyrotechnic displays; he is searching all the time for the determining facts and the principles of law which he will ultimately embody in his decision.' You must understand the Judge's attitude and stop after inviting his attention to the salient features of your case.

Do not think that because you believe in a point the Judge must be of the same opinion as yourself, and do not lose balance or temper if he does not react as you expected. If the point that you seek to make is really a good one, the repeated submission of it—with humility and modesty, without taking up a challenging attitude—is likely to bring round the Judge in your favour. On the other hand, an exhibition of surprise or of temper may strengthen the Judge in his conclusions to find against you. The advice of a successful lawyer is: 'Confront difficulties with unflinching perseverance and good humour, and they will disappear like fog before sunshine.' In repeating your arguments, however, do not use the same expressions over and over again. Change the form and the language as much as you can. You will not only avoid giving annoyance to the Judge but also save yourself from the reputation of being a bore. Remember that the Judge may not exhibit the same keenness for your points as you do.

It is also important that in court you should not speak disparagingly of any Judge. Judges, for the best of reasons, esteem and respect their brethren on the Bench, and it is a fatal mistake for counsel in an appellate court to impute to the court below *a quo*, prejudice, bias, unfairness, or ignorance of elementary law.

Judges, however judicial their minds and upright their intentions, are, after all, human, and the advocate, who—unwisely, *a fortiori*, intentionally—makes himself offensive, while he may not prejudice, will not certainly advance the cause which he pleads.

As a general rule of conduct in court, I want to emphasize that you should first present to court your best evidence or your best point, without reserving it to some later stage. It is always advantageous to create a favourable first impression and it may in some cases be possible even to capture the mind of the Judge by the overpowering directness and force of the first presentation of your case. An impressive piece of evidence may incline the Judge to accept other weaker links in the evidence supporting the main issue and a good point presented first in argument, if it does not at once win a decision for you, will create a favourable and a receptive attitude in the mind of the Judge for the rest of your arguments. Justice Williams says that if you do not make an impression within the first fifteen minutes you may argue till the end of the day without making any, and I respectfully record my agreement with his shrewd utterance. There may be long and heavy cases which do not lend themselves to such presentation; but remember this as a first rule of guidance at all stages, that the best part of even one aspect of a case should always be presented first.

Some lawyers have the impression that a point will not create its proper impression or receive its full value until the court gets into 'the heat of the case', i.e. until a later stage in argument is reached. But how often have Judges resented the keeping back of a good point to the end? They feel oppressed by the fact that so much valuable time has been needlessly wasted over weak points, and it is not surprising that they express dissatisfaction with counsel and his methods.

Nor need one press into service the argument that what appeals to counsel as weak will appeal to a Judge as strong and vice versa. Your weak point when mentioned later may then win the case for you, though it may be accompanied by an observation from the court that you should have presented it earlier. Such glaring differences of opinion are out of the normal and you will be wise to act upon your own judgement of what are good and weak points.

It also sometimes happens that a strong point, deliberately reserved to the last to capture the Judge with when he may be feeling oppressed with the difficulties of coming to a conclusion, defeats its own purpose because the Judge makes the natural observation *prima facie* that if it were a good point counsel would have put it in the forefront of his case.

It is a matter for counsel to decide in each case whether any particular point is capable of presentation out of its turn. But here a word of caution is not out of place. Where the matter concerned is only a good and strong aspect of a point, counsel must bear in mind that he is presenting it out of its setting, and therefore consider whether, if so presented, it will have the expected result.

This course may in some cases necessitate a deviation for the time being from the scheme of arguments which counsel has planned for the case. Not only is there no harm in such deviation, but the general good impression that results will facilitate and strengthen the orderly and planned presentation that follows. Each stage of the argument will carry greater weight and greater conviction to the mind of the Judge and you will sail in a generally favourable atmosphere. The entire setting will be greatly strengthened and become unassailable. Let us not forget that the Judge's only concern is to decide, and to decide quickly if possible. A reputation that your arguments are direct and to the point and that you do not beat about the bush receives its full value in the hearing that you get and in the appreciation that your presentation wins.

I next wish to impress upon you that you should always look the Judge in the face and never look down when you address the court. There is a great deal of guidance to be found in the physiognomy of the Judge. You ought to know how the Judge takes your points—directing your arguments accordingly—and of this his face is the best index. Do not at any time look around for applause or approbation from those gathered in court.

Not infrequently counsel, in the fullness of their preparation, assume that the Judge knows as much as they of the details of their case. This of course is a mistake which you must guard against. The Judge may not even have looked into the papers before coming to court: some people even think it is

wrong on his part to do so because he ought to get his first impression from counsel at the Bar. Indeed, Bacon has said 'it is no grace to a Judge first to find that which he might have heard in due time from the Bar'. You cannot therefore start *in medias res* but must begin at the beginning unless the Judge directs you to proceed from any particular stage of the case. You ought to address him as you would a person to whom you were telling a story for the first time.

Another tendency also sometimes noticeable in counsel is to narrate to the court, by word of mouth merely, the contents of documents and statements of witnesses, without making any attempt to refer the Judge to the record and draw his attention to it. This is undoubtedly proof of counsel's thoroughness of preparation which in itself is commendable; but, from the point of view of advocacy, the practice is barren of results and deserves to be avoided. Such conduct on counsel's part is mostly accounted for by nervousness, lack of restraint, want of calmness and self-possession and an undue haste to make points, which cause him to overshoot the mark. Apart from any other consideration, counsel ought to acquire the habit of feeling that there is no need for hurry even when he starts a case. He should learn to be cool and calm so as to be able to arrange his thoughts in proper sequence without confusion. To no one else is self-possession of greater value and productive of better results than to the advocate at the Bar.

There are other weighty reasons why counsel should get into the habit of reading from the records, instead of repeating their contents from memory, and should learn the art of persuading the Judge himself to read from the records. Save for very rare exceptions, the eye is, in the case of most people, a more powerful medium than the ear. Secondly, the Judge is enabled to reach more definite conclusions than when he may reasonably entertain a doubt or suspicion as to whether counsel's reproduction is accurate or whether it may not, as the outcome of enthusiastic advocacy, be a pardonable exaggeration of the reality. Thirdly, reading from the record for the benefit of the Judge is also to counsel's own advantage. When your mind is saved the strain of recollecting and reproducing it is free to serve you in other ways; while you are reading to the Judge you can think afresh about what you

read and develop new lines of thought and possibly a new orientation of the whole case.

But all this does not mean that every time you have occasion to mention the contents of a document you should make the Judge look into the record. You have done your duty if you draw his attention to the record once. There may be occasions where the pursuit of such a course may injuriously affect your performance and mar its effect. A detailed reference to documents will be wholly out of place, for example, when you summarize your arguments or appeal in categorical sequence to the strength of the proof that you have offered. The whole effect may be lost by the introduction at such a stage of a reference to the record.

In presenting arguments it is always advisable to quote chapter and verse for all that you submit. Remember, too, that language quoted from a decision or textbook makes a greater appeal to the Judge than the same idea expressed in language of your own. It behoves you therefore to make your preparation thorough and arm yourself with appropriate citations.

Then, in reading the record or making a citation, you ought to be slow enough for the Judge to follow you; and you must take him with you. Do not read merely for reading's sake but in a manner that enables you also to think upon it as you proceed. Then you may be sure that the Judge is following you. There is another advantage in such deliberate reading. New ideas may strike you, new interpretations may suggest themselves on the spur of the moment, or you may be able to correct any erroneous impressions which you formed on earlier readings. You should not, therefore, lose the splendid opportunity of reading for your own benefit when you are reading for the sake of the Judge.

You also ought to know that no one is convinced by loud words, dogmatic assertions, the assumption of superior knowledge, sarcasm, invective or the making of faces at your opponent at the Bar. 'Gentleness, cautiousness in expression, sincerity and ardour without extravagance have always their value. The minds and hearts of those that you address are apt to be closed when assertion is relied upon more than proof and when sarcasm and invective supply the place of deliberate

reasoning.' Your conduct in court should be dignified and in good taste.

You must also avoid the bad habit of using inaccurate expressions. For example, some lawyers characterize any statement that anybody makes as an 'admission'. To them there is nothing which is not an 'admission'. Even a denial is the 'admission' of the opposite. An inference from other proved facts is also an 'admission'. Any finding of the Judge is called an 'admission' by such people. Similarly, anything a witness speaks to in the box is 'conceded' by the party calling him. Habits of this kind deserve to be checked early. Law is nothing if it does not live in accuracy of thought and expression.

It should be needless to observe that the elegance and dignity of arguments in court are increased if the language employed is correct. How many arguments of the present day would bear verbatim reproduction? A sentence that is begun is never finished but is continued without end by putting parenthesis inside parenthesis. It is quite true that the purpose of all conversation and all argument is only to impress our thoughts and ideas on the minds of listeners and that this purpose can be effectively achieved by talking in phrases and incomplete sentences and interjections. But that, surely, is not the proper or the only way to conduct an argument. Well-constructed and well-enunciated sentences with appropriate connexions are bound to produce a rhythmic and persuasive effect conducive to a sympathetic hearing. Mr Jingle may have conveyed his ideas by the language he employed, but that is no reason for following his methods. Hot haste in expressing one's ideas is unnecessary and we should all learn to control our thoughts from running ahead of our expression. Judges will wait, and there is no race being run to capture the mind of the Judge. In jury cases, particularly, the form of expression and the cadence of the utterance are bound to have an influence. The learned and dignified profession of law should make an effort to speak a language of learning and dignity. Sharswood says: 'It may be true that in a court of justice the veriest dolt that ever stammered a sentence would be more attended to, with a case in point, than Cicero, with all his eloquence, unsupported by authorities; yet even an

argument on a dry point of law produces a better impression, secures a more attentive auditor in the Judge, when it is constructed and put together with attention to the rules of the rhetorical art; when it is delivered, not stammeringly, but fluently; when facts and principles, drawn from other fields of knowledge, are invoked to support and adorn it; when voice, and gesture and animation give it all that attraction which earnestness always and alone imparts.'

I have advised you to study the judgements of the Privy Council and the House of Lords regularly, in order to acquire and assimilate legal phraseology. If you train yourself to speak in the language of the learned judgements, your arguments are bound to be more effective and to find easier acceptance. When you cite a decision, you will not only glide into the language of the judgement, but the words of your argument will themselves have the subtle effect of a judicial utterance.

It is a point of advocacy, in some cases, not to formulate the points yourself, but to get the Judge to formulate them. Complex situations sometimes arise in which the exact formulation of points is not easy or decisive. You are then well-advised simply to present all matters from which the conclusion has to be drawn and to leave the formulation of the position to the learned Judge. There is an obvious advantage in such a course. As Pascal writes: 'We are more forcibly persuaded in general by the reasons we ourselves discover than those that come from the minds of others.' 'All men are more or less vain,' says Lord Abinger, 'and every man gives himself credit for a great deal of discernment. He loves to find out things for himself; to guess the answer to a riddle better than to be told it.' The Judge is sure to retain his own way of looking at the situation and if that is in your favour your point is made without more ado. Your formulation of the position may not easily be accepted by the Judge, whose tendency will be to receive your presentation with doubt if not with suspicion.

Occasional citation in arguments of an analogy or illustration has its value. Before juries its power is obvious. Even before Judges a reference to an apposite analogy or illustration has a subtle effect. The occasion, however, must be appropriate and well-chosen, the illustration apt and presented with

lucidity in a homely manner without rhetoric or ostentation. For example, a case arose over the desire of the religious head of one creed (Vadagalai Vaishnava) to enter, with all the paraphernalia and marks peculiar to his creed, and to worship, in a temple where the opposite creed (Thengalai Vaishnava) prevailed. The management of the latter temple resented and opposed the entry because it was accompanied by the above-mentioned paraphernalia and marks which they found objectionable. At first sight the learned Judges were inclined to consider unjust this opposition to the exercise of the lawful right of worship. But at this stage counsel for the objecting temple presented his arguments thus: 'My Lords, nobody has any sort of objection to the religious head of the Vadagalai Vaishnava entering our temple to exercise the right of worship. We object only to the accompaniment of the paraphernalia. Suppose I were to enter this court, for the purpose of arguing this case, with two of my servants marching in front of me, mace in hand, what would your Lordships think of it?' The illustration went home and the expected result followed; but Judges resent story-telling if it is indulged in as a habit.

You should not press a doubtful point with undue emphasis or repetition. No Judge likes that. You have a right to present every point you wish to make on behalf of your client, but a bad or doubtful point will not stand repetition.

You have yet a further and a higher duty, the performance of which will react greatly to your advantage. In some cases you may quickly produce a general good impression of the justice of your cause such that the Judge may be impelled by a desire to find a way to help you if he can. The result may be that he persuades himself to take up an unsound or untenable position and build upon it to reach a conclusion in your favour. It is then your duty as much as it is to your advantage to take the Judge gently off the wrong track and set him on the right one notwithstanding any temporary adverse effect on you. If, on the contrary, you assent to his erroneous line of argument for the simple reason that it leads to a conclusion in your favour, not only will the entire case collapse when the other side successfully attacks it, but it will also result in alienating the sympathy of the Judge which earlier you had won. No Judge will want to stand by a conclusion which is not establish-

ed on a sound basis. There is, however, an art in handling a situation of this kind—to contradict a Judge and make him perceive the fallacy in his argument without seeming either to contradict him or expose him; to smile and yet to contradict. It is acquired only by studied experience, calm self-possession and dignified self-confidence.

The preparation that you have made should enable you to assess each fact at its proper value and to determine its exact effect in relation to the whole case. You must know how far proof of a fact will take you towards the establishment of your case and how far a fact disproved by the other side affects your main case prejudicially. You must thus understand and appreciate the exact value of each fact in your scheme. One fact may have a direct bearing on the main issue which may stand or fall according as that fact is proved or disproved. Again, a fact which is one of many of equal probative value may prove one of many relevant facts, each one rendering the main issue probable or improbable in its own degree. If one of these many relevant facts fails, it means that one of the many modes of proving the main issue is lost to you. If one of the many facts which goes to prove, along with others, one of the relevant facts above-mentioned—if a fact of the second remove, let us say—should fail, its disproof may have little or no effect on the main issue. Such a result might take away only one of the many modes of proving one relevant fact which may be proved by other facts; and if we note that that relevant fact itself is only one of many others of the same category required to prove the main issue, the poor value of the particular fact of the second remove, which is not proved, will become obvious. I am referring to this so elaborately only because while counsel should not be unnerved by the disproof of a single fact he must also be prepared to concede facts of this category without arguing them strenuously and wrangling over them, sometimes to the annoyance of the Judge. There may thus be facts of the third and fourth remove, if I may so call them, which will have only infinitesimal value on the result of the case and which counsel must therefore assess at their proper worth. It is only thus that counsel can decide when and where he should direct his attack, spending powder and shot, and when and where he need not worry at all.

And here a word about how to cite decisions. It is never enough to be prepared merely to read the head-notes to the Judge. Always be prepared to recite the facts of the case from your memory. Having stated the facts in a form which will place that case on a par with the facts of your case, refer to the particular passages in the judgement that are relevant and applicable to your own case. Your citation of an authority must be telling and you should not merely pile up references without producing an effect. Before citing any authority, tell the court the point which you are seeking to make and to which the case you are about to cite relates. When you read a report to the court or refer to a judgement in argument, remember to refer to the learned Judge as 'Mr Justice So-and-So', and not as 'So-and-So, J.', which form should only be used when writing or printing. Likewise, when you mention a date to court or read it from the record, always refer to the month by name, as January, February, etc., and not by the numbers one, two, or three. While dates and years bear numbers, months bear names.

As regards the citation of reports, particularly reports of English decisions, it should not be necessary to say anything but that I have heard citations in court made in an awkward form. You do not quote as 'B. and S.' or as 'M. and S.', by initial letters, but as 'Best and Smith' or as 'Maule and Selwyn', by their full names. You do not say '2 Chancery Division of the year 1905' but '1905 2 Chancery'. You also say '19 Queen's Bench Division' and not '19 Q. B. D.', using the initial letters, and '4 Common Pleas Cases' or '1905 Appeal Cases'. When you cite the name of a case, you cite it, for example, as 'Thompson *and* Hudson' and not as 'Thompson *versus* Hudson', as it is printed.

Just as facts have to be distinguished and assessed at their proper value, so should the value of precedents and decisions be understood in their proper perspective. This ability to distinguish between decisions is more important when explaining authorities that may be cited against you. It requires wide and accurate knowledge and a subtle mind to recognize a case cited by your opponent as he is reading it out. The distinction must strike you as if by intuition. It must be obvious how broad-based and precise your grounding needs to be in

order that you may do so. I have already said that your study of law should be such as to enable you to pigeon-hole the knowledge you acquire. Then this well-arranged knowledge will enable you to distinguish decisions which may sound as though they tell against you. Some decisions may have to be distinguished on a fact which will take the decision into another sphere altogether; others may have to be surmounted by a legal distinction.

Another word. Do not imagine that you have to disprove only those points that your opponent presents. He will present his best, keeping back weaker ones. It is your duty to search for his weak points and direct your attack there. As Reed puts it, it is wiser, in some cases, to reject the offered battle-ground and force an engagement somewhere else.

I wish to refer here to a last point, though it might more properly be mentioned in the chapter on your duty to the court, and that is that you should not conceal from the court points or decisions which tell against yourself. Candour and frankness should characterize the conduct of the practitioner at every stage of his case. Apart from its being your duty, it is a point of advocacy for counsel to refer not merely to points in his favour but also to the other side of the picture and explain it away. There is a decided advantage in such a course from the point of view of advocacy. When you are in possession of the court, you can carefully and suitably explain away any point which might tell against you. If, on the other hand, you fail to refer to it and leave it to be mentioned by your opponent, in the setting that he makes for it, it will tell against you twice as much. Your failure to refer to it may well be construed as an indication of the weakness of your case, and your opponent's reference to it as a point of strength for him. Do not therefore hesitate to cite a case which is against your conclusion—but distinguish it if you can.

Referring to the trial court, I have to deplore the practice adopted by certain Judges in the matter of the trial of suits coming before them. The procedure prescribed by Order 18 of the *C. P. Code* is thrown to the winds, the pleadings are not read in court and explained and often Judges simply urge counsel to put witnesses into the box. I assume, in favour of

such Judges, that they have studied the pleadings at home; but I am afraid that that alone does not enable them to follow intelligently the evidence that is produced before them. It is not possible, at any rate, for them to understand the statements of witnesses, or the contents of documents proved through them, in their proper relation and bearing. Oftentimes the recording of the evidence is done mechanically. It is a wonder how, in their state of knowledge, their judgements can have that value which the judgements of trial courts are given, as being those of Judges who have heard and seen the witnesses. The underlying presumption, that having intelligently followed witnesses in the box they were in the best position to judge of their veracity and reliability, is not infrequently unrelated to the facts. We cannot grant that the intellectual eyes of such Judges were open at all.

Where the proper procedure is adopted the plan of the case that you have prepared, as I advised you earlier, will stand you in good stead. You will begin with an account of the parties, the circumstances that led to the present dispute, the precise nature of the dispute, the points at issue and the proofs that you intend to produce in order to establish them. This is an occasion for you to exhibit your skill in advocacy by the orderly presentation that you make. It has been said that there is nothing more difficult in the art of advocacy than to open a case effectively. You have to do it in a confident manner, manifesting your faith in the cause and yet refraining from constantly anticipating the other side and criticizing its position.

The practice of opening a case is fully stated by Gaius in these words: 'When the parties come before the judex they used to prepare the argument by setting forth the case to him concisely and in abridgement, which was called "*causae conjectio*", that is the compression of the case into a brief outline.'

As regards the actual trial, I wish to repeat to you the words of advice that Warren gives: 'Always overprove rather than underprove your case.' It is always better not to grudge the expenditure of the few additional rupees required to call a few more witnesses or to secure some more documents. It is obviously best to exclude all chance of deficient proof and to

insure the case, so to speak, against failure. Further, after a case is closed you cannot cure any defect in the proof by adducing further or additional evidence in the trial. It would be highly deplorable if a case were to fail for a trifling lack of evidence which care and caution might easily have provided.

This leads me to give you another warning. Sometimes a Judge in the trial court possesses knowledge of local conditions and has peculiar opportunities to see and feel things (e.g. the conduct of parties inside the court) that help him to come to certain conclusions with ease. On such occasions the Judge may be inclined to give you judgement without much effort, and may even, on occasions, express himself so strongly as to suggest that you need not trouble yourself to offer further proof or call further evidence. Do not allow yourself, on such occasions, to be carried away by the prospect of easy victory. Your duty to your client requires you to secure for him abiding, not temporary, success. An appellate tribunal, not possessing all the advantages of the trial court, may take a different view and reverse the judgement on the ground that the proof on the record is inadequate. I know many instances in which this has happened. Therefore do not rest on your oars when the Judge utters favourable remarks; offer him your thanks for them and proceed to complete the record by producing all the evidence you may have, even though the Judge may appear annoyed at your procedure. You have only to be respectful and he will forgive you.

Now a few words about criminal trials.

The issue in a criminal trial is always whether the accused is guilty of the offence he is charged with, and never whether he is innocent. There is consequently a well-defined distinction between the duties which a prosecutor and a counsel for the accused respectively discharge.

The duty to prove the affirmative rests with the prosecution and the function of the prosecutor is not to secure a conviction but to see that justice is done. He is not merely advocate for a party but a part of the court—a kind of minister of justice, filling a quasi-judicial position. The duty of the advocate for the accused, however, is to protect his client as far as possible from being convicted by a competent tribunal except upon legal evidence sufficient to support a conviction for the offence

with which he is charged. While not calling any witness to commit what he knows to be perjury, and short of asserting his own belief in the innocence of the accused which is overstepping the role of the advocate, his duty is to bring about his client's acquittal. As a great authority upon criminal law tersely expressed it, counsel's duty is 'to get an acquittal if he can, whatever the merits of the case may be'.

I have spoken about original trials. My account of the scene in court will be incomplete if I do not refer to appellate hearings also. Upon that matter there is a small difference in the scope for advocacy between a hearing in the High Court and a hearing in a mofussil court. In the forceful words of Mr S. Srinivasa Iyengar, referring to arguments in appeals in the High Court: 'With our printed papers paged and lined, with our opponent constantly challenging us to quote chapter and verse, and with a running fire of interruptions from the Bench and the Bar, the scope for making the worse appear the better reason becomes increasingly difficult.' It follows that there is greater scope for the unfettered play of the imagination in the mofussil than in the High Court. This apart, the method of argument is the same.

I shall first speak about the scope of arguments for an appellant. The first thing to know is that counsel for the appellant must present the whole case for both parties in his arguments. He must as faithfully present the case for the other side as his own, but in doing so he may explain or distinguish points and thereby nullify or minimize their value and effect.

This presentation of the features on both sides is also necessary and advantageous from the point of view of mere advocacy. I have adverted elsewhere to the fact that, being in possession of the court, appellant's counsel has a unique opportunity for persuading the court to see the facts on the other side through his glasses. On the other hand, if counsel for the appellant were to deal with his own case only and leave that of the opponent severely alone, counsel for the opponent would be placed in a distinctly advantageous position. He in his turn can present, untrammelled, his side from his own angle. The respondent's argument would gain further strength

from the presumption that would naturally be raised in its favour—that the appellant did not assail the position of the other side because he could not. It is obvious therefore that, from the point of view of advocacy alone, counsel for the appellant should deal in his arguments with the case of both sides.

Why then should there be two counsel, one on each side? In the expressive language that Mr S. Srinivasa Iyengar used on another occasion, the answer is that 'at different angles or through different glasses, the identical ray of fact is red, orange, or blue'.

I have spoken about the scope of the argument for the appellant. I must now turn to his method of presentation.

Counsel should begin the case by mentioning the nature of the suit and the array of parties, referring to any genealogies that may be necessary. Then should follow the historical narration of relevant facts, extending as far as is necessary to enable your evidence as well as that of the other side to be properly understood when referred to later. The opening statement should as far as possible contain everything necessary to the understanding of the whole evidence, and herein—in making the court see the facts through the same glasses as yours—lies the scope for the display of your skill. In so doing, however, you ought not to embellish a fact beyond what is on the record to support it. If challenged, you should always be able to point to a passage in the record capable of interpretation in support of your statement. In this process of skilful presentation a trap can equally well be laid for counsel for the respondent into which he should be careful not to fall voluntarily. Let me explain myself.

I have already referred to the indiscreetness of a feeble interruption in the course of an opponent's argument. It is that point that I propose to elaborate now.

Respondent's counsel, in his ability and astuteness, can perceive as appellant's counsel proceeds with his narration and argument how he is trying gradually to shift or add to or embellish his case. The temptation for him to contradict and expose appellant's counsel, in the belief that he can thereby make an end of his case at once by demolishing his basic position and pulling him off his feet, will be nearly un-

controllable. If the matter really is plain and obvious he can of course intervene; but where an able counsel constructs a case he will not find it so easy to demolish. When he challenges appellant's counsel for chapter and verse, he will at once refer the court to a passage in a document or a sentence in a deposition which, unless its setting is properly explained, may be equivocal and may lend support to the appellant's statement. The result will be a severe rebuke from the presiding Judge asking him not to interrupt unnecessarily; what is worse, the opportunity to explain the position in his own setting later will, as I have said, be lost to him altogether. 'It has been mentioned and disposed of' will be the curt answer of the Judge.

I have known the cleverest advocacy of this kind on the part of counsel for appellant and struggled against it as counsel for respondent. The appellant's counsel will develop his case from stage to stage, every time basing it on a doubtful piece of evidence which, if you should challenge him when he is in possession of the court, he will explain as sufficient basis for his statement until, when the end of the hearing is reached, you find that the Judges have been given a wholly different but plausible case. What the respondent's counsel should do in such a case is to restrain himself and let counsel for the appellant go his full length. He must carefully take notes of all the deviations that appellant's counsel makes and when his turn comes present the case from his own angle, drawing attention to the equivocal passages from his point of view. I am sure that if this is done you will not find appellant's counsel in his seat for the reply; whereas, if you had adopted the method of interruption, you would find, as I said, that you were not allowed to present the matter afresh from your point of view.

To continue the method of argument you should adopt for the appellant: next state the pleadings to court and follow this up by dealing in chronological order with the documentary evidence on both sides. Then read the oral evidence to the Judge and while doing so I must ask you to avoid what most of us do, however much we may preach against it. You should not stop and comment on particular passages as you read. The Judge will want you to read the whole evidence and to

make your comments at the end. The temptation to do otherwise may be irresistible; but I wish you to try to get into the better habit.

By the time you have finished the evidence you will have dealt with the case in all its aspects. If, before then, you fail to produce any impression there is an end of your case. You have done your duty. Otherwise, you may read the judgement and comment on it relying on matters already placed before the court.

But nowadays, except in cases which are very heavy and where the judgements of the lower court are very long, Judges ask appellant's counsel to read the judgement of the lower court before referring to the evidence. This is certainly a great handicap to advocacy. It is, however, justifiable on the principle that the hearing of an appeal is not a rehearing but only a hearing by a court of error; and it should be said to the honour of Judges that they do not shut out any presentable argument. The purpose of reading the judgement first is more to enable them to follow the arguments and the evidence, with an eye to the main points and to the conclusion. This may necessitate a slight re-adjustment of appellant's arguments, which counsel, well-prepared in his case, can easily carry out. Or if you satisfy the Judge in the first few minutes that you have a presentable case, as I have said that you should do, you will always be allowed to deal with it in your own way. Let me conclude by drawing your attention to the significant words of Lord Macmillan. 'It is a well-known fact', he says, 'that a skilful exposition of a case often largely supersedes the necessity for arguments.' He adds that an artist in advocacy never argues his cases; he merely states them. So 'orderly and adroit is the arrangement of his statement' that the conclusion which he wishes to be drawn appears inevitable. So much about the appellant's arguments.

The method of argument for the respondent seems to be slightly different. The whole case has been presented to the Judge and all the evidence read. A structure has been created by the appellant. You, for the respondent, must now demolish it. There is no need to go over the same ground as appellant's counsel. I think respondent's counsel must always be prepared, in the first instance, to present vigorously and

forcibly a broad view of the case from his angle of vision, eschewing details. He must first give a general outline, referring to the broad probabilities, thereby creating an atmosphere ready to receive the details of his story. After this has been done, counsel can go into details. I should consider it poor advocacy for the respondent to open his side with an attempt to attack details of the appellant's case all at once. A structure will not fall because one pillar here and another there are pulled down; a general unsettling of the foundations is a surer method. All details will crumble if only a powerful presentation of the general features of the case is made.

Neither is it, in all cases, the proper procedure to follow the same line of argument as appellant's counsel and traverse it point by point. That can be done in a comparatively easy case; but in more difficult cases that type of argument will be wholly ineffective. To take up again the analogy of architecture, it will pay you little to attempt to demolish the appellant's structure from one end to the other by making small holes in it here and there. It will be impregnable to attack if counsel for the appellant is worth anything. The better course is to ignore it at first. Construct a new building of your own, of the selfsame materials, from your point of view, but stronger, sounder and more impressive than appellant's, and exhibit it before the Judges for comparison. Having done that, you can begin your attacks upon the appellant's structure. You will then have brought the Judges to such an attitude of mind that even light taps will bring about its collapse. Proceeding deliberately in this manner, you will install with triumph your structure on the ruins of your opponent's. That is real advocacy.

