CASES AND OTHER AUTHORITIES

ON

LEGAL ETHICS

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AMERICAN CASEBOOK SERIES
WILLIAM R. VANCE
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THE AMERICAN CASEBOOK SERIES

THE first of the American Casebook Series, Mikell's Cases on Criminal Law, issued in December, 1908, contained in its preface an able argument by Mr. James Brown Scott, the General Editor of the Series, in favor of the case method of law teaching. This preface has appeared in each of the volumes published in the series up to the present time. But the teachers of law have moved onward, and the argument that was necessary in 1908 has now become needless. That such is the case becomes strikingly manifest to one examining three important documents that fittingly mark the progress of legal education in America. In 1893 the United States Bureau of Education published a report on Legal Education prepared by the American Bar Association's Committee on Legal Education, and manifestly the work of that Committee's accomplished chairman, William G. Hammond, in which the three methods of teaching law then in vogue—that is, by lectures, by text-book, and by selected cases—were described and commented upon, but without indication of preference. The next report of the Bureau of Education dealing with legal education, published in 1914, contains these unequivocal statements.

"To-day the case method forms the principal, if not the exclusive, method of teaching in nearly all of the stronger law schools of the country. Lectures on special subjects are of course still delivered in all law schools, and this doubtless always will be the case. But for staple instruction in the important branches of common law the case has proved itself as the best available material for use practically everywhere. * * * The case method is to-day the principal method of instruction in the great majority of the schools of this country."

But the most striking evidence of the present stage of development of legal instruction in American Law Schools is to be found in the special report, made by Professor Redlich to the Carnegie Foundation for the Advancement of Teaching, on "The Case Method in American Law Schools." Professor Redlich, of the Faculty of Law in the University of Vienna, was brought to this country to make a special study of methods of legal instruction in the United States from the standpoint of one free from those prejudices necessarily engendered in American teachers through their relation to the struggle for supremacy so long, and at one time so vehemently, waged among the rival systems. From this masterly report, so replete with brilliant analysis

and discriminating comment, the following brief extracts are taken. Speaking of the text-book method Professor Redlich says:

"The principles are laid down in the text-book and in the professor's lectures, ready made and neatly rounded, the predigested essence of many judicial decisions. The pupil has simply to accept them and to inscribe them so far as possible in his memory. In this way the scientific element of instruction is apparently excluded from the very first. Even though the representatives of this instruction certainly do regard law as a science—that is to say, as a system of thought, a grouping of concepts to be satisfactorily explained by historical research and logical deduction—they are not willing to teach this science, but only its results. The inevitable danger which appears to accompany this method of teaching is that of developing a mechanical, superficial instruction in abstract maxims, instead of a genuine intellectual probing of the subject-matter of the law, fulfilling the requirements of a science."

Turning to the case method Professor Redlich comments as follows:

"It emphasizes the scientific character of legal thought; it goes now a step further, however, and demands that law, just because it is a science, must also be taught scientifically. From this point of view it very properly rejects the elementary school type of existing legal education as inadequate to develop the specific legal mode of thinking, as inadequate to make the basis, the logical foundation, of the separate legal principles really intelligible to the students. Consequently, as the method was developed, it laid the main emphasis upon precisely that aspect of the training which the older text-book school entirely neglected—the training of the student in intellectual independence, in individual thinking, in digging out the principles through penetrating analysis of the material found within separate cases; material which contains, all mixed in with one another, both the facts, as life creates them, which generate the law, and at the same time rules of the law itself, component parts of the general system. In the fact that, as has been said before, it has actually accomplished this purpose, lies the great success of the case method. For it really teaches the pupil to think in the way that any practical lawyer—whether dealing with written or with unwritten law—ought to and has to think. It prepares the student in precisely the way which, in a country of case law, leads to full powers of legal understanding and legal acumen; that is to say, by making the law pupil familiar with the law through incessant practice in the analysis of law cases, where the concepts, principles, and rules of Anglo-American law are recorded, not as dry abstractions, but as cardinal realities in the inexhaustibly rich, ceaselessly fluctuating, social and economic life of man. Thus in the modern American law school professional practice is preceded by a genuine course of study, the methods of which are perfectly adapted to the nature of the common law."

The general purpose and scope of this series were clearly stated in the original announcement:

"The General Editor takes pleasure in announcing a series of scholarly casebooks, prepared with special reference to the needs and limitations of the classroom, on the fundamental subjects of legal education, which, through a judicious rearrangement of emphasis, shall provide adequate training combined with a thorough knowledge of the general principles of the subject. The collection will develop the law historically and scientifically; English cases will give the origin and development of the law in England; American cases will trace its expansion and modification in America; notes and annotations will suggest phases omitted in the printed case. Cumulative references will be avoided, for the footnote may not hope to rival the digest. The law will thus be presented as an organic growth, and the necessary connection between the past and the present will be obvious.

"The importance and difficulty of the subject as well as the time that can properly be devoted to it will be carefully considered so that each book may be completed within the time allotted to the particular subject. * * * If it be granted that all, or nearly all, the studies required for admission to the bar should be studied in course by every student—and the soundness of this contention can hardly be seriously doubted—it follows necessarily that the preparation and publication of collections of cases exactly adapted to the purpose would be a genuine and by no means unimportant service to the cause of legal education. And this result can best be obtained by the preparation of a systematic series of casebooks constructed upon a uniform plan under the supervision of an editor in chief. * * *

"The following subjects are deemed essential in that a knowledge of them (with the exception of International Law and General Jurisprudence) is universally required for admission to the bar:

Administrative Law.
Agency.
Bills and Notes.
Carriers.
Contracts.
Corporations.
Constitutional Law.
Criminal Law.
Criminal Procedure.
Common-Law Pleading.
Conflict of Laws.
Code Pleading.
Damages.
Domestic Relations.
Equity.
Equity Pleading.
Evidence.
Insurance.
International Law.
Jurisprudence.
Mortgages.
Partnership.
Personal Property.
Real Property. { 1st Year. / 2d " / 3d "
Public Corporations.
Quasi Contracts.
Sales.
Suretyship.
Torts.
Trusts.
Wills and Administration.

"International Law is included in the list of essentials from its intrinsic importance in our system of law. As its principles are simple in comparison with municipal law, as their application is less technical, and as the cases are generally interesting, it is thought that the book may be larger than otherwise would be the case.

"The preparation of the casebooks has been intrusted to experienced and well-known teachers of the various subjects included, so that the experience of the classroom and the needs of the students will furnish a sound basis of selection."

Since this announcement of the Series was first made there have been published, or put in press, books on the following subjects:

Administrative Law. By Ernst Freund, Professor of Law, University of Chicago.

Agency. By Edwin C. Goddard, Professor of Law, University of Michigan.

Bills and Notes. By Howard L. Smith, Professor of Law, University of Wisconsin, and William U. Moore, Professor of Law, Columbia University.

Carriers. By Frederick Green, Professor of Law, University of Illinois.

Conflict of Laws. By Ernest G. Lorenzen, Professor of Law, University of Minnesota.

Constitutional Law. By James Parker Hall, Dean of the University of Chicago Law School.

Corporations. By Harry S. Richards, Dean of the University of Wisconsin Law School.

Criminal Law. By William E. Mikell, Dean of the University of Pennsylvania Law School.

Criminal Procedure. By William E. Mikell, Dean of the University of Pennsylvania Law School.

Damages. By Floyd R. Mechem, Professor of Law, Chicago University, and Barry Gilbert, Professor of Law, University of Illinois.

Equity. By George H. Boke, Professor of Law, University of California.

Insurance. By W. R. Vance, Dean of the University of Minnesota Law School.

Legal Ethics, Cases and Other Authorities on. By George P. Costigan, Jr., Professor of Law, Northwestern University.

Partnership. By Eugene A. Gilmore, Professor of Law, University of Wisconsin.

Persons (including *Marriage and Divorce*). By Albert M. Kales, Professor of Law, Northwestern University, and Chester G. Vernier, Professor of Law, University of Illinois.

Pleading (Common Law). By Clarke B. Whittier, Professor of Law, Stanford University, and Edmund M. Morgan, Professor of Law, University of Minnesota.

Property (Titles to Real Property). By Ralph W. Aigler, Professor of Law, University of Michigan Law School.

Quasi Contracts. By Edward S. Thurston, Professor of Law, University of Minnesota.

Sales. By Frederic C. Woodward, Professor of Law, University of Chicago.

Suretyship. By Crawford D. Hening, Professor of Law, University of Pennsylvania.

Torts. By Charles M. Hepburn, Professor of Law, University of Indiana.

Trusts. By Thaddeus D. Kenneson, Professor of Law, University of New York.

Wills and Administration. By George P. Costigan, Jr., Professor of Law, Northwestern University.

It is earnestly hoped and believed that the books thus far published in this series, with the sincere purpose of furthering scientific training in the law, have not been without their influence in bringing about a fuller understanding and a wider use of the case method.

The following well-known teachers of law are at present actively engaged in the preparation of casebooks on the subjects indicated below:

Edward W. Hinton, Professor of Law, University of Chicago. Subject, *Evidence.*

Arthur L. Corbin, Professor of Law, Yale University. Subject, *Contracts.*

James Brown Scott, Professor of International Law, Johns Hopkins University. Subject, *International Law.*

A. M. Cathcart, Professor of Law, Stanford University. Subject, *Code Pleading.*

Albert M. Kales, Professor of Law, Northwestern University. Subject, *Property.*

Harry A. Bigelow, Professor of Law, University of Chicago. Subject, *Property.*

WILLIAM R. VANCE,
General Editor.

APRIL, 1917.

AUTHOR'S PREFATORY NOTE

Two reasons have been given for the failure of law schools to devote a proper amount of time to the subject of legal ethics. One has been the fact that the curriculum is already overcrowded; the other has been the lack of a source-book on the subject. It is believed that the first reason is not nearly as strong as it is supposed to be, and, once a case-book, with sufficient variety and quantity of materials to meet the needs of most persons interested in the subject, is supplied, the curriculum will be expanded to permit adequate instruction in this important subject. Bar Association resolutions emphasize the need of such instruction, and no one who is engaged in law teaching will deny that need.

In the preliminary report made to the American Bar Association in 1906 by its Committee on Code of Professional Conduct it was stated "that many men depart from honorable and accepted standards of practice early in their careers as the result of actual ignorance of the ethical requirements of the situation," and in the latest book on legal ethics it is stated that: "In the long schedule of disbarred lawyers, reviewed in the first chapter, will be found many individual cases where men went wrong out of pure ignorance. They applied commercial standards to the practice of a profession simply because they knew no better. Why were they not taught differently? Why wait to disbar, to teach men the elements of their calling?"—Julius Henry Cohen, *The Law: Business or Profession?* (1916) at page 215.

A thoughtful observer has placed a share of the blame for the ignorance of the ethical aspects of practice on the law schools themselves. In Thomas Leaming's *A Philadelphia Lawyer in the London Courts* (1911) pp. 84, 85, it is said: "Any one who has sat on a Bar Committee, or on a Committee of Censors, in America, must have been struck by the frequent instances where practitioners have fallen into error from sheer ignorance, due to inexperience or to the fact that they had not been born and bred to the best traditions. This is especially true in these days when law schools are grinding out members of the Bar who have had no real professional preceptors. As disbarment or suspension is too severe a penalty, such lapses pass unreproved and the standards sink, a result much more deplorable than the failure of individual discipline. Many a young lawyer would be induced to mend his ways if privately and fraternally informed of professional disapproval, and some would be glad to seek the judgment of such a body if it could be had without exposing names or particulars. In this way, too, a body of rulings on the professional propri-

eties applicable to American conditions would be steadily forced upon the attention of the whole profession, instead of being locked in the breasts of the more reputable members to govern merely their own conduct."

A part of what the writer of that passage wanted done is being accomplished in a praiseworthy way by the Committee on Professional Ethics of the New York County Lawyers' Association, and the questions and answers published by that Committee form a valuable part of this casebook's material. Lapses from professional propriety are being more and more reproved, and it remains for the law schools to do their part in the prevention of such lapses by giving adequate instruction in legal ethics. To do that, the law schools must present the subject to their students early in the law school course and must allow sufficient time for a full discussion of the fundamental topics. In John R. Dos Passos' *The American Lawyer* (1907) at page 67, note, it is pointed out that, to make introspection on the subject on the part of law students other than superficial, professional ethics "must be taught to the students as part of their preliminary education." The tendency is to place instruction in legal ethics in the graduating year, but that seems to be too late for effectiveness.

In the preparation of the present casebook (which justifies that name by its presentation of cases judicially decided in addition to cases decided by committees of lawyers), the Editor found it exceedingly difficult to include within a reasonably small number of pages all the material having claim to place. As part of this material had to consist of the observations of moralists, space has necessarily been economized by furnishing general passages which cite classic moral discussions, instead of incorporating all the original discussions.

Parts of cases and of quoted passages are frequently omitted. Omissions made by the Editor are indicated by three asterisks, thus: "* * *" Where an opinion or a passage contains quoted matter which the writer of the opinion or the author quoted with omissions, the omissions for which the present Editor is not responsible are indicated by dots, thus: ". . ." Other changes which seemed to the Editor to require comment are pointed out in the footnotes.

A few abbreviations are used in the book. The American Bar Association's Canons of Professional Ethics are referred to as the A. B. A. Canons. The Boston Bar Association's Revised Canons of Professional Ethics, which are a revision of the A. B. A. Canons, are referred to as the B. B. A. Canons. The questions and answers of the Committee on Professional Ethics of the New York County Lawyers' Association are referred to as the N. Y. Committee's questions and answers.

GEORGE P. COSTIGAN, JR.

Chicago, Illinois, March 15, 1917.

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CASES ON LEGAL ETHICS[1]

CHAPTER I

THE HISTORY AND ORGANIZATION OF THE LEGAL PROFESSION IN ENGLAND AND IN THE UNITED STATES

SECTION 1.—THE HISTORY OF ADVOCATES IN ENGLAND

THE CHAMPION. Edward Jenks, *A Short History of English Law* (1912) p. 198: As we have seen, the earliest lawsuit was a fight; and, in primitive times, deputies or agents are not at first allowed to fight, for obvious reasons. Even in Trial by Battle, however, the "champion," or professional pugilist, appears in English legal history at an early date,[2] at any rate in civil causes; and he

1 "As understood by your Committee, the phrase 'Legal Ethics' broadly embraces every phase of morals and manners pertaining to the two branches of the legal profession—the Bench and the Bar—in their relation to the administration of justice."—*Report of the Section on Legal Ethics* of the Bar Association of San Francisco under date of October 13, 1910.

"It is hard to mark the point where manners give way to morals, and all codes of legal ethics confuse the two. Perhaps it is as well that no attempt is made to separate them in such a code, and the writer will certainly not attempt to do so here. The important thing is to encourage right conduct, whether that conduct constitutes good manners merely or good morals."—George P. Costigan, Jr., *The Proposed American Code of Legal Ethics*, 20 Green Bag, 57, 58.

"Legal ethics may also be distinguished from the general subject [of Ethics] in that, while a violation of the moral code, as established by the conventions of society, will usually result in nothing worse than social ostracism, a disregard of the ethics of the bar may result in professional death. In * * * the legal profession a summary jurisdiction is lodged in the courts to discipline offenders against morals and good conscience. To this extent legal ethics partakes of the nature of law."—Geo. W. Warvelle, *Essays in Legal Ethics* (1902) pp. 20, 21.

2 See, for examples, the cases transcribed into *Bracton's Note Book*, Vol. II, Cases 116(1220), 164(1222), 243(1227), 328(1229), etc.—*Author's Note.*

"There thus arose for the purposes of the duel a body of bravos who, for sufficient payment, would undertake the ordeal, and risk the chances of punishment in the event of being vanquished. Accordingly, some of the older corporations had in their midst a retained champion who represented them, in defense of their rights, in any litigation in which they might be involved.

may be said to combine in himself the functions of counsel, attorney, and witness, possibly even of the jury, of later times. At any rate, he may fairly be claimed as one of the direct ancestors of the legal profession. * * * The champion gradually disappeared with the disappearance of Trial by Battle; and his place was filled by the serjeant at law (serviens ad legem) [3] and apprentice, and by the responsalis or attorney.

SERJEANTS. Frederic W. Maitland, in Maitland and Montague's *Sketch of English Legal History* (1915) 95, 96: In very old days a litigant is allowed to bring his friends into court and to take "counsel" with them before he speaks. Early in the twelfth century it is already the peculiar mark of a capital accusation that the accused must answer without "counsel." Then sometimes one of my friends will be allowed, not merely to prompt me, but even to speak for me.

It is already seen that the old requirement of extreme verbal accuracy is working injustice. A man ought to have some opportunity of amending a mere slip of the tongue; and yet old legal principles will not suffer that he should amend the slips of his own tongue. Let another tongue slip for him. Such is the odd compromise between ancient law and modern equity. One great advantage that I gain by putting forward "one of my counsel" to speak for me is that if he blunders—if, for example, he speaks of Roger when he should have spoken of Richard—I shall be able to correct the mistake, for his words will not bind me until I have adopted them. Naturally, however, I choose for this purpose my acutest and most experienced friends.[4] Naturally, also, acute and experienced men are to be found who will gladly be for this purpose my friends or anybody else's friends, if they are paid for their friendliness. As a class of expert pleaders forms itself, the relation between the litigant and those who "are of counsel for him" will be very much changed, but it will not lose all traces of its friendly character. Theoretically one cannot hire another person to plead for one; in other words, counsel cannot sue for his fees.

Seemingly, it was in the reign of Henry III that pleaders seeking employment began to cluster round the king's court. Some of them

With the growing discredit of the duel, to which the professional champion greatly contributed, the extension of civil business and the complications thence arising, more careful and exclusive study was given to the science of the law, and a body of persons, mostly, no doubt, of clerical training, devoted themselves to this pursuit."—F. A. Inderwick, *The King's Peace* (1895) p. 90.

[3] In the later form of trial by battle, the parties were accompanied, not merely by their champions, but by their serjeants. For an interesting account of the preparation for such a combat, with a statement of the presence of the serjeants, see Lowe v. Paramour, 3 Dyer, 301a (1571).

[4] "Some there be who know not how to state their causes or to defend them in court, and some who cannot, and therefore are pleaders necessary; so

the king, the busiest of all litigants, kept in his pay; they were his "serjeants"—that is, servants—at law.

GROWTH OF A LEGAL PROFESSION UNDER EDWARD I, 1272–1307.

Frederic W. Maitland, in Maitland and Montague's *Sketch of English Legal History* (1915) 92–94, 96, 97: A professional class of English temporal lawyers was just beginning to form itself. We say "of English temporal lawyers" because for more than a century past there had been "legists" and "decretists" in the land.

These legists and decretists constituted a professional class; they held themselves out as willing to plead the causes of those who would pay their fees. They did a large business, for the clergy of the time were extremely litigious. * * * And what we might call an ecclesiastical "Bar" had been formed. The canonist who wished to practice in a bishop's court had to satisfy the bishop of his competence, and to take an oath obliging him to practice honestly. The tribunals of the Church knew both the "advocate" (who pleads on behalf of a client) and the "procurator" or "proctor" (who represents his client's person and attends to his cause).

In course of time, two groups similar to these grew up round the king's court. We see the "attorney" (who answers to the ecclesiastical proctor [5]) and the "pleader," "narrator" or "countor" (who answers to the ecclesiastical advocate). * * *

Under Edward I a process, the details of which are still very obscure, was initiated by the king, which brought these professional pleaders and the professional attorneys under the control of the judges and began to secure a monopoly of practice to those who had been formally ordained to the ministry of the law. About the same time it is that we begin to read of men climbing from the Bar to the Bench, and about the same time it is that the judges are ceasing to be ecclesiastics.

W. S. Holdsworth, *A History of English Law* (1909) Vol. II, pp. 261–263: In Edward I's reign we can see clearly that a legal profession is being formed, and that it already consists of the two branches of attorneys and pleaders (narratores or counteurs or serjeant-

that what plaintiffs and others cannot or know not how to do by themselves they may do by their serjeants, proctors or friends. Pleaders are serjeants wise in the law of the realm who serve the commonalty of the people, stating and defending for hire actions in court for those who have need of them."—*The Mirror of Justices*, Book II, chap. 5, 7 Selden Society Publications, 47.

[5] "Proctors were ecclesiastical agents. They were abolished as a distinct body in 1857, when the Courts of Probate and Divorce were established."—Edward Jenks, *A Short History of English Law* (1912) 204, note.

counteurs).[6] Lord Brougham, in The Serjeants' Case,[7] thus distinguishes the two branches. "If you appear," he says, "by attorney, he represents you, but when you have the assistance of an advocate you are present, and he supports your cause by his learning, ingenuity, and zeal. Appearance by attorney is one thing, but admitting advocates to plead the cause of another is a totally different proceeding." This distinction, drawn in the nineteenth century, is clearly shown upon the records of the courts all through our legal history. It is probably as old as the Norman Conquest. The appointment of an attorney is an unusual and a solemn thing, only to be allowed on special grounds and with the proper formalities. The appointment of a pleader is no such formal proceeding. The idea that one man can stand in the place of another does not come naturally to a primitive system of law. On the other hand, the idea that one man shall assist another in legal proceedings is in harmony with many old ideas concerning law and lawsuits. * * *

Whether or not there was ever a period at which a man was not allowed the assistance of his friends when pleading before a court

[6] "Narrator, beyond all doubt, translates conteur. The problem is, how did he turn into the Serjeant? Now note that the translator of the statute of 1275 [West. 1., ch. 29, as translated in the Statutes of the Realm] puts a comma between Serjeant and Pleader or other, but the original—Sjaunt Cotour—does not. In other words, the Serjeant Counter is one person, and no distinction is intended in 1275 between the Serjeant and the pleader."—Herman Cohen, *The Origins of the English Bar*, 31 Law Quarterly Review, 56, 61.

For other parts of the same article, see 30 Law Quarterly Review, 464, and 32 Law Quarterly Review, 411.

[7] This was a case in which the exclusive privilege of the serjeants to appear at the bar of the Common Pleas was argued before the Privy Council in 1839. It is reported with many learned notes by Manning in his Serviens ad Legem.—*Author's Note.*

On April 25, 1834, a royal mandate of King William, dated April 24, 1834, was read in the Court of Common Pleas and entered of record, taking away from the serjeants at law the exclusive privilege of practicing, pleading and audience in the Court of Common Pleas. 10 Bing. 571 (1834). The serjeants were taken by surprise (see Matter of the Serjeants at Law, 6 Bing. N. C. 187, 188 [1839]); but as "the larger number of the serjeants" were by the mandate given permanent rank ahead of any who should thereafter be appointed king's counsel (see Matter of the Serjeants at Law, 6 Bing. N. C. 235, 236 [1840] and the mandate in 10 Bing. 571, 572 [1834]), they did nothing about it until after the death of King William, who issued the mandate. Meanwhile the court gave audience to all members of the bar. When Queen Victoria ascended the throne, the serjeants petitioned her to revoke the mandate. She referred the matter to the Privy Council, and the petition was refused. A bill to close the Court of Common Pleas to barristers at large was then introduced in the House of Lords, where it passed, but because no member of the House of Commons could be interested in it, the bill never came to a vote in that house. See In the Matter of the Serjeants at Law, 6 Bing. N. C. 232 (1840). The serjeants then applied to the Court of Common Pleas to call on serjeants and serjeants only to plead in that court. In the Matter of the Serjeants at Law, 6 Bing. N. C. 187 (1839). This last application succeeded on January 21, 1840. In the Matter of the Serjeants at Law, 6 Bing. N. C. 235 (1840). The joy of the serjeants at this restoration of monopoly was relatively short-lived, however, for by the Act of August 18, 1846 (9 & 10 Vict. c. 54), Parliament extended to all barristers the privileges of serjeants at law in the Court of Common Pleas.

it is difficult to say. Certainly he was allowed such assistance as early as the laws of Henry I, unless he was charged with felony. * * *

Probably in any important case pleaders will be employed. Anesty, in his journeys over the country in pursuit of the king's court, employed many, including Glanvil. In the early years of the thirteenth century there were many who made a profession of the civil and canon law. At a time when there was much litigation in the king's courts, and when the relations between the civil and canon law on the one side and the common law on the other were close, it is probable that there were many who practised both in the civil and canon law and in the common law. We have seen that William of Drogheda's book would lead one to believe that this was the case. No doubt many of these practitioners would be in orders. But we have seen that the clergy were being discouraged in the thirteenth century from taking part in any way in the administration of lay jurisdiction. The fifth Lateran Council prohibited the clergy from appearing as advocates in the secular courts unless in causes in which they themselves were concerned, or in the causes of the poor. In 1237 the constitutions of Cardinal Otho regulated the class of advocates in the ecclesiastical courts; and these, as Professor Maitland points out, may have formed a model for the class of pleaders in the king's courts. Such a class is referred to in 1235; and from the last half of the thirteenth century there are many evidences of their existence. In 1253 a man who appeared for another was amerced because he was not an advocate.[8]

SERJEANTS AND KING'S COUNSEL.

Edward Jenks, *A Short History of English Law* (1912) pp. 198, 199: The serjeants were a close order by the end of the thirteenth century, and received their patents direct from the Crown [9]—in later days with much ceremony. * * * The serjeants sat within the "bar" or boundary of the court, and were addressed by the judges as "brothers." In the eighteenth century, their place in the legal world began to be taken by the King's Counsel Extraordinary, or simply, King's Coun-

[8] Plac. Abbrev. 137. But Professor Maitland suggests that it is not quite clear that the cause of amercement was the fact that the person was not a member of the legal profession.—*Author's Note.*

[9] "The serjeants, the fathers of the Bar, whether described in Latin as narratores, in French as conteurs or in English as counters, began * * * as nominees of the Crown and officers of the courts. * * * But though serjeants were recognized by early statute, neither they nor any other class of counsel were constituted by that or by any other statute or edict, for the entire constitution and position of the Bar rests on custom and tradition."—F. A. Inderwick, *The King's Peace* (1895) Introduction, p. xiv.

sel; i. e., the officially retained representatives of the Crown other than the Law Officers.[10]

W. S. Holdsworth, *A History of English Law* (1909) Vol. II, p. 413: The elevation, then, to the dignity of serjeant was the great step forward in the profession. It made the lawyer a member of the great gild which administered the law; and it placed him almost on an equality with the bench. The serjeants and the judges were brothers of the Order of the Coif.[11] To the end they addressed one another as such, and lodged together at the Serjeants' Inns.[12] We are

[10] "And Bacon, who himself was never a serjeant-at-law, persuaded the Queen to create a new rank, that of Queen's Counsel, and to nominate him the first of that honourable brotherhood, a rank which was afterwards confirmed to him by James I."—F. A. Inderwick, *The King's Peace* (1895) p. 188.

[11] "About 1207 ecclesiastics were forbidden to act as advocates in secular courts and accordingly those of the clergy who had adopted the law as a profession and were unwilling to be deprived of their means of livelihood, assumed a coiffure or close-fitting head-dress of linen or silk to hide their bald patches; and thus, according to Sir Henry Spelman, originated the Order of the Coif."—F. A. Inderwick, *The King's Peace* (1895) p. 91.

Pulling insists that the coif "had been in use ages before * * * the rules and constitutions prohibiting the clergy from acting as advocates, judges or assessors in the secular courts" (Alexander Pulling, *The Order of the Coif* [1897] p. 21), and that "the old coif of the Serjeants-at-Law * * * was in fact an honorable and distinctive head-dress corresponding to the helmet of knighthood" (Id. p. 24).

Still another explanation of the coif is the following: "The word Serjeant is said to translate the Latin Servientes, and the King's Servants-at-Law, Servientes domini Regis ad legem, were, it is suggested, the lineal descendants of the fratres servientes, the servant brethren, of the Knights Templars. The peculiar dress of the 'Order of the Coif' is advanced as an argument in support of this fascinating pedigree. The Serjeants-at-Law marked their rank, it is suggested, by wearing red caps, under which, as in the East, a linen cap, or coif, was worn. Did the Templars bring this habit from the East, and were their first 'servants' Mohammedan prisoners? * * * A connection may be traced between the white linen thrown over the head of a Serjeant on his creation and the white mantle in which the novice was clothed when, in the Chapel of St. Anne, he was initiated into the Order of the Knights Templars, and declared a free, equal, elected and admitted brother. * * * The theory has, indeed, been advanced that the coif was a device for covering the tonsure of ecclesiastical pleaders after clerics had been forbidden to practice in the secular courts. But this explanation seems too ingenious."—Cecil Headlam in Home & Headlam, *The Inns of Court* (1909) pp. 188–190.

[12] In 32 Law Quarterly Rev. 350, 351, in mentioning Mr. Arthur Underhill's chapter on Law in *Shakespeare's England*, it is said editorially: " 'The Serjeants had Inns of their own' is a slip of the pen immediately corrected by the context, as Mr. Underhill speaks within a few lines of the disappearance of Serjeants' Inn; it is needless to say no one knows better that there was only one." The Serjeants occupied several Inns from time to time and the question is whether there was any overlapping. Cecil Headlam in Home and Headlam, *The Inns of Court* (1909) pp. 195–198, states that there was. He refers to Scrope's Inn as "the first abode of the Serjeants" and as remaining "an Inn for Judges and Serjeants-at-Law" until 1498. Meantime "at least as early as the reign of Henry VI" (1422–1461) "the Serjeants took up their residence in Serjeants' Inn" in Fleet Street. In 1758 the Serjeants gave up the Inn in Fleet Street "and united with their brethren in Chancery Lane." He adds: "The Inn, which the Serjeants joined when they left Fleet Street,

not surprised to find that the creation of a judge was, compared with the creation of a serjeant, an informal affair.

F. A. Inderwick, *The King's Peace* (1895) pp. 92, 93, 95, 96: The serjeants, who for some generations were the only recognized pleaders in the King's Courts, were part and parcel of the court itself. They held office under the Crown, were appointed by patent and had a monopoly which was so far remunerative that they were required to give feasts, rings [each inscribed with a motto] and presents upon their appointment.[13] Their title, Servientes Domini Regis ad legem, Our Lord the King's servants at law, indicated the nature of their calling, and has stereotyped the functions of an English barrister at all times. * * * They had certain specified privileges, including a salary from the Crown. * * * The serjeant's oath bound him to serve the King and his people, thus prescribing the divided allegiance which the Bar has always borne. * * * Serjeants after a time becoming too few for the business to be transacted, counsellors at law were admitted to plead. The names of some eighty-eight of these counsellors, many of whom were afterwards serjeants and judges, have been extracted from the cases tried in the reign of Edward II, and they gave the first instance of the employment of this class of advocate. * * * [Since then] there have always been the leading counsel, whether serjeant or king's counsel, holding his office by patent, and the junior counsel, who, without any patent or official position, relies solely on his knowledge of law and his skill in pleading and practice.

had been occupied by their brethren since the end of the fourteenth century. But * * * it was not called Serjeants' Inn until 1484."

[13] "The number of serjeants was gradually increased by appointment of the Crown, but the customary feasts and the gold rings which etiquette required the serjeants to give to the judges and courtiers on these occasions became so heavy a tax on their incomes that lawyers of position who did not aspire to be judges frequently begged to be relieved from the acceptance of this honorable degree."—F. A. Inderwick, *The King's Peace* (1895) p. 188.

"What the Forum was to the Bar of ancient Rome, old St. Paul's Cathedral was for many ages to the Serjeants-at-Law. As the Roman advocates paced up and down the Forum Romanum, waiting for clients or to respond to the demand 'licet consulere,' so the old Serjeant Counters were to be found at the Parvis of St. Paul's with the same object, or engaged at their allotted pillars [there] in consultation after the rising of the courts."—Alexander Pulling, *The Order of the Coif* (1897) p. 3.

The same author points out that "Parvis strictly meant only the church porch, but in the case of St. Paul's clearly comprehended the nave or middle aisle of the old Cathedral, or Paul's Walk" (Id. 71, note), and that "for a century before the fire of London" that was the walk "where the wits and gallants and newsmongers met, and the Serjeants were to be found ready to receive their clients" (Id. 263, note).

The serjeants used to pray in the chapel of St. Thomas à Becket before going to St. Paul to select their pillars.—Cecil Headlam in Home and Headlam, *The Inns of Court* (1909) p. 189.

THE INNS OF COURT. W. S. Holdsworth, *A History of English Law* (1909) Vol. II, pp. 405, 406: We have seen that in Edward I's reign there are signs that a distinct legal profession is being formed. The pleaders are already a body distinct from the apprentices [14] and the attorneys; and both are becoming subject to fixed rules. Fortescue's book, De Laudibus Legum Angliæ, shows us that, towards the end of this period, this legal profession is both formed and organized. At the head of the profession, and exercising a general control over it, are the serjeants-at-law and the judges. Beneath them, grouped together in the four Inns of Court,[15] and in the Inns of Chancery, are the various grades of the apprentices of the law, from the Benchers and Readers to the Inner Barristers or students.[16]

[14] "Although the term apprentices was in the fifteenth century applied to the serjeants, it must originally have denoted the students who were attached to some recognized teacher of the law, who was perhaps in the first instance a serjeant, and later a barrister or reader who had received the diploma or degree, by virtue of which he had audience in the Courts."—Hugh H. L. Bellot, *The Inner and Middle Temple* (1902) p. 2.

[15] In Sir John Fortescue's *De Laudibus Legum Angliæ* (1672) c. 49, it is explained that because of the expense of attending the "Innes" of Court "there is scant any man found within the Realm skillful and cunning in the laws except it be a Gentleman born, and come of a Noble stock. Wherefore they more than any other kind of men have a special regard to their Nobility, and to the preservation of their honor and fame. And to speak uprightly, there is in these greater Innes [of Court], yea and in the lesser [Innes of the Chancery] too, beside the study of the laws, as it were an university or school of all commendable qualities requisite for Noblemen. There they learn to sing, and to exercise themselves in all kinds of harmony. There also they practice dauncing, and other Noblemen's pastimes, as they use to do, which are brought up in the King's house. On the working dayes, most of them apply themselves to the study of the Law. And on the holy daies to the study of holy Scripture: and out of the time of Divine service to the reading of Chronicles, for there indeed are vertues studied and vices exiled. So that, for the endowment of vertue and abandoning of vice, Knights and Barons, with other States and Noblemen of the Realm place their children in those Innes, though they desire not to have them learned in the Laws nor to live by the practice thereof, but only upon their father's allowance."

[16] "We cannot here go into the details of the separate constitution of these Inns. It will be sufficient to say that the governing body was then, as it is now, the Benchers, who possessed powers of education, discipline, and government over the members of the Inns very similar to those possessed by the fellows of an Oxford or Cambridge college. The Benchers were presided over by a member or members of the governing body who were annually elected. Other annually elected members managed the finances of the Society; while the Readers, assisted by the Benchers, were, * * * responsible for the education of the members. * * * The Benchers and Readers are those who have publicly lectured in the Inn."—W. S. Holdsworth, *A History of English Law* (1909) Vol. II, p. 423.

"The word 'barrister' itself perpetuates the ancient discipline of the Inns, where the dais of the governing body, or Benchers, * * * was separated by a bar from the profane crowd of the Hall. The Halls of the Inns were not only the scenes of that business of eating and drinking the 'dinners' to which so much attention was devoted, and by which the students 'eat their way to the Bench,' but also the centers of the social life and educational system of these Guilds.

"Dugdale [in his *Origines Juridiciales* (1671)] gives at length the degrees

These Inns of Court are colleges which train the students in the law and call them to the bar.[17] Each has its independent, its collegiate

of Tables in the Halls of the Inns—the Bencher's Tables, the tables of the Utter Barristers, the tables of the Inner-Bar, and the Clerks' Commons, and, without the screen, the Yeoman's Table for Benchers' Clerks.

"The Utter or Outer Barristers ranked next to the Benchers. They were the advanced students who, after they had attained a certain standing, were called from the body of the Hall to the first place outside the bar for the purpose of taking part in the moots or public debates on points of law. The Inner Barristers assembled near the center of the Hall. * * *

"Readers to help the younger students were chosen from the Utter Barristers. From the Utter Barristers, too, were chosen by the Benchers 'the chieflest and best learned' to increase the number of the Bench and to be Readers there also. After this 'second reading' the young Barrister was named an Apprentice at the Law and might be advanced at the pleasure of the Prince, as Stow says [in his *Survey of London* (1598)], to the place of Serjeant, 'and from the number of Serjeants also the void places of Judges are likewise filled.' * * *

"Upon the Benchers, or Ancients, devolved the government of the Inn * * *."—Cecil Headlam in Home and Headlam, *The Inns of Court* (1909) pp. 11–13.

It is difficult to say whether the term "barrister" arose from the bars in the Inns of Court or from the bars in the courts themselves.

"Bar (formerly 'Barre' or 'Barr'). Originally the bar or rail (often in local courts in old times a mere pole) which in superior courts of record separated the members and officers of the court from the criminals brought before it, and from the suitors, their advocates and the general public. * * *

"Advocates, as representing the suitor or criminal whose case the court is trying, used always to stand at the bar, by the client's side, and there plead his cause. From this last fact the phrase 'the bar' has obtained a secondary signification, and is used to describe those who practice the profession of advocacy. From the same fact, too, we get the word 'barrister' (formerly barrastor)." 2 *Ency. of the Laws of England* (2d Ed.) pp. 104, 105.

"The bar of the old courts was not the imaginary one of to-day, but a substantial barrier of iron or wood, separating the judges and their officials from the litigants and their attorneys and advocates, as well as witnesses and the prisoners. Thus the pleader stood at the bar or ouster the bar, and gained the name of Apprenticius at Barres, or Utter Barrister, and later of Barrister-at-Law. * * * In later times the Utter Barrister was called within the Bar and became known as an Inner Barrister, and later still as 'a silk' from the material of his gown, the junior barrister taking the cast-off name of Utter or Outer Barrister, or the more colloquial term of 'stuff gownsman.'"—Hugh H. L. Bellot, *The Inner and Middle Temple* (1902) pp. 38, 39.

"The members of each Inn of Court are divided into three classes: students, utter barristers and benchers. The students are those members of the Inn who have not been called to the bar, but who have an inchoate right to be called to the bar on complying with the conditions which the four Inns have imposed. A student who is qualified to be called to the bar may, with the permission of the benchers, practise 'under the bar' as a conveyancer, special pleader, or equity draftsman; such permission is granted for one year only but may be renewed annually. Utter barristers are those members of the Inn who have been called to the bar, but who have no share in the government of the Inn. The benchers are the governing body of the Inn, and fill up vacancies in their number or add to their number by co-opting barristers who are members of the Inn."—James Robert Vernam Marchant, *Barrister-at-Law* (1905) pp. 3, 4.

17 "The right of practising as counsel in England is reserved to barristers; that is, to those who have been 'called to the bar' by one or other of the four Inns of Court. The Inns of Court are the societies of Lincoln's Inn, the Inner Temple, the Middle Temple, and Gray's Inn; they are voluntary unincorporated societies of equal rank and status, independent of the state, which

life; but in all, as in modern colleges of the same University, the customs and the system are similar.[18] All are in some sort subordinate to the judges and the serjeants, just as the modern college is subordinate to the rulings of its visitor or to the statutes of the university. Just as it is the aim of the modern college to fit its members to take the University degree, so it is the aim of the Inns of Court to educate its members to make a creditable figure in the arena

have each a similar constitution, and are bound by the same rules; they are outside the jurisdiction of the courts, but are subject to the visitatorial jurisdiction of the judges. These societies have existed from very ancient times; they seem originally to have been associations of the apprentices (apprenticii ad legem), a name which is found in use at the end of the thirteenth century to denote those legal practitioners who were not serjeants-at-law (servientes ad legem), but from whose ranks the serjeants were chosen. * * * The possession of the degree of serjeant was up to November 1, 1875, a necessary qualification for the office of judge of the superior courts of common law, but since that date no new serjeant has been made, the property of the order has been sold, and the order is now almost extinct in England."—2 Halsbury's *Laws of England*, pp. 358, 359.

[18] "These Inns of Court are survivals of a great legal university which flourished in mediæval times. * * * This legal university comprised the Serjeants' Inns, from which alone the judges were selected; the Inns of Court, who supplied the advocates who had not attained to the degree of serjeants, and the barristers, who were not yet of sufficient standing to plead; and the Inns of Chancery, where dwelt the 'clerks of chancery' and attorneys, and where the embryo barrister learned the rudiments of his legal craft. These Inns of Chancery were, for the most part, affiliated to one or other of the Inns of Court. * * * Inns of Chancery have now ceased to serve their original purpose, and such buildings as still survive are now chiefly used as offices."—Hugh H. L. Bellot, *The Inner and Middle Temple* (1902) pp. 2, 3.

While the Inns of Court constituted and still constitute a University, the educational requirements at times have been quite lax. "In the seventeenth century, however, 'readings' and 'mootings' alike fell into desuetude, and official instruction practically disappeared. The Inns became merely formal institutions, residence within the walls of which, indicated by the eating of dinners, was alone necessary for admittance to the Bar."—Cecil Headlam in Home & Headlam, *The Inns of Court* (1909) pp. 18, 19.

"Mr. Samuel Dickson * * * pointed out that no public inconvenience was felt [in England] from the calling to the Bar of gentlemen who were incompetent or unwilling to practice. For the barristers being engaged, under the English custom, not by the clients but by the attorneys or solicitors, who were themselves experienced in law, the ignorant or incompetent barristers had no chance of obtaining any business, and dropped out of sight."—James Barr Ames, *Lectures in Legal History* (1913) p. 358.

"At the present day, the inns of chancery have completely disappeared as institutions, though some of their buildings remain. But the inns of court still enjoy their ancient reputation with the sons of our nobility and gentry; and they exercise also the exclusive privilege of conferring the degree of barrister at law, the possession of which degree is an indispensable qualification for practicing as advocate in the superior courts. And for the obtaining of this degree, it is necessary to be enrolled as a student in one or other of these inns, and after a certain period to apply to its principal officers (or benchers) for a call to the bar. * * * Moreover, no student may be called to the bar, unless he has passed a public examination in law for the purpose of ascertaining his fitness."—1 Stephen's *Commentaries* (16th Ed.) 8, 9.

On the training and discipline of lawyers in England, see Harold D. Hazeltine, *Preserving the Professional Ideal in England*, 39 Amer. Bar Assoc. Rep. (1914) p. 912.

of the courts under the eyes of the judges, and ultimately to attain to the degree of serjeant and to the dignity of the bench.

MR. SERJEANT MANNING'S NOTE to DOE ex dem. BENNETT v. HALE (1850) Court of Queen's Bench, 15 Q. B. 225: Before the Statute Westm. 2 (1 Stat. 13 E. 1), c. 10, plaintiffs and defendants were bound to appear in person unless authorised, by the King's writ of dedimus potestatem de attornato faciendo, to substitute an attorney. Once before the Court, they were at liberty to avail themselves of the assistance of a countor (pleader), who might stand by them, advise with them, and speak for them. In the King's Courts of Common Law, though it was otherwise in the Ecclesiastical Courts, the countor could only be a person of a particular class, selected by the Crown ad serviendum ad legem, in administering justice as Judges of the Courts of King's Bench and Common Pleas, and as Justices of Assize; or, when not so employed by the Crown, in assisting those suitors who were too ignorant of the law, or too little acquainted with the (French) language in which the proceedings were carried on, to conduct their own cases.

But, when a general power to appear by attorney had, in 1285, been given by Stat. Westm. 2 (1 Stat. 13 E. 1), c. 10, and all persons were at liberty to appoint either general attorneys or attorneys ad lucrandum vel perdendum in a particular cause, it was thought expedient to restrict the appointment to persons presumed to be acquainted with the common law. The course of preparation for the degree of the Coif was, first to pass some time in an Inn of Chancery, then to enter at an Inn of Court, and then to proceed through the degrees of inner barrister and outer barrister to that of apprentice at law; from which latter class the serjeants were chosen.

The serjeants were bound to attend the sittings of the Magnus Bancus (the Court of Common Pleas); and, as that Court had become stationary, whilst the Chancery, the King's Bench and the Exchequer still followed the person of the King, it was considered desirable that these Courts should have the assistance of advocates who had not yet been called upon to take the degree of the Coif. A measure was resorted to for providing for both these wants. An order was made in Parliament in 1292 (1 Rot. Parl. 84 b), intituled "De Attornatis et Apprenticiis," by which the Justices of the Common Pleas were required to appoint a certain number de quolibet comitatu, de melioribus et legalioribus et libentiùs addiscentibus, to attend the Courts, great complaints having been made in Parliament of causes being lost for want of serjeants (par defaute de sergeantie). 1 Rot. Parl. 4 a; 2 Rot. Parl. 140 a, b; Mann. Serviens ad Legem, 268. From this period, apprentices at law enjoyed the double privilege of appearing as attorneys for suitors in all the Common Law Courts, and of acting as advocates in those Courts in which serjeants

did not regularly attend. Thus, in the 11 Ed. 3 (2 Rot. Parl. 96 b; Mann. Serv. ad Legem, 188), John de Codyngton, an apprentice and attorney was discharged by the council from a command of the Lord Admiral to appear at Orewell armed and apparelled as a man at arms. Afterwards persons were admitted to practice as attorneys who had not taken the degree of apprentice at law; and utter barristers were allowed to appear as advocates in the itinerant Courts without qualifying themselves to act as attorneys, within the order of 1292, by taking the degree of apprentice. Of late years students (inner barristers), being certified special pleaders, have been allowed to act as advocates at the Judges' chambers.

At common law, the serjeant could seldom receive his instructions through an attorney; and, after the making of the order of 1292, although in the Common Pleas a sergeant might be instructed by an attorney, yet in other Courts the apprentice attorney would have no one to instruct but himself, until the separation of the two functions, which now generally prevails, had taken place; a separation which does not however exist in the proceedings of many Inferior Courts, and which has been discontinued in the case of the Crown, the King's Attorney General no longer instructing and assisting the King's Serjeants, but conducting the King's business himself.

BOOREMAN'S CASE.

(Court of King's Bench, 1642. March, 177.)

Booreman was a barrister of one of the Temples, and was expelled the house, and his chamber seised for non-payment of his commons, whereupon he by Newdigate prayed his writ of restitution and brought the writ in Court ready framed; which was directed to the benchers of the said society: but it was denied by the court, because there is none in the Inns of Court to whom the writ can be directed, because it is no body corporate, but only a voluntary society, and submission to government; and they were angry with him for it, that he had waived the ancient and usual way of redress for any grievance in the Inns of Court, which was by appealing to the Judges, and would have him do so now.[19]

[19] "A mandamus will not lie to the benchers of an Inn to call a student to the bar, for the proper mode of relief in case of a refusal is by appeal to the judges as visitors. Rex v. Benchers of Gray's Inn (1780), 1 Dougl. 353. Nor will a mandamus lie to the benchers of an Inn to admit a person as student. Rex v. Benchers of Lincoln's Inn (1825), 4 B. & C. 855. Indeed, until recent times there was no remedy at all open to a person whom the benchers refused to admit as a student, for the judges had originally no jurisdiction to hear an appeal except by admitted members, but now, by consent of the Inns, the judges hear appeals against refusals to admit."—James Robert Vernam Marchant, *Barrister-at-Law* (1905) pp. 5, 6.

DIVISIONS OF THE ENGLISH BAR. Thomas Leaming, *A Philadelphia Lawyer in the London Courts* (1911) pp. 39, 40: The Bar is divided into two separate parts—the Common Law Bar and the Chancery Bar; for a barrister does not try cases of both kinds as in America. The solicitor knows whether he has a law or equity case in hand, and takes it to the appropriate barrister. Common law barristers have their chambers chiefly in the Middle Temple and Inner Temple; chancery men, largely in Lincoln's Inn, and the two kinds of barristers know little of, and seem even to have a kind of contempt for, each other. Thus a common law barrister passes his life in jury trials and appeals; whereas a chancery man knows nothing but courts of equity, unless he follows a will case into a jury trial as a colleague of a common law man to determine an issue of devisavit vel non. And there are further specializations—although the divisions are not so marked—into probate, divorce or admiralty men. Besides, there is what is known as the Parliamentary Bar, practicing entirely before Parliamentary committees, boards and commissions. It is, however, curious that in England no apparent distinction exists between civil and criminal practice and common law barristers accept both kinds of briefs indiscriminately.

A BARRISTER IN PRACTICE. Thomas Leaming, *A Philadelphia Lawyer in the London Courts* (1911) pp. 29–34: Having been called to the Bar, the question first confronting the young barrister is whether he really intends to practice.[20] He may have read law as an education, meaning to devote himself to literature, to politics or to some other pursuit, or he may have embraced the profession in deference to the wishes of his family and to fill in the time while awaiting the inheritance of property. Supposing him, however, to be one of the minority determined to rise in the profession, he is confronted with formidable obstacles, for he can not look to his friends to furnish him with briefs. He can never be consulted nor retained by the litigants themselves. The only clients he can ever have are solicitors, whose clients, in turn, are the public. He never goes beyond his dingy chambers in the Inns of Court, where, guarded by his clerk, he either wearily waits for solicitors with briefs and fees, or, more likely still, gives it up and goes fishing, shooting or hunting. And this furnishes the market for the alluring placards one sees at the old wig-makers' shops in the Inns of Court: "Name up and letters forwarded for £5 per annum."

The early ambition of the young barrister is to become a "devil" to some junior barrister, who always has recourse to such an under-

20 "The sphere of a barrister's practice includes advising on questions of law, drafting pleadings, conveyances and other documents, and acting as an advocate."—James Robert Vernam Marchant, *Barrister-at-Law* (1905) p. 13.

study, and, if the junior is making over £1000 a year, he continuously employs the same devil. This term is not applied in a jocular sense, but is the regular and serious appellation of a young barrister who, in wig and gown, thus serves without compensation and without fame—for his name never appears—often for from five to seven years. The devil studies the case, sees the witnesses, looks up the law and generally masters all the details, in order to supply the junior with ammunition.[21]

[21] "I not know how far the mysterious practice of 'devilling' obtains in the United States. In England the system may be described as the process by which an advocate of business aptitude, instructed by a client in any particular case, hands over to another advocate the conduct of that case while himself retaining the remuneration. It is traditional, it is not wholly satisfactory, but it is regulated by very precise rules which form a not inconsiderable portion of the etiquette of the profession."—Edward S. Cox-Sinclair, *The Bars of United States and England*, 19 Green Bag, 702, 707.

"DEVILLING AND OTHER MATTERS.—It is not permissible or in accordance with the professional etiquette for a Counsel to hand over his brief to another Counsel to represent him in Court and conduct the case as if the latter Counsel had himself been briefed, unless the client consents to this course being taken.

"This applies equally whether the Counsel are both juniors or both King's Counsel.

"As to the practice: in the Chancery Division it is not the practice for one junior to hold a brief (other than a merely formal one) for another, and the same is true of King's Counsel. In the King's Bench Division, in the case of juniors it is not uncommon for one Counsel to 'devil' a brief for another; but in the case of King's Counsel it is very seldom done.

"These differences in practice, however, do not indicate any uncertainty in the principle, which is that stated above.

"It is not permissible or in accordance with professional etiquette that a Counsel who has been instructed to draw pleadings should delegate his responsibility to another. But this does not preclude the Counsel who has been instructed from obtaining any assistance he may require in the work of drafting pleadings, subject to his approving the pleadings so drafted and making himself personally responsible for their contents by signing them, and the same principle is applicable to advising or to any other drafting as well as to pleadings.

"The above rules are of course subject to exception in cases of emergency, or where the interests of the client cannot otherwise be protected. There is no rule or settled practice governing the remuneration for 'devilling' or assistance given by one Counsel to another in the cases above referred to.

"With regard to juniors it is a common practice in the Chancery Division for the one Counsel to remunerate the other by paying him an agreed proportion, generally one-half, of the fees the former receives in respect of opinions or drafting. In the King's Bench Division remuneration for 'devilling' of briefs or assistance in drafting and opinions is not common. In both Divisions occasionally such work is remunerated either by casual or periodical payments.

"An arrangement of this kind is also not unfrequently made in the case of a King's Counsel who desires regular assistance from a junior in the perusal and noting of his briefs.

"No practice in the least degree resembling partnership is permissible between Counsel; and the etiquette of the profession forbids the handing over of work by one Counsel to another, outside the conditions above stated.—An. St. 1902–03, p. 4.

"DEVILLING IN VACATION.—There is no Rule of the Profession against it. An. St. 1900–01, p. 8. As to the Scottish Bar, cf. 117 L. T. Jo. p. 260."—Statement of the General Council of the Bar, *The Annual Practice* (1917) p. 2415.

Before the trial the junior has one or more "conferences" with the solicitor, all paid for at so many guineas; occasionally he even sees the party he is to represent, and, more rarely, an important witness or two. The devil is sometimes present, although his existence is, as a rule, decorously concealed from the solicitor.

If the solicitor, or the litigating party, grows nervous, or hears that the other side has employed more distinguished counsel, the solicitor retains a K. C. as leader. Then a "consultation" ensues at the leader's chambers between the leader, junior,[22] solicitor, and, occasionally, the devil.

At the trial, the junior merely "opens the pleadings" by stating in the fewest possible words what the action is about—that it is, perhaps, a suit for breach of promise of marriage between Smith and Jones, or to recover upon an insurance policy for a loss by fire—and then resumes his seat, whereupon the leader—the great K. C.—really opens the case, at considerable length and with much more detail and argument than would be good form in an American court. He states his side's contention with particularity, reads documents and correspondence (none of which have to be proved unless their authenticity is disputed—points which the solicitors have long ago threshed out) and he even indicates the position of the other side, while, at the same time, arguing its fallacy. Having done this, he leaves it to the junior to call the witnesses—more often he departs from the court room to begin another case elsewhere, and returns only to cross-examine an important witness on the other side, or to make the closing speech to the jury. In this way a busy leader may have several trials going on at once. The junior then proceeds to examine the witnesses with the help of an occasional whispered suggestion from the solicitor, who is more than ever isolated by the departure of the leader, and the devil is proud when the junior audibly refers to him for some detail.

If the leader is absent, which frequently happens notwithstanding his fee has been paid, inasmuch as no case is deferred by reason of counsel's absence, the junior takes his place, while the solicitor grumbles and more devolves upon the devil.

Occasionally, indeed, both leader and junior may be elsewhere and then is the glorious opportunity of the poor devil, who hungers for such an accident, for he may open, examine, and cross-examine, and, if neither his junior nor his august leader appear, he may even close to the jury. The solicitor will be white with rage and chagrin, wondering how he shall explain to the litigant the absence of the counsel whose fees he has paid, but the devil may win and so please the solicitor that the next time he may himself be briefed as junior. This is one of the things he has read of in the Lives of the Lord Chancellors.

22 "JUNIOR BRIEF TO JUNIOR LEADER.—The general rule is that a Barrister should not accept a junior brief to a Barrister junior to him in point of call. An. St. 1905–06, p. 10."—Statement of the General Council of the Bar, *The Annual Practice* (1917) p. 2413.

The devil is in no sense an employee or personal associate of the junior—which might look like partnership, a thing too abhorrent to be permitted. On the contrary, he often has his own chambers and may, at any time, be himself retained as a junior, in which event his business takes precedence of his duties as a devil, and he then describes himself as being "on his own."

Having gained some identity, and more or less business "on his own" from the solicitors, a devil gradually begins to shine as a junior, whereupon appears his own satellite in the person of a younger man as devil, while the junior becomes more and more absorbed in the engrossing but ever fascinating activities of regular practice at the Bar.

Reaching a certain degree of prominence, a junior at the common law Bar may next "take silk"; that is, become a K. C., or King's Counsel, which has its counterpart at the Chancery Bar in becoming a "leader." [23] * * * Whether a barrister shall "apply" for silk is optional with himself and the distinction is granted by the Lord Chancellor at his discretion, to a limited, but not numerically defined, number of distinguished barristers. The phrase is derived from the fact that the K. C.'s gown is made of silk instead of "stuff," or cotton.[24] It has also a broad collar, whereas the stuff gown is suspended from shoulder to shoulder.

Whether or not to "take silk," or to become a "leader," is a critical question in the career of any successful common law or chancery barrister. As a junior, he has acquired a paying practice, as his fee is always two-thirds that of the leader. He has also a comfortable chamber practice in giving opinions, drawing pleadings and the like, but all this must be abandoned—because the etiquette of the Bar does not permit a K. C. or leader to do a junior's work—and he must there-

[23] "At the Chancery Bar there is a peculiar subdivision which has already been mentioned. Having reached a certain degree of success and become a K. C., a barrister may 'take his seat' in a particular court, by appointment of the judge, as a 'leader.' Thereafter he can never go into another, except as a 'special,' a term which will be explained presently. For three pence, at any law stationer's, one can buy a list of the leaders in the six chancery courts, varying in number from three to five and aggregating twenty-five, and if a solicitor wishes a leader for his junior in any of these courts, he must retain one out of the limited list available. Hence, these gentlemen sit like boys in school at their desks and try the cases in which they have been retained as they are reached in rotation.

"But even for a leader at the Chancery Bar, one more step is possible, a step which a barrister may take, or not, as he pleases, and that is: he may go 'special.' This means that he surrenders his position as a leader in a particular court and is open to accept retainers in any chancery court; but his retainer, in addition to the regular brief fee, must be at least fifty guineas or multiples of that sum, and his subsequent fees in like proportion."—Thomas Leaming, *A Philadelphia Lawyer in the London Courts* (1911) pp. 40, 41.

[24] "Barristers cannot be heard in court as advocates unless they are robed."—James Robert Vernam Marchant, *Barrister-at-Law* (1905) p. 41.

"It is doubtful whether a barrister litigant who is conducting his own case has any right to appear in forensic costume or to speak from the places reserved for counsel. See Cox-Sinclair's Rights, etc., of an Advocate, p. 22."—Id. p. 70, note.

after hazard the fitful fancy of the solicitors when selecting counsel in important causes. Some have taken silk to their sorrow, and many strong men remain juniors all their lives, trying cases with K. C.'s and leaders much younger than themselves.[25]

BARRISTERS IN ENGLAND. Edward S. Cox-Sinclair, *The Bars of United States and England,* 19 Green Bag, 702, 704: The formal changes in fact, up to the present day, which have taken place in regard to the barrister-at-law, can be summed up as follows: (1) The abolition of the degree of Sergeant-at-Law, leaving all barristers of one designation, with the exception of the select few appointed King's Counsel. (2) The abolition of a few special offices of an advocate, survivals of the day when the lines of division between the Courts were sharp. For instance, certain persons in the Court of Exchequer who had priorities in motions, called from their places in the Court the Tub-man and the Post-man, were no longer so distinguished. Certain advocates belonging to special bars, such as a trusted member practising in the Mayor's Court in the City of London, ceased to have the privilege of limitation. (3) The abolition of a certain grade called the special pleaders, whose designation conveys their functions.[26] (4) The imposition of a stringent system of examination administered by the Council of Legal Education.

[25] "There are at the present time about ten thousand Barristers in London, eight thousand of whom are not in active practice. Of the two thousand in active practice, there are about two hundred King's Counsel or Leaders, as they are called (because in England every important case has to have a Leader), and the remaining eighteen hundred are Juniors, who are not allowed to 'wear the silk.'

"Only the King's Counsel are allowed to wear a silk gown, and, in order to become a King's Counsel, application must be made to the Lord Chancellor.

"Recently, out of ninety applications in one year, only fourteen were granted, and at the present time there is considered to be a scarcity of King's Counsel in active practice.

"Indeed, out of the two hundred Leaders actively at work, at least fifty devote their time exclusively to Parliamentary work, fifty to the Chancery Courts, about fifteen to the Admiralty Court, and a few entirely to divorce matters, leaving only about twenty-five King's Counsel now in active practice in the City of London. As a consequence, these twenty-five, or the majority of them, are so busy that they are often required to conduct two or three cases at a time."—Francis L. Wellman, *Day in Court* (1910) pp. 15, 16.

[26] "Special pleading" is referred to in Bernard W. Kelly's *A Short History of the English Bar* (1908) p. 92, as "An important branch of legal business." The author adds in a note on page 93 that "for the sake of the uninitiated it may be explained that a Special Pleader is a member of an Inn of Court, generally not called to the bar, who devotes himself to the drawing of pleadings, and attending at judges' chambers."

SECTION 2.—THE HISTORY OF ATTORNEYS AND SOLICITORS IN ENGLAND

THE ORIGIN OF ATTORNEYS AT LAW. Frederic W. Maitland, in Maitland and Montague's *Sketch of English Legal History* (1915) pp. 94, 95: Ancient law does not readily admit that one man can represent another; in particular it does not readily admit that one man can represent another in litigation. So long as procedure is extremely formal, so long as all depends on the due utterance of sacramental words, it does not seem fair that you should put an expert in your place to say those words for you. My adversary has, as it were, a legal interest in my ignorance or stupidity. If I cannot bring my charge against him in due form, that charge ought to fail; at all events, he cannot justly be called upon to answer another person, some subtle and circumspect pleader, whom I have hired. Thus the right to appoint an attorney who will represent my person in court, and win or lose my cause for me, appears late in the day.[27] It spreads outwards from the king. From of old the king must be represented by others in his numerous suits. This right of his he can confer upon his subjects—at first as an exceptional favor, and afterwards by a general rule.

In Henry III's reign this process has gone thus far: A litigant in the king's court may appoint an attorney to represent him in the particular action in which he is for the time being engaged; he requires no special license for this; but if a man wishes to prospectively appoint a general attorney, who will represent him in all actions, the right to do this he must buy from the king, and he will not get it except for some good cause. The attorneys of this age are by no means always professional men of business.[28]

[27] "As early as the time of Henry II we hear from Glanville [ed. by Beames, p. 275, book xi], writing in or about 1181, of the nomination of certain persons as attorneys 'to win or lose' for the party nominating them."—F. A. Inderwick, *The King's Peace* (1895) p. 90.

[28] "The first legislative reference [to attorneys] is in the Statute of Merton (20 Hen. III, c. 10 [1235]) whereby—

" 'It is provided and granted that every Freeman which oweth Suit to the County, Trything, Hundred and Wapentake, or to the Court of his Lord may freely make his Attorney to do these Suits for him.' "—E. B. V. Christian, *A Short History of Solicitors* (1896) 6. It was not until 1285 (13 Edw. I. St. 1, c. 10) that the power to appoint attorneys in the superior courts received legislative sanction. See Mr. Serjeant Manning's note to Doe d. Bennett v. Hale, ante, p. 11.

THE ORIGIN OF SOLICITORS IN CHANCERY. Edward Jenks, *A Short History of English Law* (1912) pp. 201, 202: The professional character of attorneys begins to make itself felt in the statute of 1402, 4 Hen. IV, c. 18, which speaks with regret of the number of attorneys "ignorant and not learned in the law" and requires all candidates for admission to the roll ("en rolle") to be examined by the Justices; and a statute of James I, 3 Jac. I (1605) c. 7, repeats this requirement in other terms. Meanwhile, the new jurisdiction of the Court of Chancery had produced another similar body of practitioners. At first apparently the Masters in Chancery were supposed to look after the equity suitor's interests; but the natural desire of litigants to have agents specially charged with furthering or "soliciting" their causes, led to the recognition of a special body of semi-attached officials known as "solicitors" who are treated by the statute of 1605 as on the same footing with attorneys.

SCRIVENERS. Edward Jenks, *A Short History of English Law* (1912) p. 202: A third class of non-forensic practitioners who made their appearance before the end of the sixteenth century were the "scriveners," who concerned themselves only with chamber or non-litigious business, chiefly borrowing and lending of money.

SOLICITORS AND ATTORNEYS. *13 Ency. Laws of England,* (2d Ed.) p. 437: Prior to 1875 the term "solicitor" was restricted to persons who conducted suits in the Court of Chancery; while those who acted in the common law courts were called "attorneys." [29] But now (by virtue of section 87 of the Judicature Act, 1873, which came into operation on November 1, 1875) all solicitors, attorneys and proctors empowered to practice in any Division of the High Court of Justice or in the Court of Appeal are called "solicitors of the Supreme Court." [30] * * * Further * * * it is provided [by section 21

[29] In the days of Sir Francis North, afterward Lord Guilford, "on matters of form and practice attorneys shared with junior counsel the right of audience by the judges at the side-bar, which corresponded with the modern Judges' Chambers; or, as Roger North unkindly puts it, in one place, the judges 'heard them wrangle.' "—E. B. V. Christian, *A Short History of Solicitors* (1896) p. 93.

[30] "By the Legal Practitioners Act, 1876, and the Solicitors Act, 1877, solicitors became entitled to practice in any ecclesiastical court, a privilege which the decline of ecclesiastical litigation makes less important; but from the constitution of the Probate Court in 1857 they had been able to prove wills and take other necessary proceedings in reference to the estate of deceased persons. * * * The Admiralty Court also was thrown open to solicitors." —E. B. V. Christian, *A Short History of Solicitors* (1896) pp. 225, 226.

of the Solicitors Act, 1877] that all enactments referring to "attorneys" shall be construed as if the expression "solicitor of the Supreme Court" were substituted for the word "attorneys."

SOLICITORS IN ENGLAND TO-DAY. Edward S. Cox-Sinclair, *The Bars of United States and England,* 19 Green Bag, pp. 702, 704: The formal changes which have taken place amongst solicitors may be summed up as follows: (1) The abolition of distinctions as between solicitors and attorneys, according to the court of practice; (2) the imposition of a system of examination under the Incorporated Law Society; and (3) in connection with that Society an increasing stringency of corporate discipline.

So far as the relations between the two branches of the profession are concerned, and the relation of the members of each with the general public, practically no change has taken place. The social distance between the two branches has practically vanished, the privilege of the advocate being in effect balanced by the substantiality of the solicitor. The facilities of passing from one branch to the other have been greatly extended. Solicitors have been granted audience in many inferior courts of increasing jurisdiction and therefore tend to invade the presence of the Bar by a system of peaceful penetration. In all the essential points, however, of the traditional distinction between the two branches, no change is apparent and the etiquette of the Bar maintains itself in a wondrous way, bearing in mind the disintegrating influences of a complete change in the structure of every stratum of English society.

SECTION 3.—THE RELATION BETWEEN BARRISTERS AND SOLICITORS IN ENGLAND

THE BARRISTER'S DUTY TO ACT ONLY WHEN INSTRUCTED BY A SOLICITOR. 2 Halsbury's *Laws of England,* pp. 389, 390: The usage and etiquette of the profession of a barrister require that in all but some exceptional cases counsel should not undertake any professional work as regards which the relation of counsel and client can arise except on the instructions of a solicitor. There is no rule of law to prevent a litigant from instructing counsel directly, or to prevent counsel so instructed from appearing on behalf of a litigant (Doe d. Bennett v. Hale [1850] 15 Q. B. 171); but a judicial opinion has been expressed that it is expedient in the interests of suitors and for the satisfactory administration of justice to ad-

here to the usage which requires that counsel should not accept a brief in a civil suit from any one but a solicitor. Ibid., per Lord Campbell, C. J., at p. 186.[31] The exact scope of the usage is not very clearly defined, but it extends to all civil contentious business, and to all criminal business except what is known as a "dock defense" (i. e., on the trial of an indictment, or on the hearing of an appeal under the Criminal Appeal Act, 1907 [7 Edw. 7, c. 23] a barrister in court may be instructed directly by the prisoner from the dock). It does not extend to the preparation of a will, to work before parliamentary committees, * * * or to inquiries under the Local Government Acts, the Public Health Acts or the Light Railways Act. * * * A barrister may advise in non-contentious business without the intervention of a solicitor, though the practice has been stated [by the General Council of the Bar] to be undesirable.[32]

[31] In Doe d. Bennett v. Hale, 15 Q. B. 171, 182, 183 (1850), Lord Campbell, C. J., said: "There certainly has been an understanding in the profession that a barrister ought not to accept a brief in a civil suit, except from an attorney; and I believe it is for the benefit of the suitors, and for the satisfactory administration of justice that this understanding should be generally acted upon. But we are of opinion that there is no rule of law by which it can be enforced." It is, however, enforced as a matter of custom and of professional etiquette by the General Counsel of the Bar.

"It is worthy of notice that, according to Roger North, *Lives of the Norths* (Bohn) III, par. 175, personal intercourse with the lay client, which had formerly been shared between both branches of the profession, became confined to the non-forensic branch in the last half of the seventeenth century. * * * The natural consequence of the change was that the business and reputation of individual barristers came to depend largely on the favor of attorneys and solicitors."—Edward Jenks, *A Short History of English Law* (1912) 203.

"The average solicitor is probably as able as the average barrister, and would conduct cases in court with as much propriety, and, after practice, with as much effect. But advocacy is work of a special kind, demanding for success constant and undivided attention, and in itself contains more than one man may accomplish. For the bar is, in effect, not one but several; and though the dividing lines are not rigid, there is a Chancery bar, a Common Law bar, a Parliamentary bar, a bar attached to the Criminal Courts, while knowledge further specialized gives to a few gentlemen a monopoly in patent actions and in Admiralty and other distinct classes of litigation."—E. B. V. Christian, *A Short History of Solicitors* (1896) 214, 215.

"While all the world might, if he could get it, be the client of a solicitor, a barrister's clients are only solicitors; the former being prohibited from taking cases or work from the general public without the intervention of a solicitor; and as a fact it is but rarely that a barrister sees the actual client until possibly a case goes into court. Barristers are accordingly dependent practically upon solicitors for their business. But although there is this great dependency between them, they cannot enter into partnership one with another, nor can a partnership exist between two or more barristers; but as between themselves there is no restriction against solicitors joining in partnership."—T. W. Tempany, *The Legal Profession in England—Its History, Its Members, and Their Status*, 19 Amer. L. Rev. 677, 694, 695.

[32] "No one but a properly admitted solicitor can 'sue out any writ or process or commence, carry on, solicit, or defend any action, suit or other proceeding in any court in England, or act as a solicitor in any cause, matter, or suit, civil or criminal.' 6 & 7 Vict. c. 73, § 2. A barrister, therefore, cannot commence an action for a client or carry on or defend one. No one but a

BARRISTER ACTING WITHOUT INTERVENTION OF A SOLICITOR.

BARRISTER ACTING AS SPOKESMAN FOR A DEPUTATION. Statement of the General Council of the Bar, *The Annual Practice* (1917) p. 2411: Some London contractors were forming a deputation to wait on a Public Body in London for the purpose of urging certain views of the contractors in reference to the Public Body's system of issuing licenses for certain purposes. A representative of a firm of one of such contractors requested a Barrister to act as spokesman for the deputation, and offered him, through his clerk, a fee of ——— guineas. The Barrister suggested that a solicitor should be instructed to deliver a brief, but the contractor's representative declined to do this on the ground of expense, saying that the matter was non-contentious business. Not being sure whether the fact that the Public Body was not a Judicial Tribunal of any kind made any difference, the Barrister asked the Council's opinion as to the course he should adopt. The Council replied that the general rule is that a Barrister should not appear as an advocate on behalf of a client without the intervention of a Solicitor, and that in the opinion of the Council this rule is applicable to the facts set out above. An. St. 1904–05, p. 10.

BARRISTER MEMBER OF COLONIAL LAW FIRM. Statement of the General Council of the Bar, *The Annual Practice* (1917) p. 2413: A Barrister has for some years practised in a Colony where there is no distinction between Barristers and Solicitors, and where both have equal rights of audience in the Courts. Since 1898 he has been a partner in a firm of Advocates, Solicitors and Notaries Public, carrying on business in such Colony. He has recently returned to reside in England, but continues to be a member of said firm, and to draw a share of the profits of the business. Is he entitled to practise at the Bar in England? The Council were of opinion that he ought not to practise

litigant in person or a solicitor can do this."—James Robert Vernam Marchant, *Barrister-at-Law* (1905) p. 43.

"As far back as October, 1851, a meeting of lawyers was held in London to consider the advisability of allowing solicitors to plead on an equal footing with the Bar, and in 1896 this question of the 'fusion' of both branches of the profession again came up for discussion in the professional and general press. It seems, however, to make for the best interests of each that the respective callings of barrister and solicitor should remain distinct. The advocate who does not come into immediate contact with the client has, as a rule, no personal knowledge of his merits or demerits, and can in consequence act independently of these considerations. The certain knowledge that the person whose cause he represented was actually guilty, or in the wrong, might well be conceived to prove a serious hindrance to any line of defense or pleading, besides placing the counsel himself in a very invidious position. The barrister who 'faces a British jury' does so in the light of a third person, and the arguments put forward by him derive a strength from this circumstance which would be wholly wanting under other and more partisan-like conditions."—Bernard W. Kelly, *A Short History of the English Bar* (1908) p. 118.

as an English Barrister so long as he remains a member of the Colonial firm, or takes a share of the profits made by that firm.[33] An. St. 1906–07, p. 12.

CONFERENCES AT A SOLICITOR'S OFFICE. Statement of the General Council of the Bar, *The Annual Practice* (1917) p. 2414: The Council have expressed an opinion that as a general rule it is contrary to etiquette and improper for a Barrister to attend Conferences at a Solicitor's office, but that under exceptional circumstances the rule may be departed from.[34] An. St. 1904–05, p. 10.

NON-CONTENTIOUS BUSINESS—ANNUAL PAYMENT. Statement of the General Council of the Bar, *The Annual Practice* (1917) p. 2409: There is no rule against a Barrister advising in non-contentious business without the intervention of a Solicitor, but it is an undesirable practice. * * * If fees should be taken for such opinion, such fees must be marked and paid in the usual way and on the ordinary scale, not by way of annual payment or salary. An. St. 1896–97, p. 11. Confirmed, An. St. 1907–08, pp. 13, 14, (2), (3), (4), (5).

COURTS-MARTIAL. Statement of the General Council of the Bar, *The Annual Practice* (1917) p. 2412: A Barrister ought not to appear in his professional capacity at a court-martial unless instructed by a Solicitor. An. St. 1915, p. 16. It is understood that this ruling does not apply to an officer who happens to be a Barrister appearing as "friend" of the accused.

SECTION 4.—THE GENERAL COUNCIL OF THE BAR AND THE LAW SOCIETY

THE GENERAL COUNCIL OF THE BAR. 2 Halsbury's *Laws of England,* 368, 369: Up to recent times there was no organisation of the whole body of the English bar. Each circuit had an organisation of its own in the circuit mess; there was also a kind of organisation of barristers practising in the Chancery Courts. In December, 1883, a meeting of the English bar was held, when it was resolved

[33] "A Counsel does not commit any breach of etiquette in advising, without the intervention of an English Solicitor, on a case submitted to him by a Colonial Advocate in a Colony where the professions of Barrister and Solicitor are combined. An. St. 1902–03, p. 11."—Statement of the General Council of the Bar, *The Annual Practice* (1917) p. 2410.

[34] "To the public the solicitor is the lawyer of first instance, and the only sort of lawyer with whom the client comes into contact. But if the opinion of the Bar be correct, the solicitor is no lawyer."—Edmund B. V. Christian, *A Short History of Solicitors* (1896) Preface, p. vi.

that a body to be called the "Bar Committee" should be constituted to "collect and express the opinions of the members of the bar on matters affecting the profession, and to take such action thereon as may be expedient." The Bar Committee, which was composed of persons elected by the whole bar, and was supported by voluntary contributions, continued to act until 1894. In 1892 the committee prepared certain rules for regulating the practice as to retainers which were approved by the Attorney-General of the day and the Council of the Incorporated Law Society, and are still in force.

In 1894 the place of the Bar Committee was taken by the "General Council of the Bar," a consultative and advisory body constituted by regulations approved by the bar in general meetings. These regulations provide that the Council shall be the accredited representative of the bar, and that "its duty shall be to deal with all matters affecting the profession and to take such action thereon as may be deemed expedient."

The Council consists of (1) official members, namely, the Attorney-General and Solicitor-General for the time being and every former Attorney-General or Solicitor-General whilst remaining in actual practice at the bar; (2) nominated members, namely, sixteen practising barristers, of whom four are to be nominated by the masters of the bench of each of the four Inns of Court; (3) elected members, namely, forty-eight practising barristers to be elected by the whole bar, of whom not less than twelve must be of the inner bar, and not less than twenty-four of the outer bar, and six at least of less than ten years' standing at the bar at the time of their election; (4) additional members, namely, such barristers in actual practice, not exceeding six in number, as the council may consider it desirable to appoint by reason of their parliamentary or professional position, or by reason of their representing any circuit or section of the bar not adequately represented.

THE LAW SOCIETY. *13 Ency. Laws of England* (2d Ed.) pp. 438, 439: This Society has done much since its creation in 1825 to advance the interests and improve the position of solicitors. There was an earlier association of London attorneys and solicitors, called "The Society of Gentlemen Practisers in the Courts of Law and Equity," which flourished from 1739 till about 1820, when it mysteriously expired. * * * Early in 1825 a Mr. Bryan Holme issued a circular, in which he advocated a scheme for the establishment of a "Law Institution." Two meetings were held, on March 29 and June 2, 1825, at which a society was formed under that name. * * * On December 22, 1831, a Royal Charter was granted by William IV to the Society, incorporating it under the title of "The Society of Attorneys, Solicitors, Proctors, and Others, Not Being Barristers, Prac-

tising in the Courts of Law and Equity of the United Kingdom." This full title being too long for constant use, the Solicitors Act, 1860, bestowed on the Society a shorter name—"The Incorporated Law Society." * * * By a second supplemental charter, dated June 4, 1903, the title of the Society was still further abbreviated, and it is now known simply as "The Law Society." * * *

In 1833 the Society first undertook the education of articled clerks in the principles and practice of the law. * * * In 1877 the entire practical control of the examinations which solicitors must pass was placed in the hands of the Incorporated Law Society (Sol. Act, 1877). * * * By section 21 of the Solicitors Act, 1843, the Society was appointed the "Registrar of Solicitors." By the Act of 1888, judicial powers have been conferred on the Committee of the Society, which holds a court (Lilley v. Roney, 1892, 61 L. J. Q. B. 727, 8 T. L. R. 642) to investigate charges of professional misconduct made against solicitors.

SECTION 5.—LAWYERS IN THE UNITED STATES AS CONTRASTED WITH LAWYERS IN ENGLAND

LAWYERS IN THE AMERICAN COLONIES.

Frank Gaylord Cook, *Some Colonial Lawyers and Their Work,* 63 Atlantic Monthly, 368–370: During the greater part of the seventeenth century, lawyers did not constitute a class or profession in the American colonies. In New England, their presence in the community, not to mention their services, was deemed undesirable, if not dangerous. To be sure, among the Puritan leaders, at least Winthrop, Bellingham, Humphrey, and perhaps Pelham and Bradstreet, had received a legal training. * * * But the law as a profession they had not followed with much zeal in England, and were not willing to tolerate in their new home. * * *

Moreover, the Puritans had suffered from the law as an instrument of priestly and kingly oppression, so that to them the lawyers seemed to be leagued with the clergy not only in perpetuating abuses in the courts and in the Church, but especially in suppressing dissent. * * *

Furthermore, the economy of the Puritan church and state did not contemplate the existence of a class or caste, least of all a class of lawyers. Even the minister, theoretically, was not one of a class, but one of a congregation. For the law the Independents turned from man's invention to God's ordinance. In the Bible they found an all-sufficient rule, and for its application and interpretation they looked to the men of God, the minister and godly laymen. * * *

The Body of Liberties, adopted [in Massachusetts] in 1641 as the

first code, gave permission to 'every man that findeth himself unfit to plead his own cause in any court to employ any man against whom the court doth not except, to help him, provided he give him no fee or reward for his pains.' Surely no discouragement to pleading as a profession, save its absolute interdiction, could have been found as effective as the prohibition of fees. * * * In 1663, a law was passed excluding 'usual and common Attorneys' from seats in the General Court.

The sentiment against lawyers was at this time nearly as strong in Virginia as in New England, although in the former it had sprung more from experience than from doctrine. Episcopacy, unlike Independency, was not hostile in spirit to the legal profession. But Virginia, it would seem, was a prey to a band of unscrupulous, broken-down attorneys from England; and the extent of the affliction appears from the legislation on their account. * * * In 1658, all persons, attorneys or others, who should assist in pleading causes for a compensation were made liable to a fine of five thousand pounds of tobacco.

Charles Warren, *History of the Harvard Law School and Early Legal Conditions in America* (1908) Vol. I, pp. 3–5: Six facts stand out prominently in the history of the development of early law practice in the American Colonies and Provinces.

First, the rigid state of the common law itself at the time. * * *

Second, the unpopularity of lawyers as a class. In all the colonies [t]he [lawyer] was a character of disrepute. In many of them, persons acting as attorneys were forbidden to receive any fee; in some, all paid attorneys were barred from the courts; in all, they were subjected to the most rigid restrictions as to fees and procedure. * * *

Third, the scanty materials at hand in the colonies for the study of law, and the scarcity of printed law books and reports, even in England.

Fourth, the supremacy of the clergy in the magistracy and in the courts of New England. * * *

Fifth, the participation and interference of the royal Governors in the judicial system of the colonies. * * *

Sixth, the ignorance of the judges and their lack of legal education. * * *

All these six factors served to retard the rise of the American lawyer in the 17th and early 18th centuries.[35]

[35] See the same material, revised and somewhat expanded, in Charles Warren, *A History of the American Bar* (1912) pp. 4–10, a book to which the student is referred for the history of the legal profession in the United States.

LEGAL PRACTITIONERS IN THE UNITED STATES. George Sharswood, *An Essay on Professional Ethics* (5th Ed.) pp. 25, 26: There is in this country no class of lawyers confined to the mere business of the profession—no mere attorneys—no mere special pleaders—no mere solicitors in chancery—no mere conveyancers. However more accurate and profound may be the learning of men whose studies are thus limited to one particular branch, it is not to be regretted either on account of its influence on the science or the profession. The American lawyer, considering the compass of his varied duties, and the probable call which will be made on him especially to enter the halls of legislation, must be a jurist.[36] From the ranks of the Bar, more frequently than from any other profession, are men called to fill the highest public stations in the service of the country, at home and abroad. The American lawyer must thus extend his researches into all parts of the science which has for its object human government and law; he must study it in its grand outlines as well as in the filling up of details. He is as frequently called upon to inquire what the law ought to be as what it is. While a broad and marked line separates, and always ought to separate, the departments of legislation and jurisprudence, it is a benefit to both that the same class of men should be engaged in both. Practice will thus be liberalized by theory, and theory restrained and corrected by practice.

THE LEGAL PROFESSION IN THE UNITED STATES. Edward S. Cox-Sinclair, *The Bars of United States and England,* 19 Green Bag, 702, 704, 705: In the United States, on the other hand, from the very commencement there has been a fusion of the functions of the two branches of the profession, however much for purposes of practical convenience there may be an actual division by individual agreement into two spheres of labour. Perhaps the extent of this fusion can best be seen from the oath of office imposed in the state of Michigan, which conjoins together "the duties of the office of attorney and counselor at law and solicitor and counselor in chancery." It is obvious that conditions of wide geography, sparse population, state

[36] "There is, of course, no use of suggesting in this country a division in the profession. A condition where the client is not at liberty to employ and consult with the lawyer who tries his case, where the lawyer whom he employs for advice on legal matters of moment refers those matters to counsel, and where a particular part of the profession has the sole right of audience in courts, is an arrangement so essentially aristocratic as to be unimaginable in this country. In large cities it is true that lawyers, by a natural process of association, form partnerships, which would roughly answer to a connection between an attorney and a barrister, or would represent a barrister with juniors in his firm; but this is neither in spirit nor in essence any approach to the English condition."—John M. Zane, *The Cost of a Democratic Bar,* 8 Illinois Law Review, 539, 541.

divisions, busy progress, the converging of different races, were foreign to specialization, to traditional exclusions, to barriers on professional activity and usefulness, to stately methods and to old-world habits, and there was consequently an obligation towards the union of many functions. It was found in the United States in the course of its rapid and tremendous expansion that there was no advantage in recourse to ancient divisions and no advantage in the evolution of a distinct class of advocates invested with attributes of privilege. * * *

Again the contractual relationship existing in England between the attorney and his client has formed the basis of the system in the United States, while in England that relationship has always been alien to the legal conception of an advocate. The relationship in the United States being a contractual one, there is the consequent placing of remuneration on a contractual, although I do not say a commercial, basis. There is in the United States the collateral obligation of responsibility for negligence in the carrying out of instructions. For all these reasons it is obvious that in the United States not only has there been one type of the professional lawyer, instead of two, but that that type has been from the English point of view the attorney, and not the advocate. There is in England a large, and I think an increasing, opinion in the direction of breaking down the division between the two branches of the profession.

CHAPTER II

THE LAWYER'S QUALIFICATIONS

SECTION 1.—EDUCATION, KNOWLEDGE, AND SKILL

In re BERGERON.

(Supreme Judicial Court of Massachusetts, Suffolk, 1915. 220 Mass. 472, 107 N. E. 1007.)

Petition by Emile F. Bergeron for an examination for admission to the bar. Ordered that petitioner be not entitled to take the examination as to his legal qualifications until he has passed an examination as to his general education.

RUGG, C. J. * * * The question thus presented in its broader aspects is whether any qualification in general education reasonably can be required as a prerequisite for admission to the bar. The natural impulse of any believer in a republican form of government is that no barrier ought to be raised against any individual engaging in any pursuit. Unrestricted freedom of choice and absolute equality of opportunity in every employment are elementary principles. Hence, at first sight any restrictions seem contrary to the spirit of our Constitution. But it is apparent that there are limitations imposed by the nature of things which cannot be ignored nor overleaped. The ignorant cannot undertake a handicraft without training. Statutes in recent years as to plumbers, pharmacists and many branches of the civil service furnish numerous illustrations of the recognition of this principle. The passing of an examination by teachers in the public schools has been required for many years.

The principle of preliminary examinations is thus thoroughly established as well by legislative recognition as in reason. Its proper scope is only the matter to be determined. On that point it becomes necessary to consider somewhat closely the duties of an attorney at law. He is in a sense an officer of the state. From early days he has been required to take and subscribe an "oath of office" which forbids him from promoting and even from wittingly consenting to any false, groundless or unlawful suit, from doing or permitting to be done any falsehood in court, and which binds him to the highest fidelity to the courts as well as to his clients. The courts being a department of government, this is but another way of saying that his obligation to the public is no less significant than that to the client. He is held out by the commonwealth as one worthy of trust and confidence in matters pertaining to the law.

Of course no one can know all law.[1] But every attorney ought to possess learning sufficient to enable him either to ascertain the law or to determine his limitations in that regard for the purpose of giving safe advice. It is impracticable to attempt to name the matters about which he may be asked to act. Stated comprehensively they include the liberty, the property, the happiness, the character and the life of any citizen or alien. They touch the deepest and most precious concerns of men, women and children. The occasions which lead one to seek the assistance of a lawyer often are emergencies in that person's experience which prevent the exercise of critical discernment in selecting a counsellor. They involve the utmost trust and confidence. In proportion as the client is poor, ignorant or helpless, and hence less likely to be able to exercise judgment in making choice, the necessity of adequate learning and purity of character on the part of every lawyer increases in importance. Thus the interest of the public in the intelligence and learning of the bar is most vital. Manifestly the practice of the law is not a craft, nor trade, nor commerce. It is a profession whose main purpose is to aid in the doing of justice according to law between the state and the individual, and between man and man. Its members are not and ought not to be hired servants of their clients. They are independent officers of the court, owing a duty as well to the public as to private interests. No one not possessing a considerable degree of general education and intelligence can perform this kind of service. Elemental conditions and essential facts as to the practice of law must be recognized in the standards to be observed in admission to the bar.

The right of any person to engage in the practice of the law is slight in comparison with the need of protecting the public against the incompetent. The propriety of requiring some educational qualifications as a prerequisite for admission to the bar seems plain. The exact extent of general education to be required is a matter about which opinions may differ. * * *

The rule here assailed requires something less in substance than the equivalent of an education in the average high school, as we understand it. * * *

The educational requirement does not seem unduly severe. It is urged that it is a requirement which many men who have achieved signal success in the practice of the law could not have met at the time they were admitted to the bar. Doubtless that is true. But requirements which could not have been complied with in remote districts, where facilities for the acquisition of knowledge and general instruction were scanty, hardly can be regarded as a universal

[1] In Montriou v. Jefferys, 2 Car. & P. 113, 116 (1825) Abbott, C. J., made the often-quoted statement that: "No attorney is bound to know all the law; God forbid that it should be imagined that an attorney, or a counsel, or even a judge is bound to know all the law; or that an attorney is to lose his fair recompense on account of an error, being such an error as a cautious man might fall into."

standard for other times and places. In this commonwealth, where there is a free public library in every city and town with a single exception and where every family is within reach of a free public library, where the compulsory school age is high and where provision for learning by day and evening schools is ample, the educational requirement of the rule is not beyond the reasonable reach of those possessing the native ability, the energy and the perseverance necessary to enable them to render moderately valuable service to the public as attorneys. * * * Even if it should happen in rare instances that one who could be a useful attorney should be excluded, that is on the whole far better than to have the public harmed and clients subject to injury which would be irreparable by the admission of considerable numbers of those who are deficient in education and incapable in fact. There must be a general rule. Almost every general rule of municipal or natural law in some instances appears to work a hardship upon an individual. The law of gravitation acts indifferently upon the just and the unjust. * * *

In view of all these considerations we are satisfied that the rule is not unreasonable and that the petitioner is not entitled to take the examination as to his legal qualifications until he has passed an examination as to his general education.

So ordered.[2]

ABRAHAM LINCOLN'S OPINION OF COLLEGE-TRAINED LAWYERS: Abraham Lincoln has been used so often as an argument against the need of a thorough preliminary education and careful legal training as a prerequisite to admission to the bar that his remarks about college trained lawyers ought to be quoted in a book such as this.

Lincoln had gone to Cincinnati in 1855 expecting to make an argument for the defendants in the case of McCormick v. John M. Manny & Co., but the client had arranged for Mr. Edwin M. Stanton and Mr. George Harding to make the argument.[3] Mr. Ralph Emer-

[2] "If there be any profession which imperiously requires, but at the same time richly repays, the acquisition of a thoroughly sound, practical, liberal education, it is that of the law. * * *"—Samuel Warren, *The Moral, Social and Professional Duties of Attorneys and Solicitors* (1870 Amer. Ed.) p. 51.

"A candidate for the bar is not deemed qualified to begin his legal studies of three years unless and until he is shown to have a satisfactory education as a foundation for them. Otherwise the seeds of legal learning are sown on a barren soil."—Parker, J., in In re K——, 88 N. J. Law, 157, 158, 98 Atl. 668, 669 (1915).

[3] Writers are far from agreeing as to Lincoln's treatment by Mr. Edwin M. Stanton and Mr. George Harding when they all were engaged in the defense of the case of McCormick v. Manny, in which McCormick claimed infringement of reaping machine patents. Miss Tarbell, in her Life of Lincoln, vol. 1, pp. 260–266, relies on the statements of Mr. George Harding to her and of Mr. Ralph Emerson in his pamphlet on the case. These statements show

son, of Rockford, Illinois, reports that Lincoln became satisfied with the arrangements as the trial progressed, for he found that he had not studied the case sufficiently. After Stanton's closing argument, Lincoln asked Mr. Emerson to take a walk, and Mr. Emerson states:

"For block after block he walked rapidly forward not saying a word, evidently deeply dejected.

"At last he turned suddenly to me, exclaiming, 'Emerson, I am going home.' A pause. 'I am going home to study law.'

" 'Why,' I exclaimed, 'Mr. Lincoln, you stand at the head of the bar in Illinois now. What are you talking about?'

" 'Ah, yes,' he said, 'I do occupy a good position there, and I think that I can get along with the way things are done there now. But these college-trained men, who have devoted their whole lives to study, are coming West, don't you see? And they study their cases as we never do. They have got as far as Cincinnati now. They will soon be in Illinois.' Another long pause; then stopping and turning toward me, his countenance suddenly assuming that look of strong determination which those who knew him best sometimes saw upon

that the defendant Manny had given one P. H. Watson, who had procured Manny's patents, the entire control of the defendant's case; that Watson employed Harding, a patent lawyer, to argue the question of mechanics before the court, and, in accordance with the custom of the time to "have counsel not specially familiar with mechanical questions" argue patent cases, engaged Stanton to make the closing argument; that Watson retained Lincoln, so that Lincoln might argue in Stanton's place, if Stanton should be unable for any cause to make the argument, but did not tell Lincoln that Stanton was to make the argument, if possible, until after Lincoln arrived at Cincinnati for the trial; that, however, it was Watson's, and not Stanton's, decision, that Stanton should make the argument; and that Lincoln afterwards was glad that Stanton, and not Lincoln, had made the closing speech. Mr. John T. Richards, however, in his *Abraham Lincoln, the Lawyer-Statesman* (1916) pp. 80–86, emphasizes the discourteous treatment of Mr. Lincoln by Stanton and Harding, to whom Lincoln's farmer clothes and awkwardness were worrisome, and relying on statements which in 1911 Mr. John T. Bigelow, at one time United States Minister to France, told Mr. Richards that "many years before" Mr. Harding had made to Mr. Bigelow, concludes that Mr. Hardiug's statement to Miss Tarbell was disingenuous, and that Stanton and Harding deliberately set about preventing Lincoln from making an argument. As for Mr. Emerson's independent statement, which in part corroborates Mr. Harding's statement to Miss Tarbell, Mr. Richards concludes "that Mr. Emerson did not remember clearly the events of 1855 of which, in 1909, he undertook to give an account [in pamphlet form] after the lapse of so many years." Mr. John T. Richards, *Lincoln, the Lawyer-Statesman* (1916) p. 85. As Mr. Harding's statement to Miss Tarbell shows that the three lawyers could have argued for the defendant only by consenting that Mr. E. N. Dickerson, the patent lawyer of the two engaged for the plaintiff, should make two arguments, instead of only one, that there were sound tactical reasons against the giving of the consent, since it would enable Mr. Dickerson to argue the mechanical part of the case after Mr. Harding's argument, and when Stanton and Lincoln, who were not prepared to handle the mechanics of the case, would be handicapped in replying, and that Mr. Watson, as was natural at that time, clearly preferred Mr. Stanton to Mr. Lincoln for the argument, if only one of them could be heard, it seems fair to acquit Mr. Stanton and Mr. Harding of everything except snobbishness and personal discourtesy.

his face, he exclaimed, 'I am going home to study law. I am as good as any of them, and when they get out to Illinois, I will be ready for them.'" [4]

PALMER v. BOYER.

(Court of King's Bench, 1594. Cro. Eliz. 342.)

Action for words. That he being a counsellor at law, and steward to J. S. of his manors, the defendant said of him, "He is a paltry lawyer, and hath as much law as a jack-an-ape." Upon not guilty pleaded, it was found against him, and damages twenty pounds. And it was moved that the action lieth not; for it is not said, he had "no more law than a jack-an-ape."—But it was adjudged for the plaintiff; for the words are scandalous, and touch him in his profession.[5]

CITIZENS' LOAN, FUND & SAVINGS ASS'N OF BLOOMINGTON v. FRIEDLEY et al.

(Supreme Court of Indiana, 1890. 123 Ind. 143, 23 N. E. 1075, 7 L. R. A. 669, 18 Am. St. Rep. 320.)

MITCHELL, C. J. This suit was instituted by the Citizens' Loan, Fund & Savings Association against Harmon H. Friedley, and the sureties on his bond, to recover money alleged to have been lost to the loan association on account of the negligence and want of skill of the defendant Friedley while acting as the attorney of the association. It is averred that the association made a loan of $400 to one of its shareholders in August, 1883, upon the faith of advice given by the appellee, its attorney, who certified to its officers, in

[4] Quoted in Ida M. Tarbell's *Life of Lincoln* (1909) vol. 1, p. 266. While the foregoing story seems to ring true in substance and has so good a moral that it ought to be accepted, it has been doubted. Mr. John T. Richards in his *Abraham Lincoln, the Lawyer-Statesman* (1916) pp. 84, 85, says that "in the face of the fact that many of the lawyers who were then practicing law in central Illinois were college-bred men, it does not seem possible that Mr. Emerson's recollection is correct as to what Mr. Lincoln said to him," and that it is "probable that, if the statement attributed to him by Mr. Emerson was made, it was in a spirit of jest, or that it was uttered because of the attitude of superiority which Messrs. Stanton and Harding had displayed toward him."

"The conditions precedent to a lawyer's success are severe. He must acquire sound learning; he must be trained to clear thinking and to simple and direct expression; he must be both intellectually and morally honest; and he must have the quality of loyalty to every cause in which he enlists. He should have the tact which comes from real sympathy with his fellow men, and he will be far better for the saving grace of sense of humor, which brings with it sense of proportion and good judgment."—Elihu Root, *Some Duties of American Lawyers to American Law*, 14 Yale Law Journal, 63.

[5] On imputations upon lawyers as libel or slander, see note in Ann. Cas. 1912A, 376.

writing, that the title to certain real estate, upon which the applicant for the loan proposed to execute a mortgage as security therefor, was perfect, and available to secure the loan applied for. It appears that the real estate was owned by the applicant and his wife as tenants by the entireties; that the loan was made in reliance upon the advice of the attorney; that the borrower subsequently died, his estate being insolvent; and that his widow successfully resisted a suit for the foreclosure of the mortgage subsequently brought by the association, her defense having been predicated upon the ground that she signed the note and mortgage merely as the surety for her husband.

It is insisted that the complaint shows that the association sustained loss in consequence of the ignorance, carelessness, or unskillfulness of its attorney, and that the latter, with his sureties, must therefore respond to it in damages for the amount lost. No neglect or want of skill appears, except that the attorney was mistaken as to the law applicable to the state of the title of the borrower, and its availability as a security for the loan. Attorneys are very properly held to the same rule of liability for want of professional skill and diligence in practice, and for erroneous or negligent advice to those who employ them, as are physicians and surgeons, and other persons who hold themselves out to the world as possessing skill and qualification in their respective trades or professions. Waugh v. Shunk, 20 Pa. 130. The practice of law is not merely an art. It is a science which demands from all who engage in it, without detriment, to the public, special qualifications, which can only be attained by careful preliminary study and training, and by constant and unremitting investigation and research. But, as the law is not an exact science there is no attainable degree of skill or excellence at which all differences of opinion or doubts in respect to questions of law are removed from the minds of lawyers and judges. Absolute certainty is not always possible. "That part of the profession," said Lord Mansfield, in Pitt v. Yalden, 4 Burrows, 2060, "which is carried on by attorneys, is liberal and reputable, as well as useful to the public, when they conduct themselves with honor and integrity; and they ought to be protected where they act to the best of their skill and knowledge. But every man is liable to error; and I should be very sorry that it should be taken for granted that an attorney is answerable for every error or mistake, and to be punished for it by being charged with the debt which he has employed to recover for his client." Watson v. Muirhead, 57 Pa. 161, 98 Am. Dec. 213; Mortgage Co. v. Henderson, 111 Ind. 24, 34, 12 N. E. 88.

An attorney who undertakes the management of business committed to his charge thereby impliedly represents that he possesses the skill, and that he will exhibit the diligence, ordinarily possessed and employed by well-informed members of his profession in the conduct of business such as he has undertaken. He will be liable if his client's interests suffer on account of his failure to understand and apply

those rules and principles of law that are well established and clearly defined in the elementary books, or which have been declared in adjudged cases that have been duly reported, and published a sufficient length of time to have become known to those who exercise reasonable diligence in keeping pace with the literature of the profession. Hillegass v. Bender, 78 Ind. 225, and cases cited; Pennington v. Yell, 11 Ark. 212, 52 Am. Dec. 262; Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134; Weeks, Attys, §§ 284–289; Fenaille v. Coudert, 44 N. J. Law, 286; Gambert v. Hart, 44 Cal. 553. Thus, it has been said: "An attorney is liable for the consequences of his ignorance or non-observance of the rules of practice of the court he practices in—for the want of care in the preparation of a cause for trial; while, on the other hand, he is not answerable for an error in judgment upon points of new occurrence, or of nice or doubtful construction." Chit. Cont. 482; Godefroy v. Dalton, 6 Bing. 460; Dearborn v. Dearborn, 15 Mass. 316.[6] It is his own fault, however, if he undertakes without knowing what he needs only to use diligence to find out, or applies less than the occasion requires. A lawyer is without excuse who is ignorant of the ordinary settled rules of pleading and practice, and of the statutes and published decisions in his own state; but he is not to be charged with negligence when he accepts as a correct exposition of the law a decision of the supreme court of his own state; nor can he be held liable for a mistake in reference to a matter in which members of the profession possessed of reasonable skill and knowledge may differ as to the law, until it has been settled in the courts, nor if he is mistaken in a point of law on which reasonable doubt may be entertained by well-informed lawyers. Marsh v. Whitmore, 21 Wall. 178, 22 L. Ed. 482; Kemp v. Burt, 1 Nev. & M. 262.

Now, while it is quite true that section 5119, Rev. St. 1881, which took effect September 19, 1881, prohibited a married woman from entering into any contract of suretyship, and declared all such contracts void as to her, and while it had been thoroughly settled that a married woman who had joined in a mortgage of her separate property to secure the debt of her husband was to be regarded as his surety, (Leary v. Shaffer, 79 Ind. 567,) it had never been held, prior to the 23d day of January, 1884, when the judgment in Dodge v. Kinzy, 101 Ind. 102, was pronounced, that a mortgage executed by a husband and wife on lands held by them as tenants by entireties was void as to both of them. It cannot fairly be said, therefore, that,

[6] An attorney at law "is required to be learned and skillful in the practice of his profession. He must have sufficient learning to be able to determine with reasonable accuracy upon the appropriate remedies for enforcing or securing the rights of his clients, and sufficient skill to conduct the proceedings appropriate to such remedies.

"If any attorney fails in any of these respects he may and sometimes does not only forfeit all claim for compensation, but renders himself liable to his client for any damage which he may thereby sustain."—Monell, J., in Hatch v. Fogerty, 40 How. Prac. (N. Y.) 492, 500 (1871).

before the decision in Dodge v. Kinzy, supra, was made and promulgated, so as to have become known by those reasonably diligent in the profession, it was such a mistake to advise that a husband and wife might secure a debt of the former on his estate in lands held by himself and wife as tenants by the entireties as could only have resulted from the want of ordinary knowledge and skill, or from the failure to exercise reasonable care and caution. The error must be regarded as one into which any reasonably careful and prudent lawyer might have fallen, and therefore one for which the attorney was not liable.

The judgment is affirmed, with costs.[7]

DANFORTH v. EGAN.

(Supreme Court of South Dakota, 1909. 23 S. D. 43, 119 N. W. 1021, 139 Am. St. Rep. 1030, 20 Ann. Cas. 418.)

WHITING, J. This is an election contest case, wherein the plaintiff and respondent contests the right of defendant and appellant to qualify for, and hold the office of, state's attorney in and for Minnehaha county. The decision of the lower court was against the defendant, and he appeals from the judgment of said court, and the order of said court denying a new trial.

No questions were raised upon the pleadings, and the cause was submitted to the trial court upon the facts as they appeared in the pleadings, and by a stipulation made in open court. The facts are, in brief, as follows: The defendant, George W. Egan, a person over 25 years of age, and a resident of Minnehaha county for more than a year prior to November, 1908, did at the general election on November 3, 1908, receive a majority of the votes cast for the office of state's attorney, and received the certificate of election for said office.

[7] "It is now well settled by many decisions of courts of high authority, both of England and of this country, that every client employing an attorney has a right to the exercise, on the part of the attorney, of ordinary care and diligence in the execution of the business intrusted to him, and to a fair average degree of professional skill and knowledge; and if the attorney has not as much of these qualities as he ought to possess, and which, by holding himself out for employment, he impliedly represents himself as possessing, or if, having them, he has neglected to employ them, the law makes him responsible for the loss or damage which has accrued to his client from their deficiency or failure of application."—Albey, C. J., in Cochrane v. Little, 71 Md. 323, 331, 332, 18 Atl. 698, 700 (1889). See notes in 34 Am. Dec. 89; 52 L. R. A. 883; 2 Ann. Cas. 603; 14 Ann. Cas. 342. But "if a barrister acts honestly in the discharge of his duty, he is not liable to an action by his client for negligence, or for want of skill, discretion or diligence in respect of any act done in the conduct of a cause, or in settling drafts, or in advising."—2 Halsbury's *Laws of England*, 394.

On vacating judgments on account of the negligence or mistake of an attorney, see note in 96 Am. St. Rep. 108. On when the statute of limitations commences to run against an action for the negligence or misconduct of an attorney in the performance of professional duties, see 12 L. R. A. (N. S.) 1005, note; 51 L. R. A. (N. S.) 279, note.

Said Egan had held a license to practice as an attorney in the courts of record of this state, but on October 10, 1908, by a judgment in disbarment rendered by the Supreme Court on that day, his license to practice had been revoked, and such judgment in disbarment has, since October 10, 1908, remained in full force and effect.

It is conceded that the only question in this case is as to the effect of this judgment of disbarment. Did it disqualify him from holding the said office of state's attorney? * * *

1. Can the appellant appear in a court of record? * * * He could only appear in a court under circumstances authorizing any layman to appear.

2. Not being able to appear in court as an attorney, can the appellant qualify for and hold the office of state's attorney?

It would seem axiomatic, too plain for argument and serious contention, that one who cannot perform the duties of an office cannot qualify therefor. * * *

4. Is appellant "learned in the law"? It is the contention of appellant that, being "learned in the law," he meets the requirement of the Constitution, and is entitled to hold the office in question. We have already shown that this phrase "learned in the law" is really mere surplusage as it is controlled by the more limited term "attorney," yet we will consider briefly this phrase, and see whether the appellant could bring himself thereunder in view of the judgment of this court in the disbarment proceedings. To be learned in the law one certainly must be learned in all those branches of the law which have at all times been recognized as essential in order to qualify one to practice as an attorney, and to be admitted as such. He must not only be versed in the books of law, such as those on contracts, torts, evidence, domestic relation, etc., but it is even more important that he be well based upon those rules of conduct which as a lawyer and practitioner should control his relations with his fellow lawyers, his clients, witnesses, and jurors in court, and the public in general. Knowledge of this branch of the law, commonly known as "legal ethics," has long been recognized as the most important qualification for one who is to be intrusted with the sacred duties of an attorney at law, and our present statute recognizes this fact, and makes legal ethics one of the branches to be considered in passing upon the qualification of one seeking admission to practice. Section 686, Pol. Code. This court has by its judgment held that the appellant has violated many of the ethical laws which should control the conduct of an attorney. We took no part in said judgment, but we are bound to take judicial notice of it, especially as it is referred to in the record in this case. We must as a matter of law, and we do presume that the decision of the court in the disbarment proceedings was just, and that everything stated therein was justified by the evidence.

It appears, therefore, that prior to such decision this appellant had done many things which showed either gross ignorance of, or willful

disregard of, the laws of legal ethics. When this fact has been judicially determined, as in this case, against this appellant, he will not be heard to claim that he knew his duties and the ethical rules which should have controlled his actions, and intentionally disregarded the same, but the law in its kindness will conclusively presume that he performed those acts which caused his disbarment in ignorance of his duties and of the rules of ethics, and will therefore say that no matter how well versed he may be in many branches of the law, yet being ignorant in its most important branch, he is not "learned in the law." * * *

For the reasons hereinbefore stated the judgment of the circuit court and order denying a new trial are affirmed.[8]

SECTION 2.—CHARACTER [9]

In re PERCY.

(Court of Appeals of New York, 1867. 36 N. Y. 651.)

GROVER, J. Appeal from an order of the General Term of the Supreme Court striking the appellant from the roll of attorneys and counselors of the court. * * * The order specified the charges against the appellant. Those were that his general reputation is bad; that he had been several times indicted for perjury, one or more of which was still pending; that he was a common mover and maintainer of suits on slight and frivolous pretexts, and that his personal and professional reputation had been otherwise impeached in a specified trial recently had at the circuit. * * *

By whatever cause the conduct of the appellant was induced it is clear that it was such as wholly to unfit him to practice the profession usefully to the public or beneficially to himself. His credibility was destroyed. His character had become bad. He was crowding the calendar with vast numbers of libel suits in his own favor, and in the habit of indicating additional libel suits upon the answers to

[8] On the disbarment of a lawyer as a disqualification for public office, see 20 Ann. Cas. 422, note.

[9] "Satisfactory evidence of fair moral character is generally required [for admission to the bar]. The Supreme Court of North Carolina with a dissenting opiuion held that the Legislature had the right to do away with the requirements of an iuvestigation as to the general moral character of the applicant. In re Applicants for License, 143 N. C. 1 [55 S. E. 635, 10 L. R. A. (N. S.) 288, 10 Ann. Cas. 187 (1906)]. The dissenting opinion will to many appear unanswerable. After this decision the Legislature promptly amended the statute, restoring to the court the power to pass upon the moral character of applicants."—Orrin N. Carter, *Ethics of the Legal Profession* (1915) pp. 22, 23.

those previously brought by him. In one instance at least he had sued his client in a Justice's Court, and when beaten upon trial, instead of appealing from the judgment he commenced numerous other suits against him in different towns for the same cause, when he must have known that the demand was barred by the first judgment rendered. The only inquiry is whether, in such a case, the court has the power to protect the public by preventing such persons from practicing as attorneys and counselors in the courts of the state, and by that means harass its citizens.[10] * * *

It is insisted by the appellant that the misconduct justifying a removal is some deceit, malpractice, or misdemeanor, practiced or committed in the exercise of the profession only, and that general bad character or misconduct will not sustain this proceeding. I cannot concur in this position. It has been seen that the right of admission to practice is made, both by the Constitution and statute, to depend upon the possession of a good moral character, joined with the requisite learning and ability. It is equally important that this character should be preserved after admission, while in the practice of the profession, as that it should exist at the time. It would be an anomaly in the law to make good moral character a prerequisite to admission to an office of a life tenure, while no provision for removal is made in case such character is wholly lost. * * * It is true that to warrant a removal the character must be bad in such respects as shows the party unsafe and unfit to be intrusted with the powers of the profession. There are many vices that render the character more or less bad that have no such tendency. But a want of credibility upon oath does not come within this class. When there can be no reliance upon the word or oath of a party, he is manifestly disqualified, and when such fact satisfactorily appears, the court not only have the power, but it is their duty to strike the party from the roll of attorneys. The various cases of removal, after conviction of crime, which have been made can only be sustained upon this view.[11]

10 "We think also that the term 'pettifogging shyster' needed no definition by witnesses before the jury. The combination of epithets every lawyer and citizen knows belongs to none but unscrupulous practitioners who disgrace their profession by doing mean work and resort to sharp practice to do it." —Campbell, C. J., in Bailey v. Kalamazoo Pub. Co., 40 Mich. 251, 256 (1879). See Gribble v. Pioneer Press Co., 34 Minn. 342, 25 N. W. 710 (1885).

11 In Matter of Mills, 1 Mich. 392 (1850) it was held that a charge that the reputation of Mills for truth and veracity was so notoriously bad that he was not to be believed under oath would justify his disbarment, if the charge was sustained.

"One whose perfect truthfulness is even suspected by his brethren at the Bar has always an uneasy time of it. He will be constantly mortified by observing precautions taken with him which are not used with others."—George Sharswood, *An Essay on Professional Ethics* (5th Ed.) p. 73.

"It is not enough for an attorney that he be honest. * * * He must be believed to be honest. It is absolutely essential to the usefulness of an attorney that he be entitled to the confidence of the community wherein he practices. If he so conducts [himself] in his profession that he does not deserve that confidence, he is no longer an aid to the court nor a safe guide to his cli-

It is further insisted that the court has no right to call upon an attorney to answer charges of this description, for the reason that it compels him to give evidence against himeslf. The answer to this is that the party is not compelled to be sworn at all unless he chooses. He may introduce his other evidence tending to show his innocence, and submit the matter to the court without having sworn.

The order appealed from must be affirmed. All concur.

Order affirmed.[12]

PEOPLE ex rel. HEALY, State's Atty., v. MACAULEY.

(Supreme Court of Illinois, 1907. 230 Ill. 208, 82 N. E. 612, 120 Am. St. Rep. 287.)

Information by the people, on the relation of John J. Healy, state's attorney of Cook county, to disbar Charles P. R. Macauley. Rule of disbarment made absolute. * * *

DUNN, J. The substance of the charge against the respondent is that, having discovered what he regarded as a defect in the charter of the Colliery Engineer Company, he organized a conspiracy to harass that company and to embarrass its business by organizing corporations having its name or the name in which its business was transacted, apparently for the purpose of conducting a similar business, but really for the sole purpose of injuring the business of the Colliery Engineer Company, and extorting money from it. The commissioner has found that the charge is proved, and, no exception having been taken to bring the evidence or any of his rulings before us, it is to be taken as true. The statement of the charge made and proved sufficiently characterizes the moral quality of respondent's acts. His counsel seek to justify them for the reason that what he did was done openly, under a claim of right, and that his action was praiseworthy, because he gave the Colliery Engineer Company an opportunity to test the question at the start. This argument would

ents."—Andrews, C. J., in Fairfeld County Bar v. Taylor, 60 Conn. 11, 17, 22 Atl. 441, 443, 13 L. R. A. 767 (1891).

[12] In Theron G. Strong's *Landmarks of a Lawyer's Lifetime* (1914) p. 499, it is said of John Percy that after his disbarment "he was constantly in the courts making applications for reinstatement, almost always addressed to the discretion of the court, but which could not be favorably entertained. Reinstatement appeared to be his sole idea and purpose in life. His entire time seemed to be devoted to obtaining it, and he therefore became a familiar figure in the courts until, in process of years, this unfortunate man passed out of sight."

"No heavier burden is laid upon the conscience of a lawyer than on that of every other man in whatever lawful pursuit he may be engaged. The temptations may be greater, but the education is more thorough."—William Allen Butler, *Lawyer and Client* (1871) pp. 51, 52.

"There is no profession in which moral character is so soon fixed as in that of the law; there is none in which it is subjected to severer scrutiny by the public."—George Sharswood, *An Essay on Professional Ethics* (5th Ed.) p. 169.

carry weight, if the respondent had been in good faith attempting to organize a corporation for a lawful purpose; but, while pretending to do so, his sole object was the dishonest and unlawful purpose of extorting money by interfering with the established business of a corporation already organized. He did not intend to engage in the business for the purpose for which he pretended to organize his corporation, but he intended to demand money for not doing so.

The standard of personal and professional integrity which should be applied to persons admitted to practice law in the courts is not satisfied by such conduct as merely enables them to escape the penalties of the criminal law. The statute and the rules of this court require a good moral character as a condition precedent to a license as an attorney. This includes at least common honesty, and is not consistent with an effort to obtain a part of the wealth of another by any means not denounced by the criminal statutes. The predatory instinct which led to respondent's raid upon the Colliery Engineer Company is accompanied with an obtuse moral discernment, which seems not to realize that the respondent's use of the forms of law in that matter was not proper. Youth or inexperience does not extenuate the offense of a fraudulent conspiracy to extort money that is inconsistent with the common honesty which should be an attribute of every attorney having the license of this court.

No reason is apparent why the lapse of time in this case makes it unjust or unfair to require the respondent to answer this charge. The rule will be made absolute, and respondent's name stricken from the roll of attorneys of this court.

Rule made absolute.

In re DARROW et al. (No. 6,080.)

(Appellate Court of Indiana, Division No. 1, 1908. 83 N. E. 1026.)

Proceedings to disbar Lemuel Darrow and John W. Talbot from the practice of law. From a judgment of disbarment, they appeal. Reversed, and new trial granted.

HADLEY, P. J. * * * The accusation, in substance, charged appellants and one Worden with having corruptly conspired and confederated together for the purpose of preventing the due course of law and justice, and to mislead the court and jury by procuring a witness to testify falsely in an action pending in said La Porte circuit court, and, in pursuance of said conspiracy, did corruptly procure and hire for $25 such witness to so testify on oath in said cause in said court. The details of said conspiracy and procurement and false testimony are fully set out. * * *

Appellant Darrow at the proper time offered evidence of his reputation for honesty and morality. This was refused. It is well settled that as a general rule, in civil actions, proof of the good character of

either of the parties is inadmissible, except when it is assailed by way of impeachment; but to this rule there are exceptions, as in actions for slander and libel (Downey v. Dillon, 52 Ind. 442; Byrket v. Monohon, 7 Blackf. 84, 41 Am. Dec. 212), or for malicious prosecution (Am. Ex. Co. v. Patterson, 73 Ind. 430), and in divorce (Graft v. Graft, 76 Ind. 136; Hilker v. Hilker, 153 Ind. 425, 55 N. E. 81), or breach of promise (Haymond v. Saucer, 84 Ind. 3; Jones v. Layman, 123 Ind. 569, 24 N. E. 363). The rule for the exceptions seems to be best laid down in Hilker v. Hilker, supra, as follows: "The weight of authority, however, seems to be that when the adversary, under his averments, gives evidence of particular acts and circumstances from which natural and designed inferences throw strong suspicion upon the probity of the person affected, such person may meet the suspicions thus aroused by proof of general good character in respect to the particular traits involved."

The accusation in this case charges the commission of a crime on the part of appellants and of such a kind as to be a direct assault upon their character. If they were answering to an indictment for that crime, there could be no doubt of the admissibility of character testimony. This proceeding, while classed as a civil action, is properly denominated quasi criminal. The charge of the crime is as direct as in a criminal action, the judgment of conviction penal in character, and attended with humiliation, disgrace, and moral taint equal to that attending conviction for many grades of felony. Under these circumstances the person thus charged should be permitted to avail himself of all the recognized competent evidence that would tend to disprove such charge, and vindicate the character thus assailed. It was error to exclude this testimony. * * *

Judgment reversed, with instructions to the lower court to grant a new trial.[13]

[13] "It being, therefore, according to the weight of authority, admissible for a party to give evidence of his good character before it has been assailed, when the nature of the suit puts the character of the party offering this evidence directly in issue, it seems particularly appropriate that evidence of good character should be admissible in disbarment proceedings."—Carroll, J., in Lenihan v. Com., 165 Ky. 93, 106, 176 S. W. 948, 954 (1915).

"The rule is that, when a party to a criminal or other case is entitled to prove his good character, it is limited to the trait of character involved in the crime charged. But such evidence must be limited to proof of such person's general character as to such trait as it existed before the alleged offense or 'ante litem motam.' * * *

"Said offered testimony as to the good character of appellant Darrow was not so limited, at least as to time, as required by said rule. It was therefore properly excluded."—Monks, C. J., in In the Matter of Darrow and Talbot, 175 Ind. 44, 52, 92 N. E. 369, 372 (1910).

On the admissibility of proof of disbarment or suspension to discredit a witness, see note in Ann. Cas. 1916B, 487.

CHAPTER III

THE ADMISSION AND DISCIPLINE OF LAWYERS

SECTION 1.—ADMISSION TO PRACTICE

A. B. A. CANON

29. * * * The lawyer should aid in guarding the bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education.

THE CALLING OF BARRISTERS TO THE BAR IN ENGLAND. 2 Halsbury's *Laws of England,* pp. 362–364: No person can be called to the bar in England unless he is a student of one of the four Inns of Court. * * * The intellectual fitness of a person who wishes to be admitted a student is tested by his being required to pass a preliminary examination. * * * A student cannot in general be called to the bar, unless he has kept a certain number of terms, passed a public examination on certain legal subjects, and paid the requisite fees. Terms are kept by dining in term time [1] in the hall of the Inn of which the student is a member. A student must in general keep twelve terms before being called to the bar.

THE KING v. BENCHERS OF GRAY'S INN, on the Prosecution of WILLIAM HART.

(Court of King's Bench, 1780. 1 Doug. 353.)

This was an application for a mandamus to be directed to the Benchers of Gray's Inn, to compel them to call the prosecutor to the degree of a barrister at law. In the last term, Dunning had moved for a rule to shew cause, on an affidavit, stating that the ground upon which the Readers and Benchers had rejected him was, his having been discharged under an insolvent debtor's act; but that he had complied with

[1] The terms in the Inns of Court are four in number, and begin as follows: Michaelmas, November 2; Hilary, January 11; Easter, the second Tuesday after Easter Sunday; Trinity, the second Tuesday after Whit Sunday. They each last for different periods varying from twenty-one to twenty-eight days.—Author's note.

all the usual requisites, such as paying the dues, and performing exercises, and that the two societies of the Inner and Middle Temple, upon their being consulted by that of Gray's Inn, had been of opinion that the ground of rejection was not sufficient. The affidavit also mentioned two late instances, one of a bankrupt, another of a person who had been discharged as an insolvent debtor; who had been called to the bar. It appeared that the society of Lincoln's Inn had been of opinion, when consulted, that the cause was sufficient.

In behalf of the application, it was urged, that it would be highly inconvenient to permit such a body as the Benchers of an Inn of Court to exercise a jurisdiction in such matters, uncontrolable by a court of law, and that, in the present instance, there had been manifest injustice in permitting the prosecutor to lose his time, and put himself to expense, in order to qualify himself for the bar, if he was thought to be a person incapable of being called. * * *

Lord MANSFIELD. We have consulted the other Judges on the subject of this application, and I am prepared to state the result. The original institution of the Inns of Court no where precisely appears, but it is certain that they are not corporations, and have no constitution by charters from the Crown. They are voluntary societies, which, for ages, have submitted to government analogous to that of other seminaries of learning. But all the power they have concerning the admission to the bar, is delegated to them from the Judges, and, in every instance, their conduct is subject to their control as visitors. * * * From the first traces of their existence to this day, no example can be found of an interposition by the courts of Westminster Hall proceeding according to the general law of the land; but the Judges have acted as in a domestic forum. The only case in which an attempt was made to proceed in this court is reported in March. One Booreman, a barrister of one of the Temples, having been expelled, he applied for his writ of restitution, but it was denied, "because there is none in the inn of court to whom the writ can be directed, for it is no body corporate, but only a voluntary society, and submitting to government; and the ancient and usual way of redress for any grievance in the Inns of Courts, was by appealing to the Judges." * * * I do not take the first reason stated in March to be the true one. It is not solid. The second is the true reason. As to the first the Inns of Court had regulations, they acted and were known as a body. * * * But the true ground is, that they are voluntary societies submitting to government, and the ancient and usual way of redress is by appeal to the Judges. * * *

The consequence of all this is, that we are all of opinion, that no rule should be made for a mandamus; but, if there is a ground for it, the party must take the ancient course of applying to the twelve Judges.[2]

[2] Hart, afterwards, applied by petition of appeal to the twelve Judges, and, on the 15th of Nov. M. 21 Geo. 3, he was heard by his counsel, (Morgan and

THE ADMISSION OF SOLICITORS IN ENGLAND. Edmund B. V. Christian, *A Short History of Solicitors* (1896) Preface, pp. vii, viii: The person who wishes to enter the misunderstood profession [of solicitor] must first pass an examination in "general knowledge." He must then pay £80. to the government. Having done this, he is entitled to be, and must be, apprenticed to a solicitor (who must have only one other such articled pupil) for five years, unless he has passed certain other examinations, in which case the term may be reduced to four years or three. His apprenticeship indentures, or "articles of clerkship," must then be registered with the proper authority. During this period of pupilage the clerk must have no other occupation (except by a judge's permission) and must pass two examinations in his legal acquirements. Having satisfied the examiners, and been labelled proficient, he must pay some £30. more to the government, and is then entitled to be admitted a solicitor on taking the oath to behave as such. But before he can practice he must pay, and so long as he continues to practice he must continue to pay every year, his "certificate duty." This is, in effect, an additional fixed income-tax calculated on profits which the solicitor may not make. In return for these payments he and his fifteen thousand fellow solicitors have an exclusive right to advise in legal matters for reward, and to conduct such legal business as does not fall within the province of the Bar.[3]

Lind.) His petition was accompanied with the same affidavit which had been produced to the court of King's Bench. At the same time, a certificate was laid before the Judges from the treasurer and benchers of Gray's Inn, in which they set forth, that they had not refused to call him to the bar merely because he had been discharged by an insolvent act, (although they stated that the society of Lincoln's Inn had been of opinion that that was a sufficient cause,) but, because it appeared to them from a memorial of his own, (which he had also laid before the Judges,) that he had knowingly become security for money borrowed by others, to a much greater amount than he was able to answer, and for other circumstances of his life mentioned or alluded to in the certificate. The judges were unanimous in dismissing the petition.—*Reporter's Note.*

In Manisty v. Kenealey, 24 W. R. 918, 920, (1876), Hall, V. C., said that "it appears to me perfectly clear that as regards the admission to the bar and the expulsion of members of an Inn of Court, the jurisdiction has been held by competent authority to be with the benchers, subject only to an appeal to the judges [as visitors]."

