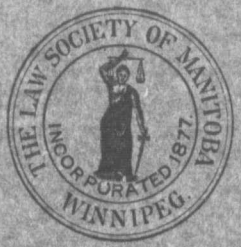
LEGAL ETHICS

ADDRESS BY

THE HON. T. G. MATHERS

CHIEF JUSTICE OF
THE COURT OF KING'S BENCH
MANITOBA

TO THE MANITOBA BAR ASSOCIATION
MAY 19TH, 1920



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LEGAL ETHICS

An Address by Chief Justice Mathers to the Manitoba Bar Association, May 19th, 1920.

Early in the nineteenth century David Hoffman of Baltimore prepared a list of fifty resolutions for the adoption of students upon admission to the Bar. Resolution forty-eight says: "The ill success of many at the Bar is owing to the fact that their business is not their pleasure. Nothing can be more unfortunate than this state of mind. The world is too full of penetration not to perceive it and much of our discourteous manner to clients, to Courts, to juries, and counsel has its source in this defect. I am therefore resolved to cultivate a passion for my profession or after a reasonable exertion therein without success to abandon it. But I will previously bear in mind that he who abandons any profession will scarcely find another to suit him. The defect is in himself. He has not performed his duty and has failed in resolutions, perhaps often made, to retrieve lost time. The want of firmness can give no promise of success in any vocation."

In that resolution Mr. Hoffman struck the keynote of success in the legal profession and of ethical conduct therein. The member of the Bar who has real liking of his profession as such, apart from its usefulness as a means of earning a livelihood, and has a knowledge of its history, customs, and traditions, will as a rule find his own ethical instincts a sufficient guide to right conduct in almost any circumstances; and the great majority of the members of the profession are admitted to practise as solicitors or called to the Bar and launched upon their respective careers with no other guide.

The curriculum of our Law School is singularly defective in this respect. We cram a few legal principles into the law student and then turn him loose to grope his way through and to discover for himself what is and what is not professional misconduct.

In I believe all the provinces of Canada, with the exception of Ontario, Alberta and British Columbia, the candidate for call or admission is required to take an oath to truly and honestly demean himself in the practice of his profession to the best of his skill and knowledge, but he receives no instruction as to what constitutes correct demeanour. (1) Often when it is unfortunately too late the young lawyer discovers that without any intention of doing wrong he has

(1) The oath administered to a barrister in Ontario and to both branches of the profession in Alberta and British Columbia constitute brief ethical codes in themselves.

violated some principle of legal ethics, the existence of which he had never been taught, and has acquired a reputation for unethical conduct which he finds it difficult or impossible to shake off.

I hope the time will soon come when every law student will not only be taught the general principles of legal ethics but will also receive a grounding in the splendid history and traditions of the English and Canadian Bars.

The average candidate when he is first entered on the books of the Law Society knows nothing or next to nothing on any of these subjects and when he is admitted to the Bar his knowledge is of the same indefinite character. He has probably read Dickens and has in this way made the acquaintance of such distinguished members of the profession as Dobson and Fogg, Sampson Brass, Sergeant Busfuz and Solomon Pell, who so freely radiated erudition that Sam Weller the elder was convinced that like the frogs he must have brains all over his body. He has probably also read "Ten Thousand a Year" and has thus been introduced to such ethical models as Quirk, Gammon and Snap, or may have browsed his way through the poets and dramatists and met with such confidence inspiring pleasantry as "who will play the part of the honest lawyer? 'Tis a hard part that." The logical deduction from all this is that lawyers as a class are a lot of ignorant, scheming mountebanks, or bloodsucking scoundrels, who live by trickery and chicanery. No person who enters the profession with such an estimate of the personnel can entertain for it that feeling of respect which Hoffman regarded as so essential to success.

The first thing then the student should be taught is, that while the lawyers of the fiction writer dramatists and smart story tellers unfortunately have in the past existed and perhaps may still be found, they are the jackals of which unfortunately all professions, even that of the ministry of the Gospel, have a few, but that the profession as a whole is composed of high minded and honorable men. He should be taught that the profession of the law is not a mere money making institution which barnacle like has attached itself to the ship of state and is tolerated only because the opportunity of ridding the community of its undesirable presence has not yet arisen but, that it is an absolutely essential institution in every civilized community; that the only place where the lawyer is not required is where the population is still in a state of barbarism where there is no law except the mere caprice of a chief or ruler; and that in the most highly civilized community their abolition would be followed by anarchy and chaos.

In an address to a body of university students on the choice of a profession the late Right Hon. W. E. Gladstone said: "As the God Terminus was an early symbol of the first form of property, so the word 'law' is the veritable emblem of the union of mankind in society. Its personal agents are hardly less important to the general welfare than its proscriptions, for neither statute nor parliament nor press is

more essential to liberty than an absolutely free outspoken Bar. Considered as a mental training the profession of the Bar is probably in its kind the most perfect and thorough of all professions."

Even Professor Lecky who was obsessed with the erroneous idea that the practice of advocacy as it is practised by the most eminent of the legal profession is inconsistent with the highest ethical standards admits that, "in the interest of the proper administration of justice it is of the utmost importance that every cause however defective and every criminal however bad should be fully defended and it is therefore indispensible that there should be a class of men entrusted with that duty. It is the business of the Judge and of the jury to decide on the merits of the case but in order that they should discharge this function it is necessary that the arguments on both sides should be laid before them in the strongest form." (The Map of Life, by Lecky, 101).

So much for the opinions of laymen, now let me give you the opinions of two very eminent Judges. Mr. Justice Best said in *Morris* v. *Hunt*, 1 Chit. Rep. 555: "There is nothing which has so great a tendency to secure the due administration of justice, as having the Courts of the country frequented by gentlemen so eminently qualified by their education and principles of honor, as at this time appear to discharge the duties which they are called upon to fulfil." Lord Chancellor Brougham, in *Greenough* v. *Gaskell*, 1 My. & K. 98, was even more emphatic. He said: "The interests of justice cannot be upholden, the administration of justice cannot go on without the aid of men skilled in jurisprudence, in the practice of the Courts and in those matters affecting rights and obligations which form the subject of all proceedings." (1)

The best sheet anchor any lawyer can possess is an ardent belief in his profession, its usefulness to the state, its respectability, its splendid traditions. If he starts on his career with a mind steeped in the history, traditions and customs of his profession, he is not likely to wander far from the path of rectitude. He will discover that to play the honest lawyer is not a hard part and that there is no other calling in which honesty and integrity pays such high dividends. He will discover, however, that there are certain ethical standards to which he must conform and that as to what these standards are his own moral or ethical instincts are not always a safe guide.

Suggestions for the adoption of a code or canons of ethics have not in the past met with much favor either in England or Canada. There has however been for some time a growing feeling here, stronger in the West perhaps than in the East, that the recognized ethical rules which experience has shown to be necessary for its government and

(1) See also lecture by Professor Richmond, Lawyers and the Public, 18 L.Q.R. 400.

control, if the profession of the law is to fulfil its highest destiny, should be formulated and reproduced in such a way as to be available for the guidance of the young practitioner instead of leaving him to discover when too late that he has been betrayed by ignorance into taking a false step.

In England the resolutions of the General Council of the Bar upon professional etiquette, conduct and practice collected and published in the 1917 White Book constitute a fairly complete code for the guidance of the higher branch of the profession. The Council is the accredited representative of the Bar charged with the duty of dealing with all matters affecting the profession. No such authority exists in Canada.

In Quebec, the General Council of the Bar has by its by-laws laid down certain ethical rules for the government of its members, and the Ontario Bar Association some years ago adopted a somewhat sketchy code. The question has been mooted in some of the other provinces with so far no concrete result. (1)

Some twenty years ago an agitation arose in the United States upon this subject. The matter was first taken up and acted upon by a number of State Bar Associations. Finally on the 27th August, 1908, the American Bar Association, meeting at Seattle, Washington, adopted a code of professional ethics with a recommendation that the subject be taught in all Law Schools and be included amongst the subjects on which candidates for admission to the Bar should be examined.

The Saskatchewan Bar Association and the Benchers of the Alberta Law Society more recently took steps towards the same end and Dr. James Muir, K.C., LL.D., of Calgary, prepared a draft which was printed and circulated. At a meeting of the Canadian Bar Association in 1918 a committee of which Mr. Angus McMurchy, K.C., of Toronto, was convener was appointed to consider the subject. This committee reported to the meeting held in this city in August last in favor of the appointment of a select committee to prepare a statement of the principles of legal ethics, using amongst other data the codes of the American and Ontario Bar Associations and Dr. Muir's draft. A committee of which I was named convener was appointed by the President, Sir James Aikins. At his request two drafts have been prepared one by myself and another by Mr. E. K. Williams, both of which have been circulated. It is expected that the whole subject will come before the Association at its meeting at Ottawa in September.

