ADDRESS OF MR. JUSTICE IVAN RAND OF SUPREME COURT OF CANADA TO LAW STUDENTS OF UNIVERSITY OF NEW BRUNSWICK.

It is a great pleasure for me to be here today. Although it is forty-one years since I entered upon the study of law, I can say to you quite honestly that I am as much a student of it today as I was then. That seems to be the glory of this profession: such a variety of question and every one demanding its own new examination. All is kept bright and fresh and the process of the law school goes on to the end.

It is, then, as a fellow student that I speak to you. I have had some experience in this work of law, and if you don't mind I'll offer to you some of the lessons it has taught me in the hope that they may be of some benefit. As I am here only to raise questions of interest to you, yyou will not, I know, object if I am very practical in my discussion and if I walk along paths which we soon shall be treading together.

As you know, from the beginning of this year, no appeal in new litigation lies to the Judicial Committee of the Privy Council from any court in Canada. Now that the policy has been settled, I may perhaps refer to what I have thought almost a conclusive consideration of the question, namely, that sooner or later this country must, in the nature of things, have taken over full responsibility in this field, and that until that responsibility had been accepted, there would be lacking some degree of that vital sense, inhering in all courts of a self-contained judiciary, of their own coming of age and of the necessary quality of their administration. Canada thus takes on judicial autonomy, and I think the members of the legal profession, as well as the students and the teachers of law, should ask themselves whether such a significant event calls for the re-examination and re-appraisal of their objectives and standards in relation to the future administration of law in this country. I am disposed to think that it does, and for that reason I presume to call your attention to it.

We shall best, perhaps, be able to come to a sound opinion on that question by assessing the work done over the past seventy-five years by that Committee. It is unnecessary, I am sure, for me, in this city, to dwell at any length upon either the quality of its judges or their adjudications. The administration of justice in Great Britain is of a standard unsurpassed by any that has existed among men. In the conception of the judicial function, in the independence and objectivity of judges, in the technique of legal reasoning, and in the processes of judgment, the courts of that country have reached full maturity.

The contribution made by the Committee to the structure of Canadian law, constitutional and general, has been immeasurable. In both fields we have been the beneficiaries of great legal ability. In Lord Herschell, Lord Watson, Lord Macnaghten and Viscount Haldane, to mention a few of the architects of the interpreted constitution, there were judicial minds of the first order; and in the general field, the authority of such judges as Lord Sumner, Lord Dunedin and Lord Atkin, among the many of eminence, and that of the present members, will long remain a guiding light in the ceaseless task of dispensing justice which we now take over. In this we see how "the old order changeth, giving place to new"; but to those magistrates the legal life of Canada will always be under obligation.

Let me briefly enumerate what I think the salient characteristics of the method of that Committee. There is first the thoroughness of oral arguments, of the examination of both fact and law; nothing is left indefinite, there are no dark spots, no point of difficulty is avoided, every authority is consulted, the tangled maze is reduced to order and made ready for adjudication. The acute analysis, the subtle distinction, the apt analogy, the exposure of fact and law to every possible aspect, the mastery and competence of it all; by these, the art of advocacy and of judicial debate, judged by any criterion, is exhibited on the highest level. The reasoning is seen to proceed not only from broad and intimate familiarity with precedent and principle but also with that sense, in their many aspects, of surrounding matters, the habits of men and the rhythms of their lives, which communicates strength and realism to judgment.

That, then, is the standard to which we must address ourselves and our future performance; and if we appreciate fully the character of what they have bequeathed us, we will recognize, in the responsibility we now bear, a challenge to the best effort and accomplishment of which we are capable. In this we must never forget that the quality of the bench is a reflection of that of the bar.

It is not my intention here to consider educational methods to be followed in a law school, but I would like to emphasize briefly some characteristics and aspects of legal training which I think essential to the development of competency in a profession whose work remains, and I think will always remain, of supreme importance to the management of civilized society. The task of the law is the working out and the application of rules and formulas to the reconciliation of conflicts between the multifarious interests of the community. Those adjustments demand a general consistency, and in the maintenance of that, as you can see, you will find yourselves making various degrees of acquaintance with the most diverse matters and situations. You are, in short, to exercise the function of harmonizing the infinite variety of social relations, by the endless repair of clash and disorder.

