The Jury and The Art of Persuasion

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I do not propose today to provide you with a precis on the eclectic art of persuasion or a check sheet on what one ought to tell a judge or a jury in summing up the evidence and presenting the law at trial. Obviously, these are matters that will depend upon the nature of each case. But even more, they will be determined by the personality of counsel: his capacity as a narrator, his facility with words and figures that will depend on his authority on the subject, and perhaps most important of all, his own inherent personality. What might appear presumptuous to a judge or jury from the mouth of a youngster with one year's experience at the bar, might sound plausible if not persuasive from the lips of a seasoned Q.C. who has long appeared before the judges who hear him and may possibly be known to some of the jurors before whom he appears.

There is an old adage that "When you need help, hire a young doctor and an old lawyer." That idea may have less validity today now that the Charter, aided by the Law Reform Commissioners are changing the law at a rate that exceeds the advances that scientific research, lasers, ultrasound and "cat-scans" have brought about in the field of medicine and surgery.

There is the story told of a young lawyer who argued long and hard upon a complex point of law. The authorities he cited were legion, and the books brought to Court lay scattered on counsel's table. Then, having completed his herculean task he sat down, exhausted. Without

rising to consider, the Judge said: III have heard what counsel for the accused has argued. I find the accused guilty.1I Nothing more! The lawyer, exasperated, took one of the heavy tomes on his table and heaved it full-tilt at the Judge. Just as the book went flying by the Judge's head, he leaned down to pick up his pen. When he saw what happened he sat bolt upright in his chair and addressed the offending young lawyer: "That was a dreadful thing you did Counsellor: I assuredly would have found you guilty of contempt, had I been an upright Judge. ll

The study of the jury can be a trial lawyer's life career. Those who have studied it, most, in the end, conclude the system to be an insoluble enigma wrapped in an endless mystery to confound the curious and comfort the gullible - the more so today since, in 1972, it was made a criminal offence by Section 576.2 of the Criminal Code for any member of a jury to disclose any information relating to the jury's proceedings - save in a criminal or investigatorial hearing. The jury's deliberations are secret and a juror's lips are forever sealed. Of course, no jury of twelve men and women, good and true, are the same. And no two members of the jury is the same. They are not picked according totheirstatusin 1ife or theireducation or their intelligence. While everyone is entitled to "equal justice under the law", jury men and women are not equal.

-While we are accustomed to argue "equality" in matters of law, when we come to address a jury concerning the client whom we represent, we lose no opportunity to bring home to the members of the jury that oUr client is unique: an individual different from all others. You must begin by individualizing your client so he is not regarded as a mere digit in what has come to be described as the "criminal

justice system" as though it were an industry, and not the brain and sinews of human life.

The members of the jury, too, must be made to feel that they are not mere digits in state-run institutions.

DISCOVER THE JURY

Before the trial begins, you should conduct a personal discovery concerning the individuals who appear on the jury list. The more you know about each prospective juror, the better armed you will be to determine whom to challenge peremptorily or for cause. The more money your client provides for his case, the more thorough is the investigation that can be "made. And if you have large sums to spend, you may do what Morris Manning was able to accomplish in this year1s Toronto Morgenthaler trial by hiring psychologists and sociologists to advise you on the personality and predilections of each prospective juror.who is to be called forward to face the prisoner at the bar, so you may know whom to challenge.

You may do this in a variety of ways - by checking your own office file indexes to learn whether a prospective juror had consulted your firm, by making inquiries of other solicitors concerning the list, by checking municipal records to determine whether a juror is a public school or a separate school supporter, and so on. Even though your client cannot afford the quasi-scientific techniques of the psychologist, you may prove to be a better judge of human nature than the experts. Apply your own experience and knowledge of that unique species, homo sapien, to the persons you are about to meet in Court. You may ultimately conclude that it is

impossible to predict human reactions and that it is just as well to accept the first 12 members of the array as jurors.