[3] "Of the Qualities Wherewith a Sollicitor Ought to be Endued to Make Him Compleat.—* * * First, he ought to have a good natural wit.

"Secondly, that wit must be refined by education.

"Thirdly, that education must be perfected by learning and experience.

"Fourthly, and lest learning should too much elate him, it must be balanced by discretion. And,

"Fifthly, to manifest all those former parts, it is requisite that he have a voluble and free tongue to utter and declare his conceipts."—*The Compleat Sollicitor* (1668) p. 9.

CLASSES OF LEGAL PRACTITIONERS IN ENGLAND. James Robert Vernam Marchant, *Barrister-at-Law* (1905) pp. 1, 2: A legal practitioner in England at the present day must belong to one or other of the following classes: Barristers, solicitors, notaries public, conveyancers, special pleaders, draftsmen in equity, and parliamentary agents. Barristers derive their authority to practise from one of the four Inns of Court; so also do conveyancers, special pleaders, and draftsmen in equity. Solicitors are admitted by the Master of the Rolls and their names are then entered on the roll of solicitors which is kept by the Incorporated Law Society. Notaries public derive their authority to practise from the Court of Faculties of the Archbishop of Canterbury. Solicitors, conveyancers, special pleaders, draftsmen in equity, and notaries public have to take out annual certificates authorizing them to practise. No certificate is required for a barrister to practise.

ADMISSION TO THE LEGAL PROFESSION IN THE UNITED STATES. Orrin N. Carter, *Ethics of the Legal Profession* (1915) pp. 21, 22: It is now the settled rule in practically all jurisdictions that the right to practice law is not a natural inherent right, but one which may be exercised only upon proof of fitness as to satisfactory legal attainments and character. * * * The practice of the law is in the nature of a franchise and is permitted only to those who have complied with the conditions required by statute and the rules of the court. * * *

It has been held that originally the courts alone determined the qualifications for admission to the bar, and that this power still exists as one of the inherent privileges of the court and necessarily incident to its control over the membership of the bar. In many, if not most, of the states, to avoid friction between the departments of government, the courts have usually acquiesced in all reasonable enactments of the legislature, the right being conceded to the Legislature by virtue of its police power. Some courts, however, have denied the existence of any power in the legislature to prescribe what qualifications shall be prerequisite to the admission of an attorney by the court.[4]

[4] On the power of the legislature to prescribe the qualifications for the admission of lawyers, see notes in 10 L. R. A. (N. S.) 289, and 10 Ann. Cas. 198.

In re MASH. (Civ. 1684.)

(District Court of Appeal, First District, California, 1915. 28 Cal. App. 692, 153 Pac. 961.)

Petition for revocation of the order admitting Samuel Lawrence Mash to practice law.

LENNON, P. J. The respondent herein, Samuel Lawrence Mash, was by an order of this court made and entered on the 13th day of July, 1913, admitted to practice law in all the courts of this state, upon motion made in open court and the presentation of a license to practice law in the state of Utah granted and issued to said Mash by the Supreme Court of that state on or about the 1st day of July, 1909. Thereafter, on May 28, 1915, the bar association of the city and county of San Francisco presented to and filed with this court a verified accusation against the respondent herein, charging him with knowingly and intentionally failing to reveal to this court upon the hearing of the motion for his admission to the bar of this state the fact that he had been previously disbarred from the practice of the law and convicted of several infractions of the law in other jurisdictions. * * *

In our opinion, the failure of the respondent at the time he made application to be admitted as a practitioner of the law in this state, to reveal the fact of his several convictions of offenses against the law and his subsequent disbarments in other jurisdictions, constituted a fraud upon the court. Under the somewhat lax procedure provided in this state for the admission of applicants to practice law here upon the presentation of a license from a sister state, the good moral character of the applicant need be established only by the assurance of local sponsors, who, as a rule, are unacquainted with the applicant before his arrival in this state to take up his residence here, and are rarely, if ever, acquainted with his professional standing in the community from whence he comes. No other means of ascertaining the applicant's good or bad character are provided; and as a consequence we take it that there is cast upon the applicant the obligation to reveal to this court at the time of his application any circumstances connected with his past professional life which must necessarily influence the court's judgment in determining whether the applicant is or is not a person of good moral character.

The only defense that the respondent would make, if permitted, to the charges contained in the accusation, is, as foreshadowed by the allegations of his answer, that it was his opinion at the time he made his application that the criminal and disbarment proceedings prosecuted against him in other jurisdictions were neither bona fide nor just, and that therefore the court would have granted his application regardless of such proceedings; in other words, having convinced him-

self that he was innocent of the charges previously preferred against him, he concluded that, even if the court had been informed thereof, it would have treated them as matters of little or no moment. If we were to concede the sufficiency of such a defense, we would practically oust ourselves of jurisdiction to pass on the moral character of an applicant to practice law. Regardless of whether the charges previously preferred against the respondent were well or ill founded, we hold that it was his duty to reveal to this court the fact that they had been preferred and prosecuted and had resulted in his conviction and disbarment. His failure to do so cannot be regarded as other than a willful deception which requires this court, if it is to give effect to that provision of the law permitting only persons of good moral character to be licensed to practice law in the courts of the state, and to maintain the dignity and decency of its bar, to revoke the license previously granted to him.

Upon the admitted facts, and for the reasons stated, it is ordered that the license to practice law in this state heretofore granted to the respondent by this court be, and the same is, hereby revoked and canceled, and that respondent's name be stricken from the roll of attorneys and counselors at law in this state.[5]

In re TILLINGHAST.

(Supreme Court of the United States, 1830. 4 Pet. 108, 7 L. Ed. 798.)

The admission of Tillinghast to the bar of the Supreme Court of the United States was moved on the ground of his admission in New York and in spite of the admitted fact that he had been struck off the rolls of a United States district court for contempt.*

MARSHALL, C. J. The court has had under its consideration the application of Mr. Tillinghast, for admission to this bar.

The court finds that he comes within the rules established by this court. The circumstance of his having been stricken off the roll of counsellors of the district court of the northern district of New York, by the order of the judge of that court, for a contempt, is one which the court do not mean to say was not done for sufficient cause, or that it is not one of a serious character; but this court does not consider itself authorized to punish here for contempts which may have been committed in that court. * * *

On consideration of the motion * * * it is ordered by the

[5] On the disbarment of lawyers for fraud in securing admission, see notes in 24 L. R. A. (N. S.) 531, and in 20 Ann. Cas. 212.

* This statement is substituted for the one in the original report.

court that John L. Tillinghast, Esq., of the State of New York, be admitted as an attorney and counsellor of this court, and he was sworn accordingly.

SECTION 2.—PRACTICING LAW WITHOUT A LICENSE

BARRISTER AND FOREIGN LAWYER. Statement of the General Council of the Bar, *The Annual Practice* (1917) p. 2413: It is contrary to etiquette for an English Barrister to allow a foreign Lawyer to have a seat in his chambers or to have his name on the door, unless the foreign Lawyer is subject to rules of etiquette similar to those of the English Bar.[6] An. St. 1909, p. 11.

PARTNERSHIPS WITH FOREIGN LAWYERS. N. Y. Committee. *Question 24:* Is it proper professional practice for one or more attorneys and counselors of the Courts of record of the State of New York to form a partnership in New York with a foreign attorney, not a citizen of the United States, and not admitted to practice as an attorney and counselor of the Courts of record of the State of New York, the duties of such foreign attorney in such partnership being specified in the articles of partnership to be to act as counsel in New York in matters relating to the laws of foreign countries?

Is it proper professional practice for such firm to advertise, by publication in newspapers, and by sending letters and distributing printed cards in which such foreign attorney's name appears as one of the members of the firm, in such form, as to convey the impression that such foreign attorney is a practitioner of law in the State of New York?

Is it proper professional practice for such partnership, in the firm name including the name of the foreign attorney, to practice as attorneys and counselors in the Court of record of the State of New York as a firm, though the foreign attorney does not appear in person before the Court, or give counsel in respect to the law of the State of New York?

[6] "A question of much difficulty arises with regard to men whose names have been struck off the Rolls, and who afterwards go as clerks to other Solicitors. "Many of us must know of instances where the clerkship position of the degraded Solicitor is but a sham; and that it is the supposed clerk (and not the Solicitor whose name appears on the door) who is really running the office."—James W. Reid, *Professional Problems*, Proceedings of the 33d Annual Provincial Meeting (1908) of the Law Society, 236, 241. Cf. § 32 of 6 & 7 Vict. c. 73, quoted in note 91, post.

Is it proper professional practice for such firm to announce the formation of their partnership in the following printed announcement:

"PRINTED CARD.

"A, B and C,

"——— Street,

"New York City.

"The undersigned announce that they have this day entered into a partnership to act as Counsel in matters relating to the laws of (foreign countries)

"(Signed) A. ————————.

"(Signed) B. ————————.

"(Signed) C. (Name of Foreign Attorney.)"

Answer: In the opinion of the Committee, the questions should be answered in the negative, because it is not proper for members of the New York Bar to enter into a law partnership with persons not qualified to practice in this State.

LAW STUDENT DRAWING LEGAL PAPERS, ETC. N. Y. Committee. *Question 38:* Is it proper for a young man of twenty-two, who at present is completing a three-year course at law school, and has worked for about two years in a law office, but has not as yet been admitted to practice, to open an office at his place of residence and there do notarial work (he being a notary public), draw various legal papers, manage estates, collect rents and do a general real estate and insurance business?

Also state whether such a pursuit would in any way affect the standing of such a person, when applying for admission to the bar, so that it might give the Committee on Character cause for hesitating in their approval of him?

Answer: In the opinion of the committee, he should refrain from the business of drawing legal papers. The giving of legal advice by notaries and others who are not admitted to practice law is, in its opinion, dangerous to the welfare of the community, because such persons have not demonstrated their capacity by submitting to examinations lawfully established for practitioners of law. The committee is not aware of any reason why he should not engage in the other employments mentioned to such extent as may not interfere with the proper completion of his law course. The committee cannot assume to express any views for the Committee on Character.

McCARGO v. STATE.

(Supreme Court of Mississippi, 1887. 1 South. 161.)

Appellant was indicted and convicted for practicing law without having paid his privilege tax as required by statute. The facts are that McCargo was a retired lawyer; had not practiced law for several years. A neighbor had a claim against a railroad, which appellant, McCargo, took charge of for the purpose of collecting from the railroad authorities. He sought these authorities, and endeavored to get them to settle the claim—to compromise it. They refused. He brought suit against the railroad company, and conducted it both through the magistrate's court and the circuit court. He neither charged any fee, nor expected any pay for his services. From a judgment imposing a fine upon him in pursuance of his conviction, he appealed.

ARNOLD, J. It is only the practicing lawyer who is required by the statute to pay a privilege tax. The term "practicing," as used in the statute, implies something more than a single act or effort. Webst. Dict. A retired lawyer who conducts but one suit in court for a friend or neighbor, without fee or reward, is not thereby brought in the classification of a practicing lawyer; and for him to do so without a privilege tax license is no more a violation of law than it would be for a retired dentist to extract gratuitously a tooth for another without first obtaining a privilege tax license, as practicing dentists are required to do.

No offense is shown to have been committed by appellant, and the judgment is reversed, and cause remanded.[7]

PEOPLE v. SCHREIBER.

(Supreme Court of Illinois, 1911. 250 Ill. 345, 95 N. E. 189.)

Serenes T. Schreiber was convicted of an offense, and brings error. Affirmed.

HAND, J. This was an information filed by the state's attorney of Winnebago county, in the county court of said county, charging Serenes T. Schreiber, the plaintiff in error, with having violated section 1 of an act entitled "An act to prevent and punish frauds in the practice of law," by holding himself out as an attorney at law, and by rep-

[7] See State v. Bryan, 98 N. C. 644, 4 S. E. 522 (1887), where although the defendant appeared in court in behalf of a client he purported to do so as agent and it was held that he was not shown to be practicing since there was no evidence that he charged anything or held himself out as a practicing attorney.

"Moreover, if the suit was brought by an attorney not qualified to practice, that was no good cause to dismiss the plaintiff's suit, but the attorney should himself suffer the punishment imposed by law."—Maxwell, J., in Rader v. Snyder, 3 W. Va. 413, 414 (1869).

resenting that he was authorized to practice law, when he had not been regularly licensed to practice law in the courts of this state. * * * A motion to quash the information was made and overruled, and the plea of not guilty was entered, and upon a trial before a jury plaintiff in error was found guilty, and the court, after overruling a motion for a new trial and in arrest of judgment, entered judgment on the verdict, sentencing the plaintiff in error to pay a fine of $300 and the costs of prosecution, and that he be committed to the county jail of Winnebago county until the fine and costs were paid. This writ of error has been sued out to review that judgment. * * *

It is finally stated the verdict is not supported by the evidence. It appears that the plaintiff in error maintained an office in the city of Rockford; that it consisted of a main office and a consultation room; that he employed a stenographer; that he had quite a pretentious law library; that his business consisted of making collections, preparing conveyances, examining abstracts, negotiating loans, closing real estate deals, advising parties as to their legal rights, and generally performing such services for his clients as are usually performed by attorneys at law, and that he stated to his clients that he was a lawyer; that upon his office door and window and office stationery he had his name, followed by the words "Collection Attorney," and that he had formed a connection with attorneys and collection agencies throughout the United States and Canada, with whom he exchanged business; that he did all the law business he could get to do, with the exception that he says he did not try cases in courts of record.[8] It is obvious the plaintiff in error was holding himself out as an attorney at law. He urges, however, that as he placed the word "collection" before the word "attorney" upon his signs and advertisements he is not guilty of a violation of the statute. Where an office and office force are maintained by a party who is engaged in the law business without having been duly admitted to the bar, he cannot escape the pains and penalties of the statute by placing after his name and before the word "attorney" some word or phrase which, at most, only shows to the ordinary observer that he is specializing in the practice of law. The evi-

[8] "A person who makes it his business to act and who does act for and by the warrant of others in legal formalities, negotiations, or proceedings, practices law (Savings Bank v. Ward, 100 U. S. 195, 25 L. Ed. 621 [1879]; In re Duncan, 83 S. C. 186, 65 S. E. 210, 24 L. R. A. [N. S.] 750, 18 Ann. Cas. 657 [1909]); and when his acts consist in advising clients touching legal matters pending or to be brought before a court of record, or in preparing pleadings or proceedings for use in a court of record, or in appearing before a court of record, either directly or by a partner or proxy, he is practicing law in a court of record (Bank v. Risley, 6 Hill [N. Y.] 375 [1844]; Abercrombeie v. Jordan, 8 Q. B. D. 187 [1881]; In re Simmons, 15 Q. B. D. 348 [1885])."—Sanner, J., in In re Bailey, 50 Mont. 365, 367, 146 Pac. 1101, 1102 (1915).

A lawyer practices "if he holds himself out to the public as an attorney at law and is rendering some services in a professional way—such as comes to him."—Ladd, J., in Barr v. Cardell, 173 Iowa, 18, 155 N. W. 312, 316, 317 (1915).

On what constitutes practicing law, see note in 18 Ann. Cas. 658.

dence fully establishes that the plaintiff in error was holding himself out as authorized to practice law without being regularly licensed to practice law, and upon his own showing he was guilty of a violation of the statute.

Finding no reversible error in this record, the judgment of the county court will be affirmed. Judgment affirmed.

In re PACE et al.

(Supreme Court of New York, Appellate Division, First Department, 1915. 170 App. Div. 818, 156 N. Y. Supp. 641.)

Proceeding against Francis P. Pace and H. B. S. Stimpson, attorneys, charging them with assisting a corporation to practice law in violation of Penal Law, § 280. On motion to confirm the referee's report. Respondents censured.

SCOTT, J. The New York County Lawyers' Association has charged these respondents, composing the law firm of Pace & Stimpson, with unprofessional conduct, in that they directly assisted a corporation, known as the "Corporation Company of Delaware," to "render or furnish legal services or advice, or to furnish attorneys or counsel or to render legal services of any kind in actions or proceedings of any nature or in any other way or manner," in violation of section 280 of the Penal Law.

The substance of the charges is accurately stated by the official referee as follows: "That the Corporation Company of Delaware at divers times during the year 1914, in violation of section 280 of the Penal Law of the state of New York, advertised by means of printed circulars and pamphlets that it maintained an office in New York City, furnished legal advice, services, and counsel, and in particular the advice and service of the respondents in and about the organization of corporations under the laws of Delaware. That respondents, in violation of said section of the Penal Law, assisted the said corporation in said unlawful acts by authorizing and permitting the corporation to advertise and by agreeing to furnish their services and advice to such persons as might or did respond to said advertisements, and by furnishing the use of an office in the borough of Manhattan to the said corporation for the purpose of carrying on its said unlawful business, and by themselves distributing the said advertisements. Further, that the corporation actually has furnished legal services and advice through the respondents in and about the organization of corporations under the laws of Delaware, and that the respondents as its agents and employés for a consideration paid to them by it assisted such corporation in all these respects."

The facts in this case are not in dispute; the respondents having met the charges with the utmost fairness and frankness, stipulating

all the relevant facts, but, of course, and with evident sincerity, insisting that they have done no wrong. The questions involved therefore are purely legal ones.

The Corporation Company of Delaware is a corporation of that state duly created and organized under its laws, and authorized, among other things, to organize corporations under the Delaware corporation laws. Its powers in this respect are very general and full. At various times up to the 9th day of September, 1914, the Corporation Company of Delaware sent through the mails in New York City to attorneys in New York certain printed advertisements or pamphlets, one of which, bore on its cover the words: "Digest of the Delaware Corporation Law, 1913. New York Office, Pace & Stimpson, Room 915, 29 Broadway, Telephone 1303–4 Rector. Corporation Company of Delaware, Equitable Building, Wilmington, Delaware."

Another pamphlet, marked, is entitled "General Corporation Laws of the State of Delaware, with Amendments to Date, 1914," and bears the firm name and address of the respondents, described as the New York office of the company, on its cover; and another pamphlet, marked Exhibit C, is entitled "Delaware Corporations, Their Advantages," and also bears the firm name and address, etc., of respondents on its cover. The latter pamphlet sets forth certain advantages of incorporating in the state of Delaware, and on page 1 thereof contains the following statements:

"The New York office is completely and fully equipped to meet all the requirements of the New York bar.

"Telephone 1303–4 Rector and our representative will be at your office in a few minutes to give your business personal attention and to relieve you of all the detail work of incorporating if you so desire without extra charge.

"Or if you prefer we will furnish you with a set of forms, a copy of the law, or any information on the subject.

"We especially solicit inquiries.

"Corporation Company of Delaware.

"Room 915, 29 Broadway, New York City."

If incorporating corporations and the furnishing of forms, information, and personal attention in connection therewith be practicing law, then this company certainly maintained an office in New York for that purpose, and held out the respondents as operating that office. It is agreed that the only acts of the respondents in connection with the Corporation Company of Delaware and the formation of certain corporations were receiving applications at their office in New York for the formation of three certain corporations under the laws of Delaware; that in each case the proposed incorporators filled out a blank form, and respondents personally or through some one in their office caused the said blanks, properly filled out, to be forwarded to the Corporation Company of Delaware at Wilmington, and thereafter the

said three corporations were duly incorporated in said state. Thereafter the Corporation Company of Delaware returned to respondents the incorporation papers, namely, charter, by-laws, books, etc., all prepared at the office of the company in Wilmington, and same were delivered by respondents to the incorporators, accompanied by bills which were paid by the incorporators. These bills were made out to the Corporation Company of Delaware, but it appears by the testimony of respondents before the committee on discipline that they received from the Corporation Company a percentage of the fee of $50 paid to such company for each of such incorporations.

The respondents' connection with the company was undoubtedly that of its agents, employés, or representatives in the city of New York. In connection with a corporation formed apparently for one Schiffmacher, the Parker Alaska Gold Company, there was mailed through respondents' office, on the letter head of the Corporation Company of Delaware, which also bore the legend in red, "New York Office, Pace & Stimpson," etc., a form letter prepared by said Corporation Company, signed, "Corporation Company of Delaware, by Francis J. Pace," which transmits the certificate of incorporation, minute books, and other corporate papers. The letter clearly gives legal advice to Mr. Schiffmacher in connection with the formation of his Gold Company, was doubtless at least written in New York, and on its face purports to be written by said respondents in the name of the Corporation Company. Whatever may be argued as to the occupations of that company in its native state, this letter most assuredly furnishes evidence of legal advice and services, both by the Corporation Company of Delaware and the respondents, given and furnished in the state of New York.

Another letter, on the same letterhead, signed "Pace & Stimpson," is evidently supplemental to the one above mentioned. It transmits the certificate book, corporate seal, and other papers pertaining to the Gold Company; and these letters, taken in connection with the other exhibits and the stipulations, leave no doubt in my mind, first, that the Corporation Company of Delaware carried on its business in this state by rendering and furnishing services or advice and furnishing attorneys and counsel, and, second, that respondents gave advice and services in the name and on behalf of said company, and assisted in the acts done by it, not only without the state of New York, but within it.

Upon receipt of the complaint or notice from the petitioner, the respondents discontinued all connection with the Corporation Company of Delaware, and since said date they have transacted no business for or in connection with said company. It should be stated that the profits of respondents in connection with this business were apparently insignificant, and that they have fully and fairly stated the facts, and have in no manner obstructed the petitioners in their investigation, and as above set forth discontinued all connection with

the Corporation Company upon receipt of the complaint of the petitioner.

The question for consideration is whether the acts of respondents amount to a violation of the statute (section 280 of the Penal Law [which forbids corporations to practice law]), or to professional misconduct. * * *

Thus the practice of law by a corporation is very clearly malum prohibitum in this state; but, quite apart from the statute, it is, and was before the statute, against public policy, and also malum in se. It has thus been held by the Court of Appeals in a most convincing opinion by Judge Vann. Matter of Co-operative Law Co., 198 N. Y. 479, 92 N. E. 15, 32 L. R. A. (N. S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879.[9] * * *

[9] "We agree with the learned counsel for the appellant that the vital question is whether prior to the act of 1909 a corporation could be lawfully organized to practice law. He claims that authority may be found in that part of the business corporations law which provides that 'three or more persons may become a stock corporation for any lawful business.' Business Corporations Law, § 2. This means a business lawful to all who wish to engage in it. The practice of law is not a business open to all, but a personal right, limited to a few persons of good moral character, with special qualifications ascertained and certified after a long course of study, both general and professional, and a thorough examination by a state board appointed for the purpose. The right to practice law is in the nature of a franchise from the state conferred only for merit. It cannot be assigned or inherited, but must be earned by hard study and good conduct. It is attested by a certificate of the Supreme Court, and is protected by registration. No one can practice law unless he has taken an oath of office and has become an officer of the court, subject to its discipline, liable to punishment for contempt in violating his duties as such, and to suspension or removal. It is not a lawful business except for members of the bar who have complied with all the conditions required by statute and the rules of the courts. As these conditions cannot be performed by a corporation, it follows that the practice of law is not a lawful business for a corporation to engage in. As it cannot practice law directly, it cannot indirectly by employing competent lawyers to practice for it, as that would be an evasion which the law will not tolerate. 'Quando aliquid prohibetur ex directo, prohibetur et per obliquium.' Co. Lit. 223.

"The relation of attorney and client is that of master and servant in a limited and dignified sense, and it involves the highest trust and confidence. It cannot be delegated without consent, and it cannot exist between an attorney employed by a corporation to practice law for it, and a client of the corporation, for he would be subject to the directions of the corporation, and not to the directions of the client. There would be neither contract nor privity between him and the client, and he would not owe even the duty of counsel to the actual litigant. The corporation would control the litigation, the money earned would belong to the corporation, and the attorney would be responsible to the corporation only. His master would not be the client but the corporation, conducted it may be wholly by laymen, organized simply to make money and not to aid in the administration of justice which is the highest function of an attorney and counselor at law. The corporation might not have a lawyer among its stockholders, directors, or officers. Its members might be without character, learning or standing. There would be no remedy by attachment or disbarment to protect the public from imposition or fraud, no stimulus to good conduct from the traditions of an ancient and honorable profession, and no guide except the sordid purpose to earn money for stockholders. The bar, which is an institution of the highest usefulness and standing, would be degraded if even its humblest member became subject to the orders of a money-making corporation engaged not in conducting litigation for

It may be taken, therefore, as the law of this state, that it is unlawful for a corporation, whether domestic or foreign, to practice law in this state, and that any member of our bar who assists a corporation in violating the law in this respect is himself guilty of wrong-doing.

That the respondents were engaged in assisting the Corporation Company of Delaware in doing what it did in this state is indisputable, and the sole question to be considered, therefore, is whether or not what that company did and undertook to do within this state constituted practicing law. It is quite certain that the practice of the law is by no means limited to appearing in court, or to advising and assisting in the conduct of litigations. That, under modern conditions, constitutes but a fraction of the duties which lawyers are constantly called upon to perform for clients.

In Matter of Duncan, 83 S. C. 186–189, 65 S. E. 210, 211 (24 L. R. A. [N. S.] 750, 18 Ann. Cas. 657) it is said: "It is too obvious for discussion that the practice of law is not limited to the conduct of cases in courts. According to the generally understood definition of the practice of law in this country, it embraces the preparation of pleadings, and other papers incident to actions and special proceedings . . . on behalf of clients, before judges and courts, and, in addition, conveyancing, and preparation of legal instruments of all kinds, and in general all advice to clients, and all action taken for them in matters connected with the law. An attorney at law is one who engages in any of these branches of the practice of law. The following is a concise definition given by the Supreme Court of the United States: 'Persons acting professionally in legal formalities, negotiations, or proceedings by the warrant or authority of their clients may be regarded as attorneys at law within the meaning of that designation as employed in this country.' Savings Bank v. Ward, 100 U. S. 195 [25 L. Ed. 621]. Under these definitions there can be no doubt that Duncan engaged in the practice of law."

Thornton on Attorneys at Law, in section 69, defines the practice

itself, but in the business of conducting litigation for others. The degradation of the bar is an injury to the state.

"A corporation can neither practice law nor hire lawyers to carry on the business of practicing law for it any more than it can practice medicine or dentistry by hiring doctors or dentists to act for it. People v. Woodbury Dermatological Institute, 192 N. Y. 454, 85 N. E. 697 [1908]; Hannon v. Siegel-Cooper Co., 167 N. Y. 244, 246, 60 N. E. 597, 52 L. R. A. 429 [1901]. The Legislature in authorizing the formation of corporations to carry on 'any lawful business' did not intend to include the work of the learned professions. Such an innovation with the evil results that might follow would require the use of specific language clearly indicating the intention."—Vann, J., in In re Co-operative Law Co., supra, in 198 N. Y. 479, 92 N. E. at pages 16, 17, 32 L. R. A. (N. S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879 (1910). The New York statute would seem, however, to permit the Legal Aid Society to practice law. On the right of a corporation to practice law, see notes in 12 Ann. Cas. 674; 19 Ann. Cas. 882. On the extent to which corporations are taking over legal business, see George W. Bristol, *The Passing of the Legal Profession*, 22 Yale Law Journal, 590.

of law in the same terms. In Eley v. Miller, 7 Ind. App. 529, 535, 34 N. E. 836, 837, the court, while stating that as generally understood the practice of law is the doing or performing services in a court of justice, in any matter depending therein, said: "But in a larger sense it includes the legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be depending in a court." * * *

The statute * * * also includes among the things forbidden to be done by a corporation the rendition or furnishing of legal services or advice, the furnishing of attorneys or counsel, and the rendition of legal services of any kind in actions or proceedings of any nature, or in any other way or manner.

Judged by the foregoing definitions we consider that there can be no doubt that the work undertaken to be done, and in fact done in several instances by the Corporation Company of Delaware within this state involved, necessarily, "practicing law." It is true that the Legislature has made it so simple and apparently easy to incorporate a company that it often happens that laymen, guided by stationers' blanks, undertake to perfect incorporation without legal advice, and sometimes without untoward consequences. But this does not prove that the incorporation of a company according to statute does not involve, properly speaking, legal advice, which in practically every case is requisite, if there is to be assurance that the work, when done, has been done legally and properly. There is necessary the interpretation of statutes, the preparation of the proper papers, and a consideration of the nature of the corporation to be formed in order that it may meet the needs of its projectors. All this calls for the application of legal knowledge and skill and the consequent rendering of legal advice and services.

Naturally the degree of legal skill varies greatly with the nature and purposes of the projected corporation, but in all some degree is required. It would be absurd to hold that the preparation of the papers requisite for the incorporation of a company and the incidental advice necessarily given in connection therewith do not call for legal services and are not included within the definition of the "practice of the law." We are therefore clearly of the opinion that the acts which the Corporation Company of Delaware undertook to do and did do in this state constituted the practice of law herein and were in direct violation of the law of this state. Whether or not its acts were lawful in Delaware does not clearly appear and does not concern us. It is sufficient that they were unlawful here. If these acts were unlawful in this state, it is clear that the respondents assisted in and furthered them, and therefore shared in the doing of the unlawful acts. For this they cannot escape responsibility, even although they erroneously believed that they were doing no wrong.

Their actions, however, since these charges were made against them, commend them strongly to our consideration. Not only did they frankly meet the charges and stipulate all the facts, but they have severed their relations with the Corporation Company of Delaware, and have discontinued the practices for which they were criticized by the complaining Association.

Under these circumstances, while we cannot wholly overlook their acts, which clearly amounted to professional misconduct, we find no occasion for administering any further discipline than a censure. All concur.

EMPLOYMENT OF ATTORNEY BY CORPORATION TO GIVE LEGAL ADVICE TO ITS MEMBERS. N. Y. Committee. *Question 108:* A group of business men form a membership corporation for the purpose, amongst many other things, of employing an attorney under an annual retainer to supply them (a) with reports upon the state of the law applicable to any given state of facts of interest in connection with the business of any of the members, and (b) to furnish legal advice to the members in connection with any of their business affairs. The corporation does not advertise that it furnishes advice, nor does it receive inquiries, but it directs any member applying for advice, to communicate directly with the attorney and to receive the advice directly from him. The attorney is not in any way under the control of the association in connection with advice so given and he exercises his own discretion and independent judgment with respect to all applications for advice. I might add that in the letters sent out to its members, the corporation makes the following statement: "All inquiries as to legal matters should be addressed directly to the general counsel of the association, John Doe, at this office, who will reply direct. He will make no charge for information as to the state of the law applicable to any state of facts, except where unusual or extended research is required, when he will, before proceeding, notify the inquirer as to the exact cost."

The service which the attorney renders to the individual members directly, does not include any legal service of any character, other than the reporting upon the state of the law and the giving of advice in connection with the questions submitted. The members pay annual dues, out of which the lawyer is compensated. Is his position unethical or illegal in this connection?

Answer: In the opinion of the Committee, the practice referred to comes within the condemnation of section 280, Penal Law [Consol. Laws, c. 40], as construed in Matter of Co-operative Law Co., 198 N. Y. 479 [92 N. E. 15, 32 L. R. A. (N. S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879]; Matter of National Jewelers' Board of Trade,

New York Law Journal, March 2, 1916; and Meisel v. National Jewelers' Board of Trade, 90 Misc. Rep. 19 [152 N. Y. Supp. 913], and is therefore prohibited to members of the New York Bar.

In re SECURED HOLDINGS CORPORATION.

BIRDSEYE v. KING.

(Supreme Court of New York, Special Term, New York County, 1915. 88 Misc. Rep. 706, 151 N. Y. Supp. 422.)

Action by Clarence F. Birdseye against Henry G. King and others. On motion by the Secured Holdings Corporation for reargument of motion to cancel and strike from the docket a lis pendens. Motion for reargument; and original motion to cancel and strike lis pendens, granted.

GIEGERICH, J. * * * The first question to be considered is whether the suspension of the plaintiff from practice as an attorney has the effect of preventing him from continuing to act in person in the prosecution of his suit. I am satisfied that the act of the Appellate Division in suspending him from practice was not intended to have, and does not have, such an effect.

Section 55 of the Code of Civil Procedure provides that: "A party to a civil action who is of full age may prosecute or defend the same in person or by attorney, at his election, unless he has been judicially declared to be incompetent to manage his affairs."

Section 65 provides: "If an attorney dies, is removed or suspended, or otherwise becomes disabled to act, at any time before judgment in an action, no further proceeding shall be taken in the action, against the party for whom he appeared, until thirty days after notice to appoint another attorney, has been given to that party, either personally, or in such manner as the court directs."

It is argued on behalf of the plaintiff that this provision is applicable to his case under the present circumstances. I do not think it is applicable. The plaintiff is not prosecuting his action as an attorney, but in his individual capacity. The fact that he is an attorney is purely fortuitous, and of no consequence whatever. His rights are no more and no less than as though he were a plumber or an engineer, and the fact that he has been deprived of his special privilege to practice as an attorney no more affects his individual right to prosecute his own action than would the loss by a plumber or an engineer of his special license or privilege deprive him of his individual right to appear for himself in legal proceedings. By the order of the Appellate Division he is "suspended from practice as an attorney and counselor at law," but there is no prohibition against his appearing in court and prosecuting or defending an action in his individual capacity. * * *

The motion for a reargument is therefore granted, and the original motion to cancel the lis pendens and strike it from the county clerk's docket is granted, with $10 costs against Clarence F. Birdseye.[10]

Settle order on notice.

SECTION 3.—THE LAWYER AS AN OFFICER

I. His Office

BARRISTERS ARE NOT OFFICERS OF THE COURT IN ENGLAND. James Robert Vernam Marchant, *Barrister-at-Law* (1905) p. 30: Barristers are not, as solicitors are, officers of the Supreme Court, and the Court has no special control over them, and although it has been said that the Superior Courts have, by virtue of their inherent jurisdiction, power to suspend from practicing before them particular barristers who have been guilty of misconduct, which renders them unfit to practise, there is, it is believed, no reported instance in recent times of the exercise of such a power in England.[11]

ATTORNEYS AS OFFICERS OF THE COURT IN ENGLAND. Alexander Pulling, *A Summary of the Law and Practice Relating to Attorneys* (3d Ed., 1862) p. 395, note (i): The 4 Hen. 4, c. 18, seems first to have made attorneys officers of the Courts by directing their names to be placed on the Roll. This statute seems only to have included attorneys in the Court of Common Pleas, and attorneys of other courts or solicitors were not deemed to be privileged

[10] See Philbrook v. Superior Court, 111 Cal. 31, 43 Pac. 402 (1896).

Though a disbarred attorney may argue his own case, it has been held that an attorney who has a contingent fee contract and thereafter is disbarred has no right to conduct the contingent fee case. Leonard v. Toledo, St. L. & W. R. Co. (D. C.) 232 Fed. 281 (1916). This was decided in view of a state contingent fee contract doctrine which recognized such contracts when not coupled with a provision giving the attorney exclusive control of the case or preventing the client from settling without his attorney's consent, and which gave the attorney at the most only an equitable interest in the subject-matter of the contingent fee contract. In addition to pointing out that the disbarred attorney was not the party in interest in the litigation, the court remarked that the attorney's application for permission to try the case was really an application to practice, and to grant it would be to reverse its disbarment adjudication. On the extent of the restriction on the right of a disbarred or suspended lawyer or unlicensed person to transact legal business for another, see note in 24 L. R. A. (N. S.) 750.

[11] "Thus as we have seen the advocate was not an officer of state or an official of the Royal Courts of Justice, but merely a trained and selected person to whom the courts on the recommendation of his Inn of Court gave audience for the purpose of being informed by him in the course of his representation of his clients."—Edward S. Cox-Sinclair, *The Bars of United States and England*, 19 Green Bag, 702, 703.

as officers. Year Book Hil., 1 Hen. 7, 12; Corners Case, Noy, 112. Solicitors [12] were indeed formerly regarded as agents merely in the soliciting causes for those who employed them, and had therefore no power to appear formally like attorneys in court in the place and stead of the client, and could hardly be deemed court officers until the 2 Geo. 2, c. 23, §§ 2 and 3, required them also to be formally admitted and enrolled. At the present day, however, when the same qualifications and a similar form of admission are required for both attorneys and solicitors, they may equally be regarded as officers of the courts in which they practice.

LAWYERS AS OFFICERS OF THE COURT IN THE UNITED STATES. Crocker, J., in Cohen v. Wright, 22 Cal. 293, 315: Attorneys are officers of the court, and as such are subject to the control of the court before which they practice, which has power to summarily investigate the dealings and transactions between them and their clients in cases before it, as also to disbar them for misconduct and deprive them of the privilege of practicing their profession. The books are full of decisions in which they are termed officers in this sense. And in some cases the courts have said, arguendo, that they are "public officers," on the ground that they receive stated fees fixed by statute, and are subject to the control of the court. Walmsby v. Booth, Barnardiston Ch. 478; Merritt v. Lambert, 10 Paige [N. Y.] 352, affirmed without any opinion under the style of Wallis v. Loubat in 2 Denio [N. Y.] 607; Waters v. Whittemore, 22 Barb. [N. Y.] 595. But none of the cases we have been referred to hold directly, as a point actually decided in the case, that they are "officers," or "public officers," within the legal meaning of those terms when used in statutes and constitutions, except the case of Wood in 1 Hopk. Ch. [N. Y.] 6, which is clearly overruled by the numerous cases to the contrary.[13] We therefore hold that an attorney at law is not an officer, within the meaning of that term as used in the constitution.[14]

[12] That is, persons habitually undertaking the care and superintendence of the legal affairs of others, but not clothed with any express power of attorney to bind their principals.—Alexander Pulling, *A Summary of the Law and Practice Relating to Attorneys* (3d Ed. 1862) p. 7.

[13] "The bar is no unimportant part of the court, and its members are officers of the court. Thomas v. Steele, 22 Wis. 207 [1867]; Cothren v. Connaughton, 24 Wis. 134 [1869]. See Bacon's Abr. Attorney, H.; 1 Tidd's Pr. 60; 3 Black. 25; 1 Kent, 306; Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366 [1866]. And if officers of the court, certainly, in some sense, officers of the state for which the court acts. In re Wood, Hopk. Ch. [N. Y.] 6 [1823]. This is not really denied in In the Matter of Attorneys' Oaths, 20 Johns. (N. Y.) 492 [1823], decided in the same year. And if it were, we have no doubt that the Chancellor was correct, and that attorneys and counsellors of a court, though not properly public officers, are quasi officers of the state whose justice is administered by the court."—Ryan, C. J., in Matter of Mosness, 39 Wis. 509, 510, 20 Am. Rep. 55 (1876).

[14] "Attorneys at law [of a United States court] are officers of the court, admitted as such by its order; but it is a mistake to suppose that they are

II. His Oath [15]

EARLY FORMS OF OATHS OF SERJEANTS. Josiah Henry Benton, *The Lawyer's Official Oath and Office* (1909) pp. 25, 26: The earliest authentic forms of the lawyer's oath in England now to be found are those of the Serjeant-at-Law and of the King's Serjeant in an ancient Roll of Oaths in the reign of Queen Elizabeth, which

officers of the United States, as they are neither elected nor appointed in the manner prescribed by the Constitution for the election or appointment of such officers. Ex parte Garland, 4 Wall. 333, 378 [18 L. Ed. 366 (1866)]."—Clifford, J., in Savings Bank v. Ward, 100 U. S. 195, 198, 25 L. Ed. 621 (1879).

"An attorney at law is a sworn officer of the court. Some one has said that an attorney's duty is well expressed in the Institutes in these words: 'These are the precepts of the law: to live honorably; to injure nobody; to render to every one his due.' "—Chase, J., in In re Holland, 110 App. Div. 799, 800, 97 N. Y. Supp. 202, 203 (1906).

But it has been asserted that: "If we divest ourselves of the influence of preconceived notions, this will appear to be the true view of the matter. An attorney is neither a public officer nor an officer of the court, in any proper legal sense. He exercises a quasi-public franchise, a privilege, not under the court but under the law; not at the will or pleasure, or subject to any arbitrary judgment, of the court, but as of legal right, under conditions prescribed by the law-making power. If this view be correct, the exercise by the court of any power over him as its own officer, subject as such to its control, is unwarranted in law."—Albert E. Pillsbury, *The Legal Relations Between Bench and Bar*, 32 Amer. L. Rev. 161, at page 165.

A suggestion that trial lawyers be turned into public officers has been made. "It must always be remembered that the profession of law is instituted among men for the purpose of aiding the administration of justice. * * * As long as private individuals are at liberty to use an officer who is a quasi-public officer as a representative, and pay him out of their private means, so long will the ends of justice to a great extent be diverted from that source. * * * I make this suggestion that it might be worthy * * * of the profession in general to consider the proposition to make the members of the profession officers of the public almost exclusively, and that remuneration be derived from the public in the same manner as judges are now paid. Then again, as part of the expenses of the litigation, the client engaging the services of an attorney could then be required to pay into the public treasury a certain sum of money for the services of counsel. Counsel would then be directly responsible to the public, and his only object in the practice of his profession would then be to aid in the proper administration of justice."—Christian Doerfler, *The Duty of the Lawyer as an Officer of the Court*, 24 Green Bag, 74, 75, 76. See, also, Wesley W. Hyde, *Reorganization of the Legal Profession*, 8 Illinois Law Review, 239, 243.

[15] "Why is any oath required for admission to the practice of the law? No oath is required by law for admission to practise in any other profession, even where qualifications to practice are prescribed or ascertained by examinations required by law, as in the case of physicians. But an official oath has always been required for admission to the practice of the law. Why is it required? What is its significance, and what obligation does it impose?

"The significance of the lawyer's oath is that it stamps the lawyer as an officer of the state, with rights, powers and duties as important as those of the Judges of the Courts themselves. When a lawyer is admitted to practice and takes the required oath of office he has as much right to discharge the duties of his office as a representative or senator has to sit and act in the Legislature, or a Governor to exercise the functions of a chief magistrate. He has as much right to appear in Court and be heard for a party to a cause as a Judge has to hear and decide the cause. A lawyer is not the servant of his client. He is not the servant of the Court. He is an officer of the Court,

was until recently kept in the Crown Office at Westminster, but is now at the Record Office in Chancery Lane, London. * * *

These oaths * * * are as follows:

King's Serjeant: Ye shall Swear, That well and truly ye shall serve the King and His People, as one of His Serjeants of the Law, and truly council the King in His Matters when ye shall be called, and duely and truly minister the King's Matters, after the Course of the Law, to your Cunning: ye shall take no Wages nor Fee of any Man for any Matter where the King is Party against the King; ye shall as duly and hastily speed such Matters as any Man shall have to do against the King in the Law, as ye may lawfully do without Delay or tarrying of the Party of his lawful process in that that belongeth to you: ye shall be attendant to the King's Matters when ye shall be called thereto: as God you help, and by the Contents of this Book.

Serjeant at Law:[16] Ye shall Swear, That well and truly ye shall serve the King's People as one of the Serjeants at the Law, and ye shall truly council them that ye shall be retained with after your Cunning: and ye shall not defer, tract, or delay their Causes willingly, for covetous of Money, or other Thing that may turn you to Profit: and ye shall give due Attendance accordingly: as God you help, and by the Contents of this Book.[17]

EARLY FORM OF OATH OF ATTORNEYS. Josiah Henry Benton, *The Lawyer's Official Oath and Office* (1909) pp. 27, 28: The earliest authentic record of an Attorney's Oath now to be found is in the famous Red Book of the Exchequer preserved in the Record Office. This book was a register of important documents, forms of oaths and other matters which it was deemed desirable to preserve in a permanent form, transcribed from mediæval Remembrancer Books and other sources. * * *

In this book is found the form as follows:

"The Oath of the Attorneys in the Office of Pleas: You shall doe noe Falshood nor consent to anie to be done in the Office of Pleas of this Courte wherein you are admitted an Attorney. And if you shall knowe of anie to be done you shall give Knowledge thereof to the

with all the rights and responsibilities which the character of his office gives and imposes.

"He is also an officer for life whose office cannot be taken from him except for cause established by due process of law upon proof, hearing and judicial determination."—Josiah Henry Benton, *The Lawyer's Official Oath and Office* (1909) pp. 3, 4.

16 See 1 Coke's Inst. 214.

17 "And I well remember when the Lord Treasurer Burleigh told Queen Elizabeth, Madame, here is your attorney general (I being sent for) qui pro domina regina sequitur; she said she would have the forme of the records altered, for it should be attornatus generalis qui pro domina veritate sequitur."—3 Coke, Inst. 79.

Lord Chiefe Baron or other his Brethren that it may be reformed you shall Delay noe Man for Lucre Gaine or Malice [18] you shall increase noe Fee but you shall be contented with the old Fee accustomed.[19] And further you shall use your selfe in the Office of Attorney in the said office of Pleas in this Courte according to your best Learninge and Discrecion. So helpe you God."

THE LAWYER'S OATH IN ENGLAND TO-DAY. Josiah Henry Benton, *The Lawyer's Official Oath and Office* (1909) p. 119: The order of serjeants-at-law has ceased to exist, and with it has gone the ancient oath of office of a sergeant-at-law. Attorneys and solicitors now take an oath prescribed by statute as follows:

"I, ———, do swear (or solemnly affirm, as the case may be) that I will truly and honestly demean myself in the practice of an attorney * (or solicitor, as the case may be) according to the best of my knowledge and ability; so help me God."

Barristers are not required to take any oath or to sign any roll, but assume practice as soon as they are admitted by one of the Inns of Court.

[18] "An important clause in the official oath is 'to delay no man's cause for lucre or malice.' It refers, no doubt, primarily, to the cause intrusted to the attorney, and prohibits him from resorting to such means for the purpose of procuring more fees, or of indulging any feeling he may have against his client personally. Such conduct would be a clear case of a violation of the oath. But it is a question, also, whether the case generally in which he is retained is not comprehended. How far, then, can he safely go in delaying the cause for the benefit of, and in pursuance of the instructions of, his client? A man comes to him and says: 'I have no defence to this claim; it is just and due, but I have not the means to pay it; I want all the time you can get for me.' The best plan in such instances is, no doubt, at once frankly to address his opponent, and he will generally be willing to grant all the delay which he knows in the ordinary course, can be gained, and perhaps more, as a consideration for his own time and trouble saved. If, however, that be impracticable, it would seem that the suitor has a right to all the delay which is incident to the ordinary course of justice. The counsel may take all means for this purpose which do not involve artifice or falsehood in himself or the party. The formal pleas put in are not to be considered as false in this aspect, except such as are required to be sustained by oath."—George Sharswood, *An Essay on Professional Ethics* (5th Ed.) 115–117.

[19] In the *Practick Part of the Law* (1653), at pages 3, 4, the oath of attorneys contains the additional sentences at this place: "You shall plead no forreign plea; nor sue no forreign suites unlawfully to hurt any man, but such as shall stand with the order of the Law and your Conscience. You shall seale all such Process as you shall sue out of this Court, with the Seale thereof, and see the King's Majestie, and my Lord Chiefe Justice discharged of the same. You shall not wittingly nor willingly sue, nor procure to be sued, any false suite, nor give aide or consent to the same, on paine of being expulsed from the Court for ever."

* This is the form of oath prescribed in 1843 by 6 & 7 Vict. c. 73, § 19, but since 1875 only the word solicitor has been used. See ante, pp. 19–20.

THE OATH RECOMMENDED BY THE AMERICAN BAR ASSOCIATION.—I DO SOLEMNLY SWEAR:

I will support the Constitution of the United States and the Constitution of the State of ———;

I will maintain the respect due to Courts of Justice and judicial officers;

I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the Judge or jury by any artifice or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval;

I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice. SO HELP ME GOD.[20]

III. HIS DUTY TO SERVE

A. B. A. CANONS

4. A lawyer assigned as counsel to an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf.

[20] "But an honest man is always under oath; and the sanction of a formal vow adds nothing to the moral obligation springing of itself from the relation of lawyer and client, just as the oath of a witness in court imposes no new obligation to veracity, but only places him in a position of definite responsibility for a falsehood."—William Allen Butler, *Lawyer and Client* (1871) pp. 17, 18.

In connection with the oath, it may be of interest to note the prayer which Dr. Johnson wrote when at the age of 56 he had thoughts of studying law (A. D. 1765, ætat. 56):

"PRAYER BEFORE THE STUDY OF LAW.—Almighty God, the giver of wisdom, without whose help resolutions are vain, without whose blessing study is ineffectual; enable me, if it be thy will, to attain such knowledge as may qualify me to direct the doubtful, and instruct the ignorant; to prevent wrongs and terminate contentions; and grant that I may use that knowledge which I shall attain, to thy glory and my own salvation, for Jesus Christ's sake. Amen."—James Boswell's *Life of Samuel Johnson, LL. D.* (Everyman's Library, 2 Vol. Ed.) Vol. 1, p. 305.

5. It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused. * * *

30. JUSTIFIABLE AND UNJUSTIFIABLE LITIGATIONS. The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong. But otherwise it is his right, and, having accepted retainer, it becomes his duty to insist upon the judgment of the Court as to the legal merits of his client's claim. His appearance in Court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination.

31. RESPONSIBILITY FOR LITIGATION. No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what business he will accept as counsel, what causes he will bring into Court for plaintiffs, what cases he will contest in Court for defendants. The responsibility for advising questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions.

BRIEFS—OBLIGATION TO ACCEPT. Statement of the General Council of the Bar, *The Annual Practice* (1917) p. 2412: The general rule is that a Barrister is bound to accept any brief [21] in the Courts in which he professes to practice, at a proper professional fee.[22] Special circumstances may justify his refusal to accept a

21 "BRIEF.—A brief is the document which contains the instructions for a barrister to conduct a civil or criminal case; it is his authority to appear and argue for the party named. It is always indorsed with the title of the Court and of the action or case, and with the names of the counsel and of the solicitor who delivers it. It should be marked with the proper fee before counsel goes into Court. A properly prepared brief contains a short statement of the client's case, with all material facts arranged in strict chronological order, and the observations of the solicitor thereon; this is followed by the 'proofs,' i. e. a detailed account of what each witness is prepared to state, if called. These proofs should be most carefully prepared by the solicitor from the witness' own lips; he should not trust to his client's account of what he expects the witnesses will swear to; such expectations are often misleading. Sometimes also it is advisable to give, in the brief, hints for the cross-examination of the witnesses expected to be called on the other side. Copies of the pleadings and notices, of the interrogatories and the answers to them, and of all material correspondence, should accompany the brief; a list of these documents, if they be numerous, should be given on the first page of the brief or in its fold. The correspondence should be copied bookwise, each letter on a separate page, and the whole arranged in one bundle in strict chronological order."—2 *Ency. of the Laws of Eng.* (2d Ed.) 399, 400.

22 In Ex parte Lloyd (1822) Montague, p. 70n., at p. 71n., Lord Eldon is quoted as saying: "A barrister ought not to exercise any discretion as to

particular brief.[23] Any complaint as to the propriety of such a refusal, if brought to the notice of the Council and by them considered seasonable, would be transmitted by them to the Benchers of the Inn of which the Barrister is a member. An. St. 1903–04, p. 15.

THE COURSE OF ACTION OF SIR EDWARD CARSON AND MR. (LATER SIR) F. E. SMITH IN THE MARCONI CASES

The so-called Marconi affair, involving a number of very prominent members of the British cabinet, besides presenting a clear question of political ethics, gave rise to a combined politico-legal ethical problem. Sir Rufus Isaacs, later Lord Reading, the Lord Chief Justice of

the suitor for whom he pleads in the court in which he practices. 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." That is a clear statement of the English bar's view, but the dire results suggested for the contrary rule have not followed the adoption of that contrary rule in the United States where, in civil and criminal causes alike, a lawyer may legally decline a case unless he is specifically appointed by the court to represent a party.

The English view is forcibly expressed in a well-known passage of Erskine's speech in defense of Thomas Paine, as follows:

"In every place where business or pleasure collects the public together, day after day my name and character have been the topics of injurious reflection. And for what? Only for not having shrunk from the discharge of a duty which no personal advantage recommended, but which a thousand difficulties repelled. * * * Little indeed did they know me, who thought that such calumnies would influence my conduct. I will forever, at all hazards, assert the dignity, independence and integrity of the English bar, without which impartial justice, the most valuable part of the English constitution, can have no existence. From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the court where he daily sits to practice, from that moment the liberties of England are at an end. If the advocate refuses to defend, from what he may think of the charge or of the defense, 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."—*Speeches of Lord Erskine*, edited by James L. High (1876) pp. 473–475.

[23] In an article on *The Right to Retain an Advocate* in 29 Law Magazine and Review, 406, 407, 408, Edward S. Cox-Sinclair has this to say of the rule: "The effect of this rule would be to prohibit a barrister from refusing to appear, not only in consequence of purely personal considerations of convenience or advantage, but in consequence of his view of the character of the person requesting his services, or his view of the rights of the parties concerned in the controversy, or his view of the law which the court is asked to administer. In the absence of special circumstances the only grounds for his refusal would appear to be either that the court of the litigation is not one in which he professes to practice or that the fee tendered him is not, according to the professional standard in that court, for that class of cases, an adequate one. Is this rule the one which obtains in England according to the

England, was, in 1912 and 1913, Attorney General, Mr. Lloyd George was Chancellor of the Exchequer, and the Master of Eilbank, afterwards Lord Murray, was the Chief Government Whip (otherwise referred to as the Chief Patronage Secretary). In 1912 the British government, through the Postmaster General, entered into a contract with the English Marconi Company for the use of the Marconi system of wireless telegraphy at stations in different parts of the British Empire. Sir Rufus Isaacs was a brother of Mr. Godfrey Isaacs, who was managing director of the English Marconi Company and who was also a director of the American Marconi Company. The tender of the English Marconi Company to the British government was accepted on March 7, 1912, but the formal contract was not signed until July 19, 1912, pending negotiations as to particular contract clauses.[24]

The American Marconi Company was a separate corporation from the English, but the English company owned a majority of the shares of the American company, and, while the American company as such was entitled to no interest in any profits to be made by the English company out of the contract with the British government,[25] the

traditional practice of the Bar, and if so, upon what grounds can it be upheld as a matter of theory and as a matter of practice? Our first conclusion, upon a careful survey of the usages of the profession, must be that it seems clear that, whatever may be the rule in other civilized states, in England the rule exists and is insistent." And on page 411, in speaking of retainer in criminal cases, he says: "To sum up, where the English rule is obligation to accept except under special circumstances, the American rule is obligation not to refuse where special circumstances exist." On pages 416, 417, in speaking of civil causes, he says: "It may also be stated that hardly nowhere in the world, save in England, is there held to be any obligation in a civil case upon the advocate to accept a retainer when he is unwilling for any reason to appear. Whatever may be the rule in America regarding criminal cases, it is clear that in civil cases the advocate is absolutely free to accept or reject a retainer."

"One question of professional obligation, as to which the practice at the English bar might be misleading, has been definitely and properly settled [by A. B. A. Canon 31]. An American lawyer is free to decline any retainer. There may be a reason for denying such a right to the English barrister. His retainer comes through the hands and at the instance of another legal practitioner, who presumably has satisfied himself that the action ought in justice to be brought, or defended, as the case may be. To refuse to accept it would reflect on him. With us, where the client comes or can with propriety come directly to him whom he wishes to advocate his cause, such considerations of fraternity or professional etiquette have no place."—Simeon E. Baldwin, *The New American Code of Legal Ethics*, 8 Columbia L. Rev. 541, 544, 545.

"A lawyer is the servant of his fellow-men for the attainment of justice: in which definition is expressed both the lowliness and the dignity of his calling; the lowliness—in that he is the servant of all, ever ready to assist as well the meanest as the loftiest; the dignity—in that the end whereto he serves has among other things temporal no superior or equal. For justice is nothing less than the support of the world whereby each has from all others that which is his due; the poor their succour; the rich their ease; the powerful their honour."—Edward O'Brien, *The Lawyer* (1842) p. 57.

[24] Report of the Select Committee, London Times, June 14, 1913, Supplement, p. 3.

[25] Id. p. 2.

minority of the Select Committee appointed to investigate the matter thought that great indirect advantages would be bound to accrue to the American company as part of the Marconi wireless telegraphy system from the English company's advantageous contract with the British government.[26] Mr. Godfrey Isaacs, by virtue of a contract between the English Marconi Company and the American Marconi Company, had a large number of shares of the latter company to sell, which he could sell at par, but which were of greater prospective value, and he offered some to Sir Rufus Isaacs, who refused to buy. Another brother, Mr. Harry Isaacs, bought some of the shares, and on April 17, 1912, after the offer of contract with the British government made by the English Marconi Company was accepted, as stated above, Sir Rufus Isaacs bought from Mr. Harry Isaacs 10,000 of the shares of stock in the American Marconi Company. The same day the Chancellor of the Exchequer, Mr. Lloyd-George, and the Chief Whip of the Liberal Party, the Master of Eilbank (afterwards Lord Murray), bought from Sir Rufus Isaacs, at the price which he had paid, 2,000 of the 10,000 shares. The Chief Whip bought shares with party funds. All three sold shares at a profit, and the Chancellor of the Exchequer and the Master of Eilbank subsequently bought other shares. The purchases were made and shares sold by the purchasers without any attempt at concealment, but because of the rapid increase in the price of the shares, and the quick and large profits apparently made by these public officers,[27] the matter soon became the subject of unfavorable rumors.

"Before the end of July [1912] the rumors found publicity in the press. In the Eye Witness, a small journal which presented the independent and erratic views of Mr. Belloc and Mr. Chesterton, the whole Marconi contract was, in language of unmeasured denunciation, declared to be a corrupt bargain." [28]

On October 7, 1912, Parliament reconvened, and on October 11,

[26] Id. p. 7.

[27] In the course of the debate in the House of Commons in June, 1913, it was estimated that Sir Rufus Isaacs made a profit of about £8,000 on the 8,000 shares sold by him.

On June 18, 1913, Sir Rufus Isaacs said of the purchase of the 10,000 shares: "I bought them at the price stated to me as the market price. * * * I did not fix the price." Parliamentary Debates, H. of C. (5th Series) Vol. 54, p. 433. He also stated that: "According to the representations made to me, and according to my belief, I thought this was an independent company, the sole connection, if you can call it a connection, being that its operations, limited to the territory of the United States, were the working of the inventions of Mr. Marconi," and that "The Chancellor of the Exchequer and the Master of Eilbank only knew what I told them." Id. p. 436. The Select Committee so found (London Times, June 14, 1913, Supplement, p. 2), but the minority of the Committee also reported that the shares were in fact bought "at a time when the shares could not have been bought in the ordinary course on the Stock Exchange and at a price lower than that at which an ordinary member of the public could then have bought them." Id. p. 8.

[28] *The Marconi Affair*, 219 Quarterly Review, 256, 261.

a motion for a Select Committee to investigate the Marconi matter was made in the House of Commons by the Postmaster General, Mr. Herbert Samuel. At that time questions were asked and answered in the House in reference to the Marconi contract and shares. Sir Rufus Isaacs, after asserting that he had "never from beginning to end, in any shape or form, either by deed, act or word, or anything else, taken part in the negotiations in reference to this company" and its contract with the government, and after mentioning the fact that the price of shares was 14s. or 15s. before the contract, and eventually rose to £9 after the announcement of the contract was made, said: "Never from the beginning, when the shares were 14s. or £9, have I had one single transaction with the shares of that company. I am not only speaking for myself, but I am also speaking in behalf, I know, of both my Right Hon. Friend, the Postmaster General, and the Chancellor of the Exchequer. * * *" [29]

By denying that he had dealt in Marconi shares, Sir Rufus Isaacs meant, as the prices which he quoted and his subsequent statements show, English Marconi shares, but he was understood by many to be denying having dealt in any Marconi shares, whether British or American. The Ministers were telling the truth, but clearly were seeking to evade the question of the propriety of the purchase of the American Marconi shares.

The Select Committee moved for on October 11, 1912, was appointed by the House of Commons to investigate the Marconi matter, and by February, 1913, the Chancellor of the Exchequer and the Attorney General became aware that the whole affair must be aired and the only question was as to the best way of letting it be done. On February 14, 1913, a Paris journal, "Le Matin," with a London office, published a charge that Sir Rufus Isaacs had used improper influence with Mr. Samuel, the Postmaster General, to secure for the English Marconi Company its contract with the British government. The Ministers at once seized the opportunity of partially airing the matter through the institution of libel actions against the proprietors of Le Matin.

Two libel actions were started against the proprietors of Le Matin, one by Mr. Samuel, the Postmaster General, and one by Sir Rufus Isaacs, the Attorney General. As the defendants made no defense, there was not a contested trial of either action, but on March 19, 1913, when the actions came on for disposition, the two being heard as one, Sir Edward Carson and Mr. (later Sir) F. E. Smith who, with other counsel, appeared for the plaintiffs, put Sir Rufus Isaacs in the witness box to explain in part about the American Marconi purchase.[30] As concerns the libel against the plaintiffs, the defendants, through their counsel, expressed great regret and tendered a full and

[29] Parliamentary Debates, H. of C. (5th Series) Vol. 42, p. 718.
[30] London Times, March 20, 1913, p. 8.

complete apology for the published imputation that these officials "had utilized their high official positions and knowledge, as members of the government, for the purpose of speculating in the shares of this particular British Marconi Company at the time that company was negotiating with the government over this contract," [31] and a judgment in each case was entered for the plaintiff, with full indemnity for costs.

Later Cecil Chesterton, a journalist, was brought to trial, and on June 7, 1913, was convicted, for criminally libelling Mr. Godfrey Isaacs, managing director of the British Marconi Wireless Telegraph Company, by charging that he used corrupt means to obtain for that company its contract with the British government. Sir Edward Carson and Mr. F. E. Smith appeared for the prosecution in that criminal case.

Finally on June 18 and 19, 1913, the whole Marconi scandal was discussed in great detail in the House of Commons. On June 18, Sir Rufus Isaacs admitted that the course taken on October 11, 1912, in not mentioning the American Marconi shares, "was a mistaken course," [32] and that he should have been more frank, though he positively denied the faintest intention to deceive any member of the House in regard to these transactions. The Chancellor of the Exchequer also made a statement. On June 19, 1913, after a two days' extended discussion, the House of Commons voted the following resolution:

"Resolved: That this House, after hearing the statements of the Attorney General and the Chancellor of the Exchequer in reference to their purchases of shares in the Marconi Company in America, accepts their expression of regret that such purchases were made, and that they were not mentioned in the debate of 11th October last, acquits them of acting otherwise than in good faith, and reprobates the charges of corruption brought against Ministers which have been proved to be wholly false." [33]

Meanwhile, after the conviction of Cecil Chesterton, a newspaper attack was made on Sir Edward Carson and Mr. F. E. Smith, both of whom were members of the House of Commons, because they had appeared in the Chesterton case and in the libel actions against the proprietors of Le Matin when it was certain that matters in controversy in those cases would come up for discussion and vote in the House of Commons, as they did less than two weeks after the Chesterton conviction. On June 13, 1913, the London Times, in an editorial, pointed out that the Chesterton criminal trial was "almost inseparable from issues certain to be discussed in the House of Commons, and naturally, one would have thought, by two of its most

[31] Id.

[32] Parliamentary Debates, H. of C. (5th Series) Vol. 54, p. 422.

[33] Parliamentary Debates, H. of C. (5th Series) Vol. 54, p. 670.

effective debaters." The editorial worded the ethical problem as follows:

"The man of ordinary intelligence, who knows nothing about the etiquette of the Bar, does not understand how it comes about that they should occupy a position as advocates which might conceivably prove embarrassing to them in the performance of their duties in Parliament and in public discussions generally. * * * The etiquette of the Bar, we are told by some of its members, left these counsel no choice; they could not refuse briefs delivered to them; they acted in accordance with a laudable practice and tradition which give all comers the services of eminent advocates. After Sir Edward Carson's speech of yesterday,[34] no one will doubt that this was his own whole-hearted opinion; but it must be confessed that professional opinion does not speak with entire unanimity."

The Times put the matter mildly when it said that professional opinion did not speak with entire unanimity. The most extreme view —a view which apparently Sir Edward Carson and Mr. F. E. Smith did not entertain (see Mr. F. E. Smith's letter mentioned below)— was that, no matter if counsel were members of Parliament, they had, as advocates, no legal right to refuse the professional employment offered them. That view was stated most forcibly by Sir Ralph Neville, one of the Justices of the Chancery Division, in a letter in the London Times of June 16, 1913. He wrote: "As it was once put to me, always remember that you are in the position of a cabman on the Rank bound to answer the first hail." And the analogy was approved as "exactly right" by "H. C." in a letter to the London Times of June 20, 1913.

But under the resolution of the General Council of the Bar of February, 1904,* "special circumstances" will justify a barrister's refusal to accept a particular brief. Presumably they may even require such refusal. And the real question is whether the circumstances in which Sir Edward Carson and Mr. F. E. Smith found themselves were such special circumstances.

In a letter printed in the London Times of June 14, 1913, Sir Harry B. Poland, a prominent barrister, asserted that Sir Edward Carson and Mr. F. E. Smith were perfectly free to decline employment in the prosecution of Chesterton, but said that most counsel would have taken the employment, as "no one could have foreseen that the Marconi affair would stir both political parties as it has done." He also said: "It seems to me that the conduct of these counsel is a matter between themselves and their constituents and that the public has nothing whatever to do with it." "L. L." in the

[34] Before the Scottish Constitutional Club in Glasgow, in which he said: "I believe in what I did I acted in accordance with my duty as a barrister and I think I also did so according to the highest traditions of the bar."

* This is the statement of the General Council of the Bar as to "Briefs—Obligation to Accept," found ante, p. 67.

same issue pointed out, on the other hand, that Sir Charles Russell, who held a general retainer for the London Times when that paper began the publication of a series of articles on "Parnellism and Crime," gave up that retainer so that he might be unfettered in his discussion of the matter in Parliament. Mr. F. E. Smith, in a letter in the London Times of June 17, 1913, speaking for himself alone, admitted that Sir Edward Carson and he "could not have been compelled to accept briefs" in the case, and that they "were never under any delusion upon this point." He pointed out that Mr. Rigby Swift, K. C., who was also a member of the House of Commons, appeared for the defense in the Chesterton case, and was in the same position as Sir Edward Carson and himself, and insisted that "in these matters every one must be his own judge."

When the Marconi affair resolution of June 19, 1913, came to a vote in the House of Commons, Sir Edward Carson and Mr. F. E. Smith abstained from voting. "W. O.," in a letter in the London Times of June 21, 1913, said: "Every one must agree that they rightly abstained, after having appeared for some of the principal persons concerned in the recent law cases; but does not the very sense of the necessity for their present inaction supply the verdict on their previous action? Unless—which is inconceivable—they put their position as members of the Bar before their duty to their country as members of Parliament."

In the London Times for June 24, 1913, "An Old M. P." pointed out that by the incapacity of Sir Edward Carson and Mr. F. E. Smith "their constituents were practically disfranchised," and asked, "Is this right or just to the electors?" He concluded: "It ought surely to be a sufficient reason to justify any counsel in refusing a retainer for him to say that by doing so [accepting it?] he would obtain information confidentially which he was [would be] unable to use in debate, or that it would compel him not even to carry out his primary duty to his constituents of voting."

Yet under date of June 21, 1913, the Law Times editorially said that "Sir Edward Carson and Mr. F. E. Smith are to be congratulated in demonstrating to the public the fact that the services of counsel are open to every member of the public alike." [35]

[35] *The Bar and the Public*, 135 Law Times, 180, 181.

"I do not believe that a lawyer has any more right, as a matter of correct public service, to hold a retainer while writing a law in the public interest, and that a law which may affect his client adversely, than has a judge to hold retainers for those whose interests may be affected by the decisions which he renders or the judgment which he signs. * * * Is it not as important to the public that laws be framed free of the influence, conscious or unconscious, of private interests as that they be administered free of such influence?" Wm. E. Borah, *The Lawyer and the Public*, 2 American Bar Assoc. Journal, 776, 780.

On June 19, 1913, the British Prime Minister, Mr. Asquith, while stating that he regarded some of the attempts to formulate a code of ethics of public men in regard to pecuniary transactions as inept and ill-advised, said:

SPECIAL RETAINERS. Statement of the General Council of the Bar, *The Annual Practice* (1917) p. 2428: The opinion of the Council was asked under the following circumstances:

A. was solicitor for the prosecution and B. was solicitor for the defence in a criminal case. C. was a member of the bar. On 18th November, 1904, A. asked C.'s clerk by telephone if C. was in a position to accept a retainer for the prosecution, and C.'s clerk said "Yes." A. said, "Then I will send one by post to-night." On 19th November, 1904, by the first post a form of retainer duly arrived, but without any cheque or other form of payment of the fee. C.'s clerk, on the telephone, called A.'s attention to the omission, and A. said it was an oversight on his part, and he would send a cheque on at once. Shortly afterwards, and before the arrival of A.'s cheque, B. delivered a retainer for the defence with payment of the fee in cash. B. was informed of the above facts, but left his retainer, claiming that it was binding. C. had not accepted either retainer, being uncertain whether it was A. or B. who was entitled to his services. Both A. and B. desired to stand upon their strict rights, and C. had no desire, even if he had the right, to favour either; but if C. was entitled to waive the absence of a cheque with A.'s retainer he would do so, as the omission to enclose it was merely an oversight.

The Council were of opinion that a special retainer is binding when duly delivered, and that therefore no question of "acceptance" or "waiver" can arise (see Annual Statement, 1901–02, p. 5). They were further of opinion that a Retainer is not duly delivered unless and until the fee thereon is received in cash, and that under the circumstances stated B.'s retainer was binding. An. St. 1904–05, p. 10.

"But there are certain principles, certain rules, * * * which are rules not only of morality, but of common sense and are beyond dispute. Let me enumerate one or two of them. The first, of course, and the most obvious, is that Ministers ought not to enter into any transaction whereby their private pecuniary interests might even conceivably, come into conflict with their public duty. There is no dispute about that. Again, no Minister is justified under any circumstances in using official information, information that has come to him as a Minister, for his own private profit or for that of his friends. Further, no Minister ought to allow or to put himself in a position to be tempted to use his official influence in support of any scheme or in furtherance of any contract in regard to which he has an undisclosed private interest. That again is beyond dispute. Again, no Minister ought to accept from persons who are in negotiation with or seeking to enter into contractual or proprietary or pecuniary relations with the state any kind of favor. That, I think, is also beyond dispute. I will add a further proposition, which I am not sure has been completely formulated, though it has no doubt been adumbrated in the course of these Debates, and that is that Ministers should scrupulously avoid speculative investments in securities as to which, from their position and their special means of early or confidential information, they have or may have an advantage over other people in anticipating market changes. * * * Those in my opinion are rules of positive obligation."—Parliamentary Debates, H. of C. (5th Series) Vol. 54, pp. 556, 557.

VISE v. HAMILTON COUNTY.

(Supreme Court of Illinois, 1857. 19 Ill. 78.)

SKINNER, J. The plaintiffs below, being attorneys of the court, were appointed by the Circuit Court of Hamilton county to defend a person indicted for forgery, and unable to employ counsel. They entered upon the conduct of the defense, and their services rendered are proved worth twenty dollars, for which they seek to charge the county. The county was not a party to the prosecution, and had no authority or control in the matter, nor did the county employ the plaintiffs to perform the service. There can, therefore, be no assumpsit in law on the part of the county to pay what the services were worth. The prosecution was carried on "in the name and by the authority of the People of the State of Illinois," and with it the county had no concern or power of interference, and was under no obligation to furnish counsel for the accused. In criminal prosecutions, the accused has the right to be heard, and to defend by himself and counsel, and such is the benignity of our institutions that, lest the innocent suffer for want of proper defense, the court, in case of inability of the accused to obtain counsel, will appoint counsel for him, and may compel the counsel, as an officer of the court, subject to its authority to defend the accused against unjust conviction.[36]

[36] "Under the ancient common law, persons accused of treason or felony were not permitted to defend, under the plea of not guilty, by counsel. The practice was, not to permit counsel to be heard on questions of fact, but the court would assign counsel to discuss questions of law arising on or after the trial. In such cases the prisoner proposed the point, and if the court supposed it would bear discussion it assigned counsel to argue it. 2 Hawkins' Pleas of the Crown, chap. 39, § 4, p. 555; 1 Chitty on Crim. Law, 407. Thus it appears that at the common law the court exercised the power of assigning counsel to argue legal questions, and it seems counsel could only appear for that purpose after being assigned by the court. The Bill of Rights (or article 8, section 9) of the [Illinois] Constitution of 1818 provided 'that in all criminal prosecutions the accused hath a right to be heard by himself and counsel,' and the Constitution of the United States contains a similar provision regulating the practice in the federal courts. This constitutional provision is retained in the present organic law, and modified the rigor of the common law by extending the privilege of the accused to be heard by counsel on both the facts and the law; but it still left the common law in force as to the power of the court to assign counsel. * * * Thus it is seen that under the common law and the ninth section of article 8 of the Constitution of 1818, the courts had the power, and it was their duty, to assign counsel to defend persons charged with crime who were unable to employ counsel, and such has ever been the practice in this state."—Walker, J., in Johnson v. Whiteside County, 110 Ill. 22, 23, 24 (1884).

"The court has a right to command the services of counsel for persons unable to pay, in civil as well as criminal cases. Acts 1821, c. 22, § 3; Acts 1857–58, c. 58; Code 1858, § 3980. Where a lawyer takes his license, he takes it burthened with these honorary obligations. He is a sworn minister of justice, and when commanded by the court cannot withhold his services in cases prosecuted in forma pauperis."—Sneed, J., in House v. Whites, 5 Baxt. (Tenn.) 690, 692 (1875).

On the right to compensation of attorneys assigned by the court to defend an indigent accused person, see Ann. Cas. 1913E, 206, note.

The law confers on licensed attorneys rights and privileges, and with them imposes duties and obligations, which must be reciprocally enjoyed and performed. The plaintiffs but performed an official duty, for which no compensation is provided. Edgar County v. Mayo, 3 Gilman, 82.

Judgment affirmed.

IV. His Privilege to Slander

WOOD and GUNSTON.

(Upper Bench Court, 1655. Style, 462.)

In a tryal at Bar in an action upon the case for words between Wood plaintiff, and Gunston defendant, it was said by Glyn, Chief Justice, that if a councellor speak scandalous words against one in defending his clyents cause, an action doth not lie against him for so doing, for it is his duty to speak for his clyent, and it shall be intended to be spoken according to his clyents instructions.[37]

[37] In Munster v. Lamb, 11 Q. B. D. 588 (1883), the Court of Appeal held that the counsel's privilege is absolute. Brett, M. R., said: "This action is brought against a solicitor for words spoken by him before a court of justice, while he was acting as the advocate for a person charged in that court with an offense against the law. For the purposes of my judgment, I shall assume that the words complained of were uttered by the solicitor maliciously, that is to say, not with the object of doing something useful towards the defense of his client: I shall assume that the words were uttered without any justification or even excuse, and from the indirect motive of personal ill will or anger towards the prosecutor arising out of some previously existing cause; and I shall assume that the words were irrelevant to every issue of fact which was contested in the court where they were uttered; nevertheless, inasmuch as the words were uttered with reference to, and in the course of, the judicial inquiry which was going on, no action will lie against the defendant, however improper his behavior may have been." Page 599. And further on he said: "Of the three classes—judge, witness, and counsel—it seems to me that a counsel has a special need to have his mind clear from all anxiety. * * * To my mind it is illogical to argue that the protection of privilege ought not to exist for a counsel who deliberately and maliciously slanders another person. The reason of the rule is that a counsel who is not malicious, and who is acting bona fide, may not be in danger of having actions brought against him." Pages 603, 604.

In Bottomley v. Brougham, [1908] 1 K. B. 584, 587, Channell, J., said: "Privilege means, in the ordinary way, a private right. Now there is no private right of a judge, or a witness, or an advocate to be malicious. It would be wrong of him, and if it could be proved [i. e., if the proof were not objected to] I am by no means sure that it would not be actionable. The real doctrine of what is called 'absolute privilege' is that in the public interest it is not desirable to inquire whether the words or acts of certain persons are malicious or not. It is not that there is any privilege to be malicious, but that, so far as it is a privilege of the individual—I should call it rather a right of the public—the privilege is to be exempt from all inquiry as to malice; that he should not be liable to have his conduct inquired into to see whether it is malicious or not—the reason being that it is desirable that persons who occupy certain positions as judges, as advocates, or as litigants should be perfectly free and independent, and, to secure their independence,

LA PORTA v. LEONARD.

(Court of Errors and Appeals of New Jersey, 1916. 88 N. J. Law, 663, 97 Atl. 251, L. R. A. 1916E, 779.)

MINTURN, J. The plaintiff alleges that during a proceeding in the recorder's court of the city of Hoboken the defendant, a lawyer of many years' standing, remonstrated with him, a colaborer at the bar, in the following manner: "You are a vermin. You are a disgrace to the bar, and are starting out in the wrong way as a young lawyer. This will give you a black eye. You and your client committed perjury. You suborned your client."

This language resulted in a suit at law for slander, in which the plaintiff alleged serious injury to his reputation and standing in the community, and demanded substantial damages by way of reparation. To this demand defendant replied that he did not utter the language, and that, if he did, he was protected in so doing by the legal privilege peculiar to counsel, which, as he conceived, hedges him about in absolute security, so long as his utterances are honestly conceived, to conduce to the advantage of his client.

The testimony at the trial resulted in an issue of fact which the court properly left to the jury, with the result that a verdict for $300 was rendered against the defendant. A number of trial errors are alleged as grounds for reversal, none of which calls for extended consideration, excepting this fundamental contention of the defendant that his utterances in court as counsel for a client are absolutely privileged, and also the refusal of the trial court to instruct the jury that previous charges and accusations uttered by the plaintiff against the defendant might be considered by the jury in mitigation of damages.

The initial objection is fundamental in this department of the law, and serves to call forth a pronouncement from this court indicating the line of demarcation beyond which the utterances of counsel are not

that their acts and words should not be brought before tribunals for inquiry into them merely on the allegation that they are malicious."

In Flint v. Pike, 4 B. & C. 478 (1825), the court discriminated carefully between the privileged remarks of counsel in court and the newspaper publication of those remarks. As Holroyd, J., said in that case: "With a view to the due administration of justice, counsel are privileged in what they say. Unless the administration of justice is to be fettered, they must have free liberty of speech in making their observations, which it must be remembered may be answered by the opposing counsel, and commented on by the judge, and are afterwards taken into consideration by the jury, who have an opportunity of judging how far the matter uttered by the counsel is warranted by the facts proved. Therefore, in the course of the administration of justice, counsel have a special privilege of uttering matter even injurious to an individual, on the ground that such a privilege tends to the better administration of justice. * * * It by no means follows, however, because a counsel is privileged when, in the course of the administration of justice, he utters slanderous matter, that a third person may repeat that slanderous matter to all the world. The repeating of such slander is not done in the course of the administration of justice, and therefore is not privileged." Id. 480, 481.

protected by the claim of privilege. The claim of privilege obtains recognition as an exception to a general rule of liability for tort-feasance only from the highest considerations of necessity and public policy. 1 Street on Legal Liability, 307.

In 1883 the English Court of Queen's Bench, speaking by Brett, Master of the Rolls, in Munster v. Lamb, 11 Q. B. D. 588, laid down the rule that the privilege of an advocate with respect to defamatory words uttered by him as advocate, in the course of a judicial inquiry, with reference to the subject-matter of the inquiry, is absolute and unqualified, and that no action can be maintained against him for such words, even though they were irrelevant and spoken maliciously and without reasonable cause.

In a copious note to this case the editor in 7 E. R. C. 727, presents a critical résumé of the English and American cases dealing with the subject; and the modification of this rule, as enunciated by the decisions of the American courts, where the question has been presented for consideration, is there emphasized by a series of well considered adjudications. As a result of this examination it is therein laid down that the general American doctrine upon this subject is that counsel is not liable to a civil action, nor to criminal proceedings for anything he may have said in the course of a trial or investigation, although malicious and intended to defame, provided it was relevant and pertinent to the subject-matter of the controversy, but otherwise if malicious and not pertinent and relevant to the inquiry.[38] Rice v. Coolidge, 121 Mass. 395, 23 Am. Rep. 279; White v. Carroll, 42 N. Y.

[38] "Then we take the rule to be well settled by the authorities that words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore if spoken elsewhere would import malice and be actionable in themselves are not actionable if they are applicable and pertinent to the subject of inquiry. * * * And in determining what is pertinent, much latitude must be allowed to the judgment and discretion of those who are intrusted with the conduct of a cause in court, and a much larger allowance made for the ardent and excited feelings with which a party, or counsel who naturally and almost necessarily identifies himself with his client, may become animated by constantly regarding one side only of an interesting and animated controversy in which the dearest rights of such party may become involved. * * * Still this privilege must be restrained by some limit, and we consider that limit to be this: That a party or counsel shall not avail himself of his situation to gratify private malice by uttering slanderous expressions, either against a party, witness or third person, which have no relation to the cause or subject-matter of the inquiry."—Shaw, C. J., in Hoar v. Wood, 3 Metc. (Mass.) 193, 197 (1841). See Carpenter v. Ashley, 148 Cal. 422, 83 Pac. 444, 7 Ann. Cas. 601 (1906).

In Maulsby v. Reifsnider, 69 Md. 143, 151, 152, 14 Atl. 505, 506 (1888), Robinson, J., points out that "it is absolutely essential to the administration of justice that he [counsel] should be allowed the widest latitude in commenting on the character, the conduct and motives of parties and witnesses and other persons directly or remotely connected with the subject-matter in litigation. * * * The privilege thus recognized by law is not the privilege merely of counsel, but the privilege of clients, and the evil, if any, resulting from it must be endured for the sake of the great good which is thereby secured. But this privilege is not an absolute and unqualified privilege. * * *"

161, 1 Am. Rep. 503; Smith v. Howard, 28 Iowa, 51; Barnes v. McCrate, 32 Me. 442; McMillan v. Birch, 1 Bin. (Pa.) 178, 2 Am. Dec. 426; Mower v. Watson, 11 Vt. 536, 34 Am. Dec. 704.

Perhaps the most cogent expression of the American as distinguished from the English rule is to be found in Maulsby v. Reifsnider, 69 Md. 143, 14 Atl. 505. There the court observed: "We cannot accept the absolute and unqualified privilege laid down in Munster v. Lamb. * * * We cannot agree with Brett, M. R., that in a suit against counsel for slander, the only inquiry is whether the words were spoken in a judicial proceeding, and, if so, the case must be stopped. * * * If counsel in the trial of a cause maliciously slanders a party, or witness, or any other person in regard to a matter that has no reference or relation to, or connection with, the case before the court, he is and ought to be answerable in an action by the party injured. This qualification of his privilege in no manner impairs the freedom of discussion so necessary to the proper administration of law, nor does it subject counsel to actions for slander, except in cases in which upon reason and sound public policy he ought to be held answerable."

A modern American writer of distinction, affirms in harmony with this doctrine that: "It is here generally held that the privilege of lawyers, witnesses, and parties is conditional upon the pertinence of the matter to the question on hand and its materiality." 1 Street, Liability, 308, and cases cited. See, also, 25 Cyc. 377, and cases cited.

Applying this rule, which we conclude to be the more rational solution of the inquiry, to the language attributed to the defendant, it becomes manifest that, conceding its truthfulness, it was intended to be entirely personal to the plaintiff, as a lawyer, and was intended to reflect upon him and his professional conduct in a case in which both the plaintiff and defendant were engaged as opposing attorneys. It consequently could have no bearing upon the question at issue, and quite clearly was irrelevant to the proper conduct of the case then before the court. The trial court left the question of the pertinency and relevancy of the language to the jury to determine, and in this we find no error under the rule to which we have adverted.

The refusal of the trial court, however, to charge the defendant's fifth request presents a legal barrier to the affirmance of this judgment. To apprehend its relevancy we must recur to the facts presented by the record. The recorder's court seemed to be redolent with a militant atmosphere far from conducive to sedate procedure under the highest ethical standards. Thus the testimony of the defendant shows that the plaintiff at the same hearing expressed himself of and concerning the defendant and his legal modus operandi as follows: "Mr. Leonard and Mr. S., being shrewd lawyers, so manipulated and coaxed their client that he committed perjury and obtained his judgment by fraud."

Therefore the defendant upon this trial insisted that, while the remarks which are the basis of this action may not be entitled to receive recognition in any logical compendium of the retort courteous, they may without question be properly classified under the classic appellation of a "tu quoque." And, if to this it be answered that in a court of law his legal status thus acquired is no answer to the plaintiff's claim for damages, his insistence is nevertheless that the jury should have had the opportunity to consider the offense in question, in conjunction with the serious accusation which provoked it, and that in the light of this provocation the offense charged to him might appear to be but the natural and indignant ebullition of a learned advocate, whose ripe experience in the trials of the forum had reached the didactic stage of the seer and yellow leaf, which entitled him to paternally admonish a neophytic junior, whose practical vision of a legal career is usually circumscribed by the buoyant and unstable perspective of the radiant hues of incipient morn.

Concededly in such a status experentia docet. Such an exalted state of mind upon the part of the defendant might be said to exclude any semblance of malice, as an animating motive, and may have supplied raison d'être upon which a jury might base an argument in mitigation of damages. The trial court declined to so view the case, and, ignoring that contention, charged that the damages to which the plaintiff might be entitled, if they accepted his view of the case, were sufficiently comprehensive to include damages of a punitive or exemplary character, dependent upon their finding the existence of actual malice. In consonance with that view the learned trial court declined to charge the request alluded to, which was as follows: "If you believe the story of the plaintiff, La Porta, and you find from the testimony that the utterances of the defendant, Leonard, in the Hoboken recorder's court were provoked by previous charges and accusations made by the plaintiff, La Porta, attacking the defendant, Leonard, then you may consider this in mitigation for damages."

The refusal to charge this request, obviously eliminated from the case all consideration by the jury of the question of provocation to which we have adverted, and which was properly a subject for their consideration, as a basis for mitigation of damages. The doctrine which requires the court to submit to the jury the question of provocation, in cases where the complaining party insists upon punitive or exemplary damages, is settled beyond controversy by the great trend of adjudication in this country.

In 8 R. C. L. 551, the rule is stated that: "Provocation may be shown in mitigation of punitive damages, even to the extent of entirely excluding recovery to compensatory damages only"—citing cases. A résumé of the doctrine and the cases will be found in a note to Mahoning Valley R. R. Co. v. De Pascale, 70 Ohio St. 179, 71 N. E. 633,

65 L. R. A. 860, 1 Ann. Cas. 896. To the same effect are 13 Cyc. 66, and cases cited, and 25 Cyc. 421, and the cases there collected.

The result is that the refusal of the trial court to charge the request under consideration necessitates the reversal of the judgment below and the issuing of a venire de novo.[39]

V. Confidential Communications

A. B. A. CANON

6. * * * The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

JEREMY BENTHAM ON THE PRIVILEGE OF CONFIDENTIAL COMMUNICATIONS OF CLIENT AND LAWYER.—Rationale of Judicial Evidence. By Jeremy Bentham. *Bentham's Works* (John Bowring's Ed.) vol. 7, pp. 473–475: When, in consult-

[39] In Rogers v. Thompson (N. J.) 99 Atl. 389 (1916), a slanderous statement made by counsel at a creditors' meeting in bankruptcy proceedings was held privileged as made in a legal proceeding. On the privilege of a lawyer from prosecution for libel or slander for statements made in judicial proceedings, see 7 Ann. Cas. 603, note. On communications between lawyer and client as privileged within the law of libel and slander, see Ann. Cas. 1912A. 479, note.

"The 'privilege' which under proper circumstances protects the attorney against an action for libel does not necessarily control in contempt proceedings. * * * Courts of record everywhere * * * strike from their files pleadings, briefs and other papers [containing scandalous matter], * * * and such rulings are not infrequently accompanied with additional reprimands, written or spoken, embodying the severest censure. Occasionally, it is also deemed necessary to impose still other penalties, such as fines or even imprisonments."—Helm, J., in People v. Berry, 17 Colo. 322, 324, 29 Pac. 904 (1892). See Ex parte Pater, 5 B. & S. 299 (1864).

So the lawyer's privilege does not protect him from suspension or disbarment for such great abuse of privilege as shows him not to be a fit and proper person to remain a member of the bar. People v. Green, 9 Colo. 506, 13 Pac. 514 (1886); In re Adriaans, 17 App. D. C. 39 (1900). As was said "per curiam" in People v. Green, 9 Colo. 506, 533, 534, 13 Pac. 514, 527 (1886): "Neither the letter nor the spirit of the attorney's privilege permits him to enter our courts and spread upon judicial records charges of a shocking and felonious character against brother attorneys, and against judges engaged in the administration of justice, upon mere rumors, coupled with facts which should, of themselves, create no suspicion of official corruption in a just and fair mind. And although, in actions of libel and slander, it has been thought wise to exempt them from liability for defamatory words, published or spoken, in the course of judicial proceedings, provided such words are material, in a disbarment proceeding the recognition of such a privilege could neither secure justice nor advance the independence of the bar. On the contrary, its inevitable tendency would be to destroy the respect due to the profession as well as to the bench, and cripple the influence and usefulness of both."

ing with a law adviser, attorney or advocate, a man has confessed his delinquency, or disclosed some fact which, if stated in court, might tend to operate in proof of it, such law adviser is not to be suffered to be examined as to any such point. The law adviser is neither to be compelled, nor so much as suffered, to betray the trust thus reposed in him. Not suffered? Why not? Oh, because to betray a trust is treachery; and an act of treachery is an immoral act. * * *

But, if such confidence, when reposed, is permitted to be violated, and if this be known (which, if such be the law, it will be), the consequence will be, that no such confidence will be reposed. Not reposed? Well: and if it be not, wherein will consist the mischief? The man by the supposition is guilty; if not, by the supposition there is nothing to betray: let the law adviser say everything he has heard, everything he can have heard from his client, the client cannot have anything to fear from it. That it will often happen that in the case supposed no such confidence will be reposed, is natural enough: the first thing the advocate or attorney will say to his client, will be—Remember that, whatever you say to me, I shall be obliged to tell, if asked about it. What, then, will be the consequence? That a guilty person will not in general be able to derive quite so much assistance from his law adviser, in the way of concerting a false defence, as he may do at present. * * *

The contract between a delinquent and his law adviser, is a contract which has for its object the enabling the delinquent to escape the punishment which is his due. With what consistency, to what end, would the law seek to enforce a contract to such an effect? Suppose a like contract between a delinquent and his jailer—a contract, the object of which shall be to enable the delinquent to escape. Does the law seek to enforce this sort of contract? No, not anywhere. But why not? It might, with as much reason as in the other case.

If the law adviser, of his own motion, the law neither commanding nor forbidding him, were to offer his testimony for the purpose of promoting the conviction of his client, the imputation of treachery would have, if not a good ground, at any rate a better, a more plausible ground. But the question is not, whether the lawyer shall thus offer his testimony; but whether the law shall command it, or authorize him, nay force him, to refuse it.

Compare the law in this case, with the law in the case of treason—misprision of treason. If, knowing of an act of treason committed, a man forbears to give information of it, such forbearance is punished, and certainly not without reason, as a high crime. In the case of the law adviser, the rule now under consideration would probably be deemed applicable to the crime of treason, as well as to all others. The law in this case finds a man in whom it protects that very species of conduct which it punishes in every other man, and that species of

conduct a mischievous one; one of which the effects cannot but be pernicious. To what end, with what consistency, can the law find out a man to receive with safety, and even under an obligation of concealment, and confidence, that pernicious confidence, which it punishes in every other man? * * *

In a case like this, it would certainly be too much to punish the law adviser as an accomplice, for lending his advice (which is his mode of assistance) to a guilty client, or for not spontaneously disclosing such lights towards the ascertainment of his guilt, as it has happened to him to collect. It might deter the lawyer from lending his assistance to an innocent person when accused, by the fear of being involved in the punishment in case of his proving guilty. But to what use, or with what consistency, forbid his disclosing any such proof of guilt, even though called upon so to do? * * *

"A counsel, solicitor, or attorney, cannot conduct the cause of his client" (it has been observed) "if he is not fully instructed in the circumstances attending it: but the client" (it is added) "could not give the instructions with safety, if the facts confided to his advocate were to be disclosed." Peake on Evidence (Ed. 1801) p. 126. Not with safety? So much the better. To what object is the whole system of penal law directed, if it be not that no man shall have it in his power to flatter himself with the hope of safety, in the event of his engaging in the commission of an act which the law, on account of its supposed mischievousness, has thought fit to prohibit? The argument employed as a reason against the compelling such disclosure, is the very argument that pleads in favour of it.

This being the professed object of the English system of law,—viz. the prevention of offences,—is it reconcilable to the idea of wisdom or consistency, that it should lay down a rule, the effect of which, without contributing to the protection of the innocent, or preventing vexation in any other shape, is purely and simply to counteract its own designs?[40] * * *

[40] "I have recently heard an arraignment of our present judicial system in the trial of causes by a prominent, able and experienced member of the Boston Bar. * * * He feels that the procedure now in vogue authorizes and in fact requires counsel to withhold facts from the court which would help the cause of justice if they were brought out by his own statement. To remedy this he suggests that all counsel should be compelled to disclose any facts communicated to them by their clients which would require a decision of the case against the clients. * * * To require the counsel to disclose the confidential communications of his client to the very court and jury which are to pass on the issue which he is making, would end forever the possibility of any useful relation between lawyer and client. It is essential for the proper presentation of the client's cause that he should be able to talk freely with his counsel without fear of disclosure. * * * The useful function of lawyers is not only to conduct litigation, but to avoid it, where possible, by advising settlement or withholding suit. Thus, any rule that interfered with the complete disclosure of the client's inmost thoughts on the issue he presents would seriously obstruct the peace that is gained for society by the compromises which the counsel is able to advise."—William Howard Taft,

TAYLOR v. BLACKLOW.

(Court of Common Pleas, 1836. 3 Bing. N. C. 235.)

On demurrer to defendant's plea the facts shown by the pleadings were: The defendant, an attorney, was employed by plaintiff to raise money for him on mortgage. The plaintiff delivered to the defendant the abstracts of title. The defendant, as the plaintiff knew, had a client to whom he applied for the loan and that client was entitled to take advantage at law, but not in equity, of a defect in the plaintiff's title which the defendant discovered. The defendant disclosed to this other client the defect in the plaintiff's title and that client employed the defendant to bring actions to try the title, actions of trespass and other actions. The plaintiff was forced to get an injunction from the Court of Exchequer and because his adversary became insolvent was unable to get satisfaction from him for costs and damages. The plaintiff therefore brought this action for £2000. damages alleging that the whole damage to him was due to the defendant's breach of confidential communications.*

TINDAL, C. J. * * * It is alleged to have been his [defendant's] duty not voluntarily or unnecessarily to divulge the said defect in the plaintiff's title: and it was most clearly his duty not to disclose any defect in his client's title. Instead of faithfully discharging that duty, when his client's deeds are put into his hands for the purpose of raising money he discloses defects of title to the very person who was about to lend. It is argued that he was also employed on the part of the proposed lender, and was actuated by a sense of justice towards him. There may be persons also who have not sufficient firmness to take a decided course under such circumstances; but if the defendant thought he had a conflicting duty towards his several employers, it would have been an easy course to deliver back the deeds to the plaintiff, and to consider his lips sealed with a sacred silence as to the whole of their contents: however, he thought proper to disclose the defects in his client's title to one who thereupon brought actions and filed bills in Chancery against the plaintiff. In consequence of this disclosure, the plaintiff sustained the temporal injury of the costs and expenses of those suits. There has been therefore a breach of duty on the part of the defendant, attended with temporal injury on the part of the plaintiff, and there is no ground for saying that an action does not lie for such an injury, incurred by a breach of duty. If there were any doubt, an answer would be found in the authority cited from Comyn's Digest. It is urged that the plaintiff was himself aware that the defendant was employed also by the party to whom he made the disclosures. I

Ethics in Service (1915) pp. 31, 32. Cf. Lord Chancellor Brougham in Greenough v. Gaskell, 1 Myl. & K. 98, 103 (1833).

* This statement of facts is substituted for that in the original report.

cannot see how that circumstance affords an answer to this action, unless it be considered in the light of a waiver; but as the plaintiff could never have expected that defects in his title should be disclosed by his own attorney, his knowledge of the defendant's intercourse with the other party cannot be taken to operate as a waiver.

GASELEE, J. It is not important to the decision of this cause, whether the communication which the defendant made was one which he would have been authorized to withhold in a witness-box or not; for the first duty of an attorney is to keep the secrets of his client. * * *

VAUGHAN, J. I am of the said opinion. There can be no doubt the defendant has been guilty of a gross breach of a great moral duty; and the law is never better employed than in enforcing the observance of moral duties. I think however, that the contents of these deeds were a privileged communication, which the defendant could not have been compelled to disclose. * * *

Judgment for plaintiff.[41]

SOLICITOR USING FOR CLIENT'S BENEFIT INFORMATION ACQUIRED AS CLERK TO ANOTHER SOLICITOR. Opinion of the Council of the Law Society, *Law, Practice and Usage in the Solicitor's Profession* (1909) p. 307: 1014. A question was asked whether a solicitor is justified in using for the benefit of a client, in carrying out that client's instructions, information which it is to the client's interest to know, but which had been acquired by the solicitor in a quasi-confidential capacity—such as when he was

[41] In Jenkinson v. State, 5 Blackf. (Ind.) 465, 466 (1840), Blackford, J., said: "The policy of the law requires that, when an attorney is consulted on business within the scope of his profession, the communications on the subject between him and his client should be treated as strictly confidential. It is not material whether the evidence relate to what was said by the attorney or what was said by the client, in their private conversation on the business in which the attorney was professionally employed. The statements of each to the other, in such cases, must be considered as privileged communications; and the attorney should neither be required nor permitted, by any judicial tribunal, to divulge them against his client, if the latter object to the evidence."

The rule about confidential communications "is confined strictly to communications to members of the legal profession, as barristers and counsellors, attorneys and solicitors (Wilson v. Rastall, 4 T. R. 759 [1792]), and those whose intervention is necessary to secure and facilitate the communication between attorney and client as interpreters (Du Barre v. Lisette, Peake's Rep. 78 [1791]), agents (Perkins v. Hawkshaw, 2 Stark. Rep. 239 [1817]), and attorneys' clerks (Taylor v. Foster, 2 Carr. & P. 195 [1825])."—Shaw, C. J., in Foster v. Hall, 12 Pick. 89, 93, 22 Am. Dec. 400 (1831).

On privileged communications, see Ann. Cas. 1913A, 3, note. That communications to a lawyer acting for several clients jointly are not privileged as between them, but are privileged as between any of them and third persons, see 11 Ann. Cas. 877, note. On the privilege of a lawyer against revealing the identity of his client, see L. R. A. 1916C, 602, note.

On communications between lawyer and client as privileged within the law of libel and slander, see Ann. Cas. 1912A, 479, note.

clerk to another solicitor, before he himself started in practice. The facts were as follows: The solicitor's client owned a building estate on one side of a road. The land on the other side belonged to persons who were commencing to erect shops, which, in the client's opinion, would spoil his property, and he instructed the solicitor to do what he could to prevent shops being erected, he having already lost a tenant on account of the proposed erections. Prior to starting in practice the solicitor was a salaried conveyancing clerk to a firm of solicitors representing the estate on part of which the shops were being erected, and he ascertained the existence of a mutual deed of covenant between a former vendor and certain purchasers of part of land prohibiting the erection of shops on any part of the estate. On account of the prohibition the purchase was not completed.

The Council expressed the opinion that, inasmuch as the existence of the covenant against building shops was disclosed by an intending vendor to the employers' client as an intending purchaser, and therefore was not information acquired by the solicitor's late employers in confidence, but in relation to an outsider's affair, the solicitor was justified in using the information for the benefit of his client. Opinion of Council, July 26, 1888.

UTILIZING KNOWLEDGE DERIVED FROM LEGAL EMPLOYMENT TO HAVE CLIENT DECLARED MENTALLY INCOMPETENT. N. Y. Committee. *Question 88:* An attorney discovers through his professional relations with a client facts which convince him that his client is mentally incompetent and is about to bring financial ruin upon himself and family through his improvident and reckless business transactions.

1. Can the attorney properly accept employment from the client's wife to have him legally decreed incompetent?

2. If the answer be in the affirmative, can the attorney properly utilize in behalf of the wife's application the knowledge of the husband's affairs and acts which he acquired during his employment by the husband?

3. Can the attorney in legal proceedings instituted by the wife, to have her husband legally declared incompetent, testify concerning said affairs and transactions?

Would it make any difference in the answers, or any of them, if it were assumed that the attorney believed or even knew at the time of his employment by the husband that he was mentally incompetent, and accepted the employment with the knowledge and consent of the wife in the belief that he could thereby so advise the incompetent as to prevent loss through his ill-advised and reckless conduct?

Answer: In the opinion of the Committee, subdivision 1 and subdivision 2 of the question should be answered in the affirmative, and

subdivision 3 of the question should not be answered by this Committee, because it presents a pure question of law. (See sections 835, 836, Code Civ. Proc., and In re Cunnion, 201 N. Y. 123 [94 N. E. 648, Ann. Cas. 1912A, 834].) The Committee is also of the opinion that the last paragraph of the question should be answered in the negative.

In making the above answer, the Committee has assumed that the lawyer in question is acting from good motives in the way that he deems best for the true interests of the supposed incompetent, and that he has no reasonable doubt as to his client's incompetency.

DISCLOSURE OF THE WILL OF A CLIENT BECOMING OF UNSOUND MIND. Opinion of the Council of the Law Society, *Law, Practice and Usage in the Solicitor's Profession* (1909) p. 305: 1007. A solicitor prepared his client's will, and it remained in his custody after signature. The testator some time afterwards became incapable of attending to business, and his friends wished to know the provisions of the will. The solicitor had given up practice, and inquired whether there would be any objection to his handing the will to the solicitor who usually transacted the business of the testator's family.

The Council expressed the opinion that it was the solicitor's duty to retain the will until he had the authority of the testator to part with it, and that he ought not to allow any person to make himself acquainted with the contents of it. Opinion of Council, May 19, 1871.[42]

ALTERATION OF WILL—REVOCATION OF APPOINTMENT OF A SOLICITOR AS EXECUTOR. Opinion of the Council of the Law Society, *Law, Practice and Usage in the Solicitor's Profession* (1909) p. 306: 1010. A gentleman instructed a solicitor to alter his will, the chief alteration being the appointment of the solicitor's father as one executor in the place of a solicitor who had hitherto acted for the testator. The new solicitor did not know the reason of the change. Knowing the former solicitor well, the new solicitor felt a great delicacy in the matter, as he knew that the testator wished for absolute secrecy, and thought it his duty not to divulge a word. After the death of the testator great blame was attached to the new solicitor for not having told the former solicitor.

The Council expressed the opinion that both professional propriety

[42] On communications between lawyer and client in regard to testamentary matters as privileged, see 14 Ann. Cas. 601, note; Ann. Cas. 1912A, 839, note; Ann. Cas. 1916C, 1073, note.

and the solicitor's duty to his client bound him to keep the matter a secret. Opinion of Council, July 14, 1884.

DUTY OF MANAGING CLERK OF A LAWYER WHEN THE CLERK DISCOVERS EMPLOYER'S FLAGRANT WRONG-DOING. N. Y. Committee. *Question 78:* The following questions are submitted by a lawyer who, while managing clerk in the employ of another lawyer, learned of the latter's irregularities as specified below. The inquirer has severed his relations with said former employer on account of the said irregularities, but he now inquires whether it is his professional duty to take any other steps in respect to the matter, and, if so, what?

(a) While in the said employ the inquirer learned by virtue of his employment that his employer, acting in behalf of a plaintiff in a negligence action, had received from a casualty company which appeared for the unsuccessful defendant, a check in full payment of a judgment for damages, and costs rendered in behalf of the plaintiff, the employer's client, but the employer (as the inquirer is advised by the plaintiff) has not acquainted the plaintiff with the fact of such payment or accounted to him for the amount thereof, but has falsely informed his client that an appeal from said judgment is pending and has retained the money without the knowledge of the client.

(b) The employer was retained to prosecute an action for breach of promise of marriage; the inquirer learned from an affidavit procured by him at his employer's suggestion, detailed facts which if disclosed would demonstrate that the plaintiff has no cause of action, and particularly when the alleged promise was made the plaintiff knew that the defendant was a married man and legally unable to carry out his promise. The employer had full cognizance of the contents of the affidavit but nevertheless directed the inquirer to serve a summons upon the defendant, and the defendant was accordingly served by direction of the inquirer.

(c) While in the said employment the inquirer learned of the misapplication by the employer of funds entrusted to him by a client for investment, and the employer falsely represented to his client that the investment had been made as directed and falsely persuaded the client to delay foreclosure on the pretense that the maker of the obligation, in which he falsely pretended to have made the investment, is an honest but poor man.

Answer: This committee never expresses an opinion as to whether a given state of facts is ground for disciplining an attorney. To do so would trench upon the jurisdiction of another committee of this Association. This committee therefore treats Question No. 78 as presenting but one inquiry, viz., whether it is the professional duty of a lawyer to inform against his former employer, also a lawyer, when

knowledge of the employer's flagrant wrongdoing has come to the employé in the course of the latter's employment as managing clerk —that is, in a confidential capacity. In the opinion of the committee, an employé, being a lawyer, owes a higher duty to his profession at large than to a dishonest employer, and therefore should not only leave the employment, but lay all the facts before the proper committee of a bar association. (See No. 29, Canons of Ethics of the American Bar Association.)

WILLIAMS v. QUEBRADA RAILWAY, LAND & COPPER CO.

(Chancery Division, [1895]. 2 Ch. 751.)

This was an action by John Williams on behalf of himself and all others the holders of debentures and debenture stock in the Quebrada Railway, Land & Copper Company, Limited, to enforce their securities.

In 1883 and 1885 the directors of the company passed resolutions for the creation and issue of 6 per cent. debenture stock constituting a first charge, by way of a floating security, upon the undertaking and property of the company, and the stock was issued accordingly.

In 1886 the company with the consent of the debenture stockholders, created and issued 6 per cent. "prior mortgage debentures," charged, also by way of a floating security, in priority to the debenture stock, upon the company's undertaking and property.

The company made default in payment of the interest due on both the debentures and debenture stock on September 1, 1894, and on September 3 this action was commenced. The plaintiff delivered a statement of claim alleging that on February 22, 1894, an agreement was entered into between the company and Messrs. Matheson & Co., the sole consignees and agents for the sale of the company's ores, whereby the company purported (without disclosing the existing charges) to charge all their property with a large sum of money alleged to be due from them to Messrs. Matheson & Co. in the agency transactions. With reference to that agreement paragraph 22 of the statement of claim alleged as follows: "When the last hereinbefore stated agreement was entered into the company was insolvent, and its stoppage was, to the knowledge of the parties, imminent, and the charge created by the said agreement was not given in the ordinary course of business or for the purpose of enabling the company to continue its business, but to defeat and delay the holders of debentures and debenture stock, and the said agreement is utterly void, or, in the alternative, the charge thereby created is subject, as to all the property therein comprised, to both the debentures and the debenture stock."

Messrs. Matheson & Co. were joined with the company as defendants to the action, which claimed declarations to establish the priority of the debentures and debenture stock over Messrs. Matheson & Co.'s

agreement of charge; also to have both classes of debenture securities enforced; and to have the agreement set aside.

In October and November, 1894, resolutions were passed by the company for a voluntary winding-up and liquidators were appointed. In the course of the proceedings the liquidators filed an affidavit of documents, but as to a portion of them paragraph 2 of the affidavit stated as follows: "The said defendant company object to produce for inspection certain portions of the minute and agenda books comprised in the first part of the first schedule hereto, on the ground that they contain matters not relevant to the matters in question in this action, and also such other parts of the said minute and agenda books which contain copies of or extracts from counsel's opinions and the defendant company's solicitor's advice on matters on which the defendant company required and obtained opinions and advice. The said defendant company also object to produce the documents comprised in the second part of the said first schedule, on the ground that, other than so far as they consist of such parts of the minute and agenda books as last aforesaid, they are papers which have at different periods been submitted to counsel to advise the company upon their affairs before action brought, and also comprise papers submitted to counsel during the progress of this action for the purpose of his advising the defendant company and their solicitors for the purpose of obtaining their advice, and are therefore privileged."

The plaintiff then took out this summons for the production and inspection of the documents mentioned in paragraph 2 of the liquidator's affidavit.

KEKEWICH, J. This case is, in my opinion, one of unusual gravity and importance. It is of the highest importance, in the first place, that the rule as to privilege of protection from production to an opponent of those communications which pass between a litigant, or an expectant or possible litigant, and his solicitor should not be in any way departed from. However hardly the rule may operate in some cases, long experience has shewn that it is essential to the due administration of justice that the privilege should be upheld. On the other hand, where there is anything of an underhand nature or approaching to fraud, especially in commercial matters, where there should be the veriest good faith, the whole transaction should be ripped up and disclosed in all its nakedness to the light of the Court.

It is said this case is not one of fraud. Shortly it is this. The plaintiff and those he represents are the holders of debentures and debenture stock of the defendant company. They say: "We have a first charge on the property of the company, and our first charge is obstructed by another charge given by the defendant company in favour of their agents, but really with the intention to defeat and delay our security. Ours is a floating security, not to come into effect—that is, not to come into activity—until certain circumstances take place, including a winding-up of the company." Then it is alleged that the

company was insolvent, and that they found it useless for them to continue to carry on business and they had to stop, but that in order to prevent for a time this inevitable result they gave a charge in favour of their agents, and, as the plaintiff alleges, they did it in such a way as to defeat the holders of first debentures. That is what I understand the plaintiff's case to be, and it is said that is not a charge of fraud. It is difficult to say it is not commercial dishonesty. It is, in my opinion, commercial dishonesty of the very worst type; and that is fraud.

Then the company, which is now in liquidation, makes, by its liquidators, an affidavit of documents, including minutebooks, and it appears that the company have in their minutebooks, not only a minute of a resolution passed by the board of directors as to this charge, but copies of or extracts from the opinions of counsel and advice of the company's solicitors with reference to this charge; and they say they are not bound to produce these because they are confidential communications between them and their legal advisers which ought to be protected from production. It is obvious that, if this objection holds good, justice may be defeated; but it may be right that justice in this case should be defeated in order to uphold the general administration of justice. But is it right that justice should be defeated in this case? It is said that, this being a case of fraud, it is taken out of the ordinary rule, and that no protection can be claimed, on the ground of privilege, in a case which is one of fraud. The case of Reg. v. Cox, 14 Q. B. D. 153, is referred to, and there, after full argument, the judgment of the Court for Crown Cases Reserved, consisting of Lord Coleridge, C. J., and Hawkins, Stephen, Watkin Williams, and Mathew, JJ., was delivered by Stephen, J. It was a considered judgment going into the whole law upon the subject: and it goes the length of saying that it is a principle established by many cases that, where there is a charge of fraud, the protection of confidential communications between a client and his solicitor on the ground of privilege is not allowed.[43] But it is argued that that was a criminal case, and that in

[43] In Queen v. Cox, 14 Q. B..D. 153, 167 (1884), Stephen, J., said: "A communication in furtherance of an illegal purpose does not 'come into the ordinary scope of professional employment.' A single illustration will make this plain. It is part of the business of a solicitor to draw wills. Suppose a person, personating some one else, instructs a solicitor to draw a will in the name of the supposed testator, executes it in the name of the supposed testator, gives the solicitor his fee, and takes away the will. It would be monstrous to say that the solicitor was employed in the 'ordinary scope of professional employment.' He in such a case is made an unconscious instrument in the commission of a crime."

Again, in reference to the remark of Lord Cranworth, then Vice Chancellor, in Follett v. Jefferyes, 1 Sim. (N. S.) 1, 17 (1850), that "no court can permit it to be said that the contriving of a fraud can form part of the professional occupation of an attorney," Stephen, J., said: "It is true that this is only a dictum, but it shews decisively how Lord Cranworth understood the rule on this subject, and this suggests another observation. In order that the rule may apply there must be both professional confidence and professional employment; but if the client has a criminal object in view in his communica-

civil cases the rule has been laid down only where there is something more than a charge of fraud against the defendant—where, for instance, the solicitor or attorney to the defendant has himself been a party to the fraud; and, no doubt, there are many passages to that effect to be found in the authorities, besides the passage that has been read from Mr. Bray's exceedingly useful book on Discovery; but I do not find that passage upheld by the judgment in Reg. v. Cox, 14 Q. B. D. 153. No doubt, also, the case of Reg. v. Orton, cited 14 Q. B. D. 170, 171, cited in that case, in which Cockburn, C. J., gave an elaborate judgment, was a criminal case, but the judgment in Reg. v. Cox, 14 Q. B. D. 153, is based on general principles, and does not

tions with his solicitor one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is avowed, the client does not consult his adviser professionally, because it cannot be the solicitor's business to further any criminal object. If the client does not avow his object, he reposes no confidence, for the state of facts which is the foundation of the supposed confidence does not exist. The solicitor's advice is obtained by fraud. To return to our former illustration. If A., proposing to forge a will, says to B., a solicitor, 'Forge for me a will in the name of C.,' he asks B. to commit a crime, which is not B.'s professional business. If he says, 'I am C., and I want you to make my will for me,' he reposes no confidence in B., but on the contrary commits a gross fraud upon him." 14 Q. B. D. at pages 168, 169.

Stephen, J., further quoted the language of Bovill, C. J., in the case of Tichborne v. Lushington, Shorthand Notes, p. 5211, as follows: "I believe the law is, and properly is, that if a party consults an attorney and obtains advice for what afterwards turns out to be the commission of a crime or a fraud, that party so consulting the attorney has no privilege whatever to close the lips of the attorney from stating the truth. Indeed, if any such privilege should he contended for, or existed, it would work most grievous hardship on the attorney, who, after he had been consulted upon what subsequently appeared to be a manifest crime and fraud, would have his lips closed, and might place him in a very serious position of being suspected to be a party to the fraud and without his having an opportunity of exculpating himself."

In Russell v. Jackson, 9 Hare, 387, 392, 393 (1851), Vice Chancellor Turner said: "Where a solicitor is party to a fraud, no privilege attaches to the communication with him upon the subject because the contriving of a fraud is no part of his duty as solicitor; and I think it can as little be said that it is part of the duty of a solicitor to advise his client as to the means of evading the law." The last part of the statement is exemplified in Queen v. Bullevant, [1900] 2 Q. B. 163.

"If the client consults the lawyer with reference to the perpetration of a crime, and they co-operate in effecting it, there is no privilege, for it is no part of an attorney's duty to assist in crime—he ceases to be counsel and becomes a criminal. If he refuses to be a party to the act, still there is no privilege, because he cannot properly be consulted professionally for advice to aid in the perpetration of a crime. In the case of a fraud, if it is effected by the co-operation of the attorney, it falls within the rule as to crime, for their consultation to carry it out is a conspiracy which, on its accomplishment by the commission of the overt act, becomes criminal and an indictable offence."—Green, V. C., in Matthews v. Hoagland, 48 N. J. Eq. 455, 469, 470, 21 Atl. 1054, 1059 (1891).

"Professional communications are not privileged when such communications are for an unlawful purpose, having for their object the commission of a crime. They then partake of the nature of a conspiracy or attempted conspiracy, and it is not only lawful to divulge such communications, but under certain circumstances it might become the duty of the attorney to do so."—Champlin, J., in People v. Van Alstine, 57 Mich. 69, 79, 23 N. W. 594, 598 (1885).

draw any distinction between a case of crime and a case of civil fraud; and certainly, in Reg. v. Orton, cited 14 Q. B. D. 170, 171, Cockburn, C. J., said nothing to lead to the conclusion that to oust the privilege the attorney must be a party to the fraud. A fraudulent person intending to commit a fraud would take great care not to let his solicitor know of the fraud if he could possibly avoid doing so: his object would be to deceive his solicitor as well as everyone else. In such a case, as Cockburn, C. J., said, "If the client had a dishonest purpose in view in the communication he makes to his attorney with the view of making the attorney the innocent instrument of carrying out the fraud, it deprives the communication of the privilege." If, in such a case as that, privilege attached to the communication, justice would be very easily defeated.

In my opinion, the observations of Stephen, J., apply to a case where the solicitor to the party charged with fraud is not himself charged with being a party to the fraud. It appears to me that the case of Reg. v. Cox, 14 Q. B. D. 153, is applicable to civil as well as criminal cases. In In re Postlethwaite, 35 Ch. D. 722, where Reg. v. Cox, 14 Q. B. D. 153, was considered, North, J., refers to the judgments of Lord Cranworth in Follett v. Jefferyes, 1 Sim. (N. S.) 3, and of Turner, V. C., in Russell v. Jackson, 9 Hare, 387, and says (35 Ch. D. 726): "Both those cases are of very high authority, and they both received the approval of the full Court for Crown Cases Reserved in Reg. v. Cox, 14 Q. B. D. 153. It seems to me, therefore, that if the case alleged by the statement of claim be true, there can be no professional privilege for the documents in question."

I was extremely reluctant to order the production of these documents without knowing something about them. It might be that, after all, privilege had not been aptly claimed, or I might inadvertently and unfairly to the defendants make them produce a number of documents which could only be used for the purpose of harassing them, and might have no direct bearing on the matters in question; and therefore I endeavoured to fall back upon the rules.

Sub-rule 2 of rule 19A of Order XXXI says this: "Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court or a judge to inspect the document for the purpose of deciding as to the validity of the claim of privilege." The old practice that existed long before the Judicature Acts on the Common Law side was always for the judge to take the documents and determine for himself whether they should be produced or not. That was occasionally done also on the Equity side. I remember one case in which an important document was produced to the Master of the Rolls in order that he might say whether it ought to be produced to the other side or not; and I also know, of my own experience, that the late Sir James Hannen always insisted on seeing documents in Probate actions. My difficulty was whether I could insist on seeing the documents in question here, because the rule says

"for the purpose of deciding as to the validity of the claim of privilege," and I had already made up my mind that the claim of privilege was invalid. I wished to see them because I wished to stop, if I could, the production of useless documents the production of which would only harass and do no good, but would only cause trouble and costs. Mr. Rowden assented to my seeing them. I have seen them, and I have come to the conclusion that the plaintiff's counsel must have an opportunity of looking at them. That they are relevant is perfectly clear to my mind, but whether they support the plaintiff's charge of fraud I will not say. I ought not to express any decided opinion whether they do or do not, but I do say that they require the closest investigation on behalf of the plaintiff. Therefore there must be an order in the usual form for the production and inspection of these documents, and the defendants, having been unsuccessful, must pay the costs of this application in any event.[44]

[44] Communications in regard to an executed fraudulent transaction are privileged. Hartness v. Brown, 21 Wash. 655, 59 Pac. 491 (1899); Alexander v. United States, 138 U. S. 353, 11 Sup. Ct. 350, 34 L. Ed. 954 (1891). In the former case, at pages 667, 668, of 21 Wash., at page 494 of 59 Pac., Reavis, J., for the court, said: "The authorities usually state that this privilege is for the benefit of the client, and that he alone can waive it. This is unquestionably correct. But, as observed in Bacon v. Frisbie, supra [80 N. Y. 394, 36 Am. Rep. 627 (1880)], the objection can be made by any one against whom the evidence is offered, in the interest of sound public policy."

"The late Mr. Serjeant Hullock I knew well. * * * He was once concerned in a cause of great importance, and was instructed not to produce a certain deed unless it was absolutely necessary. Either from forgetfulness, or from a desire to terminate the matter at once, Hullock, early in the cause, produced the deed which upon examination, appeared to have been forged by the client's attorney. Mr. Justice Bayley, who was trying the cause, desired the deed to be impounded, in order that it might become the subject of a prosecution. Before this could be done, Mr. Hullock said he wished to inspect it; and on its being handed to him, returned it to his bag. The judge remonstrated, but in vain. 'No earthly power,' said Mr. Hullock, 'shall induce me to surrender it. I have incautiously put a man's life in peril; and though I have acted to the best of my discretion, I should never be happy again should a fatal end ensue.' The judge still continued to remonstrate, but declined to act until he had consulted the other judge. The consultation came too late; the deed was in the meantime destroyed, and the rascally attorney escaped. Too much praise, however, cannot be given to the honest and intrepid advocate."—Jay, quoted in Edward Foss, *Memories of Westminster Hall* (1874) Vol. 1, pages 170, 171.

"It not infrequently happens that deeds, contracts, or other written instruments may be delivered by a client to an attorney under such circumstances that the attorney cannot be compelled or permitted to produce the same in evidence against his client at the demand of an adversary party. In this class of cases the deed or other written instrument is not itself privileged. It is merely the possession of the attorney that is protected. As he received the instrument by reason of the confidential relation of client and attorney, he cannot be compelled to yield up such possession at the demand of another, nor to reveal the contents of the paper. In such cases, however, it is open to the other party to prove, by any other competent evidence, the contents of the paper, because the same are not, in and of themselves, privileged. The decisions in this class of cases do not touch the principle which is involved in the matter of confidential communications, whether written or oral, passing between client and counsel. In the latter instance, the privilege attaches to the communication itself. In order that there may be perfect confidence

A STATE'S ATTORNEY'S PROBLEM AS TO CONFIDENTIAL COMMUNICATIONS

My Dear Mr. ———:

The State's Attorney of ——— County, Illinois, Mr. X——, came in our office this afternoon in an effort to solve a problem that is puzzling him. He has a melodramatic case coming up for trial Tuesday, the facts of which are so unusual and the questions of evidence so complicated that I am taking the liberty of referring them to you.

Mr. X—— in his private practice represented the husband in a divorce case and a suit for alienation of his wife's affections, and in said capacity as attorney received from his client certain letters, which he found concealed in his house purporting to be written to his wife by her lover, and also a statement obtained by the husband signed by the wife in which she confesses to having had illicit relations with said lover.

Six months later X—— received evidence that his client was guilty of the crime of dynamiting the home of the alleged lover. (By this time the client had become reconciled to his wife.) In his official capacity as State's Attorney, he indicts both husband and wife, and their hired man for the crime, and withdraws as counsel for the husband. The letters and statement remain in his possession and are important evidence of motive since the only evidence in the case is circumstantial.

Attorneys for defense demand return of papers. The lover is head of a family and a prominent citizen and denies having written the letters.

Query: (1) Must said X—— as State's Attorney surrender the papers in question?

(2) If so, is there any indirect method of introducing them as evidence, assuming their authenticity can be proved?

(3) In this conflict of ethics, which duty should prevail—that owing to his client or that one to the Public arising by reason of his oath of office?

established between client and counsel, and upon considerations of enlightened public policy, the rule has been established that the client may freely communicate to his counsel all facts connected with the subject out of which grows the relation in question, and that the communication thus confidentially made cannot be used in evidence against him, unless he himself, by some unequivocal action on his part, deprives the communication of its privileged character, and thereby renders it competent evidence against himself. To fairly carry out the real purpose of the rule, it must be held that privileged communications are, in and of themselves, incompetent, regardless of the mere manner in which it is sought to put them in evidence."—Shiras, J., in Liggett v. Glenn, 51 Fed. 381, 395, 396, 2 C. C. A. 286, 300 (1892).

On requiring a lawyer to produce papers or documents belonging to his client as a violation of privilege, see 48 L. R. A. (N. S.) 334, note.

(4) Would it be essential to have a special State's Attorney appointed to prosecute the case?

Very sincerely yours, [Signed] Y———.

DISCLOSURE OF INFORMATION TO THE QUEEN'S PROCTOR. Opinion of the Council of the Law Society, *Law, Practice and Usage in the Solicitor's Profession* (1909) p. 288: 941. A solicitor, in his professional capacity, had obtained from a client information which, if disclosed to the Queen's Proctor, would, in all probability, prevent a miscarriage of justice, and inquired whether he ought to disclose it as an officer of the Court.

The Council expressed the opinion that it is the duty of a solicitor not to disclose secrets confided to him by his client. Opinion of Council, January 12, 1894.

LAWYER UTILIZING CONFIDENTIAL COMMUNICATIONS FOR HIS OWN BENEFIT. N. Y. Committee. *Question 44:* An attorney, in the course of representing a client in certain specific matters, is informed by the client that certain real estate is held by a third person for him (the client) in the third person's name, the property having been transferred by the client to the name of the third person for the purpose of avoiding a judgment, that deed being placed on record, the client, however, having taken back a deed from the third person to himself, this deed remaining off record and in the client's possession. The information is given to the attorney in the course of a general discussion, and entirely disconnected from any matter in which counsel's service or advice had been given.