Experience will tell you that it is more difficult and requires greater skill and ability to argue a respondent's case than an appellant's case, though in your earlier years your impression will be just the opposite. I believe that the litigant public also knows this and consequently senior counsel get more respondents' engagements than appellants'. It used to be said of the late Sir V. Bhashyam Iyengar that he argued more cases for the respondent than he did for the appellant and further that he lost more cases for the respondent than he won for the appellant.

I must now say a word about arguing points of law. I am not saying anything derogatory to anybody when I say that it is easier to argue law than facts. Experience will teach you that, while you must know the law of familiar application well, your main work in cases will generally be with facts. The older you grow, the less books you will cite and you will realize that when you have properly grasped and presented the facts and details of your case you have no need for books even in the court of last resort. Younger members of the Bar particularly should realize that they are in their element in arguing law while they cannot have the same confidence in arguing facts; so I need say little about arguments on law. However, I would say this: if industry can win its prize, it is here. If intellectual alertness and subtlety have scope, it is here. I expect counsel arguing a point of law to have thoroughly studied the point directly and in relation to all other matters that impinge upon it or are affected by it by way of logical consequence. An argument on a point of law may be dependent on well-established principles in other aspects of the same branch of law on the one side and may tend to react on still other branches of law on the other. You must know with precision the limitations caused by positions established in the same branch of law and you must realize that you cannot start unsettling settled principles. You must also appreciate the effects upon other branches of law of the position that you take up, which if logically extended may lead to absurd results in them. Lord Halsbury no doubt said in *Quinn* v. *Leathem*, (1901) *A.C.* 495, that there can be no assumption 'that the law is necessarily a logical code', but that is only the statement of an exception which proves the rule. My attempt is only to show how wide and exhaustive and intensive your preparation should be.

Then, as to presentation, when you formulate a position of law you ought to have contemplated in advance all its limitations and exceptions and variations. Your statement should be so complete that when you cite authorities, and they contain a statement of limitations or qualifications or exceptions, they will fit in with your statement of the law without any need for you to alter in any manner the original enunciation that you have made. This habit comes of accurate,

thoughtful and classified study, to which I have referred. Remember that the value of your development of a new aspect of a legal point goes for nothing if any one of the relevant authorities should point to a new limitation or qualification which you failed to mention. You will thereby lose the confidence of the Judge in your accuracy of stating the law.

I have already referred to the propriety of citing authorities on both sides, distinguishing such as you may, and finding a place for each in your scheme. If you consider that any decision is wrong and that it enunciates bad law, never beat about the bush but take a bold stand and say that it is wrong. Do not attempt to distinguish cases that are not distinguishable.

I have also spoken about the mode of citation and I need not repeat it here. A decision is authority only for what it decides [see *Quinn* v. *Leathem*, (1901) *A.C.* 495], and a study of the facts of each decision will stand you in good stead in distinguishing it and allocating to it its proper place in your mental shelf.

I want, however, to refer to an increasing tendency which is threatening to become a habit, and which I wish the Honourable Judges of the High Court at least would strongly discourage—the tendency to be content merely with the citation of a decided case by way of precedent, without any attempt to examine its underlying principles. How well it would be if only counsel would formulate and expound the general principle of a decision before citing it! Not only would the citation then gain in force, in the appeal that it would make, but it would also be a piece of self-education of abiding value. Our Judges give us a patient hearing and time is no concern with them in the consideration of cases; but it would contribute to the improvement of the Bar if learned Judges would, without being satisfied with the citation of a mere precedent, provoke inquiry and research and insist on counsel examining basic principles.

CHAPTER X

PROFESSIONAL CONDUCT IN GENERAL

High standard of the Bar — Duty to cultivate professional habits — Certain duties special to the legal profession — Avoid touting — Avoid undue intimacy with clients and their clerks — Do not advertise — Duty must prevail against self-interest — Confidential communications — Counsel as witness in a cause — No duty to accept just or good cases only — Duty in criminal cases, when accused confesses guilt — Fee not to be your sole consideration — Size of fee should not affect your efforts — Notify client of inability to appear for him — No relation between fee and service — Return unearned fees — Delegation of briefs — Returning fees in special cases — A converse case and the revision of the fee — Receiving presents — No contingent fee — Share of gains of litigation — Never postpone settlement of fee — Duties in special cases — Cases of compromise — Advancing moneys — No promissory notes for fee — Statutes and other rules on ethics

It is a matter on which we can congratulate ourselves that the legal profession is marked by prevalent high character and a deserved reputation for learning and honesty. It has not only set itself high standards of professional conduct, but it has also been strenuous in following and maintaining them. The lawyer deserves to be highly esteemed because, with such large numbers at the Bar, with such varied activities in which he is called upon to take a responsible part, and with such opportunities and temptations to misconduct himself, he has not fallen 'from his high estate' with any frequency. Statistics furnished by the Madras Bar Council Office show that from 1934 to 1939, with the strength of the Advocate Bar ranging from 2,712 to 3,729, there were no more than thirty complaints against advocates referred by the High Court to the Bar Council for inquiry and in only six of them were practitioners found culpable and punished; all the others ended in the honourable acquittal of the practitioners concerned.

In assessing the work of the Bar we cannot ignore the fact that our Judges are mostly recruited from the Bar and that their excellence is not a little due to the training they obtained there.

In the first place, I must advise you to cultivate what Justice Williams significantly describes as 'professional habits' as distinguished from 'business habits'. If differences exist in the measure of success achieved by different lawyers having equal general ability and possessing equal advantages in

other respects, it is to a large extent due to the differences in their professional habits. Illustrating this topic Justice Williams pictures the character of some types of lawyers, all of whom want business but quite unconsciously alienate clients at their first meeting. He says: 'Some lawyers are so unsocial in their manners as to be really uncivil. They drive people away from them by creating in their minds the impression that they are not welcome, that their presence is an intrusion and their business inquiries an impertinence. Others are crisp and sharp in their habits of speech and impress those whom they meet with the idea that if not positively angry about something they are far from being in good humour. There are others who have an insolent, careless and inattentive manner, who really appear to think labour of any sort a burden to be gotten rid of as easily and as speedily as possible.' Without in any way compromising your self-respect or your moral nature, your habitual treatment of clients and their agents can be such as to make you agreeable to them and win their estimation and confidence. Above all make it a habit always to say what you believe and refuse to say what you know is false; for you should make yourself worthy of belief if you wish others to believe you.

I have already told you in a general way that the moral standards for professional life are no different from those for moral living in society and that what is morally wrong cannot be professionally right. Justice Williams puts the rule in the form of two general propositions: 'Whatever tends to "lower the standard" of the profession, and impair its dignity and usefulness, is against public policy, even if the question of private morals be left wholly out of sight. The other is that the employment of any methods or appliances by the practitioner to advance the interest of a client that tend to interfere with the administration of justice is "not professional" and will not be tolerated by the courts.' There are some special matters, however, in respect of which no moral reproach may attach in ordinary life; but the high standards that we insist on for the legal profession require that they should be avoided.

One such matter is 'touting'. In commercial or other walks of life, where there is competition, it may not be considered

morally wrong to pay to a person who fetches you custom a portion of the gain that you make through his help. But in the legal profession this is strictly prohibited. The tradition of the Bar is that the advocate must not seek business but that business must seek the advocate. The lawyer must not apply to others to make a trial of his capacity but wait until his merits are discovered and appreciated. Notwithstanding the great competition that exists, never allow yourself even to be suspected of courting work by offering 'commission'. Do not allow yourself to be tempted by the prospect of immediate gain, or to be misguided by the example of those few persons who may have attained to position and rank at the Bar because of—or, rather, in spite of—their complicity in such practices. Do not allay the conflict in your mind by the thought that the past may not be remembered and that success is worth achieving at any cost. Let your conscience 'hang about the neck of your heart' as it did about Launcelot Gobbo's; but, in your case, may it have the better of the fiend!

We read instances of barristers hobnobbing with solicitor's clerks and the like. Vakils' clerks and clients' clerks stand in the same position. This does not mean that you should not be on amicable terms with them. You can move on terms of friendship and equality without jeopardizing the dignity of the profession.

Another matter forbidden to the lawyer is advertising. You ought never to advertise yourself. The only legitimate method by which you can bring yourself to the notice of others is by your work, the display of your ability and industry. Your learning and quick-wittedness, your earnestness in the client's cause, your sincerity and transparent honesty in all your dealings with him, the thoroughness of your preparation, your clear and dignified address in court, these and these alone must advertise you. The manner in which you conduct yourself towards your client should be such that it inspires confidence so that even a client whose cause may not have been won by your efforts would nevertheless appreciate your endeavours and mention you to other litigant friends of his as a thoroughly reliable person. A recommendation of this sort by one client to another rarely fails and will help to spread your reputation.

It is considered bad etiquette for a practising barrister in England to give an interview to a representative of the Press on any matter in which he is engaged as counsel. It is proper that we should follow the same practice here. It is, however, proper etiquette for a member of the Bar to call on a new Judge when he assumes office. It is desirable that new Judges should have the opportunity of becoming acquainted with the members of the Bar who practise before them.

Next, whenever interest and duty come into conflict duty ought to prevail. Difficult situations present themselves not infrequently in the life of a lawyer. On such occasions it is best that you consult the senior members of the Bar and follow their advice. When you are confronted with an ethical problem involving the profession, you will rarely err if you keep in mind a high sense of honour and a conscientious desire to follow right 'in the scorn of consequence'. A situation may arise, for instance, when confidential information gathered from a client on one occasion may be helpful to his opponent in a subsequent case. The client may not on the second occasion offer you an engagement, but the opponent might be willing to do so from motives good or bad. In such cases your conscience and sense of honour will properly advise you to reject the proffered engagement lest you should unwittingly make use of knowledge obtained in confidence. All communications made by a client to his counsel for the purpose of obtaining professional advice or assistance in a pending or contemplated action, or in any other proper matter calling for professional assistance, are privileged; and such privilege is perpetual.

'Though it is a restriction upon practice, it is highly desirable that an advocate should not appear before a local authority of which he is a member or in a case against it.' The Bar Councils of Patna and of Allahabad have rules to this effect. The Patna Bar Council have an additional rule which states that 'An advocate shall not accept a retainer or brief in a case in which he has acted in a judicial or quasi-judicial character, e.g. as a Commissioner or Arbitrator'.

Again, though it is not strictly a case of interest coming into conflict with duty, a situation may arise where the client on the side opposite to that on which you are engaged may

seek intimacy with you—I will take it to be with honourable intent—and offer to engage you in a new litigation against a third party. There may be no question of professional etiquette preventing you from accepting the latter engagement, but yet, to avoid placing yourself in a position in which your actions may be suspected, it may be desirable not to accept it so long as your former engagement continues.

In another place, I advised you that you owe a duty to yourself not to accept any engagement in the trial of which you may have to give testimony. This decision need not rest on any conflict of supposed interest with duty but should be supported upon broader grounds, namely that it might tend to throw suspicion on the lawyer's character, entail loss of respect for the profession as a whole and diminish public confidence in the purity of the administration of justice. There is no rule of evidence disqualifying counsel from giving evidence in the suit in which he is engaged. Section 126 of the *Indian Evidence Act* does not make counsel incompetent as a witness; it only enacts the privilege of the client against the non-disclosure of certain matters by the lawyer, whether he is acting for the client then or had acted for him before, i.e. it prevents him from testifying against the client except in specified circumstances. The American Bar Association recommends that, for ethical reasons, counsel in the case should entirely refrain from testifying. But, it would seem, there is stronger reason for counsel not placing himself in such a situation that by his own act he would not be assisting in the discovery of truth. The dual position as counsel and witness might also affect his credibility which is a grave risk for a lawyer to run.

While thus there can be no objection on grounds of incompetency to the lawyer acting as a witness, his continuance as counsel after testifying deserves as a general rule to be discountenanced, notwithstanding the absence of any legal prohibition against it. It is well to remember that where he continues in the case he may personally suffer from the embarrassment which the situation creates for him. There is the further possibility, particularly in jury cases, of the jury giving testimonial weight to his arguments. The lawyer who is privileged to defend in all lawful ways a client of whose

guilt he has knowledge would not be justified in being an active party in the possible perversion of justice. There may, however, be cases where a lawyer is suddenly called upon to give evidence and he cannot throw up his brief after testifying; where, for example, no provision can be made for any one else to conduct the trial. In other cases he may be called merely to speak to a matter not involving the merits of the case. On the whole a satisfactory rule to adopt is to leave the decision as to whether a lawyer should continue to the discretion of the presiding Judge and only allow him to be active in the further conduct of the case with the Judge's permission. On the one hand, such a rule would not permit counsel to give professional ethics as his excuse for withholding material evidence; on the other, recognition that the basis of the rule is a matter of evidential rather than professional ethics would prevent the exclusion of the lawyer from continuing in the cause in cases where he need not be so excluded. The latter consideration would also enable counsel to continue to conduct a case where his co-counsel or partner is a witness, which a rule of professional ethics does not permit.

In a recent case, *In the matter of Venkatachariar and Sivaramakrishna Dikshitar*, (1942) 2 *Madras Law Journal* 479, the Honble Sir Lionel Leach, Chief Justice, said: 'A person who is appearing as counsel should not give evidence as a witness. If in the course of the proceedings it is discovered that he is in a position to give evidence and it is desirable that he should do so, the proper course is to retire from the case in his professional capacity.'

There is no doubt that from the point of view of the profession, counsel should keep out of a case in which he may be called upon to give evidence and that he would be exercising the wiser discretion if he retired from any case in which he had to be a witness. The Patna Bar Council have rules that:

'No advocate shall accept a retainer if he knows or has reason to believe that he is likely to be a witness other than a purely formal witness or that his own conduct is likely to be impugned in such case or proceeding.

'If an advocate accepts a brief in such case or proceeding as is referred to in the last preceding rule without knowing or

having reason to believe that he is likely to be a witness other than a purely formal witness or that his own conduct is involved in the case and if at any subsequent stage such fact comes to his knowledge, he shall at once retire from the case.'

The Allahabad Bar Council have the following rules:

'If an advocate knows, or has reason to believe, that he will be an important witness of fact in a case about to be tried, he ought not to accept a retainer in the case.

'If an advocate accepts the retainer, but at the opening or any subsequent stage of the case before the evidence is concluded it becomes apparent that he is a witness on a material question of fact which is in issue, he ought not to continue to appear as counsel unless in his opinion he cannot retire from the case at that stage without jeopardizing the interests of his own client.'

It has sometimes been said that an advocate should undertake only such cases as he believes to be just. Stated in this form the rule not only throws undue responsibility on the practitioner but is also unfair to the profession. It would be more appropriate to say that the lawyer should not undertake a cause which he knows or believes to be unjust. The profession of law stands avowedly for justice and, in the words of Forsyth, 'an advocate would indeed be a "chartered libertine" and a pest to society if he might, without any imputation upon his honesty, support the principles of the wicked which in his soul he abhorred'. Fortunately it is not the true theory of an advocate's profession, that he is bound to undertake any and every cause which is offered to him in utter disregard of its nature or merits. The question is best answered by Reed: 'If his lawyer is aware of his motive and of his facts showing the prosecution of the case to be corrupt and he still helps the client on, he becomes as bad as the client, or even worse. "Why should you sue for property, for which you have been paid?" was asked. "O", was the reply, "I choose to insist upon all my legal rights." The lawyer broke into a rage, and he ordered his would-be client off, with the remark that he must find somebody else to aid him in his d—d villainy. This exemplifies the promptness with which you should always fling away a knavish case.' Sharswood presents the same view thus: 'Counsel has an undoubted right, and is

in duty bound, to refuse to be concerned for a plaintiff in the legal pursuit of a demand which offends his sense of what is just and right. . . It would be on his part an immoral act to afford that assistance when his conscience told him that the client was aiming to perpetrate a wrong through the means of some advantage the law may have afforded him.' He proceeds to quote Chief Justice Gibson who said: 'It is a popular but gross mistake to suppose that a lawyer owes no fidelity to any one except his client and that the latter is the keeper of his professional conscience. . . The high and honourable office of counsel would be degraded to that of a mercenary, were he compelled to do the biddings of his client against the dictates of his conscience.'

It is also said that a lawyer should not undertake cases which he knows to be bad, having no chances of success. The correct standard, however, is that he should decline to accept an engagement when it clearly appears to him that the client has no case. Otherwise he should take his client to court, when he feels reasonably sure that he has 'a legal, evidential or emotional advantage' in his favour. How often has it not happened that at the first blush a lawyer has come to a conclusion adverse to his client, while further investigation of the circumstances has entirely changed his opinion? Lord Halsbury said that the contention 'that an advocate is bound to convince himself by something like an original investigation that his client is in the right before he undertakes the duty of acting for him' is ridiculous, impossible of performance and would lead to injustice. Counsel cannot usurp judicial functions and improbable stories are often true notwithstanding their improbability. If the case offered is prima facie tenable, the advocate is not to turn it down. 'The lawyer can neither predict', says Reed, 'nor assume the event; he can at best but expect and hope. He is to be governed by probabilities, not certainties.'

The following story about Sir Matthew Hale, quoted by Sharswood, will be of interest. 'If he saw a cause was unjust, he for a great while would not meddle further in it but to give his advice that *it was so*; if the parties after that would go on, they were to seek another counsellor, for he would assist none in acts of injustice; if he found the cause doubtful

or weak in point of law, he always advised his clients to agree their business. Yet afterwards he abated much of the scrupulosity he had about causes that appeared at first unjust, upon this occasion: there were two causes brought him which, by the ignorance of the party or their attorney, were so ill-represented to him that they seemed to be very bad; but he, inquiring more narrowly into them, found they were really very good and just; so after this he slackened much of his former strictness of refusing to meddle in causes upon the ill circumstances that appeared in them at first.'

Archer says that 'if upon mature consideration there remains a doubt in your mind as to whether your client has a good case, that doubt should be resolved in his favour'. Instances are not infrequent of cases apparently bad, but equitable and just in themselves, which some lawyers declined to undertake, being won by others.

The duty of the advocate in criminal cases when the accused confesses his guilt requires to be specially mentioned. Such confessions might be made before the acceptance of the engagement by counsel or later during the course of the proceedings or the trial.

Taking the former case, it would seem that there is nothing *per se* unprofessional in an advocate accepting an engagement to appear and conduct the trial on behalf of an accused person after he has made a confession to him. [Cf. Section 126 of the *Indian Evidence Act*, illustration (a).] The fact that a heavy duty lies on the prosecution to establish the guilt of the accused affirmatively and beyond reasonable doubt would seem to be the ground of distinction; for it might be possible for counsel to defend by adopting the line of testing the accuracy of the evidence for the Crown without seeking to establish a substantive defence in opposition to the case of the Crown. In some cases nothing more may be possible so that the defence will only be of a negative rather than an affirmative character. It might also be that to admit the performance of an act would not *ipso facto* amount to an admission of guilt for the offence which the act might indicate. It is, however, most undesirable that counsel should accept any engagement in circumstances which might tie his hands in the conduct of the defence or otherwise seriously circumscribe and embarrass

him. It is obvious that he cannot assert that which he knows to be a lie and no harm will be done to the accused by directing him to another counsel with the caution not to embarrass that other.

Where the accused makes a confession of guilt in the course of the proceedings or the trial, after the advocate has begun to act for him, it seems that counsel not only could but should continue to represent him in the further stages, if so required by the client. Such was the advice given by Baron Parke in a similar situation in the Courvoisier trial discussed by Serjeant Ballantine in his *Experiences*. To do the contrary, that is to throw up the brief openly at that stage, may not accord with the high standards for which the legal profession always stands as it will lead to the needless exposure of the accused, seriously jeopardizing his position. The confession would, no doubt, impose very strict limitations on counsel's further procedure; but he should shoulder the responsibility and make the best of the situation on behalf of the accused. He could not consider himself released from his imperative duty to do all that he honourably can for his client. The observations of Mookerjee J., and the report of the General Council of the Bar approved by Sir Edward Carson and Sir Robert Finlay, quoted in *The King-Emperor* v. *Barendra Kumar Ghose*, 28 *Calcutta Weekly Notes* 170, at pp. 183 and 184, are instructive on this topic. According to Mookerjee J., it would amount to unprofessional conduct on the part of counsel to convey his own knowledge of the guilt of the accused to the presiding Judge. The learned Judge further observes that it would be unjudicial for the Judge to continue to hear the case after such report.

Thus, different considerations apply to the two cases and they turn upon what would be in the best interests of the accused, notwithstanding his confession. In the first of the two cases, there is nothing unprofessional in counsel taking up the engagement though it might be more proper for him to decline to do so; while in the second case it is his positive duty to continue to represent the accused and do his best for him, if so required.

It will be of interest to note that paragraph 5 of the *Code of Professional Ethics* promulgated by the American Bar Associa-

tion reads as follows: 'A lawyer may undertake with propriety the defence of a person accused of crime although he knows or believes him guilty, and having undertaken it he is bound by all fair and honourable means to present such defences as the law of the land permits, to the end that no person may be deprived of life or liberty but by due process of law.'

You should not make your fee the sole consideration of your actions. Justice Williams says: 'If some one comes to you with a meritorious case but without means wherewith to pay your fees or secure their payment, do not decline the case unless you have a better reason than poverty for so doing. You owe it to the law, to the profession of which you are a member, and to your own sense of right, to see that weakness and poverty and innocence shall not want for an advocate to press their claims for justice or to defend them against the unscrupulous and the strong.' Ordinarily you must appear in any case when a proper professional fee is offered unless there are special circumstances which dictate the rejection of that particular brief. The Allahabad Bar Council have a rule to this effect:

'An advocate is bound to accept any brief in the court in which he professes to practise at a proper professional fee, according to the length and difficulty of the case, unless there are special circumstances, which, *inter alia*, would include personal relationship, want of time, ill health, the fact that the client has already retained another lawyer, a belief that in the special circumstances the case is one which ought not to be advocated in court, to justify his refusal.'

But, where the client has stipulated a fee, an advocate whose full fees had not been paid would be within his rights in refusing to conduct the case himself or agree to a change of advocate. In a recent application before the Madras High Court, where the question arose, their Lordships ruled that it was clear that, in the absence of misconduct on the part of the advocate, the client was not entitled to the sanction of the court for a change of advocate without making satisfactory arrangements to pay the advocate on record his stipulated fee. Their Lordships followed the earlier rulings in *Ramasami Chetti* v. *Subbu Chetti, I.L.R.* 23 *Mad.* 134, *Babui Radhika*

Debi v. *Ramasray Prasad Chawdhry, I.L.R.* 9 *Pat.* 865 and *Punkajkumar Ghosh* v. *Sudheerkumar Shikdar, I.L.R.* 60 *Cal.* 1273.

Your efforts should never be guided and controlled by the quantum of the fee that you get. You are at liberty to make stipulations at the start; but having once accepted a fee you ought never to brood over its smallness or over the higher fee secured by the opposing counsel. 'No man ever succeeded in life who failed to put conscience into the work, no matter how humble it was. Every man should conscientiously recognize this predominating fact, that when he agrees to perform a certain labour for a certain remuneration, however small in proportion to the amount desired, he has sold his time and ability, and agreed to perform the work in his best possible manner.' Working for the success of the client is your only concern after you have accepted the engagement. Avarice is one of the most dangerous and disgusting of vices. But it is fortunate that it is not found so often in youth as in age. It gives birth to a meanness which contaminates every pure and honourable principle.

Further, you should not decline to appear for a client who has not paid you the whole fee, unless you clearly notify him in good time of your attitude in the matter (see *Rajah Muthukrishna Yachendra Bahadur* v. *Nurse, I.L.R.* 44 *Mad.* 978); though on the question whether the contract of the advocate for professional service and the contract of the client for remuneration are independent or otherwise, the rule which best accords with common sense, convenience and practice—according to that eminent lawyer, statesman and scholar Sir P. S. Sivaswami Aiyar—is that the contract for service is dependent on the performance of the contract for remuneration. Needless to add that this opinion is entitled to the greatest weight as that of one who cherished the highest ideals of the profession and uniformly practised them.

In his lectures on professional ethics, Justice Sundara Aiyar cites the case of *Munireddi* v. *K. Venkata Rao,* 23 *Madras Law Journal* 447, as supporting his view that counsel was 'not entitled to omit to conduct the case on the ground that the fee had not been paid'. The case cited, however, is no authority for the position stated in such broad terms, because

in this case it was found that the whole fee had been paid and that counsel nevertheless defaulted. In his judgement Justice Sundara Aiyar himself says: 'Having regard to this finding it is unnecessary to deal with the further question whether the non-payment of a portion of the fee would absolve the pleader from his duty to appear for the client.'

And if you have received fees for contemplated services which circumstances prevent you from rendering, refund the fee in whole or proportionately, without waiting for a demand from the client. Complications may sometimes be introduced by reason of the conduct, or rather misconduct, of the client, and the question may then arise as to how far the responsibility lies on him for your failure to do your part and what proportion of the fee, if any at all, you should return. If any such complications should arise, you will do well to take the advice of respected leaders of the Bar. But in all such cases let your decision incline more in favour of the client than in your own.

A related question is how far counsel can delegate his functions without the obligation to return the fee. Current practice is for one counsel to transfer a brief to another on his own responsibility when he is unable to attend to it himself, owing to ill-health or unexpected pressure of work. Courts recognize such delegation and give audience to the delegate; and that is the sanction for a practice which is so well known that it has almost come to be understood as an implied term of engagement. But it does not mean, as Justice Sundara Aiyar rightly points out, that delegation is a proper act between counsel and client or that counsel's responsibility to his client is absolved thereby. This freedom obviously cannot exist in cases where the client gives directions to the contrary, or has stipulated for the personal appearance of particular counsel. In such cases counsel has no option but to return the fee if he cannot appear in person. In other cases it is both a duty to the court and a duty to the client for counsel to see that the client is properly represented at the hearing. Moreover, when transferring a brief counsel should transfer it to someone of equal competency, to whose appearance the client if consulted would not have taken objection: to do otherwise, is to abuse the privilege.

Nor should a practitioner accept an engagement knowing he cannot attend to it himself and with the deliberate intention of transferring it; this would be nothing less than an act of fraud. It is gratifying that so far no client has raised questions impeaching the conduct of counsel in respect of any delegation. Let it be repeated that where the delegation is not made with the express consent of the client, the responsibility of counsel to the client continues notwithstanding the delegation.

Another question, closely connected with the foregoing, is whether, when two counsel are engaged in a case but only one of them attends at the hearing, the client is entitled to ask the absenting counsel for a return of a part of the fee. Let it be assumed that both counsel had prepared the case and one of them could not attend by reason of his being engaged in another court at the same time. Justice Sundara Aiyar gives the opinion that counsel is not bound to return any portion of the fee and founds his conclusion on the following reasons. He says that when two counsel are engaged it is wholly a matter of arrangement between them as to which should argue in court; that, except in cases of special contract with a special fee, the client is not entitled to say which shall argue the case for him; and that in some cases the senior may feel that it is better for the case that the junior should argue it. He adds that in the matter of the obligation to return the fee there can be no difference between the senior and the junior.

With great respect I must say that the position is somewhat different. Whatever may be said in relation to the junior, the position enunciated for the senior does not seem to be acceptable. We have no system of 'specials' and when a senior is engaged from the very outset the presumed contract is that the senior will appear and conduct or argue the case. I do not think that any further special contract supported by a special consideration is called for. If this position is agreed to, the necessary consequence is obvious. The following appears in *The Jottings of an Old Solicitor*: 'The first information I had of the appointment of Lord Selborne as Lord Chancellor was the receipt of a cheque for the fees which had been paid on a brief in the House of Lords. The circumstances of that case might have been thought to justify a different course. The papers were rather heavy and the question was a difficult one.

The appeal had been in the paper for hearing on two days before the vacation and Lord Selborne had been in attendance on both days at the House of Lords, ready to argue, and there had been at least one consultation, but the case was not reached before the vacation, in the course of which he became Lord Chancellor. Thus he had much trouble with the case, but he returned the whole of the fee.' This is an example to follow. It is not often that a client makes a claim of this kind; but it is consistent with the dignity of the profession to satisfy him when he does make it, particularly when, as Justice Sundara Aiyar says, the fee is considered a consolidated one covering the conduct of the whole case. Justice Sundara Aiyar makes a distinction where counsel is appointed a Judge, when he says it is the practice to return a portion of the fee. The case is not less strong when counsel continues in the Bar. The honour of the profession deserves to be saved at the expense of individual gain. If counsel should at any time feel that it is better for the case that the junior should argue it, nothing prevents the senior from sitting by his side and directing the arguments. Let it not be forgotten that the engagement involves the exercise of reasonable skill and care by counsel in the discharge of his duties, which is a responsibility that lies on him. It seems anomalous to state that counsel is bound to appear even when the whole fee has not been paid, but that he may not be bound to appear when the whole fee has been paid simply because another counsel is engaged with him.

The opposite situation arises where counsel has settled a consolidated fee for a case and the work turns out to be so much heavier than was anticipated by both parties that the stipulated fee is wholly inadequate for the services required. Obviously the fee settled is for the whole case and counsel has no right to ask for a revision of the fee (see *Ambashankar Uttamram* v. *Heptulla Sarafalli, I.L.R.* 54 *Bom.* 1). But in such cases there would be nothing improper in counsel accepting an additional fee from the client if he is prepared and willing to pay it. The principle of the rules which the Madras Bar Council have framed permitting a claim for a refresher or fresh fee in certain cases where additional and unanticipated work arises support this point of view. It need not be put on

a par with the receipt of a present from the client upon the success of the litigation. In no event, however, should the payment of the refresher be dependent upon the result of the litigation.