This, however, is subject to one caveat. Go over the list with your client well before the trial. Ask him to stroke out any prospective juror he does not want, and abide by his wishes. As the prospects are called forward, stand by your client and have him silently signal to you if the person who is called is not acceptable to him. Again, abide by your client's wishes. An actively participating client is a happier client.

After the jury is empanelled, it is well to note with care the names and the occupations of each member who will sit in the box throughout the trial, watching, listening, thinking and, ultimately (as judges of the facts) deciding the issues that have brought you and your client before them.

In a motor accident case, where an issue of defective brakes arises, if you know that Juror No. 3 sitting up front to be Terry Tyre, a garage mechanic specializing in brakes, it may not be inappropriate in the course of your address to bring Exhibit 7 over to the jury box and show Juror No. 3 the worn brake lining that was found on the accused's car, and put it in his hand and say, "Mr. Tyre: you, as a mechanic, will recognize this brake lining and the extent of its wear - you and your colleagues will be deciding whether brakes in this condition are efficient ---".

On the other hand, if you are defending an alleged cattle rustler, and you know there are ranchers sitting on the jury, you will not suggest that just because there was no brand on the flank of the calves that went missing, with no

tag on their ears, the owner could not possibly recognize his calves by their faces. Better by far, to impeach the identification of the accused, than to mess around with a calf that ranchers have an uncanny ability of recognizing as though they were long-lost members of their family.

As for the jury, - it is a special kind of creature. It has been called "a canny, shrewd and reliable animal --- a clever beast, not to be handled carelessly." Being a domestic beast, a cow is essentialy friendly. But any counsel who treats it as a pet poodle will likely feel its bite and damn its boot.

COUNSEL'S STYLE

Every lawyer has his own style of presenting his client's case in court. Be it judge or jury that hears the case, each of us is determined to argue every issue of fa,ct and of law as strenuously and persuasively as our powers permit. By "power", I mean our powers of persuasion directed to convincing the judges that our course is just and that our client obeyed the law - not that we are bright and blessed with insight, but that our client is right, that the judge is bright, and that we come in peace and not to fight.

Remember, we speak in Court, not for ourselves, but for our client. 2,000 years ago, Marcus Tullius Cicero, the greatest Roman lawyer of them all put it this way:

> lilt is a great mistake to consider the speeches we deliver before the court as a faithful depository of our personal opinions. All these speeches emanate from the cause and the circumstances rather than the man and the orator. For if the cause could speak for itself

there would be no need of counsel. We are therefore called upon not to utter our own maxims, but to bring out everything of significance that the cause can furnish."

Shakespeare was well acquainted with Cicero's forensic accomplishments. When the time came for him to lay the scene that followed Julius Caesar's assassination,' on the Ides of March, you will remember that he cast Mark Anthony in the role of Caesar's closest friend. And in his speech over Caesar's body, he had Mark Anthony tell his "Friends, Romans, Countrymen (to) lend me your ears. I came to bury Caesar, not to praise him .••• " And then, describing Caesar's great achievements and all he had done for Rome and the poor, he tells them a little about Caesar's Will. In the Will he left his wealth to the people of Rome. Then Mark Anthony dramatically removes the mantle that covers Caesar's body and diverts the great assemblage who are still shouting to see th,e Wi11, Ill show y'ou Caesar's poor dumb wounds and let them speak for me,1I saying only, that lIif you have tears, prepare to shed them now.. Il He dramatically removes the mantle that covers Caesar's stabbed and wounded body.

Mark Anthony's speech is a passionate address to the jury. The wounds are the evidence, and Mark Anthony produces them on the body of Caesar, and he marks them as Exhibit "A" in his case against Brutus and Cassius, for they speak more graphically than anything else; they tell those who see the objective evidence that Brutus is not the patriot he painted himself to be. Brutus and Cassius are villains most vile, and yet, Anthony does not condemn them, but praises them for being "honourable men".

"But Brutus is an honourable man.
So are they all - all honourable men."

Repeated again and again, these "honourable men" viewed in the light of the murder Mark Anthony describes, their honour melts like butter in the noonday sun, and boils and burns through all the streets of Rome.