The client afterward fails to pay the attorney for the services rendered. Suit follows and judgment is recovered by the attorney. Execution is issued and returned unsatisfied. It appears then that the collection of the judgment, and therefore compensation to the attorney for his services, will be impossible unless he is permitted to proceed after the real estate in question and permitted to show that the same really belongs to the debtor client.

1. Would it be improper for the attorney, in enforcing his claim for compensation against his client by legal process, to attempt to reach his client's interest in the real property, thus necessarily disclosing in the proceedings, and utilizing for his own benefit, his client's statement to him, collection otherwise being impossible?

2. In legal proceedings for the enforcement of the claim, can the attorney properly call upon another attorney, who prepared and took the acknowledgments to the deeds of conveyance and reconveyance, to testify respecting the transaction?

Answer: In the opinion of the committee, to preserve inviolate his client's confidence is a fundamental ethical rule of our profession, binding upon every lawyer. This rule is now embodied in our New York Code of Civil Procedure, section 835, and has been rigidly applied, but with certain apparent exceptions. With such possible exceptions in mind, the majority of the committee is still of opinion that the attorney should not, in the case submitted, utilize for his own benefit the confidential statements of his client; and it would therefore answer Query No. 1 in the affirmative, and Query No. 2 in the negative.

LAWYER'S DUTY ON COMMUNICATION OF THREATS. N. Y. Committee. *Question 13:* "A lawyer is consulted by a client about an alleged claim of the client, and the client, upon being advised that the claim is, in the opinion of the lawyer, unfounded or not enforcible, then so conducts himself that the lawyer concludes that he has reasonable ground for believing that his client, disappointed at the advice, will commit acts of violence against a member of his family against whom the disappointed client asserted his fancied claim, and the attorney knows that the disappointed client has in the past carried out similar threats against the same individual, and the attorney concludes that the client intends to carry out his renewed threats, and the attorney knows the person threatened, members of his family, and his counsel. Is the attorney under any professional duty which would either require him to, or preclude him from, communicating the threats, or disclosing them, or taking such steps as seem to him reasonably calculated to prevent the person who consults him from accomplishing his threatened purpose of violence?"

Answer: The Committee does not consider that the privilege of professional confidence extends to such threats. It is not, therefore in its opinion, unprofessional for the attorney to give warning.

A FALSE BILL OF ITEMS. John Brooks Leavitt, *Lawyer and Client,* in *Every-Day Ethics* (Yale University Press, 1910) pp. 49–51: A couple of horses had been sent by their owner to New York for sale and placed at a certain livery stable. They were not sold for a year or more. The bill for their keep had mounted up and when the liveryman sold them he claimed that the proceeds of sale were not enough to pay his bill and brought suit for the difference. His lawyer fell ill and I was brought into the case. The defendant's attorney served on me a demand for a bill of items showing how much each horse had been sold for, the date of sales and the names and addresses of the purchasers. My client asked me if he was required to give the in-

formation. I advised him that when one man sells another's property he must always tell, when asked, to whom, when and how much. He then gave me names, addresses, dates and amounts, which I gave to the defendant's counsel in a formal letter. At a consultation on the eve of the trial, my client informed me that he had not given me the true names of the purchasers. I asked him why not. He replied that he did not want the defendant to go to them. I told him that that was the very reason why the law required an agent to give such information to his principal, that he had put me in the position of having lied to the other side, and I would not have anything more to do with his case. So I gave him his papers and a consent for substitution and sent him away. I had no right to volunteer to the other side the information that my client had been guilty of this deceit, but I supposed as a matter of course that the defendant, having ascertained that the information was false, would, on learning that I had withdrawn, put two and two together and infer my reason, and would subpœna me as a witness to prove that the lie was my client's and not mine. I considered the question, and reached the conclusion that my client's statement to me not having been given to me as a secret in order to enable me to advise him, but for me to communicate it to the other party, it was not privileged. The trial came off. I was not called. Meeting the other lawyer a few days after, I asked him the result, and he replied that a verdict had been given for the plaintiff. On my saying that I had supposed he would subpœna me to prove that it was my client who had given me the names which I had transmitted, he replied that he thought that it was privileged. Of course, I could not be allowed to testify to my client's second communication to me that his first was false. But to say that a communication made to a lawyer in order to be told to some one else is privileged is absurd. No client has any right to have his lawyer lie for him. Neither has a client any right to engage a lawyer to join him in a criminal transaction, with the expectation that the law will seal the lawyer's mouth.[45]

[45] David Paul Brown tells of finding himself, as junior counsel for the defendant in an ejectment action being tried before Judge Bushrod Washington, in the predicament of having the witnesses needed to prove the possession of the defendant away from court when their testimony was wanted. After a wait and then a statement by the judge that "I believe the case must go on," Mr. Brown in desperation called as a witness one of the opposing counsel, who lived in the vicinity of the land. Mr. Brown says: "The counsel objected to being sworn, on the ground that he was not bound to disclose what might injuriously affect his client. 'Why not?' replied the judge, with more than usual fire in his eye, 'You are not asked to state anything confided to you by your client; but the relation of client and counsel does not impart to the counsel any exemption from the obligation to testify to what he independently knows; if you know, therefore, you must state who was in possession of the land. Were it otherwise, when a member of the bar has knowledge of a fact important for the case of one party, it would only be requisite for the other party to employ him, and thereby defeat the purposes of justice—let him be sworn.'"—David Paul Brown, *The Forum; or Forty Years Full Practice at the Philadelphia Bar* (1856) Vol. 1, pp. 361, 362.

DUTY OF LAWYER WHERE CLIENT ADVISED TO FILE WILL FOR PROBATE INTENDS TO CONCEAL THE WILL FOR HIS OWN GAIN. N. Y. Committee. *Question 84:* A lawyer is consulted by a client named as executor in a document purporting to be the last will and testament of a decedent, and in and by which provisions are made for the benefit of others than the person named as the executor, the executor being a stranger in blood to the decedent and the beneficiaries named in the said document being the decedent's next of kin and heirs at law. After a statement of the facts by the client the lawyer forms an opinion thereon and advises his client that it is the client's duty to file the will for probate. He subsequently learns that the client instead of following his advice intends to conceal the will and appropriate the property of the decedent. His only source of knowledge of the existence of the will is his consultation with the person named as executor in which the will was exhibited.

In the opinion of the Committee:

1. Can the lawyer properly disclose the existence of the will to those interested in its provisions, whom he believes to be otherwise ignorant of its existence and of the provisions therein for their benefit?

2. Can he properly advise the prosecuting attorney of his knowledge?

Answer: While the Committee recognizes the wide extent of the privilege accorded to communications from a client to his legal counsel, and the fact that such privilege is protected by statute (Code Civ. Proc. § 835), nevertheless it is of the opinion that such privilege ought not to be extended to the circumstances of the present case; the lawyer should unquestionably first expostulate with the executor, so that he himself may avail himself of the opportunity to disclose the existence of the will; but if such expostulation fail, then in the opinion of the Committee the attorney should make known to the interested parties the fact that there is a will in existence. Where a client consults an attorney in order to obtain his assistance in the commission of a crime, the rule of privileged communications does not apply. The duty of the attorney to the court and to society forbids the application of the rule in such a case. For like reasons we believe that where an attorney ascertains that a former client is about to commit a felony (Penal Law, § 2052 [added by Laws 1910, c. 357]), such, for example, as the concealment of a will as suggested in the present question, even though his knowledge of the contemplated felony is due to the communications previously made to him by the client, when no crime or felony was in contemplation, it is the duty of the attorney to prevent the felony if he can, by disclosing the facts to those against whom, or against whose interests, the felony is directed.

We do not believe, however, that this duty goes to the extent of

requiring him to call the matter to the attention of the prosecuting attorney, although in our opinion it would not be improper for him to do so.

UNITED STATES v. COSTEN.

(Circuit Court of the United States, District of Colorado, 1889. 38 Fed. 24.)

BREWER, J. (orally). This is a proceeding to disbar. The facts are these: The respondent was counsel for the complainant in certain litigation in this court. After acting as counsel for complainant awhile, he ceased to be thus employed, possibly by reason of a transfer of the interests on that side; and after he had ceased to act as counsel he proposes to the other side employment by it, and advises its counsel that he is in possession of facts of great importance to that side; he desires employment, but that the fact be concealed. Plainly, from the letters which he wrote, as plainly as language can express, he says to the other side: "I have acquired knowledge during my employment of facts of great importance. I am no longer employed by the complainant. I want to be employed by you, and I will put you in possession of these facts, though I do not want to be known as under your employment." The letters, whose writing is admitted, are attached to the charges presented by the committee.

Now, it is the glory of our profession that its fidelity to its client can be depended on; that a man may safely go to a lawyer and converse with him upon his rights or supposed rights in any litigation with the absolute assurance that that lawyer's tongue is tied from ever disclosing it; and any lawyer who proves false to such an obligation, and betrays or seeks to betray any information or any facts that he has attained while employed on the one side, is guilty of the grossest breach of trust. I can tolerate a great many things that a lawyer may do,—things that in and of themselves may perhaps be criticised or condemned when done in obedience to the interest or supposed interest of his own client, and when he is seeking simply to protect and uphold those interests. If he goes beyond, perhaps, the limits of propriety, I can tolerate and pass that by; but I cannot tolerate for a moment, neither can the profession, neither can the community, any disloyalty on the part of a lawyer to his client. In all things he must be true to that trust, or, failing it, he must leave the profession.

The motion for disbarment will be allowed.[46]

[46] "It has uniformly been held that facts communicated to a legal adviser are the privilege of the client, and not that of the attorney. * * * If an attorney should so far forget his professional duty as to voluntarily offer to give in testimony facts communicated to him by his client, without the express consent of the client so to do, 'a short way of preventing him would be

SECTION 4.—SUMMARY PROCEEDINGS

STRONG v. HOWE.

(Court of King's Bench, 1716. 1 Stronge, 621.)

Mr. Strong who had a mortgage on the estate of Mr. Howe, had deposited the writings in the hands of his counsel, who upon a proposal to pay the money delivered the writings to Mr. Howe's brother, who was an attorney, and took a receipt from him to re-deliver them upon demand. Mr. Howe the attorney intrusted them with the mortgagor, who immediately took up £200. and left the writings as a pledge, without the privity of his brother. And now upon motion against the attorney the court made a rule on him to re-deliver the writings at his peril, otherwise an attachment: for they said, they would oblige all attornies to perform their trust, and how hard soever this might be as between him and his brother, yet between him and Mr. Strong it stood only upon the note, by which he had engaged to return the writings in all events.[47]

Ex parte DEANE.

(Court of King's Bench, 1834. 2 Dowl. 533.)

C. Cresswell applied for a rule to shew cause why a person, who was now an attorney, should not pay over certain sums of money, and

by striking him off the roll.' Earl Cholmondeley's Case, 19 Ves. 261 [1815]." —Scott, J., in People v. Barker, 56 Ill. 299, 301 (1870).

Though the privilege is that of the client, "attorneys and clients cannot broaden the scope of the privilege, although they may narrow it, even to the point of waiving it altogether, and therefore it is unimportant that the unknown client exacted from the attorney a promise that he would keep secret whatever communications should be made. That might be a reason for the witness refusing to answer without a compulsory order of the court, but it would not and could not of itself, without the aid of the law, protect a communication."—Thomas, J., in United States v. Lee (C. C.) 107 Fed. 702, 704 (1901).

[47] See In re a Solicitor, [1907] 2 K. B. 539. In Stephens v. Hill, 10 M. & W. 28, 32, 33 (1842), Lord Abinger, C. B., said: "I believe the first case to be found of proceedings taken by the court against an attorney for something done by him in the way of his profession is to be found in a case in Strange's Reports, Strong v. Howe, 1 Stra. 621 (1725). * * * Ever since that time applications of a similar nature have been very common in all cases where an attorney in his professional capacity has received money for which, although he might be made accountable in a civil action, the court will compel him to do summary justice, without putting the client to the necessity of bringing one."

On summary proceedings, see 2 Am. St. Rep. 847, note.

furnish an account of others which he had received during his clerkship, to his late master.

PATTESON, J. He was not an attorney, it appears, at the time when he became possessed of these sums, and, therefore, the plaintiff cannot interfere summarily. You must have recourse to your action.

Rule refused.[48]

In re CARROLL.

BRICE v. CARROLL.

(Chancery Division, [1902] 2 Ch. 175.)

FARWELL, J. In my opinion this is a very bad case. The defendant Carroll being a clerk in the employment of this solicitor in 1895, received as executor of the will of the testatrix in this action a small sum of money to which the plaintiffs are now entitled. This money he handed over to his master, who had acted as his solicitor in proving the will of the testatrix, and who took it knowing it to be trust money and retained it without giving any security. As long ago as August last the money was called in. It is not forthcoming, and now this solicitor makes an affidavit in which he states that he will pay the money "in due course," whatever that may mean. The only defence to the present application is that this Court has no jurisdiction to make the order. In my opinion, the two cases that have been cited [49] sufficiently support this application, and are authorities to shew that the Court has jurisdiction to make a summary order on its officer in a case like this. I adopt the language of James, L. J., in In re Clerihew's Estate, 24 L. T. 861, where he says "it would be a shocking thing if this order could not be made." The order I make is that Mr. McIntosh do bring the money into court within fourteen days, and I also order him to pay the costs of this motion.

[48] "I think the proper rule to be that a lawyer is subject to the summary jurisdiction of the court in relation to all of his actions performed while a member of the bar, whether or not, at the time such summary jurisdiction is invoked to redress a wrong committed by him, he be an attorney or counselor in fact. If he was an attorney and counselor at law when the action complained of was done, even though he subsequently has been disbarred or has voluntarily caused his name to be stricken from the roll of attorneys and counselors, he is within the summary jurisdiction of the court in relation to such action."—Hendrick, J., in In re Burnham, 58 Misc. Rep. 576, 579, 109 N. Y. Supp. 988, 990 (1908). See Simes v. Gibbs, 1 W., W. & H. 40 (1838).

[49] In re Clerihew's Estate, 24 L. T. 860 (1871); Staniar v. Evans, 34 Ch. D. 470 (1886).

Matter of KNIGHT.

(Court of Common Pleas, 1822. 1 Bing. 91.)

Lens, Serjt., on a former day, moved for a rule calling on Knight, an attorney of this court, to shew cause why he should not pay over to one Hall, money which he had received on bills, which Hall had requested him to get discounted: Lens moved this, on affidavits which, as he said, disclosed conduct on the part of Knight, amounting perhaps to breach of good faith, and he urged, that in such a case, the Court would exercise its authority over an attorney, as being one of the ministers of the court.

But as it appeared that what was complained of had not been done in the course of any cause in which the attorney was engaged, and as no precedent was furnished for summary interference against an attorney, except where a cause was depending, the Court were unwilling to grant the rule, observing, that to procure bills to be discounted was not within the peculiar province of an attorney, and that the applicant must have recourse to the ordinary remedies which the law afforded.

Lens, however, having this day referred the Court to De Woolfe and Others v. ———, 2 Chitty's Reports, 68, and urging that the present matter had been committed to Knight, in his character of attorney, the Court granted a rule nisi.[50]

In re LANGSLOW.

(Court of Appeals of New York, 1901. 167 N. Y. 314, 60 N. E. 590.)

In the matter of the application of Mary Elizabeth Langslow, executrix of Richard D. Lewis, for an order directing an attorney to pay over certain moneys. From an order of the Appellate Division (52 App. Div. 635, 66 N. Y. Supp. 1135), affirming an order entered on the report of a referee directing such payment, the attorney appeals. Modified.

VANN, J. * * * The court had no jurisdiction, upon a summary application based upon a petition and notice of motion, to compel the appellant to pay over moneys collected by him merely as a business agent. The cases where the court has jurisdiction to thus enforce

[50] "The summary jurisdiction evidently originates in the disciplinary power which the court has over attorneys as officers of the court. The opinion seems to have been prevalent at one time that the jurisdiction extended only to attorneys employed as such in suits depending in court, to hold them to their duty in such suits; but a more liberal view has obtained, and it is now well settled that the jurisdiction extends to any matter in which an attorney has been employed by reason of his professional character."—Durfee, C. J., in Anderson v. Bosworth, 15 R. I. 443, 445, 8 Atl. 339, 341, 2 Am. St. Rep. 910 (1887). See Lynde v. Lynde, 64 N. J. Eq. 736, 745, 746, 52 Atl. 694, 58 L. R. A. 471, 97 Am. St. Rep. 692 (1902).

payment by an attorney are confined strictly to moneys collected in an official or professional capacity. If an attorney acts as a commercial agent for another, and receives money in that capacity, the remedy for nonpayment is by action only. An agent who collects money is not subject to summary process to compel the payment thereof merely because he happens to be an attorney. He cannot be punished for contempt if he retains moneys collected by him in pursuance of an ordinary contract of trade, not involving the relation of attorney and client. It is only when he receives money while acting as an officer of the court that there is jurisdiction to compel payment by order, instead of by judgment and execution. For the protection of the court and the maintenance of high character on the part of its officers, acts done by an attorney as such are carefully scrutinized, and he is held to a rigid accountability for moneys received by him by virtue of the professional relation.[51] Courts, however, do not extend such acute scrutiny to mere business relations between lawyers and laymen, such as have no connection with the office of attorney, but might exist as well if neither party to the transaction were a lawyer. For wrongs done by an attorney in his professional character he may be summarily proceeded against, but for acts done by him merely as a man of business the person aggrieved by his misconduct is left to the remedy by action, although the court, in order to protect the public, maintain the integrity of the legal profession, and protect it from the influence of a vicious member, may discipline or disbar the offender. * * *

The orders of the courts below should be modified by striking out the provision requiring payment of the amounts found due, and, as thus modified, affirmed, without costs in this court to either party.[52]

O'BRIEN, J., dissenting. * * *

[51] "The relations between a lawyer and his client are not those merely of debtor and creditor. The lawyer collects money of his client, so to speak, in trust for him, and it is the duty of the court, in upholding the character of the profession, to see that moneys so collected are paid to the client. It would be very hard, indeed it would work lasting disgrace to the profession, if, when a lawyer collects money belonging to his client, the only remedy which the client has is a suit at law against the lawyer."—Brewer, J., in Jeffries v. Laurie (C. C.) 23 Fed. 786, 790 (1885).

[52] In Matter of Niagara, Lockport & Ontario Power Co., 203 N. Y. 493, 496, 497, 97 N. E. 33, 34, 38 L. R. A. (N. S.) 207, Ann. Cas. 1913B, 234 (1911), in refusing to entertain summary proceedings because the petitioner denied that the relationship of attorney and client ever existed between it and the attorney whom it sought to compel in such proceedings to deliver up certain documents, Hiscock, J., for the court said: "The relationship of attorney and client is the very foundation of a summary proceeding such as this. The courts will not by such a proceeding enforce ordinary contractual obligations not springing out of this relationship, even though the obligor happens to be an attorney. * * * When, however, this relationship of attorney and client does exist, the courts by virtue of their inherent power and control over their own officers, and quite independent of specific statutory provision, will under proper circumstances exercise jurisdiction and summarily compel an attorney to fulfill his obligations toward his client by paying money or delivering documents which belong to him, adequate provision being made in

REX v. BENNET.

(Court of King's Bench, 1754. Sayer, 169.)

Upon a rule to show cause why the defendant, who was an attorney, should not pay his client the sum of nineteen pounds, together with the costs of this application, it appeared: that J. S. was arrested at the suit of his client for the sum of nineteen pounds, and was in custody; that the defendant had taken a security from J. S. to his client for that sum, and discharged him out of custody; and that the defendant, at the time of taking the security, knew it to be worth nothing.

The rule was made absolute.

And by RYDER, C. J. It is highly reasonable that an attorney who has misbehaved in so gross a manner should make a satisfaction to his client.[53]

BEAL v. LANGSTAFF and his bail.

(Court of Common Pleas, 1768. 2 Wilson, 371.)

The defendant's bail, and several other persons, made an affidavit that the bail entered into the recognizance at the instance and request of the defendant's attorney, who in consideration thereof promised to the bail to save them harmless, notwithstanding which promise their goods were taken in execution on a judgment upon the bail-bond for £170. and upwards; and now it was moved that the defendant's attorney might be obliged to make the bail satisfaction for the value of their goods taken; but PER CURIAM this is only a breach of a parol promise, and we cannot interfere in a summary way, here being nothing criminal, but you must bring your action; so the bail took nothing by the motion; then it was moved that the bail might have the

the latter case for satisfaction of any demands against the client for compensation and for which the attorney might have a lien on the documents."

On summary jurisdiction as dependent on the relation of lawyer and client, see 18 Ann. Cas. 115, note; Ann. Cas. 1913B, 236, note.

Summary jurisdiction will be exercised where the lawyer acted in the character of lawyer, even though petitioner was not technically his client (see Strong v. Howe, ante, p. 102), and even though he was entrusted with work which one not a lawyer could do. As was said by Abbott, C. J., in In the Matter of the Executors of Aitkin, deceased, 4 B. & Ald. 47, 49 (1820): "Where an attorney is employed in a matter wholly unconnected with his professional character, the court will not interfere in a summary way to compel him to execute faithfully the trust reposed in him. But where the employment is so connected with his professional character as to afford a presumption that his character formed the ground of his employment by the client, then the court will exercise this jurisdiction."

[53] So, where an attorney neglected to deliver a brief to counsel until after a verdict after default was taken against the client, a new trial was granted on the attorney's paying the costs "out of his own pocket."—De Roufigny v. Peale, 3 Taunt. 484 (1811); White v. Sandell, 3 Dowl. 798 (1835).

affidavit returned to them; but PER CURIAM, it has been read, and is now filed and become a record of the court, and cannot be taken off the file.

BARKER v. BUTLER.

(Court of Common Pleas, 1771. 2 W. Bl. 780.)

Hatt the plaintiff's attorney had declared in trespass, assault and false imprisonment (instead of case), for a malicious arrest and prosecution. The defendant pleaded in justification, that the arrest was made by process from the Palace Court, and nonprossed the plaintiff for want of replication. And for the costs of this nonpros. £11. 15s. 2d. the plaintiff was taken in execution. Now Davy applied to the Court for a rule on Hatt the attorney to return to the plaintiff this £11. 15s. 2d. But THE COURT refused to interpose in so summary a way to correct the mistake of an attorney, but left the plaintiff to his ordinary remedy.

PITT v. YALDEN.

(Court of King's Bench, 1767. 4 Burrows, 2060.)

Mr. Serjeant Nares and Mr. Dunning shewed cause, yesterday, "why the attorney for the plaintiff should not pay the debt and costs;" for not having declared against the defendant within two terms; by the omission whereof the defendant obtained his discharge. * * *

The point of law, they said, is fully settled, "That the term in which the arrest was made, is to be considered as one of the two terms." * * *

Lord MANSFIELD. That part of the profession which is carried on by attornies is liberal and reputable, as well as useful to the public, when they conduct themselves with honour and integrity: and they ought to be protected, where they act to the best of their skill and knowledge. But every man is liable to error: and I should be very sorry that it should be taken for granted, that an attorney is answerable for every error or mistake, and to be punished for it by being charged with the debt which he was employed to recover for his client from the person who stands indebted to him.

A counsel may mistake, as well as an attorney. Yet no one will say that a counsel who has been mistaken shall be charged with the debt. The counsel indeed is honorary in his advice, and does not demand a fee: the attorney may demand a compensation. But neither of them ought to be charged with the debt for a mistake.

Not only counsel, but judges may differ, or doubt, or take time to consider. Therefore an attorney ought not to be liable, in cases of reasonable doubt. * * *

Here, I think it is not a clear case enough for the Court to proceed in a summary way. In some cases, the Court may certainly do so: but in this case, the plaintiff ought to be left to his action.

The attornies are far from having been guilty of any gross misbehaviour. It does not appear to me, that they were grossly negligent, or grossly ignorant, or intentionally blamable: they were country-attornies; and might not, and probably did not know, that this point was settled here above. The words of the act are not so explicit as to direct them clearly: and they might act innocently.

Therefore we ought not to proceed against them in a summary way. * * *

Rule discharged, but without costs.

WINDSOR v. BROWN.

(Supreme Court of Rhode Island, 1885. 15 R. I. 182, 9 Atl. 135, 2 Am. St. Rep. 892.)

STINESS, J. The petitioner asks for an order of the court requiring the respondent, an attorney at law, to pay over a balance of money due to her upon an execution which she holds against him. It is admitted that he collected a claim for her; that, upon a disagreement between them about the amount which he was entitled to retain for services, she brought suit against him and recovered judgment; and that he has paid over to her something more than he claimed he ought to pay, but less than the amount of the judgment in her favor. As stated in Burns v. Allen, Index W. 31, it is not the province of the court, in a proceeding of this kind, to adjust accounts between counsel and client. Neither does the court undertake to collect disputed claims for clients against attorneys in whom there has been an unfortunate and misplaced confidence. Nevertheless, when an officer of the court withholds funds unconscionably, or to an amount clearly above any legal claim, the court, not undertaking to settle the exact sum that may be due, but to enforce good faith and fair dealing, will require its officer to pay so much as is beyond dispute. In such a case the question before the court is that of honesty, and the fair performance of official duty.

In Balsbaugh v. Frazer, 19 Pa. 95, Black, C. J., said: "If the client is dissatisfied with the sum retained, he may either bring suit against the attorney, or take a rule upon him. In the latter case, the court will compel immediate justice, or inflict summary punishment on the attorney, if the sum retained be such as to show a fraudulent intent. But if the answer to the rule convinces the court that it was held back in good faith, and believed not to be more than an honest compensation, the rule will be dismissed, and the client remitted to a jury trial." See, also, In re Harvey, 14 Phila. (Pa.) 287.

In the case before us, the petitioner claims that, as the amount due has been determined by suit and judgment, the balance is unlawfully detained, and should be subject to the order of the court. But this is not so. The respondent cites authority to the effect that a client, in proceeding by one process, waives the right to proceed by the other.

In Cottrell v. Finlayson, 4 How. Prac. (N. Y.) 242, the language seems to imply that, as remedies by suit and by summary process are concurrent, the election of one is a waiver of the other, because there should not be two suits to recover the same debt. If this is so, it follows that a petitioner seeking a summary order will be bound by that order as to the amount which may be left to be claimed for fees. Instead, therefore, of saying that one retention is so illegal or unjust as to call for the interference of the court, or that another retention, though possibly too large, is still within the range of reasonable and lawful dispute, the court would become the tribunal to try the question of fees, involving also questions of fact.

We do not need to go so far as to decide whether the election of one remedy is a waiver of the other. This involves the question whether an application to compel an attorney to pay over a balance which he has no claim to hold, deprives either of the parties of their right to a jury trial, as to the amount that may fairly be disputed between them. It is not clear that the disputable and the undisputable claims are one and the same debt. They certainly stand on different grounds, but there can be no question that, where a client has obtained a judgment for the whole amount due him, he has thereby waived his right to summary process; for the parties no longer stand in the simple relation to each other of counsel and client. The respondent is not before the court simply as its officer. He is the petitioner's judgment debtor. The summary jurisdiction of the court cannot be invoked when the relation of attorney and client has been changed to that of debtor and creditor. As stated in Re Davies, 15 Wkly. Rep. 46: "The money owing from Davies, which had been received by him as attorney, has been converted into a judgment debt, and no longer exists as the debt which was due from him as an attorney." [54] See, also, Bohanan v. Peterson, 9 Wend. (N. Y.) 503, where the client had taken a note from the attorney.

The petition must therefore be dismissed.[55]

[54] But see In re Grey, post, p. 110.

[55] "The practice in this state has been uniform to allow an attachment where the attorney retains money in his hands that justly belongs to his clients. That the unlawful claim is made in good faith has never been held, in our courts, to be an answer to the proceeding. In re Bleakley, 5 Paige [N. Y.] 311 [1835]."—Peckham, J., in Bowling Green Sav. Bk. v. Todd, 52 N. Y. 489, 493 (1873).

"The fact that there is a controversy as to whether the relation of client and attorney existed when the money was received does not deprive the court of jurisdiction in the summary proceeding. * * * In the summary proceeding the court has the power to adjust any set-off which the attorney may have on account of fees or other charges due to him in connection with the

BROWN v. BROWN.

(Supreme Court of Indiana, 1853. 4 Ind. 627, 58 Am. Dec. 641.)

ROACHE, J. Petition for a divorce. On the hearing of the petition it was dismissed.

The court taxed the costs of the cause against the attorney of the plaintiff, because of the unnecessary grossness and indelicacy of the petition, and of his improper deportment in reading it.

To set aside this taxation the cause is brought here.

To protect itself against gross violations of decency and decorum is a necessary incidental power of a court. They have the right to punish in this way such misconduct as is alleged in this case on the part of an attorney. It is a power to be exercised at the sound discretion of the judge, and this court can interfere only where it is shown to have abused its discretion. This is not shown in the present case. * * * The judgment is affirmed, with costs.[56]

In re GREY.

(Court of Appeal, [1892]. 2 Q. B. Div. 440.)

Appeal from the decision of a Divisional Court (Grantham and Charles, JJ.), refusing to make an order against a solicitor for payment of a sum of money within four days.

The facts were as follows: The appellant retained the solicitor to (inter alia) bring an action for goods sold and delivered on his behalf. Such action being brought, judgment therein was recovered by the appellant for the amount of £268 17s. 9d., which amount was received by the solicitor under the judgment. He claimed to retain the amount so received by him in respect of a bill of costs of greater amount delivered by him to the appellant. The appellant, however, alleged that he was not indebted in respect of the full amount of the costs claimed, on the ground that a special arrangement had been made between him and the solicitor that the latter should only charge costs out of pocket

proceeding in which he received the money in question, or as the result of any other services for which he has a lien on money of his client coming into his hands."—McClain, J., in Union Bldg. & Sav. Ass'n v. Soderquist, 115 Iowa, 695, 698, 699, 87 N. W. 433, 434 (1901).

[56] In Pittsburgh, etc., R. Co. v. Muncie, etc., Co., 166 Ind. 466, 77 N. E. 941, 9 Ann. Cas. 165 (1906), in striking a brief from the files as "offensive, impertinent and scandalous," the court said: "As a brief we cannot recognize it as a paper or part of the case, and it is our duty to protect the files of this court from becoming the permanent receptacle of such an unworthy document." In a concurring opinion Jordan, J., said: "While I fully concur in the opinion of the court in the matter herein, nevertheless striking the brief of attorney's client from the files in its effect operates more to punish the client than the attorney. In my opinion the offender should be required to purge himself of contempt."

and a commission of 5 per cent. on amounts recovered; and that, giving credit to the solicitor for such costs and commission, a balance of £156. remained due from him. The appellant brought an action against the solicitor to recover such balance. The solicitor counter-claimed the amount of his bill of costs. The appellant, in his reply, set up the special arrangement. The jury found a verdict in favour of the appellant for £156., and judgment was entered thereon. Execution by fi. fa. was issued on the judgment, but proved ineffective, the judgment debtor having two days before the trial executed a bill of sale of all his effects to secure a loan of £250. and interest. * * *

Lord ESHER, M. R. It seems to me that the true way of dealing with this case is to deal with it according to the principle which was laid down by this Court in In re Freston, 11 Q. B. D. 545, and recognized and approved of in In re Dudley, 12 Q. B. D. 44. The principle so laid down is that the Court has a punitive and disciplinary jurisdiction over solicitors, as being officers of the Court, which is exercised, not for the purpose of enforcing legal rights, but for the purpose of enforcing honourable conduct on the part of the Court's own officers. That power of the Court is quite distinct from any legal rights or remedies of the parties, and cannot, therefore, be affected by anything which affects the strict legal rights of the parties. Such was the principle laid down in the cases to which I have referred, and which were decisions of the Court of Appeal, and therefore are binding on us till overruled by the House of Lords. So, if a solicitor obtains money by process of law for his client, quite irrespective of any legal liability which may be enforced against him by the client, he is bound, in performance of his duty as a solicitor, to hand it over to the client, unless he has a valid claim against it. If he spends it, or if, still having it, he refuses to hand it over, he commits an offence as an officer of the Court, which offence has nothing to do with any legal right or remedy of the client. Here the solicitor does not deny that he received this money, but he sets up a claim in respect of it, which, if valid, would have relieved him from the charge of a breach of his duty as solicitor. It has been decided against him by a jury that he had no valid claim to a large part of it, and, if the finding of the jury, which, I think, we cannot now question, is true, it follows, from such finding, that in keeping this money he did that which was contrary to his duty as a solicitor. The client had, no doubt, a legal remedy for recovery of the money, viz., by an action for money had and received. But the two things, the breach by the solicitor of his duty as such, and the legal right of the client, are quite separate and distinct. The client had a legal right to the money, but the Court has a right to see that its own officer does not act contrary to his duty. The client here brought an action and recovered judgment for the money, which no doubt, changed the client's right. The debt has become a judgment debt, and, so far as the client's legal remedies are concerned, that alters the state of things. He can no longer sue for the original debt,

and is relegated to his remedies on the judgment; but the conduct of the solicitor has not been altered. Anything, that may have been a breach of his duty as a solicitor on his part before the judgment, remains a breach of duty after it. Whether, if after the judgment the solicitor had paid the amount, the Court would still have jurisdiction, it is immaterial in this case to consider. I believe it still would have had the same jurisdiction as before, but it would have been exercised in a different way. I think that even then the matter might have been brought before the Court by the Incorporated Law Society; and, if they thought the case a bad case, though the money had been paid, the Court could strike the solicitor off the rolls or suspend him. It was suggested that the right of the client has been altered, and that there are other means of proceeding against the solicitor for any breach of duty which he may have committed; but the fact of there being such other means does not take away the jurisdiction to make the order for payment of the money. Of course, it would not be exercised cumulatively in addition to such other means, but the Court may take which ever course it thinks right.

It appears to me that we can make the order asked for on the ground that the power of the Court which is invoked is a punitive, disciplinary power to prevent breaches of their duty by its officers, quite distinct and separate from the client's legal right, and therefore unaffected by any alteration of such right. * * * The matter, in my opinion, is one of discretion to be exercised according to the circumstances of the particular case, in which the Court has to exercise its discretion. I do not say for a moment that the fact that judgment has been recovered by the client is not a matter to be taken into serious consideration in such a case. The Court must see that the solicitor is not oppressed. The fact that such a judgment has been recovered is a fact which should cause the Court to pause and consider whether the application against the solicitor is oppressive. * * *

Under the circumstances of this case I am not satisfied that we shall be oppressing this solicitor by making an order on him to pay this money. To say that he must pay it in four days might be oppressive. The order which I think we ought to make in the exercise of our discretion, and by which we shall not be overruling the discretion of the Divisional Court, for their view was that they had no discretion, and were bound by authority, is that the solicitor must pay the amount due within a month, the effect being that, if he does not so pay it, an application may be made for his attachment. But I think that order must be made on the terms that the client, having elected to apply to the disciplinary jurisdiction of the Court, must from this time forth take no proceedings by writ of execution or otherwise on the judgment in respect of the debt without further order of the Court.

BOWEN, L. J. I am of the same opinion. The solicitor in this case is in a situation which presents two aspects, involving a double responsibility. He was a debtor, who owed a legal debt. He also owed

a duty to his profession, and the Court of Justice whose officer he was, to pay over the money which belonged to his client, and of which he had possession through the confidence placed in him in his professional capacity, and as an officer of the Court. There are in such a case two wholly distinct rights, the right of the client at law to be paid his debt, and his right to apply to the Court as a person whose confidence has been abused by a person who is an officer of the Court, and whom he would not have trusted unless he had been such an officer. * * * The moral duty of the solicitor does not disappear because the legal debt has become a judgment debt. We are sitting now as a tribunal for the enforcement of professional duties. How can the legal doctrine of res judicata apply in such a case? The legal right of the client may be merged in the judgment, but the offence of the solicitor against his professional duty and the Court is not purged by the mere fact that the simple contract debt has become a judgment debt. He still remains under the moral obligation to pay over to his client the money which was his client's; and it is none the less his duty to do so, because a judgment has been obtained. If the offence is not purged, how can the jurisdiction of the Court be taken away? * * * The solicitor has in this case defeated the client's legal execution by an act of his own, and he fails to satisfy us that at this very moment he has not still got this money belonging to his client in his hands. It is, therefore, impossible to say that he has satisfied his obligations as an officer of the Court, and, till he does that, the punitive jurisdiction of the Court is no doubt applicable. The question is whether an order ought to be made on him to pay this money.

It has been said that, though this Court might deal with him in other ways, it ought not to order him to pay the money. I cannot assent to that view. Of course we should have power to strike him off the rolls or suspend him, if we thought that a case for doing so had been made out; but that does not shew that it is not right to order him to disgorge this money of his client's which he retains. It seems to me that such an order is the least that justice requires.[57]

[57] In re Strong, 32 Ch. Div. 342 (1886), was a case where an order was made to take an account of all money received by a solicitor on behalf of his client, and that within one month from the chief clerk's certificate the solicitor pay the client the amount found due. Before the month was up the solicitor was struck off the roll. He made default in payment. The court held that he could be attached for contempt, as the money was due from him as solicitor despite the fact that he was no longer on the roll.

That a summary jurisdiction proceeding is not a bar to an action by the client for money withheld or for damages for the wrongful act of the lawyer, see Coopwood v. Baldwin, 25 Miss. 129 (1852).

SMITH v. McLENDON.

(Supreme Court of Georgia, 1877. 59 Ga. 523.)

BLECKLEY, J., Judge Clark, sitting at chambers, in Americus, Sumter county, heard a writ of habeas corpus and the return thereto, the object of the proceeding being to free from imprisonment in the jail of Webster county, an attorney at law, who was in custody under an attachment founded upon a rule absolute granted by Webster superior court. Discharge under the writ was denied, and the prisoner was remanded. This is assigned as error. * * *

Imprisonment under an attachment for contempt, to compel obedience by an officer of court to a lawful order to pay over money which he has collected in the course of his official or professional duty, is not imprisonment for debt. It is sound disciplinary dealing with an unruly member of the forensic household. One who lives and moves within the precincts of the court misbehaves, to the injury of a person who has trusted him, and whose confidence he has abused, and the court orders him to make redress. He refuses, and the court, as the minister of law, chastens him by imprisonment, and endeavors to coerce obedience. It is true, he is a debtor; but he is more than a debtor—he is an assistant in the affairs of justice, and as such, bears a peculiar and special relation to the law. Through that relation the court acts upon him, treating him, not as a mere debtor who will not pay, but as a domestic of the law who refuses to obey his master. * * * Judgment affirmed.

SECTION 5.—SUSPENSION AND DISBARMENT [58]

I. PROCEDURE IN SUSPENSION AND DISBARMENT CASES

JEROME'S CASE.

(Court of King's Bench, 1627. 1 Cro. Car. 74.)

Memorandum this term. Because one Jerome, an attorney, had prosecuted three several actions of debt, every one of them being above the sum of forty pounds, and so finable to the King; and procured judgments to be entered upon them, no original writs being sued forth, he himself having received the charges for suing the originals, as well for the fine to the King as for the said writs (as he himself confessed upon his examination); and because it was done voluntarily, in deceit

[58] On the constitutionality of statutes relating to the disbarment of lawyers, see 44 L. R. A. (N. S.) 1195, note.

of the King for his fines, and against his oath as attorney that he should not practise any deceit, it was ordered, that he should be put out of the roll of attornies, and be cast over the Bar and committed to the Fleet; but no fine was imposed upon him, quia pauper; and in the Year-Book, 20 Hen. 6 fol. 37. There is the like judgment: and it was forthwith put in execution accordingly.

A precedent was shewn, which was entered in the roll 30 Eliz. that one Osbaston, an attorney, for falsifying and forging a writ of capias, was ordered to be put out of the roll, and cast over the Bar,[59] and fined

[59] This was "the bar which separated the court from Westminster Hall."—E. B. V. Christian, *A Short History of Solicitors* (1896) 43.

"The accommodation of seats at the bar of the courts appears but a modern contrivance. * * * The expression 'sitting within the bar' was certainly not known before the seventeenth century. * * * The bar of the old Curia Regis * * * separated those who legally constituted the Court (with its official staff) from those who were not thus belonging to it, but came as litigants, suitors or pleaders, or as witnesses, defendants, or prisoners. The Judges and other members of the tribunal sat on the Benches, whilst the litigants and advocates stood at the bar. The separation was not merely imaginary. It was made by a substantial barrier of iron or wood."—Alexander Pulling, *The Order of the Coif* (1897) pp. 187, 188.

The casting over the bar seems originally to have been carried out literally. The serjeants, once used the same ceremony to express their contempt for those attorneys who were endeavoring to interfere with the serjeants' monopoly of the business of the Court of Common Pleas. "'The Common Shop of Justice,' as Sir Orlando Bridgman called it in the following reign, was a happy hunting-ground, having the exclusive jurisdiction over real actions, in which serjeants-at-law were alone entitled to practice. It was proposed, and a bill was drafted in 1655, to throw this court open to all barristers and attorneys, giving to every qualified practitioner the same right to conduct cases there as he had in the Exchequer and the Upper Bench. The change was not popular, however, in Westminster Hall, and an unhappy attorney endeavoring to assert this inchoate right was laid hold of by the serjeants and thrown over the spiked iron bar which divided their court from the floor of Westminster Hall."—F. A. Inderwick, *The Interregnum* (1891) p. 230.

The older lawyers were much given to physical demonstration. For example, in In re Nathaniel Redding, stated in T. Raym. 376 (1680) "the gentlemen at the bar" persuaded the court to order that the gown of one who had been formerly a practiser at the bar should be pulled over his ears and the order was at once executed.

The publicity which attended these performances made them all the more enjoyable or contemptuous.

"Unless the student bears in mind the arrangement of Westminster Hall, the openness of the courts which permitted the judges [in the different courts] to see each other and command a view of the entire hall, the ever-moving and incessant throngs of loiterers, and the freedom with which visitors were permitted to laugh and talk aloud, he misses the humor, and poignancy, and spirit of the best stories that are presented in the annals of the law courts. * * * When Lady Harriet Berkeley openly refused the protection of her father, after the trial of Lord Grey de Werke for her seduction, swords were drawn and blood would have been spilled had not Chief Justice Pemberton—speaking within the hearing and sight of the judges of the Common Pleas, the officers of the Chancery, and all the dense mass of spectators who had been drawn to the Hall by that supremely scandalous cause celèbre—terminated by his prompt intervention a scene which Macaulay has stigmatized as 'unparalleled in our legal history.' * * * In this same open hall Cromwell's grandson stood and listened to the abuse which a chancery advocate directed at the memory of the great Protector, and the eyes of a multitude were upon him, when Lord Chancellor Hardwicke rebuked the orator by say-

five pounds, and sworn never to practise after as attorney, and to be brought to the King's Bench Bar and Exchequer, that knowledge might be taken of him that he was not to practise any longer as attorney in those Courts.[60]

ANONYMOUS.

(High Court of Chancery, 1746. E. B. V. Christian, A Short History of Solicitors (1896) 122.)

One of the solicitors in Chancery, also an attorney of the Common Pleas, whose name appears in the list printed in 1730, was convicted of conspiracy to accuse a man of some property of a criminal offence in order to obtain his wealth. Thereupon he was ordered to be struck off the roll, and the Clerk of the Petty Bag was to see to it. This, it is stated, was the first instance of such an order in Chancery.

In re ———, Gent.

(Court of King's Bench, 1834. 3 Neville & M. 566.)

Mr. Pitt, the plaintiff in the cause of Pitt v. Combs, in person applied to the court for a rule calling upon an attorney of this court to show cause why his name should not be struck off the roll of attorneys; which application he was about to found upon affidavits which he held in his hand, imputing misconduct to the attorney in conducting the defence in Pitt v. Combs.

ing, 'I observe Mr. Cromwell standing outside the bar there, inconveniently pressed by the crowd; make way for him that he may sit by me on the bench.' The rebuke deserved a large audience. * * * Somewhere about the time of George III.'s accession the courts were enclosed with boarding, but were held in the same places as before."—Edward Foss, *Memories of Westminster Hall* (1874) Vol. 1, pp. 84–86.

"Among other proofs that the courts met in Westminster Hall in the reign of Edward I, we have an order of that king that William de Brewes, a serjeant-at-law, who had publicly insulted a baron of the Exchequer named Roger de Hegham, should go, with his body ungirt, his head uncovered, and his coif laid aside, from the Court of King's Bench, at Westminster, through the middle of the Hall, when the Court was full, to the Exchequer, and there ask the Baron's pardon."—Edward Foss, *Memories of Westminster Hall* (1874) Vol. 1, p. 5.

The arrangement of the courts added zest to the court order in Milward v. Welden, Tothill, 101 (1565), where "the plaintiff for putting in a long replication was fined ten pounds and imprisoned, and a hole to be made through the said replication, and hanged about his neck, and he to go from bar to bar."

The frontispiece to Inderwick's *King's Peace* reproduces Gravelot's engraving of "The First Day of Term" at Westminster Hall. The original engraving is in the Library of the Inner Temple. Inderwick states on the back of the frontispiece that: "It shows Westminster Hall as it would have appeared down to the time of George II."

[60] See Byrchley's Case, Jenkyn's Rep. 262 (1584).

Lord DENMAN, C. J. (after consulting with Mr. Le Blanc, the master). The court has said that they will not receive an application of this sort except at the hands of a barrister. There are obvious reasons for such a rule.

Rule refused.[61]

DISCIPLINING MEMBERS OF THE PROFESSION IN ENGLAND. T. W. Tempany, *The Legal Profession in England—Its History, Its Members and Their Status,* 19 Amer. L. Rev. 677, 699, 700: Like everything else connected with the two branches of the profession, even the means by which barristers and solicitors are respectively deprived of their professional standing differ; for whilst a barrister is disbarred,[62] solicitors are struck off the roll.[63] In the case of the former, the power of disbarring is reposed in the benchers of the Inns of Court, whilst in the latter case it is vested in the judges of the Supreme Court. In neither instance need the offense be criminal; something very far short of that is sufficient to get a man at least suspended, if not disbarred or struck off the roll. In one case a barrister was suspended for two years for advertising in a colonial paper; while a solicitor was suspended for the like period for accepting a commission unknown to his client. While in cases of disbarring the initiative is taken by the benchers of the Inns of Court, in that of solicitors it is different; and any person may apply by motion to the court to strike the name of a solicitor off the roll, or the application may be made by the registrar of solicitors on public grounds. In any event notice of such motion must be served on the registrar of solicitors fourteen clear days before the hearing of the motion, and the causes of complaint upon which the motion is founded must be supported by affidavit. The registrar of solicitors may appear by counsel on the hearing, and either apply for or support the application for an order to remove the offending solicitor from the roll. When the court or judge makes such an order, it is drawn up by the registrar of solic-

[61] A fuller report is Ex parte Pitt, 2 Dowl. 439 (1834). There Lord Denman, C. J., is reported as saying: "The motion against an attorney being in the nature of a criminal information, the court requires that it should be made by a gentleman at the bar." Ex parte Pitt was followed in a case under the Solicitor Act, 1888 (51 & 52 Vict. c. 65, § 13). In re a Solicitor, [1903] 2 K. B. 205.

[62] "A barrister may be disbarred on his own petition, and if he wishes to become a solicitor he must be so disbarred, for he cannot, without being disbarred, serve as a clerk to a solicitor, or be put on the roll of solicitors. Disbarring, when a barrister does not petition to be disbarred, is a punishment inflicted by the benchers on a barrister who is guilty of conduct unbecoming his profession. A bencher who is guilty of such conduct would be disbenched as well as disbarred."—2 Halsbury's *Laws of England,* 361, 362.

[63] "In some instances the solicitor has been suspended from practice for a longer or shorter period, and not actually struck off [the Roll]."—2 Seton, *Forms of Judgments and Orders* (6th Ed.) 1116.

itors, who takes all subsequent proceedings as to the actual removal of the offender's name from the roll in the same way as if the application for the order had originally been made to the court by the registrar. With regard to the practice in cases of application to strike off the roll, we think that, inasmuch as the benchers disbar barristers subject to a right of appeal to the judges, the Incorporated Law Society might with advantage be intrusted with the duty of striking off the roll in the case of solicitors, subject to a like right of appeal; and moreover we consider that all such applications should not be heard in open court, but taken in private, as is the case with similar applications to the benchers. For though an application to strike a solicitor off the roll may be unsuccessful, and the reasons for the application without foundation, a stigma attaches to the man against whom such an application has been made, however groundless the application and however innocent he may be. The fact of being disbarred or struck off the rolls, of course, means social ruin.[64]

DISCIPLINING MEMBERS OF THE PROFESSION IN THE UNITED STATES. Orrin N. Carter, *Ethics of the Legal Profession* (1915) pp. 88, 89: In the absence of a statute providing differently, disbarment proceedings may usually be instituted by any person interested. This question is frequently settled by rules of court. The practice is growing to have these matters placed in charge either of public officials—such as the state's attorney or attorney-general—or local bar associations. * * * The practice has obtained in some jurisdictions that the only method of disciplining lawyers was by disbarment. This is a mistake. The desired end will be accomplished, and better results obtained very frequently, from a reprimand, fine or suspension. * * * Some of the bar associations for slight offenses, are attempting to reprimand and discipline their members after an investigation, without taking the matter into court, and are

[64] "The discipline of the Bar—the maintenance of correct standards of professional conduct—is everywhere a difficult problem. In England, with the experience of centuries, good results are obtained, upon the whole, considering that human nature is alike the world over. The General Council of the Bar governs the Bar; the Statutory Committee of the Incorporated Law Society governs the solicitors. These two bodies occasionally confer together —or rather exchange views—in matters concerning the relations of the two branches of the profession.

"The General Council of the Bar, having heard a complaint against a barrister, reports its findings with recommendations—perhaps of disbarment in exceptionally serious cases—to the Benchers of the barrister's Inn. They alone have the power to act and nearly always follow the recommendation. Probably little difference exists in their deliberations, methods and actions in serious cases and that of corresponding disciplinary agencies in the United States, whether called a Bar Committee or a Committee of Censors. Disbarment is an extreme penalty in both countries, inflicted only for moral turpitude amounting usually to crime."—Thomas Leaming, *A Philadelphia Lawyer in the London Courts* (1911) pp. 67, 68.

endeavoring, when the matters are taken into court, to carefully distinguish as to the character of professional offenses and grade the severity of the judgment accordingly.

DISCIPLINING MEMBERS OF THE PROFESSION IN NEW JERSEY. Swayze, J., in In re HAHN (1916) 85 N. J. Eq. 510, 96 Atl. 589, 591, 592: Our method of licensing counselors, attorneys, and solicitors is peculiar. From the very beginning of the province of New Jersey in the time of Lord Cornbury and probably in East Jersey at least from the time of Governor Basse in 1698 (Leaming & Spicer's Laws, p. 223, subd. XI), attorneys and counselors have been licensed by the Governor under the great seal of the state. The Supreme Court never has licensed them nor admitted them to practice. In re Branch, 70 N. J. Law, 568, 570, 571, 57 Atl. 431. * * *

Enough has been said to demonstrate the difference between our practice and the English practice. Practitioners in the superior courts in England were admitted by each several court to practice in that court, and each court had its own roll. 3 Bl. Comm. 26. By the Act of 2 Geo. II, c. 23, § xx, a sworn attorney in any of the Courts of King's Bench, Common Pleas, etc., might be sworn and enrolled as a solicitor without further fee after an examination of his qualifications to be a solicitor. That act did not give a similar privilege to solicitors to act in the law courts, and the omission was corrected by 23 Geo. II, c. 26, § xv, which permitted solicitors to be enrolled as attorneys of the King's Bench or Common Pleas without fee upon an examination by the judges of the solicitor touching his fitness and capacity to act as attorney. Under such a system, each court controlled its own roll and its own officers, and although an attorney who had been struck off the roll of one court might also be stricken off the roll of another court, this was not always done. 1 Tidd, *89; 1 Archbold, 30; In re Richard Peter Smith, 1 B. & B. 522.

The power of the English courts was a power to discipline officers of their own appointment by striking names off a roll kept by that very court, not by some other. In New Jersey the appointment comes, not from the court, but from the Governor; counselors, attorneys, and solicitors are more than mere court officers; their commissions run in substantially the same terms and are issued by the same authority and with the same solemnity as our own. They do not in terms require enrollment by the court. That requirement comes from immemorial usage descended from the English practice and implied rather than required by the Practice Act. But for the provisions of that act it might be doubtful whether even the Supreme Court could nullify the Governor's commission, or whether any action of that character could be of consequence if the Governor should choose to issue a new commission. Could the Chancellor, even if he knew an attor-

ney and solicitor to be unfit to practice, refuse to obey the mandate of the Governor? Whatever the inherent power of a court may be to punish its officers, it has no inherent power to deprive the Governor's commission of its efficacy to authorize an attorney and solicitor to "appear and practice in all courts of record and to receive fees therefor, and to require all judges, justices, and others concerned to admit him accordingly."

The power of the Supreme Court to deprive the Governor's commission of its efficacy rests on the Practice Act of 1799. Section 3 of that act, which appears substantially unchanged in the Revised Practice Act of 1903 (C. S. 4054), enacts that if any counselor, solicitor, or attorney at law shall be guilty of malpractice in any of the said courts, he shall be put out of the roll and never after be permitted to act or practice as a counselor, solicitor, or attorney at law, unless he shall obtain a new license and be again enrolled in due form of law. The section is directed against malpractice in "any of the said courts." [65]

WERNIMONT v. STATE ex rel. LITTLE ROCK BAR ASS'N.

(Supreme Court of Arkansas, 1911. 101 Ark. 210, 142 S. W. 194; Ann. Cas. 1913D, 1156.)

This is an appeal prosecuted by Henry G. Wernimont from a judgment of the Pulaski circuit court revoking his license to practice law in that court, and striking his name from the roll of its attorneys. * * *

FRAUENTHAL, J. It is urged by counsel for the defendant that he was entitled to have a jury pass upon the charges made against him, and that the court erred in discharging the jury and proceeding with the trial himself.

Proceedings for the suspension or disbarment of attorneys for professional misconduct are not criminal, but civil, in their nature. They are not instituted or intended for the purpose of punishment. Their object is to preserve the purity of the courts and the proper and honest administration of the law. Attorneys are officers of the court, made so by its order when they are admitted to practice therein. The purpose of the proceedings for suspension and disbarment is to protect the court and the public from attorneys who, disregarding their oath of office, pervert and abuse those privileges which they have obtained by the high office they have secured from the court.

The right to practice law is not an absolute right, but a privilege only. It is but a license which the court grants by its judgment of admission to the bar, and which the same court may revoke whenever misconduct renders the attorney holding such license unfit to be in-

[65] On the power of courts to disbar attorneys, see 5 Ann. Cas. 990, note; 15 Ann. Cas. 419, note.

trusted with the powers and duties of his office. The revocation of such license is therefore only a civil proceeding, governed by the rules applicable to all civil actions.[66] Weeks on Attorneys at Law, § 80; Randall v. Brigham, 7 Wall. 523, 19 L. Ed. 285; Ex parte Wall, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552; Turner v. Commonwealth, 2 Metc. (Ky.) 619; State v. Harber, 129 Mo. 271, 31 S. W. 889; Ex parte Finn, 32 Or. 519, 52 Pac. 756, 67 Am. St. Rep. 550; In the Matter of Chandler, 105 Mich. 235, 63 N. W. 69; In the Matter of an Attorney, 83 N. Y. 164.

In the practice prescribed by our statutes for the disbarment of attorneys, it is provided: "When the matter charged is not indictable, the trial of the facts alleged shall be had in the court in which the charges are pending, which trial shall be by jury, or, if the accused fails to appear, or, appearing, does not require a jury by the court." Kirby's Dig. § 460. But in the trial of all cases civil in their nature, it is the province of the court to direct a verdict where the evidence is uncontroverted. And so, in this character of proceeding, the court has the power to direct the return of a specific verdict, even if a jury had been impaneled to try the charges made against an attorney, in the event the evidence adduced upon such trial is uncontroverted.

In the present proceeding, the court heard the case upon the facts set out in the defendant's sworn answer, and therefore admitted by him, and the record of cases in said court whose verity could not be assailed. The evidence was therefore uncontroverted, and it became the province of the court, as well as its duty, to have directed a jury as to the verdict they should have returned had the case been tried by a jury. If, therefore, the uncontroverted evidence adduced in this case sustains grounds for the disbarment of the defendant, he is not prejudiced and cannot complain because the court discharged the jury and proceeded, under such uncontroverted testimony, to make findings and render a judgment.

The proceedings for the disbarment of attorneys are not formal. The prosecution thereof may be conducted in the name of the state by its prosecuting officer (Turner v. Commonwealth, supra), or the court may require a member of the bar to present and prosecute the charges (State v. Harper, supra). After due and proper notice has been given to the defendant of the charges preferred against him, the court has the power to proceed with the trial of the matter according to the rules of practice adopted by it not contrary to any procedure prescribed by statute. Where there is a conflict in the evidence adduced relative to

[66] In People v. Stonecipher, 271 Ill. 506, 111 N. E. 496 (1916), it was held that, as a disbarment proceeding is not a criminal prosecution, the accused attorney has no constitutional right to meet the witnesses face to face, and that where it would be proper to take depositions in a civil cause they may be taken in disbarment proceedings. Cf. Moutray v. People, 162 Ill. 194, 44 N. E. 496 (1896).

On the right to a jury trial in disbarment proceedings, see note in Ann. Cas. 1913D, 1162.

the charges preferred, we are of opinion that, by the above section 460 of Kirby's Digest, the defendant is entitled to a trial thereof by a jury; but he is deprived of no right of which he can complain, where the case is tried by the court without a jury when the evidence adduced upon the trial thereof is uncontroverted. Beene v. State, 22 Ark. 149.

The next question to be considered is whether or not the facts proved and admitted constitute a legitimate ground for striking the name of the defendant from the roll of attorneys of the Pulaski circuit court.

It is well settled that the power of removal from the bar is possessed by all courts which have authority to admit attorneys to practice. Any attorney may forfeit the license which he has obtained by abusing it, and the power to exact such forfeiture rests with the court which grants it. It is settled that the power to strike from the rolls the name of such an attorney is inherent in the court itself, and is indispensable to protect the courts in their dignity and the public in the proper administration of the law, as well as in maintaining the honor and purity of the profession. Weeks on Attorneys at Law, § 80; Beene v. State, supra; Ex parte Burr, 9 Wheat. 529, 6 L. Ed. 152; Bradley v. Fisher, 13 Wall. 335, 20 L. Ed. 646; Ex parte Robinson, 19 Wall. 505, 22 L. Ed. 205; In re Philbrook, 105 Cal. 471, 38 Pac. 511, 884, 45 Am. St. Rep. 59; Boston Bar Association v. Greenhood, 168 Mass. 169, 46 N. E. 568; 3 American & Eng. Law, 300; 4 Cyc. 905.

Such power should be exercised with caution, and only for reasons which would render the continuance of the attorney in practice inimical to the just and proper administration of justice, or subversive of the integrity and honor of the profession. Ex parte Burr, supra.

Conduct of an attorney in the performance of his duties as such is especially subject to the supervision of the courts in which he exercises that profession. They may compel him to act honestly with his clients and honestly in his practices with the courts. He may be removed for malpractice and for dishonesty in his profession. This malpractice and dishonesty may consist of the perversion and abuse of the processes of the court to obtain an unwarranted and unjust action. If, by any act of commission or omission, he deceives the court so that he obstructs or pollutes the administration of justice, or by the suppression of truth obtains a result which the law would not warrant, he is guilty of malpractice and renders himself unworthy of the privileges which his license and the law confers upon him.

If an attorney is guilty of unprofessional conduct, he is subject to suspension or disbarment by the court, according to the degree of the moral turpitude evinced by such unprofessional conduct. It has been held that this professional misconduct may consist "in betraying the confidence of a client, in attempting by any means to practice a fraud, impose upon or deceive the court, the adverse party, or his counsel, tampering with or suborning witnesses, fraudulently inducing them to absent themselves and avoid attendance upon court when it is sus-

pected or known that their testimony will or may be prejudicial to him or his client; and, in fact, any conduct which tends to bring reproach upon the legal profession or to alienate the favorable opinion which the public should entertain concerning it." Ex parte Ditchburn, 32 Or. 538, 52 Pac. 694; In re Serfass, 116 Pa. 455, 9 Atl. 674; O'Connell, Pet., 174 Mass. 253, 53 N. E. 1001, 54 N. E. 558; Penobscot Bar v. Kimball, 64 Me. 140; In re Weed, 26 Mont. 507, 68 Pac. 1115; note to In re Philbrook, 45 Am. St. Rep. 59.

In the case at bar the defendant conceived the plan of forcing the compromise or collection of notes or small claims against persons resident in counties throughout the state by the use of the process of the court, in a manner that is claimed to have been an abuse thereof. These notes were given for premiums for future insurance which failed by reason of the insolvency of the insurance companies, and on this account there was no valid consideration for these notes. He combined with a resident of Pulaski county in the purchase of these small claims, which were sold under circumstances which indicated that they were practically worthless and their legality doubtful. It is the policy and spirit of our law, enacted into statute by our Legislature, that every defendant shall be sued in the township or county of his residence. To this general principle there are statutory exceptions, chiefly in cases where there is a joint liability against two or more defendants residing in different counties. In such cases, it is provided that suits may be brought in the county of the residence of any of the defendants, and service of summons can then be had upon the other defendants in any county, thereby giving jurisdiction over their persons to the court wherein the suit is thus instituted. Kirby's Dig. §§ 6072, 4558. But before this jurisdiction can be acquired by virtue of these statutes over the person of such defendants nonresident of the county wherein the suit is instituted, it is essential that the defendant resident of the county where the suit is brought shall be a bona fide defendant. By our statute, it is further provided that, before judgment can be had against such nonresident defendants, a judgment must be obtained against the resident defendant. Kirby's Digest, § 6074.

If the transaction is colorable and collusive, and the resident person not a defendant in fact and in good faith, then service of process of summons upon him would be incapable of laying the foundation for jurisdiction of the court over nonresident defendants served with summons in other counties. Upon such facts being made known to the court, it would be its duty to quash the service of summons upon such nonresident defendants. Such defendants cannot be dragged from the forum of their residence by any sham or contrivance to evade suit against them in a court in the county where they reside. Such a perversion of the court's process is a fraud practiced upon the court, which should receive its condemnation upon being made aware of it. * * *

Knowing that under our statutes a defendant must be sued in the county or township of his residence, Wernimont, in order to evade these plain provisions, conceived the plan of having a resident of Pulaski county indorse the notes so that he apparently would be jointly liable upon them, and thus could be sued as one of the defendants. By this method, he obtained the issuance of summons against defendants residing remote from the county where the suits were brought, and obtained for the courts issuing such process apparently legal jurisdiction over such defendants. If, as a matter of fact, such resident defendant was not in truth a bona fide defendant, and so known to Wernimont, who secured the issuance of such process, then he was guilty of practicing a fraud upon the court and subverting the proper administration of the laws. This was the more reprehensible because it was not done in one case, but in hundreds of cases. * * *

It is plain that the transfer and guaranty by Miller was a subterfuge, concocted for the purpose of imposing on the court's process and practice under the statute, in order to secure jurisdiction over persons nonresident of the county where the suit was brought, and attempting, by this abuse of the court's process, to extract from such nonresident persons compromises or judgments by default.

The presentation of these facts to the court would have resulted in quashing the service of such process and a deprivation of jurisdiction of such court over such nonresidents. By suppressing these facts which he knew, Wernimont practiced a fraud upon the court in obtaining the issuance of these summonses and in endeavoring to secure judgments based thereon.

It is urged that Wernimont did not act in bad faith with the court because he thought he had the right to make the transaction and to adopt a practice for service of summons upon defendants nonresident of the county authorized by statute. But his action could not have been done in good faith, because the transaction with Miller is plainly colorable and collusive. His subsequent action in taking nonsuits in the circuit court, when the nonresidents prosecuted appeals from the judgments obtained before the justice of the peace, evinced that he knew that he was committing an imposition upon the court. The number of the suits thus brought, and the continuance of the practice, indicate a total disregard of his duty as an attorney and officer of the court to uphold and maintain the proper administration of justice.

The lower court found that he was guilty of such malpractice, by his perversion and abuse of the court's process, that he was not a fit person to continue the practice of law in that court, and therefore ordered his removal; and we are of the opinion that the uncontroverted testimony sustains the finding and action of the court.

The judgment is, accordingly, affirmed.[67]

[67] "A proceeding for the removal of an attorney at law from his office is not instituted, prosecuted or forwarded by a writ. It is not 'founded on legal process according to the signification of the words "per legem terræ" as used

II. Nature of Suspension and Disbarment Proceedings

Ex parte BROUNSALL.

(Court of King's Bench, 1778. 2 Cowp. 829.)

This was an application to the Court to strike the defendant off the roll of attornies, he having been convicted of stealing a guinea; for which offense he received sentence to be branded in the hand, and to be confined to the house of correction nine months.

Mr. Solicitor General, who shewed cause, stated, that the conviction, which was the ground-work of the motion, was at least four or five years ago, since which time no misconduct whatever could be imputed to the defendant: and he argued, that the defendant having received the benefit of clergy and having been branded in the hand, it operated as a statute pardon; therefore, to comply with the application would be to punish the defendant a second time for the same offence. * * *

Lord Mansfield. This application is not in the nature of a second trial or a new punishment. But the question is, whether, after the conduct of this man, it is proper that he should continue a member of a profession which should stand free from all suspicion. Suppose he had been a justice of peace, the conviction itself would not remove him from the commission; but could there be a doubt that he ought to be struck out of the commission? As at present advised, I am of opinion, without any doubt, that the rule should be made absolute. But as it is for the dignity of the profession that a solemn opinion should be given, we will take an opportunity of mentioning it to all the Judges.

Lord Mansfield on this day said: We have consulted all the Judges upon this case, and they are unanimously of opinion, that the

in Magna Charta,' and in the Constitution and statutes. 'At common law an attorney was always liable to be dealt with in a summary way. . . . No complaint, indictment or information ever was necessary as the foundation of such proceedings. Usually they are commenced by rule to show cause, or by an attachment or summons to answer. . . . Sometimes they are founded on an affidavit of the facts; . . . in other cases, by an order to show cause why he should not be stricken from the roll; and when the court judicially know of the misconduct of an attorney, they will of their own motion order an inquiry to be made . . . without issuing any process whatever.' In re Randall, Pet'r, 11 Allen [Mass.] 473, 479 [1865]. In the respect that no writ or process issues, this proceeding resembles a petition for a writ of mandamus, and for other extraordinary writs (Taylor v. Henry, 2 Pick. [Mass.] 397 [1824]), or for preliminary injunction and numerous other orders or rules to show cause. See Kennard v. La., 92 U. S. 480, 23 L. Ed. 478 [1875]."—Rugg, C. J., in In re Allin, 224 Mass. 9, 112 N. E. 494, 495, 496 (1916).

In People v. Mead, 29 Colo. 344, 68 Pac. 241 (1902) it was held that neither the disbarment petition filed by a bar association nor the information of the attorney general filed after a reference to him need be under oath, although the answer of the attorney whose disbarment is sought is required to be under oath.

defendant's having been burnt in the hand, is no objection to his being struck off the roll. And it is on this principle that he is an unfit person to practice as an attorney. It is not by way of punishment; but the Court, on such cases exercise their discretion, whether a man whom they have formerly admitted, is a proper person to be continued on the roll or not. Having been convicted of felony, we think the defendant is not a fit person to be an attorney. Therefore let the rule be made absolute.[68]

[68] "In exercising summary jurisdiction over attorneys, as distinct from other persons, courts have in view two leading objects—one, to compel the attorney to deal fairly and honestly with his client (Strong v. Mundy, 52 N. J. Eq. 833 [31 Atl. 611 (1895)]); the other, to remove from the profession a person whose misconduct has proved him unfit to be intrusted with the duties and responsibilities belonging to the office of an attorney. Ex parte Brounsall, Cowp. 829 [1778]; Stephens v. Hill, 10 Mees. & W. 28 [1842]. In the attainment of these objects the idea of punishment has no appropriate place."—Dixon, J., in In re Lentz, 65 N. J. Law, 134, 138, 46 Atl. 761, 762 (50 L. R. A. 415 [1900]).

"Proceedings to discipline a solicitor are civil and not criminal; and their purpose is not to punish the respondent, but to purify the bar and protect the court and the public from the fraud and imposition of reckless and unscrupulous lawyers. And yet, after all, I know of no better term in which to characterize the plight of a disciplined solicitor, one disbarred or suspended, than as 'punishment.' That is the term used by our Supreme Court in the Cahill Case [66 N. J. Law, 527, 50 Atl. 119 (1901)], and it amounts to punishment by whatever name called. It involves disgrace to the solicitor, and takes from him a privilege, the enjoyment of which brings him business and the means of livelihood."—Walker, Ch., in In re Breidt, 84 N. J. Eq. 222, 230, 94 Atl. 214, 218 (1915).

"An attorney at law is not merely a member of a profession practicing for personal gain nor is he on the other hand a public officer. He is an officer of the court. * * * A proceeding for disbarment is simply the exercise of jurisdiction over an officer, an inquiry into his conduct not for the purpose of granting redress to a client or other person for wrong done, but only for the maintenance of the purity and dignity of the court by removing an unfit officer."—Hammond, J., in Boston Bar Association v. Casey, 211 Mass. 187, 191, 192, 97 N. E. 751, 754, 39 L. R. A. (N. S.) 116, Ann. Cas. 1913A, 1226 (1912).

THE STATUTE OF LIMITATION AND DISBARMENTS.—"The statute of limitations has no application to delinquencies such as have been shown to exist. The court, in such cases, will consider any unexplained, unreasonable delay in presenting the charges, and also whether, by reason of the delay, the accused has been deprived of a fair opportunity of securing proof to meet the accusation; but the proceeding for the disbarment of an attorney is not barred by the express terms of the statute of limitations, nor will the courts establish a limitation, as to the time in which such proceedings may be instituted, by analogy to the statute of limitations, unless, from the nature or circumstances of the particular case, it appears that it would be unjust or unfair to require the attorney to answer as to such occurrences."—Boggs, J., in People v. Hooper, 218 Ill. 313, 322, 75 N. E. 896, 899 (1905).

See notes in 11 L. R. A. (N. S.) 557, and L. R. A. 1915D, 1218.

In re WALLACE, An Attorney and Barrister.

(On Appeal from the Supreme Court, Halifax, Nova Scotia, L. R. 1 P. C. 283.)

This was an appeal from an Order of the Supreme Court at Halifax, in the Province of Nova Scotia, suspending the Appellant from practising in that Court as an Attorney and Barrister. * * *

Lord WESTBURY. The Appellant in this case is an Advocate, and also an Attorney, admitted to practice in the Supreme Court of Nova Scotia. It appears that he was also a suitor in that Court. In two or three cases in which he was such suitor he seems to have supposed that he had reason to complain of the conduct of the Judges of the Court, and he accordingly wrote a letter, addressed to the Chief Justice, reflecting on the Judges, and on the administration of justice generally in the Court; which undoubtedly was a letter of a most reprehensible kind.[69]

This letter was a contempt of Court, which it was hardly possible for the Court to omit taking cognizance of.

It was an offence, however, committed by an individual in his capacity of a suitor in respect of his supposed rights as a suitor, and of an imaginary injury done to him as a suitor; and it had no connection whatever with his professional character, or anything done by him professionally, either as an Advocate or an Attorney. It was a contempt of Court committed by an individual in his personal character only.

To offences of that kind there has been attached by law and by long practice a definite kind of punishment, viz. fine and imprisonment. It must not, however, be supposed that a Court of Justice has not the power to remove the Officers of the Court if unfit to be entrusted with a professional status and character. If an Advocate, for example, were found guilty of crime, there is no doubt that the Court would suspend him. If an Attorney be found guilty of moral delinquency in his private character, there is no doubt that he may be struck off the Roll.

But in this particular case there is no delictum brought forward or assigned, except that which results from the fact of addressing an

[69] Among other things in the letter the appellant said: "I may be wrong, but I can't help thinking, that I am not fairly dealt with by the court or judges, and that the well-beaten track is often departed from for some bye-way to defeat me" (page 286). In In the Matter of the Ludlow Charities, Mr. Lechmere Charlton's Case, 2 My. & Cr. 316 (1836), Mr. Charlton, a party to a petition in chancery and also a barrister and a member of Parliament, wrote a threatening letter to the master and after the Chancellor's attention was called to the letter wrote a rather truculent letter to the Chancellor, avowing the authorship of the letter to the master. He was imprisoned in the Fleet by order of the Chancellor. One petition for discharge was denied by the Chancellor because it did not show a change of heart on the part of petitioner, but another was received by the Chancellor "as an expression of contrition for the offense" and Mr. Charlton discharged.

improper and contemptuous letter to the Chief Justice of the Court, in respect of something supposed to have been done unjustly to the writer in his private capacity as a suitor. We think therefore, there was no necessity for the Judges to go further than to award to that offence the customary punishment for contempt of Court. We do not find anything which renders it expedient for the public interest, or right for the Court, to interfere with the status of the individual as a Practitioner in that Court. In that respect, therefore, we think that the Judges departed from the course which ought to have been pursued, by adopting a different description of punishment from the ordinary punishment for offences of this nature.

When an offence was committed which might have been adequately corrected by that punishment, and the offence was not one which subjected the individual committing it to anything like general infamy, or an imputation of bad character, so as to render his remaining in the Court as a Practitioner improper, we think it was not competent to the Court to inflict upon him a professional punishment for an act which was not done professionally, and which act, per se, did not render him improper to remain as a Practitioner of the Court.

On this ground, therefore, we do not approve of the Order. At the same time we desire it to be understood that we entirely concur with the Judges of the Court below in the estimate which they have formed of the gross impropriety of the conduct of the Appellant. But we are still of opinion, that his conduct did not require and did not authorize a departure from the ordinary mode and standard of punishment; and upon that ground, and that ground only, we shall advise her Majesty to discharge the Order, in respect of its having substituted a penalty and mode of punishment which was not the appropriate and fitting punishment for the case in question.[70]

[70] "A proceeding for the punishment of a criminal contempt of court, whether committed in facie curiæ, or committed out of the view and presence of the court, is a summary proceeding of a quasi criminal character, in which the contemner may be punished criminally by both fine and imprisonment; while the proceeding to suspend or revoke an attorney's license, as laid down in the Code, while it is special in its character, is neither criminal nor quasi criminal, either in its procedure or in its consequence."—Wallin, C. J., in State v. Root, 5 N. D. 487, 493, 67 N. W. 590, 592, 57 Am. St. Rep. 568 (1895).

"Where an attorney has disobeyed a rule of court, he is in contempt, and the proper course then is to apply for an attachment against him. If he continue in contempt, the question will then arise as to the propriety of his continuing any longer on the roll; but we cannot at once, merely for a contempt, compel him to shew cause why he should not be struck off the roll."—Littledale, J., in Ex parte Townley, 3 Dowl. 39, 40 (1834).

III. Grounds of Disbarment [71]

(*A*) *In general*

SOME ENGLISH STATUTES. Comyn's *Digest*, title "Attorney": (B. 14.) What Things an Attorney Ought Not to Do. By the St. 4 H. 4, 18. Attornies shall be sworn to make no suit in a foreign country.

By the St. W. 1, 3 Edw. 1, 29. No serjeant, counter, nor any other (which extends to attornies, clerks in court, and others, 2 Inst. 224) shall do any manner of deceipt, etc., or consent to do it, to beguile the court; and if he be thereof attainted, he shall be imprisoned for a year and a day, and if the trespass demand a greater punishment, it shall be at the king's pleasure. * * *

By the St. 3 Jac. 7. If an attorney or solicitor willingly delay his client's cause for gain, or demand by his bill other monies than were disbursed, the party grieved shall have an action and recover his costs and treble damages, and the defendant shall be discharged from being an attorney, or solicitor any more. * * *

(B. 15.) How the Misdemeanor of an Attorney Shall be Punished. By the St. 4 H. 4, 18. If an attorney be notoriously found in default of record, or otherwise, he shall forswear the court, and never after be received in any court of the king. * * *

By the St. 12 G. 29. If any, convicted of forgery, perjury, subornation or common barretry, act as an attorney, solicitor or agent in any court, etc., the judges on complaint, or information, shall examine it in a summary way, and if it appear, etc., shall cause him to be transported, as felons are.

[71] In In re Cahill, 66 N. J. Law, 527, 530, 531, 50 Atl. 119, 120 (1901) Fort, J., said: "To justify the disbarment of an attorney one of three things should be established: (1) Conviction of crime. (2) Evidence which, in the judgment of the court, shows that a crime has been committed, and that the facts proven would justify a conviction thereof. (3) Such intentional fraud upon the court or a client as shows evidence of moral turpitude. For less offences, such temporary suspension as the court may deem proper punishment will be imposed." That statement overemphasizes the matter of punishment, overlooks breach of duty to others than the client or court as a ground for disbarment, and fails to recognize non-fraudulent breaches of duty towards courts and clients as grounds for disbarment. No all-inclusive statement of grounds of disbarment, that attempts to be specific can be accepted.

On grounds of disbarment of lawyers, see 45 Am. St. Rep. 71, note.

(B) *Want of Moral Character*

In re ELLIOTT.

(Supreme Court of Kansas, 1906. 73 Kan. 151, 84 Pac. 750.)

Proceedings for the disbarment of C. E. Elliott. Respondent acquitted.

SMITH, J. * * * The accusation in this case contains 14 separate charges. * * *

Charge 12. That for the year previous to the filing of these charges the respondent had been an habitual drunkard. The evidence shows that Elliott's conduct in the respect charged has been far from exemplary—in fact has been such at times as should subject him to severe criticism. Yet the evidence of the successive judges before whom he has practiced law for many years shows only one instance in which Elliott has appeared in court in such condition of intoxication as to attract attention thereto or to affect his business capacity. No client of his, unless it be Burnette, has been produced to testify that his business has been neglected or in any way suffered by reason of Elliott's intemperance, or who has testified to any facts that would justify such conclusion. True it is that a man is required to show upon his admission to the bar that he is of a good moral character. His license to practice after he is admitted, however, will not be revoked on account of objectionable personal habits, until it is shown that such habits have rendered him unable to attend to his duties as a lawyer properly, or have rendered him unworthy of the great trust and confidence generally accorded to the members of the profession, or that such habits have become so bad as to scandalize his profession or the courts in which he practices. We do not think the evidence sufficient to establish either of these conditions in this case. * * *

Disposed as is this court to encourage and assist in maintaining a high standard of integrity in the profession of which we are members, and realizing as we do that no profession, except, perhaps, that of the clergy, demands a cleaner private life or a keener sense of professional honor than does that of the lawyer, we are unable under the evidence in this case to impose this great forfeiture and penalty upon the accused.

The respondent is acquitted.[72]

[72] "It is said that the courts are not the curators of the morals of the bar, and it is probably true that the courts should not take cognizance of a solitary immoral act, not amounting to a crime and unconnected with his duties in court, of a member of the bar. It is, however, one of the requisites for admission to the practice that the candidate should present evidence to the court that he is a person of good moral character, and it would be a great stigma upon an honorable profession if the members of it were powerless to purge it of any who may have been improvidently received into its fold and whose after life is offensively corrupt, or whose business transactions, even

In re MONTEGRIFFO.

(Supreme Court of New York, Appellate Division, First Department, 1915. 171 App. Div. 933, 156 N. Y. Supp. 512.)

PER CURIAM. The respondent, who was admitted to the bar in the year 1905, was charged by the Association of the Bar with a number of fraudulent acts, some of minor importance, but all indicating his unfitness to remain a member of the profession. It would serve no good purpose to recount in detail the many instances of fraud and wrongdoing with which he was charged, and which have been fully sustained by the evidence, and which are detailed at length in the report of the official referee filed herewith. Some of these offenses are of a very serious character; other, perhaps, standing by themselves, would not be sufficient to require the infliction of the most severe penalty; but, taking them all together, the respondent appears, as has been shown by the evidence, to be a totally unfit person to remain a member of an honorable profession. Many of the charges he made no attempt to defend himself against, and as to others his defense, and his testimony in his own behalf is characterized by the official referee, and we think justly, as being evasive and false.

The report of the referee is therefore approved, and the respondent is disbarred.[73]

outside of courts, are characterized by dishonesty; in short, that the profession is compelled to harbor all persons of whatever character who have gained admission to it and are fortunate enough to keep out of jail or the penitentiary."—Smith, J., in In re Wilson, 79 Kan. 450, 455, 100 Pac. 75, 77 (1909).

In In re Evans, 94 S. C. 414, 422, 78 S. E. 227, 230 (1913), Woods, J., for the court, declared that "untrue asseveration made without probable cause in public speech by a member of the bar that certain citizens have stolen or burned specific property is a serious offense, going to the foundation of character, and must be weighed by the courts, especially when coupled with other offenses showing a reckless disregard of professional duty." The court thought the reason for the attorney's fall was that he "is an inebriate. All men know that alcohol may make liars of the truthful, knaves of the honest, ruffians of the gentle, and traitors of the faithful" (94 S. C. at page 423, 78 S. E. 230). Accordingly the attorney was suspeuded indefinitely, with leave to apply for reinstatement after two years "upon satisfactory proof that he has not for two years immediately preceding his application used intoxicating liquors and that he has reformed his character" (94 S. C. at page 424, 78 S. E. 231).

[73] In Matter of Stein, 120 App. Div. 375, 376, 105 N. Y. Supp. 199, 200 (1907), in a "per curiam" opinion with reference to the misappropriation by an attorney of three small sums, viz., $50, $27, and $37, the last two sums being appropriated in Municipal Court cases, it was said: "The amounts misappropriated are small and the cases themselves do not involve a large amount of money. These facts, instead of mitigating, aggravate the offense of the attorney. Litigants who seek the inferior courts are peculiarly at the mercy of their attorneys. Their interests are often of greater proportional importance to them than those of litigants who seek higher tribunals. The only contact with the courts of justice which a very large portion of the population ever has is with the minor courts of criminal and civil jurisdiction. It is of great concern to the community that such contact should result in re-

In re SHEPARD.

(Supreme Court of Michigan, 1896. 109 Mich. 631, 67 N. W. 971.)

Certiorari by Charles A. Shepard to reverse a judgment of disbarment. Affirmed.

HOOKER, J. * * * The charges upon which the defendant was tried related to the death of a girl from an abortion, and it was charged that the defendant was with her for a time before her death, for the purpose of preventing her making an ante mortem statement concerning the affair; that he directed who should care for her, and forbade that any person should be with her alone, and directed her attendant (one Wright) not to permit her to make any statement concerning herself, or her condition, or the cause thereof. This was under circumstances showing that he was acting as attorney for one who was suspected of being instrumental in causing the abortion. The complaint states as a conclusion from the facts alleged, among other things, that defendant "was guilty of unlawful and unprofessional conduct in that he attempted to stifle evidence of the commission of a crime, by preventing an ante mortem statement of said Viola Stevens." Counsel contend that these charges were not sufficiently specific, and that they do not constitute a legal ground for the disbarment of the defendant, but we think they obviously do. * * *

We find no error in the proceedings, and the judgment is affirmed.

In re KNOTT. (No. 11,842.)

(Supreme Court of California, 1887. 71 Cal. 584, 12 Pac. 780.)

BY THE COURT. This is a proceeding to disbar the respondent for making what is claimed to have been a false affidavit in a proceeding to obtain a patent at Washington. Apparently the affidavit was one which the respondent may have believed to have been literally and technically true, but which was morally false, and was, in effect, an imposition upon the secretary, with whom it was filed. We have before had occasion to condemn the practice which is too common of making affidavits to what the affiant may claim to be the legal effects of facts not stated. They are often simply impositions upon the court. In this case the respondent was at the time young and inex-

spect for the courts and confidence in the administration of the law." The motion to disbar was granted.

On wrongful retention of money as a ground for disbarment, see 17 Ann. Cas. 692, note; 19 L. R. A. (N. S.) 414, note.

It is immaterial that the money has been misappropriated in another jurisdiction, as long as the dishonest conduct shows that the lawyer is unworthy of confidence in his profession.—In re Graffius, 241 Pa. 222, 88 Atl. 429 (1913).

On disbarment of lawyers for acts committed in another jurisdiction, see 17 Ann. Cas. 599, note; 19 L. R. A. (N. S.) 892, note.

perienced, and relied upon the assurance of an older and more experienced lawyer, that he could properly make the affidavit. It was not really an act as an attorney in our jurisdiction, and could probably only be considered as affecting the moral character of the respondent. The accuser desires to have the proceeding dismissed, saying that he made the accusation under the influence of anger. We do not recognize the right of an accuser to have such a proceeding dismissed; but having examined the evidence, we are inclined, in view of all the circumstances, to attribute the fault, though a grave one, to youth, inexperience, and ignorance. The proceeding is therefore dismissed.[74]

In re NAPOLIS.

(Supreme Court of New York, Appellate Division, First Department, 1915. 169 App. Div. 469, 155 N. Y. Supp. 416.)

See post, p. 551, for a report of the case.

In re MACCOLLA.

(High Court of Justice, Queen's Bench Division, 1884. 77 Law Times, 182.)

Application on the part of the Incorporated Law Society to strike Maccolla, a solicitor, off the rolls for misconduct in forging the jurat to an affidavit.*

The circumstances under which the thing was done, as described by the learned judges in passing sentence, were these: The solicitor had to support an appeal against an order which had been made in the cause in which he and a relative of his were interested, and in the course of the proceedings the judge had used certain strong expressions in disapproval of his conduct. For the purpose of the appeal against this order which was to come on next day (and in which he was ultimately successful), it was necessary that he should make and file an affidavit, and such an affidavit be prepared, partly engrossed and partly in his own hand-writing, and then he added to it the jurat, or the statement that it had been sworn before a certain commissioner for taking affidavits, and signed his name to it, as if it was an affi-

[74] In In re Keegan (C. C.) 31 Fed. 129 (1887), an attorney's name was stricken from the roll of the court because of deliberately false statements made by him in writing in a land department pre-emption claim proceeding.

In Kimpton v. Eve, 2 Ves. & B. 349, 352 (1813), Lord Eldon said that, if a solicitor told the opposing party that an injunction order had been granted, when it had not, and the party acted on that notice to his injury, "the solicitor, so intimating without foundation that an injunction had been granted, would unquestionably be liable to be struck off the Roll, to make satisfaction to the party injured, and to an indictment for so acting."

* This is an abbreviation of the statement in the original report.

davit duly sworn, whereas, in fact, it was not. In order to be used it would have to be filed before four o'clock in the day, and the solicitor left it on his table. In his absence his clerk saw it, and took it to be an affidavit duly sworn, but, observing an alteration in it not initialed, as usual, by the commissioner, he took it to the commissioner to have it so initialed; but the commissioner then saw it had not been sworn before him, as the signature was not his, and the matter came before the Law Society, who asked the solicitor for explanation, and he offered certain explanations, which, however, the council of the society did not consider satisfactory, and so the case was brought before this court. The solicitor filed an affidavit in extenuation, and exhibited testimonials as to his previous character, and it appeared that in the appeal he had been successful. The main point urged in extenuation was that no harm was done to any one or any wrong intended, and that, in fact, the document was not used in any way; and, further, that the solicitor was under excitement and pressed for time, and did the act hastily and without deliberation. However, as already stated, the Council of the Incorporated Law Society felt it their duty to bring the matter before the court.

Wills, Q. C. (with Murray), appeared for the society, and pointed out that the affidavit had not, in fact, been used, and that there did not appear to have been any intention to defraud any one.

Murphy, Q. C. (with Tindal Atkinson), addressed the court in mitigation, and in extenuation of the offence committed, which, however, he admitted to be most serious.

FIELD, J., said, in giving judgment, it was one of the most painful duties of the judges to consider what punishment ought to be imposed on a member of the profession who has been convicted of misconduct. There could be no doubt, in this instance, it was an offence of a very serious character. Having recounted the facts as above stated, the learned judge said he was willing to believe that there was no intention to defraud anybody or to mislead the court into making an order it might not otherwise have made. On the other hand, he could not help agreeing with Mr. Williamson (the secretary to the Incorporated Law Society) and the council of the society, in thinking that the explanation offered by the solicitor was not satisfactory, and it was not satisfactory to him. He was desirous of taking into account all circumstances that might fairly be taken into consideration in mitigating punishment. It might fairly be considered that it appeared to have been a first offence, and, again, there was a distinction always drawn between a mere attempt or an inchoate act and a complete offence, and this affidavit was not, in fact, used, nor did it appear that the affidavit made was different, or that there had been any attempt to impose on the court a different affidavit from that afterwards made. Then there were testimonials to the previous good character of the solicitor. The excuse or extenuation offered by the solicitor was that he did the act under great pressure and anxiety and in a moment of excitement.

It was difficult to suggest any other reason for it, for it was not suggested that the motive was to save the trifling fee (only 1s. 6d.) payable on swearing an affidavit. Under these circumstances, he had thought the matter over very anxiously, and had come to the conclusion that it was an act rather, perhaps, foolish and inconsiderate than deliberately fraudulent or criminal; but he was not quite sure that he took the same view as his brethren as to the proper punishment to be inflicted; and as they were the majority, and their view would prevail, he would not say anything more on that head nor enter into the reasons which might have led him to take a more severe view of the case, and he would say no more, therefore, than that he concurred in the sentence they would pronounce.

MANISTY, J. * * * It was certainly a case of gross impropriety of conduct, and under all the circumstances he thought that justice would be satisfied by suspension for two years.

LOPES, J., said he had come to the same conclusion. The solicitor was a young man starting in an honourable profession, and had hitherto borne a good character, and he was disposed to think that the act was done in a moment of excitement, and under the pressure of the moment, without any intent to defraud, and so he was satisfied with the sentence pronounced.

PEOPLE ex rel. HEALY, State's Atty., v. MACAULEY.

(Supreme Court of Illinois, 1907. 230 Ill. 208, 82 N. E. 612, 120 Am. St. Rep. 287.)

See ante, p. 40, for a report of the case.

(C) Commission of Criminal Acts

In re ———, an Attorney.

(Court of Queen's Bench, 1864. 12 W. R. 311.)

Archibald moved for a rule calling on an attorney to answer the matter of certain affidavits, charging him with acts amounting to an indictable misdemeanor, viz., the obtaining of money under false pretences. [COCKBURN, C. J. We cannot order an attorney to answer, if, by doing so, he may incriminate himself. Short v. Pratt, 1 Bing. 102.]

Archibald then asked for a rule nisi, calling upon the attorney to show cause why he should not be struck off the rolls. [COCKBURN, C. J., referred to In re ———, 5 B. & Ad. 1088, where a similar application was refused.] [BLACKBURN, J., referred to Stephens v. Hill,

10 M. & W. 28, as showing that the court might grant a rule calling on the attorney to show cause why he should not be struck off the rolls, although they will not compel him to answer the matters of an affidavit.]

COCKBURN, C. J. The case in the Exchequer, referred to by my brother BLACKBURN, being later than that to which I called attention, we will follow it in this case, and grant a rule nisi, calling on the attorney to show cause why he should not be struck off the rolls.

BLACKBURN and MELLOR, JJ., concurred.

Rule nisi accordingly.[75]

In re WEARE.

(Court of Appeal, [1893]. 2 Q. B. Div. 439.)

See post, 147, for a report of the case.

In re SUMMERS.

(Supreme Court of New York, Appellate Division, First Department, 1916. 159 N. Y. Supp. 86.)

PER CURIAM. Respondent was admitted to the bar in October, 1911. On the 24th of March, 1916, at the Trial Term of the Supreme Court held in and for the county of Kings, respondent was duly convicted upon his plea of guilty of a felony, to wit, attempted grand larceny in the first degree. A certified copy of such judgment of conviction having been presented to this court, the name of the respondent must

[75] On the disbarment of lawyers for criminal acts prior to their conviction for crime, see 114 Am. St. Rep. 839, note; 8 Ann. Cas. 847, note. On acquittal on the criminal charge as a defense to the disbarment proceeding for the same offense, see 10 Ann. Cas. 887, note. In some states by statute lawyers cannot be disbarred for criminal acts not connected with their professional duties until after their conviction. On the constitutionality of these and other statutes relating to the disbarment of attorneys, see 44 L. R. A. (N. S.) 1195, note. In Montana it was announced that: "Where the crime falls clearly without the sphere of official duty, it is discretionary with the court to hear and determine it upon the merits prior to a criminal prosecution and conviction in the local court; and it will refuse to entertain the accusation in the absence of urgent reasons why it should do so. In re Wellcome, 23 Mont. 140, 58 Pac. 45 (1899); Id., 23 Mont. 213, 58 Pac. 47 (1899). It is but just and fair to the accused that it should refrain from investigating and passing judgment upon such a charge, to the end that his rights may not be prejudiced. But where the conduct charged as the ground for removal falls within the sphere of official duty, as does that charged in this case, it is of no moment that it amounts to an offense against the criminal laws, nor whether criminal proceedings have been instituted and prosecuted to a conclusion."—Brantly, C. J., in In re Thresher, 33 Mont. 441, 444, 445, 84 Pac. 876, 877, 114 Am. St. Rep. 834, 8 Ann. Cas. 845 (1906).

be ordered to be stricken from the roll of attorneys, under the provisions of paragraph 3 of section 88 of the Judiciary Law. Settle order on notice.[76]

(*D*) *Improper Professional Conduct*

HANSON'S CASE.

(Court of Common Pleas, 1617. 1 Br. & Gold. 44.)

Hanson, one of the Attorneys of the Common Pleas, delivers a Note to the Sheriff's Clerk, of the names of diverse Jurors that were to be returned, and of diverse others that were not to be returned, in a case concerning one Butler, and for this Offence he was put out of the Roll of Attorneys.

SHARON v. HILL.

(Circuit Court of the United States, District of California, 1885. 24 Fed. 726.)

In this case, following two oral opinions, one by FIELD, J., and one by SAWYER, J., in explanation of a court order to disarm the defendant, who had been carrying a pistol and threatening the life of counsel for the plaintiff, there occurred between court and counsel for the defendant a discussion as to the propriety of counsel appearing in court armed when he knows that a hostile witness will be armed. Part of it was:

Mr. Tyler: I would say to his honor, Judge FIELD, that, although I thoroughly concede everything he says, in certain instances, yet where a lawyer has information that a witness will come armed, he will very likely do as I myself have done—come armed, to protect himself.

[76] In New York proof of conviction of crime makes disbarment compulsory, but the commission of crime may be ground for disbarment, even in the absence of criminal prosecution.—In re Stanton, 161 App. Div. 555, 146 N. Y. Supp. 890 (1914).

"The effect of a conviction of felony as a ground for disbarring an attorney is not annulled by a writ of error and supersedeas."—Per curiam opinion in Ex parte Cohen, 72 Or. 570, 573, 144 Pac. 79, 80 (1914).

In In the Matter of King, Gent., 8 Q. B. 129 (1845), an attorney had been charged in an insufficient indictment with conspiring to defraud parties of goods by getting another person to obtain the goods on credit and then seizing the goods on a collusive execution sued out against that person. A rule to show cause why he should not be struck off the roll was obtained. In the criminal prosecution the attorney was convicted by the jury, and the conviction reversed for insufficiency of the indictment. On the rule to show cause, Denman, C. J., said: "In his affidavit he denies being a party or privy to criminal conduct or that the indictment contains an offense punishable by the law of the realm; but he does not deny the commission of the acts charged in the indictment. We must not, merely because the indictment is bad in point of law, shut our eyes to the fact that the jury have convicted him of conduct rendering him unfit to be an attorney. Rule absolute" (8 Q. B. at page 134).

Justice Field: Then you would act very improperly. You should report the fact to the court and let the man carrying arms be arrested.

Judge Sawyer: When you have any such information, you should have the party put under bonds, or apply to the court in advance for protection.

Justice Field: Any man, counsel or witness, who comes into a court of justice armed, ought to be punished, and if he is a member of the bar, he ought to be suspended or removed permanently. That is the doctrine that ought to be inculcated from the bench everywhere. So far as I have the power, I will enforce it.

Mr. Tyler: So should I enforce it.

Justice Field: The reason that you give for carrying arms in court is not a good reason.

Mr. Tyler: Where witnesses do come armed—

Justice Field: Then report the fact to the court; that is the proper way.

Mr. Tyler: That will not stop a bullet.

Judge Sawyer: Then arrest the parties in advance, and put them under bonds, or apply to the court to have them examined and disarmed before permitting them to enter the court. The laws are very severe.

Mr. Tyler: The laws are very severe, but it is harder on the man that gets the bullet.

Justice Field: I don't mean to say that there may not be times in the history of a country, in certain communities, when everybody is armed. That was the case in the early days of California, when people traveled armed; but at this time, when law is supposed to be supreme, when all good men are supposed to obey it, and where counselors are sworn to obey the law and to see it properly administered, the carrying of arms into a court cannot for a moment be tolerated.[77]

In re COHEN.

(Supreme Court of New York, Appellate Division, First Department, 1915. 169 App. Div. 544, 155 N. Y. Supp. 517.)

In the matter of the application for the disbarment of Louis H. Cohen, an attorney. On report of official referee on charges of professional misconduct. Respondent disbarred.

See, also, 152 App. Div. 883, 136 N. Y. Supp. 1133.

[77] The editor is reminded of an order of court entered in Utah while he was in practice there requiring persons attending court to leave their guns and spurs outside the courtroom. That was not very original, however, for in 1614 the Inns of Court "ordered that no Gentleman of any House of Court or Chancery shall come into their several Halls with Cloaks, Boots, Spurs, Swords or Daggers."—William Dugdale, *Origines Juridiciales* (2d Ed., 1671) p. 318.

PER CURIAM. The respondent is charged with having taken advantage of the inexperience and necessities of a client to extort from him an exorbitant and unconscionable fee for certain legal services rendered, and it is also charged that, after an order had been made requiring him to repay a large part of the fee retained, he fled from the jurisdiction of the court to avoid the enforcement of its order. * * *

It is no less improper for an attorney to take advantage of his client's necessities and inexperience to induce him to make a contract in advance to pay an exorbitant fee for services than it is to take advantage of those necessities and that inexperience to exact an unreasonable fee after the services have been rendered. Nor does it lessen the impropriety of respondent's conduct that, under the spur of disciplinary proceedings, he made a settlement with his client, and paid a substantial part of the moneys which he had been adjudged to owe him. These proceedings are not designed to compel payments, but to protect and preserve the honor and integrity of the legal profession. In our opinion the charge that respondent took advantage of Rich's inexperience and deceived him as to the true value of the services rendered, thereby exacting and retaining an unreasonable sum for the services rendered is sustained.[78]

An even more serious charge, to wit, that after the entry of the order directing him to make restitution respondent fled the jurisdiction of the court in order to render it powerless to enforce its order is practically admitted, or at least proven beyond the possibility of a doubt. It is quite true that, save under very special circumstances, a court will not ordinarily discipline an attorney for a mere failure to pay over money, which he has been directed to pay by order or judgment. The law provides other remedies by which such payment may ordinarily be enforced, and if there were nothing before us save the respondent's failure to pay over the money which he was required to pay by the order of September 7, 1911, we should hesitate to punish him for such failure, which might have been due to inability, rather than contumacy. His serious offense, however, consisted in fleeing the jurisdiction with the intent and purpose to render the court powerless to enforce its order, and thus to prevent the application of the remedies provided by law. Such action on the part of an attorney is most reprehensible, and has for many years been considered in England as a sufficient reason for striking an attorney off the rolls. This course was followed by the Court of Queen's Bench, sitting in banc, in 1846, in the course of which Lord Denman, who delivered the judgment of the court, referred to a similar case which had arisen as

[78] See People v. Bamborough, 255 Ill. 92, 99 N. E. 368 (1912), a case of disbarment for exacting excessive fees.

early as 1821. See 10 Jurist, part I, p. 198, and Ex parte A. B., an attorney, 4 Jurist, 630.[79]

In every aspect the conduct of the respondent calls for the most severe condemnation, which could not be adequately expressed by a mere censure, or even by a temporary suspension from practice. He has shown himself to be so completely lacking in a due sense of the duty which a lawyer owes to his client and to the court that he has demonstrated his unfitness to remain a member of the bar.

He is therefore disbarred. Settle order on notice.

BAR ASSOCIATION OF CITY OF BOSTON v. GREENHOOD.

(Supreme Judicial Court of Massachusetts, Suffolk, 1897. 166 Mass. 169, 46 N. E. 568.)

KNOWLTON, J. This is an appeal from a judgment of the superior court removing the respondent from the office of an attorney at law in the courts of the commonwealth. * * *

We now come to the question whether the particular facts found were sufficient to warrant a general finding of guilty of deceit, malpractice, and gross misconduct in office. The respondent, in resisting the probate of a will, called as a witness Florence W. Lowe, who had entered into an agreement in writing with his clients to aid them to the utmost of her power in the contest against the allowance of the will. Two other persons entered into the same agreement, and the pay of all of them was made contingent on the success of his clients in the litigation. If they succeeded, she was to have $500, and the other two were to have one-seventh of the net amount obtained by the contestants; if they failed, she and her associates were to receive nothing. She had lived in the family of the testator for a considerable time before his death, and was a material witness upon the subject of his mental condition. The respondent drew this agreement, and signed it in behalf of his clients. In pursuance of the agreement, Florence W. Lowe interviewed witnesses, and aided in procuring evidence, and testified at the trial. The temptation held out by this arrangement, and the danger that it would lead to a trial in part upon untrustworthy testimony, bring it perilously near, if not within, the rule that forbids the making of similar agreements on grounds of public policy. Patterson v. Donner, 48 Cal. 369; Marshall v. Railroad Co., 16 How. 314, 14 L. Ed. 953; Dawkins v. Gill, 10 Ala. 206; Gillett v. Board of Sup'rs of Logan County, 67 Ill. 256.

[79] In In the Matter of ———, Gent., 1 D. & R. 529 (1822), the court "intimated a doubt as to the propriety of an attorney remaining any longer upon the Rolls of the Court" where he kept out of the way to avoid personal service of a rule to show cause why attachment should not issue against him for not paying money pursuant to the Master's allocatur.

The respondent, although he had a duplicate of the agreement in his possession, did not make known its existence, produced Florence W. Lowe as a witness without disclosing that she had an interest of this kind, and when the existence of the paper was finally shown on cross-examination, and when the presiding justice requested that the paper be produced by the witness, and it was understood that she would produce it, he excused her from further attendance, or sent her away, and told her "that when he wanted her again he would send for her." This was on May 25th. On May 29th, the witness not having returned, and the court having called for her, and called upon him for an explanation, he said that he had a duplicate original among his papers in court, and he then searched for it, but did not find it. The paper was not exhibited until, on May 31st, the witness returned to the court, and produced it. We think the finding of the court that he tried to suppress this evidence was well warranted. Whatever may be thought of his conduct up to the time when the existence of the paper was disclosed in cross-examination, and the paper was called for by the judge, it was clearly his duty then, if not to do what he could to obtain and present the evidence, at least to do nothing to conceal or suppress it. He had taken an official oath "to do no falsehood, nor consent to the doing of any in court," and to conduct himself "with all good fidelity, as well to the court" as his clients. Pub. St. c. 159, § 36. Fidelity to the court required him, when he had in his possession an important paper which the court called for to be put in evidence, to produce it. Instead of producing it, he waited four days, without disclosing that he had any connection with it; and it was two days more, after a formal order from the judge, before the paper was obtained from his witness, who, in the meantime, had been staying away under his direction.

The question before us on this branch of the case is not whether these facts necessarily show deceit, malpractice, or other gross misconduct, but whether they furnish any evidence of it from which the court could find it by way of inference or otherwise. With reference to the question with what purpose and intent he was acting, it is to be remembered that much importance is to be attached to evidence which was before the trial court that cannot be put upon paper. Not only were other witnesses personally present before the court, but the respondent himself was a witness, whose look and manner in giving his testimony may have been even more significant upon this question than his words. There is nothing upon the record to indicate that there was any error of law on the part of the court in making the original finding of guilty on this branch of the case.[80]

[80] In In re Robinson, 140 App. Div. 329, 125 N. Y. Supp. 193 (1910), an attorney was suspended for a year for directing a person to evade service of a subpœna to appear before a federal grand jury which was investigating the affairs of a corporation in which the attorney was a director and was inves-

In regard to the fourth and fifth specifications, it appears that when Rich [the executor of William Dunn] filed his first account the respondent [who was acting as attorney for three legatees under the will] knew that he had failed to charge himself with as much by about $900 for the stock as he ought to have done. He did not act in the interest of his clients at this time by objecting to the account, and having the error corrected. So far as appears, he did not disclose his knowledge to anybody. Rich owed him a sum of money, which he declined to pay unless the respondent would assent to the allowance of the account in behalf of his clients. The respondent, therefore, signed his assent in their names, obtaining his pay, and the account was allowed. His signing tended to mislead the judge of the probate court, and all who were to share in the balance in the hands of the executor. He testified that when he signed his assent he intended to wait until the second account was presented, and then to object to the allowance of that unless the executor would correct, to the extent of the interest of his clients, the first count which had been allowed with his assent, given for his personal advantage in such a way as to deceive the executor, the judge of the probate court, and the persons interested in the proceeds of the estate, including, so far as appears, his own clients. Thereupon, on the filing of the second account, he wrote a letter to the executor's counsel, threatening the executor with an attack unless he paid the amount which his clients should receive, and proposing to keep the whole matter a secret if a payment was made.

His conduct in reference to Rich, in giving his assent to the account, and thereby obtaining his pay, and professing to make a written assent of his clients that would be valid and effectual, when all the time he had a secret intention to avoid the assent on the filing of the second account, was dishonest. In reference to his clients, it is not to be inferred that they consented to his signing their assent to the allowance of an account which he knew gave them much less than they were entitled to, on the chance of subsequently getting the account opened to correct the error. His testimony that it was his intention, when Rich should file his second account, to object to the allowance of it "if his clients would authorize him so to do," plainly implies that he signed their assent without telling them of the error, or conferring with them about the action to be taken in regard to it. His own interest to get his pay, which was the inducement to him to sign this assent, coupled with his threatening letter and proposal of secrecy after the second account was filed, warranted the judge of the superior court in inferring that in this he was wanting in fidelity to his clients, as well as to the court. To represent that his clients assented to the account under these circumstances was a direct brand upon the probate court. His subsequent attempt to obtain what belonged to them, not having the ac-

tigating the affairs of the president of the corporation. See In re Rouss, 169 App. Div. 629, 155 N. Y. Supp. 557 (1915).

count corrected, but in an indirect way, does not relieve his conduct of its deceit and impropriety.

We do not intimate that an attorney may not settle a claim in behalf of his clients without stopping to see that justice is done to others who may have a similar claim, and without always disclosing irregularities of which he has knowledge, and for which he is not responsible. But what the respondent did was much more than this. The facts found, with the inferences that may be drawn from them, well warrant a finding that he was guilty of deceit and gross misconduct in his office of attorney; and it is immaterial that, in making his findings of fact, the judge has not attempted to make a complete analysis of the conduct described, nor to state all the particulars in which it was culpable.

It is important that the oath of office taken by attorneys on admission to the bar should not be considered and treated by those who take it as an empty form. Nothing in the life of the people more deeply concerns their welfare than the administration of justice in our courts. The high standard of integrity which is prescribed by our constitution and our laws for the officers of our courts should be maintained. The removal or suspension of an attorney is necessarily damaging to him, and may even be ruinous. It should only be ordered after a careful investigation of the alleged causes for it. But when it appears that one has ceased to regard the principles of morality, and that fidelity to truth and justice without which the practice of law is a mockery, a court should not hesitate to remove him.

The question whether the interests of the public require a judgment of absolute removal, or of removal only for a time, is not before us. Like the imposition of a sentence on conviction of a crime, it involves a consideration of questions of fact, and is to be determined by the trial court in the exercise of its discretion. Judgment affirmed.

MAKING DEMAND WITH THREAT OF LEGAL CONSEQUENCES OF REFUSAL. N. Y. Committee. *Question 107:* Is a lawyer justified in sending a letter to a debtor owing a debt secured by mortgage, that unless the claim is paid within a time fixed, an action will be brought for the foreclosure of the mortgage?

Answer: In the opinion of the Committee, there is no objection to the course suggested in the question.[81]

[81] In Matter of Chadsey, 141 App. Div. 458, 126 N. Y. Supp. 456 (1910), a lawyer was suspended for six months for seeking to obtain by means of threats letters of a compromising character alleged to have been written by his client.

(E) Ignorance of Law and Incompetence

BRYANT'S CASE.

(Superior Court of Judicature of New Hampshire, 1851. 24 N. H. 149.)

Petition for the suspension or removal from office of John S. Bryant, an attorney.

GILCHRIST, C. J. * * * The weight of evidence is that Bryant had no authority to appear for Pollard. If his course could be shown to proceed from any fraudulent or corrupt motive, if he intended to do wrong, we should have no hesitation in suspending or removing him from office. But the evidence does not satisfy us that he intended to commit a wrong, either against Pollard or against any other person. It is true he appeared for Pollard without any authority; but it is not improbable that, supposing he had an interest, he thought he had a right to appear and defend it without reference to Pollard. But he was ignorant of the law and the practice, and being thus ignorant, and perhaps embarrassed and uncertain what course to pursue, he said whatever he thought would answer the immediate purpose, without looking beyond it. This course may fairly enough be presumed to have resulted from his ignorance of the law, and not to have proceeded from that corrupt and fraudulent motive mentioned in the cases referred to.

This brings us to the question whether, in the present state of the law, mere ignorance of the law, however gross, can authorize the court to remove an attorney from practice. But how can the court possess this power, when the statute declares that any citizen, twenty-one years of age, and of good moral character, shall, on application, be admitted to practice as an attorney? * * *

Anything that tends to lower the standard of professional acquirements among those whose duty it is to investigate and defend the rights of others is to be lamented. Every man may be a plaintiff or defendant. Every man may have a right to enforce, or an unjust claim to resist. It would seem to be more for the public good that when he applies to an attorney for advice he should have security, from the attorney's previous study of his profession, that he is reasonably competent to discharge his trust. * * *

And it is with a full conviction of the importance of preserving the standard of professional qualifications that we have been, nevertheless, constrained to come to the result that ignorance of the law in an attorney does not authorize the court to suspend or remove him from office, as a contrary doctrine would render it necessary that an at-

torney should possess some knowledge of the law—a condition which the statute does not require. * * *

Petition dismissed.[82]

(F) *Non-Professional Misconduct*

In re HILL

(Court of Queen's Bench, 1867. 3 Q. B. Cases, 543.)

Rule calling upon Robert Raby Hill to shew cause why he should not be struck off the roll of attorneys of this Court. * * *

COCKBURN, C. J. No case has, so far as I am aware, come before the Court under the precise circumstances under which this case presents itself, namely, of an act of delinquency committed by an attorney's clerk, who at the same time is an attorney, though at that time not acting as such; but still I think, on every principle of justice, we ought not the less to entertain the application. In dealing with the case, I am perfectly prepared to abide by what I said in Re Blake, 3 E. & E. 34, 30 L. J. (Q. B.) 32.[83] When an attorney does that which

[82] "Ignorance of law and neglect of business may keep a lawyer in the lowest ranks of his profession, and render him liable in damages to his clients for any loss caused thereby; but such would afford no ground for disbarment. But the man who is lacking in integrity and who does not deal honestly and fairly with his client, the court and the other party, but who practices deceit, or fraud, or dishonesty, or overreaching craft, no matter how learned and diligent he may be, is unworthy of his profession and should be disbarred." —Benet, Acting Associate Justice, in In re Duncan, 64 S. C. 461, 482, 42 S. E. 433, 440 (1902).

"I am in favor of the recall of incompetent lawyers. * * * We can get rid of a dishonest or corrupt lawyer, but there is no way of getting rid of the incompetent lawyer, and the latter, ordinarily, does the most damage. * * * I certainly favor lodging in our trial courts authority to suspend a lawyer from practice upon its appearing by the pleadings he files or his conduct at the trial table that he is incompetent. Arbitrariness and prejudice of the trial judge can be guarded against by requiring him to refer the question of the lawyer's competency to a standing or special committee of the bar to reexamine the supposed incompetent lawyer, investigate his record and report its findings upon and in accordance with which the court shall act. If an unfavorable report is made, suspension should only be until passage of a satisfactory examination."—Louis H. Winch, *The Recall of Lawyers*, 24 Green Bag, 135, 136.

"An old rule of court directs a jury of able and credible officers, clerks and attorneys, once in three years, to be impanneled and shown to inquire (inter alia) 'of such who have been admitted attorneys or clerks, and are notoriously unfit, their names to be presented to the court, and they to be punished or removed as the case shall require.' R. G. Mich. 1654, r. 3, incorporating provisions of rules and orders of C. P. 9 Eliz. 1567."—Alexander Pulling, *A Summary of the Law and Practice Relating to Attorneys* (3d Ed.) 465, note (m).

On improper advice to a client with no intent to wrong him as ground for suspension or disbarment, see L. R. A. 1916A, 1175, note.

[83] In In the Matter of Blake, 3 E. & E. 34, 38 (1860), Cockburn, C. J., said: "I proceed upon the general ground that where an attorney is shewn to have been guilty of gross fraud, although the fraud is neither such as renders him

involves dishonesty, it is for the interest of the suitors that the Court should interpose and prevent a man guilty of such misconduct from acting as attorney of the Court. In this case, if the delinquent had been proceeded against criminally upon the facts admitted by him, it is plain that he would have been convicted of embezzlement; and upon that conviction being brought before us, we should have been bound to act. If there had been a conflict of evidence upon the affidavits, that might be a very sufficient reason why the Court should not interfere until the conviction had taken place; but here we have the person against whom this application is made admitting the facts. It appears that he, being a clerk in the employment of Messrs. Hargrove, received a sum of money on their account, and he embezzled it; that is conduct of which, although he was not acting in the character of an attorney, yet being an attorney, the Court is bound to take notice.

There are, however, in the case, circumstances of mitigation. It appears that shortly after this transaction, which is the subject-matter of the present application, he left the employment of the gentlemen in whose service he had been, and set up business for himself at Ipswich, and that an interval of three years has since elapsed, and during the whole of that time he has behaved himself with perfect propriety in his character of attorney in the various transactions in which he has been engaged; and that may fairly, I think, entitle us to draw the inference that he did act in this transaction under the influence of great pressure, and that it was an exception to the ordinary course of his conduct, and that he has entirely abstained from anything similar since. * * * I think, upon all the facts of the case, we are not called upon to go to the extent of striking him off the roll; but we cannot pass the case over without marking our sense of the misconduct in this instance admitted to have taken place. The least we can do is to say that he must be suspended from practising as an attorney for twelve months.[84] * * *

liable to an indictment nor was committed by him while the relation of attorney and client was subsisting between him and the person defrauded, or in his character as an attorney, this court will not allow suitors to be exposed to gross fraud and dishonesty at the hands of one of its officers."

[84] "It would be carrying the doctrine too far to hold that an attorney must be free from every vice, and to strike him from the roll of attorneys because he may indulge in irregularities affecting to some extent his moral character, when such delinquencies do not affect his personal or professional integrity. To warrant a removal, his character must be bad in such respects as show him to be unsafe and unfit to be entrusted with the powers and duties of his profession; and it is not essential that this misconduct or bad character should be in respect to some deceit, malpractice or misdemeanor practiced or committed in the exercise of his profession only."—Snyder, President, in State v. McClaugherty, 33 W. Va. 250, 259, 10 S. E. 407, 410 (1889).

In re WEARE.

(Court of Appeal, [1893] 2 Q. B. Div. 439.)

Appeal from an order of the Divisional Court (Wills and Charles, JJ.) ordering the name of E. Weare, a solicitor, to be struck off the roll.

It appeared that on August 30, 1892, Weare was convicted under the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69) § 13, by two justices of Bristol for that he, being the landlord of No. 4, Harford Street, Bristol, was unlawfully and wilfully a party to the continued use of such premises as a brothel, and was sentenced to a term of imprisonment.

It was proved beyond dispute that the above house and some other houses belonging to Weare were let to weekly tenants, and had been used as brothels. The justices considered it also to be established that Weare knew all along that the premises were being so used. Upon appeal to the quarter sessions, the recorder took the same view of the evidence as the justices, and affirmed the conviction, but set aside the sentence of imprisonment and substituted a fine of £20. Weare was ordered to pay sums of money to the justices and to the informer towards their respective costs of the appeal. These sums were paid.

On December 17, 1892, the Incorporated Law Society served Weare with notice of motion that his name might be struck off the roll of solicitors; and on May 18, 1893, the Divisional Court made an order in accordance with the notice of motion.

Lord ESHER, M. R. I am sorry to say that in this case I cannot have any real doubt as to the facts. I think that the only inference to be drawn from the evidence (to the mind of any person who will look at it calmly) is that this person has allowed himself to be the landlord of brothels, and that he has let his houses to tenants when he knew that those tenants were using them as brothels. Nor can I doubt that his doing so is a criminal offence within the statute which has been read to us. * * *

It is argued that if an offence committed by a solicitor is not an offence in his character as a solicitor, or having relation to his character as a solicitor, then, however monstrous it may be, the Court has not authority to strike him off the rolls because the act is not done by him in his capacity as a solicitor. That would seem to me to be a very strange doctrine if it were true—that a person convicted of a crime, however horrible, must, if it be not connected with his professional character, be allowed by the Court still to be a member of a profession which ought to be free from all suspicion.

But is it a true doctrine? It seems to me that it was decided not

to be so as far back as the time of Lord Mansfield in 1778. In re Brounsall, 2 Cowp. 829.[85] * * *

All these cases seem to me to shew that it is not necessary that the offence, at all events, if it be a criminal offence, should be committed by the offending party in his character as an attorney; the question is whether it is such an offence as makes it unfit that he should remain a member of this strictly honourable profession. Where a man has been convicted of a criminal offence, that prima facie at all events does make him a person unfit to be a member of the honourable profession. That must not be carried to the length of saying that wherever a solicitor has been convicted of a criminal offence the Court is bound to strike him off the roll. That was argued on behalf of the Incorporated Law Society in the case of In re a Solicitor, Ex parte Incorporated Law Society, 61 L. T. 842. It was there contended that where a solicitor had been convicted of a crime it followed as a matter of course that he must be struck off; but Baron Pollock and Manisty, J., held that, although his being convicted of a crime prima facie made him liable to be struck off the roll, the Court had a discretion and must inquire into what kind of a crime it is of which he has been convicted, and the Court may punish him to a less extent than if he had not been punished in the criminal proceeding.

As to striking off the roll, I have no doubt that the Court might in some cases say, "Under these circumstances we shall do no more than admonish him;" or the Court might say, "We shall do no more than admonish him and make him pay the costs of the application;" or the Court might suspend him, or the Court might strike him off the roll. The discretion of the Court in each particular case is absolute. I think the law as to the power of the Court is quite clear. * * * The Divisional Court, having heard the case, has come to the conclusion that this solicitor has been convicted of a criminal offence of such a disgraceful kind that he ought to be struck off the rolls. The Court is not bound to strike him off the rolls unless it considers that the criminal offence of which he has been convicted is of such a personally disgraceful character that he ought not to remain a member of that strictly honourable profession. Now, what is the offence? The offence is being a party to the use of a house belonging to him as a brothel. Is it or is it not personally disgraceful? Try it in this way. Ought any respectable solicitor to be called upon to enter into that intimate intercourse with him which is necessary between two solicitors, even though they are acting for opposite parties? In my opinion, no other solicitors ought to be called upon to enter into such relations with a person who has so conducted himself. I think he has been convicted of a personally disgraceful offence. The conviction is

[85] The opinion here considered In re Brounsall, 2 Cowp. 829 (1778), Rex v. Southerton, 6 East, 126 (1805), and In re Hill, L. R. 3 Q. B. 543 (1868). [In re Brounsall and In re Hill are given ante, pp. 125, 145.]

prima facie a reason why the Court should act. The disgracefulness of the crime in this case is such that the Court was bound to strike him off the roll. I know how terrible that is. It may prevent him from acting as a solicitor for the rest of his life; but it does not necessarily do so. He is struck off the roll; but if he continues a career of honourable life for so long a time as to convince the Court that there has been a complete repentance, and a determination to persevere in honourable conduct, the Court will have the right and the power to restore him to the profession. His case, therefore, is not hopeless; but for the time he must be struck off the roll, and this appeal must be dismissed.[86]

LOPES, L. J. * * * I wish to make only one observation with regard to a point that arose about the conviction. It is perfectly clear that the mere fact that the person has been convicted of a criminal offence does not make it imperative on the Court to strike him off the roll. There are criminal offences and criminal offences. For instance, one can imagine a solicitor guilty of an assault of such a disgraceful character that it would be incumbent on the Court to strike him off the roll. On the other hand, one can imagine an assault of a comparatively trifling description, where in all probability the Court would not think it its duty to interfere. The same observation would arise with regard to indictments for libel. There are libels and libels, some of which would compel the Court to act under the plenary power it possesses, others where the Court would hesitate before it so acted. * * *

DELANO'S CASE.

(Supreme Court of New Hampshire, 1876. 58 N. H. 5, 42 Am. Rep. 555.)

DOE, C. J. This is a proceeding instituted by the court on the question whether Delano should be allowed to retain the office of attorney. The facts have been found by a Commissioner appointed by an order of the circuit court, in the usual form, at the February term, 1875.

Delano was admitted to practice as an attorney, in 1870, on evidence of age and good moral character, under Gen. St. c. 199, § 2. In 1871, 1872 and 1873, he was collector of taxes of the town of Farmington. Being engaged in the busines of buying, fitting, and running a mill for

[86] "In a still more recent case [Matter of Isaacs, 172 App. Div. 181, 158 N. Y. Supp. 403 (1916)] an attorney, besides practicing law, was engaged in the real estate business. For the purpose of securing a more favorable sale of a piece of real estate which he owned, he made a lease for a large rental to one whom he knew was irresponsible. The lease was evidently for the purpose of 'puffing up' the value of the property. It was decided that this amounted to fraud and misrepresentation, which in a civil suit would have made the lawyer liable in damages. * * * The court disbarred him."—Julius Henry Cohen, *The Law: Business or Profession?* (1916) p. 14.

the manufacture of bobbin lumber, and not having sufficient funds of his own for that business, he used the money of the town, received by him as collector of taxes, to the amount of $8,000 or $9,000, a large part of which the town has lost by this violation of his official duty. As is usual in such cases, he expected, when he appropriated the money to his own use, to be able to restore it without the misappropriation being discovered. He intended to restore it, and was guilty of much less than the usual amount of falsehood and fraudulent artifice. He and his wife and family did what they could to make good the loss to the town, but with only partial success.

We have no doubt, that, in the absence of all statutory regulation of the matter, the court would be authorized to suspend this attorney from practice, or to remove him from office. Cooley, Const. Lim. 337; Sanborn v. Kimball, 64 Me. 140. In Ex parte Brounsall, Cowp. 829, an attorney was struck off the roll for stealing a guinea, Lord Mansfield saying: "The question is, whether, after the conduct of this man, it is proper that he should continue a member of a profession which should be free from all suspicion. * * * He is an unfit person to practise as an attorney. It is not by way of punishment; but the court on such cases exercise their discretion, whether a man, whom they have formerly admitted, is a proper person to be continued on the roll or not."

The temptation to which Delano yielded is one to which he would be constantly exposed in the practice of his profession. The money he misapplied was not the money of a client; but his situation as collector of taxes was, in substance, the situation of an attorney receiving money for a client. And when it appears that he could not be safely trusted in the former case, it thereby appears that he cannot be safely trusted in the latter. If his defalcation had occurred before he was admitted to the office of attorney, that fault should have prevented his admission; and, being enough to prevent his admission, it is enough to require his removal. This would clearly be so if the subject of removal were regulated solely by the common law of the state.

"The court shall inquire in a summary manner into any charge of fraud, malpractice, or contempt of court, against an attorney, and, upon satisfactory evidence of his guilt, shall suspend him from practice, or may remove him from office." Gen. St. c. 199, § 7. If this statute affords a remedy only for misfeasance in the office of attorney, it does not apply to this case. We think the true construction is given in Mills' Case, 1 Mich. 392, where it is held that such a statute does not limit the common-law power of the court, and that an attorney may be suspended or removed for other causes than those mentioned in the statute. An attorney is a public officer. Admission to and expulsion from his office are regulated by law. He takes an official oath. The public is entitled to ample protection against the danger of any abuse of the great powers of the office which the public by

its agents has conferred upon him. When Delano was admitted, age and good moral character were the only necessary qualifications. Legal knowledge and skill were not required. But it is indispensable that an attorney be trustworthy. And he is not trustworthy if he is capable of improperly applying to his own use his client's money, whether he intends to return it or not. It would be an unreasonable construction of the statute, to hold that his license cannot be revoked when it invites the community to trust him in a particular wherein he cannot safely be trusted. The legislature could not have intended to abolish the ancient requirement of his continued integrity, and require another branch of the government to continue to hold him out to the world as worthy of confidence when the holding out becomes false and fraudulent.

