A CODE OF LEGAL ETHICS

BY

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A Paper Prepared for the Canadian Bar Association Meeting at Winnipeg, Man., August, 1919.

The Canadian Bar Association honoured me by a request, through the President and Secretary, "to prepare an address on Professional Ethics to be delivered to the Association at its annual meeting in Winnipeg in August;" and the Convener of the Committee appointed at Montreal in 1918 on Professional Ethics, was good enough to call upon me in connection with the request. From what was said by Mr. MacMurchy it appeared that the real matters to be discussed were the advisability of a written Code of Ethics, and the contents of such Code if it should be considered advisable to formulate one. To both the Secretary and Mr. MacMurchy I expressed an opinion adverse to a written Code of Ethics; and both desired me, nevertheless, to prepare an address on the subject.[1]

In my own Province for nearly a century and a quarter, jurisdiction over the Bar has been exercised by the Law Society of Upper Canada, organized in 1797 under the authority of the statute of that year of the young Province of Upper Canada—and since that time no advocate has been heard by the Courts unless and until he has been called to the Bar by that Society. Full jurisdiction over the attorney or solicitor the Law Society does not possess: it prescribes the curriculum for, it educates, it examines, it certifies the fitness to be admitted as a solicitor of the candidate, but there its authority and duty end—and even that jurisdiction was not original, but was given by the statute of 1858. But in our system it has always been and is now the case that all but a very small percentage of solicitors are barristers, and of barristers are solicitors.

The first chapter of the first Statute of the Province of Upper Canada (32 Geo. III., c. 1), introduced the laws of England as the rule for decision in all matters of property and civil rights, while the criminal laws of England formally prescribed for the conquered colony by the Royal Proclamation of 1763 had been left untouched by the Quebec Act of 1774 (14 Geo. III., c. 85). Accordingly when the profession in the province was organized the law, civil and criminal, in force was the existing law of England (with a few trifling exceptions).

The Act of 1797 was intended to place the profession of law on much the same basis as in England, but the circumstances of

the colony did not allow of this being fully accomplished. One attempt to introduce the English system of prohibiting the same person to be both barrister and solicitor was defeated by the Benchers themselves, a second by the Judges, and the third and last by the Legislature; and the system is too firmly established to be now shaken.

It may, therefore, be said with reasonable accuracy that the Law Society has jurisdiction over the profession at large.

The Bar and the Bench of our province have followed the traditions of England, recognizing that England is their intellectual ancestor. We in Ontario are inclined to claim, perhaps to make rather a boast, that the Bar and Bench of the western provinces have been largely recruited from our province and share our traditions. Where that is not the case, the traditions of the profession in England are equally potent as with us.

The Bar and Bench of the Maritime Provinces have their own traditions, but these, like ours, are based on England.

Our illustrious sister, Quebec, stands in a different position: her criminal law indeed is English in its origin, but her civil law is based not upon the Common Law of England, but upon the Civil Law of Rome. Yet most of her rules, customs and practices are the same as ours.

Remembering the history of our profession, I thought it wise to consult the Chiefs of Bench and Bar in England; and as Ireland has much the same system, and traditions, I at the same time consulted those in that land. Scotland has a law based on the Civil Law as has Quebec, and I asked the opinion of some of the leaders in Scotland.[2] Without a single exception, all who replied were opposed to a written Code of Ethics.[3]

The opinion of the profession in the British Isles is most persuasive, but, of course, it should not, it cannot be considered conclusive upon us, however closely we are affiliated, however much we owe to the Mother Country, however near the practice of the Courts. Circumstances in this Dominion, as in other Dominions, may make a difference advisable if not imperative in system.

As against the practice in the Old Land we may be inclined to consider that in the various States of the American Union—the usages of trade and of society, the "genius of the people" are much more near our own in many of these States than in England; while politically we are intensely British (and have no desire to change our position) in the general conduct of business, and of intercourse, in form and customs we are inclined rather to the American. Most of the Bar Associations of the various States of the Union have their formal Codes of Ethics as has the general Society—the American Bar Association. I am favoured in being an honorary member of several of these Bar Associations, and have enjoyed the privilege of frequent and somewhat close association with their members; and I have found an almost universal approval of the written Code.