In essence, law is a part of the field of government. We distinguish between political government and the legal order, but they both operate in regulation of conduct and action in society. It seems to me, then, that what one might call a general political literacy is one of the important requirements in the equipment of a lawyer. He should know in an intimate way the country's constitution, its political institutions, their laws, procedures and conventions; and possess a general knowledge of their history and developments. This should include the weary struggles of political martyrs over the centuries to achieve those liberties which he now enjoys. That constitution is a skeletal structure of fundamental ideas within which the life of the country is carried on under political and civil law.

Given that understanding, the student is introduced to the actual matters and workings of the law. To them he is indeed largely a stranger. Neither the words contract, tort, trusts, equity and all the rest of the legal vocabulary, nor the matters underlying them, mean little, if anything, to him. These matters are the transactions and relations between men; and it is with thin material that he commences to erect within his mind a systematized body of thought intended to correspond with what he will meet later in actual experience. He is begin-

niing to associate human action with rules of law and with legal effects; but that association so far is only intellectual, something taken on trust, lacking the element in education of conviction.

Now, what does such an undertaking on his part call for? Law, dealing with human behaviour, is of the utmost practicality; it constitutes the bod yof rules, positive and negative, in accordance with which people can get along together with the least trouble. They are or should be of th eessence of the practical wisdom garnered from centuries of experience ;and nothing in experience is, therefore, irrelevant to his purpose. It is told of Lord Mansfield that to a friend, not a lawyer, proceeding to a colony as Chief Justice he gave the advice, that he should never hesitate to give his judgments but never to give any reasons for them. This reflects both the nature of judgment in most ordinary matters and the special and artificial reasoning developed in the law.

You ought, I think, first to endeavour to become artists in thinking. What I mean by that is not to be achieved by anything short of the intelligent and relentless exercise of your mental faculties. I recall an address given by Sir John Simon in, I think it was, 1922 before the Canadian Bar Association at Ottawa. It was an address on the art of advocacy, and I recall the three rules which he laid down as essential to success: they were, the first, the second and the third of them, Unremitting Toil. But there are, I think, certain means and methods by which that toil can be made pleasanter and more effective, by which artistry can, in greater or less degree, be acquired.

There is the imagination: interpenetrating all thinking, it can, like any other faculty be strengthened and made a powerful instrument by its conscious use. It will enable you to carry facts and situations backward or forward to new examples or illustrations; it will enable you to look at a problem not only in one or two dimensions, but as if it were a centre within the dimensions of a globe, in which it presents an aspect from every point on the surface. It is, I think, the culmination of legal analysis and development to work out a problem in that universal sense, or in other terms, completely to rationalize it. You will come to understand that no fact exists in isolation, that we live in an invisible web of relations to each other and to things, and if you take any simple matter in law dealt with in the aspect of A and B, you will soon learn by searching that there are other aspects between A and C and D and on towards the end of the alphabet. The disciplined imagination, allied with the reasoning faculty, by summoning up all pertinent factors, and ranging about their circumference, enables you to effect that global appreciation with clearness and conviction; and its long continued practice will furnish you with a power of great facility and of incalulable benefit. There is likewise its capacity for pictorial representation. It is essential to a lawyer that he be able to reproduce rapidly in his mind the factual scene or event with which he is dealing; and again that accomplishment may become largely the product of the conscious effort of imagination.

By that use, also, you will be enabled to enter into the minds of others, to recreate the thoughts, passions, intentions and volitions as they operated in the unseen portion of the external situation which you are examining; the subjective field can, in this respect, be compared to the submerged part, the much larger part, of an iceberg; and perhaps we can gather from this that lawyers should look beneath the surface

of things if they would avoid grief. The reconstruction of matters of objective fact alone — in the ordinary sense — is difficult enough, but that of these states and processes of mind and feeling is so far more so; but that invisible world will ever be of vital signficance to your problems; and you must equip yourselves, figuratively, to be skilled and courageous explorers of its depths. For this, in addition to imagination, we must not only obey the Socratic injunction, to "know thyself," but avail ourselves of the present-day knowledge and theories of psychology. One must, in fact, become acutely sensitive to the whole range of reactions, a response you can see instinctively exhibited by the great lawyers in moving human dramas. But you must constantly remind yourselves that situations of life with which you will deal are not made of dead elements; they are alive and pulsing with thought and feeling; and in rebuilding them you will be driven to summon up all of your insights under the compulsion of your imaging power.