Mr. Delano is removed from the office of attorney.[87]

Ex parte WALL.

(Supreme Court of the United States, 1883. 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552.)

BRADLEY, J. A petition was filed in this case by J. B. Wall for an alternate writ of mandamus to be directed to James W. Locke, district judge of the United States for the southern district of Florida, to show cause why a peremptory writ should not issue to compel him to vacate an order made by him as such district judge, prohibiting said Wall from practicing at the bar of said court [for encouraging and participating in the lynching of a man in front of a United States courthouse in term time during the noon recess of court], and to restore said Wall to the rights, privileges, and immunities of an attorney and proctor thereof. The petition set forth the proceedings complained of, and an order was made by this court requiring the judge

[87] In Allen's Case, 75 N. H. 301, 73 Atl. 804 (1909), the money of a client was used, but friends of the attorney replaced it. The court said the attorney had done just what the court inferred in Delano's Case that Delano was capable of doing.

"It is not only the general duty of a clerk [of court] to treat all litigants impartially, but it is his especial duty to indorse the correct file mark on all papers required to be filed. And when, without the consent of both litigants and for the purpose of securing to one of them a right which he otherwise would not have, that officer willfully misdates his file mark, he commits an act which is a fraud upon the other party and constitutes gross official misconduct, and for which he can and should be removed from office, as well as punished for contempt of court. Also, if he is induced to commit such act by an attorney representing the party to be benefited thereby, the attorney so offending can and should be disbarred and not permitted to continue the practice of his profession, as well as punished for contempt of court."—Key, C. J., in Howard v. Gulf, C. & S. F. Ry. Co. (Tex. Civ. App.) 135 S. W. 707, 709 (1911).

On the disbarment of lawyers for misconduct in a nonprofessional official capacity, see L. R. A. 1915A, 663, note.

to show cause why the prayer of the petition should not be granted. The rule to show cause has been answered, and we are now called upon to decide whether the writ ought to be granted. * * *

It is laid down in all the books in which the subject is treated, that a court has power to exercise a summary jurisdiction over its attorneys to compel them to act honestly towards their clients, and to punish them by fine and imprisonment for misconduct and contempts, and, in gross cases of misconduct, to strike their names from the roll. If regularly convicted of a felony, an attorney will be struck off the roll as of course, whatever the felony may be, because he is rendered infamous. If convicted of a misdemeanor which imports fraud or dishonesty, the same course will be taken. He will also be struck off the roll for gross malpractice or dishonesty in his profession, or for conduct gravely affecting his professional character.

In Archb. Pr. (Ed. by Chitty) 148, it is said: "The court will, in general, interfere in this summary way to strike an attorney off the roll, or otherwise punish him, for gross misconduct, not only in cases where the misconduct has arisen in the course of a suit, or other regular and ordinary business of an attorney, but where it has arisen in any other matter so connected with his professional character as to afford a fair presumption that he was employed in or intrusted with it in consequence of that character." And it is laid down by Tidd that "where an attorney has been fraudulently admitted, or convicted (after admission) of felony, or other offense which renders him unfit to be continued an attorney, or has knowingly suffered his name to be made use of by an unqualified person, or acted as agent for such person, or has signed a fictitious name to a demurrer, as and for the signature of a barrister, or otherwise grossly misbehaved himself, the court will order him to be struck off the roll." 1 Tidd, Pr. 89 (9th Ed.). Where an attorney was convicted of theft, and the crime was condoned by burning in the hand, he was nevertheless struck from the roll. "The question is," said Lord Mansfield, "whether, after the conduct of this man, it is proper that he should continue a member of a profession which should stand free from all suspicion. . . . It is not by way of punishment; but the court in such cases exercise their discretion, whether a man whom they have formerly admitted is a proper person to be continued on the roll or not."

Now, what is the offense with which the petitioner stands charged? It is not a mere crime against the law; it is much more than that. It is the prostration of all law and government; a defiance of the laws; a resort to the methods of vengeance of those who recognize no law, no society, no government. Of all classes and professions, the lawyer is most sacredly bound to uphold the laws. He is their sworn servant; and for him, of all men in the world, to repudiate and override the laws, to trample them under foot, and to ignore the very bands of society, argues recreancy to his position and office, and sets a pernicious example to the insubordinate and dangerous elements of the body pol-

itic. It manifests a want of fidelity to the system of lawful government which he has sworn to uphold and preserve. Whatever excuse may ever exist for the execution of lynch-law in savage or sparsely-settled districts, in order to oppose the ruffian elements which the ordinary administration of law is powerless to control, it certainly has no excuse in a community where the laws are duly and regularly administered. But, besides the character of the act itself, as denoting a gross want of fealty to the law and repudiation of legal government, the particular circumstances of place and time invest it with additional aggravations. The United States court was in session; this enormity was perpetrated at its door; the victim was hanged on a tree, with audacious effrontery, in the virtual presence of the court! No respect for the dignity of the government as represented by its judicial department was even affected; the judge of the court, in passing in and out of the place of justice, was insulted by the sight of the dangling corpse. What sentiments ought such a spectacle to arouse in the breast of any upright judge, when informed that one of the officers of his own court was a leader in the perpetration of such an outrage? We have no hesitation as to the character of the act being sufficient to authorize the action of the court. * * *

The writ of mandamus is, therefore, refused.[88]

[88] In State v. Graves, 73 Or. 331, 144 Pac. 484, L. R. A. 1915C, 259 (1914), where an attorney was suspended from practice for being one of a mob which forcibly took from a city jail three members of the Industrial Workers of the World, who had denounced the United States flag and government, carried them some distance from the city, made them kiss the American flag and ordered them never to return, McBride, C. J., said: "An attorney is an officer of the court, sworn to obey the laws, and upon occasions of this kind it is his duty, if present at all, to uphold the law and counsel peaceable and lawful methods, and what might be excusable in the conduct of a citizen unacquainted with the law cannot be overlooked in an attorney." On acting with a mob as ground for discipline, see L. R. A. 1915C, 259, note.

In Dormenon's Case, 1 Mart. O. S. (La.) 129 (1810), an attorney's name was struck off the rolls because he "acted in concert with the negroes and mulattoes of St. Domingo in destroying the whites." He was later exonerated of the charge by the legislature and was restored to the roll by the court. Dormenon's Case, 2 Mart. O. S. (La.) 305 (1812).

In Smith v. State, 1 Yerg. (Tenn.) 228 (1829), an attorney was disbarred because, after being challenged, he fought a duel in another state and killed his antagonist.

"What I desire to impress at this time upon members of the legal profession is that every one of them is or should be from his very position and from the license which gives him special privileges in the determination of legal questions and controversies, a public leader and teacher, whose obligation to support the constitution and laws and to act with all due fidelity to the courts is not fully performed, when the fundamental organization of society is assailed or threatened, or the laws defied or likely to be in the community in which he lives, as a result of revolutionary purpose or of ignorance or unreasoning passion, unless he comes to the front as a supporter of settled institutions and of public order, and does what he properly and lawfully can to correct any sentiment, general or local, that would in itself be a public danger, or be likely to lead to disorder or unlawful violence. It is a low and very unworthy view any one takes of his office when he assumes that he has nothing to do with public ignorance of the duty of subordination to the institutions of organized society, or with breaches of law existing or threatened,

PEOPLE ex rel. CHICAGO BAR ASS'N v. WHEELER.

(Supreme Court of Illinois, 1913. 259 Ill. 99, 102 N. E. 188, 45 L. R. A. [N. S.] 1202, Ann. Cas. 1914C, 286.)

DUNN, J. Upon an information filed, a rule was entered against the respondent requiring him to show cause why he should not be disbarred. * * *

The only question in the case is whether the lending of money at a usurious rate of interest is sufficient ground for the disbarment of an attorney. The answer is to be taken as true. No single circumstance of hardship or oppression is suggested, unless the mere fact of a usurious loan on an assignment of wages is such a circumstance. No individual is shown ever to have complained of the respondent's acts or supposed himself to have been wronged. The defendant's rates varied from 2½ to 10 per cent. a month. The law permits pawnbrokers to charge 3 per cent. a month, yet a pawnbroker's business would not, of itself, prevent his admission to the bar. A candidate for admission to the bar must show that he is possessed of a good moral character, and one who has been admitted may be disbarred if he has lost that character. Usury is not an offense against the law in Illinois. Of itself it is not immoral. It would be contrary to common experience to say that a man who lends money at usurious rates is for that reason alone not a man of good moral character. If the respondent's answer was not true, if he was conducting his business in a fraudulent and oppressive manner, if he was imposing upon the weak and ignorant, and unjustly increasing the burden of their debts, an issue of fact should have been made.

The facts appearing in the record do not justify the disbarment of the respondent. The rule will be discharged.

Rule discharged.[89]

IV. EFFECT OF REPARATION AND PARDON

PEOPLE ex rel. WAYMAN, State's Atty., v. CHAMBERLIN.

(Supreme Court of Illinois, 1909. 242 Ill. 260, 89 N. E. 994.)

Information to disbar, on the relation of John E. W. Wayman, state's attorney of Cook county, against George B. Chamberlin. Rule made absolute.

except as he may be called upon to prosecute or defend in the courts for a compensation to be paid him."—Thomas M. Cooley, 17 Am. Bar Assoc. Rep. (1894) pp. 218, 219.

[89] On taking usury as a ground for disbarment, see Ann. Cas. 1914C, 287, note.

VICKERS, J. * * * Respondent further contends that the settlement with his clients [for money collected] upon a basis that was satisfactory to them is a defense to this information. We cannot assent to this view. The relation of attorney and client is so intimate and the influence which the attorney has is so great that it would not do to establish the rule that any transaction to which it can be shown that a client has agreed must be regarded within proper professional bounds. Clients may be induced through stress of circumstances to agree to any settlement proposed, however unfair it may be, rather than resort to legal proceedings to obtain their rights. The fact that such settlement has been made will not preclude an inquiry into the moral and professional quality of the attorney's acts prior to and in connection with such settlement. In the case at bar respondent collected $1,200 on the Nagel notes. Having received this money, which belonged to his clients, it was his duty to report the collection to them and pay over the amount due them after deducting his proper fees and other charges. Instead of doing this, he reported, after he had received a part of the money and knew the prospect was good to settle the balance, that the notes were outlawed, and that anything received on them would be the same as so much money found. After the money was all paid over he refused to make any statement of his counterclaim, and by his neglect and delay made it necessary for his clients to employ another attorney to adjust the matter. After repeated efforts of Mr. Richards [the lawyer engaged to secure an accounting from the respondent] to obtain a statement of respondent's counterclaim, and after it had been strongly intimated that a resort to some coercive measures would be had, respondent offered to pay $300 in full settlement of the claim. Afterwards, when the matter was in the hands of the grievance committee of the bar association and after respondent knew that the committee were adverse to him, he paid about 50 per cent. of the claim and took a receipt therefor in full. We are impressed by the evidence in this record that respondent was not acting in good faith with his clients in setting up his several pretenses for not paying over this money, and that, by his course of dealing with his clients, he finally succeeded in procuring a settlement by which he retained a considerable sum of money to which he was not entitled.[90] * * *

[90] "The fact that the solicitor guilty of misconduct has made reparation to the client may satisfy that particular individual, but it does not deprive the general public of its claim for protection against an unsafe member of a privileged class, nor the Law Society of its claim to expel an unworthy member. The professional man who does what is right because he is in jeopardy of degradation has ceased to act uprightly. This honesty of compulsion is not the kind of honest demeanor to which the solicitor pledges himself in his oath of office. Mischief more or less must result to the good repute of the whole profession by the indulgence of mistaken lenity in cases where the payment of money, unjustly and dishonestly withheld by an officer of the law, is allowed to purchase immunity from wholesome discipline."—Boyd, C., in

Respondent's conduct in connection with the transaction above discussed is such as to satisfy this court that he is unworthy to continue to exercise his professional calling and that his name should be stricken from the roll of attorneys of this court. It will therefore be so ordered.

Rule made absolute.

Hands v. Law Society of Upper Canada, 16 Ont. 625, 638 (1899). See In re Davies, 93 Pa. 116, 39 Am. Rep. 729 (1880).

In In re ——— (an Attorney), 9 L. T. (N. S.) 299 (1863), where no one appeared on either side when the case was called, Pollock, C. B., said: "Grave charges are made against the attorney, which must be answered by him, and if not answered he ought to be punished. * * * If those whose duty it is to be here and proceed with the matter forget their duty, the court will not forget its duty, but take care that such steps are taken as will prevent a private settlement of the proceedings by smothering it and so getting rid of the matter."

EFFECT OF PARDON.—"Pardon, or the payment of a fine, or service of sentence, may restore one to his civil rights—may blot out the offense committed —but it cannot wipe out the act of which he was adjudged guilty, and it is the act that the court considers in these disbarment proceedings."—Campbell, C. J., in People v. Weeber, 26 Colo. 229, 231, 57 Pac. 1079, 1080 (1899).

In People v. Burton, 39 Colo. 164, 88 Pac. 1063, 121 Am. St. Rep. 165 (1907), the fact that the lawyer sought to be disbarred for conviction of grand larceny had been pardoned by the Governor was held not to defeat the disbarment proceeding, even though he insisted that he was innocent of the offense for which he was convicted; but the attorney was allowed to offer proof in defense of the disbarment charge.

In Sanborn v. Kimball, 64 Me. 140, 150 (1875), the court said that a lawyer who had forged a deposition and caption, and after conviction was pardoned, was "in the eye of the law * * * as innocent of that offense as if he had never committed it," but could be disbarred because as attorney he offered the deposition and caption as evidence in court and obtained their admission.

In In re Emmons, 29 Cal. App. 121, 154 Pac. 619 (1915), it was held that a disbarment proceeding founded solely on the attorney's conviction of a felony for asking and receiving a bribe must be dismissed, where it appeared that after the conviction and several years before the disbarment proceeding the attorney was pardoned by the Governor. The court was particular to point out that the conviction was the sole proof relied on, there being no charge, apart from the conviction, that the attorney committed any act involving moral turpitude, dishonesty, or corruption, or any act that would be a cause of disbarment, and intimated that on a proper petition for disbarment a charge of such moral turpitude would be investigated, even though it involved a reopening of the very matters on which the conviction was based, since the question would merely be whether acts were committed by the attorney which showed him to be unfit to be an attorney at law. See 4 California L. Rev. 236, where the commentator apparently failed to understand the court's attitude in this case. On the effect of pardon on the right to disbar a lawyer, see 16 L. R. A. (N. S.) 272, note.

In Thatcher v. United States, 212 Fed. 801, 129 C. C. A. 255 (1914), a lawyer was disbarred in the United States lower courts in Ohio for reasons which had led to his disbarment first in the Ohio state courts. Pending a writ of error to the United States Circuit Court of Appeals, the Ohio Supreme Court readmitted the attorney. The United States Circuit Court of Appeals said of this fact: "That has no bearing here. If in due time an application is made in the District Court for Mr. Thatcher's readmission, that court will give such force to the state court's action as may be thought proper."

V. Reinstatement after Discipline

THE KING v. GREENWOOD.

(Court of King's Bench, 1760. 1 W. Bl. 222.)

Greenwood was an attorney of this court, and, about two years ago, was struck off the roll for malpractice, and was now upon humble petition and motion readmitted; the court declaring that the striking off the roll was not to be understood as a perpetual disability,[91] but was sometimes only meant as a punishment, and might be considered in the light of a suspension only, if the court sees cause.[92]

[91] It was held that if, under section 32 of the English Attorneys and Solicitors Act (6 & 7 Vict. c. 73), the name of an attorney or solicitor was struck off the rolls, the court was without power to reinstate him because the act provided that such a solicitor shall be "forever after disabled from practicing as an attorney or solicitor." In re Lamb, 23 Q. B. D. 477 (1889). Moreover, such section was construed not to leave the court any discretion to do anything short of striking the solicitor off the roll if he is found guilty of the specified offenses. In re Burton, [1903] 2 K. B. 300. Those offenses were: "If any attorney or solicitor shall willfully or knowingly act as agent in any action or suit in any court of law or equity, or matter in bankruptcy, for any person not duly qualified to act as an attorney or solicitor as aforesaid, or permit or suffer his name to be anyways made use of in any such action, suit or matter upon the account of or for the profit of any unqualified person." 6 & 7 Vict. c. 73, § 32. But by 62 Vict. c. 4, § 1, authority to readmit such solicitors was given.

[92] "That a court which has the power to suspend or disbar an attorney has also the power to reinstate him cannot be doubted. * * * In other words, courts recognize the possibility of reformation of character. The decisive question on such an application is whether the applicant is of good moral character, in the sense that phrase is used when applied to attorneys of law, and is a fit and proper person to be intrusted with the privileges of the office of an attorney. To establish that fact on an application for reinstatement, the mere formal proof of good character required upon an original application is not enough. Neither is a petition by attorneys, stating that, in their opinion, the applicant has been sufficiently punished. In re Enright, 69 Vt. 317, 37 Atl. 1046 [1897]; In re Pemberton (Mont.) 63 Pac. 1043 [1901]. The proof must be sufficient to overcome the court's former adverse judgment of the applicant's character."—Young, C. J., in In re Simpson, 11 N. D. 526, 528, 93 N. W. 918, 919 (1903).

"It is hardly necessary to observe that this power of reinstatement is by no means in conflict with the general rule as to judgments; that they pass beyond the power and control of the court after the lapse of the term at which they were rendered. The effect of a judgment of disbarment is merely upon the personal status of the attorney proceeded against, by withdrawing a privilege theretofore enjoyed; and the subsequent restoration of that privilege by the same court is in no sense a modification or vacation of the original judgment. It is somewhat analogous to the restoration of insane persons under guardianship to a status sui juris, and other like cases, where the judgment of disability is in its nature provisional only. These observations are made in order that the exercise of the power here recognized may not be confused with the wholly different question of the modification and vacation of judgments, to which it is not germane."—Somerville, J., in Ex parte Peters (Ala.) 70 South. 648, 649 (1916).

In In re Kone, 90 Conn. 440, 97 Atl. 307 (1916), it is pointed out in a per curiam opinion that the question for determination on a reinstatement application "is not one as to the sufficiency of the punishment already suffered by the offending attorney, but one as to the present fitness of the applicant

Ex parte PYKE.

(Court of Queen's Bench, 1865. 6 Best & S. 703.)

Stammers, in Hilary Term, January 31st, moved that Mr. H. H. Pyke be readmitted as an attorney. It appeared by the affidavits that Mr. Pyke, having been originally an attorney, was struck off the roll at his own request, and called to the bar by the Honourable Society of Gray's Inn, in January, 1838. In October, 1843, he was summoned before the benchers of that Society on the charges of "participating by previous agreement in the profits of an attorney," and in one particular case of having "acted both as counsel and attorney." On these charges he was shortly after disbarred, which decision was affirmed by the Judges at Serjeants' Inn, to whom he had appealed. In 1845 he applied to this Court to be readmitted to practice as an attorney, but the application was refused. Since that time he kept up his professional knowledge by reading, and carried on the business of a law and general agent, first as assistant to his father, and afterwards on his own account. He had suffered much both in health and circumstances from being deprived of his business.

Although Mr. Pyke will not be restored to the bar, there is no reason why he should not be readmitted to the profession of an attorney. The offences charged against him are merely breaches of the conventional usages of the bar, if even that. [COCKBURN, C. J. The acting in contravention of the conventional regulations of either branch of the profession is a violation of honourable feeling. We must assume that what was done by the benchers was rightly done.] Even supposing Mr. Pyke had done something affecting his status as an attorney, the Court will not on that account keep him from the profession for ever. Rex v. Greenwood, 1 W. Bl. 222. * * *

COCKBURN, C. J. We think enough has not been done to entitle Mr. Pyke to be readmitted as an attorney. He has not produced the evidence which has been required on all similar occasions of good conduct from the epoch when disbarred till the present time. We must take it that the sentence of the benchers of Gray's Inn, confirmed by the Judges, was perfectly right, and that the conduct on which Mr.

for reinstatement to again exercise the privileges and functions of an attorney as an officer of the court and confidential manager of the affairs and business of others intrusted to his care and keeping in view of his previous misconduct, his discipline therefor, and any reformation of character wrought thereby or otherwise as shown by his more recent life and conduct."

"While no general rule can be laid down to govern all cases, it seems to us that a good test [for reinstatement of attorney] would be this: Looking at the life and conduct of the attorney prior to the disbarment, and the reasons for the disbarment, have his life and conduct since that time been such as to satisfy the court that if restored to the bar he will be upright, honorable and honest in all his dealings? Will his restoration to the bar be compatible with a proper respect of the court for itself and with the dignity of the profession?"—Stewart, C. J., in Matter of Palmer, 9 Ohio Cir. Ct. R. 55, 70, 71 (1894).

On the reinstatement of disbarred lawyers, see Ann. Cas. 1912A, 813, note.

Pyke was charged and found guilty was such as rendered him an unfit person to be at the bar. And there is nothing we should more anxiously uphold than the principle that the same honour and the same integrity which are essential to the character and position of a barrister are also necessary to the character and position of an attorney. I quite feel that the individual who, in consequence of dishonest or dishonourable conduct, is unfit to be at the bar, ought not to be admitted to the other branch of the profession.

Still I cannot help feeling, both on principle and precedent, that sentences of exclusion from either branch of the profession need not necessarily be exclusions for ever. And when we find that a gentleman has suffered twenty years' exclusion, and that the sentence, however right, has had the salutary effect of awakening in him a higher sense of honour and duty, we should not be inexorable. * * *

Therefore, if Mr. Pyke will satisfy us by the testimony of trustworthy persons (especially members of the profession) that in whatever business he has since been engaged, whether assisting his father as law agent or as law agent on his own account, his conduct and character have been unimpeached and unimpeachable, we might grant his application. But, as it stands, we have nothing but the simple fact that he was disbarred as an unfit person to practise at that branch of the profession; and so long as that stands alone we cannot give effect to the application which has been made by Mr. Stammers with the greatest ability and propriety.

BLACKBURN and MELLOR, JJ., concurring.

Application refused.

Stammers now renewed the application on an affidavit of Mr. Pyke, which gave the history of his life since he was disbarred. It stated in detail the places where he resided; that he had never since been accused of crime or wrong, or been in debt, and had conducted himself "with undeviating integrity and rectitude"; that he had formed no connections, being utterly secluded from the world, and was unknown even to his tradesmen; that he had applied to several gentlemen of the bar who formerly knew him to certify to his good conduct during that period, but they refused on the ground that they had lost sight of him. He produced a letter from the Master of the Rolls, one of the benchers of Gray's Inn, stating that in his opinion nothing appeared during the investigation there which ought to disentitle him to be readmitted. Also a letter from the Lord Chief Baron that in his opinion the exclusion had been long enough. And lastly, a letter written by the Steward of Gray's Inn by command of the benchers, saying that nothing disclosed on the former occasion ought, after the lapse of time, to prevent his being restored to the rolls.

Garth, for the Incorporated Law Society, urged that the applicant ought to be re-examined, and cited an instance where this was done.

THE COURT however said, although they had required Mr. Pyke to produce testimonials of his good conduct since he was disbarred, they

would not expect him to perform impossibilities; and that the circumstance of his having lived in complete retirement fully explained the absence of such testimonials.

Application granted.[93]

In re HARRIS.

(Supreme Court of New Jersey, 1915. 88 N. J. Law, 18, 95 Atl. 761.)

In the matter of the petition of John Harris to be restored to the roll of attorneys. Decided that the hitherto insuperable bar to petitioner's application is removable. * * *

GARRISON, J. * * * The provisions of section 5 [of the Practice Act] as to disbarment for malpractice and readmission to practice clearly contemplate that it shall be possible for an attorney who has been put out of the roll to be again admitted to practice, and the policy thus declared by the Legislature, and not "otherwise provided" in the Constitution, is binding upon us to the extent of forbidding our adoption of a rigid judicial policy to the effect that an attorney, once disbarred, shall never again be admitted to practice. Notwithstanding the fundamental policy that is thus inherent in the statute from which we derive our powers, there are certain minor questions of judicial policy that are open to our adoption or rejection, one of which is whether the making of complete restitution by the former attorney shall, in all cases, be a sine qua non to his restoration to the roll.

In the recent case of In re Hawkins, 4 Boyce, 200, 87 Atl. 243, Chief Justice Pennewill, speaking upon this question for the Superior Court of Delaware, said: "We do not attach very much importance, as a rule, to the matter of restitution, because that may depend more upon financial ability or other favoring circumstances than repentance or reformation. A thoroughly bad man may make restitution, if he is able, in order to rehabilitate himself and regain his position in the community; and a thoroughly good man may be unable to make any restitution at all."

Without underestimating the importance of restitution a moment's reflection must convince one that of all the factors that enter into the question of moral fitness the mere circumstances of restitution is the one most likely to be fortuitous and to depend upon conditions and circumstances that afford no reliable test of moral qualities. The money

[93] In Ex parte Leith, 7 W. R. 579 (1859), an attorney who had been out of practice for eighteen years applied for a renewal of his certificate. Hill, J., said: "I think the applicant has been out of practice much too long to justify his readmission without examination." It was ordered that he be readmitted upon examination.

In Ex parte Frost, 1 Chitty, 558, note (1815), it was said of an attorney, struck off the rolls and seeking readmission, that "the want of experience arising from his having discontinued practice was, independently of the other circumstances, a sufficient ground for not acceding to the motion."

may have come from wealthy relatives, or from a lucky speculation or from engaging in some alien business venture, or it may have been borrowed, in which case the old liability is apparently extinguished by the creation of a new one. Taken in connection with other circumstances, restitution may be of the utmost significance, but this, oftener than not, is due to such other circumstances rather than to the mere fact of nonrestitution; as, for instance, if the former attorney became possessed of sufficient money with which to make restitution, but refused so to apply it.

Upon the whole, we conclude that there should be no hard and fast rule upon the subject of restitution, but that each case should be considered and dealt with in the light of its own circumstances, bearing in mind that the aim of the court is to search the heart of the petitioner in order to arrive at a just judgment as to his moral standards as shown in his conduct.

The evidence in the present case convinces us that the petitioner has made such restitution as his crippled capacity to earn money permitted, and has done so to the satisfaction of those who still have claims against him. * * *

We conclude that the partial restitution the petitioner has actually made is not inconsistent with his moral reformation, and that his failure to make complete restitution should not be held to be an insuperable bar to his present petition.

This brings us to a consideration of the merits of the present petition as disclosed by the proofs. * * *

In the examination of the evidence itself we are impressed, at the outset, with the manner in which it was obtained, viz., that it was not procured by the personal solicitations of the petitioner or by any one acting in his behalf, but was elicited by the Bar Association in the course of an independent investigation, conducted entirely by its agents. Personally solicited letters or mere signatures obtained to a petition, while plenary evidence of the unwillingness of such signers to deny a personal favor, is very far from being cogent evidence of any particular state of facts, especially if it relates to the moral character of the person who obtains the letters or circulates the petition. This sort of evidence, if such it can be called, is so well understood as to be practically negligible. On the contrary, the body of testimony now before us lacks nothing that could make for its spontaneous and impersonal character. It is given by citizens of the highest standing from all walks of life, divided between the profession of the law and the laity, although naturally the former predominate over any other class. * * *

Mention has been made of the fact that the petitioner has supported himself in part by the preparation of law students for their examination, and not the least impressive of the evidence before us comes from such former students; let one speak for the rest: "Mr. Harris

prepared me, among others, for my bar examination, and in all his lectures and talks to us has stood only for the highest, noblest, and best ideals of the profession. We all know to whom we can go when blocked by a knotty or complicated problem, and know, too, that we'll get good, square, honest advice; for Mr. Harris has long been known as 'Dean of Our Legal Advisers.'" * * *

Finding the testimony to be ample in quantity, given in a quasi judicial inquiry by witnesses of the highest standing and of unquestioned opportunity for knowing the truth of that to which they voluntarily testify, we can reach no other verdict upon the proofs than that the case is a proper one for the interposition of the court to relieve the petitioner from the disability under which he now rests, especially in view of the fact that the Bar Association, upon whose charges and presentation he was disbarred, has, after a thorough investigation, unanimously asked for his reinstatement.

No one of these considerations, standing alone, and no group of them less than the whole, would support this conclusion, which rests emphatically upon the concurrence and combination of them all. This conclusion relegates the question of the proper practice to be pursued under section 5 of the Practice Act to such future application as the petitioner may be advised to make, the matter, as far as I know, never having been passed upon or considered by the court. All that we now decide is that the hitherto insuperable bar to such application is removed.[94]

ANON.

(20 Hen. 6, fo. 37. 1 Coke Inst. 215.)

NEWTON, Chief Justice of the Court of Common Pleas, gave judgment of an attorney of that court, that had sued out a capias without an original,[95] that his name should be drawne out of the roll of attorneys, and that he should never be attorney in this court, nor in any other court of the king, and that he should not meddle in them in the law; and to perform all this, he in those days was sworne on a book. And NEWTON said to him, The king hereafter, when you shall have better grace, may pardon you by his letters patents, etc., and then you may be restored againe.[96]

[94] In In re Brandreth, 39 W. R. 687, 60 L. J. Q. B. 501 (1891), the court ordered a solicitor restored to the rolls, although his conviction on a criminal charge still stood.

[95] By statute this was an offense punishable by imprisonment for at least a year and a day. 1 Coke, Inst. 213.

[96] "While the effect of the pardon was to relieve him of the penal consequences of his act, it could not restore his character."—Clay, C., in Nelson v. Commonwealth, 128 Ky. 779, 789, 109 S. W. 337, 340 (16 L. R. A. [N. S.] 272 [1908]).

CHAPTER IV

THE ETHICAL DUTIES OF LAWYERS TO COURTS

A. B. A. CANON

1. THE DUTY OF THE LAWYER TO THE COURTS. It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance.[1] Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

B. B. A. CANON

II.[2] THE SELECTION OF JUDGES. It is the duty of the Bar to endeavor to prevent political considerations from affecting the selection of Judges. It should protest earnestly and actively against the appointment or election of those who are unfit; and it should strive for the appointment of those who are properly qualified and are willing to forego other employments, whether of a business, political or other character, which may embarrass their free and fair consideration of questions before them for decision.[3] The aspiration of lawyers for judicial position should be governed by an impartial estimate of their ability to add honor to the office and not by a desire for the distinction the position may bring to themselves.

[1] "A Barrister ought not to recommend another as his leader or junior. And such questions as, Who is the best man for a witness action in such a Court? Which leader is the persona grata in such a Court? Do you get on all right with X. as your leader? are improper questions, and should not be answered."—Statement of the General Council of the Bar, *The Annual Practice* (1917) p. 2413.

[2] A slight revision of A. B. A. Canon 2.

[3] See paper by Simon Fleischmann, *The Influence of the Bar in the Selection of Judges*, N. Y. State Bar Assoc. Reps. (1905) p. 60.

A. B. A. CANONS

3. ATTEMPTS TO EXERT PERSONAL INFLUENCE ON THE COURT. Marked attention and unusual hospitality on the part of a lawyer to a Judge, uncalled for by the personal relations of the parties, subject both the Judge and the lawyer to misconstructions of motive and should be avoided. A lawyer should not communicate or argue privately with the Judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a Judge special personal consideration or favor. A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due the Judge's station, is the only proper foundation for cordial personal and official relations between Bench and Bar.

20. NEWSPAPER DISCUSSION OF PENDING LITIGATION. Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An ex parte reference to the facts should not go beyond quotation from the records and papers on file in the Court; but even in extreme cases it is better to avoid any ex parte statement.

21. PUNCTUALITY AND EXPEDITION. It is the duty of the lawyer not only to his client, but also to the Courts and to the public to be punctual in attendance, and to be concise and direct in the trial and disposition of causes.

B. B. A. CANONS

XXIII.[4] CANDOR AND FAIRNESS. The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.

It is not candid or fair for the lawyer to misquote or distort the contents of a paper, the testimony of a witness, the language or argument of opposing counsel, or the language of a decision or a textbook;[5] or knowingly to cite as authority a decision that has been

[4] A revision of A. B. A. Canon 22.

[5] Hoffman's Resolution XLI: "In reading to the court or to the jury, authorities, records, documents or other papers, I shall always consider myself as executing a trust and as such, bound to execute it faithfully and honorably. I am resolved, therefore, carefully to abstain from all false or deceptious readings, and from all uncandid omissions of any qualifications of the doctrines maintained by me, which may be contained in the text or in the notes; and I shall ever hold that the obligation extends not only to words, syllables, and

overruled, or a statute that has been repealed; or in argument to assert as a fact that which is not supported by evidence or to distort or misrepresent facts in taking the statements of witnesses, in drawing affidavits and other documents, or in the presentation of causes.

A lawyer should not offer evidence, which he knows the Court should reject, in order to get the same before the jury by argument for its admissibility, nor should he address to the Judge arguments upon any point not properly calling for determination by him. Neither should he introduce into an argument, addressed to the Court, remarks or statements intended to influence the jury or bystanders.

These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice.

XXIV.[6] ATTITUDE TOWARD JURY. Attempts to curry favor with juries by fawning, flattery or pretended solicitude for their personal comfort are unprofessional. Suggestions of counsel, looking to the comfort or convenience of jurors, and propositions to dispense with argument, should be made to the Court out of the jury's hearing. A lawyer must never converse with jurors about a pending case; and he should avoid communicating with them even as to matters foreign to the cause.

A. B. A. CANON

29. UPHOLDING THE HONOR OF THE PROFESSION. Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. The lawyer should aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law, but the administration of justice.

letters, but also to the modus legendi. All intentional false emphasis and even intonations in any degree calculated to mislead, are petty impositions on the confidence reposed, and, whilst avoided by myself, shall ever be regarded by me in others as feeble devices of an impoverished mind, or as pregnant evidences of a disregard for truth, which justly subjects them to be closely watched in more important matters."—David Hoffman, *A Course of Legal Study* (2d Ed.) Vol. 2, pp. 769, 770.

[6] A revision of A. B. A. Canon 23.

SECTION 1.—INFLUENCING, INTIMIDATING, AND CRITICIZING JUDGES

Ex parte COLE.

(Circuit Court of the United States, District of Iowa, 1879. 1 McCrary, 405, Fed. Cas. No. 2,973.)

An information against C. C. Cole, praying his disbarment. To this information a demurrer was interposed. * * *

MILLER, Circuit Justice. * * * Divested of legal verbiage, and put in plain English, the charge [in the first paragraph of the information] is that he suggested, advised and incited his clients, parties to an important suit in this court, being at a distance from this state, to influence the action of the court by intimidation applied to its members, by publications in the newspapers and printed circulars; that the purpose was to influence them improperly in their judicial action in that suit—and especially that they were advised and incited to thus influence the action of Judge Dillon, one of the judges of the court, by publications in the newspapers of an abusive character, impeaching his motives and charging him with partiality and warping the law for personal considerations. I will not stop here to argue the question whether this is a legitimate mode of furnishing reasons to a judge for his decision, nor do I think it necessary to consider whether such a mode of winning a judgment is one which a court can tolerate in its own officers.

I am not now considering the right of the newspaper press to discuss for itself the conduct of the judges, in court or out of it, nor the right of any individual to criticise the acts and judgments of the court. This is a case of an attorney of the court, employed to conduct a suit pending in that court, who advises his client in advance of the hearing of the case or motion in hand, urging his client to endeavor to procure a decision in his favor, by exciting the fears of the judge by the terrorism of newspaper attacks and abusive circulars, under the expectation that rather than endure their repetition the judge will secure repose by a favorable decision. It is not criticism after the act that is intended. It is threat for the future.

It is my opinion that no lawyer who will advise this as a means of securing a judgment or order or decree of a court should be permitted to practice in that court. * * *

The second paragraph is made up of extracts from letters written by respondent to Cate and Ashhurst [his clients] pending certain motions and efforts to get the court to proceed in executing a decree it had already rendered for the sale of the railroad, which was the result of

the litigation. Some of these extracts, though censuriously reflecting on the court, are, in my opinion, so far protected by the relation of client and attorney existing between respondent and the parties to whom they were written, as that, whether true or false, they cannot become the foundation for expulsion from the bar. For I am very clearly of opinion that short of an attempt to pervert justice by bringing to bear on the judge who is to decide, influences of corruption, intimidation or the improper weight of personal influence in a secret and unjustifiable manner, a very large latitude is permissible to the lawyer in discussing the means of successfully asserting the rights of his client, and that this extends to the discussion of the fitness of the judge before whom the case may come, to try it, and the peculiar influences which may work on his mind to favor one side or the other of the controversy.

But there are two extracts from these letters which very far transcend this right. They come directly within the principle I have laid down as applicable to the charges of the first paragraph. In one of these extracts respondent acknowledges the receipt of articles of incorporation of the purchasers of the road under the sale, which, it seems, required the approval of the court, and in reply, he says: "I have yours of the twenty-third also with the articles of incorporation inclosed. I am not a sufficient railroad man to be enabled to criticise with any judgment or sagacity. So far as I am able to judge, they are without objection, and I have no doubt will prove acceptable to the court. I was going to suggest to you, whether or not, since the approval by the court, although nominally a judicial act, in this case is essentially a matter of executive conduct, whether it would not be well for myself and wife, in our vacation, to make a short visit to Davenport, to Judge Dillon and family; and while there and before the sale, to present to him the articles of incorporation and discuss them, and get his actual approval of them before the sale, and thus practice on our friends the game they have been practicing on us hitherto. I have no doubt I could get a very frank and thorough expression of his opinion in that way. What do you suggest in respect to that? It is possible that I can go to Davenport week after next."

As it may become my duty hereafter to consider the judgment which ought to be pronounced, if respondent wrote this letter without sufficient excuse, I will not discuss it further than to say that in my opinion the lawyer who will coolly offer to his client to take his wife on a visit to the family of the judge—a visit which should be sacred to friendship alone,—and there, while an honored guest, to avail himself of the freedom of conversation, which it would seem like rudeness in the host to forbid, and in the absence of the other party to the suit, to seek to commit the judge to the expression of opinions favorable to his client which are to govern him in the court, should be excluded from practice in the courts or from the confidence of the judge. While

this court has no control over the social relations of the judge and the lawyers, it has power to exclude such persons from the bar. The flagrant turpitude of such a proposal is not mitigated by the statement that it is a game—fit word to express it—which the other side have been practicing on respondent's clients. If the entire bar shall ever adopt this rule of practice, and the belief of the respondent that it can be successfully done is true, then will the courts of law, instead of deserving the name of courts of justice, become the facile instruments of all forms of fraud and injustice.[7]

Another extract, which reads as follows, is from a letter written to Mr. Ashhurst: "Please confer with Mr. Cate and Mr. Latrobe, and see whether it is not best to renew our motion at the May term and for you to come here and argue it. I think it is, and it is not improbable, that I could control enough of the newspapers of the state, in ventilating the course of the trustee, its attorney, and the court, to awake Judge Dillon to the idea that perhaps he had better let the law take its course than to further warp it for personal or friendly considerations. If you shall advise me of the adoption of the course suggested, I will see that the thorns in the flesh are properly entered." I think this letter, if ever written, is evidence of the matters alleged in the first paragraph. It is the worst of the whole series of charges against respondent. As I have already shown that the first paragraph, if sustained by proof, is sufficient, it follows that this, which sets out with more particulars, the facts themselves, is also sufficient.† * * *

In the Matter of PRYOR, an Attorney at Law.

(Supreme Court of Kansas, 1877. 18 Kan. 72, 26 Am. Rep. 747.)

BREWER, J. Motions to dissolve certain injunctions were argued before Hon. W. P. Campbell, district judge of the 13th judicial district. The motions were taken under advisement, and a few days

[7] "Private interviews of counsel with the court in order to make private or ex parte statements, or to endeavor to impress their views, is undoubtedly wrong and tends to corrupt justice. So to send or authorize clients to have such interviews. No gentleman will adopt this course; it is unfaithfulness to the court. But it is not infrequently invited by the court itself. Judicial ethics must not be lost sight of. What client ever spoke to Judge Washington or Judge Tilghman? When judges read newspapers on the bench, and consult with reporters during a trial, or confer with tipstaves, or advise parties, or receive private complaints against counsel, they invite to every evil that is thus reprehended. The judge has no right to hear anything of a cause out of court, and he can always prevent it; and if he does not prevent it, he encourages it."—David Paul Brown, *The Forum; or Forty Years Full Practice at the Philadelphia Bar* (1856) Vol. II, pp. 69, 70.

† Upon the announcement of the foregoing opinion, the respondent answered. Subsequently, before the final hearing, the respondent made a satisfactory acknowledgment and apology; whereupon the proceeding was, upon motion of the committee of the bar association, dismissed.—*Reporter's Note.*

thereafter word was sent by the judge to the counsel for plaintiff advising him of the overruling of the motions. This information was conveyed to the counsel for defendant, one of whom wrote and forwarded the following letter:

Winfield, Cowley County, Kansas, June 26, 1876.

Hon. W. P. Campbell—Dear Sir: Mr. Hackney this evening informed me that he had received a letter from you stating that you had overruled the motions to dissolve those injunctions. I can hardly believe that such is the fact, for it is directly contrary to every principle of law governing injunctions, and everybody knows it, I believe. Consequently we send herewith orders dissolving said injunctions. But if you have concluded to overrule said motions, as Hackney says, you will please allow our exceptions to each and every of your rulings, and allow us time to make and file our case in supreme court, which we will do as quickly as it can be done; for it is our desire that no such decisions or orders shall stand unreversed in any court we practice in. Also, fix terms for staying orders.

Yours respectfully, Pryor, Kager & Pryor.

The judge on the receipt of this letter construed it as a contempt—issued his warrant for the arrest of the writer, and after a hearing adjudged him guilty of contempt, fined him fifty dollars therefor, and suspended him from practice in the courts of that district until the fine should be paid. And the question presented for our consideration is, whether this ruling and order of the judge shall be set aside, or permitted to stand. It appears from other testimony in the case, as well as from the intimations in the letter, that no orders had actually been signed. Notice of his conclusions had simply been given by the judge, and the attorneys requested to prepare the formal order. The matter was therefore still pending before him.

Upon this we remark in the first place, that the language of this letter is very insulting. * * * To say to a judge that his ruling is contrary to every principle of law, may be simply a reflection upon his intelligence; but to couple with it an assertion that everybody knows it, is clearly an imputation upon his integrity. How can a judge be honest, and yet decide contrary to that which he as well as all others knows to be the law?

We remark secondly, that an attorney is under special obligations to be considerate and respectful in his conduct and communications to a judge. He is an officer of the court, and it is therefore his duty to uphold its honor and dignity. Certain privileges attach to him by reason of such official position. He may in the trial of cases use language concerning witnesses, and parties, and all matters and things in issue, which elsewhere and under other circumstances would be libelous. By virtue of this privilege, we often hear from the lips of counsel in argument, or read in the briefs filed in proceedings in error in this court, the most severe animadversion and criticism upon the conduct and rulings of the courts from which the proceedings are

brought. They have the same right of criticising the ruling and conduct of those courts in proceedings pending here, that they have in those courts of criticising the actions and conduct under review there. In other words, the independence of the profession carries with it the right freely to challenge, criticise, and condemn all matters and things under review and in evidence. But with this privilege goes the corresponding obligation of constant courtesy and respect toward the tribunal in which the proceedings are pending. And the fact that the tribunal is an inferior one, and its rulings not final and without appeal, does not diminish in the slightest degree this obligation of courtesy and respect. A justice of the peace before whom the most trifling matter is being litigated, is entitled to receive from every attorney in the case courteous and respectful treatment. He is pro hac vice the representative of the law, as fully as the chief justice of the United States in the most important case pending before him. A failure to extend this courteous and respectful treatment, is a failure of duty; and it may be so gross a dereliction as to warrant the exercise of the power to punish for contempt.[8]

Now as we have said, the language of the letter is insulting. It would be so regarded outside of judicial proceedings, and in the intercourse of gentlemen. To charge another with knowingly doing an illegal act, would always be regarded as an imputation to be resented. Change the circumstances a little: suppose in a public trial in the court-house, after a ruling had been made, an attorney in the case should say to the court: "That ruling is not the law, and your honor knows it." Who would doubt that the court might rightly treat such language as contempt, and punish it accordingly? Yet practically that is this case. The fact that in the case supposed, others are listening, and hear the words, and in this the language reaches the judge alone, does not change the quality of the act.

It will be borne in mind that the remarks we have made apply only while the matters which give rise to the words or acts of the attorney are pending and undetermined. Other considerations apply after the matters have finally been determined, the orders signed, or the judgment entered. For no judge, and no court, high or low, is beyond the reach of public and individual criticism. After

[8] "The bar have great liberty and high privileges in the assertion of their clients' rights as they view them; but on the other hand they have equal obligations as officers in the administration of justice, and no duty is more fundamental, more unremitting, or more imperative than that of respectful subordination to the court. The foundation of liberty under our system of government is respect for the law as officially pronounced. The counsel in any case may or may not be an abler or more learned lawyer than the judge, and it may tax his patience and his temper to submit to rulings which he regards as incorrect; but discipline and self-restraint are as necessary to the orderly administration of justice as they are to the effectiveness of an army. The decisions of the judge must be obeyed, because he is the tribunal to decide, and the bar should at all times be the foremost in rendering respectful submission."—Mitchell, J., in Matter of Scouten's Appeal, 186 Pa. 270, 279, 40 Atl. 481 (1898).

a case is disposed of, a court or judge has no power to compel the public, or any individual thereof, attorney or otherwise, to consider his rulings correct, his conduct proper, or even his integrity free from stain, or to punish for contempt any mere criticism or animadversion thereon, no matter how severe or unjust. Nor do we wish to be understood as expressing any opinion as to the power to punish others than attorneys and officers of the court, for language or conduct even while the matter is pending and undetermined. Whether the same rules and considerations apply to them or not, we do not care to inquire. Such is not the case before us; and to this case alone do our remarks apply.

We remark again, that a judge will generally and wisely pass unnoticed any mere hasty and unguarded expression of passion, or at least pass it with simply a reproof. It is so that, in every case where a judge decides for one party, he decides against another; and oftimes both parties are beforehand equally confident and sanguine. The disappointment therefore is great, and it is not in human nature that there should be other than bitter feeling, which often reaches to the judge as the cause of the supposed wrong.[9] A judge therefore ought to be patient, and tolerant of everything which appears but the momentary outbreak of disappointment. A second thought will generally make a party ashamed of such outbreak, and the dignity of the court will suffer none by passing it in silence. On the other hand, a little thing which is properly unnoticed once, may by its repetition require notice and punishment. It is but a little matter to whisper a single time in the presence of a court in session, but if repeated, and the monitions of the court disregarded, it may become not merely the privilege, but the clearest duty of the court to punish for contempt. So an attorney sometimes, thinking it a mark of independence, may become wont to use contemptuous, angry, or insulting expressions at every adverse ruling, until it becomes the court's clear duty to check the habit by the severe lesson of a punishment for contempt. The single insulting expression for which the court punishes may therefore seem to those knowing nothing of the prior conduct of the attorney, and looking only at the single remark, a matter which might well be unnoticed; and yet if all the conduct of the attorney was known, the duty of interference and punishment might be clear.

We make these suggestions, not as intimating that such has been the prior conduct of the attorney in this case, for we neither know nor

[9] "Remember that the judge may decide against you without being a fool or a knave. Sometimes he could not be for you without being one or both." —Frederic R. Coudert, *Addresses* (1905) pp. 413, 414.

"He [the Barrister] does not interfere after the judge has decided. He knows that perfection in the administration of justice consists in causes being fully heard, deeply considered, and speedily decided. When the cause has been fully heard, the advocate's duty is terminated. 'Let not the counsel at the bar,' says Lord Bacon, 'chop with the judge, nor wind himself into the handling of the cause anew, after the judge hath declared his sentence.'" —Basil Montague, *The Barrister*, in his *Essays and Selections* (1837)

have heard anything outside of this single matter which reflects at all upon him. We do it simply to indicate that the wisdom or necessity of the court's action is not always disclosed by the single matter apparent in the record, and that therefore, in a matter like this, involving personal conduct toward the court, a large regard must be paid to its discretion. If the language or conduct of the attorney is insulting or disrespectful, and in the presence, real or constructive, of the court, and during the pendency of certain proceedings, we cannot hold that the court exceeded its power by punishing for contempt. See generally on the subject of contempts, 2 Bishop on Cr. Law (5th Ed.) ch. 12, § 242, and following, and cases cited; 4 Blackstone, 283; Com. v. Dandridge, 2 Va. Cas. 408. * * * Order affirmed.[10]

Ex parte STEINMAN.

(Supreme Court of Pennsylvania, 1880. 95 Pa. 220, 40 Am. Rep. 637.)

The Court below entered rules on A. J. Steinman and W. U. Hensel, to show cause why they should not appear and answer for contempt of court, and also why they should not be disbarred for misbehavior in their offices as attorneys of said court.

SHARSWOOD, C. J. * * * The complainants were members of the bar of Lancaster county, and were also the editors of a newspaper published there. They printed in their paper an article very severely

[10] In In re Griffin (City Ct. N. Y.) 1 N. Y. Supp. 7 (1888), it was held not to be contempt of court for a lawyer to write a letter to a trial judge charging him with trying to conceal facts from the appellate court, stating that his decision was unjust, and threatening, in case of an adverse decision in another case, to lay the whole proceedings before the appellate court and the public, but it was held to be unprofessional conduct which would justify discipline. Discipline was not recommended, however, because the lawyer made a satisfactory apology.

In People v. News-Times Pub. Co., 35 Colo. 253, 84 Pac. 912 (1906), on criminal contempt proceedings against the newspaper corporation and against Senator Thomas M. Patterson, the corporation's lawyer director, majority stockholder, manager, and editor in chief, who had charged in newspaper articles that the Colorado Supreme Court and certain of its judges were influenced by corrupt motives in certain rulings in certain pending causes, the court held that the truth of the publication was no defense, and that it was no defense to show that there was no intent to commit a contempt. This was because "there can be no doubt that the articles tend to degrade the court in the eyes of the public, impair its authority and embarrass it in the disposition of pending business." 35 Colo. at page 391, 84 Pac. 948. See, also, 35 Colo. page 393, 84 Pac. 912. The Supreme Court of the United States refused to interfere with the contempt proceeding fine. Patterson v. Colorado, 205 U. S. 454, 27 Sup. Ct. 556, 51 L. Ed. 879, 10 Ann. Cas. 689 (1907).

For an interesting case of disbarment for intemperate public criticism of the court, see In re Hilton (Utah) 158 Pac. 691 (1916). See, also, State v. Kirby, 36 S. D. 188, 154 N. W. 284 (1915).

On criticism of court action as contempt or as ground for disbarment, see 17 L. R. A. (N. S.) 572, note; 15 Ann. Cas. 205, note. On court action in reference to scandalous or disrespectful language in briefs, see 9 Ann. Cas. 168, note; 15 L. R. A. (N. S.) 525, note.

reflecting upon the conduct of the court in a certain prosecution in the Quarter Sessions, in which the defendant had been acquitted on an indictment for violating the liquor law. It charged that the acquitted "was secured by a prostitution of the machinery of justice to serve the exigencies of the Republican party," and added that as the judges belonged to that party it was "unanimous—for once—that it need take no cognisance of the imposition practised upon it and the disgrace attaching to it." We may safely assume that it meant to charge and did charge that the judge had decided the case wrongfully from motives of political partisanship. We have no hesitation in pronouncing such a publication to be a gross libel on its face. Nothing can be more disgraceful—not even perhaps that of direct bribery—than such an imputation on the motives of judges in the administration of justice. * * *

But the gravamen of the offence of the complaints was that the publication was a libel on the court of which they were attorneys, and this, it is earnestly contended, was "misbehavior in their office," which gave the court power to exercise summary jurisdiction by removing them.

The duty of an attorney is briefly comprehended in the terms of his oath "to behave himself, in the office of attorney according to the best of his learning and ability, and with all good fidelity as well to the court as to the client." Was the publication in question a breach of this oath? Fidelity to the court includes many particulars, but they all evidently concern his official relations. "The sum of the matter," says Chief Justice Gibson, in Austin's Case, 5 Rawle, 205, 28 Am. Dec. 657, "is that an attorney-at-law holds his office during good behavior, and that he is not professionally answerable for a scrutiny into the official conduct of the judges which would not expose him to legal animadversion as a citizen." [11]

Some of the remarks in the opinion in that case have been much relied on by the learned counsel who argued as amici curiæ in support of the action of the court below. But there are two considerations bearing upon the question which now exist, but did not at the time that decision was rendered. The first is, the new provision on the subject of the liberty of the press which has been introduced into the Bill of Rights of the Constitution of 1874, and the second is that at that time the judiciary was not elective. Judges, in 1835, were

[11] Leading up to this conclusion the court had said in that case: "The conduct of a judge, like that of every other functionary, is a legitimate subject of scrutiny, and where the public good is the aim, such scrutiny is as open to an attorney of his court as to any other citizen. * * * Even a battery might be committed by an attorney on a judge consistently with the official relation, if provoked in matters of social intercourse. It is the motive, therefore, that makes an invasion of the judge's rights a breach of professional fidelity; from which he is to be protected for the sake of the public and the suitors of his court, not for his own."—Gibson, C. J., in Case of Austin, 5 Rawle (Pa.) 191, 205, 28 Am. Dec. 657 (1835).

appointed by the governor, and their tenure of office was during good behavior. There might then be some reason for holding that an appeal to the tribunal of popular opinion was in all cases of judicial misconduct a mistaken course and unjustifiable in an attorney. The proceedings by impeachment or address were the course and the only course which could be resorted to effectually to remedy the supposed evil. To petition the legislature was then the proper step. To appeal to the people was to diminish confidence in the court and bring them into contempt without any good result. We need not say that the case is altered and that it is now the right and the duty of a lawyer to bring to the notice of the people who elect the judges every instance of what he believes to be corruption or partisanship. No class of the community ought to be allowed freer scope in the expression or publication of opinions as to the capacity, impartiality or integrity of judges than members of the bar. They have the best opportunities of observing and forming a correct judgment. They are in constant attendance on the courts. Hundreds of those who are called on to vote never enter a court-house, or if they do, it is only at intervals as jurors, witnesses or parties. To say that an attorney can only act or speak on this subject under liability to be called to account and to be deprived of his profession and livelihood by the very judge or judges whom he may consider it his duty to attack and expose, is a position too monstrous to be entertained for a moment under our present system.[12]

[12] "A judge who is a candidate for re-election must expect to have his qualifications freely discussed and summarily decided by an electorate, which may not he well informed or discriminative. However unfortunate this, in specific instances, may seem, it is an essential part of the elective system, and as such it must be accepted. Nor does a citizen lose this right to criticise because he is a lawyer. We cannot think that a lawyer citizen's criticism of such a candidate must needs be confined to what is 'decent and respectful.' His criticism may be as iudecent and disrespectful as the facts justify. The rule governing such campaign utterances must be that of qualified privilege: Where expressions of opinion, they are permitted, if in good faith; and where statements of fact, they may be made, if true, or in good faith and with probable cause believed to be true; but they are forbidden if the derogatory fact allegations are false, and are by the utterer known, or with ordinary care should be known, to be false. In this modified form, the rule is accepted in all jurisdictions. 18 Am. & Eng. Encyc. 1041, 1042. This court has adopted the stricter rule that good faith and probable cause will not make a falsehood privileged. Post Pub. Co. v. Hallam, 59 Fed. 530, 539 [8 C. C. A. 201 (1893)]."—Per curiam, in Thatcher v. United States, 212 Fed. 801, 807, 129 C. C. A. 255, 261 (1914). See In re Thatcher (C. C. and D. C.) 190 Fed. 969 (1911); In re Charles Thatcher, 80 Ohio St. 492, 89 N. E. 39 (1909).

Where the criticisms do not relate to pending causes and the judge is a candidate for re-election, strictures by a lawyer editor upon the judicial acts of the judge and his unfairness, even though they impute to him corrupt motives, have been held not to constitute criminal contempt.—State v. Circuit Court for Eau Claire County, 97 Wis. 1, 72 N. W. 193, 38 L. R. A. 554, 65 Am. St. Rep. 90 (1897). See, also, State Board of Law Examiners v. Hart, 104 Minn. 88, 116 N. W. 212, 17 L. R. A. (N. S.) 585, 15 Ann. Cas. 197 (1908).

"When a case is finished, courts are subject to the same criticism as other people."—Holmes, J., in Patterson v. Colorado, 205 U. S. 454, 463, 27 Sup. Ct. 556, 558, 51 L. Ed. 879, 10 Ann. Cas. 689, 1907.

In admitting, as he seems to do, that a libel on the court may be a breach of professional duty in an attorney, Chief Justice Gibson adds a most material qualification. "The motion should be clearly shown to have been the acquirement of an influence over the judge in the exercise of his judicial functions by the instrumentality of popular prejudice." No such motive has been or can be imputed to these complainants. The learned judge who delivered the opinion of the court below imputes no such motive to them. He says: "Their motive, though not openly or at all avowed in the publication, is too obvious to admit of doubt. The least reprehensible motive by which their professional misconduct can be supposed to have been animated is a desire for prominence or notoriety in the editorial corps. The real or true motive could be no other than partisan malice or a wilful headlong zeal to promote partisan interests in the face of their official fidelity to this court and regardless of all consequences." Suppose the motives here assigned to be the true motives which actuated the complainants—a desire for notoriety, partisan malice, and a wilful headlong zeal to promote partisan interests—what had they to do with professional conduct or fitness to practice law? The complainants, in their sworn answers to the rule, aver that in making the publication in question, they were "acting in good faith, without malice, and for the public good."

Of course we mean to express no opinion upon the merits of the controversy between the court below and the complainants. We concede to the court all that has been claimed on their behalf, that the publication in fact was a false and malicious libel, and that in making the rule absolute they were actuated by a simple desire to uphold the authority and dignity of the court. If this were a mere question of discretion, we are of opinion their order was a mistake.[13] The Act of 1879 gives this court jurisdiction to review the discretion of the court below, and we think it was not in this case wisely exercised.

The order which made absolute the rules to show cause why the names of the complainants should not be stricken from the list of attorneys is hereby vacated and the rules discharged, and it is ordered that the complainants be restored to the bar, the costs of this proceeding and writ of error be paid by the county of Lancaster.

[13] (A. D. 1776, Ætat. 67.)
"Next day we talked of a book in which an eminent judge was arraigned before the bar of the publick, as having pronounced an unjust decision in a great cause. Dr. Johnson maintained that this publication would not give any uneasiness to the judge. 'For (said he), either he acted honestly, or he meant to do injustice. If he acted honestly, his own consciousness will protect him; if he meant to do injustice, he will be glad to see the man who attacks him so much vexed.' "—James Boswell, *Life of Samuel Johnson, LL. D.* (Everyman's Library, 2 Vol. Ed.) Vol. 1, p. 637.

THE TWEED CONTEMPT CASE. Theron G. Strong, *Landmarks of a Lawyer's Lifetime* (1914) pp. 81–86: Probably one of the most important and dramatic trials that has ever taken place in the city of New York was that of William M. Tweed. He was twice tried. The first trial came on before Judge Davis in January, 1873. A number of indictments had been found against Tweed more than a year previous, but the trial had been postponed on various pretexts until, to the public at large, it seemed that it was altogether probable that they would not be pressed.

After Judge Davis's election [to the Supreme Court of New York in 1872] it soon became evident that the delays had been because the wise prosecutors of Tweed had been waiting until the people had had an opportunity to elect a new Judge and a new District Attorney, free from any suspicion of influence on the part of Tweed. He was known to be wealthy, and had retained for his defense some of the most eminent members of the bar, including David Dudley Field, John Graham, John E. Burrill, William Fullerton, William O. Bartlett, Elihu Root and Willard Bartlett. The people were represented by the new District Attorney, Benjamin K. Phelps, and one of his assistants, Daniel G. Rollins, with counsel specially retained, Lyman Tremain and Wheeler H. Peckham. Now, at last, this notable case was to be tried, but the trial had a lame and impotent conclusion after occupying three weeks, for the jury reported that they were unable to agree and were discharged. The prosecution, however, immediately moved for a retrial, but Judge Davis doubted his legal right to extend the term of the court, and the case having been postponed, it was not until November, 1873, that the retrial was moved.

Judge Davis was again presiding over the branch of the court where the trial was to take place. Probably nothing more distasteful to Tweed, and his counsel, could have occurred than to find Judge Davis presiding. Tweed was represented by the same counsel. Elihu Root and Willard Bartlett were at this time young men in the first years of their practice, but they had already begun to give promise of the distinction which they subsequently achieved. So distasteful was Judge Davis to Tweed's counsel that they conceived the idea of presenting to him the following paper, setting forth reasons why he should not preside at the trial of the case:

"The counsel for Wm. M. Tweed respectfully present to the Court the following reasons why the trial of this defendant should not be had before the Justice now holding the court:

"First. The said Justice has formed, and upon a previous trial expressed, a most unqualified and decided opinion, unfavourable to the defendant, upon the facts of the case; and he declined to charge the jury that they were not to be influenced by such an expression of his opinion. A trial by jury influenced as it necessarily would be by the

opinion of the Justice, formed before such time, would be had under bias and prejudice, and not by an impartial jury, such as the constitution secured to the defendant.

"Second. Before the recent Act of the Legislature of this State, providing that challenge to the favor shall be tried by the Court, any person who had assumed a position in reference to this case and this defendant, such as said Justice had assumed, would have been disqualified to act as trier. The defendant is no less entitled to a fair trial of his challenge now than he was formerly. What would have disqualified a trier, must disqualify a judge now.

"Third. Most of the important questions of law, which will be involved in the trial, have already been decided by the said Justice adversely to the defendant, and, upon some important points, his rulings were, as we respectfully insist, in opposition to previous decisions of other judges.

"Although there may be no positive prohibition of a trial under these circumstances, it would be clearly a violation of the spirit of our present constitution, which prohibits any judge from sitting in review of his own decision.

"The objection to a judge, who has already formed and expressed an opinion upon the law, sitting in this case, is more apparent from the fact that in many States, where jurors are judges of law as well as facts, he would be absolutely disqualified as a juror.

"David Dudley Field.	J. E. Burrill.
"John Graham.	Elihu Root.
"William Fullerton.	Willard Bartlett.
"William O. Bartlett.	William Eggleston."

Upon its presentation, there was indeed a stirring scene. Judge Davis was the last man to be trifled with, or to be lectured upon what his duty was in the business before him. He gave indications of great surprise and indignation that any counsel, however eminent, should have dared to present such a document to him, but his feelings were well suppressed and his judicial dignity maintained, and, while informing the counsel that the presentation of the paper was a manifest impropriety, he, at the same time, informed them that before taking any action in regard to it he would consult his associates as to the proper course to pursue. That he conducted himself with admirable self-possession there can be no doubt. He was certainly not a man who could be intimidated.

He took no further action until the close of the trial, when he informed Tweed's counsel that he would proceed in the matter the following Monday morning, and directed all the counsel who signed the paper to attend. Accordingly, at the time designated, not only the counsel were in attendance but the court room was packed with an audience which included leading men of the bar and citizens of prom-

inence, to await the action of the Court upon a matter which so deeply concerned the independence of the judiciary and the dignity of the court. Judge Davis proceeded to state his views of the paper in the following words:

"At the beginning of this trial, I notified the counsel for the defense that I should take some action upon a certain paper which was handed me before the case opened. I intended then, and I intend now, that that document shall receive the notice that it deserves.

"I now fix the hour of ten o'clock on Monday morning next when counsel for the defense must be present; at which time I shall proceed to do what I deem proper in the matter, and take such action as your proceeding demands. You (and all of you who signed the paper) are directed to attend on Monday morning."

Upon the adjourned day an explanation was attempted, in reply to which Judge Davis stated that if the paper had been submitted to him privately he would not have considered it necessary to take action concerning it, but that having been submitted to him as presiding Justice of the Court of Oyer and Terminer, it was incumbent upon him to do so. He then proceeded to announce his decision which was as follows:

"In expecting the case to be tried, counsel thought it part of good tactics to prevent the judge, then sitting, from presiding. It was an attempt, judging by signatures of distinguished counsel, to intimidate the judge. The counsel sought vainly for a precedent, and will fail in seeking, here or in England, for a case of a tribunal or justice not taking notice of a paper of such a character. If such a paper were presented to an English judge by counsel, clothed as the 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." (Applause in Court, which was promptly checked by the judge.)

"As God is my judge, what I feel it my duty to do, I do, not from personal motives, but from a solemn sense of duty to the court, the bar, and above all, to the administration of Justice. No lawyer is justified in any act, for the sake of his client, which renders him amenable to the bar of his own conscience, or tends to degrade the tribunal before which he appears, or lessen respect for that official authority on which so much depends for the preservation of our institutions. I must make the mark so deep and broad that all members of the bar will know, hereafter, that all such efforts are open to censure and punishment by fine, as the law permits. I fine William Fullerton, John Graham, William O. Bartlett, $250 each, and order that they stand committed until the fine is paid. Mr. Burrill's position has already been explained, and Mr. Field is three thousand miles away from the jurisdiction of the court. In respect to the younger members of the bar, who have signed the paper—Elihu Root, Willard Bartlett, and William

Eggleston—I have this to say: I know how young lawyers are apt to follow their seniors. Mr. Eggleston did not take active part in the trial, and I do not speak of him. The other two younger lawyers displayed great ability during the trial. I shall impose no penalty, except what they may find in these few words of advice: I ask you, young gentlemen, to remember that good faith to a client never can justify or require bad faith to your own consciences, and that however good a thing it may be to be known as successful and great lawyers, it is even a better thing, to be known as honest men. Proper orders will be prepared by the clerk and submitted to me."

CASPER v. KALT-ZIMMERS MFG. CO. et al.

(Supreme Court of Wisconsin, 1915. 159 Wis. 517, 150 N. W. 1101.)

On motion for rehearing. Denied. For former opinion, see 159 Wis. 517, 149 N. W. 754.

VINJE, J. * * * By way of justifying their presentation of the case in this court, counsel for appellants, in their brief resisting the motion for a rehearing, say: "They (counsel) have grown to believe (perhaps erroneously, as a general proposition) that courts of equity recognize no limitations upon their powers, and that they enjoy most the finding of new plausible ways for the destruction of rights, however fortified by Constitutions, statutes, or well-established principles, if once it has been made to seem to them personally desirable to accomplish that end."

This is a severe arraignment of courts of equity, and it must have been intended to have special reference to this court, or else it would not have been advanced as a reason why counsel pursued a certain method of presenting the case. That this conclusion is just appears by their language, for they add: "That is why they were not content to submit the cause upon appellants' protection by such barriers of the law."

The language is a direct charge that, in the belief of counsel, this court enjoys most the finding of new plausible ways for the destruction of rights, however fortified by Constitutions, statutes, or well-established principles, if once it has been made to seem personally desirable to accomplish that end. Did such a charge emanate from counsel defeated in an important and hotly contested case, some allowance could perhaps be made for the frailty of human nature smarting under defeat. But such is not the fact. Counsel were successful upon every proposition involved in the appeal. So their language must be considered as the calm, deliberate utterance of their belief upon the subject. So considered, it presents a most flagrant violation of professional ethics and of the duty and respect which attorneys owe courts. It is regrettable enough that counsel entertain such a belief

respecting this court. It is still more regrettable that they should so act as to make it necessary to put their belief on record, for no court worthy of the name would permit such a studied insult to pass unnoticed.

This court does not claim infallibility. It realizes that it is only a human agency, and therefore may err. But it does claim that it is earnestly laboring to administer justice; to preserve, not to destroy, rights; to so interpret and apply the Constitution, statutes, and principles of law that they shall become the shield of right, not of wrong; and to conserve them in their spirit and integrity, to the end that they may truly fulfill the purpose for which they were ordained and established. To accomplish this object to its fullest extent this court needs no unprofessional goad. Judicial labor is not lightened, nor is judicial balance strengthened, by such language as counsel has used. Hence it is reprehensible from every point of view, and deserves the severest condemnation from bench and bar alike. Counsel for appellants will be allowed no costs, either for printing brief or for attorney's fees, upon the denial of the motion for a rehearing.

Motion for rehearing denied, without costs, and appellants' brief upon the motion is ordered stricken from the files.

BRADLEY v. FISHER.

(Supreme Court of the United States, 1871. 13 Wall. 335, 20 L. Ed. 646.)

This was an action brought by Joseph H. Bradley, who was, in 1867, an attorney-at-law, practicing in the Supreme Court of the District of Columbia, against George P. Fisher, who was then one of the justices of that court, to recover damages alleged to have been sustained by the plaintiff, "by reason of the willful, malicious, oppressive, and tyrannical acts and conduct" of the defendant, whereby the plaintiff was deprived of his right to practice as an attorney in that court. * * *

The court ruled that the defendant had jurisdiction to make the order striking the name of the plaintiff from the roll of attorneys of his court and instructed the jury that the plaintiff was not entitled to recover. A verdict was returned for the defendant and judgment entered thereon.

FIELD, J.[14] * * * The order of removal complained of in this case, recites that the plaintiff threatened the presiding justice of the Criminal Court, as he was descending from the bench, with personal chastisement for alleged conduct of the judge during the progress of a criminal trial then pending.

[14] The statement of facts is greatly abbreviated and only a small portion of the opinion is given.

The matters thus recited are stated as the grounds for the exercise of the power possessed by the court to strike the name of the plaintiff from the roll of attorneys practicing therein. It is not necessary for us to determine in this case whether under any circumstances the verity of this record can be impeached. It is sufficient to observe that it cannot be impeached in this action or in any civil action against the defendant. And if the matters recited are taken as true there was ample ground for the action of the court. A greater indignity could hardly be offered to a judge than to threaten him with personal chastisement for his conduct on the trial of a cause. A judge who should pass over in silence an offence of such gravity would soon find himself a subject of pity rather than of respect. * * * Judgment affirmed.[15]

SECTION 2.—CANDOR IN THE PRESENTATION OF CASES

I. Disclosure of Essential Fact

ANONYMOUS.

(Court of Common Bench, 1720. 1 Strange, 384.)

Two persons put in bail in feigned names, and because there were no such persons they could not be prosecuted for personating bail on the Statute. 21 Jac. 1, c. 26. So THE COURT ordered them and the Attorney to be set in the pillory which was done accordingly.[16]

[15] On page 355 of 13 Wall. (20 L. Ed. 646), Justice Field said of an attorney's office: "To deprive one of an office of this character would often be to decree poverty to himself and destitution to his family. A removal from the bar should therefore never be decreed, where any punishment less severe—such as reprimand, temporary suspension, or fine—would accomplish the end desired."

[16] In People v. Pickler, 186 Ill. 64, 57 N. E. 893 (1900), it was held that a lawyer who presented to the court appeal bonds with sureties whom he knew to be worthless or fictitious persons was guilty of a fraud on the court warranting disbarment.

In In re Hirst, 9 Phila. (Pa.) 216, 217 (1874), Hare, P. J., points out "that an attorney is not responsible for the character of the bail presented by his client, unless there is some fact or circumstance which should rouse suspicion or put him on inquiry. If nothing appears to the contrary, he may take it for granted that the principal is honest, and that the sureties do not intend to commit perjury."

But in In re Sachs, 169 App. Div. 622, 155 N. Y. Supp. 461 (1915), a lawyer was suspended from practice for two years for assuring a magistrate that bonds were "all right" when he did not know that they were. The per curiam opinion stated that: "Every judge should be able to rely upon receiving a truthful and frank answer to any question put to an attorney regarding the facts of any case in which the attorney is engaged and is seeking action favorable to his client. The respondent was clearly guilty of imposing upon the

STATE ex rel. STATE BAR ASS'N v. FINN.

(Supreme Court of Oregon, 1898. 32 Or. 519, 52 Pac. 756.)

Proceeding by the state, on the relation of the State Bar Association, for the disbarment of C. H. Finn, an attorney at law, for willful misconduct in his profession in affixing his official jurat as notary public to what purported to be affidavits but what were not because not in fact sworn to before him, and in causing them to be filed for use in an action in which he was attorney for one of the parties. Suspended from practice for one year.

PER CURIAM.[17] * * * Crandall, and perhaps one or two others, who were asked if they had signed these papers, indicated that they had, and this is the nearest any of them came to making oath to their contents; but, notwithstanding, the defendant appended his jurat thereto, and signed and sealed the same as a notary public, so that upon their face the documents have the appearance of genuine affidavits, when in fact they are not. With full knowledge of their true condition, the defendant caused them to be filed for the purpose of influencing the court in favor of his client upon the pending motion. Does what is related constitute willful misconduct on the part of the accused, in his profession? If it does, he is amenable to the court under the charges preferred against him; otherwise not. The documents are not false in substance, but they are not genuine in so far as they purport to be the sworn statements of the individuals subscribing them. If they had been filed in the form of mere statements or representations, there could have been no possible culpability ascribed to the defendant, but in that condition they would not have been effective for any purpose; and this the counsel knew as well as any one, for he is by no means ignorant of the practice. The very obvious purpose, however, in presenting the statements in the form of affidavits, and under the apparent sanction of an oath, was to give them the weight of testimony taken ex parte, and entitle them to the consideration of the court. The condition is similar to that of an officer certifying that he had taken the deposition of a party, and that, before proceeding to take the same, the witness had been by him duly sworn, when in truth and in fact the officer had not seen the witness, nor at any time attempted to administer an oath to him touching the statements made; the only distinction being that the deposition is a higher grade of testimony, in that an opportunity is given for cross-examination. To present such a deposition would be a representation to the court that it was the genuine testimony of the witness, regularly taken under the

magistrate when he gave his personal assurance that the bonds offered were 'all right,' even if he were merely ignorant upon the subject, and did not know that they were 'straw' bonds, given by professional bondsmen. This constituted professional misconduct of a very serious nature."

[17] The statement of facts is much abbreviated.

sanction of an oath, when in truth and in fact it was not at all entitled to consideration as testimony in the case, and could not, under the rules of practice, affect in any manner the matters in dispute. Such is the effect of the presentation of the pretended affidavits as genuine, while lacking the sanction of an oath. There is a twofold falsity in the proceeding. It comprises a false certificate of the administration of an oath, and a false representation that the statements produced are the sworn testimony of witnesses or supposed affiants, entitling them to the consideration of the court. That an attorney is culpable who seeks thus to maintain his cause, there can be no contention. Such practice is not consistent with truth, nor does it conform to right principles of fair dealing, and is well calculated to impose upon, overreach, and mislead the court into a perversion of justice. Conduct in an officer which may lead to such an end cannot receive the sanction of the court as correct. * * *

It is evident that he had no intention of asking a withdrawal of these papers, except as a means of extricating himself from the charges of professional misconduct which followed. * * * The chief culpability about the transaction, confining the proof to the charges preferred, is that it shows a reckless and willful disregard of the regularity of the means employed for the accomplishment of ultimate purposes. Furthermore, it shows a deliberate willingness to permit the court to be deceived and misled by the consideration of fictitious documents and evidence, for the production of which the accused is solely and directly responsible. Such reckless demeanor by an attorney is not consistent with professional ethics or obligations, and constitutes, as we are led to conclude, willful misconduct in his profession. * * *

We have determined that a suspension will accomplish the purpose of correcting the evil in the present case, and therefore direct that the defendant be suspended from practice in all the courts of the state for the period of one year. An order will be entered accordingly.[18]

[18] In Erskine v. Adeane, 18 Sol. J. 573 (1874), the court was asked to strike off the rolls "a solicitor of great experience" and twenty years' standing because the solicitor, receiving an affidavit which had been altered by the deponent in a way to make its meaning obscure, interlined some words to make sense of a certain paragraph, but words which constituted a material alteration, and without having the affidavit resworn had it filed. Jessel M. R., said in conclusion: "He must have known that he was making the deponent seem to swear to that which possibly might not be true. In his zeal for his client, he left the deponent out of sight, who might have been indicted for perjury. He was sure the solicitor had no corrupt motive, and merely wished to further his client's interests. He was anxious not to ruin him entirely by the decision he was about to give; yet he was bound to mark in a definite manner his disapproval of the solicitor's conduct, and the least he could do was to suspend the solicitor for six months and order him to pay the costs of the motion."

In In re Arctander, 26 Minn. 25, 1 N. W. 43 (1879), an attorney at law was suspended from practice for six months because as notary he antedated the jurats and acknowledgments to the official oath of office and the justification of sureties on the bond of a justice of the peace, so as to make it appear that the justice had qualified in time to acquire jurisdiction of a criminal pro-

In re ATTORNEY.

(Supreme Court of New York, Appellate Division, Second Department, 1896. 10 App. Div. 491, 42 N. Y. Supp. 268.)

Petition by Charles Hewlett to strike the name of an attorney from the roll of attorneys and counselors of the supreme court, and to forbid his practicing in any state court.

HATCH, J. * * * Upon the two charges, therefore, we have this result: That respondent caused to be submitted a case for decision which he knew was not in compliance with law; that the case was an imperfect and partial presentation of all the facts which ought to have been submitted to the court. This is as favorable a view for respondent as the finding and evidence warranted. Such acts constitute professional misconduct, as it foists upon the court a fictitious controversy, and is to that extent a fraud and imposition upon it. Courts are constituted to decide actual questions existing between parties who are real, and who have a real controversy. And the law has carefully hedged about the submission of controversies between parties with such formalities and solemn requirements as will prevent anxious persons from resorting improperly to its aid, and at the same time furnish real litigants an easy mode of invoking its authority. Code Civ. Proc. §§ 1279, 1280. A proper regard for the dignity of the court, a just recognition of its relation to the public, and a proper conception of the office of a lawyer, require a due observance of these formalities, in order that the court may properly discharge its obligations and fulfill its public function; otherwise the source of its authority is corrupted, and the administration of justice brought into contumely and disrepute. The submission of anything but a real controversy has been denominated judicially as a fraud. Judson v. Flushing Jockey Club, 14 Misc. Rep. 350, 36 N. Y. Supp. 126. In Lord v. Veazie, 8 How. 255, 12 L. Ed. 1067, it was said by Chief Justice Taney: "Any attempt by a mere colorable dispute to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court." * * *

We conclude, therefore, that as to these charges the respondent was guilty of professional misconduct, and that his act in submitting or causing to be submitted the case to the general term was a fraud and imposition upon the court, and that such fraud was aggravated by his imperfect and partial statement of the facts. * * *

After a careful consideration of the evidence, the character of the

ceeding commenced before another justice and transferred from the latter on an affidavit of bias. See Gammons v. Johnson, 76 Minn. 76, 78 N. W. 1035 (1899).

offenses of which the respondent is guilty, and the punishment which attaches, even though no penalty be added to his conviction, lead us to the conclusion that justice will be fairly attained by suspending respondent from practice as an attorney and counselor at law in the courts of this state for the period of two years.[19]

PEOPLE ex rel. HEALY, State's Atty., v. CASE.

(Supreme Court of Illinois, 1909. 241 Ill. 279, 89 N. E. 638, 25 L. R. A. [N. S.] 578.)

Information, on the relation of John H. Healy, state's attorney, against Theodore G. Case to disbar respondent, or, in the alternative, to suspend or discipline him. Respondent suspended for one year.

PER CURIAM. * * * On July 19, 1907, the respondent filed a bill for divorce in the superior court of Cook county for his client, Eliza Ellen Epcke, praying for a divorce on the ground of extreme and repeated cruelty, and the husband, by his solicitors, afterward filed an answer denying the charges of the bill. On November 23, 1907, the respondent appeared for the complainant before Judge Barnes and a solicitor appeared for the defendant, and the cause was heard on the testimony of the complainant and two witnesses in her behalf. The solicitor for the defendant did not cross-examine the witnesses or introduce any testimony or take any part in the hearing. A written agreement had been entered into by the parties, and was presented in court as to alimony and the custody of a child. The chancellor dismissed the bill for want of equity, and, after leaving the courtroom, there was some conversation in the corridor between the respondent and his client and Adolph R. Weseman, the solicitor for defendant. According to Weseman's testimony, respondent stated to his client that they were at liberty to proceed again, the decision of Judge Barnes having only the effect of a nonsuit. There was discussion between respondent and Weseman as to whether the order dismissing the bill was a final disposition of the case, and respondent claimed that it was not. Two days afterward, on November 25, 1907, respondent filed in the circuit court of Cook county, a court of concurrent and equal jurisdiction with the superior court, another bill for divorce by Mrs. Epcke against her husband, containing the same allegations and charges of cruelty as the former bill, and no other. Shortly afterward respondent met Judge Stough, a judge of a circuit outside of Cook

[19] See Matter of Elsam, 5 Dowl. & Ry. 389 (1824); In re Hawes, 169 App. Div. 644, 156 N. Y. Supp. 283 (1915).

"I wish it to be known that in my judgment, at any rate, it is not the part of a respectable solicitor to induce clients to lend their names for appeals in which they have no interest at all, in order that the solicitor himself may gain his own private ends."—Rigby, L. J., in Harbin v. Masterman, [1896] 1 Ch. 351, 371.

county, who was then, by request of the proper authorities, holding court in Chicago, and asked him to hear the cause. The request was not a peculiar or unreasonable one according to the general practice in hearing divorce cases in Cook county, and Judge Stough agreed to comply with it. Thereupon respondent commenced to talk to the judge about the case, and the judge said: "I do not want to hear anything about it. I will hear your case when you bring your witnesses in." Weseman testified that the respondent told him previous to the hearing before Judge Stough that he had started to tell Judge Stough about the former hearing, but was told by the judge he did not want to talk about the case; that, if respondent made a good case, a decree would be granted, otherwise not. The respondent had not proceeded far enough in his talk with Judge Stough before he was interrupted to acquaint him with the fact of the former hearing. The defendant's solicitors entered their appearance and filed an answer denying the allegations of the bill, and the cause was heard before Judge Stough on November 29, 1907. Weseman was again present at the hearing, and had charge of the defendant's side of the case. Complainant and the same two witnesses who testified before Judge Barnes testified before Judge Stough and gave substantially the same testimony, and no other. The defendant's solicitor did not cross-examine the witnesses or introduce any testimony and a decree was granted by Judge Stough. Shortly after the second hearing Judge Barnes became acquainted with the fact that Mrs. Epcke had filed the second bill, and he thereupon called on Judge Stough, told him of the first hearing and decree, and said he thought the second decree should be vacated. This was the first information Judge Stough had that the case had been finally determined in the other court and he immediately vacated his decree. The respondent was called to Judge Stough's courtroom, and, upon being informed that the decree had been vacated, said that in the conversation had in the corridor he wanted to tell the judge about the former hearing and he would not let him. * * *

The question presented is whether the concealment from the chancellor of the circuit court of the prior adjudication by a chancellor of a superior court, or the failure to disclose it, was such a fraud on the court as shows the respondent to be unworthy of a license to practice law in this state. That the first decree dismissing the bill for want of equity was a final and conclusive determination of the rights of the parties is not denied; but it is argued in respondent's behalf that such defense could be considered by the chancellor only if set up by the defendant by plea, and that respondent was under no obligation to disclose to the chancellor the fact that upon the identical pleadings, after a full hearing, the issue had been determined in a court of competent jurisdiction against his client. The commissioner seems to have adopted that view, and concluded that it was not the strict legal duty of respondent to make the disclosure in the absence of a collusive agreement to keep the fact from the knowledge of the court. Of course,

it required no collusive agreement to keep the chancellor in ignorance of the records of another court, of which he could have no knowledge unless their contents were brought to his attention. The argument and conclusion are based upon an entire misconception of the relation and the duty of the lawyer to his client and to the court. "The lawyer's duty is of a double character. He owes to his client the duty of fidelity, but he also owes the duty of good faith and honorable dealing to the judicial tribunals before whom he practices his profession. He is an officer of the court—a minister in the temple of justice. His high vocation is to correctly inform the court upon the law and the facts of the case and to aid it in doing justice and arriving at correct conclusions. He violates his oath of office when he resorts to deception or permits his clients to do so. He is under no obligation to seek to obtain for those whom he represents that which is forbidden by the law." People v. Beattie, 137 Ill. 553, on page 574, 27 N. E. 1096, on page 1103, 31 Am. St. Rep. 384.

Whatsoever hesitation there might be in the mind of a lawyer as to what his obligation requires of him in the way of disclosures against his client's interest, there can be no question of the duty to make the disclosure of a prior adjudication in a case like this. In Christian nations marriage is not treated as a mere contract between the parties, to be suspended or dissolved at their pleasure, but rather as a status based upon public necessity and controlled by law for the benefit of society at large. 14 Cyc. 576. The interests of society are so involved in proceedings to dissolve the marriage relation that the public is interested in such proceedings to a greater degree than in ordinary civil actions. While a divorce suit is a controversy between private parties, the interest of the public in the marriage status is concerned, and the court will regard such interest whatever attitude the parties to the suit may take. 2 Bishop on Marriage and Divorce, § 498. Arising out of the public right that divorce shall be granted only for statutory and sufficient causes, the practice has uniformly been different from that recognized in other cases. A divorce will not be granted upon default or bill taken for confessed unless the charges are sustained by sufficient proof. Shillinger v. Shillinger, 14 Ill. 147; Wheeler v. Wheeler, 18 Ill. 39. It will not be granted upon consent of parties, but a cause must be proved to the satisfaction of the court, independently of the fault or confession of either party. Dunham v. Dunham, 162 Ill. 589, 44 N. E. 841, 35 L. R. A. 70. "In a divorce suit the interest of the state is paramount to the rights of the parties, or, in more familiar terms, the parties are not entitled to relief where the same would be against public policy." 1 Nelson on Divorce and Separation, § 8. "Though a suit for a divorce, upon its face, is a mere controversy between the parties to the record, yet the public occupies the position of a third party. Society has an interest in every marriage, and it is the duty of the state, in the conservation of the public morals, to guard the relation and to see that the status of all applicants for its dissolu-

tion should be established." Way v. Way, 64 Ill. 406, 414. In Schmidt v. Schmidt, 29 N. J. Eq. 496, the court said: "The divorce petition is not evidence of any fact stated in it. To permit parties in divorce suits to establish, merely by the allegations and corresponding admissions of bill or petition and answer, the facts which are necessary to give the court jurisdiction would be to practically annul important provisions of the law, and leave to simple, unverified (and perhaps fraudulently collusive) averment and admission facts which the Legislature intended should be established by proof." In Beazley v. Beazley, 3 Haggard's Eccl. 639, in discussing whether or not a former divorce of one of the parties should have been pleaded, it was said: "If a fact of such magnitude had been suppressed, any sentence pronounced by the court . . . would not have been finally binding. . . . Such suppression would have rendered all the proceedings liable to impeachment. An endeavor to obtain a sentence when such material information was withheld would be unfair to the court and prejudicial to the due administration of justice." This court in Dunham v. Dunham, supra, held that when the wife upon a separation from her husband goes to another state for the purpose of obtaining a divorce, and brings a suit there for that purpose without disclosing the fact that a suit is pending in this state involving the same matters, she is guilty of such fraud and deception as to invalidate the decree of divorce obtained by her in such other state. Surely the law and decisions on these questions were well known to an attorney of more than 20 years' practice. * * *

A decree dismissing a bill for divorce upon a hearing is a final decree. The parties have no right again to litigate the matters involved in that suit, and by filing a new bill try different judges until they find one who agrees with them upon the facts. The public are also interested in the finality of a decree. Neither is it consistent with the authority and dignity of the courts or of proper administration of justice that parties desiring divorce may, after their cause has been heard and determined, successively file the same bill and submit the same evidence to all the judges of the various courts having jurisdiction until one of them shall grant the relief sought. It would be the duty of the court before whom such a bill is filed after having been heard and dismissed in a court of co-ordinate jurisdiction at once to dismiss the bill upon learning of the prior adjudication, whether it was pleaded or not. The filing of a bill in such a case is a fraudulent imposition on the court.

In this case it is manifest that both parties desired divorce. The hearing before Judge Barnes in the superior court and the dismissal of the bill were on Saturday. On the following Monday the bill was filed in the circuit court. On Tuesday the appearance of the defendant was entered and an answer filed, and on Friday the cause was brought to a hearing as if it were a bill filed in good faith for the adjudication of the rights of the parties, solicitors appearing for each

party, but neither advising the chancellor of the facts, which would have shown that the status of the parties upon the matters shown had already been determined. While the conduct of the parties was not collusion in the legal sense, as applied in the divorce law, it was reprehensible conduct on the part of both the solicitors thus to induce the chancellor to take jurisdiction of a case which he would not have considered if informed of the truth.

The conversation which took place between Judge Stough and the respondent does not help the matter. The respondent knew that the decree was final, and he at least felt some doubt about the propriety of his action. If he had any communication to make to Judge Stough in regard to the merits of the case, it should have been addressed to him in open court. Respondent had no right to attempt an explanation to the judge out of court, and the judge, with a proper sense of his position in the matter, declined to hear any talk about the case. The matter was not presented in court, where alone it could be considered. The respondent's conduct is not capable of an innocent construction. His failure to disclose the former adjudication, which he knew was final, was not consistent with the good faith and fair dealing which is required to be observed by members of the bar toward the courts in which they practice. The argument that he was not acting from corrupt motives or for wrongful purposes, but in accordance with his understanding of the law, is not justified by the facts. His motive is to be determined by what he did. He did not testify before the commissioner, but it is not consistent with his statement to Judge Stough that he was going to tell him out of court about the former adjudication, for counsel to say that he did not understand that such was his duty. He could not have been ignorant of the legal effect of the first decree, and the natural inference is that, if Judge Stough would not hear the case when he knew the facts, he would have sought another judge. If he stated the fact in court, he would take the risk of having the bill dismissed, and he did not state it. His motive was to obtain a divorce for his client, and with a complaisant solicitor representing the defendant and desirous of the same result he knew that the knowledge of the former adjudication, which was a bar to his suit, had not and would not come to the knowledge of the chancellor. We are not willing to set up or indorse such a standard of the duty of an attorney holding our license to practice in courts of justice as is contended for by respondent and approved by the commissioner.

The exceptions are sustained, and it is ordered that the respondent, Theodore G. Case, be suspended from practicing as an attorney in this and all other courts of record of this state for the term of one year from the entry of judgment under this order.

Respondent suspended.[20]

[20] In In re Carleton, 33 Mont. 431, 84 Pac. 788, 114 Am. St. Rep. 826 (1906), the court declared it "to be unprofessional and contrary to the principles of professional fair dealing expected at the hands of all counsel by the court"

FARMER, C. J. (dissenting). * * * The whole question of respondent's guilt is one of motive, and I agree with the commissioner that the proof failed to establish any corrupt motive on the part of the respondent. * * *

IN RE RAILROAD BONDS. Frederick Trevor Hill, *A Lawyer's Duty with a Bad Case*, 8 Everybody's Mag. 457, 459, 460: Most men can be trusted to choose between vice and virtue, good and evil, right and wrong, when the issues are perfectly well defined. But unfortunately the lawyer's problems do not often take so simple a form. He must frequently decide between the legal right and the moral wrong —between legal justice and fair dealing—between what he knows is law and what he feels is honorable.

Not long ago a lawsuit was tried in New York which illustrates to some extent the complexity of such decisions. This case had a peculiar inside history and raised a question for which there is perhaps no precedent in the books, although the private records of more than one active office would prove that the situation is not altogether unique.

The action was brought on behalf of a woman, the holder of certain railroad bonds, against the officers and directors of the company which issued them, charging the officials with fraud and attempting to hold them responsible for the supposed value of the securities. The suit began to attract attention, and before it came to trial the counsel for the plaintiff had made arrangements with other bondholders whereby this particular litigation was to be conducted as a test case for the benefit of all persons similarly situated. There was no question as to the justice of the plaintiff's claim, and her case was apparently well supported by the law and the facts. During the trial, however, the attorney received private information that, though the plaintiff had possession of the bonds in suit, she did not own them and had not

for counsel to act for both parties in a suit to annul a marriage brought about by him between a seducer and the seduced and to conceal that fact and the further facts that the marriage took place on the understanding that the parties were not to live together as husband and wife and that five days after it the parties contracted to annul it, in pursuance of which contract the annulment suit was brought.

In In re Cahill, 66 N. J. Law, 527, 530, 50 Atl. 119, 120 (1901), an attorney was suspended because he attempted to obtain a collusive divorce. He denied knowledge of the collusion, but Fort, J., for the court, said that: "A solicitor cannot shut his eyes to facts and say, 'I did not see them,' when he would have seen them if he had kept his eyes open."

"When I was at the Bar, error was brought, and infancy assigned, when the man was thirty years old; and the attorney was threatened to be turned out of the roll."—Twisden, J., in Aston's Case, 1 Mod. 41 (1671). See post, p. 415.

"If any counsellor shall presume to move [in Chancery] for one in Forma Pauperis that is not so admitted, and shall under that pretence make a second motion, the Register shall enter neither of his orders but shall within four days acquaint the Lord Keeper or Master of the Rolls with the abuse, that he that did it may be condignely punished."—Thomas Powell, *The Attourneys' Academy* (1647) pp. 233, 234.

owned them at the commencement of the action, having previously sold them under circumstances sufficient to account for the error.

The counsel's first impulse was to announce his discovery and discontinue the action, but when he expressed that intention to the other parties interested he met a storm of angry opposition. Events had taken such a turn that the failure of this test suit meant the failure of all similar claims. There was a chance that the fatal error which the attorney had unearthed might not be discovered by the other side. The lawyer's answer was that he knew the plaintiff had no right to recover, and that was enough for him. He did not propose to deceive the court by prosecuting an action which, with his knowledge of the facts, was fraudulent, no matter how just the other cases might be. He was reminded that the discontinuance of this action would defeat the other claims and make it impossible for the claimants to receive justice. He was urged to remember the large interest he personally had in the result of the action, but at this argument he promptly resigned. Another attorney was appointed in his place, the litigation was continued without the slightest suspicion on the part of the defendants of its fatal weakness, and ultimately a large sum of money was recovered from them.

It is an indictment of the profession to say that, with full knowledge of the facts, the Bar's approval of the conscientious attorney would be merely perfunctory and official, and its bestowal accompanied by an enigmatic smile.

DIVORCE—ARRANGEMENT TO SUE IN DISTANT STATE UPON EXISTING CAUSE NOT RECOGNIZED IN PRESENT DOMICILE. N. Y. Committee. *Question 100:* Husband and wife, residents of this state, are not living together; the husband having actually and by express declaration deserted the wife. There is no ground known to the wife on which she could obtain a divorce in New York. Let it be assumed that facts existing at the time of the desertion will give ample grounds for divorce at the instance of the wife in several other states. There has been absolutely no collusion in bringing such facts into existence. The husband, who actively desires a divorce, and his attorney, have requested that the wife accept a substantial money payment for herself in settlement of all claims for future maintenance and also a substantial fee for her attorney; and in return for these payments, that she go to another state, where existing facts would be grounds for a divorce, and there procure a divorce decree, it being the husband's plan to go to such state and accept service of papers.

Will you kindly give me the opinion of your Committee on the propriety of such an arrangement?

Answer: In the opinion of a minority of the Committee, it would be unprofessional for a member of our bar to advise, or assist in, the arrangement suggested, the object of which is to escape the operation of the laws of this state; but a majority is of the opinion that the arrangement is not inherently improper, provided there is no imposition on the wife, and the arrangement is fully disclosed to the foreign court, and the change of residence is actual and in good faith.

Supplementary answer: The inquirer has remonstrated with the Committee for its answer to Question No. 100, insisting that the Committee should have answered the question as presented, without suggesting conditions not included therein. The Committee, in consequence, supplements its former answer as follows:

A majority of the Committee was unable to agree with the minority that the mere fact that the statutes of New York do not provide for the relief desired in the case suggested is sufficient ground to condemn the arrangement or the participation of a New York lawyer in aid of relief elsewhere according to the law there in force. In the opinion of the majority, the vice of such arrangements does not arise from the state of the law in New York, but from possible imposition upon the injured party owing to the importunities of the wrongdoer and the conditions imposed by him, possible imposition upon the foreign court by concealment of the actual facts, and a fraudulent resort to the foreign state by one only colorably a resident of such state. As the question did not negative these possibilities (though it did not, it is true, explicitly suggest them), the majority concluded that it should point out specifically the only conditions upon which, in its opinion, the arrangement would not be open to condemnation. It is unwilling to indicate that it would consider as reprehensible, participation by a lawyer in such arrangement, if carefully conditioned as it has suggested. It does consider, however, that the careful observance of such conditions would tend to minify the number of such arrangements and to rob them of the character which has led to what it deems the most serious criticism.

ACCEPTING RETAINER TO PROCURE DIVORCE WITH KNOWLEDGE THAT A STATUTORY BAR EXISTS. N. Y. Committee. *Question 106:* A woman desires to retain me to institute an action for absolute divorce against her husband who has been living for the past two years an adulterous life with another woman.

During the conversation she confessed to me that she also has been living for the past year an adulterous life with another man. I am certain that the adultery charged against the husband was not committed with the connivance, consent, privity or procurement of the wife. I am also convinced that she has not cohabited with her husband ever since she became aware of his adulterous life nor has she

condoned it. I am also certain that the husband will not interpose a defense nor will make a countercharge of adultery against the wife.

Knowing all these facts, have I a moral or legal right to take and prosecute the woman's case?

Answer: In the opinion of the Committee, upon the facts stated, the services of the attorney could not be successful except by concealing from the court facts which it ought to know; and therefore he ought to decline the employment. The Committee refers to New York Code of Civil Procedure, section 1758, subdivision 4.

DUTY OF LAWYER FOR DEFENDANT IN DIVORCE SUIT WHERE PARTIES AGREE TO DISCONTINUE DIVORCE SUIT AND HAVE DEFENDANT BRING ANNULMENT SUIT. N. Y. Committee. *Question 54:* A. sues his wife B. for an absolute divorce. B. defends and makes a motion for alimony and counsel fee. Pending the decision of the motion, A. suggests to B. that she accept from him a fixed sum of money in lieu of alimony and counsel fee, provided B. will bring an action against him to annul the marriage, whereupon A. will discontinue his action.

B. has a meritorious ground upon which to base an annulment suit, namely, under age of legal consent at the time of the marriage and no cohabitation.

May B.'s attorney, with knowledge of the foregoing facts, institute the annulment suit in her behalf and advise his client as to the propriety of bringing such suit?

Answer: In the opinion of the committee, an affirmative answer should be given to the question; but it is the duty of counsel to advise the court before whom the motion for alimony and a counsel fee is pending, of the facts surrounding the proposed discontinuance of the divorce action, and the proposed institution of the annulment suit, and to make a similar disclosure in the annulment action.

The committee expresses no opinion upon the legal effect of the motion for alimony and counsel fees upon the subsequent action for annulment of the marriage.

DIVORCE—DUTY OF LAWYER WHEN CLIENT ASKS HIM TO PERSUADE HER HUSBAND TO INSTITUTE PROCEEDINGS. N. Y. Committee. *Question 37:* Mrs. O., a client of A., an attorney, informs him that she deserted her husband over three years ago. That her husband is living in the city of ———, state of ———, and has resided there, she believes, for a considerable period. That she is satisfied that she can never live with him again under any circumstances.

She desires A., as her attorney, to see Mr. O., to ask him if he will not institute proceedings for a divorce against her in said state of ———, in which state she is informed he is entitled to a divorce on the ground of her desertion, and of which state he has been a resident for a sufficiently long time.

Is A., in accepting the retainer, and having the interview with Mr. O., guilty of unprofessional conduct?

Answer: In the opinion of the committee, it is not unprofessional to accept such a retainer, and there is no collusion or other impropriety in asking a husband to enforce rights which have already accrued. In view of the only too numerous scandals connected with divorce litigation, however, the committee believes that attorneys should be particularly careful in all such cases to satisfy themselves that there has been no collusion in the prior conduct of the parties.

DIVORCE—DUTY OF LAWYER AS TO ACCEPTING AID OF OPPOSING PARTY TO PROVE ACTS GIVING CLIENT GROUND FOR DIVORCE. N. Y. Committee. *Question 86:* A husband, five years ago, became infatuated with another woman and, since that time, has made life with him so intolerable that his wife has accepted his frequent invitations to leave and has left him. The wife now resides in New York county, while the husband continues to reside in the county where both formerly lived as man and wife. Before the final rupture, and as part of the causes leading to it, the husband repeatedly told the wife that he had been unfaithful, that he intended to continue to be so, and that evidence existed which would entitle her to an absolute divorce. He gave her no details by which she could, unaided by him, obtain for herself such evidence. Certain real property purchased by the husband stands in the name of the wife. In certain other real property of the husband she has an inchoate right of dower. She desires a divorce, but has no means with which to watch for and obtain evidence of probable and threatened future delinquencies of the husband. He has offered, and repeats his offer through his attorney, to furnish the names of witnesses to offences which occurred before the rupture, on condition that terms satisfactory to him in regard to alimony and the disposition of the real property above mentioned are agreed upon and that the action be brought in the county of the wife's present residence.

Is it proper for her attorney to bring an action for absolute divorce, upon evidence so obtained, the attorney, by the way, having been retained a day or two before the rupture?

Would such an action be collusive? I am attorney for the wife and do not desire to participate in a collusive action.

Answer: In the opinion of the Committee, the propriety of the suggested agreement is not to be determined solely by the test of collu-

sion. The acts of which evidence is to be secured are stated to have been already committed, and this circumstance would seem to avoid the charge of collusion in its technical sense (Dodge v. Dodge, 98 App. Div. 85, 88 [90 N. Y. Supp. 438]); the Committee is of opinion, however, that the attorney in a divorce case should regard with disfavor any offer by the adverse party to stipulate to furnish witnesses to the past offence charged, in consideration of stipulations as to alimony, release of dower, etc. (See Train v. Davidson, 20 App. Div. 577 [47 N. Y. Supp. 289].) A majority of the Committee is of the opinion that, nevertheless, in the case submitted, if the attorney for the wife be satisfied of her good faith, it would not be improper for the attorney to bring the suit in the manner and pursuant to the arrangement stated, provided that the whole agreement be in writing and be expressly made subject to the approval of the court, and a full disclosure thereof and of all the facts relating thereto is made to the court at the trial (see Schlesinger v. Klinger, 112 App. Div. 853 [98 N. Y. Supp. 545]), and the client be advised of the fact that the court may decline to confirm it.

In re TEPPER.

(Supreme Court of New York, Appellate Division, First Department, 1915. 170 App. Div. 889, 154 N. Y. Supp. 412.)

In the matter of a petition and charges against Emanuel Tepper, an attorney, for professional misconduct, preferred by the Bar Association of the City of New York. Respondent censured.

INGRAHAM, P. J. We think the respondent is to be censured for his lack of frankness to the court on the trial of the action of Eastmond v. McNaught and Clarke, in not stating to the court the fact that a stipulation had been signed by which the defendant Clarke was to be exonerated from liability on condition of his furnishing evidence to the plaintiff in the action which would sustain the plaintiff's action against McNaught. It is true the respondent did state to the court that Clarke had been released, but no statement was made to the court that a stipulation had been made by which Clarke's release depended upon his furnishing the plaintiff with evidence that would insure recovery against McNaught. It was not that Clarke had been released that was the essential fact which would enable the jury to judge of his credibility, but the fact that a stipulation had been made by which a release was to be effected if he furnished the testimony and then became a witness to prove the plaintiff's case against McNaught.

Attorneys should always remember that in their conduct of actions before the courts it is serious professional misconduct to enter into an agreement with a witness by which a witness will obtain a personal advantage if his testimony is satisfactory to the party calling

him or his attorney, and we think that making such a contract with a person involved in the transaction which is to be investigated, which gives to the witness a personal advantage, dependent upon such person's becoming a witness and testifying in the action, is serious professional misconduct, which requires discipline, and the respondent should therefore be severely disciplined for not frankly stating to the court that the release of Clarke from liability was dependent upon his furnishing evidence in the action which would sustain the plaintiff's cause of action against his codefendant.

It appears, however, by the papers submitted in opposition to this application, that the respondent has withdrawn from practice of the profession. He was perfectly frank in his statement to the Grievance Committee of the Bar Association as to what he had done, and he made a frank statement to the court, disclaiming any idea at that time that he was guilty of professional misconduct; and, under these circumstances, we think that it will be sufficient to censure the respondent for his conduct, without further disciplinary proceeding.[21]

In re MARRON et al.

(Supreme Court of New Mexico, 1916. 160 Pac. 391.)

Original proceedings for the disbarment of Owen N. Marron and another. Respondents suspended from practice for one year.

HANNA, J. There are nine specifications in the accusation filed against the respondents. The first specification is to the effect that in a certain civil action pending in the district court of Bernalillo county said respondent Francis E. Wood having then and there in his possession a certain copy or duplicate of an original contract, the contents and purport of which were material to the determination of the issues in said cause, concealed the same beneath a blotter in the office of the clerk of said court and when, afterwards, he was requested by counsel for the opposite party to produce his said copy of said contract, he replied in substance that the contract was not in his posses-

[21] "Within the past year, a prominent young lawyer was disbarred. Shortly afterwards he died, leaving an estate of over a million dollars. His millions could not save him from the disgrace of a public stripping of his badge of office. His practice had consisted mainly in appearing in proceedings against the city in which real estate was condemned for public use. The main offense of which he was convicted lay in his failure to disclose to the court, in cases in which he appeared as trial counsel, that pending the trial he had acquired from his original clients, and was himself financially interested in, the real estate the value of which the court was about to determine. The court observed: 'What is really the case here is that this respondent has endeavored to unite the profession of the practice of the law with the business of a speculator in real estate, purchasing property which was subject to condemnation or about to be condemned.' Matter of Flannery, 150 App. Div. 369, 388 [135 N. Y. Supp. 612 (1912)]."—Julius Henry Cohen, *The Law: Business or Profession?* (1916) pp. 3, 4.

sion or custody or under his control, when as a matter of fact the said contract was at that time remaining where it had been concealed beneath a blotter in the office of the clerk of the district court.

It is contended by the respondent Francis E. Wood that this copy of the contract was not material to the issues in said cause, and that therefore his conduct was not subject to criticism. It is urged by the Attorney General, however, that regardless of the materiality of the said document in the trial of the issues in said cause, the conduct of the said respondent Francis E. Wood was reprehensible to the same degree as if the said document were material and necessary to the trial of the issues in said cause. With this contention we fully agree. The conduct of the said respondent in concealing the paper from and deceiving the court and opposite counsel by statements bordering upon, if not amounting actually to falsehood, is certainly unbecoming a member of the legal profession.

The court therefore finds that said Francis E. Wood in the particulars hereinbefore mentioned has been guilty of unprofessional conduct requiring punishment at the hands of the court.

It is, therefore, considered, ordered, and adjudged by the court here that said Francis E. Wood, by reason of his said conduct, is deserving of the reprimand of this court.

The second specification of the accusation is to the effect: That the respondent Francis E. Wood, while engaged as counsel for the defendant in the trial of a certain cause before the district court of Bernalillo county in which Ernest Meyers was plaintiff and the Meyers Company, Incorporated, was defendant, offered in evidence on behalf of the defendant a certain alleged release, which was in words and figures as follows:

"Albuquerque, New Mexico, Nov. 1st, 1913.

"Whereas, by article 8 of the contract between the Meyers Co. Inc., of Albuquerque, New Mexico, and myself, dated Jany. 1st, 1912, said Company is required to make a certain payment to me in the matter of Alex D. Shaw & Co., of New York, on the happening of certain events therein stated.

"Now, therefore, in consideration of the sum of one dollar and other valuable considerations to me in hand, receipt of which is hereby acknowledged, I hereby release said Meyers Co. from any payment to me of the sum of $501.88 or any part thereof mentioned in said Article 8 as a credit to said Alex D. Shaw & Co. Ernest Meyers."

That said respondent Francis E. Wood then and there alleged and pretended to the court that the said release constituted valid and admissible evidence of the payment and discharge of the cause of action upon which the plaintiff had brought suit in said court. That said respondent Francis E. Wood moved and requested the court to instruct the jury that said release constituted a valid and sufficient defense on behalf of the defendant in said cause, and that he thereby caused the district judge then presiding in said cause to so instruct

the jury, which jury, under the instructions of the court, returned a verdict finding the issues for the defendant. That in truth and in fact the said alleged release was not a valid and lawful release, discharge, or satisfaction of the said defendant from liability to the said Ernest Meyers, and that the said respondent Francis E. Wood then and there well knew the same.

It appears from the evidence that the said release was procured from the plaintiff Ernest Meyers for the purpose of enabling the firm of Alex D. Shaw & Co. of New York City to recover from the Meyers Company the sum of $501.88 which had been placed with the defendant the Meyers Company by the said Ernest Meyers as security against possible liability upon a merchandise account at that time unsettled and disputed. At the time the said release was introduced in evidence it appears from the proofs that the said respondent Francis E. Wood was thoroughly familiar with all of the facts and circumstances surrounding the execution and delivery of the said release, and knew that the same had never been delivered to the Meyers Company except for the purposes hereinbefore stated. He also knew at that time that a reassignment of the said claim had been executed by the said Alex D. Shaw & Co. to the said Ernest Meyers, which was intended to supersede and cancel the said alleged release.

In consideration of all the facts and circumstances in regard to this specification, the court finds that the said Francis E. Wood, in so introducing in evidence the said release, was guilty of deliberate and intentional deceit of the district judge before whom the said cause was then being heard, and that his conduct requires punishment.

It is therefore considered, ordered, and adjudged by the court, that said Francis E. Wood, be, and he is hereby, suspended from further practice in the courts of New Mexico as an attorney at law for and during the period of one year from the date hereof.[22] * * *

[22] In the Matter of Eldridge, 82 N. Y. 161, 37 Am. Rep. 558 (1880), Eldridge was suspended from practice for three years because, in a will contest, to show undue influence he used the deposition of a witness named Wheeler which it was shown consisted of detailed answers to direct interrogatories which the lawyer had prepared in full for the witness and which he even read for the witness to the commissioner who was taking the deposition, and of answers to cross-interrogatories which he had prepared for the witness and which he left with the witness, who read the prepared answers to the commissioner. As Finch, J., said: "Practically the examination was merely an affidavit drawn by Eldridge and sworn to by Wheeler. In its true character it was not admissible before the surrogate. When, therefore, it was disguised in the shape of testimony and the form of an examination and so received into the case, a fraud was committed on the surrogate and the author of it was Eldridge. Grant that the answers are not shown to be false, and that Eldridge believed them to be true; yet he corrupts justice at the fountain by dictating the evidence of the witness. Upon the trial of an issue in open court a question merely leading is excluded. The law so carefully guards the independent and unwarped testimony of a witness that it will not permit, even by the form of a question, the suggestion of its answer. Yet here the answers to thirty-three direct interrogatories and forty-one cross-interrogatories are actually written out by the attorney for the use of the witness, and so imported into the case."—82 N. Y. at page 171, 37 Am. Rep. 558 (1880).

II. Arguments to Court and Jury

PHIPPS et al. v. CITY OF MEDFORD.

(Supreme Court of Oregon, 1916. 158 Pac. 666.)

Burnett, J. A very earnest petition for a rehearing of this case has been presented on behalf of the plaintiffs and has had our careful attention. As a foreword, we notice this statement of the petitioner: "The applicant for a rehearing occupies a somewhat embarrassing position. If his supplication is subservient, sycophantic, and flattering, his sincerity and honesty of purpose may be questioned; while if he utters his actual sentiment and opinion of the decision, he is apt to alienate the affection of the court."

The duty of an attorney to his client requires utter fearlessness of purpose and a high order of talent. The function of the court which counsel is called upon to advise is to declare the law without reference to flattery, invective, or affection. The ascertainment of the legislative will as limited by the Constitutions of the state and of the United States is the sole object of judicial quest. The true lawyer will present his view to the court without sycophancy on the one hand or scurrility on the other. He will courageously declare his views of the true rule to be observed, with his reasons therefor, irrespective of the adverse ruling of the court. 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 of nothing more. Any court worthy of the name will respect such conduct although it may not concur with the argument. * * *

The petition for rehearing is denied.

HUTCHINSON v. STEPHENS.

(Court of Chancery, 1837. 1 Keen, 659.)

Mr. Rogers, on the part of the defendant, moved for leave to have this cause advanced, and heard on the next day for short causes. * * *

Mr. Tinney, on the part of the plaintiff, opposed the motion. * * *

The Master of the Rolls [Lord Langdale] inquired whether Mr. Tinney could say that this cause was not proper to be heard as a short cause.

Mr. Tinney said that he was not prepared to say that it was not so. * * * But he submitted * * * that no instance could be shown in which a defendant had ever set down a cause or applied to have it set down as a short cause, and that this circumstance furnished of itself a strong ground for refusing such an application. * * *

THE MASTER OF THE ROLLS [Lord LANGDALE]. * * * With respect to the task which I may be considered to have imposed upon counsel [in asking in each case whether they considered the cause proper to be heard as a short cause or not] 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 the 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. It is to these considerations that I apply myself; and I am far from thinking that any counsel who attends here will knowingly violate, or silently permit to be violated, any established rule of the court to promote the purposes of any client, or refuse to afford me the assistance which I ask in these cases.[23]

The present application, being made on the behalf of a defendant, differs in that respect from those which have previously been brought under my consideration; but the difference does not appear to me to be material. * * *

Let this cause be heard on the first short cause day after to morrow.

[23] "It is impossible to exaggerate the importance of being absolutely fair with the court. Candour 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 justitiæ 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 argument 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 upon such errors, and the confidence of the courts and of 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. Once made, such a reputation renders future success at the Bar almost an impossibility. Falsus in uno, falsus in omnibus, is a maxim not applicable exclusively to the witness."—Justice Anglin, *Relations of Bench and Bar*, 29 Can. L. T. 1, 7, 8.

EARL OF BEAUCHAMP v. OVERSEERS OF MADRESFIELD. MARQUIS OF SALISBURY v. OVERSEERS OF SOUTH SIMS. SAME v. BONTEMS. SAME v. BULWER.

(Court of Common Pleas, 1872. L. R. 8 C. P. 245.)

The first of these cases was an appeal from the revising barrister from the western division of the county of Worchester.

The name of the appellant appeared in the overseers' list of persons claiming to vote in respect of "freehold house and land."

No objection was made to the name of the claimant on the list. But, as it was proved that the claimant was a peer of parliament, and had taken his seat in the House of Lords, the revising barrister decided that he was not entitled in law to have his name inserted in the register, and expunged it. * * *

A. Wills, Q. C., for Lord Beauchamp. The question intended to be raised here is, whether a peer of parliament is entitled to be placed upon the register of voters in the election of members of parliament. It is difficult to contend that such a right exists, when every principle of the constitution and all the authorities upon the subject are opposed to it, and the most diligent search has failed to discover a single atom of authority in its favour. * * * Manisty, Q. C., for Lord Salisbury, after the authorities referred to by Mr. Wills, 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. * * *

BOVILL, C. J. 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 pronounce a formal judgment for the respondents, the learned counsel for both the appellants agreeing that their claim to vote is untenable. * * *

KEATING, J. * * * I would merely desire 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. I feel extremely reluctant to give any judgment in this case. The course which has been pursued by the counsel for the appellants has placed the Court in great difficulty. I must confess I entertained considerable doubt whether the claim set up could be supported; but I thought it right to make some suggestions for the purpose of ventilating the propositions stated by the learned counsel in admitting that they had no case. I quite agree 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 the 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. I am of the same opinion. 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. The total absence of authority in favour of the claim, and the concessions made by the counsel for the appellants, abundantly justify the conclusion at which we have arrived, quite irrespectively of the constitutional reasons which might be advanced in opposition to the claim.

Decisions affirmed.[24]

[24] "I lately asked a member of the bar, a man of the highest honour, 'What would you do if you were defending a man on a capital charge, and you were aware of a decision dead in point which had escaped the notice of counsel for the prosecution and of the judge at the trial, but which, if disclosed, would inevitably put the rope round 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.' "—Showell Rogers, *The Ethics of Advocacy*, 15 Law Quar. Rev. 259, 275, note.

"It is not the duty of counsel to suggest points of law which are against his client; but it is his duty to insist upon no point which he knows to be contrary to the law."—Nisbet, J., in Moody v. Davis, 10 Ga. 403, 410 (1851).

"Let us assume, as another example, that you are arguing a general demurrer in a case involving $30,000, and that you know there is a long line of authorities supporting your contention; but suppose you know, on the other hand, that there is one authority by a very eminent court absolutely adverse to your position; you have made a long argument and have presented all your authorities to the trial judge, who, apparently, is very much inclined to hold against you. In your argument you have said nothing about the adverse decision by one of the most learned courts of the land. You sit down. Your opponent attempts to answer you, but in his argument utterly fails to cite the strongest case in his favor. At the conclusion of your address the court turns to you and inquires if you know of any case or cases which conflict with the law as stated by you in your opening argument.

"Query: What is your duty to the court, as a sworn officer of that court?

"By the rules [of ethics] you are required to act justly toward the court; to be honest with the court; and you are required to treat the court as you would like the court to treat you, if your positions were reversed and you were attempting to do justice according to law. In view of these rules it would appear that you are compelled to advise the court of the adverse decision, although your client should thereby lose the suit."—John C. Harris, *Legal Ethics*, 69 Alb. L. J. 300, 303.

"It is well understood by the profession," says General Mason Brayman, "that lawyers do not read [to the court] authorities favoring the opposing side. I once heard Mr. Lincoln, in the Supreme Court of Illinois, reading from a reported case some strong points in favor of his argument. Reading a little too far, and before becoming aware of it, he plunged into an authority against himself. Pausing a moment, he drew up his shoulders in a comical way, and, half laughing, went on, 'There, there, may it please the court, I reckon I've scratched up a snake. But, as I'm in for it, I guess I'll read it through.' Then in his most ingenious and matchless manner, he went on with his argument, and won his case, convincing the court that it was not much

ARGUING TO THE JURY AGAINST THE COURT'S INSTRUCTIONS TO THE JURY. David Paul Brown, *The Forum; or Forty Years Full Practice at the Philadelphia Bar* (1856) Vol. II, p. 71: In some cases the counsel may say, "he does not ask a verdict against the charge of the court"; but there are cases in which his course should be different. Suppose, according to his view, the charge should be grossly wrong—the amount in controversy large—he is concerned for defendant; if the verdict go against him he is to carry up the case—give security for more than he is worth—toil through years of anxiety and delay—afterwards encounter difficulties as to the facts out of which the law arises or as to the character of the witnesses from whom they are derived. Are these no reasons to forbid a time-serving acquiescence in the views of the court which he believes to be wrong? [25]

ALLOWABLE ARGUMENT. N. Y. Committee. *Question 34:* Does the committee regard the following as proper professional conduct:

One of a firm of lawyers formerly occupied judicial position, and while a judge he delivered an opinion. After his resumption of active practice the opinion is cited by opposing counsel as controlling and in conflict with a contention made by the former judge's firm. In its brief this firm inserts the following: "It was a member of our firm who wrote the opinion cited against us. When this matter was recently brought to his attention he gave it as his view that the practice which we urge is proper, and the motion which we make is made with his express sanction."

Answer: In the opinion of the committee the reference in the brief to the present "view" or opinion is improper. It is outside the scope of allowable argument.

of a snake after all."—Quoted by Ida M. Tarbell, *The Life of Abraham Lincoln* (1909) Vol. 1, pp. 255, 256.

[25] "Counsel can never be permitted to argue to the jury against the instructions of the court, nor to indulge in any line of argument or comment that would tend to induce them to disregard the instructions given for their government. This is a matter that is always within the control of the court."—Alvey, C. J., in Baltimore & Ohio Railroad Co. v. Boyd, 67 Md. 32, 43, 10 Atl. 315, 318, 1 Am. St. Rep. 362 (1887). See, also, Hitchins Bros. v. Mayor, 68 Md. 100, 11 Atl. 826, 6 Am. St. Rep. 422 (1887).

SECTION 3.—TAMPERING WITH OR DISREGARDING COURT ORDERS

STATE ex rel. FOWLER v. FINLEY, Circuit Judge.

(Supreme Court of Florida, 1892. 30 Fla. 325, 11 South. 674, 18 L. R. A. 401.)

Original proceeding in mandamus by the state of Florida on relation of George P. Fowler for a peremptory writ to compel Jesse J. Finley, as judge of the circuit court for the fifth judicial circuit, to vacate an order disbarring relator from practicing as an attorney at law. Awarded.

TAYLOR, J. * * * As to the second charge, of interlining the words "of Putnam" in the decree in chancery in the case of Wood v. Peterman et al., after it had been signed by the chancellor, although it is denied by the relator that such interlineation was done subsequent to the signing of the decree, still we think that the proof, if not prejudiced, is quite sufficient to establish the fact that it was done subsequent to the signing of the decree. This fact being established, the next question to be considered is, does the evidence show that it was done with that fraudulent, corrupt, and bad motive that is necessary to have been shown before disbarment could follow? The evidence shows that the interlineation occurred in that part of the decree that undertook to locate or describe the land involved in the decree; and the interlineation caused the sentence in the decree as signed, "county and state of Florida," to read "county of Putnam and state of Florida." It is apparent from the evidence, and from the fact that the decree was in a cause pending in Putnam county, that the land involved therein, to whose description the interlineation referred, did in fact lay in the county "of Putnam;" and it is apparent also from the evidence of the clerk, Frank Wright, that the land was otherwise sufficiently located or described without the words interlined; and from all this it is evident that the omission of the interlined words "of Putnam" was a lapsus pennæ on the part of the draughtsman who prepared the decree, and that of right it was proper that they should have been put into the decree at the point in which they were interlined, prior to its presentation to the judge for his signature thereto. * * * Mr. Fowler, when he made this interlineation in the decree, could not have been actuated by any bad or fraudulent motive of unfair gain to himself or his client, or harm to any one else, because the act done, being wholly immaterial, was powerless to effect any result whatever. * * * There was no proof that Mr. Fowler made this interlineation under the impression or belief that it added to or detracted from the substance or form of the decree, or was necessary to give it effect. * * *

We do not wish it to be understood that we are inclined to condone, palliate, countenance, or excuse any manner of tampering with the decree of a court after it obtains the sanction of the judge's signature, even to the crossing of a "t" or the dotting of an "i" therein; on the contrary, we think that such a practice is highly reprehensible, and deserves severe punishment, no matter how innocent or immaterial the alteration or change may be. A proper respect for the sanctity of the official judgments and decrees of our courts demands that this shall be so, and, in recognition of the sanctity of judicial decrees, our chancery court rule 87 has been provided, requiring an order of the court for the correction of clerical mistakes in decrees arising from any accidental slip or omission. But when such an interference with a judicial decree is made unauthorizedly and incautiously, but without any bad motive or fraudulent design, it partakes more of the character of a contempt of the court than of that moral turpitude that stamps the perpetrator as being an unfit person to exercise the office of an attorney. In the absence, therefore, of any evidence showing that the relator was actuated, in making the interlineation charged by any bad motive or fraudulent design, we do not think that, under the circumstances, it either merited or warranted the infliction upon him of that severest and most humiliating of all punishments to an attorney,—disbarment. Mr. Weeks, in his admirable work on Attorneys, (page 159,) in discussing the subject of disbarment, says: "The end to be attained is protection, not punishment. As punishment, removal from office is unreasonably severe for those cases in which the end is reclamation, not destruction, and for which reprimand, suspension, fine, or imprisonment seem to be the more adequate instruments of correction; for expulsion from the bar blasts all prospects of prosperity to come, and mars the fruit expected from the training of a lifetime."

In the absence of any proof of moral turpitude on the relator's part in making the interlineation charged, we think that the sentence for his entirely unauthorized and highly reprehensible act should have been aimed at correction and reasonable punishment, as there were no elements in it that marked him as a corrupt practitioner, against whom the public should be protected by destroying his official life as an attorney. The peremptory writ is awarded and ordered.[26]

[26] See In re P., 83 N. J. Eq. 390, 91 Atl. 326 (1914).

TERRITORY v. CLANCY, Clerk.

SAME v. KENDALL et al., County Commissioners.

(Supreme Court of New Mexico, 1894. 7 N. M. 580, 37 Pac. 1108.)