I often think of that speech: one of the greatest in our literature. I learned it when I was 13 years old in Grade 8. Misbehaving in class was visited with castigation, penance and work imposed upon malefactors by our principal, Mr. Harrop, not in the form of corporal punishment, but by "staying in after four" at which time an assignment was given to each delin'quent student to memorize a poem of 1'2 O,r 16 lines; when you could recite these lines perfectly, you could leave for the day. But not before. The punishment,had a wondrous effect. The conduct of some students became exemplary, and they memorized very little poetry. The delinquents profited yet more because they memorized a great many beautiful fine English poems. All of which proves that we learn less from our successes than from our sins.

Of course one must choose language that the members of a jury, today, will understand. Shakespearian English may seem unsuited to a jury at Lac La Ronge. And yet, it is better to risk speaking a little above your own assessment of a jury's intellectual capacity, than to speak down to them. Better that you should approach them as your peers, than to convey to the jury the impression that you regard them as your inferiors•

TELL ME A STORY

Some jurors in Saskatchewan are better-read than most lawyers, especially in fields ecclesiastical. On one occasion, when defending a young man charged with rape, I

said to the jury, "I want to tell you a story - a true story - that most of you, I am sure, will know --."

Now everyone loves a story. In the course of a long trial, what could be more welcome? And so the jurors leaned forward in the,ir chairs just a little, and they wondered what it was to be about. I cited and read the case of Joseph who, as Genesis, Chapter 30 reports, was sold by his jealous brothers to merchants who took him away with them into the land of Egypt. There, Joseph became a servant of the wealthy Potiphar. Potiphar's wife "looked favourably" upon Joseph and sought to seduce him. At this point in my address, I walked over to the witness stand and took the Bible lying on the ledge, thumbed .through it until I turned up the story and read from Chapter 30, verses 1 to 23. They tell the ancient story of how an innocent man was trapped by the treachery and guile of a scheming woman who was spurned by the innocent young man who was the object of her lechery. And then, suddenly, the similarity between the attractive woman by whom my client was entrapped, struck home.

The effect of a simple act of this sort is helpful in any-trial before a jury because it appeals to the -love that all of us, young and old, have for a story, even as you sophisticated lawyers waken and prick up your ears when I say "I'll tell you a story."

That story of Joseph and Potiphar's wife worked. I expect it encouraged one or two of those jurors to go home and tell their wives and kids that they all ought to go to church more often.

As counsel before a jury, you are a story-teller - not a writer of fiction or a purveyor of half-truths and lies

- but the teller of a story that should be designed to capture everyone's interest because it is not about inanimate things or abstractions - but about human beings and their behaviour and alleged misbehaviour. We all know, there is no subject that fascinates people more than - people. And upon the story you tell before a jury depends the life and fortune, the reputation and future of the person who places all of these gifts in your safekeeping.

Of course, it is all the better if there is a mix in the theme. The Reader's Digest recognizes this better than any other publication I know. Its formula requires stories that are a mix of travel, sex, adventure, animals and religion. I've sometimes thought a great subject for "the ultimate story" I would write for Reader's Digest would be:

> "HOW I TRAVELLED TO THE ARCTIC IN SEARCH OF ADVENTURE AND SEX AND FOUND RELIGION" SHACKED UP WITH A POLAR BEAR."

If it is a story you are to tell the jury, it must be told gracefully and artistically.

Lord Denning was not only a great judge, but a consumate story-teller, and his judgments, many of them, begin with a statement of facts disguised in the form of a best-selling novel. Listen to this opener that sounds like a fairy tale:

> "In Bognor Regis there was, years ago, a rubbish tip. It was filled in and the ground made up so that it looked like the land next to it. You would not have known there had been a rubbish tip there." - Dutton v Bodnar Regis, (1972) 1 All E.R. 462.

It ended up by establishing one of the most important principles of vicarious liability.