This leads me to refer to the practice of receiving presents from successful clients. It might appear that the difference between this and acceptance of a refresher is very slender. Nevertheless the practice deserves to be discouraged as inconsistent with the dignity of the profession [see *Po Htin Maung* v. *Saw Hla Pru, A.I.R.* (1930) *Rang.* 243, and *Brojendra Nath Mullick* v. *Luckhimoni Dassee, I.L.R.* 29 *Cal.* 595, and the cases cited therein]. The points of distinction are that the one is not a mere present but a *quid pro quo* that does not depend upon the success of the litigation.

The following exception to the general rule of prohibition against subsequent variations of the contract as to fees has been suggested by Justice Sundara Aiyar. If counsel has accepted an unsuitable fee at the commencement for proper reasons—such as the poverty of the client or the like—he might be justified in receiving an additional fee, call it a present, from the client when he succeeds in the contest. This is a borderline case, and the only objection to it can be that it is dependent upon the result of the litigation. But the danger in permitting it is that it may encourage in counsel a tendency to take an undue interest in the litigation, which is the danger also guarded against by the rule prohibiting the settlement of contingent fees.

According to the rules of professional etiquette now recognized and followed it is objectionable to stipulate for a larger fee on the contingency of success in litigation. American lawyers see no objection in this, though they are not unanimous on the matter. 'The contingent fee', says Charles A. Boston, a President of the American Bar Association and Chairman of the Committee on Professional Ethics (1912-32), 'is the chief wedge which has tended to break down the honourable tradition of the legal profession.' The practice is not favoured in England; but that by itself may not be a reason for us to reject it as we do not stand in all respects on the same footing as barristers who cannot sue for fees. A decision of the Madras High Court in *Achamparambath*

Cheria Kunhammu v. *William Sydenham Gantz, I.L.R.* 3 *Mad.* 138, held that the practice was not only improper, as not being in keeping with the dignity of the profession, but also illegal. The same view was taken in *Afzal Beg* v. *Jyotis Sarup,* 8 *Allahabad Law Journal* 151. It is of no avail to test whether rules of etiquette and moral standards can be justified by the strict logic of principles of law. There may be nothing illegal in permitting the settlement of a contingent fee; there may be no question of public policy in it; it may not be bad as a champertous act and, further, the law of champerty has no application to India; but the rule has to be tested by its effect upon the integrity and morale of the profession. Even a remote suspicion of counsel's interest in the result of the litigation, whose conduct might thereby be influenced by it, and any circumstances that may even suggest that idea, should be wholly avoided if the legal profession is to maintain its status and dignity. Advocates both act and plead, but our highest ideals should be those of the barrister who pleads, and not those of the solicitor who acts. Justice Sundara Aiyar suggests the possibility of legalizing such an agreement in particular cases, where, for instance, the contingent fee stipulated is no higher than the regulation fee and there is no other vitiating or invalidating circumstance. We may seek to support the exception by the argument that poor litigants should be enabled to engage the ablest counsel who may demand higher fees than they are able to pay at present. All this may seem reasonable from one point of view; but the higher and abiding interests of the profession require not only that the rule against contingent fees should be maintained, but that no inroads by way of exceptions should be made on it. There is, I believe, no advocate wholly indifferent to the prestige which attends victory and the prospect of an additional fee might even tempt him to win his case by unfair means. Again, apart from the gambling factor involved in the stipulation for a contingent fee, the practitioner will be placing his remuneration above the rendering of professional services in a just case, a position which is indefensible from the point of view of high professional standards. Should any exception be admitted one can foresee that the exception will soon become the general practice and bring down standards with a dis-

astrous effect upon the general tone of the profession. Calcutta and the Punjab illustrate how the habit can spread. The evil sought to be remedied is as nothing compared to the possible danger to a great institution deserving to be fostered with nourishing care. The justification for the proposed exception is to provide for the 'poor man's' cases; but the problem is better and more honourably solved by the institution of bureaus for the conduct of 'poor men's' cases, which I advocate elsewhere. We even find that in provinces where the exception has been admitted, and has been in vogue as a regular system for many years, efforts are now being made to put an end to it. There can therefore be no justification of any kind for introducing it in a province where we have all along maintained, though not without a struggle, a high level of purity in the profession.

A recent decision of the Bombay High Court in *T. L. Wilson & Co.* v. *Hari Ganesh Joshi, I.L.R.* (1939) *Bom.* 307, enforced such an agreement in the case of a solicitor, holding that there was nothing in the general principles of law to invalidate it. Though we also act as solicitors, and combine with advocacy their functions as well, the tradition that the Indian Bar has so far built up has never been based upon the ideals of the solicitor who may legitimately advance moneys for the litigation. The idea that whatever is not bad in law is good for the advocate to adopt would be destructive of the principle of maintaining high standards of professional morality. As early as 1881 agreements for remuneration contingent on success, in relation to vakils, were disapproved of in Bombay, in *Shivaram Hari* v. *Arjun, I.L.R.* 5 *Bom.* 258, as giving pleaders a personal interest in the litigation of their clients.

In a case in the Punjab, *Ganga Ram* v. *Devi Das,* (1907) *Punjab Record* No. 61, a Full Bench of nine Judges sat to consider how far the practice of 'back fees', obtaining as a regular system there, legalized by a decision of a Full Bench of that court in 1878, should be permitted to continue. Seven of the nine Judges condemned it in the result and agreed to put an end to the practice in the interests of the profession, though the reason that was given, that it was opposed to public policy, may not be wholly acceptable. The system was

that of returning the fee in case of failure of litigation, but founded upon a single contract made at the commencement. There was generally nothing unconscionable in it and no client complained against it. Two of the learned Judges disagreed; but the grounds of their dissent are worth noticing. Among the grounds of distinction that were relied upon were that the practice in question existed amongst pleaders enrolled under the *Legal Practitioners Act*, and that it had been prevalent, as has been said, as a general practice, with judicial recognition, for a large number of years. Chatterji J., a dissenting Judge, says: 'The fixing of a high ethical standard which will not permit a legal practitioner to have any concern with the result of the case in his hands, even to the extent of having any part of his fee dependent on it, is an advantage in improving the tone of the Bar.' He concludes: 'I should on the whole prefer its abolition in spite of the advantages it sometimes offers to poor litigants and new and struggling practitioners, but I doubt very much whether we can bring about that abolition by holding it to be opposed to public policy.' Lal Chand J., who wrote the leading dissenting judgement, laid stress on the economic conditions of the province, and said: 'I do not mean for a moment that "back fee" may not occasionally in a few cases act as an incentive for a more zealous or over-zealous prosecution of the suit or appeal.' The learned Judge held that there was no question of public policy involved in it and that it was a helpful system in a poor province like the Punjab, and pointed to the distinction between a legal practitioner practising in a Chief Court, with the obligation to file his contract in court, and pleaders practising in chartered High Courts without any obligation of that kind. The report shows that most of the litigation in the Punjab was financed by moneylenders.

It is significant, for our purpose, that Lal Chand J., distinguishes the system of 'back fees' from that of 'contingent fees', and says: 'It appears to me that there is a considerable distinction between cases where the fee is payable only on success and the practice we are called upon to condemn. The former is of a somewhat speculative nature and may on that account be objectionable.' So he too condemns the system of 'contingent fees' as distinguished from 'back fees' and admits

that the abolition of the system would raise the standard of fees, a consummation devoutly to be wished.

In *In the matter of an Advocate*, (1939) 2 *Madras Law Journal* 320, an advocate entered into an agreement by which he was to be paid 14 per cent of whatever was recovered in the suit, but later agreed to be remunerated on the basis of the taxed costs. The court held that in both cases the agreement was 'no cure, no pay' and punished the advocate for professional misconduct.

What has been said about the stipulation for contingent fees would, with stronger force, apply to contracts for a share in the fruits of litigation. The offence is more heinous and opinion is unanimous in condemning it. The practice seems to have been prevalent in Calcutta in early days, however. In the case of *In the matter of Moung Htoon Oung*, 21 W.R. 297, the learned Judges, while reprobating such a practice as 'improper and mischievous' gave to the offending counsel only a warning 'inasmuch as it appeared that the advocate in this instance did that which was done by other advocates, even by persons to whom he might fairly look for an example'. Couch C.J., then observed that there might possibly be cases, they would be very few, in which an advocate might be allowed to make an arrangement of this kind. This statement, I believe, is the basis for Justice Sundara Aiyar proposing legislation to legalize certain exceptions to the general rule against contingent fees. The *obiter dictum* was made in 1874, when the Bar had not had time enough to build up a tradition of its own, borrowed or otherwise. Couch C.J., moreover, was suggesting an exception to a more heinous offence, and one may be certain that even the reformer would not go the length of countenancing it now. In the case of *In the matter of an Advocate*, (1900) 4 *Calcutta Law Journal* 259 (F.B.), it was laid down by a Full Bench of five Judges that 'it was improper for an advocate or pleader to stipulate with his client to share in the result of a litigation and that in this case a warning and censure would be sufficient, but it should be distinctly understood that should a case of a similar nature be brought to the attention of the court in future it will be most severely dealt with'.

Justice Sundara Aiyar also proposes that the settlement

of the fee may in certain cases—e.g. in the case of a pauper litigant—be postponed until the results of the litigation are known. He suggests that it should be fixed 'as early as possible and certainly immediately after the results are known' for the reason that quarrels might arise between the advocate and the client in, what I would call, the division of the spoils. Comment is needless. If recognized, this principle would indicate the low-water mark of professional standards. Detractors of the Bar have never been wanting and this would indeed give them an additional stick to beat lawyers with.

It is gratifying that the Madras Bar Council have given their opinion against the advocate on all these matters. They have ruled that he should not accept a present in the event of the case terminating successfully, or stipulate for a contingent fee dependent upon the result of the case or on the amount actually realized, and that the settlement of the fee should be made as early as practicable, and reduced to writing with the signature of the client thereto whenever possible.

The Patna Bar Council have a rule to the same effect in the following terms: 'No advocate shall stipulate with his client for the payment of a present over and above his actual fee in case of success; nor shall he exact, or attempt to exact, a supplementary fee at the last moment, or absent himself from the case when such fee is not paid.'

The Allahabad Bar Council have a salutary rule that 'Each Bar Association should lay down a minimum fee for giving professional advice, for drafting and for other miscellaneous work, suitable to the particular locality and no advocate should work for less than the fixed minimum fee. Other fees are fixed by the rules made by the High Court.

'Provided that an advocate may for special reasons work without charging any fee at all.'

Now that we are on the matter of fees, I may add that when a consolidated fee is settled for a case, but the client compromises it at an early stage, even before the hearing, you are entitled to the whole of the stipulated fee. In *Ambashankar Uttamram* v. *Heptulla Sarafulli, I.L.R.* 54 *Bom.* 1, their Lordships held that the principle of *quantum meruit* had no application to the case. On the Appellate Side of the High Court, where an appeal is compromised before counsel

prepares for the hearing, it is the practice to charge only half the fee.

Allied to the topics that we have been discussing is the question whether an advocate may advance moneys to the client for the purposes of the litigation in which he is engaged. A solicitor may; but a barrister may not. Justice Sundara Aiyar rightly says: 'Probably the courts may not be prepared to condemn the advance of money by a vakil during the progress of an original suit and it may be difficult to distinguish between original work and appellate work in this respect... The rule... is to adopt always the higher standards. Personally I would be inclined to advise that a vakil should abstain from advancing moneys for the purpose of litigation.' The only objection can be to advancing money with the definite and avowed object of starting or sustaining a litigation which might not otherwise be initiated or conducted, and should not apply to occasional temporary accommodation in emergencies. A client may not be prepared to meet an urgent demand in the middle of a case and may seek temporary accommodation. Counsel may receive a printing bill for an amount larger than the amount of the client's funds that he holds; and payment into court may be urgent and may not brook delay. There would be nothing wrong in making the temporary accommodation or in supplying deficiencies of this nature as a temporary measure. A client may labour under a similar difficulty at the time of the institution itself. The amount of court-fee with which he has provided himself upon the advice of counsel may be less than he is called upon to pay. He may be unprepared to meet it at once and there may be no time to be lost. I am referring to the last illustration only to indicate that no distinction need be founded on the fact that the accommodation is made at the initial and not the later stages of the litigation. The transaction has to be tested wholly by the spirit in which the advance is made and the motive which induces it. The proper test is to inquire whether the transaction tends to create in the advocate an undue interest in the litigation. It deserves to be repeated, however, that it is highly desirable that counsel should not expose himself to suspicion and should avoid all possible misconceptions arising out of a transaction of this kind. If a friend becomes a client

and relies upon the antecedent friendship for monetary assistance, by all means help the friend in his difficulty; but let it stop there. It is advisable for friends never to enter into the relationship of counsel and client, but to advise the friend to engage another counsel. That there is nothing intrinsically improper in a temporary advance is supported by the decision of two of our most learned Judges, who were distinguished members of the Bar and helped to build it up, the late Sir S. Subramania Aiyar and the late Sir V. Bhashyam Iyengar, in *Subba Pillai* v. *Ramaswami Aiyar*, *I.L.R.* 27 *Mad.* 512, which was a case concerning a pleader under the restrictions of the *Legal Practitioners Act*. The decision itself was based on general principles applicable to advocates as well.

In a recent case, *In the matter of Sri K. R., Pleader, Trichinopoly*, (1942) 2 *Madras Law Journal* 196, the Honble Sir Lionel Leach, Chief Justice, stated the position in the following terms: 'The question which the court is called upon to decide is whether in advancing the moneys to his client for the purpose of the litigation the respondent was doing something which is improper. In this country a pleader, like the advocate, combines the functions of the solicitor and the barrister in England. He does the solicitor's part of the work and he pleads in court. As he fulfils both roles he must be subject to the disabilities of both. There would be nothing improper for a solicitor in the circumstances of this case to advance moneys to his client, but it would be improper for a barrister briefed by a solicitor to do so and the higher standard must be applied. By helping his client in this way, the respondent had a personal interest in the litigation; in fact an actual interest in the subject-matter of the suit. This is surely not in keeping with the standard of conduct which his profession demands of him. It would be manifestly improper for a practitioner fulfilling the two roles to advance money to a person for the purpose of the institution of a suit, and it is difficult to see what difference there can be when money is advanced for the purpose of continuing the litigation. The only safe rule to lay down is that a pleader or an advocate should not lend money to his client at any time for the purpose of an action in which he is engaged.'

In conformity with the above observations, the Madras Bar

Council have, with the approval of the High Court, added rule in the following terms: 'No advocate shall lend mone to his client for the purpose of any action or legal proceeding in which he is engaged by such client.

'*Explanation*: No advocate shall be held guilty of a breach of this rule if, in the course of a pending suit or proceeding and without any arrangement with the client in respect of the same, the advocate feels compelled by reason of any unanticipated emergency, or by reason of the rules of the court, to make a payment to the court on account of the client for the progress of the suit or proceeding.'

It deserves to be mentioned that assistance in a small measure, by way of accommodation even at the initial stages of filing a plaint or preferring an appeal, may not come within the prohibition. The offence consists in the creation of the relationship of lender and borrower between counsel and client which should be avoided at any cost.

It is undesirable to take promissory notes in lieu of fees from clients. In any event you cannot certify for the fee to be included in the costs of the cause, though you may be entitled to enforce it by suit or otherwise against the client under the *Legal Practitioners (Fees) Act* (XXI of 1926) which repealed Section 28 of the *Legal Practitioners Act* (XVIII of 1879).

As I have said, the peculiar position of the advocate imposes upon him duties in several directions. Though he represents a client and owes duties to him, he is also an officer of the court and a counsellor to it with special duties to discharge. At the same time, as a member of the brotherhood of the law, he has responsibilities to the profession and to his brother lawyers. He also owes duties to his opponent as a co-operator with the court in its search for truth. He owes duties to his client and to himself. He is also under obligations to the public and to the State. To maintain a perfect balance between these various and sometimes conflicting duties is no easy task. I shall endeavour to classify them, but they may overlap and several of the duties must come under more heads than one. Before doing so, however, I shall draw your attention to certain statutory provisions and rules made under statutory powers which define your duties.

There are first the *Legal Practitioners Act* and the rules framed thereunder which, though they do not directly apply to advocates of the High Court, may well be taken to enunciate principles of conduct applicable to all. Section 13 of the *Act* requires that the lawyer should take instructions only from the party himself or his recognized agent or a servant, relation or friend authorized by the party in this behalf, except in the case of pardanashin women or anyone unable to instruct the lawyer in person for sufficient cause. It also enacts that the High Court may suspend or dismiss any pleader 'who tenders, gives or consents to the retention, out of any fee paid or payable to him for his services, of any gratification for procuring or having procured the employment in any legal business of himself or any other pleader' or 'who, directly or indirectly, procures or attempts to procure the employment of himself as such pleader, through or by the intervention of any person to whom any remuneration for obtaining such employment has been given by him or agreed or promised to be so given' or 'who accepts any employment in any legal business through a person who has been proclaimed as a tout'. I have already referred to this matter.

Rule 15 framed under the *Legal Practitioners Act* says that it shall be the duty of every pleader to keep a regular account of all moneys he receives and disburses in the course of his employment. This is a duty which the lawyer owes to his client and to himself.

Rule 16 enjoins that 'Practitioners of courts . . . are strictly prohibited from purchasing from their clients, or any other person, any interest in any decree passed by the court in which they practise'.

This illustrates the application of the rules of ethics, when interest and duty come into conflict, to which I have referred.

Section 136 of the *Transfer of Property Act,* in dealing with actionable claims, likewise enacts a rule of public morality: 'No Judge, legal practitioner or officer connected with any court of justice, shall buy or traffic in, or stipulate for, or agree to receive any share of, or interest in, any actionable claim and no court of justice shall enforce, at his instance, or at the instance of any person claiming by or through him, any actionable claim, so dealt with by him as aforesaid.'

On the subject of the confidential relation that subsists between a lawyer and his client and the duty of non-disclosure, a duty which he owes to the client for the maintenance of good public morals, Section 126 of the *Indian Evidence Act* enacts that no lawyer 'shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment' as such lawyer by or on behalf of his client or 'to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment or to disclose any advice given by him to his client in the course and for the purpose of such employment'. This obligation continues after the employment has ceased. To the same purpose, Rule 16 of the *Appellate Side Rules* of the High Court and Rule 20 of the *Civil Rules of Practice* prescribe that 'except when specially authorized by the court, or by consent of the party, a pleader who has advised in connexion with the institution of a suit, appeal or other proceeding, or has drawn pleadings in connexion with any such matter or has, during the progress of any such suit, appeal or other proceeding, acted for a party, shall not, unless he first gives the party for whom he has advised, drawn pleadings or acted, an opportunity of engaging his services, appear in such suit, appeal or other proceeding, or in any appeal, or application for revision therefrom, or in any matter connected therewith, for any person whose interest is opposed to that of his former client:

'Provided that the consent of the party shall be presumed if he engaged another pleader to appear for him in such suit, appeal or other proceeding without offering an engagement to the pleader whose services he originally engaged.'

Rule 15 of the *Appellate Side Rules* enacts that when by sickness or other cause you are unable to attend in court to the business for which you have accepted engagement, you must instruct some other practitioner to appear on your behalf.

Then we have the following rules of professional etiquette formulated by the Madras Bar Council:

'In every case in which an advocate of over ten years' standing receives a fee of not less than Rs. 500 he is expected to be instructed by a junior advocate, pleader or solicitor.'

'An advocate may stipulate for a refresher if he has to argue on fresh evidence taken or ordered to be taken or on the return of a finding called for, by an appellate court and also for arguing on a reference to a third Judge or before a Full Bench and he shall not be bound to appear in such cases when such refresher is not paid, provided however that in no case shall such refresher exceed the original fee.'

'Where a case has been disposed of by any court and the same is remitted back to that court by an appellate or revisional tribunal either for retrial or for a finding, an advocate who appeared for a party in the earlier stages is not bound to appear at the later stages of the proceedings without a fresh fee.'

'No advocate shall accept an engagement from a client in any case without the consent of the advocate, if any, already in the case and when an advocate accepts an engagement without his having reason to believe that another advocate is already engaged in the case, it shall be the duty of the advocate so accepting the brief to take early steps to obtain such consent; and if any question or dispute arises in the matter, the same shall be referred for the decision of the Bar Council by the advocate or the advocates concerned. It shall be the duty of an advocate to give his consent to the engagement of another advocate where his fee has been paid.'

'All disputes or differences in professional matters between advocates are expected to be brought up before the Bar Council in the first instance.'

Rule 20-A of the *Civil Rules of Practice* enacts a rule for mofussil courts in the following terms: 'An advocate or pleader proposing to file an appearance in a suit, appeal or other proceeding in which there is already an advocate or pleader on record, may not do so, unless he produces the written consent of such advocate or pleader or, where the consent of such advocate or pleader is refused, unless he obtains the special permission of the court.'

The following rules relating to unprofessional conduct, framed by the Allahabad Bar Council, are of practical help and they are quoted here notwithstanding the occasional repetition of ideas which have already been expressed elsewhere in this book.

'1. An advocate should not do anything by way of advertisement or touting for business.

'2. An advocate should not tender, give or consent to the retention, out of any fee paid or payable to him for his services, of any gratification for procuring or having procured the employment in any legal business of himself or any other advocate, or directly or indirectly procure or attempt to procure the employment of himself through or by the intervention of any person to whom any remuneration for obtaining such employment has been given by him, or agreed or promised to be so given.

'3. An advocate should not accept employment in any legal business through a person who has been proclaimed as a tout under Section 36 of the *Legal Practitioners Act* (1879) or is believed to be a tout.

'4. It is highly unprofessional for an advocate to traffic in litigation in any way whatsoever, directly or indirectly.

'5. It is not professional misconduct if, in the absence of any instructions from the first client, an advocate appears for the opposite party in a subsequent proceeding which is not directly connected with or in continuance of the first proceeding. Briefs may not be accepted in execution proceedings or in appeals following engagement in the suit itself, or in sessions court following engagement in original trial or commitment proceedings.

'6. An advocate should not wilfully neglect to appear and conduct a case after he has received full fees. An advocate is justified in not appearing if his full fees for such appearance have not been paid.

'7. Taking fees as an advocate in a case where the advocate is in fact a party is grossly improper conduct.

'8. Filing a false certificate of fees is grossly unprofessional. It is illegal to obtain a bond or promissory note for fees and to file a certificate of fees on its basis.

'9. Writing intimidating letters to any court or libellous articles against a court is unprofessional.

'10. Purchasing property in a court auction in execution of his client's decree is professional misconduct; equally so if the advocate purchases it for other persons.

'11. To enter into an agreement with a client for a present

over and above his fees in case of success is unprofessional for an advocate. His conduct amounts to gross misconduct if he attempts to extract a supplemental fee at the last moment and absents himself on failure to pay.

'12. Misappropriation of the client's money entrusted to an advocate is gross professional misconduct.'

The General Council of 'The Bar of the Province of Quebec' have framed by-laws, as reported in 29 *Canadian Law Times*, p. 372, which enumerate the following amongst other acts which are declared to be derogatory to the honour and the dignity of the profession:

'1. To reveal a professional secret.

'2. To publish or communicate a false report of judicial proceedings, either injurious to the honour and dignity of a lawyer or of the profession or of the Bench.

'3. To take a lawyer by surprise, and disloyal acts in professional or social relations between brother lawyers.

'4. To abandon a client just before the hearing or the trial of his case without having given him sufficient time to obtain another lawyer, or in imposing upon him conditions which the advocate knows his client is incapable of fulfilling.

'5. To acquire a litigious right or a debt with the object of instituting legal proceedings, and by these means to earn fees or profits out of the right so bought or acquired.

'6. Abuse of confidence by an advocate to the detriment of a client, amongst others:

'Acquiring for himself or for his relations or friends in whole or in part—either in his own or in his partner's name—rights or pretensions, whose existence and foundation only became known to the attorney through consultations with his clients, who thought they had a right thereto, and are by this means deprived thereof.

'7. To solicit clients or cases, or traffic in any manner with a ministerial officer or with a business agent.

'8. To accept a salary instead of regular fees fixed by the tariff, in giving up to the clients the regular fees; or to make an arrangement in advance having as object the reduction or giving up of fees granted by the tariff with the object of gaining a client or business.

'9. To share his fees with a client or to make any arrange-

ment by which the client would participate or would have an interest in the fees.

'10. To undertake any case with an arrangement of participation in the results *quota-litis*.

'11. To retain unjustly the moneys, papers or documents of a client.'

For the rules on professional etiquette, conduct and practice of the General Council of the Bar in England, I refer you to Part VI of *The Annual Practice*.

The American Bar Association have adopted a set of 'Canons of Professional Ethics' as a general guide for the members of the legal profession. The preamble thereto says: 'It is peculiarly essential that the system for establishing and dispensing justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration' and adds that the future of the country depends upon the 'maintenance of justice pure and unsullied' which cannot be 'unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men'. These canons will be found printed as Appendix I to *Organization and Ethics of the Bench and Bar* by F. C. Hicks. It is interesting to know that the Association have also framed a set of 'Canons of Judicial Ethics' to govern the personal practice of members of the judiciary in the administration of their office.

On page 573 of the same volume is set out a form of 'Oath of Admission' to the Bar, which clearly states 'the general principles which should ever control the lawyer in the practice of his profession'. I think that all Bar Councils in India should act together and devise a suitable form for us here on the same lines so as to bring home to young entrants the serious responsibilities of the profession and their duty to uphold its honour and dignity. A common form of the 'Oath of Admission' would further symbolize the unity of the Indian Bar.

CHAPTER XI

DUTY TO THE COURT

Duty of respect — Duty to attend throughout hearing — Duty to attend to receive judgement — No exhibition of familiarity — No arguing privately — Control of temper in court — Improper to malign a Judge — Engaging relations of Judges — Where counsel may interrupt — No repetition of arguments — Duty not to mislead — No duty to say no case — Addressing unsound arguments — Pleading false facts — Obligations in the matter of preparing and filing affidavits — Duty to discover all documents — Exhibiting unfavourable documents in trial — Speak loudly — Duty to be in attendance

WHEN dealing with counsel's conduct in court, I gave some hints on methods of advocacy. I said that the Judge should not be interrupted or contradicted, that his questions should be answered without reserve and directly, that you should not interrupt opposing counsel or argue with him across the Bar, and so forth. All these are as much matters of duty to the court as they are points of advocacy. I propose now to deal with your other duties to the court and to the presiding Judge, duties which should be followed quite apart from their contribution to the success or failure of your case.

The first duty that you owe to the court is to be respectful. You owe that duty not 'for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance'. You can be deferential without being abject, and independent and fearless while being respectful. There is no reason why, while maintaining the rights of his client and safeguarding his own, counsel should not be courteous and respectful in his demeanour towards the court. The epigram of a learned Judge—'Neither truckle nor be truculent'—possibly expresses the duty and the right of counsel in this particular as well as it can be stated. Nothing is more destructive of public confidence in the administration of justice than a disregard by the court of the privileges of the Bar or incivility, rudeness or disrespectful conduct on the part of counsel towards the Judge. Even when the Judge, forgetful of the fact that you are an officer of the court and a counsellor to it, treats you with disrespect, value yourself too highly to pay him back in the same coin. A firm and temperate remonstrance is all you need make. This certainly does not mean that the

lawyer is to be spineless and subservient to the Bench. Occasions may arise when your duty to your client and a proper regard for the interests committed to your charge render it necessary on your part to offer a firm and decided opposition to the view expressed or the course pursued by the court. When this has to be done, do it in a manly way, but without disregarding the outward forms of respect due to the court.

Your duty to the court involves that when you have started on the hearing of a case, you should attend to it throughout; you cannot leave the court, placing someone else in charge of the case, unless you take the permission of the court to do so. When, however, you have cases in different courts, coming up for hearing at the same time, you have the right to decide which case deserves your personal attention and no Judge can compel you to conduct the case before him, rather than another, when you have made other adequate arrangements for its conduct.

Further, it is a courtesy due to the court as much as it is your duty that you should be present in court to take judgement when it is being pronounced. If you cannot attend personally, you must at least arrange that you are properly represented at that time. It is possible that the Judge may desire to verify some fact or it may be that some slight error creeps in which you or your representative could set right. Judges have to deliver judgements in the presence of parties or their representatives who must necessarily be present to receive them.

You should not exhibit in court familiarity with the Judge. In no event should you try to exploit his friendship or to take undue advantage of the tribunal. You can be easy without exhibiting familiarity. There are lawyers who sedulously seek to create in the minds of clients a belief that they have a 'pull' with particular Judges. Unabashed they employ every artifice to give the impression that they are on terms of intimate friendship with them. They obtrude themselves upon these Judges on every possible occasion and even drop hints of the degree of their relationship. Such conduct cannot be too severely condemned. Do not conduct yourself in any manner that suggests that you are seeking special consideration or personal privilege or favour. Remember that you will be bringing discredit to an innocent and honourable

Judge by such behaviour. Even where the Judge is your personal friend, do not, in any manner, parade that friendship, even innocently. The lawyer who attempts to take improper advantage of social or friendly relations with a Judge is unworthy of his profession and is not the type of man who is likely to enjoy the confidence of his fellow-practitioners or to attain to any degree of eminence at the Bar.