Although in most cases other reasons were alleged for that approval, I am wholly of the opinion that in many instances that view is due in no slight degree to the fact that the United States and the separate States have all a written Constitution. The mind of the American lawyer naturally and instinctively inclines to written formulation of all precepts, all rules, all principles.

The difference in the connotation of the words "Constitutional" and "Unconstitutional" in the American usage and our own will illustrate my meaning. In the United States the "Constitution" is a written document of so many words and letters, with us the Constitution is the indefinite and indefinitely formulated principles upon which a British people should be governed—what is "Constitutional" and what is "Unconstitutional" in the United States is for the Court to decide on legal principles and methods by an examination of the formal document to be known and read of all men—in Canada it is for Parliament, or in the last resort the electorate, by the consideration of what is for the benefit of the people. In the United States anything transgressing the written document is illegal however wise it may be. With us to say a proceeding is "Unconstitutional" is to say it is legal, however unwise, or even oppressive, it may be. Whether my impression of the cause of the formulation of a Code of Ethics in the United States is well founded or not, it is manifest that the practice in that land is not binding upon us, like as the two countries are in most particulars.

I propose, therefore, to attack the question without reference to other countries, and briefly to state the conclusions I have arrived at. I may be permitted to say that these conclusions are not formed, though they may be stated, now for the first time.

In the first place it may be assumed that it is not proposed to lay down a Code, disobedience to which would result in disbarment temporarily or otherwise. Our Law Society of Upper Canada has ample power to disbar in a proper case, but the power has been exercised only in the case of crime whether after conviction or otherwise. So far as I know it has never been suggested that a Code of Rules should be laid down to govern the Discipline Committee or Convocation in their duties in that regard, and I can see infinite difficulties in the way of such codification.

Not to dwell upon that phase, however, let us consider the real proposition, which is to lay down a Code the breach of which will lead to the disapproval of professional brethren, to exclusion from association and fellowship, to ostracism by respectable members of the Bar. If it were proposed to make the Code a Penal Code violation of which would render the offender liable to disbarment, legislation would be necessary, and many considerations would arise which may now be passed over—considerations which to my mind would be fatal to the proposition.

What of a Code without such consequences? of a Code intended to govern the conduct of the practitioner, but the violation of which would involve only social punishment? or a Code intended simply as advice as to conduct?

It seems to me much like drawing up a Code of Etiquette to make a gentleman.[4]

When I used to deliver lectures to the students of the Osgoode Hall Law School on Legal Ethics, I devoted most of my time and efforts to showing that the profession of law is a liberal as well as a learned profession, that there is and can be nothing in the practice of law inconsistent with the highest type of scholar, gentleman, and Christian. With that as a text all else follows—the lawyer, a gentleman, will act as such, he will treat all, whether professional brethren or laymen, as he would be treated in like case—that, it seems to me, is the whole of the law and the prophets. I would have in every law school two or three lectures in each year on legal ethics in that sense—lectures either by the president or (preferably by) some one in active and extensive practice, devoted to inculcating in the mind of the students the all-important fact that the lawyer who is worthy of his profession is not a mere money making machine, but a gentleman respecting himself and his fellow men—he may and should make all the money he honestly and honourably can, but only so much and how as he honestly and honourably can. Is there any more need for a Code for lawyers than for members of a club? Both are expected to act as gentlemen, but no one would think of codifying the duties of club members. In that view a Code is superfluous, unnecessary.

There are, however, positive objections to a Code which states any but the most indefinite generalities. Any Code which entered into particulars would in my view do more harm than good — and for two reasons: First, when a Code of Rules has been formulated it is most natural, almost inevitable indeed, for its provisions to be considered exhaustive; whatever is forbidden is wrong, and in most minds the old logical fallacy of the "undistributed middle" is not avoided, but it is considered that what is not forbidden is not wrong. When one is charged with wrong doing, and told that he must act in a particular way, his defiance is "on what compulsion must I?" "It is not so written in the Code."

It is the natural and inevitable consequence of any written code to divide sharply what is forbidden from what is not—and what is not forbidden too often is considered to be allowed.[5] Anyone who is accustomed to refer to a written Code for the rule to direct his conduct will be apt to believe that it is complete, and will generally give himself the benefit of any doubt or omission.[6]

Again, unless I am quite in error, any attempts to particularize would be dangerous. Let me take two examples.