One of the objections to a code is the danger of it being regarded as exhaustive and that anything not coming within its express prohibition is allowable. It is not possible to formulate a code of legal

(1) Since this address was delivered the Bar Association of Saskatchewan has adopted a code largely based upon this draft.

ethics which will provide the lawyer with a specific rule to be followed in all the varied relations of his professional life. The very most that can be done is to state with as much particularity as possible and with a due regard to custom and tradition those general principles which experience has taught us must be observed if the profession is to maintain its high place in the social structure and adequately fulfil the important and responsible duties which fall to its lot. It must not be assumed that in these draft canons any attempt whatever has been made to exhaust the subject or to lay down rules of conduct which will be sufficient for all purposes and under all sets of circumstances. Many duties quite as important and equally imperative though not specified will arise in the course of almost every lawyer's practice. When a young practitioner is in doubt as to what course he ought to pursue under such circumstances his best plan is to ask the advice of some senior member of the profession.

At the threshold of the discussion of a code of ethics arises the question, under what sanction is it to be enforced? Is it if adopted to be a mere admonition to be obeyed or disregarded at the will of the individual member or is the offender to be subject to discipline, and if so by whom? Mr. Justice Mignault, who has kindly furnished me with the manuscript of two lectures delivered by him to the students of McGill, holds strongly to the view that any code to be of value must be binding. He argues that those who are deaf to moral suasion require something more persuasive than a mere exhortation to keep from sinning against professional good conduct. Mr. Justice Mignault's opinion derives additional weight from the fact that in the province of Quebec, where he practised, the Bar Councils have by statute plenary power to discipline their members for any conduct which is derogatory to the honor or dignity of the Bar.

In that province the by-laws of the General Council of the Bar constitute a binding code of professional ethics for breach of which or for professional misconduct not covered thereby a member may be disciplined or suspended from practice temporarily or permanently.

A code of ethics adopted by the Canadian Bar Association would of course have no binding effect upon the Law Societies of the several provinces.

As the law at present stands there are no agencies clothed with express authority to punish breaches of an ethical code, adopted for the whole Dominion. The incorporated Law Associations in the several provinces possess by statute certain control over their members but the disciplinary power of their Associations is by no means uniform. In this province the Benchers have power to disbar or suspend a barrister. They have power to resolve that a solicitor is unworthy to practice as such or that he should be suspended for a named period. The resolution is communicated to the Prothonotary whereupon an order of the Court is issued on praecipe suspending or striking the

solicitor off the rolls as the case may be. In either case the Court of King's Bench has power "upon sufficient cause being shown" to restore the condemned member. It will be observed that the power of the Benchers over barristers is absolute to disbar or suspend without the intervention of the Court but in the case of a solicitor the Benchers have no power to either strike off or suspend—that must be done by order of the Court. In addition, the Court of King's Bench has authority by statute to hear any complaint against a member of either branch of the profession "for unprofessional conduct or misconduct as a barrister, attorney or solicitor" and either suspend or strike the offender off both or either of the rolls.

In Saskatchewan and Alberta the disciplinary power is possessed by the Superior Courts or the Judges thereof. In British Columbia the Benchers have "full power to disbar, disqualify, suspend from practice or strike off the rolls any barrister or solicitor for good cause shown" subject to appeal to the Supreme Court Judges as visitors.

In Ontario, New Brunswick and Nova Scotia the power of the Benchers is with some difference in procedure practically the same as in Manitoba. In Quebec the jurisdiction of the governing body is absolute while in Prince Edward Island so far as I am aware there is no disciplinary power except that inherent in the Court.

It will appear, therefore, that any code adopted by the Canadian Bar Association must unless the law is changed be and remain a mere exhortation. Nevertheless, I think nothing but good can result from this adoption. "Laws will not," says the Outlook, "make a community virtuous nor will canons of professional ethics make dishonorable men honorable. Nevertheless in a democratic country good laws help to raise and strengthen the standard of social virtue and canons of professional ethics similarly tend to raise and to strengthen the standard of professional honor."

In those provinces where the governing body of the Bar by whatever name it may be known is vested with disciplinary power, such a code might receive a measure of enforcement insofar as it is consistent with the laws of the province. Whether it did or not would depend upon the construction which the governing body put upon any particular canon.

Another matter that must be borne in mind in the formulation of a code of ethics is that the legal profession in Canada is made up of two distinct professions, with different duties, different responsibilities and liabilities, different history and traditions and subject to different rules. In only one province, viz., Quebec, is there but one degree in the law, that of advocate. In Alberta and Saskatchewan every member is necessarily both a barrister and solicitor while in all the other provinces every lawyer may if he choose belong to both professions or to only one of them.

In the United States, the pioneers in the formulation of codes of

legal ethics, and from which emanates almost all literature on the subject, both branches of the legal profession, with us nominally separate but in reality combined, are blended in the attorney-at-law.

The suggested canons of ethics to which I have already alluded were prepared with these considerations in mind. I don't think I can do better than devote so much time as I may without wearying you to a discussion of this draft, clause by clause, beginning with the preamble.

"The lawyer is more than a mere citizen. He is a minister of justice, an officer of the Courts, his client's advocate, and a member of an ancient, honorable and learned profession."

The term "lawyer" is used so as to embrace both branches of the profession. In either capacity he is certainly more than a mere citizen, he is veritably a minister of justice and has been so regarded by the Courts. In *Mayor of Norwich* v. *Berry,* 4 Burr. 2115, it was decided than an attorney in active practice could not be compelled to execute the office of Sheriff to which he had been elected because it was in the interest of the kingdom that an attorney should be exempt from all offices incompatible with his attendance in the Court of which he was minister. In so deciding, Yates, J., said: "The Court must have ministers; the attornies are its ministers." The term minister of justice is also applicable to the higher branch of the profession. So much so that while he is his client's advocate he is not his agent. Chief Justice Best said in *Colledge* v. *Horn,* 3 Bing. 121: "I cannot allow that counsel is the agent of the party" and later Chief Baron Pollock said in *Swinfin* v. *Lord Chelmsford,* 2 L.T. N.S. 413: "I always said I will be my client's advocate not his agent; to hire himself to any particular course is a position in which no member of the profession ought to place himself." On another occasion Lord Langdale, M.R., said in *Hutchinson* v. *Stephens,* 1 Keene at 668, speaking with reference to a question which he had put to counsel and to which counsel had candidly replied though his answer was against his client's interest, "with respect to the task which I may be considered to have imposed upon counsel I wish to observe that it arises from the confidence which long experience induces me to repose in them, and from a sense which I entertain of the truly honorable and important services which they constantly perform as ministers of justice, acting in aid of the Judge before whom they practise. No counsel supposes himself to be a mere advocate or agent of his client, to gain a victory, if he can, on a particular occasion. The zeal and the arguments of every counsel, knowing what is due to himself and his honorable profession, are qualified not only by considerations affecting his own character as a man of honor, experience, and learning, but also by considerations affecting the general interests of justice."

That a solicitor or attorney is an officer of the Court and as such subject to its summary jurisdiction is strictly true, but it is not univer-

sally true of a barrister. In England solicitors are, but barristers are not, officers of the Court in which they practise. [1]

Members of the Order of Serjeants now defunct and who pleaded in the Common Pleas, received their patents direct from the Crown and were, Inderwick says, for that reason officers of the Courts. Barristers on the other hand derive their status from one or other of the Inns of Court, from which they receive their training in the law and call to the Bar. The Inns of Court were and are independent of the Courts except that they are subject to the visitorial jurisdiction of the Judges. [2] Barristers were admitted to plead in the Courts in the reign of Edward II. when the serjeants became too few for the business transacted. They had no patent or official position and relied solely on their knowledge of law and skill in pleading and practise. That is the position of a barrister in England today.

The right to call to the Bar or to expel or suspend therefrom is vested in the Benchers of his Inn, subject only to an appeal to the Judges as visitors. [3] If a barrister misconducts himself the Court may refuse him audience but that appears to be the extent of its jurisdiction in England [4]; although Sir Thomas Raymond at 376 of his reports records an instance of much more summary and drastic treatment meted out to a barrister by order of the Court. One Nathaniel Redding a barrister who had been condemned to the pillory for subornation of perjury came into Court and demanded that an information for oppression be received against Justices Jones and Dollen by whom he had been condemned. The Court ordered his words to be taken down and in the quaint language of the period "the gentleman of the Bar did pray that his gown might be pulled over his ears which was ordered and executed in Court." [5]

In the present day it is in England well recognized that because a barrister is not an officer of the Court the Courts have no summary jurisdiction over him except the right to deny him audience.

Whether or not a barrister in Canada is to be regarded as an officer of the Court is by no means clear. In two provinces, Alberta and Saskatchewan, his official character is expressly declared by statute. In Ontario a solicitor is declared by statute to be an officer but nothing is said about barristers.

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(1) 2 Hals. 646: "The Bars of United States and England," 19 Green Bag 702.

(2) The King v. Grays Inn, 1 Doug. 353.

(3) Manisty v. Kenealey, 24 W.R. 918.

(4) Mitchell's Case, 2 Atk. 173.

(5) In olden times the disbarment of a barrister or the striking of an attorney off the rolls appears to have been attended by some physical demonstration. In Jerome's Case, 4 Cro. Car. 79 E.R. 665, the order of the Court was that Jerome be put out of the roll of attorney and be cast "over the Bar." The report says that a precedent was shown in the roll, 30 Eliz., where a like judgment was given in the case of one Osbaston. In Hanson's Case, Moore, K.B. 882, it is said that "Tho. Hanson attorney del Court fuit picked over le barre." See also Box v. Barnaby, Hobart's Rep. 117, 80 E. R. 266. Inderwick; the order to cast the offending attorney over the Bar was literally executed.