I would advise you further not to communicate or argue privately with a Judge about the merits of a pending case, however familiar and friendly he may be with you. You must do nothing that may even remotely tend to suggest that you are impairing the dignity or impartiality of the Judge.

The next point I wish to mention is that you should never display temper in court (or outside it) because of an adverse ruling or decision. The temptation to show your disappointment, to be sharp in retort and impatient in manner, will be strong; but remember it is highly unprofessional to yield to it. One side or the other must prevail in each of the several stages of a proceeding in court; imagine the consequence if the Bar generally were to register its emotional reactions! Counsel should bear in mind how wearisome is a Judge's office and how much there is to try his temper and patience. 'A good temper', says a learned writer, 'is an inestimable advantage to a lawyer, and whatever his position it will carry him, with ease, comfort, and rapidity, over all obstructions to the end of his journey. A bad one will strew his way throughout with thorns, will convert every one with whom he has to deal into an enemy, and himself, in short, into his greatest.'

You should not only scrupulously avoid maligning a Judge, or lending ear to any accusation against him, but should also put down with a strong hand and with determination all such efforts that may come within your notice. It is not unusual in this country, as perhaps it is elsewhere also, for a losing client to make improper suggestions about the Judge. Never allow scandal of this sort to be suggested by your client. I trust that the whole Bar acts with one mind on this matter. Judges are not free to defend themselves and are therefore particularly entitled to receive the support of the Bar against unjust criticism and clamour. We cannot forget that the Bar and the Bench are mutually dependent and indeed

members of one body; and that the Bar stands to gain by the reputation for incorruptibility of the Bench. It is the spirit of the Bar that must deepen and confirm the instinct of the Judge for fearless decision. This does not mean that, even though there is proper ground for a serious complaint against a judicial officer, it is the duty of the lawyer not to submit his grievances to the proper authorities in the proper manner.

The inclination of clients to offer engagements to relations of the Judges who will hear their cases, mainly on the ground of the relationship, ought equally to be curbed. No practitioner ought to encourage this tendency. The Judge concerned will appreciate your positive discouragement of it. It is reported of the late Sir Gooroo Dass Banerjee, Judge of the Calcutta High Court, that he would never take up a case in which one of his relatives appeared as lawyer. Consequently neither his son nor his son-in-law, who were members of the Bar, could accept a brief in any case before him.

It is not proper that in court you should, without just cause, interrupt counsel on the opposite side. Interruption is permissible to correct an erroneous statement of fact or to mention a preliminary objection. You can also shut out irrelevant evidence by an interruption. Otherwise interruption is improper and two can play at the game. Moreover, if your learned friend on the opposite side disdains to play the same game he will secure the sympathy of the Judge. In another place I have already explained the dangers of a feeble interruption from the point of view of advocacy. 'Do unto others as you would be done by' is a good maxim to follow.

You owe a duty to the court not to repeat yourself to the annoyance of the Judge. You must leave no stone unturned to make sure that you have brought your position to his consideration, but you must not repeat arguments without limit merely because the Judge does not agree with you. The lawyer's habitual belief that he has not said enough and his never-failing tendency to talk *ad infinitum* must be checked.

The next duty that you owe the Judge is not to mislead him. You are forbidden to have recourse to any artifice or subterfuge which may beguile him. Complete candour and frankness are necessary and all possibility of deception should be avoided. All is not fair at law any more than in war. You must secure

the confidence of the court and be trusted by the Judge. The life of a member of the Bar who is not trusted by the Bench must indeed be an unhappy one. You may not know the law; you may be incorrect in your statement of it; you may have overlooked a relevant authority; these are things which may happen to any one. But the court should be assured that you are not misleading it. You ought never to overstate your case or misquote the contents of a document or the testimony of a witness or the argument of opposing counsel or the language of a decision or of a textbook. You should not, with knowledge of its invalidity, cite as authority a decision that has been overruled, or a statute that has been repealed. Nor should you in argument assert as a fact that which has not been proved. As I have already mentioned, your duty goes so far as to require you to draw the attention of the court to any relevant and binding decision which is contrary to your contention, even if the other side is represented and counsel for the opposite side is not aware of it. You ought also to avoid intentionally false emphasis, or an intonation of voice in any degree calculated to mislead the court. You need not fear that this duty to the court will not be in complete accord with the interests of your client.

It is a question for consideration whether, if counsel is convinced that he has no case, he ought to say so and refrain from arguing. No doubt he should do so if the case is completely covered by a number of precedents and he can think of no reasoning by means of which he can attack them. In other words, such conduct on the part of the advocate would be justifiable if it is a case of the client having no chance at all. But if it is a question to be decided on principle, counsel ought not to attach supreme importance to his own view. The Earl of Selborne said: 'It has happened to me, not very seldom, that the end of a case has been contrary to my first impression of it, and that I have, nevertheless, been satisfied that justice was done.' According to Justice Sundara Aiyar the principles that justify counsel citing decisions against himself do not apply to arguments. Such a problem would not arise in relation to facts.

The following incident that is reported in *The Earl Beauchamp* v. *The Overseers of Madresfield, L. R.* 8 *C. P.*

245, will interest you. There counsel for Lord Beauchamp who sought to have the electoral roll revised began his arguments thus: 'The question intended to be raised is whether a peer of Parliament is entitled to be placed upon the register of voters in the election of members of Parliament. It is difficult to contend that such a right exists, when every principle of the constitution and all the authorities upon the subject are opposed to it, and the most diligent search has failed to discover a single atom of authority in its favour.' The following views were expressed by the learned Judges: Bovill C.J., said that the course which the learned counsel had taken, was properly taken. Keating J., said: 'I would merely desire to add an expression of my entire approval of the course pursued by the learned counsel for the appellants; and to say that I have yet to learn that it is otherwise than the duty of counsel to say so when he finds a point not to be arguable. I have always understood it to be the chief function of the Bar to assist the court in coming to a just conclusion.' But Brett J., added: 'I quite agree that it is the duty of counsel to assist the court by referring to authorities which he knows to be against him. But I cannot help thinking that, when the counsel has satisfied himself that he has no argument to offer in support of his case, it is his duty at once to say so, and to withdraw altogether. The counsel is master of the argument and of the case in court, and should at once retire if he finds it wholly unsustainable, unless indeed he has express instructions to the contrary. With the greatest respect for the two learned counsel who have appeared for the appellants in these cases, I must confess I do not quite approve of the course which they have taken.'

On the question whether counsel may address unsound arguments to court, the following is what Sir P. S. Sivaswami Aiyar has to say in his introduction to Justice Sundara Aiyar's lectures on professional ethics.

'Another controversial topic relates to the propriety of putting forward arguments felt by the advocate to be unsound. While it is difficult to lay down a general rule, it is not possible to agree with the view that, short of the limits imposed by the perspicacity of the Judge, any argument, however unsound, and known to be so, may be put forward

by an advocate. It is no doubt true that it is the province of the Judge to determine what is sound and that the advocate should not undertake the functions of the Judge, or assume that his own impressions must necessarily be right. But this theory must not be ridden to death and it has its limitations. The higher the standing of the advocate and the greater the known incompetence of the Judge, the greater should be the self-restraint of the advocate in putting forward unsound arguments. The obligation is specially heavy when such arguments are likely to lead to private injustice or the enunciation of mischievous principles by the court calculated to cause public detriment. I have known cases in which eminent advocates in the Madras Bar have had occasion to deplore the success of their advocacy from the point of view of justice, or the public point of view, but laid the flattering unction to their souls that the responsibility had been solely with the Judges.'

On the same principle it would not be professionally right to include in the pleadings facts which the practitioner knows personally to be false. It is no defence to say that the statement is that of the party. In *Thangavelu Mudaliar* v. *Chengalvaroya Gurukkal,* 69 *Mad. Law Journal* 250, Sir Owen Beasley C.J., observed: 'With regard to the advocate, it was most improper for him to allege fraud on their behalf in the written statement without satisfying himself that there was some evidence which would reasonably justify such a charge. . . Although an advocate has his duty towards his client to perform, he has other duties and responsibilities as well. He has no right whatever even on the instructions of the client to make reckless charges of fraud. His responsibility to the court, and I may also add to the Bar whose traditions it is his duty to maintain, makes it incumbent on him to satisfy himself that there are reasonable grounds for making such charges.' To the same effect are the observations of the court in *Kedar Nath Lal* v. *The King-Emperor, I.L.R.* 14 *Pat.* 10.

In *Hill's Case,* (1603) *Cary* 27 S.C. 21 *Eng. Rep.* 15, the report reads: 'Daniel Hill having put in for his client a long insufficient demurrer to a bill exhibited against his client, in which supposed demurrer were many matters of fact, and other things frivolous and vain, the Lord Chancellor Egerton

awarded five pounds costs against the party; and ordered that neither bill, answer, demurrer, nor any other plea, should from henceforth be received under the hand of the said Hill', a punishment out of all proportion to the misfeasance that was committed.

As regards the obligations of the practitioner in the matter of preparing and filing affidavits, I have referred to them earlier while dealing with the drafting of pleadings.

A recent decision of the House of Lords in *Myers* v. *Elman*, (1940) *A.C.* 282, is of vital importance to the legal profession as reinforcing the jurisdiction of the court over practitioners as officers of the court and contains authoritative pronouncements in regard to the making of pleadings and affidavits of documents by practitioners. The case before the House of Lords itself related to a solicitor but the principles that were enunciated are applicable to practitioners in this country who both act and plead. Having regard to the nature of the subject dealt with, which is a matter of frequent, if not daily, occurrence in the life of a practitioner, and the scope of the punitive jurisdiction of the court which is recognized by the decision, the pronouncements require to be carefully examined and clearly understood. I have therefore considered it necessary to add an appendix giving a full exposition of the case with material excerpts from the leading judgements. Here, however, I shall endeavour to formulate only the conclusions derivable from the pronouncements.

It will be professional misconduct to prepare and present to court an affidavit of documents sworn by a client containing statements which the practitioner knew, or must have suspected, to be false.

The practitioner will not be excused merely because he has notified the falsity to the client who insisted on swearing it. His duty is to withdraw from the case, when the client takes up that attitude.

The jurisdiction of the court in the matter is not the same as the jurisdiction which entitles the court to strike off the name of a practitioner from the rolls or to suspend him; but it is founded on the right of the court to enforce the duty which an officer owes to it. Misconduct, default or negligence in the course of proceedings will justify an order by the court,

even though no personal obloquy is involved. The jurisdiction is invoked not to punish the practitioner but more to give redress to the party injured by the conduct of the practitioner. It is not only punitive but also compensatory, though not as affording relief for breach of any duty that the practitioner owed to the litigant. The jurisdiction will be exercised in proper cases by ordering the practitioner to pay the costs of the opposite party in the action.

As the obligation arises from the fact of the practitioner being an officer of the court, he will be liable for acts done by his registered clerk under delegation, though the practitioner himself was personally unaware of the proceedings, on the principle that the principal is liable for all acts done by the agent within the scope of his authority. He cannot take shelter behind his clerk.

In regard to pleadings, which are not made on oath, it will not be professional misconduct if the falsity of the statement consists in mere denials and the pleadings only put the opposite party to the proof of his allegation.

It would seem that where the pleadings contain affirmative allegations which the practitioner knew, or must have suspected, to be false, the practitioner is exposing himself to the risk of professional misconduct. As Dr Johnson said, counsel are not to tell what they know to be lies.

The principles of the decision as formulated above involve far-reaching consequences. On the one hand they seem to require of the practitioner very high standards in his daily work. On the other, courts and clients are armed with a new and powerful weapon which it is not safe to put into all hands. Observance of the rules will no doubt ennoble the profession; elevate it in the eyes of society and reform the morals of the litigant public. But there are many difficulties that practitioners have in this country in dealing with clients and in making them realize the value and advantage of high standards. As Lord Atkin says, some delegation of work to clerks is also inevitable and practitioners' clerks in this country cannot be put on a par with the solicitor's establishment in England to whose efficiency the noble and learned Lord pays ungrudging tribute. Great caution and circumspection are therefore called for in the exercise of this jurisdiction. It is well at the same

time that the practitioner realizes the rigour of his duty, keeps the proper ideal before him and strives to live up to it. The responsibility of the practitioner is twofold, to maintain standards himself and to restrain malevolent clients from seeking to invoke this jurisdiction towards unworthy ends.

It would be in place here to canvass the limits of the implications of the observations of the noble and learned Law Lords in the case cited above. The range of acts which a solicitor or any practitioner in this country has to undertake on behalf of his client in the preparation and conduct of a cause is very wide. The making of pleadings is but a very small part of it. Where is the line to be drawn to mark off those duties, for the breach or even the negligent discharge of which he would be as liable as for professional misconduct, from those other duties in respect of which he has discretion to act in the best interests of his client untrammelled by any other consideration? For it is obvious that the functions of a practitioner are not limited by ascribing to him the character of an officer of the court merely. He is essentially a trusted representative and an agent for the client. His character and obligations as an officer of the court arise only out of this primary character which he possesses as an accredited agent and in the course of the discharge of those primary obligations. He is only secondarily and only in part an officer of the court. While in the discharge of his duties in, and in relation to, the court his actions and conduct are circumscribed by the limitations which his character as an officer of the court might impose on him, he does not continue to bear that character throughout in respect of all his other acts in relation to or on behalf of his client. In other words, a practitioner acting for his client is acting in a much larger sphere than is connoted by his relation to the court as its officer; and the scope of his actions and conduct, as solicitor for his client, is by no means coterminous with the range of his duties as such officer. To hold otherwise would cut at the very root of the position of the practitioner, in the scheme of the administration of justice, as a necessary intermediary between the client and the court and as an accredited representative of the client for whom he appears. The House of Lords recognize this distinction, that the practitioner has duties towards

his client which fall outside his obligations to the court and are untrammelled by them. It is obvious that no practitioner is employed by a client merely to confess judgement or deliberately to expose the weakness of the case in the supposed discharge of his obligations to the court. Where then is the scope for him to present his client's case at its best, employing tactics and strategy where necessary?

The decision of the House of Lords gives liberty of action to the practitioner in the matter of making pleadings and raising defences and issues. But there are many other varieties of acts for which a practitioner has to undertake responsibility on behalf of the client. It is not possible to enunciate them *seriatim*. In fact their number is legion; but as guidance to ourselves we may lay down the following. Let it be a first rule that honourable conduct in all matters is to be studied and practised. There need, however, be no assumption that the duty of absolute disclosure, enunciated with reference to affidavits of documents, applies in respect of all acts which a practitioner has to do on behalf of his client; or that, as soon as a fact or a document which militates against his case and lends support to that of the adversary comes to the practitioner's knowledge, the maintenance of his honour requires him to hand over his client, disclose the matter to the court and solicit a judgement in favour of the opposite side. The line may therefore be drawn by stating that no practitioner acting on behalf of his client shall do anything with the object of using the court for the purpose of perpetrating a fraud upon the opposite party or for doing manifest injustice to him and thereby seeking to make the court an instrument of fraud or oppression. Subject to this duty which he owes the court, the practitioner must conduct himself as an honourable man maintaining fidelity to the trust reposed in him and properly discharging his contractual obligations to his client.

In *In the matter of an Advocate, High Court, Lahore I. L. R. 24 Lahore* 409, a Full Bench of that court ruled that where a petition to the Judicial Committee for leave to appeal *in forma pauperis* has to be accompanied, under Rule 8 of the Judicial Committee Rules 1925, by a certificate of counsel that the petitioner has reasonable grounds to appeal and counsel had granted the required certificate in a case where no

such grounds of appeal existed, the conduct of counsel was highly improper and an abuse of the process of the court. The learned Judges held that the advocate who had shown such utter disregard of his solemn and serious responsibility as counsel was guilty of gross professional misconduct.

An allied question is whether in a trial court the pleader is bound to exhibit documents which militate against his contention. Justice Sundara Aiyar's answer is that he is not. There is a good deal of difference between the duty of placing before the court all the facts on the record and the duty of putting on record in an original litigation all facts which may have a bearing on the case. This is not inconsistent with the duty of counsel not to place untrue facts before the court; for an advocate must have liberty to decide what facts he will place before it.

Two other small matters. Remember to speak up. If you have anything to say, say it so that it can be heard. Nothing annoys a Judge more than having to strain to hear what counsel is saying.

The other is that you should never make a Judge wait for you. Always be in attendance and readiness. You may have a case in court which in all probability will not be reached; but that does not mean that you can absent yourself from court. You will not only be failing in your duty to the court if you are absent when by some unexpected turn of events your case is called, but you will also be endangering the interests of your client. This duty lies more heavily upon the junior and there can be no excuse for his not being in attendance at all times. The decision in *Maharaja of Vizianagaram* v. *Lingam Krishna Bhupati*, 12 *Mad. Law Journal* 473 at p. 475, may interest you. There junior counsel was ordered to pay the costs of the hearing in reversing an order of a Judge dismissing a suit, for default of appearance when both the senior and junior were absent at the time when the case was called. It used to be said of one of our respected leaders, the late Dewan Bahadur C. Ramachandra Rao Sahib, that though he might have only one case in court, and that the last on the list and not likely to be taken up for many days, he would be in attendance every day from the time the court sat till it rose and from the first day that the case appeared on the list.

CHAPTER XII

DUTY TO THE PROFESSION

Enumeration of many duties — Foundation of the edifice of the Bar — The fraternity of the Bar—Spirit of service and equality—Each member a trustee for the profession as a whole — Nasty habit of fawning — Never decry your colleagues — Behave like a sportsman — Suggesting senior or junior counsel — Settlement of a joint fee by senior — Do not object to engagement of other counsel — Beating down fee of others engaged with you — No encroachment on others' business — Honourable treatment of brethren — Mutual relation between senior and junior — Accepting brief against a lawyer — Emulation of successful men

I CONSIDER that the duty you owe to the community of the legal profession is of vital importance. No one ever attains to such a position at the Bar that he can afford to disregard his brethren or despise their opinions. There is not a man living who in his heart of hearts does not desire to be well thought of by his associates, however much he may affect indifference. And 'nothing is more certain than that, in the long run, the practitioner will find the good opinion of his professional brethren of more importance than the good opinion of what is commonly called the public'. Let me begin by cataloguing some of your duties.

1. Keep up the best traditions of the Bar.

2. Never be a party to the lowering of standards.

3. Do not pursue your profession in a spirit of competition and rivalry with your brethren.

4. Do not underbid.

5. Do not keep out a brother practitioner.

6. Do not indulge in scandalmongering about a brother lawyer.

7. Do everything to encourage the spirit of comradeship and brotherhood and to avoid 'the barren graces of the *nil admirari*'.

8. Always be prepared to subordinate your personal interests to those of the profession.

9. Treat your seniors with respect and show sympathy and kindness to your juniors.

10. Never refrain from giving help to a brother member or generously acknowledging help given by him.

The edifice of the Bar is built upon the foundation of high

tradition which has grown under the vigilant and watchful eye of public criticism. I have referred to a general tendency of antagonism to the Bar, notwithstanding the great service that the Bar is rendering both to the State and to the community. The foundation has therefore been laid against odds and in uncongenial soil to stand against the current of criticism, and the edifice of our professional reputation has been built upon it securely. If you cannot add to its glory, do nothing to mar it, do nothing to undermine the foundation. Referring to the English Bar, a learned writer says: 'The decadence of such a Bar would be regarded by every reflecting and public-spirited person as a national misfortune; for with the prosperity of that Bar as one of its leading institutions the welfare of the country is linked indissolubly. Whatever, therefore, may tend to injure it—to derange its interests, to impair the independence of its members, and present them with a lowered standard of intellectual, moral and professional requirements—is most seriously to be deprecated. God forbid that from any cause, or combination of causes, a great profession, long radiant with renown from the virtue, the patriotism, the intellect, the learning and eloquence of its members, should ever be seen degenerating into a trade—a miserable medley of mere money-seeking and money-making mediocrities!' The ideal is by no means different for us of the Indian Bar. Let me reinforce the position by reading to you similar advice given by another great lawyer: 'Remember the example that has been set up for centuries: remember you are a part of a great legal system which is the admiration of the world; and make up your mind that no hope of immediate gain shall lead you to depart from the traditions of the Bar.'

There is no profession which binds its members in closer fraternity than the profession of law. As Lord Macmillan said: 'It is not for nothing that in the law we call each other brethren. . . If I have to seek for the explanation of the bond which binds in brotherhood the servants of the law throughout the world, I venture to think that I should find it in our common devotion to a great ideal, the promotion of the orderly progress of civilization.'

This close relationship which exists between members of the Bar ought to be fostered by a spirit of service and of equality.

There should always be a readiness on the part of the members of the Bar to give help and advice to brother members. Any member of the Bar, be he young or old, may find himself perplexed by difficulties. They may be matters of professional conduct, a conflict between his duty to the court and his duty to a client, or a question between him and another member of the Bar. On all such occasions the services of any member of the Bar, however eminent, ought to be at the disposal of others. As a learned writer has put it: 'If an older member should allow the younger ones to lean a little on his knowledge and experience now and then when it is necessary to keep them from falling, and give them a word of cheerful encouragement, they may be counted upon to pay it with interest in many ways.' Addressing as I do, the younger members of the Bar, I must here allude to the corresponding duty that lies on them towards their seniors. In the language of another writer: 'No young man can prosper in his profession who is unmindful of due respect to his seniors at the Bar. He that is so breaks down his own safety and dignity should he live to be old; in respecting them he respects himself.'

In your professional dealings in and outside court you should always bear in mind that every member of the Bar is a trustee for the honour and prestige of the profession as a whole. It is the duty of each one to carry the banner aloft and never to lower it. Where undeserved contumely is shown to you in the discharge of your professional duty, by the Bench or by anybody else, you have no right to treat it as a personal affair to which you can submit at your pleasure and without due protest. You cannot, in that manner, barter away the honour and dignity of the profession for the mere sake of an immediate gain to yourself or to your client. Where would the profession be if every member of the Bar considered only his personal or immediate interests, was indifferent to the larger interests of the profession, and was prepared to surrender the honour and prestige of the Bar, as if it were a matter with which he was not concerned? It behoves you therefore to safeguard the great trust that is in your keeping and, while you act in a well-disciplined manner, to take care to see that the liberty and independence of the profession are not in any manner jeopardized. Those who pride themselves upon being

paragons of patience and coolness and offer proof of this in their unperturbed submission to insults, those who cringe and fawn for petty favours or paltry immediate gains, are cankers in the profession which will not allow it to bloom.

It is a nasty habit with some practitioners, while watching the proceedings in court or waiting for a case of their own, to express approval, by nods or other visible facial signs, of the opinion of the Judge, though this may be adverse to the counsel in possession of the court and though they themselves know nothing about the matter. In some cases this is the innocent, though mischievous, result of an unwholesome habit. In other cases it is part of a designed scheme and therefore the more culpable. It is foolish for any practitioner who has a case set down for later hearing to suppose that this kind of attitude will induce reciprocal concurrence on the part of the Judge when he presents his case in his turn. No Judge, I am sure, either wants this kind of support from the Bar or is influenced by it. No judgement is won merely by flattering the Judge, directly or indirectly. On the other hand, fawning might work prejudicially on the mind of the Judge, and the habit itself is loathsome. The creeping and servile advocate is despised by the Judge with whom he would ingratiate himself.

Again, some lawyers—fortunately they are few—adopt it as a fashion, when they get into a case, to decry, directly or indirectly, the work of their colleagues who were earlier in charge. They discover a lacuna in almost everything that has gone before and nothing that has been done is acceptable without emendation. They assume the god and seek by their brazen comments to impress their own importance and superior merit upon the ignorant client. They postulate failure as inevitable and wonder what they can do, if they do not actively put themselves forward as saviours of the situation. Conduct such as this is discreditable in the extreme; it is unprofessional. Such 'shallow-sounding fools', whose claim to recognition obviously rests not upon their worth but upon their arrogance, will soon be discovered even by the ignorant. They can never hope to win the regard of the profession which is the prize for which every lawyer should strive.

I have said that a lawyer should always conduct himself like a gentleman. He should also behave like a sportsman

when occasion demands. It sometimes happens, though such occurrences are no doubt rare, that owing to a misconception, the presiding Judge falls foul of your learned friend on the opposite side for no fault or error of his. It is your duty then to speed to his rescue and correct the Judge.

It is the etiquette of the English Bar that no senior barrister shall suggest who his junior shall be and vice versa. It would seem that the rule should not be made strictly applicable to conditions in our country where the dual system does not prevail and the client does not possess the skilled assistance of a solicitor in choosing his proper counsel. Oftentimes the client seeks a suggestion in the matter and it would be impossible for the advocate not to respond to the question. So long as senior or junior counsel do not insist on particular junior or senior counsel being engaged it seems that there would be nothing unprofessional in suggesting the name of a senior or junior for engagement whether it be in answer to a direct question from the client or even by way of voluntary suggestion in the best interests of the case. The mischief creeps in where seniors exercise a silent and indirect influence in favour of the engagement of 'consanguinei' or 'affines', or juniors force the client to engage the particular seniors to whom they are under obligation. The remedy, however, lies in the hands of practitioners who must restrain themselves from enforcing their predilections or prejudices, must give alternatives to the client and must accept his ultimate choice. There can be nothing wrong in counsel helping the client to choose the advocate suitable for his case. No moral turpitude can attach to it. A strict rule to the contrary would be unworkable and, I am afraid, would be a dead letter.

Allied to this topic is the question of the settlement of the fees in which a senior's help is sought by the junior. I have known seniors of repute and unblemished professional life who declined to settle a joint fee for both senior and junior. They would fix their own fees leaving the junior to settle with the client. I have also known cases where clients would not agree to the settlement of a joint fee and reserved to themselves the opportunity to beat down the junior. It is well known that clients are hard upon the junior and often will not agree to pay him a reasonable fee, bearing a fair proportion to that of the

senior who may not be anything like 'specials'. It would be dle to discuss the good or bad ethics of the matter; but, while no fault can be found with the senior for having done anything mproper in refusing to settle a joint fee, it would advance the professional interests of the junior Bar if the senior, even at some personal sacrifice, agreed to divide a single fee with the unior. Even otherwise it would be proper for the senior to see hat the junior is adequately compensated for his labours and o use all persuasive means towards that end. Referring to a ase in the Federal Court, where they apply with some modifi-cations the English rule which requires a junior's fee to bear a certain proportion to the fee marked on the senior's brief, Sir Maurice Gwyer, first Chief Justice of India, says: 'It is the luty of a junior counsel to refuse to accept a brief which is not properly marked, and it is the duty of a senior counsel to support his junior in every way, by refusing to go into court nless a proper fee is marked on his junior's brief.' They have lso made a rule for the Federal Court 'that before a case is alled on in court, counsel's fees shall have been legibly marked pon their briefs and that the back sheets of the briefs so narked, with counsel's receipt on it for the fee, shall be pro-luced on taxation to the Taxing Master'. A similar rule suit-bly framed for the provincial courts will be of great help.

I ought not to fail to draw attention here to a corresponding luty on the part of the junior. No junior should fix a joint fee or himself and the senior and unduly benefit himself by the ransaction. A sense of fairness should prevail on all hands nd there should be no desire to make money at the expense f a brother member.

The Allahabad Bar Council have a wholesome rule to the ffect that 'where a senior and junior are engaged in a case for he same purpose, it is the duty of both to see that both are aid; and in case either is not paid the other would be justified n refusing to work'.

On the same subject the Patna Bar Council have the follow-ng rule: 'When more advocates than one are engaged in a ase on one and the same side, it shall be the duty of each one f them to see that his colleagues are paid their respective fees or work already done; provided always that the scale of fees hall have been settled in writing.'

I have said that you should not pursue your profession in a pirit of competition or rivalry with your brethren and that ou should not underbid them. It is as unprofessional to seek n engagement by offering to the client the temptation of an nduly low fee as it is to court introduction to a client by aying secret remuneration to a person having influence over im. The same principle must govern the mutual relations of he members of the Bar when one of them has it in his power o recommend an engagement to a colleague. Members of ie honourable profession of law must be, like Cæsar's wife, bove suspicion.

I shall now refer to some other points which are derivable s corollaries from those mentioned already.

Never consider a client's proffer of assistance of additional ounsel as evidence of want of confidence in you. You have o right to be annoyed because he does so. The matter must e left to the determination of the client.

Do not consider it part of the duty that you owe to your lient to help him in beating down the fee of another practi- oner who may be engaged in the case. Where the client is illing to pay a particular fee, it is none of your business to eek to bring it down, though in your opinion it may be above ie normal. On the other hand, your duty to a brother ractitioner being the greater, you will be acting properly in elping to raise his fee to the normal level in cases where the lient is aggressive and endeavours to lower it below the roper standard.

Any efforts, direct or indirect, to encroach to any extent pon the business of another lawyer are unworthy of those ho should be brethren at the Bar. The trader is at liberty to ake away his rival's customers if he can, but a lawyer must ever entice or endeavour to entice another lawyer's clients. As a learned writer observes, the last general clause of the enth commandment contains a special rule for lawyers: *Thou halt not covet thy neighbour's clients.* Beware of all jealousies, nd despise every unfair device which may promise to raise ou at the expense of a brother lawyer.

