

Success at the Bar: --- Lessons from Literature and Prosopography

An up-dated version of Lee J. W. Aitken's* fascinating paper, originally published in the Australian Bar Review.

Nemo repente fuit turpissimus¹.

"Muir² for facts, Avory³ for law, Gill⁴ for brass."⁵

According to Dickens, "while Mr Stryver⁶ was a glib man, and an unscrupulous, and a ready, and a bold, he had not that faculty of extracting the essence from a heap of statements, which is among the most striking and necessary of the advocate's accomplishments".⁷ Certainly, such a power of synthesis and selection is vital to success at the Bar. So, too, is the ability to seek out the underlying principle in any matter and bring it to the attention of the Court.⁸

Perhaps, however, mere physical attributes may count for more.⁹ Good looks will go a long way: Sir Edward Marshall Hall¹⁰ "was a very handsome man, with a noble head and a most expressive face, and F.E. Smith's comment is not to be bettered: 'Nobody could have been as wonderful as Marshall Hall then looked.'"¹¹ On the other hand, Viscount Haldane had a singularly undistinguished and portly frame and a thin voice ill-suited to advocacy. The explanation for the apparent paradox may be that Marshall Hall argued predominantly before juries, while Viscount Haldane specialised in elucidating "great questions before supreme tribunals". A small build and insignificant appearance need not preclude success in a *nisi prius* practice since psychological forces often compensate. Horace Avory K.C. was physically unprepossessing but he compensated for this, as Sir Patrick Hastings records, by "a personality which was infinitely forbidding".¹²

Stamina¹³ and a good digestion¹⁴ are indispensable. So, too, is the capacity for unremitting hard work. Lord Denning

⁴ Charles Gill Q.C., a leading counsel in controversial cases and Sir Patrick Hastings' pupil-master.

⁵ The proverbial recommendation on the choice of counsel at the English Common Law Bar at the end of the nineteenth century; see Jackson *op.cit.* p.91. The successful counsel would display all the characteristics and abilities of this trinity.

⁶ A happy choice of name for the character, rivalled, perhaps, in appropriateness only by the real life Lord Braxfield, the famous Scottish hanging judge (1721-1799) who was himself the subject of R.L. Stevenson's *Weir of Hermiston* (1896).

⁷ Charles Dickens, *A Tale of Two Cities* Chapter 5, "The Jackal".

⁸ Viscount Haldane of Cloan, *Autobiography*.

⁹ "... Success at the Common Law Bar depends largely on the impression made on solicitors who see a man in court or moving about the halls and corridors of the Law Courts. ... a man of insignificant appearance has always a hard battle to fight": (1921) 66 Sol. J. 135 quoted in R.F.V. Heuston *Lives of the Lord Chancellors 1885-1940* Vol. I. p.12 (Hereinafter Heuston Vol. I or *Lives of the Lord Chancellors 1940-1970* Vol. II).

¹⁰ Sir Henry Dickens noted, however, that "he had not that gift of far-seeing discretion which is required of a great advocate": Dickens, *The Recollections of Sir Henry Dickens* (1934) p.244.

¹¹ Norman Birkett, *Six Great Advocates* (1961) p.12 quoted in H. Montgomery Hyde, *Norman Birkett* (1964) p.87.

¹² "It is no exaggeration to say that he could sentence a man to death with as little display of emotion as a magistrate fining a drunk half a crown": Jackson *op.cit.* p. 16. Avory was also, however, a man of great generosity. When appointed to the Bench he allowed Hastings to use his chambers rent free for a long period of time when Hastings took them over, along with Sir Harry Poland's chair. Characteristically, he would not allow Hastings to take his library as well.

¹³ For a good example of what can be accomplished over lunch, see the effort of the Attorney-General, Sir Reginald Manningham-Buller, in analysing completely new evidence in the lunch break and re-examining upon it immediately thereafter: Devlin, *Easing the Passing* (1986) p.70 giving an "insider's view" of the Bodkin Adams murder trial.

¹⁴ "It was well said of him (Lord Campbell), in explanation of his success, that he lived eighty years and preserved his digestion unimpaired." Lord Russell of Liverpool, *The Royal Conscience* (1961) p.115.