* * * * * * * * * *

In the Matter of the Contempt Proceeding against C. A. Spiess.

PER CURIAM. This attorney and officer of this court confesses that he advised the county commissioners of Santa Fé county—against whom Hon. NEEDHAM C. COLLIER, an associate justice of the supreme court of New Mexico, did on the 13th day of November, 1893, direct the issuance of a writ of prohibition to restrain the county commissioners of Santa Fé county, N. M., from proceeding against W. P. Cunningham, sheriff and ex officio collector of said county, with a view to declare his said office vacant—that they were not under any obligation to recognize the order of the said associate justice, and he declares that as a lawyer he honestly entertained the opinion that the said order, not being directed to the board of county commissioners, was in no sense binding upon them, though duly brought to their attention, and its contents explained by counsel representing W. P. Cunningham. It cannot be tolerated that a person enjoying the privilege of practicing his profession before this court should deem it legitimate to counsel the disregard of its order upon the technicality that it was not formally promulgated by the clerk of the court, and duly directed. Knowing that such an order existed, and that in effect it was the action of this court, he should, in a proper appreciation of his relations to this court, have realized that it was incumbent upon him to admonish a due observance of the provisions of its order, rather than encourage premeditated and precipitate violation thereof. Apprised that an associate justice of this court had declared that sufficient cause existed to forbid the exercise of assumed jurisdiction by the said commissioners, it was his plain duty, as an honorable member of this bar, if called upon for counsel by the board, to inform them that the order was before them in substance, though not in form, and that they could not properly ignore it, no matter how great the disappointment to them of the arrest of their programme. That an attorney should hasten a body to acts deemed so questionable that their performance was forbidden by a tribunal duly authorized in the premises, for the purpose of taking advantage of delay in the formal completion of the order by the improper conduct of the ministerial officer of said court, cannot be too severely condemned, and it is well settled that any such practice is unworthy, and regarded as contempt. King v. Barnes, 113 N. Y. 476, 21 N. E. 182.

We will, in consideration of the animus, however, which influenced the proceeding of the attorney now under consideration, pay due regard to his disclaimer of any intention to commit a contempt. It is therefore adjudged that the said C. A. Spiess be imprisoned in the county jail for 30 days, and suspended from practice as an attorney of this court for 12 months.[27] * * *

[27] But see In re Kowalsky, 4 Cal. Unrep. Cas. 377, 35 Pac. 77 (1893).

CHAPTER V

ETHICS OF LEGAL EMPLOYMENT IN GENERAL

PROFESSIONAL ETHICS. Henry W. Williams, *Legal Ethics* (1906) pp. 202, 203: "Professional ethics" is not a distinct system of morality, but it is the application of the accepted standards of right and wrong to the conduct of professional men in the business relations peculiar to their professional employment. It is not important what the profession may be or the nature of the relations resulting from it, for under all circumstances the first duty of every business man is to conduct his business with integrity. In the general treatment of this subject it has sometimes happened that too much stress has been put upon the adjective "professional," so that the substantive "ethics" has been almost lost sight of. * * * There is no difference between personal and professional ethics.

LAWYERS WHO APPEAR IN A FOUL CAUSE. Jeremy Collier, *Essays Upon Several Moral Subjects* (1709) Part IV, pp. 198–200: In the essay *Of Lying,* Philotimus and Philalethes discourse as follows:

Philot. * * * Pray what is your Opinion of those Lawyers who appear in a foul Cause?

Philal. I think if they know it, they misbehave themselves, and have much to answer for. What can be more unaccountable than to solicit against Justice, and lend the Credit of one's Character to an ill Business? To throw in dilatory Pleas and false Suggestions to perplex the Argument, or entangle the Witness? To make a mercenary Noise against Right and Reason? To misapply Precedents and Statutes, and draw the Laws into a Conspiracy; to endeavor to surprize the Judge, and mislead the Jury? To employ Learning and Lungs, and Elocution to such Purposes as these, is to disgrace the Bar, and mismanage to a high Degree.

Philot. Must the Council start at every dark Appearance, and the Client be dismiss'd at the first information: That's hard: A Cause which has an ill Face at first, clears up sometimes in the Court, and brightens strangely upon the Pleading. This Observation prevail'd with Sir Matthew Hale to discharge his Scruples, and practise with more Freedom.[1]

[1] "I am not unmindful of that ever-mooted question, how we can, with the strictest honor, maintain the side that is wrong, and the suggestion that as

Philal. I grant this reverend Judge relax'd a little, and gave his Conscience more room, for the Reason you mention. When his Business lay at the Bar he made no Difficulty to venture thro' Suspicion and Dislike: He thought it no Fault to bring the Matter to an Issue, and try the Strength of either Party. But when he once found it work foul, and shrink under the Test, he would engage no farther, nor ever encourag'd the keeping on the Dispute.[2]

Philot. What then, must a Man turn away his Clients, and baulk his Profession?

Philal. 'Tis no part of a Lawyer's Profession to promote Injustice, or help one Man to that which belongs to another. The Laws are made to secure Property, to put an end to contests, and help those to Right, that suffer Wrong. They were never design'd to entangle Matters, to perpetuate Quarrels or enrich any Set of Men at the Damage of the Community. To engage in an ill Cause when I'm conscious 'tis so, is in plain English, to encourage a litigious Humour, to countenance a Knave; 'tis to do my best to disseize an Honest Man of his Birthright, and wrest his Money or his Land from him. If the Privilege of Practice, if the Pretence of taking a Fee, will justifie us in this Liberty; why mayn't the Consideration of Money bear us out in other Remarkable Instances? Why mayn't we be hired for any

only one side can be right in every lawsuit, we must half the time be struggling for injustice. But that vexed question has long been settled by the common sense of mankind. 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 heard.' When Jeremiah Evarts, the father of my great master in the law, and himself a truly great and righteous man, had graduated from Yale and was considering the law as his profession, this same question disturbed his honest and conscientious mind, and he consulted Judge Ellsworth, afterwards Chief Justice of the United States, who solved his doubts by advising him that any cause that was fit for any court to hear was fit for any lawyer to present on either side, and that neither judge nor counsel had the right to prejudge the case until both sides had been heard, and he told him of Sir Matthew Hale, one of the most righteous lawyers and judges in English history, who began with the same misgivings, but modified his views when several causes that he had condemned and rejected proved finally to be good."—Joseph H. Choate, *American Addresses* (1911) pp. 183, 184.

[2] "I never used my elocution to give credit to an ill cause; to justify that which deserved blame; to justify the wicked, or to condemn the righteous; to make anything appear more specious or enormous than it deserved. I never thought my profession should either necessitate a man to use his eloquence by extenuations, or aggravations, to make anything worse or better than it deserves, or could justify a man in it: to prostitute my elocution or rhetoric in such a way, I ever held to be most basely mercenary, and that it was below the worth of a man, much more of a Christian, so to do."—Sir Matthew Hale in *The Account of the Good Steward* in the *Works of Sir Matthew Hale* (1805 Ed. by Thirwall) Vol. II, p. 283.

other Mischief? Why mayn't a Physician take a Fee of one Man to poyson another? [3]

DR. JOHNSON ON THE PRACTICE OF THE LAW AND HONESTY. James Boswell, *Life of Samuel Johnson, LL. D.* (Everyman's Library 2 Vol. Ed.) Vol. I, pp. 342, 343: (A. D. 1768, Ætat. 59.) 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 your supposing your arguments to be weak and inconclusive. But, sir, that is not enough. An argument which does not convince yourself, may convince the judge to whom you urge it; and if it does convince him, why, then, 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." *Boswell*—"But, sir, does not affecting a warmth when you have no warmth, and appearing to be clearly of one opinion, when you are in reality of another opinion, does not such dissimulation impair one's honesty? Is there not some danger that a lawyer may put on the same mask in common life, in the intercourse with his friends?" *Johnson*—"Why, no, sir. Everybody knows you are paid for affecting warmth for your client; and it is, therefore, properly no dissimulation; the moment you come from the bar you resume your usual behavior. Sir, a man will no more carry the artifice of the bar into the common intercourse of society than a man who is paid for tumbling upon his hands will continue to tumble upon his hands when he should walk on his feet." [4]

[3] "But good Lawyers have not with us that liberty which good Physicians have; for a good Physician may lawfully undertake the cure of a foul and desperate disease, but a good Lawyer cannot honestly undertake the defense of a foul and desperate Cause. * * * For what is the matter and subject of our Profession but Justice, the Lady and Queen of all moral vertues? and what are our Professors of the Law but her Counsellours, her Secretaries, her Interpreters, her servants? Again, what is the King himself but the clear Fountain of Justice?"—Sir John Davis in his *A Preface Dedicatory* to his Reports.

[4] "Sunday, 15th August [1773]. We talked of the practice of the law. Sir William Forbes said, he thought an honest lawyer should never undertake a cause which he was satisfied was not a just one. 'Sir (said Mr. Johnson), a lawyer has no business with the justice or injustice of the cause which he undertakes, unless his client asks his opinion, and then he is bound to give it honestly. The justice or injustice of the cause is to be decided by the judge. Consider, sir, what is the purpose of courts of justice? It is, that

LORD ELDON ON THE DUTIES OF ADVOCACY. Horace Twiss, *The Public and Private Life of Lord Chancellor Eldon* (3d Ed.) Vol. 1, pp. 76, 77: Mr. [John] Lee, afterwards Solicitor General, who was familiarly known in the legal and professional circles of that time as Jack Lee, had a good deal of business on the Northern Circuit when Mr. [John] Scott [afterwards Lord Eldon] joined it, and treated the novice with distinction and kindness. The circuit, in those days, was usually performed on horseback, and at its close, Lee and Scott would ride homeward together. Lord Eldon's Anecdote Book has the following recollections of these journeys:

"When I first went the Northern Circuit, I employed my time, having no business of my own, in attending to the manner in which the leading counsel did their business. I left Lancaster, at the end of a circuit, with my friend Jack Lee, at that period a leader upon the circuit. We supped and slept at Kirkby Lonsdale, or Kirkby Stephen. After supper I said to him, 'I have observed that throughout circuit, in all causes in which you were concerned, good, bad, indifferent, whatever their nature was, you equally exerted yourself to the utmost to gain verdicts, stating evidence and quoting cases, as such statement and quotation should give you a chance of success, the evidence and the cases not being stated clearly, or quoted with a strict attention to accuracy, and to fair and just representation. Can that,' said I, 'Lee, be right? Can it be justified?' 'Oh, yes,' he said, 'undoubtedly. Dr. Johnson,' he stated, 'had said that counsel were at liberty to state, as the parties themselves would state, what it was most for their interest to state.' After some interval, and when he had had his evening bowl of milk punch and two or three pipes of tobacco, he suddenly said, 'Come, Master Scott, let us go to bed. I have been thinking upon the question that you asked me, and I am not quite so sure that the conduct you represented will bring a man peace at the last.'

"I have understood [added Lord Eldon] that Dr. Johnson's state-

every man may have his cause fairly tried, by men appointed to try causes. A lawyer is not to tell what he knows to be a lie: he is not to produce what he knows to be a false deed; but he is not to usurp the province of the jury and of the judge, and determine what shall be the effect of evidence,—what shall be the result of legal argument. As it rarely happens that a man is fit to plead his own cause, lawyers are a class of the community who, by study and experience, have acquired the art and power of arranging evidence, and of applying to the points at issue what the law has settled. A lawyer is to do for his client all that his client might fairly do for himself, if he could. If, by a superiority of attention, of knowledge, of skill, and a better method of communication, he has the advantage of his adversary, it is an advantage to which he is entitled. There must always be some advantage on one side or other; and it is better that advantage should be had by talents, than by chance. If lawyers were to undertake no causes till they were sure they were just, a man might be precluded altogether from a trial of his claim, though, were it judicially examined, it might be found a very just claim.'—This was sound practical doctrine, and rationally repressed a too refined scrupulosity of conscience."—James Boswell, *The Journal of a Tour to the Hebrides with Samuel Johnson, LL. D.* (Temple Classics Ed.) 13, 14.

ment was to this effect: That as it was the duty of counsel to give information to the court, he ought to state facts accurately, to quote cases accurately, to misrepresent nothing with respect either to facts or cases, and having accurately stated facts and quoted cases, he was at liberty in conscience to reason upon them to the very best of his powers and abilities; and as the law supposed the judge to be an abler man, and an abler lawyer than the counsel, the judge was to reason better upon the facts and the cases, than the counsel; and, proceeding in this way, the counsel did nothing wrong in thus gaining the cause for his client. But it may be questioned whether even this can be supported."

THE BUSINESS OF THE LAWYER. C. A. Kent, *Legal Ethics,* 6 Mich. L. Rev. 468, 474–476: The chief business of the lawyer is that of counsel as to legal rights, and the maintenance, through the courts, of such rights. The lawyer offers himself as an expert as to the legal rights of all who ask his assistance and as to their enforcement. He is not an expert as to moral as distinguished from legal rights. He may know less of these than his client. There is, too, such a difference of opinion as to mere moral rights that, generally, they do not constitute a basis of advice. Still in some cases there may be in a community a prevailing moral sentiment which will prevent the enforcement of plain legal rights. Such sentiment must be taken into account because likely to affect the result of a suit. In general, the lawyer advises as to legal rights, and considers moral questions only as they affect the result. This leads to an indifference to morality which is often made a reproach to the profession. The business of general advocacy has its dangers. The lawyer comes to ask of any given position, not so much whether it is just as whether it can be maintained. In this respect he does not differ from most other advocates. Many, perhaps most, politicians are watching the currents of public opinion, not to find out whether or not they are right, but to discern some popular wave on which they can ride into power. Our newspapers are aiming mainly to an increase of circulation, and so advocate whatever is likely to be popular. This moulding of one's views to suit his interests is seen almost everywhere. The men who love the truth above popularity are rare. The lawyer differs from other classes mainly in this, that his advocacy of a particular side has been secured by money. He might have been retained on the other side, and, if he had been, his advocacy of the opposite view might have been equally earnest.

It is hard for most people to believe that such openly purchased advocacy can be sincere. They will trust to the sincerity of a politician, in his profession of seeking only the public good; or, even, to that of the most sensational newspaper, rather than to that of the lawyer.

The truth, probably, is that the majority of all classes of advocates are sincere. Nature is very kind in allowing us to believe almost anything which it is for our interest to advocate. The uncertainty of the law contributes to the freedom with which lawyers advocate any cause in which they are retained. The suitor is entitled to his legal rights. But, what are these? In many cases it is very hard, perhaps impossible, to tell save at the end of a suit. In giving advice a lawyer is compelled to take many chances. He can act only on probabilities. His interests impel him to advise suits, as otherwise he can get little pay and less reputation.

Perhaps the uncertainty of the law is not greater than that of other opinions, but it is made more manifest by the fact that legal opinions are brought to a decision. A man may cherish absurd views in theology, philosophy, medicine, or even science, all his lifetime, without fear of being compelled to yield his convictions; but a lawyer must justify his advice by results, or he loses his business. The conflict of opinion among even the most intelligent is one of the most marked characteristics of humanity. No view gains universal acceptance. The theory of gravitation is disputed. The most conflicting doctrines as to almost every question of interest to society are maintained by able men. Society is always in a ferment between new opinions and the old. It seems sometimes as though there was nothing fixed, no agreement on which men can act together. And yet union in action is often of far more consequence than the correctness of opinions.

Fortunately, there are in nations and communities deep prejudices inaccessible to the most plausible arguments, and union in these makes government and the rule of law possible, even where the more intelligent are waging endless conflicts on the most vital questions. The good of this conflict is not, as is often said, so much in the final triumph of the truth as in the conflict itself. The benefit is in the race, rather than in any goal. And, as this great war of opinions has always existed, so it is likely to continue to the end of time. The conflicts of the law are but a part of this universal conflict.

The lawyer is seeking a living, wealth and reputation. He can get these only through his clients. What do clients chiefly wish? Is it to get justice? Perhaps they will say this, but they mean by justice their own success; and their chief motive in employing a lawyer is to get one who will win. And they are not particular as to the means used to reach this end. A man charged with crime cares little as to the instruments used to keep him from state prison. In many civil cases clients have a desire to win so strong that they hesitate at no means. The interests of the lawyer lead to the greatest zeal in his client's cause. His greatest temptation is to the use of improper means. It is hard for him, as indeed, for all men, to have a morality much higher than that of their competitors. In general, he will

think as those around him think, or, at the most, as the best men around him think. If he has a morality much higher he will be likely to lose all employment. Suitors will not retain attorneys who are unwilling to use all means for success generally thought reputable. We must be content with rules of legal ethics under which lawyers can live and prosper. We must find these rules in the necessities of the business, and not alone in an ideal morality. These necessities of a business are different in different ages and countries, but the question is always what is the highest standard under which the business can prosper? And in practical life it may be difficult to apply a standard to the facts of a given case. Men must often act without time for reflection; and the instinctive judgment of one properly educated may be wiser than the studied rules of an abler man. Here, as everywhere, common sense may be the best sense.

THE NATURE OF ADVOCACY. *On the Principle of Advocacy as Developed in the Practice of the Bar,* 20 Law Mag. (N. S.) 265, 273–278, 283, 284: Let us next observe the moral position of the advocate in cases of disputed fact, of which it is impossible for him to ascertain the truth before he accepts the retainer, unless, indeed, he could summon all the witnesses, sift their evidence, and anticipate every aspect the case may assume when tried before a jury. He reads his brief; he may possibly find there grounds to believe that his client has no cause of action or ground of defence, and, if so, he will, if he acts rightly, take the earliest opportunity of expressing his opinion, and, if expenses can be yet saved, of urging a withdrawal or a compromise; and if neither can be obtained, he will, if for the plaintiff, make a fair statement of the case in the true aspect in which he has discerned it, and let it meet its doom as speedily as it can; or, if for a defendant, will content himself with watching and scrutinizing the plaintiff's proofs precisely as the judge himself does when no counsel appears for the defence. But the unprofessional reader may be assured that of cases seriously litigated those which call for this exercise of duty are comparatively rare.[5] * * *

It is matter of curious observation, how any event, which is shared,

[5] "Yet it must not be supposed because counsel may fail in the result that the cause was unfounded and unworthy of support—much less that he knew it to be so. * * * Every lawyer knows that there are cases in which he is perfectly assured of two things—first, the honesty of the case; secondly, the corruption of the adversary. And yet he is almost as certain that his case must fail and the opposite party triumph. * * * What can the spectators or auditors know, while they presume to judge him, of the nature of the information of which he is the sacred depository, and upon which must mainly depend the question as to his conscientious rectitude? There never was a lawyer in full practice who has not lost cases equal in merit to any that he ever gained."—David Paul Brown, *The Forum; or Forty Years Full Practice at the Philadelphia Bar* (1856) Vol. 2, pp. 33, 34.

or witnessed merely, in a state of hurry or excitement, presents different and even opposite aspects to the memory, and how a bias, from some almost or wholly imperceptible cause, converts spectators, who are without interest and above suspicion, into partisan witnesses. Such is almost every case of litigated collision by land or water; in which it is usual to find both bystanders and passengers differing, not only on the looser points of sobriety and speed, but on such matters of direct opposition, as on which side of the road or river each carriage or vessel was proceeding, and even on which side of a carriage or vessel a blow was struck. If such differences arise in the recollection of impartial persons, surely it cannot be surprising that each party is confident that he is injured, and communicates his case, in that confidence, to his counsel. The result is, that, with the exception of cases admitted to be without defence, and committed to counsel merely to watch the proofs of the adversary, and cases in which no struggle is anticipated on the facts, but their legal application alone is disputed, or technical objections are suggested, the statement presented to counsel is almost always such as to induce a strong belief in the justice of the cause, and to enlist his feelings powerfully in its success. To one thus prepossessed, who can wonder that in the animation of the contest the first impression is deepened; and as the little chapter of life, with all its living interest, opens around him, his client's case becomes part of his own being; that his belief in its justice insensibly but inseparably blends with his natural desire to succeed; and that he hears all the arguments and regards all the testimony against it with the surprise, dislike, and incredulity of inveterate opinion sharpened by zeal. The irregularities which counsel sometimes commit, when betrayed into conversational attacks on each other, and the petulance with which they occasionally treat opposing witnesses,—faults often to be severely censured, and always to be deplored,—generally arise from the excess of this conviction, and the irritation consequent on an attempt to defeat it. * * *

To avoid all harsh remark as far as possible, to reconcile opposing testimony by any theory rather than that of willful falsehood, and never to impute it unless in the full belief that it has been committed, is the wisdom no less than the duty of the advocate, as it was the practice of the greatest of all advocates of our time, the late Lord Abinger. As the vehemence of counsel is justified by the strong belief they imbibe that the cause they maintain is just, so they are bound to conduct it as befits an honest cause, leaving the consequence of its falsehood to fall on the client who has deceived them. Although not bound to state or prove the case of an adversary, they are bound, if they anticipate it, to do so fairly; to state the entire material effect of an instrument; to produce no document with the hope of raising an impression they believe to be untrue by the ambiguity of its language; to garble nothing; to conceal nothing; to misrepresent nothing; but to

present every argument and illustration which the zeal of the most earnest friendship could urge, and which are rarely urged with powerful effect unless in the conviction that they are urged for justice. As the zeal of an honourable advocate during the progress of a cause is in proportion to the confidence he feels in its merits, so we believe that the continuance of that confidence or its overthrow determines the feeling with which he regards the issue. He often remains unconvinced, though conquered; but we venture to assert that the only regret, beyond the disappointment of an excited moment, which he feels, arises from an impatience of a failure of justice, mingled often with vain regrets for the insufficiency of his own exertions; and that the only permanent feeling of pleasure he cherishes in success is nurtured by the consciousness that right has been done by his victory. That there are instances in which the pride of intellect, in its unhallowed vivacity, may, at the Bar as in other spheres of action, exult in the triumph of evil, or in a heartless indifference to evil and good, we do not deny; but that a disposition to glory in the success of wrong is a general characteristic of the English Bar, we do solemnly deny; and we esteem the charge so utterly groundless that, freely acquitting those who have urged it of intentional falsehood, we can only regard it as a proof of the force of bias in disturbing the aspects of truth, which not only influences barristers, but all men who reason through the medium of the prejudices or the affections. * * *

The exercise of the advocate's profession is unquestionably attended with peculiar temptations and dangers, not without counterbalance of influences for good. Its soul is sympathy. The chief excellence of the advocate is in proportion to the facility with which he can become a party in the most momentous concerns of strangers—admitted by their choice into a little world of anxious hopes and fears, affections and resentments—and identifying his own existence, for the time, with the sharp and giddy crisis of alien fortunes. As thus he lives in the lives of others, the vicissitude of interest, while it involves no indifference to personal hypocrisy or falsehood, may tend to relax the sterner fibres of the mind, and render it less capable of discerning and appreciating abstract truth. A pliancy of character may thus be fostered, unfavourable to the maintenance of political consistency,—a weakness which the advocate shares with the poet, who, accustomed to "accommodate the shows of things to his desires," is open to the seductions of sentiment when he would scorn those of lucre. Such, however, is not the invariable effect of the practice of advocacy—in some minds the very habit of rapidly passing from one range of sympathies to another begets an earnest aspiration after conditions which are stable and enduring, and fixes the roots of individual principles deeper; and therefore, the Bar has at all times boasted examples of political consistency, maintained against the most flattering temptations. The more immediate danger of advocacy arises from the heat and activity of its

struggles—the suddenness with which its resources are called into action—the surprises which occur in the disclosure of an adverse case, or the unexpected failure of its own,—which are too apt to produce those flaws of temper of which witnesses complain, and may sometimes, though we believe rarely, lead to expedients which deliberation would not sanction, and which are afterwards deplored in vain. Against this temptation—we believe the most perilous of all to which a barrister at Nisi Prius is exposed—it behooves him to exert his utmost vigilance, as we believe the charges which have been preferred against the practice of the Bar have received more support from such hurried lapses from candour, than from any habitual or deliberate baseness, even in the few who have deserved them. On the other hand, the rapid intercourse with numerous forms of many-coloured life, which the practice of the Bar involves, tends to destroy all intolerance, religious, political, or moral—to nurture the affections—to quicken and enlarge the sympathies—to induce allowance for human frailty; and these influences are, we believe, deeply interfused in the personal character of barristers.[6] The very practice of representing the feelings of others is, at least, one remove from self-love, and though very far from approaching the comprehensiveness of true humanity, breaks the crust of selfishness, which courses of worldly success in other occupations too often engender. Whatever of passion or of weakness may be mingled with the practice of the Bar—and we do not deny the frequent intrusion of each—we fearlessly assert that they scarcely ever betray its members into the expression of opinions calculated to relax the moral sense, to impair love and veneration for the good and pure; but that counsel frequently obtain and use opportunities of enforcing high duties by generous expression; of exposing and denouncing baseness, which would else remain undetected and unpunished; and if from the failure of human institutions, they cannot always prevent the success of the wrong-doer, of associating it, not with triumph, but with infamy.[7]

[6] "The difficulties and perplexities which frequently beset an attorney in active practice are not underestimated. In the language of another court: 'His professional life is full of adversaries. Always in front of him there is an antagonist, sometimes angry and occasionally bitter and venomous. His duties are delicate and responsible, and easily subject to misconstruction.' In re Eldridge, 82 N. Y. 167 [37 Am. Rep. 558 (1880)]. But we feel constrained to add that there is a spirit of fairness and magnanimity among members of the bar not surpassed in any other profession."—Cassoday, J., in In re O——, 73 Wis. 602, 618, 42 N. W. 221, 225 (1889).

[7] "How far, for example, is it permissible in cross-examination to browbeat or confuse an honest but timid and unskillful witness; to attempt to discredit the evidence of a witness on a plain matter of fact about which he had no interest in concealment by exhuming against him some moral scandal of early youth which was totally unconnected with the subject of the trial; or by pursuing such a line of cross-examination, to keep out of the witness-box material witnesses who are conscious that their past lives are not beyond reproach? How far is it right or permissible to press legal technicalities as opposed to substantial justice? Probably most lawyers, if they are perfectly

MORAL COMPROMISE IN THE LAW. William Edward Hartpole Lecky, *The Map of Life, Conduct and Character* (1899) pp. 108–113: In the interests 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 indispensable that there should be a class of men entrusted with this 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 clear interest of society requires this, and a standard of professional honour and etiquette is formed for the purpose of regulating the action of the advocate. Misstatements of facts or of law; misquotations of documents; strong expressions of personal opinion, and some other devices by which verdicts may be won, are condemned; there are cases which an honourable lawyer will not adopt, and there are rare cases in which, in the course of a trial, he will find it his duty to throw up his brief.

But necessary and honorable as the profession may be, there are sides of it which are far from being in accordance with an austere code of ideal morals. It is idle to suppose that a master of the art of advocacy will merely confine himself to a calm, dispassionate statement of the facts and arguments of his side. He will inevitably use all his powers of rhetoric and persuasion to make the cause for which he holds a brief appear true, though he knows it to be false; he will affect a warmth which he does not feel and a conviction which he does not hold; he will skillfully avail himself of any mistake or omission of his opponent; of any technical rule that can exclude damaging evidence;[8] of all the resources that legal subtlety and severe cross-examination[9] can furnish to confuse dangerous issues, to obscure or minimise inconvenient facts, to discredit hostile witnesses. He will appeal to every prejudice that can help his cause; he will for the time so completely identify himself with it that he will make its success his

candid, will agree that these things are in some measure inevitable in their profession, and that the real question is one of degree, and therefore not susceptible of positive definition. There is a kind of mind that grows so enamored with the subtleties and technicalities of the law that it delights in the unexpected and unintended results to which they may lead. I have heard an English judge say of another long deceased that he had through this feeling a positive pleasure in injustice, and one lawyer, not of this country, once confessed to me the amusement he derived from breaking the convictions of criminals in his state by discovering technical flaws in their indictments."—William Edward Hartpole Lecky, *The Map of Life, Conduct and Character* (1899 Ed.) pp. 116, 117.

[8] "If the rule appealed to is law, it is not only the right, but the duty, of the lawyer to call attention to it. All rules are called 'technical' by those against whom they operate."—Sir Frederick Pollock in 18 Law Quar. Rev. 411, note. But, as to technicalities, see Anderson v. George, post, p. 439.

[9] "How else are you to find out whether a hostile witness is lying or not?" —Sir Frederick Pollock in 18 Law Quar. Rev. 411, note.

supreme and all-absorbing object; and he will hardly fail to feel some thrill of triumph if by the force of ingenious and eloquent pleading he has saved the guilty from his punishment or snatched a verdict in defiance of evidence.

It is not surprising that a profession which inevitably leads to such things should have excited scruples among many good men.[10] Swift very roughly described lawyers as "a society of men bred from their youth in the art of proving by words, multiplied for the purpose, that white is black and black is white, according as they are paid." Dr. Arnold has more than once expressed his dislike, and indeed abhorrence, of the profession of an advocate. It inevitably, he maintained, leads to moral perversion, involving, as it does, the indiscriminate defence of right and wrong, and in many cases the knowing suppression of truth. Macaulay, who can hardly be regarded as addicted to the refinements of an overfastidious morality, reviewing the professional rules that are recognised in England, asks "whether it be right that not merely believing, but knowing a statement to be true, he should do all that can be done by sophistry, by rhetoric, by solemn asseveration, by indignant exclamation, by gesture, by play of features, by terrifying one honest witness, by perplexing another, to cause a jury to think that statement false." Bentham denounced in even stronger language the habitual method of "the hireling lawyer" in cross-examining an honest but adverse witness, and he declared that there is a code of morality current in Westminster Hall generically different from the code of ordinary life, and directly calculated to destroy the love of veracity and justice. On the other hand, Paley recognised among falsehoods that are not lies because they deceive no one, the statement of "an advocate asserting the justice or his belief of the justice of his client's cause." Dr. Johnson, in reply to some objections of Boswell, argues at length, but, I think, with some sophistry, in favour of the profession. "You are not," he says, "to deceive your client with false representations of your opinion. You are not to tell lies to the judge, but you need have no scruple about taking up a case which you believe to be bad, or affecting a warmth which you do not feel. You do not know your cause to be bad till the judge determines it. * * * An argument which does not convince yourself may convince the judge, and, if it does convince him, you are wrong and he is right. * * * Everybody knows you are paid for affecting warmth for your client, and it is therefore properly no dissimulation." Basil Montagu, in an excellent treatise on the subject, urges that an advocate is simply an officer assisting in the adminis-

10 "Exactly the same may be said of the minister of religion committed to preach particular doctrines, and of the politician committed to the platform of his party. Mr. Lecky's strictures appear to me quite unworthy of his abilities: not to say that the matter was dealt with once for all by Dr. Johnson in a passage too familiar for citation. See L. Q. R. XV, 263."—Sir Frederick Pollock in 18 Law Quar. Rev. 411, note.

tration of justice under the impression that truth is best elicited, and that difficulties are most effectually disentangled, by opposite statements of able men. He is an indispensable part of a machine which in its net result is acting in the real interests of truth, although he "may profess feelings which he does not feel and may support a cause which he knows to be wrong," and although his advocacy is "a species of acting without an avowal that it is acting."

It is, of course, possible to adopt the principles of the Quaker and to condemn as unchristian all participation in the law courts, and although the Catholic Church has never adopted this extreme, it seems to have instinctively recognized some incompatibility between the profession of an advocate and the saintly character. Renan notices the significant fact that St. Yves, a saint of Brittany, appears to be the only advocate who has found a place in its hagiology, and the worshippers were accustomed to sing on his festival "Advocatus et non latro—Res miranda populo." It is indeed evident that a good deal of moral compromise must enter into this field, and the standards of right and wrong that have been adopted have varied greatly. How far, for example, may a lawyer support a cause which he believes to be wrong? In some ancient legislations advocates were compelled to swear that they would not defend causes which they thought or discovered to be unjust. St. Thomas Aquinas has laid down in emphatic terms that any lawyer who undertakes the defence of an unjust cause is committing a grievous sin. It is unlawful, he contends to co-operate with any one who is doing wrong, and an advocate clearly counsels and assists him whose cause he undertakes. Modern Catholic casuists have dealt with the subject in the same spirit. They admit, indeed, that an advocate may undertake the defence of a criminal whom he knows to be guilty, in order to bring to light all extenuating circumstances, but they contend that no advocate should undertake a civil cause unless by previous and careful examination he has convinced himself that it is a just one; that no advocate can without sin undertake a cause which he knows or strongly believes to be unjust; that if he has done so he is himself bound in conscience to make restitution to the party that has been injured by his advocacy; that if in the course of a trial he discovers that a cause which he had believed to be just is unjust he must try to persuade his client to desist, and if he fails in this must himself abandon the cause, though without informing the opposite party of the conclusion at which he had arrived; that in conducting his case he must abstain from wounding the reputation of his neighbour or endeavouring to influence the judges by bringing before them misdeeds of his opponent which are not connected with and are not essential to the case.[11] As lately as 1886 an order was issued from Rome, with the express approbation of the

[11] *Dictionnaire de Cas de Conscience*, art. "Avocat"; Migne, *Encyclopédie Théologique*, i. serie, tome xviii.—*Author's Note.*

Pope, forbidding any Catholic, mayor or judge, to take part in a divorce case, as divorce is absolutely condemned by the Church.[12]

There have been, and perhaps still are, instances of lawyers endeavouring to limit their practice to cases which they believed to be just. Sir Matthew Hale is a conspicuous example, but he acknowledged that he considerably relaxed his rule on the subject, having found in two instances that cases which at the first blush seemed very worthless were in truth well founded. As a general rule English lawyers make no discrimination on this ground in accepting briefs unless the injustice is very flagrant, nor will they, except in very extreme cases, do their client the great injury of throwing up a brief which they have once accepted. They contend that by acting in this way the administration of justice in the long run is best served, and in this fact they find its justification.

In the conduct of a case there are rules analogous to those which distinguish between honourable and dishonourable war, but they are less clearly defined and less universally accepted.

THE ETHICS OF ADVOCACY. Sir John A. Boyd, *Legal Ethics,* 4 Canadian L. Rev. 85, 92–96, 98: The professional advocate is according to his temperament more or less a partizan of the side he represents. He is exposed to many special temptations and beset by many allurements to swerve from the path of strict rectitude. He has to guard against the excitement of controversy, the excessive sense of devotion to his client, the convenience of mis-statement, (under stating what makes against him and over stating what makes for him) the overwhelming desire of gaining the day, even though the success be but temporary. It is no easy matter to preserve the proper ethical poise and more particularly when juries and not judges are addressed. The general result has been embodied in the once popular estimate of the bar,—that they were indiscriminate defenders of right or wrong by the indiscriminate utterance of truth or falsehood.

The effect of the old system on the demeanor of the advocate is pictured by a competent hand in the Quarterly Review of 1837 and the writer was neither a prejudiced nor an ill-informed observer. The passage appeared in an essay on Lord Bacon which may be found in the collected writings of T. B. Macaulay. Dealing with the subject of advocacy Macaulay says: "We will not at present enquire whether the doctrine held by English lawyers be or be not agreeable to reason and morality. Whether it be right that a man should with a wig on his head and a band round his neck do for a guinea what without those appendages he would think it wicked and infamous to do for an empire: whether it be right that not merely believing, but knowing a

12 *Revue de Droit International,* xxi. 615.—*Author's Note.*

statement to be true, he should do all that can be done by sophistry, by rhetoric, by solemn asseveration, by indignant exclamation, by gesture, by play of features, by terrifying one honest witness, by perplexing another, to cause a jury to think that statement false—it is not necessary to decide these questions. The professional rules be they good or bad, are the rules to which many wise and virtuous men have conformed and are daily conforming. If therefore Bacon did no more than these rules required of him we shall readily admit that he was blameless."

Quoting and criticizing this passage in 1846 James Spedding in his "Evenings with a Reviewer" comments pithily: "Will you indeed? If he did half as much as is here implied I should hold him unpardonable." Here Spedding anticipates the modern verdict upon such practices not only of the public but of the profession itself.

The current was beginning to set against these "jury tricks" even in the year Macaulay wrote, 1837, and the first notable call to better things came from the lips of Lord Langdale. "No counsel," he said, "supposes himself to be a mere advocate or agent of his client to gain the 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 and experience and learning but also by considerations affecting the general interests of justice."

Now the professional rules referred to by Macaulay were based in the main upon certain assumptions that in legal advocacy the conventions of the profession might properly supersede the dictates of ordinary morality as to truth and sincerity. These assumptions were indeed defended by no less sturdy a moralist than the famous Dr. Paley whose treatise on "Moral Philosophy" used to be a text book in Colleges and Universities of this and the Mother Country. This learned divine laid it down in 1785 that a prisoner pleading "not guilty" and an advocate (contrary to his real opinion) asserting the justice or his belief in the justice of his client's cause were on a like footing. Both he says, were falsehoods but not lies. For in such instances no confidence was destroyed in the hearer because none was reposed: no promise to speak the truth was violated because none was given or understood to be given.

Contemporaneously with Spedding's comment, which I have quoted, was published in 1845 a treatise on morals by Dr. Whewell, Master of Trinity College, Cambridge. He refuted the position taken by Dr. Paley and laid down principles which have been accepted and have controlled the ethics of advocacy to this day. His argument is briefly this: To answer the ends of justice there should exist a profession of advocates ready to urge with full force the arguments on each side in doubtful cases. And if the advocate in his mode of pleading and exercising his powers allows it to be understood that that is all he undertakes to do, he does not transgress the principles of truth and justice,

even in pleading a bad case—since even in such bad case there may be arguments and even good arguments. But if in pleading he asserts his belief that his cause is just when he believes it unjust, he offends against truth: as any other man would do who in like manner made a like assertion. Every man when he advocates a case in which morality is concerned has an influence upon his hearers which arises from the belief that he shares the moral sentiments of all mankind. This influence is one of his possessions which like all his powers he is bound to use for moral ends. If he mix up his character as an advocate with his character as a moral agent, using his moral influence for the advocate's purposes, he acts immorally; he makes the moral rule subordinate to the professional rule; he sells to his client not only his skill and his learning but himself. He makes it the supreme object of his life to be not a good man but a successful lawyer. The advocate must look upon his profession like every other endowment and possession, as an instrument which he must use for the purposes of morality. To act rightly is his proper object; to succeed as an advocate is a proper object only in so far as it is consistent with the former. To cultivate his moral being is his highest end: to cultivate professional eminence is a subordinate aim. Moreover there belongs to the advocate moral ends with regard to his profession, namely, to make it an institution fitted to promote morality. He must seek so to shape its rules and so to alter them, if need be, that they shall be subservient to the rules of duty. To raise and purify the character of the advocate's profession so that it may answer the ends of justice without requiring insincerity in the advocate, is the proper aim of a good man who is a lawyer—a purpose in which he may well and worthily employ his efforts and influence.

This strong deliverance struck at the root of the unreal methods of the insincere pleader and it carried conviction to, or expressed the conviction of, the best minds in the profession. From the middle of the last century it may be said that the methods of advocacy have been revolutionized.

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.

Nowhere have I seen better stated than by James Spedding the modern view as to the true function of advocacy, which conforms to the

highest standard of morality. Though his words relate immediately to criminal cases they no less pertain to the ethics of advocacy in the trial of all cases. "The end of the whole proceeding (he says) is to do justice and the means is, to know the truth. The business of the counsel for the prosecution is to set forth the evidence against the defendant; that is the evidence which tends to show that he is guilty of the crime imputed to him. His discretion is to be exercised in setting forth that evidence fairly, in such manner, I mean, that it shall have upon the minds of the judges its true and proper value; that it shall weigh with them for exactly so much and only so much, as it would weigh in the judgment of a just and understanding man, balancing in his own mind the arguments for and against. He is not to attempt to strike the balance himself because that would be to assume the office of judge which (besides that it is not his office) cannot be exercised till the other side has been heard. He is only to take care that all the true weights, and that no false weights, are put into the scale of which he has the charge. This surely is the principle upon which it is his duty to act. And I thought it had been (as a principle) universally recognized. For even the monstrous practices of our modern courts of law are justified, or I should better say an attempt is made to justify them, on the plea that they do in fact and upon the whole tend to produce this result. So many false weights must be put in the one side to balance so many false weights on the other." This book of Spedding's although written in 1846 was not published till 1881. It is now recognized that the true function of the advocate is to abstain from all quibbles and clap-trap, not to misrepresent or garble, not to assert untruths or to play a part, or in any unfair way to seek to gain success. The cardinal principle is that each counsel is to take care that all the true weights and that no false weights are put into the scale of which he has the charge.

So in the treatment of witnesses, the modern method is entirely opposed to the rough handling of former days. The judges now interfere to protect the witness from unfair attack. The attempt to browbeat or bewilder an honest witness would be or should be at once stopped by the Court. The witness must not be bullied or what he says perverted by the ingenuity of the skilled examiner.

No doubt the zealous advocate is tempted to represent facts unfairly, to assert convictions which he does not feel, to urge specious and plausible arguments, to simulate passion and generally to act an unreal part in order to aid his client and capture the jury. These practices however common in former days are not now accepted in foro conscientiæ as the outcome of legitimate advocacy. They are rather to be regarded as temptations to be resisted. For example the voice of the profession was heard in 1903, apropos of a remark made in Court by Mr. Justice Grantham that lawyers were paid to raise false issues. Thereupon the English bar at a meeting of the General Council gave expression to the following resolution: "That any state-

ment to the effect that counsel are paid to raise false issues or to misrepresent evidence is one which the Council repudiates as misrepresenting the function and practice of the bar." The learned judge thereafter explained he had not spoken seriously and that he did not mean to impute falsehood to the bar though he spoke of raising false issues. He was perhaps seeking to put the point as Paley had done, but his observation was perhaps rather out of place and out of time. * * *

The present ethical standard as to both branches of the profession expects and requires truth and not trickery, simplicity and not duplicity, candor and not craftiness in the conduct of legal affairs. And generally the new type of advocacy is in form and substance perfectly simple, direct, unaffected and practical.

LORD BROUGHAM'S SPEECH IN QUEEN CAROLINE'S CASE in the House of Lords in 1820. John Brooks Leavitt, on *Lawyer and Client,* in *Every Day Ethics,* pp. 60–62: When that miserable King George IV, was on the throne, he tried to get through Parliament a bill of divorce against his wife Queen Caroline. He had in fact been married to another woman, Mrs. Fitzherbert, before he ascended the throne, and as she was a Roman Catholic he had by the law of England forfeited his title to the throne. The fact of his prior marriage was a secret known to but few, and had been faithfully kept by them, and the rascally husband had been allowed to ascend the throne and marry Caroline in the belief that a marriage, which under oath he denied, would never be proved against him. He was thus a bigamist and a perjurer. During the trial in Parliament Queen Caroline's counsel, Brougham and Denman, were given the proofs of his first marriage, and thus fortified they caused it to be intimated to the King's Counsel that if the trial were proceeded with they would prove the bigamy and dispute his title. For a while it was supposed that they would not have the courage to carry out their threat. Brougham dissipated that hope by an immortal utterance, during one of his speeches in his client's defense. After the use of language which, to them who knew the secret, showed that he was referring to it, he stated that he would conceive himself bound not to make it public if the bill were not pressed, otherwise he would. Then came this statement of a counsel's duty in words that will remain imperishable, words which have nerved many a counsel to do his duty in face of adverse public opinion:

"And let it not be thought, my Lords, that if either now I did conceive, or if hereafter I should so far be disappointed in my expectation that the case against me will fail, as to feel it necessary to exercise that right,—let no man vainly suppose, that not only I, but that

any the youngest member of the profession would hesitate one moment in the fearless discharge of his paramount duty. I once before took leave to remind your Lordships—which was unnecessary, but there are many whom it may be needful to remind—that an advocate, 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 all 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!" [13]

This deliverance has sometimes been claimed to mean that in the service of his client a lawyer should not hesitate to commit any wrong. If that were so, then the utterance would be infamous. Nothing of the sort was in Brougham's mind, as any one will discover on reading his own account of the circumstances under which it was made. The suggestion is an insult to his memory. An honorable man will not take dishonorable means to win a client's case, whether criminal or civil.[14]

[13] See *Memories of the Life and Times of Lord Brougham* (2d Ed.) 406, note. Lord Brougham's "suggestion that the duty of the advocate might compel him to throw the kingdom into confusion was intended to warn George IV that if he proceeded with his purpose to procure an Act of Parliament freeing him from Queen Caroline he (Brougham) would claim that by reason of his marriage with Mrs. Fitzherbert, a Roman Catholic, his royal Majesty was for official and legal purposes dead and his throne vacant. The threat seems to have been effectual."—Frederic R. Coudert, *Addresses* (1905) p. 381.

[14] Lord Halsbury is quoted as saying in a private letter written in 1893: "When it is remembered that not abstract truth, but what is proved by legal evidence to be true, is what courts of justice deal with, I think the proposition is not very difficult to adopt that Lord Brougham's overstatement is much nearer the truth than the tone of advocacy which should take into account what the popular side of the question would be; or, to put it in a more practical form, what the newspapers would say of the advocate next day. That he must not suggest what he knows or has good reason to believe is false is obvious; but 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."—Showell Rogers, *The Ethics of Advocacy*, in 15 Law Quar. Rev. 259, 271, 272.

"However, Mr. James T. Brady, of the New York bar, has disagreed with Lord Brougham in the propositions which that learned gentleman laid down as to the duties of the advocate. Mr. Brady, in defending John Y. Beall (who was hung on Governor's Island for being a guerilla and spy), makes use of the following language: 'I wish to say to this court, on the honor of a gentleman, that I never have supposed that Lord Brougham's definition of the duties or right of an advocate was correct. I have never entertained the idea that it proceeds, in the view of refined society, or in the view of any instructed conscience, further than this—that an advocate may fairly present honorably whatever any man who is accused would have a right in truth to say for

THE ETHICS OF ADVOCACY. William Forsyth, *Hortensius* (3d Ed.) pages 390, 391: But * * * a certain latitude must be allowed to an advocate, the limits of which it is not easy to define, and which must be left in a great degree to his own good sense and discretion. It would be rendering his office almost useless, if every impassioned speech which he delivers on behalf of another were to be tested by the same canons according to which we criticise the opinions expressed in an essay or a sermon. It is as true now as it was in the time of Cicero, that it would be a great mistake to look for the deliberate convictions of the man in the address of the counsel.[15]

To a certain extent there may be the suppressio veri—for no one surely will contend that it is the duty of an advocate to bring forward facts of the existence of which he may be conscious, but which would be ruinous to his client—although there ought never to be the suggestio falsi. No doubt it is difficult to steer the right course between this Scylla and Charybdis, so as to avoid the infraction of a moral duty; and the temptation is sometimes great to overleap the boundaries that separate falsehood from truth. And herein consists one of the chief trials of the profession, and constant vigilance is required lest the speaker should be hurried away by his zeal for his client to misrepresent facts, or pledge himself to the belief of opinions which he does not entertain.

REMARKS OF LORD BROUGHAM AND LORD CHIEF JUSTICE COCKBURN ON ADVOCACY AT THE DINNER TO M. BERRYER.* In November, 1864, at a dinner given by the Bar of England to M. Berryer, a French advocate and statesman, Lord Brougham, in responding to a toast, likened M. Berryer to Erskine, and said:

"In both of them he had remarked that faculty of conducting cases with perfect skill and matchless eloquence; and in both, above all,

himself, and no more.' "—Thomas Dunphy and Thomas J. Cummins, *Remarkable Trials* (1867) p. 338.

In Third Great Western Turnpike-Road Co. v. Loomis, 32 N. Y. 127, 133, 88 Am. Dec. 311 (1865), Porter, J., referred to Lord Brougham's speech as "the atrocious but memorable declaration of one of the leading lawyers of England on the trial of Queen Caroline," and after quoting it said that "such a proposition shocks the moral sense."

"These principles—if they are so to be considered—[of Lord Brougham] being uttered, no doubt under high professional excitement, can certainly never be approved by any just or reasonable man. They would, if carried out to the extent suggested, make the advocate worse than a highwayman, and render him, under cover of the law, a virtual highwayman."—David Paul Brown, *The Forum; or Forty Years Full Practice at the Philadelphia Bar* (1856) Vol. 2, p. 28.

[15] Sed errat vehementer, si quis in orationibus nostris, quas in judicas habuimus, auctoritates nostras consignatas se habere arbitratur.—*Pro Cluentio*, 50.

* Reported in the London Times of November 9, 1864, and in 40 Law Times, 16, 17.

he had noted that indomitable courage which in the interests of their clients quailed neither before Kings nor Courts nor Judges. In both was observed the first great quality of an advocate, to reckon everything subordinate to the interests of his client. In this country the administration of justice depended principally on the purity of the judges; but next on the prudence, the discretion, and the courage of the advocate, and no greater misfortune could befall the administration of justice than an infringement of the independence of the bar or the failure of courage in our advocates." [16]

Lord Chief Justice Cockburn, the next speaker, said, among other things:

"Much as I admire the great abilities of M. Berryer, to my mind his crowning virtue—as it ought to be that of every advocate—is that he has throughout his career conducted his cases with untarnished honour. The arms which an advocate wields he ought to use as a warrior and not as an assassin. He ought to uphold the interests of his clients per fas and not per nefas.[17] He ought to know how to reconcile the interests of his client with the eternal interests of truth and justice."

THE CASE OF THE QUEEN v. D'ISRAELI. 1 Townsend, *Modern State Trials* (1850) pp. 257, 258:[18] Mr. Austin, in opening the case of the petitioners against the return of Mr. Fector for Maid-

[16] Of Lord Brougham when at the Bar it has been said that: "His labors as an Advocate are marked by great ability, much knowledge, and a strong and laudable anxiety in favor of the party for whom he is engaged. I believe that few suitors who from time to time have employed him, have had good reason to complain that he neglected their interests, or amid his numerous avocations, that he did not use his utmost exertions, whether of study or argument, in their favor."—*Criticisms on the Bar, etc.*, by [J. Payne Collier] Amicus Curiæ (1819) pp. 255, 256.

[17] "Lord Halsbury was, I believe, the first to call attention to the fact that the key-note of this striking passage in Cockburn's speech, which has in its turn become almost as famous as Brougham's own words in defense of the queen, is derived from Quintilian. The contrast of the arms of the warrier with those of the assassin is an almost literal transcript from the passage in which he says that teachers of oratory like himself will deserve nothing but ill of mankind si latroni comparamus hæc arma non militi. In another passage, but changing the metaphor, he finely says that an advocate is not to throw open the haven of his eloquence as a port of refuge to pirates."—Showell Rogers, *The Ethics of Advocacy*, 15 Law Quar. Rev. 259, 271. In a note on the same page Mr. Rogers says: "Quintilian's standard of ethics in advocacy is puzzling enough to the modern reader. It is at times as absurdly high as it is at other times shockingly low. The apparent irreconcilability can only be explained by supposing his view to be that a good man in a good cause may do all manner of evil that good may come!"

Of Lord Cockburn's "per fas and not per nefas" speech it has been said: "Those words are the best epitaph which can be bestowed on Sir Alexander Cockburn."—Edward Manson, *Builders of Our Law During the Reign of Queen Victoria* (2d Ed.) p. 166.

[18] In the above report, the speeches are much abbreviated. A more complete account of this interesting case is found in Joseph Stammers' *The Case of the Queen v. D'Israeli* (1838).

stone, before a committee of the House of Commons, was reported to have stated, according to his instructions, that Mr. D'Israeli, at the general election, had entered into engagements with the electors, and made pecuniary promises to them which he had left unfulfilled. Mr. D'Israeli wrote a letter to the newspapers, completely refuting the charge; but, not content with his disproof, added strong personal imputations on the counsel, and sarcasms on a profession "the first principle of whose practice appears to be, that they may say any thing, provided they be paid for it. The privilege of circulating falsehoods with impunity is delicately described as doing your duty towards your client, which appears to be a very different process to doing your duty towards your neighbour. This may be the usage of Mr. Austin's profession, and it may be the custom of society to submit to its practice; but for my part, it appears to me to be nothing better than a disgusting and intolerable tyranny, and I for one shall not bow to it in silence." [19]

A criminal information [for libel on Mr. Austin] was filed, judgment suffered by default, and the eloquent declaimer stood on the floor of the Court to receive sentence.

"If," said the Attorney-General, Sir J. Campbell, commenting on this bitter invective against the profession of the law, "a gentleman at the bar did not boldly and resolutely state the material and relevant facts, according to the instructions he has received, he would not be doing his duty to his neighbour; he would not be doing his duty to his client; he would not be doing his duty to himself. Without this practice, justice could not be administered, and innocence could not be vindicated; the law would be a dead letter."

Mr. D'Israeli made a rhetorical apology for his rash and ill-advised impromptu. "The report [of Mr. Austin's speech, supra] contained allegations [against my character and conduct] of no common severity —an accusation of public corruption and private dishonesty. I am not desirous of vindicating the expressions used in that letter in reference to the profession, but I believe that there is, in the principle on which the practice of the bar is based, a taint of arrogance, I will not say audacity, but of that reckless spirit which is the necessary consequence of the possession and the exercise of irresponsible power. The question is one indeed of great delicacy and great difficulty. I have imbibed an opinion that it is the duty of a counsel to his client to assist him by all possible means, just or unjust, and even to commit, if necessary a crime for his assistance or extrication. This may be an outrageous opinion, but it is not my own."

[19] D'Israeli's published letter's concluding paragraph was:

"I, therefore, repeat that the statement of Mr. Austin was false, and inasmuch as he never attempted to substantiate it, I conclude that it was on his side but the blustering artifice 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."—Joseph Stammers, *The Case of the Queen v. D'Israeli* (1838) p. 4.

Mr. D'Israeli then read the famed passage in Mr. Brougham's defence of Queen Caroline, and said, "According to this high authority, it is the duty of a counsel for his client even to commit treason." [20]

THE NATURE OF ADVOCACY. James Ram, *A Treatise on Facts* (4 Amer. Ed.) pp. 270, 271: The advocate represents his client. But he does not represent him in the sense that for every purpose of attack and defense he stands entirely in his client's place. If he did, such representation would necessarily involve this consequence—that supposing the client himself would attack or defend in an unscrupulous, dishonourable or lying manner, the advocate must do so too. Such a consequence completely extinguishes the notion of entire representation of the client.[21]

A LAWYER AND AN UNSCRUPULOUS CLIENT. Geo. W. McCrary, *Professional Ethics,* 14 West. Jurist, 193, 200: Perhaps you will ask me that old question, Is there no limit to the loyalty of a lawyer to his client—must he advocate a cause he knows to be wrong, or defend an act he knows to be dishonest? I answer there is, there must be, a limit beyond which the advocate cannot go. A lawyer should never permit himself to be made the tool of an unscrupulous client. If he is asked to aid a rascal in an effort to oppress or wrong another, he must refuse. No fee should be sufficient to hire him for such a work. There are lawyers, or men who call themselves lawyers, who hold the opinion that they are to reflect in all cases the views and wishes of their clients, having no opinion and no conscience of their own. Such will consider themselves bound to aid rascality if the rascal will

[20] D'Israeli's apology for wronging Mr. Austin was deemed by the court "most ample and satisfactory" and the incident ended. Joseph Stammers, *The Case of the Queen v. D'Israeli* (1838) p. 13.

[21] "The advocate stands forward as the representative of his client; he tells his client's story, and it is known that he is doing no more; the same allowance is made for everything he says that would be made were the party himself the pleader. But certainly the advocate has no right, nor is it his duty, to do that for his client which his client has no right to do for himself." —Francis L. Wellman, *Day in Court* (1910) p. 78.

"As a lawyer, Mr. S., of Kansas, defended a negro murderer, and, after his sentence, wrote to the Governor a strong indorsement of the negro's application for a pardon. Now, as Governor S. of Kansas, he has had to pass upon a new application for his old client's pardon, and his own letter, written as a lawyer, has been laid before him. But he refuses to grant the pardon, and says that as Governor it is his right and duty to view the matter 'in an entirely different light.' This raises the very interesting, though by no means new, question: In the code of legal ethics, what does a client's fee buy and what does it leave unbought?"—New York World, quoteed by Geo. W. Warvelle, *Essays in Legal Ethics* (1902) p. 175, note.

pay for it, and they are generally well fitted for such work. Happily, this class is small.[22]

THE ADVOCATE CONTRASTED WITH THE INTERPRETER. Edward O'Brien, *The Lawyer* (1842) pp. 14, 15, 17: But it is asked—Why should it be accounted more immoral in an advocate faithfully to detail a case as stated to him by his client, without troubling himself as to the truth or falsehood of the facts contained in it, than it is in an interpreter? The simple answer is that the advocate is not an interpreter—and the difference follows necessarily from the different parts sustained by the two characters. The interpreter is the minister of the court, and as such is bound faithfully to fulfill the part entrusted to him. The advocate, on the other hand, is the assistant, the counsellor, the friend of his client, and as such is concerned that he for whom he acts do that alone which is just and right. Were the interpreter, as he sometimes is or may easily be supposed, the minister of the client and not of the court, it would be his bounden duty to his client in the exercise of his office to convey nothing to the court which he knew or was convinced was false. * * * If a client in person be admitted to plead his own cause, conscience requires, and no law forbids that he demand that alone which he believes to be just. Why then should the Lawyer standing in the client's place do otherwise? If he does so at the instance of his client, he becomes a willing accomplice in a premeditated act of injustice. If he does so against the wish of his client, what excuse has he to plead for thus making his client an involuntary instrument of evil? Not the necessity of the case, for no such necessity exists; not the obligation of the law, for the law does not attempt to impose any such obligation. His only plea is utility; and utility can never be accepted as an excuse for doing or aiding in doing what is morally wrong.

THE ADVOCATE CONTRASTED WITH THE JUDGE. Edward O'Brien, *The Lawyer* (1842) pp. 73, 31, 32: The judge is appointed to administer the laws, according to their letter: he is bound so to do by the command of his prince and the oath of his office; and if at any time he is obliged to give judgment which he knows must work injustice he does so against his will. But the Lawyer who being to counsel and assist his client, willingly, no law compelling him, coun-

22 In the Trial of the Wakefields, reported in 2 Townsend's *Modern State Trials* (1850 Ed.) 112, 140, Mr. Scarlett, afterwards Lord Abinger, said: "No man shall ever place me in a situation either in this court, in public or in private, to vindicate an act of immorality or an act of injustice. My duty, as an advocate, is to give my humble efforts to the administration of the law, such as it is, and it is not my duty to endeavour to prevent it."

sels and assists him in that which is unjust, becomes before God a partaker in his client's evil deeds. If one reply that he is no judge but an advocate, and that till the judge have given sentence he knows not whether the cause be just or unjust: he replies by distinguishing: that some causes there are which even the sentence of the judge cannot make just, and these no law obliges him to advocate: others again are doubtful, and in these he applies to the judge for the solution of the doubt, stating to him the case as in truth he believes it to be, and fairly opening to him the difficulty thereof; others again are manifestly just, and to the defense of these he brings with zeal and diligence whatever powers God has given him. * * * The case of the advocate is altogether different [from that of the judge]: he is not so much the servant of the law as of his client, who is bound in conscience to use the law only for good ends; and if he seeks to pervert it to bad ends, the advocate who knowingly assists him in doing so becomes a partaker in the crime; and just in proportion as the law of the land makes it imperative upon the judge to follow the letter of the law even where that letter works injustice, in the same proportion is it incumbent upon the client and his counsel to take care that they abuse not the strength of iniquity to overthrow the weakness of equity. That this distinction is one which has its foundation in the nature of the thing, and is not a merely arbitrary line drawn for the purpose of argument, will be evident if we for a moment imagine an advocate coming forward with language such as we constantly hear from the lips of British judges, denouncing the conduct and character of those in whose favour nevertheless they are constrained to give judgment. If the Lawyer were the minister of the court and of the Law, his course of duty would be clear, and he would follow the same rules as the judge. But he is not such: he is the minister of his client, though subject to the control of the court, and therefore it cannot be otherwise than immoral in him to lend his aid to that which he believes in his conscience to be morally wrong.[23]

[23] "It is remarkable, however, that Puffendorf, in his *Law of Nature and Nations*, makes use of the argument derived from the difference between the functions of the advocate and the judge to justify conduct revolting to common honesty and contends for a degree of license in favor of the former which the most unscrupulous would hardly venture to claim. He says [Lib. iv, I, § 21]: 'For since the judge is supposed fully to understand the law, the advocate, by producing false laws, or false authorities, is not likely to prevail to any purpose; and he is never credited upon his bare assertion, but obliged to produce sufficient proof. And therefore if a guilty person do by this means sometimes escape unpunished, the fault is not to be charged on the advocate, or on the prisoner, but on the judge who had not the wisdom to distinguish between right and wrong.' In other words, a cunning counsel may falsify quotations and impose upon the ignorance of a judge, and think that he shifts from himself the responsibility of a deliberate untruth on the plea that the court ought to be able to detect the fraud. A pick pocket might, with equal justice and logic argue that he does not deserve punishment because the person whom he has robbed ought to have been more vigilant in protecting his property."—Wm. Forsyth, *Hortensius* (3d Ed.) pp. 394, 395.

"I will add one remark upon the danger incurred by the advocate—even if

THE ADVOCATE CONTRASTED WITH THE POLITICAL SPEAKER. William Forsyth, *Hortensius* (3d Ed.) pages 392–394: In almost every place except a court of justice, the speaker takes upon himself to decide upon matters of opinion and fact. If he be a member of a body in which the will of the majority is law, he is a party to the judgment which he has by his arguments supported. Without those ar-

he be one who would scruple either wilfully to use sophistry to mislead a judge, or to perplex and browbeat an honest witness—of having his mind alienated from the investigation of truth. Bishop Butler observes, and laments, that it is very common for men to have 'a curiosity to know what is said, but no curiosity to know what is true.' Now, none can be (other points being equal) more in need of being put on his guard against this fault than he who is professionally occupied with a multitude of cases, in each of which he is to consider what may be plausibly urged on both sides; while the question what ought to be the decision is out of his province as a pleader. I am supposing him not to be seeking to mislead by urging fallacious arguments; but there will often be sound and valid arguments—real probabilities—on opposite sides. A judge, or any one whose business it is to ascertain truth, is to decide according to the preponderance of the reasons; but the pleader's business is merely to set forth as forcibly as possible those on his own side. And if he thinks that the habitual practice of this has no tendency to generate in him, morally, any indifference, or, intellectually, any incompetency, in respect of the ascertainment of truth,—if he consider himself quite safe from any danger,—I should then say that he is in very great danger."—Archbishop Richard Whately's note to Bacon's essay *Of Judicature*, in his 1868 edition of *Bacon's Essays*, p. 557.

"Justice is found, experimentally, to be most effectually promoted by the opposite efforts of practiced and ingenious men, presenting to the selection of an impartial judge the best arguments for the establishment and explanation of truth. It becomes, then, under such an arrangement, the decided duty of an advocate to use all the arguments in his power to defend the cause he has adopted, and to leave the effects of those arguments to the judgment of others. However useful this practice may be for the promotion of public justice, it is not without danger to the individual whose practice it becomes. It is apt to produce a profligate indifference to truth in higher occasions of life, where truth cannot, for a moment, be trifled with, much less callously trampled on, much less suddenly and totally yielded up to the basest of human motives."—Sydney Smith in Sermon on *The Lawyer that Tempted Christ* in *Works of Rev. Sydney Smith* (1873 Ed.) 425.

In his essay *Of Judicature* Sir Francis Bacon said: "There is likewise due [from the judge] to the public a civil reprehension of advocates, where there appeareth cunning counsel, gross neglect, slight information, indiscreet pressing or an over-bold defence."

And Archbishop Richard Whately, in commenting on that statement, said: "The temptation to an 'over-bold defence'—to a wilful misleading of a judge or jury by specious sophistry, or seeking to embarrass an honest witness, and bring his testimony into discredit—is one to which the advocate is, undeniably, greatly exposed."—*Bacon's Essays, with Annotations by Richard Whately* (1868) p. 554.

"It seems to me as if the duty imposed upon an advocate of endeavoring to bring every circumstance to bear upon his own case, and against his adversary's, insensibly produces a disposition to see every circumstance as it arises through that medium; and that the impression upon his mind is rather that which is the favorable one to his client, than that which is the true one; and consequently, if he does not watch himself narrowly, that he will, without intending it, habitually, and necessarily misrepresent everything that passes. * * * Make a point of stating evidence as it is, and not as you wish it to be; of repeating a witness's words, if you have occasion to repeat them, literally. * * * I repeat that the cause of truth is assisted by the different lights, true and false, in which facts are placed by the advocate:

guments the particular decision would perhaps not have been arrived at. He does not appeal to that majority as a body distinct from himself. Whether they agree with him or not, his speech is the open expression of that opinion, which has determined him individually to vote in some particular way. If he sincerely believes that his views are correct and ought to be adopted, he is right in endeavouring to influence his hearers. If not, he is a hypocrite.

But the situation of the advocate is very different. His business is to supply materials out of which a decision is to be formed by others; but not all the materials—only those which relate to one side and view of the question; for he does not stand before the tribunal to array conflicting probabilities, and weigh minute differences, as though to him were committed the task of adjudicating between opposing claims. He is to urge as forcibly as he can all the arguments which may be suggested in favour of one particular side, and present them to the understanding of those whose duty and vocation it is to weigh everything that may be advanced on both sides, and carefully ascertain the validity of the reasoning by which they are respectively supported. All that an advocate undertakes to perform, in the point of view in which we are now considering him, is this: He says, "I will bring before the notice of the judge all that can be maintained in favour of one side of the question. The same will be done by my opponent, and the court will decide between us." He stands wholly separate and distinct from the tribunal, which pronounces its judgment upon the value it attaches to his arguments; and which recognizes their cogency by adopting them, or shows its sense of their insufficiency by rejecting them. The only case in which we can conceive such a situation as this being fairly open to objection on the ground of morality, would be where the attainments and intellectual power of the advocate were so vastly superior to those of the tribunal he was addressing, that he could as it were force it to surrender its own judgment to his, and extort from it any sentence which suited that side of the cause of which he happens to be retained.[24]

but it is perplexed and perverted by the practice of misrepresenting facts."—Hortensius, *Deinology* (1789) pp. 231, 232.

"The desire to please a client, the still stronger anxiety for the triumph of a verdict, continually tempts the Advocate to practices for which, indeed, he may appeal to high authorities, but which religion and reason forbid."—Edward W. Cox, *The Advocate* (1852) p. 54.

[24] "A forensic advocate who pleads a cause the soundness of which he doubts, or disbelieves, is not in the same position as a party politician who votes in Parliament, or a speaker who appears on a public platform, in support of measures or objects which he disapproves. There is no moral obliquity on the part of the former such as indisputably exists in the case of the latter. Moreover, a lawyer's duties as an adviser differ toto cœlo from his duties as an advocate. He is justified in giving his advocacy, though not his opinion, according as he is retained. The knowledge that an eminent lawyer has given an opinion on a case in a particular way has, and rightly has, an effect altogether different, on the lay and the legal mind alike, from the knowledge that the same lawyer has been retained by one side to plead the same case in court. As the private adviser of his client, a lawyer is bound to express to

COMPARISON OF ADVOCATE WITH ACTOR. John Cordy Jeaffreson, *A Book About Lawyers* (1867) Vol. II, pp. 46, 47: To lawyers of every grade and specialty the histrionic faculty is a useful power; but to the advocate who wishes to sway the minds of jurors it is a necessary endowment. Comprising several distinct abilities, it not only enables the orator to rouse the passions and to play on the prejudices of his hearers, but it preserves him from the errors of judgment, tone, influence—in short, from manifold blunders of indiscretion and tact by which verdicts are lost quite as often as through defect of evidence and merit. Like the dramatic performer, the court speaker, especially at the common law bar, has to assume various parts. * * * Speaking of a famous counsel, an enthusiastic juryman once said to this writer—"In my time I have heard Sir Alexander [Wedderburn] in pretty nearly every part; I've heard him as an old man and a young woman; I have heard him when he has been a ship run down at sea, and when he has been an oil-factory in a state of conflagration; once, when I was foreman of a jury, I saw him poison his intimate friend, and another time he did the part of a pious director in a fashion that would have skinned the eyelids of Exeter Hall; he ain't bad as a desolate widow with nine children, of which the eldest is under eight years of age; but if ever I have to listen to him again, I should like to see him as a young lady of good connexions who has been seduced by an officer in the Guards." [25]

him his individual and honest opinion: as his 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. If an advocate were to be permitted to express his personal opinion of the justice of his case, the interests of clients would often suffer. For it would follow that in cases where such an opinion was not, and could not honestly, be expressed, the inference that his opinion was adverse would, and with good reason, be irresistibly drawn; just as a prisoner, who now has the opportunity of going into the witness-box to give his version of the case and refrains from doing so, runs a considerable risk of having his innocence suspected. From what has been already said will also be seen the essential difference, too often overlooked, between the duties of an advocate and those of an expert witness. The latter is bound to express his honest personal opinion on the scientific or technical matters respecting which he is called upon to give his testimony. Hence it is that experts who lie—as possibly they occasionally do—not only arrogate to themselves the position of advocates with greater liberties than forensic advocates possess; but they are, as they have been aptly termed, advocates who have sworn solemnly that they will not be advocates. 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.' "—Showell Rogers, *The Ethics of Advocacy*, 15 Law Quar. Rev. 259, 267–268.

[25] "It used to be said of Sir W. Garrow that he was an actor as well as an advocate—that when silent he ceased not to address the jury by the change of his features; to a certain degree this power is enjoyed and em-

FERGUSON v. MOORE.

(Supreme Court of Tennessee, 1897. 98 Tenn. 342, 39 S. W. 341.)

WILKES, J. This is an action for damages. The declaration has two counts—one for breach of contract to marry, and the second for seduction accomplished by reason of such contract. The cause was heard before a court and a jury of Lincoln county, and a verdict for $2,000 was rendered upon the first count, and of $12,700 upon the second, and for the aggregate sum of $14,700 judgment was rendered for plaintiff, and defendant has appealed, and assigned errors. * * *

It is next assigned as error that counsel for plaintiff, in his closing argument, in the midst of a very eloquent and impassioned appeal to the jury, shed tears, and unduly excited the sympathies of the jury in favor of the plaintiff, and greatly prejudiced them against defendant. Bearing upon this assignment of error we have been cited to no authority, and after diligent search we have been able to find none ourselves. The conduct of counsel in presenting their cases to juries is a matter which must be left largely to the ethics of the profession

ployed by Mr. Sergeant Best: it is much the same as the by-play upon the stage, and some counsel, whose leaden visages can express little else but their dullness, call it unfair and ungentlemanly. They forget or never knew that an advocate is nothing but an actor who, like the Italian improvvisatori players, invents the dialogue of his own part, the plot being supplied him; and they might just as reasonably object to his being eloquent, because they cannot put three sentences together, as to his availing himself of this or any of the other faculties God has bestowed upon him."—*Criticisms on the Bar, etc.*, by [J. Payne Collier] Amicus Curiæ (1819) pp. 55, 56.

Archbishop Whately points out that a lawyer has not the same justification as an actor for feigning pity, disgust, contempt, etc., because it is not known that the lawyer is feigning, whereas, it is known that the actor is doing so. —Bacon's *Essays with Annotations by Richard Whately* (1861) p. 556.

"The lawyer's rhetoric and his logic may be as wide and various as the four quarters of the globe, but they must 'turn on the poles of truth.' He has not the license of the actor, who is known to be playing a part, and therefore deceives no one in his assumed character; nor of the novelist, whose art is best employed in making fiction resemble truth. He is not a gladiator, who hacks and thrusts with venal weapons indifferently in any quarrel, still less is he an irresponsible part of the 'machine of justice,' without soul or conscience, flying like a shuttle from one side to the other, through the intricate web and meshes of law and fact, out of which are woven the warp and texture of the law."—William Allen Butler, *Lawyer and Client* (1871) pp. 48, 49.

"We have long had the actor-advocate with us. America has evolved yet another phase; that is, the tenor-advocate. The following quotation is from the Sun [of April 8, 1911]: ['The unwritten law was acknowledged by the jury at Fort Worth, Texas, to-day, when Mrs. Brooke, the wife of an eminent lawyer, was acquitted of the charge of murdering Mrs. Binford, whom she shot dead from motives of jealousy. * * *] Counsel closed a powerful argument by singing to the jury in a tear-choked voice, "Home, Sweet Home." The song trembled on his lips [and brought tears to the eyes of all the jurors, the defendant, and the crowd that was packed in the room. It was a dramatic finish to the most dramatic murder trial in Texas.] The verdict of acquittal was received with impressive demonstrations of applause.' "—William Durran, *The Lawyer, Our Old-Man-of-the-Sea* (1913) pp. 56, 214, note.

and the discretion of the trial judge. Perhaps no two counsel observe the same rules in presenting their cases to the jury. Some deal wholly in logic—argument without embellishments of any kind. Others use rhetoric, and occasional flights of fancy and imagination. Others employ only noise and gesticulation, relying upon their earnestness and vehemence instead of logic and rhetoric. Others appeal to the sympathies—it may be the passions and peculiarities—of the jurors. Others combine all these with variations and accompaniments of different kinds. No cast-iron rule can or should be laid down. Tears have always been considered legitimate arguments before a jury, while the question has never arisen out of any such behavior in this court, we know of no rule or jurisdiction in the court below to check them. It would appear to be one of the natural rights of counsel which no court or constitution could take away. It is certainly, if no more, a matter of the highest personal privilege. Indeed, if counsel has them at command, it may be seriously questioned whether it is not his professional duty to shed them whenever proper occasion arises, and the trial judge would not feel constrained to interfere unless they were indulged in to such excess as to impede or delay the business of the court. This must be left largely to the discretion of the trial judge, who has all the counsel and parties before him, and can see their demeanor as well as the demeanor of the jury.

In this case the trial judge was not asked to check the tears, and it was, we think, an eminently proper occasion for their use, and we cannot reverse for this. But for the other errors indicated the judgment must be reversed, and the cause remanded for a new trial. Plaintiff will pay the costs of the appeal.[26]

THE RIGHT TO WITHDRAW FROM THE ADVOCACY OF AN UNJUST CAUSE. Theodore Bacon, *Professional Ethics,* 17 Journal of Social Science, 37, 43, 44: It must sometimes happen, however, in every long career, that one entering upon a litigation in enthusiastic sympathy with his client shall, with the progressive development of the case, find his ardor chilled by dishonoring disclosures. Even then it may well appear that his continued service will not be the active promotion of wrong; and if that is so, the only effect of the revelation may be that he will render no longer a sympa-

[26] See Albert W. Gaines, *The Lawyer's Lachrymal Rights,* 38 Amer. Law Rev. 695.

"But it is Cicero's advice [in *De Inventione,* i, 56] that when the jury are touched, the advocate's tears should cease; and this he thinks, on good authority, they easily can."—James Ram, *A Treatise on Facts* (4 Amer. Ed.) 286.

"The great orator must be a man of absolute sincerity. Never advocate a cause in which you do not believe or affect an emotion you do not feel. No skill or acting will cover up the want of earnestness. It is like the ointment of the hand which bewrayeth itself."—George F. Hoar, *Oratory,* 29 Scribner's Magazine, 756, 758.

thetic, but merely a faithful service. But if the new view of the man and of his cause has made it appear that his continued pursuit, or resistance, is but the attempting or the consummation of a wrong in which the advocate would have refused to co-operate if it had been made known to him at the outset, what then becomes his duty? I cannot accede to the position taken by an eminent and high-minded jurist, whose discussions of the general subject have largely contributed to elevate and strengthen the tone of the profession. Mr. Justice Sharswood says: "When he has once embarked in a case, he cannot retire from it without the consent of his client or the approbation of the court. To come before the court with a revelation of facts damaging to his client's case, as a ground for retiring from it, would be a plain breach of the confidence reposed in him, and the law would seal his lips." (Legal Ethics, 28, 29). Undoubtedly he may not disclose the facts he has learned; and without the consent of the client, or the permission of the court overruling the client's protest, he may not withdraw from the case. But it is inconceivable that he can be compelled to be an active accomplice in wrongdoing, simply because he has been entrapped into it under the pretence of an honorable service. If he presents to his client the unadorned statement: "I find that what you represented to me to be an honest cause is, in fact, a contrivance to defraud your creditor or to swindle a family of orphans out of their farm; take your papers to some one who is in that line of business;" can it be imagined that the client will insist upon the continuance of service upon such a divergence of views? Or, if he carries his persistence so far as to drive his counsel to court with a motion to be relieved, was there ever a court which would meet his statement that, for reasons personal to himself, and which he was not at liberty to disclose, he desired to be relieved from further service, with a refusal to allow him to demit his charge? I cannot, therefore, distinguish between a case which honorable counsel ought not to undertake with a knowledge of its character, and a case which, once undertaken, turns out to be of such a character. Under either condition, the lawyer who enters it, or the lawyer who does not retire from it, is an accomplice in the wrong; and if a cloud is cast upon the client's cause by the unexplained withdrawal of a lawyer of good repute, and the entrance into it of a successor of different character, it may be the misfortune of the client, but not the fault of the counsel.[27]

[27] "It is well established in the case of the client that he may at any time, for any reason which seems satisfactory to him, however arbitrary, discharge his attorney. If the latter has not been guilty of any tangible violation of the relation, this substitution must be made on conditions which are fair to him. Tenney v. Berger, 93 N. Y. 524, 529 [45 Am. Rep. 263 (1883)]; Matter of Prospect Avenue, 85 Hun, 257 [32 N. Y. Supp. 1013 (1895)]; Matter of Paschal, 77 U. S. [10 Wall.] 483, 496 [19 L. Ed. 992 (1870)]. In the case of the attorney the general rule is that he may terminate his relationship at any time for a good and sufficient cause and upon reasonable notice. Eliot v. Lawton, 7 Allen [Mass.] 274 [83 Am. Dec. 683 (1863)]; Powers v. Manning, 154 Mass. 370 [28 N. E. 290, 13 L. R. A. 258 (1891)]." Hiscock, J., in Matter

THE GOOD ADVOCATE.

Thomas Fuller, *The Holy State and the Profane State* (1841 Ed.) Book 2, chap. 1, pp. 49, 50:

CHAPTER I—THE GOOD ADVOCATE.

He is one that will not plead that cause wherein his tongue must be confuted by his conscience. * * *

MAXIM I.

He not only hears, but examines his client; and pincheth the cause, where he fears it is foundered.—For many clients, in telling their case, rather plead than relate it; so that the advocate hears not the true state of it till opened by the adverse party. * * *

II.

If the matter be doubtful, he will only warrant his own diligence. * * *

III.

He makes not a Trojan siege of a suit, but seeks to bring it to a set battle in a speedy trial.—Yet sometimes suits are continued by their difficulty, the potency and stomach of the parties, without any default in the lawyer. * * *

IV.

He is faithful to that side that first retains him. * * *

V.

In pleading, he shoots fairly at the head of the cause; and having fastened, no frowns nor favours shall make him let go his hold. * * *

VI.

He joys not to be retained in such a suit where all the right in question is but a drop, blown up with malice to be a bubble.—Wherefore,

of Dunn, 205 N. Y. 398, 402, 403, 98 N. E. 914, 916, Ann. Cas. 1913E, 536 (1912). See Underwood v. Lewis, [1894] 2 Q. B. 306.

"As there is no difficulty as to what counsel should do in an honest though feeble case, neither is there any question as to what he should do when, after having been retained, he discovers that his case is unsound and dishonest. He is bound to abandon the cause at once. He is not bound, as has been observed, to do more for a client than the client could justly do for himself. Or, if he has, in error, advanced so far in the cause that he cannot abandon it without compromising too far the interests of his client, he must at least be careful, while he watches its progress, not to adopt its principles and thereby forfeit his own self-respect and the approval of his own conscience."—David Paul Brown, *The Forum; or Forty Years Full Practice at the Philadelphia Bar* (1856) Vol. 2, pp. 36, 37.

in such trivial matters, he persuades his client to sound a retreat and make a composition.

VII.

When his name is up, his industry is not down. * * *

VIII.

He is more careful to deserve, than greedy to take, fees. * * *

CHAPTER VI

SOLICITATION OF LEGAL BUSINESS

SECTION 1.—ADVERTISING

A. B. A. CANON.

27. ADVERTISING, DIRECT OR INDIRECT. The most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not per se improper.[1] 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 procure business by indirection through touters of any kind, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills or offering retainers in exchange for executorships or trusteeships to be influenced by the lawyer.[2] Indirect advertisement for business by furnishing or inspiring

[1] "In small cities or rural communities, long usage has sanctioned the insertion of professional cards in the advertising columns of the local newspapers. But in large cities where advertising in the public prints is carried to such extremes, the profession frowns upon advertising by lawyers. It is considered undignified for a lawyer's card to be inserted in company with the appeals of clairvoyants, medical quacks, matrimonial bureaus, and get-rich-quick schemes."—Gleason L. Archer, *Ethical Obligations of the Lawyer* (1910) § 130, p. 241.

[2] "It would be an unquestioned breach of Canon 27 for a lawyer to advertise that he would draw wills without charge, and it would not heal the wound without a scar if it was implied that the lawyer should be named as executor, trustee, or guardian. Yet it has been the custom for years of corporate competitors of the lawyers so to advertise, and in fact to live up to the advertisement. * * * By Canon 27, also, a lawyer is forbidden to solicit employment. But he may own stock in a trust company which advertises its ability to act as executor, trustee, etc., although he knows that in the business thus acquired he is to be employed."—Robert McMurdy, *Ethics and the Corporations*, 6 Illinois Law Review, 54, 55.

"When, therefore, the trust company offers to draw one's will, as a means of securing the position of trustee under the will, and offers the services of its own attorneys for the purpose, it must find its authority in some express provision of law distinguishing it from any other corporation. The case is not the simple case of the ordinary request of a lay trustee that his own counsel be permitted to draw the trust deed or will. The interest of the grantor is

newspaper comments concerning causes in which the lawyer has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer's positions, and all other like self-laudation, defy the traditions and lower the tone of our high calling, and are intolerable.[3]

ADVERTISING BY ENGLISH BARRISTERS. Statements of the General Council of the Bar, *The Annual Practice* (1917) pp. 2406, 2413, 2416:

ADVERTISING BY BARRISTERS. The attention of the Council has been called to certain advertisements contained in a Legal Directory published in America in which the names of members of the English Bar, together with their London addresses, were set out, and which appeared to the Council to constitute an infringement of the rule of Professional Etiquette that an English barrister should not advertise. The Council accordingly placed themselves in communication with the gentlemen concerned, and were glad to be assured by them that the advertisements had been inserted without their knowledge, and that they had taken immediate steps to suppress the advertisements. An. St. 1905–06, p. 13.

CHANGE OF ADDRESS. There is no objection to a Barrister sending notice to solicitors of change of address, so long as it be sent only

not identical with the interest of the trustee, and ordinarily the trustee's lawyer would not be qualified to safeguard the interests of the grantor. By what change in professional attitude has it become proper for him, who is the paid counsel for the trustee, to be also the counsel for the grantor? And if he is to be paid for his services, and the employment is secured by solicitation or advertising, how has the nature and character of the service been distinguished from that of any lawyer whose business is solicited through his efforts? * * * We conclude, therefore, that certain matters are clear: (1) Neither a title company nor a trust company may offer to draw a deed of trust or a will for the purpose of becoming trustee or executor. (2) Neither a title nor a trust company may offer to furnish legal service or advice in the drawing of a deed of trust or will. (3) Lawyers who participate in such practices and receive retainers under such circumstances are violating the canons of ethics of their profession."—Extracts from a lawyer's opinion quoted in Julius Henry Cohen, *The Law: Business or Profession?* (1916) pp. 274–276.

See *Is it Professional for Lawyers to Draw Wills for Trust Companies Where Such Business is Secured by Advertising?* 79 Centr. L. J. 111.

[3] "The consensus of opinion seems to be that a lawyer has a perfect right to enter into any newspaper discussions of current topics, even though the natural result of such publication may be to bring clients to the lawyer. Such discussion may in fact be a distinct public service. The lawyer of ability, with his training in the logical analysis of a cause, is qualified to become a leader of popular thought. * * * But a lawyer should not take part in a newspaper discussion if he is in the employ of corporations or interests concerned, unless he discloses his employment. He should not endeavor to influence public opinion as to cases then pending in which he is in any way concerned."—Gleason L. Archer, *Ethical Obligations of the Lawyer* (1910) § 132, p. 244.

to the Barrister's clients. An. St. 1900–01, p. 8. But "clients" means regular clients only, and not every Solicitor from whom a Barrister may have at any time received a set of papers.[4] An. St. 1905–06, p. 10.

Reports of Companies. A Barrister should not permit his name to be printed in the reports of limited companies, which are annually forwarded to the shareholders and which describe him as legal adviser to the company. An. St. 1909, p. 8.

Names of Counsel Giving Opinions—Publication of. The practice of certain newspapers publishing the names of Counsel in connection with opinions printed in their columns has been altered to meet the wishes of the Council. An. St. 1896–97, p. 9.

Answers to Legal Questions in Newspapers and Periodicals. It is contrary to professional etiquette for a Barrister to answer legal questions in newspapers or periodicals, whether for a salary or at ordinary literary remuneration, (1) where his name is directly or indirectly disclosed or liable to be disclosed, or (2) where the questions answered have reference to concrete cases which have actually arisen or are likely to arise for practical decision. An. St. 1908–09, p. 23.

Signed Articles. It is not a breach of professional etiquette for a Barrister to write for a technical journal a series of signed articles dealing with legal questions which have a general interest for the profession amongst whose members the journal circulates, provided that such articles do not deal with concrete cases which have actually arisen, or are likely to arise, for practical decision. In such signed articles the writer may describe himself as "barrister-at-law," and if he is the author of a text-book dealing with his subject, he may also describe himself as such. This applies to articles, whether signed at the foot or not, which are headed with the name of the writer. An. St. 1915, p. 17.

Photographs in Legal Newspapers. It is undesirable for Members of the Bar to furnish signed photographs of themselves for publication in legal newspapers. An. St. 1900–01, p. 8.

[4] The war has caused an addition to the English rule. In 51 Law Journal, 198, the General Council of the Bar states that: "The Council are of opinion that, in the exceptional circumstances of the war, members of the Bar ought to be permitted to inform their regular [solicitor] clients (a) on being called up that they are joining the colours and have made arrangements for their practice to be continued in their absence; (b) on their return, that they have returned to practice."

ADVERTISING BY SOLICITORS IN ENGLAND. Edmund B. V. Christian, *A Short History of Solicitors* (1896) p. 234: The etiquette of solicitors has been strong enough to repress advertisement.[5]

PEOPLE ex rel. ATTORNEY GENERAL v. MacCABE.

(Supreme Court of Colorado, 1893. 18 Colo. 186, 32 Pac. 280, 19 L. R. A. 231, 36 Am. St. Rep. 270.)

Original proceedings by the people of the state of Colorado, on the relation of the attorney general, against Isaac J. MacCabe, to procure his disbarment as an attorney and counselor at law.

In this proceeding the petition states that respondent, a duly-licensed attorney, has been guilty of malconduct in his said office as an attorney and counselor at law, in that, for a long time immediately preceding the exhibiting of the petition, he had repeatedly published in a newspaper of large circulation, in the city of Denver, the following advertisement: "Divorces legally obtained very quietly; good everywhere. Box 2344, Denver." Respondent, by his answer, admits that he caused the advertisement to be published as alleged in the petition. Cause submitted upon petition and answer.

ELLIOTT, J. The ethics of the legal profession forbid that an attorney should advertise his talents or his skill, as a shopkeeper advertises his wares. An attorney may properly accept a retainer for the prosecution or defense of an action for divorce, when convinced that his client has a good cause; but for any one to invite or encourage such litigation is most reprehensible. The marriage relation is too sacred, it affects too deeply the happiness of the family, it concerns too intimately the welfare of society, it lies too near the foundation of all good government, to be broken up or disturbed for slight or transient causes.

[5] Advertising and the solicitation of business in other ways are no more proper for solicitors than for barristers, despite the impression to the contrary which some American lawyers entertain. This is shown in a striking way in Ontario, Canada, where nearly all members of the profession are both barristers and solicitors. The Honourable William Renwick Riddell, Justice of the Supreme Court of Ontario, has very kindly furnished the editor with the following statement of professional opinion and practice in Ontario. He writes:

"With us it is the worst possible form for a barrister or even a solicitor to seek business in any personal way. It is not punishable by exclusion from the Rolls, indeed, but it is the sign of a 'black sheep.' A firm of barristers and solicitors may insert a simple card in the press (if patent solicitors they may so state, but otherwise no specialty is advertised)—and they may send a plain card to any one, whether in the profession or out of it. I have never known a barrister (not also practicing as a solicitor or with solicitors) to advertise. It would look odd and be the subject of unfavorable comment. The Law Society of Upper Canada has no rule on the subject, nor the local Bar Association. It is simply the etiquette of the profession and of gentlemen and our esprit de corps is high. Noblesse oblige."

In the present case we are not called upon to deal with a matter of ordinary advertising, but with a peculiar kind of advertising. Respondent did not advertise for business openly, giving his name and office address. His advertisement was anonymous and well calculated to encourage people to make application for divorces who might otherwise have refrained from so doing. When a lawyer advertises that divorces can be legally obtained very quietly, and that such divorces will be good everywhere, such advertisement is a strong inducement, a powerful temptation, to many persons to apply for divorces who would otherwise be deterred from taking such a step from a wholesome fear of public opinion. The advertisement published by respondent says, in effect: "If you are dissatisfied with your partner in life,—if you desire a divorce,—communicate with me, and your desire shall be gratified. No one will know it. You see I advertise anonymously. I do not even subject myself to criticism. Everything will be done very quietly, and you will be able to sever the disagreeable marriage tie without public scandal, and hence without reproach."

The fear of public opinion is not the highest motive, but it exercises a wholesome influence in many ways. It is undoubtedly potent in preventing many suits for divorce; and in most of such cases, not only the individuals directly concerned, but the circle of society in which they move, as well as society at large, are greatly benefited by the restraining influence of public opinion. The advertisement published by respondent to the effect that divorces could be legally obtained very quietly, which would be good everywhere, was the more mischievous because anonymous. Such an advertisement is against good morals, public and private. It is a false representation, and a libel upon the courts of justice. Divorces cannot be legally obtained very quietly which shall be good anywhere. To say that divorces can be obtained very quietly is equivalent to saying that they can be obtained without publicity. Every lawyer knows that to obtain a legal divorce a public record must be made of the proceeding; the complaint must be filed; the summons must issue, process must be served upon the defendant, either personally or by publication in a public newspaper, proof must also be taken; and a decree must be publicly rendered by the court having jurisdiction of the proceeding. All these public proceedings the statute imperatively requires, and for a lawyer, by an advertisement, to indicate that such public proceedings can or will be dispensed with by the courts having jurisdiction of such cases, is a libel upon the integrity of the judiciary, that cannot be overlooked when brought to our notice. * * *

In his answer in this case respondent says, in effect, that in advertising for divorce business he did it in entire ignorance that it was wrong; that he ceased to so advertisé, in deference to the court, upon the commencement of this proceeding; that if this court shall adjudge such advertising to be wrong, or to be malconduct in office as an attorney,

within the meaning of the statutes, he will cheerfully abide by and obey the directions of the court in the premises. In view of these statements in the answer, this being the first case of the kind brought in this court, we do not feel it incumbent upon us to perpetually deprive respondent from pursuing his business as an attorney. A court intrusted with the power to admit and disbar attorneys should be considerate and careful in exercising its jurisdiction. The interests of the respondent must in every case be weighed in the balance against the rights of the public; and the court should endeavor to guard and protect both with fairness and impartiality. In this connection the words of Chief Justice Marshall, in Ex parte Burr, 9 Wheat. 529, 6 L. Ed. 152, are particularly appropriate: "On the one hand, the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him. On the other, it is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved. For these objects, some controlling power—some discretion—ought to reside in the court. This discretion ought to be exercised with great moderation and judgment; but it must be exercised, and no other tribunal can decide, in a case of removal from the bar, with the same means of information as the court itself."

In view of all the circumstances of this case, the judgment of this court is that respondent (MacCabe) be, and is hereby, suspended from practice as an attorney and counselor at law for the period of six months from this date, and until the payment of all the costs of this proceeding.[6]

ADVERTISEMENTS BY LAWYERS. N. Y. Committee.

Question 1: A member of the bar submitted to the Committee a simple business card containing his name, profession, office address and telephone number, and asked the Committee whether the insertion of such a card in a trade journal would be deemed unethical.

Answer: The form of advertisement proposed by you cannot be characterized as unprofessional, but its adoption must be left to the sense of propriety of the individual practitioner. The Committee, however, does not approve of such form of advertisement.

Question 32: Do you deem it improper professional conduct for a lawyer to advertise for business in the following form? You will note that he does not mention his profession.

[6] See People v. Goodrich, 79 Ill. 148 (1875), People v. Smith, 200 Ill. 442, 66 N. E. 27, 93 Am. St. Rep. 206 (1903); In re Schnitzer, 33 Nev. 581, 112 Pac. 848, 33 L. R. A. (N. S.) 941 (1911); In re Neuman, 169 App. Div. 638, 155 N. Y. Supp. 428 (1915). On advertising as ground for disbarment, see notes in 9 L. R. A. (N. S.) 282, 33 L. R. A. (N. S.) 941.

"AVOID LITIGATION

"I act as adviser, arbitrator, adjudicator and special confidential agent to diplomatically adjust all difficulties and disputes for individuals, corporations or heirs. Bond given when matters of trust are placed with me. Bank references.....Appointment by 'phone:....."

Answer: In the opinion of the committee, the advertisement referred to is improper, notwithstanding its opening words, "Avoid litigation."

Question 45: An inquirer has handed the committee a series of advertisements appearing in a daily newspaper in the forms hereto annexed, and has asked an expression of the opinion of the committee upon the propriety of such advertising by lawyers.

"LAWYERS

"A.—Able lawyer, specialist family troubles, private matters, &c.; furnishes reliable advice; all cases handled; satisfaction guaranteed; quick results; domestic relation laws of all states explained. Call, write, LAWYER.

"A.—A.—A.—A.—ACCIDENTS, estates, family troubles; cases handled successfully; satisfaction guaranteed; strictly confidential; matters quickly settled; no fee unless successful. Call, write, 'phone..... LAWYER .....

"ACCIDENT CASES, DOMESTIC TROUBLES and all legal difficulties STRENUOUSLY handled to YOUR SATISFACTION. LAWYER.....Evenings till 9.

"FOR results see me; reliable, experienced; successful; accident, family troubles, all cases, consultation free. Call or write. LAWYER.

"LAWYER (American), highest standing; consultation free; notary public. .....Sundays, evenings till 9."

Answer: In the opinion of the committee, all of the advertisements appended to Question No. 45 are improper.

"The ethics of the legal profession forbid that a lawyer should advertise his talents or his skill as a shop-keeper advertises his wares." People v. McCabe, 18 Colo. 186, 32 Pac. 280, 19 L. R. A. 231, 36 Am. St. Rep. 270.

The first four are also objectionable because they seem to indicate a willingness to take all cases, irrespective of the merit of the cause; and the first three have the demerit of containing an impossible and therefore false and misleading guaranty of satisfaction.

Question 89: In the opinion of the Committee, is the following advertisement by a lawyer improper:

"Will handle a few deserving law cases without any fees except actual court costs and expenses. P. O. Box ———"?

Answer: In the opinion of the Committee the advertisement is improper. Such solicitation of employment, whether gratuitous or not, is derogatory to the dignity of the profession, and too readily opens the door to imposition. The Committee again calls attention to Canon 27 of the Canons of Ethics of the American Bar Association.

Question 115: An attorney has directed the attention of the Committee to the following advertisement:

"Publicity
of the right sort for Lawyers and
their Clients.

"All services confidential.

"Address Box ——, this office."

and asks:

"Does not this ask lawyers to engage in practices directly contrary to the Rules of Ethics?"

Answer: Notwithstanding the advertisement mentions "publicity of the right sort," it is the opinion of the Committee that the adoption of such methods suggests the promotion of the improper discussion of pending litigation and the improper puffing of lawyers—in direct contravention of the recommendation of Sections 20 and 27 of the Canons of Ethics of the American Bar Association.

[Note: The Committee is advised that the advertisement has been voluntarily discontinued, upon this criticism of its import.]

Question 58: It seems to be the prevailing practice for Patent Attorneys to run cards in their local papers, somewhat as follows:

"PATENTS

"Richard E. Roe secures U. S. and Foreign Patents. . . . Bldg. . . ."

"PATENTS

"Richard E. Roe, formerly Examiner U. S. Patent Office. Patents, Trade-marks, Copyrights, . . . Bldg. . . ."

Does the committee deem this proper professional practice?

Answer: In the cards quoted, the advertiser does not describe himself as an attorney or counsellor at law. Patent attorneys are not necessarily attorneys at law, though attorneys at law may be patent attorneys, that is to say, either solicitors of patents or advisers in respect to patent matters. The committee sees no impropriety in the advertisements, even though the advertiser is an attorney at law. (See Answer No. 65.)

Question 65: I ask the opinion of the committee upon the propriety of the following form of advertisement of a Patent Attorney, who is an attorney at law:

"Dear Sir:

"You need my services while I, in return, need your business.

"The manufacturer who would lead his competitors, and stay in the lead must protect, by patent, all improvements he may make in his machinery of production, and also in the particular articles which he produces. Such patents must be as broad and comprehensive as the present state of the art of his particular line will permit, otherwise he will not be properly protected.

"While not the only one, I do claim that I can secure you protective patents on your inventions.

"If you have no consulting attorney in these matters, permit me to suggest that now is the time to supply that deficiency.

"You will find a patent attorney useful, not only when you have some improvement to patent, but also when you see some patented device which you would like to manufacture. That is where the knowledge of a skilled patent attorney will be invaluable to you in advising whether you can manufacture with impunity or not; or in suggesting slight changes in the patented article whereby the patent can be avoided.

"My references, which will be furnished upon request, are of the highest character, and my services are engaged by some of the largest inventors in the country.

"Trusting to hear from you in the near future and to be given an opportunity to show the worth of my services to you.

"Very truly yours,"

Answer: In the opinion of the committee, it is improper for any attorney to advertise in the form stated in the question. The ethics of the legal profession forbid that a lawyer should advertise his skill as a shopkeeper advertises his wares. The committee again calls attention to Canon 27 of the American Bar Association, regarding the solicitation of professional employment. * * * (See also our answer to Question No. 58.)

ADVERTISEMENT BY ATTORNEY CONCERNING SEPARATE LOAN-BROKERAGE AND REAL-ESTATE BUSINESS CARRIED ON BY HIM. N. Y. Committee. *Question 114:* In the opinion of the Committee is there any professional impropriety in a lawyer, while in active practice, also carrying on a loan-brokerage and real-estate business, and advertising such business, stating that the advertiser has money to loan and property to sell?

Answer: In the opinion of the Committee, a lawyer should always conduct himself, in all of his undertakings, with due observance of the standards of conduct required of him as a lawyer. The carrying on of a loan-brokerage and real-estate business by a lawyer, while in active practice, is not, in the opinion of the Committee, condemned

by any accepted standard in the profession in this country. Since, for the reason stated, the carrying on of the business cannot be condemned, the advertising of the business is not essentially improper, if the advertisement be in such form as to avoid the interpretation that it is a solicitation of professional employment, or the solicitation of business or employment because the advertiser is a lawyer. The Committee, however, does not favor the practice described in the question, because in its opinion such practice has a tendency to lower the essential dignity of the profession.

ADVERTISING—IN LEGAL JOURNAL—SOLICITING EMPLOYMENT BY LAWYERS. N. Y. Committee.

Question 83: Is it ethical for a lawyer who is an expert in the preparation of briefs to put a card in a legal journal announcing his preparedness to do special work of this kind?

Answer: In the opinion of the Committee, there is no impropriety in a lawyer's offering his assistance as a brief-writer to other lawyers in the manner stated.[7] But see Answers to Questions 36, 46, 58 and 65; and Number 27, Canons of Ethics of American Bar Association.

Question 96: In the opinion of the Committee would there be professional impropriety in a member of the bar addressing a circular letter or printed announcement card to members of the bar advising them that he is both a member of the bar and a certified public accountant, and offering his services to them in matters of legal accounting, such as the preparation and trial of cases requiring a knowledge of account-

[7] ADVERTISING—IN PROFESSIONAL JOURNAL—SOLICITING EMPLOYMENT BY ATTORNEYS.—N. Y. Committee. *Question 105:* In the opinion of the Committee is there any professional impropriety in an advertisement inserted in a local law journal and couched in the following terms:

"*A New Departure in Consultation Practice.*

"As an experiment, until this notice is withdrawn or modified, will, to the best of my ability, without special research, furnish to attorneys of the state of ————, as hereinafter noted, answers (signed by me) to questions as to the law of the state of ————, to aid in either office or court work.

"All questions must be impersonal and presented in duplicate, one to be made part of and so returned with answer.

"No citation of authority given unless called for in question and then charge will be doubled, and, if either discussion of authority or authority pro and con called for, charge will be trebled.

"Oral conference, either before or after answer, will increase charge one-half. Charge for each answer without citation of authority or oral conference, not less than five or more than ten dollars.

"Right to decline to answer any question reserved.

"*(Name.)* *(Address.)* *(Telephone number.)*"

Answer: The Committee has disapproved a somewhat similar appeal made in the form of a letter to members of the bar (Question No. 46). The proposed unsolicited offer of professional services published in a law journal appears to the Committee to be quite as objectionable.

ing practice, enumerating by way of suggestion to them various classes of cases arising in their practice in which he considers that he may assist them with advantage because of his knowledge of the theory and practice of accounts?

Answer: In the opinion of the Committee there would be no professional impropriety in a member of the bar addressing a printed announcement card to members of the bar, advising them that he is both a member of the bar and a Certified Public Accountant; but the addition of the other matters stated in the question seems to the Committee to be objectionable.

ADVERTISEMENT BY CORPORATION OF NAME OF LAWYER AS ITS PROFESSIONAL ADVISER. N. Y. Committee. *Question 47 VIII:* (*a*) Is there any impropriety in an attorney permitting his name to be advertised as attorney or counsel in connection with a corporation's, bank's, trust company's, or re-organization or creditors' committee's announcement of its purposes by advertising in newspapers or circulars or upon its letter-heads?

Answer: No; provided the particular form of advertisement is not otherwise objectionable. It is obvious that the re-organization committee, the corporation, the bank or trust company may depend in part in its appeal for public confidence and business on the standing and reputation of its professional adviser; so also in the case of creditors' committees either in a re-organization plan or in the request for co-operation among creditors, the name of the attorney by whom the proceedings in aid of the creditors will be conducted is often the determining feature in the decision of the creditor as to whether or not he will co-operate. On the assumption, therefore, that the attorney is not the moving party in the advertisement of his name, we think it would be unreasonable to answer this question in the affirmative.

(*b*) Is there any impropriety in an attorney permitting his name to be announced as attorney or counsel for a trade organization or association upon its stationery?

Answer: No.

ADVERTISING NAME IN LIST OF LAWYERS AND COLLECTION AGENCIES. N. Y. Committee. *Question 47 IX:* (*a*) May A. B., a lawyer, having a commercial law practice, pay a fee to M. N. O., a list made up of lawyers and in which collection agencies appear, for the privilege of having his name appear upon such list?

Answer: Yes, provided the form of the announcement is not otherwise objectionable (see I (b)); provided also that the amount he pays to M. N. O. is not determined by the amount realized by A. B.

(*b*) Does it make any difference as to its professional propriety, that

the list is used exclusively for and by lawyers, or is intended to be circulated also among laymen?

Answer: No.

(*c*) Does it make any difference as to its professional propriety, that the charge of the list varies according to the amount of business received by the lawyer through such a list?

Answer: Yes, since it necessarily involves a division of the lawyer's professional fees, in consideration of the securing of employment for him by the person with whom he divides his professional fees.

(*d*) Does it make any difference that the list in connection with its publication or circulation maintains a complaint department at its own expense, adjusting differences arising out of charges earned or claimed, and issues for each representative in the list a surety company bond guarantying the faithful performance of his duty?

Answer: Yes. It is derogatory to the essential dignity of the profession for a lawyer to seek employment by offering, or permitting another to offer, a bond to guarantee his honesty or efficiency.

(*e*) Does it make any difference as to professional propriety, that the list is confined wholly to lawyers, but managed for profit, and restricted in each town to such firms or individuals as are approved by the managers, assuming, also, that the managers in good faith, seek only to put into the list competent and trustworthy lawyers, and make their decision only after careful investigation concerning the lawyer?

Answer: No.

USE OF FIRM NAME CONTAINING NAMES OF DEAD AND RETIRED MEMBERS AND OF A FORMER MEMBER NOW ON THE BENCH. N. Y. Committee. *Question 67:* A., B., C., D., E., and F. are members of the bar, practicing under the firm name of A., B., C. & D. After many years of large and successful practice, there comes a time when A. dies, B. retires and C. enters a judicial office, which disqualifies him from practice.

May D., E., and F. continue to practice in the firm name of A., B., C. & D., by filing a certificate under the co-partnership laws, or otherwise?

Of course, the practice of the law has its business aspects, but may it be treated thus as a business rather than as a profession, or the exercise of a personal privilege?

Is an appearance by such firm an appearance by "attorney" within the meaning of section 55 of the Code of Civil Procedure? Is practice by such a firm consistent with the other provisions of the Code and of the Judiciary Law regulating attorneys?

Answer: This inquiry includes questions of law, as to none of which this committee expresses any opinion (but see Matter of Kaffenburgh,

188 N. Y. 49 [80 N. E. 570]). Dealing with the question of professional propriety only—

1. In the opinion of the committee, it is improper for lawyers to continue to practice under a firm name which contains the name of a former partner who has been elevated to the bench, unless the name of such former partner is also that of one of the continuing members of the firm. A Justice of the Supreme Court or a Judge of the Court of Appeals, and (in certain counties) a County Judge or Surrogate, is forbidden by the constitution (article 6, § 20) to practice law himself, and his former associates should not, therefore, practice in his name. Were there no constitutional impediment, the criticism likely to be evoked by such a course is sufficient cause to disapprove it.

2. In the opinion of the committee, and in view of many well-known instances, there is no impropriety in the continued use by surviving or continuing members of a legal co-partnership of a firm name which contains the name of a deceased or retiring partner, provided the provisions of the Partnership Law [Consol. Laws, c. 39], if applicable, are complied with, and provided, further, that there are no special circumstances, such as the disbarment of the retiring partner or his elevation to the bench which would make such a course improper.[8] (See Matter of Kaffenburgh, 188 N. Y. 49, 80 N. E. 570.)

[8] "The next professional ethics case which came before the Board involved the propriety of the retention in the firm name of that of an incumbent of judicial office. We recognize it to be permissible to retain in the firm name that of a deceased partner (with the consent of his widow and heirs), and this custom was urged in this case as an analogous precedent. The distinction between the two cases seemed to us, however, to be too plain for discussion, and we were unanimous in our opinion that the propriety of such a course could not be justified. Lest any injustice should unwittingly be done, it is fair to say that no improper motive is to be attributed to the gentlemen involved in this inquiry. The senior member of this firm had an entirely honest, but we believe exaggerated, notion of the great financial loss which would result from the abandonment of the use of a name which had become well known to commercial lawyers in this country and abroad for more than twenty-five years. The personal relations of the members of this firm had been such that the junior, upon his election to the bench, did not feel at liberty to deny his senior the right to continue the use of the old firm name, although the partnership relation was wholly terminated. It will therefore be observed that no question of bad faith or wrongdoing was involved, but merely a question of professional propriety. We could, however, do no less than to record our matured and deliberate convictions against the justification of such a practice under any circumstances, with the hope that our views might commend themselves to the parties interested, and we have been gratified by their manifest desire to conform so far as possible with the principles for which we have contended. The position of a judge is such that there should be no semblance of business relationship between himself and any practicing lawyer, even though the lawyer refrains from the trial of cases before such judge."—Edgar Bronson Tolman, President, in *Chicago Bar Association's Annual Reports* (1912) pp. 4, 5.

ADVERTISEMENT BY LAWYER'S CLERK. N. Y. Committee.

Question 49: I have in my employ a clerk of mature years, who wishes to have cards printed showing that he is connected with my office. He has submitted to me a draft of such a card in the following form:

"A..... B.....
"With C..... D.....
"Counsellor at Law
"(address)
"(telephone)"

In the opinion of the Committee would such a card convey the impression that I am holding out this clerk as a lawyer, or is it, in the opinion of the Committee, objectionable for any other reason?

Answer: The Committee is not advised of any valid reason why the clerk, not being admitted to the bar, should use a card referring to the attorney; and it appears to be beneath the essential dignity of the professional position of the attorney to permit its use, while likelihood of its abuse seems obvious.

Question 79: A young man, intending to apply for admission to the Bar, but not yet having taken the examination, has a position as a law clerk in the office of a firm of attorneys. The young man and the firm wish his friends to know where he is and that he holds an important position in the office, believing it to be possible that some legal business may follow him into the office.

Under these circumstances, is it proper that the name of the young man should appear upon the office door, underneath and separated from the names of the firm and the partners, there being nothing on the door to indicate that the firm is a law firm or practicing law? The young man's name does not appear upon the stationery.

Answer: In the opinion of the committee, the placing of the young man's name upon the door under the specific conditions of the question and with the purpose indicated, would seem to be objectionable. It is not proper for members of the bar even to aid in misrepresenting any occupant or employé in the office as being a member of the bar.

SECTION 2.—OTHER SOLICITATION OF EMPLOYMENT

A. B. A. CANONS.

27. ADVERTISING, DIRECT OR INDIRECT. * * * The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, 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.[9] It is equally unprofessional to procure business by indirection through touters of any kind,[10] whether allied real estate firms or trust companies advertising

[9] "The basis of the relationship between lawyer and client is one of unselfish devotion, of disinterested loyalty to the client's interest, above and beyond his own. Let the lawyer seek you for his own profit and you despise him."—Julius Henry Cohen, *The Law: Business or Profession?* (1916) p. 197.

"One day a woman walked into my office, a stranger, without any letter of introduction, and wanted me to defend her in a suit. I asked her how she had come to me? She replied to the effect that she had seen my name somewhere. I told her this was a very poor way to select a lawyer, that she had no guarantee whatever that I would serve her either faithfully or well, and as she ought not to take me, I could not take her, without inquiry, and she must therefore bring me a letter of introduction. * * * The business of advising another man is a delicate and responsible matter. If I volunteer my advice, if I proffer my services, if I push myself upon your attention, what guarantee have you that I am worthy of confidence? * * * The lawyer should be sought by, and not a seeker of, the client."—John Brooks Leavitt, on *Lawyer and Client*, in *Every Day Ethics* (Yale University Press, 1910) pp. 44, 45.

[10] "In many kinds of business the public is accustomed to see honorable men soliciting business, and there is too great a tendency to think that what can be done by A. may legitimately be done by B., no account being taken of the difference in the character of their respective occupations. To solicit one to begin a suit is not only to solicit business relations between the lawyer and the person sought for a client, but further to urge a course of conduct which may materially damage a third person. Every owner of a right of action should be left to take the initiative in determining this matter for himself."—10 Law Notes, at page 45.

For an extreme case of solicitation in various ways by a lawyer engaged in the collection business, see In re Schwarz (Sup.) 161 N. Y. Supp. 1079 (1916). The court, Clarke, P. J., writing the opinion, said of one circular in which the lawyer spoke of "the prominent position I occupy in the commercial world for being the most successful Commercial Collections Attorney," and of "my Gibralter-like organization," etc., that "the foregoing reads like the advance bills of the late P. T. Barnum in heralding the approach of the Greatest Show on Earth." On page 1083 of 161 N. Y. Supp. the court said: "It is impossible to reproduce in a written opinion the visual effect of the letters, circulars, folders, articles, and advertisements submitted for our inspection, and of necessity imperfectly set forth herein. They are typical of modern advertising business methods, and would be appropriate to the exploitation of patent medicines or other proprietary articles, but are utterly abhorrent to professional notions or standards. Unless the ancient and honorable profession of the law, whose practitioners are officers of the court of the highest fiduciary char-

to secure the drawing of deeds or wills or offering retainers in exchange for executorships or trusteeships to be influenced by the lawyer.[11] * * *

28. STIRRING UP LITIGATION, DIRECTLY OR THROUGH AGENTS. It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so.[12] Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital attaches or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services. A duty to the public and to the profession devolves upon every member of the Bar, having knowledge of such practices upon the part of any practitioner, immediately to inform thereof to the end that the offender may be disbarred.

7. * * * Efforts, direct or indirect, in any way to encroach upon the business of another lawyer, are unworthy of those who should be brethren at the Bar;[13] but, nevertheless, it is the right of

acter, under obligations of service to the state, to the community, and to the court, is to be degraded to the rank of a quack medicine business enterprise, the advertising and business solicitation methods here under review must be emphatically and absolutely condemned."

[11] See note 2, ante.

[12] "'Discourage litigation' was his [Lincoln's] advice to lawyers. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser—in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of becoming a good man. There will always be enough business. Never stir up litigation. A worse man can scarcely be found than one who does this. Who can be more nearly a fiend than he who habitually overhauls the register of deeds in search of defects in titles, whereon to stir up strife and put money in his pocket? A moral tone ought to be infused into the profession which should drive such men out of it."—Frederick Trevor Hill, *Lincoln, the Lawyer* (1906) 102, 103.

[13] "Beware of unfair rivalry in the business. In these days of warm competition, you are often tempted to forget the proprieties. I was going down Dearborn avenue some years ago and I met a leading lawyer, who seemed to be in low spirits. I said 'What is the matter with you this morning?' 'I was just thinking,' he replied, 'how mean some men are in our profession. An honest and successful lawyer, who has a very fine practice, has just stooped to a mean trick at my expense. A client of mine, a very rich man, died; the notice of his death appeared in the paper; he left a considerable estate. But I got no notice to take care of it and I was much puzzled. Of course it was not for me to offer my services. But a few weeks after the death I was at Graceland Cemetery, and by accident I came to the grave of this former client of mine. There I saw a number of floral decorations which had been placed about the coffin; and the greatest and largest piece had the profession-

any lawyer, without fear or favor, to give proper advice to those seeking relief against unfaithful or neglectful counsel, generally after communication with the lawyer of whom the complaint is made.

DR. JOHNSON ON THE PROPRIETY OF SOLICITATION OF EMPLOYMENT BY A LAWYER. James Boswell, *Life of Samuel Johnson, LL. D.* (Everyman's Library, 2 Vol. Ed.) Vol. 1, pp. 607, 608: (A. D. 1776, Ætat. 67.) When we had talked of the great consequence which a man acquired by being employed in his profession, I suggested a doubt of the justice of the general opinion, that it is improper in a lawyer to solicit employment; for why, I urged, should it not be equally allowable to solicit that as the means of consequence, as it is to solicit votes to be elected a member of Parliament? Mr. Strahan had told me that a countryman of his and mine, who had risen to eminence in the law, had, when first making his way, solicited him to get him employed in city causes. *Johnson*—"Sir, it is wrong to stir up lawsuits, but when once it is certain that a lawsuit is to go on, there is nothing wrong in a lawyer's endeavoring that he shall have the benefit rather than another." *Boswell*—"You would not solicit employment, sir, if you were a lawyer." *Johnson*—"No, sir; but not because I should think it wrong, but because I should disdain it." This was a good distinction, which will be felt by men of just pride. He proceeded: "However, I would not have a lawyer to be wanting to himself in using fair means. I would have him to inject a little hint now and then, to prevent his being overlooked."

COMMISSIONS OR PRESENTS FROM BARRISTERS. Statement of the General Council of the Bar, *The Annual Practice* (1917) p. 2414: Any Barrister who gave any commission or present to any one introducing business to him would be guilty of most unprofessional conduct, which would, if detected, imperil his position as a Barrister.[14] An. St. 1899–1900, p. 6.

al card of this particular lawyer attached to it. On sending over to the Probate Court, moreover, I found the man had charged it to the estate.' The sequel was that the lawyer that sent that floral decoration was afterwards sent to the penitentiary. I shall not deduce from that that every lawyer who gives a large floral decoration to a rich man's widow is going to be sent to the penitentiary. But I do warn you against that method of getting practice. I preach to you here that the only sure way of advancement is a close application to any and all legitimate professional work. The rest will take care of itself. Each piece of honest professional work breeds more clients."—Frank J. Loesch, *The Acquisition and Retention of Clients*, 1 Ill. L. Rev. 455, 467, 468.

[14] In Canada, though each lawyer is usually both barrister and solicitor, there is a practical division in the profession, as some lawyers are mainly

FEES TO BARRISTERS' CLERKS. Statement of the General Council of the Bar, *The Annual Practice* (1917) p. 2418: The clerk of Mr. A. informed the clerk of Mr. B. that the latter (Mr. B.) had received a certain brief on circuit because he had recommended the Solicitor to send it to Mr. B. (as was the fact), and suggested that Mr. B. should give him the clerk's fees which he would have received on it had Mr. A. been on the circuit, and so able to accept the brief. Mr. B., considering that such a practice might lead to serious abuses if it were countenanced, requested a pronouncement of the Council on the matter. The Council expressed the opinion that the practice referred to is absolutely improper. An. St. 1904–05, p. 11.

BARRISTER ENGAGING IN BUSINESS. Statement of the General Council of the Bar, *The Annual Practice* (1917) pp. 2413, 2414. A practising Barrister should not as a general rule carry on any other profession or business, or be an active partner in or a salaried official or servant in connection with any such profession or business. There are undoubtedly exceptions to this general rule. Financial business is not an exception to the general rule. A practising Barrister should not actively associate himself with the carrying on of a financial business (e. g. the issuing of Government loans) for a salary or for other payments varying with the amount of financial business done. There is no objection to a practising Barrister acting as an ordinary director (i. e., not a managing director) of companies of good standing, carrying on a business which is free from anything of a derogatory nature. There is a great difference between the usual work of ordinary directors in the privacy of a board-room and the active carrying on or management of a business. On the other hand there are grave objec-

barristers and some mainly solicitors. Under such circumstances it might be expected that a barrister-solicitor called in as counsel might on occasion steal the client. But the Honourable William Renwick Riddell, Justice of the Supreme Court of Ontario, in an address delivered before the Chicago Society of Advocates in 1914 said:

"I have never heard it so much as suggested that any counsel ever stole a client and I cannot think that such a thing could ever take place. The brief is brought or sent to counsel by the solicitor himself. If the client brings it, he must bring either the solicitor or a letter from him. The client cannot in the first instance be so much as seen without the solicitor's consent, and the solicitor is always kept informed of everything that is being done with or for his client. The client is sent back to the solicitor; no counsel would directly or indirectly accept as a client of his own one sent to him by a solicitor. If any counsel were ever to come under suspicion of such improper dealings, his practice would dwindle to the vanishing point. If it were proved against him, he should be suspended or disbarred."

In 29 Scottish Law Rev., at page 66, it is noted that the benchers of the Inner Temple in London suspended a young barrister from practice for three years because soon after being called to the bar as a barrister he wrote to the clients of the solicitor of the barrister with whom he had been studying, asking them to send him work.

tions to a practising Barrister taking part in negotiations and arrangements with financial houses and visiting other persons, firms, or companies, as the representative of any financial house. Such conduct on the part of a practising Barrister would not accord with the principles which should regulate the conduct of a practising Barrister in relation to his profession as such, and would clearly be contrary to professional etiquette. An. St. 1914, p. 19.

KING OF GRAYES INN v. LAKE.

(Court of King's Bench, 1671. 2 Ventris, 28.)

Action for that whereas he was bred up to the law and practised it, and had many persons of honour and others his clients, and thereby got money and maintained his family, &c. The defendant, falso & malitiose wrote a letter to Anne Countess of Lincoln, who was plaintiff's client, containing that the plaintiff would give vexatious, and ill counsel, and stir up a suit, and that he would milk her purse and fill his own large pockets, &c., per quod he lost the said countess and other clients. Upon not guilty pleaded and a verdict for the plaintiff, it being moved in arrest of judgment, Wylde, Archer and Tyrrell, held that the action lay; 'tis a scandalous letter concerning his profession, and here is a special damage: he does give bad counsel, spoken of a lawyer, judged actionable; so Dunce stirring up suits is taken in malam partem.[15]

VAUGHAN, Chief Justice. I must submit to the rule given, but am of another opinion. * * * The words spoken here have no more relation to the plaintiff's profession, than to say of a lawyer he hath a red nose, or but a little head. * * * 'Tis said he stirred up a vexatious action, so does a counsel when he advises an unsuccessful action; for the party is amerced pro falso clamore. He will milk your purse, taken enunciatively, signifies no more than milking a bull; the phrase is not come to an idiom. So of filling his pockets; these words might have been spoken of the law, and indeed they are spoken of the thing, not the man or his practice: dunce, corrupt, &c., concern the profession; but these words are applicable to any. If he had said, he were not a good fiddler, would that be actionable?

[15] "It is quite clear that barristers and physicians may sue for words touching them in their profession, although their fees are honorary. The loss of a gratuity is special damage."—W. Blake Odgers, *Libel and Slander* (2d Ed.) *75. On imputations upon lawyers as libel or slander, see Ann. Cas. 1912A, 376, note.

In re A SOLICITOR.

(Court of Appeal, [1915] 1 Irish, 152.)

Motion.

This was an application on behalf of the Incorporated Law Society of Ireland to the Lord Chancellor to make such order as he should think fit upon the report of the committee of the council of the Society appointed under sect. 34 of the Solicitors (Ireland) Act, 1898.

O'BRIEN, L. C. * * * Now, the real offence which is charged here is with reference to a letter which was written by the respondent on the 26th October, 1914. It is marked "private," and it was sent to the Irish Vehicle Owners' Accident Company in College Green. I should say that what is popularly described as the offence of "touting" was charged against the respondent here; and the Incorporated Law Society find that there is no evidence against him on which they should hold that he was guilty of any such offence as touting, and he is entitled to have that emphasized in his favour. The other charge, however, this the Incorporated Law Society insists amounts to professional misconduct, arises not so much in consequence of the letter itself, but in consequence of the suggestion contained in the letter by reason of the incorporation of four documents which were enclosed in it. The letter says: "Please accept my thanks for your courtesy. I am solicitor for thirty-two insurance companies; and when I find that any other company is involved, I always make it a point to save the respective companies from litigation, and this is always appreciated by my clients. Take a look at enclosed and return to me; they will give you some idea of the man you are corresponding with." A photograph of the respondent was also enclosed. Much of this letter represents a method of advertisement tolerated in other and newer countries; but I think it unhappy, and not deserving of imitation. Nor should I imagine that it is consistent with the view we in this country entertain of the professional status of a solicitor. At the same time opinions may differ with regard to that question; and there is a certain amount of advertisement which a solicitor may consider right to indulge in which might not amount to professional misconduct, although the better feeling of the majority of the profession might greatly condemn it as not being seemly or proper. This case, however, I regret to say, does not, in my judgment, fall within that possible class of case, because I think that the effort to obtain a retainer from this particular company was connected with representations which, on the true facts, were most improper to have been made by the respondent.

In the first place, it is suggested as a ground for employing him—because that is what it comes to—that he is a justice of the peace. He is not a justice of the peace, and he never was a justice of the peace. He also suggests that he is the solicitor in Ireland to the Official Solicitor, England, to the Board of Trade (Companies Department), to the Official Receiver in Bankruptcy, to the Public Trustee,

and to the King's Proctor. He occupies no such official positions, though it is only fair and just to him to say that the evidence shows that from time to time he has been employed in Ireland as solicitor for one or other of those named public authorities. But that did not justify the representation which is contained in that document that he occupied this position of practically official solicitor to those bodies. That, however, might be passed over but for a very serious matter in connexion with two documents which are enclosed. One purports to be a testimonial by the Recorder of Dublin, bearing testimony to the high ability and character of the respondent—a matter that I will, in fairness to the respondent, say something on. That testimonial of the Recorder contains the statement: "He now practises before me regularly, so that I can speak with an intimate knowledge of his capabilities." That document was not obtained from the learned Recorder for any purpose except in connexion with an application which the respondent was making for some public employment; and to use it for the purpose of obtaining business from even one client, containing as it did the statement that "he now practises before me regularly," to my mind constitutes upon the part of the respondent the very gravest professional misconduct. In addition to that, he utilized a letter which was given to him by the Recorder of Belfast, stating that he continued to act as solicitor for himself and relations, that whilst associated with him as registrar he had the best opportunities of studying his character, and that he was a man of great industry and geniality and so forth. The use of this document is not in itself so reprehensible, as there is no suggestion that he was actually practising before the Recorder. But taking the two documents together, I can conceive them to have been used for no other purpose than to represent to the Irish Vehicle Owners' Accident Company that the position of the respondent, by reason of his relations with the Recorder of Dublin, by reason of his relations with the Recorder of Belfast, and by reason of his relations with the High Court—because there were three testimonials given for another purpose by three judges of the High Court—rendered it desirable in the pecuniary interests of the Company that he should be employed in the conduct of the business which, beyond all doubt, would bring him as a professional advocate before the learned Recorders of Dublin and of Belfast. To use those documents for any purpose other than that for which they were given by those learned judges was not only a matter of bad taste, but it was a matter that, I think, even in itself, verges very closely upon professional misconduct. But to use them for the purpose of obtaining business, which business might lead him to practise before those two judges, was clearly, in my judgment, professional misconduct within the definition which I have adopted.[16]

[16] "The third professional ethics case arose from the discovery that general letters of introduction and recommendation, addressed 'To whom it may concern,' and given by judges to lawyers, had been published and circulated.