A well-known compilation by a Bar Association of the highest rank both as to members and otherwise, has it "His," *i.e.*, the lawyer's, "appearance in Court should be deemed equivalent to an assertion on his honour that in his opinion his client's case is one proper for judicial determination." That I make bold to deny—while the lawyer may not bring into Court a dishonest claim, or set up a dishonest defence (because he is an honest man, and the law compels no man to dishonesty), the client is entitled to the services of his lawyer to enforce any claim or defence which is not dishonest; the client is entitled to the full and candid opinion of his lawyer, but when that is given he is entitled to have his case put to the Court whatever may be the lawyer's opinion on the law. Neither Court nor client is at all concerned with the opinion of counsel—the client demands, the Court enforces the law, as it is found to be—that is the duty of the Court, the right of the client. Counsel makes no assertion by implication of his own opinion when he argues the case of his client, and it would be unjust and improper to consider that counsel when arguing is representing that there was in his opinion doubt as to the law.[7]

It may be said that I have misconceived the meaning of the rule which I am discussing—if so and if the rule means simply that counsel in arguing a case is giving it an assurance that his claim is an honest one, this indicates another danger arising from the language employed. The formulation of rules free from ambiguity unless they be expressed in the most general and therefore futile terms is of enormous difficulty; and not only *dolus latet in generalibus* but the dishonest lawyer's ingenuity will enable him to misconstrue language with some plausibility—and where all else fails he can plead misunderstanding.

Another example: The solicitor for a mortgagee demands $14.75 interest due—the mortgagor sends him a cheque for $14.50; the solicitor returns it and brings an action for foreclosure.[8] The Court and the profession are shocked—and probably such conduct would be strongly animadverted upon by the Code builders; but the conduct of the solicitor may have been wholly justifiable. The mortgagor may have been following a course of petty dishonesty—this may have been but the culmination of a long series of attempts to defraud his creditor out of small sums, and the action for foreclosure brought after warning of the effect of such conduct if continued; it may be that the mortgagee has been put to trouble and expense in getting his own, and that the action for foreclosure was in simple self-defence.

Circumstances are so different that what looks like oppression in the abstract case is plain dealing and good business in the concrete.

We should, it seems to me, avoid creating an artificial conscience. It is well known that a statute against a particular course of conduct will inevitably bring about a state of public opinion that such conduct is morally wrong, however innocent it may be in fact. A familiar instance is the feeling now widespread that it is wrong for a tradesman to prefer one creditor to another. To anyone who takes the trouble to think over the matter, it will be plain that sometimes it is consistent with the highest morality to do that very thing—yet in our Ontario law it is allowable only if money is paid. As though there were in morals a difference between giving money and money's worth!

Again, all common law courts are adamant against what has been branded with the horrid name of champerty—no lawyer can acquire an interest in the subject matter of an action. A young mining engineer without much business finds that there is a "mining proposition"—the location is owned by a man too poor or too indifferent to develop it and ascertain its value—the engineer looks over the ground and sees a good prospect of making the mine pay, and he enters into a contract with the owner that he will at his own expense develop the mine for half the profits. That is good business, good morals, and is for the advantage in common of both parties; and the law approves, and will enforce such a contract.

The brother of the engineer, a young solicitor, finds out that a man has a claim to valuable property but is too poor or too indifferent to enforce his claim—the solicitor examines into the title, etc., and sees a good prospect of recovering the property, and he makes a contract that he will at his own expense bring an action and recover the land for half the profit. No Court would approve or enforce such a contract—it may be good business and for the advantage in common of both parties, but the Court says it is bad morals. Wherein does the difference between the two cases consist?

We have in the latter case an artificial conscience.

I know it will be answered *interest reipublicae ut sit finis litium*. But that does not mean that it would be for the advantage of people at large, that there should be no law suits—so long as injustice prevails a lawsuit to end an injustice is infinitely better—and, I add, infinitely more in harmony with the genius of our people—than passive submission to the injustice. The maxim means that it is for the interest of the people that a lawsuit when started should be carried to a conclusion with all due expedition—and if it means anything more it, is that it will be a good thing for the people when wrong shall cease, and there will be no further need for litigation.