This, however, does not preclude a lawyer from advising a lient who seeks relief against unfaithful counsel; though even ere the second lawyer should act only after communication

with the lawyer complained against. He should be charitable towards his fellow practitioner, endeavour in an open and manly way to persuade the client to continue the former counsel and himself accept the engagement only if it is clear that the client is determined upon making a change. He should be loath to accept the engagement if the difference with the client can be adjusted and should offer his aid towards bringing about a reconciliation. Further, before accepting the engagement he should insist that all unsettled matters be satisfactorily adjusted with the original counsel and decline to act if the client refuses to do so.

I must not conclude without referring to the mutual relations between a junior and a senior in connexion with a cause in which both are engaged. To express it in the language that Sir Walter Scott used in another context, the junior should be 'a walking-stick, not a crutch'. While on the one hand the senior should not feel himself in need of a crutch, the junior should not attempt to be more than a walking-stick. The habit of some juniors to be fussy, seeking to create an impression that they are everything, deserves to be condemned as much as the attitude of some seniors who make it appear that they do not need any help from any junior. Browne expressively describes such juniors as always 'lifting the lid' or 'bubbling over in steam', pulling the senior's gown as if it were 'a bell rope' and always whispering something into his inattentive ear. The tendency of some junior members to address concurrent arguments to the court while the senior is on his legs deserves equally to be condemned.

Finally, I may add that both leader and junior must be absolutely loyal to each other. We do, though rarely, come across sorry instances of disloyal leaders and disloyal juniors who, if anything goes wrong with the case, throw over their colleagues. I have known some leaders to bully their juniors in consultations, and even in the court-room, and to make remarks and observations disparaging to the junior in the presence of the client, with the object of emphasizing their own importance and superiority and the comparative insignificance of the junior. It is needless to observe that such conduct is unworthy.

On the other side I have known some juniors to sneer at

their seniors in front of the client forgetting that in turn their own reputations stand the risk of being similarly undermined. But let no junior imagine that he is advancing his interests by doing so. The professional advantages of both, the cause of the client and the interests of justice are all best served by loyal and cordial co-operation between leader and junior.

Nor let it be assumed that your duty to the community of the legal profession or your obligation to foster close relations between its members requires that you should refuse to espouse the just cause of a lay litigant and to file a plaint or accept a brief against a brother lawyer. It is possible to understand an initial reluctance, particularly when the lawyer concerned is a prominent member of the Bar. But it is obvious that there can be no two different standards of justice, one for the lay litigant and another for the lawyer; and your duty to the profession demands that you should vindicate the administration of equal laws to all alike. The only effective way to reassure the public of the moral integrity of the profession is to expose the wrongdoer who withholds the performance of legal obligations in defiance of the law—possibly under cover of the badge of the law—and who thereby sullies the fair name of the profession. Let it be made known that the lawyer stands for justice whomsoever it may concern.

Last, but not least, do not envy a professional brother who by his learning and industry, or even by some happy chance, attains to position and rank and earns large pecuniary emoluments. Where the success is deserved, strive to emulate him. Even if it be otherwise, do not seek to lessen his worth or his qualities, remembering that law is, in a measure, a gamble and that there is scope for much luck in it. To brood enviously over his successful career and your own indifferent one will do you more harm than good. Try to learn to live the happy life whose character is portrayed by Sir Henry Wotton in these words:

> Who envieth none whom chance doth raise
> Or vice.

CHAPTER XIII

DUTY TO YOUR OPPONENT

Never mislead or overreach — Avoid interruptions — Quarrels in court must not affect outside relations — Do not underrate opponent — Avoid vexatious opposition — Do not plan a surprise — Never laugh at opponent's arguments — Encourage young men — Do not snatch victory — Do not get order behind opponent's back — Do not discuss case with Judge in absence of opposing counsel — Do not take advantage of ignorance or folly of opposing counsel — Sir P. S. Sivaswami Aiyar's advice — Treatment of opposing client

NEXT, you owe a duty both to the counsel opposing you and to his client who is your client's adversary.

I have already referred to your duty to treat opposing counsel as a gentleman. You ought never to suspect him. Remember that he is as much engaged as you are in the search for truth as an officer of the court. A difference of recollection may exist or a misunderstanding may arise between you and your learned brother upon a matter within your own knowledge. On such occasions, if explanation does not persuade him, it is best that you should regard the slips and oversights of your opponent liberally and avoid sharp words or insinuations which may lead to unnecessary and permanent estrangement. Such conduct will yield you adequate return in your own increased self-respect. A member of the Bar should avoid unnecessary personal difficulties with a professional brother.

Never mislead your opponent by concealing or withholding positions in your opening argument upon which he must reply for his side, and never attempt to overreach him. Do not fly into a temper even if he attempts to mislead you and the court. Regard it as the feeble device of an impoverished mind and as evidence of his disregard for truth which requires you to watch him closely on more important matters. You can always in such cases turn the tables on him at the end.

I have already said that the interruption of counsel on the opposite side should be avoided. As you would not like to be interrupted you should not interrupt your opponent.

Whatever controversies exist in court between you and your learned friend do not allow them to affect in the slightest manner your relations outside. As Dr Johnson said, you are paid to exhibit warmth and there the matter should end.

Do not speak ill to your clients of the performance of opposing counsel. Remember that that would really detract from the credit due to you. Your credit is the greater when he has done well, though you may have done better.

Do not vexatiously raise opposition to everything and throw obstacles in your opponent's way merely because your client, in the hatred he has for his adversary, instructs you to do so.

It is both morally and professionally wrong to mislead an opponent or put him on the wrong scent regarding any point in the case. It is equally improper to spring a surprise upon him which you know can only succeed because it is a surprise. Even if your scheme should succeed you will only be rousing the lifelong dislike and distrust of a brother lawyer. In any event you ought most carefully to avoid earning the reputation of being a sharp practitioner.

If counsel appearing upon the opposite side is a young man, do not thwart him in his first attempt in court. Give him a helping hand and encourage him to conduct himself well. This will not affect the interest of your client in the least; nor is it your duty to endeavour to snatch a victory unawares.

Do not discuss your case with the court in the absence of the opposing counsel, or attempt to get an order from the court behind your learned friend's back. Apart from matters on which rules of procedure require notice to be given to counsel on the opposite side, there may be other applications which you have to make; for instance, applications for adjournment for the better convenience of yourself or your client. You should not attempt to get such an order without consulting your friend; for the order that you obtain may not suit his convenience. It sometimes happens that the respondent engages counsel in advance of an appeal and such counsel asks the counsel preferring the appeal to give him notice of any intended motion for an urgent interim order. In such cases, though there is no rule of law or procedure compelling appellant's counsel to give such notice, the more proper course, as the Madras Bar Council have ruled, is for appellant's advocate to inform the other of any motion he intends to make. He may not be bound to supply copies of the petition, affidavits, etc., but it is not right that he should make the

motion without giving notice to the advocate of the opposite party.

It is highly improper to attempt to impress the Judge by laughing at the arguments of the opposite side or by wearing an expression of surprise or contempt. To laugh at your opponent in order to suggest that you think very poorly of his case and to signify by your giggling that his arguments are worthless are mean tactics. They are not merely unfair to your learned friend; they are also disgusting habits.

Never take advantage of the ignorance or folly of opposing counsel. If you do, your triumph will only be temporary. When the mistake is found out, as it should be, the Judge will hold you equally responsible for not correcting it. The time spent on it will have been wasted and you should not contribute to a waste of time. Let me quote here Sir P. S. Sivaswami Aiyar's advice to the apprentices of 1918. 'There is one thing which budding advocates should remember, and that is that a victory won by foul play is not worthy. If you give your opponent a full and fair chance of making himself heard, and then you beat him, you are entitled to credit. But if you do anything by word, or by deed, or by suggestion, or otherwise, to interfere with the fair hearing which your opponent might otherwise obtain, the victory which you may win is tainted and is not worth having. No self-respecting man ought to care for it.'

As for your client's adversary, although your client may paint him in the darkest colours and spit fire at him, you should treat him as every citizen is entitled to be treated. He may not be the villain that your client pictures him to be. He may even be your client on a later occasion.

When he gives evidence in support of his case, do not bully him or handle him roughly or in any manner mark him out as your client's adversary. That may arouse sympathy for him which may recoil on your client to his detriment. You are to treat him as you would any other witness on the opposite side. Further, do not take advantage of any privilege that you may have and forget the ethical obligation to refrain from unjustly disparaging the adversary for mere effect.

CHAPTER XIV

DUTY TO YOUR CLIENT

Mostly common to yourself also — Remember it is the only case to him — Duty of disclosure — Duty not to appear where interest may conflict — Selection of points— Duty in giving opinions — Duty in advising compromise and settling compromises— Powers of counsel to make or accept compromise — Duty in making admissions— Responsibility for clerk's acts — Civil liability to client — Purchasing in court sales

Now to the duties that you owe to your client. Most of these you owe as much to yourself as to him. That you should account for his moneys strictly and return to him the unexpended balance, that you should reply to his letters and reply to them honestly, that you should not hesitate to communicate to him an unfavourable result and do it as promptly as you would have done a result to the contrary, that you should give his papers back to him when the case is over, that you should represent him with undivided fidelity and not divulge his secrets or confidences—these are duties which you owe to yourself as much as to him.

If you remember that though it may be one of many engagements for you it is the one important case for your client, you will realize in their full import many of your duties to him. I will not therefore repeat your duty to give him a patient hearing, to examine all his papers yourself, and the like.

'It is the duty of an advocate at the time of retainer to disclose to the client all the circumstances of his relations with the parties and his interest or connexion, if any, with the controversy which might influence the client in the selection of counsel.' Having regard to the confidential relation between counsel and client, it is also counsel's duty not to accept retainer or employment from other clients in matters adversely affecting any interests of a former client about which confidential information has been disclosed.

Counsel ought to bear in mind that he should not appear for two clients whose interests *may* conflict. He is an officer of the court and should represent only one or other of the litigants. Marchant cites the case of a summons to determine whether a sum of money was to be treated as capital or income

in which the plaintiff was a trustee without any beneficial interest, and the defendants, another trustee, the tenant for life and the remainderman. On counsel stating that he appeared for the neutral trustee and for the tenant for life, Farwell J. said that it was the duty of the trustee's counsel to assist the court and that he ought not to argue on behalf of the beneficiary.

A question that may frequently arise for your decision is whether you can select one or two points as strongest for argument and rest your whole case on them alone. I would not advise young men at the Bar to do this; for some arguments which you discard as untenable or weak may, as experience commonly shows, influence the mind of the Judge whose judicial acumen may be as unquestionable as the advocate's forensic insight.

Two other subjects on which you may like help in order to decide your line of conduct are the matter of giving opinions and the matter of advising or settling a compromise.

In giving opinions, counsels' duty is to 'act as Judge, responsible to God and man, as also especially to their employers, to advise them soberly, discreetly and honestly to the best of their ability, though the certain consequence be the loss of large prospective gains'.

Sharswood gives the admonition that this is imperatively demanded alike by considerations of duty and interest. 'It is much better for a man occasionally to lose a good client', says he, 'than to fail in so plain a matter.' He then pictures the situation thus: 'It is true that it is often very hard to persuade a man that he has not the best side of a lawsuit; his interest blinds his judgement: his passion will not allow him to reflect calmly and give due weight to opposing considerations. There are many persons who will go from lawyer to lawyer with a case, until they find one who is willing to express an opinion which tallies with their own.' 'Such a client', he adds, 'the lawyer . . . will now and then lose; but even such a one, when finally unsuccessful, as the great possibility is that he will be, when he comes down to sit and calculate all that he has lost in time, money and character, by acting contrary to the advice first given, will . . . determine if he gets into another difficulty of the kind to resort to that

attorney and abide by his advice.' 'Thus may a man', Sharswood concludes, 'build up for himself a character far outweighing, even in pecuniary value, all such paltry particular losses; it is to such men that the best clients resort; they have the most important and interesting lawsuits and enjoy by far the most lucrative practice.'

An opinion ought to be definite, as far as possible. 'It is your opinion that the client asks for, not your doubts.' But, having given his opinion, it is counsel's duty, in a doubtful case, to point out that there is another possible view and that the state of the authorities makes the final result uncertain. To quote a relevant rule of the *Ontario Code:* 'The miscarriages to which justice is subject and the uncertainty of predicting results admonish attorneys to beware of bold and confident assurances to clients, especially where the employment depends upon the assurance and the case is not plain.'

If a client desires to know what the law is regarding a certain contemplated transaction, which may be a misdeed, it is a lawyer's duty to explain it. But his duty should end there. He should not in any way aid in the furtherance of an illegal transaction. It has been said that in such transactions a lawyer, instead of giving legal advice, should take advantage of the opportunity to deliver a moral lecture to his client. I do not conceive that any such duty devolves upon him. He was consulted as a lawyer, not as a moralist.

It has also to be remembered that, while counsel should be anxious not to encourage foolish litigation, he should, on the other hand, also avoid suffocating a good case by premature opinion. A member of the Bar stands to gain in the long run by advising caution and drawing the client's attention to the possibly heavy financial implications of a case. Where the controversy admits of it, counsel will do well to seek to adjust the matter without litigation if possible.

Referring to your duty when giving advice on a proposed settlement pending suit or appeal, it is a truism to state that you should give your honest opinion according to the best of your ability. You may say that your opinion is so-and-so and it is for the client to say whether there is to be a settlement or not. Counsel, however, should be ever vigilant to discover chances of compromising controversies, though he

should not bring pressure to bear on the client (unless there is a risk of other proceedings). Where the client stands a great risk, is advised of it, and still desires the case to be fought to a finish, it is counsel's duty to fight it for him and to use every legitimate means to bring about success.

There may be other cases where the client proposes that you should confer with opposing counsel or others in order to secure a settlement or compromise. It is not your duty then to secure a compromise by any means, or to adopt a system of tactics to beat down the opposite side by machinations, to the 'vulgar surprise of clients and the admiration of a few ill-judging lawyers'. On the other hand, your only duty is to examine the matter with care, form a judgement as to what you will offer or accept, and then frankly and firmly communicate your views to opposing counsel. Dilatoriness may sometimes pay more than even your client hopes for, but you owe a duty to yourself and to the great profession of which you are a member not to resort to such methods. A reputation for skill of this kind will doubtless entail loss of character.

Regarding the powers of counsel to make or accept a compromise on behalf of a client, Lord Atkin, delivering the judgement of the Privy Council in *Sourendranath Mitra* v. *Tarubala Dasi*, 57 *Indian Appeals* 133, S.C. *I.L.R.* 57 *Cal.* 1311, explained the foundation and scope of such authority in the case of advocates who derive their general authority to represent the client from being briefed on his behalf. He observed: 'Their Lordships regard the power to compromise a suit as inherent in the position of an advocate in India . . . It is a power deemed to exist because its existence is necessary to effectuate the relations between advocate and client, to make possible the duties imposed upon the advocate by his acceptance of the cause of his client. The advocate is to conduct the cause of his client to the utmost of his skill and understanding. He must in the interests of his client be in the position, hour by hour, almost minute by minute, to advance this argument, to withdraw that; he must make the final decision whether evidence is to be given or not on any question of fact; skill in advocacy is largely the result of discrimination. These powers in themselves almost amount to powers of compromise: one point is given up that another

may prevail. But, in addition to these duties, there is from time to time thrown upon the advocate the responsible task of deciding whether in the course of a case he shall accept an offer made to him, or on his part shall make an offer on his client's behalf to receive or pay something less than the full claim or the full possible liability. Often the decision must be made at once. If further evidence is called or the advocate has to address the court the occasion for settlement will vanish. In such circumstances, if the advocate has no authority unless he consults his client, valuable opportunities are lost to the client.' Lord Atkin proceeded to emphasize that the authority is not 'an apanage of office, a dignity added by the courts to the status of barrister or advocate at law' but one 'implied in the interests of the client, to give the fullest beneficial effect to his employment of the advocate', and he states the limitations of that authority in the form that 'the implied authority can always be countermanded by the express directions of the client' and 'no advocate has actual authority to settle a case against the express instructions of his client.' The learned Judge then observed, however, that where the legal representative in court of a client derived his authority from an express written authority, such as a *vakalatnama*, different considerations might well arise, and that in such cases their Lordships expressed no opinion as to the existence of any implied authority of the kind under discussion.

Having regard to the essential character of the power to make compromises, in the best interests of the administration of justice, it is a matter for consideration by the High Court whether the time has not arrived when larger discretion and greater responsibility should properly be vested in the present-day advocate. As pointed out by the Privy Council in the case above quoted, considerations of a lack of confidence in the integrity and judgement of an Indian advocate can no longer be advanced to refuse to place him on a level with the English barrister, when he is now exercising every other power, short of this one, to make or consent to a compromise. He can bind his client by his admissions, give up points, and do many other things in the conduct of the case for which the sole sanction is the integrity of the Bar and its high moral character. It is also desirable that clients should in their own

interests be educated to repose greater confidence in their representatives in court.

It would seem consonant with reason, therefore, that all advocates in this country who act under written authority should be trusted with the further privilege of making or consenting to a compromise on behalf of the client. The forms of *vakalatnama* now prescribed for use in mofussil courts and the High Court do not contain any clause empowering counsel to do so. The authority of the advocate being written there is no scope for inferring any implied authority though the written authority may be silent on the matter. The scope of the written authority should therefore be enlarged, at the same time reserving liberty to the client to countermand this portion of the authority without putting an end to the general engagement, or to give express instructions on the matter to his advocate which if the advocate does not see fit to conform to he will have to avoid by returning the brief.

Counsel owes a duty to his client not to make any admission in court about any point in the case without the client's knowledge and assent. An admission by counsel on a point of fact [*Kotayya* v. *Sreeramulu, A.I.R.* (1928) *Mad.* 900] binds the client, though on a question of law a party will not be bound by an erroneous admission. *Vide Tagore* v. *Tagore,* 18 *W.R.* 359 at 367 (P.C.) and *Beni Pershad Koeri* v. *Dudhnath Roy, I.L.R.* 27 *Cal.* 156 (P.C.). Where counsel strongly believes that an admission of some kind ought to be made and the client cannot be persuaded to agree, he will do well to withdraw from the case rather than make the admission on his own responsibility. This does not prevent counsel from conceding the result of certain facts or aspects of the case in order to build up his arguments or press them with effect on the Judge. The alternative, in some cases, may be that he has nothing further to say. In *Venkata Narasimha Naidu* v. *Bhashyakarlu Naidu, I.L.R.* 25 *Mad.* 367, the Privy Council expressed their concurrence with the High Court in the opinion that counsel's 'general powers in the conduct of a suit include the abandonment of an issue which, in his discretion, he thinks it inadvisable to press'.

It remains to mention that when you have once started a case you cannot retire from it without the consent of the client

or the permission of the court. Moreover, as established by the pronouncement of the House of Lords in *Myers* v. *Elman*, (1940) *A.C.* 282, you are liable to your client for your clerk's misconduct, negligence or fraud and you cannot excuse yourself by throwing the blame on him. In the case of *Myers* v. *Elman*, above cited, Viscount Maugham said that the solicitor 'cannot shelter himself behind a clerk, for whose actions within the scope of his authority he is liable' and Lord Atkin observed that 'they (solicitors) cannot evade the consequences of breach of duty by showing that the performance of the particular duty of which breach is alleged was delegated by them to a clerk'.

In England if a barrister acts honestly in the discharge of his duty he is not liable to an action by his client for negligence or for want of skill, discretion or diligence. The law requires nothing but the honest discharge of his duty to the best of his judgement. The position may not be the same with reference to an advocate who makes a contract with his client. But he does not by accepting an engagement promise perfect legal knowledge with respect to the subject-matter of his employment or that he will bring to bear the highest degree of skill. If the advocate discharges his duties with ordinary and reasonable diligence, care and prudence, he will not be liable for the consequences. Thus in *Saw Hla Pru* v. *S. S. Halkar and Another*, *I.L.R.* 9 *Rang.* 575, Page C. J. says: 'An advocate of this court in the exercise of his profession is bound to exercise reasonable skill and prudence, but he is not expected to be infallible.'

In *Alagirisami* v. *Ramanathan*, *I.L.R.* 10 *Mad.* 111, it was held that the language of Order 21 Rule 73 of the *Code of Civil Procedure* is not plain enough to debar pleaders of parties generally from purchasing property sold in execution of the decree. This does not mean that an act of purchase may not, in some circumstances, be held to amount to professional misconduct. You will therefore be well advised to avoid such transactions.

CHAPTER XV

DUTY TO YOURSELF

Duty to others is duty to self also — Self-respecting independence required — Addressing Judge in ordinary conversation — Dignified relations with clients — Fixing appointments with clients — Cultivate passion for profession — Captious requisitions not to be complied with—Counsel not to agree to play a part subordinate to the client — Production of false documents to be prevented — Confess mistakes or omissions — Duty in unrepresented cases — No assertion of personal belief — Duty not to deal with client represented by counsel — No distinction between small and large cases — Or between own and senior's brief — Avoid controversy about fees with client — Reject excess briefs — Avoid slovenliness in court — Avoid laughing in court — Adopt businesslike habits — Your duty in transferring briefs — Liability as regards client's money — Be ready to appear when senior counsel absent — Do not borrow; cultivate self-reliance — Cultivate taste for study of literature

NEXT after your duty to your client is the duty that you owe to yourself. In a sense whatever you owe to the court, or to the profession, or to your brethren at the Bar, or to your opponent, or to your clients, or to the public, or to the State, you owe to yourself also.

You owe to yourself, first, a self-respecting independence in the discharge of your professional duty without at the same time in any manner purporting to deny the respect and courtesy that you owe to others. The maintenance of that self-respect demands that you should not cringe or fawn, even to secure a tangible advantage.

Referring to judicial domination and its ill-consequence in creating a sycophantic Bar, an Attorney-General of Boston says: 'No lawyer regards any Judge exactly as he would regard the same man unclothed with the sanctity of the judicial character. Most lawyers, by temperament and training, if not by instinct, hold any and every Judge in some degree of awe. What lawyer has not observed the servile demeanour of many of his brethren in the presence of a Judge, in or out of court? Who has not seen the air of anxious propitiation, the obsequious smile, the forced laugh at the mildest of judicial jokes, the cowering before the judicial frown? Who does not know the Judge's toady? Who has not observed the pliant crook of his knee, and wondered whether thrift could follow such fawning?' I am sure that you will endeavour your utmost to disprove these aspersions and that you will declare

as Erskine did in defence of Paine: 'I will for ever, at all hazards, assert the dignity, independence and integrity of the English Bar, without which impartial justice, the most valuable part of the English constitution, can have no existence.' Referring to Lord Esher, Witt writes: 'No man ever enjoyed a clever repartee more than did Lord Esher and if counsel had a smart answer ready so much the better. What he could not endure was a counsel who knuckled under to him'.

Judges are entitled to be addressed as 'My Lord', 'Your Honour' or 'Your Worship', as the case may be, only when they act as Judges. The form of address is due to the occupant of the Bench, and not to the Judge personally, during his tenure of office. He is not therefore properly addressed in that form in ordinary conversation when he is not discharging the functions of a Judge. I have known tahsildars address Collectors of Districts as 'Your Honour' even at social functions. Indeed, the habit becomes so much a part of their nature that they cannot restrain themselves from addressing even personal friends without the addition of a 'Your Honour'. Whatever may be the expectations of heads of executive departments in this country I believe that Judges do not have similar expectations. It is also well that a symbol of the dignity of the court is not debased into a mark of servility on the part of the advocate.

You should also avoid doing anything which may be misunderstood as courting work. You should be cautious in your relations with clients and clients' agents. Persons of social status and position do not lose their status and position because they become your clients and you ought to give them every courtesy that they deserve. But that is a very different thing from lowering and demeaning yourself in order to please them. So likewise with the agents of clients. They may wield large influence with their principals. But that does not justify you in treating them with undue kindness and consideration or giving them the same status or rank as their principals.

I have ventured to sound this note of warning because undue familiarity may degenerate into a habit of treating clients and their agents, not as employers that one serves, but, in the words of Justice Williams, as 'attendant satellites',

He says: 'They [lawyers] set themselves up as the great solar centre of their system and they make their clients and their business interests revolve about that centre and reflect its brilliancy. Such men try causes quite as much for the spectators on the back bench as for the court and jury. They pose for effect upon the public. They parade and display their own wit or learning or experience to impress beholders and magnify themselves; and they use their clients and their causes as the opportunity or medium for display.' Needless to say that any tendency towards this habit should be nipped in the bud.

Conversely, bad behaviour towards less important clients in court and in the presence of other people is another form in which this tendency exhibits itself. Counsel forget that they owe courteous treatment to all their clients and they cannot expect the court to give them credit when they themselves do not show any regard to them. Where such conduct is pursued merely with a view to parade one's own superiority, it betokens a vulgar mind. Your own self-respect and dignity require that you should avoid such conduct; they should not stand in need of establishment by this method.

It is always desirable that you should not crowd together different clients at the same time but fix separate appointments for them to meet you. Some practitioners, particularly of the type that I have referred to above, deliberately plan to gather them together in the belief that that enhances their own importance. It is well known that clients, from rural parts particularly, are very touchy and suspicious and the presence of some one who they imagine to resemble a friend of their adversary might scare them away. Further, a client prefers to confer with you in the confidence which privacy gives and you ought to give him every facility to do so. Remember that if clients know that your time has to be pre-engaged they will regard you the better for it. Where many clients gather and you can attend to but one of them, the others will naturally become dissatisfied. From your point of view, to meet only one client at a time will be a great aid to concentration; it is also important to be businesslike in your habits.

Cultivate a passion for your profession and make your business your pleasure. Much of a lawyer's discourteous

manner to clients, to courts and to counsel on the opposite side, has its source in his failure to cultivate this sense.

Always bear in mind the words of wisdom that Chief Justice Cockburn uttered. He said that, while an advocate should be fearless in carrying out the interests of his client, 'the arms which he wields are to be the arms of the warrior and not of the assassin'. He added: 'It is his duty to strive to accomplish the interests of his client *per fas* but not *per nefas*. It is his duty to the utmost of his power to seek to reconcile the interests he is bound to maintain and the duty it is incumbent upon him to discharge with the eternal and immutable interests of truth and justice.' Lord Atkin says similarly that you should avoid confusing your client's interests with your still higher duty of observing truth.

You should neither enforce nor countenance your client's insistence on captious requisitions or a frivolous or vexatious defence, merely intended to vent his malice upon his adversary or to annoy or delay him. Sharswood puts the matter in a telling form thus: 'No man ought to allow himself to be hired to abuse the opposite party. It is not a desirable professional reputation to live and die with, that of a rough tongue, which makes a man to be sought out and retained to gratify the malevolent feelings of a suitor in hearing the other side well lashed and vilified.' In such cases it is only proper that you should give a determined answer to your client that he has the option to choose other counsel.

The following rule extracted from the *Ontario Code* gives useful guidance. 'As to incidental matters pending the trial not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposite attorney to trial when he is under affliction or bereavement, forcing the trial on a particular day to the serious injury of the opposite attorney, when no harm will result from a trial at a different time. . . the attorney must be allowed to judge. No client has a right to demand that his attorney shall be illiberal in such matters, or that he should do anything repugnant to his sense of honour and propriety.'

Relating to applications for adjournment, the Madras Bar Council gave the following opinion: 'An advocate can agree to an adjournment notwithstanding the client's unwillingness,

and it may be the thing to do in many conceivable cases. To say that is not however to say that the advocate who refuses to agree does what is professionally improper. It is a matter of taste and accommodation, not one of etiquette.'

Counsel ought to realize that the responsibility for the conduct of the litigation is solely his and that the client should be given no control over it. While counsel is bound to act according to instructions, and cannot of his own accord give up any of the client's rights, the mode of conducting the litigation is wholly within his discretion and counsel should not yield to any of his client's importunities in the matter. In *Strauss* v. *Francis, L.R.* 1 *Q.B.* 379, Blackburn J. said: 'Few counsel, I hope, would accept a brief on the unworthy terms that he is simply to be the mouthpiece of the client. Counsel, therefore, being ordinarily retained to conduct a cause without any limitation, the apparent authority with which he is clothed when he appears to conduct the cause, is to do everything which, in the exercise of his discretion, he may think best for the interests of his client in the conduct of the cause.' Mellor J. added: 'No counsel, certainly no counsel who values his character, would condescend to accept a brief . . . without being allowed any discretion as to the mode of conducting the cause. And if a client were to attempt thus to fetter counsel the only course is to return the brief.' It is not proper for counsel either to submit to any limitation of his ordinary authority or to agree to take a subordinate place in the conduct of the case. If a client proposes to conduct his case in person and examines and cross-examines witnesses, counsel ought not to sit by and suggest questions or argue the points of law in the case.

A lawyer should not produce what he knows to be a false document or tender knowingly a false witness. He should not accept engagement and litigate a cause which is false to his knowledge. Compare illustration (b) to Section 126 of the *Indian Evidence Act.* It is also desirable that he should not take up cases in which he is likely to be called as a witness.

However willing a client may be to pursue a hopeless case, do not advise the continuance of such proceedings, though the continuance may be to your benefit and the client may implicitly rely upon your opinion.

Some lawyers are inclined to tease the client and fall foul of him when they feel that the opposite side is gaining ground or their own case is weakening or they are confronted with difficulties which they cannot surmount. This is done with evident intent to disown responsibility for the result and to throw it on the client. Such conduct is doubtless the last resort of one who is a coward and who has lost his own self-respect.