¹ "No-one becomes an absolute rogue overnight", the apocryphal explanation, in Scotland, for the long period of time involved in the novitiate of a Writer to the Signet, as quoted by Lord Macmillan, *A Man of Law's Tale* (1952) p.33.

² Sir Richard Muir, Senior Treasury Counsel and the most formidable of prosecutors because of his gradgrind attention to detail. In his autobiography he records with regret the acquittal of a murderer whom he was prosecuting because of his failure to take his customary view of the scene of the crime due to rain. A good example of his masterly exposition in opening a case may be seen in the Crippen murder, his notes for which are in Blom-Cooper, *Law as Literature* p.14. He is the model for the Crown Prosecutor, Sir Heyman Drew in Ernest Raymond's novel, *We, The Accused* (1934). For a less than flattering description of his methods, see, *Stinie, The Murder on the Heath* (1988) which describes his approach in the Stinie Morrison murder.

³ Sir Horace Avory, famous prosecutor and subsequently the pre-eminent criminal judge in England. For an encomiastic biography, see Jackson, *Mr Justice Avory* (1935).

without immodesty baldly recalls: "I was called to the Bar and worked as hard as anyone ever has done".¹⁵ Lord Kilmuir could be in conference from 9 a.m. to 10.30 a.m., in Court until 5.15 p.m., on the London train from Manchester by 5.45, in the House of Commons from 9.00 p.m. until 11.30 and "then back on the midnight train to the North".¹⁶ It is important to keep up your health. Sir Isaac Isaacs, no trencherman, was devoted to cups of tea¹⁷ and continued to run long distances late into middle age.¹⁸ At the age of 47, when Lord Chancellor, the Earl of Birkenhead, after dinner and still in his dinner jacket, won a handicap race around Tom Quad at Christchurch, Oxford against a Blue more than 20 years his junior.¹⁹

Very great intelligence may be more a hindrance than a help. Lord Hailsham has noted that "of all the Lord Chancellors in history, ... only Lord Birkenhead got a first class in law; and the others who did study law as their first degree did not, if fact, achieve first class honours."²⁰ Horace Avory obtained a third as did Lord Halsbury. Sir Patrick Hastings was largely self-taught. Marshall Hall without affectation, insisted on his junior arguing any point of law.²¹ Hebetude enables the advocate to withstand the inevitable tedium which any great practice entails. As Mr. Micawber once rightly observed: "to a man possessed of the higher imaginative powers the objection to legal studies is the amount of detail which they involve."

Of course, one can take devotion to duty so far as to be unpleasant. At the end of *Re Boundary Between Canada and Newfoundland*²² which had lasted fourteen days in the Privy Council, Walter Monckton and the other juniors were about to go off and have a celebratory lunch.

"We were debating whether to ask (Sir John) Simon to join us when we heard him say to his clerk: What is the next thing, Ronald? and we were deterred".²³

Equally useful is "l'abilite de fixer les objets distants longtemps"²⁴, a particular trait Churchill ascribed to F.E. Smith K.C. who when summoned to London in the Leverhulme libel action found a stack of papers nearly four foot high awaiting him at the Savoy. "He ordered a bottle of champagne and two dozen oysters and began to read the papers. They were of great length and complexity, and he worked on them for eleven hours, all through the night." His terse, unequivocal opinion²⁵ and its subsequent vindication by the largest damages award made to that date²⁶ are well-known.²⁷

¹⁵ Denning, *Family Story* (1981) p.84.

¹⁶ R.F.V. Heuston, *Lives of the Lord Chancellors* Vol. II p.164. Viscount Dilhorne "was known to have left the House at 3 a.m. and by 9 a.m. to be ready for a conference with devils, at which he showed a detailed knowledge of his brief".

¹⁷ One may usefully contrast his abstemiousness with the bibulous behaviour of other great advocates. Dickens, for example, says of Stryver and Carton that they "drank enough to float a king's ship": *Tale of Two Cities*. The Earl of Birkenhead was often worse for wear for drink; see, Campbell, *F.E. Smith, First Earl of Birkenhead* (1983) passim.

¹⁸ Z. Cowen, *Isaac Isaacs*.