TIME AND TEARS

In preparing a case, it is essential that all of the events as they occurred be set out in strict chronological order, with reference to the place at which each event occurred, and who was present at each place at that time, and who was present before and after what phone calls were made and when, and what letters were sent and received, and how. If clocks and memory are accurate, time relationships are a great astringent in determining the truth.

A recent illustration of significance of time arose in The Queen v Thatcher (reported everywhere) in relation to the discovery of the body of the victim in Regina, and the whereabouts of the accused within the time-span of one hour. More significant yet, of course, is the efficiency or inefficiency of an investigating police force.

In complex situations, a detailed and accurate chronology of events is the first prerequisite to an understanding of any case.

In argument before the jury, however, counsel may find that there are better ways to unfold the story than with a clock, bearing in mind the words of Oliver Wendell Holmes that:

> "Men think dramatically, not quantitatively." (Law and the Courts, Speeches, (1913) p. 24.

Sir Edward Marshall Hall recognized this fact, when he related to his biographer, Marjoribanks (IIFor the Defence", 1929, 1):

> liMy profession and that of an actor are somewhat akin, except that I have no scenes to help me, and no words are written for me to say. There is no backcloth to increase the illusion. There is no curtain. But out of the vivid, living dream of somebody else's life, I have to create an atmosphere."

To this, the biographer added as his Ishopping list" for the ideal counsel:

> lIHe must; then be histrionic, crafty, courageous, eloquent, quiCk-minded, charming and great-hearted. These are the salient qualities which go to make a great advocate."

If one pursues drama in the courtroom, there is one curtain riser that has been called the finest opening by counsel for the defense in a murder case ever known. John Inglis, in 1857, in the trial of Madeline Smith in Edinburgh, stood before the jury and said:·

> "Gentlemen of the Jury, the charge against the prisoner ismurder, and the punishment for murder is death; and that simple statement is sufficient to suggest to us the awful solemnity of the occasion which brings you and me face to face. II

You may say IIthat is a great opening where capital punishment faces your c1ient. But what are weto talk about when hanging is no longer the enemy?1I Fear not! Life imprisonment is no less awesome a punishment. The

distinction may be no greater than that between "Molson's beer" and "Molson's light". I have used this opening since "abolition". Upon the jury, its effect was sobering. Upon the prisoner, once at least - it was sobbering. That is precisely the effect you seek.

As for tears, a Tennessee judge, in 1897, commented upon counsel's resort to this genre of advocacy. He said:

> "Tears have always been considered legitimate arguments before a jury, and while the question has never arisen of any such behaviour in this Court, we know of no rule to check them. It would appear to be one of the natural rights of counsel, which no Court of constitution could take away... If counsel has them at his command, it may be seriously questioned whether it is not his professional duty to shed them whenever proper occasion arises, and the trial Judge would not be constrained to interfere unless they were indulged in to such excess as to impede or delay delay the business of the Court."
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> Ferguson v Moore (1897) 98 Tenn. 2, at p. 351, per Wilkes" J.

So long as the tears are genuine, Lord Mansfield would, I think agree, believing as he did, with Alexander Pope, that "Ingenuity is one thing, and simple testimony another, and 'plain truth', needs no flowers of speech" - Wilks v Wood (1763) 19 How. St. Tr. 1153 at p. 1176.

MILK AND HONEY

Laughter, of course, is better than tea'rs. I recommend Peter MacDonald's recently published book, Court Jesters for your entertainment at home and the edification of your colleagues in Court, especially the anecdotes of the

famed Calgary lawyer, Paddy Nolan who was called "The Fastest Wit in the West."