Justice Williams gives some advice which is worth quoting: 'If you have forgotten or neglected to do something which you should have done about their [clients'] business, or if you have made some mistake which affects their interests, be honest enough to admit the exact truth and be manly enough to take the consequences of your own omission or mistake. Never dodge the responsibility which fairly belongs to you, nor suffer yourself to be guilty of such cowardly meanness as to try to shield yourself from the blame you deserve by charging the consequences of your own fault upon someone who is not in a position to be heard in his own defence or even to know of the allegation made against him.'

It is your duty to be scrupulous and careful when the opposite side is unrepresented and to place the case before the court from the point of view of both sides. You are an officer of the court, a co-operator with it in the search for truth. In *Cole* v. *Langford,* (1898) 2 *Q.B.* 36, counsel for the plaintiff began his arguments thus: 'As the defendant does not appear in opposition to the motion, the plaintiff is bound to call the attention of the court to certain cases which seem to raise a doubt whether the present action will lie.'

It is also improper for a lawyer to assert in argument his personal belief in the justice of his case. This is to be deprecated, because the character or eminence of counsel should be wholly disregarded when determining the justice or otherwise of a client's cause.

The following observations which Whewell makes in his *Elements of Moral and Political Science* are both pertinent and instructive: 'Every man when he advocates a case in which morality is concerned, has an influence upon his hearers, which arises from the belief that he shares the moral sentiments of all mankind. This influence of his supposed

morality is one of his possessions which, like all his possessions, he is bound to use for moral ends. If he mix up his character as an advocate with his character as a moral agent, using his moral influence for the advocate's purpose, he acts immorally. He makes the moral rule subordinate to the professional rule. He sells to his client not only his skill and learning but himself. He makes it the supreme object of his life to be, not a good man, but a successful lawyer.'

Another point which must be remembered is embodied in Canon 9 of the Code of Ethics adopted by the American Bar Association: 'A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel, much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel.'

Do not make a difference between a 'small' and a 'large' case. They are relative terms. The former is to the poor man what the latter is to the rich man. Remember that if you neglect the 'small' cases you have, you may not get the 'large' ones which you wish to have. The pronouncement of the Judge is of equal validity and has equal force whether it is made in a small case or a big one. Witt, in his *Life in the Law*, gives a warning to the young man who gets into a big case, does his part well and wins and therefrom imagines that he is on the high road to fortune. He cites the following instance. 'Chancery counsel, now a Judge, bestowed infinite labour on a very difficult case and won it. The solicitor delivered his next brief to the junior counsel who had appeared on the losing side. His excuse was that the opponent had fought so well.' Witt adds: 'On the other hand, some insignificant case will turn to be the beginning of great things.'

In preparing cases, do not make any distinction between a brief which a client has given you directly and another in which a senior has asked you to help him. You should use the same zeal in the one as in the other.

Avoid controversies with clients in the matter of remuneration, but without sacrificing either your self-respect or your right to receive reasonable recompense for your services. For like reason avoid lawsuits with clients unless they are unavoidable and necessary to prevent injustice, imposition or fraud.

Do not deliberately accept briefs which you know you will not be able to do justice to. It is recorded of Sir James Scarlett (Lord Abinger) that one of his greatest merits was that, when he was engaged in a cause, his services might always be relied upon and that he disdained to adopt the vicious practice of taking contemporaneous briefs in all courts and wandering from one to another.

Do not be slovenly in court. Always stand up when you desire to say anything or when you are addressed by the Judge. This habit will, to some extent, act as a brake on the tendency to make undue interruptions. Avoid, for example, putting one of your feet on your chair or putting your hands in your pockets while arguing. When not actually engaged in court, give attention to what others do and say rather than settle down for a nap. There is much in the practice of the law which is unwritten and which must be learned by observing the proceedings in court and from the experience of others.

It is bad etiquette to burst into wide or noisy laughter in court. 'Life is an earnest business and no man', says Professor Blackie, 'was ever made great or good by a diet of broad grins.' A gentle smile, on the other hand, is oftentimes helpful. It enables one to get out of awkward situations and 'lightly to shake off the incongruous'. If you laugh at all, let it be with the Judge.

You ought to maintain a record of your engagements, containing the terms of your settlement with the client, his address, and any other special instructions he may have given. You must also maintain an account of all financial dealings with your clients and keep copies of all important letters that you write to them. When each case is over, give the client a copy of your account and return his papers and any balance of his money that may remain with you.

Here I will give the instructions to members of the Bar, in the matter of accounting, issued by the Madras Bar Council.

'1. Regular accounts in bound books, viz. a day book and a ledger, should be maintained by every practitioner regarding the daily receipts and disbursements of the money of his clients.

'2. The fee for each case should be settled at the earliest

opportunity and, wherever possible, the settlement should contain the signature of the party. Such settlement should appear in the accounts as soon as settled, and in cases of continuous transactions with clients regarding a series of cases the accounts should be settled at least once a year; and, in every case where the practitioner receives moneys from his client without express direction for appropriation to any purpose, it is advisable that the practitioner appropriates such payment towards fees and out-fees and communicates the same to the client immediately in all cases where the amount received is capable of allocation or appropriation.

'3. Moneys received or drawn from court by practitioners on behalf of their clients should be paid without delay to the client who should be intimated by post immediately after such receipt, and where the client does not turn up the money should be remitted to the client's address by postal money order. If for any reason the money cannot be so paid or remitted to the client, the same should be invested in the Post Office Savings Bank at the place in the name of the practitioner, provided that where the amount exceeds the limit prescribed by the postal rules relating to investment in the Savings Bank Account, the excess should be invested in any other bank in the locality.

'4. Practitioners should avoid arrangements by which clients' moneys in their hands are converted into loans. But in no case should such conversion be made without the previous consent in writing of the client.'

The resolutions of the Madras Bar Council also show that you may not appropriate towards your fee what the client has earmarked for payment of printing charges or other specific purposes.

It might interest you, and be of help also, to know something about the nature of the liability of an advocate in respect of his client's moneys which come into his hands. Money may get into an advocate's hands in two ways. He may receive, on behalf of the client, amounts payable to the latter. He may receive from the client himself, or from others on his behalf, moneys for out-fees. The point of distinction is whether the advocate receives the money as bailee or whether he is merely a debtor to the client for the amount: the

difference between the two being that if the advocate should deposit the sums in a bank, exercising ordinary care, and the bank should fail, he would not be liable if he were a bailee while he would be liable if he were a debtor. Justice Sundara Aiyar in his lectures says that 'the question is not easy to decide' in regard to amounts received by counsel on behalf of the client. He adds that he is not expressing any opinion about amounts received by counsel for out-fees, though in his arguments *In the matter of a Vakil of the High Court,* 20 *Mad. Law Journal* 494, in which Justice Sundara Aiyar represented the Madras High Court Vakils' Association at the hearing, he is reported to have said that 'out-fees are considered as debts'.

As regards amounts received by counsel on behalf of the client, the decision in the case above quoted, which ruled that the advocate was not entitled to use the money even temporarily, shows that he was not a debtor but only a bailee. I do not think, therefore, that it need still be considered as a matter of doubt. It cannot be that the advocate is a bailee for one purpose and a debtor for another.

Regarding moneys received for out-fees, I do not see why any difference should exist in respect of the legal relation between counsel and client. If anything, the fact that the moneys are handed to counsel for a specific purpose ought to decide in favour of his character as a bailee. If he were merely a debtor he ought to be entitled to make use of the money which would only result in his having a civil liability for it. The obligation to keep the client's money available at any time for use on behalf of the client can only be consistent with his being a bailee thereof. Further, the advice that is generally given—to keep the client's out-fees money in a separate account—can only be understood as meaning that the advocate is not entitled to use it, which means again that he is a bailee and not a debtor.

In concluding the discussion, Justice Sundara Aiyar suggests a way out of the difficulty. 'You might ask the client', he says, 'to make a deposit to his own account and authorize you to draw any sums that may be required from the person that makes the deposit.' Thus every mofussil client is to have an account in a town bank for purposes of

his case, the pass-books being handed over to counsel with authority to draw upon the account. Is this practicable? Is it not a dream? Is all this elaborate procedure suggested to avoid a debtor's liability? The rule that he enunciates is more honoured in the breach than in the observance. There need be no distinction drawn as to the nature of counsel's liability between moneys received for out-fees and other moneys. If counsel is a bailee in both cases, everything else follows. It is obvious, however, that counsel cannot claim non-liability as a bailee unless he himself acted as a bailee in fact, and kept the client's money separate and distinct from his own. In a recent case in the Madras High Court the learned Judges made the following observation. 'We think it necessary also to say that this case brings out very clearly the desirability of legal practitioners keeping separate accounts of their own money and their clients' money and seeing that their clients' money is deposited in a bank in a separate account. If that is done it will be easy for a pleader to refrain from spending his clients' money for purposes other than his clients' and, if his conduct is questioned, to show that he has not transgressed the limits of professional good conduct.'

I have dealt elsewhere with the practice of transferring briefs, by way of delegation, when ill-health or pressure of work or private reasons prevent you from attending to them personally. I discussed the limits of the obligation both in relation to the court and in relation to the client. What about your obligation towards the lawyer to whom the brief is transferred? In the interests of all parties concerned his acceptance of the brief should not be left as a mere matter of friendly obligation. The practice on the Appellate Side of the Madras High Court, which may be taken as a fair and equitable adjustment, is to transfer with the brief one half of the fee.

Act always in a businesslike manner. Never leave a letter lying on your table longer than is necessary. Be prompt in entering your appearance, filing affidavits, etc., without needlessly putting them off. Delay is always dangerous. Even in preparing cases, do it at the earliest opportunity. There is no harm, but there is immense good, in your doing it more than once. Allow free scope for your mind to chew the cud. Follow Chesterfield's advice: 'What you can do or

think you can, begin it.' 'A man that is young in years', says Lord Bacon, 'may be old in hours, if he has lost no time.'

Finally, when senior counsel is absent do not fail to take the opportunity of appearing yourself. You owe it to yourself to promote your chances in the profession.

An American writer advises the younger members of the Bar to avoid strong liquor and to pay their debts in due time. The former is needless advice here; but I would ask younger members of the Bar to avoid getting into debt at all. They should endeavour to live within their means at any sacrifice. Do without necessities even, if you cannot afford them, and never dream of any luxury. It is wholly erroneous to assume that a showy life is a *sine qua non* for success in the profession. The Honble Sir S. Varadachariar, Judge of the Federal Court, has disproved it, and his life is an example to follow. To cultivate self-reliance and to be dependent upon no man for one's needs are proofs of mental and moral strength which is an asset in professional life.

Before I close, I wish to say a few words on an extra-professional matter. Taste for the study of literature and the inclination to devote time to the reading of good and profitable books, not pertaining strictly to the profession, were once the distinguishing marks of our profession but are now becoming rarer. We can derive little comfort from the reflection that other professions are open to the same reproach of deterioration in literary attainments. Besides its value as a qualification for forensic contest, nothing is so well adapted to fill up the intervals of business with rational enjoyment as a knowledge of polite literature. In the words of Sharswood: 'It fortifies the soul against the calamities of life. It moderates, if it is not strong enough to govern and control, the passions. It favours not the association of the cup, the dice-box or the debauch. The atmosphere of a library is uncongenial with them. It clings to home, nourishes the domestic affections, and the hopes and consolations of religion.'

CHAPTER XVI

DUTY TO THE PUBLIC AND THE STATE

Lawyers and government — Discourage dishoneet litigation — Duty not to corrupt witness — Duty to prevent delay in litigation — Right to reject cases — Duty in poor men's cases — Duty of Bar Councils — Duty when cross-examining witnesses — Discharge of duty through Judges — Duty to see that proper law exists — Duty not to help circumvention of law — Duty in regard to newspaper publication — Responsibilities as an officer of the court

I INDICATED, generally, the duties of the lawyer to the public and the State when I referred to his responsibilities. As Forsyth puts it: 'He who has devoted himself to that profession which is as difficult as it is honourable; who receives in his chamber the most confidential communications; who directs by his counsel those who come to ask his advice and listen to him as though he were an oracle; who constitutes himself the organ of those who find themselves attacked in their persons, their honour, or their fortune; who brings forward and gives efficacy to their demand, or repels the charges brought against them; he, I say, who does all this, must necessarily require the support of the public. By his knowledge, his talents, his morality, he ought to endeavour to win the confidence and the good will of his fellow citizens.' In the words of Justice Williams, the proper standpoint is 'that the practice of the law is more than the private occupation of him who pursues it; that it is the duty of an office in which the courts and the general public are deeply interested'.

This position is adequately substantiated by one fact: that the government of most of the democratic nations of the world is a government of lawyers. The Bar is the field from which incumbents to responsible quasi-judicial and administrative offices are largely chosen. There have been and there are many lawyers who have sacrificed careers at the Bar for service to the public and to the State, who have earned our lasting regard and gratitude and deserve commendation on all hands. Consider how many lawyers have entered the local or central legislatures or other public bodies and who are giving their services at great personal and pecuniary sacrifices. I shall advert to this topic again; here I shall merely refer to

some matters where your activities as a lawyer in the exercise of your profession have a bearing upon the life of society.

One essential duty you have is to discourage dishonest, as well as desperate and dubious, litigations. Conversely you should assist honest litigation. The general interests of justice are as much your concern as your own character as a man of honour.

Upon this topic Dos Passos says: 'In the commencement of suits, the lawyer has need, therefore, of honesty, learning, prudence, and patriotism. It rests with him to preserve the purity of the legal system; to separate the chaff of fraud, exaggeration and doubt from the wheat of fact and truth. For if, from ignorance, dishonesty, or indifference to the effects of his action, he advises the commencement of an unjust suit, or the evasion or a denial of a legal claim, he defeats the objects of the law, he prostitutes its forms, and brings its administration into contempt and disrepute. He poisons the fountain of justice at its source, and the evil effects are felt all through the body of the law.'

For like considerations counsel is under an obvious duty not to consent to, or with knowledge connive at, his client's endeavours to corrupt a witness into giving false evidence. If he later discovers secret efforts in this regard on his client's part, it is proper for him to prevent the further pursuit of those efforts. While the disclosure of the perjured character of the testimony might cast a reflection upon the honour and integrity of the lawyer who introduces the witness, counsel's obligations to the State demand that he should not participate directly or indirectly in any effort to pollute the stream of justice.

But it would seem that the professional obligations of counsel extend beyond the limits indicated. Counsel cannot be a party to the corruption of a witness, even though it be to further the course of justice by forcing him to speak the truth or by preventing him from withholding his testimony. It is a wholesome rule that no counsel should identify himself with his client or become interested in the conduct of the litigation.

On this subject, Hicks cites a case which is worth quoting. The plaintiff suing in damages had been assaulted by the defendant in the presence of a sole witness. The witness was

unwilling, without recompense, to give evidence of what he had seen. He addressed a letter to plaintiff's counsel in which the importance of his evidence as sole witness to the incident was adverted to. The writer went on to say that he could of course be subpoenaed and compelled to testify, but added: 'But when a person *is made to speak*, it is easy for one to *forget* the most important part.' He insisted upon a reward and a legal guarantee therefor. Eventually counsel guaranteed to pay a sum to the witness out of any moneys that might come into his hands in settlement of any judgement that might be recovered against the defendant. Upon these facts counsel was charged with professional misconduct. He sought to justify his action on the ground, amongst others, that, if compelled to testify, witness had threatened to forget what had happened, and that the writing of the letter for the purpose of securing truthful testimony was not 'an act of malpractice nor any infraction of legal ethics'. The court in punishing counsel with an order of suspension said that counsel laboured under a mistaken notion that his duty to his client was superior to considerations of public policy and added that 'attorney's duty to his client is a solemn obligation, but it has never been held that it is greater than law itself. However just the attorney believed his client's claims to be, he may not liquidate it by force of arms, by bribery or any other unlawful means.' The judgement concluded that in such matters the exigencies of any given case must yield to the larger demands of public duty.

The lawyer also owes a duty to see that litigation is not unduly delayed. To delay when you are fairly prepared is dangerous. Some lawyers imagine that postponement will enable them to become better prepared. They forget that there is the equal chance of their losing that vigour that comes from their first interest in the case. Others grow ingenious in devising pretexts for adjournments, earnestly pressing them on the attention of the court. The energy they spend in postponing the trial or hearing would be better spent on the immediate conduct of the case. A habit of this kind might cause counsel to deteriorate until he gradually grew to distrust himself and to dread the responsibility of the trial or the hearing. Let the order of the court in *In the matter of a First Grade Pleader, Vellore*, 60 *Madras Law Journal* 393, suspending a

pleader for seeking adjournments on grounds which were known to him to be untrue or which he must have had reason to believe were untrue, be a warning against such conduct.

It sometimes happens that the client has frankly no substantial defence to make and only desires to gain more time. In such cases it would seem that the client has a right to all the delay which is incidental to the ordinary course of justice. Counsel may take advantage of the course of the law for this purpose, without involving himself or his client in any artifice or falsehood.

Under Section 136 of the *Transfer of Property Act*, no legal practitioner 'shall buy or traffic in, or stipulate for, or agree to receive any share of, or interest in, any actionable claim, and no court of justice shall enforce, at his instance, or at the instance of any person claiming by or through him, any actionable claim, so dealt with by him as aforesaid'. By virtue of the terms in which 'actionable claim' is defined, secured debts do not fall within the prohibition of the above section; nor do stock shares, debentures, etc., by reason of the provisions of Section 137 of the same Act. Rule 16 of the Rules framed under the *Legal Practitioners Act* reads: 'Practitioners of courts subordinate to the High Court are strictly prohibited from purchasing from their clients or from any other person any interest in any decree passed by the court in which they practise.' These limitations placed upon the legal practitioner are in furtherance of the interests of the public and the administration of justice. If practitioners were permitted to purchase claims and sue upon them or enforce them on their own behalf, it might encourage litigation which would not otherwise have been started and might thereby delay the speedy disposal of bona fide litigation.

Public interest equally demands that no practitioner shall decline to accept a retainer offered on behalf of the accused or the Crown; but in civil cases the better opinion seems to be that the practitioner is under no similar obligation unless the refusal of the retainer would lead to injustice. It follows that the advocate would be within his rights in refusing to take up a case which is hopeless or absolutely dishonest. There is a difference of opinion on this matter between the English and American, and the Continental Bar; but I do not propose to

deal with that here *in extenso*. It may not interest you and I do not expect that the problem will confront you at the start of your career. The rule given above is adequate for all practical purposes.

Suffice it to say for your guidance that a working rule has to be devised in reconciliation of several seemingly inconsistent principles. The first is that the legal profession is not venal, with its corollary that no practitioner shall be bound to conduct a case beyond a stage when his conscience will not permit him to do justice to the client. In his lectures, Justice Sundara Aiyar has quoted many valuable and authoritative opinions on this matter including those of Cicero, Quintilian, Justinian, D'Aguesseau, Sir John Davys, Sir Matthew Hale and others. The next principle is that no counsel can assume the functions of a Judge and seek to make a preliminary investigation into the truth or justice of a case, a principle for which I have already cited ample authority. The third is that an advocate is an officer of the court and its counsellor; he is a limb in the administration of justice, having his duty to perform just as the Judge has his, a fact which every practitioner is proud to own. Then there is the well-recognized distinction between civil and criminal cases, viz. the right of every accused person not to be convicted unless he is proved to be guilty. I may add that Sir P. S. Sivaswami Aiyar thinks that Justice Sundara Aiyar's view on this matter is not convincing. To accept an engagement, continue in it and do it half-heartedly is not, in any event, a course which one can recommend to young members of the Bar who must be burning with a sense of righteousness as well as enthusiasm.

One way in which members of the Bar can render service to the community in the exercise of their profession is in undertaking 'poor men's' cases without fee or reward. It may be considered that this is sometimes done for the sake of experience; but you should disprove any such suggestion by the amount of care and time you give to cases of this nature. Your reward lies not so much in any thanks you may receive from the court, as in the satisfaction of having done your duty to the public. It is unfortunate that in India institutions have not developed for the conduct of such cases. This has

led to those misconceptions about the privileges of a lawyer which I adverted to earlier.

I think I may take the liberty here of suggesting that this is a matter in which Bar Councils ought to take the initial steps. In a speech made in 1925, Lord Buckmaster said: 'There remains the big problem . . . and that is what steps we are to take to remove from our profession the reproach that the poor man cannot get the same even-handed justice as the rich. It does not mean that he does not get justice before the Bench. That I have never heard said. But that, in the ability to employ clever counsel and clever lawyers and to spend the money necessary for the preparation of a case, he was at a disadvantage with the rich litigant and the result of that disadvantage may well be that the scales of justice may be turned against him.' This speech was made before the *Rules of Practice* of the Supreme Court were amended in 1926 in respect of this matter. These rules were further amended in 1928, reaching the form in which they now stand incorporated as rules 22 to 31 (*h*) of Order XVI. Bar Councils in India may well move the enactment of rules on the same lines as the English rules but adapted to conditions here. They may also frame a model set of rules for 'Poor Aid Societies' and encourage their formation. In this connexion, I may refer to two interesting articles on this subject in Vol. XXXVI of the *Harvard Law Review*, and in Vol. XIII of the *Canadian Law Review*. The latter concludes with the following remarks: 'Quite apart, therefore, from the duty that we should all feel that we owe to those of our less fortunate fellow citizens who are without means to secure for themselves that equality before the law to which they should be entitled, work of this kind is likely to bring its own reward in the enhanced esteem with which the public is likely to be led thereby to regard the profession.'

It is also relevant here to draw attention to your duty towards members of the public who may figure as witnesses in a trial. In cross-examining them, you have to bear carefully in mind the injunction contained in Section 149 and the penalty imposed by Section 250 of the *Indian Evidence Act*. You cannot put a question making an imputation unless you have reasonable grounds for thinking that the imputation

conveyed is well founded. You should not put questions recklessly because the client urges you to do so. This is not a matter in which you will be protected merely because you are acting on the client's instructions.

The lawyer's duty to the State *qua* lawyer is amply vindicated by the conscientious discharge of their duties by our Judges, most of whom are chosen from the Bar. It is a credit to the Bar that our judiciary always maintains its independence of the executive and enjoys in full measure the confidence of the public.

Again, as stated in the *Code of Legal Ethics* of the Bar Association of San Francisco, the legal profession is responsible for the progress and adequacy of the law, a point to which I shall advert later. In any event, counsel owes it to the State that makes the laws that he will not assist secretly in violating them. It is equally dishonourable to assist in the circumvention of the spirit of the law while seeming to obey it to the letter. Such acts tend to create public distrust in law and lawyers and the community of the profession stands to suffer.

The lawyer is also bound by duty not to give or encourage newspaper publicity to any matter which may refer to any pending or anticipated litigation. To do so might tend to prejudice the administration of justice and interfere with the trial in court. The danger is greater still in jury cases.

Finally it should always be remembered that the fair administration of equal and just laws in the State is of far greater importance than the success or failure of any individual in any particular case. Thus public policy requires that every lawyer should first realize his responsibilities as an officer of the court. He is part of the machinery employed in meting out justice and would be guilty of a crime if knowingly he subordinated his official duty to his own personal interests or to the interests of his client.

CHAPTER XVII

HAS THE LAWYER ANY PRIVILEGES?

The answer both affirmative and negative — Privilege of discharging duties — His right to his fee — Certain privileges stated — Incident in the Calcutta High Court — Illustrations from trial courts — Privileges not personal but client's — Expressions used in judicial inquiry — Exemption from arrest under civil process — Certain other privileges — Eligibility for public office — Privilege of making statements from Bar — Privilege of barrister to authenticate cases — Exemption from serving on jury — Lien for unpaid fees and advanced out-fees — Master of own time and movements

I HAVE furnished you with a long catalogue of your duties under several heads and declared the many injunctions that you must obey. It must be bewildering for you to be reminded of a long series of duties to be discharged without so much as hearing a whisper of any privilege to be enjoyed. You are certainly entitled to ask 'Have lawyers no privileges at all? Is it all one-sided? Do those to whom we owe many duties, owe to us no single reciprocal duty?'

The answer that I have to give you is both affirmative and negative. Yes, you have the privilege of your duties; and, no, you have no privilege other than the duties that you have to perform.

You have the privilege of discharging all those duties which those who are not members of the legal profession cannot do. In *Emperor* v. *Rajani Kanta Bose and Others, I.L.R.* 49 *Cal.* 732, Mookerjee J. observes on p. 804: 'The practice of the law is not a business open to all who wish to engage in it; it is a personal right or privilege . . . it is in the nature of a franchise from the State . . .' That you are a member of the legal profession is your privilege; that you can represent clients is your privilege; that you can in that capacity claim audience in courts is your privilege. Yours is an exalted profession in which your privilege is your duty and your duty is your privilege. They both coincide.

You have your right to a fee; but even that is not necessarily related to your duty in all cases. There may be cases which you undertake without a fee, and very properly too; but even then your duties will exist unabated. The question of the fee is incidental and we cannot forget that the barrister

cannot sue for a fee but can only accept what is voluntarily put into the pouch at his back. The Roman and Athenian lawyers of old performed services for their clients without the expectation of fee or reward, in the present-day meanings of these words.

It is your privilege to have audience of the court and to insist on your right to be heard without any hindrance so long as you act decorously and with due respect to the court. Section 14 of the *Indian Bar Councils Act* defines your right to practise. The court cannot ask you to sit down or stop your arguments unless you unduly and annoyingly press an argument which the Judge has sufficiently warned you is untenable and that he takes a different view. You are, however, entitled to claim to argue where the Judge, without giving you sufficient opportunity to address your arguments, expresses an adverse opinion, or attempts to close the case, or threatens to dispose of it. But let it be remembered that, in all cases, the lawyer should scrupulously observe his duty by conducting himself with due respect to the court. In no case is a Judge entitled to ask a practitioner to leave the precincts of the court unless he behaves in such a manner as to create a disturbance in the working of the court. In the words of an Attorney-General of Boston: 'Nothing can do more to elevate the character of the Bar, and promote its usefulness as one of the chief agencies of justice, than clear understanding of its rights and resolute vindication of its independence. Nothing can do more to preserve the harmony of its relations with the Bench, and unite the power of these two great forces to the common end of good judicial administration.'

Referring to an incident before Mr Justice Page of the Calcutta High Court in 1924, in which the learned Judge asked a practitioner to leave the court, the editor of the *Calcutta Weekly Notes* wrote in 28 *C.W.N.*, p. clxxxi: 'A Judge may refuse to hear counsel if he is irrelevant or repeats his argument. He may ask him to resume his seat, but to do so in the style of a schoolmaster is hardly consistent with the dignity of the court and the respect due to the profession. We doubt also whether counsel can be ordered out of court except for persistence in boisterous conduct.' In this connexion I would ask you to read for yourself the very interesting and instructive case of *In re Pollard*, *L.R.* 2 *P.C.* 106.

In *Hakumat Rai* v. *The Crown, I.L.R. 24 Lahore* 791, Din Mohammad J. lays down the correlative obligations of counsel to the court and of the court to counsel in the following terms: 'It is true that a lawyer should always conduct himself properly in a court of law and exert his best at all times to maintain the dignity of the court, but the court has also a reciprocal duty to perform and should be not only not discourteous to a lawyer but should also try to maintain his respect in the eyes of his clients and the general public with whom he has to deal in his professional capacity. Hypersensitiveness on the one side or rudeness on the other must be avoided at all costs. Both the Bench and the Bar are the two arms of the same machinery and unless they work harmoniously justice cannot be properly administered. In my view, therefore, mutual adjustment and not mutual antagonism should be the end in view on both sides, eliminating all ideas either of domination or of servility.' The learned Judge then quotes a passage from Oswald's *Contempt of Court:* 'An oversubservient Bar would be one of the greatest misfortunes that could happen to the administration of justice.' He also refers to a rule framed by the American Bar which sums the position up: 'A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due to the Judge's station, is the only proper foundation for cordial, personal and official relations between Bench and Bar.'

On the same subject Justice Sundara Aiyar says: 'Without failing in respect to the Bench, it is the duty of members of the Bar to assert their just right to be heard by the tribunal before which they are practising. They should be fearless and independent in the discharge of their duties; they would be perfectly right in protesting against irregular procedure on the part of any Judge; and if the advocate is improperly checked or found fault with—i.e. not if any observations are made on the merits of the case but if the advocate himself is improperly dealt with—he should vindicate the independence of the Bar. He would be perfectly justified in insisting on getting a proper hearing, and he would have the right to object to any interruption in the course of his argument such as to disturb him in doing his duty to his client.'

Occasions often arise in trial courts where Judges, rightly or wrongly, prevent the whole of the evidence from going on the record. In such cases counsel is entitled to insist on the evidence being taken or at least on the Judge making a record of the fact that evidence was tendered but was excluded. A matter of more frequent occurrence is where the Judge disallows a question put to a witness. You may then respectfully ask that the fact of the question being disallowed be noted.

But are these privileges personal to the lawyer? A little reflection will show you that they belong only to his office which involves the performance of duties to others. They exist, in truth, merely to enable the lawyer to perform his duties to those others and for their protection. Your duty to others gives them a right to expect from you the proper performance of your duty, which in its turn imposes an obligation on third parties to respect your duties and permit a performance of them. It is the maintenance of this obligation by third parties that assumes the character of a privilege in you. Put in simple form, the privilege is the client's, but he enjoys it through counsel. The privilege is also of such a character that you have no option as to whether you should avail yourself of it or not. Omission on your part to insist on your privilege would result in your failure to discharge your duty to a third person, the client. So we end where we began, that your privilege is your duty and your duty is your privilege.