In several of the provinces, as Ontario and Manitoba, the Benchers are empowered to disbar barristers but solicitors must be dealt with by the Court. This difference in procedure has apparently been borrowed from England without due regard to the difference in the status of the two professions here and in England, and without any intention of stamping the one as an officer and the other not. The question is however of secondary importance because in all the provinces barristers are called to the Bar by the Courts and the Privy Council has said in *Re Justices of Antigua*, I Knapp. 267, 12 E.R. 321, that for that reason the Courts have inherent jurisdiction to disbar or suspend them. In all the provinces they are required to subscribe to an oath of office. That fact in itself seems to stamp them as officers of the Court. It may I think therefore be affirmed with respect to both branches of the profession that they are officers of the Court, subject to its jurisdiction, and with rights, powers and duties to the State and to the Courts as important as those of the Judges themselves. "In these several capacities it is his duty to promote the interests of the State, serve the cause of justice, maintain the authority and dignity of the Courts, be faithful to his clients, candid and courteous in his intercourse with his fellows and true to himself."

Someone has said that the lawyer's duty is expressed in the Institutes in these words: "These are the precepts of the law; to live honorably; to injure nobody; to render to every man his due."

"TO THE STATE"

(1) "He owes a duty to the State, to maintain its integrity and its law and not to aid, counsel, or assist any man to act in any way contrary to those laws."

This duty is imposed by the oath which every lawyer takes when called to the Bar or admitted as a solicitor. "No attorney or counsel," said Judge Daniels in *Goodenough* v. *Spencer*, 46 How. Pr. 347, "has a right in the discharge of his professional duties to involve his client by his advice in a violation of the laws of the State and when he does so he becomes implicated in the client's guilt, if, when by following the advice a crime against the laws of the State is committed. The fact that he acts in the capacity and under the privilege of counsel does not exonerate him from the well founded legal principle which renders all persons who advise or direct the commission of a crime guilty of the crime committed by compliance with the advice." And President Woodrow Wilson said in an address to the American Bar Association in 1910,—"You are all servants of the public, of the State itself. You are under bonds to serve the general interest, the integrity and enlightenment of law itself in the advice you give individuals."

(2) "When engaged as a public prosecutor his primary duty is not to convict but to see that justice is done; to that end he should

withhold no facts tending to prove either the guilt or innocence of the accused."

This ethical doctrine is probably the outgrowth of the time when accused persons were not entitled to the assistance of counsel but even then it was seldom acted upon as all who have read early English trials know. A prosecuting counsel who at the present day acted with the savagery with which Coke the great master of the Common Law prosecuted Lord Raleigh, or with which the learned Bacon prosecuted his friend and patron Lord Essex, would suffer legal if not social ostracism. With us there is no such thing as a private prosecutor once an accused person has been committed for trial. All prosecutions are conducted by counsel representing the Crown and the Crown has no interest to serve other than to see that justice is done. Such counsel should not be partisan, eager to convict. He is an officer of justice whose duty it is to aid in arriving at the truth. He owes a duty to the accused as well as to the State, neither to adduce irrelevant nor to exclude relevant evidence. It is due to the Canadian Bar to say that I believe they seldom or ever sin against this canon. In the matter of addresses to the jury, the practice in this province at least is different from what it is in England. Here prosecuting counsel opens with a short address, merely explaining the nature of the case and the facts which he expects to establish by the witnesses, reserving his principal speech until the evidence is all in. That practice was severely condemned by Mr. Justice Blackburn in *Reg.* v. *Holchester*, 10 Cox 226. He there said: "It used to be considered that the counsel for the prosecution was in a *quasi* judicial position—to bring forward proofs of the prisoner's guilt, but with the responsibility of doing so, not as mere counsel to try to get a verdict, but as an assistant to the Court, fairly to bring out the facts. * * * The counsel for the prosecution is to state his case before he calls the witnesses; then when the evidence has been given either to say simply "I say nothing," or "I have already told you what would be the substance of the evidence and you see the statement which I made is correct," or in exceptional cases to say "something is proved different to what I expected" and add any simple explanation which is required. If that course * * * be followed the administration of criminal justice will go on as it has hitherto done in this country, and as I hope, it always will, fairly and properly, the prosecuting counsel being part of the Court—a minister of justice, filling a *quasi* judicial position. But if the counsel for the prosecution is to think it a matter of duty in every case to sum up the evidence, and introduce into criminal courts the practice at *nisi prius*—if instead of feeling himself a minister of justice, he is to open his case slightly, call the witnesses, and then trust to a powerful and eloquent speech, as if he were a partisan—it will be utterly impossible to conduct criminal trials as they have hitherto been conducted."

While subscribing fully to what Mr. Justice Blackburn says with respect to the duty of a prosecuting counsel to regard himself as a

minister of justice acting in aid of the Court and with no object to serve other than the ends of justice, it would be unsafe to assume that in England his right to make a closing speech is as limited as the remarks of the learned Judge indicate. The practice, as outlined in Bown-Rowlands on Criminal Proceedings 231, differs in no essential respect from that prevailing here.

(3) "He should take upon himself without hesitation and if need be without fee or reward, the cause of any man assigned to him by the Court and exert his best efforts on behalf of the person for whom he has been so assigned counsel."

The whole question of supplying legal assistance to the poor whether by way of defence on a criminal charge or in suing or defending in a civil action where his cause appears to be an honest one, might well occupy the attention of your association. Have we lawyers in the past discharged our full obligation as ministers of justice and officers of the Courts in this respect? The answer must be I think that the machinery for the administration of justice has not lent itself to securing for the needy the measure of justice which is his due. From the earliest times the legal obligation of the lawyer to conduct the cause of a poor litigant without reward when assigned thereto by the Court has been recognized [1], not only in England but in the continental countries and the United States. In actual practice counsel have only been assigned in criminal cases of the graver sort; in civil cases the right to sue or defend, in *forma pauperis*, has constituted the sole concession to the poor. In recent years there has been a considerable awakening and various agencies have been set on foot for the purpose of securing justice for those who cannot afford to pay the incidental expense if left to their own resources. In England by the Poor Prisoners' Defence Act, 1903, provision is made for the assignment and payment of counsel and solicitor to act for any person committed for trial upon a certificate of the committing justice or the Judge of Assize that the persons ought to have such legal aid. In Canada the usual practice in criminal cases has been to assign a member of the Junior Bar to any prisoner who wants and is unable to fee counsel. I cannot say that the assignment of an inexperienced fledgling to such a task has often resulted in any great benefit to the unfortunate accused, and my own practice has always been to endeavor to secure the services of counsel who can be of real assistance, when possible of his own choice.

In capital cases, it is the custom for the province to pay a reasonable fee to secure counsel for the defence where the accused is unable to do so. Whether or not our Courts have inherent power to compel counsel and solicitor to act when assigned without fee has never so

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(1) This seems to be doubted, Reg. v. Fogarty, 5 Cox 161, and counsel cannot be forced on a person. Reg. v. Yscuado, 6 Cox 386.

far as I am aware been tested. For the honor of the Bar be it said I have never known a case of refusal.

There is no distinction between the duty in civil and criminal cases, but in the former the practice has so far fallen into decay that its existence is sometimes denied. The Superior Courts in England have however recently recognized not only the obligation but the power of the Court to impose it. By rules passed in 1914 the formation of lists of barristers and solicitors who volunteer their services to poor suitors is provided for. Rule 26 provides for the assignment to a poor litigant of counsel and solicitor whether named in the list or not; and the following rule provides that neither shall be at liberty to refuse his assistance unless he satisfies the proper officer or the Court or a Judge that he has good grounds for refusing.

The object of the canon is to define the ethical duty of the lawyer to give the benefit of his service to the poor in either civil or criminal matters where requested by the Court to do so.

Until some other agencies are created such as the Legal Aid Association in the United States or the improvement of the machinery respecting in *forma pauperis* proceedings, I am not hopeful of any striking results from the adoption of the canon. (1)

(4) "It is a crime against the State and therefore highly non-professional in a lawyer, to stir up strife or litigation by seeking out defects in titles, claims for personal injury or other causes of action for the purpose of securing or endeavoring to secure a retainer to prosecute a claim therefor; or to pay or reward directly or indirectly any person, for the purpose of procuring him to be retained in his professional capacity."

The first sentence is levelled against the offence of maintenance which includes champerty, and which comprises cases where a man "improperly and for the purpose of stirring up litigation and strife encourages others either to bring actions or make defences which they have no right to make." (2)

Insofar as champerty and maintenance are crimes it has been held by the Court of Appeal in Manitoba that that part of the common law of England had become obsolete before the 15th July, 1870, and consequently was not part of the law introduced into Manitoba; (3) but that they are matters of illegality which may be pleaded as a defence in a civil action. In other provinces champerty and maintenance constitute part of the common law derived from England. (4)

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(1) The Carnegie Foundation, Bulletin number thirteen, compiled by Reginald Heber Smith entitled, "Justice and the Poor," contains much valuable information on this subject.