The shortest address to a jury in the history of Saskatchewan, and the briefest cross-examination of a complainant in a rape case occurred in Moose Jaw at the turn of the century. The story is among the best-loved-of the cognoscenti of the Alberta Bar. This is MacDonald's report of the case, at pp. 130-131:

> "In Moose Jaw, Paddy Nolan once defended a man charged with raping a young woman. Out of respect for Nolan's ability, the Crown brought in a formidable opponent, R.A. Bonnar of Winnipeg, to prosecute.
>
> Bonnar led the girl through her evidence with great tact. Her story was simple, and convincing. She was a dairy maid, working on a farm, and she said that when she was returning from the barn with a pail of milk the accused jumped out of hiding and sexually assaulted her.
>
> Nolan's famous cross-examination of the girl is a model of brevity and wit:
>
> 'How much milk were you carrying?'
> 'A gallon.'
> 'And what was the size of your pail?'
> 'It was a gallon pail.'
> 'Did it have a lid or cover of any sort?'
>
> 'No, it had no cover.'
> 'Your milk must have pretty well filled the pail?'
> 'It was filled to the brim.'
> 'And when you arrived home after meeting the accused, how full was your pail then?'
> 'It was still filled to the brim.'
> 'I have no further questions.'

"Nolan's address to the jury was short and snappy. 'Gentlemen, this young woman says that she lost her virtue, but saved her milk. What do you think about it?

'Not guilty' was what they thought."

PROPS

Melvin Belli would have no difficulty in answering Edward Marshall Hall's lament that in his presentations to the jury, he lacked the Thespian sadvantage of a stage, a backdrop, lines and props. No lawyer has done more than Belli, to achieve for plaintiffs in personal injury and fatal accident actions, damages that would beggar the treasuries of Croesus. And in the process, he has been responsible for so increasing the insurance premiums of the medical profession in the United Sates, as to have driven countless surgeons into an early retirement.

Belli appeared as counsel for a beautiful young woman who had been involved in a serious motor vehicle accident and was suing the driver responsible for the loss of a limb. Her leg required amputation. Each morning Belli would walk into the courtroom after the jury had been seated, carrying under his arm, a package wrapped in brown butcher paper. This, he placed on counsel's table at which he sat - conspicuously, in full sight for all to see. Each time Court rose, he carefully carried the package out with him. Each morning and afternoon, the performance was repeated. For five days the jury watched in rapt wonder, the ritual that Belli performed. For five days, they grew curiouser and curiouser. Then, the time came for Belli to address the jury. After recounting the dreadful ordeal his client had undergone, he described the beautiful legs she once had - and now she had but one. Then he angrily tore away the string

and the brown butcher paper, and said: "You saw what that beautiful girl was left with after the accident." "You saw the plastic and the steel, the screws and the leather;" You saw this lifeless thing" - and he threw it on the floor before the jury. "Look at it; touch it, feel it, move it. Compare it with the one that was saved." "A three-legged chair is not a chair; a one-legged woman ismuch lessthan a woman."

The jury thought dramatically, not quantitatively. And a huge sum in damages was awarded.

Clarence Darrow was a consumate actor before a jury, presenting himself when occasion served, in a simple, homespun way that appealed to most juries, andespeeially those in small towns. In the South, Darrow met William Jennings Bryan in the famous "Monkey Trial" an issue was the right of Scopes to teach the "Origins of the Species" in a manner considered to be contrary to Genesis', Counsel divested themselves of their heavy coats and smoked in the courtroom during the trial. All were in their shirtsleeves, Darrow with his ga1,luses.

Legend has it that Darrow would light up with the greatest deliberation when opposing counsel began his address to the jury. He fondled his long cigar, he brandished it, he drew deeply from it and blew the smoke across the courtroom. And all the whi 1e he was very careful to let no ash fall from his great cigar. First one jury noticed how long the ash of Darrow1s cigar was growing. He nudged his neighbour. Now there were two. Another juror was' distracted and gazed at the growing length of the ash. Then another and another joined the entranced company. Each wondered how long that incredible cigar ash could really grow without disintegrating

and dropping disaster over Darrow's shirt. The result, for William Jennings Bryan, was devastating. All eyes were now focused on the cigar. No one paid' the slightest heed to the sweated, sullen Bryan. And so he sat down. Deflated. But not defeated. He could afford to sit because everyone in that town, down to the village dog, was dead against Darrow and his evolutionary asinity'.