The real difference is that one contract is forbidden by law and the other is not.[9]

So long and in such places as this rule is law, it is proper to say, as one Code does, "the lawyer should not purchase any interest in the subject matter of the litigation which he is conducting"—but that there is a general ethical rule I deny.

Contingent or conditional fees are in the same category.[10]

These are some of the reasons which, to my mind, make it inadvisable to formulate a Code of Ethics.[11]

My opinion in short is that a Code of Legal Ethics, if sufficiently general, is unnecessary—if specific is dangerous.

WILLIAM RENWICK RIDDELL.

NOTES.

Note 1.

The following is the correspondence.

156 Yonge St., Toronto,
1st May, 1919.

THE HON. MR. JUSTICE RIDDELL,
Osgoode Hall, Toronto.

Re Professional Ethics.

DEAR JUDGE RIDDELL:—

At the annual meeting in Montreal, a committee was appointed on Professional Ethics. Mr. Angus MacMurchy, K.C., was named as convener. The committee was instructed to take the code of Legal Ethics prepared by the American Bar Association as a basis for a Canadian Code, and to report thereon. At the Council meeting on Monday, it was decided to ask yourself and Mr. Justice Mignault of the Supreme Court to prepare an address on professional ethics, to be delivered to the Association at its annual meeting in Winnipeg, during the last week in August. I trust that you and Judge Mignault will be able to help us on this important subject. Possibly some co-operation might lessen the work. In the meantime, I am enclosing a copy of the American Code.

Yours faithfully,
R. J. MACLENNAN,
Secretary.

OSGOODE HALL,
Toronto, 2nd May, 1919.

R. J. MACLENNAN, ESQ.,
Secretary Canadian Bar Association,
156 Yonge Street, Toronto, Ont.

MY DEAR SIR,—

Your letter of yesterday is at hand. I shall, if physically able, prepare something on professional ethics for the meeting in Winnipeg. I should, however, say that I am wholly opposed to anything in the way of a written code of ethics for the profession, and if I write I shall write in that sense. Perhaps after this expression of opinion, which has been formed after long and careful consideration, your Association would not care to have anything from me.

Yours very truly,
WILLIAM RENWICK RIDDELL.

Government House,
Winnipeg, 3rd May, 1919.

THE HON. W. R. RIDDELL,
Supreme Court of Ontario, Toronto.

MY DEAR MR. JUSTICE RIDDELL,—

At the last meeting of the Council of the Canadian Bar Association, held on Monday, it was unanimously decided that you and Mr. Justice

Mignault be asked to suggest a code of professional ethics for the next annual meeting. In order to facilitate your work, it was thought that the American Bar Association's code might form a good basis for a Canadian code. We think it very desirable that in every Province of Canada the same professional ethics should prevail. Having been so long at the Bar, you will appreciate this, and the opinion was expressed that there were no others better qualified than you and Mr. Justice Mignault to take up this subject and give the Association the benefit of your thought. An important place will be left on the programme for this.

I am, yours very sincerely,
J. A. M. AIKINS.

Note 2.

A letter in the following form was sent (amongst others) to
The Lord Chancellor.
The Lord Chief Justice.
The Attorney-General, and
The Chairman of the General Council of the Bar, at London; also to
The Lord Chancellor of Ireland.
The Lord Chief Justice, Ireland.
The Attorney-General, Ireland, and
The President of the Incorporated Law Society of Ireland, at Dublin, and also to
The Lord Justice General.
The Lord Justice Clerk, and
The Lord Advocate at Edinburg.

"Mr. Justice Riddell presents his Compliments to the Lord Chief Justice of England.

Mr. Justice Riddell has been asked by the Canadian Bar Association to write a paper, or deliver an address, at the coming meeting in August of the Association on a Code of Legal Ethics.

Mr. Justice Riddell is himself not in favour of a written code of ethics, and sees no necessity for it; but it is known that others have a different opinion.

Mr. Justice Riddell would therefore ask the Lord Chief Justice if there is a written Code of Ethics for the legal profession in England, and also whether the Lord Chief Justice approves of such a code. If such a code exists, Mr. Justice Riddell would be glad of a copy of the same. The legal profession in Ontario, as it at present exists, began in 1797, and has so far found no necessity for a code.

