



HOW TO EXPLAIN TO YOUR CLIENT WHY YOU LOST HIS CASE

*Byron Bacon,
with introduction and notes by Peter Scott Campbell*

INTRODUCTION

ON JUNE 28TH AND 29TH OF 1883, a proto-version of the Kentucky Bar Association met in Louisville to discuss the burning legal issues of the day. After two days of debating the merits of railroad regulation and jury reform, the convention's participants unwound at a banquet where various members made light-hearted speeches on assigned topics. A speech by Louisville wit (and one-time partner with Louis D. Brandeis's uncle Lewis Dembitz) Byron Bacon went over so well that a newspaper reporter transcribed it and reprinted it in its entirety in the next day's edition of the *Louisville Courier-Journal*. Its appearance there spread awareness of the speech outside of Kentucky. As a result, by the end of the year it had been reprinted in four different law journals.

Byron Bacon (1834-1900) was "one of the best-known and most popular practitioners of the Louisville bar." Louisville Courier-Journal, Apr. 3, 1900, at 6. Peter Scott Campbell is Technical Services Librarian in the Louis D. Brandeis School of Law at the University of Louisville. The "Introduction" and numbered footnotes in this article are by Campbell. Everything else is by Bacon.

Unfortunately, the reporter's transcription contained a number of errors, one even serious enough to render an entire paragraph nonsensical. Rankled, Bacon submitted a revised copy, with footnotes and possibly even new material, to the history journal *Southern Bivouac* in 1886, and that publication created a second wave of popularity, leading to more sporadic reprints up until 1917. To celebrate the centennial of its last appearance, the *Green Bag* is bringing back this minor classic for a new generation of readers to enjoy. What follows here is Bacon's corrected version, complete with his original footnotes. My additions are printed in separate numbered footnotes to avoid confusion.

BYRON BACON'S SPEECH

I deprecate the thought that I respond because, from a more extended experience than my legal brethren, I bring to the solution of this question the exhaustive learning and skill of the specialist. The characteristic modesty of our profession forbids that I should arrogate to myself to instruct the eminent lawyers around me, wherein they doubtless have attained that perfection which only long practice can give.

I assume, therefore, that the subject was proposed for the edification of novitiates—those “young gentlemen” to whom Blackstone so often and so feeling alludes, who after a long and laborious course of study, have been found, upon an examination by the sages of the law, not to have “fought a duel with deadly weapons since the adoption of the present Constitution,” and have been admitted to our ranks.*¹ To them, then, I shall offer briefly some suggestions upon this point, hoping that they may not find them of practical value upon the termination of their first case.

The question, as framed, is not unlike that with which Charles II long puzzled the Royal Society. He demanded the cause of certain phenomena, the existence of which he falsely assumed. The answer was simply the de-

* Before admission to the practice of law in Kentucky, the applicant is required by the Constitution of that State to make oath that he, being a citizen thereof, has not fought a duel with deadly weapons with another citizen of the State.

¹ The oath relating to dueling is still a requirement. One of the joys of attending the swearing in ceremony for Kentucky's new lawyers is watching the applicants try to keep a straight face while reciting the oath.

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nial of the existence of the phenomena. What lawyer ever attempted to explain the loss of the case upon the hypothesis that he had lost it? That a lawyer cannot lose a case is as well established a maxim as that “the king can do no wrong,” or that “the tenant cannot deny his landlord’s title.” Eliminate this error and our question is of easy solution.

Coke tells us that law is the “perfection of human reason;” Burke, that it is “the pride of the human intellect;” “the collected reason of ages, combining the principles of eternal justice with the infinite variety of human concerns;” “the most excellent, yea, the exactest of the sciences;” and the eloquent Hooker, that “her seat is the bosom of God, her voice the harmony of the spheres; all things in Heaven and on Earth do her homage – the least as feeling her care, the greatest as not exempt from her power.” But we know that, if it be the purest of reason, the exactest of the sciences, its administration is not always intrusted to the severest of logicians or the exactest of scientists. We know that the great, the crowning glory of our “noble English common law” is its uncertainty, and therein lies the emolument and pleasurable excitement of its practice.

If, oblivious of this, you shall have assured your client of success in the simplest case, the hour of his disappointment will be that of your tribulation, and professional experience can extend you no solace or aid.