(2) Findon v. Parker, 11 M. & W. 682; Neville v. London Express [1919], A.C. 368.

(3) Thomson v. Wishart, 19 M.R. 340.

(4) Meloche v. Dequire, 34 S.C.R. 24; Hopkins v. Smith, 1 O.L.R. 659; Briggs v. Fleutot, 10 B.C.R. 309.

The recent decision of the House of Lords in *Neville* v. *London Express* [1919] A.C. 368, indicates that the common law crime of maintenance is not obsolete but is still regarded as being an indictable offence. "The criminal law prohibits and may punish the act but in the absence of damage the remedy is not by civil action," per Lord Finlay, Id. at 380.

In so far as barristers and solicitors are concerned, champerty has been legalized in this province by sec. 73 of The Law Society Act and they are now at liberty to bargain for a share in the subject matter of the litigation, or for remuneration in any other way, subject to review by the taxing officer of the King's Bench. Manitoba stands alone I believe in this respect and the wisdom of the legislation is doubted by many prominent members of the profession.

The balance of the canon is designed to prevent the disreputable practice of ambulance chasing, happily I think but little resorted to in this province, although when the records show that a lawyer of no great prominence appears in an undue proportion of personal injury actions one may be excused for suspecting that he has had agencies at work contrary to the ethical doctrine stated in this canon. It is no doubt within the memory of most of you that a somewhat sensational investigation disclosed the fact that a member of the Bar whose name has since been removed from the rolls had a working arrangement with a certain Winnipeg police constable not now on the force, whereby for a consideration the constable undertook to use his influence with prisoners to secure the counsel a retainer. As a warning to others I might mention that in that case no prosperity attended any of the parties to the compact, because both the constable and the counsel afterwards served terms in the penitentiary, and the client was hanged.

"TO THE COURT"

(1) "His conduct should at all times be characterized by candor and fairness. He should maintain towards the Judges of the Courts a courteous and respectful attitude and insist on similar conduct on the part of his client, at the same time maintaining a self-respecting independence in the discharge of his professional duties to his client.

(2) "Judges, not being free to defend themselves, are entitled to receive the support of the Bar against unjust criticism and complaint. Whenever there is proper ground for serious complaint of a judicial officer, it is a right and duty of the lawyer to submit the grievance to the proper authorities."

(3) "He should not offer evidence which he knows the Court should not admit. He should not, either in argument to the Court or in address to the jury, assert his personal belief in his client's innocence, or the justice of his cause, or as to any of the facts involved in the matter under investigation."

(4) "He should never seek to privately influence, directly or indirectly, the Judges of the Court in his favor, or in that of his client, nor should he attempt to curry favor with juries by fawning, flattery, or pretending solicitude for their personal comfort."

"It is impossible," said Mr. Justice Anglin, 29 Can. L.T. 1, "to exaggerate the importance of being absolutely fair with the Court; candor and frankness should characterize the conduct of the barrister at every stage of the case. The Court has the right to rely upon him to assist it in ascertaining the truth, *Veritas est justitiae mater*. He should be most careful to state with strict accuracy the contents of a paper, the evidence of a witness, the admissions or the arguments of his opponent. Knowingly to cite an overruled case or to refer to a repealed statute as still in force would be unpardonable and counsel cannot be too cautious not to make such mistakes unwittingly. A charitable construction is not always put on such errors and the confidence of the Courts, and his professional brethren, is far too important for counsel to jeopardize it lightly. The success of the advocate who enjoys this confidence is assured; while the lawyer who is not candid with the Court or who attempts to deceive or mislead it very quickly attains an undesirable reputation."

It is very seldom indeed that the Bar has afforded any ground for complaint of a lack of respect for the Superior Courts or the Judges thereof. A sentiment of profound respect for the sanctity of the Courts of justice is one of the most deeply implanted traditions of the Bar and seldom indeed is there any occasion for the interposition of the Judges. In the rare instances in which there has been any transgression by a member of the Bar an intimation from the bench is almost always acquiesced in. From an experience of almost fifteen years on the bench I can say that I have never on a single occasion found it otherwise. Instances have, however, come to my knowledge where members of the Bar have seemed to forget the obedience and submission which for the sake of the decent and orderly administration of justice they owe to the rulings and decisions of the presiding Judge. No one can entertain a higher opinion of the rights and privileges of counsel in the discharge of the important and often extremely arduous duties which they are called upon to discharge—rights and privileges which, I trust for the interests of the community as a whole, will never be abridged or taken away.

After some differences of opinion the extent to which counsel may go in the advocacy of his client's interests has become fairly well defined. The most extreme view of a counsel's duty was that expressed by Brougnam in his speech in defence of Queen Caroline. "An advocate," he said, "by the sacred duty which he owes his client knows in the discharge of that office but one person in the world, that client, and none other. To save that client by all expedient means—to protect that client at all hazards and costs to others and among others to

himself—is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction which he may bring upon any other. Nay, separating even the duties of a patriot from those of an advocate and casting them if need be to the wind he must go on reckless of the consequences, if his fate it should unhappily be to involve his country in confusion for his client's protection." This passage was afterwards relied upon by Mr. Disraeli in answer to a criminal information for libelling Mr. Austin, counsel against him in an election petition proceeding, by writing of Mr. Austin's speech in opening that it was "but the blustering of a rhetorical hireling availing himself of the vile license of a loose-tongued lawyer not only to make a statement which was false but to make it with a consciousness of its falsehood." If Lord Brougham's language were to be accepted as a general description of the duties of an advocate it would not be using too strong language to describe it, as one author has done, as "infamous" or another, that if carried to the extent suggested would "render him under cover of the law a virtual highwayman." I prefer the statement of Lord Chief Justice Cockburn that "the arms which an advocate wields he ought to use as a warrior not as an assassin. He ought to uphold the interests of his clients *per fas*, and not *per nefas*." Lord Halsbury in a letter to Showell Rogers, 15 L.Q.R. 259, at 271, says that, "it is the advocate's duty to have primarily before his mind's eye that it is not his own but another's case he is arguing, and to reason earnestly and courageously for it, and not to be awed by the modern ogre who, without any responsibility, sits in his calm retirement and decides for everybody else what they ought to do." Mr. James T. Brady of the New York Bar, lays it down, "that an advocate may fairly present honorably whatever any man who is accused would have a right in truth to say for himself and no more." His duty to both Court and client will admit of nothing less. His character as a gentleman and the dignity of his profession will permit nothing more.

It is the duty of the Judge to declare the law, and whether counsel thinks him right or wrong it is the duty of counsel, for the time being, to submit. In the quaint language of Lord Bacon, "Let not the counsel at the bar chop with the Judge nor wind himself into the handling of the cause anew after the Judge has declared his sentence." The jury are bound to take the law from the Judge as he lays it down for their guidance, and counsel cannot be permitted to argue to the jury against the rulings of the Judge on questions of law, or to suggest that his instructions in that respect are wrong and that they are at liberty to disregard them. With respect to questions of fact it is quite otherwise. Counsel are quite at liberty to appeal to the jury against any opinion upon a question of fact which the Judge may have intimated and to remind them that they, and not the Court, are the judges of the fact (per Cockburn, C.J., *Re Pater*, 9 Cox. 547), and so long as

this is done in a becoming manner no Judge should take exception to it. If trials are conducted with these facts in mind the administration of justice will proceed in an orderly manner, but any transgression of them can have no other effect than to degrade the profession and to lower the dignity and usefulness of Courts of justice and to lessen both in the respect, confidence and esteem of the community.

To openly charge a Judge with bias or prejudice rendering him unfit to preside in a particular case is an offence against decency unheard of in England in two hundred years. I have already alluded to the last recorded instance and in that case you will remember that upon motion of other members of the Bar then present the offender had his gown pulled over his ears. In the United States the only notable instance of an attempt to intimidate a Judge by charging him with prejudice or bias was in the famous Tweed case. The first trial before Judge Davis and a jury resulted in a disagreement. When the case was again called before the same Judge, counsel for the defence presented a written protest to the Judge alleging that because of opinions expressed in the former trial both as to the facts and the law he was disqualified from presiding. Further than to inform counsel that the presentation of the document was a manifest impropriety, the Judge took no further notice of it until after the trial when he ordered all the offending counsel to attend before him and fined them for contempt. In doing so he said, "If such a paper were presented to an English Judge by counsel, clothed as English Judges are with powers which the constitution withholds from our Judges, not one of them would be sitting here now and not one of them would find his name one hour after on the roll of counsel." No doubt an English Judge has power to summarily discipline counsel for such a contempt, but Judge Davis credits him with a power which he does not possess when he suggests that he possesses the right to disbar a barrister. In this respect the power of Canadian Judges is more extensive than those of England. It is a power which I trust for the sake of both the Bench, the Bar and the community at large, there will never be occasion to use.

Instances have occurred within the memory of all of us, where counsel have yielded to the infirmity of temper and have displayed an unbecoming degree of petulance, because the Judge's ruling was not in accord with their views. I know how hard it sometimes is to preserve an outward calm under circumstances of acute disappointment at a decision which counsel believes to be wrong, but control of the temper under all circumstances is part of the discipline which counsel must inflict upon themselves, not only for their own sake, but for the sake of their profession and those whom they serve. If there is any rule which a lawyer ought to keep pasted in his hat it is to keep his temper under all circumstances.