May 6th, 1919."

Note 3.

The following letters were received:—

1. From the Lord Chancellor.

"HOUSE OF LORDS, S.W.I.

SIR,—

I am directed by the Lord Chancellor to reply to your memorandum of the 6th of May, with reference to the address proposed to be delivered by you at the meeting of the Canadian Bar Association on a Code of Legal Ethics.

There is not in England any written code regulating the etiquette and practice of the Bar. The General Council of the Bar from time to time deals with cases submitted to it for decision or advice with reference to practice and etiquette, and the answers to these questions are published in the annual statement issued by the Council. The Bar Council has, however, no disciplinary powers. Certain rules with reference to practice as to retainers were prepared by the Council of the Law Society in consultation with the Bar Committee (whose place has now been taken by the General Council of the Bar), and sanctioned by the Attorney-General in July, 1892. The decisions or opinions of the General Council of the Bar and the rule as to retainers will be found printed in the Yearly Supreme Court Practice, 1916, at page 2054. These documents, however, do not constitute a complete code in the matter.

Questions arising with reference to the conduct of barristers, students of the Inns of Court, in which the conduct of any such barrister or student is impugned, are dealt with in the first place by the Benchers of the Inn to which the barrister or student belongs, and on appeal by the Judges of the High Court sitting together. The decisions of the Benchers and of the Judges in the case of an appeal are, as a rule, not published except in so far as they impose any penalty upon the barrister or student concerned.

In addition, there is, as is no doubt well known to you, a considerable floating body of practice and tradition in these matters, which for the most part, is not committed to writing, and certain bodies of barristers, for example, the members of a particular circuit or Sessions mess, are subject to rules regulating the conduct of the members of the circuit or mess, which in some cases are and in others are not committed to writing.

While on broad questions of professional etiquette and practice, no difficulty arises, and any member of the Bar can without difficulty regulate his conduct according to the view generally accepted in the profession, difficult questions sometimes arise under general or local rules, whether written or otherwise. It is open to any member of the Bar in any such case to submit the matter for advice or decision to the General Council of the Bar.

So far as the solicitor's profession is concerned, I am to suggest that you should seek advice from the Law Society, whose Secretary is Mr. E. R. Cook, Law Society's Hall, Chancery Lane, London W.C. 2.

I am, sir,

Your obedient servant,

CLAUD SCHUSTER."

THE HON. MR. JUSTICE RIDDELL.

2. From the Lord Chief Justice.

"ROYAL COURTS OF JUSTICE,

London, W.C. 23/5/19.

The Lord Chief Justice, England, presents his compliments to Mr. Justice Riddell, and in reply to his letter of the 6th inst., begs to inform him that no such written code of ethics exists in England, nor is His Lordship of opinion that there is any need for it.

HON. MR. JUSTICE RIDDELL,

Supreme Court of Ontario, Toronto."

3. From the Attorney-General.

"ATTORNEY-GENERAL,

May 23rd, 1919.

The Attorney-General presents his compliments to the Hon. Mr. Justice Riddell, and in reply to his letter dated the 6th inst., has to say that there is no written code of ethics for the legal profession in England. The decisions of the Bar Council on questions of professional etiquette form a more or less code for the Bar, and these are collected and published in a convenient form in the Annual Practice and in the Yearly Practice of the Supreme Court (e.g., Yearly Practice for 1918, vol. 2, p. 2054, "Etiquette and Practice of the Bar"). The Attorney-General does not think that a written code is desirable. Such a code could not be complete, because changing circumstances are bound to give rise to new questions from time to time."

4. From the Chairman of the General Council of the Bar.

"5, Stone Buildings,

Lincoln's Inn, W.C. 2,

May 26, 1919.

SIR,—

I am directed by the Chairman of the General Council of the Bar to reply to your letter of the 6th inst., and to say that, while there is no written code of ethics for the legal profession in England, the Bar Council have from time to time been asked to express their opinion on professional conduct in certain cases, and the rulings appear under the heading "Etiquette and Practice" of the Bar in the "Yearly Practice

of the Supreme Court, 1918," published by Butterworth & Co., Bell Yard, London E.C., and the "Annual Practice," published by Sweet & Maxwell, Chancery Lane, also in Halsbury's Laws of England, vol. II. p. 357, published by Messrs. Butterworth & Co., of London.

