It is a different thing to engage as private counsel in a prosecution against a man whom he knows or believes to be innocent. Public prosecutions are carried on by a public officer, the Attorney-General, or those who act in his place; and it ought to be a clear case to induce gentlemen to engage on behalf of private interests or feelings, in such a prosecution. I certainly think that it ought never to be done against the counsel's own opinion of its merits. There is no call of professional duty to balance the scale, as there is in the case of a defendant. It is in every case but an act of courtesy in the Attorney-General to allow private counsel to take part for the Commonwealth; such a favor ought not to be asked, unless in a cause believed to be manifestly just. The same remarks apply to mere assistance in preparing such a cause for trial out of court, by getting ready and arranging the evidence and other matters connected with it: as the Commonwealth has its own officers, it may well, in general, be left to them. There is no obligation on an attorney to minister to the bad passions of his client; it is but rarely that a criminal prosecution is pursued for a valuable private end, the restoration of goods, the maintenance of the good name of the prosecutor, or closing the mouth of a man who has perjured himself in a court of justice. The office of Attorney-General is a public trust, which involves in the discharge of it, the exercise of an almost boundless discretion, by an officer who stands as impartial as a judge. "The professional assistant, with the regular deputy, exercises not his own discretion, but that of the Attorney-General, whose *locum tenens* at sufferance, he is; and he consequently does so under the obligation of the official oath."* On the other hand, if it were considered that a lawyer was bound or even had a right to refuse to undertake the defence of a man because he thought him guilty; if the rule were universally adopted, the effect would be to deprive a defendant, in such cases, of the benefit of counsel altogether.

The same course of remark applies to civil causes. A defendant has a legal right to require that the plaintiff's demand against him should be proved and proceeded with according to law. If it were thrown upon the parties themselves, there would be a very great inequality between them, according to their intelligence, education, and experience, respectively. Indeed, it is one of the most striking advantages of having a learned profession, who engage as a business in representing parties in courts of justice, that men are thus brought nearer to a condition of equality, that causes are tried and decided upon their merits, and do not depend upon the personal characters and qualifications of the immediate parties.† Thus, too, if a suit be instituted against a man to recover damages for a tort, the defendant has a right to all the ingenuity and eloquence he can command in his defence, that even if he has committed a wrong, the amount of the damages may not exceed what the plaintiff is justly entitled to recover. But the claim of a plaintiff stands upon a somewhat different footing. Counsel, as it appears to me, at least have an undoubted right, and are in duty bound, to refuse to be concerned for a plaintiff in the legal pursuit of a demand, which offends his sense of what is just and right. The courts are open to the party in person to prosecute his own claim, and plead his own cause; and although I admit that he ought to examine and be well satisfied before he refuses to a suitor the benefit of his professional skill and learning, yet in my view it would be on his part an immoral act to afford that assistance, when his conscience told him that his client was aiming to perpetrate a wrong through the means of some advantage the law may have afforded him. "It is a popular but gross mistake," says the late Chief Justice Gibson, "to suppose that a lawyer owes no fidelity to any one except his client, and that the latter is the keeper of his professional conscience. He is expressly bound by his official oath to behave himself, in his office of attorney, with all fidelity to the court as well as the client; and he violates it when he presses for an unjust judgement, much more so when he presses for the conviction of an innocent man. ..... The high and honorable office of a counsel would be degraded to that of a mercenary, were he compelled to do the biddings of his client against the dictates of his conscience." The sentiment has been expressed in flowing numbers by our great commentator, Sir William Blackstone:—

> "To Virtue and her friends a friend,
> Still may my voice the weak defend:
> Never may my prostituted tongue
> Protect the oppressor in his wrong;
> Nor wrest the spirit of the laws,
> To sanctify the villain's cause."

Another proposition which may be advanced upon this subject is, that there may and ought to be a difference made in the mode of conducting a defence against what is believed to be a righteous, and what is believed to be an unrighteous claim. A defence in the former case should be conducted upon the most liberal principles. When you are contending against the claim of one, who is seeking, as you believe, through the forms of law, to do your client an injury, you may justifiably avail yourself of every honorable ground to defeat him. You may begin at once by declaring to your opponent or his professional adviser, that you hold him at arm's length, and you may keep him so during the whole contest. You may fall back upon the instructions of your client, and refuse to yield any legal vantage ground, which may have been *gained through the ignorance or inadvertence of your opponent*. Counsel, however, may and even ought to refuse to act under instructions from a client to defeat what he believes to be an honest and just claim, by insisting upon the slips of the opposite party, by sharp practice, or special pleading—in short, by any other means than a fair trial on the merits in open court. There is no professional duty, no virtual engagement with the client, which compels an advocate to resort to such measures, to secure success in any cause, just or unjust; and when so instructed, if he believes it to be intended to gain an unrighteous object, he ought to throw up the cause, and retire from all connection with it, rather than thus be a participator in other men's sins.

Moreover, no counsel can with propriety and a good conscience express to court or jury his belief in the justice of his client's cause, contrary to the fact. Indeed, the occasions are very rare in which he ought to throw the weight of his own private opinion into the scales in favor of the side he has espoused. If that opinion has been formed on a statement of facts not in evidence, it ought not to be heard,—it would be illegal and improper in the tribunal to allow any force whatever to it; if on the evidence only, it is enough to show from that the legal and moral grounds on which such opinion rests. Some very sound and judicious observations have been made by Mr. Whewell in a recent work on the elements of moral and political science, which I know I shall be excused when they are heard, for quoting at length:—

'Some moralists,' says he, 'have ranked with the cases in which convention supersedes the general rule of truth, an advocate asserting the justice, or his belief in the justice, of his client's cause. Those who contend for such indulgence argue that the profession is a mere instrument for the administration of justice: he is to do all he can for his client: the application of laws is a matter of great complexity and difficulty: *that the right administration of them in doubtful cases is best* provided for if the arguments on each side are urged with the utmost force. The advocate is not the judge.

"This may be all well, if the advocate let it be so understood. But if in pleading he assert his belief that his cause is just when he believes it unjust, he offends against truth, as

* Per Gibson, C. J., in Rush v. Cavenaugh, 2 Barr, 169.

† "There are many who know not how to defend their causes in judgment, and there are many who do, and therefore pleaders are necessary; so that that which the plaintiffs or actors cannot or know not how to do by themselves, they may do by their serjeants, attorneys, or friends." Mirr. of Justices, ch. 2. sec. 1.