Why Darrow did this was clear. But how he did it may be helpful. It was simple. You can do it too. He ran a thin wire down the length of the whole cigar and not a particle of ash fell to the floor.

Drama or no drama, the plot you describe to the jury, the play you present for the ire dification, cannot be fanciful. It must be plausible and have about it the ring of truth. The kind of alternate pleadings that were in vogue decades ago, today command little respect froll1 judge or jury. I think of the defence to a plaintiff's claim alleging damage done to the 'plaintiff's kettle when it was loaned to the defendant for which damages were sought. The Defence: 1. the Defendant did not borrow the kettle from the Plaintiff; 2. if he did borrow the kettle it was returned in perfect condition; 3. if it was not returned in perfect condition, it was damaged when the Defendant borrowed it. Juries have difficulty understanding that kind of legerdemain, and it just turns them off.

AMBIVALENCE

In criminal trials the alternate-kettle defence still is sometimes made, as in rape cases (or sexual assault). Counsel argues: "First, members of the Jury - my client was not with the Complainant at the time in question,

why, he doesn't even know the girl. However, if you do find that my client was there on the night in question, I ask you to acquit because the female Complainant consented to the sexual intercourse!"

When you address the jury, what you cannot, in good common sense and reason deny, you should clearly and gracefully, admit. If, in the rape case we postulated, it is clear that the parties were found copulating, admit that fact, without equivocation. The principle is simple: abandon the fantastical; argue the feasible.

To do otherwise is to place yourself in the position of the artless accused, who, having been found guilty of murdering his mother and his father, pleads with the judge to show mercy, because he is now, alas, an orphan!

And remember Samuel Johnson, that paragon of common sense, who said to Boswell, the young lawyer who became his biographer:

> "He is an ingenious counsel who has made the most of his cause; but he is not obliged to gain it."

Do a good, creditable job, but do not strain. Shumiatcher's First Law of Cross-Examination applies also to the Jury address: "Good Is Best: Better Is Worse".

While counsel is not technically on trial, the jury is genuinely concerned about the credibility of your statements as counsel for the accused who is on trial. The quoting of select portions of the evidence taken in the course of the trial can be very effective in counsel's address to the jury, particularly if a key witness has used a

phrase that is striking and highly relevant. But counsel must be certain that the words attributed to the witness are absolutely accurate.' Before using this technique, you should verify the passages you expect to quote, with the court reporter or the tape recorder in advance, or make certain' that your Junior (if you have one) takes full and accurate notes.

A SOFT ANSWER

Under normal circumstances, the presiding Judge is unquestionably the most important and influential person in the court room. It is not only that he rules upon all questions of law; his prestigious position works its magic upon all who are present at trial, and particularly upon members of the jury who 'generally are novices in thei r task, who wish; desperately, to play their part properly and in accordance wi,th the rules, and who realize that counsel stand in an adversaria1 position with each other. They naturally look to the JUdge, not only for direction in matters touching the law, but for guidance in all things passing in the court-room since it is he who presides there and rules like a caliph at the ancient city gates. There is no appeal from him 'til long after the Jury has spoken. For better or worse, one must abide his rulings and sometimes put up even with abuse, hoping that on appeal, a bad ruling will be corrected.

Therefore, if you are to persuade, the technique that you ought to adopt is the soft and subtle demeanor - addressing, but not insisting; explaining, but not haranguing; suggesting, but not declaiming. Better still, if you, as counsel can so metamorphose your role as to appear as student, not as instructor, as a perspicacious but

disinterested bystander viewing the human scene, you may subtly plant in the mind of the Judge or in the brain of a juror, by modest and oblique suggestion, the seed of an idea you seek to advance, so that it appears to be not your own, but is the Judge's - or the juror's. If you can do this, you have gone a long way to succeeding in Court, or perhaps paving your way to a more lucrative leading role in a Shakespearian play at Stratford.

In my book, "Man of Law - A Model", I quote from a distinguished Italian lawyer, Piero Calamandrei. He said (p.100):

> "A lawyer should be able to suggest arguments which will win his case so subtly to the judge (or a jury) that the latter believes he has thought of them himself. This, I suggest, is the finest form of the forensic art that most perfectly conceals art."