But your client’s cause has resulted unfavorably. You, of course, are never to blame; the fault is that of the judge, the jury, or your client himself, and it may be of all three. It becomes your duty to divert the tide of his wrath into those channels where it can do the least possible harm. If he be a crank and shoots the judge or cripples a juror, they fall as blessed martyrs, and their places and their mantles are easily filled; but not so readily your place or your mantle. As one of America’s sweetest poets, Mr. G. . . . M. D. . . . ,² has expressed it in a touching tribute to our professional and social worth, unequalled for delicacy of sentiment, boldness of imagery, and beauty of diction in the whole range of English poetry:

* A member of the Kentucky bar, who, unlike Sir William Blackstone, did not forsake the muses when he espoused the profession of which he is a distinguished ornament.

² G.M.D. was George M. Davie, a prominent Louisville attorney who was in attendance at the banquet. Poetry lovers and the morbidly curious can find more examples of his work on the Internet.

Byron Bacon & Peter Scott Campbell

“Judges and juries may flourish or may fade,
A vote can make them as a vote has made;
But the bold barrister, a country’s pride,
When once destroyed can never be supplied.”^{‡3}

The selection then of a target for your client (I use the word “target” metaphorically) must rest upon the peculiar facts and circumstances of the case and the “sound discretion,” as the venerated Story has it, of the counsel. But avoid, if possible, imputing the blame to your client, for although this has been attended with very happy results, yet his mood at such times is apt to be homicidal, and, moreover, you should bear in mind that there your aim is to conciliate.

“Who wrote that note?” demanded an Indiana Lawyer who, under the old system of procedure, had declared in covenant as on a writing obligatory, and gone out of court on a variance.⁴

“I got Squire Brown to write it,” answered his sorely vexed and discomfited client.

“I thought so,” sneered the learned counsel. “Didn’t you know that no d--- magistrate could write a promissory note that would fit a declaration?”

First, as to the jury. Upon this head I need not enlarge, only remind you that you are not held by the profession as committed or estopped by any eulogium, however glowing, which you may have pronounced during the progress of the trial on their intelligence or integrity. It is only in the capacity of a scape-goat that the American juror attains the full measure of his utility, and as such he will ever be regarded by our profession with gratitude not unmingled with affection.

[‡] A passage in *The Deserted Village* forcibly reminds us of these lines, yet we would be slow to charge the author of the *Vicar of Wakefield* with plagiarism.

³ Davie was born in 1848, some 78 years after the publication of *The Deserted Village*.

⁴ A declaration in covenant was, to simplify it a bit, a lawsuit to enforce payment of a “writing obligatory,” aka a bond, or in this instance, a promissory note. If there were significant discrepancies in the paperwork, the suit could be thrown out of court, because of the “variance.” This paragraph and the two following it were not in the original version of the article. It is likely that they were not in the speech at all, and that Bacon added them while revising the article.

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But it is to the judge that we turn in this extremity with unwavering confidence. The serenity and grandmotherly benignity enthroned upon his visage is to the layman that placidity of surface which indicates fathomless depths of legal lore; to the lawyer it bespeaks the phlegmatic temperament of one whose mission is to bear uncomplainingly the burdens of others.

It comes upon you like a revelation, that your weeks of study, your elaborate preparation, your voluminous brief, are all for naught; that the impetuous torrent of your eloquence has dashed itself against his skull, only to envelope it in fog and mist, and more “in sorrow than in anger” you confess that the presumption that every man knows the law cannot be indulged in his favor. Even your luminous exposition has failed to enlighten him.

You need not spare him. He thrives on abuse. Year in and year out he bears the anathemas of disappointed lawyers and litigants with the stolid indifference of Sancho Panza’s ass in the valley of the pack-staves, or beneath the missiles of the galley-slaves, and society comes finally to regard him pretty much as did Sancho his ass. It berates him, overtakes him, half starves him, and loves him.

But seriously considered, our question is only a long-standing and harmless jest of the bar, meaningless in actual practice.

The lawyer is untiring in his client’s behalf, and the client knows, be the result what it may, that he has had the full measure of his lawyer’s industry, zeal, and ability, and requires no explanation.

Lord Erskine said, that in his maiden speech “he felt his children tugging at his gown and heard them cry, ‘Now, father, is the time for bread.’” The British bar applauded the sentiment. The American lawyer throughout the case feels his client tugging at his gown, and if unsuccessful is sustained by the consciousness that he has done his whole duty as God has given him to see and perform it; and, should he want further consolation, he can open that eldest of all the books of the law and there read these words which may soothe his wounded spirit, and possibly best answer the question of tonight:

“I returned and saw under the sun that the race is not to the swift, nor the battle to the strong, neither yet bread to the wise, nor yet riches to men of understanding, nor yet favor to men of skill, but time and chance happeneth to them all.”