Having, however, determined the offence of which the respondent has been found guilty, it is most desirable that I should say something with regard to his own position. It is not every fault that a man commits that makes it binding on a Court to inflict severe punishment; and, if the offence has been committed more through thoughtlessness than evil intent, that not only must be considered by the Court, but effect must be given to that consideration. Now I accept the statement which has been made here on his behalf by Mr. Hanna, whose skilful and judicious management of the case has largely impressed me, that the offence arose from thoughtlessness and not deliberate malice, and that the solicitor regrets what he did. Accordingly, the order I will make is one of leniency. That the respondent seems to be a gentleman of great ability—exceptional ability—exceptional industry, exceptional anxiety to do the work which his clients give to him, is manifest from the documents which are before me. But that in itself makes it more deplorable that he should have yielded, in is anxiety to procure more business, to methods which have to be condemned. * * * I entirely accept the excuses which have been made, but they are only excuses, and, accordingly, I must order that, while making no rule on the application, he must pay to the Incorporated Law Society all their costs and expenses of the proceedings which they have undertaken in connexion with the bringing of the case before this Court. * * *

Serjeant Matheson: The costs before the committee were Mr. Gerald Byrne's costs.

The LORD CHANCELLOR. He must indemnify Mr. Byrne, and the Incorporated Law Society.[17]

In re A SOLICITOR.

Ex parte THE LAW SOCIETY.

(King's Bench Division, [1912] 1 K. B. Div. 302.)

Report of the Committee appointed under the Solicitors' Act, 1888.

An application was duly made by C. H. Heddon, of 1, Station Bridge, Harrogate, Yorkshire, solicitor, that Arthur William Gilling, of 2,

Since these particular circulars were shown to have been sent only to existing clients of the lawyers so introduced and recommended, and since the judges probably had no idea how their recommendations were to be used, we did not feel at liberty to do more than pass a resolution, general in its terms, calling the attention of the judges to the inadvisability of giving general letters of recommendation to lawyers so couched as to be susceptible of use for advertising purposes in the solicitation of business."—Edgar Bronson Tolman, President, in *Chicago Bar Assoc. Annual Reports* (1912) p. 5.

[17] "A solicitor who directly by personal solicitation, or indirectly—whether through the medium of an assignee, trustee, collecting agency or otherwise—interferes with the professional relations subsisting between other solicitors, commits a gross breach of the etiquette of the bar."—M. H. Ludwig, *Practical Ethics of the Lawyer*, 29 Canadian Law Times, 253, 261.

Princess Square, Harrogate, solicitor, might be required to answer the allegations contained in an affidavit which accompanied the application, and that his name might be struck off the roll of solicitors of the Supreme Court, or that he might be suspended from practice as a solicitor, or that such order might be made as the Court should think right, on the ground that the matters of fact stated in the affidavit constituted professional misconduct on the part of the said Arthur William Gilling in his capacity of solicitor of the Supreme Court of Judicature in England.

The charges made were:

(1) That the respondent procured the formation of "Patten's Agency, Limited," being a company formed (inter alia) to undertake the recovery of debts for its subscribers, and that he did so with a view to its employment by him as an adjunct to his business as a solicitor.

(2) That whether the respondent procured the formation of the company or not, he, with the like view, from its inception financed and controlled it.

(3) That the respondent commenced and carried on certain actions for the recovery of debts placed in the hands of the company for collection upon terms which were champertous and improper.

(4) That the respondent by the agency of the company systematically solicited debt-collecting business, and that he did so without disclosing his connection with the company. * * *

A prospectus (dated 1910) issued by the company was, so far as material, in the following terms.

"PATTEN'S AGENCY, LIMITED, with which is incorporated the LONDON AND PROVINCIAL MERCANTILE ASSOCIATION.

"Established 1877.

"This association is one of the oldest of the many trade protection societies now existing in England.

"The objects of the society are as follows:

"4. To collect accounts for members at a nominal charge, and in cases of necessity to take legal proceedings for the recovery of the same with the least possible expense and trouble. . . .

"DEBT COLLECTING DEPARTMENT

"Applications for debts are made and commission is charged on the amount recovered only; viz., on amounts under £50., 2½ per cent.—not less than one shilling on any amount—and, on sums over £50., 2½ per cent. on the first £50., and 1¼ per cent. on the remainder.

"In all cases where legal proceedings have to be taken to enforce payment, the same commission is charged by the solicitor on the amount recovered, in addition to out-of-pocket expenses sanctioned by the members and not recovered from the debtor. In such cases where commission is due to the solicitor no commission is charged by the society.

"In unsuccessful cases, no charge is made either by the society or its solicitor, except for actual out-of-pocket expenses.

"The solicitor may be consulted by the members on all subjects affecting them as members of the association free of charge." * * *

DARLING, J. In this case an application was made that the respondent, a solicitor, might be required to answer certain allegations which were made against him by the applicant, who is also a solicitor. The Committee of the Law Society investigated the matter, and their findings are stated in the report which they made. Speaking for myself I think that the findings of the Committee are entirely supported by the evidence. The business which was carried on by Patten's Agency, Limited, was designed practically for the sole advantage of the respondent. He undoubtedly had a very considerable financial interest in it. Patten was merely a nominee of his, who held shares which were bought and paid for by the respondent, and held for his benefit. The shares were held and the agency practically existed for the purpose of bringing business to the respondent which he conducted as a solicitor. That is found by the Committee of the Incorporated Law Society to be professional misconduct. * * * I see no reason for coming to any other conclusion than that to which the Committee of the Law Society has come, namely, that that method of obtaining business is not such as this Court can possibly countenance, and that therefore the Committee was perfectly right in saying that with regard to that matter there was professional misconduct.

But there was something more. The terms on which the respondent conducted the business were such that they amounted to champerty in law. * * *

Now the respondent had a distinct interest in the amount which he would recover. His commission for bringing an action was to be governed, the percentage being fixed, by the amount recovered. It is perfectly plain, upon the uncontradicted facts which were laid before the Committee of the Law Society, that he tried to get the costs out of defendants in addition to the commission which he would receive from this debt-collecting agency, which was practically carried on in his own office, and with his own money. He would receive something from the plaintiffs, and what he would get from the defendants as well. That was champerty.

I therefore come to the conclusion that the respondent has been guilty of professional misconduct in every respect in which the Committee of the Law Society have found him guilty of it. * * *

DARLING, J. The conclusion of the Court is that the respondent has been guilty of professional misconduct, and with regard to his punishment we have been told that he is not at this moment practising, having disposed of the business which he had. But apparently he has still a certificate with which he might practise. There is nothing before us to shew whether he has finally retired from practice or not, and

we think that it should be put out of his power to practise for some time, even should he desire to do so. The order of the Court is that he be suspended for twelve months and pay the costs of the inquiry and of this motion.

Order accordingly.[18]

SOLICITATION WHERE LAWYER CONDUCTS A COLLECTION BUSINESS. N. Y. Committee. *Question 47 I: (a)* May A. B., a lawyer, conduct either in his own name or under some trade name or title a collection business, the following being assumed as the method of doing business: Advertisements or cards are inserted in publications, and *letters sent to merchants, in which it is stated that the concern is engaged in a general collection business and solicits accounts for collection; solicitors are employed to visit merchants to solicit their collection business;* the clerks employed in the business are paid fixed salaries; all of the profits go to the attorney; and the latter attends to professional matters arising out of the business within his own territory; the concern sending to other attorneys practicing therein such matters as arise outside of A. B.'s territory.

Answer: No. This plan unites the practice of a profession with the conduct of a business which involves the solicitation of professional employment; the essential dignity of the profession requires that general solicitation of professional employment should be avoided.

(b) Does it make any difference in the answer if the matter underscored in the previous question is omitted from the hypothetical case?

Answer: Yes. There is no reason why the lawyer may not make a specialty of collections as a part of his professional activities; he should not however, cloak his identity under a trade name or title; he should practice his profession either in his own name, or in association with some other lawyer or lawyers whose names may be used to identify the association. If his announcements are inserted in publications, they should conform to the provisions of Canon 27 of the American Bar Association, approved by the New York State Bar Association; that is, they should consist of a simple professional card, and he should not in any other way generally solicit professional employment.

[18] "Is there any conceivable difference between employing 'John Doe,' your own clerk, as a runner for business, and employing 'John Doe, Inc., Collection Agency,' for the same purpose? * * * The collection agency as a means of collecting moneys from delinquent debtors by dunning, or in performing other service not involving the service of a lawyer, has a legitimate place in commercial life; but when it indulges in 'touting' for a lawyer or trading in a lawyer's service, it breaks down the standards of the profession essential to the preservation of credit itself."—Julius Henry Cohen, *The Law: Business or Profession?* (1916) pp. 227, 228.

SOLICITATION BY LETTERS SENT OUT BY A CLIENT WITH THE CONSENT OF THE LAWYER. N. Y. Committee.

Question 4: An inquirer submitted the letter given below, and asked in substance whether it is proper professional practice for a lawyer to procure business through the systematic efforts of a client, at the instigation of the lawyer, by means of letters sent out by the client in behalf of the lawyer, urging the employment of the latter by other persons engaged in the same business as the client.

"Dear Sir: For some time past our entire legal business has been handled by the firm of A. B. & C., who act as our attorneys and general counsel on a very moderate annual retainer. Our relations with this firm have been so agreeable and their services and terms so satisfactory to us that we have decided to bring their plan of legal service to your attention, in the hope that we may thereby aid them to increase their clientele.

"Under our contract with this firm all our legal work, however large or small, is promptly and efficiently cared for, and we have the privilege of consultation and advice at all times, either at their office or our own. Their retainer is divided into quarterly instalments, payable at the end of each quarter-year. In this way our legal work becomes practically a fixed charge and may be anticipated among other operating expenses. This feature, as well as the promptness, efficiency and convenience of the service, the low cost and the business-like methods pursued, appeals to us very strongly and we feel that other business men would gladly avail themselves of the services of this firm, if these advantages were pointed out. In fact, we are advised that within the past year some twenty-five large firms and corporations have retained this firm on a similar basis. They employ a competent staff and their offices are among the largest and best equipped in the city. The firm is made up of four comparatively young men, each of whom is thoroughly experienced, capable and energetic.

"It would afford us satisfaction if by this means we can put them in touch with another client, and we would appreciate it very much if you would take the trouble to arrange an interview at your office with a member of their firm.

"Yours very truly, _____."

Answer: That in the opinion of the Committee such a practice is not proper.

Question 47 III: (a) May A. B. take a retainer from G. H., an organization of business men, to perform such legal services as G. H. may require as its attorney, and also to attend to such legal matters as the members of G. H. shall refer to A. B., G. H. urging and soliciting its members to place in A. B.'s hands for reference to A. B. all matters involving collection of accounts, or involving the representation of creditors in bankruptcy proceedings, upon the ground that by

co-operation in the handling of debtor's affairs, members interested will profit?

Answer: We assume, of course, that the lawyer's retainer by the association leaves him free to follow his own conscience. The committee sees no impropriety in the course suggested, provided that G. H. is a bona fide organization formed by its members for their own benefit, is not engaged in a regular business of collecting accounts of non-members for profit and it is the actual interest of the organization which prompts its solicitation, and provided the plan is not merely a cover for the solicitation of business by the attorney. The practice of the solicitation of professional employment by a lawyer is to be condemned, no matter what device may be resorted to as a cover or cloak; indeed, the adoption by him of a cover or cloak to conceal what if openly done would be professionally improper, merely intensifies the impropriety, for it adds deception to what would otherwise be an undesirable breach of the essential dignity of the office. * * *

(d) May G. H. in matters in which it desires the co-operation of creditors, not members of G. H., circularize such creditors, urging them to place their claims with G. H. or A. B. in order that A. B. may conduct such legal proceedings as may be necessary, it being assumed that it is for the best interests of creditors that such proceedings should be conducted?

Answer: Upon the assumption that G. H. does this not for the purpose of engaging in a general practice, but solely in the special case for the purpose of protecting the interests of its members, it may be done; the committee believes it would be preferable to have the proxies run to G. H. or an officer; if it be a device to enable A. B. to do indirectly what he could not properly do directly, it is to be condemned.

(e) Does it make any difference in the above situation whether A. B. performs the service for such non-members gratuitously or not?

Answer: If the interest of G. H. demands or justifies gratuitous services for non-members, or any other good reason in the opinion of A. B. so demands or justifies it, he is not required to charge for his services; but if it is a mere device to secure non-members as clients in other employment, it becomes a reward offered for employment, and therefore it is to be condemned for reasons already assigned.

Question 47 VIII: (c) Is there any impropriety in A. B., an attorney, permitting a trade organization for which he acts as attorney or counsel to solicit its members to consult A. B. upon such legal matters as require professional service, or to solicit the sending of claims for suit by members of the association to A. B.?

Answer: In general, we consider such solicitation improper; where, however, the collective interests of the members of the association require co-operation, it is not improper.

(d) Is there any impropriety in A. B. permitting a collection agency, doing a general collection business, including the solicitation of col-

lections but not legal business, to print upon its stationery and in its advertisements "A. B., attorney," or "A. B., counsel?"

Answer: No.

SOLICITATION BY LETTERS OF THE LAWYER. N. Y. Committee.

Question 14: "May I know whether in the opinion of your Committee it would be unprofessional for an attorney, who is the counsel for an association, to send out letters to a number of its members suggesting employment upon an annual retainer?"

Answer: In the opinion of the Committee it is desirable that such solicitation of business should be discouraged; the Committee deems it unprofessional.

Question 16: Is it the opinion of the Committee that members of the bar should not resort to the solicitation of business by means of a communication in the following form?

"Gentlemen:

"I would like to submit a proposition to take care of all your legal matters under a yearly contract at less than your collections alone now costs; in order to make a client of you.

"My method is now being used by many large reputable firms and corporations in this city to whom I would be pleased to refer you.

"I shall be pleased to call upon you and explain in detail.

"Very truly yours, A. B. C."

Answer: That in the opinion of the Committee such solicitation of business is improper.[19]

Question 46: In the opinion of the committee, would it be considered unethical for a lawyer to send the following form of letter to members of the bar with whom he has a personal acquaintance:

"Dear Sir:

"In the course of your practice, you occasionally are retained to prosecute actions to recover damages for injuries sustained through negligence. If you do not keep in close touch with the different decisions of the courts as they are handed down daily, you may experience difficulties in framing a proper complaint.

"If you will send to me a full statement of the facts in any of your

[19] In In re Hittson, 15 N. M. 6, 99 Pac. 689 (1909), a lawyer who had been retained to defend a client charged with murder sent the client some notes to be executed for attorney's fees, and followed the notes up with a letter in which he stated that the client had a pretty hard case and it would take some money to beat it, but that if the client would do as he told him he would bring him through, but the client must raise some money or fix up the notes. The client did not send the notes, but instead employed other counsel. The lawyer then wrote the client: "If you go to trial without me in your case I will bet you you hang. Will bet you the best suit of clothes made. You had better get busy." The court suspended him from practice for two years.

accident claims, I will draw the complaint for you, and a trial memorandum applicable to such case, and charge you for my services ten per cent. of the amount of the recovery or settlement. In the event of no recovery or settlement, no charge will be made.

"Trusting we may be able to do some business together in the near future, I am."

Answer: In the opinion of the committee, it is requisite that members of the legal profession should aim to preserve its dignity. They regard the direct and general solicitation of professional employment as undignified, for this reason, they disapprove the appeal for business suggested in the question; they also consider that such appeal might be construed as intimating a willingness to accept professional employment regardless of the merits of the case, which they also disapprove. The committee takes this opportunity to call attention to Canon 27 of the American Bar Association respecting the solicitation of professional employment. * * *

Question 47 V: (*a*) May A. B., an attorney representing some clients, creditors in XYZ, a bankruptcy proceeding, send a general circular letter to all creditors, informing them of his representation of some creditors, and urging them to place their claims and proxies in his hands, for the reason that co-operation is in the best interests of the estate?

Answer: No. The co-operation which is desired among the creditors to prevent fraud or to secure an efficient administration is the concern of the clients, as to which the lawyer may properly advise them; but he should avoid doing directly or indirectly anything that savors of such solicitation of employment.

(*b*) May he do this, if the circular letter instead of dealing generally, asks that such claim be placed in his hands if the creditor is not otherwise represented?

Answer: No. This does not eliminate the objectionable element of solicitation.

(*c*) May he do either (*a*) or (*b*) if his sole motive is to insure the complete protection of his immediate clients' interests?

Answer: No. His motive is immaterial; as his client's interests demand protection, the client or some other agent of the client may seek the co-operation, always provided it is not a mere device to solicit employment for the attorney.

Question 69: A., an attorney practicing in this city, writes to B., a judgment creditor of C., stating that he has information whereby he can collect a judgment of B. against C., and states in the letter that if he succeeds in collecting the judgment, he is to receive as his compensation a sum equal to forty per cent. of the amount collected, and if he fails to collect, then no charge is to be made against B. B. writes to A., stating that if he is not called upon to bear any part of the expense,

then A. may proceed. Without a written answer to the communication last mentioned A. proceeds to enforce the collection of this judgment.

May I take the liberty of asking the views of your committee on this transaction?

Answer: In the opinion of the committee the conduct of the attorney is improper in two aspects, namely: that he solicits the employment and impliedly agrees to bear the expenses.

ALPERS v. HUNT. (No. 12,801.)

(Supreme Court of California, 1890, 86 Cal. 78, 24 Pac. 846, 9 L. R. A. 483, 21 Am. St. Rep. 17.)

THORNTON, J. This is an action brought by the plaintiff, as assignee of William L. Bolte, against John Hunt, executor of the last will and testament of George F. Sharp, to recover a sum of money claimed to be due on a contract alleged to have been made by Sharp and I. C. McCeney with plaintiff's assignor. On the trial verdict and judgment passed for plaintiff. Defendant moved for a new trial, which was granted, and, from the order granting the motion, plaintiff appealed. * * *

Is the contract set forth in the complaint contrary to public policy or good morals? Such is the question presented to us for determination. That contract is in substance this: A third person, not an attorney and counselor at law, enters into an agreement with an attorney and counselor at law that he will procure his employment by a litigant, and that in consideration of such procurement he is to have from the attorney and counselor so employed, one-third part of whatever remuneration the attorney receives for his services from the litigant. Is such a contract void as contended, is the point presented for consideration and decision. Courts are justified in declaring a contract void as against public policy, when it is expressly or impliedly forbidden by the paramount law, or by some principle of the common law, or by the provisions of a statute. As said by Chase, C. J., in the License Tax Cases, 5 Wall. 469, 18 L. Ed. 497: "This court can know nothing of public policy except from the constitution and the laws, and the course of administration and decision." The policy of the state "can be ascertained only by reference to the constitution and laws passed under it, or, which is the same thing, to the principles underlying and recognized by the constitution and laws." Lux v. Haggin, 69 Cal. 308, 4 Pac. 919, 10 Pac. 674. Though public policy is a doctrine on which courts and judges should proceed with caution, still there are many cases to be found in the books of reports in which the doctrine has been applied. Marriage brokage bonds, contracts in restraint of trade, contracts by expectant heirs, or in consideration of illicit cohabitation, or such contracts as may injuriously affect the ad-

ministration of justice, or to procure a contract from a public officer, or to pay for an appointment to office, or aiding in procuring an appointment, or to pay for obtaining a pardon, or injuriously affecting the public interest as to the location of the terminus of a railroad, afford instances of the application of the doctrine. See 5 Rob. Pr. c. 42, pp. 407, 433, where many cases are cited and commented on. In considering this question, our attention must necessarily be given to the statutes of this state in regard to attorneys and counselors at law. * * * One of the causes for which he may be removed or suspended is the following: "Lending his name to be used as attorney and counselor by another person, who is not an attorney and counselor." Code Civ. Proc. § 287, subd. 4. * * *

Bolte was never an attorney and counselor at law. He had never been admitted to the privileges, or authorized to exercise the rights, of an attorney and counselor. He had never assumed or been authorized to assume any of the functions of an attorney and counselor, nor was he bound by the obligations of such a position. Now, if either of the attorneys who contracted with Bolte had lent to the latter his name to be used by him as attorney and counselor, he would have been guilty of a violation of the clause above quoted from section 287 of the Code of Civil Procedure, for which he would have been liable to be removed or suspended from the practice of his profession. Was not Bolte really allowed to use their names in the prosecution of a matter in litigation? Under the employment of them as attorneys, made through Bolte's procurement, they engaged to use their faculties as attorneys and counselors at law for his benefit, and that, too, in a cause in which he had no interest as a party. By the terms of the agreement he was to derive a benefit from the rendition of their services in their professional capacity, and to receive a share of their fee, as if he had been concerned with them as a regularly admitted attorney. He is thus enabled, through their agency, vicariously, and not openly and in his own name, to aid in the prosecution of a matter in litigation, and to receive through it such a reward as is usually gained by an attorney regularly admitted to exercise his profession. An attorney is prohibited to allow the direct use of his name as an attorney and counselor at law, under the circumstances disclosed by the complaint in this case. Of what avail is such prohibition, if it can be by such indirection as is practiced in this case evaded? We are of opinion that the facts here disclose a case of indirect violation of the clause referred to, which is as much forbidden as a direct violation. If such a practice were allowed, an attorney might have a number of undisclosed associates through his agency exercising the functions of an attorney and counselor, and reaping the rewards flowing therefrom, without resting under any of the responsibilities incident to such a position, and possessing none of the qualifications which the law demands and requires. Such a practice would tend to increase the amounts demanded for professional services. In such a case an attor-

ney would be induced to demand a larger sum for his services, as he would have to divide such sum with a third person.

We have examined Bunn v. Guy, 4 East, 190, and Candler v. Candler, Jac. 225, cited by counsel for appellant to sustain the validity of the contract sued on. We do not consider them applicable to the case before us. The office of attorney in England is entirely different from that of an attorney and counselor in this state. In England the fees of an attorney are fixed by statute, or rules of court, or orders in council, and his bill of costs and charges for disbursements are subject to be taxed by a taxing officer, and the taxation reconsidered by such officer. The decision of the taxing officer can also be revised by the judge on appeal. Weeks, Attys. §§ 324, 325, et seq. We cannot suppose that the fact that the attorney has to share the amount of his bill with an outsider, would at all affect the amount allowed him. That amount would be the same regardless of the circumstance that he was bound by his agreement to divide it with another. * * * It is clear that the right of the plaintiff to recover herein is the same as that of his assignor, Bolte. If the latter cannot recover, neither can the plaintiff, his assignee. * * * Order affirmed.[20]

[20] See Langdon v. Conlin, 67 Neb. 243, 93 N. W. 389, 60 L. R. A. 429, 108 Am. St. Rep. 643, 2 Ann. Cas. 834 (1903); Holland v. Sheehan, 108 Minn. 362, 122 N. W. 1, 23 L. R. A. (N. S.) 510, 17 Ann. Cas. 687 (1909).

"It is said that the law permits attorneys to solicit business and hence that there is no valid reason why they should not be permitted to pay agents to solicit business for them. But for nearly a century the [New York Statute] law has prohibited them from obtaining retainers by offering or giving any valuable inducements whatever to the desired clients themselves, for the plain reason that such conduct tends to stir up litigation which might not otherwise arise and because needless litigation has always been deemed a public evil. It is equally manifest that the employment of paid agents has the same tendency. Where, as in the case at bar, the remuneration of the agent depends upon the number of retainers he procures, the strongest motive exists on his part to incite the assertion and prosecution of claims that might otherwise never be heard of. Nor is there anything in the suggestion that the employment of paid emissaries is essential to the protection of the poor, who might not become aware of their right to prosecute remedies in the courts for wrongs which they may have suffered. The permission which the law now gives to attorneys to serve clients for a contingent fee is sufficiently well known throughout the community to enable any one, however limited his means, to secure adequate professional service in the enforcement of any meritorious claim in the courts. It is not necessary for the protection of the poor to sanction the practice which, as applied to negligence cases, under the name of 'ambulance chasing,' has brought deserved discredit upon those engaged in it; and in any event, if the views which have been expressed are correct, the law denounces the practice as criminal."—Bartlett, J., in Matter of Clark, 184 N. Y. 222, 233, 77 N. E. 1 (1906).

But in Chreste v. Louisville Ry. Co., 167 Ky. 75, 180 S. W. 49, 53 (1915), Clay, C., said: "There are many forms of solicitation. Some lawyers seek business by advertising in the newspapers; others by sending out announcement cards; others by asking their friends to send them business; others by applying directly, or through the medium of friends, for employment by firms and corporations; others buy stock in corporations, with the understanding that they are to be employed as counsel; still others invite to their homes and frequently entertain those who are likely to require the services of an attorney. Doubtless many solicit business in person, or through young lawyers or agents employed for that purpose. Manifestly, if every kind of solici-

tation, regardless of the form it may take, is to be condemned, then only in rare instances would there be such a thing as a valid contract of employment between a lawyer and his client. If some forms are to be permitted, while others are to be condemned, where shall the line be drawn? We recall one case where some parties visited an old lawyer and asked him what they should do. He replied that they ought to employ a lawyer. Thinking that the case was too small for him to take, they asked him to recommend a lawyer. He replied: 'I will be glad to attend to the matter for you.' On which side of the dividing line would such solicitation fall? If it be lawful for an attorney to send out announcement cards, or insert an advertisement in the newspaper, or buy stock in a corporation, with the understanding that he is to be employed as counsel, or ask his friends to recommend him for employment by firms or corporations, how can it be said that, if he solicits business in person, or by an agent, that the public interest will be so endangered that any contract obtained under such circumstances will be contrary to public policy? In saying this we are not unmindful of the fact that what is usually termed 'ambulance chasing' does not comport with the highest ideals of the profession. We do not wish to be understood as sanctioning such conduct. On the contrary, we take advantage of this occasion to express our unqualified disapproval of this method of obtaining law business. But it must be remembered that there is a wide difference between what is undignified or unbecoming conduct on the part of an attorney and what is clearly contrary to public policy. Such conduct may be disapproved of by the courts and by those representatives of the profession who are concerned in seeing that its standards are never lowered, and yet it may fall far short of being so injurious to the interest of the public as to invalidate a contract of employment thus obtained. While such conduct may sometimes result in the employment of the unworthy, the consequences that would follow the rule that mere solicitation is contrary to public policy would frequently be antagonistic to the public interest, in that it would prompt solvent firms or corporations to make unfair settlements, in the absence of counsel, in the hope that the fee of the attorney might be defeated by a plea that the contract of employment was obtained by solicitation. Considering the difficulty of fixing the dividing line between what is proper and improper solicitation, the uncertainty that the doctrine would introduce into all contracts between attorneys and their clients, the fact that solicitation is not condemned at common law or denounced by our Constitution or statutes, and the further fact that it is difficult to perceive upon what theory it can be said to be clearly injurious to the public good, we conclude that mere solicitation on the part of an attorney, unaccompanied by fraud, misrepresentation, undue influence, or imposition of some kind, or other circumstances sufficient to invalidate the contract, is not of itself sufficient to render a contract between an attorney and client void on the ground that it is contrary to public policy."

In Chreste v. Commonwealth, 171 Ky. 77, 186 S. W. 919, 926 (1916), Carroll, J., added, however: "But there is a very wide difference between the unprofessional and undignified practice of personal solicitation of business and the indefensible and vicious practice of employing agents and runners who are not lawyers to go about the country soliciting business and stirring up strife and litigation for a stipulated consideration or a contingent fee. Such agents and runners as these are not restrained in their activities by any professional or ethical sense of propriety. Their sole object is to secure clients for their employers, and they use in this effort such arts and schemes as will get results without giving any thought or attention to the disturbing and objectionable nature of the business in which they are engaged. The friends, acquaintances, and associates of an attorney have, of course, the unquestioned right to sound his praises and divert to him such clients as they can persuade in a legitimate way to engage his services. But there is a manifest difference between securing business through the influence and efforts of friends, acquaintances, and associates and securing it through the methods employed by the strictly commercial enterprise of hired agents. And it would seem at first impression to strike any fair-minded man, whether lawyer or not, as being highly improper for an attorney to have agents or runners to go about and make their living by securing for him employment in cases he would not

INGERSOLL et al. v. COAL CREEK COAL CO. et al.

(Supreme Court of Tennessee, 1906. 117 Tenn. 263, 98 S. W. 178, 9 L. R. A. [N. S.] 282, 119 Am. St. Rep. 1003, 10 Ann. Cas. 829.)

Action by Henry H. Ingersoll and others against the Coal Creek Coal Company and others.[21] From a decree in favor of complainants, defendants appeal. Reversed, and suit dismissed.

WILKES, J. * * * Now, the present case is simply this: There had been a terrible disaster in the defendant's mine, caused by an explosion, and hundreds of men had been suddenly killed, and numbers of women made widows, or childless, and numbers of children made fatherless. It was such a terrible catastrophe as to shock the community and arouse universal regret and horror. We may grant that a right of action accrued to the next of kin of every person killed and to every person injured.

The complainants, through their special partner, Chandler, went at once to the scene of the disaster, and personally solicited such parties as had rights of action to put their claims into complainants' hands. Under the facts, the firm, and each member, was a party to this personal solicitation.

It seems that other attorneys reached the scene of disaster before the complainants; and, as the Court of Chancery Appeals state, Chandler "entered actively into the competition for business, that he boldly and openly saw widows and others whose husbands and next of kin had been killed in the explosion, and sought as other lawyers were doing, to have them intrust the bringing and prosecution of suits to his firm, but that it does not appear that he practiced any fraud or deception, or made any false representations to get cases for his firm. He made several trips to Coal Creek on this business, at the expense

otherwise get. It is entirely outside of the legitimate functions of an attorney to incite litigation, although it should be said that there are few who indulge in this unprofessional conduct, and obviously it is much more reprehensible for an attorney to hire another, and often irresponsible, person to do this for him."

In Lyon v. Hussey, 82 Hun, 15, 31 N. Y. Supp. 281 (1894), it is held that a contract by which a person agrees to procure evidence for another in consideration of part of the recovery is against public policy. Van Brunt, P. J., said: "The recognition of contracts of this character would be the introduction of all sorts of fraud and deception in proceedings before courts of justice, in order that parties might receive compensation out of the results of their successful manufacture of proofs to be presented to the court, thus holding out a premium upon subornation."

On solicitation of employment by a lawyer as ground for disbarment, see 17 Ann. Cas. 627, note.

[21] Complainants sued as attorneys of record of ten plaintiffs whose suits had been compromised and dismissed without the consent of the attorneys. Complainants sought to recover of defendant the fees in the compromised cases by enforcing statutory liens on the causes of action in those cases. See 117 Tenn. 263, 98 S. W at pages 179, 183, 9 L. R. A. (N. S.) 282, 119 Am. St. Rep. 1003, 10 Ann. Cas. 829 (1906).

of the firm. He secured some 40 cases, and 150 or more cases were secured by other lawyers, all in a few days. The cases were to be prosecuted on a contingent fee of so much per cent., and of this Chandler was to have a certain proportion. Suits were brought, and compromised afterwards, as has already been set out. There can be no doubt of plaintiff's right to recover, unless they are denied relief on the ground of unprofessional conduct which the court deems sufficient to repel them."

We are of opinion that, under the facts disclosed by the finding of the Court of Chancery Appeals, complainants are not entitled to recover, because these facts show acts of impropriety inconsistent with the character of the profession and incompatible with the faithful discharge of its duties.

We cannot agree to several propositions advanced by complainants. We cannot agree that in these latter years a spirit of commercialism has lowered the standard of the legal profession. We cannot agree that the practice of law has become a "business," instead of a "profession," and that it is now allowable to resort to the practices and devices of business men to bring in business by personal solicitation, under the facts shown in this case.

As to how far an attorney may go in soliciting business, or whether he may solicit at all, we are not called upon to decide; but when such a case is presented, as is disclosed in this record, of attorneys rushing to the scene of disaster in hot haste, and competing with each other in soliciting the bereaved ones to allow them to sue for their losses, we feel that we are called upon to say in no uncertain terms that such conduct is an act of impropriety and inconsistent with the character of the profession. We cannot, we dare not, lower the standard of the legal profession to that of a mere business, in which fleetness of foot, or the celerity of the automobile, determines who shall be employed.

The miserable victims of the disaster are dazed by the terrible bereavement. They are in no condition to consider their rights to damages. In their extremity, they fly to any one promising relief, when, if left to time and more mature consideration, they would be enabled to make, perhaps, a better choice. In addition, it is unbecoming a member of the profession, and a public scandal, and when he bases his right to recover fees upon such improper conduct, and lowering the character of the profession and the court, it is no excuse that other attorneys do the same; but this is rather a reason why this court should act promptly and decidedly, in order that an end may be put to the practice.

It is no excuse that corporations which have caused such disasters have been alert to send their agents and representatives to the scene, with a view of forestalling suits and making favorable compromises. This court has never failed to condemn this practice in the strongest terms; and, whenever a case has come before it which in any way smacked of fraud or undue advantage arising out of such conduct,

this court has not been slow to disregard or set aside improper or hard settlements. But such agents of corporations are not, as a rule, officers of the court, nor do they occupy that high status which the law places the attorney upon; and we think that we can safely say that if any attorney should make such settlement, under such circumstances, this court would not hesitate to disbar him.

It is said that there is no precedent for refusing fees because of such conduct. If this be so, we are admonished by the record in this case that it is high time that such a precedent be set, and in such terms as may not be mistaken or misunderstood.

The argument made in this case, that such practice is not looked upon with disfavor by many members of the profession, that it is freely indulged in by prominent attorneys, that it is necessary to successful practice, and that the Court of Appeals, while deprecating the practice, does not condemn it—these and other arguments call for a full and emphatic expression from this court in this case.

It is said that, even if this rule should prevail in considering questions of good faith and professional conduct between attorney and client, after the relation is established, it does not prevail in the making of the contract of employment, and that in making such contract, before the fiduciary relation has become established, the parties stand upon the same footing and as strangers to each other.

There is unquestionably a difference between the relations existing between attorney and client before and after employment, and in some respects, at the time and in the matter of a retainer of the lawyer's services, so that an attorney, after he is employed, will not be allowed to charge fees which he might have charged, when he was retained, if the same are excessive (Rose v. Mynatt, 7 Yerg. 30; Phillips v. Overton, 4 Hayw. 291), but this principle does not reach the present controversy.

Here it is not the client alone who is concerned, but the court and the public; and the question is not narrowed down to the issue whether the client has been injured, but whether the conduct of the attorney has been contrary to the character of the profession, and opposed to a sound public policy and to the proper and decorous administration of the law.

As a matter of fact, the present suit does not concern these clients specially. They will not be benefited or burdened by it. They are interested in it in the same sense that the general public is interested, and by their individual relation to it.

We are not now attempting to lay down the rule of good faith between lawyer and client, but the professional conduct of the attorney as he appears to the court and public in the practice of his profession. Nor are we attempting to lay down a rule of conduct for the agents of corporations in their efforts to effect compromises of damage suits. When a case, such as counsel depicts, arises, we will deal with it as we think the law and public policy demand. * * *

In the present case, no disbarment proceedings have been brought, and we are not called upon to pass upon that question. * * *

For the reasons stated, we are of opinion that the complainants are not entitled to recover, and the decree of the Court of Chancery Appeals is reversed, and complainants' suit dismissed; and they will pay all costs.[22]

SOLICITATION BY REDUCTION OF CHARGES TO COLLECTION AGENCY PATRONS TO ALLOW COLLECTION AGENCY TO CHARGE FOR COLLECTION OF EVIDENCE, ETC., BY ITS EMPLOYEES. N. Y. Committee. *Question 74:* The answers of the committee to Question No. 47 have prompted the following inquiry:

A firm of attorneys have from time to time been selected by a collection agency as special counsel in respect to the enforcement of the collection of claims entrusted to it by its patrons; this firm is not the regular counsel for the agency, but is employed occasionally upon claims and in litigation, when the regular counsel is not engaged. The collection agency, while not undertaking to do or doing any actual legal work, has designated its own employés to examine and prepare accounts and data, to find witnesses, interrogate them, report the facts to said firm, serve summonses and subpœnas, and correspond with its patrons in respect to the facts of the claims and the litigation. The firm has rendered its bills for legal services to the patrons of the agency, but, in its care, and has had no communication with the patrons, except through the agency. In view of the fact that the agency through its own employés has lightened the labors of the counsel,

22 "We are administering our discipline and our ethics committees upon the philosophy that the bar is a profession, and we are conducting the practice of the law in large measure as though it were a business. No wonder men are falling by the wayside."—Julius Henry Cohen, *The Law: Business or Profession?* (1916) p. 212.

In Chreste v. Commonwealth, 171 Ky. 77, 186 S. W. 919 (1916), one of the charges against Chreste, whose disbarment was sought, was that during the trial of a personal injury action in which the counsel for the plaintiff knew that there was a missing material witness, but did not know his name or whereabouts, Chreste, who knew the witness and where he could be found, said to the counsel for the plaintiff that he would tell him about the witness if he would employ Chreste in the case, and in that way secured employment and a contingent fee. In sending the disbarment case of Chreste back for a new trial the court pronounced his conduct a proper basis for a rule to show cause why he should not be suspended or disbarred. The court said: "There were two courses that he could have pursued safely and without blame. One would have been to keep to himself the information that he possessed, and the other to have voluntarily disclosed without fee or reward what he knew to Mrs. App or her counsel. But he did not see fit to adopt either of these courses. He chose to offer for sale the information that he had concerning the missing witness, and put his offer in such a way as to coerce counsel for Mrs. App into accepting his proposition." 171 Ky. 77, 186 S. W. at p. 925 (1916).

On when a lawyer's contract of employment is void as against public policy, because secured by solicitation, see 119 Am. St. Rep. 1035, note; 10 Ann. Cas. 842, note; 17 Ann. Cas. 690, note.

they have reduced their bills accordingly, at the instance of the agency, so as to enable this agency to render a bill to its patron for the service actually performed by its own employés, without increasing the amount of the charge to the patron beyond the amount which would be charged by the firm, if it were required to render not only the strictly legal services, but also the incidental services now and heretofore performed by the employés of the agency.

Should the firm discontinue its practice of charging less to the patrons of the agency than to its other clients, for whom it necessarily performs the services which in the case of the agency's patrons are performed by the agency?

Answer: In order not to prejudice similar questions which may come before another committee of this Association, this committee expresses no opinion as to whether or not the arrangement above described involves the unlawful practice of law by the collection agency. If it does, the lawyer should, of course, not lend himself to the arrangement.

Assuming that the collection agency is not unlawfully practicing law, then in the opinion of the committee the arrangement described should still be disapproved, because, (whatever may be the effect or intent in the present instance) such an arrangement is too apt to facilitate the solicitation of business for attorneys, and the division of a lawyer's fees with a layman. In the opinion of the committee, such results should be avoided by making the relation of the lawyer to the patron the direct relation of attorney and client, and by making the lawyer's reasonable charge for his services to the client in such manner as to disclose the lawyer's identity and relation and prevent the agency from concealing his charge or covering it in its own charge.

This committee is also of the opinion that such services as are involved in preparing a litigated case for trial upon the facts should be performed by or under the direction of an attorney who may be held responsible to client and court according to the measure of a lawyear's responsibility, rather than by or under the direction of, a lay intermediary which is presumably in the business of soliciting claims that may result in litigation.

LAWYER DOING BUSINESS OF COLLECTIONS UNDER ASSUMED NAME, EMPLOYING SOLICITORS FOR COLLECTIONS TO BE MADE WITHOUT LITIGATION, RECOMMENDING OTHER LAWYERS AND RECEIVING COMPENSATION FOR THE RECOMMENDATION BY DIVISION OF FEES OR OTHERWISE. N. Y. Committee. *Question 81:* First. Is it unprofessional or censurable for an attorney to record with the county clerk of New York county a certificate showing that he is doing business under an assumed name as a mercantile agency, with the object of doing a collection business, which business shall consist of

employing solicitors to solicit claims for collection, without any intention to institute a law suit for the recovery of the claims; said collection business being conducted through collectors and through the mails?

Second. Assuming that the answer to the question is in the negative, is it unprofessional or censurable or champertous for the attorney conducting said agency, to recommend to his clients, friends of his, attorneys, who would institute actions for the recovery of claims in the event said claims cannot be collected by him through his mercantile agency:

(a) If the attorney conducting the mercantile agency should be compensated for his recommendations, whether by a division of the fees or be compensated in some other form and not out of the fees, it being clearly understood that the attorneys who institute actions are to be paid, not by the agency, but by the clients?

(b) If there be no division of fees between them, nor any other compensation given for the recommendation of the actions to be instituted?

Third. Is it, in the opinion of your Committee, champertous, for an attorney personally to engage solicitors to solicit for collections, claims upon which suit is to be instituted by the attorney, where the solicitor is not paid a part of the fees received by the attorney, but is paid a weekly salary for general services rendered to the attorney, inclusive of services as a solicitor, and where said salary is paid to the solicitor, irrespective of whether he obtains any claims for the attorney upon which suit is to be instituted or not?

Answer: In the opinion of the Committee, it is improper for a lawyer to engage in professional employment under an assumed name; the making of collections by a lawyer is professional employment; and the employment of solicitors by a lawyer to procure claims for collection, whether with or without litigation, is improper, regardless of the method of compensating the solicitors; if the objectionable features of solicitation and anonimity be removed, it is not improper for a lawyer to undertake the making of collections, with or without litigation, or to conduct a mercantile agency or to recommend another lawyer for employment by his clients; but all division of compensation between lawyers should be based upon the sharing of professional responsibility or service, and a division of fees merely because of the recommendation of another is not proper. (The Committee directs attention to its previous Answers to Questions No. 42, 47 and 98, and to Canons 27 and 28 of the American Bar Association.)

SOLICITATION BY A MERCHANT ON BEHALF OF HIS SON, A LAWYER. N. Y. Committee. *Question 117:* The following situation is respectfully brought to the attention of your Committee for an expression of its opinion:

A. is a young attorney, recently admitted to practice in this state, and B. is the attorney's father. B. is a merchant of some standing and wishes to assist A. in developing his clientele. B. proposes to enclose A.'s professional card with his (B.'s) letter calling attention to the fact that his son is a practicing lawyer, and mail the same to a number of business firms with whom he has dealings. A. has refused permission to do this on the ground that such a proceeding would not be within the ethics of the profession.

Answer: In the opinion of the Committee, A.'s refusal to countenance his father's purpose accords with the best traditions and standards of the legal profession. (See Canon 27 of the American Bar Association, and the answers of our Committee to Questions 4, 8, 16, 46, 49, 59, 68, 69.)

STIRRING UP LITIGATION. N. Y. Committee.

Question 91: In the opinion of the Committee is it proper professional practice for attorneys to investigate unsatisfied judgments and communicate with the judgment creditors asking their authority to proceed with the collection? For illustration, the method of procedure adopted by such attorneys is indicated in the following form of communication enclosing a proposed contract of employment:

"There is a judgment on record in your favor obtained a number of years ago against a party who is now able to pay the debt.

"I have information which, I believe, will enable me to collect this judgment for you.

"If you will be good enough to authorize me to make that collection for you upon the understanding contained in the paper enclosed herewith, I shall be pleased to promptly proceed with the collection.

"Trusting to hear from you as soon as conveniently possible, I beg to remain, Yours very truly, ———.

[Enclosure.]

"I hereby retain John Doe, attorney at law, of New York City to collect a judgment, still outstanding and unpaid, recovered against ———.

"For such collection I hereby agree to pay my said attorney fifty per centum of any amount collected on said judgment.

"It being agreed that if no collection is made, I am not to be charged for any services to be rendered by my said attorney.

"It being further agreed that no settlement or compromise for less than the full amount, principal and interest, shall be made without my consent.

"Dated, New York, ———, 1915.

"———."

Answer: In the opinion of the Committee, the practice is unprofessional.

Question 73: Is it proper professional conduct for a lawyer who is counsel for a public administrator, and who has appeared in behalf of the public administrator to oppose the probate of a will and who has been permitted by the court as amicus curiæ to propound questions in opposition to the probate, notwithstanding the objection that his client has no standing to make such opposition, and who has by his questions and the answers thereto induced the probate judge to state that he will require further proof to satisfy him that the will should be admitted and will call for the production upon an adjourned date of an earlier testamentary instrument described in the questions, then to seek out the person named as executor in the earlier testamentary instrument executed by the decedent and induce him to offer the earlier instrument for probate and to employ the lawyer as his counsel for the purpose, notwithstanding such executor has previously announced that he was satisfied of the genuineness and validity of the later instrument?

Answer: In the opinion of the committee the attorney's conduct is improper as stirring up litigation for his own profit, and in view of the capacity in which the lawyer elicited the information it was improper for him to so use it for his own advantage.

SOLICITATION OF INCONSISTENT RETAINER. N. Y. Committee. *Question 94:* Is it the opinion of the Committee that there is professional impropriety in the following conduct of an attorney for a bankrupt, viz.:

The bankrupt has filed an offer of composition on the basis of 20 per cent. His attorney sends out a circular letter to all of the creditors of the bankrupt urging them to accept the offer and enclosing to them blank proofs of claim to be made out by the creditors, stating to them that he will file the proofs for them with the referee in Bankruptcy and collect and remit their dividends free of charge, in case they see fit to return their respective proofs of claim to him.

Answer: Although the question does not disclose how the attorney will collect the dividend, it would seem that his intention is to suggest the giving of a proxy or power of attorney. By the acceptance of such proxy in the usual form, the attorney would at once be authorized to act for both debtor and creditor—charged with conflicting duties. Unless his circular letter makes it entirely clear that the attorney, in offering to file proofs of claim, does not seek to assume the relation or duties of an attorney to the creditors, the Committee disapproves the practice suggested. Of course, no such communication should be sent direct to creditors who are represented by counsel.

SOLICITATION—PAYING LAW CLERK UNDEFINED AMOUNTS FOR BUSINESS WHICH THE EMPLOYER GETS THROUGH HIM. N. Y. Committee. *Question 80:* Friends of a law clerk not yet admitted to the bar occasionally retain the attorneys in whose office the law clerk is employed, probably out of compliment to the law clerk. It is well understood that the firm cannot divide with the clerk any fees resulting from this business. The clerk receives a regular salary.

Is it improper for the attorneys to recognize the quality of the services performed by the clerk in assisting the firm in transacting this business by making him additional compensation from time to time, not measured or graduated as a percentage of the fees of the business, but being more or less arbitrary in amount?

Answer: In the opinion of the committee, the practice mentioned in the question is improper. It violates the rule that a lawyer should not pay, by way of bonus or otherwise, to a person not an attorney at law, a consideration for bringing in business.

AGREED COMPENSATION OF NON-PROFESSIONAL CLERKS IN LAW OFFICE BY SHARE OF ANNUAL NET PROFITS. N. Y. Committee. *Question 122:* Do you think it improper for an attorney who has a considerable number of employees to permit them to participate in the annual net profits as part of their compensation or salary? This scheme has been found to promote efficiency in mercantile establishments and I would like to install it in my office, but it has occurred to me that it is susceptible of the construction that a lawyer is sharing his fees with a layman, in view of the fact that a number of my employees are not admitted to the Bar.

However, it seems to me that it is more logical to merely view the matter as additional salary.

Answer: In the opinion of the Committee, the gratuitous distribution by a lawyer to his employees of moneys in an amount based on his annual profits, is not open to any reasonable objection. But making in advance an agreement with non-professional employees to share profits with them, is, in the opinion of the Committee, inconsistent with the essential dignity of the profession, and is liable to be made the cloak for promoting the solicitation of employment for the office.

SOLICITATION OF PROFESSIONAL EMPLOYMENT BY FORMER EMPLOYÉ OF FIRM OF LAWYERS, FROM CLIENTS OF SUCH FIRM. N. Y. Committee. *Question 109:* Canon 27 of the American Bar Association states that the solicitation of busi-

ness by personal communications or interviews, not warranted by personal relations, is unprofessional. In the opinion of the Committee is there essential impropriety in any of the following methods of solicitation of professional employment by an attorney, formerly employed by a firm of lawyers still continuing to practice, who has now established his own firm; such solicitation being directed to those clients of his former employers with whom he came into direct and close personal professional relations, while in the former employment and by reason thereof:

(a) By a simple card or letter of announcement of the formation of his new firm;

(b) By a direct notification of the formation of his new firm and a request for professional employment from such clients;

(c) By such last-mentioned notification and request, including a specific request to such clients, without the knowledge or consent of his former employers, that his new firm or he be substituted for his former employers in the continued charge of professional matters which, during his former employment, were then in his especial personal charge by direction or permission of his former employers and as their employee;

(d) By adding to the solicitation indicated in (c) an explanation of the reasons why he conceives himself better equipped to render efficient service than his former employers because of his greater personal familiarity with the matters gained while in such former employment;

(e) Provided (first) such respective acts of notification and solicitation be after the termination of his former employment,

Or (second)

(f) While still in the employ of the firm, whose clients he thus solicits.

Answer: In the opinion of the Committee, the solicitation by an attorney of professional employment from the clients of the firm by which he was formerly employed, in any of the methods mentioned in the question except the method mentioned in subdivision (a), is unprofessional, and disloyal to his former employers. The lawyer owes it to his employers, as counsel owes it to his attorney of record, not purposely to induce, through the opportunity afforded him by the confidential relation in which he is placed, the transfer of professional employment from his employers to himself. (See Canon 27, American Bar Association, 1st half.) The circulation of a professional card is not condemned by the Canon.

CHAPTER VII

THE ETHICAL DUTIES OF LAWYERS IN CRIMINAL CASES

SECTION 1.—PROSECUTING LAWYERS

B. B. A. CANON.

V.[1] * * * The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done.[2] Sup-

[1] A revision of A. B. A. Canon 5.

[2] At this point the New York State Bar Association added the sentence: "He should avoid oppression and injustice."

The ethical doctrine embodied in this canon was enunciated originally in English law because of the unfair advantage which prosecutors of criminal actions had over the accused.

"Strange though it may seem, it was not until the reign of Queen Anne that a prisoner put upon his trial for felonies short of treason could insist as a right that the witnesses in his favour should be examined on oath. It was not until the year 1836 (when the Prisoners' Counsel Act was passed) that a person accused of felony could enjoy the full benefit of counsel's aid in matters of law as well as matters of fact, and the advantage of counsel's address to the jury. Many cases are known in which great wrong was done because the accused were unable, in the existing state of the law, to place before the court the evidence and the arguments which would have established their innocence."—Luke Owen Pike, *A History of Crime in England* (1876) Vol. II, p. 444.

Originally "in treason and felony the accused could not have counsel; later, when witnesses could be had for the king, the accused could not have them; and still later, when he also could have them, his witnesses could not be sworn. * * * How then were juries kept in check in such cases? Probably the influence of the crown was sufficiently strong to prevent much injustice as against the prosecution. On the other side, the king could pardon, and moreover the natural sympathy of the jury with accused persons, and the operation of humane maxims and sentiments secured a tolerable fairness. And, no doubt, the judges disciplined the jury in one way or another."—James Bradley Thayer, *Preliminary Treatise on Evidence* (1898) pp. 157, 160, 161.

While the rule that the public prosecutor is not to convict, but to see that justice is done, became fixed in the law as a result of the lack of counsel for the defense in the early days of the criminal law in England, the time when the rule was most needed saw its most flagrant violations. The most notorious violation of the rule was by the Attorney General, Sir Edward Coke, in 1603, in the prosecution of Sir Walter Raleigh for high treason. In opening the case against Sir Walter, Sir Edward Coke engaged in colloquy with him in the course of which Sir Edward said to Sir Walter, "I will prove you the notoriest traitor that ever came to the bar," and "Thou art a monster; thou hast an English face but a Spanish heart." 2 State Trials, 7. And again:

pressing facts or secreting evidence which might be of assistance to the accused is highly reprehensible.[3]

STATE v. MONTGOMERY.

(Supreme Court of Washington, 1909. 56 Wash. 443, 105 Pac. 1035, 134 Am. St. Rep. 1119, 21 Ann. Cas. 331.)

E. T. Montgomery was convicted of rape, and he appeals. Reversed.

RUDKIN, C. J. * * * The prosecuting witness, a girl of the age of 15 years, was taken into custody about three months before the trial, and was confined in the juvenile detention room from the time of her arrest until after the trial. She was called as a witness for the state at the opening of the trial, and testified that the appellant never had sexual intercourse with her at any time or place. The prosecuting attorney thereupon stated to the court, in the presence of the jury, that the witness had stated the contrary to him many, many times; that the witness had been tampered with, and bought, etc. He was then permitted to ask the witness leading questions. In answer to such questions, the witness freely admitted that she had told the prosecuting attorney that the appellant had sexual intercourse with her on three different occasions, but insisted that she was frightened into making such statements. The prosecuting attorney was then permitted, over the objection and protest of the appellant, to interrogate the witness

"Thou viper; for I thou thee, thou traitor." 2 State Trials, 10. After the examination of the last witness, there occurred this passage between them:

"And at the repeating of some things, Sir Walter Raleigh interrupted him, and said he did him wrong.

"Att[orney General, Sir Edward Coke]: Thou art the most vile and execrable traitor that ever lived.

"Raleigh: You speak indiscreetly, barbarously and uncivilly.

"Att.: I want words sufficient to express thy viperous treasons.

"Raleigh: I think you want words, indeed, for you have spoken one thing half a dozen times.

"Att.: Thou art an odious fellow, thy name is hateful to all the realm of England for thy pride.

"Raleigh: It will go near to prove a measuring cast between you and me, Mr. Attorney.

"Att.: Well, I will now make it appear to the world that there never lived a viler viper upon the face of the earth than thou."—2 State Trials, 26, 27.

Sir Walter Raleigh was convicted and sentenced, but the sentence was not executed for nearly fifteen years, and then, by the irony of fate, it was Sir Edward Coke, as Chief Justice, who overruled Sir Walter Raleigh's objection, based upon the opinion of Lord Chancellor Bacon (2 State Trials, 37) that the king had pardoned him by giving him, about thirteen years after the original sentence, "A commission to proceed in a Voyage beyond the seas, wherein I had power as marshal, on the life and death of others," and awarded execution under the old sentence. 2 State Trials, 34, 35. "It was the opinion of most lawyers, that he, who by his majesty's patent had power of life and death over the king's liege people, should be esteemed or judged rectus in curia, and free from all old convictions." 2 State Trials, 37. But Sir Walter Raleigh was beheaded October 29, 1618.

[3] The New York State Bar Association changed the words "is highly reprehensible" to the words "is a public wrong."

at length, relative to statements she had made, wherein she admitted that the appellant had sexual intercourse with her at different times and places, with all the details and attendant circumstances. The witness admitted the making of all such statements, but insisted that they were absolutely false. She was thereupon withdrawn from the stand to be recalled some hours later. After leaving the stand, she was first taken to the prosecuting attorney's office, and thence to the detention room and placed in charge of the matron. Before leaving her, the prosecuting attorney told her that he could send her to the penitentiary for perjury, and after he left the matron told her that she would find the prosecuting attorney a very good friend, but a very powerful enemy. The witness herself testified that the matron interceded with the prosecuting attorney in her behalf and asked him not to send her to jail. The respondent contends that the prosecuting attorney and the matron only insisted that the witness should speak the truth; but the record shows only too clearly that the witness was given plainly to understand that her testimony given in the morning was not true, and that she should adhere to and reaffirm the statements made to the officers before the trial. The record clearly shows, also, that the witness was put under duress, and that her testimony was not voluntarily given when she took the stand the second time and testified against the appellant.

Notwithstanding the foregoing facts, the respondent earnestly insists that the weight of the testimony of this witness was for the jury, in the light of all the surrounding circumstances, and that this court may not interfere with the verdict. We readily concede that the weight of testimony is ordinarily for the jury; but this case presents the far more important question whether a prosecuting attorney may threaten and intimidate witnesses, and place testimony obtained by duress before a jury, against one accused of a public offense. The duty of such officers has often been defined by the court. In the appeal of Nicely, 130 Pa. 261, 18 Atl. 737, the court said: "The district attorney is a quasi judicial officer. He represents the commonwealth, and the commonwealth demands no victims. It seeks justice only—equal and impartial justice—and it is as much the duty of the district attorney to see that no innocent man suffers as it is to see that no guilty man escapes. Hence he should act impartially. He should present the commonwealth's case fairly, and should not press upon the jury any deductions from the evidence that are not strictly legitimate." In Hurd v. People, 25 Mich. 405, Christiancy, J., said: "The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object, like that of the court, should be simply justice, and he has no right to sacrifice this to any pride of professional success. However strong may be his belief of the prisoner's guilt, he must remember that, though unfair means may happen to result in doing justice to the prisoner in the particular case, yet justice so obtained is unjust and dangerous to the whole commu-

nity." In Biemel v. State, 71 Wis. 444, 37 N. W. 244, the court said: "He is an officer of the state, provided at the expense of the state, for the purpose of seeing that the criminal laws of the state are honestly and impartially administered, unprejudiced by any motives of private gain, and holding a position analogous to that of the judge who presides at the trial. Such is the view taken of the office of prosecuting attorney by the courts of this country as well as England, and we think it is the true view of his position." "It is the duty of the prosecuting attorney to treat the accused with judicial fairness; to inflict injury at the expense of justice is no part of the purpose for which he is chosen. Unfortunately, however, we sometimes meet with cases in which these officers appear to regard themselves as the counsel for the complaining party rather than the impartial representatives of public justice." Cooley, Constitutional Limitations (7th Ed.) p. 440, note 2. See, also, Curtis v. State, 6 Cold. (Tenn.) 9; March v. State, 44 Tex. 64; Gandy v. State, 24 Neb. 716, 40 N. W. 302.

The conduct of the prosecuting attorney on the trial of this case did not measure up to these requirements. His statement in the presence of the jury that the prosecuting witness had been tampered with and was bought was both prejudicial and unwarranted. After the prosecuting witness had admitted that she had made contradictory statements out of court, her further examination as to the details of these statements, to the effect that the appellant had sexual intercourse with her at different times and places, with all the attendant circumstances, could have no other object than to bring these extra judicial statements before the jury, to the manifest prejudice of the accused, and such a result must have been intended. Furthermore, courts of common law have always excluded confessions extorted from prisoners, because, as said by Judge Cooley, the common law "recognized fully the dangerous and utterly untrustworthy character of extorted confessions, and was never subject to the reproach that it gave judgment upon them." Cooley, Constitutional Limitations, p. 442. If extorted confessions are dangerous and utterly untrustworthy in character, is not extorted testimony open to the same objection? In State v. McCullum, 18 Wash. 394, 51 Pac. 1044, this court condemned the practice of extorting confessions from persons accused of crime, by confining them in dark cells until a confession was wrung from them, and we must now add our condemnation to the practice of extorting testimony from witnesses by like means or by threats or duress of any kind. Such acts are declared criminal in some states, and public officers are not exempt from their provisions. Gandy v. State, supra. While it is important that the appellant should be punished for his crime, if guilty, it is of far greater importance that settled principles designed for the protection of life and liberty should not be overthrown; and if persons accused of crime cannot be convicted, without using against them testimony wrung from unwilling witnesses, by threats of criminal pros-

ecution and imprisonment, it is better far that they should go free than that such practices should receive the sanction and approval of the courts.

It is not our purpose to condemn the zeal manifested by the prosecuting attorney in this case. We know that such officers meet with many surprises and disappointments in the discharge of their official duties. They have to deal with all that is selfish and malicious, knavish and criminal, coarse and brutal, in human life; but the safeguards which the wisdom of ages has thrown around persons accused of crime cannot be disregarded, and such officers are reminded that a fearless, impartial discharge of public duty, accompanied by a spirit of fairness toward the accused, is the highest commendation they can hope for. Their devotion to duty is not measured, like the prowess of the savage, by the number of their victims.[4]

Believing that the appellant was not accorded a fair and impartial trial in the court below, the judgment is reversed, and a new trial ordered.

[4] "It is as much the duty of prosecuting attorneys to see that a person on trial is not deprived of any of his statutory or constitutional rights as it is to prosecute him for the crime with which he may be charged, but it is a matter of common knowledge, and every practitioner at the bar will bear witness, that the district attorney who fully appreciates and practices this self-evident duty is a rare exception rather than the rule. In practice he is usually as enthusiastic to add one more conviction to his string of legal conquests as the counsel for defense may be to clear his client; and equally in such instances, in the extremes followed, do we, as a rule, observe no difference in the methods adopted by the prosecution and those of counsel defending."—King, J., in State v. Osborne, 54 Or. 289, 296, 103 Pac. 62, 65, 20 Ann. Cas. 627 (1909).

On the duty of the prosecuting attorney to see that the accused has a fair trial, see note in 21 Ann. Cas. 333.

"It has been laid down judicially on a number of occasions that a prosecuting attorney is an officer of justice; that his duty is not merely to strive to secure a conviction but requires him to see that the legal rights of the accused are respected. Thus in a recent case (Hillen v. People, 59 Colo. 280, 149 Pac. 250 [1915]) it was said: 'It is greatly to be regretted that prosecuting officers so often forget that in the trial of a criminal case they represent the state, which demands not that the accused be convicted but that justice be done. A prosecutor should act not as a partisan eager to convict, but as an officer of the court, whose duty it is to aid in arriving at the truth in every case. Occupying this quasi judicial position, he may not properly endeavor to exclude competent evidence, nor introduce that which is of doubtful competency. He owes a duty to the accused as well as to the state.' This is all very well, but how about the attorney for the defense? Has he any other interest or duty than to endeavor to secure an acquittal? Certainly if he owes a duty to secure justice even at the expense of his client it has not been announced so frequently or so clearly. And whatever may be his duty, it cannot be enforced, as can that of the prosecutor, by depriving the client of an ill-gotten victory. The theory of the modern jury trial seems to be that the truth is best elicited by the conflict of two partisans. If that be true, they should compete on equal terms. As was said in State v. Kent, 4 N. D. 577 [62 N. W. 631, 27 L. R. A. 686 (1895)]: 'The best mode of reaching the truth is by the strenuous contentions of opposing counsel, each animated by the conviction that the cause he has espoused is just. The public have some interests at stake in a criminal prosecution. May all the zeal be displayed on one side, and none be tolerated on the other?' In perhaps no other particular is the persistence of tradition in legal procedure more clearly

PEOPLE ex rel. STEAD, Atty. Gen., v. PHIPPS.

(Supreme Court of Illinois, 1914. 261 Ill. 576, 104 N. E. 144.)

Disbarment proceedings * * * against Harry M. Phipps. Respondent suspended for one year and until permitted to resume practice.

CARTWRIGHT, J. * * * Charge No. 10 was based on the following facts: The respondent was elected state's attorney of Wabash county in 1908. Complaint was made to him that Goldie and Harry Petty, children 10 and 12 years old, respectively, and Frank Brines, aged 14, had taken an evergreen tree from a cemetery lot in Mt. Carmel. An evergreen tree had been cut from the cemetery lot of James Beanblossom, and these boys had sold a tree at Russell's grocery store which was believed to be the same. The respondent filed an information in the county court against the children and had them arrested. Leroy Petty, the father of the Petty children, became surety for the appearance of the children, and the respondent advised the father to have the boys plead guilty. The father objected, but the respondent told him that that was the easiest and cheapest way out; that the fine would be nominal; and, the defendants being young boys, the court would not send them to jail. The respondent also urged the children to plead guilty, but they protested that they did not take the evergreen tree from the lot, and told him where they obtained it. They never admitted their guilt, but he went with them to the court and prepared formal waivers of trial by jury and a confession of guilt, which the children signed. The paper was handed to the judge, who entered judgment thereon, with a fine and order that the boys be committed to jail until the fine and costs were paid. The judge then talked to the boys about their offense, and asked them why they committed it, when Frank Brines replied that they did not take the tree, but got their tree on Keyes Hill. The judge asked them why they pleaded guilty when they were not, and they said they never pleaded guilty and always said they were not guilty. The judge set aside the judgment and appointed an attorney to inquire into the case. The respondent was acting as state's attorney for the people, and his conduct in urging the plea of

shown than in this matter of safeguarding the rights of an accused person. In the days when government was all powerful and criminal prosecutions were not infrequently inspired by a desire to put to death an enemy of the king such a public attitude is easily explicable. But its persistence under modern conditions is conservatism gone mad."—Unsigned Editorial in 20 Law Notes, 81, 82.

It may well be suggested, however, that it is the duty of a public defender, paid by the state, that should be compared with that of the public prosecutor. Private counsel, paid by the accused or his relatives or friends, is in a different position from that of counsel paid by the state to defend. The latter's duty, like that of the public prosecutor's, will doubtless be merely to see that justice is done even at the expense of his client. The duty of private counsel for the defense is different just because the public is not his client.

guilty and having the boys sign such a plea while they protested their innocence was most reprehensible, and not justified because he believed he could prove them guilty.

The exceptions of the respondent to the findings of fact by the commissioner are overruled. * * * -

The respondent is suspended from practice as an attorney for a period of one year and until thereafter permitted to resume practice by order of this court.

Respondent suspended.[5]

PEOPLE v. DANE.

(Supreme Court of Michigan, 1886. 59 Mich. 550, 26 N. W. 781.)

Information for larceny.

CHAMPLIN, J. * * * The prosecuting attorney, in addressing the jury on behalf of the people, asserted to the jury that he knew that the defendant was the man who took the money. The attorney for the defendant objected to this remark. * * * It is the duty of

[5] This decision takes a very different view of the public prosecutor's duty from that entertained by Warvelle as revealed in the following passages:

"230. On the other hand, the mere fact that a prosecutor may believe an accused person to be innocent gives him no right to slight his duty, for notwithstanding his belief, the prisoner may yet be guilty. Where a person has been held to answer a criminal charge, it devolves upon the state's attorney to duly prosecute such charge regardless of his personal views. Whatever evidence he may have should be properly presented and whatever of fair argument may arise thereon should be made. It is for the jury to pass upon the question of guilt, not the prosecuting officer.

"231. The same pseudo-moralists that so loudly condemn attorneys for defending persons whom they know or have reason to believe are guilty, are equally emphatic in their denunciation of prosecuting officers who insist on 'persecuting' those whom they believe to be not guilty, and it is often asserted that a state's attorney is under a moral duty to enter a nolle prosequi whenever he is satisfied that a prisoner is innocent of the charge preferred against him. Nothing could be more pernicious or misleading. The prosecutor is under a legal as well as a moral duty to perform the functions of his office, and he commits a gross breach of his trust if he assumes to use the opportunities of his office to prevent accused persons from being tried. What his belief may be is wholly immaterial, and while it is true that he may, under certain circumstances, enter a nolle pros., yet this is done, not because of his belief in the innocence of the accused, but as a measure of public policy and for the purpose of saving the public money, in cases where it becomes evident that the accused cannot be convicted. In such a proceeding the guilt or innocence of the prisoner is immaterial.

"233. There is, however, a wide difference between the functions of the public officer and the private counselor. The former must, as a part of his official duty, duly prosecute all persons who have been presented by the grand jury or otherwise held to await trial on a criminal charge; the latter is under no duty whatever, and if he appears it is entirely a matter of his own volition. Therefore, while an attorney may be permitted to assist in a prosecution, it is yet a privilege that he should exercise with the utmost caution and circumspection, and never, under any circumstances, should be consent to aid in the conviction of one whom he knows or believes to be innocent."—Geo. W. Warvelle, *Essays in Legal Ethics* (1902) pp. 140–143.

the public prosecutor to see that the person charged with crime receives a fair trial, so far as it is in his power to afford him one, and it is likewise his duty to use his best endeavor to convict persons guilty of crime; and in the discharge of this duty an active zeal is commendable, yet his methods to procure conviction must be such as accord with the fair and impartial administration of justice; and it is improper for one occupying the position of the prosecuting officer to make a statement to the jury of a fact as of his own knowledge, which has not been introduced in evidence under the sanction of an oath, relating to the material issues in the case. State v. Balch, 31 Kan. 465, 2 Pac. 609. If the prosecutor was cognizant of the fact that the defendant was the man who took the money, and wished the jury to be possessed of his knowledge, he should have been sworn as a witness, and given his evidence in the usual way, so that the defendant could have the benefit of a cross-examination. Nor can we say that the statement made by the prosecutor was error without prejudice. It is impossible to tell what influence the statement had upon the mind of the jury. It is presumable that statements of fact based upon personal knowledge, made by a person occupying the responsible position of prosecuting attorney of a county, whom the people have chosen because of his ability and character to fill that position, would have both weight and influence with the jury, and may have determined any doubt which they, or some of them, may have entertained of the defendant's guilt against him.

The judgment must be reversed, the conviction set aside, and a new trial granted.[6]

[6] On the reversal of convictions because of unfair or irrelevant arguments or statements of facts by prosecuting attorneys, see note in 46 L. R. A. 641.

"A prosecuting attorney is a public officer 'acting in a quasi judicial capacity.' * * * The desire for success should never induce him to endeavor to obtain a verdict by arguments based on anything except the evidence in the case and the conclusions legitimately deducible from the law applicable to the same. To convict and punish a person through the influence of prejudice and caprice is as pernicious in its consequences as the escape of a guilty man." —Battle, J., in Holder v. State, 58 Ark. 473, 481, 25 S. W. 279, 281 (1894).

"It is difficult to lay down an inflexible rule applicable to irrelevant statements by the public prosecutor to the prejudice of the defendant. In some cases it is manifest they do no harm. In others, where the case depends upon a mass of circumstances, many of which are contradicted, others equivocal except as light is reflected upon them by their association, it is more important that nothing but proven and relevant facts should be brought into the whole field of observation from which the jury are to deduce their conclusion. And as the field enlarges it is the more important that care should be taken to prevent the mingling of mere statement with fact."—Landon, J., in People v. Smith, 162 N. Y. 520, 531, 56 N. E. 1001, 1004 (1900).

HARDAWAY v. STATE. (No. 14,941.)

(Supreme Court of Mississippi, 1911. 99 Miss. 223, 54 South. 833, Ann. Cas. 1913D, 1166.)

SMITH, J. Appellant, a negro, was convicted of the unlawful sale of intoxicating liquor, and appeals to this court.

There were only two witnesses to the fact of the alleged sale—one a white man, introduced on the part of the state, and the appellant, who testified in his own behalf. The case is a close one on its facts. In his closing argument to the jury the acting district attorney, over the protest of appellant, and unrebuked by the court, appealed to race prejudice by suggesting to the jury that they believe the state witness instead of appellant, for the reason that the state witness was a white man and appellant was a negro.

Race prejudice has no place in the jury box, and trials tainted by appeals thereto cannot be said to be fair and impartial. As was said by the Supreme Court of Alabama, in Tannehill v. State, 159 Ala. 51, 48 South. 662: "It is the duty of the court to see that the defendant is tried according to the law and the evidence, free from any appeal to prejudice or other improper motive, and this duty is emphasized when a colored man is placed upon trial before a jury of white men." And by this court, in Hampton v. State, 88 Miss. 257, 40 South. 545, 117 Am. St. Rep. 740: "Mulattoes, negroes, Malays, whites, millionaires, paupers, princes, and kings, in the courts of Mississippi, are on precisely the same exactly equal footing." And again by this court, in Harris v. State, 96 Miss. 379, 50 South. 626: "Every defendant at the bar of his country, white or black, must be accorded a fair trial according to the law of the land, and that law knows no color."

Reversed and remanded.[7]

WILKINSON v. PEOPLE.

(Supreme Court of Illinois, 1907. 226 Ill. 135, 80 N. E. 699.)

See post, p. 449, for a report of the case.

In re VOSS.

(Supreme Court of North Dakota, 1902. 11 N. D. 540, 90 N. W. 15.)

In the matter of the accusations against H. G. Voss, attorney and counselor at law. Judgment of suspension.

MORGAN, J. * * * In January, 1898, Mr. Voss, as state's attorney, commenced ten or twelve actions to abate nuisances alleged to

[7] See State v. Washington, 136 La. 855, 67 South. 930 (1915).

have been created by the defendants therein by the unlawful sale of intoxicating liquors in places unlawfully kept by them for such sales, and for unlawfully keeping liquors for sale in such places. These actions were brought under section 7605, Rev. Codes 1899, by the state, on the relation of one Christ Christianson, who was a representative of the State Enforcement League of North Dakota. An injunction and a search warrant were issued by the judge of the district court, and a search at each place was made at the time the papers were served. Such search did not result in the finding of any intoxicating liquors, and the places searched were not therefore closed by the sheriff. The papers were placed in the hands of the sheriff by Mr. Voss in the afternoon of the day on which the judge issued the orders, and were served by the sheriff on the same day. The sheriff's fees for such searches and service of the papers amounted to nearly $200, and he presented his bill therefor to Mr. Voss, for his approval thereof, before it was presented to the board of county commissioners for allowance. Mr. Voss refused to approve of the bills, claiming that the county was not liable for their payment until judgment had been rendered against the county. The sheriff then went to the secretary of the Citizens' Protective Association of Mandan to consult with him concerning the payment of his fees. This association is composed of the business men of Mandan. It was organized for the purpose of furthering the business interests of the city of Mandan, and had a membership of sixty-seven business men. Mr. Voss was not a member of such association. A large majority of this association was opposed to the enforcement of the prohibition law in Mandan, and favored a license system and protection from prosecution, under which the city derived a revenue from those engaged in the unlawful sale of beverages. Pursuant to the interview of the sheriff with the secretary of this association, as to the payment of his bill for serving the papers in these actions, the secretary called a meeting of the association, and a meeting thereof was immediately held in a room back of the secretary's store. At this meeting the question of the payment of the sheriff's fees was considered, and it was there decided to call upon Mr. Voss to ascertain why he objected to the sheriff's bills being paid by the county. They called upon Mr. Voss on the following day, when Mr. Voss explained to them why he objected to the payment by the county of such fees. He there gave the same reasons that he had previously given the sheriff, viz., that the county was not liable until a judgment of dismissal had been rendered in the actions. Thereupon a general discussion followed as to the course to be pursued in reference to the actions and the payment of the sheriff's fees. Some favored that the law should take its course, and that the actions be prosecuted; others favored no prosecution of the actions; others favored that the county should pay the costs; others that the defendants should pay them. Mr. Voss was not present during the whole hour during which this meeting lasted, he having been called away and remained

out until the meeting had closed and the parties were dispersing. At this meeting the sheriff's bill was corrected, as it contained overcharges, and Mr. Voss read from the statute what the legal fees were for the various items included in the sheriff's bill. He also stated that the sheriff had found no intoxicating liquors on the search, and that he had no evidence warranting the closing of the places. At this meeting it was decided that the defendants in these actions must pay the sheriff's fees, and it was there decided that each defendant must pay $17.50. It was understood, as the general sentiment of the meeting, that in case any defendant paid such sum that his case would be dropped, and in case any defendant refused to pay such sum the action was to be prosecuted against him. No witness states that Mr. Voss was a party to such proposed action nor made any promises to drop the actions. He states that he made no promises to drop the actions, and that no one asked him to do so. He does state that he was not aware that defendants paid such costs until some time thereafter. However, a committee was appointed at this meeting to collect such sum from each of the defendants, and all of them paid such sum, excepting one defendant, who refused, and his place was closed, but not under instructions from Mr. Voss. The front door was locked, but such defendant remained in possession, and had access to his building through a side entrance. Mr. Voss never took any further action whatever in these actions.

It is our conclusion that he acquiesced in the action of the meeting at his office, and, in conformity to the sentiment and wishes of the majority at that meeting, took no further action on the cases, and did not intend to. We cannot find from a reading of the evidence that he did not know that it was the sentiment of that meeting that the prosecutions should be dropped and discontinued. The attendance at this meeting was fourteen. It lasted one hour. There was much discussion. Mr. Voss participated in such discussion while present, and he was present a considerable portion of the time. Mr. Voss knew that the county was not thereafter asked to pay such fees, and must have known that the reason for ascertaining the correct amount of such fees in each case was that it was intended by the meeting that the defendants were to pay such sum. The defendants were not liable for the payment of such costs at that time. On what theory did they pay such sum, except on the condition that the actions were not to be further proceeded with? None other is apparent nor suggested. * * * It is proven in this record beyond question that some, if not all, of these defendants were engaged in openly running saloons where intoxicating liquors were sold by them. It cannot be entertained for a moment that evidence could not be produced to the court, under such circumstances, sufficient to warrant a decree in favor of the plaintiff. No attempt was made to do so. Undoubtedly there was a strong sentiment in Mandan against the enforcement of the prohibition law, but we lay no stress upon the contention made, that efforts to enforce the law by

actions such as these under consideration would be futile, as such contention is no less than an assertion that the citizens of Mandan and Morton county would perjure themselves rather than permit the enforcement of the prohibition law. Such a contention is not worthy of consideration or mention. * * * The evidence justifies the conclusion that the defendant did not force the prosecution of these actions to judgment, because he deferred to the action of the committee while in his office that the actions were to be dropped and not prosecuted. This was a violation of his duty as state's attorney, and, consequently, a violation of his duty as an attorney at law, and is highly reprehensible.

The duties of state's attorney are to be performed regardless of public sentiment, and he who administers that office in deference to sentiment opposed to the law is unfit to hold that office or to be an attorney at law. * * * This question was asked of Mr. Voss: "If there has been any act or neglect to act on your part which might be construed as a neglect to enforce either of these laws, was that act or neglect to act brought about by what appeared to you the exigency of the case, taking into consideration the general sentiment and feeling of the community?" He answered: "Yes, sir; I realized the fact through the years I have been public prosecutor that a penal statute does not rise above the sentiment back of it." The sentiment of the community respecting the enforcement of a law should not be the test as to whether it is to be enforced or not. State's attorneys are not permitted to thus practically repeal laws deemed obnoxious by their constituents. Their duty lies in the direction of attempting the enforcement of all laws when violations are properly brought to their attention. We do not understand that mere inaction by a state's attorney in enforcing the prohibition law, when he is not asked to take action on evidence produced to him, is a violation of his duties. But to virtually dismiss actions commenced in response to the wishes or arrangements of those opposed to the enforcement of that law is quite another question, and to so act when there is evidence in his possession to warrant an attempt to secure judgments is, in our judgment, acting under wrong motive, and in direct violation of the oath of office taken by him, and consequently a violation of his duties as an attorney at law. It is a palpable neglect to prosecute a violation of that law as directed by section 7604, Rev. Codes 1899, and is a misdemeanor under the provisions of section 7620, Rev. Codes 1899, under which he might have been removed from his office. It involved a violation of an express statute, and is a misdemeanor involving moral turpitude. * * *

The evidence disclosed that the defendant, while state's attorney, engaged in gambling in a public gambling house. * * * Section 7243, c. 37, Rev. Codes 1899, pertaining to gaming, provides that: "It is the duty of all sheriffs, police officers, constables and prosecuting or state's attorneys to inform against and prosecute all persons whom they

have credible reason to believe are offenders against the provisions of this chapter and any omission so to do is punishable by a fine not exceeding five hundred dollars." Neglecting to inform against the keeper of this gambling house under such section is made a misdemeanor. To inform against such keeper, when he had positive evidence of guilt, was the duty of the defendant, and his failure to do so was a plain violation of his official duty. Whether such misdemeanor committed by him was one involving moral turpitude remains to be considered.

Gambling is an act beyond the pale of good morals, and is an evil practice under any circumstances, though it does not necessarily involve moral turpitude. But the misconduct charged against the defendant is not that of gambling, but a failure to prosecute the keeper of such place after having knowledge that he kept a place containing gambling devices. * * * His answer is that no one asked or requested him to prosecute. The statute contemplates that he shall make a complaint himself. In this class of cases he must become informant and prosecutor when he has knowledge of guilt or credible reason to believe that such offense has been or is being committed. The section imposes an unusual duty upon state's attorneys,—one requiring them, under penalties, to institute criminal proceedings in such cases. By accepting the office of state's attorney, this duty is assumed, as well as other and more agreeable duties. To violate such duty is a violation of and an utter disregard of his oath of office. The commission of a misdemeanor that necessarily, by its commission, includes a violation of an oath of office, is committing a misdemeanor that involves moral turpitude. Though not perjury in a technical sense, it still involves the violation of an oath, and there can be no willful violation of an oath that does not carry with it a disregard of principle and law amounting to moral turpitude. * * *

It cannot be successfully maintained that criminal conduct on his part as state's attorney cannot be used as evidence to take from him the authority under which he practices law, and under which he exercises the functions of state's attorney. * * * Our conclusion is that the misconduct shown would justify disbarment. But in view of the circumstances and the fact that the attorney in charge of the prosecution does not ask for a disbarment, and in view of the fact that the ends of justice will in our opinion be subserved by a more lenient judgment than that of disbarment, we will not inflict the severest penalty.

In view of the evidence we conclude that the defendant should be temporarily suspended from practicing as an attorney and counselor at law in all the courts of this state. The judgment of the court is that the defendant be suspended from the practice of law in all the courts of this state for the period of nine months from the 23d day of April, 1902, and that he be reinstated at the end of such period without further action on the part of this court, unless, prior to the expiration of such period, a written statement shall be filed with the clerk of this court, signed by a majority of the prosecuting committee of the State

Bar Association, setting forth that the defendant has been guilty of misconduct showing that he is not worthy nor entitled to be reinstated, or has violated the mandate of this court herein, during the period of his suspension. All concur.[8]

STATE v. KENT.

(Supreme Court of North Dakota, 1895. 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686.)

Myron R. Kent, having been convicted of murder, brings error. Reversed.

CORLISS, J. * * * We now approach a very interesting question. The state's attorney was assisted on the trial by Mr. Nye—a citizen of Minnesota, and a member of the bar of that state. He was retained by the brothers of the murdered woman to assist in the prosecution. He stated to the trial judge that while he had been paid nothing by his clients, and had had no talk with them on the subject of fees he presumed that they would compensate him for his services in the case. He was not employed by the county of Morton, in which the crime was committed, or by the state's attorney of that county, to assist in the prosecution; but the latter stated in open court that he desired to have Mr. Nye assist him, for the reason that he (the state's attorney) was unable, because of physical ailments, to stand the labor and strain of the case, without aid. Mr. Nye was allowed, despite the objection of the counsel for the accused, to assist in the

[8] In Law Notes for September, 1912, p. 101, is discussed the action of the Georgia prosecuting attorney who had charge of the prosecution of Mrs. Daisy Opie Grace for the shooting of her husband. After the acquittal of the accused he stated "that but for ethical considerations he might have taken the witness stand and testified that to his personal knowledge the shooting did not take place at the hour claimed by the defense, but at an hour which, if established, would have gone a long way towards demolishing the case of the defense." And Law Notes asks: "Was the prosecuting attorney justified in failing to take the stand? He states that he was advised by eminent judges and lawyers not to do so. Notwithstanding the source of his counsel, we believe that he was ill advised. * * * An analogous case is that of People v. Hamberg, 84 Cal. 468 [24 Pac. 298 (1890)], a prosecution for obtaining money under false pretenses, wherein it was said: 'We do not see why the prosecuting attorney, who was in a situation to know of the facts tending to show guilty knowledge on the part of the defendant as to his pretended title, should not have been allowed to give his testimony in the interests of justice, and we do not perceive any error in the court allowing him to do so.' This language tends strongly to show that the court not only considered it legal but ethical for the prosecuting attorney to testify in behalf of the state. Another similar instance is the case of State v. Wilmbusse, 8 Idaho, 608 [70 Pac. 849 (1902)], a prosecution for homicide, wherein it was held that it was not error to permit the prosecuting attorney to testify with regard to a dying declaration as well as the mental condition of the deceased at the time the declaration was reduced to writing and signed by him. The question of ethics involved is a nice one, and an error on the side of prudence is natural and in that respect commendable, but we believe that no principle of professional ethics would have been violated had the attorney testified in the case and continued to conduct the prosecution."

trial of the case, taking a very active part therein. Counsel for the accused insists that this was prejudicial error. There are two grounds on which he assails the action of the trial judge in permitting Mr. Nye to participate in the trial: First, that he was employed by private persons, and not by the public; second, that he was neither a resident nor a member of the bar of this state. We will discuss these two points in the order in which they are stated.

In England, criminal prosecutions were as a rule carried on by individuals interested in the punishment of the accused, and not by the public. The private prosecutor employed his own counsel, had the indictment framed and the case laid before the grand jury, and took charge of the trial before the petit jury. 1 Chit. Cr. Law, 9, 825.[9] This system does not prevail in this state. Here, in each county, there is a public prosecutor, called the "state's attorney" for that county. It is his duty to prosecute all criminal offenses triable in that county. He is paid a salary for that purpose out of the public funds. He is not allowed to receive any fee or reward from or on behalf of any prosecutor or other individual for services in any prosecution or business to which it is his official duty to attend, nor be concerned as attorney or counsel for either party, other than for the state or the county, in any civil action depending on the same state of facts upon which any criminal prosecution commenced, but undetermined, shall depend. Sections 427, 433, Comp. Laws. We do not think that this change in policy indicates a purpose to exclude the counsel for interested persons from all participation in the prosecution. Such counsel cannot initiate the proceedings, or conduct them. The control of criminal prosecution has been taken from private hands, and transferred to public functionaries chosen for that express purpose. But there is nothing in the statute to justify the conclusion that counsel employed by interested persons may not assist the public prosecutor, in case he and the trial judge deem this course proper. The fact that the state's attorney who controls criminal cases is not allowed to receive any compensation from private prosecutors for the prosecution of a criminal case does not warrant the conclusion that no counsel paid by private persons shall be permitted to assist in the trial of such a case. It is one thing to have the prosecution entirely in the hands

[9] In In re W. B. Davies, Lowndes & Maxwell's Bail Court Reports, 207 (1853), a rule was moved that an attorney who had presented a brief for the prosecution in a criminal case without being asked should show cause why he should not be struck off the roll. The attorney wrote a letter showing that he thought he was merely taking a chance of having costs allowed him by the court. Crompton, J., in the course of the argument, said: "Since the object for which he volunteered was to get costs, which are in the discretion of the court, what can be easier than for the court to check the practice by refusing the attorney his expenses in such cases?" And after the argument he refused the rule, saying: "What this person has done is simply this: He has intruded himself into a prosecution. It is not high practice, certainly, for an attorney, and it ought to be discouraged; but I do not think that it is such an act as requires that he should be struck off the roll."

of one who may be influenced, because of a retainer, by the strong desire of his client to secure a conviction; but it is an entirely different thing to allow such an interested counsel to aid in the prosecution one who stands affected by no other motive than that of securing the punishment of guilt, and who has absolute control over the case. The law has removed criminal prosecutions from the control of private interests, but has not excluded such interests from all participation therein. If no error is committed on the trial, we fail to see how an accused can be prejudiced by the fact that those personally interested have employed private counsel to aid the public prosecutor. Certainly, he should not be heard to complain of the zeal of the private counsel, if such counsel has not allowed his zeal to hurry him into error.

The best mode of reaching the truth is by the strenuous contentions of opposing counsel, each animated by the conviction that the cause he has espoused is just. The public have some interests at stake in a criminal prosecution. May all the zeal be displayed on one side, and none be tolerated on the other? The public interests demand that a prosecution should be conducted with energy and skill. While the prosecuting officer should see that no unfair advantage is taken of the accused, yet he is not a judicial officer. Those who are required to exercise judicial functions in the case are the judge and the jury. The public prosecutor is necessarily a partisan in the case. If he were compelled to proceed with the same circumspection as the judge and the jury, there would be an end to the conviction of criminals. Zeal in the prosecution of criminal cases is therefore to be commended, and not condemned. It is the zeal of counsel in the court room, alone, of which the accused can complain. No decision can be found which questions the right of the prosecuting officer to consult with, and receive all manner of aid, even during the trial, from counsel for private parties, outside of the court room. And if such zeal in the court room, on the trial, does not result in error, what conceivable difference can it make whether such assistant was employed by the public, or by private persons? May not cross-examination of witnesses be conducted, and arguments to court and jury be made, by one who is as much convinced of the guilt of the accused as his counsel is persuaded of his innocence? The manner of conducting the case in the court room cannot work legal prejudice to the accused, without resulting in error for which the conviction will be set aside. It is therefore of no legal importance what inspires the zeal of the attorney who assists in the trial. Whatever is done to the injury of the prisoner by private counsel, for which he can have no redress, is done out of court; for instance, by concealing or fabricating evidence. At just this point, where the zeal of counsel employed by private parties may be deadly to the accused, no kind of safeguard is or can be thrown around him. The prosecuting officer may consult with, and be entirely governed by the advice of, such private counsel; and yet the accused

has no remedy, if the private counsel does not participate in the trial. If he does so participate, his zeal works no more prejudice to the accused than the zeal of any other equally able counsel who may be employed by the public. The cases all agree that an assistant hired by the public may engage in the trial without giving the prisoner any legal cause for complaint. Of course, the latter may think he is prejudiced because of being compelled to confront an exceptionally able and experienced prosecutor, but this furnishes no legal ground for overthrowing the conviction.

The question can be placed in a clear light by the following statement of it: Can a defendant in a criminal case, who is obliged to submit to the zeal of an assistant prosecutor employed by the public, insist that the zeal of an assistant counsel employed by interested parties shall not be displayed against him, although it results in no error on the part of the prosecution in the management of the case? We think there is only one answer to this question, and that is against the right of the accused to complain in either case, so long as no error has been committed by the assistant on the trial. The rule is different, however, in Michigan and Massachusetts, under statutes very similar to ours. Meister v. People, 31 Mich. 99; Sneed v. People, 38 Mich. 251; People v. Hurst, 41 Mich. 328, 1 N. W. 1027; People v. Bemis, 51 Mich. 422, 16 N. W. 794; Com. v. Gibbs, 4 Gray (Mass.) 146. The reasoning of Judge Campbell in Meister v. People, while very plausible, does not convince us that there should be interpolated into the statute an implied prohibition against counsel employed by interested parties assisting in the prosecution. We are unable to discover in the statute any other policy than that of transferring the control of criminal prosecutions from private to public hands. We think that the control of the public prosecutor over the proceedings is a sufficient guaranty that the accused will not be made the innocent victim of oxerzealous prosecution by private persons. While aware that Judge Campbell has made out a strong case in support of his view, we cannot discover in the legislation of this state the evidence of a policy hostile to the quite general practice of allowing the prosecuting officer to be assisted by counsel retained by those having a personal interest in the prosecution distinct from that of the general public. In support of our ruling on this point, we cite the following cases: State v. Helm, 92 Iowa, 540, 61 N. W. 246; Keyes v. State, 122 Ind. 527, 23 N. E. 1097; Polin v. State, 14 Neb. 540, 16 N. W. 899; State v. Bartlett, 55 Me. 220; State v. Fitzgerald, 49 Iowa, 260, 31 Am. Rep. 148; State v. Wilson, 24 Kan. 189, 36 Am. Rep. 257; Burkhard v. State, 18 Tex. App. 599–618; Gardner v. State, 55 N. J. Law, 17, 26 Atl. 30; Benningfield v. Com. (Ky.) 17 S. W. 271; People v. Tidwell, 4 Utah, 506, 12 Pac. 61; 1 Bish. Cr. Proc. § 281; Whart. Cr. Pl. & Prac. § 555. See, also, People v. Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75; Jackson v. State, 81 Wis. 127, 51 N. W. 89; U. S. v.

Hanway, Fed. Cas. No. 15,299. See particularly, the reasoning of Judge Elliott in Keyes v. State, 122 Ind. 527, 23 N. E. 1097, and Judge Brewer in State v. Wilson, 24 Kan. 189, 36 Am. Rep. 257. The decision of the Wisconsin supreme court in Biemel v. State, 71 Wis. 444, 37 N. W. 249, sustaining the Michigan and Massachusetts doctrine, appears to be based upon legislation in that state authorizing the trial judge to appoint an assistant whenever he thinks the public interests require it, and providing that such assistant shall be paid out of the public funds. See pages 248 and 249. The case of Lawrence v. State, 50 Wis. 507, 7 N. W. 343, is distinguished in the Biemel Case on the ground that it was decided before the new statute was passed, giving the trial judge power to appoint an assistant to be paid out of the public treasury. The Lawrence Case is more in harmony with, than opposed to, our views.[10] We hold that it was not error to permit Mr. Nye to assist in the prosecution, at the request of the state's attorney, because of his having been employed by the brothers of the murdered woman.[11]

Does the fact that he was not a member of the bar of this state render him an improper person to participate in a criminal prosecution? This precise question was decided in favor of the contention of counsel for the accused in Wisconsin. State v. Russell, 83 Wis. 330, 53 N. W. 441. But the decision was founded on the wording of the statute of that state authorizing the trial judge to appoint counsel to

[10] But see Rock v. Ekern, 162 Wis. 291, 156 N. W. 197, L. R. A. 1916D, 459 (1916).

[11] On the right of private counsel to assist in the prosecution of criminal cases, see Ann. Cas. 1912B, 659, note. On his right to compensation from a private employer for assisting in the prosecution, see L. R. A. 1916D, 462, note.

"It was held by this court in State v. Tighe, 27 Mont. 327, 71 Pac. 3 [1903], that it was proper to permit the county attorney to have the assistance of counsel, though he was employed and paid by private parties. The members of the community do not lose interest in the prosecution of criminals when they elect an officer whose duty it is to prosecute them; nor do they surrender their right to employ all just and proper means to see that the rights of the state are preserved. When the exigencies of the state demand it, as when the public prosecutor is without experience or incomptent, or is confronted by an array of able and talented counsel who appear for the defendant, in a difficult and complicated case, the interests of the state demand that he have assistance. In all such cases it is within the discretion of the court to appoint competent counsel to assist, or to permit counsel employed by private parties, or even volunteers, to appear for that purpose. The defendant is entitled to a fair and impartial trial, but nothing more. Special counsel are subject to the same control by the court as the public prosecutor, and, so long as they are not guilty of conduct prejudicial to the defendant, the latter has no right to complain."—Brantly, C. J., in State v. O'Brien, 35 Mont. 482, 497, 90 Pac. 514, 519, 10 Ann. Cas. 1006 (1907).

"When such assistants [privately paid prosecutors] are employed in the case, the state attorney should always remain present at the trial, and see that a public prosecution for a criminal offense does not degenerate into a private persecution, and that the administration of the criminal law is not made a vehicle of oppression for the gratification of private malice, or the accomplishment of private gain or advantage."—Liddon, J., in Thalheim v. State, 38 Fla. 169, 183, 184, 20 South. 938, 942 (1896).

assist in the prosecution. The court held that the word "counsel" meant a member of the bar of that state. We have no such statute in this state. On the contrary, our legislation seems to voice a different policy. The act which regulates the admission of attorneys to practice provides that "any member of the bar of another state actually engaged in any case or matter pending in any court of this state may be permitted by such court to appear in and conduct such case or matter while retaining his residence in another state without being subject to the foregoing provision of this act." Laws 1891, c. 119, § 7. Our legislation, so far from being inimical to the employment of nonresident counsel to assist in criminal prosecutions, seems to place them on the same footing in this respect as resident attorneys. The statute, in express terms, dispenses with the necessity of the foreign counsel's taking any oath. Therefore, one of the main arguments against allowing a foreign attorney to assist the prosecution in a criminal trial, put forth by the court in the Russell Case, does not have any application in this state, with its policy, as shaped by legislation, of permitting foreign counsel to try cases without taking any oath. Whether such counsel does or does not take an oath is practically of little moment to the accused. Every attorney of high character is acting under the restraint of a more sacred oath than that which is formally administered to him in court,—the oath which, through his whole career, he constantly administers to himself in secret, before the solemn tribunal of his own conscience. A mere formal, lip-uttered oath will never control the conduct, unless it is the echo of an oath taken within. The fact that the foreign attorney is not amenable to the court before which he appears, as is a resident attorney, cannot prejudice the rights of the accused. The trial judge can always, at any stage of the prosecution, refuse to permit him longer to remain in the case; and, if the judge considers that his conduct has been prejudicial to the accused, he can always grant the accused a new trial. It is safe to leave these matters to the sound judgment of an impartial magistrate.[12] * * *

The judgment and order are reversed [for other reasons], and a new trial is ordered. All concur.

RUSH v. CAVENAUGH.

(Supreme Court of Pennsylvania, 1845. 2 Pa. 187.)

Action of slander brought by an attorney against a client who had employed him to assist in prosecuting a man named Crean for forgery. The attorney, becoming convinced of the innocence of the accused, consented to withdraw the charge despite the client's instructions. The client, in the presence of witnesses, charged the attorney with un-

[12] See Goldsberry v. State, 92 Neb. 211, 137 N. W. 1116 (1912).

professional conduct in so acting and in retaining money for fees in that case. The attorney obtained a verdict and judgment in the court below.[18]

GIBSON, C. J. It is settled by Alston v. Moore, 1 Rolle's Abr. 53, that it is actionable to call a lawyer a cheat; for though he were not indictable for cheating his client, or punishable for it by striking from the roll, it is enough to support an action for words which impute it, that they touch the business by which he gets his bread.

But the material question is, did the plaintiff violate his professional duty to his client, in consenting to withdraw his charge of forgery against Crean when before the alderman, instead of lending himself to the prosecution of one whom he then, and has since, believed to be an innocent man? It is a popular, but gross, mistake, to suppose that a lawyer owes no fidelity to any one except his client; and that the latter is the keeper of his professional conscience. He is expressly bound by his official oath to behave himself in his office of attorney with all due fidelity to the court as well as the client, and he violates it when he consciously presses for an unjust judgment: much more so when he presses for the conviction of an innocent man. But the prosecution was depending before an alderman, to whom, it may be said, the plaintiff was bound to no such fidelity. Still he was bound by those obligations which, without oaths, rest upon all men. The high and honourable office of a counsel would be degraded to that of a mercenary, were he compelled to do the biddings of his client against the dictates of his conscience. The origin of the name proves the client to be subordinate to his counsel as his patron. * * *

In the case before us, Mr. Rush not only acted in accordance with it, but was guided by an extremely delicate sense of propriety. Convinced by the testimony of Mr. Bacon that the accusation was false, he did not only what every honest man would do, but what happened to be the very best thing he could do for his client—he abandoned the prosecution for the avowed reason that it could not be supported. He did not discontinue it, as has been said, for its fate was in the hands of the magistrate, who alone was responsible for it. But the defendant offered to prove the goodness of his own character, to show that Mr. Rush ought not to have acted on Mr. Bacon's information in preference to his client's instructions. His client's character, however, was not in issue, nor was Mr. Rush bound to give credence to the instructions of a heated client, rather than to the sober testimony of a dispassionate witness. It is enough that he acted to the best of his judgment on reasonable premises, for judging in sincerity, he would not be responsible for the accuracy of his conclusion. Besides, it was not pretended at the trial that he had judged erroneously. His relinquishment of the prosecution, then, being defensible, he was entitled to compensation for his services so far as he had gone. Had he continued

[18] The statement of facts here given is substituted for that of the reporter.

to prosecute against the dictates of his conscience, he would have been entitled to nothing, and the argument here, that he was not entitled, because he did not continue, would place him on the horns of a dilemma. But his task was done when the prosecution was ended, and he was then entitled to demand a quantum meruit. * * *

Judgment affirmed.

PEOPLE v. BLEVINS.

(Supreme Court of Illinois, 1911. 251 Ill. 381, 96 N. E. 214, Ann. Cas. 1912C, 451.)

Newton C. Blevins was convicted of murder in the first degree, and he brings error. Reversed.

FARMER, J. Plaintiff in error, Newton C. Blevins, was indicted at the August term, 1910, of the circuit court of Johnson county for the murder of James De Palma, an Italian, employed by the Carter Construction Company as foreman of a construction gang which had been engaged in constructing a railroad near Marion, Ill. Plaintiff in error was a coal miner living at Scottsboro, Williamson county. * * *

Plaintiff in error had no means to employ counsel, and when the indictment was returned against him the court appointed two lawyers from the Johnson county bar to defend him. The indictment was returned into court on the 15th day of August, 1910, and on the same day plaintiff in error was arraigned, counsel appointed for him, and the case set for trial August 17th, at which time the trial was entered upon. The state's attorney of Johnson county, the state's attorney of Williamson county, George White, of Williamson county, and George W. English, of Johnson county, all appeared for the prosecution. On the 18th day of August, and after but three jurors had been accepted, one of the counsel appointed to defend plaintiff in error presented his motion and affidavit, asking that the state's attorney of Williamson county, White, and English be not permitted to appear and assist the prosecution. The affidavit stated that plaintiff in error's counsel had not had sufficient time to acquaint themselves with his defense and prepare the case for trial; that they had had but limited experience in the trial of such cases; that one of them had been engaged in the practice of law less than two years; that the other one had given most of his attention to the practice in civil cases, and had a limited experience in the practice in criminal law; that said counsel were greatly overmatched in experience and numbers by counsel appearing for the people, three of whom had no connection with the office of state's attorney of Johnson county, but were employed and paid by outside parties for their services; that by reason of the superiority of counsel appearing for the state in ability, experience, and number, plaintiff in error was being oppressed, and was in danger of losing his life or liberty on account of such oppression. The court denied the motion,

and refused to limit the number of counsel for the people, and permitted the four lawyers named to prosecute the case to its conclusion. This ruling of the court is assigned for error.

An examination of this record convinces us that this ruling of the court was erroneous. In Hayner v. People, 213 Ill. 142, 147, 72 N. E. 792, 794, it was held to be not beyond the power of the court to permit counsel paid by private parties to assist the state's attorney, where there is no oppression of the defendant or injustice to him. The court said: "In granting such permission the court should see that the criminal law is not being used to gratify malice or personal ends; but cases frequently arise where the administration of public justice requires that the state's attorney should have assistance. There are cases where the state's attorney is clearly outclassed and overmatched by counsel for the defendant. Such matters must be left largely to the discretion of the court, whose duty it is to prevent oppression of the defendant, and to permit such assistance as fairness and justice may require. It might be a wrong and oppression to a defendant to permit able and experienced counsel employed by private parties to assist a competent state's attorney in a contest with inexperienced or inefficient counsel for the defense." It does not appear from that case that the defendant was unable to employ his own counsel, or that he was defended by counsel appointed by the court. If the law as stated in the case referred to applies where the defendant is able to and does employ his own counsel, it would seem that it would apply with greater force where he is unable to employ counsel and they are appointed by the court. When a court is called upon to appoint counsel for a defendant in a criminal case who is unable to employ counsel for himself, it is the duty of the court to see that counsel is assigned having sufficient ability and experience to fairly represent the defendant, present his defense, and protect him from undue oppression. Oppression may result to a defendant defended by young and inexperienced counsel, where he is prosecuted by an array of experienced and able attorneys, either in arriving at a conclusion as to his guilt or innocence of the charge, or in determining upon the punishment to be inflicted upon him where he is found guilty.

There can be no doubt of the right of a court to permit counsel employed by private parties to assist the state's attorney, but this discretionary power should never be abused by permitting counsel for the defendant to be overwhelmed, on account of their inexperience, by the number and ability of counsel assisting the state's attorney; and this discretion should be exercised with greater caution where the counsel are appointed by the court than where they are his own voluntary selection. Consciousness of counsel in this case, of their inferiority in knowledge and experience to counsel representing the prosecution, could hardly fail to intimidate and embarrass them in their efforts to

represent their client. This record shows that by reason of the inexperience of plaintiff in error's counsel incompetent evidence of a highly prejudicial nature was introduced by the prosecution on the trial. No reason appears in this case why so large an array of counsel for the prosecution, composed of experienced lawyers, should be thought necessary to a fair and impartial trial. In our opinion the court should have limited the number of lawyers assisting the state's attorney to one, or should have appointed additional experienced counsel to represent plaintiff in error. * * *

For the errors indicated, the judgment of the circuit court is reversed, and the cause remanded. Reversed and remanded.[14]

PUBLIC PROSECUTOR—PROCURING OR FACILITATING NEWSPAPER PUBLICATIONS RESPECTING HIS OFFICIAL ACTIVITIES. New York Committee. *Question 103:* (a) In the opinion of your Committee does Canon 20 of the American Bar Association's Code of Ethics apply to publications by a public prosecuting attorney as to pending or anticipated litigations whereof he has charge by virtue of his office?

(b) Is it proper professional conduct for a public prosecuting attorney to inform the newspapers that the government has evidence, tending to convict designated individuals of designated crimes, and that the evidence is laid before the Grand Jury?

Answer: (a) The rule expressed in the Canon is a salutary one; but as applied to public prosecuting attorneys it may be subject to exceptions in the public interest. In the absence of a specific statement of facts, the Committee is unprepared to answer this branch of the inquiry more definitely.

(b) A prosecuting attorney is not merely a lawyer; he is also a public officer. His duties are intimately connected with the detection of crime and the securing of evidence for convictions and the preservation of public order. We cannot say that in the discharge of his duties there are no instances in which it would be proper for him to make use of newspaper publicity as stated in the question; but in the opinion of the Committee, under circumstances which would justify such action, his course should be dictated solely by the public interest, and should be taken with due regard to law.[15]

[14] On the appointment of inexperienced or unfaithful counsel or of an insufficient number of counsel to represent the defendant in a criminal case as reversible error, see note in Ann. Cas. 1912C, 457.

[15] "May 11, 1915. *Question:* Counsel A., acting for a business men's association, advised the prosecution of B.; a warrant had been issued and he asked if the Association could properly advertise for persons who could furnish information necessary to the prosecution.

"*Answer:* The Committee advised that if the ends of justice required advertising for witnesses who knew the facts, the Association might make suitable advertisement to be properly phrased by Counsel A."—Report of May 1,

STATE v. ROCKER.

(Supreme Court of Iowa, 1906. 130 Iowa, 239, 106 N. W. 645.)

The instant defendant was indicted jointly with Dora Rocker, for the crime of murder in the first degree. Upon his motion he was granted a separate trial. The trial resulted in his conviction, and from the judgment he appeals. Reversed.

BISHOP, J. 1. August Shroeder, the person alleged to have been murdered, came to his death on June 30, 1900. It seems that, shortly thereafter, the defendant, Charles Rocker, was arrested upon information filed before a justice of the peace, charging him with the murder of Shroeder, and upon hearing he was discharged. He then commenced a civil action for malicious prosecution against his accuser, and one of the attorneys employed by him was Simon Fisher, who thereafter, as county attorney, signed the indictment which forms the basis of the present proceeding. Before pleading, defendant filed a motion to quash the indictment, supported by affidavits, basing the same upon the facts above stated, and the further averment that, as his attorney in said civil action, Fisher became possessed of all the information defendant had respecting the death of Shroeder and the circumstances and evidence in relation thereto. The motion then represents that Fisher made use of the information and knowledge thus obtained in conducting the examination of witnesses before the grand jury, in advising the grand jury, and in preparing the indictment voted and returned against the defendant. Notwithstanding the fact that Fisher made no attempt at denial of the matters thus charged, the motion was overruled.

We think it should have been sustained. It is true the charge made was in general terms, but, from the mere fact of a retainer in the civil action, it must be presumed that Fisher became possessed of every fact either known to Rocker or concerning which he had information from others respecting the death of Shroeder and the circumstances and cause thereof. The communication, it may readily be supposed, would include the facts concerning his own life and character, as such might become material in various ways. All this would naturally follow a retainer. It was necessary, in the first instance, to enable the attorney to determine whether or not a cause of action existed, and, in the next place, to prepare for a presentation of the case in court and meet any opposition presented in the way of defense. Now, by statute, it is made the duty of an attorney "to maintain inviolate the confidence, and, at any peril to himself, to preserve the secret of his client." Not only is this true by statute, but it is true by every consideration of the ethics of the profession. And it has been held repeatedly that an attorney, who has once been made the recipient of the confidence of a

1916, of the Committee on Professional Ethics of the Bar Association of St. Louis.

client concerning a certain subject-matter, is thereafter disqualified from acting for any other party adversely interested in such subject-matter. State v. Halstead, 73 Iowa, 376, 35 N. W. 457; 4 Cyc. p. 920, and cases cited in notes.

Such, in effect, was the position in which Fisher placed himself. We need not go to the length of holding that the statements made in the motion and affidavits appearing in this record are sufficient to convict the county attorney of any willful betrayal of professional confidence, and we do not understand counsel for appellant to contend for any such holding. It is enough that the officer placed himself in position to be open to such a charge, and that we make emphatic the declaration of his disqualification to act in the prosecution of his former client, under the circumstances appearing. Being disqualified, he should have moved the appointment of a substitute, as provided for in Code, § 304. Now the statute provides that an indictment shall be set aside, on motion, when it is made to appear that "any person other than the grand jurors was present before the grand jury during the investigation of the charge, except as required or permitted by law." Code, § 5319. While ordinarily it is the duty of the county attorney to attend upon the grand jury when required by that body (Code, § 307), there can be no warrant for his appearance when disqualified by reason of his having been attorney for the person charged in respect of the very matter under investigation. He is then a person not required or permitted by law to be before the jury. This conclusion finds support, in principle at least, in the case of State v. Will, 97 Iowa, 58, 65 N. W. 1010. There the judge holding the term went to the grand jury room and advised the jury respecting the case against the defendant under investigation, and it was held that he was a person not required or permitted to be before the jury. Accordingly, the indictment found should have been set aside. It follows, from what we have said, that the trial court erred in overruling the motion to set aside the indictment against the present defendant, and the case will be remanded, for submission to another grand jury for investigation and such action as may be determined upon by such grand jury. * * *

For the errors pointed out, the judgment is reversed, and the cause remanded, for further proceedings according to law. Reversed.[16]

[16] In In re Bunston (Mont.) 155 Pac. 1109 (1916), a county prosecuting attorney was disbarred because he abused his office by filing informations and issuing warrants for the purpose of forcing settlements of civil actions in which he had been retained, and because he had "the habit of keeping and issuing warrants at his pleasure without the existence of sworn complaints duly filed to authorize them." The latter warrants the court referred to as "these modern 'lettres de cachet.'"

A STATE'S ATTORNEY'S PROBLEM AS TO CONFIDENTIAL COMMUNICATIONS

Printed ante, p. 96.

SECTION 2.—THE LAWYERS FOR THE DEFENSE

A. B. A. CANONS.

4. When Counsel for an Indigent Prisoner. A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf.

5. The Defense or Prosecution of Those Accused of Crime. It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound by all fair and honorable means, to present every defense 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.[17] * * *

15. How Far a Lawyer May Go in Supporting a Client's Cause. Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.

It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.[18]

[17] "The lawyer's primary obligation, as an officer of the court, to assist in the administration of justice, is neither abrogated nor diminished by his appointment or retainer to defend a person charged with crime. * * * Whenever an attorney's professional obligation compels him to bring about the acquittal of a person charged with crime through the advancement of a legal proposition foreign to the guilt or innocence of the accused, his success is to be regarded both by him and by his professional brethren rather as the culmination of a regrettable duty than as a professional triumph."—Part of Canon XI of the *Code of Legal Ethics of the California Bar Association* adopted in 1910.

[18] In the B. B. A. Canons this sentence is amplified into the following Canon XVI: "It is improper for a lawyer to assert in argument his personal belief in his client's innocence, in the truthfulness or untruthfulness of a wit-

The lawyer owes "entire devotion to the interests of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne 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 attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.

16. RESTRAINING CLIENTS FROM IMPROPRIETIES. A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards Courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrong-doing the lawyer should terminate their relation.

HOFFMAN'S RESOLUTION XV. David Hoffman, *A Course of Legal Study* (2d Ed.) Vol. II, pp. 755–757: When employed to defend those charged with crimes of the deepest dye, and the evidence against them, whether legal or moral, be such as to leave no just doubt of their guilt, I shall not hold myself privileged, much less obliged, to use my endeavors to arrest or to impede the course of justice, by special resorts to ingenuity—to the artifices of eloquence—to appeals to the morbid and fleeting sympathies of weak juries, or of temporizing courts—to my own personal weight of character—nor finally, to any of the overweening influences I may possess from popular manners, eminent talents, exalted learning, etc. Persons of atrocious character, who have violated the laws of God and man, are entitled to no such special exertions from any member of our pure and honorable profession; and, indeed, to no intervention beyond securing to them a fair and dispassionate investigation of the facts of their cause, and the due application of the law; all that goes beyond this, either in manner or substance, is unprofessional, and proceeds, either from a mistaken view of the relation of client and counsel, or from some un-

ness, or in the justice of his client's cause, that belief being neither competent evidence nor fair argument."

In 29 Scottish Law Rev. at page 66, it is noted that the Benchers of the Inner Temple in London suspended a young barrister from practice for a year because in defending a prisoner he "declared to the jury that his client had nothing against his character, though he knew at the time that he had two convictions against him."

worthy and selfish motive which sets a higher value on professional display and success than on truth and justice, and the substantial interests of the community. Such an inordinate ambition I shall ever regard as a most dangerous perversion of talents, and a shameful abuse of an exalted station. The parricide, the gratuitous murderer, or other perpetrator of like revolting crimes, has surely no such claim on the commanding talents of a profession whose object and pride should be the suppression of all vice by the vindication and enforcement of the laws. Those, therefore, who wrest their proud knowledge from its legitimate purposes to pollute the streams of justice and to screen such foul offenders from merited penalties, should be regarded by all (and certainly shall by me) as ministers at a holy altar full of high pretension and apparent sanctity, but inwardly base, unworthy, and hypocritical—dangerous in the precise ratio of their commanding talents and exalted learning.

THE PLEA OF NOT GUILTY. John Selden, *Table Talk* (1689). See Arber's English Reprints (1898 Ed.) p. 65: LAW. A Man may plead not guilty, and yet tell no Lye, for by the Law no Man is bound to accuse himself, so that when I say Not guilty, the meaning is, as if I should say by way of Paraphrase, I am Not so guilty as to tell you; if you will bring me to a Tryal, and have me punisht for this you lay to my Charge, prove it against me.[19]

ADVOCATING CAUSES OF PERSONS ACCUSED OF CRIME. William C. Townsend, *Modern State Trials* (1850) Vol. I, pp. 254, 256, 257, 261, 262: The first duty of the prisoner's counsel is anxiously to take care that his client be not illegally convicted. But he will be convicted illegally when the indictment is technically wrong, —when improper evidence is admitted, or when evidence not worthy of belief has been accredited. It is no breach of an advocate's duty to address the jury, though he may casually know, without being permitted to reveal, that the prisoner has confessed. The counsel for the

[19] "The question in the American or English court is not whether the accused be guilty. It is whether he be shown to be guilty, by legal proof, of an offense legally set forth."—George F. Hoar, *Oratory*, 29 Scribner's Magazine, 756, 758.

"In criminal cases, it appears to me to be most advisable to exhort a prisoner to plead not guilty, as, on an investigation of his case, it may turn out that the offense for which he has been charged capitally may amount to a misdemeanor only."—Park, J., in Godefroy v. Jay, 5 Moore & Payne, 284, 300 (1831).

"Hence it is that guilty persons are generally thought none the worse of because they plead 'not guilty.' A shrewd appreciation of the principles of our criminal law, as well as not a little wit, was shown in the answer of the prisoner who, when asked to plead guilty or not guilty, replied, 'Faith, and how can I tell until I've heard the evidence?'"—Showell Rogers, *The Ethics of Advocacy*, 15 Law Quar. Rev. 259, 261.

Seven Bishops knew that they had admitted their handwriting to the petition before the incensed king in council, yet shrunk not from objecting that there was no proof of the fact, and had almost succeeded in defeating the criminal information upon that technical objection.[20] Were Finch and Somers ever censured for availing themselves of defective proof in court, and not importing into the case their own private knowledge and belief? Why should the counsel be blamed for commenting on evidence that may, or may not, appear false to persons who have not themselves a positive knowledge that the prisoner is guilty? The jury are sworn to decide on the evidence brought before them; the fact that the prisoner did commit the crimes will not make their verdict less erroneous if they have decided against him on insufficient evidence; it will only make their decision less a subject of regret. * * * Though his crime be of scarlet dye, deeper than that of Cain, the accused criminal must be heard according to our just and humane laws before he is condemned; and, unequal to the task of speaking for himself, must be suffered to attempt to disprove the charge, or defeat his accuser, by counsel.

An ignorant relative of some forlorn prisoner may accompany the attorney to counsel's chambers, and say, "We know he is guilty, we only wish you to quibble for him;" meaning, according to the real etymology of the word, quidlibet, to say every thing that can be said in his behalf. Laymen and clerics, who ought to be better informed, express their utter amazement that members of a liberal profession should condescend to act on the spirit of such instructions—to take any objection to the indictment to which it may be liable—to exclude the evidence of a hostile witness—to endeavour to break it down by cross-examination. And yet he would betray the first principle of advocacy were the barrister to decline availing himself of all technical or strictly legal objections. He is bound to urge all that his unfortunate—it may be guilty—client would have been anxious, had he possessed the competent ability, to urge for himself; to mould into more presentable shape the crude efforts at exculpation of the man who stands at the bar for his deliverance; embody his thoughts in fitting language—to invest his case with all the arts of rhetoric—to persuade, convince, by the force of argument compel, the jury to acquit. There is the well-understood restriction by which every gentleman feels himself bound, the line of demarcation within which he must necessarily walk, to refrain from introducing his own individual belief, and from stating facts of which there is no evidence. It is no part of his duty—

[20] Of the trial of the Seven Bishops for criminal libel on the Crown in alleging the non-existence of the dispensing power, Sir James Fitzjames Stephen in his *History of the Criminal Law of England* (1883) Vol. I, p. 415, says: "Speaking merely as a lawyer, I can only say that the law of libel at that time was so vague, that it is difficult to say whether or not a perfectly modest and respectful expression of the opinion that the king had made a mistake was a libel."

quite the reverse—to misstate the evidence, but to dwell strongly on those portions which tell most for the prisoner, to explain away adverse facts by any ingenious hypothesis which a reasonable man may make, and to which reasonable men may listen. It is an offensive fallacy to argue that, if he does not state, he acts a lie. The patron, in right of his office, should call attention to the most favourable parts of his client's case, in the most earnest manner he can; should dress his remarks in the most attractive guise, and conciliate, with smooth and facile art, the suffrages of those who are to decide. He may be as impassioned as the cunning player in Hamlet. Why should he not? The warmth may not be affected, for passionate pleading is at least as likely to kindle the disputant as when contending in private argument for victory. * * *

Each advocate is to present his case as strongly as the law or the facts will permit. With the ultimate decision of the cause he has nothing to do. Suppose the wrong indubitable, is there any breach of propriety in addressing the jury in mitigation of damages, in softening asperities of statement, and, if necessary, calling witnesses to modify the case. Why should not technical defects be taken advantage of? The prosecutor has failed to comply with some of those conditions on the performing of which alone he, as a member of society, has a right to the assistance of the law. "The law," says Mr. Gisborne, "offers its protection only on certain preliminary conditions: it refuses to take cognizance of injury, or to enforce redress, unless the one be proved in the specific form which it prescribes; and, consequently, whatever be the pleader's opinion of his cause, he is guilty of no breach of truth and justice in defeating the pretensions of the persons whom he opposes, by evincing that they have not made good the terms on which alone they could suppose themselves entitled to success." Gisborne's Moral Essays.

As to cross-examination, the right is equally clear. What kind of person says this? Is he destitute of that moral sense requisite to give weight to his testimony? There would be guilty silence in not testing his credit.

The effect of the present system upon the parties pursuing it can scarcely be gainsayed; neither has the profession generally, nor have individual members, lost caste by a fearless, impassioned, successful exposition of their client's case, however worthless morally that may have been. The counsel is no less accredited in private than the diplomatist "sent out to lie for the good of his country," as trustworthy as the philosophical Johnson, or erudite Parr, who combined an inveterate habit of arguing for victory with a scrupulous regard for truth.

SERJEANT BALLANTINE'S COURSE OF ACTION IN A ROBBERY CASE in the Old Bailey in 1848. 39 Law Mag. 54, 55: A few weeks ago Mr. Ballantine defended a prisoner at the Old Bailey, on the ground that he was merely the instrument of another person whom he named. This person, he said, called the prisoner up in the night by throwing gravel at the window (some of which was found on the window sill) and made him go and assist in the robbery. Mr. Ballantine maintained that the counsel for the prosecution had not dared to contradict this story, by calling the person alluded to, although he was in court. He therefore asked the jury to credit the prisoner's story and acquit him.

Now, as far as the law goes, Mr. Ballantine was perfectly correct. That learned and acute judge, Mr. Baron Alderson, laid it down in Reg. v. Crowhurst, 1 Car. & Kir. 370, that where the prisoner tells a probable story to account for his conduct, which some person could either contradict or confirm if called, and that person is not called, the jury ought to acquit. They have no right therefore to throw the onus of proving the story upon the prisoner, and for this plain reason —that it is easy to call a man to affirm that which shall inculpate another and exculpate himself; but it is far less easy for the prisoner to persuade a man to come and give evidence against himself. If, therefore, the prisoner's story be not true, there is no obstacle to its disproof; and its omission is presumptive proof that the prosecution is wrong and ought to fail. In this view, then, we see that Mr. Ballantine was fully justified in what he said.

There is another fact, however, which formed the ground of the volley of abuse levelled at Mr. Ballantine. The person whom the prisoner had named, and the prosecutor had not called, though in court, had been subpœnaed by the prisoner. Well, what of it? Where is the stigma thence attaching to Mr. Ballantine? What did it matter to the argument used, or to its legitimate weight, whether the witness who was there, and being there, was not called into the box by B., had been brought there by A.? No doubt he had: but was it less competent to B. to call him on that account? Certainly not. The whole question was, did the prosecutor call him when he might, or not? He did not call him; and it was just as much a presumption in the prisoner's favor that he was not called, whether he was brought there by one party or the other. The learned recorder thought, however, it made all the difference, and saw in it a degree of treachery in the counsel for the prisoner which shocked him. * * *

True it is, that Mr. Ballantine might as well have said—to carry the matter to the extreme against him, he had, perhaps, better have said—that the witness whom the prosecutor did not dare to call had been subpœnaed by the prisoner. But if he had it would only have increased, and certainly not have diminished, the force and truth of

what he was urging upon the jury. Where then was the disgrace of omitting to mention it?

HENRY L. CLINTON'S COURSE OF ACTION IN PEOPLE v. SHAY. Frederick Trevor Hill, *Legal Defeaters of the Law,* 2 Putnam's Monthly, 293: In New York, Mr. Henry L. Clinton, a well-known criminal lawyer, successfully defended a brutal murderer named Shay by discovering a clerical error in the indictment. This paper, instead of reciting that Shay, with a certain knife, stabbed his victim, read "a ceertain knife did stab," etc., which the lawyer insisted was an indictment of the knife rather than of Shay, and the culprit went free.[21]

BENJAMIN BUTLER'S COURSE OF ACTION IN COMMONWEALTH v. RECORD. Frederick Trevor Hill, *Legal Defeaters of the Law,* 2 Putnam's Monthly, 293: Some years ago in Boston a burglar named Record was suspected of gaining access to the houses he robbed by means of duplicate keys, but for a long time he successfully evaded the police. Finally he was apprehended in the very act of removing a key carelessly left in a front door, and, being arrested, was

[21] See note 17 ante.

"Counsel for the prisoner and counsel for the prosecution have different duties to perform. The former has to get an acquittal if he can, whatever the merits of the case may be, provided he acts up to the rule laid down by Sir Alexander Cockburn, Lord Chief Justice of England, in his speech at the banquet given by the Bar of England to M. Berryer on November 8, 1864. * * * The duty of prosecuting counsel is to assist the court to arrive at the truth. * * *"—Sir Harry Bodkin Poland, *A Short History of the Criminal Evidence Act,* 1898, pp. XXI, XXII, a preface to Wilfred Baugh Allen's edition of the act.