I have always regarded it as highly improper for counsel either

in argument to the Court or in address to the jury to assert his personal belief in his client's innocence or the justice of his cause or as to whether or not any fact or facts was or was not established by the evidence. I was a little surprised to find that the late Sir John Boyd, speaking on "Legal Ethics," 4 Can. L. Rev. 85, referred with only mild dissent to Archdeacon Paley's justification of a lawyer, even contrary to his real opinion, asserting his belief in the justice of his client's cause. Sir John says: "It is now generally perceived that there is no duty cast upon the lawyer to assert his belief in the truth or justice of his client's case even if he does believe him in the right, and to make such an assertion where he doubts or has no faith in the right or justice of the claim is to violate truth for the purpose of leading the tribunal astray. If such declarations were to be made a part of each address the jury would take their omission to be a confession that the client's cause was unworthy. Therefore, as no conscientious man could make such assertion in all cases, and the declarations of an unconscientious man would soon carry no weight, it is best that no counsel should indulge in such expressions of personal belief, and this is the course followed by the best representatives of the Bar." I know that lawyers of great prominence have not hesitated to express their own convictions, amongst them Lord Brougham, Sergeant Shee and Lord Campbell, but seldom or ever was it done without a rebuke. Erskine reprobated it, and Cockburn described it as unprecedented. The true rule as stated by Showell Rogers in "Ethics of Advocacy" 25 Law Quarterly Review 259, viz., "that it is an inflexible rule of forensic pleading that an advocate shall not, as such, express his personal opinion or belief in his client's case." "As a private adviser of his client," he says, "a lawyer is bound to express to him his individual and honest opinion." As an advocate in a public Court he ought not to express that opinion to the Court, whether it be for or against his client, and to do so is a distinct departure from his duty. Whenever an advocate asserts a thing as a fact he does so subject to the qualification—which is not the less real although unexpressed, and which the very capacity in which he appears is universally regarded as constituting an *ipso facto* implication—that he speaks according to his instructions and not of his own knowledge or belief. * * * The personal opinion of an advocate is wholly irrelevant to every issue in his client's case which must be tried and determined solely, *secundum allegata et probata;* in short, as every juror swears that he will determine it—according to the evidence." (1)

The question sometimes arises whether the obligation to deal candidly with the Court obliges counsel to mention a decision or decisions which he has discovered and which he believes to be dead against him. That it is his duty to do so, at least when the other side is not repre-

(1) The subject is discussed by the Alberta Court of Appeal in R. v. Moke [1917] 3 W.W.R. 575.

sented by counsel, is stated by Mr. Showell Rogers in an article, Ethics of Advocacy, published in 1899 in 19 Law Quarterly Review. He there says: "The duty of counsel in all cases civil or criminal where only one side appears, clearly is to act as an assistant to the Court and as a minister of justice; just as counsel for the prosecution does * * * in criminal cases, even when the accused is represented." He mentions a civil case, *Cole* v. *Langford* [1898], 2 Q.B. 36, in which Mr. Greyson Ellis, counsel for the plaintiff, opened his argument by saying, "as the defendant does not appear in opposition to the motion, the plaintiff is bound to call the attention of the Court to certain cases which seem to raise a doubt whether the present action will lie." He also refers to *Beresford* v. *Sims*, reported in the same volume at 641, where the accused was not represented. Channell, J. remarked upon the paucity of authority to which the Court had been referred or which during the argument it had been able to find, "although of course," he said, "we do not suggest that counsel for the appellant would not have brought any authorities before us that he knew of."

In a later civil case, *Credits Gerundeuse* v. *Van Weede*, 12 Q.B.D. 175, in which only one side was represented, Baron Pollock said: "Mr. Barnes (counsel for the applicant), in moving, properly called our attention to a *dictum* in *Patorni* v. *Campbell*, which if effect be given to it is clearly against his application."

But what of the case where both sides are represented? Even in that case Mr. Showell Rogers says: "I venture to think that if a previous decision is found which is adverse and wholly undistinguishable —if in other words and to use a common expression it 'hits the bird in the eye'—the only proper course in the general interest of justice is to bring it to the notice of the Court himself, if the other side fails to do so, and then to make the best of the situation." He admits that this is a counsel of perfection which will win the approbation of the Court, but almost certainly lose him his client. This counsel of perfection was certainly pursued to a quixotic degree in *Beauchamp* v. *Overseers*, L.R. 8 C.P. 245. The fact was that the respondents had expunged the names of the Earl of Beachamp and the Marquis of Salisbury from the list of voters upon the ground that as peers they had no right to vote. An appeal was taken from this decision by the both noble Lords, Mr. Wills, Q.C. appearing for Lord Beauchamp, and Mr. Manisty, Q.C. for Lord Salisbury. The question involved was whether a peer of parliament was entitled to be placed upon the register of voters, and both learned counsel, (contrary to the interests of their clients if they desired the appeal to succeed), not only admitted that a peer had no such right but argued strenuously and at length against it. Mr. Wills said: "All the authorities upon the subject are opposed to it and the most diligent search had failed to discover a single atom of authority in its favor." Mr. Manisty said he "agreed that it would be vain to argue that a peer has a right to vote in the election of a

member of the House of Commons or to be on the register of voters." So fully did counsel for the appellants argue the case for the respondents that counsel for the latter were not called upon.

Bovill, C.J., said: "From the course which the learned counsel have taken, and properly taken, on the argument of these cases it seems hardly necessary for us to do more than to pronounce a formal judgment for the respondents, the learned counsel for both appellants agreeing that their claim to vote is untenable."

Keating, J., said he desired to "add an expression of my entire approval of the course pursued by the learned counsel for the appellants; and to say that I have yet to learn that it is otherwise than the duty of counsel to say so, when he finds a point not to be arguable. I have always understood it to be the chief function of the Bar to assist the Court in coming to a just conclusion."

Brett, J., however, was not so much enamoured of the course pursued by the appellants' counsel. He said it had "placed the Court in great difficulty." * * * "I quite agree," he said, "that it is the duty of counsel to assist the Court by referring to authorities which he knows to be against him. But I cannot help thinking that when counsel has satisfied himself that he has no argument to offer in support of his case, it is his duty at once to say so and to withdraw altogether. The counsel is master of the argument and of the case in Court and should at once retire if he finds it wholly unsustainable, unless indeed he has express instructions to the contrary. With the greatest respect for the two learned counsel who have appeared for the appellants in these cases, I must confess I do not quite approve of the course which they have taken."

Grove, J., the only other Judge, said: "It is a difficult task to pronounce a judicial decision in a case where one side only of an argument has been heard, and therefore I abstain from going into my reasons for concurring in this judgment."

If I might venture an opinion, it is that I concur with Brett and Grove. Had counsel for the appellant in an ordinary civil action pursued the course adopted by Messrs. Wills and Manisty, I can imagine with what amazement their client would have heard them, contending against the right they had been briefed to support. By doing so they were usurping the functions of the Court, and their client might very well say to them in the oft quoted language of Baron Bramwell, "I want your advocacy not your judgment. I prefer that of the Court."

A litigant's rights in law are those which the Court gives him and he is entitled to have these rights so determined. It sometimes happens that claims are adjudged to be good contrary to the opinion of the most eminent counsel. I well remember when I was a very young practitioner pleading a defence contrary to the opinion and advice of the late Chief Justice Howell, than whom this province never had a

sounder lawyer. He nevertheless not only supported that defence at the trial and obtained a verdict upon it, but held it in the Full Court.

What should counsel for the defence in a criminal case do, if he knew of a case dead against him which the prosecution had overlooked? Mr. Showell Rogers says in a note to the article already referred to: "I lately asked a member of the Bar, a man of the highest honor, what would you do if you were defending a man on a capital charge and you were aware of a decision dead against you in point which had escaped the notice of the counsel for the prosecution and of the Judge at the trial, but which if disclosed would inevitably put the rope around your client's neck? The only answer I received, accompanied by a significant look, was 'I would rather not be placed in such a position.'"

If counsel for the accused person is not bound to bring to the attention of the Court or the prosecution evidence known to him, but of which both are ignorant, and the production of which would condemn his client, by what principle can he be bound to aid in his condemnation by assisting the prosecution with respect to the law?

"TO HIS CLIENT"

(1) "He should obtain full knowledge of his client's cause before advising thereon and give a candid opinion of the merits and probable results of pending or contemplated litigation. He should beware of bold and confident assurances to clients, especially where the employment may depend on such assurances. He should bear in mind that seldom are all the law and facts on the side of his client, and that *'audi alteram partem'* is a safe rule to follow."

(2) "He should at the time of retainer disclose to the client all the circumstances of his relations to the parties, and his interest in or connection with the controversy, if any, which might influence the client in selection of counsel. He should avoid representing conflicting interests, ~~except by consent of all concerned, given after a full disclosure of the facts.~~"

(3) "Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation."