¹⁹ The incident is recorded in Campbell, *F.E. Smith, First Earl of Birkenhead* (1983) pp. 705-706. Birkenhead bet Milligan, the Olympic miler, fifteen pounds to five pounds that he could run four laps of Tom Quad, Christchurch before Milligan could run eight. Before they began F.E. made one more condition. "The bets are laid" the witnesses protested. "The one condition is", F.E. insisted solemnly, "that I have one more whisky and soda".

²⁰ Lord Hailsham in Bos and Brownlie, *Liber Amicorum for Lord Wilberforce* (1987) p.4.

²¹ Perhaps it might better be said that it is most useful not to seem too intelligent. Lord Birkett once expressed surprise at the lack of success at the Bar of Phillip Guedella, a brilliant Cambridge contemporary. "It is one of the fascinating questions why men succeed or fail at the Bar. Guedella with every gift - brilliant in speech, highly intelligent, industrious - and yet he failed. My own view is that he was too clever and gave the impression of being a little superior to the ordinary run of men": *Lord Birkett of Ulverstone*. Lord Diplock was advised not to mention certain high academic achievements when he commenced in practice. In this, as in many other things, *ars est celare artem*. The different respect accorded to purely academic achievement may be noted in the number of Melbourne advocates who rejoice in an academic doctorate and the similar number of their Sydney counterparts, similarly qualified, who do all they can to suppress mention of their degrees for fear it will be bad for business. I once gently reproved the judge to whom I was Associate for failing to recognise the Ph.D. of a barrister before him, to be told that only an LL.D. would receive any accolade in his court! On this restricted basis, only Dr Spry would be recognised.

²² 137 L.T. 157 (P.C.)

²³ Birkenhead, *Walter Monckton* (1969) p.78. This lack of humanity, perhaps, led to the famous couplet concerning Sir John:

"Sir John Simon isn't like Timon,
Timon hated mankind, Sir John doesn't mind".

On the other hand, when Simon became Lord Chancellor he left his extensive library to his Inn to replace books destroyed in the bombing during the early part of World War II.

²⁴ W.S. Churchill, *Great Contemporaries* describing F.E. Smith.

²⁵ "There is no answer to this action for libel, and the damages must be enormous".

²⁶ Fifty thousand pounds, since surpassed by several recent awards such as that to Mrs. Sutcliffe against "Private Eye"; but see now the decision of the Court of Appeal in *Sutcliffe v. Pressdram Ltd.* [1990] 2 W.L.R. 271 which greatly reduced the jury award and laid down rules as to the assessment.

²⁷ Heuston Vol. I p.363. And see H. Montgomery Hyde, *Their Good Names* (1970) p.195 "The Soap Trust Libel".

An "artificial" memory helps.²⁸ In 1906 Lord Halsbury's son was shown a brief of his father's delivered in 1855 by a Chester solicitor. There was nothing on it except that on the last page "there was written, in my father's handwriting, the times of 3 trains to London." Upon his return to the capital, his son asked Lord Halsbury about the case.

"He remembered every single witness, he told me what they said, he told me which broke down and which were believed, he told me of the two important letters which won the case; he remembered the judge and every detail of the case".

Perhaps Hardinge Giffard was an exception; Lord Alverstone once said that to succeed at the Bar you must have a mind which can remember and a mind which can forget. Lord Macmillan has remarked, "as each case was concluded it was wiped off the slate to make way for its successor..."²⁹

A certain insouciance under pressure undoubtedly helps. Lord Halsbury "never read a brief a second time, and rarely a first". Such an approach accords with that of Sir Patrick Hastings who made a point of never making a note upon his brief. When F.E. Smith K.C. argued before Mr Justice Darling it was wonderful to see "which of two great minds coming entirely afresh to the consideration of the question at issue would be the first to grasp the points."³⁰ Examples of sang froid and even impertinence are legion. Who now would respond as Danckwerts K.C. did in reply to Lord Alverstone C.J.'s comment, "I would have put that somewhat differently Mr Danckwerts" with a simple and enigmatic: "You would?"³¹

For appellate work, an understanding of judicial psychology is especially useful. Owen Dixon K.C. would often play one member of the High Court off against another.³² In *Afternoon Light* Sir Robert Menzies records an illuminating incident. Dixon, opposed by Latham K.C. in the High Court, was being pressed on a particularly difficult point. Rather than respond immediately, he gave a laugh³³ "which chilled [Menzies'] blood" and said that he would wait to hear what Sir John had to say. Sir John began to lecture the Bench with his usual didacticism, speedily put it off side, and allowed Dixon to win almost by default.