As was said by Sir James Hannen, President, in an English divorce case, "there is an honorable way of defending the worst of cases." Smith v. Smith, 7 P. D. 84, 89 (1882).

"Every man charged with an offense in a court of law stands or falls according to the evidence there produced. If that which is brought forward against him is weak and insufficient, or the charge itself is so inartificially framed that the law, if appealed to, must relax its hold upon its prisoner, it can be no violation of moral duty to point out these deficiencies to the court, although the effect must be that the criminal will escape. * * * But it cannot be denied that the utmost circumspection is necessary to prevent the zeal of the advocate from hurrying him too far. He must keep within certain prescribed limits, and stand strictly, in such cases as we are now considering, upon the defensive. He may honorably say to the accuser: 'Prove my client guilty if you can. You use the law as a sword; I will take it as a shield;' and so long as he keeps within the lines which the law has traced for the protection of the accused, he may—nay he must—afford his client the benefit of its shelter. If the law allows a loophole of escape, he is a traitor to his trust if he does not bring this before the attention of the judge. He would incur a fearful responsibility indeed if, knowing an objection which, if taken, would be fatal to an indictment, he were to suppress it, because he was satisfied of the fact of his client's guilt. It is no doubt difficult to observe the proper medium and herein, in a moral point of view, consists one of the chief trials of the profession."—Wm. Forsyth, *Hortensius* (3d Ed.) pp. 408, 409.

duly indicted for larceny. Benjamin Butler defended him and pleaded that a key was part of a door, a door part of a house, and a house real estate. Therefore no conviction was possible for larceny, which covered the stealing of personal property—not real estate. This plea actually availed, and the prisoner was discharged.[22]

BENJAMIN BUTLER'S COURSE OF ACTION IN COMMONWEALTH v. HAYWARD. Frederick Trevor Hill, *Legal Defeaters of the Law,* 2 Putnam's Monthly, 293, 294: Again [Benjamin] Butler boasted of having saved one Hayward from suffering the death penalty by interposing a curious defense. Hayward was a burglar who broke into a railroad depot. He was immediately pursued by a constable, and, seeing that escape was impossible, he coolly waited for the officer and deliberately shot him to death. Butler discovered that almost the only kind of building not covered by the statute making burglarious entry a felony was a railroad depot. Therefore he claimed that Hayward, in breaking into a railroad station-house, had committed no offense for which the constable could arrest him without a warrant, and that death resulting from resisting an illegal arrest was not murder in the first degree. This plea succeeded![23]

[22] "If a flaw can be detected in the proceedings or in the evidence, if a doubt, not of guilt, but of the proper proof of the same, can be fairly raised, the counsel is bound to press these advantages with all achievable effect, and cause, if possible, the acquittal of a man whom he may know to be in fact guilty as charged."—John C. Reed, *Conduct of Lawsuits* (2d Ed.) § 82, pp. 60, 61.

[23] See note 17 ante. "I once saw a man tried for embezzling money, the price of hay which he had taken from a rick belonging to his employer and sold. There was no proof that he had ever had the money, and if he had there was no proof that he had received it for and on account of his master. It was contended that if it was anything it was stealing the hay. So he was acquitted and charged with stealing the hay. Argued that if it was anything it was embezzling the money, for he had authority to sell the hay. Acquitted. Not because he was not guilty."—Richard Harris, *Hints on Advocacy* (1903) p. 207.

"For he [Quintilian] pretends that, * * * many laudable reasons may induce an advocate to undertake the defense of a criminal. For instance, he may wish to preserve the life of such a man, in order that he may be reclaimed from his evil ways, and become a useful citizen. Or, although his client is clearly guilty, he may think that the state has need of his services, and that a public benefit will be conferred by rescuing him from the arm of the law; on the same principle that led Fabricius to vote in favor of Rufinus as consul, because, although the latter was a man without principle, and his own enemy, he believed him to be an able general, and war was then impending over Rome. The reply to such an argument is that causes are not undertaken on this principle, and perhaps no such instance has occurred since courts of justice have existed."—Wm. Forsyth, *Hortensius* (3d Ed.) pp. 407, 408.

"We believe it is safe to say that in a very large proportion of cases the lawyer who defends a person accused of crime is actuated, in his conduct of the cause, not by a desire to see that justice is done, but by a desire to win his case. Of course he tries to think that he believes that when he wins his case he sees that justice is done. But the fact is that he really cares very

THE DEFENSE OF A PERSON ACCUSED OF CRIME AND BELIEVED BY HIS LAWYER TO BE GUILTY. Editorial in 4 Jurist, 593, 594: It is pretty clear that the existing [English] rule is that counsel are not at liberty to refuse to defend a prisoner by reason of any preconceived notions of their own as to his guilt or innocence: and having undertaken his defence, they are bound to say for him all that he might be reasonably supposed to say for himself; or, in other words, all that they may consider necessary and efficient for his protection. * * *

What sophism can satisfy us that it is consistent with morality to urge arguments which we believe to have no weight; to distort some facts; to conceal others; in fact, to count upon the weakness of juries and judges, and to practice a voluntary deceit? It is vain to say, we are mere mouthpieces; that we are only the organs of our clients; and that no one is deceived by the artificial representations of counsel. * * * We know that practically much effect is produced by the weight of particular counsel's reputation; and more than anything by the greater or less apparent conviction of his own mind. * * * It is not, then, true that we are, for all purposes, the mere organs of our clients; we speak as the counsel of the accused, it is true; but we are not, therefore, deprived of our own individuality; we represent our client's case, but we act on the tribunal with the force of mind, the reputation, the personal weight and the personal powers of persuasion appertaining to ourselves. As regards the advocate himself, therefore, considered without reference to surrounding institutions, there can be no doubt that the customary rule of the profession is one inconsistent with the laws of morality; since it amounts to neither more nor less than that a man is bound to deceive, if it be for the interest of his client.

But then it is said that it is rendered requisite for the due protection of the accused, by the institutions constituting the legal polity of the country; and this argument has reference to the proposition that, if

little whether or not justice is done so long as he can win his case. The obvious result is that he is sorely tempted to set up false alibis, hire alienists, plan stage effects, coin ridiculous phrases in the hope of winning the sympathy of the jury or popular approval (i. e., dementia Americana), and in short avail himself of every possible expedient to make the case an advertisement of his ability to 'get off' persons charged with crime. If, on the other hand, the lawyer should undertake the case of one whom he believed to be guilty and do nothing more than present such matters as he honorably could on his client's behalf, it would be practically impossible to prevent the jury from sensing his mental attitude, which would prejudice his client's chances. Furthermore, his acceptance of his retainer and fee would be intrinsically dishonest, for he would know that he was expected to do more than see that legal formalities were observed. Altogether it would seem a much safer, a much more dignified, a much more honorable course for a lawyer to refuse to undertake the defense of one whom he believes to be guilty."—Editorial on the *Propriety of Defending a Person Believed to be Guilty*, 10 Bench and Bar (N. S.) 521, 522, 523.

counsel are to be at liberty to form and to act on an opinion that an accused person is or is not guilty, they become judges and not advocates, and that the result may be to deprive persons accused of crime of their just rights of defence.

Let us consider this view of the subject. In the first place, take the hypothesis in the strongest possible way, that the counsel selected comes to the conclusion that the accused is guilty and refuses to defend him at all—is it then correct to say that he assumes the functions of the judge? We apprehend not. The judgment passed by the judge is not merely an opinion; it is a binding decree, having punitive consequences more or less fatal to the accused. The advocate, on the contrary, who shall refuse to defend him, passes no judgment at all analogous to that of the judge. He merely enounces an opinion, having no specific consequences, and totally unbinding even on the opinion of others. Even this opinion is not directly enounced, and is only to be collected by inference, from this act. It is not true, therefore, to say that the advocate has usurped the place of the judge. Suppose, however, that many advocates are successively selected, and severally come to the same conclusion, and refuse to defend the prisoner. Then, it is said, the evil of a practice contrary to the existing one would be apparent; we should have a prisoner absolutely deprived of the benefit of a professional defender. But we answer, this is a state of things which could never happen unless the evidence against the prisoner, on his own showing, was so strong as to afford an irresistible inference of his guilt. Because, it is clear that, owing to the various modes of viewing the same thing possessed by even ordinary men, and much more by lawyers, it would be utterly impossible that a considerable number of counsel should all arrive at the same conviction from the same body of evidence, unless that evidence were irresistibly conclusive. If that be the case, how is the prisoner damnified? The same evidence which convinced his [numerous] counsel must, of necessity, convince his judges, and the privation of counsel would flow simply from that which deprives him of a right to defence, viz. his certain guilt. The truth is, that much of the affection for the present system arises from our confounding the right of an accused person, as between himself and the State, with his supposed rights, as between him and another person who knows or believes his guilt. In the first case we have admitted his right to defence, which amounts to no more than a right to assistance, in order to shew to the State what is the truth. But the right claimed for the accused in the second case is a right to compel some other person to utter that which he does not believe, in order to screen him, the accused, from the punishment due to his crime. The existence of any such right we deny. We contend that, if an accused person be really guilty, he has no moral right to any defence. In him, any attempt to avoid punishment by a deception tending to satisfy his judges that he is innocent is an additional

crime, instead of a justifiable act; and how can it be a virtue in his counsel to do that for him which is a crime if done by himself? How can that, which it is an additional crime in him to attempt, be a moral right, if attempted for him by another? The doctrine, as we conceive, on principles of a high morality, would be this: That the accused is entitled to defence so long as it is uncertain whether he is guilty or not, and from [by?] such persons only as are ignorant whether he is so. But he is not entitled, in point of morality, to defence from [by?] any person who knows his guilt. And the extent to which such person knows or believes his guilt should be, it seems to us, the measure of the duty of that person in defending him.[24]

MR. SEYMOUR'S COURSE OF ACTION IN THE MIRFIELD MURDER CASE.[25]

Two men, Reid and McCabe, were tried before Mr. Justice Patteson at the assizes for Yorkshire in the winter of 1847–1848 for murders committed at Mirfield. For one of the murders Reid had formerly been tried and acquitted. McCabe was now joined as an accomplice as to another murder on evidence that went to show that he was in close conversation with Reid soon after the murder. He had also strengthened suspicion against himself by his own confused statements. The line of defense adopted by Reid's counsel, Mr. Seymour, was to charge McCabe with the murder, and so shift it from Reid altogether. Mr. Justice Patteson's charge was strongly favorable to McCabe, but both the accused were found guilty. Reid confessed his guilt; and the newspapers declared that he had not only done so to his counsel before the trial, but that he had also confessed that the crime was committed by himself alone, thus making the innocence of McCabe known to Mr. Seymour.

Mr. Seymour, in a letter to the London Times, admitted that he was in possession of a statement made by Reid in answer to questions about the new evidence against him and that the statement tended to

[24] "I do not place the right of the lawyer to defend a client whom he believes to be guilty upon the ground that he cannot know that his client is guilty until his guilt has been officially and finally declared, by a court and jury, because he often does know, in the sense that he has a moral conviction of the guilt of his client which he has derived through the ordinary channels of information. I place the right of the lawyer upon the ground that he is an officer of the law, and that it is his duty to see that the forms of law are carried out, quite irrespective of individual knowledge. The argument that the lawyer cannot know of the guilt of his client until he has been officially adjudged so might be used with equal force by an accessory after the fact. Why could not every accessory after the fact declare, with the same reason as the lawyer, that he could not know that a crime had been committed because the person whom he had assisted had not been adjudged judicially guilty?"—John R. Dos Passos, *The American Lawyer* (1907) pp. 158, 159.

[25] This statement is an abridgment of that found in 39 Law Mag. 56–59.

inculpate Reid and gave Mr. Seymour reason strongly to presume Reid's guilt, but he denied that the statement at all exculpated McCabe or was irreconcilable with the supposition of McCabe's guilt.

But in his letter Mr. Seymour went farther than he should have done, saying:

"And now, Sir, assuming that to be true which I deny, and admitting for a moment that a 'full confession' was made to me 'previous to the trial which wholly exculpated McCabe,' I am yet to learn that I would be deserving of blame for endeavoring to throw the whole guilt upon McCabe if the evidence, by which the jury were bound to decide, warranted such a course. I am yet to learn that this would be either morally or professionally wrong.

"When a counsel accepts a brief for a prisoner he becomes, in my opinion, bound by a twofold obligation. I esteem it in the first place to be his strict and solemn duty to keep faithful to his client during the trial, or pending it, and to hold his secrets as a religious trust. They are commissa fidei—they must not be violated—they must not be exposed. In the next place, it is equally his bounden duty to frame the best defense in his power from the evidence given at the trial.

"If a prisoner confess his guilt, or make admissions which tend to criminate him while they acquit his fellow prisoner, is his counsel to hurry into the witness-box to ruin and betray him? If not, then his confession is not the evidence; and does a counsel overstep his duty who adopts a line of defense wholly irrespective of that confession, but which is founded on the evidence before the jury, borne out and justified by it? When a veto is thus put upon this exercise of a counsel's discretion—when, instead of his argument being weighed and measured by the nature of the evidence, his motives and private opinions are publicly submitted to a rigid moral test—the relation of client and counsel will be deranged, and their mutual confidence interrupted; the independence of the bar will be violated, and the principle of advocacy will be abolished altogether." [26]

[26] An anonymous writer on *License of Counsel* in 39 Law Mag. at page 59, says: "The pinch of the case is entirely evaded in this argument, nor does the latter paragraph give the slightest support to the hypothesis in the former. The gravamen of the charge is that of endeavoring to criminate a person one knows to be innocent, in order to acquit a client one knows to be guilty. What has this to do with good faith towards the client? Cannot a secret reposed in a barrister by one man be kept without rendering it necessary to attack another? If the relation of client and counsel cannot be maintained, and justice to a guilty man be done, without hazarding the life of an innocent one, then the sooner it be 'deranged' the better. * * * The fact is that it is alike improper and unprofessional for counsel to do that for a prisoner which it would be unjustifiable in the prisoner to do for himself; and we apprehend there can be small doubt that it would be unjustifiable in a prisoner to get an innocent man hanged in order to save his own neck from a halter."

CHARLES PHILLIPS' COURSE OF ACTION IN COURVOISIER'S CASE.[27]

In 1840 Lord William Russell, 73 years old, deaf and infirm, was murdered in his bed. He was a widower and his household consisted of a woman cook, a housemaid, named Sarah Mancer, and a Swiss valet named Courvoisier. The valet, Courvoisier, was arrested and indicted for the crime, and he retained several counsel, among whom were Mr. William Clarkson and Mr. Charles Phillips.

While it seemed clear that some one in the house committed the crime, the prisoner's counsel went to trial convinced that he was innocent. They cross-examined Sarah Mancer, the housemaid, closely, to show that there was as much probability that she or the other servant was the criminal as that the prisoner was, and to show further that the police, incited by the hopes of the large rewards that had been offered, had conspired unjustly to fasten suspicion upon the prisoner.[28]

After Sarah Mancer's cross-examination and after some other witnesses were examined, a Madame Piolaine, whose husband and a partner conducted a hotel in a rather unsavory neighborhood, became suspicious, after hearing read a newspaper item about the case, that Courvoisier might be a former servant whom she knew only by the name of Jean, and who, shortly before the murder, had left with her a brown paper parcel which had never been called for. In consequence of that suspicion, the parcel was opened in the presence of a solicitor and was found to contain some missing plate which belonged to the murdered nobleman. The next morning Madame Piolaine identified Courvoisier among those in the prison yard as the servant who had left the parcel with her.

Courvoisier recognized Madame Piolaine, and a few minutes later, after he had been taken to the court room, he sent for his counsel and told them that he committed the murder, but insisted that they continue to defend him, which, after some hesitancy on Mr. Phillips' part, they did.[29]

[27] There is considerable literature on the Courvoisier case. In 1 Townsend's *Modern State Trials*, 244, 313, is an account which summarizes the testimony of the different witnesses. See Id. pp. 275–303. The trial is also reported in Atlay's Famous Trials of the Century, 44, and in Thomas Dunphy and Thomas J. Cummins' *Remarkable Trials* (1867) 310. In 2 Warren's *Miscellanies* (1855), p. 1, will be found Samuel Warren's review of the case as reprinted from 11 Law Review, 376. In 24 Littell's Living Age, 179, 230, 306, and 25 Littell's Living Age, 289, 310, will be found the letters of Warren and Phillips, various comments on the case, and Warren's review of it. In 12 Law Rep. (Vol. 2, N. S.) 433, 479, 536, will be found some of the same material.

[28] Some time after the trial Sarah Mancer became insane and the London Examiner insisted that she was "driven mad by the sufferings and terror arising out of the Courvoisier trial."

[29] The unusualness of the position Phillips was placed in by Courvoisier is shown by Mr. Serjeant Ballantine's remarks, as follows: "I suppose few coun-

But immediately there was an illustration of the fact that a conscientious lawyer's knowledge of his client's guilt robs his endeavors in that client's behalf of their efficacy. At once all attempt to cast suspicion on the innocent servants was abandoned and the cross-examination of the subsequent witnesses became almost perfunctory.

Courvoisier was recognized by Mrs. Piolaine and recognized her just before court in the morning and almost at once made his confession to his counsel. After that seven policemen and ten other witnesses were examined before Mrs. Piolaine gave her testimony. Eight other witnesses gave their testimony after she did that same day. There was only half a page of cross-examination of Inspector Tedman, the first of the seven policemen, though he "gave very strong and apparently conclusive evidence against the prisoner." [30] The other policemen, with the exception of one who was cross-examined by Mr. Clarkson, Phillips' associate, were briefly cross-examined. The ten other witnesses who preceded Mrs. Piolaine were not cross-examined at all. Mrs. Piolaine was cross-examined with reference to whether the hotel of her husband and his partner was a gambling house, what she had heard about the murder and the trial, etc.[31] "The remaining eight witnesses were scarcely cross-examined at all," we are told by Samuel Warren, who adds that from the moment of the confession Phillips' "fire slackened and was directed thenceforth to only two or three points, and these, unless we are grievously mistaken, really vulnerable portions of the case, and justifying, in our opinion, after much consideration of the facts elicited on cross-examination, the gravest suspicions." [32]

sel have defended more accused persons than myself, and I must allow that innocence was not the characteristic feature of the majority of my clients; but I cannot remember any case in which I received an unqualified admission of guilty. The utmost that approached to it was a mild suggestion that if the evidence was too strong for me to obtain an acquittal, it was hoped that I would save my client from transportation."—Mr. Serjeant Ballantine, *Some Experiences of a Barrister's Life* (5th Ed.) p. 76.

[30] Samuel Warren on *The Practice of Advocacy—Mr. Charles Phillips and His Defence of Courvoisier*, in 11 Law Review, 376, 400 (Feb. 1850); same article in Samuel Warren's Miscellanies, Vol. II, p. 1.

[31] On the need of cross-examining Mrs. Piolaine, see 1 Townsend's Modern State Trials, 244, 299, where it is said: "It was impossible that Mr. Phillips should refrain from cross-examining the witness without admitting the prisoner's guilty theft just previous to the murder. She was a perfect stranger, the locality of her hotel notorious, the coincidence of time when the discovery was made singularly remarkable, and the whole truth could not have been ascertained, nor full justice done between the Crown and the prisoner, had his counsel, through a misplaced delicacy, abstained from all questioning upon points which invited explanation."

[32] 11 Law Review, 376, 403; Samuel Warren, *Miscellanies* (1855) Vol. II, p. 31.

"The writer has always insisted that a lawyer had no moral right to defend on the merits a man he knew in advance to be guilty, and has supported his position by two reasons: (1) Such action warps the lawyer's moral nature; and (2) in so far as the lawyer does not deliberately become accessory after the fact to the crime, his knowledge of his client's guilt robs his exertions in the client's behalf of their effectiveness. The first reason seems to the

Courvoisier was convicted, and later confessed his guilt.[33] After Courvoisier's confession became known, Mr. Phillips was attacked by the London Examiner because he remained as counsel after Courvoisier confessed to him and because of what he was supposed to have said and done thereafter in the prisoner's behalf.[34] For years he refused to notice the attacks upon him, but finally, in November, 1849, nine years after the trial, and at the earnest solicitation of his friend Samuel Warren, and in reply to a letter from Warren, he wrote a letter to Warren which gave his version of the various happenings. The letters of Warren and Phillips were printed in the London Times of November 20, 1849, and are as follows:

"Inner Temple, Nov. 14th, 1849.

"My Dear Phillips: It was with pain that I heard yesterday of an accusation having been revived against you in the 'Examiner' newspaper, respecting alleged dishonorable and most unconscientious conduct on your part, when defending Courvoisier against the charge of having murdered Lord William Russell. Considering that you fill a responsible judicial office, and have to leave behind you a name unsullied by any blot or stain, I think you ought to lose no time in offering, as I believe you can truly do, a public and peremptory contradiction to the allegations in question. The mere circumstances of your having been twice promoted to judicial office by two Lord Chancellors, Lord Lyndhurst and Lord Brougham, since the circulation of the reports to which I am alluding, and after those reports had been called to the attention of at least one of those noble and learned lords, is sufficient evidence of the groundlessness of such reports.

writer conclusive, but for those who believe that the guilty man has a right to have his defense vigorously presented, the second reason shows that the supposed right of the guilty man is infringed unless he is defended by a man who believes in his innocence."—George P. Costigan, J., *The Proposed American Code of Legal Ethics*, 20 Green Bag, 57, 66.

"If a client is charged with crime, and is guilty, it is not to his interest to confess it even to his lawyer, and under the principle that no man is bound to criminate himself, he is not under a duty to do so. His defense will, however, be embarrassed if his lawyer is in doubt as to his innocence. A guilty man must be defended by technicalities, and technicalities are the ruination of an innocent man."—John Brooks Leavitt on *Lawyer and Client* in *Every-Day Ethics* (Yale University Press, 1910) pp. 46, 47.

[33] The confession will be found in the Annual Register for 1840, p. 236, and in Thomas Dunphy and Thomas J. Cummins' *Remarkable Trials* (1867) at page 368. Courvoisier confessed under date of June 22, 1840, and was executed July 6, 1840. The Examiner's attacks on Phillips began June 27, 1840.

[34] See issues of June 27, 1840, and July 11, 1840.

In 21 Belgravia, 216 (1873), is a sketch of the life of Charles Phillips written by Percy Boyd. The same sketch is copied, but without the author's name, in 15 Every Saturday, 270. The writer of that article several times refers to the bad feeling between Charles Phillips and Albany Fonblanque, the editor of the London Examiner, and says: "I am unable to say what was the original ground of quarrel between Phillips and the late Mr. Albany Fonblanque, who had then the management of the Examiner; but in the columns of that able journal appeared a series of attacks upon the professional character of Phillips which evinced great animosity on the part of the writer."—21 Belgravia, 216, 225.

"Some time ago I was dining with Lord Denman, when I mentioned to him the report in question. His lordship immediately stated that he had inquired into the matter, and found the charge to be utterly unfounded; that he had spoken on the subject to Mr. Baron Parke, who had sat on the Bench beside Chief Justice Tindal, who tried Courvoisier, and that Baron Parke told him he had, for reasons of his own, most carefully watched every word that you uttered, and assured Lord Denman that your address was perfectly unexceptionable, and that you made no such statements as were subsequently attributed to you.

"Lord Denman told me that I was at liberty to mention this fact to any one; and expressed in noble and generous terms his concern at the existence of such serious and unfounded imputations upon your character and honor.

"Both Lord Denman and Baron Parke are men of as nice a sense of honor and as high a degree of conscientiousness as it is possible to conceive; and I think the testimony of two such distinguished judges ought to be publicly known, to extinguish every kind of suspicion on the subject.

"I write this letter to you spontaneously, and, hoping that you will forgive the earnestness with which I entreat you to act upon my suggestion, believe me ever yours sincerely, Samuel Warren.

"Mr. Commissioner Phillips."

"Nov. 20 [1849].

"My Dear Warren: Your truly kind letter induces me to break the contemptuous silence, with which for nine years I have treated the calumnies to which you allude. I am the more induced to this by the representations of some valued friends that many honorable minds begin to believe the slander because of its repetition without receiving a contradiction. It is with disgust and disdain, however, that even thus solicited I stoop to notice inventions too abominable, I had hoped, for any honest man to have believed. The conduct of Lord Denman is in every respect characteristic of his noble nature. Too just to condemn without proof, he investigates the facts, and defends the innocent. His deliberate opinion is valuable indeed, because proceeding from one who is invaluable himself. My judicial appointments by the noblemen you mention would have entailed on them a fearful responsibility, had there been any truth in the accusations, of which they must have been cognizant. I had no interest whatever with either of these chancellors, save that derived from their knowledge of my character, and their observations of my conduct. It is now five and twenty years since Lord Lyndhurst, when I had no friend here, voluntarily tendered me his favor and his influence, and his kindness to me remains to this day unabated. Of Lord Brougham, my ever warm and devoted friend, I forbear to speak, because words cannot express my affection or my gratitude. His friendship has soothed some af-

fliction and enhanced every pleasure, and while memory lasts will remain the proudest of its recollections and the most precious of its treasures. This is no vainglorious vaunting. The unabated kindness of three of the greatest men who ever adorned the bench ought, in itself, to be a sufficient answer to my traducers. Such men as these would scarcely have given their countenance to one who, if what was said of him were true, deserved their condemnation. I am not disposed, however, though I might be well warranted in doing so, to shelter myself under the authority of names, no matter how illustrious. I give to each and all of these charges solemn and indignant contradiction, and I will now proceed to their refutation. The charges are threefold, and I shall discuss them seriatim.

"First, I am accused of having retained Courvoisier's brief after having heard his confession. It is right that I should relate the manner of that confession, as it has been somewhat misapprehended. Many suppose it was made to me alone, and made in the prison. I never was in the prison since I was called to the bar, and but once before, being invited to see it by the then sheriffs. So strict is this rule, that the late Mr. Fauntleroy solicited a consultation there in vain with his other counsel and myself. It was on the second morning of the trial, just before the judges entered, that Courvoisier, standing publicly in front of the dock, solicited an interview with his counsel. My excellent friend and colleague, Mr. Clarkson, and myself immediately approached him. I beg of you to mark the presence of Mr. Clarkson, as it will become very material presently. Up to this morning I believed most firmly in his innocence, and so did many others as well as myself. 'I have sent for you, gentlemen,' he said, 'to tell you that I committed the murder!' When I could speak, which was not immediately, I said, 'Of course, then you are going to plead guilty?' 'No, sir,' was the reply, 'I expect you to defend me to the utmost.' We returned to our seats. My position at this moment was, I believe, without parallel in the annals of the profession. I at once came to the resolution of abandoning the case, and so I told my colleague. He strongly and urgently remonstrated against it, but in vain. At last he suggested our obtaining the opinion of the learned judge who was not trying the cause, upon what he considered to be the professional etiquette, under circumstances so embarrassing. In this I very willingly acquiesced. We obtained an interview, and Mr. Baron Parke requested to know distinctly whether the prisoner insisted upon my defending him, and, on hearing that he did, said, I was bound to do so, and to use all fair arguments arising on the evidence.[35] I therefore

[35] It needs to be said that Baron Parke was really one of the two judges trying the cause, but Chief Justice Tindal was to sum up to the jury. When Mr. Phillips spoke of Baron Parke as the learned judge who was not trying the cause, he meant the judge who was not presiding in the cause and who was not under the duty of summing up to the jury. Baron Parke appears to have been much annoyed at being told of the defendant's confession, and, after giving Phillips the advice to go ahead with the defense, permitted the

retained the brief, and I contend for it, that every argument that I used was a fair commentary on the evidence, though undoubtedly as strong as I could make them. I believe there is no difference of opinion now in the profession that this course was right. It was not until after eight hours' public exertion before the jury that the prisoner confessed; and to have abandoned him then would have been virtually surrendering him to death. This is my answer to the first charge.

"I am accused, secondly, of having 'appealed to Heaven as to my belief in Courvoisier's innocence,' after he had made me acquainted with his guilt. A grievous accusation! But it is false as it is foul, and carries its own refutation on its face. It is with difficulty I re-

Chief Justice to sum up the jury without the Chief Justice knowing of the confession.

"Sir Harry Bodkin Poland, Q. C., tells me that he personally knew nearly all the counsel engaged in the case * * * and that he remembers being told by one of them that Parke, B., was much annoyed at being informed by Phillips of the prisoner's confession."—Showell Rogers, *The Ethics of Advocacy*, 15 Law Quar. Rev. 259, 277, note.

The reason for Baron Parke's annoyance at being consulted by Phillips is perfectly apparent, when it is remembered that an English barrister, unlike an American lawyer, has no right to refuse even to take a case, and clearly has no right to withdraw from a case undertaken, except under very special circumstances which clearly did not exist in the Courvoisier case. He was bound to go ahead, but was perfectly free to conduct the defense in any proper way. Serjeant Ballantine, who was present at the trial, has expressed what seems to be the English bar's opinion of Phillips' action in consulting Baron Parke. He said: "Mr. Charles Phillips was a curious compound of intellectual strength and weakness. He possessed undoubted genius, and power of speech amounting at times to eloquence, but was deficient in moral courage and self-reliance. * * * The course pursued by Mr. Phillips [after Courvoisier told him that he had committed the murder] showed the inherent weakness of his character. It was peculiarly a situation for self-reliance and sound judgment. He was bound to continue the defence; although no doubt his mode of conducting it could not but be materially affected by the new circumstances. Mr. Phillips, however, adopted a line that was wholly inexcusable. He sought an interview with Mr. Baron Parke—who, it must be remembered, although not the presiding judge, was assisting at the trial—communicated to him the confession of his client, and asked his advice. This conduct placed the judge in a most painful position and was grievously unjust to the accused. It is probable that, if Baron Parke had not been taken by surprise, he would have declined to express an opinion. I happen, however, to know that, having learnt that the prisoner did not wish to relieve his counsel from the defence, the learned Baron said that of course he must go on with it. And if he gave any advice at all, this was the only advice he could give, and ought to have been patent to the inquirer; and certainly no censure can be too severe upon the conduct of Phillips, who, when assailed for his management of the case, violated the confidence that his interview with Baron Parke demanded and endeavored to excuse himself by saying he had acted under that learned judge's advice. I heard Phillips' speech; it was extremely eloquent. He made the most of some indiscretions in his opponent's opening, but he was overweighted by the facts; and certainly, since I have been at the bar, juries have not shown themselves apt to be carried away by flowers of rhetoric."—Mr. Serjeant Ballantine, *Some Experiences of a Barrister's Life* (5th Ed.) pp. 69, 74.

Even from the American point of view, Phillips' course in consulting Baron Parke was at least of doubtful propriety. As one American lawyer has said: "I have never been able to see what right the counsel had to inform the judge as to his client's confession. Nor had he any right to cast upon the judge the responsibility of deciding as to his continuance in the case. It was for himself to determine, and his determination should have been to keep silent

strain the expression of my indignation; but respect for my station forbids me to characterize this slander as it deserves. It will not bear one moment's analysis. It is an utter impossibility under the circumstances. What! appeal to Heaven for its testimony to a lie, and not expect to be answered by its lightning? What! make such an appeal, conscious that an honorable colleague sat beside me whose valued friendship I must have forever forfeited? But, about all and beyond all, and too monstrous for belief, would I have dared to utter that falsehood in the very presence of the judge to whom but the day before, I had confided the reality? There, upon the bench above me sat that time-honored man—that upright magistrate, pure as his er-

as to the confession and go on with the defense."—John Brooks Leavitt on *Lawyer and Client* in *Every-Day Ethics* (Yale University Press, 1910) p. 59.

That Phillips was justified in going on with the defense after the confession is clear, providing he conducted the defense in an honorable way. "They totally mistake the rights and duties of the profession who pretend that Mr. Phillips ought to have abandoned his client, and thrown up his brief. He had not confessed aloud in open court, he had pleaded not guilty, and the jury were sworn to decide his guilt according to the evidence: by that alone, so far as affected the trial, he was to be justified, and by that alone to be condemned. To have revealed his private confession would have been as base as in the Romish priest to betray the secrets of the confessional. The fiduciary character of counsel to his client, led to this rash and ill-advised communication. But it was a sacred secret, not to be whispered abroad. It is impossible to blame a gentleman of extreme sensibility, placed in a new and very embarrassing situation, for consulting the most eminent and best qualified in the profession, as to the course he should adopt. By thus appealing to the oracles of justice, he proved, if proof were necessary, his anxious wish to act according to the most rigid and scrupulons sense of honour. Had full time been given for reflection, perhaps it would have been a more judicious course to have rejected all further mention, as far as was possible all consideration, of the enforced confidence, and, resuming his arduons duties on the trial, to have watched the evidence and tested the clearness of the proofs. In the profession there is, there can be, but one voice as to the necessity for Mr. Phillips, thus importuned, continuing the defence. If the advocate must persist in defending a guilty client, who had retained his professional services, and insisted on his not renouncing a half-performed engagement, he is equally bound to defend him with all his might and all his strength. Mr. Phillips did gird himself to the task, and summon his whole energies to the painful labour, though nervously oppressed with the sense of an overwhelming secret, and the sting of a message which Courvoisier had sent, subsequent to his declaration, that he considered his life to be in his hands. The dread of unconsciously to himself permitting his private information to cripple and deaden his exertions must have sharpened the strictures which the eloquent and sensitive advocate made upon those parts of the evidence that invited animadversion, and must have given a keener edge to his comments on those witnesses who seemed to press unfairly on the criminal."—W. C. Townsend, *Modern State Trials* (Ed. 1850) Vol. I, p. 244, at pp. 247, 248.

"On a criminal prosecution, one principle acted on by the English law is that no one is bound to convict himself; another is, that the onus probandi, the burthen of proof of the offence charged, lies on the party prosecuting. These principles exempt the advocate of any one accused from all obligation to divulge through his examination of the witnesses any fact of which the advocate may happen to have knowledge, and which he thinks will be injurious to his client. The conscience of the advocate cannot be hurt except by a breach of his duty: he owes no duty to the public, nor to any one, to disclose the accused person's guilt; his whole duty is to his client; and this duty is to take care that his client have justice."—James Ram, *A Treatise on Facts* (4 Amer. Ed.) pp. 272, 273.

mine 'narrowly watching' every word I said. Had I dared to make an appeal so horrible and so impious—had I dared to outrage his nature and my own conscience, he would have started from his seat and withered me with a glance. No, Warren, I never made such an appeal; it is a malignant untruth, and sure I am, had the person who coined it but known what had previously occurred, he never would have uttered from his libel mint so very clumsy and self-proclaiming a counterfeit. So far for the verisimilitude of his charge. But I will not rest either on improbability, or argument, or even denial. I have a better and a conclusive answer. The trial terminated on Saturday evening. On Sunday I was shown in a newspaper the passage imputed to me. I took the paper to court on Monday, and, in the aldermen's room, before all assembled, after reading the paragraph aloud, I thus addressed the judges, 'I take the very first opportunity which offers, my lords, of most respectfully inquiring of you whether I ever used such an expression?' 'You certainly did not, Phillips,' was the reply of the late lamented Lord Chief Justice, 'and I will be your vouchee whenever you choose to call me.' 'And I,' said Mr. Baron Parke, happily still spared to us, 'had a reason, which the Lord Chief Justice did not know for watching you narrowly, and he will remember my saying to him, when you sat down, "Brother Tindal, did you observe how carefully Phillips abstained from giving any personal opinion in the case?" To this the learned Chief Justice instantly assented.' This is my answer to the second charge.

"Thirdly, and lastly, I am accused of having endeavored to cast upon the female servants the guilt which I knew was attributable to Courvoisier. You will observe, of course, that the gravamen of this consists in my having done so after the confession. The answer to this is obvious. Courvoisier did not confess till Friday. The cross-examination took place the day before, and so far, therefore, the accusation is disposed of. But it may be said I did so in my address to the jury. Before refuting this let me observe upon the disheartening circumstances under which that address was delivered. At the close of the, to me, most wretched day on which the confession was made, the prisoner sent me this astounding message by his solicitor, 'Tell Mr. Phillips, my counsel, that I consider he has my life in his hands.' My answer was, that as he must be present himself, he would have an opportunity of seeing whether I deserted him or not. I was to speak on the next morning. But what a night preceded it! Fevered and horror-stricken, I could find no repose. If I slumbered for a moment, the murderer's form arose before me, scaring sleep away, now muttering his awful crime, and now shrieking to me to save his life! I did try to save it. I did everything to save it, except that which is imputed to me, but that I did not, and I will prove it. I have since pondered much upon this subject, and I am satisfied that my original impression was erroneous. I had no right to throw up my brief, and turn

traitor to the wretch, wretch though he was, who had confided in me. The counsel for a prisoner has no option. The moment he accepts his brief, every faculty he possesses becomes his client's property. It is an implied contract between him and the man who trusts him. Out of the profession this may be a moot point; but it was asserted and acted on by two illustrious advocates of our own day, even to the confronting of a king, and, to the regal honor be it spoken, these dauntless men were afterwards promoted to the highest dignities.

"You will ask me here whether I contend on this principle for the right of doing that of which I am accused, namely, casting the guilt upon the innocent? I do no such thing; and I deny the imputation altogether. You will still bear in mind what I have said before, that I scarcely could have dared to do so under the eye of Baron Parke and in the presence of Mr. Clarkson. To act so, I must have been insane. But to set this matter at rest, I have referred to my address as reported in the Times—a journal the fidelity of whose reports was never questioned. You will be amazed to hear that I not only did not do that of which I am accused, but that I did the very reverse. Fearing that, nervous and unstrung as I was, I might do any injustice in the course of a lengthened speech by even an ambiguous expression, I find these words reported in the Times:—'Mr. Phillips said the prosecutors were bound to prove the guilt of the prisoner, not by inference, by reasoning, by such subtile and refined ingenuity as had been used, but by downright, clear, open, palpable demonstration. How did they seek to do this? What said Mr. Adolphus and his witness, Sarah Mancer? And here he would beg the jury not to suppose for a moment, in the course of the narrative with which he must trouble them, that he meant to cast the crime upon either of the female servants. It was not at all necessary to his case to do so. It was neither his interest, his duty, nor his policy, to do so. God forbid that any breath of his should send tainted into the world persons depending for their subsistence on their character.' Surely this ought to be sufficient. I cannot allude, however, to this giant of the press, whose might can make or unmake a reputation, without gratefully acknowledging that it never lent its great circulation to these libels. It had too much justice.

"The Morning Chronicle, the Morning Herald, and the Morning Post, the only journals to which I have access, fully corroborate The Times, if, indeed, such a journal needed corroboration. The Chronicle runs thus: 'In the first place, says my friend Mr. Adolphus, and says his witness, Sarah Mancer—and here I beg to do an act of justice, and to assure you that I do not for a moment mean to suggest in the whole course of my narrative that this crime may have been committed by the female servants of the deceased nobleman.' The Morning Post runs thus: 'Mr. Adolphus called a witness, Sarah Mancer. But let me do myself justice, others justice, by now stating, that in the whole

course of the narrative with which I must trouble you, I beg you would not suppose that I am in the least degree seeking to cast the crime upon any of the witnesses. God forbid that any breath of mine should send persons depending on the public for subsistence into the world with a tainted character.' I find the Morning Herald reporting me as follows: 'Mr. Adolphus called a witness named Sarah Mancer. But let me do myself justice and others justice by now stating that in the whole course of the narrative with which I must trouble you, I must beg that you will not suppose that I am in the least degree seeking to cast blame upon any of the witnesses.' Can any disclaimer be more complete? And yet, in the face of this, for nine successive years has this most unscrupulous of slanderers reiterated his charge. Not quite three weeks ago he recurs to it in these terms: 'How much worse was the attempt of Mr. Phillips to throw the suspicion of the murder of Lord William Russell on the innocent female servants, in order to procure the acquittal of his client Courvoisier, of whose guilt he was cognizant!' I have read with care the whole report in the Times of that three hours' speech and I do not find a passage to give this charge countenance. But, surely, surely, in the agitated state in which I was, had even an ambiguous expression dropped from me, the above broad disclaimer would have been its efficient antidote.[36]

"Such is my answer to the last charge; and, come what will, it shall be my final answer. No envenomed reiteration, no popular delusion, no importunity of friendship, shall ever draw from me another syllable. I shall remain in future, as I have been heretofore, auditor tantum. You know well how strenuously and how repeatedly you pressed me to my vindication, especially after Lord Denman's important conversation with you, and you know the stern disdain with which I dissented. The mens conscia recti, a thorough contempt for my traducer, the belief that truth would in the end prevail, and a self-humiliation at stooping to a defence, amply sustained me amid the almost

[36] In Thomas Dunphy and Thomas J. Cummins' *Remarkable Trials* (1867) at pp. 338–359, is what purports to be a correct copy of Phillips' speech, but the source from which it was obtained is not stated.

Of the charge that Phillips endeavored to fix the guilt on Sarah Mancer, Mr. Serjeant Ballantine says: "I heard Phillips's speech: it was extremely eloquent. * * * There is not, I think, any ground for saying that he endeavored to fix guilt, by unworthy means, upon a servant girl. It may be said that in every case where it is acknowledged that an offence had been committed, the defence of the client must be founded upon the assumption that some one else is guilty * * * I am sure that, whatever his faults of taste and judgment, he would not have been capable of so grave a crime."—*Some Experiences of a Barrister's Life* (5th Ed.) p. 75.

An American lawyer has had this to say on the point: "Any reckless attempt to injure persons who had committed no crime would, of course, be highly censurable; but at the same time, if by a fuller cross-examination the counsel could show that there was as much probability that other persons had committed the crime as his own client, it is difficult to hold that respect for the feelings or reputation of third persons should curtail such cross-examination and deprive his client of the benefit which he might otherwise derive from it."—Frederic R. Coudert, *Addresses* (1905) pp. 380, 381.

national outcry which calumny had created. Relying doubtless upon this, month after month, for nine successive years, my accuser has iterated, and reiterated his libels in terms so gross, so vulgar, and so disgraceful, that my most valued friends thought it my duty to them publicly to refute them. To that consideration, and to that alone, I have yielded; in deference to theirs, relinquishing my own opinions. If they suppose, however, that slander, because answered, will be silenced, they will find themselves mistaken.

"'Destroy the web of sophistry—in vain—
The creature's at his dirty work again.'

"No, no, my dear friend, invention is a libeller's exhaustless capital, and refutation but supplies the food on which he lives. He may, however, pursue his vocation undisturbed by me. His libels and my answer are now before the world, and I leave them to the judgment of all honorable men. C. Phillips."

To Phillips' letter the London Examiner made several bitter replies. Part of one which appeared in the London Examiner of November 24, 1849, is as follows:

"Having received a private confession that his client was the murderer, Mr. Phillips, disclaiming an intention to criminate the female servants, proceeded to cast upon Sarah Mancer the most foul suspicions. Knowing that the police had fixed the imputation of guilt in the proper quarter, he branded individual members of that body as liars, bloodhounds, and miscreants; and accused them generally of a conspiracy to obtain the government reward by convicting an innocent man. Thoroughly conscious that the evidence of Mrs. Piolaine, if she was believed, would complete the case against the murderer, he threw out the most unfounded aspersions upon her character and that of her husband. Finally, being in possession of the knowledge of who did the crime, he solemnly protested that the Omniscient God alone knew who did it. This was our charge, from which, at the same time, we not only omitted nothing put forward in so-called extenuation, but interfered to throw discredit on a charge yet more incredibly revolting. We carefully quoted Mr. Phillip's God forbid that he should do what he afterwards did. We gave him what benefit might be derivable from his denial of having made a solemn appeal to Heaven of Courvoisier's innocence; from his assertion that he had acted on the advice of others in retaining his brief after the confession; and from the favorable testimony of the judges who tried the case, in regard to his appeal to the Deity. We even admitted his right, in the peculiar circumstances, to retain his brief; and contended only that he should have refrained from any line of defence, the effect of which, if successful, would have procured the acquittal of his guilty client by criminating or destroying the character of persons who had borne true evidence against him. In short, our charge was restricted

to Mr. Phillips's solemnly acted belief in the murderer's innocence; and to those points in which, in the course of that performance, he became the assailant and accuser of witnesses whose truth he had no reason to suspect after receiving the murderer's confession. Let us now mark how this indictment is met after nine years' rest and reflection.

"Mr. Phillips, in his exculpation, alleges our attack to have been threefold, and proceeds to dispose of it under three distinct heads. The first is that of having retained his brief, which we expressly excepted from our charge. It now appears that he retained it with the sanction of the judge, Mr. Baron Parke, who assisted Chief Justice Tindal in trying the case, and to whom the fact of the confession was communicated. The second is that of having appealed to Heaven as to his belief in Courvoisier's innocence, which we gave him at the time the credit of having denied. As we have said, we did not accuse him of solemnly protesting that belief, but of solemnly acting it. Our assertion was, not that he invented a falsehood to profess faith in his client's innocence, but that he invented a falsehood to profess ignorance of his client's guilt; and that he profaned the name of the Deity by using it to give solemnity to this falsehood. The third and last accusation to which Mr. Phillips replies, is that of having endeavored to cast imputations of guilt upon the female servants; and the sum of his answer on this head is to requote that very 'God forbid he should,' etc., which we carefully quoted in our original comment on his speech; and to declare the charge to have been solely derived from his cross-examination of Sarah Mancer on the day when he still supposed his client innocent, to which cross-examination we never even remotely adverted.

"Now here we might close this subject, as far as this journal is concerned. Mr. Phillips has only done his best to evade every charge specifically brought against him by us. He does not mention his attack upon the police, whose efficiency and character, so vital to the interests of justice, he labored to damage irretrievably. He does not mention his gross imputations on Mrs. Piolaine, of whom he knew nothing but that she was the decisive witness against his client, and that her identification of him on the evening of the first day of the trial had led to his confession on the following morning. He would evade the profanity of having introduced the name of the Deity into a false assertion, by setting up a difference of assertion hardly material. He would escape the consequence of having imputed guilt to Sarah Mancer, by suggesting a confusion between her cross-examination on Thursday and his speech on Saturday. But this shall not serve. We have been challenged to reopen this affair, and we will not shrink from doing so. The reply which was meant to dispose of our accusations, will now enable us finally to establish them, on authority above suspicion.

"The report of the trial which appeared in the Times has been lately restudied by Mr. Phillips; he has in particular 'read with care the whole report in the Times' of his three hours' speech; and of these reports he guarantees the strictest fidelity. Now we have compared with the Times every passage quoted in the Examiner of the 27th June, and find them to have been taken verbatim et literatim, from that journal. We now write with the file of the Times before us, and with the assurance of Mr. Phillips himself, therefore, that such additional expression as we may at present quote are not colored by exaggeration or unfairness. Nor is it less important that we have also the assurance of Mr. Phillips that he knew of his client's guilt before the commencement of the second day's proceedings, a day earlier than has commonly been supposed. Before the court opened on Friday, he heard the confession; he cross-examined all the police constables, except Baldwin, in the course of that day; he cross-examined Mrs. Piolaine in the afternoon of that day; and on the following morning he spoke for the defence. Having premised thus much, we solicit the reader's attention to the subjoined parallel passages:

What Mr. Phillips Asserts he did NOT *say.*

I am accused, secondly, of having "appealed to Heaven as to my belief in Courvoisier's innocence," after he made me acquainted with his guilt! A grievous accusation. But it is false as it is foul, and carries its own refutation on its face. . . . What! appeal to Heaven for its testimony to a lie, and not expect to be answered by its lightning! What! make such an appeal, conscious that an honorable colleague sat beside me whose valued friendship I must have forever forfeited? But, above all, and beyond all, and too monstrous for belief, would I have dared to have uttered that falsehood in the very presence of the judge to whom, but the day before, I had confided the reality? There, upon the bench above me, sat that time-honored man, that upright magistrate, pure as his ermine, "narrowly watching" every word I said. Had I dared to make an appeal so horrible and so impious, had I dared so to outrage his nature and my own conscience, he would have started from his seat and withered me with a glance. No, Warren, I never made such an appeal; it is a malignant untruth, and, sure I am, had the person who coined it but known what had previously occurred, he never would have uttered from his libel mint so very clumsy and self-proclaiming a counterfeit.—*Times*, Nov. 20, 1849.

What Mr. Phillips admits he DID *say.*

It was not his business to prove who did the crime: that was the task they, (his opponents,) had undertaken. Unless that was proved, he would beseech the jury to be cautious how they *imbrued their hands in this man's blood.* THE OMNISCIENT GOD ALONE KNEW WHO DID THIS CRIME: he was not called on to rend asunder the dark mantle of the night, and throw light upon this deed of darkness. . . . If they acquitted the prisoner of the murder, he was still answerable for the robbery, if guilty of that. And even supposing him guilty of the murder, which INDEED WAS KNOWN TO ALMIGHTY GOD ALONE, and of which, for the sake of his eterna soul, he hoped he was innocent, it was better far that in the dreadful solitude of exile, &c., &c. . . . His anxious task was now done; that of the jury was about to begin. *Might God direct their judgment.—Times,* June 22, 1840.

What Mr. Phillips dreamt the night before he defended the murderer.

At the close of the to me most wretched day, on which the confession was made, the prisoner sent me this astonishing message, by his solicitor: "Tell Mr. Phillips, my counsel, that I consider he has my life in his hands." My answer was, that, as he must be present himself, he would have an opportunity of seeing whether I deserted him or not. I was to speak on the next morning. But *what a night preceded it! Fevered and horror-stricken, I could find no repose. If I slumbered for a moment, the murderer's form arose before me, scaring sleep away, now muttering his awful crime, and now shrieking to me to save his life! I did try to save it.* I did everything to save it except that which is imputed to me; but that I did not, and I will prove it.—*Times*, Nov. 20, 1849.

Mr. Phillips's definition of the duties of an advocate.

The counsel for a prisoner has no option. *The moment he accepts his brief, every faculty he possesses becomes his client's property.* It is an implied contract between him and the man who trusts him. *Out of the profession this may be a moot point;* but it was asserted and acted on by two illustrious advocates of our own day, even to the confronting of a king, and, to the regal honor be it spoken, these dauntless men were afterwards promoted to the highest dignities. You will ask me here whether I contend, on this principle, for the right of doing that of which I am accused, namely, casting the guilt upon the innocent? I do no such thing; and I deny the imputation altogether.—*Times*, Nov. 20, 1849.

What Mr. Phillips now says of Courvoisier's fellow-servants.

Thirdly and lastly, I am accused of having endeavored to cast upon the female servants the guilt which I knew was attributable to Courvoisier. You will observe, of course, that the gravamen of this consists in my having done so after the confession. The answer to this is obvious. Courvoisier did not confess till Friday; the cross-examination took place the day before, *and so far, therefore, the accusa-*

What dreams he threatened the jury with if they found the Murderer guilty.

He spoke to them in no spirit of hostile admonition. HEAVEN KNEW HE DID NOT. He spoke to *them in the spirit of a friend and fellow-christian,* and in that spirit he told them that if they pronounced the word [guilty] lightly, *its memory would never die within them. It would accompany them in their walks, it would follow them in their solitary retirements like a shadow, it would haunt them in their sleep, and hover round their bed; it would take the shape of an accusing spirit, and* CONFRONT AND CONDEMN THEM BEFORE THE JUDGMENT SEAT OF THEIR GOD. SO LET THEM BEWARE HOW THEY ACTED.—*Times*, June 22, 1840.

Mr. Phillips's illustration of the duties of an advocate.

. . . His learned friend demanded, who murdered Lord William Russell? *He*, (Mr. P.,) *was not bound to show that; but he had a right to know who placed the bloody gloves in the prisoner's trunk between the 6th and 14th of May,* when the prisoner had been already three days in gaol? Had there not been practices here? *"Thus bad begins, but worse remains behind."* This man, it was evidently determined, *should be made the victim of some foul contrivance. . . . Some villains must have been at work here* to provide proofs of guilt against the prisoner, and endeavor to make the jury instrumental in rendering him *the victim, not of his own guilt, but of their machinations.*—*Times*, June 22, 1840.

What Mr. Phillips said of Courvoisier's fellow-servants nine years ago.

They were bound to show the prisoner's guilt, not by inference, by reasoning, by that subtle and refined ingenuity, *which he was shocked to hear exercised in the opening address of his friend,* [why does Mr. Phillips now omit this?] but by downright, clear, open, palpable demonstration. How did, they, &c. . . . *He wished not to asperse the female servants.*

tion is disposed of. But it may be said I did so in my address to the jury. . . . I find these words reported in the *Times*—"Mr. Phillips said the prosecutors, were bound to prove the guilt of the prisoner, not by inference, by reasoning, by such subtle and refined ingenuity as had been used, but by downright, clear, open, palpable demonstration. How did they seek to do this? What said Mr. Adolphus and his witness, Sarah Mancer? And here he would beg the jury not to suppose for a moment, in the course of the narrative with which he must trouble them, that he meant to cast the crime upon either of the female servants. It was not at all necessary to his case to do so. It was neither his interest, his duty, nor his policy to do so. God forbid that any breath of his should send tainted into the world persons depending for their subsistence on their character." Surely this ought to be sufficient. * * * *I have read with care the whole report in the* Times *of that three hours' speech, and I do not find a passage to give this charge countenance.—Times,* Nov. 20, 1849. God forbid, &c., &c., &c. It was not at all necessary to his case to do so. . . . The prisoner had seen his master retire to his peaceful bed, and was alarmed in the morning by the housemaid, who was up before him, with a cry of robbery, *and some dark, mysterious suggestions of murder.* "Let us go," said she, "and see where my lord is." *He did confess that that expression struck him as extraordinary.* If she had said, "Let us go and tell my lord that the house is plundered," that would have been natural: but why should she suspect that any thing had happened to his lordship? *She saw her fellow-servant safe, no taint of blood about the house, and where did she expect to find her master?* Why, in his bed-room, to be sure. *What was there to lead to a suspicion that he was hurt?* Courvoisier was safe, the cook was safe, and *why should she suspect that her master was not safe too?—Times,* June 22, 1840.

"It will be observed that Mr. Phillips silently admits, at the opening of the last passage quoted from his exculpation, that he had cast aspersions of guilt upon the female servants during cross-examination, and before he had received his client's confession. But let the reader honestly say whether the passages quoted from his speech after he knew Courvoisier's guilt were not calculated to strengthen, rather than remove, the effect of previous aspersions. Is not the guilt of a foreknowledge of the murder, if not of the murder itself, distinctly implied? * * *

"Our plain and distinct averment against Mr. Phillips is, that, with a perfect knowledge where the guilt lay, he endeavored to cast the suspicion of the guilt upon the innocent. To that averment we in all respects adhere."

The Legal Observer of December 22, 1849,[37] made the following comment:

"The charge of having appealed to God to attest the sincerity of his belief that Courvoisier was innocent has, however, crumbled away; and all that is now alleged, is, that Mr. Phillips, having shortly before been informed by Courvoisier that he was guilty, publicly told the jury that 'the Omniscient God alone knew who had done the crime.' A more gross and glaring variance or departure (to use a technical language) from the original charge—a more complete changing of the

[37] 39 Legal Observer, 137.

ground of attack, we have seldom seen. We regard the original charge as annihilated. Supposing, then, Mr. Phillips to have used the expression above quoted, he ought, in all fairness, to be taken to have meant only, that as far as concerned the jury's legitimate means of judging from the evidence, they could not absolutely know who had done the crime. That this was the only legitimate interpretation to be put on his words, is evident from the fact that, when uttering them, he was aware that he himself, Mr. Clarkson, Mr. Flower, the prisoner's attorney, and the prisoner, knew the fact of the prisoner's avowal of guilt. What, then, could Mr. Phillips have meant by such an assertion? He knew that the confession would in a few hours be blazoned over the world; and cannot be supposed to have been insane enough to venture on so impious an asseveration, taken in its literal sense, and one so sure of quick detection.

"But did he, in fact, utter the expression in question? If, as we have been informed on what we deem good authority, several persons present are ready to depose on oath that he said simply, 'Do you ask me who did this crime? Ask the Omniscient God!' There is an end of even this varied version of the calumny; for nothing is easier than to suppose the reporter, though entitled to every degree of credit for correctness, to have fallen into a slight confusion of terms, in reporting the speech in the third person. But, however this may be, it is impossible to believe that what was actually said by Mr. Phillips was of the dreadful character imputed to him, regard being had to the decisive and unquestioned testimony of the late Chief Justice Tindal and Mr. Baron Parke, to the unexceptionable character of Mr. Phillips's address. After that testimony, we presume every thing in favor of Mr. Phillips, and against the validity of the charges.

"The same observation applies to the second item of accusation, and which is that relating to the alleged inculpation of the female servants. This also, we regard as conclusively disposed of. It was evidently founded originally on a forgetfulness of the all-important fact, that the cross-examination of the women-servants had preceded, instead of succeeding, the confession of Courvoisier. After he had confessed, Mr. Phillips, at the very outset of his defence, conspicuously and anxiously disclaimed all intention of imputing the crime to the female servants; and the jury doubtless carried the disclaimer along with them, as Mr. Phillips evidently intended they should, throughout the defence. It seems to us highly uncandid in any commentator on the case to suppress this important fact, or seek to fritter away the effect of it by harping on one or two stray expressions apparently at variance with it, culled out of a three hours' speech by a most eloquent counsel, speaking under circumstances of almost overwhelming and perhaps unparalleled difficulty. Was Mr. Phillips to defend Courvoisier, or was he not? It is admitted that he was bound to do so, and by 'all fair arguments arising on the evidence.' That he discharged this trying duty admirably, is vouched for by Chief Justice Tindal, and

Mr. Baron Parke. It is impossible to have more conclusive and unexceptionable testimony. It is impossible to impugn either the intellectual capacity, the opportunities for vigilant observation, or the lofty integrity and honor of these distinguished personages; and their testimony crushes the calumny into powder."

And Samuel Warren, in his review of the case, says:

"Nothing but a reckless determination to draw harsh inferences, would induce a man to persevere in torturing the expression attributed to this eloquent advocate, into an impiously deliberate appeal to the Deity to attest a known falsehood! But did Mr. Phillips, in fact, use the expression? We verily believe that he did not, but one which might be very easily misunderstood for it. The report in the Times is given in the third person, and not professedly verbatim; and the slightest turn of expression, unconsciously, would make all the difference. We have made inquiries on this subject, and find that a member of the bar who was present at the trial,—a gentleman of long standing in the profession,—of ability, of high character, and unquestionable honour,—Mr. Fortescue, paid close attention to Mr. Phillips, and will state on oath, without the slightest hesitation, as he has ever since stated on innumerable occasions when the subject was mentioned, that Mr. Phillips' exact words were—'But you will say to me, if the prisoner did it not, who did? I answer, ask the Omniscient Being above us, who did it: ask not me, a poor finite creature like yourselves: ask the prosecutor who did it; it is for him to tell you who did it; it is not for me to tell you who did it; and until he shall have proved, by the clearest evidence, that it was the prisoner at the bar, beware how you imbrue your hands in the blood of that young man.' [38] How easy for even the ablest reporter (and the report of these proceedings in the Times evinces the utmost ability and fidelity)—in throwing the above sentence into the third person, to adopt the phraseology, on the literal accuracy of which it is now sought to impale the reputation of a most distinguished advocate!

"But even admitting that Mr. Phillips, in the course of a three hours' speech, was betrayed into the momentary adoption of this expression,

[38] This gentleman has informed us that, the moment he heard of the statement attributed to Mr. Phillips, he said to his informant, "I know the passage which must have been misunderstood," repeated the words as above given, and immediately went to Mr. Phillips, repeated them to him, and offered to communicate it to the newspapers.—*Warren's Note.*

Mr. Serjeant Robinson in his *Bench and Bar* (2d Ed.) pp. 57–63, refers to the Courvoisier Case, which he says was the first trial for murder he ever attended. Of Phillips' speech he says: "It was contended that he had called God to witness that *he believed* the prisoner to be innocent. What he did say was, that *God only knew* whether or not he was guilty" (p. 61). As there are a number of inaccuracies in the rest of Serjeant Robinson's account of the trial, no weight should be attached to this statement. It is apparent that in 1889, when the book was published, he had no independent recollection of the speech of Phillips. Mr. Fortescue's statement, on the contrary, deserves to be credited.

—which we are satisfied, for reasons above stated, was not the fact,—is it not the height of injustice and uncharitableness to put upon it the very worst construction of which the words are susceptible? To weigh with malignant nicety verbal expressions, uttered, too, on such a fearful occasion, in golden scales? We believe that the profession and the public are too just to tolerate such a thing for a moment. * * *" [39]

Warren later stated that after the publication of his review of the Courvoisier case in 11 Law Review, 376, in March 1850, the charge against Phillips "was never reasserted." [40]

[39] 11 Law Review, pp. 433, 434. See 2 Warren's *Miscellanies* (1855) pp. 63–66, for same passage.

If further confirmation of the injustice of that charge against Phillips is needed, it will be found in the letter from his associate, Clarkson, found in the appendix of the pamphlet of correspondence about the Courvoisier case put out in 1849 by Phillips. That letter is as follows:

"Temple, Saturday [Nov. —, 1849].

"My Dear Phillips: I have hitherto abstained from obtruding any expression of my sentiments on the subject of your speech on the trial of Courvoisier, because I felt that it would be an intrusion, and besides that, the policy of entering into a public antagonistic discussion upon the subject of newspaper criticism regarding professional conduct, was, on the part of professional men, to say the least of it, a doubtful one. It seems, however, that some friends of yours of much higher rank and profounder judgment, considering the continual attacks made upon your personal character and reputation, think differently, and that, at their instigation, you have, in your present position felt called upon, at length, to vindicate yourself. Perhaps, therefore, it may not be unacceptable to you that I should in this manner convey to you my congratulations on the success of your effort, and my entire and cordial confirmation of all the facts you have advanced in your letter to Warren.

"Yours faithfully, William Clarkson."

—From *Correspondence between Samuel Warren, Esq., Barrister-at-Law and Charles Phillips, Esq., Relative to the Trial of Courvoisier, with a Preface and Appendix* (London, 1849) p. 27.

"The deductions to be drawn from the Courvoisier case may be summarized as follows:

"An attorney is bound to retain a case and continue the defense notwithstanding he may ascertain during the course of the trial that his client is guilty.

"It is his duty even under such circumstances to screen his client from conviction on insufficient evidence and to employ in his defense all fair arguments.

"He has no right, even though the facts may admit of the possibility of guilt in others to cast suspicion on the innocent nor to damage the character of honest witnesses.

"He is wholly unjustified in asserting his belief in his client's innocence, knowing at the time that he is guilty."—Geo. W. Warvelle, *Essays in Legal Ethics* (1902) pp. 215, 216.

[40] 2 Warren's *Miscellanies* (1855) p. 1, note.

Montagu Williams tells of one criminal case that bears a faint resemblance to the Courvoisier Case so far as the relations of counsel and client are concerned, but not as to the sequel. He was employed to defend a London pickpocket of the type depicted by Dickens in Oliver Twist, and says: "On looking at the depositions handed to me, I believe by one of his friends, I saw that the case was a completely hopeless one. The prisoner was charged with stealing a watch in the neighborhood of Finsbury Square. A man was standing there, his attention engaged on something that was going on in the roadway, when he felt a tug at his waistcoat, and, on looking down, found that his watch was gone, and that the broken end of his chain was hanging loosely

DEFENDING PRISONERS AFTER CONFESSION OF GUILT. Statement of the General Council of the Bar, *The Annual Practice* (1917) pp. 2433, 2434: The Council were asked to advise on the propriety of Counsel defending on a plea of "Not guilty" a prisoner charged with an offence, capital or otherwise, when the latter has confessed to Counsel himself the fact that he did commit the offence charged. The questions raised were (1) What is the duty of Counsel under the circumstances? may he, according to modern views defend in such case, and if so ought he to do so? (2) Does the same answer apply where he has already appeared in Court for the prisoner?

The Council adopted the following report (An. St. 1915, p. 14):

"Different considerations apply to cases in which the confession has been made before the advocate has undertaken the defence and to those in which the confession is made subsequently during the course of the proceedings.

"If the confession has been made before the proceedings have been commenced, it is most undesirable that an advocate to whom the confession has been made should undertake the defence, as he would most certainly be seriously embarrassed in the conduct of the case, and no harm can be done to the accused by requesting him to retain another advocate.

"Other considerations apply in cases in which the confession has been made during the proceedings, or in such circumstances that the advocate retained for the defence cannot retire from the case without seriously compromising the position of the accused.

"In considering the duty of an advocate retained to defend a person charged with an offence who, in the circumstances mentioned in the last preceding paragraph, confesses to Counsel himself that he did commit the offence charged, it is essential to bear the following points clearly in mind: (1) that every punishable crime is a breach of the common or statute law committed by a person of sound mind and

from his button-hole. Beside him stood the prisoner, whom he at once seized; then, on looking down, he saw his watch lying on the pavement. There were several previous convictions against the accused, and, if the result of the trial were antagonistic, it was likely that the judge would pass upon him a sentence of five or seven years' penal servitude. After the jury had been sworn, and the prisoner had pleaded, I crossed over to the dock and strongly recommended him to withdraw the plea he had just made, and substitute one of 'Guilty,' promising to say what I thought best for the purpose of mitigating his punishment. The little rascal was most indignant, and, turning to me, said: 'Go on, go on; I want you to do my case, and I beg you to do it, sir. I shall get out of it. You'll win, I know you will. You've done so twice before for me.' I was somewhat amused at the impudence of my client, and returned to my seat, whereupon the trial proceeded. In the end, the prisoner's anticipation was realized, and he was acquitted. On hearing the verdict he began to literally dance in the dock, and, looking over to me, shouted out: 'I told you so—I told you so! You never know what you can do till you try;' then, with a bow to the Judge, he skipped down from his position and emerged into liberty."—Montagu Williams, *Leaves of a Life* (1890) Vol. 1, pp. 161, 162.

understanding; (2) that the issue in a criminal trial is always whether the accused is guilty of the offence charged, never whether he is innocent; (3) that the affirmative rests on the prosecution. Upon the clear appreciation of these points depends broadly the true conception of the duty of the advocate for the accused.

"His duty is to protect his client as far as possible from being convicted except by a competent tribunal and upon legal evidence sufficient to support a conviction for the offence with which he is charged.

"The ways in which this duty can be successfully performed with regard to the facts of a case are (a) by showing that the accused was irresponsible at the time of the commission of the offence charged by reason of insanity or want of criminal capacity, or (b) by satisfying the tribunal that the evidence for the prosecution is unworthy of credence, or, even if believed, is insufficient to justify a conviction for the offence charged, or (c) by setting up in answer an affirmative case.

"If the duty of the advocate is correctly stated above, it follows that the mere fact that a person charged with a crime has, in the circumstances above mentioned, made such a confession to his counsel is no bar to that advocate appearing or continuing to appear in his defence, nor indeed does such a confession release the advocate from his imperative duty to do all he honourably can do for his client.

"But such a confession imposes very strict limitations on the conduct of the defence. An advocate 'may not assert that which he knows to be a lie. He may not connive at, much less attempt to 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.

"A more difficult question is within what limits, in the case supposed, may an advocate attack the evidence for the prosecution, either by cross-examination or in his speech to the tribunal charged with the decision of the facts. No clearer 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.

"It must be clearly understood that this report is not intended as anything more than an answer to the specific question submitted. It

is based on the assumption that the accused has made a clear confession that he did 'commit the offence charged,' and does not profess to deal with the very difficult questions which may present themselves to Counsel when a series of inconsistent statements are made to him by the accused before or during the proceedings,* nor does it deal with the questions which may arise where statements are made by the accused which point almost irresistibly to the conclusion that the accused is guilty but do not amount to a clear confession.† Statements of this kind must hamper the defence, but the questions arising on them are not dealt with here. They can only be answered after careful consideration of the actual circumstances of the particular case."

The above report was submitted to and approved by the then Attorney-General (Sir Edward Carson, K. C., M. P.) and by Sir Robert B. Finlay, K. C., M. P.

IN RE A CHINAMAN. Editorial on the *Propriety of Defending a Person Believed to be Guilty,* 10 Bench and Bar, N. S. 521: A tale is told—whether true or not is immaterial—of a lawyer on the Pacific Coast who received a visit from a Chinaman who announced that he wanted to ask what the lawyer's fee would be to defend him on a charge of murder. When the amount was stated the Chinaman left the office without saying anything more. Some three days later the morning papers contained an account of a murder in the Chinese quarter the night before, and in the afternoon of the same day the Chinaman returned to the lawyer's office and placed upon the desk the amount of the fee which had been named, remarking "Allee lite, I killee him." * * *

The case is an extreme one of a lawyer being confronted with the old problem of the duty of a lawyer towards a client whom he knows

* In 60 Solicitors' Journal, 473, 474, mention is made of the dilemma of counsel for the accused in In re Arthur Danoel, 12 Court of Cr. App. 49, as follows: "Counsel was briefed to defend a Belgian accused of rape, and his written instructions were that the woman's story was false, the prisoner never having committed the physical acts complained of. At the trial counsel received proofs of witnesses whose evidence was only relevant if the defense was one of consent, and he was verbally told that such was the real defense. What in this case was he to do? He, in fact, ignored the verbal instructions, and challenged by all legitimate means the correctness of the story of the prosecutrix. The prisoner was convicted, and on appeal alleged that his counsel had violated his authority by ignoring the true defense. The appeal was dismissed on the ground that the evidence clearly justified a verdict of guilty, but, in any event, the court approved of the course taken by counsel [in view of the inconsistency of the defenses] as proper and reasonable."

† "In no conference have I ever had the experience of being told by a defendant that he was guilty; but on more than one occasion after the defendant, a respectable tradesman accused, perhaps, of receiving stolen property, has left my room with his solicitor he has quickly stepped back again and anxiously whispered to me, 'What do you think I shall get?' "—Edmund D. Purcell, *Forty Years at the Criminal Bar* (1916) p. 127.

to be guilty; but perhaps no more extreme than many which actually occur every year.[41]

THE CONDUCT OF THE DEFENSE OF AN ACCUSED PERSON. David P. Brown, *The Forum; or Forty Years Full Practice at the Philadelphia Bar* (1856) Vol. II, pp. 43, 44: A man is charged with murder—it is known, and he admits to his counsel, that he struck the fatal blow, but also states that the deceased, at the instant, had treated him with great indignity—had pulled his nose, or spat upon him, or committed an outrage upon his domestic peace and honor. This is killing, it is true, but no murder, either in foro humano, or perhaps, in foro conscientia. What shall prevent honorable counsel from maintaining that, at most, it is but manslaughter, or homicide se defendendo.

The time of trial arrives—the counsel takes his position by his client—he knows what, perhaps, no one else but that client knows; he carefully surrounds his defence with every possible safeguard—from a prejudiced jury, from zealous witnesses, from illegal questions or answers, from perverted views of the law or evidence, from inflammatory appeals of the prosecuting counsel, and from the errors of the the court. It is for the prosecution to prove its case.

After the prosecutor's case is established, of course the defendant's counsel is not to deny the blow, though he is not compelled to admit it. He is certainly not to suggest that the blow was struck by another. Heaven forbid! but he is to introduce such evidence as he has, of general reputation, or relative or direct facts, tending to furnish a correct view of the true character of the transaction, and the causes which gave rise to it. Certainly no Christian would deny the propriety of such a course.[42]

[41] Thus, the late T. F. Marshall, of Kentucky, related of himself that, when a very young lawyer, he was appointed by the court to defend a man accused of parricide. He hastened to the jail to interview his client, and, of course, told the prisoner that he must confide in his counsel and tell him the exact truth, and then inquired:

"'Did you really kill your father?'

"'Yes,' he replied, 'I reckon I did, Mr. Marshall.'

"'Good heavens! and what did you do that for?'

"'Well, it was the fall of the year, and I didn't think it would pay to winter him.'

"Now this may seem a very tough example, yet even in such a case I shall claim that Marshall was right in defending his client."—William Wirt Howe, *Professional Ethics*, 5 Va. Law Reg. 507, 515.

Montagu Williams once defended a man, charged with the murder of his wife, by severing her head from her body, and obtained an acquittal. The client proceeded to get drunk and the night of the acquittal "passed down the High Street of the town, and holding out his right hand exclaimed:

"'My counsel got me off, but this is the hand that did the deed.'

"Of course," adds Williams, "a man cannot be tried twice for the same offense, and, to my perpetual regret, this ruffian remained at large."—Montagu Williams, *Leaves of a Life* (1890) Vol. 1, p. 180.

[42] "Much of the literature of legal ethics is concerned with the propriety of a lawyer's undertaking the defense of one whom he believes to be guilty of

CLARENCE S. DARROW'S COURSE OF CONDUCT IN THE McNAMARA CASES

At one o'clock in the morning of October 1, 1910, the Los Angeles Times building was blown up. It was just when the paper was going to press and twenty-one persons were killed. The Times was a newspaper which was regarded by the laboring people as opposed to organized labor. Then on December 25, 1910, the Llewellyn Iron Works at Los Angeles were dynamited.

In March or April, 1911, James B. McNamara and John J. McNamara, brothers, were arrested. Both were indicted for the Times building explosion murders, and John J. McNamara was indicted for the dynamiting of the Llewellyn Iron Works. Both were implicated by the confession of Ortie E. McManigal, a confederate, who confessed to having blown up the Llewellyn Iron Works at the direction of John J. McNamara and who stated that James B. McNamara confessed to him that he dynamited the Times building. Both of the McNamaras, who were prominent labor union men, employed as their attorney Clarence S. Darrow of Chicago.

In May, 1911, the American Federation of Labor officials, after the assurance was given to Samuel Gompers, its president, "that there was absolutely no case against the McNamara brothers," [43] concluded that it should undertake the matter of gathering funds for the defense.

"In accordance with our decision," says Gompers, "the officials of the Federation and its departments came together early in June, in Washington, in conference with Attorney Clarence Darrow of Chi-

crime. Here, though the ethical aspect is more clearly outlined, the same considerations apply as in civil cases. Although a lawyer may properly decline such employment, circumstances may be such as to impose upon him an obligation to undertake the case. Such was the obligation felt by William H. Seward, who, because he believed the prisoner to be insane, volunteered, in the face of strong popular feeling, to defend [Freeman] a friendless negro, indubitably demonstrated to have committed an atrocious murder. In his address to the jury, he thus expressed the sense of duty by which he was actuated: 'I am not the prisoner's lawyer. I am, indeed, a volunteer in his behalf, but society and mankind have the deepest interests at stake. I am the lawyer for society, for mankind, shocked, beyond the power of expression, at the scene I have witnessed here of trying a maniac as a malefactor.' The right of an advocate to defend a person accused of crime does not depend upon the guilt or innocence of the accused, but upon his right to be defended." Edward S. Oakes, *The Ethics of Advocacy in an Unjust Cause*, 17 Case and Comment, 433, 435, 436. On pages 453, 454, the same writer refers to William Green's application for a writ of error in behalf of John Brown after the latter's conviction and despite an inflamed public opinion.

For an account of William H. Seward's action in the Freeman case, see Frederic Bancroft, *The Life of William H. Seward* (1900) Vol. 1, pp. 174–180. Freeman, a negro, who was insane when he killed several people and wounded others, was convicted by one jury, but, after a new trial was granted, became too imbecile for the trial judge to consent to proceed with the case and a few months later died. Seward's defense of Freeman was in the face of great public clamor for Freeman's conviction and execution, and although it threatened his professional ruin it really hastened his professional success.

[43] 38 McClure's Mag. 371, 374.

cago, who had previously been engaged to conduct the defense. He informed us that a great sum of money would be required for the defense, some $300,000. The trial, or trials, he explained would take a year or a year and a half; the attorneys' fees would be large, for the attorneys would be obliged to give up their own business and move themselves and their families from their own cities to Los Angeles. A similar great expense would come with the high-priced experts and the host of witnesses.

"I confess that I, as well as my colleagues, was astounded by the amount of money required, and I was very dubious as to whether we could raise any such sum, and so expressed myself. But we went to work and we raised by contribution, entirely voluntary with organized labor, a sum approximating $225,000. * * *

"The McNamara defense money, when received, was forwarded by Mr. Morrison to Mr. Darrow, the attorney. * * *" [44]

In the late summer of 1911, Gompers visited the McNamaras and reports that J. J. McNamara, whom he knew fairly well, assured him that he was "absolutely guiltless" and said to him: "I want to send a message by you to organized labor and all you may meet. Tell them we're innocent—that we are the victims of an outrageous plot." Gompers adds:

"I believed him—I had no reason not to at that time—and I delivered his message.

"If he had told me in confidence that he was guilty, I will say this: I don't believe I would have betrayed him! I'm willing to stand by that—I don't believe I would have betrayed him. But I certainly wouldn't have declared my confidence in his innocence; and I certainly would not have gone out and helped to collect money for him." [45]

The trial began on October 10, 1911.

"The defense fought for delay. They raised the question of the legality of J. J. McNamara's extradition in the California courts; they moved for the quashing of the indictments on the ground that the grand jury was biased; they demanded a new judge. Clarence S. Darrow, their counsel, exhausted every possible technicality in his fight for his clients, but could not prevent their final arraignment on Oct. 11. Then the prosecution announced its intention of trying the two prisoners separately, and elected to take first the case of James B. McNamara, the younger brother, who is accused of having been the more active partner in causing the actual explosions. He was placed on trial for the death of Charles J. Haggerty, a machinist, who was one of the twenty-one killed in the Los Angeles Times explosion. * * *

"After seven weeks of continuous sessions only eight jurors had

[44] Id. [45] Id. 375.

been finally selected and the proceedings seemed interminable," [46] when, after some charges of jury bribing, and after an understanding that James B. McNamara should not receive capital punishment, the defendants, on December 1, 1912, pleaded guilty. James B. McNamara pleaded guilty to murder in the first degree, and John J. McNamara pleaded guilty to the charge of having dynamited the Llewellyn Iron Works.

After the pleas of guilty, there were newspaper interviews with both Clarence S. Darrow, the defendants' chief counsel, and with Samuel Gompers, President of the American Federation of Labor. In the Chicago Tribune for December 2, 1911, Clarence S. Darrow is quoted as saying:

"The Times building was blown up by James B. McNamara with nitroglycerin, to be sure, but the bomb touched off the gas, and gas really did it.

"As a matter of fact Jim McNamara did not mean to kill anybody. They have told me the whole story. * * * I reiterate that there was really no criminal intent.

"The bomb was meant as a scare to the Times and I doubt whether there was enough explosive to really do the damage that was done, but of course gas helped. But the crime is the same no matter what the intent." [47]

In the same issue of the Tribune, Samuel Gompers is quoted as saying:

"My associates and I have been imposed upon—terribly imposed upon—and I am overwhelmed, astonished and indignant."

And also:

"All laboring people have been imposed upon, and if we had known the McNamaras were guilty we wouldn't have raised money to defend them."

In the Chicago Tribune for December 2, also, M. J. Deutsch, secretary of the Building Material Trades Council of Chicago is reported as saying:

"Union labor does not countenance dynamiting nor murder. We raised a defense fund simply because we took the word of the accused that they were innocent and because they were entitled to an assumption of innocence until guilt was proved."

And Robert H. Hanlon, secretary of the Building Trades Council is quoted as saying:

[46] 24 Green Bag, 51.

[47] Clarence S. Darrow was later indicted for the alleged bribery of George N. Lockwood, a prospective juror in the McNamara case, and was acquitted. See 45 Literary Digest, 323. "Darrow's speech in his own defense * * * contained a justification of his advice to the McNamaras to plead guilty and the assertion that the blowing up of the Los Angeles Times building, though a criminal act, was done with no thought of taking human life."—Id.

"It is too bad they did not confess before they got union labor to organize a defense fund for them. Of course we would not have helped them had we known them guilty."

In the Chicago Tribune for December 4, 1911, resolutions of various labor unions denouncing and repudiating the McNamaras are reported, and in the Chicago Tribune for December 8, 1911, is found a similar condemnatory statement by the Ways and Means Committee of the American Federation of Labor.

In the Chicago Tribune for December 3, 1911, Clarence S. Darrow is quoted as saying:

"I never told Samuel Gompers or anyone else that J. B. McNamara was innocent. I always have believed, however, that John J. had nothing to do with the Times disaster, though I learned of his connection with the Llewellyn explosion."

In the Chicago Record-Herald for December 5, 1911, is the following:

"Another development of the day was the admission by Clarence S. Darrow that he had known from the beginning that the McNamaras were guilty. The only paper that supported the accused men in the months preliminary to the trial to-day published the following statement attributed to the chief counsel for the defense:

" 'When I took this case last March I foresaw this plea of guilt. I had hopes of saving the boys, but found it impossible. I wish the world could see the case as I saw it—the criticisms would not be so severe.

" 'My conscience is at rest, but it is hard enough to have to surrender in this fight, for the boys are not murderers at heart and thought they were just fighting a battle between capital and labor, but to have maledictions heaped upon my head for doing what I conceive was right is hard.' "

In the Chicago Tribune for December 6, 1911, Clarence S. Darrow is quoted as saying: "From the first there never was the slightest chance to win."

On December 5, 1912, the McNamara brothers came up for sentence, and a short confession by James B. McNamara was read. It is given in the Chicago Tribune for December 6, 1911, as follows:

"I, James B. McNamara, having heretofore pleaded guilty to the crime of murder, desire to make this statement of facts:

"On the night of September 30, 1910, at 5:45 p. m., I placed in Ink alley, a portion of the Times building, a suit case containing sixteen sticks of 80 per cent. dynamite, set to explode at one o'clock the next morning. It was my intention to injure the building and scare the owners. I did not intend to take the life of any one. I sincerely regret that these unfortunate men lost their lives. If the giving of my life would bring them back I would gladly give it. In fact, in plead-

ing guilty to murder in the first degree I have placed my life in the hands of the state." [48]

Judge Bordwell in sentencing James B. McNamara is quoted in the Chicago Record Herald for December 6, 1911, as saying in part:

"A man who would put sixteen sticks of 80 per cent. dynamite in a building * * * in which you, as a printer, knew gas was burning in many places, and in which you knew there were scores of human beings toiling, must have had no regard whatever for the lives of his fellow beings. He must have been a murderer at heart." [49]

The judge then proceeded to sentence James B. McNamara to the penitentiary for life and John J. McNamara to the penitentiary for fifteen years.

William J. Burns, the detective, had this to say after the confession:

"There's just one man in the crowd who comes out now and says he knew the McNamaras were guilty—Darrow, their attorney—the same man McNamara told McManigal [the confederate who confessed to Burns] to telegraph at once if he were ever arrested. He knew it from the time he took the case, and he was talking about it with his acquaintances around Los Angeles some little time before the confession; but he did not inform in any way his principals—the American Federation of Labor, the men who were paying him for his work. Gompers, especially, was astounded when he heard about it.

"All of that $200,000 of the Federation was handled by these men, you remember. It went to Morrison, the Federation's Secretary, who paid it to Clarence Darrow upon the order of Samuel Gompers, the president. * * * And not once did Darrow intimate to the other two men that their clients were guilty!

"It will be worth waiting for to see just how the three men account for the $200,000, according to the resolution of their council, to the contributors. Darrow will get, of course, with his $50,000 retainer and his hundred dollars a day and expenses, well toward one-half of it.

[48] In the Chicago Record-Herald for December 6, 1911, William J. Burns, the detective who accumulated the evidence that forced the pleas of guilty, is quoted as saying: "Why doesn't 'Jim' McNamara tell how he knocked off the gas cocks and flooded with gas the place where the suit case filled with dynamite was put? If he told that, then could he convince any one that he did not intend the entire destruction of the Times building and its occupants?"

[49] This last statement was the judge's contradiction of Clarence S. Darrow's statement as reported above in the Chicago Record-Herald for December 5, 1911. Here ought to be noted Ex-President Roosevelt's reiteration of a truism in reference to the McNamara case. In The Outlook, Vol. 99, at page 902, he said: "Murder is murder, and the foolish sentimentalists or foolish wrongdoers who try to apologize for it as an 'incident of labor warfare' are not only morally culpable, but the enemies of the American people, and, above all, are enemies of American wage-workers."

It will be interesting to see their detailed accounts of the remaining $100,000 or $125,000." [50]

At another place in the same interview Burns said:

"They got together—according to Secretary of the American Federation of Labor Morrison's last statement—nearly $200,000 and over $170,000 of it was handed over to Darrow. Really they got more, and they gave Darrow more—a good deal more." [51]

The ethical question as to Clarence Darrow's action in the McNamara cases was stated by Professor John H. Wigmore of Northwestern University under the title "The Limits of Counsel's Legitimate Defense" in 2 Journal of Criminal Law and Criminology, 663, 664, 665, as follows:

"Whoever did dynamite the Los Angeles Times building, crowded with human beings, did a brutal murder, did he not? He deliberately killed a score of defenseless beings, under circumstances which have never been regarded as anything but plain murder outside of the tenets of Machiavelli or the Hindu thugs or Stevenson's dynamiters. Now we know who did it. But Clarence Darrow knew it from the first. His interview published in the dispatches of December 5 says: 'When I took this case last March I foresaw this plea of guilt.' And yet he spent one hundred and ninety thousand dollars of laboring men's innocent money to secure at any cost the escape of men whom he knew to be guilty of this coarse, brutal murder—a murder which has been universally condemned by labor unions and all other classes from the Atlantic to the Pacific as placing its perpetrators beyond the limit of sympathy or protection.

[50] 38 McClure's Mag. 363, 371. The expense for the prosecution was also very large. "There were many weeks while the evidence was being gathered when a thousand men and more were working on the case under the direction of the district attorney. At no time since this investigation began did the daily pay roll drop below a thousand dollars."—Walter V. Worhlke in The Outlook, Vol. 99, at page 905. The editor is reliably informed that "while no separate statement of the expense incurred by the prosecution in these [McNamara] cases has ever been compiled, a fairly accurate estimate * * * shows the cost to the county was upwards of $240,000."

[51] 38 McClure's Mag. 363, 368. Under date of August 9, 1912, Frank Morrison, Secretary of the American Federation of Labor, issued a Financial Report of the McNamara Defense Fund which went into great detail as to receipts (which amounted at that date to a total of $236,878.39), but gave only meager statements of the disbursements of $227,911.85. The expenses merely show that $200,000 was paid to Clarence Darrow on account of attorney's fees and expenses; that two other lawyers received together a total of $13,500; and that the balance went for expenses of visiting meetings, printing and mailing literature, producing and exhibiting the McNamara film, etc. Mr. Burns doubtless got no comfort from that kind of a report.

In all fairness it should be stated that a number of the expenditures of the prosecution are represented by just as meager vouchers. In the county auditor's office in Los Angeles eight of the largest canceled checks of the county in the McNamara cases bear merely the notation "Secret Service" and were payable to John D. Fredericks, who was then district attorney. Those eight checks, which were only part of the expenditure for secret service were for amounts aggregating $72,000.

"Is this what the right of defense by counsel means? If so, then there is something rotten in the principle. It is useless to befog the issue by asking: May not a counsel act for a client whom he believes to be guilty? Of course he may; the best professional traditions agree to that, and no argument for or against it matters here. Nor do we assume here that Clarence Darrow was privy to the $4,000 bribe to a juryman; that part would look dark for him if he had the spending of the money in detail, which perhaps he did not. We do not assume that the hundred and ninety thousand dollars was used to bribe anybody. But we do ask whether the counsel's duty and right of securing a fair trial justifies him in setting himself as systematically and persistently as the expenditure of two hundred thousand dollars signifies to secure the acquittal of clients whom he knew from the beginning to be guilty of the worst crime recognized in law and morality alike. That is our question."

Mr. Darrow made no direct answer to this question, but in his testimony in the criminal action in which he was acquitted of the charge of bribing a juror and in his speech to the jury in that action he attempted an answer to similar questions. His whole argument is contained in the following passages from his speech as printed in pamphlet form. The first of these passages is:

"Mr. Ford [the Assistant District Attorney] said I knew these people were guilty from the beginning. Where is the evidence? I did not. I have practiced law for many a year. I do not go to a client and say, 'Are you guilty, are you innocent?' I would not say it to you. Every man on earth is both guilty and innocent. I know it. You may not know it; I know it. I find a man in trouble. In a way his troubles may have come by his own fault. In a way they did not. He did not give himself birth. He did not make his own brain. He is not responsible for his ideas. He is the product of all the generations that have gone before. And he is the product of all the people who touch him directly or indirectly through his life, and he is as he is, and the responsibility rests on the infinite God that made him. I do what I can for him, kindly, carefully, as fairly as I can, and do not call him a guilty wretch.

"I had no knowledge whatever about the McNamaras until it was borne in on me day by day that this man I knew who trusted everything to me could not be saved if he went to trial. Just as the doctor finds that his patient must die, so it came to me that this client was in deadly peril of his life. Do you think that if I had thought there was one chance in a thousand to save him I would not have taken that chance? You may say I should not. That if I believed he was guilty I should not have tried to save him. You may say so; I do not." [52]

[52] *Plea of Clarence Darrow in His Own Defense*, etc., pp. 50, 51.

The other passage is as follows:

"Nobody meant to take human life in the Times disaster and the position of the State in the settlement of the matter showed that nobody meant to take human life. I heard these men talk of their brothers, of their mothers, of the dead; I saw their human side. I wanted to save them, and I did what I could to save them, and I did it as honestly and devotedly and unselfishly as I ever did an act in my life, and I have nothing to regret however hard it has been. Gradually it came to me that a trial could not succeed.[53] Gradually another thing came to me. It was expensive—the money of the Erectors' Association, of the State of California, the power of the Burns Agency, everything was against us. It needed money on our side, and a great deal of it. It needed money that must be taken from the wages of men who toil—men whose cause I have always served, and whether they are all faithful to me or not, the cause, that I will serve to the end. I could not say to them that my clients would be convicted. I could not say to the thousands who believed in them, and who believed in me, that the case was hopeless. The secrets that I had gained were locked in my breast, and I had to act—act with the men whom I had chosen to act with me. I had to take the responsibility, grave as it was, and I took it." [54]

In closing this statement of the ethical problem presented by the McNamara cases, it seems desirable to note a smaller ethical problem revealed in Mr. Darrow s speech in his own defense in the bribery case. Mr. Darrow appears to have been accused of lack of frankness in persuading the McNamara brothers to plead guilty. The charge seems to have been that Clarence S. Darrow, knowing that J. B. McNamara was unwilling to have J. J. McNamara to plead guilty to anything, obtained J. B. McNamara's consent to plead guilty without revealing to him that as an integral part of the arrangement being made with the prosecution J. J. McNamara was to plead guilty. The problem is treated by Mr. Darrow as follows:

"Each brother was willing to suffer himself, but J. J. didn't want his brother to be hanged, and J. B. didn't want J. J. to plead guilty to anything. J. B. agreed to plead guilty and take a life sentence, and J. J. said to us that after his brother's case was out of the way he would plead guilty and take a ten years' sentence. Ford said that I should have told J. B. that J. J. was to plead guilty. Why? I was

[53] On July 30, 1912, Clarence S. Darrow testified, as reported in the Chicago Record-Herald for July 31, 1912, as follows: "I felt that, owing to the number of lives lost in the Times explosion and the bitter feeling in the community, it would be difficult to avoid the death penalty for both men." And as reported in the Chicago Tribune for July 31, 1912, he said: "We did it believing that the time would come when the sentences would be commuted or the men pardoned. I still cling to that belief," and "I wanted to save their lives if possible."

[54] *Plea of Clarence Darrow in His Own Defense*, etc., p. 52.

defending J. B., and it was my business to get the best terms I could for him. I was also defending J. J., and it was my business to get the best terms I could for him. I had no right to play either one against the other—no right, let alone what a man would naturally do." [55]

In view of the contemplated publication of the foregoing account of the McNamara Cases, Mr. Clarence S. Darrow on January 10, 1917, handed to the Editor of this casebook the following statement in writing:

"I undertook the McNamara case without any knowledge whatever as to whether the defendants were in any way involved in the destruction of the Times building with its incidental loss of life. At the time I went into the case I had never seen the defendants and had not visited Los Angeles and the matter had been under investigation and in progress for several months. I did not know the facts until weeks after I undertook the case. I then believed as I do now that no intention was in the mind of any one to kill any person; the purpose being only to scare the owners of the Los Angeles Times—a paper then conducting a hostile campaign against the strikers in the city. Sixteen sticks of dynamite (as I now recall it) were placed in an alley leading into the building. The explosion did not even stop the machinery, but unfortunately the sticks were hastily dropped near some barrels of ink which were converted into vapor, spread through the building, and thus set on fire the building, and the lives were lost through the fire. Legally the crime of murder was complete for the reason that the placing of dynamite was an unlawful act and the defendants were therefore guilty of the act whether the result was intended or not. Five lawyers were associated in the case and a large corps of investigators gathered information from many cities covering the whole United States. Most of the money to defray the expenses was collected before the real facts were known, but I then and now considered it my duty when in the case to give the defendant the best defense I could, and of course could not give out that I really believed he placed the dynamite. Under the laws of California one convicted of murder in the first degree could be punished by death or life imprisonment as the jury might determine, and in any event I felt it my duty to get the lowest punishment possible. I always abhorred the idea of the state taking life and then as always like the physician I felt it my duty to save life if I could. Then, too, I recognized that in labor and political cases the motives of men are far different than in cases that are generally designated as criminal. Neither did I ever believe in the doctrine of free will, but I think that every act is governed by conditions and circumstances which make the act absolutely

[55] *Plea of Clarence Darrow in His Own Defense*, etc., p. 54.

necessary. I judged this case, as I do all other acts in court and out, from what I consider uncontrovertible rules of logic and philosophy.

"As to fees, five lawyers were associated with me with numerous investigators and the necessary expenses involved in such a case were large. The amount collected for the defendants was less than that paid by the state and all lawyers' fees and most detectives' services for the state were paid through regular salaries and did not come from the fund. I closed my office and went to Los Angeles and was engaged in that case for six months and received less than $50,000 as a fee, which would not be mentioned as extravagant for a lawyer engaged in any important case. Especially is this true in my case, as much more than half my time that has been given to industrial and labor cases for twenty-five years has been without any financial reward.

"I have thought this case over from every angle and am sure that whatever the responsibilities involved no conscientious lawyer could have performed them in any other way.

"Chicago, Ill., Jan. 10, 1917."

ABRAHAM LINCOLN'S COURSE OF ACTION IN THE ARMSTRONG MURDER CASE

In 1857 William Armstrong, commonly known as "Duff" Armstrong, was indicted for the murder of a man named Metzker, and Armstrong's mother engaged Lincoln, who was a friend of the family and charged nothing for his services, to assist her son's lawyers to defend him.

Armstrong had beaten Metzker in a drunken fight on the night of August 29, 1857, the fight apparently being started by Metzker, and the same night another drunken man named Norris had hit Metzker with a piece of wood. The fights took place in a grove near a religious camp-meeting. Three days after these occurrences, Metzker died. Marks of two blows made by some instrument were found on Metzker's body, and either blow might have caused his death. Norris and Armstrong were indicted together for murder by the grand jury for Mason county, Illinois, but they were tried separately. Norris was tried in Mason county, and was convicted of manslaughter and sentenced to the penitentiary. Armstrong took a change of venue to Cass county, and Armstrong's trial took place in that county some months after Norris was sentenced.

The charge of the indictment was that Norris and Armstrong conspired to kill Metzker and that one of the blows which resulted in Metzker's death was given by Armstrong with "a certain hard, metallic substance called a sling shot." For the defense it was insisted that there was no conspiracy and that Armstrong used only his fists in hitting Metzker. The conspiracy theory was not supported by proof,

and it seemed clear that, if Armstrong used only his fists in fighting Metzker, he was not responsible for the latter's death.

On the question of fact as to whether Armstrong did strike Metzker with a sling shot, the case for the prosecution rested mainly on the testimony of one Allen, who swore that at about eleven o'clock on the night of August 29, 1857, and when Allen was about 150 feet away from Armstrong and Metzker, he saw Armstrong strike Metzker with a sling shot. He swore positively several times that he was able to see what happened so far away because the moon was shining brightly at that time and was about where the sun would be at one o'clock in the afternoon.[56] To refute this witness, Lincoln produced an almanac.[57]

Accounts differ as to whether the almanac was put in evidence or was merely used by Lincoln in his argument to the jury, and all kinds of stories have been current about the almanac. Lamon, one of Lincoln's biographers, says that Lincoln used "an almanac of the year previous to the murder," [58] that the almanac was produced first during the argument to the jury, and that Lincoln "easily proved by it that, at the time the main witness declared the moon was shining in great splendor, there was, in fact, no moon at all, but black darkness over the whole scene. In the 'roar of laughter' and undisguised astonishment succeeding this apparent demonstration, court, jury and counsel forgot to examine that seemingly conclusive almanac, and let it pass without a question concerning its genuineness." [59] Lamon does, however, give in a footnote a statement by Henry Shaw, who was assisting prosecuting counsel in the Armstrong case, that Milton Logan, the foreman of the Armstrong jury, told him that the almanac produced "was the one for the year of the murder, and no trick about it; that he is willing to make an affidavit that he examined it as to date,

[56] See statement of Juror John T. Brady in Journal of the Illinois State Historical Society, Vol. 3, pp. 39, 40.

[57] "Some doubt has been expressed as to whether an almanac was in fact introduced in evidence during the trial. There is abundant evidence, however, that Mr. Lincoln did introduce the almanac."—John T. Richards, *Abraham Lincoln, The Lawyer-Statesman* (1916) p. 51.

[58] Ward H. Lamon, *Life of Lincoln* (1872) p. 328. It should be borne in mind that while Herndon says that he sold Lamon a copy of Herndon's manuscripts of the facts about Lincoln which Herndon had gathered up to 1870–1871, and that "if what facts and opinions he got from me were stricken out of his book there would not be much left of it, as I think" (Joseph Fort Newton, *Lincoln and Herndon* [1910] p. 306), he also says that "quite every word" of Lamon's book was really written by Chauncey F. Black, and adds: "I have for years been written to by various persons to know why Lamon was so much prejudiced against Lincoln. The bitterness, if any, was not in Lamon, so much as in Black, though I am convinced that Lamon was no solid, firm friend of Lincoln, especially during Lincoln's administration, or the latter end of it." Id. pp. 307, 308. It is significant that Herndon's account of the Armstrong murder trial contains no suggestion that the almanac was other than a correct one for the year of the alleged murder. William H. Herndon and Jesse William Weik, *Herndon's Lincoln* (1889) Vol. 4, p. 358.

[59] Ward H. Lamon, *Life of Lincoln* (1872) p. 329.

and that it was an almanac of the year of the murder." [60] Mr. Shaw added: "My own opinion is that when an almanac was called for by Mr. Lincoln, two were brought, one of the year of the murder, and one of the year previous; that Mr. Lincoln was entirely innocent of any deception in the matter. I the more think this from the fact that Armstrong was not cleared by any want of testimony against him, but by the irresistible appeal of Mr. Lincoln in his favor." [61]

Another version of the story is that the almanac "was not one of 1857, but of 1853, in which the figure 3 had been changed to 7." [62]

That the almanac produced by Lincoln was for the year 1857 there can be no doubt. The statement of Mr. Milton Logan, the foreman of the jury, to that effect, has been corroborated by another member of the jury, Mr. John T. Brady, who says, "There has never been a question in my mind about the genuineness of the almanac, that it was an up-to-date almanac; this I am sure of as it was passed up to the Judge, jury and lawyers, who all examined it closely." [63] Judge Abram Bergen, who was at that time a resident of Cass county and who was present at the trial, has made it clear that there were two almanacs produced, but both were for the year 1857. The other almanac was produced by the prosecution—that would of course be the usual procedure—for comparison with the one relied upon by Lincoln. Mr. Bergen states that both almanacs substantially agreed as to the position of the moon on the night of August 29, 1857.[64]

[60] The affidavit appears to have been made, for Judge Abram Bergen stated that he "saw an affidavit made by Milton Logan, the foreman of the jury, that he personally examined the almanac when it was delivered to the jury, and particularly noticed that it was for the year 1857, the year of the homicide." James L. King, *Lincoln's Skill as a Lawyer*, 166 No. Amer. Rev. 186, 194.

[61] Ward H. Lamon's *Life of Lincoln* (1872) p. 330, note.

[62] Ida M. Tarbell, *The Life of Abraham Lincoln* (1909) Vol. 1, p. 273.
The almanac story antedated Lincoln.
"A fellow was tried for highway robbery, and the prosecutor swore positively to him, saying he had seen his face distinctly for it was a bright moonlight night. The counsel for the prisoner cross-questioned the man, so as to make him repeat that assertion and insist upon it. He then affirmed that this was a most important circumstance, and a most fortunate one for the prisoner at the bar, because the night on which the alleged robbery was said to have been committed was one in which there had been no moon; it was during the dark quarter! In proof of this he handed an almanac to the bench, and the prisoner was acquitted accordingly. The prosecutor, however, had stated everything truly; and it was known afterward that the almanac with which the counsel came provided had been prepared and printed for the occasion."—*The Doctor* [by Robert Southey] Vol. III, p. 146, Ed. 1835, as quoted in James Ram, *A Treatise on Facts* (4 Amer. Ed.) 269.

[63] Quoted by Mr. J. N. Gridley in the Journal of the Illinois State Historical Society, Vol. 3, at page 40.

[64] "During the entire trial," says Judge Bergen, "I was seated in the bar behind the attorneys for the state and those for the defendant, not more than four feet from any one of them, and noticed everything with the deepest interest, as any young lawyer naturally would. During the introductions of the evidence Mr. Lincoln remarked to the judge that he supposed the court would take judicial notice of the almanac; but in order that there might be no question on that point he offered it as a part of the evidence for the de-

That the almanac of 1857 discredited the witness, Allen, if he was as far away as 150 feet from the fight testified about, is clear. The almanacs for that year show that on the night of August 29, 1857, the moon set some minutes before twelve o'clock. While there was not "black darkness over the whole scene," as Lamon implies Lincoln to have argued, it still is true that the moon "was so near the western horizon at eleven o'clock on that evening that it could not have furnished sufficient light to have enabled the witness, Allen, to see the striking of a blow by Armstrong at the distance at which he claimed to have seen it struck." [65] It cannot be doubted that Lincoln made his argument on a genuine and unaltered almanac for the year 1857 and that he made only a fair argument on that almanac. Armstrong was acquitted largely because of Lincoln's personal plea in his favor and without any deception of any kind being practiced by Lincoln.[66]

fense, the court accepting it and remarking that any one might use the almanac in the progress of the argument. * * * When Lincoln finally called [on the sheriff to whom he had handed it] for the almanac he exhibited it to the opposing lawyers, read from it, and then caused it to be handed to members of the jury for their inspection. * * * I well remember that another almanac was procured from the office of Probate Judge Arenz in the same building. It was brought to the prosecuting attorneys, who examined it, compared it with the one introduced by Mr. Lincoln, and found that they substantially agreed, although it was at first intimated by the state's attorneys that they had found some slight differences. All this I personally saw and heard, and it is as distinct in my memory as if it had occurred but yesterday." James L. King, *Lincoln's Skill as a Lawyer*, 166 N. Amer. Rev. 193, 194.

[65] John T. Richards, *Abraham Lincoln, the Lawyer-Statesman* (1916) p. 51.

[66] Lincoln's general inability to defend a person whom he believed to be guilty is well known.

"Lincoln was not considered a formidable opponent in the criminal courts, however, unless he thoroughly believed in the justice of his cause. Mr. Whitney reports that on one occasion when he was defending a man charged with manslaughter, the testimony demonstrated that his client ought to have been indicted for murder in the first degree, whereupon Lincoln instantly lost all interest in the case. He did not actually abandon the defense, but he could not co-operate effectively with his associates who were endeavoring to acquit the defendant, and one of them states that when Lincoln addressed the jurors he disparaged the effort which had been made to work upon their feelings and confined himself to a strictly professional argument along conventional lines, with the result that the defendant was found guilty and sentenced to three years' imprisonment. This fairly disgusted Mr. Whitney, who was anxious to have the murderer acquitted, and he does not hesitate to characterize Mr. Lincoln's conduct as 'atrocious.' But Lincoln was guilty of many other 'atrocities' of the same character. It is well known that he virtually abandoned his client in another capital case when he discovered that he was defending a guilty man. 'You speak to the jury,' he said to Leonard Swett, his associate counsel; 'if I say a word, they will see from my face that the man is guilty and convict him.' On another occasion, when it developed that his client had indulged in fraudulent practices, he walked out of the courtroom and refused to continue the case. The judge sent a messenger directing him to return, but he positively declined. 'Tell the judge that my hands are dirty and I've gone away to wash them,' was his disgusted response."—Frederick Trevor Hill, *Lincoln the Lawyer* (1906) 237–239.

Lincoln apparently could defend with better spirit when his sense of humor was appealed to, despite his client's guilt.

" 'During my first attendance at court in Menard county,' relates a lawyer who traveled the circuit with Lincoln, 'some thirty young men had been in-

RUFUS CHOATE AND THE PROFESSOR WEBSTER MURDER CASE.

When Dr. John W. Webster, Professor of Chemistry at Harvard, was charged with having murdered in the Harvard Medical School Building Dr. George Parkman of Boston, Rufus Choate was one of the lawyers consulted for the defense. Rufus Choate was not retained for the defense, however, but, because the reason why he was not throws light upon his ethical attitude, the incident deserves consideration.

Professor Webster, who, until a short time before the tragic happening for which he was hung, had very friendly relations with Dr. Parkman, was in debt to the latter. To secure the indebtedness, Professor Webster had given Dr. Parkman a mortgage on Professor Webster's household goods and on his collection of minerals. Shortly before his disappearance, Dr. Parkman discovered that Professor Webster had sold the mortgaged minerals to Mr. Robert G. Shaw, Dr. Parkman's brother-in-law, and declared that "he would see Dr. Webster and give him a piece of his mind; that it was downright fraud, and he ought to be punished." [67] On Monday, November 19, 1849, Dr. Parkman called on Professor Webster at the Medical School Building and, reproaching him for the sale of the mortgaged minerals, insisted upon payment. There seems to be no reason to doubt the statement in Professor Webster's final confession to his clergyman that Dr. Parkman "had threatened me with a suit, to put an officer into my house, and to drive me from my professorship, if I did not pay him." [68] Professor Webster put Dr. Parkman off until the next day, and on the next day, by a note, put him off until Friday, November 23, on which day he was asked to call at Professor Webster's rooms after Professor Webster's lecture hour. Dr. Parkman did call about 2 p. m. on Friday. Professor Webster's first story was that when Dr. Parkman called he paid him the money owed and that Dr. Parkman at once left, saying he would go cancel the mortgage; but, although several people testified to having seen Dr. Parkman at other places in Boston later in the afternoon of that day, it seems clear that he never

dicted for playing cards, and Lincoln and I were employed in their defense. The prosecuting attorney, in framing the indictments, alternately charged the defendants with playing a certain game of cards called "seven-up" and in the next bill charged them with playing cards at a certain game called "old sledge." Four defendants were indicted in each bill. The prosecutor, being entirely unacquainted with games at cards, did not know the fact that both "seven-up" and "old sledge" were one and the same. Upon the trial of the bills describing the game as "seven-up" our witnesses would swear that the game played was "old sledge," and vice versa on the bills alleging the latter. The result was an acquittal in every case under the instructions of the court. The prosecutor never found out the dodge until the trials were over, and immense fun and rejoicing were indulged in at the result.' "—William H. Herndon and Jesse William Weik, *Herndon's Lincoln* (1889) Vol. 2, p. 349, note.

[67] 4 American State Trials, 92, 118. [68] Id. 447.

left the Medical School Building, but died in Professor Webster's room and presence.

Various unusual acts of Professor Webster's, following Dr. Parkman's disappearance, aroused the suspicions of the janitor of the Medical School Building, and, as a result, he chiseled through the vault of Professor Webster's private privy in the building, and, on Friday, November 30, 1849, found there the pelvis of a man and part of a man's right leg. On the evening of the same day, in Professor Webster's furnace in the Medical School Building, certain bones, some gold and a block of mineral teeth were found, and on the next day, in his laboratory, a thorax, a piece of a man's left leg, and a knife of Professor Webster's, all packed in a tea chest, were discovered.

"Surgeons who put the remains together reported that they were those of a man about the height of Dr. Parkman; that the dismemberment must have been done by one having a knowledge of anatomy; and the Professor of Anatomy declared that they were not part of any subject that had been used in the college for the purposes of dissection. And finally the dentist who had made a full set of false teeth for Dr. Parkman identified the set found in the furnace as his, and he produced the model which fitted the plate exactly." [69]

In Professor Webster's final confession to his clergyman,—the confession was made after his conviction had been affirmed, but, because of his previous conflicting stories, the confession did not persuade the Board of Pardons that the killing was not premeditated,—Professor Webster admitted that he killed Dr. Parkman after the latter had refused to listen to Professor Webster's attempted appeal for further time to pay and after Dr. Parkman had again threatened to have him deprived of his professorship. The confession states: "I cannot tell how long the torrent of threats and invectives continued, and I can now recall to memory but a small portion of what he said. At first I kept interposing, trying to pacify him, so that I might obtain the object for which I had sought the interview. But I could not stop him and soon my temper was up. I forgot everything. I felt nothing but the sting of his words. I was excited to the highest degree of passion and while he was speaking and gesticulating in the violent and menacing manner, thrusting the letter and his fist into my face, in my fury I seized whatever was the handiest—it was a stick of wood—and dealt him an instantaneous blow with all the force that passion could give it. I did not know, nor think, nor care where I should hit him, nor how hard, nor what the effect would be. It was on the side of his head, and there was nothing to break the force of the blow. He fell instantly upon the pavement. There was no second blow. * * * Perhaps I spent ten minutes in attempts to resuscitate him; but I found that he was absolutely dead. In my horror and consternation I ran instinctively to the doors and bolted them—the doors

[69] Id. 95.

of the lecture room and of the laboratory below. And then what was I to do?

"It never occurred to me to go out and declare what had been done and to obtain assistance. I saw nothing but the alternative of a successful removal and concealment of the body on the one hand, and of infamy and destruction on the other." And so he pursued the course of concealment and lying which resulted in his conviction.

Professor Webster's lack of the money with which to make the payment to Dr. Parkman which he claimed he made; the fact that if he made the payment he overpaid Dr. Parkman by some months of interest; and other facts developed at the trial, when coupled with the very conclusive identification of the remains found as those of Dr. Parkman, made his conviction on the defense which he relied upon inevitable. His final confession did not lead to even a commutation of sentence, and on August 30, 1850, he was hung.

Rufus Choate's attitude toward the case may best be stated by quoting the statement of Justice Otis P. Lord of the Massachusetts Supreme Judicial Court and Joseph Neilson's comment on it, as given in Joseph Neilson's "Memories of Rufus Choate." [70] The statement of Justice Lord was made to explain why Rufus Choate was unwilling to undertake Dr. Webster's defense. The Justice stated:

"I had a conversation with Mr. Choate on this subject. It was more than twenty years ago, and, of course, it is impossible to reproduce precisely his language, but the interview was substantially this: I said to Mr. Choate, 'Is it true that you refused to defend Professor Webster?' to which he replied,—not in direct terms, but by implication,—that he did not absolutely refuse, but that they did not want him. Pausing for a while, he added: 'There was but one way to try that case. When the Attorney-General was opening his case to the jury, and came to the discussion of the identity of the remains found in the furnace with those of Dr. Parkman, the prisoner's counsel should have risen and said, substantially, that, in a case of this importance, of course counsel had no right to concede any point, or make any admission, or fail to require proof, and then have added, "But we desire the Attorney-General to understand, upon the question of these remains, that the struggle will not be there. But, assuming that Dr. Parkman came to his death within the laboratory on that day, we desire the Government to show whether it was by visitation of God, or whether, in an attack made by the deceased upon the prisoner, the act was done in self-defense, or whether it was the result of a violent altercation. Possibly the idea of murder may be suggested, but not with more reason than apoplexy, or other form of sudden death. As the prisoner himself cannot speak, the real controversy will probably be narrowed to the alternative of justifiable homicide in self-defense, or of manslaughter by reason of sudden altercation." '

"Having said this, he added, 'But Professor Webster would not

[70] 1884 Ed., pp. 17–21.

listen to any such defense as that,' accompanying that statement with language tending to show that the proposed defense was rejected, not only by the accused, but by his friends and advisers.

"He then said, 'The difficulty in that defense was to explain the subsequent conduct of Professor Webster,' and he proceeded with a remarkable and subtle analysis of the motives of men, and the influences that govern their conduct, to show that the whole course of the accused, after the death, could be explained by a single mistake as to the expediency of instantly disclosing what had happened; that hesitation or irresolution or the decision, 'I will not disclose this,' adhered to for a brief half hour, might, by the closing in of circumstances around him, have led to all that followed. Having concealed the occurrence, he was obliged to dispose of the remains, and would do so in the manner suggested, and with the facilities afforded by his professional position. He concluded, 'It would have been impossible to convict Professor Webster of murder with that admission.'

"I suggested that the possession of the note by Professor Webster, as paid, was an awkward fact. He said, 'Yes, but it might seem to become a necessity after his first false step of concealment.' He added, 'Dr. Parkman was known to have been at the hospital. When, and under what circumstances, and to explain what statements made by him, the Professor thought it expedient to say he had paid the note, or to obtain possession of it, would probably never appear. It was simply an incident whose force could be parried, if he could obtain credit for the position that the concealment was a sudden and impulsive afterthought, which took possession of and controlled him in his subsequent conduct.' "

"We have, in these statements," added Neilson, "the desired testimony as to Mr. Choate's relation to that case. We have also an illustration of his view of the duty and privilege of an advocate. It is apparent that, while accepting the theory that, in a criminal case, a lawyer is not at liberty to withhold his services absolutely, Mr. Choate did not think him bound to go into court, contrary to his own convictions, and assert what he did not believe to be true, or take a line of defense which he considered untenable. Thus, for instance, as he was satisfied that, at the time and place alleged, Dr. Parkman had died in Professor Webster's presence, Mr. Choate was not willing to act on the theory that Dr. Parkman was alive after that time, and to call and examine witnesses to testify, as they finally did, under a mistake as to identity, that they had seen him day after day in the streets of the city. That theory was set up on the trial and failed, as Mr. Choate had foreseen that it would fail." [71]

[71] Joseph H. Choate has said of Rufus Choate: "His theory of advocacy was the only possible theory consistent with the sound and wholesome administration of justice—that, with all loyalty to truth and honor, he must devote his best talents and attainments, all that he was, and all that he could, to the support and enforcement of the cause committed to his trust."—Joseph H. Choate, *American Addresses* (1911) pp. 16, 17.

THE CZOLGOSZ CASE.

In Rev. Samuel Fallow's Life of William McKinley [72] is an account of the trial and conviction of Leon F. Czolgosz for assassinating President McKinley. Before Czolgosz was indicted he was examined as to his sanity and he was pronounced by prominent alienists to be sane. As he refused to say, even after his indictment, whether or not he wanted a lawyer, the court "appointed two eminent lawyers and ex-judges, Loran L. Lewis and Robert C. Titus, to act as his attorneys." [73] The counsel saw their client for the first time on September 21 and he refused to answer a single question. The trial began September 23, "and Judge Titus for the defense, arose and explained that the attitude of himself and his associate in the case was embarrassing and peculiar, consisting chiefly in the enforced duty of securing all the forms of law and justice in the prosecution of the case." [74] At the trial "no witnesses were sworn for the defense. Not a word of evidence was before the court as to the sanity of the prisoner. The alienists who examined him were not called. To the assassin was offered the opportunity to go on the stand, but he only shook his head when his lawyers asked him." [75]

"Judge Lewis addressed the jury on behalf of the defense, his associate afterwards concurring in all he said. As he progressed it became apparent that his whole soul recoiled against the crime which he sought to extenuate. * * *

" 'This trial here is a great object lesson to the world,' he said in the course of his moving speech. 'Here is a case where a man has stricken down the beloved President of his country in broad daylight in the presence of hundreds of thousands of spectators. If there was ever a case that would excite the anger, the wrath of these who saw it, this was one, and yet under the advice of the President, "Let no man hurt him," he was taken, confined in our prison, indicted, put upon trial here and the case is soon to be submitted to you as to whether he is guilty of the crime charged against him. That, gentlemen, speaks volumes in favor of the orderly conduct of the people of the city of Buffalo.

" 'How can a man with a sane mind perform such an act? The rabble in the streets will say, no matter whether he is insane or not, he deserves to be killed. The law, however, says that you must con-

[72] 1901 Ed., pp. 439–448. [73] Id. 439. [74] Id. 440.

[75] Id. 443.

Charles S. Olcott in his Life of William McKinley (1916) Vol. 2, at page 385, says of Leon F. Czolgosz that: "Two of the most distinguished alienists of the country examined him and agreed that he was quite sane. There could be no defense on any other ground than that of insanity." And on page 386, he says that the defendant's counsel "saw that their client received all the rights to which he was legally entitled."

sider the circumstances and see if he was in his right mind or not when he committed the deed. If you find he was not responsible, you would aid in lifting a great cloud from the minds of the people of this country. * * *

"'I had the profoundest respect for President McKinley. * * * His death was the saddest blow to me that has occurred in many years.'" [76]

[76] Samuel Fallows, *Life of William McKinley* (1901) pp. 443, 444.

"It is obvious that it was not the state of the law, but the state of public opinion, which prevented, in the case of Czolgosz, any of the grievous delays and thwartings of justice which we see on every hand. His lawyers could, but would not, dared not, apply for stays and certificates and changes of venue. Judges could, but would not, dared not, stay the execution of sentence upon the President's assassin. * * * The people wanted only justice on a miscreant, but they wanted it, wanted it speedily and surely. They got it; and it is safe to say that if an equally aroused and watchful public opinion pressed upon all our courts at all times we should not see justice baffled so often as we do. The Buffalo bar, with a fine sense of its own responsibility, secured the appointment of two ex-judges as counsel for Czolgosz. If the New York bar were as sensitive concerning its own reputation, it would in similar ways bring its influence to bear to make the process of our courts in this city more orderly and less scandalous."—*The Lesson of the Czolgosz Trial*, The Nation, Vol. 73, pp. 332, 333.

"A mooted question among lawyers is as to the propriety of defending a criminal whom one knows to be guilty. Personally I refuse to do it. Yet I recognize the fact that many lawyers, and conscientious ones at that, will accept employment of this kind because they believe that it is the duty of a lawyer to accept employment from every client who needs representation. It is not so much, however, the mere fact of representation that brings about discredit to our profession and contempt for law by the public, but the manner in which that representation is performed. Few countries have suffered more humiliating or disgraceful spectacles than did the the United States when Charles J. Guiteau was defended for the murder of President Garfield. Every trick of the criminal lawyer, every petty objection, every plea for delay, every possible dilatory tactic was used by his counsel. Contrast this with the representation of Czolgosz when on trial for the murder of President McKinley. His legal rights were protected, his counsel saw that he had a fair trial, that no incompetent testimony was introduced. The consequence was that in an expeditious, but decent, orderly manner he was tried and punished for his crime. These two cases are as good exemplifications as I should desire of the point I am endeavoring to make, viz., that the manner of defending a known criminal is productive of respect or disrespect for law and lawyers according to whether it is the manner of the lawyer or the pettifogger. If there is any doubt in the mind of any one that all possible technicalities need not be taken advantage of, and that a criminal hearing can be expedited when necessary, or delayed when desired, let him contrast the course of the same lawyer when defending for a fee and when he is appointed by the court to defend a pauper criminal."—Percy Bell, *The Lawyer's Relation to Lawlessness*, 48 Amer. L. Rev. 209, 214, 215.

Of the Guiteau trial, however, Charles E. Grinnell wrote in the American Law Review for January, 1882 (Vol. 16, at page 55): "After all, then, it is our opinion that in this as in many other important cases the persons who are on the spot, and who are responsible for the matters in hand, have understood and attended to their business with a discretion superior to that of some of the most highly esteemed among the spectators."

CANCEMI'S CASE. Frederic R. Coudert, *Addresses* (1905) pp. 377, 378: One Cancemi was tried many years ago, in the city of New York, for a murder committed in the street. He was arrested while fleeing (or while supposed to be fleeing) from the pursuit of those who had seen him, they said, commit the crime. The case excited a great deal of newspaper comment and it became correspondingly difficult to find an impartial jury. When the panel had been exhausted it was found that only eleven jurors had qualified and it was then suggested that the case might be tried before eleven men. Counsel for the defense acquiesced, apparently in good faith, and, as I believe, without any thought that they were jeopardizing the rights of their client or in any way exceeding the limits of their duty. The presiding justice was a man of great ability and experience. Cancemi was convicted and sentenced to death. The point was taken on appeal that counsel had no power to make such a concession, that the accused was entitled to a jury of twelve men, and that his counsel had no authority to stipulate that right away. The point was held well taken by the Court of Appeals and the judgment was reversed. Cancemi was tried a second time, convicted of a minor degree of manslaughter, manifestly a compromise verdict, and, I am informed, after serving out his term of imprisonment returned to his country, where he obtained a position of distinction. It is now stated and generally believed that he was absolutely innocent.

Much obloquy was thrown upon the counsel because, it was said, they had violated their stipulation. I do not hesitate to express the opinion that they would have failed in their duty if, upon discovering their error, they had not frankly stated it to the court and asked the court to give their unfortunate client the protection to which he was entitled. Counsel in a capital case have no right, nor authority, to concede anything that jeopardizes the client's life and if they subsequently discover that they have erred, and that a life is to be thereby sacrificed, it is infinitely more manly, and more in accordance with the traditions of the profession, to throw themselves into the breach—to stand the reproach of unreflecting or prejudiced persons and to undo the mischief that they ignorantly caused—than to remain silent. Human life is too sacred to be tampered with on the ground of etiquette or to be sacrificed because of counsel's reluctance to confess their fallibility. No one could have blamed these gentlemen if they had retired from the case and if a newcomer had repudiated the binding effect of their stipulation. Was it not more honorable on their part, instead of resorting to such an evasion, to lay aside all personal risks, to face the difficulty bravely and do their full duty as they understood it? [77]

[77] In People v. Jugigo, 128 N. Y. 589, 28 N. E. 139 (1891) the Court of Appeals condemned the needless vexation of appellate courts by hopeless appeals in criminal cases and suggested that attorneys who brought them should be disciplined.

WITNESS FOR PROSECUTION ACTING AS TRIAL COUNSEL FOR ACCUSED. N. Y. Committee. *Question 28:* Recently, as a notary public, I administered an oath to a party in a matter pending in the United States Land Office. Now that party has been indicted for perjury, alleging that the matters sworn to were false. The party admits the oath, but intends to plead the truth of the statements, and can easily do so. Of course I will be a material witness for the government, although there will be no dispute over my testimony. He will admit the oath. This party desires that I represent him in his defense on the perjury charge. Can I ethically do so?

Answer: As a general principle, a lawyer should not act as trial counsel in a criminal cause in which he knows or has reason to believe that he is to be a material witness for the prosecution. The question imports that in the given case the testimony of the inquirer is not in dispute, is against his client, and would be only formal. If the nature of his testimony could be assuredly so limited, the Committee would not disapprove the retainer. Except in a case where such limitation may be confidently predicted, the retainer should, in the opinion of the Committee, be refused.

GAULDEN v. STATE.

(Supreme Court of Georgia, 1851. 11 Ga. 47.)

The case of the State v. James Cody and Patrick Cody, for a misdemeanor, being called up for trial, Wm. B. Gaulden appeared as one of the counsel for defendants, and requested his name to be marked on the docket; when counsel for the State objected, upon the ground that said Gaulden, at the previous April Term, (being then the Solicitor General of the district,) drafted the indictment upon which the issue for trial was formed, that he consulted with the assistant counsel, and was cognizant of the facts of the case. It also appeared that the Solicitor General's fee for drawing the indictment had been allowed by the Court, but had not been paid out of the fines and forfeitures, as authorized by law, there not being any fund in hand for that purpose.

Upon argument, the Court below excluded Mr. Gaulden from appearing as counsel.

This decision is assigned as error.