Allied to the imagination is the conceptual function. Here artistry can be shown at its best. In a field of fact you will have given a certain number of points: your task will be to bring them within an attractive mould or picture, an intellectual conception. It will be of advantage that it bear features similar to those of some known formulation to which the law has already attached an effect. You thus make use of the old but always influential means of anaogly to extend legal decision. What is needed here is resourcefulness and judgment in fixing the aspect and setting from which the new matter is to be viewed, in the use of the most realistic perspective.

To illustrate concepts generally, let us consider for a moment that of negligence. This is one with which you will have a great deal to do, and at the outset you wil try to form a mental image of the idea which it carries. How can that most advantageously be done? This particular subject, in its general outline, lends itself to direct perception of what is most important, its underlying matter. Let us, for our purpose, envisage the whole body of active society, and ask ourselves what we observe as prominent characteristics in its conduct or behaviour. We see, as we look upon it, general uniformities of action: we move along a highway on the right hand side: we pause before driving ahead at the risk of collision with others; in the use of property, we exhibit consideration for neighbours; preceding action generally, we contemplate possible consequences to others. Before us is human conduct manifesting itself witihn the restraints of civility, stopping at limits which we learn through experience to respect. In the language of the late Justice Holmes of the Supreme Court of the United States, we see the "common sense of the community" in action. These uniformities, followed in all but the exceptional case, set, as it is said, the standard of conduct: reasonable conduct, the conduct of a reasonable person when he is acting normally. When we speak, therefore, of negligence, we speak of a departure from those channels of behaviour which men have been led to make by the inherent necessities of conduct itself: without them social life would be intolerable. The law declares that to be a legal standard which the community has in fact already established; that is the important consideration; we see the rules arising out of the life which they control; and it would seem to me to assist in the initial grasp and in the subsequent development of such an idea, that what may be called the raw matter giving rise to the conception be thus broadly apprehended.

There will be difficulty at first in forming these complex ideas because of that scantiness of personal experience of which I have already spoken. You will come, I think, to see that only when we are able to

identify ideas with matter either of our own experience or what we have learned from that of others, do they bear a sense of authenticity. That fact lies behind the theory of the so-called case method: that the student familiarize himself primarily with the matters of fact from which legal rules and principles are drawn. Once some of these particulars have been grasped, the generalization of the principle can then be realistically perceived. What I am saying is merely that the personal experience of life by a lawyer is necessarily limited and he must supplement that immeasurably by a knowledge of as much as he can garner from the experience of others.

On this topic, let me add one more suggestion. Your aim must be to become a thinker in your own right. For that it is a desirable practice for a young lawyer first to endeavour to resolve a complication without help from others. Intellectual self-reliance and the capacity for the formulation of opinion represent the maturity of a lawyer and neither can be attained by mere patch work use of decided cases. Excessive initial dependence on authority weakens the ability to cope with the reasoning behind it. You may take it for your immediate purpose as it was said several centuries ago, that law is reason, and that you can make that reasoning process your own only by its constant exercise.

Your next step will be to enter upon action :you will be expressing yourselves both in writing and orally, and in what manner will it be done? In the work of a law office, you will have contracts, conveyances, pleadings and various other writings which are to be prepared, and which you must rely upon your own competency to express properly. Allow me to make a few observations on that.

I have become interested anew in pleadings. I am beginning to wonder how many present-day lawyers have ever caught the glimpse of artistry in drafting them? I am afraid that the liberalization of the statement of claim, by limiting it to the facts without conclusions of law, has had two harmful effects: it has tended to excuse the pleader from thinking out his case thoroughly in advance of pleading: and it has led to sloppiness in stating it. Now I can scarcely imagine any one disputing the view that the lawyer should be a student of language, if for no other reason than that language is one of the great implements of his profession. The heritage of the English and French tongues which we possess should rebuke us for the almost utter lack of that dissatisfaction with our ability to employ words which alone can hold us to a worthwhile standard. Who among us are tortured by repetition and overlapping, by tag ends of sentences and paragraphs, by the failure in logical sequence and development, in marshalling narrative argument, by the superfluous word, by the deadly and cumbrous legalism, by the weakening adjective? Who among lawyers seek for the greatest economy of words to convey the completeness of the thought? In preparing defences, how many master the logical course of broad denial, followed by limited denials until the last circumstance is isolated, in paragraphs of one or two lines? From my experience, very few. I have come to the conclusion that too many lawyers of today are either unfamiliar with or indifferent to either the history or theory of pleadings; and that they seldom address themselves to a thorough analytical treatment of what is or is assumed to be contained in them. I do not criticize merely bad habits in thinking, speech or writing; but I think we all must criticize ourselves when, in the presence of the skill and accuracy of the past, open to us for the taking, but to be modified in application to the changes in substance we have made, we find we have abandoned standards in an essential part of our art.