The duty of ascertaining all the facts before advising thereon will avoid many unpleasant surprises for both lawyer and client. Every lawyer who has been in practice a few years has learned this lesson, sometimes by dearly bought experience. Clients cannot always be relied upon to relate all the circumstances, and sometimes the most material facts are only elicited by a process of cross examination. Having possessed himself of all the facts, the next duty of the lawyer is to advise his client candidly and honestly. If in his opinion the client has no case he should tell him so, and dissuade him entering into litigation that is either unnecessary or liable to be unfruitful. In

Jacks v. *Bell*, 3 C. & P. 316, Lord Tenterden said to the plaintiff's attorney, "You say in your evidence that you neither persuaded nor dissuaded the plaintiff when he applied to you on the subject of this action. In that respect you did not do your duty. It was your duty to tell him that he ought not to bring the action."

Hoffman's 8th resolution is: "If I have ever had any connection with a cause, I will never permit myself (when that connection is for any reason severed) to be engaged on the side of my former antagonist. Nor shall any change in the formal aspect of the cause induce me to regard it as a ground of exception. It is a poor apology for being found on the opposite side that the present is but the ghost of the former cause."

As early as 1672 an attorney, one Mason [1] was committed to the Fleet and stricken off the rolls, because after being retained on one side he accepted a retainer on the other. About the same period, it was on several occasions decided to be actionable, to accuse an attorney of being an ambidexter, or one who dealt with both sides. The rule in England today is not inflexible, because by Rule of Etiquette 20, 1917, Annual Practice 2429, counsel who has drawn pleadings, or advised on one side may accept a brief on the other side, provided he gives the party for whom he has drawn pleadings or advised, an opportunity of retaining him for the trial. And rule 21, Id. 2431, says that counsel is not obliged to accept a retainer in any case where he has previously advised another party, and he should refuse where he would be embarrassed in the discharge of his duty by reason of confidence reposed in him by the other side. [2]

Not only is a lawyer bound not to stir up litigation but it is his duty to keep his client out of it, whenever it is reasonably possible to do so, and to always be on the alert for a favorable opportunity of effecting a compromise, whenever from the nature of the dispute a compromise is possible. Every person who has been much involved in litigation realizes that it is a poor settlement which is not better than a lawsuit. The lawyer who will hold his clients, and whose name will be blessed amongst them, is he who keeps his clients out of litigation. The power of counsel or solicitor to effect a settlement or compromise, without his client's consent, is not within the scope of this paper, but those who are interested in the subject may with profit refer to *Matthews* v. *Munster*, 20 Q.B.D. 141; *Strauss* v. *Francis*, L.R. 1 Q.B. 379; *Shepherd* v. *Robinson* [1919], 1 K.B. 474; *Watt* v. *Clark*, 12 P.R. 359; *Neale* v. *Gordon Lennox* [1902], A.C. 465; *Little* v. *Spreadbury* [1910], 2 K.B. 662.

(4) "He should treat adverse witnesses, litigants, and counsel with fairness, refraining from all offensive personalities. He must

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(1) Freeman 74.

(2) See Per Lord Elden, Bricheno v. Thorp, Jacob 300; Amphlett v. Blaylock, 3 Alta. 61.

avoid imparting to professional duties the client's personal feelings and prejudices. At the same time he should discharge his duty to his client with firmness and without fear of judicial disfavor or public unpopularity."

From motives of public policy the law exempts counsel, attorney and solicitor from both civil and criminal liability for anything said by them on behalf of their clients in a judicial inquiry. This privilege extends even to the utterance of words which are both malicious and irrelevant. In the United States I believe the privilege only extends to what is pertinent and material. Every consideration of prudence, if for no higher motive, should restrain the lawyer from abusing this privilege. Nothing is ever gained, but much is forfeited, by offensive and unfair treatment of any of the adverse parties to the litigation. The best and most successful counsel are the most courteous to their opponents. I am glad to say, that the professional bully has been almost if not entirely eliminated from a profession, which never had a place for him. Counsel may fully discharge his duty to his client and at the same time demean himself as a gentleman. Richard Harris, K.C., in his Hints on Advocacy at 53, has this to say: "The most eminent are as a rule the most unaffected, and the quiet moderate manner is generally the most effective. I do not intend to imply that bluster and a high tone will not sometimes unnerve a timid witness, but this is not cross-examination or true advocacy. It is not wit but bullying—not intellectual power but mere physical momentum. Nor would I say that the advocate should at all times treat a witness with the gentleness of a dove. Severity of tone and manner compatible with self-respect is frequently necessary to keep a witness in check—and to draw or drive the truth out of him if he have any; but the severity will lose none of its force, nay, it will receive an increase of it, by being furbished with the polish of courtesy instead of being roughened with the language of uncompromising rudeness. Instances of the latter are extremely rare at the English Bar." It is, however, the occasional bully who excites the most public attention and creates in the lay mind the impression that the majority of lawyers are of that type. Even the learned and observant Archbishop Whately, in his "Elements of Rhetoric," falls into this error. Not until he has become as extinct as the Dodo will the profession be entirely free from his blighting influence. As pointed out by Sir John Boyd in his address on Legal Ethics, the Courts should and in practice do, protect witnesses from unfair attack—will not allow them to be bullied or what they say perverted by the ingenuity of the skilled examiner.

(5) "He should endeavor by all fair and honorable means to obtain for his client the benefit of any and every remedy and defence which is authorized by law. He must, however, steadfastly bear in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of the lawyer does not

permit, much less does it demand of him, for any client, violation of law or any manner of fraud or chicanery.

(6) "It is his right to undertake the defence of a person accused of crime, regardless of his own personal opinion as to the guilt of the accused. Having undertaken such defence, he is bound by all fair and honorable means to present every defence that the law of the land permits, to the end that no person may be deprived of life or liberty but by due process of law."

Lawyers are ministers of justice; that is the ideal function of the Bar, but we must understand what is meant by justice. Our Courts are Courts of law, not, as some have erroneously supposed, Courts of conscience. The casuist's code could only be enforced by Judges possessing unfettered discretion, and we know what Lord Chief Justice Camden said on that subject. "The discretion of a Judge," he said, "is the law of tyrants, it is always unknown; it is different in different men; it is casual and depends upon the constitution, temper and passion. In the best it is oftentimes caprice; in the worst it is every crime, folly, passion to which human nature is liable." Courts of Equity were for a time thought to be Courts of conscience but when so regarded met with no favor. Selden speaks of equity as "a roguish thing for which there was no measure but the successive chancellors' consciences which might vary as much as the length of their feet, a reproach which Lord Elden repudiated and said nothing could give him greater pain than a recollection that he had done anything to justify it. (1) Experience soon taught that, if the doctrines of equity were to be of any value as a system of jurisprudence, the Chancellors must be as much under the control of fixed maxims and as much bound by prior authorities as the common law Judges.

Liberty and property today are regulated in accordance with the law of the land, and the function of the lawyer is to secure for his client the protection of these laws. That is what is meant by aiding in the administration of justice; and when he succeeds in securing for him the benefit or protection of the law, in the vast majority of cases it will be found that he has obtained for him substantial justice.

The ethical principles involved in these two canons have been the occasion of a great deal of controversy. Hoffman's 12th and 13th resolutions are to the effect that he would never plead either the statute of limitations or infancy to defeat an otherwise honest demand, and no doubt he would have included the statute of frauds in the same category. In adopting these resolutions Hoffman has assumed a wisdom and a morality higher than that of the legislature by which these laws were enacted. The understanding of the profession has never been in accord with Mr. Hoffman's resolutions; but is much better and more accurately expressed in the canon. At the same time the lawyer

(1) Gee v. Pritchard, 2 Swan. 414.

must not in the interest of his client violate the law. Neither should he allow himself to be used as an instrument of oppression or wrong. In the language of Lord Cockburn already quoted the arms which he wields are to be "the arms of the warrior and not of the assassin."

It will sometimes happen that after a lawyer has accepted in good faith a retainer in a civil cause he has become convinced that it is dishonest and unjust. His duty under such circumstances is well stated in an article in Volume 20 of The Green Bag, 62, by Mr. Geo. P. Costigan: "Whenever," he says, "the circumstances of a civil case make it clear that a man of honor and conscience cannot longer be a party to its prosecution or defence without dishonor and moral degradation, it is of course his duty, paid legal advocate though he may be, to abandon the case in the popular meaning of the word by withdrawing from it and letting the client find, if he can, another lawyer to take the withdrawer's place."

An interesting question of legal ethics was projected into the famous Tichbourne Ejectment action by Sir John Coleridge, then Attorney General, who led for the defence, in which Sir John got rather the worst of it. He seems to have become so obsessed with the dishonesty and iniquity of the claimant's pretensions that he could not understand how any person else could entertain other views, and at one stage of the trial he charged counsel for the claimant, Serjeant Ballantyne and Mr. Gifford, the present Lord Halsbury, with having made themselves accomplices in their client's crime, because they did not withdraw. Both defence counsel made spirited rejoinders and refused to be lectured on their duty by the Attorney General. The conflict between these eminent counsel was much discussed in legal periodicals, amongst them 8 C.L.J. N.S. 61, and the Law Times, in both of which Sir John's attitude was severely condemned, as it appears to have been by the entire legal profession. The view expressed was that counsel for the claimant were not bound to usurp the functions of the jury and anticipate their verdict by throwing up the case under penalty of becoming participators in his villiany if he should fail. The Canada Law Journal concludes its article by saying, "We trust this most unpleasant episode may after all be productive of good results in establishing the rule that no counsel, however high his position or how strong his convictions of the justice of his cause may arrogate the right to impugn the motives or question the integrity of even the humblest of his professional brethren."