Let me take this opportunity of reminding you that there is a school of juridical philosophy, of which Sir Frederick Pollock is an exponent, which postulates all rights in terms of duties only. This theory was first enunciated by Auguste Comte, the great French philosopher, and M. Duguit, the eminent French jurist and political theorist, in this form: 'A man has only one right, viz. the right to do his duty.' This is no light-hearted epigram.

The only occasion for claiming a personal privilege arises in respect of expressions used by an advocate in the course of a judicial inquiry. In England such statements are absolutely privileged. No action can be maintained against a barrister for anything said on such occasions even though it were irrelevant and spoken maliciously, without reasonable cause.

In *Munster* v. *Lamb*, *L.R.* 11 *Q.B.D.* 588, Fry L. J. says: 'The court can control all the proceedings and persons before them, and safeguards are provided against licence and excess; but if such an action as this were allowed, no person would be free from fear, arduous duties could not be efficiently performed, and the public would be injured.'

In this country, however, the position is not so obvious. In an early Madras case, *Sullivan* v. *Norton*, *I.L.R.* 10 *Mad.* 28 (F.B.), it was held that an advocate could not be proceeded against civilly or criminally for words uttered in the discharge of his duty as advocate. But the Calcutta, Bombay, Patna and Rangoon High Courts—in the cases respectively of *Banerjee* v. *Anukul Chandra Mitra*, *I.L.R.* 55 *Cal.* 85; *Tulsidas Amanmal Karani* v. *Billimoria*, *A.I.R.* 1932 *Bom.* 490; *Nirsu Narayan Singh* v. *Emperor*, *I.L.R.* 6 *Pat.* 224 and *McDonnell* v. *Emperor*, *I.L.R.* 3 *Rang.* 524—have taken a different view, namely that the common law doctrine of absolute privilege does not apply to the criminal law of defamation in India. A recent Madras Full Bench, in *Tiruvengada Mudali* v. *Tirupurasundari Ammal*, *I.L.R.* 49 *Mad.* 728, has also thrown doubts on the question, whether the English common law doctrine of absolute privilege is applicable to the criminal law of India. The Full Bench, however, did not overrule the decision in *Sullivan* v. *Norton*, *I.L.R.* 10 *Mad.* 28, as is properly pointed out in *Mir Anwarrudin* v. *Fathim Bai*, *I.L.R.* 50 *Mad.* 667. Here, too, it is worth remembering that the privilege of counsel in this respect is, as has been pointed out, the privilege of the client—the right of every subject to assert and defend his rights in all courts of justice and to protect his liberty and life by the free and unfettered statement of every fact conducive to that end.

Under Section 135 of the *Civil Procedure Code*, a pleader while going to or attending a tribunal for the purpose of a pending matter, and while returning from such tribunal, is exempt from arrest under civil process other than a process issued by such tribunal for contempt of court. But even this exemption is for the furthering of public interests and for the better administration of justice and cannot be said to be a privilege personal to the pleader.

It is, however, your privilege that, once you are engaged in a case and file a vakalat, another lawyer cannot get into

the case without your consent. Nor will the court allow a change of advocate unless the fees contracted to be paid to you have been paid in full. In a recent case the Madras High Court said: 'It seems to us clear from the rules and from the decisions that, in the absence of misconduct on the part of the advocate, the client is not entitled to the sanction of the court for a change of the advocate without making a satisfactory arrangement to pay the advocate who has had charge of the case hitherto.'

It is further your privilege to ensure that the forms and requirements of the law are strictly observed and carried out and to defend an accused person towards that end even though you may have knowledge or reason to believe that he is guilty.

It is also the personal privilege of the advocate that he is made eligible for several offices under statutes and under administrative rules. For example, under the *Government of India Act*, 1935, a pleader who has been such for not less than five years is eligible for appointment as a District Judge, which expression includes 'Additional District Judge, Joint District Judge, Assistant District Judge, Chief Judge of a Small Cause Court, Chief Presidency Magistrate, Sessions Judge, Additional Sessions Judge, and Assistant Sessions Judge'. A pleader of a High Court of ten years' standing is eligible for appointment as Advocate-General of a province or of the Federation, a Judge of a High Court or a Judge of the Federal Court. He is eligible to be made Chief Justice of India if he has been a pleader for at least fifteen years. Section 2 of the *Administrator-General's Act*, 1913, makes an advocate eligible for appointment to the office of Administrator-General. Under Section 12 of the *Madras Hindu Religious Endowments Act*, 1927, a pleader of not less than ten years' standing is eligible for appointment as President of the Board of Commissioners for Religious Endowments. Section 5A(3) of the *Indian Income-tax Act* (XI of 1922) provides that the judicial members of the Appellate Tribunal shall possess 'such qualifications as are normally required for appointment to the post of District Judge'. Under Section 4(2) of the *Official Trustees Act* (II of 1913) 'no person shall be appointed to the office of Official Trustee who is not (*a*) a barrister, or (*b*) an advocate, attorney or vakil enrolled by a High Court'. Judges of the

presidency and provincial small cause courts, district munsiffs, official assignees, official receivers, public prosecutors, government pleaders and liquidators are all appointed from the Bar under administrative rules.

It is also your privilege, resulting from the credit due to the honour and prestige of the profession, to make, on occasions, statements from your place in the Bar and without being sworn. For example, it happens sometimes, in cases where counsel take part in settling compromises of pending litigations, that disputes occur when the matter is brought before the Judge for being made an order of court. The extent of counsel's authority or any mistake he may have made or some other like question might be mooted. It is then your privilege to make a statement from the Bar on matters that have transpired, without making an affidavit. Lord Esher once said that they would never admit an affidavit in such cases but trusted to the honour of counsel. In *Hickman* v. *Berens*, (1895) 2 *Ch.* 638, a dispute arose as to the extent of the authority given by the client to his counsel and the court accepted the statement of counsel made from his place in the Bar without requiring it to be made on oath.

It will also interest you to know that on the same principle the barrister in England enjoys a peculiar privilege. He has the right to authenticate by his name the report of a case decided in court. 'As soon as a report is published of any case with the name of a barrister annexed to it, the report is accredited and may be cited as an authority before any tribunal.' That marks the limit of the reliance placed on the integrity of the profession.

By Section 320, clause (i), of the *Criminal Procedure Code*, a legal practitioner in actual practice enjoys the privilege of being exempt from serving as a juror or assessor.

An advocate has a lien, for any unpaid fees, upon such papers of the client as are in his hands. This lien is possessory, though Justice Venkatasubba Rao says, in *Bijili Sahib* v. *Dadhamia Bhalambai*, 69 *Mad. Law Journal* 802, that he does not 'propose to decide finally whether a legal practitioner in India has the right of possessory lien'. In the absence of an express agreement, however, he has no claim or charge upon the fruits of the litigation (see *Krishnamachariar* v. *The Official*

Assignee of Madras, 62 *Mad. Law Journal* 185). The observations of Wallis C.J. in *Rajah Muthukrishna Yachendra Bahadur* v. *Nurse*, *I.L.R.* 44 *Mad.* 978, to the effect that vakils 'can insist upon the payment of their fees in advance or rely on their lien on the client's papers and on the fruits of the litigation as well as on their right to sue for their fees' are, I must say, too wide. To the extent that they refer to a lien upon the fruits of the litigation, the observations are merely *obiter*. An advocate has, however, the agent's lien, under Section 217 of the *Indian Contract Act*, in respect of moneys expended by him for out-fees on behalf of the client and he is entitled to repay himself out of sums he receives to the credit of his client. *Vide Subba Pillai* v. *Ramaswami Aiyar*, *I.L.R.* 27 *Mad.* 512. Order 8, rule 6, of the *Code of Civil Procedure* (1908), provides that the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree shall not be affected by the provision that a written statement pleading a set-off shall have the same effect as a plaint in a cross-suit so as to enable the court to pronounce a final judgement in respect both of the original claim and of the set-off.

But more valued by the lawyer than all these privileges is the fact that he is master of his time and movements. He is a member of an independent profession. He is not fettered as a salaried official is. He is not accountable save in respect of the discharge of his professional duties or anything that affects the proper discharge of them. He is enabled to enter public and political life without restraint and play his part therein. It is this freedom he enjoys that is the main attraction for many a young man.

CHAPTER XVIII

THE PROBLEM OF THE FUTURE

The lawyer's position today — Shifting centre of forces — Essential character of legal profession — Duty to make correct laws, etc. — Scope for making enemies and for losses — Problem whether to enter public life or not, not easy of solution — Present situation to be considered — American writer on the present position — The profession has lost much ground — No longer profitable — Competition keener, clients disloyal — Advancement of political consciousness — Impossibility of later entering politics — More time at disposal—Lawyers seek additional avocations — Necessity for secondary interests — Lawyers must enter public life — Bar Councils must be liberal — Formation of partnerships — Benevolent associations — Group insurance — Changing the system of fees chargeable — Chances in the legal profession — Conclusion

In an address which Sir Alladi Krishnaswami Aiyar, until recently Advocate-General in Madras, delivered, he is reported to have said: 'The days when lawyers could content themselves with working at their own cases and earning money are over, and the lawyer of today should—if he would take his place in society and not become a back number, enlarge his mental outlook and realize his duties to society—equip himself for the purpose and make his contribution to the social and economic welfare of society.' He observed that there is a tendency among lawyers to live in some distant past and to think, not in terms of the present or of the future, but in terms of a bygone age. Further, what the lawyer at the present moment has to realize is that he is a citizen and that he owes a heavy duty to the society in which he lives in order to help it march on progressive lines.

The Honble Sir S. Varadachariar referred to the same tendencies when he spoke of the gradual shifting of the centre of forces from judicial chambers to the legislative arena. At the present moment, the condition of the country and the condition of the Bar alike justify a reiteration of the important function of the legal profession.

I referred earlier in these talks to the far-reaching influence which the great profession of law has been exercising on the welfare of the country. I shall have done nothing if I have not impressed upon you how 'without a free and honourable race of advocates, the world will hear little of the message of justice', and how essential a strong, upright and independent

Bar is to the welfare of the nation. My efforts will have been equally in vain if I have not made you alive to the great obligation that lies upon the lawyer to play his part in shaping the life of the community and the country.

It is the duty of the lawyer to endeavour to make the laws under which he lives as perfect as possible, and to suggest and bring about changes in them. It is his duty also to take an interest in public affairs, to discuss important issues, and to exert his influence on behalf of purity in politics and a wise, just and economical administration of law. His very vocation opens to him opportunities for doing his country political service.

It should not be forgotten, however, that the undertaking of this responsibility may expose him to criticism, make enemies for him, alienate friends and, above all, cause him to lose clients and with them his profits; while, by abstaining from politics and public life, he may have more time to devote to his profession, more time to meet and consult clients and more time to discharge his professional duties. But it redounds to their credit that members of the Bar have always faced this situation with courage, unselfishness and sacrifice, and borne their part in bringing about social amelioration and advancement in the country.

You who are just on the threshold of your careers at the Bar may be puzzled to know what you should do. Should you take an active part in public life or should you confine yourselves to the practice of your profession? Here, indeed, is a conflict which has to be reconciled, if possible. On the one side, if you wish to rise to professional eminence, if you wish to be successful and make money and a name, is it wise to take an active part in public and political life so soon? Is it wise to devote more time and attention to these matters than your ordinary duties as citizens demand? To put the question more bluntly, if a lawyer wishes to rise to eminence at the Bar, should he not devote himself exclusively to the profession? Is not the law 'a jealous mistress'? The problem is by no means easy of solution. For one thing, it stands to reason that the lawyer who gives all his time to his profession must, in the long run, outstrip his competitor who divides his time between law and politics. There have been men at the Bar, in our

own experience and knowledge, who zealously stuck to law and therefore rose to positions of eminence. On the other side, there have been others whose eminence in the legal sphere cannot be accounted for solely by their exclusive devotion to the profession, but who were largely aided by their place in politics and public life. There is also a third category of persons, who have been criticized as not having attained to their due position in the legal profession by reason of their dabbling in politics and public life.

In coming to a conclusion on this matter, or arriving at a workable solution in relation to it, the conditions of the country and the Bar alike at the present moment have a bearing on the subject. It is not a matter for mere theoretical or *a priori* reasoning, or one to be decided by the experience of the past and the precedents that it furnishes. Whatever may have been the legitimate solution offered a decade or more ago, circumstances at the present moment relieve us of the difficulty of balancing on the scales two different aspects of the problem, each of which is difficult of accurate measurement. Sir Alladi, I am glad to say, has publicly expressed the necessity for recognizing the needs of the present, when we can no longer 'recline in the drowsy groves of Academe', continuing to regard our attitude in the past as immutable. 'To be vain of the past is to be weak in the present. The transformation that is wrought in the social and political life of a people by changes in material conditions is one of the prime facts of universal history.' Is it different for the legal profession?

I will here quote the very relevant observations of a writer in the *Cornell Law Quarterly*, Vol. XXIII: 'The legal profession itself must change with the times. No longer can any lawyer believe he exists [merely] to serve his client. He cannot represent a special interest to the exclusion of other considerations; indeed, in doing so, he misrepresents both himself and his client. If his client cannot see the interest involved, because he is himself a party to the cause, his lawyer must see the larger issues for him. It is no accident that the great legal reputations of our generation rest, not on the work done by lawyers for hire, but on their public or their unpaid extra-professional activities. For law is not a matter of going

through judicial processes, of shifting losses, of collecting judgements, or of drawing a set of satisfactory papers. These are means only. Behind the court, behind the Judge, beyond the corporate mortgage and the file of documents, there are endless human beings desiring to live, to work, to realize themselves. Only as our procedures, our papers, our legislation and our administration permit an even greater number of people to satisfy their lives is our technique useful. It is for this, and only for this, that our profession exists.' To the same effect, spoke Choate: 'I was brought up to believe that work was the end and aim of life, that that was what we were placed here for. But on contemplating your best examples, I have learnt that work is only a means to a higher end, to a more rational life, to the development of our best traits and powers for the benefit of those around us, and for getting and giving as much happiness as the lot of humanity permits.'

I referred to the change of circumstances as calling for an examination of the situation from a new angle. The first and most essential consideration is that the legal profession has, of late, lost much ground. Members of a noble and honourable profession as we are, eminent and indispensable as our services to society and the country have been, we cannot shut our eyes to the fact that we have been losing rank steadily. It is needless here to canvass the reasons that have led to it. To say that in a measure, and in a measure only, the fault 'lies in ourselves that we are underlings' may be correct. But it is necessary to affirm that it is not due to any falling off on our part from our high traditions; it is not that the ideals and standards that the profession has always had have been lowered; it is not that members of the Bar have become exclusive and do not offer themselves for public service.

The next consideration is that the practice of the profession is not so profitable as it was some years ago. For one thing litigation has been made costly. The increase of court-fees has definitely affected the capacity of the client to pay fees as he used to do. For another, the economic depression has had its repercussion upon the legal profession. Thirdly, the crowding of the Bar and the spreading out of the income must have an influence on individual incomes.

Then there are reasons which demand of lawyers, more

than ever before, their intense devotion to their professional work. The competition is keener now than it has ever been. Moreover, clients do not now generally remain as steadfast and loyal as was once the case. In the urgent stress of business and the spirited competition of the times, clients will not wait. If they call once and the lawyer is absent from his desk, they have no compunction at all about going to another. Their business interests demand it and we have therefore no right to raise a quarrel about it.

Then the arena of the lawyer's activities has in recent years been considerably enlarged. New judicial, quasi-judicial and administrative jurisdictions are necessarily created in a growing constitution and as the result of an advancing civilization, opening out new avenues of work for the lawyer.

Again, there is the advancement of the political consciousness of the nation and the increasing part that the people have to play in the administration of the country.

Formerly a lawyer attained eminence at the Bar, secured a comfortable estate, and then jumped over the fence into politics and took a parallel place in public life. But the same is not possible in the conditions that now exist, owing largely to the democratization of the country and the sacrifices that it involves. A place in public life also requires to be striven after and a high place can only be secured by long service.

Then again the busiest lawyer of the future will have more time at his disposal than ever before. I do not think that all his time can be required for the profession. He will have more leisure than his predecessors.

Further still, the mental outlook of the profession has, for economic reasons, changed; lawyers are asking why they should not have a second string to their bows, why they should not add to their incomes by a supplementary avocation which does not detract from the dignity of the profession.

Last, but by no means the least, the lawyer must be persuaded to have other interests in life, so essential for the expansion of his mental and moral outlook. 'Law marches into the grand arena of human rights and liberties, and deals with large questions, in the handling of which it is often of more consequence that a pleader should be a complete man than an expert lawyer.'

These vital and somewhat inconsistent aspects of the profession deserve to be considered, but on the whole I desire to place before you my deliberate opinion that the lawyer should no longer confine himself to the cloistered seclusion of the law. The lawyer who says that he takes no interest in politics and public life and devotes himself wholly to his profession should at this day, I am afraid, be said to be but half a lawyer. To travel outside the confines of his work is a need for him, and public life and its many activities are waiting to absorb his services. I should advise you, therefore, to enlarge your horizon and widen the scope of your activities, to take your part in public life, each according to his temperament and inclination and capacity. You can well make contribution of your time and effort to multitudinous public enterprises, to civic, State or national causes and programmes.

I must, however, sound a note of caution to the young advocate who enters politics or some other walk of public life in the hope that his professional prospects may be advanced thereby. His name may become known and he may get some sort of advertisement; but he will be advertised not as a lawyer but as a politician. He must therefore decide to take upon himself the duties of public life disinterestedly, in a spirit of service and in the spirit of the teachings of the *Gita*, to work with no desire to profit therefrom.

To quote a learned writer: 'Mobilization of the resources of the Bar to demonstrate the efficacy and efficiency of the democratic process is the order of the day. The great human resources of the Bar are needed by State and nation in the public service. The resourcefulness of the legal profession can serve a high purpose in finding practical ways and means for consummating the hopes and desires of a free people.'

Elsewhere I have indicated how the duty of the lawyer to the State requires that he should be responsible for the progress and adequacy of the law. As Lord Macmillan said: 'Politics are concerned with the regulation of the contact of human beings with each other.' That regulation involves that 'a certain amount of social legislation is essential to the preservation of the liberty of the individual'—legislation which in effect promotes rather than diminishes freedom. Law thus acts

as the vehicle of politics, in that the politician gives expression and effect to his policy by new developments of legislative activity—at least in a country which claims to possess a representative Government. The defect, however, of all social politics and consequent legislation is their tendency to run to extremes, endangering liberties. Here it is that law has again to step in. Though law is the means of enforcing policy, it ought also to be the master of the policy, as guardian and vindicator of the two most precious things in the world, justice and liberty. And it is by the standards of justice and liberty which they set up that all Governments must ultimately be judged and must ultimately stand or fall. This argument, taken from Lord Macmillan's address on *Law and Politics*, should make obvious the duty of the lawyer, who in the words of Lord Maugham is 'the custodian of civilization', to take his part in the political and public life of his country. We have a dual purpose to serve; to save the Government by holding it within bounds; and to protect the people by the maintenance of proper standards of justice and liberty.

In presenting this conclusion, namely that the lawyer should take part in some form of public life, I am not unmindful of the other side of the picture that I have portrayed. Confining attention to what is practicable, two considerations are relevant in giving effect to the proposal. One of them is that the authorities controlling the legal profession should regard it with a broadened outlook. The other is that members of the Bar should more and more endeavour and seek to realize in their professional life, in a real and practical sense, their comradeship, which underlies the metaphor of 'the learned brotherhood of the Bar'.

It seems to me that, in bringing about the realization of these ideals, Bar Councils, as the guardians and protectors of the legal profession, have an important part to play. In the first place, they must investigate the matter and make efforts to widen the sphere of the lawyer's activities and secure for him greater scope for discharging his functions as an advocate. There are many judicial, quasi-judicial and administrative jurisdictions in which officers of Government, under statutory or administrative authority, adjudge upon the rights of individuals in various ways. My learned friend

Mr K. Chandrasekharan's illuminating lectures on *Administrative Law in Madras* indicate a number of such jurisdictions, in the exercise of which the party concerned ought to have, but at present is not allowed to have, the benefit of counsel presenting his case.

This question has two aspects and the legal profession is rightly concerned with both. One is the right of the party concerned to have his case presented in an orderly manner and in the best light possible. *Audi alteram partem* is a rule not to be suffered in form only, but to be put into practice in a manner that will afford the fullest opportunity to the party to present his case to the best effect. The rule should give the right of being represented by counsel in all cases.

The second aspect is that of the legal profession, whose members are now denied the privilege of standing for justice. It is forgotten that the legal profession is a co-operator in public administration as well, and bears on its shoulders the onerous duty of seeing that the proper standards of justice are maintained. It is incidental that the legal profession may be helped in the result, and that is no ground for misinterpreting any agitation in this direction. In his valuable book on *Justice and Administrative Law* Professor Robson says: 'What is now badly wanted in our [the English] governmental system is a co-operative effort between the legal mind and the administrative mind; the administrator pushing the law into uncharted provinces where new standards are required, the lawyer insisting that those standards shall be formulated in terms which are capable of judicial application. For this reason, among others, I think that lawyers should not be barred from appearing before any Administrative Tribunal whatsoever.'

The recent case of *Rajagopala Iyengar* v. *The Collector of Salt Revenue*, (1937) *M.W.N.* 821, forcibly illustrates the urgent necessity for action. It is needless to examine or to solve many a legal conundrum raised to defeat the just rights of the citizen and of the lawyer. The point raised in the case cited may be right or wrong or it may be a Gordian knot. But if it be one, it must be cut, and appropriate legislative and administrative remedies found without delay. I am sure that no one who is concerned with the meting out of justice would, as a matter of policy, refuse the legitimate assistance of a

co-operator and counsellor. Nor would he be anxious to pronounce a verdict against an innocent party by tripping him up, as it were, on any unguarded and ill-considered statements which he may have made merely in the fond hope of saving himself, without even a proper foundation therefor. The matter deserves to be investigated closely in all its bearings by the Bar Councils.

I also appeal to Bar Councils to enlarge the scope of the earning activities of the lawyer and to permit him to take up other remunerative employments that will not derogate from the dignity of the profession. It is not for me here on this occasion to explain more fully the reasons for my conclusion. I may, however, avail myself of this opportunity to sound a note of warning; for I apprehend that, if the authorities do not take the matter in hand and act generously and liberally, the necessities of the situation may embolden people to overstep reasonable bounds, and thus lower the general morale of the profession—a position to be seriously deprecated. It seems to me to be far better to keep the profession under control, guide its members and direct them into appropriate channels.

I find that in 1899 the High Court issued a notification that a vakil carrying on trade or business without the leave of the court should be liable to suspension or dismissal. Thereupon the editors of the *Madras Law Journal* observed that an appeal from the High Court to the body of the profession would have been quite enough to secure their concurrence, without the necessity of issuing a notification. In the same volume we find that Mr Justice O'Farrell ruled that if a pleader was a director of a fund he would be deemed to be carrying on business, and the *Madras Law Journal* animadverted on the hardship and inconvenience of this rule. Its editors then were Messrs. V. Krishnaswami Aiyar and P. R. Sundara Aiyar who later became Judges of the High Court, and P. S. Sivaswami Aiyar who was later Advocate-General.

Again, as early as 1912, in *Munireddi* v. *K. Venkata Rao*, 23 *Madras Law Journal* 447, Sankaran Nair J. observed: 'A pleader by engaging in a trade cannot be said to act unprofessionally. The notion that no trade, however honestly carried on, is worthy of a vakil is a relic of the times that have passed away and its introduction in India should be a matter

for regret.' He added that such a prohibition 'is not required by the condition of the legal profession or the circumstances of the country' and suggested that each individual case should be dealt with by the High Court on application. In the same case the late K. Srinivasa Iyengar (later Advocate-General and a Judge of the High Court), representing the Madras High Court Vakils' Association, stated in his arguments that 'a prohibition of trade or business in general will exclude many an unobjectionable profession'.

Even now, lawyers are directors of companies, which brings them remuneration. They are also permitted to continue joint-family businesses without objection. A knowledge of law, legal rights and legal procedure is becoming increasingly necessary for the successful conduct of business and if the country is to develop the lawyer should take an increasingly important part in the superintendence of business administration. To extend the liberty a little further would, I think, do no harm. The Madras Bar Council, have properly resolved 'that an advocate may undertake part-time work as long as the work does not conflict with his duties and is not derogatory to his status and that every case of an advocate entering into any particular business be considered on its own merits'. The result, however, will depend upon the spirit in which the rule is worked. It need not be feared that there will be a rush before the Bar Council for such permission. Members of the Bar, brought up in the atmosphere in which they have been, will, I am sure, fully realize their position, status and responsibilities and will neither add so many other avocations as to affect their efficiency or resort to such businesses as might endanger their dignity. It is proper that relief should be given to the few that need it.

The Allahabad Bar Council have a rule to the effect that no advocate while practising shall engage in a trade or business or accept an appointment carrying a salary without previously obtaining the permission of the Bar Council and the High Court, provided that an advocate may supplement his income by engaging himself as (*a*) a part-time teacher, (*b*) a private tutor, (*c*) a sleeping partner in a Hindu joint-family concern, (*d*) a part-time legal adviser to an estate or corporation, (*e*) a part-time journalist to any printer, after

obtaining permission of the High Court through the Bar Council.

The Bombay Bar Council hold that an advocate may undertake part-time work so long as its practice does not conflict with his duties and is not derogatory to his status as an advocate. They prefer that no specific rule prohibiting advocates from (*a*) engaging in any trade or business, (*b*) becoming directors or part-time secretaries to limited companies, or (*c*) accepting any part-time service be framed, and that every case of an advocate entering into any particular business be considered on its own merits.

The Patna Bar Council are strongly of opinion that no rule should be framed to restrict an advocate from taking up any supplementary occupation. At the same time it is the considered opinion of that council that an advocate should not take up any occupation which is derogatory to his status as an advocate.

Another point which I particularly wish to advocate, taking into account the general decrease in the lawyer's earnings, is that you should constitute yourselves into partnerships. I find that, in his lectures to apprentices delivered in 1918, Sir P. S. Sivaswami Aiyar said that the soil of Madras was very uncongenial to the formation of partnerships among vakils. But much water has flowed under the bridge since then and the conditions of litigation have changed a great deal both in Madras and in the mofussil. Tales of the absence of continued agreement and amicable relations between lawyer-partners need not discourage you, for we see many lawyer-partnerships today working with success and with cordial relations existing between the partners. A partnership has much to be said in its favour. Any day two heads are better than one: The client has the benefit of two for the fee that he pays for one. The influence that each may command serves to the benefit of both. Each can relieve the other in his work and this gives each partner more time for public work without trespassing on what is due to professional work. At the same time, it enables both to accept a variety of engagements which individually they could not undertake. Those of you who have higher ambitions need not labour under the impression that a partnership curtails the possibility of individual advance-

ment and preferment. The career of that distinguished Judge, Sir M. Venkatasubba Rao, and his elevation to the Bench when he was carrying on his profession in partnership, should allay your doubts in that direction. Both Choate and Burr were members of partnerships.

But I must here emphasize a point of distinction. We must remember that in England there can be no partnerships amongst barristers, though the opposite is almost the rule amongst solicitors. Advocates in this country perform the dual functions of barristers and solicitors; but that is no reason to found partnerships amongst advocates upon principles that govern partnerships amongst solicitors. These latter are commercial partnerships with the attendant paraphernalia of goodwill, right to dissolution and accounts, etc. Partnerships amongst advocates should be cast in a new and different mould altogether, so as to emphasize the character of strict professional partnerships as distinct from trade or commercial partnerships. Partnerships amongst advocates should be non-commercial, free and on terms of equality, though there may be inequality of interest in the earnings.

In the expressive language of the Honble Sir Lionel Leach, Chief Justice of Madras, there is no suggestion that legal partnerships should be put on a commercial basis so that it would be possible for an advocate to claim a share in the practice of a firm. He says: 'The partnership which I have in view is a partnership where an advocate puts nothing in when he joins it and takes nothing out when he leaves it'; and adds: 'Such a partnership must necessarily be autocratic in its character. The senior partner must be in a position to choose his associates and his word must be law within the partnership. A partnership on this basis may not be feasible outside the legal profession, but within a profession which exists for the regulation of rights between man and man there should be the mentality to make it a success.'

We have under the Indian law a new legal idea in the admission of minors to the benefits of partnerships. Partnerships amongst advocates should be formulated on a like conception and it would be proper for Bar Councils to give a definite shape to this idea by framing a set of rules to this end. The self-respect of the individual junior would be

enhanced and thereby that of the profession as a whole. This is certainly preferable to the system that sometimes obtains, of making to juniors periodical payments, in the nature of salaries, which may symbolize servitude.

Another need, calling for immediate action, is the planning and promoting of lawyers' organizations, to award benefits to a member who sacrifices his career at the Bar for public service, to provide for the destitute and their families, and such other purposes. There is in England 'The Barristers' Benevolent Association', founded in 1873, 'to afford assistance in necessitous and deserving cases to members of the English Bar, special pleaders and conveyancers, who are and have been in practice in England, their wives, widows and children'. Amongst the trustees and members of the committee are the names of Honourable Judges, and Attorney-Generals and Solicitor-Generals, past and present, are *ex officio* members of the committee. The constitution and scope of such an Association may have to be altered to suit the conditions and needs of the Bar in this country.