Similarly, Viscount Haldane "knew the judges in the House of Lords and Privy Council so well that I could follow the workings of their individual minds".³⁴

Above all, a good advocate possesses his own style. In Galsworthy's *The Silver Spoon*³⁵ Soames briefs Sir James Foskisson K.C. on Fleur's behalf in a libel action brought against her by Marjorie Ferrars.

"Since selecting him Soames had been keeping his eye on the great advocate; had watched him veiling his appeals to a jury with an air of scrupulous equity; very few - he was convinced - and those not on juries, could see Sir James Foskisson coming round a corner."³⁶

This is the same quality Sir Owen Dixon lauded in Sir Frank Gavan Duffy. "He had the odd and forgotten theory that what mattered most in courts was advocacy, and he had thought about it a lot and he had practised it with extraordinary success. I had a room in Selborne Chambers at that time which fortunately was almost the last room before you got on to Bourke

Street, and in the niceness of his disposition he used to come in to me and say, 'Dixon, come up and see what I am going to do in such-and-such a court'. And it was worth going up to see what he did, I can assure you. If ever there was a man who could make bricks without straw in open court, it was Sir Frank Gavan Duffy."³⁷ This ability not to be seen coming round a corner, to make bricks without straw, exists and is easily recognisable but cannot be defined.

²⁸ Viscount Haldane could remember facts and legal principles without effort but "by some curious mental freak he had a poor memory for verse or prose." Heuston Vol. I. p. 168.

²⁹ Lord Macmillan *op.cit.* p.115

³⁰ Lord Macmillan *op.cit.* p.126

³¹ Dickens notes: "Unfortunately both for himself and the profession, he [Danckwerts] had a violent and uncontrollable temper, which quite unfitted him for the position of a judge." *The Recollections of Sir Henry Dickens* (1934) p.245.

³² "He would with diabolical skill set one judge against another in dialectical combat in the course of persuading the majority to decide in his favour." Sir Douglas Menzies's memoir in (1973-1974) 9 M.U.L.R.1.

³³ Sir Owen Dixon's laughter was, apparently, a feature which people always noted. For example, in his note, "Sir Owen Dixon: An Intellectual Man of Passion" (1986) 15 M.U.L.R. 579, 581 Peter Ryan describes it as "harsh cackling laughter".

³⁴ Heuston *op.cit.* Vol. I. p.189.

³⁵ (1929) Book II of *A Modern Comedy*.

³⁶ One can only regret that Galsworthy does not give more details of another great lawyer, Bobstay Q.C., employed by Soames's uncle Swithin in an earlier slander action brought against him by a member of the Walpole Club. "Swithin had called him in public 'a little touting whipper-snapper of a parson'. He remembered how he had whittled the charge down to the word 'whipper-snapper', by proving the plaintiff's height to be five feet four, his profession the church, his habit the collection of money for the purpose of small-clothing the Fiji islanders. The Jury had assessed 'whipper-snapper' at ten pounds - Soames always believed the small clothes had done it. His Counsel had made great game of them - Bobstay Q.C. ... Bobstay would have gone clean through this 'baggage' and come out on the other side."

³⁷ (1963) 110 C.L.R. xiii.

To succeed it is also vital to perceive and seize the main chance. Lord Haldane did so when briefed overnight to appear in an important Privy Council case on behalf of the Canadian government, Sir Patrick Hastings when left by Lord Carson to conduct an important fraud trial on his own³⁸, Lord Goddard by being able to advise in a banking matter late on a Saturday morning when there was no other counsel in the Temple.³⁹