There is the mastery of the spoken word and the technique of oral action. You are the professional descendants of the sophists: you speak for others, in the forum of the law. What of artistry here? I understand it is now considered respectable to be fastidious in speech, and so far we are getting on. What of questioning? Let me take the direct examination. Do we ever strive for skill in winning from witnesses the story which we hope to persuade the tribunal to accept? Do we ever think of the blotch a leading question may make on that story? Apart altogether from the technical aspect of it, can anything be more destructive of value in evidence than that it should be out of the mouth of counsel instead of witness?

And then cross-examination, and here, too, I deal only with superficial features of the technique. Have we a distinct purpose for every question asked? Do we put short, precise, single questions? Do we exhaust every topic opened to the extent of our purpose or break off only with another purpose? Have we an ungovernable tendency to ask purposeless and unnecessary questions?

It may be that this art of examination suffers from the limited example available to the young lawyers of today, and the style of which, exhibited by leading counsel, he was formerly able consciously to absorb. The constant attendance of juniors at trial is the traditional mode of inculcating the skill and art of the examiner; but in most parts of this country we cannot count very much on that now. The absence of the specialist advocates as in England is, also, a handicap. We must resort then to other means; and why not the study of the performances of great examiners as given in the accounts of famous trials and elsewhere? I cannot think it would not be of the utmost assistance. But here, as elsewhere, it depends on the individual and his determination to attain to proficiency.

Advocacy before a court of appeal calls for special qualifications. Counsel must be master of every aspect of the legal questions. Here particularly analysis and the use of analogy can exhibit attainment of the highest order. The oral argument is not for the purpose merely of enabling counsel to state positions; it is the means by which the contentions and propositions of each party are to be tested and the controversy reduced to ultimate points if not to its determination.

To the accomplishment in these functions of the lawyer, which assumes a knowledge of the rules, let me suggest as its rounding out, an acquaintance with those generalizations which make up what we call jurisprudence. They enrich the content of positive law, and they enable us to see more clearly the summations of those rules into coherent and articulate order. It would be a great mistake to treat philosophic speculation as foreign to what, however practical, must remain a profession. Are we to become ashamed of scholarship? Is it to be ruled out of a profession which was among the first to engender it? Are we to remain ignorant of the great thinkers who have furnished us with the basic ideas of law and politics? Who gave us the notion that absolute political power resides in the people who may confer it or withdraw it where and when they choose? The philosopher John Locke, and you find the the entire body of law shot through with similar products of philosophic thought.

Now I have dwelt largely on one feature of a lawyer's performance: its quaility and artistry. I emphasize that because excellence in that sense means a terrifying sort of universal accomplishment, and to some

extent that is so. It is the most exacting of professions and it is essentially individualistic in its product. Your main object is to produce a well stored, sensitive, and imaginative mind, and a polished implement of reasoning. Your work lies in the processes of evolving justice. It is no mean function. I remember the valedictory words to one of his classes of the late Prof. Gray of Harvard: "Be proud of your profession." I give you those words today.

I have two purposes in mind: the first is to set before you the goals which are now come to the full circle. Can you imagine a greater honour to be accorded a Canadian lawyer than that his country should call him to its final court of appeal? And with that as its apex, look to the hierarchy of courts of which the Bar must prepare the members. Here again I suggest you keep your imagination active and maintain the hopes and visions of youth. We all have natural investments: but in the end the question will be, have we made the best of them? To prepare yourselves for these responsibiilties, should they offer, by quiet but indefatigable application to the mastery of your art, ought to be your first ambition; in the jargon of the day, raise your sights.

Here is my second purpose. With independence, with unremitting industry, with high standards and loyalty to public and private duties, we owe it to the people of this country to make of the legal profession an instrument of the highest competency in an enlightened administration of justice. The future of Canada will be one of great growth and achievements; her population will double and treble; her wealth will be staggering; her business life will take on tremendous dimensions; she will become a nation of strength and influence. But all that growth will carry corresponding responsibilities: and in this vital function which has been committed to our hands, we cannot permit any failure.