A third need is for the exploration and utilization of schemes like communal or group insurance, in which groups of lawyers in any locality can co-operate for the benefit of the whole group. But this is not the occasion to canvass these ideas in detail. Advocates' Associations may well take up these and allied matters.

It is also a matter worthy of investigation by Bar Councils, whether, without unduly increasing the cost of the unsuccessful litigant and without bringing the system of dual agency into force, a system of charging fees may not be introduced which will lead to a natural distribution of work and fees between a senior and a junior in respect of every important case. Any system that tends to provide more work and more fees for the junior should be welcome; but, at the same time, the obligation of the junior to avail himself of the assistance of a senior, at the proper stages, in cases in which such assistance is required, ought not to be forgotten. It is no doubt true that present-day Judges do not adopt the severe Socratic method inaugurated by the late Sir T. Muthusami Aiyar, and followed by other eminent Judges, of interrogating a practitioner very closely and so plying him with questions

that either he convinced the Judge or the Judge convinced him that one or other was wrong, a method that gave no chance to ill-equipped and ill-prepared practitioners. But this present mildness of Judges is no reason against youth calling to its aid the wisdom of age. After all, the young members of the Bar, however competent, cannot ignore the facilities and advantages which experience at the Bar gives to the senior practitioner. The difference in their performances may not be obvious; but the difference is nevertheless real and sometimes decisive. Reticence is as valuable as eloquence, and experience alone can give the correct guidance as to what to say and what not to say.

Success in the law is slow and uncertain. Notwithstanding the general decline in the value of its rewards, law still has its prizes which are at all times covetable. There is always room at the top. The prizes that await the successful are magnificent and the promise of reward is held out without fear or favour to such as possess industry, ability and character. I trust therefore that it will continue to attract the best intellects, as it has ever done. Make your profession your pleasure. Remember the words of Tranio, in *The Taming of the Shrew,* that 'no profit grows where is no pleasure ta'en'. Do not grow disaffected because at first you have to do a lot of waiting or because the work you get is tedious and dry. Take courage, bearing in mind the lines of Scott,

> In man's most dark extremity
> Oft succour dawns from Heaven.

It was Lord Bowen who said: 'A man may be a fool to choose a profession; but he must be an idiot to give it up.' 'He who abandons any profession', says Archer, 'will scarcely find another to suit him. The defect is in himself.'

Forsyth quotes the following passages from Tacitus and Cicero, which ought to be encouraging. Tacitus says: 'What can be more safe than to practise that profession, whereby being always armed, you will be able to afford protection to your friends, assistance to strangers, and safety to those who are in peril; and, on the other hand, spread terror and alarm amongst your enemies and the malevolent, while you yourself are meanwhile secure, and invested, as it were, with the

panoply of power?' And Cicero: 'What is so king-like, so generous, so munificent, as to bestow help on those that supplicate our aid? to raise the oppressed and save our fellow citizens from peril and preserve them to the State?'

Let me hearten you by recalling that it used to be said of the late V. Krishnaswami Aiyar, who later dominated the legal and public life of Madras, that he had decided, in despair, to quit Madras for good, when the appointment of a brother lawyer as a District Munsiff brought him some work in which he distinguished himself. Always be prepared and persevere in your work with a full sense of its responsibilities; you are sure to become a successful lawyer and a useful citizen. To quote an eminent Canadian lawyer: 'Success in building up a practice of law has never failed to those who possess the characteristics of integrity, energy, promptness and perseverance. Ability and genius are potent factors, but greater than these, or naught without them, are those which have been referred to above. Their careful observance will be followed by success as surely as day follows night.'

I will conclude with an extract from Lord Macmillan's speech on 'Law and History': 'We call ourselves a learned profession. Let me remind you that we are also a liberal profession. The difference between a trade and a profession is that the trader frankly carries on his business primarily for the sake of pecuniary profit, while the members of a profession profess an art, their skill in which they no doubt place at the public service for remuneration, adequate or inadequate, but which is truly an end in itself. The professional man finds his highest reward in his sense of his mastery of his subject, in the absorbing interest of the pursuit of knowledge for its own sake, and in the contribution which, by reason of his attainments, he can make to the promotion of the general welfare. It is only by the liberality of our learning that we can hope to merit the place in public estimation which we claim, and to render to the public the services which they are entitled to expect from us.'

May God speed you and bring you all success with honour!

APPENDIX I

THE JUDGE

Identity of vocation between Bench and Bar — Assumption of distinction between them, untrue — Conduct of Bench towards Bar, a relevant topic — Counsel's duties arise largely out of his relation to court — Counsel's right to have expectations of Judge — Duty of Judge to regard privileges of Bar — Exclusiveness of Judges, undesirable — Interruptions from the Bench — An instance of the Socratic method — Questionable propriety of this method — Court made a debating forum — Junior counsel handicapped — Mid-course between undue interruption and absolute silence — Counsel prefer interruption to immobility — A taciturn Judge — Methods of cutting arguments short — Should Judge previously study papers? — Opinion in favour of a not too careful or minute study — Duties of patience, courtesy and kindliness

It is often ignored that members of the judiciary are equally members of the legal profession. Where Judges are chosen wholly from the practising Bar, this identity of their vocations cannot easily be lost sight of. The Judge and the practitioner discharge complementary functions in building up the edifice of Justice; their division of duties is merely to secure economy of labour and efficiency of result.

Different causes may lead to this untrue assumption of a distinction between the vocations of Judge and practitioner, as if they were alien to each other. The constitution of the judiciary may be one cause for this, and the continued exclusiveness of members of both sides of the profession may also have its influence. But whatever the causes of this misunderstanding, the unity of purpose of the Bench and the Bar deserves to be recognized, encouraged and cherished. A Judge, on his appointment, does not cease to be a member of the legal profession; and, we may add, that any one not already a member of the profession who is made a Judge, becomes *ipso facto* adopted into it. The efficient administration of justice calls for a full recognition of this identity of vocation.

A discourse on professional conduct pertaining to the legal profession ought, therefore, to embrace within its scope a discussion of the conduct of the Bench in relation to the Bar. The topic may not be strictly relevant in an address advising apprentices-at-law as to how they should equip themselves for practice at the Bar; yet the subject as a whole would be incomplete without it. This is my justification for adding

this essay as an appendix to the course of lectures published in this volume.

Elsewhere I have endeavoured to enunciate the duties that counsel owes to the court and to the presiding Judge. In truth, many of the obligations which a practitioner owes to his client, or to a brother-practitioner, or to the community of the profession, or to the public, arise, in a general way, out of the duties that he owes to the tribunal. For a practitioner, *qua* practitioner, has no existence apart from his relation to the court of which he is an officer, adviser and helper.

This necessary interrelation between the practitioner and the Judge involves a reciprocal obligation and it may therefore be permissible for a practitioner to canvass the expectations that he has of the court and the Judge to whom he owes so much. He is entitled to consider what kind of conduct from the Judge and what measure and sort of co-operation from the court will enable him, from his point of view, to discharge best his own duties.

On many matters it may not be possible to state positively and categorically what a Judge should be or should do; but it is possible to enunciate what the advocate would not wish the Judge to be or to do in the interests of the Bar, and in the best interests of the administration of justice in which both are engaged.

I have referred to the primary duty of counsel not to be uncivil, rude or disrespectful in any form or manner towards the Judge. It is not too much to say that this duty of counsel calls for a reciprocal duty on the part of the court not to disregard the privileges of the Bar. While Judges ought to be insistent upon the dignity of their office and upon a deferential courtesy in speech and manner, and should properly enforce it, they should not expect from the Bar conduct tantamount to servility; neither should they themselves be haughty and overbearing in manner, nor impatient and inconsiderate in their conduct, nor rude and unapproachable in their relations with the Bar.

As Justice McCardie said, it is the sense of independence of the Bar that deepens and confirms the instinct for fearless decision in the Judge. So, even where a practitioner's conduct calls for chastisement from the court, it is consistent with its

own dignity to make the admonition in a dignified manner. Lord Bacon has said: 'There is due to the public a civil reprehension of advocate where there appeareth cunning counsel, slight information, indiscreet pressing, or an overbold offence.' Thus, duty to the Bar, duty to himself and duty to the public, all alike demand civil conduct on the part of the presiding Judge.

Some judicial officers, particularly in the mofussil, suffer from an obsession that easy relations with members of the Bar are liable to be misunderstood and that they even derogate from their own dignity. The consequence is that they shut themselves up in seclusion, and are the worse for it from every point of view. I believe they suffer mentally, morally and physically, and lose intellectual vigour, moral equipoise and physical stamina. They will not move on easy terms with a member of the Bar who practises in their court; they generally avoid all kinds of social contact, and where they attend any formal function they cannot shed the consciousness of their judicial office but feel offended if the same form or manner of courtesy that they are accustomed to in court is not shown to them at social gatherings as well. This enforced exclusiveness on the part of Judges, I should say, has a baneful effect even on the administration of justice. No Judge need suppose that practitioners are as a class dangerous to move with, or are so far inferior to him in status that he should keep at a distance from them. Learned Judges of the Madras High Court have shown by their example how Judges of the highest court can move on equal terms with members of the Bar outside the court and yet maintain the dignity of their office, and can enforce discipline inside the court, even in relation to persons accustomed to move on the most familiar and intimate terms with them. Free and easy behaviour with practitioners generally is bound to elevate Judges, make their work in court easier, and improve the tone of their administration. Nor need any Judge of an inferior court believe that Judges of the superior court look on such conduct with disfavour or lend ear to hasty and ill-considered accusations which ignorant persons may make. No Judge, not even the best, can properly or fully discharge his functions without the willing and genial co-operation of the Bar, which is called

forth by equal social behaviour. While the power and authority behind the Judge deserve the highest respect they should not be brought forward at every stage to overawe the Bar. Love wins more than fear ever does.

It is an everyday experience that Judges look with disfavour upon interruptions from the Bar. They dislike a member of the Bar interrupting the argument of opposing counsel and call him to order where the interruption is not warranted. To interrupt the Judge when he is speaking is properly considered intolerable, and I have known Judges who have sternly refused to complete what they intended to say. It is not the duty of Judges to speak and, when they speak at all, they speak to help counsel in argument, to clear up a difficulty or to elucidate a complex situation. But should the attitude of the Bar towards interruption from the Bench be likewise one of intolerance?

Interruptions from the Bench may be of various types. Questioning with a view to elucidate or to advance the argument of a position ought to be welcomed by everybody. No one, except the person to whom an interruption of any kind means that the line of his argument is cut off, can resent such voluntary assistance from the presiding Judge who, after all, is the person to be convinced by the argument.

But there are other Judges who adopt the Socratic method, ply the practitioner with questions and allow themselves to be counter-questioned till either the practitioner confesses defeat or they feel convinced that the position adopted by the advocate is sound. This kind of catechism can only happen in cases where the Judge has prepared the brief at home as fully as the practitioner himself. Let me illustrate with an experience in which I was personally concerned.

It was a second appeal in which I appeared for the appellant, and, as counsel on the opposite side was engaged elsewhere when the case was called, a request was made to the court to pass over the case for a while. Thereupon the Judge remarked: 'Is the respondent anxious to be heard in this case? Mr Krishnaswami, let us hear you.' I then respectfully submitted that, in order to be fair to my learned friend on the opposite side, it would be better if my arguments were heard after he had arrived, for, I said, I believed I would be able to

show that there was very much more in my case than perhaps His Lordship *prima facie* thought there was. The learned Judge then adjourned the hearing until the petitioner's counsel arrived on the scene. What happened when the case was taken up? It was a tussle, a quarrel, you might call it a fight, between the Judge and myself, each questioning the other, each exposing the untenable consequences of the position taken by the other. This went on for more than two hours, and the judgement which was then pronounced, without calling upon the respondent, was to this effect: 'For reasons orally stated by me during the discussions at the Bar, the second appeal is dismissed with costs.' On my part, there was nothing to be dissatisfied with. It was an intellectual treat. But was I the only person to be satisfied?

There may well be differences of opinion on the usefulness of such a method. Its propriety may not be generally accepted. For one thing, it converts the court-house into a debating forum. It leaves little room for cool and collected thinking. On the whole—though with competent Judges justice may not fail in many cases—there may remain that residuum of doubt that justice has not been reached. In any event, the client will not have the satisfaction of knowing that his cause has been heard fully and satisfactorily. Even when his arguments are calmly and patiently heard, how often does not the practitioner indulge in introspection, wondering whether he has said everything that can be said, discovering to his dismay that he has omitted a possible aspect, and then seeking to find laboured satisfaction in the thought that if he had put forward that position the opposite side would have met it with such other answer, and that the result would not have been different. Which practitioner has not, at one time or another, passed through mental agony of this kind?

Secondly, this catechismal method is a definite handicap to the junior practitioner, however able, who is not accustomed to presenting all his arguments in this form, whereas he would find himself greatly helped by limited questioning from the Bench. Interruption or questioning within limits should always be welcome, because they indicate the trend of thought of the Judge and the points to which it is of special importance that the practitioner should direct his argument. A

Master of the Rolls, who afterwards became the Lord Chief Justice of England, said: 'The task of the Judge is difficult in observing the mid-course between the cross-examining spirit which incessantly interrupts counsel and the absolute silence which refrains from asking a question which might serve to elucidate a difficulty.' An interruption that assists an argument has to be distinguished from one that destroys it.

Would the Bar prefer a Judge to sit absolutely silent and not to indicate any kind of reaction to the arguments proceeding before him? I think that the unanimous opinion of the Bar, excepting the very few who mechanically recite arguments got up by rote, would be against him. They prefer to be lightly interrupted and in any event to be given some indication of the Judge's attitude. Nothing is more difficult than to argue a case before a court 'whose taciturnity or stolidity makes it impossible for counsel to know whether his argument is appreciated or even understood—whether the court is entirely with him or wholly against him'. Even if the only alternatives were either absolute silence and immobility or frequent and even troublesome interruption, I think that most counsel would choose the latter.

I well remember a late learned Judge of the Madras High Court who was of the former type. He would look everywhere except at the arguing practitioner, while he made researches of his own and drew conclusions by his own method. For ought you could say, he might have been looking at page 50 when you were referring to page 5; and the only words that he would utter during arguments, and those in a gruff tone and unsympathetic manner, were 'Have you finished?' The consequence was that the arguing counsel would start to trot out his points again, in the belief that he had produced no favourable impression. On the appellant resuming his seat, the respondent would be called, and he, in his turn, would pile up arguments in a frenzy, in the suspicion that the Judge was in favour of the appellant. This method may have taught counsel to collect all his arguments together and address them to the Bench without omission; but no counsel likes to be placed in that situation.

Astute Judges legitimately adopt various decorous methods of cutting short unduly long arguments. I remember a learned

Chief Justice of Madras who, being satisfied that appellant's counsel was merely spinning arguments, would indicate that he wished to call on the respondent. This never failed to have the immediate effect of limiting the appellant's further arguments. Having called the respondent's counsel the learned Judge would stop him after a few minutes and thus effectively stifle any attempts of appellant's counsel to start afresh in reply, with the remark that as the respondent had not been called on those points, the appellant had no right to reply in the form that he did.

Then there is the question whether Judges should study the papers at home before they hear counsel. No one can object to a Judge acquainting himself sufficiently with the facts of the litigation to follow the arguments with interest and easy appreciation, just as he can lawfully make a personal local inspection in order to understand the facts and evidence of a case in their proper bearing. The evil lies in the tendency, which may develop into a habit, of forming conclusions in some rough form before hearing counsel. There are Judges who study the papers in detail and with care, and then confront counsel with material of which even the other side may not realize the force. And a Judge's point has always a hundred per cent value. The better opinion seems to be that this kind of preparation of a case by a Judge does not lead to the sound administration of justice. Where the court that hears the case is composed of a Bench of two or more Judges, no useful purpose is gained by a discussion over the head of another Judge, who may not only be not interested but perhaps annoyed at it when his opinion has equally to govern the ultimate decision. No Judge need aspire to prove that he is abler than counsel appearing in the case. Judges are, after all, human, and when unintentionally scope is afforded for the ego to assert itself it is not easy afterwards to control it. It is also excusable that Judges should entertain an exaggerated idea of the importance attaching to their position and of the value of their opinions. The ideal has been stated in the following form, that the most eminent characteristics of a Judge are the realization, first, of 'the duty of patience' and, second, of 'the high obligation of courtesy and kindliness'. Among the rules that Lord Justice Fry set himself to follow was one which

may well be an inspiration to every Judge; and that was: 'I must remember to give a benignant and receptive listening to each side, and, when hearing young counsel, I must remember how great the pleasure a kind word from the Bench has been to me in former years.' Lord Bacon says: 'Patience and gravity of hearing is an essential part of justice and an over-speaking Judge is no well-tuned cymbal. It is no grace to a Judge first to find that which he might have heard in due time from the Bar, or to show quickness of conceit in cutting off evidence or counsel too short, or to prevent information by questions though pertinent. The parts of the Judge in hearing are four: to direct the evidence; to moderate length, repetition or impertinency of speech; to recapitulate, select and collate material points of that which hath been said; and to give the rule or sentence. Whatsoever is above these is too much, and proceedeth either of glory, of willingness to speak or of impatience to hear, or of shortness of memory, or of want of a staid and equal attention.' Bacon adds: 'It is generally better that the Judge should err on the side of indulgence in this matter than that he should endeavour to hold the reins too tightly.' After all, 'the administration of justice is necessarily but an approximation towards that ultimate and absolute justice which may come with the millennium but never before'.

APPENDIX II

A BRIEF ACCOUNT OF THE CASE OF *MYERS* v. *ELMAN*, [1940] A.C. 282

ON APPEAL FROM A DECISION OF THE COURT OF APPEAL REPORTED SUB NOM *MYERS* v. *ROTHFIELD*, [1939] 1 K.B. 109

Two charges were laid against a solicitor: one, that he delivered defences which he must have known or suspected to be false; and the other, that he prepared and permitted his client to make affidavits of documents which were inadequate and false. The original action in which the solicitor was alleged to have done these acts was one in which the plaintiff charged the defendants therein with conspiracy and fraud, and it ended in a verdict for the plaintiff for damages and costs almost as claimed. The plaintiff could recover nothing from the defendants in the action and he presented this application to the court, to order and direct the solicitors of the defendants to pay the costs adjudged against their respective clients, on the ground that the solicitors had been guilty of professional misconduct. Among the points that arose in the hearing of the application were the following: that while there were rules giving jurisdiction to the court to make orders between a solicitor and his client in proper cases, there was no jurisdiction under which a client could ask for an order against a solicitor appearing for the opposite party; also that the solicitor had left the conduct of the proceedings largely to his managing clerk who was a solicitor's clerk of ability and long experience.

The trial judge, Singleton J., held that the solicitor was not guilty of professional misconduct in filing defences which put in issue the charges of fraud against his clients. But finding that as a result of a deliberate policy adopted in the solicitor's office 'in the conduct of the defence and in relation to discovery', the solicitor 'increased the plaintiff's difficulties, added to the expense and obstructed the interests of justice', he held that the solicitor was guilty of 'professional misconduct as a solicitor and an officer of the court', and ordered him to pay a share of the costs of the original action and the entire costs of the application.

In the course of his judgement, His Lordship said that, as to the filing of the defences, reliance had been placed on behalf of the applicant on the fact that the solicitor 'continued to act in the action for these defendants notwithstanding that he was aware or put to his inquiry that these defendants were raising false issues therein'; but he desired to make it clear that he did not regard that, taken by itself, as sufficient evidence of misconduct. His Lordship observed that both solicitor and counsel were often put on inquiry as to the bona fides of the client but that nothing ought to be said which might prevent, or tend to prevent, either of them from doing his best for his client so long as the duty to the court was borne in mind. He added that the position had often been discussed in criminal cases and it was the same in civil cases: there was no reason why a solicitor should not act for a person even though he knew him to have been guilty of a crime, or of fraudulent conduct in civil proceedings.

Referring to the affidavit of documents, His Lordship observed that a solicitor was not performing his duty to the court if he left the question of the relevancy of documents to be decided by the client and refused to show an entry which he knew to be relevant, even though his client said it was not relevant; he added that letters written to the client pointing out what was necessary were not to be regarded seriously. His Lordship concluded by saying that the solicitor was an officer of the court, to which, as such, he owed a special duty, and that he was a helper in the administration of justice. He also owed a duty to his client but if he were asked or required by his client to do something which was inconsistent with his duty to the court, it was for him to point out that he could not do it, and, if necessary, to cease to act.

The Court of Appeal, Greer and Slesser L. JJ., MacKinnon L. J. dissenting, reversed the judgement on the following grounds. Assuming that the solicitor could be held liable for professional misconduct if he had done the act personally, he was not liable in this case 'inasmuch as he had appointed a fully qualified clerk to do such business, and the act had been done not by the solicitor himself but by the clerk'. They also added that 'even if the solicitor himself had prepared and delivered the defences, he would not by so doing have

been liable, since it was not professional misconduct in a solicitor to prepare and deliver on behalf of his client a defence which he might himself suspect contained misstatements or raised false issues and put the plaintiff to the proof of his case'.

Before the House of Lords, the appeal was heard by Viscount Maugham, Lord Atkin, Lord Russell of Killowen, Lord Wright and Lord Porter. All the noble and learned Law Lords, except Lord Russell, agreed in reversing the decision of the Court of Appeal and restoring that of Singleton J., and Lord Russell only differed on a question of fact—whether the evidence tendered established the charges. On the question of the existence of the jurisdiction and the other points of law, he agreed with Viscount Maugham.

Viscount Maugham first dealt with the scope and nature of the jurisdiction. He held that the jurisdiction of the court to order a solicitor to pay costs personally was very different from the jurisdiction to strike him off the rolls or suspend him. In the former case, the court was merely exercising its jurisdiction over an officer of the court and enforcing his duty to the court. He added that, in making the order to pay costs, the primary object of the court was not to punish the solicitor but to protect the client who had suffered, and to indemnify the party who had been injured, and that misconduct or default or negligence in the course of the proceedings was sufficient to justify such an order. He followed this up by saying that if the solicitor's negligence was sufficient to invoke the jurisdiction, he could not shelter himself behind a clerk, for whose actions within the scope of his authority he was liable. The noble and learned Lord then drew a distinction between pleadings which make false denials and which are not on oath, and untrue affidavits of documents, observing: 'However guilty they [clients] may be, an honourable solicitor is perfectly justified in acting for them and doing his very best in their interests, with, however, this important qualification; that he is not entitled to assist them in any way in dishonourable conduct in the course of the proceedings. The swearing of an untrue affidavit of documents is perhaps the most obvious example of conduct which his solicitor cannot knowingly permit. He must assist and advise his client as to the latter's

bounden duty in that matter; and if the client should persist in omitting relevant documents from his affidavit, it seems to me plain that the solicitor should decline to act for him any further. He cannot properly, still less can he consistently with his duty to the court, prepare and place a perjured affidavit upon the file.' He added: 'A further observation should be made here. Suppose that in such a case the client swears an affidavit of documents which discloses nothing relating to the frauds alleged in the statement of claim and suppose that the solicitor has previously given his client full and proper advice in the matter but has no good reason to suppose that the affidavit is untrue, it may be asked what else ought the most punctilious solicitor to do? My answer is nothing at that time. But suppose that, before the action comes on for trial, facts come to the knowledge of the solicitor which show clearly that the original affidavit by his client as defendant was untrue and that important documents were omitted from it, what then is the duty of the solicitor? I cannot doubt that his duty to the plaintiff, and to the court, is to inform his client that he, the solicitor, must inform the plaintiff's solicitor of the omitted documents, and if this course is not assented to he must cease to act for the client. He cannot honestly contemplate the plaintiff failing in the action owing to his client's false affidavit. That would, in effect, be to connive in a fraud and to defeat the ends of justice. A solicitor who has innocently put on the file an affidavit by his client which he has subsequently discovered to be certainly false owes it to the court to put the matter right at the earliest date if he continues to act as solicitor upon the record.' His Lordship concluded with the expression of his concurrence with the trial Judge that the solicitor was guilty of 'professional misconduct in not insisting on his client disclosing the relevant documents' and 'in preparing and putting on the file affidavits of documents which he knew to be very inadequate'.

Lord Atkin said that 'the words "professional misconduct" themselves are not necessarily confined to cases where the solicitor himself is personally guilty. After all, they only mean misconduct in the exercise of the profession: and they cover cases where a duty is owed by the solicitor to the court

and is not performed owing to the wrongdoing of the clerk to whom that duty has been entrusted.' The confusion in the Court of Appeal had arisen, he said, 'from the fact that charges of personal misconduct have been generally brought by a special procedure'. He added: 'It seems to be quite incorrect to suppose that the cases in which solicitors have been ordered to pay costs where there has been no personal complicity are cases in which the court is exercising a kind of summary jurisdiction in contract or tort by way of awarding damages for breach of warranty of authority. The court is not concerning itself with a breach of duty to the other litigant but with a breach of duty to itself.' He then put to himself the question 'What is the duty of the solicitor?' and answered it thus: 'He is at an early stage of the proceedings engaged in putting before the court on the oath of his client information which may afford evidence at the trial. Obviously he must explain to his client what is the meaning of relevance: and equally obviously he must not necessarily be satisfied by the statement of his client that he has no documents or no more than he chooses to disclose. If he has reasonable ground for supposing that there are others, he must investigate the matter; but he need not go beyond taking reasonable steps to ascertain the truth. He is not the ultimate judge, and if he reasonably decides to believe his client, criticism cannot be directed to him. But I may add that the duty is specially incumbent on the solicitor where there is a charge of fraud; for a wilful omission to perform his duty in such a case may well amount to conduct which is aiding and abetting a criminal in concealing his crime, and in preventing restitution.' He concludes his judgement with the observation: 'I have tried to bear in mind the difficulties into which an honest member of the profession is put when he has to defend a client charged with dishonesty or any other crime. He is not to arrogate to himself the ultimate decision which is to be the Judge's. He may be suspicious, but his suspicions may be misplaced. Every one has a right to have his defence put before the court. But in such cases it is specially incumbent upon solicitor and counsel alike to observe their obligations to the court. As Dr Johnson said, they are not to tell what they know to be a lie.'

Lord Wright, in his judgement, gives useful guidance as to the nature of the lawyer's duties in regard to the preparation of pleadings. He says: 'It is difficult and perhaps impossible to formulate any principle which would afford a general definition applicable to such cases. Singleton J. wisely said: "Nothing ought to be said which may prevent or tend to prevent solicitor or counsel from doing his best for his client so long as his duty to the court is borne in mind. A client is entitled to have legal aid in order to put the other side to proof of the case against him, and to test and probe that case and the evidence adduced. Thus the client is entitled to say that he denies the fraud or other matters charged and to have that defence placed on the record. He is entitled to have professional aid in regard to the maintenance of that defence before and at the trial to plead matters in mitigation and in regard to questions of damage."' He adds: 'I agree with the opinion of Singleton J. that it is not sufficient evidence of misconduct, taken by itself, that a solicitor continued to act in the action notwithstanding that he was aware or was put on inquiry that the defendants were or might be raising false issues in it.' On the question of the jurisdiction of the court, His Lordship said: 'Alongside the jurisdiction to strike off the roll or to suspend, there existed in the court the jurisdiction to punish a solicitor or attorney by ordering him to pay costs, sometimes the costs of his own client, sometimes those of the opposite party, sometimes, it may be, of both . . . The matter complained of need not be criminal. It need not involve peculation or dishonesty. A mere mistake or error of judgement is not generally sufficient, but a gross neglect or inaccuracy in a matter which it is a solicitor's duty to ascertain with accuracy may suffice . . . It need not involve personal obliquity. The term professional misconduct has often been used to describe the ground on which the court acts. It would perhaps be more accurate to describe it as conduct which involves a failure on the part of a solicitor to fulfil his duty to the court and to realize his duty to aid in promoting in his own sphere the cause of justice . . . The jurisdiction is not merely punitive but compensatory.' The noble and learned Lord then proceeded: 'The solicitor cannot simply allow the client to make whatever affidavit of documents he thinks fit, nor can he escape

the responsibility of careful investigation or supervision. If the client will not give him the information he is entitled to require or if he insists on swearing an affidavit which the solicitor knows to be imperfect or which he has every reason to think is imperfect, then the solicitor's proper course is to withdraw from the case. He does not discharge his duty in such a case by requesting the client to make a proper affidavit and then filing whatever affidavit the client thinks fit to swear to.'

Lord Porter said that he rejected the contention that the summary jurisdiction of the court extended to relief only in cases of personal misconduct and neglect of duty. 'It is misconduct in the way in which the work entrusted to his firm is carried on, not the personal misdoing of the individual, which gives rise to the exercise of the jurisdiction . . . The court is not enforcing a civil right but exercising its authority over the conduct of its officer.' He concluded: 'In any case I do not consider that the solicitor or his clerk has fulfilled the obligation of supervising to the best of his ability the swearing of a full and complete affidavit of documents.'

Lord Russell of Killowen who disagreed with the majority on the finding on the facts said: 'It is, I think, immaterial that no professional misconduct is attributable to Mr Elman personally. He would none the less have failed in the discharge of the duty which he owed to the court.'

APPENDIX III

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