Equally, it is vital to be able to withstand the vicissitudes of the first few years at the Bar. Viscount Maugham remembered that: "The necessity of getting briefs, especially if one has a wife and child to support, is of a very poignant kind ... the waiting for work is a terrible drawback to a young barrister's life and tends to sour his whole existence. I shall never forget those unhappy days."⁴⁰ Sir John Rolt often complains in his autobiography of his straitened financial circumstances, "res angustae domi". Sir Garfield Barwick was bankrupted on a guarantee given for his brother's petrol station and left with nothing but his chair! Rufus Isaacs had been "hammered" on the Stock Exchange. Sir Patrick Hastings found that brown paper was a satisfactory substitute for shoe leather. Despite these difficulties all ultimately succeeded because they were prepared to take a risk. Hastings once had to pawn his watch to raise the train fare to go on Circuit but he "never liked a game that is played for safety". Dr Evatt's astringent comment to Sir John Kerr is completely in point. When the latter hesitated on risking the Bar, Dr Evatt replied: "What do you want me to do? Make out a deed poll guaranteeing you six hundred pounds a year?"⁴¹

Relationships with solicitors, and the appropriate professional treatment of them count for much. Lord Denning urged the neophyte to demonstrate "good sense and a pleasing manner".⁴² Lord Simon put it simply.

"You must cultivate the faculty, in your early days, of giving professional advice, when consulted by people older than yourself, with firmness and without either pomposity or apologies."

It is possible, within bounds to publicise: "To get his name on the title-page of a useful law book has always been recognised as one of the few legitimate methods of publicity open to an aspiring member of the Bar".⁴³ Sir Patrick Hastings took this method to extremes by writing a turgid monograph on money-lending over the Summer Vacation in order to secure a seat in Charles Gill's chambers by dedicating the work to him!

Of course, it is no disadvantage to be the scion of a great legal house or have other legal connections. As the odious clerk in C.P. Snow's *Time of Hope*⁴⁴ observes to the hero, a newly called barrister, about to commence pupillage: "I want to know what strings you can pull, sir ... Some of our young gentlemen have uncles or connexions who are solicitors. It turns out very useful sometimes. It's wonderful how the jobs come in". Certainly, it must have assisted Sir Henry Winneke's career to be the son of a judge and the son-in-law of a prominent solicitor. Examples could be multiplied.

In the end, however, success flows from enjoyment of practice. In *Time of Hope* the smug hero spends many hours excoriating his pupil-master, Herbert Getliffe but recognises in the end that:

"Getliffe's mind was muddy, but he was a more effective lawyer than men far cleverer, because he was tricky and resilient, because he was expansive with all men, because nothing restrained his emotions, and because he had a simple, humble, tenacious love for his job."⁴⁵

This devotion to the law is amply demonstrated when Getliffe decides to take silk in the very middle of the Great Depression. Getliffe is a miserly specimen "so mean that, having screwed himself to taking one to lunch, he would arrive late so that he need not buy a drink beforehand."⁴⁶ Why then does he seek advancement?

He does so because of "his delight in his profession, his love of the legal honours not only for their cash value but for themselves. If ever the chance came ... he would renounce the most lucrative of practices in order to become Getliffe J., to revel in the glory of being a judge."⁴⁷ It is a sad testimony on the times, and the esteem and respect now accorded to judicial officers generally, that such worthy motives are insufficient in the present economy to attract barristers onto the Bench or to dissuade them, once appointed, from leaving it. □

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³⁸. He had been briefed with Carson to defend a libel action brought by Robert Siever and Carson was called away to Ireland on political business. Hastings said: "When Carson went to Ulster he brought me fortune": H. Montgomery Hyde, *Carson* (1953) pp. 45-46.

³⁹. F. Bresler, *Lord Goddard* (1977) pp.50-51.

⁴⁰. Lord Maugham, *At the End of the Day* p.59.

⁴¹. Kerr, *Matters for Judgment* (1978) p.46.

⁴². *Family Story* p.92.

⁴³. Lord Macmillan *op.cit.* p.55. I once propounded this theory to the judge to whom I was Associate, suggesting a book on Company law. He looked at me sardonically and said: "Yes, and they will send you nothing but cases on the Dog Act!"

⁴⁴. (1949) Penguin p.241.

⁴⁵. C.P. Snow *op.cit.* p.247.

⁴⁶. C.P. Snow *op.cit.* p.314.

⁴⁷. *Ibid.*

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