And I go on to suggest (as you will already have perceived):

> "The artistic (or artful) counsel will, therefore, leave spaces in his submission so that his listeners may be free to furnish them with familiar trappings, each fashioning his own associations out of the memory of his "personal experience. Counsel will trigger the minds 'of a jury into action so that they will themselves conjure up their own questions and draw their own inferences. Clay cast in a mold fashioned by its maker is not easily factured by a critic of its form. So a juror, however open to conviction, is likely to hold more firmly to his own views, than to defend the arguments of counsel."

AN EXCEPTIONAL JUDGE

Sometimes spirited counsel have been known to have found it impossible to apply Solomon's wisdom that "a soft answer turneth away wrath". Some few have responded to the conduct of an abusive and arbitrary Judge in a different way. There have been such Judges and bloody.jeffreys was not the only one. Two such lawyers were the late Alan E.mbury, Q. C. of Regina and one M. C. Shumiatcher. The Judge was the Honourable C. S. Davis of the Saskatchewan Court of Queen's Bench.

Mr. Justice Davis entertained an extraordinarily high opinion of his own abilities, some bordering (it would appear) upon the clairvoyant. After an accused was arraigned and while the jury was being selected, he had a habit of intently staring at the prisoner in the box, obviously sizing him up, all the while comforting his own neck by running his fingers inside his starched collar. The process was invariably the same. It occupied perhaps one or two minutes. When hewas done, he pursed his 1ips grimly, gave two or three nods of his knowing head, leaned back into his chair, cupped his hands before him in obvious satisfaction with the sage opinion he had formed of the hapless prisDner which, during the rest of the trial, he made it his business to communicate in no equivocal terms, to the jury.

May I recall to you the case of The Queen v Schaumleffel at which Davis presided. My client had been one of four in a party that travelled one fall day east of Regina to hunt deer. The hunters' truck got mired down and it was agreed that two of the party would leave in search of a tractor they had spotted on a farm a mile or so away. Schaumleffel and his companion remained with the truck

awaiting their friends' return with help. The trees and shrubbery were turning red, and the sun began to set. All of the h'unters wore red clothing as the law then requi,red. Schaumleffel was a first-class shot and he had a powerful scope on his .303 rifle. As he an'd his friend waited, Schaumleffel kept an eye open for game. A short while after the hunters had split, Schaumleffel shouted to his companion: "There's deer out there beyond the stubble!" His friend looked and said, "Yes, it sure is!"

And so Schaumleffel took careful aim and fired one round from his .303. The deer went down. But almost immediately, it got up and began to run. He fired a second round. The deer dropped• Again it rose and again it ran. Schaumleffel fired a third round. The animal fell. Both hunters ran to where it lay, Schaumleffel taking his long hunting knife from its scabbard, as he ran, making ready to cut the animal's throat.

When he reached the site he was shocked to find lying there, one of his two friends who had gone in search of help. There were three bullet wounds - one in the right arm and one in each leg. In due course, the local farmer, driving his tractor came to the scene. The wounded man was taken to hospital. Fortunately, he recovered after some months, and as good fortune would have it, his permanent injuries were none too serious.

Schaumleffel was charged with criminal negligence. Mr. Justice Davis presided at the trial. Schaumleffel told his story. As soon as he began to describe the deer that he saw, Davis cut in and said: "You never saw a deer, you saw a man!" The accused insisted he saw a deer. And in this he persisted until Davis fairly went into a rage, and turned to

the jury and said that whatever the witness might say, it was no deer that was there: it was a man and everybody knew it!