I am, sir,
Your obedient servant,
HAROLD HARDY,
Secretary.

THE HON. MR. JUSTICE RIDDELL,
Toronto."

5. From the Lord Chancellor of Ireland.

"LORD CHANCELLOR, IRELAND,
Secretary's Office,
Four Courts, Dublin,
21st May, 1919.

The Lord Chancellor of Ireland presents his compliments to Mr. Justice Riddell and informs him, in reply to his inquiry of the 6th inst., that there are only a few rules, pertaining to retainers, for the legal profession in Ireland, and that he does not consider any further written code of ethics to be necessary."

6. From the Lord Chief Justice (Ireland).

"KING'S BENCH DIVISION, IRELAND,
Four Courts,
Dublin, 23rd May, 1919.

DEAR MR. JUSTICE RIDDELL,—

There is no written code of ethics for the legal profession in Ireland, and the necessity for one has not been felt.

Acts of professional misconduct can be dealt with in two ways, (*a*) the delinquent can be brought before the Bar Council, which is chosen by and is representative of the profession, and they have power to admonish, and, in an extreme case, to refuse to accept the person's subscription to the Law Library, which would have the effect of excluding him from practice, or (*b*) The Benchers of the King's Inns, in cases of grave misconduct, can disbar the delinquent, subject, as in England, to an appeal to the body of Judges.

The practice which prevails here of all barristers meeting in one library—which is the centre of professional work—has the effect of creating an *esprit de corps*, and at the same time enforcing a spirit of discipline which is absent in England.

In matters of professional etiquette, we follow the general rules which have been laid down from time to time by the General Council of the Bar of England, of which I send you a copy taken from the Annual Practice.

As regards solicitors, charges against them are investigated before a Statutory Committee of the Incorporated Law Society, whose report is brought before the Lord Chancellor, with whom the ultimate decision rests.

Yours sincerely,
THOMAS A. MALONEY.

THE HON. MR. JUSTICE RIDDELL, etc."

7. From the Attorney-General for Ireland.

"IRISH OFFICE,
22nd May, 1919.

DEAR SIR,—

I am directed by the Attorney-General for Ireland to acknowledge your inquiry of May 6th, and to acquaint you with the following facts in answer to the same.

No code of legal ethics exists for the Irish Bar.

The ethics of the profession are controlled by the public opinion of the Bar. The Benchers of the King's Inns exercise jurisdiction over members of the Bar in cases of violation of professional decorum? The standard of professional conduct is also reviewed by the Bar Council, but there is no coercive jurisdiction in this body.

Yours faithfully,
HUGH MONTGOMERY MILLER,
Private Secretary.

THE HON. MR. JUSTICE RIDDELL, etc."

8. From the Chairman of the Incorporated Law Society of Ireland.

"Dublin, 21st May, 1919.

Mr. Robert G. Warren, President of the Incorporated Law Society of Ireland, presents his compliments to Mr. Justice Riddell, and in reply to his communication of the 6th inst., begs to say that there is no written code of ethics for the legal profession in Ireland, and the President does not approve of such a code."

From Scotland.

9. From the Lord Justice General.

"COURT OF SESSION, SCOTLAND.

The Lord Justice General presents compliments to Mr. Justice Riddell, and begs to say that in Scotland there is no written code of legal ethics. There is, however, an unwritten code which is regarded by all Scottish lawyers as sufficient. The Lord Justice General sends herewith a lecture delivered by one of the leaders of the Scottish Bar on the subject of "The Ethics of Advocacy." This lecture contains the fullest and most exhaustive exposition of the subject known to the Lord Chief Justice General."

10. From the Lord Justice Clerk.

"22 Moray Place, Edinburgh,
24th May, 1919.

DEAR MR. JUSTICE RIDDELL,—

I had yours of the 6th inst. We have no written code of ethics—our law of practice in the matter depends on practice and tradition. I understand that the Lord President has sent you a copy of a paper by Mr. Macmillan of our Bar, which is the best pronouncement on the subject with which I am acquainted.