Lord Campbell in his Lives of the Chief Justices, relates of the great and good Sir Matthew Hale, that "he began with the specious but impracticable rule of never pleading except on the right side which," Lord Campbell says, "would make the counsel decide without knowing either facts or law and would put an end to the administration of justice," but that Sir Matthew afterwards abated much of the scrupulosity he had about causes which appeared at first view unjust.

Few people have more tersely stated the duty of counsel than Samuel Johnson in the following dialogue with his friend Boswell:

"Boswell: I asked him whether as a moralist he did not think "that the practice of the law in some degree hurt the nice feeling of "honesty.

"Johnson: Why no, Sir, if you act properly. You are not to "deceive your clients with false representations of your opinion; you "are not to tell lies to a Judge.

"Boswell: But what do you think of supporting a cause which "you know to be bad?

"Johnson: Sir, you do not know it to be good or bad till the "Judge determines it. I have said that you are to state facts fairly; "so that your thinking or what you call knowing a cause to be bad "must be from reasoning, must be from supposing your arguments to "be weak and inconclusive. But, sir, that is not enough. An argu- "ment which does not convince yourself may convince the Judge to "whom you urge it; and if it does convince him why there, sir, you are "wrong and he is right. It is his business to judge and you are not to "be confident in your own opinion that a cause is bad, but to say all "you can for your client and then hear the Judge's opinion."

Baron Bramwell said, in *Johnson* v. *Emerson,* L.R. 6 Ex. 367, "A man's rights are to be determined by the Court, not by his attorney or counsel. It is for the want of remembering this that foolish people object to lawyers, that they will advocate a cause against their own opinions. A client is entitled to say to his counsel 'I want your advocacy not your judgment; I prefer that of the Court.'" (1)

Joseph H. Choate in an address in 1911, went to the root of the matter when he said: "It is only out of the contest of facts and of brains that the right can ever be evolved—only on the anvil of discussion that the spark of truth can be struck out. Perfect justice, as Judge Story said, belongs to one judgment seat only—to that which is linked to the throne of God—but human tribunals can never do justice and decide for the right until both sides have been fully tried."

The English rule undoubtedly is that counsel is not at liberty to refuse to defend a prisoner by reason of any preconceived notion of his own as to the accused's guilt or innocence. The canon under discussion does not make it the duty but the right to do so if he choose.

A more difficult question and one that has caused considerable discussion in England is not touched by the canon. I refer to the question of taking up or continuing the defence of an accused person after he has confessed his guilt of the crime charged.

In the Courvoisier Murder Case, 1 Townsend St.T. 244, (2) the

(1) He had previously laid down the same doctrine in Swinfin v. Chelmsford, 5 H. & N. at 900.

(2) A very full account of this controversy is to be found in Costigan's Cases on Legal Ethics, 321.

celebrated Charles Phillips was counsel for the accused. During the trial the prisoner made a complete confession to his counsel but at the same time insisted that he continue his defence. Phillips' first impulse was to throw up his brief but finally at the urgent suggestion of his associate counsel Mr. Clarkson, he laid the matter before Baron Parke, one of the presiding Judges. Baron Parke on being told that the accused refused to release his counsel, told Phillips that he must continue to act and he did so. Courvoisier was convicted and executed. On the fact of the confession to his counsel becoming known, Phillips was severely criticised by the London Examiner, not because he did not abandon the accused, but because it said he endeavored to fasten the crime upon an innocent party, a fellow servant named Sarah Mancer, a charge, which if true, would have amply justified the criticism. He was also blamed by his legal brethren for having mentioned the confession to Baron Parke, thus not only putting the Judge in an awkward position but being unfair to the accused. Although the Examiner returned to the attack from time to time it was not until after the lapse of nine years that Mr. Phillips, then occupying an important judicial position, made any reply. A consideration of all the evidence convinces one that Mr. Phillips violated no ethical principle. He not only did not endeavor to cast suspicion upon Sarah Mancer after the confession, but, in his speech, he expressly told the jury that he did not mean to do so. The whole question of the duty of counsel after his client has confessed has been reviewed by the English Bar Council whose ruling is published in the 1917 White Book at 2433. The general conclusion is that where an accused person has confessed to his counsel, a confession "is no bar to that advocate appearing or continuing to appear in his defence, nor indeed does such confession release the advocate from his imperative duty to do all he honorably can do for his client. But such a confession imposes very strict limitations on the conduct of the defence. An advocate may not assert to that which he knows to be a lie. He may not connive at, much less substantiate a fraud. While therefore it would be right to take any objection to the competency of the Court, to the form of the indictment, to the admissibility of any evidence or to the sufficiency of the evidence admitted, it would be absolutely wrong to suggest that some other person had committed the offence charged or to call any evidence which he must know to be false having regard to the confession; such, for instance, as evidence in support of an alibi, which is intended to show that the accused could not have done or in fact had not done the act. That is to say, an advocate must not (whether by calling the accused or otherwise) set up an affirmative case inconsistent with the confession made to him." As to counsel's duty with respect to the evidence for the prosecution, "no rule can be laid down than this, that he is entitled to test the evidence given by each individual witness and to argue that the evidence taken as a whole is insufficient to amount

to proof that the accused is guilty of the offence charged. Further than this he ought not to go."

(7) "He should not acquire by purchase or otherwise any interest in the subject matter of the litigation being conducted by him. He should act for his client only and having once acted for him he should not act against him in the same matter or in any other matter related thereto, and he should scrupulously guard and not divulge his client's secrets or confidences."

This canon is in direct conflict with section 73 of the Manitoba Law Society Act. In England [1] and in every other province a champertous agreement between a lawyer and his client is not only unenforceable but is an indictable offence. In two provinces, Alberta and Ontario, a barrister upon call is required to take an oath amongst other things "not to be guilty of champerty or maintenance."

It sometimes happens that what is legally right is ethically wrong and although the Manitoba statute permits a lawyer to bargain for an interest in the subject matter of the litigation, if the tendency of such a bargain is to degrade an honorable profession it should be reprobated. An interest in the subject matter reduces the lawyer from the position of the litigant's advocate to that of his partner, subjects him to all the temptations which beset a party, and not infrequently leads to unhappy conflicts between them when it comes to a question of settlement. The right to bargain for such an interest encourages that maladorous species the "ambulance chaser."

I am sure no member of the profession wants to see repeated in Canada a scene such as followed the mine explosion at Coal Creek, Tennessee, some years ago by which hundreds of men were killed, when numerous lawyers hastened to the place and as stated in *Ingersoll* v. *Coal Creek*, 98 S.W.R. 178, "entered actively into the competition for business," openly soliciting bereaved widows to entrust them with the right to bring suits for damages for a share of the proceeds. The report says that 190 damage actions were in this way started. The attorneys for the defendant attempted by negotiations with the plaintiffs' attorneys to effect a compromise but the latter no doubt to some extent influenced by their interest in the actions refused the amount offered. The defendant's attorneys then adopted the unethical course of going behind their back and making the offer direct to the plaintiffs, who accepted it and the enterprising attorneys got nothing.

What in the United States are known as contingent fee contracts and in England speculative actions, not involving a stipulation for an interest in the subject matter but in which the solicitor's right to payment hinges upon results have received countenance in both countries. In a speculative action for personal injury before Mr. Justice Darling in which the defendant obtained a verdict, he ordered the plaintiff's

(1) 1 Hals. 51; in re Solicitors, [1912] 1 K.B. 302.

solicitor to pay the defendant's costs but his decision was reversed by the Court of Appeal, 110 L.T. 94. The Master of the Rolls said in his opinion "there is no impropriety at all in a solicitor's merely conducting a speculative action, for if it were improper for a solicitor to do so, many poor people would be unable to get their legal rights." A few months before Lord Chief Justice Russell said "it was perfectly consistent with the highest honor to take up a speculative action in this sense, viz., that if a solicitor heard of an injury to a client and honestly took pains to inform himself whether there was a bona fide cause of action, it was consistent with the honor of the profession that the solicitor should take up the action. It would be an evil thing," he said, "if there were no solicitors to take up such cases because there was in this country no machinery by which the wrongs of the humbler class could be vindicated. Law was an expensive luxury and justice would very often not be done if there were no professional men to take up their cases and take the chance of ultimate payment; but this was on the supposition that the solicitor had satisfied himself by careful inquiry that an honest case existed."

In such an action it would be perfectly fair that a solicitor, considering the risk involved, should be remunerated upon a somewhat higher scale than that ordinarily allowed. To guard against abuse, all agreements stipulating for more than the usual costs should be in writing and approved by some competent official of the Court at the commencement of the business, otherwise they should be unenforceable.

(8) "He should report promptly to his client the receipt of any monies or other trust property and avoid the comingling with his own, or use of trust money or property, ~~without the knowledge or consent~~ of his client."

(9) "He is entitled to reasonable compensation for his services but he should avoid charges which overestimate or under-value the service rendered. When possible he should adhere to established tariffs. The client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge or even none at all."