The expert evidence I called included an occulist, an ophthalmologist and a psychologist. The sum and total of their evidence was that when we talk of "seeing" a thing, we do not really see wi th ou reyes. The eye is not a came rat . It is simply. a lens. The lens simply filters light that sets up impulses that reach and stimulate the brain. The seeing process is a mental process, and when we say "we see", what really happens is that what we see is really what we think. Seeing is a thinking process. We see 'what we want to see or what we expect to see. With experiments conducted in Court, the expert witnesses established the phenomenon of the "set" in sight: we see what we expect to see, whether it be a deer in woods we hope to see and to shoot, or our girlfriend whom we have dated and expect to meet at the corner. • • The mistake of identification we often may make derives from the message the brain receives and, possibly, misinterprets.

Because he had been so vehemently opposed to my client in the course of his testimony, in my address to the jury, I applied the Embury-Shumiatcher treatment, and I told the jury in no uncertain terms that they and they alone are the jUdges of fact, and they alone must decide what occurred, not only in the field, but in the mind of the accused. The Judge has the power to tell them what the law is. As for the facts, the Judge has no authority whatever to tell the jury what occurred or how or why.

1 suggested that the learned Judge, no doubt he would have a good deal to tell them as to what he thought happened that day in the field. But whatever the Judge's views might be, 1 told them they were free to ignore them,

just as they could ignore what I said and what the Crown prosecutor might tell them about the facts or the law. But I did tell them that they could not ignore the evidence of the experts. Neither could they turn a deaf ear to what my unfortunate client saw and did. There was no contradictory evidence that the Crown had led to deny the phenomena Schaum1effel and his companion had described.

Had Mr. Justice Davis not betrayed his strong prejudice against the accused, it may well be that his directions to the jury that day, (weighted as they were against the accused}, would have resulted in the conviction he obviously wanted. But he was contemptuous of the evidence Schaum1effe1 had given, he discounted the expert evidence and he made a few cutting comments on my submission to the 'jury. His address to the jury was so transparently weighted against the accused, the jury went their own way and acquitted my client.

The lesson to be learned is simply this - that if the Judge has made it clear that he is irreconcilably hostile to your client, pry the judicial mask from his face; bring his hostility out into the open. You have nothing to lose but a lost cause, and a fine or. a few days of jail for contempt of court.

THE INSTRUMENT

We have all experienced success and failure before a jury, and so we know the ecstacy and the agony of that long, protracted, slow, complex and anomalous ritual dance which is the jury trial. But for all of that, I can say of a jury trial what Winston Churchi'" once said of democracy, -

that it is the world's worst possible system for making decisions - except for all others.

I can think of no institution of the law in any country where there exists a better way of combining the wisdom and sophistication of the law, with the common sense and good judgment of twelve ordinary citizens who, turning away from their ordinary business and their personal diversions and pleasures, cheerfully dedicate a part of their lives to protect and enrich their fellow citizens in matters of the greatest moment to the nation, and to all of us: the individual's life, liberty, reputation and property.

I have often ended an address to the Jury with a short vignette of G. K. Chesteron. It is a gentle way of conveying to the jury the sense of responsibility and occasion that their presence in court as judges inspires in most of them. Chesteron wrote of his first and only experience as a juror in a criminal court in England. It was an experience that impressed him in this way, -

> "Our civilization has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be left to trained men. When it wishes for light upon that awful matter it asks men who know no more law than I know, but who can feel the things that I felt in the jury box. When it wants a library catalogued, or the solar system discovered, or any trifle of that kind, it uses up its specialists. But when it wishes anything done which is really serious, it collects twelve of the ordinary men standing round. The same thing was done, if I remember right, by the Founder of Christianity."

History suggests tests of the greatness of the civilizations of the world. There are the relatively frivolous tests of fashion, or food or wine. There are the serious tests of strength and power and might, of political maturity, of literature and the arts. There is the test of a nation's treatment of its minorities, its weak and disabled, its errant and misguided citizens and those who lie completely in its power.

But I believe there is one test that few consider: Does the nation have a race of free, talented and courageous advocates to champion the cause of the individual for whom civilization itself exists? If this be a legitimate test, then we owe a debt to those who have laid the foundations of our great profession - and we owe a duty to ourselves to shape our skills and bend our wills, to emulate their example and to perpetuate the principles of "justice and mercy" under the law.