Our Dean of Faculty is the arbiter for our Bar in all such questions.

I must say I think it would be very difficult, and I think somewhat dangerous, to formulate a *written* code of ethics.

Yours,
CHARLES SCOTT DICKSON,
Lord Justice Clerk."

11. From the Lord Justice Advocate.

"THE LORD ADVOCATE.

The Lord Advocate presents his compliments to Mr. Justice Riddell, and begs to acknowledge receipt of Mr. Justice Riddell's letter of the 6th inst.

There is in existence no written code of ethics for the legal profession in Scotland.

There are a few rules regulating counsel's retainers which—for the convenience of the profession generally—have been more or less officially published, and are printed in the annually printed "Parliament House Book," itself an unofficial publication, but even these rules are no more than a formulation of professional custom, as instructed by the trend of decision in individual cases by the Dean of the Faculty of Advocates.

I held office as Dean for several years; and, in accordance with the practice of my predecessors, I referred all cases of professional conduct which were referred to me, to solution in accordance with the simple rules of honour. Our tradition has always been that the more difficult the point is, the more strictly should the test of honourable conduct be applied. And it is obvious that the application of the rules of strictly honourable conduct consorts very ill with any attempt to reduce the rules of honour to a written code.

The Lord Advocate agrees with Mr. Justice Riddell in deprecating any attempt to frame a written code of ethics. Like Mr. Justice Riddell he sees no necessity for it."

Parliament House,
Edinburgh."

[The Lord Justice General was good enough to send me a paper on "The Ethics of Advocacy," by H. P. Macmillan, Esq., K.C., read before the Royal Philosophical Society of Glasgow, which sets out clearly and powerfully the conception of the duty of the advocate or barrister which has always prevailed at our Bar.—W. R. R.]

Note 4.

This is not wholly original—I owe it in essence to Dr. Scott of Edmonton, who did me the honour to call upon me with Mr. MacMurchy.

Note 5.

I have conversed with many American lawyers of eminence on the subject of a written constitution, and with (I think) one exception, they have all agreed that the written Constitution (necessary as it was) has had the effect of dulling to a certain extent the perception of legislatures between right and wrong; legislators are apt to refer as a test of right and wrong to the provisions of the constitution. Whatever is not forbidden by the constitution is allowable for the legislature and executive.

Note 6.

We have only to look at the way in which many corporations are conducted to find an instance—a company will, as a rule, consider itself justified in acting in any way not forbidden by the "Companies Act."

Note 7.

I remember very early in my own practice, the late Vice-Chancellor Proudfoot, when Mr. William Kerr, Q.C. (afterwards Senator for the Dominion), advanced in argument what seemed to be an untenable proposition, saying to him, "But, Mr. Kerr, is it your own opinion that that is the law?" Mr. Kerr did not answer; he stopped in his argument, and remained silent for a moment, when the Vice-Chancellor said: "I beg your pardon, Mr. Kerr; I should not have asked that question." Mr. Kerr said, "I thank your Lordship; I was placed in an unfortunate position by the question. If I answered it in the negative, I might prejudice my client's case, if the affirmative, I would add nothing to my argument." I have never forgotten that episode, and to this day it is always an unpleasant thing for me to hear a counsel say, "I think the law is so-and-so." However earnest counsel may be, however firmly convinced of the soundness of his argument, he should remember that it is his argument the Court wishes, not his opinion.

Note 8.

This is not an imaginary case, but an actual occurrence; the solicitor resides and practices in Toronto. When speaking of possible justification, I do not suggest anything as to the facts of the particular case.

Note 9.

That the Statutes of Champerty are in affirmance of the Common Law may be doubted—whatever the ostensible reason for the rule, it seems to me that it is but another illustration of the apothegm, *beati possidentes*.

Note 10.

Of course in these cases I am considering the case of the solicitor particularly; there are reasons of prudence which may prevent the barrister from having anything to do with the subject matter of litigation or with contingent fees—but I insist the reasons are reasons of prudence and not of morals.

Note 11.

If we are to have a code of ethics, I shall be glad to do all in my power (if it be desired) to assist in formulating such a code as will be most useful to my brothers-in-the-law.