(10) "He should avoid controversies with clients regarding compensation so far as is compatible with self-respect and with the right to receive reasonable recompense for services. He should always bear in mind that the profession is a branch of the administration of justice and not a mere money getting ~~occupation~~."

Many of the applications to strike solicitors off the rolls would be unnecessary if all would observe the advice contained in canon 8. The mingling of client's money with his own has led to the downfall of many solicitors without any premeditated wrongdoing on his part, and the danger of such a course cannot be too forcibly impressed upon every young practitioner.

My observation has led me to the conclusion that the best and most successful members of the profession, seldom if ever, have a dispute with their clients over a question of costs and in the rare instances in which such disputes do arise the solicitor is almost invariably found to be in the right. The lawyer who insists upon his strict legal right with respect to compensation under all circumstances will discover that he has adopted a poor method of attracting clients. Litigation with clients is one of the most unfavorable forms of advertising the lawyer can indulge in, and is in the long run almost certain to be unprofitable. On the other hand generous treatment of clients, particularly if they are poor or in very hard circumstances, even the writing off of all fees is like casting your bread upon the waters; it will return after many days. Abraham Lincoln owed in considerable degree his start on the road to the presidency to his reputation for generous treatment of the unfortunate.

(11) "He should not appear as witness for his own client except as to merely formal matters, such as the attestation or custody of an instrument, or the like, or when it is essential to the ends of justice. If he is a necessary witness with respect to other matters, the conducting of the case should be entrusted to other counsel."

It is stated, 2 Hals. par. 663, to be doubtful whether a person who appeared as counsel can give evidence in the same proceeding. In two cases in Ontario, *Benedict* v. *Boulton,* 4 U.C.R. 96; and *Cameron* v. *Forsyth,* Id. 189, he was said to be incompetent. Later however in *Davis* v. *Canada Farmers Mutual,* 39 U.C.R. 452, it was held that although there was no rule of law preventing an advocate also being a witness "it is an indecent proceeding and should be discouraged." With respect to any incident arising out of the litigation concerning which it is necessary to have the evidence of counsel engaged, the English rule is for counsel to make his statement from his place at the Bar without being sworn; *Hickman* v. *Berens* [1895], 2 Ch. 638. Even if thought advisable that counsel should be sworn the practice is for him to give his evidence from his place at the Bar without entering the witness box; *Wilding* v. *Sanderson* [1897], 2 Ch. 539.

The English rule is stated in the White Book for 1917 at 2428 as follows: "A barrister should not accept a retainer in a case in which he has reason to believe he will be a witness and by being engaged in a case it becomes apparent that he is a witness on a material question of fact, he ought not to continue to appear as counsel if he can retire without jeopardizing his client's interests. Nor should counsel accept a brief in an Appellate tribunal when he has been a witness in the Court below."

"TO HIS FELLOW LAWYER"

(1) "His conduct towards his fellow lawyer should be characterised by courtesy and good faith. Whatever may be the ill feeling

existing between clients it should not be allowed to influence lawyers in their conduct and demeanour towards each other and towards the suitors in the case. All personalities between them should be scrupulously avoided as should also colloquies between counsel which cause delay and promote unseemly wrangling."

(2) "He should endeavor as far as possible to suit the convenience of the opposing lawyer when the interest of his client or the cause of justice will not be injured by so doing."

(3) "He should give no undertaking he cannot fulfil and he should fulfil every undertaking he gives. (1) He should never in any way communicate upon the subject in controversy, or attempt to negotiate or compromise the matter directly with any party represented by a lawyer, except through such lawyer."

Not only is a compromise made with a party without the knowledge of his solicitor extremely bad form but if made for the purpose of depriving the solicitor of his costs the Court will intervene to protect him. (2)

(4) "He should avoid all sharp practice and he should take no paltry advantage when his opponent has made a slip or overlooked some technical matter. No client has a right to demand that his lawyer shall be illiberal or that he shall do anything repugnant to his own sense of honor and propriety."

Hoffman's fifth resolution covers the whole ground. He says: "In all intercourse with any professional brethren I will always be courteous. No man's passion shall intimidate me from asserting fully my own or my client's rights, and no man's ignorance or folly shall induce me to take any advantage of him: I shall deal with them all as honorable men ministering at our common altar. But an act of unequivocal meanness or dishonesty though it shall wholly sever any personal relation that may subsist between us shall produce no change in my deportment when brought in professional connection with them; my client's rights and not my own feelings are alone to be consulted."

"TO HIMSELF"

(1) "It is his duty to maintain the honor and integrity of his profession and to expose without fear or favor before the proper tribunals unprofessional or dishonest conduct by any other member of the profession, and to accept without hesitation a retainer against any member of the profession who is alleged to have wronged his client."

(2) "It is the duty of every lawyer to guard the Bar against the

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(1) Such undertakings may be summarily enforced; Re Osler, Man. R. Temp. Wood, 205; Re McPhillips, 6 M.R. 108.

(2) Stewart v. Hall, 17 M.R. 653.

admission to the profession of any candidate whose moral character or education unfits him for admission thereto."

(3) "The publication or circulation of ordinary simple business cards is not *per se* improper but solicitation of business by circulars or advertisements or by personal communications or interviews not warranted by personal relations, is unprofessional. It is equally unprofessional to seek retainers through agents of any kind. Indirect advertisement for business by furnishing or inspiring newspaper comment concerning causes in which the lawyer has been or is connected, or concerning the manner of their conduct, the magnitude of the interest involved, the importance of the lawyer's position, and like self-laudations, which defy the traditions and lower the tone of the lawyer's high calling, should not be tolerated. The best advertisement for a lawyer is the establishment of a well merited reputation for personal capacity and fidelity to trust."

It is contrary to the etiquette of the English Bar to advertise in any form. Just how rigid the rule is will appear from a perusal of the rules of professional etiquette in the 1917 White Book at 2406 and 2416.

In Canada the publication in the newspaper or other periodical of a simple business card is permitted but every other form of advertising is frowned upon. This applies to solicitors as well as barristers.

There is a form of advertising through the news columns of the daily press habitually indulged in by some members of the profession which ought to cease. The discussion of causes, in which lawyers may be retained, in the newspaper, the unfolding of the particular line of attack or defence which they propose to adopt, is most unbecoming. The lawyer who has a regard for professional propriety will refrain from such meretricious publicity.

(4) "No lawyer is advised to act either as adviser or advocate for every person who may wish to become his client; he has a right to decline employment."

In England "the general rule is that a barrister is bound to accept any brief in the Court in which he profesess to practise at a proper professional fee. Special circumstances may justify his refusal to accept a particular brief." What circumstances will justify a refusal are decided by the Benchers of the Inn.

The same rule prevails in at least two of the Canadian provinces, Ontario and British Columbia. In each of them the barrister's oath obligates him "not to refuse causes reasonably founded."

Whatever reasoning underlies the rule in England it is undoubtedly one of long standing. In *Ex parte Lloyd,* Mont. 70, Lord Elden said: "A barrister ought not to exercise any discretion as to the suitor for whom he pleads in the Court in which he practises. If a barrister was permitted to exercise any discretion as to the client for whom he will

plead, the course of justice would be interrupted by prejudice to the suitor and the exclusion of integrity from the profession."

Erskine took the same view. In his speech in defence of Tom Paine he said: "If the advocate refuses to defend from what he may think of the charge or the defence he assumes the character of the Judge: nay, he assumes it before the hour of judgment; and in proportion to his rank and reputation puts the heavy influence of perhaps a mistaken opinion into the scale against the accused in whose favor the benevolent principle of English Law makes all presumptions and which commands the very Judge to be his counsel."

The subject was much discussed because Sir Edward Carson and the present Lord Chancellor, then F. E. Smith, K.C., accepted briefs from the present Lord Chief Justice in his libel action arising out of the Marconi affair in 1912, and both justified themselves on this principle.

So far as I am aware the rule does not apply to a solicitor, so that a solicitor has always the right to decline employment. The reason why the same right is denied to the barrister, in those jurisdictions where it is denied, is that he receives his brief from a solicitor who has presumably satisfied himself that the action is a just one and to refuse to accept it would be to reflect on him. That reason does not apply where, as with us, the barrister in his capacity as solicitor takes instructions from the client in the first place.

(5) "No client is entitled to receive, nor should any lawyer render, any service or advice involving disloyalty to the State, or disrespect for the judicial office, or the corruption of any person or persons exercising a public or private trust, or deception or betrayal of the public."

(6) "Every lawyer should bear in mind that the oath of office taken on his admission to the Bar is not a mere form but is a solemn undertaking and on his part should be strictly observed."

(7) "He should bear in mind that he can only maintain the high traditions of his profession by being in fact as well as in name a gentleman."

I shall conclude with a passage from an Assize sermon by the eloquent Sydney Smith:

"In all the civil difficulties of life men depend upon your exercised faculties and your spotless integrity and they require of you an elevation above all that is mean and a spirit which will never yield when it ought not to yield. As long as your profession retains its character for learning, the right will be defended; as long as it preserves itself pure and incorruptible, on other occasions not connected with your profession, those talents will never be used to the public injury, which were intended and nurtured for the public good."