WARNER, J. * * * In this case, the former Solicitor General has only done what has heretofore been the general practice in most of our Circuit Courts; but upon what principle this practice has been allowed to prevail, we are not advised. The question has, however, now been presented for our consideration and judgment, and we are bound to decide it according to our views of right and public policy. It is urged in behalf of the former Solicitor General, that in his official capacity, he must be considered as standing indifferent between

the people of the State and the defendant who is indicted; that when his successor has been elected and qualified, the State is to be considered as having discharged him from her service, and therefore, he is at liberty to appear as counsel for the defendants whom he prosecuted while in office. Admitting, that in his official capacity, he is supposed to stand indifferent, so far as his personal feelings are concerned, yet, he is not the less the counsel for the State on that account, and must necessarily become familiar with the facts of the case upon which the State relies for a successful prosecution of the indictment. His position, as the counsel for the State, enables him to learn the difficulties which may stand in the way of the conviction of one who is really guilty, which no other person would be as likely to know, for the reason, that his communication with the prosecutor, the witnesses, and the Grand Jury, afford him the means of ascertaining many facts, which only those who are officially connected with the government, can know. Shall he be permitted to make use of the privilege thus officially conferred upon him, while in the discharge of his duties as counsel for the State for the purpose of defending those who have been accused of crime during his official term of office, and that, too, for a reward paid by them to him, for such service? * * *

The administration of the law should be free from all temptation and suspicion, so far as human agency is capable of accomplishing that object; and in our judgment, public policy most emphatically demands, that a Solicitor General who has been employed by the State, to prosecute defendants for a violation of her laws, for the compensation affixed by law, should not be allowed to defend such defendants from the charge contained in the indictment, after the expiration of his term of office, for a compensation to be paid by them for that purpose. Such a practice will have a tendency to greatly embarrass the administration of the Criminal Law; for, as the term of the office of Solicitor General is about to expire, prosecutors and others, who may be intrusted to prosecute offenders, will necessarily be restrained from communicating freely with the State's counsel, when he may be employed at the next term of the Court, to defend the indicted culprit. It is no sufficient answer to say, that the law will not allow him to disclose any fact which may have been communicated to him, as the counsel for the State to her prejudice. If he knows the vulnerable points in the case, derived by his official connexion with it, there are many ways by which those points might be made available to the defendant on his trial, by his counsel, besides disclosing them as a witness. * * *

We affirm the judgment of the Court below, as before stated, on the ground of public policy, irrespective of the particular facts of this case.[78]

[78] See Wilson v. State, 16 Ind. 392 (1860); In re Cowdery, 69 Cal. 32, 10 Pac. 47, 58 Am. Rep. 545 (1886).

In People v. Spencer, 61 Cal. 128 (1882), a lawyer was suspended from prac-

DUTY OF LAWYER FOR AN ACCUSED WHO HAS FORFEITED BAIL. N. Y. Committee. *Question 70:* When an accused person has deposited cash bail for his appearance for trial on a criminal charge and has also made a deposit of money with his lawyer, subject to the order of the accused, in case of conviction, and the bail is forfeited—

1. Is it improper for the lawyer to honor an order from his client who has fled to Canada, directing the payment to one outside the state of the deposit made with his lawyer?

2. Is it incumbent upon the lawyer to advise the police officials of the receipt of a communication from his client disclosing his whereabouts and enclosing such order?

Answer: In the opinion of this committee there is no impropriety in the lawyer's honoring the order of his client in respect to the disposition of his client's property. The client has not forfeited all civil rights nor his ownership of property by becoming a fugitive from justice. In the opinion of the committee it would be improper for the lawyer to disclose the information; his obligation to his client, imposed by our law in the interest of the supposedly proper and satisfactory administration of justice, a rule which is binding upon the lawyer, precludes him from making the disclosure to any one without his client's express consent.

The committee bases his latter opinion upon its view that the professional relation extends to the date of the communication, notwithstanding the other facts stated in question.

In re LANE.

(Supreme Court of Minnesota, 1904. 93 Minn. 425, 101 N. W. 613.)

In the matter of the application for the removal of Freeman P. Lane, attorney and counselor at law. Judgment suspending respondent.

PER CURIAM. * * * But, further, upon the admission and statements of the respondent himself, it appears that he knew that the witness Ada Hubbell [who was detained in jail to testify against respondent's clients, Roberts and Leland, who were defendants in criminal actions] had planned to escape at the time she ran away, and that her escape necessitated the postponement of the two criminal prosecu-

tice for three months for moving for the defendant in a criminal case to set aside an indictment which as district attorney the lawyer had drawn.

But in People v. Johnson, 40 Colo. 460, 90 Pac. 1038 (1907), it was held not to be ground for the discipline of a lawyer that he appeared for the defendant, although as district attorney he had filed the information on which the defendant was being tried.

tions referred to; that thereafter she kept herself concealed for several months, and that respondent became acquainted with this fact; also that she was necessitous and in distressed circumstances, and that about the time when the criminal prosecution against Roberts and Leland was coming on the respondent obtained knowledge of the hiding place of the witness, and informed Roberts of this fact, and advised him to send her aid, and himself made a remittance to her for Roberts, which could have been for no other reason than to continue her in her concealment and thereby prevent her from being a witness in the criminal causes against Roberts and Leland. * * *

We therefore told hold that the element of the charge which accused respondent of having encouraged the witness Ada Hubbell in the criminal cause to continue in concealment and avoid attendance, when it was known that she would be required as a witness, has been established, and that this was a breach of professional duty by the respondent as an attorney and counselor, and subjects him to discipline therefor.

The judgment of the court is that respondent be suspended from practicing as an attorney or counselor in any of the courts of this state for the period of one year. Let judgment be entered accordingly.[79]

WITHDRAWAL FROM CASE BY COUNSEL. Statement of the General Council of the Bar, *The Annual Practice* (1917) p. 2416: The Council have had under their consideration the following circumstances: A Judge of the Circuit Court in W. Africa tried a case where prisoners were defended by a Barrister-at-Law, a member (native) of the Local Bar. The Barrister took exception to the Judge's ruling out some evidence, which he considered irrelevant, but which

[79] In In re Hanson (Utah) 158 Pac. 778 (1916), a lawyer was suspended from practice for sixty days because, when employed to defend a man charged with murder in the first degree, and when, as he insisted, he was denied by the chief of police an inspection of the clothes worn by the man who was killed, which were being kept at the police station as evidence, he obtained the clothes from a city detective, at the latter's suggestion, surreptitiously. The lawyer entered the police station from an alley in the rear shortly after midnight so as to avoid being seen by anybody but the detective, received the bundle of clothes from the detective and immediately left by the back door and the alley. He was arrested in the alley, the police officers having set a trap for him. He insisted that he intended merely to inspect the clothes and then return them, instead of withholding them from the prosecution. The court, giving him the benefit of the doubt, accepted that view of his conduct. But Frick, J., for himself and McCarty, J., after pointing out that the lawyer could have obtained a court order for the inspection of the clothes, said that: "To say the least [he] was guilty of a grievous infraction of the rules of propriety in his acts and conduct respecting the bundle of clothes" (158 Pac. at page 780 [1916]); and Straup, C. J., in concurring, said that: "The clandestine manner in which he did receive and take them [the clothes], and in which he attempted to depart with them, even with the intent as claimed by him, shows such misbehavior and delinquency upon his part as to subject him to discipline."

the Barrister wished to put in. After the adjournment the Barrister informed the Judge that with the consent of his clients he would withdraw from the case, stating as his reason for so doing the fact of the Judge ruling out his evidence. On questioning the prisoners the Judge found that they had not consented to the withdrawal, and they protested that they desired the Barrister to continue to represent them, as they had already paid for his services. The Judge wished to know if he could have compelled the Barrister to continue in the case. The Council replied that they knew of no power to compel the Barrister to proceed with the case under the circumstances mentioned, but that if a member of the English Bar had acted as described, the matter would be a proper one to bring to the notice of the Masters of the Bench of the Inn of Court of which he is a Member. An. St. 1907–08, p. 10.

CHAPTER VIII

THE ETHICAL DUTIES OF LAWYERS IN CIVIL CASES

SECTION 1.—ASCERTAINING FACTS AND ARRANGING COMPROMISES

B. B. A. CANON.

VIII.[1] ADVISING UPON THE MERITS OF A CLIENT'S CAUSE. A lawyer should endeavor to obtain full knowledge of his client's cause before advising thereon,[2] and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation.[3] The miscarriages which occur through miscalculations of counsel, surprises in evidence, the fallibility of juries, the errors made sometimes even by judges, and through other "rough chances of the law," all admonish the lawyer not to assure his client too boldly of success, especially when his employment may depend on his giving such as-

[1] A revision of A. B. A. Canon 8.

[2] "The Attorney thus fitted for practice, he must be very carefull in taking right and due instruction from his Client, and informe himselfe of whatsoever is materially incident to his Cause; that so he may know what manner of Action is most proper to be brought on behalf of his Client, for a Cause once throughly, and rightly grounded, goes on with a great deal of ease and satisfaction both to the Attorney and Client."—*The Practick Part of the Law* (1653) pp. 4, 5.

[3] "To be a lawyer is and should be understood and recognized as being well versed in the law, and possessed of ability to make a just and proper application thereof to the facts in a given case."—Huston, C. J., in In re Badger, 4 Idaho, 66, 69, 35 Pac. 839, 840 (1894).

Hoffman's Resolution XXXI: "All opinions for clients, verbal or written, shall be my opinions, deliberately and sincerely given, and never venal and flattering offerings to their wishes or their vanity. And though clients sometimes have the folly to be better pleased with having their views confirmed by an erroneous opinion than their wishes or hopes thwarted by a sound one, yet such assentation is dishonest and unprofessional. Counsel, in giving opinions, whether they perceive this weakness in their clients or not, should act as judges, responsible to God and man, as also especially to their employers, to advise them soberly, discreetly, and honestly, to the best of their ability, though the certain consequence be the loss of large prospective gains."—David Hoffman, *A Course of Legal Study* (2d Ed.) Vol. II, p. 764.

"Jeremy Taylor lays it down as a rule that 'advocates must deal plainly with their clients, and tell them the true state of their case.' This is a sound rule. Physicians may hesitate to tell their patients the truth, for fear of a fatal shock, but the truth told to a client never kills him, however much it may disagree with him. Many a client would be saved time, temper, peace of mind, money, and reputation, were he advised at the beginning, what he so often discovers at the end, of a lawsuit, that he has no defense to a debt which he owes, or that he has no remedy for the wrong which he seeks to redress."—William Allen Butler, *Lawyer and Client* (1871) pp. 18, 19.

surance. Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation.[4]

In re WESTERN MINE LITIGATION. *The Life Story of a Successful Lawyer,* 9 Everybody's Mag. 84, 89–91: The experience which I cherish with the largest gratification was a case in which I was able to check my own clients as they were embarking upon a litigation which promised to be of enormous extent. I was especially gratified for two reasons: My clients' cause was questionable, although technically legal, and I made a large fee in spite of my keeping them out of their proposed scheme. If things always turned out that way rectitude would be easy.

It was the affair of a Western mine, or rather aggregation of mines, now well known and richly productive, but then in the first uncertain stages of development. It was rather under-capitalized at $1,000,000. Its entire stock had been sold at such a low figure that it never had been furnished with proper means. Then it was loaded down with debts, which had reached $300,000. Its management had been both lavish and ineffective, and it was a serious question whether it could ever produce enough to pay even the interest on its debts.

At this stage the president and another stockholder, who was also the largest creditor, made common cause. They would get up the old-fashioned freeze-out—have a receiver appointed and apply for an order for a sale, then have some friend buy it in and surrender it to them. In order to force the price down to a point of profit, there

[4] "It is not enough that the counsel do not promote litigation or speculate in causes of action. He must dissuade his client from commencing suit whenever it is clearly unnecessary [to sue]. Lord Tenterden [in Jacks v. Bell, 3 C. & P. 316 (1828)] once rebuked an attorney thus: '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.' "—William Allen Butler, *Lawyer and Client* (1871) p. 23.

"A very important part of an advocate's duty is to moderate the passions of the party, and, where the case is of a character to justify it, to encourage an amicable compromise of the controversy. It happens too often at the close of a protracted litigation that it is discovered, when too late, that the play has not been worth the candle, and that it would have been better, calculating everything, for the successful party never to have embarked in it—to have paid the claim, if defendant, or to have relinquished it, if he was plaintiff. Counsel can very soon discover whether such is likely to be the case, and it cannot be doubted what their plain duty is under such circumstances." —George Sharswood, *An Essay on Professional Ethics* (5th Ed.) 109.

"Let it be your always kept rule, except in those cases where delay is perilous, never to bring an action or file a defence until you have been refused a composition that you regard reasonable and right."—John C. Reed, *Conduct of Lawsuits* (2d Ed.) § 285, p. 197.

In In re Dartnall, [1895] 1 Ch. 474, a solicitor who displayed unreasonable haste in starting litigation was disallowed his costs against his client.

would be examinations by several mining experts, whose opinion of the mines was known to be unfavorable, and who would make calamity reports, just before the sale. The stockholders would perforce be content with the dispensation of Providence, and would discourage the other creditors from making a pool to acquire the property. The creditors would thus get but a percentage of their claims, the stockholders would be wiped out, and the president and the chief creditor would take the property, the latter making good his losses on his part of the debt by his big grab of the new stock.

This was not precisely the way they told the story when the two asked me to put through the deal. It was told with the circumlocution of men who are driven to the wall and are willing to incur losses and take great risks to save the property; also, they were tactful as to the expected appraisal of the mines by the experts. Most experts who had looked into the property had been discouraging, and, although there were one or two engineers, perhaps, who were more hopeful, it was certainly fair for the purposes of the sale to follow the opinion of the majority.

After hearing them I said: "Gentlemen, I perceive, as perhaps you do not, what a very complicated transaction this is. It is fraught with hazards which must be avoided. It may involve prolonged litigation, and your present transaction must be so shaped as to sustain that litigation even to the Supreme Court of the United States. If I undertake the affair at all, it will cost you $50,000 as a retainer. But I am not sure I will undertake it at all. If you still wish me to serve you, I will give you my answer in two weeks."

"The fee," said the chief creditor, "is not excessive for such a transaction, and we will wait here in New York for a fortnight and get your decision. We feel sure it will be favorable, and we are prepared to do more for you than you have demanded."

I wrote that day to a friend who was within 400 miles of the mines. If he was not an expert of the schools, he had been a prospector for many years, and I was ready to trust his experience and trained instinct in telling me what was in those mines. I wrote: "Go to the mines by the first train; spend as much time there as possible up to this day two weeks; then wire me in twenty words your independent judgment."

The morning my men were to return to me I got this telegram: "Experts, fools or frauds. Mines show million in sight. Ore croppings 1,000 feet long, 150 wide. Vein runs deep. Badly worked, but great promise."

When my would-be clients entered, this yellow message was under my blotter-pad. In response to their inquiry I made a little speech:

"Gentlemen, what you have proposed to me is only the ancient game of freeze-out. There are many creditors who are to get but a small percentage of their claims, although the largest creditor is to get half

the mine in lieu of his loss. All the small stockholders, who have invested from their little on the hopes which the president awakened, are to lose every cent of their investments, while the president is to get half the mine for himself. This is to be effected by a most plausible programme. Expert opinions, supposedly impartial, but really ex parte, are to be purchased, and with money which belongs to those who are to be mulcted.

"What will the result be? More serious than I at first imagined. After your sale that ex parte appraisal will be contested. A fight will be on which may mean bloodshed, and will certainly mean discredit and perhaps criminal prosecutions. I cannot undertake your proposed transaction at any price.

"But now, gentlemen, let me show you a better way. I know something myself of your mines." Here I drew out the telegram from my friend, the prospector, and read it to them.

"I don't believe in your experts, but I do believe in the honesty and value of the opinion in this telegram. I know that you also believe with me. If you didn't, you would not be so brave to buy a sinking ship. Now, if you will abandon your scheme as too costly as well as wrong, and adopt the plan I shall outline, you will make more money yourselves, you will save your good names, and you will save from loss all the small stockholders and creditors who are tied up with you."

The faces of the men had grown tense and gray; now they were somewhat relaxed with curiosity. I placed before them a simple and equitable plan. First, it involved a frank recognition and announcement of the situation; namely, that the management had been atrocious, but that the property itself was sound. Then, that a receiver should be appointed, but, instead of forcing a sale, that he was to induce the creditors to accept, one and all, as advantageous a settlement of their claims as possible.

The men were finally convinced of the hopefulness of the new plan, and accepted with cordiality. The receiver was appointed, and without exception each of the forty creditors agreed upon a settlement at fifty-five per cent. of their claims, ten per cent. in cash and the balance in one-year notes, for it was found that the assets would enable the receiver to liquidate to that degree.

After the final arrangements of details, work was undertaken at the mines with vigor and hope under a new management. The property began to produce abundance of rich ores. Not only were the notes met, but a hundred cents on the dollar was paid to the creditors. Dividends on the stock swelled its value, until, I believe, it is now selling on the curb at some 400 per cent. Nobody has lost; and my two friends have each made handsome fortunes. Lastly, I also shared in the good fortune.

Yet I will admit that my advice at the critical moment, right as it was and happy as it has proved, was not given without a sharp temptation to fall in with the clever and well-fortified scheme.[5]

ROBINSON v. MURPHY.

(Supreme Court of Alabama, 1881. 69 Ala. 543.)

BRICKELL, C. J. * * * The error assigned by the appellants asserts that the decree as an entirety is erroneous.

The point of controversy, decisive of the case, is whether an attorney at law, by virtue of his general retainer and authority, can accept in satisfaction of a judgment he has obtained for a client, a less sum than is really due, or for such sum transfer the judgment, binding the client. The authority of an attorney to compromise pending litigation is fully recognized in the English courts upon the theory that he is, as to the matters involved in the litigation, the general agent of the client. See elaborate note of Prof. Green to § 24, 8th Ed., Story on Agency; Wharton on Agency, §§ 587–592.[6] These learned authors express the opinion that the doctrine of the American courts coincides

[5] "I must confess that I am unable to perceive the moral difference between the lawyer who knowingly accepts a part of the spoils that his burglar client has stolen as payment of his fee for defending that client, and the lawyer who takes a part of the stock of a wrecked railroad from the conspirators whom he has directed. I am similarly unable to discover any moral difference between the lawyer in the cities, who is retained permanently by a gang of criminals to be of service in the event of their detection and apprehension, and the lawyer who organizes an illegal combination and is retained by it to direct it along the devious ways of plundering under forms of law."—Percy Bell, *The Lawyer's Relation to Lawlessness*, 48 Amer. L. Rev. 209, 214.

[6] The English view that counsel are general agents having apparent authority to compromise, and so may bind a protesting client by a compromise entered into by the other party without knowledge on his part of the client's protests, is well brought out in Strauss v. Francis, L. R. 1 Q. B. Cases, 379 (1866). In that case Blackburn, J., said: "Mr. Kenealy has ventured to suggest that the retainer of counsel in a cause simply implies the exercise of his power of argument and eloquence. But counsel have far higher attributes, namely, the exercise of judgment and discretion on emergencies arising in the conduct of a cause, and a client is guided in his selection of counsel by his reputation for honour, skill and discretion. Few counsel, I hope, would accept a brief on the unworthy terms that he is simply to be the mouthpiece of his client. Counsel, therefore, being ordinarily retained to conduct a cause without any limitation, the apparent authority with which he is clothed when he appears to conduct the cause is to do everything which, in the exercise of his discretion, he may think best for the interests of his client in the conduct of the cause; and if within the limits of this apparent authority he enters into an agreement with the opposite counsel as to the cause, on every principle this agreement should be held binding." Accordingly the action of Serjeant Ballantine in withdrawing a juror, in pursuance of a compromise, against the client's wishes not communicated to the opposing party or opposing counsel, was upheld.

So a solicitor has apparent authority to compromise an action begun (In re Newen, [1903] 1 Ch. 812), but none to compromise a cause of action not yet sued upon (Macauley v. Polley, [1897] 2 Q. B. 122). After judgment his au-

with that of the English courts. There would be possibly much of difficulty in supporting the opinion by a protracted examination of the decided cases.[7] * * *

Prior to our statute in reference to composition of debts, if this transaction had occurred between the plaintiff and the defendant in the judgment, the acceptance of a less sum in payment would not have operated its satisfaction. There is a want of a valuable consideration for the agreement of a creditor to remit the whole, on the payment of a part of a just and ascertained debt. Barron v. Vandvert, 13 Ala. 232; Pearson v. Thomason, 15 Ala. 700 [50 Am. Dec. 159]. It may be that under the statute, if the parties themselves had been the actors, there would have been a settlement in writing for the composition of

thority to compromise is perhaps less extensive than before judgment. See In re A Debtor, [1914] 2 K. B. 758.

"Generally speaking, we should be disposed to support an agreement of compromise entered into after the parties have jointly consulted the family solicitor, even though the agreement may not be quite in accordance with the rights of the parties, because we think that, generally, the very object of the compromise is to avoid the necessity of having the exact relative legal rights determined by litigation; but I cannot agree with Kekewich, J., if he means by his judgment that the family solicitor is entitled to keep those consulting him in the dark as to their rights because he thinks that it is for the advantage of all parties to compromise, and that if they knew their exact rights there would be no chance of compromise."—Vaughan Williams, L. J., in In re Roberts, [1905] 1 Ch. 704, 710, 711.

[7] "And, in harmony with the great majority of the courts of this country, we affirm the rule that an attorney has no implied authority to compromise his client's cause of action, except when confronted with an emergency."—Brown, J., in Gibson v. Nelson, 111 Minn. 183, 188, 126 N. W. 731, 734, 31 L. R. A. (N. S.) 523, 137 Am. St. Rep. 549 (1910). This doctrine applies before as well as after judgment.

"But * * * an attorney who is clothed with no other authority than that arising from his employment in that capacity has no power to compromise and settle or release and discharge his client's claim. He may do all things incidental to the prosecution of the suit and which affect the remedy only and not the cause of action. He cannot bind his client by any act which amounts to a surrender in whole or in part of any substantial right."—Whitehouse, J., in Pomeroy v. Prescott, 106 Me. 401, 407, 76 Atl. 898, 901, 138 Am. St. Rep. 347, 21 Ann. Cas. 574 (1910).

See 21 Ann. Cas. 577, note; Ann. Cas. 1915B, 832, note; 31 L. R. A. (N. S.) 523, note.

In emergencies, however, the power may exist.

"We are satisfied that an attorney may negotiate a compromise where the circumstances are such that he must act without delay, and where the interests of the client will be seriously imperilled unless his action is prompt and decisive. If there is time and opportunity for consultation with the client, then the attorney should not assume authority to compromise his client's claim; but if there is an emergency that prevents consultation and forces immediate action, it is the duty of the attorney to take such steps as will secure the greatest benefit to his client. The necessity creates the authority, and the position of the attorney demands that the authority be exercised for the client's good. Where there is no emergency, there is no authority, but the authority springs into existence with the emergency. To deny this would be to affirm that there are cases where the attorney must stand idle when action would save his client from loss, and this is incompatible with the general principle that it is the duty of an attorney to do all that can justly be done to promote the interests of his client."—Elliott, J., in Union Mutual Life Ins. Co. v. Buchanan, 100 Ind. 63, 76, 77 (1885).

the judgment, to which effect would have been given according to their intention without inquiring into the consideration.

The power of an attorney is not co-equal, co-extensive, or the equivalent of that of the client. He is, as has been said in numerous decisions of this court, a special agent, limited in duty and authority to the vigilant prosecution or defense of the rights of the client. * * * Within the limits of that professional action which may be necessary for the conduct of the proceedings in the course of pending suits, and of direction to ministerial officers in the issue, levy and return of executions, the attorney may have large discretionary powers given to him, that he may perfect and promote the rights and interests of the client. But entering into bargains or contracts by which the debt of the client is released or discharged without full payment in money, is not one of his general powers. If the power is not specially conferred, the validity of all such bargains or contracts, so far as they affect the client, depends upon his ratification. He may ratify or repudiate as he may believe most conducive to his interest. Kirk's Appeal, 87 Pa. 243, 30 Am. Rep. 357; Levy v. Brown, 56 Miss. 83; Maddux v. Bevan, 39 Md. 485; Moye v. Cogdell, 69 N. C. 93.

All who deal with an attorney or other agent must ascertain the extent of his authority. If they do not inquire, they can claim no protection because they indulged suppositions or conjectures, reasonable or unreasonable, that the agent had the authority he was exercising. Gullett v. Lewis, 3 Stew. 23. * * * Whoever has dealt, or may in this state deal with an attorney, can have no right to rely on his exercise of any other power, unless it is specially conferred. Whether it has been especially conferred, they must, at their own peril, ascertain. The acceptance by the attorney of a less sum than was due upon the judgment did not operate its satisfaction; and the transfer or assignment of the judgment was in excess of his authority.

The decree of the chancellor must be reversed.[8] * * *

[8] "An attorney by virtue of his retainer can do anything fairly pertaining to the prosecution of his client's cause, and the protection of his client's interest involved in the suit; but he cannot, under such general authority, surrender or compromise away his client's substantial rights. To do it requires the express authority of the client, or his agreement thereto. * * * Where an attorney makes a compromise or settlement of a case without any authority so to do, it may be set aside and vacated, upon application of his aggrieved client seasonably presented." Brewer, C., in Turner v. Fleming, 37 Okl. 75, 77, 78, 130 Pac. 551, 552 (45 L. R. A. [N. S.] 265, Ann. Cas. 1915B, 831 [1913]). The court in that case set aside an order of dismissal of a cause entered upon the suggestion of attorneys as a result of an unauthorized compromise and reinstated the cause.

But some courts will not set aside a compromise actually entered into by the unauthorized attorney unless it is unreasonable. Holker v. Parker, 7 Cranch, 436, 3 L. Ed. 396 (1810); Williams v. Nolan, 58 Tex. 708 (1883); Whipple v. Whitman, 13 R. I. 512, 43 Am. Rep. 42 (1882). Moreover, "while an attorney by virtue of his employment has not authority to make a compromise of an action he is employed to prosecute or defend, it is not to be presumed, when one so situated assumes the right to exercise such a power and does exercise it, that this was done without lawful authority, and but slight evidence in

SECTION 2.—CONFLICTING INTERESTS

B. B. A. CANON.

VI.[9] ADVERSE INFLUENCES AND CONFLICTING INTERESTS. It is the duty of a lawyer to disclose to the client all his relations to the parties, and any interest in or connection with the controversy, which might influence the client in choosing or continuing to employ him as counsel.[10]

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests whenever his duty to one client may require or lead him to do anything that may injure the cause of his other client or to leave undone anything that might advance it.[11]

such a case may be sufficient to authorize the belief that he was clothed with all the power he assumed to exercise."—Stayton, C. J., in East Line & Red River R. Co. v. Scott, 72 Tex. 70, 73, 10 S. W. 99, 101, 13 Am. St. Rep. 758 (1888).

That a lawyer who compromises his client's case against the client's express directions is not entitled to any compensation is held in Rogers v. Pettigrew, 138 Ga. 528, 75 S. E. 631, 42 L. R. A. (N. S.) 852, Ann. Cas. 1913D, 409 (1912). See 42 L. R. A. (N. S.) 852, note; Ann. Cas. 1913D, 410, note.

[9] A reversion of A. B. A. Canon 6.

[10] "An attorney is bound to disclose to his client every adverse retainer, and even every prior retainer, which may affect the discretion of the latter. * * * When a client employs an attorney, he has a right to presume, if the latter be silent on the point, that he has no engagements which interfere, in any degree, with his exclusive devotion to the cause confided to him; that he has no interest which may betray his judgment or endanger his fidelity."—Story, J., in Williams v. Reed, 3 Mason, 405, 418, Fed. Cas. No. 17,733 (1824).

[11] "It is fundamental, in respect to the duty of an attorney towards his client, that he should not use any information, which he has derived from his client, to the prejudice or injury of his client, and especially that he shall not act in opposition to his client's interests; and the rule is, as laid down in Ferg. J. Prac. 27, that lest any temptation should exist to violate professional confidence, or to make any improper use of information which an attorney has acquired confidentially, as well as upon principles of public policy, 'he will not be permitted to be concerned on one side of proceedings in which he was originally in a different interest.' "—Monell, J., in Hatch v. Fogerty, 40 How. Prac. (N. Y.) 492, 503 (1871).

"The test of inconsistency is not whether the attorney has ever appeared for the party against whom he now proposes to appear, but it is whether his accepting the new retainer will require him, in forwarding the interests of his new client, to do anything which will injuriously affect his former client in any matter in which he formerly represented him, and also whether he will be called upon in his new relation to use against his former client any knowledge or information acquired through their former connection."—Morrow, J., in In re Boone (C. C.) 83 Fed. 944, 952, 953 (1897).

See Messenger v. Murphy, 33 Wash. 353, 74 Pac. 480 (1903).

Hoffman's Resolution VIII: "If I have ever had any connection with a cause, I will never permit myself (when that connection is from any reason severed) to be engaged on the side of my former antagonist. Nor shall any

The obligation to represent the client with undivided fidelity does not end with the matter in which the lawyer may have been employed. Thenceforth the lawyer must refrain not only from divulging the client's secrets or confidences, but also from acting for others in any matters where such secrets or confidences or knowledge of the client's affairs acquired in the course of the earlier employment can be used to the former client's disadvantage.

A. B. A. CANON.

10. ACQUIRING INTEREST IN LITIGATION. The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting.[12]

SIMON MASON'S CASE.

(Common Bench, 1672. Freem. 74.)

A petition was exhibited against S. Mason, and articles alleged and proved, inter alia, that he had been an Ambidexter, viz., after he was retained by one side he was retained on the other side, and for this was committed to the Fleet and turned out of the roll. He was prosecuted by Sir John Huit and others.[13]

ANONYMOUS.

(Court of King's Bench, 1702. 7 Modern, 47.)

BY THE COURT. No man, though by consent of parties, can be attorney on both sides.[14]

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."—David Hoffman, *A Course of Legal Study* (2d Ed.) Vol. II, p. 753.

On the propriety and effect of a lawyer acting for a party adverse to the former client in the same general matter, see Ann. Cas. 1912B, 212, note.

[12] See post, Chapter IX, note 46. On the right of a lawyer to purchase from the adverse party the subject-matter of the employment, see Ann. Cas. 1915C, 953, note.

[13] "These slanderous words spoken of an attorney, 'Thou dealest on both sides, thou deceivest many,' an action lies for them."—Byrchley's Case (1585) Jenkins' Rep. (4th Ed.) 284.

[14] In Strong v. International B., L. & I. Union, 82 Ill. App. 426 (1898), affirmed on the Appellate Court's opinion in 183 Ill. 97, 55 N. E. 675, 47 L. R. A. 792 (1899), an attorney who represented adverse litigants was denied a recovery of fees from one client even though that client had waived any objection at the time of the inconsistent employment. Sears, J., who wrote the Appellate Court opinion said: "Some decisions may be found which hold that when an attorney at law acts with the consent of both adverse litigants, in

RETAINERS. Statement of the General Council of the Bar, *The Annual Practice* (1917) p. 2426: A general retainer[15] applies only to proceedings to which the person giving the retainer is a party. Accordingly where a mutual insurance club, which insured its members' steam trawlers, gave a general retainer to X., whom they furnished with a list of the vessels covered by the insurance, this general retainer

the character of an umpire, for the determination of their differences, there is then no inconsistency in such employment. But where the employment for each is to protect the respective and conflicting interests as they may arise in the litigation, it is generally held to be against public policy to allow a recovery of compensation." 82 Ill. App. at page 431.

In Lalance & Grosjean Mfg. Co. v. Haberman Mfg. Co. (C. C.) 93 Fed. 197 (1899), counsel for a litigant, supposing the litigation ended, accepted a retainer of a kind not disclosed from an adverse party to the litigation. The litigation turning out not to be at an end, the former client sought an order requiring the counsel to give up the retainer of the adverse party and enjoining them from accepting any other, and from revealing to the new client any confidential matter or thing acquired from the old one. The court pointed out that the new client might have business which the counsel could with perfect propriety transact, and, while it admitted that there was danger that the counsel might "unintentionally and perhaps unconsciously" put at the service of the new client "confidential information obtained from the old client by reason of the professional relationship," it refused to make the order. The court (Lacombe, Circuit Judge) said: "It is thought that the honorable obligation of a reputable member of the bar is a better assurance that professional secrets will be respected than would be an order of the court." 93 Fed. at page 200. In Peirce v. Palmer, 31 R. I. 432, 77 Atl. 201, Ann. Cas. 1912B, 181 (1910), however, the court enjoined a lawyer from acting for legatees under a will, who were cousins of his, against an ex-executor for whom he had formerly been attorney, even though the majority opinion stated that he had actually gained no confidential information which would assist him in representing his cousins and so "was no better prepared to prosecute" their claims "than was any other attorney at the bar."

It was held in Spinks v. Davis, 32 Miss. 152 (1856), that a contract by which an attorney took a claim against an intestate's estate for collection and at the same time agreed to take out letters of administration of the estate was void as against public policy because of the inconsistent obligations under which the attorney would be placed thereby.

[15] The distinction in England between general retainers and special retainers is as follows: "General retainers are either ordinary or limited. An ordinary general retainer applies to the Supreme Court and House of Lords. A limited general retainer applies to the Tribunal or Tribunals or Court or Courts to which it is expressed to be limited. A separate general retainer must be given for the Privy Council. A separate general retainer must be given for Parliamentary Committees. If the counsel who has accepted a general retainer from one party should be offered a special retainer or brief by another party, the general retainer entitles the party who has given it to reasonable notice before the offered special retainer or brief is accepted. Subject to these rules a general retainer lasts for the joint lives of the client and counsel, unless the same be forfeited. In case a special retainer or brief is offered to counsel by a party other than the party from whom he has accepted a general retainer, the counsel, after giving notice to the party from whom he has accepted the general retainer of the offer of the special retainer or brief, is at liberty to accept the special retainer or brief of the other party, unless a special retainer or brief be given within a reasonable time by the party from whom he has accepted the general retainer. When a general retainer has been given, and a brief is not delivered to the retained counsel in any action, or other proceeding in which the party giving the general retainer is concerned, and to which it applies, or a special retainer or

did not operate as a general retainer covering proceedings in which the members of the club individually, or their trawlers, were parties; and where a plaintiff in an action against one of such steam trawlers instructed X. to settle statement of claim, X. was not entitled to set up such general retainer as a reason for declining such instructions. The principle of this is not confined to mutual insurance clubs; it applies to any case in which the services of a barrister are sought against an individual who is insured in a company for which the barrister holds a general retainer. An. St. 1913, p. 14.

RETAINER RULES PREPARED BY THE BAR COMMITTEE AND APPROVED BY THE ATTORNEY GENERAL AND BY THE COUNCIL OF THE LAW SOCIETY, 1892. *The Annual Practice* (1917) pp. 2429, 2431.

Retainer Rule XX. Counsel who has drawn pleadings or advised, or accepted a brief, during the progress of an action on behalf of any party shall not accept a retainer or brief from any other party without giving the party for whom he has drawn pleadings or advised, or on whose behalf he has accepted a brief, the opportunity of retaining or delivering a brief to him, but such Counsel is entitled to a brief at the trial, and on any interlocutory application where Counsel is engaged, unless express notice to the contrary shall have been given to him with the instructions to draw such pleadings or advise, or at the time of the delivery of such brief. Provided always, such Counsel shall not be entitled to a brief in any case where he is unable or unwilling to accept the same without receiving a special fee.

brief is not given within a reasonable time after a notice has been given by the counsel holding a general retainer, that a special retainer or brief has been offered to him by another party, the general retainer is forfeited; provided that the holding of a general retainer does not entitle a Queen's Counsel to the delivery of a brief on occasions when it is usual to instruct a junior counsel only. Where a general retainer has been given for one person, and he is party to a proceeding with others, and appears separately, the retainer applies to that proceeding; but if he appears jointly with others, the retainer does not apply and remains unaffected. A special retainer cannot be given until after the commencement of an action, appeal or other proceeding. A special retainer in an action or proceeding in the Supreme Court gives the client a right to the services of the counsel while the action or proceeding remains in or under the control of that Court. A special retainer in an action or proceeding other than an action or proceeding in the Supreme Court gives the client a right to the services of the counsel during the whole progress of such action or proceeding. A counsel who has been specially retained is entitled to the delivery of a brief on every occasion to which the special retainer applies; provided always: A special retainer does not entitle a Queen's Counsel to the delivery of a brief on occasions when it is usual to instruct junior counsel only. When more than one junior counsel has been retained, only one of such junior counsel is entitled to the delivery of a brief on occasions when it is usual to instruct one junior counsel alone."—*Law, Practice and Usage in the Solicitor's Profession* (1909) p. 294.

Retainer Rule XXI. No Counsel can be required to accept a retainer or brief or to advise or draw pleadings in any case where he has previously advised another party on or in connection with the case, and he ought not to do so in any case in which he would be embarrassed in the discharge of his duty by reason of confidence reposed in him by the other party, or in which his acceptance of a retainer or brief or instructions to draw pleadings or advise would be inconsistent with the obligation of any retainer held by him, and in any such case it is the duty of the Counsel to refuse to accept such retainer or brief, or to advise or to draw pleadings, and in case he has received such retainer or brief inadvertently, to return the same.[16]

BRICHENO v. THORP.

(High Court of Chancery, 1821. Jacob, 300.)

A motion was made on the part of the Plaintiffs, that the Defendants might be restrained from employing G. G. Day, as their solicitor in this suit, or as their attorney or solicitor in any other suit in equity or action at law, commenced or to be commenced in respect of the matters in question in this cause, and to restrain G. G. Day from acting as their solicitor or attorney, and from communicating to them, their counsel, clerks in court, solicitor, attornies, or agents, any information relating to the matters in dispute in such suits or actions which had come to his knowledge, as clerk to the Plaintiff, T. E. Fisher.

This suit was commenced in the year 1816, for the purpose of seting aside a bond entered into by the Plaintiff Bricheno, and by the Plaintiff Fisher, as his surety, to the Defendants upon allegations of its having been obtained by misrepresentation. Fisher was the solicitor for himself and the Plaintiff Bricheno, in the cause. G. G. Day had been his articled clerk from the year 1812 until October 1817, when his articles expired. In the year 1818 he was admitted an attorney, and commenced practice on his own account. He had lately become the solicitor of the Defendants in the cause. * * *

The LORD CHANCELLOR [ELDON]. This is a motion of great importance. It seeks that the Defendant may not be allowed to employ Mr. Day, and that he may not be employed as their solicitor in this cause or any other suit relating to the same matters, by reason that he was a clerk in the office of Fisher, one of the Plaintiffs, and the solic-

16 "The spirit of this rule is to be observed rather than the letter, and where Counsel is aware that confidence has been reposed in him by someone not his client, but who has been assisting his client with information, he should not afterwards act against that person in any matter in which such information would be material. An. St. 1896–1897, p. 8."—Statement of the General Council of the Bar as to Retainer Rule XXI, *The Annual Practice* (1917) p. 2431.

itor in the cause, and therefore has or may have material information as to the interest of the Plaintiffs, and that if he communicates it, or makes use of it against them, he may be doing them an injury which the Court ought not to permit him to inflict. * * *

The argument goes to this extent: that if a gentleman has been five years a clerk, and in that period happens to have to deal with the causes in which his master is employed, that he cannot afterwards become solicitor for any of the parties against whom his master was employed. It did appear to me that this was going very far, and I thought, that before thus shutting up the sources of employment, it was incumbent on the Court to see that there was something more than hypothetical mischief to be guarded against. I have, therefore, read these papers, and though I think it should not be publicly pointed out to me, yet I wish to have it pointed out to me from these papers, in what particular the employment of Mr. Day will be prejudicial to the Plaintiffs. There are general allegations, but nothing particular is stated; unless that is done, I cannot go to the length of making this order. As a general proposition, it would preclude him from being concerned even in a cause in which the master himself might not object to be concerned for both sides.

I know that formerly at the bar, if a counsel was employed, and a retainer was offered him on the other side, he first gave those for whom he had been employed the option of retaining him, but if they would not, there was no difficulty in going over to the other side, notwithstanding all that he might know. If that be the rule at the bar, we must not lay it down differently for solicitors. I have no conception that we are to give ourselves liberties that we refuse to others.[17] * * *

WASSELL v. REARDON.

(Supreme Court of Arkansas, 1851. 11 Ark. 705, 44 Am. Dec. 245.)

WALKER, J. The defendant executed to the plaintiff's attorneys a power of attorney by which they were empowered to confess judgment for said defendant on a note which the plaintiff had placed in

[17] In its answer to question 11 the New York County Lawyers' Association's Committee says: "In the opinion of the Committee it contravenes proper professional ethics for an attorney to accept a retainer against his former [lawyer] employer involving matters of which he might have obtained knowledge while in such employment and by reason thereof."

"Preserve absolutely inviolate whatever comes under your notice in the office. * * * Never talk elsewhere of what passes there, on any pretense, or the confidence reposed in your master by his client will be cruelly betrayed, as well as that of your master in you. Duly consider, how frequently important interests may be fatally compromised by the chattering of the lowest underling in an office."—Samuel Warren, *The Moral, Social and Professional Duties of Attorneys and Solicitors* (1870 Amer. Ed.) pp. 82, 83.

the hands of such attorneys for collection. By virtue of this power judgment was regularly confessed and entered of record.

To this judgment it is objected:

1. That the attorney at law for the plaintiff could not act as attorney in fact for the defendant, touching the same subject matter on account of his prior retainer by the plaintiff—the interest and rights of the plaintiff and defendant being adverse.

2. That the judgment was not confessed until after the note was barred by limitation, and that it was the duty of the attorney to have interposed this defence.

3. That the power was revoked by the efflux of time.

As a general rule it is true that agents cannot act so as to bind their principals, where they have or represent interests adverse to the principal's. This rule is founded upon the consideration that the principal bargains for the skill and vigilant attention of the agent to the subject matter entrusted to him; and the policy of the law will not tolerate the existence of an adverse interest in the agent to that of his principal for fear it may influence his conduct to the prejudice of interests of the principal. This well recognized rule is particularly applicable to buying and selling agents, where the principal contracts for the services of an agent at a time when he has no interest in the subject entrusted to him, but subsequently by his own act acquires interest in it adverse to that of the principal.

In the case before us the attorney had no interest in the matter of his agency unless it should arise from his claim to compensation as a collector, which may or may not have been otherwise settled; nor had the plaintiff any interest whatever in the act to be done of which the principal, at the time he instituted him agent, was not fully advised; and if such disqualification existed he, by his own act, expressly waived it by conferring upon the agent such power with a knowledge of the facts. When it is remembered that the whole ground upon which this rule is based, rests upon the fraudulent advantage which such an interest may stimulate the agent to take to the prejudice of his principal's rights, it will scarcely be contended that the circumstances of this case bring it within the reason and spirit of the rule. The principal was informed of the nature and extent of the interest which the payee in the note had in the act to be performed by the agent. The facts disclosed in the instrument itself prove this; and that it was intended that the act to be performed should enure to the mutual benefit of both the payor and payee: to the first by saving him the expense incident to a suit in the usual form; to the other by facilitating and making certain a recovery.

This therefore was not a mere naked power in which the principal was alone interested, but a power coupled with an interest in a third person, made upon good and sufficient consideration, and in regard to which the principal was well advised, and so far from an undue ad-

vantage having been taken of him in the relationship in which the agent stood towards him, he only did that which every truthful honest man should do, and what every prudent, considerate attorney should accede to. The act which the attorney undertook to perform was in perfect harmony with the interest of his client and of the duty and integrity of defendant, the payor.

If the attorney had undertaken to defend for the payor as it is argued that he should have done, then indeed he would have represented adverse interests inconsistent with those of his principal. But it is evident that such is not the nature of his undertaking. He was not only not authorized to interpose a defence to the action, but the powers conferred upon him negative the idea that any defence existed. Suppose the agent had offered to defend and upon a rule to show by what authority he appeared for the purpose of defence, had produced the power of attorney directing him to confess judgment upon the debt, it is evident that such showing would have been held insufficient. We think therefore that there was no such adverse interest involved in the act to be done as to disqualify the attorney from confessing judgment. * * * Let judgment be affirmed with costs.[18]

SMITH and Another v. CHICAGO & N. W. RY. CO.

(Supreme Court of Iowa, 1883. 60 Iowa, 515, 15 N. W. 291.)

Action to recover for professional services rendered by plaintiffs, who are attorneys at law. There was a judgment upon a verdict for defendant. Plaintiffs appeal.

[18] See Sipes v. Whitney, 30 Ohio St. 69 (1876).

In Askew v. Goddard, 17 Ill. App. 377 (1885) it was held that an attorney for a creditor who acted under a warrant of attorney to confess judgment in a note given to the creditor by the debtor had no power to fix an attorney's fee for himself, although the note expressly stated that the judgment confessed could include an attorney's fee and although the fee he fixed for himself was reasonable.

In Molyneux v. Huey, 81 N. C. 106, 113 (1879), Ashe, J., said that the fact that a lawyer had brought suit as attorney for the plaintiffs and as counsel for the defendants had gotten the defendants to confess judgment was "of itself sufficient to vitiate the judgment," and pointed out that the case at bar "aptly illustrates the great impropriety of the same person acting as counsel for opposing parties" because the defendants had a counterclaim, not put in, and probably a good defense to the action in that it was not properly maintainable until nearly five years later. See, also, Marcom v. Wyatt, 117 N. C. 129, 23 S. E. 169 (1895).

"Suppose you hold two judgments against C., one for A. and the other for B., and B., whose judgment is the latest, directs you to issue a testatum execution into the adjoining county against property belonging to defendant. You could not, with propriety, issue your execution upon the first, to the exclusion of the second, judgment, allowing you are equally bound to both the clients—as he that is most vigilant is most regarded in law and conscience." —David Paul Brown, *The Forum; or Forty Years' Full Practice at the Philadelphia Bar* (1856) Vol. II, p. 47.

BECK, J. 1. The plaintiffs, who are attorneys at law, sue to recover $3,000, the balance due them for professional services rendered in resisting a claim of the heirs of one Murray McConnell, made before the Department of the Interior of the United States, for a patent of certain lands in the city of Chicago, which they allege their ancestor entered at the proper government land-office. * * *

The position of counsel of defendant seems to be that as plaintiff Smith had, while in office [as Assistant Attorney General of the United States assigned to duty in the Interior Department] prepared and concurred in a decision adverse to defendant, it was a fraud upon his part to accept a retainer and render services for defendant, without having disclosed his connection with the case and his concurrence in the decisions referred to, and that he cannot recover for such services. The court below held [and instructed the jury] that these facts could be considered in determining the value of plaintiffs' services.

An attorney at law ought not to accept a retainer in a case when he believes that the law is against his client. It is not his duty, in order to subserve the interest of his client, to mistake the law and the facts, and if he be satisfied that the client cannot recover except by perversion of the law and the facts, the attorney ought not to take the case. But the fact that an attorney has, under a prior retainer, advocated views of the law and facts different from those upon which his client rests his case, or has officially, as a judge or officer of the government, held a different view of the law and the rights of the parties, will not of itself disqualify him from accepting a retainer. An attorney has the right and privilege, possessed by all men, and all officers and judges, to change his views upon the law and the facts of a case when reason requires it. It would be absurd to say that a lawyer or judge, having once expressed an opinion upon legal questions, shall never change it, and that a judicial or official decision will forever bind the person announcing it. From the nature of legal questions, which always depend upon the combination of facts for their correct decision, it is to be expected that lawyers will not always, in their solution, apply the same principles or reasoning, and we doubt not that it often occurs that in cases upon the same facts lawyers honestly have, at successive periods, different views of the law. Lawyers often go from the bench or other official positions to the bar. It would be absurd to require such, when offered a retainer, to review their judicial and official services, in order to advise their client whether, at a prior time, they had held opinions which might be regarded as unfavorable to their cases, or, if they failed to do this, to subject them to a charge of fraud, which could be set up as a defense to their claims for compensation. This is just what defendant insists upon.

The position of counsel for defendant and the court below is based upon the thought that the value and efficiency of a lawyer's services depends upon some personal quality; that courts and officers discharging judicial duty will be affected by showing that the advocate before

them has changed his views of the law, or that even his personal traits or antecedents are subject to remark or criticism. The judge or officer, if he rightly discharges his duty, will hear nothing of this kind, and will be far from permitting it to influence his decision, if, in any way, it has come to his knowledge. A lawyer should be heard for his cause, and not for himself. His arguments should be alone weighed, and the precedents he cites should alone be considered in deciding his cases. What he before advocated as a lawyer, or decided as a judge or officer, should be no more considered than his personal traits or his antecedents. * * *

For the errors pointed out the judgment of the district court is reversed.[19]

CONFLICTING INTERESTS. N. Y. Committee.

Question 25: Would you consider it unprofessional for a lawyer, who is the attorney for executors, about to account, to write to a large number of European legatees who are not represented by an attorney, advising them to be so represented in this country and suggesting the name of a reputable lawyer here, and enclosing a power of attorney and asking for its execution and proper acknowledgment? Funds being ample to pay all such legatees in full and the attorney to receive payment thereof, and transmit to them less his stated charges for collection?

[19] In In re Harrisson, [1908] 1 Ch. 282, solicitors sought to tax against their clients the expense of employing particular counsel against whose employment the clients had objected because the counsel had previously expressed an opinion adverse to their rights. By a rule of etiquette applicable to both counsel and solicitors, "counsel who has * * * advised * * * during the progress of an action on behalf of any party * * * is entitled to a brief at the trial * * * unless express notice to the contrary shall have been given to him with the instructions * * * to advise." Feeling bound by that rule the solicitors employed the counsel despite the objections of the clients. The action was settled without trial. The taxing master allowed the solicitors the expense of employing the counsel objected to, but the court disallowed it. The proper course for solicitors to pursue in such a case was outlined as follows: "In my judgment the proper course for a solicitor to pursue when he is instructed not to brief a certain counsel who, according to these rules of etiquette [i. e., those sanctioned by both branches of the profession], is said to be entitled to a brief, is either to explain those rules to the client and say that when he briefs anybody else he will have, in fairness to him and to the profession generally, to state the facts, in which case the brief may probably be returned; or, if he feels that the case justifies it, he may say that he is so clearly governed by the rules of the profession and the etiquette of the profession that, if he is not allowed to brief that counsel, he shall feel justified in throwing up his retainer and refusing to act for the client any further. But it does not seem to me that he can rely upon the rules of etiquette which have been so adopted by both branches of the profession, so as to justify him in briefing the counsel in question, notwithstanding his client's refusal to give his authority, and then charge his client with the expenses incurred in delivering the brief."—Parker, J., in In re Harrisson, [1908] 1 Ch. 282, 286.

In Wheatley v. Bastow, 7 De G., M. & G. 558 (1855), a solicitor was struck from the rolls because without authority he engaged counsel to act contrary to the interests of his client.

All this with the view of expediting the accounting and saving time and expense in advertising the citation. And this with no expectation or understanding of division of fees or any possible suggestion of condoning any possible irregularities in the accounting?

Answer: In our opinion, it is not proper professional conduct for a lawyer in the case stated to volunteer the name or urge the employment of an attorney to represent parties whose interests or position on the record may be adverse.

Question 33: A. gave Mrs. C. an option on a piece of property. She threatened suit for the return of the option money. A. called on his attorney, stated the facts to him, asking him to defend him in the suit should one be brought. The lawyer agreed to do this. No payment was made for retainer, and none asked as A. was absolutely responsible financially, and had had business relations with this attorney before, under similar circumstances.

Subsequent to this, Mrs. C. saw the junior partner of this law firm, who commenced suit against A. A. called on the junior partner and protested against his taking the case against him. The junior partner pleaded justification by saying that when he commenced the suit he was ignorant of any arrangement between A. and his partner, and further that there was no payment for retainer.

First: Was the junior partner justified in taking the case against A.?

Second: Could he withdraw from the suit and in case the suit went on, could the senior partner defend A., as per original agreement between himself and A.?

Answer: In the opinion of the committee, that if in ignorance of A.'s relationship with the senior member, the junior member took Mrs. C.'s case, there was nothing in his conduct justifying criticism; but upon discovery of the fact, each party was disqualified from acting for either of the parties in the controversy.[20]

Question 35: A. is a member of the bar assuming to represent a legatee under a will. He offers the will for probate at the request and procurement of the only child of the decedent, who has already, to his knowledge, announced her determination to contest and defeat the probate. It appears by frank admission of A. upon the first hearing that

[20] See In re Luce, 83 Cal. 303, 23 Pac. 350 (1890). In People v. Betts, 26 Colo. 521, 58 Pac. 1091 (1899), both members of a firm of lawyers were disbarred because one retained money collected for clients and, for the firm, made false statements that collection had not been made, and because the other, though he received no part of the money, knew of the collection and of the false statements. In In re Lichtenberg, 164 App. Div. 560, 150 N. Y. Supp. 7 (1914), one of two attorneys, who occupied offices together, was employed by certain creditors to have their debtor adjudged bankrupt. He failed to disclose to his clients that the bankrupt's attorney was the attorney who occupied offices with him and had already consulted him about the bankrupt's affairs, and the court censured him for his failure to reveal those facts.

he will not take any active step in support of the probate, and the duty devolves upon the persons named as executors. Upon the hearing before the surrogate on the contested issues, A. co-operates with the attorney for the contestant, advises with him and assists in the contest of the will propounded by him for his client.

Does not this constitute unprofessional conduct?

Answer: In the opinion of the committee, that upon the facts as stated, A. appears to have assumed inconsistent positions in offering the will for probate and then in co-operating in contesting its probate. In the absence of any further facts which might explain and possibly justify the apparent inconsistency, the committee would consider that the duty of A. to his client, the legatee, should preclude him from acting as stated in the question.[21]

Question 63: In the opinion of the committee, is it improper professional conduct for A., the attorney of record and counsel for the administrator of a decedent's estate, while continuing as such, to accept a retainer in behalf of the wife of one of the next of kin to institute and prosecute for her an action for divorce, and in connection with his proceedings in the divorce action, and in order to secure alimony and counsel fees for the plaintiff, to make application to enjoin the husband from disposing of his interest in the decedent's estate? A. has not sustained any direct relations to the defendant husband in the administration proceeding; A.'s immediate client therein, the ad-

[21] "The guardian ad litem of minor defendants, in any cause, is their responsible representative; and no one can properly represent an infant, as guardian ad litem, or as his attorney, who has an engagement to represent an adverse interest, however slight."—Haralson, J., in Parker v. Parker, 99 Ala. 239, 244, 13 South. 520, 522, 42 Am. St. Rep. 48 (1892).

"Lawyers are frequently appointed trustees in bankruptcy. Under such circumstances, in spite of their profession, it is eminently proper that they should retain counsel to advise them. * * * It frequently happens in these proceedings that one attorney represents a majority of creditors and is therefore in a position to dictate the appointment of the trustee. Suppose that under such circumstances he offers the post to some legal friend, provided he be himself retained as attorney. Now, in considering this offer, the proposed trustee must remember that his judgment will be pledged to the service of all the creditors alike, and, indeed, what in actual practice is too often forgotten, that he will become a fiduciary for the bankrupt himself. If the estate should by any chance prove more than sufficient to pay all the creditors in full, it would be his duty to restore the surplus to the bankrupt, and in all cases it will be his direct duty to the bankrupt to see that the estate realizes as much as possible. Among these various beneficiaries of his trust, the interests of the various parties may well prove to be strongly antagonistic, and it will become his duty to preserve among all these contending interests the even balance of the strictest impartiality. Under such circumstances to employ the attorney for particular creditors and to follow his advice may be to take action which will benefit some creditors at the expense of the others. * * * In general, therefore, an offer such as we have supposed should be looked at askance, and should not under any circumstances be accepted without a full disclosure of the facts to the court or referee in charge of the proceedings, and, if possible, to the creditors."—Everett V. Abbott, *Some Actual Problems of Professional Ethics*, 15 Harvard Law Review, 714, 719, 720.

ministrator, being a relative of the defendant husband, has criticised the act of his attorney as unprofessional.

Answer: In the opinion of the committee, the attorney's course is not essentially improper; he is the attorney for the administrator, but as such no direct relation exists between him and the husband; it would be improper for him to assail his own client, but the remedy invoked is not directed against his client, and the question does not disclose that he has taken any steps inconsistent with his duty.

Question 75: A client has newly furnished me with evidence to nullify certain bankruptcy proceedings on account of fraud and collusion between the insolvent and some of his creditors. Other bona fide creditors have come to consult me in regard to this evidence with a view of retaining me in their behalf. The client first above referred to is implicated in the tainted acts alluded to.

1. Assuming that the said client gives his consent, and his legitimate interests are not prejudiced thereby, may I act for the bona fide creditors by using the evidence in their legitimate interests?

2. If not, may I refer said bona fide creditors to some reputable attorney of my acquaintance, with a view of the latter acting in their behalf the same as I would have done, if I could properly act in the premises?

Answer: In the opinion of the committee, in the absence of facts, if any, not disclosed by the question, which might reveal other duties on the part of the attorney, the inquirer may, since his original client consents, with propriety act in behalf of the bona fide creditors. The question discloses no reason why the course suggested in section 2 of the question should be followed rather than that suggested in section 1; but if there be any reason, or if the inquirer prefers, the committee sees no objection to the inquirer's referring the bona fide creditors to some other reputable attorney, as suggested in section 2.

Question 97: In the opinion of the Committee, is it proper professional conduct for a lawyer, who is the attorney for a board of county commissioners, to advise it in answer to its inquiry whether in his opinion it has legal power to grant an application for the reduction of an assessment on the personal property of a class of institutions, where the lawyer is not only the attorney for the board but also a large property holder and taxpayer, and a director and stockholder in one of the institutions of the class concerned? In the opinion of the Committee, is it sufficient that in advising the board he should disclose the fact of his interest, or should he decline to advise on account of such conflicting interests?

Answer: In the opinion of the Committee, the attorney should decline to advise on account of his conflicting personal interest in the matter involved. His personal interest, and the quasi-judicial character of the municipal body, differentiate this case from those where

upon full disclosure of his professional relation to both parties to a controversy, a lawyer may advise either party as to the law applicable thereto.

Question 119: A title company insured Doe's title. Doe sold to Roe who rejected title and sued Doe. Pursuant to its title insurance policy the title company employed an attorney to defend the action for Doe. Prior to judgment in this action Doe began a suit against the title company upon its policy.

The attorney above referred to has had no confidential communications with Doe, the action of Roe v. Doe turning entirely upon questions of law.

An appeal in Roe v. Doe is pending, with the same attorney employed by the title company appearing for Doe.

May this attorney with propriety represent the title company in the suit brought against it by Doe? Or in a future suit or suits brought against it by Doe on the same policy?

Answer: Doe being separately represented by his own attorney in the action between himself and the company, and having by his own contract consented to his representation in the other action by the attorney designated by the title company,—the Committee is of the opinion that the attorney is not representing conflicting interests within the scope of the rule reprobating inconsistent employment.

This answer is explicitly limited to the situation disclosed by the question: i. e., of a contract with an indemnitor which binds Doe to accept the defense of his title by the title company and its attorney thereto designated. But the attorney must bear constantly in mind that in the first action he represents Doe, and that he and the title company must not allow its contract interests, nor the amount of its indemnity obligation, to affect his defense of Doe's rights as vendor. (See Brassil v. Maryland Casualty Company, 210 N. Y. 235, 104 N. E. 622, L. R. A. 1915A, 629.)

Question 128: An infant bride, whose marriage was consented to by her parents, refuses to consummate such marriage either sexually or socially; and upon reaching the age of consent promptly disaffirms the marriage and seeks through her guardian to annul the same under Section 1743, Subdivision I of the Code of Civil Procedure.

The husband, hopeless of reconciliation, has no objection to such proceeding. The wife, however, has no funds with which to retain counsel; but the husband is willing to advance the same to her guardian for such purpose, and consults his own attorney, who in good faith suggests the name of another attorney for the wife to consult.

Query: Is it professionally improper for the attorney consulted by the wife to accept retainer and fee, knowing these circumstances, but without knowing, or having any dealings with, the husband?

Answer: The selection of the attorney, whether suggested by the husband or not, is controlled by the guardian by whom the action is brought;—the minor having reached the age of consent but not of majority. With this safeguard, and if the facts be fully disclosed to the Court, it is, in the opinion of the Committee, not improper for such attorney, if consulted with a view to his being retained, to accept the employment, under a compensation advanced through the guardian by the husband.

BAR ASSOCIATION v. GREENHOOD.

(Supreme Judicial Court of Massachusetts, Suffolk, 1897. 166 Mass. 169, 46 N. E. 568.)

See ante, p. 140, for a report of the case.

CONFLICTING INTERESTS. Report of May 1, 1916, of the Committee on Professional Ethics of the Bar Association of St. Louis: (6) March 13, 1916. The President of our Association on behalf of an unnamed lawyer, A., asked whether A. could ethically represent a small number of stockholders out of a large number in a large corporation, attacking the conduct and management of the directors and at the same time act for an individual (and long-time) client in a claim for personal injuries against the corporation.

Answer: The Committee answered A. might represent both clients, with qualification that if a situation arose, as it might, presenting some embarrassment, A. must deal with that condition when it arose.

ACCEPTING EMPLOYMENT FROM FINANCIALLY EMBARRASSED DEBTOR OF CLIENT, ON CONDITION THAT DEBTOR FIRST PREFER AND PAY HIS DEBT TO CLIENT. N. Y. Committee. *Question 123:* A creditor places a claim for suit in the hands of A., an attorney. Suit is instituted against the debtor, and upon the receipt of the summons and complaint, he calls on A., the attorney, and acquaints A. with his affairs, and desires to retain A. as his attorney to look after his affairs. It becomes necessary to call a meeting of the creditors of the debtor and arrange for an extension of time within which to pay his debts. Before A. accepts a retainer from the debtor, he informs the debtor that before he can act in the matter it is necessary that the creditor whom A. represents be paid in full, and the debtor agrees to do that.

Answer: In the opinion of the Committee, the acceptance of employment from the debtor is improper, because the attorney, as repre-

senting the first creditor, by securing the preference specified, assumes a position incompatible with impartially counselling the debtor or representing him fairly to the other creditors.

RETAINER OF UNITED STATES DISTRICT ATTORNEY IN STATE COURT LITIGATION. N. Y. Committee. *Question 82:* Is it ethical for a lawyer who has been appointed as assistant to the United States District Attorney to carry on private litigation in state courts which requires his presence in the court room?

Answer: In the opinion of the Committee there is nothing essentially unethical in the practice suggested, so long as it does not interfere or conflict with the due performance of duty by the assistant. The Committee calls attention to the following circular issued by the Attorney General of the United States:

"Order No. 508.

"To all United States Attorneys, and Assistant United States Attorneys:

"From time to time the attention of the Department has been called to the following matters connected with the conduct of the offices of United States Attorneys:

"1st. The absence from their offices in the federal buildings, and the want, or seeming want, of attention to public business, by reason of attention to private business in their private offices.

"2d. The use of their official positions to advertise and promote their private business, by advertising the fact in the newspapers or printing their official position upon their private letter-heads and private business cards.

"3d. The use of the offices in the public buildings for the transaction of private business.

"As to the first of these complaints, it is obvious that their first duty is to the public, and that no private business should in any way interfere or be allowed to appear to interfere, with the discharge of public duties. It is therefore ordered that, as far as possible, they be present in their offices during reasonable office hours ready to meet the public and confer about and transact official business.

"As to the second of these complaints, it is plainly improper for a public official to use his public position for private professional purposes, and all methods of so doing are prohibited whether by the use of the official name on letter-heads, advertisements in newspapers, or otherwise.

"As to the third complaint, it is just as improper to use the public offices for the transaction of private business. It is, therefore, directed that no private professional business be transacted in public offices.

"It is not the purpose of this order to prohibit United States At-

torneys, or their assistants, from accepting private professional business and transacting personal business, but to avoid any interference of private with public business, as well as any fair criticism by the general public of the methods of conducting the businesses of the office. The hearty co-operation of the United States Attorneys and their assistants to these ends is relied upon with confidence.

"Respectfully, T. W. Gregory, Attorney General."

SECTION 3.—THE ACCEPTANCE AND CONDUCT OF THE CLIENT'S CAUSE

I. The Justice of the Client's Cause

A. B. A. CANONS.

30. Justifiable and Unjustifiable Litigations. The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong.[22] But otherwise it is his right, and, having accepted retainer, it becomes his duty to insist upon the judgment of the Court as to the legal merits of his client's claim. His appearance in Court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination.

31. Responsibility for Litigation. No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what business he will accept as counsel, what causes he will bring into Court for plaintiffs, what cases he will contest in Court for defendants. The responsibility for advising questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility.

[22] Hoffman's Resolution XXXIII: "* * * What is morally wrong cannot be professionally right, however it may be sanctioned by time or custom. * * *"—David Hoffman, *A Course of Legal Study* (2d Ed., 1836) Vol. II, p. 765.

Hoffman's Resolution XI: "If, after duly examining a case, I am persuaded that my client's claim or defense (as the case may be), cannot, or rather ought not to be sustained, I will promptly advise him to abandon it. To press it further in such a case, with the hope of gleaning some advantage by an extorted compromise, would be lending myself to a dishonorable use of legal means in order to gain a portion of that, the whole of which I have reason to believe would be denied to him both by law and justice." Id. p. 754.

He cannot escape it by urging as an excuse that he is only following his client's instructions.[23]

TRUTHFUL PLEADING. N. Y. Committee. *Question 95:* Under section 30 of the Code of Ethics of the American Bar Association, as published by West Publishing Co., in 1915, it is suggested that it is a lawyer's right to insist upon the judgment of the court as to the legal merits of his client's claim, unless the suit is brought to harass or injure, etc.

Under New York practice practically all pleadings are verified. In order to get the legal merits of his claim before the court the client must set forth his cause of action in legal terms with legal characterization of the facts, and swear to it. Of course the actual facts are clearly either true or false.

But do you consider that such a verification is equivalent to an affidavit of merit, and that therefore there is a question of legal ethics involved, so that an attorney should not draw up a pleading for his client unless he, as a lawyer, believes beyond a doubt that his client has the law on his side? Or is it sufficient for the attorney to feel that his client has a claim or defense which is justiciable, as suggested by section 30 above referred to, regardless of the attorney's own view of the legal merits? There is room for argument in most cases, as shown by the frequency of dissenting opinions of courts.

Answer: In the opinion of the Committee, if the facts be truthfully pleaded, the lawyer may present any fairly debatable law question for the court's determination. The client is entitled to have a fairly debatable question of law presented from the angle of his side, though the lawyer might think, and might advise his client, that the question was a doubtful one. This, of course, excludes the raising of such points as the lawyer knows are without merit. At all times the lawyer must truthfully plead the facts as they are known to him; and if he pleads such facts according to their legal effect, he must believe that

[23] "The less keen are the moral perceptions of a client, the more should be those of his legal adviser. The aim of the latter should be not only to get his client out of trouble, but to keep him out. In the long run this can only be done if morality is brought into the business. * * * No wise lawyer will ever advise a client to pursue a morally wrong course, nor countenance him in so doing. * * * No advice can in the long run prove sound that has not a moral basis."—John Brooks Leavitt, *Lawyer and Client* in *Every-Day Ethics* (Yale University Press, 1910) pp. 68, 69.

"Sir, be prevailed upon constantly to keep a Court of Chancery in your own breast: and scorn and fear to do anything but that which your conscience will pronounce consistent with, and conducing to 'Glory to God in the highest, peace on earth and good-will towards men.' "—Cotton Mather, *Proposals to Lawyers*, p. 4.

"Keep a record of the cases you discourage after full investigation, and of their final results, and you will find that in the long run you take ten cases which you should not to one that you turn off mistakenly."—John C. Reed, *Conduct of Law Suits* (2d Ed.) § 90, pp. 64, 65.

they fairly warrant the statements he makes in the pleading. For this he is responsible to the court of which he is an officer.

THE JUSTICE OF THE CLIENT'S CAUSE. William Forsyth, *Hortensius* (3d Ed.) p. 383: In France it was one of the solemn obligations imposed upon every advocate by oath, that he would not maintain causes that were unjust; and Pasquier thus writes to his son: "Do not undertake any cause which you do not believe to be good; for in vain will you attempt to persuade your judges if you are not first persuaded of the justice of your cause. Combat for truth and not for victory." [24] We have seen also that, at the present day, it is part of the duty of the president of the court to warn the counsel for a prisoner not to speak against his conscience, or the respect due to the laws.[25]

ANONYMOUS.

(Court of King's Bench, 1677. 1 Mod. 209.)

An action was brought against four men, viz. two attorneys and two solicitors, for being attorneys and solicitors in a cause against the plaintiff in an Inferior Court, falsò et malitiosè knowing that there was no cause of action against him. * * *

PER TOTAM CURIAM. There is no cause of action. For put the case as strong as you will: suppose a man be retained as an attorney to sue for a debt which he knows to be released, and that himself were a witness to the release; yet the Court held, that the action would not lie; for that what he does, is only as servant to another, and in the way of his calling and profession.[26] * * *

[24] A son fils sur le point de devenir advocat. Lettre vi.—*Author's Note.*

"The first thing to be done in opening a case is to impress the jury with the idea that at least you believe in it yourself."—Richard Harris, *Hints on Advocacy* (1903) pp. 9, 10.

"If the advocate himself does not feel strongly and sincerely, by no art can he excite through sympathy the feelings of his audience. It is his sense of right, his indignation of the wrong, enlisted in the cause he is advocating, making themselves visible even on his face, uttering their own natural and appropriate language, that kindles sympathy in the minds of the audience."—Francis L. Wellman, *Day in Court* (1910) p. 37.

"Juries need to be convinced of the honesty of purpose and truthfulness of the advocate. Otherwise they will look upon him with suspicion, distrust his assertions, and however great his ability, and brilliant his oratory, listen to him as an actor merely, his emotions feigned and his argument an ingenious fallacy."—Id. pp. 52, 53.

[25] Code d'Inst. Crim. liv. ii, chap. 4.—*Author's Note.*

[26] In Bicknell v. Dorion, 16 Pick. (Mass.) 478, 490 (1835), Shaw, C. J., said: "But we think in general it is true, that an action cannot be maintained against an attorney, on the ground of his instrumentality in bringing a civil action against the plaintiff, unless where he has commenced such suit without the authority of the party in whose name he sues, or unless there be a con-

PROSECUTING AN ACTION AT LAW WHICH IS VALID THERE, BUT WHICH EQUITY WILL ENJOIN.

(Doctor and Student.)[27]

Dialogue II, Chap. VI.—*The Fifth Question of the Student.*

Stud. Whether may a man with conscience be of counsel with the plaintiff in action at the common law, knowing that the defendant hath sufficient matter in conscience whereby he may be discharged by a subpœna in the chancery, which he cannot plead at the common law, or not?

Doct. I pray thee put a case thereof in certain, for else the question is very general.

Stud. * * * If a man bound in an obligation pay the money, and taketh no acquittance, so that by the common law he shall be compelled to pay the money again. * * *

Doct. This case seemeth to be like to the case that thou hast next before this, and that he that knoweth the payment to be made doth not as he would be done to, if he gave counsel that an action should be taken to have it payed again.

Stud. If he be sworn to give counsel according to the law, as serjeants at the law be, it seemeth he is bound to give counsel according to the law, for else he should not perform his oath.

Doct. In these words (according to the law) is understood the law of God, and the law of reason, as well as the law and customs of the realm: for as thou hast said thyself, in our first dialogue in Latin, that the law of God, and the law of reason, be two special grounds of the laws of England, wherefore (as methinketh) he may give no counsel (saving his oath) neither against the law of God, nor the law of reason. * * * Wherefore if he should give counsel against the defendant in that case, he should do against both the said laws.

Stud. If the defendant had no other remedy but the common law, I would agree well it were as thou sayest, but in this case he may have good remedy by a subpœna: and this is the way that shall induce him directly to his subpœna, that is to say, when it appeareth that the plaintiff shall recover by law.

Doct. Though the defendant may be discharged by subpœna, yet the bringing in of his proofs there will be to the charge of the defendant, and also the proofs may die or they come in. Also there is a ground in the law of reason, Quod nihil possimus contra veritatem, (that is) We may do nothing against the truth; and sith he knoweth it is truth that the money is payed, he may do nothing against the truth; and if

spiracy to bring a groundless suit, knowing and understanding it to be groundless, and without any intent or expectation of maintaining the suit." See Farmer v. Crosby, 43 Minn. 459, 461, 45 N. W. 866 (1890). But see Green v. Elgie, 5 Q. B. 99, 114 (1843).

[27] From the edition by William Muchall published at Cincinnati in 1874.

he should be of counsel with the plaintiff, he must suppose and aver that it is the very due debt of the plaintiff, and that the defendant with-holdeth it from him unlawfully, which he knoweth himself to be untrue: wherefore he may not with conscience in this case be of counsel with the plaintiff, knowing that the plaintiff is payed already. Wherefore if thou be contented with this answer, I pray thee proceed to some other question.

Stud. I will with good will.

SCHALK v. KINGSLEY.

(Supreme Court of Judicature of New Jersey, Feb., 1880. 42 N. J. Law, 32.)

VAN SYCKEL, J. This suit was brought by the plaintiff to recover damages which he sustained by injury done to premises upon which he held a mortgage.

The alleged tort was the removal of fixtures from the mortgaged premises, which were appropriated by one Rogers, a subsequent mortgagee. The defendant, Kingsley, who is an attorney-at-law, was employed by Rogers, as his attorney in this matter. While acting in that capacity, Kingsley, on behalf of Rogers, employed workmen to remove the fixtures, and paid them for their labor.

Two questions are presented by the case:

First. Whether suit will lie against the attorney.

Second. What is the true measure of damages in such cases.

An attorney is not liable with his client, in a joint action of trespass, unless it can be shown that he has gone beyond the strict line of his duty. So long as he acts strictly in the execution of the duties of his profession, and does not actually participate in the commission of the trespass, he is not liable. But when he steps beyond that line, and actively aids his client in the execution of his purpose, he is not shielded from responsibility. Hunter v. Burtis, 10 Wend. (N. Y.) 358; Green v. Elgie, 5 Q. B. 99; Ford v. Williams, 13 N. Y. 577, 67 Am. Dec. 83.

While he acts merely in his character of attorney, making use of the process of the law to enforce his client's demand, however groundless and vexatious it may be he is not amenable to suit. Oakley v. Davis, 16 East, 82; Sowell v. Champion, 6 Ad. & El. 407.

In the latter case it was conceded that the attorney would have made himself liable if he had done something beyond the mere delivery of the writ, as by going with the officer to assist in its execution, or giving some direction independent of that in the writ, to execute it in an unauthorized mode.

The distinction is clearly drawn in Hardy v. Keeler, 56 Ill. 152, where it is held that an attorney is not liable for any illegal seizure that may be made under a writ issued by him; but where, in addition to

issuing the writ, he sent his clerk to assist in the levy thereof, the plea that he is an attorney will not avail as a defence.

In this case the attorney employed the workmen, instructed them to commit the wrong complained of, and paid them for it. Under such circumstances, he cannot claim that he was acting in the legitimate sphere of an attorney at law, and is not entitled to immunity. * * *

The rule to show cause should be discharged.

BURNAP v. MARSH.

(Supreme Court of Illinois, 1852. 13 Ill. 535.)

CATON, J. This was an action on the case brought by the plaintiff against the defendants for maliciously suing out a writ of ne exeat against the plaintiff, and causing him to be arrested and imprisoned thereon. To the first count of the declaration, the defendants demurred. * * *

We are of opinion that the demurrer was improperly sustained to the first count. That count was, that the defendants "without having any reasonable or probable cause for so doing, but contriving and intending to imprison, harass, oppress, and injure the said plaintiff falsely and maliciously, as the attorneys and solicitors of Jacob Alberts and others of Baltimore, in the State of Maryland, sued and prosecuted out of the Circuit Court," &c., a writ of ne exeat against the plaintiff; and, "contriving and intending as aforesaid, falsely and maliciously caused the said plaintiff to be arrested under and by virtue of the said writ," etc. It is not denied that in order to render the attorneys liable for suing out a writ and causing the plaintiff to be arrested thereon, something more must be shown than would be required were the action brought against the party in whose behalf the writ was sued out. The rule by which attorneys may be held liable for malicious prosecutions is clearly laid down by Tindal, C. J., in Stockley v. Harnidge, 34 Eng. C. L. R. 276. It was there held, that if the attorneys who commenced the suit alleged to be malicious, knew that there was no cause of action, and knowing this, "dishonestly and with some sinister view, for some purpose of their own, or for some other ill purpose which the law calls malicious, caused the plaintiff to be arrested and imprisoned," they were liable. To protect attorneys beyond this, would be authorizing those who are the most capable of mischief to commit the grossest wrong and oppression. It is true that when the attorney acts in good faith in prosecuting a claim which his client believes to be just, and is actuated only by motives of fidelity to his trust, he ought not to be held liable, although he may have entertained a different opinion as to the justice or legality of the claims. When the client will assume to dictate a prosecution upon his own responsibility, the attorney may well be justified in representing him

so long as he believes his client to be asserting what he supposes are his rights, and is not making use of him to satisfy his malice. But when an attorney submits to be made the instrument of prosecuting and imprisoning a party against whom he knows his client has no just claim, or cause of arrest, and that the plaintiff is actuated by illegal or malicious motives, he is morally and legally just as much liable as if he were prompted by his own malice against the injured party. If he will knowingly sell himself to work out the malicious purposes of another, he is a partaker of that malice as much as if it originated in his own bosom. The attorney, then, cannot always justify himself under the instructions of his client, no matter how positive they may be. Nor is it always necessary to show a conspiracy between the attorney and client, although some courts have treated that as necessary. An attorney may so act under his general employment to enforce a legal claim, as to render himself alone liable for a malicious prosecution or arrest.

In this State, it is only under particular circumstances that a debtor is liable to be arrested; and if an attorney in the course of the prosecution of a just claim, and without the instruction or knowledge of his client, and without any reasonable or probable cause for so doing, maliciously causes the debtor to be arrested, it would be monstrous to hold that he might shield himself from liability, because his client had not conspired with him to commit the wrong. Where the attorney chooses to act upon his own responsibility under his general retainer, and without specific instructions, and causes the debtor to be arrested, the act becomes his own rather than his client's, and he must see to it that he does not proceed without reasonable or probable cause, and especially where he is prompted by his malice. It will not do to turn the injured party round to seek his remedy against the client, who may be a thousand miles off and in a foreign country or distant jurisdiction, and who may not have directed the arrest, and may be entirely innocent of any wrong.

By applying these principles of responsibility, we are of opinion that enough is charged in this first count to render the attorneys liable. The charge is, that as the attorneys of Alberts and others, they falsely and maliciously, caused the plaintiff to be arrested under the writ. If they are charged as acting as attorneys, they are charged as acting without reasonable or probable cause for them so to act, in that capacity, and the malice is charged to have been their own. The question on trial will be, had they reasonable or probable cause, as attorneys, to sue out the writ? It may be true, that evidence which would be sufficient to show a want of probable cause for the client, would not establish the same thing as to the attorneys; but the question before us is one of pleading, and not of evidence.

It cannot, and ought not, to be said that if it be established by proof, that the defendants sued out the writ without cause, which would jus-

tify them in so doing, and from motives of malice, and for the purpose of vexing and harassing the plaintiff, and caused him to be arrested thereon, the defendants are not liable for the injury thus wantonly inflicted. It would be a just reproach to the law, to hold, that attorneys could thus act with impunity. The pleading is sufficient, and the demurrer to the first count was improperly sustained. * * * Judgment reversed.[28]

[28] In Johnson v. Merson, L. R. 6 Ex. 329 (1871), an action against a solicitor for maliciously and without reasonable and probable cause procuring the defendant to be adjudicated bankrupt, the court was evenly divided as to whether a verdict against the defendant should be upheld. Despite a stay of proceedings given in the bankruptcy proceedings to the plaintiff, the defendant procured his adjudication of bankruptcy on a petition which set up the facts; but two of the judges—Kelly, C. B., and Cleasby, B.—thought that he either knew that no act of bankruptcy was committed or at any rate did not bona fide believe that one was. Bramwell, B., and Martin, B., thought that an act of bankruptcy was committed, but that in any event defendant did not act without reasonable and probable cause. In the course of his opinion Bramwell, B., made some often quoted remarks, namely: "Further, I think a wrong question was left to the jury—'Did the defendant know that the proceedings were stopped till the registrar should make an appointment for the examination of the sureties, and execution of the bond?' For suppose he did, he had a right to the opinion of the court in a case truthfully stated, as I say this petition was. A man's rights are to be determined by the court, not by his attorney or counsel. It is for want of remembering this that foolish people object to lawyers that they will advocate a case 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.' "—L. R. 6 Ex. 329, 367.

Hoffman's Resolution II: "I will espouse no man's cause out of envy, hatred or malice toward his antagonist."—David Hoffman, *A Course of Legal Study* (2d Ed.) Vol. II, p. 752.

On the liability of a lawyer for malicious prosecution in bringing a suit for a client, see Ann. Cas. 1915B, 718, note.

On false imprisonment by lawyers, see 67 Am. St. Rep. 425, note.

"Upon a thorough examination of the authorities, we are convinced that the general rule is that attorneys at law, in the exercise of their proper functions as such, are not liable for their acts, if such acts are made in good faith and pertinent to the matter in question, and when in the course of a judicial proceeding a witness refuses to answer a question which is pertinent and material to the issue involved, and the attorney requests that such witness be punished for contempt, the attorney is not liable in damages for false imprisonment."—Rittenhouse, C., in Waugh v. Dibbens (Okl.) 160 Pac. 589, 592 (1916).

On the advice of counsel as a defense to the action against the client for malicious prosecution, see Ann. Cas. 1912D, 423, note; 18 L. R. A. (N. S.) 49, note.

"While the advice of a lawyer may repel imputations of malice and bad faith, it can furnish no further justification. If the advice be wrong, and the client follow it, his conduct is as wrong as the advice. Lawyers are not privileged to advise foolishly, and their clients are not shielded by their foolish advice. The court will look at the act, and not at its adviser, in judging of its merit or demerit."—Emery, J., in Hanscom v. Marston, 82 Me. 288, 298, 19 Atl. 460, 462 (1890).

THE HIGHWAYMAN'S CASE.

EVERET v. WILLIAMS.

(Court of Exchequer, 1725. Compiled from 9 European Magazine, p. 360 ff., and 9 Law Quarterly Review, 197 ff.)

In the European Magazine for May, 1787, "Causidicus" wrote that "In my junior days I had frequently heard it asserted that a highwayman had once filed a bill in a Court of Equity for a discovery and equal division of the booty taken on the road; but the improbability of so extraordinary an instance of effrontery ever existing always inclined me to disbelieve it.[29] The death of a very old practicer has accidentally thrown into my hands a copy of the bill, with the several orders made upon it; all which I have every reason to believe genuine."

The bill supplied by "Causidicus" covers three printed pages of small type. It was filed in the Equity side of the Exchequer by John Everet against Joseph Williams, and was signed by Jonathan Collins as counsel.

The bill recited that the plaintiff, John Everet, was skilled in dealing and in buying and selling several sorts of commodities, such as corn, hay, straw, horses, cows, sheep, oxen, hogs, wool, lambs, butter, cheese, plate, rings, watches, canes, swords and several other commodities, whereby complainant had acquired a very considerable sum of money to the amount of £1000. and upwards; that the defendant, Joseph Williams, applied to him to become a partner; that in 1720 they entered into a partnership which was to end at Michaelmas, 1721, and by which it was agreed that they should equally provide all sorts of necessaries at their joint and equal expense, such as horses, saddles, bridles, assistants and servants, and should equally bear all expenses on the road and at inns, taverns or ale houses or at markets or fairs or elsewhere for carrying on the said joint dealing.

It then alleged that pursuant to the agreement of partnership "your orator and the said Joseph Williams went on and proceeded jointly in the said dealings with good success on Hounslow Heath, where they dealt with a gentleman for a gold watch"; that later "your orator was prevailed on and encouraged to go along to Finchley aforesaid where the said Joseph Williams and your orator dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles and other things to the value of £200. and upwards"; that "about a month after the said dealing at Finchley aforesaid the said Joseph Williams came to your orator and informed him that he heard there was a gentleman at Blackheath who had a good

[29] As late as April, 1893, Sir Frederick Pollock declined to believe it (9 Law Quarterly Review, 105, 106), but on investigation accepted it as true, saying: "Truth is stranger than fiction."—9 Law Quar. Rev. 197.

horse, bridle, saddle, watch, sword, cane and other things to dispose of, all which he believed they might have for little or no money; and * * * your orator was thereupon prevailed on again to go with the said Joseph Williams to Blackheath aforesaid where they met the said gentleman and after some small discourse had between your orator, the said Joseph Williams and the said gentleman, they dealt for the said horse, bridle, saddle, watch, sword, cane and other things at a very cheap rate, and thereupon returned to London with the said horse, bridle, saddle, watch, sword, cane and other things; which your orator avers were well worth £50. and upwards"; and that "your orator and the said Joseph Williams continued in their joint dealings together until Michaelmas aforesaid, during which time your orator and the said Joseph Williams dealt together in several places, viz. at Bagshot in Surrey, Salisbury in Willshire, Hampstead in Middlesex, and elsewhere, to the amount of £2000. and upwards."

A ground for discovery alleged was "for as much as your orator's witnesses who could prove the truth of all and singular the said premises to be as herein set forth are either dead or gone beyond the seas into places remote and unknown to your orator, and for that your orator is remediless in the premises by the strict rules of the Common Law and relievable only in a Court of Equity before your Honours, where just discoveries are made, frauds detected, and just accounts stated."

On October 30, 1725, Mr. Serjeant Girdler, who was of counsel for the defendant, moved that the bill be referred to the Deputy Remembrancer for scandal and impertinence, which was done.

On November 13, 1725, on the plaintiff's application, the bill was dismissed with costs.

On November 29, 1725, on motion of Mr. Serjeant Girdler, the Deputy Remembrancer's report that the bill was both scandalous and impertinent was confirmed with an order that a messenger or tipstaff forthwith attach the bodies of Mr. William White and Mr. William Wreathcock, the plaintiff's solicitors, to answer the contempt of court.

On December 6, 1725, the tipstaff having brought the solicitors into court, the solicitors were fined £50. each and Jonathan Collins, the counsel, was ordered to pay the defendant his taxed costs. The order concluded: "And the Court declares the indignity to the Court as satisfyed by the said fynes, and the Deputy not to consider the scandal in the taxation" of costs.

The plaintiff was executed at Tyburn in 1730, the defendant at Maidstone in 1735. Wreathcock, one of the solicitors, was convicted of robbery in 1735, but was reprieved and transported.[30]

[30] The editor has been asked the following question: If the highwaymen had invested the proceeds of their robberies in a piece of real estate, taking title as tenants in common, would it have been unethical for a lawyer who

REPRESENTING PLAINTIFF IN ACTION TO COLLECT PRINCIPAL LOANED WITH USURY. N. Y. Committee. *Question 61:* A. borrowed from B. the sum of $100 and gave his three months' promissory note for $125, the increased amount being a "bonus." Upon default made in the payment of the note, the holder thereof requests an attorney to sue upon the same.

Would the fact that usurious interest was exacted preclude the attorney from accepting the claim?

Answer: In the opinion of the committee, it is not improper for the attorney to accept and prosecute the claim, unless it appears from the circumstances disclosed to him that the exaction of the usurious interest was in its nature extortionate or oppressive. Usury is a defense and may be waived. The attorney should, however, advise his client fully that the defense of usury may be set up, and, if established, may defeat the claim.[31]

was cognizant of the facts to represent one of them in obtaining partition of the property?

In Bowman v. Phillips, 41 Kan. 364, 21 Pac. 230, 3 L. R. A. 631, 13 Am. St. Rep. 292 (1889), a contract between clients, who were engaged in selling intoxicating liquors in violation of a prohibitory liquor law, and their attorneys, whereby for a monthly compensation for one year the attorneys were to defend all cases brought against the clients for violation of the prohibitory liquor law was held void because against public policy. Valentine, J., said on pages 368, 369, of 41 Kan., on page 231 of 21 Pac. (3 L. R. A. 631, 13 Am. St. Rep. 292): "The wrong on the part of the plaintiffs [the attorneys] consisted simply in entering into a contract to defend persons for criminal offenses which were in contemplation of all the parties to be committed in the future. This was a virtual encouragement of the defendants to violate the law. * * * Attorneys at law, above all others, should refrain from doing any thing which might seem to encourage a violation of the laws."

In Levy v. Kansas City, 74 Kan. 861, 86 Pac. 149 (1906), one who was licensed under a city ordinance in violation of law to run a gambling house sought to have the city enjoined from arresting him or otherwise interfering with him in the conduct of his business unless he should be found to be conducting it in a disorderly manner. The trial court denied the injunction asked for by him and granted the city a perpetual injunction restraining him from conducting his gambling house. In dismissing a writ of error brought by the gambling house proprietor, the per curiam opinion declared that: "This is probably the first instance in the history of the state that a professional criminal, confessing to a daily violation of the law has had the effrontery to apply to a court of equity jurisdiction for protection from arrest and prosecution while he pursues his criminal vocation."—74 Kan. 862, 86 Pac. 150.

"We do not wish to be understood as holding that a lawyer may not properly undertake to test the constitutionality of a criminal statute that is in fact constitutional. Such contracts are often made. However, if, in addition to undertaking to test its constitutionality, he contracts that he will, pending such test, suspend or nullify its operation, the contract is void."—Neil, J., in Arlington Hotel Co. v. Ewing, 124 Tenn. 536, 552, 138 S. W. 954, 958, 38 L. R. A. [N. S.] 842, Ann. Cas. 1913A, 121 (1911). See 38 L. R. A. (N. S.) 842, note. On what contracts of lawyers are void as against public policy, see 13 Am. St. Rep. 297, note.

31 "I cannot, however, refrain from stating my dissent from that distinction which it has been sometimes sought to draw between the prosecution of

REPRESENTING RICH CREDITOR IN FORECLOSURE OF MORTGAGE AGAINST UNFORTUNATE DEBTOR. John C. Harris, *Legal Ethics,* 69 Alb. L. J. 300, 301: Let us suppose that the richest man in the county has loaned another citizen money and taken a mortgage upon all the goods and chattels and hereditaments and appurtenances and choses in action and franchises and things tangible and rights intangible, and, in fact, a mortgage upon everything except the man's soul, and that the debtor has had great misfortune and sickness and trouble and is temporarily unable to pay, and that the rich man, whose friendship and favor and patronage is valuable to you, a lawyer, comes into your office and demands that the debtor be pursued in terms of the law; that the mortgage lien be foreclosed; that the debtor's property be forced upon the market, purchased by the creditor for one-tenth of its actual value, the amount of the execution sale be credited on the debt and judgment held over the debtor for the balance remaining unpaid, although at a fair valuation the mortgaged property is double the amount in value of the debt; and the rich man tenders you $1,000 as a cash retainer to do the act.

What does the code of legal ethics require? * * *

Now justice according to law would, perhaps, warrant your filing foreclosure proceedings and absolutely sacrificing the property of the debtor; but the rub is that you must also love mercy, and mercy is the quality of being compassionate toward an offender or adversary, and willing to spare or help him; and therefore, under the rules you must decline the $1,000 retainer and refuse to take the case.[32]

a claim which, in Judge Sharswood's phrase, 'offends the counsel's sense of what is just and right,' and the unjust and unrighteous resistance to a just claim. It has been maintained that a lawyer may properly assist in the latter, when it would be unconscionable in him to aid in the former. I cannot so regard his duty. Take the case of a usurious claim. I know of no more barbaric provision of law than the atrocious forfeitures imposed by the law of New York for an agreement to take six and a quarter per cent. interest. In the forum of conscience, such an agreement must be as binding as to take five per cent. For a man to violate it, having it in his power to perform it, is a dishonest act. But I cannot find it to be less dishonest to plead the defense, in an action in the usurious mortgage, than to bring suit to have the mortgage annulled for usury. In either case the act of the party is unconscionable, and the counsel whom he calls upon may surely indulge his taste, if he chooses, by declining the retainer. But he may with equal propriety, and without abating a tittle from his scorn of his client, assist him in enforcing the law, which is none the less law because it dishonors the commonwealth, remembering the apothegm contributed to political science by one who never claimed to be a philosophical statesman, that the best way to get rid of bad laws is to carry them into effect."—Theodore Bacon, *Professional Ethics,* 17 Journal of Social Science, 37, 45.

[32] "Suppose an action brought to recover from a widow or an orphan all they have in the world and the counsel is informed that only half the money was due by the husband or father of defendant as copartner with the plaintiff, and these facts could not be shown by defendant—what lawyer would claim to recover in such a case? We repeat it, a lawyer is bound to refuse a case that he believes to be dishonest, or to retire from it the moment he dis-

MORAL DUTY OF COUNSEL WHERE THE CLIENT IS MORALLY IN THE WRONG BUT LEGALLY IN THE RIGHT. William Forsyth, *Hortensius* (3d Ed.) pp. 398, 399: Suppose the facts are such as to leave no doubt on the mind of the advocate that the cause of his client is morally unjust.[33] Take for instance an informality in a will. The intention and wishes of the testator are clearly and unequivocally expressed but there is a technical objection to the validity of the instrument and the heir-at-law, or nearest of kin, seeks to take advantage of the mistake. What is the duty of the advocate then?

The answer, I think is that he may with a safe conscience undertake the cause of the party who seeks to set aside the instrument. [*Author's Note:* Molena, however, in his treatise, *De Justitia,* decides this question in the negative. He says that the advocate non posse illis præstare patricinium utpote ad rem injustam.] If the objection is presented to the court, the judges are bound by their oaths to give effect to it, supposing it to be valid. And how can it be a wrong in an advocate to ask on behalf of another what the law says he has a right to receive? * * * But it does not follow from this that, in all cases where the law is in favor of a party, an advocate is bound to render his services to that party if he applies for them. He may well refuse to become the instrument to work out the ends of mean and unprincipled malignity.[34]

covers it to be so."—David Paul Brown, *The Forum; or Forty Years' Full Practice at the Philadelphia Bar* (1856) Vol. II, p. 30.

Herndon's *Lincoln* (1889) Vol. 2, p. 345, note, quotes the following letter which is labeled "From an undated MS., about 1866":

"Dear Herndon: One morning, not long before Lincoln's nomination—a year perhaps—I was in your office and heard the following: Mr. Lincoln, seated at the baize-covered table in the center of the office, listened attentively to a man who talked earnestly and in a low tone. After being thus engaged for some time, Lincoln at length broke in, and I shall never forget his reply. 'Yes,' he said, 'we can doubtless gain your case for you; we can set a whole neighborhood at loggerheads; we can distress a widowed mother and her six fatherless children and thereby get for you six hundred dollars to which you seem to have a legal claim, but which rightfully belongs, it appears to me, as much to the woman and her children as it does to you. You must remember that some things legally right are not morally right. We shall not take your case, but will give you a little advice for which we will charge you nothing. You seem to be a sprightly, energetic man; we would advise you to try your hand at making six hundred dollars in some other way.' Yours, Lord."

[33] "A lawyer has a right to take all the advantage his learning and talents afford him, in order to sustain a good cause or defeat a corrupt one; but he has no privilege to substitute his talents or learning for the honesty of a case, and thereby render iniquity triumphant. Where he has doubts as to the correctness of his position, he may fairly incline in favor of the party he represents, and sustain his views by every authority and fact that the law or evidence may supply, leaving it, of course, to the court and jury to ratify or reject them. He is not to decide the case, nor is he morally answerable for the correctness of its decision; but he is answerable for the correctness of the motives by which he is influenced."—David Paul Brown, *The Forum; or Forty Years' Full Practice at the Philadelphia Bar* (1856) Vol. II, pp. 31, 32.

[34] "The father of a family dies, having bequeathed his estate, in consequence of disapproving his son's way of life, to a nephew. The son claims

ACCEPTING RETAINER TO PROCURE DIVORCE WITH KNOWLEDGE THAT A STATUTORY BAR EXISTS. N. Y. Committee. *Question 106:* A woman desires to retain me to institute an action for absolute divorce against her husband who has been living for the past two years an adulterous life with another woman.

During the conversation she confessed to me that she also has been living for the past year an adulterous life with another man. I am certain that the adultery charged against the husband was not committed with the connivance, consent, privity or procurement of the wife. I am also convinced that she has not cohabited with her husband ever since she became aware of his adulterous life nor has she condoned it. I am also certain that the husband will not interpose a defense nor will make a countercharge of adultery against the wife.

Knowing all these facts have I a moral or legal right to take and prosecute the woman's case?

Answer: In the opinion of the Committee, upon the facts stated, the services of the attorney could not be successful except by concealing from the court facts which it ought to know; and therefore he ought to decline the employment. The Committee refers to New York Code of Civil Procedure, section 1758, subdivision 4.

the property in a court of law, pleading that the testator was disordered in his understanding, and that the will was not attested by competent witnesses. A barrister well acquainted with all the circumstances of the case is desired by the nephew to undertake his defence. Suppose the private sentiments of the counsel to be that the father had cherished unreasonable prejudice against his son, and therefore was guilty of a moral crime in making the nephew his heir. Yet he may defend with a safe conscience the title of the latter."—Thomas Gisborne, *An Enquiry into the Duties of Men* (1800) Vol. I, pp. 336, 337.

"Innumerable particular cases might be put which would afford interminable discussion for casuists as to the right course for an advocate to adopt in foro conscientiæ as well as in foro legis. For instance, * * * when it is right to allow others to be prejudiced through ignorance of defects in a title to landed estates of which a client and his predecessors have been for a long period wrongfully in possession, but whom it would now be unjust for various reasons to dispossess; * * * whether to assist in recovering from a good man, who is making a good use of it, property which really belongs to a bad man who avows that he intends, if and when he recover it, to apply it for illegal or immoral purposes; whether to argue on behalf of the validity of a harsh or cruel will which is known to express a malevolent testator's real intentions, although if it were invalidated greater justice would be done to more deserving persons."—Showell Rogers, *The Ethics of Advocacy*, 15 Law Quarterly Review, 259, 278.

DEFEATING HONEST CLAIM BY TECHNICAL DEFENSE—AS RES JUDICATA

(Doctor and Student.) [85]

Dialogue II, Chap. V.—*The Fourth Question of the Student.*

Stud. If he that is the very heir be certified by the ordinary, bastard, and after bring an action as heir against another person: whether may any man, knowing the truth, be of counsel with the tenant, and plead the said certificate against the demandant by conscience or not?

Doct. Is the law in this case, that all other against whom the demandant hath title shall take advantage of this certificate, as well as he at whose suit he is certified bastard?

Stud. Yea verily, and that for two causes, whereof the one is this. There is an old maxim in the law, that a mischief shall be rather suffered than an inconvenience: and then in this case if another writ should afterward be sent to another bishop in another action, to certify whether he were a bastard or not: peradventure the bishop would certify that he were mulier, that is to say, lawfully begotten, and then he should recover as heir: and so he should in one self court be taken as mulier and bastard. For avoiding of which contrariosity, the law will suffer no more writs to go forth in that case, and suffereth also all men to take advantage of the certificate, rather than to suffer such a contradiction in the court, which in the law is called an inconvenience. * * * And forasmuch as the said maxim was ordained to eschew an inconvenience (as before appeareth) it seemeth that every man learned may with conscience plead the said certificate for avoiding thereof, and give counsel therein to the party according unto the law, or else the said inconvenience must needs follow. But yet nevertheless I do not mean thereby, that the party may after, when he hath barred the demandant by the said certificate, retain the land in conscience by reason of the said certificate: for though there be no law to compel him to restore it, yet I think well that he in conscience is bound to restore it, if he knew that the demandant is the very true heir, whereof I have put divers cases like in the seventeenth chapter of our first dialogue in Latin. But my intent is, that a man learned in the law, in this case, and other like, may with conscience give his counsel according to the law, in avoiding of such things as the law thinketh should for a reasonable cause be eschewed.

Doct. Though he that doth not know whether he be a bastard or not may give his counsel, and also plead the said certificate; yet I think that he that doth know himself to be the very true heir may not plead it: and that is for two causes, whereof the one is this: every man is bound by the law of reason to do as he would be done to: but I think that if he that pleadeth that certificate were in like case, he would think

[85] From the edition by William Muchall published at Cincinnati in 1874.

that no man, knowing the certificate to be untrue, might with conscience plead it against him, wherefore no more may he plead it against none other. The other cause is this: Although the certificate be pleaded, yet is the tenant bounden in conscience to make restitution thereof, as thou has said thyself; and then in case that he would not make restitution, he that pleadeth the plea should run thereby in like offence, for he hath holpen to set the other man in such a liberty, that he may chuse whether he will restore the land or not; and so he should put himself to jeopardy of another man's conscience. And it is written, Eccl. 3, Qui amat periculum peribit in illo; that is, He that wilfully will put himself in jeopardy to offend, shall perish therein. And therefore it is the surest way, to eschew perils, for him that knoweth that he is heir, not to plead it. And as for the inconvenience that thou sayest must needs follow, but the certificate be pleaded; as to that it may be answered, that it may be pleaded by some other that knoweth not that he is very heir: and if the case be so far put, that there is none other learned there but he, then methinketh that he shall rather suffer the said inconvenience, than to hurt his own conscience; for always charity beginneth at himself, and so every man ought to suffer all other offences rather than himself would offend. And now that thou knowest mine opinion in this case, I pray thee proceed to another question.

THE DEFENSES OF INFANCY, THE STATUTE OF LIMITATIONS, AND THE STATUTE OF FRAUDS. George P. Costigan, Jr., *The Proposed American Code of Legal Ethics,* 20 Green Bag, 57, 62, 63: It has often been urged against lawyers that they will interpose certain defenses when they know that the other party's cause is just. Among these defenses are infancy, the statute of limitations, and the statute of frauds. In the first place, it should be said that in the vast majority of cases where these pleas are made it is not known that the plaintiff's cause is just, and the lawyer putting in the defense simply selects his surest way of winning. Then again, not all lawyers would put in such pleas where justice demands that the plaintiff recover. Hoffman's 12th and 13th resolutions on professional deportment are as follows:

"XII. I will never plead the Statute of Limitations when based on the mere efflux of time; for if my client is conscious he owes the debt, and has no other defense than the legal bar, he shall never make me a partner in his knavery.

"XIII. I will never plead or otherwise avail of the bar of Infancy against an honest demand. If my client possesses the ability to pay, and has no other legal or moral defense than that it was contracted by him when under the age of twenty-one years, he must seek for other counsel to sustain him in such a defense. And although in this, as well as in that of limitation, the law has given the defense, and con-

templates, in the one case, to induce claimants to a timely prosecution of their rights, and in the other designs to protect a class of persons, who by reason of tender age are peculiarly liable to be imposed on,—yet, in both cases, I shall claim to be the sole judge (the pleas not being compulsory) of the occasions proper for their use."

I cannot agree, however, that Hoffman's resolutions deserve a place in a code of legal ethics. The pleas of infancy, the Statute of Limitations, and the Statute of Frauds are perfectly good pleas in themselves, and are demanded in the majority of cases by sound public policy.[36] If the case is fit for the attorney to take, the pleas may morally be put in if their truth can be proven. The legislature has given us the age limit, or permitted the common law age limit to continue, and it has given us the Statute of Limitations and the Statute of Frauds, all to accomplish certain ends demanded by supposed public policy, and it is upon the legislature, rather than the lawyers, that the responsibility for the pleading of such defenses must be placed. Like the exemption statutes, these defenses rest on a real or supposed public policy of which the legislature is the exclusive judge, and in the vast majority of cases the lawyer is aiding in the carrying out of that public policy by assisting his client in setting up these defenses. In the cases where injustice is plainly being done by interposing such pleas, the conscientious lawyer will of course do his best to dissuade the client from resorting to them. His full duty is done, however,

[36] "The defenses of infancy, statute of frauds, statute of limitations, or that a promise was gratuitous are only too often dishonorable defenses, but their abolition would probably increase rather than diminish injustice."—James Barr Ames, *Lectures on Legal History* (1913) p. 448.

"Take the defense of the statute of limitations. Its purpose is not to enable dishonest debtors to take advantage of their creditor's leniency, and evade the payment of a just debt. Far from it. Its real object is to protect honest men from the prosecution of unjust claims, where the lapse of years has resulted in loss of the evidence on which their defense rests. The law must, however, be general in its terms. It cannot say that honest men shall not be, and dishonest men may be, sued after six years. It can only say that neglect to sue shall be a defense for all men. Whether a particular man shall plead it is left for each man to determine for himself. It is an immoral thing for a man not to pay his debts, if he is able, and it is his duty to do all in his power so that he may be able, whether it be in one year or ten. There are, however, circumstances which morally justify a debtor in putting in the defense that the suit was not brought in time."—John Brooks Leavitt on *Lawyer and Client* in *Every-Day Ethics* (Yale University Press, 1910) pp. 56, 57.

"A sense of honor may sometimes induce a man to renounce the advantages afforded him by the law; as, for instance, in the case of a bankrupt who pays his creditors in full, although their claims are barred by his certificate. But this is an obligation which rests wholly upon the conscience of the individual; and it would be quixotic to say that an advocate is conniving at fraud because in such a case he interposes on behalf of his client the defences behind which the law permits him to retire."—Wm. Forsyth, *Hortensius* (3d Ed.) p. 402.

It has been suggested to the editor by a colleague that it may be unethical to assist in the collection of a just debt which has not been barred by the statute of limitations, but which neither the creditor nor the debtor any longer expected to be paid.

when he has protested as vigorously as possible against his client's action. He can then with good conscience file the pleas or, if in the given case such action is repugnant to him, he can refuse to file them, and let the client seek another attorney.[37]

ATTORNEY GENERAL SIR JOHN COLERIDGE'S COURSE OF ACTION IN THE TICHBORNE EJECTMENT CASE

In the ejectment action of Tichborne v. Lushington, which resulted in the Chief Justice of the Common Pleas committing the claimant to Newgate on charges of forgery and perjury and in the claimant being indicted, convicted, and sentenced to two successive terms of penal servitude of seven years each for perjury, a question of legal ethics arose.

The claimant, who insisted that he was Sir Roger Tichborne and who was later indicted as "Thomas Castro, otherwise Arthur Orton, otherwise called Sir Roger Charles Tichborne," was in the opinion of the jury in the criminal case really Arthur Orton,[38] and in the ejectment action the real defendants (the nominal defendant being only a tenant) insisted, of course, from the start that the plaintiff was an impostor. The trial of that action commenced May 10, 1871, and by February, 1872, the Attorney General, Sir John Coleridge, who was

[37] "But secondly: It is objected—'Supposing that we were able to collect before us all the materials for forming a correct judgment, different minds form very different estimates of what is right and wrong, and what one man may deem unlawful another may deem lawful and right. As for example: One man may think it wrong to defeat the clear intentions of a testator though informally expressed; another may think that there is no harm in doing so: one may think that he may without scruple or violence to his conscience evade the performance of a promise not in writing, by pleading the law which requires that certain promises to be binding must be in writing: another may think otherwise: so of the statute of limitations and many other cases that might be put.' To this objection the answer is clear: My conscience and not that of my client is to determine my actions. It matters not to me that another man deems this or that lawful; if I deem it unlawful, I may not aid him in it. The experience of every day tells me that thousands will think lawful, or act as though they thought lawful, things which I cannot think so. If I am a person of a morbidly scrupulous conscience, ready to suggest captious doubts and difficulties respecting every course of conduct that can be proposed (as doubtless many such are found), I may fairly expect that clients will not come to me for counsel and advice; but if I am not so—if my judgment is generally such as straightforward, honest men would form, then, should my avowal that I will not aid others in what I deem wrong drive away clients from me, I may fairly suppose that they are such as it is well for me to be quit of."—Edward O'Brien, *The Lawyer* (1842) pp. 36, 37.

[38] Serjeant Ballantine, who was chief counsel in the ejectment action but was not retained in the criminal action, felt that the latter action was mismanaged in that Dr. Kenealy who led for the defense "finally committed the cardinal blunder of undertaking to prove what was not really in issue, namely, that his client was in truth Sir Roger Tichborne" (*Some Experiences of a Barrister's Life* [5th Ed.] 390), and thus assumed the burden of proof when, if the fact was in issue, the burden of establishing that the claimant was not Sir Roger Tichborne should have been left on the prosecution.

leading the defense, was so satisfied in his own mind that the plaintiff was an impostor, that he apparently could not understand how the counsel for the plaintiff could take any other view.

On February 8, 1872, accordingly, the Attorney General, in the course of a speech for the defendant, called attention to "the fact" that Mr. Rose, one of the attorneys, and his son had retired from the case and "the fact" that the plaintiff had "signed" a letter "with a forged address * * * and with a forged date," said that "these facts, in any other than the Tichborne case would be thought conclusive as against the plaintiff; but in this case ordinary rules of action did not seem to apply. * * * His mind might be clouded by the strange mystery and obscurity in which this case was enveloped, but he should have thought that the demonstration [as to the letter] * * * was some slight evidence that the plaintiff * * * was a rank, a gross, and an arrant impostor. * * * It might be that there was an answer to all these matters, but in any other cause the matters mentioned that morning would have put an end to the case. But this had not followed here. And those who conducted the plaintiff's case [Mr. Serjeant Ballantine, Q. C., and Mr. Giffard, Q. C.] in the face of the arguments pressed upon them thus, and in the face of these demonstrations, must not complain if, by and by, it should be pointed out that although it was the duty, the great and sacred duty, of members of the profession to which he belonged to defend by all legitimate arguments any case which might be intrusted to them, and although no man would stand up more indignantly than he should against the imputation which was sometimes ignorantly cast upon the Bar and others in the profession of the law, that they should not defend persons whom they thought guilty, or of whose guilt they had a suspicion—yet he would maintain that the duty of counsel in assisting in the prosecution of fraud was a very difficult thing indeed, and he would say that lawyers, whoever they might be, who after demonstrations of the iniquity, the injustice and fraudulent character of a claim, lent themselves still to the prosecution of that claim made themselves accomplices in the crime which they helped forward." [39]

Mr. Serjeant Ballantine, in replying, stated that counsel for the plaintiff were "perfectly well acquainted with that letter, and we had a mass of circumstances bearing upon it which when the proper time comes, will be submitted to the jury," and he asked to be protected "from the needless insinuations and sneers" of the Attorney General. And Mr. Giffard said: "What has fallen from the Attorney General would produce the impression upon the mind of every one that it was an insinuation against the members of the Bar who were opposed to him. My learned friend has referred to his character as Attorney General, but I venture to say that position, which he occupies by ac-

[39] London Times for Feb. 9, 1872, and 8 Canada Law Journal (N. S.) pp. 61, 62.

cident, does not make him more than simply a member of the Bar, and I refuse to have my conduct judged by him." [40]

The Law Times of February 10, 1872, editorially deemed it "unfortunate that the Attorney General should have thought it necessary in the course of his speech in the Tichborne case" to refer to Mr. Rose's withdrawal from the firm of attorneys for the plaintiff, saying: "Whether Mr. Rose had withdrawn from the firm or not could by no possibility form an element for the consideration of the jury, and the assertion that he had done so naturally called forth a letter of explanation which was calculated to have a bad effect upon the claimant's cause. Mr. Rose has had a difference with Mr. Baxter and Mr. Norton, but until there had been a change of attorneys by order of the court, that difference was a private matter not in evidence, and to surmise inaccurately with reference to it was straining the license of counsel to the utmost. And in our opinion Mr. Rose, considering the moment inopportune for giving an explanation, should have contented himself with saying that he had not withdrawn from the firm." [41]

With reference to the reflections of the Attorney General on Mr. Serjeant Ballantine and Mr. Giffard, the Editor of the Law Times said:

"It may fairly be expected that we should give expression to the general opinion in the Profession with reference to the conflict, for such it must be called, between the Attorney General and the Counsel for the Tichborne claimant on Wednesday. The prevalent feeling and opinion is strongly offered to the course pursued by the Attorney General. The primary question is, Has any counsel a right to impugn the honor and integrity of counsel opposed to him on grounds such as those advanced by the Attorney General? The learned gentleman concludes that a certain piece of evidence proves fraud, and that such evidence cannot be rebutted. He concludes further that this conviction has also been brought home to the minds of his opponents, and he charges them, as counsel, with being accessories in the fraud unless they at once throw up their briefs. As interpreter, by his position, of the rules of etiquette governing the Bar, Sir John Coleridge would undoubtedly be justified in expressing this view if his opinion were taken upon the point. But immediately that he constitutes himself the censor morum in a yet undecided case in which he is acting not as Attorney General, but simply as an advocate, and condemns his opponents as accessories in a fraud unless they pursue a certain course, he frames a dangerous precedent—a precedent calculated to promote indecent displays of temper in our courts of law to the confusion of suitors and the detriment of the Profession. We are not at all sure that he is right in drawing a distinction between the duties of counsel in defending a man whom he knows to be guilty and in upholding a suit which,

[40] Id. [41] 52 Law Times, 264.

in his own mind, he believes to be dishonest. But to add that counsel in the latter case is to usurp the functions of the jury, and anticipate their verdict by throwing up the case, and that if he fails in this, he is a participator in the villainy of his client, is to propound a principle most difficult of application, and which, if accepted, might lead to disastrous consequences. We believe, therefore, that the protests of Serjt. Ballantine and Mr. Giffard have the cordial approval of the entire Profession." [42]

WITHDRAWAL BY COUNSEL FROM UNJUST CIVIL CAUSES. George P. Costigan, Jr., *The Proposed American Code of Legal Ethics*, 20 Green Bag, 57, 61, 62: A lawyer may take up a case which he believes in and then at some subsequent stage discover its injustice. The only general rule that can be laid down even there is that he should abandon it, if there is no shadow of doubt in his own mind that it is an unjust cause. * * *

Whenever 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 defense 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. We lawyers are apt to be more cautious about asserting this in regard to criminal cases than in regard to civil cases, * * * and even in civil cases we are sure that a lawyer should never desert the client at a stage in the case where no other lawyer can be employed, unless the moral necessity for so doing is absolutely apparent.[43]

II. Negotiations with the Opposing Party

A. B. A. CANON.

9. Negotiations With Opposite Party. A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid

[42] Id.

[43] Horace Binney, who in his day was a leader of the Pennsylvania bar, said of himself: "I never prosecuted a cause that I thought a dishonest one, and I have washed my hands of more than one that I discovered to be such after I had undertaken it, as well as declined many which I perceived to be so when first presented to me."—Charles Chauncey Binney, *The Life of Horace Binney* (1903) p. 443.

On what is sufficient ground for abandonment of a contract of employment made with a client, see Ann. Cas. 1912D, 640, note.

everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.[44]

DUTY TO OPPOSING LAWYERS AND PARTIES. N. Y. Committee.

Question 21: In the separation action of Jane Doe against John Doe, there were awards of alimony and counsel fee, none of which the defendant paid, having kept out of the state for the express purpose of avoiding these payments. The case was finally tried. The defendant did not appear, resting his defense on a western divorce which our court set aside. The decree, among other things, gave a money judgment for some $2,000 back alimony. There were several appeals from orders and in one instance the defendant was found guilty of contempt and fined several hundred dollars. Plaintiff's attorney served a notice of lien.

Later, the judgment of $2,000 was sent to Philadelphia, where the defendant then was, and a suit was begun on the judgment. Thereupon the defendant entered into a collusive arrangement with his wife whereby all of the various judgments and orders directing the payment of moneys in New York were satisfied, and this satisfaction was set up in a supplemental answer in Philadelphia.

This litigation had continued for years, and the plaintiff's attorney had worked without reward, advancing large sums of money in the litigation. Several judgments for costs consisted largely of printing bills that he had paid. He even advanced moneys to keep the plaintiff from starving, as throughout the entire litigation the defendant

[44] Hoffman's Resolutions XLIII and XLIV:

"XLIII. I will never enter into any conversation with my opponent's client relative to his claim or defense, except with the consent and in the presence of his counsel.

"XLIV. Should the party just mentioned have no counsel, and my client's interests demand that I should still commune with him, it shall be done in writing only,—no verbal response will be received. And if such person be unable to commune in writing, I will either delay the matter until he employs counsel,—or, take down in writing his reply in the presence of others; so that, if occasion should make it essential to avail myself of his answer, it may be done through the testimony of others, and not by mine. Even such cases should be regarded as the result of unavoidable necessity, and are to be resorted to only to guard against great risk, the artifices of fraud, or with the hope of obviating litigation."—David Hoffman, *A Course of Legal Study* (2d Ed.) Vol. 2, p. 771.

In In the Matter of Ann Oliver, 2 Ad. & E. 620 (1835), where two attorneys obtained from Mrs. Oliver, who was seventy-five years old, her signature to a paper affecting certain land which she had recovered in ejectment, she wanted, before signing, to send for her solicitor but the attorneys objected to the delay. On rule to show cause why the attorney who had the paper should not deliver it up to be canceled and pay the costs of the application, Lord Denman said: "This rule must be made absolute. When it appeared that Mrs. Oliver had an attorney, to whom she referred, it was improper to obtain her signature with no attorney present on her part. If this were permitted, a very impure, and often a fraudulent, practice would prevail."

kept out of the state and never paid one dollar either in alimony or costs.

The defendant had but one attorney through this litigation, and he was entirely familiar with all the circumstances. Yet he, with a new lawyer representing the plaintiff, drew this collusive agreement, which deprived the plaintiff's attorney of his lien, even for the costs made up largely of printing disbursements advanced by him.

Was this action on the part of the defendant's attorney ethical? If not, what should be done in the matter?"

Answer: This Committee uniformly declines to express its views upon the propriety of disciplinary proceedings; and it does not advise persons of their property rights or the means of enforcing them. The attorney's lien and his right to reimbursement were property rights.

We do not regard it as ethically proper for an attorney to enter into or advise any collusive or other agreement to destroy any property right unjustly.

Question 71: W., an attorney, obtains a judgment for his client J. in the sum of one hundred and fifty dollars. After taking an inquest, and obtaining an order for the examination of N., the judgment debtor in supplementary proceedings, W. is approached by C., the attorney for N., and is offered the sum of ten dollars as his own fee in this matter, and twenty-five dollars for J. in full settlement of all claims against N. W., after conferring with his client, decided not to accept this offer.

Subsequently C. approaches J. and offers him ten dollars which is accepted in full satisfaction of J.'s claim against N. This is done without consulting or informing W., the attorney for J.

Kindly advise me whether this conduct on the part of C., an attorney, is professional and proper.

Answer: In the opinion of the committee, the act of C., in approaching W.'s client and settling the proceedings without W.'s knowledge is unethical.

Question 85: A. is in possession of a tract of land under claim of ownership. B. also claims ownership. Both have consulted counsel in regard to their respective claims, and the counsel have consulted each other. B.'s counsel proposes to A.'s counsel that B. bring an action in ejectment to test the title and that a stipulation be entered into before the action is commenced that the judgment shall be without costs. A.'s counsel refuses to make the stipulation. Afterward B.'s counsel goes to A. and induces him to sign, in his individual capacity, the same stipulation which his counsel had refused to make for him. A.'s counsel ascertains the fact and charges B.'s counsel with unprofessional conduct, which B.'s counsel denies, defending the propriety of his act upon the ground that A.'s counsel was not an attorney of record in the matter.

Answer: In the opinion of the Committee, the conduct of B.'s counsel was unprofessional. It violates * * * Canon 9 of the Canons of Ethics of the American Bar Association. * * *

Question 93: In an action, judgment is procured in favor of plaintiff. Defendant wants to settle case with plaintiff's attorneys direct. Plaintiff's attorneys insist upon settlement being made through defendant's attorneys. Defendant's attorneys do not wish to consummate settlement until their bill is paid. The matter stayed in statu quo for several weeks. By what consideration should plaintiff's attorneys be guided?—their duty to their client to collect the judgment, or, should they stand still and insist upon the matter being settled through defendant's attorneys? Whether an execution would collect the judgment is not known, but it might imperil an early settlement.

Answer: In the opinion of the Committee, the plaintiff's attorneys having done all that professional courtesy requires, and the legal relationship between the defendant and his attorneys having moreover terminated,[45] there is no impropriety in plaintiff's attorneys dealing directly with the defendant.

III. Pleadings, Affidavits, and Abuse of Process

TRIVIAL AND FALSE PLEADINGS. Edward O'Brien, *The Lawyer* (1842) p. 80: Thirdly, he, the Lawyer, will not take trivial demurrers to gain time and to harass the opposite party and put him to expense; nor will he draw false pleas in the hope that the evidence which the other side shall bring may prove defective or that he may abuse his opponent into a belief that his cause is stronger than it really is. He considers that pleadings however technical, are the formal allegations of the parties, to be supported by evidence according to their legal intent; and hence, to plead that which he knows to be untrue, though it be clothed in the robes of form, he considers not on that account as less unjust, but rather an aggravated falsehood.[46]

[45] Upon the termination of the legal relationship, see Lusk v. Hastings, 1 Hill, 656 (1841); Magnolia Co. v. Sterlingworth Co., 37 App. Div. 366, 56 N. Y. Supp. 16 (1899); Conklin v. Conklin, 113 App. Div. 743, 99 N. Y. Supp. 310 (1906).—N. Y. Committee.

[46] "But it has been said that it was the duty of the defendant [who was sued by plaintiff for negligence in permitting, as plaintiff's attorney, an action by one Dubois against plaintiff to go by default] not to plead, or even put the general issue on the record, if there was no real defence to the action brought against the plaintiff by Dubois; and we have been referred to the old statute of Beaupleader [3 Edw. I, c. 29, commented on by Coke in 2 Inst. 214], and other authorities, in support of the principle; but, if they are looked at, it is manifest that their sole object is to prevent a party from putting on the record pleas containing affirmative matter which is false within the knowledge of the party pleading it: it was never intended to take from the defendant any right he might have of putting the plaintiff to prove his case, whether the demand or cause of action were or were not admitted or

ASKING EXCESSIVE DAMAGES. N. Y. Committee. *Question 10:* Is an attorney justified in asking for five thousand dollars damages in a case where he knows his client would be perfectly satisfied with a settlement of a few hundred dollars and where there appears to be no just ground for demanding more than a few hundred dollars?

Is a lawyer guilty of moral turpitude who demands in settlement of a claim for damages an amount far in excess of what he believes to be a proper measure of damages?

Answer: The Committee considered, in the absence of a more detailed statement, that the demand should not exceed what, in the opinion of the attorney, would be a maximum proper recovery under the facts which he has reason to believe are the basis of his client's rights.

PIERCE v. BLAKE.

(Court of King's Bench, 1695. 2 Salk. 515.)

The defendant pleaded a false plea in abatement, viz. that the plaintiff was dead; the Court was moved, that the attorney might be compelled to swear it. Et per HOLT, C. J. We cannot compel him in any case to swear his plea, but where it is a foreign plea; but the attorney, if he puts in a false plea to delay justice, breaks his oath, and may be fined for putting a deceit upon the Court. He remembered a case where judgment was given against a defendant above forty years of age, upon which judgment he brought a writ of error, and assigned infancy, and appearing by attorney for error, and the Court fined the attorney: * In the principal case the Court ordered the attorney to plead immediately, so as he would stand by it; or the Court, if he did not, would inquire into the truth of the plea, and, if they found a deceit and a trick, they would fine him.[47]

Note: The Court will not order a man to plead peremptorily till the rules be out.

denied. It is the province and duty of a jury to ascertain whether the plaintiff's demand or complaint be true or false, as well as the nature and extent of its existence. It is frequently necessary to plead the general issue, in order that the amount of the damages alleged to have been sustained may be inquired into and ascertained, and brought to the proper level."—Tindal, C. J., in Godefroy v. Jay, 5 Moore & Payne, 284, 297 (1831).

"Pleadings are frequently nothing but a legalized form of telling untruths. Should a man insert statements there that he would never venture to put into an ordinary document under similar circumstances in private life?"—Alfred Emden on *Is Law for the People or the Lawyers?* in 49 Nineteenth Century, 858, 861.

* See ante, p. 190, note.

47 "The placing in pleadings of numerous allegations which the pleader has no intention or expectation of proving or attempting to prove, when such allegations are of a character calculated to prejudice or unduly affect the jury,

VEALE v. WARNER.

(Court of King's Bench, 1669. 1 Saund. 326.)

Debt on bond by Veale against Warner, conditioned for the performance of an award. On oyer of the condition, the defendant pleaded that the arbitrators made an award, by which they awarded the defendant to pay to the plaintiff £3169. 16s. 3d. and to give a general release to the plaintiff; but he did not shew any thing which was to be done by the plaintiff, although in truth they had awarded him to give a general release to the defendant. And so the award, as it was shewn by the defendant, was bad, being all to be performed on the part of the defendant, and nothing on the part of the plaintiff. And the defendant further averred in his plea that he had paid the money, and had given the release according to the award, and prayed judgment if the plaintiff ought to have his action. The plaintiff took issue that the defendant had not paid the money modo et forma, &c.; and this he prays may be inquired of by the country, &c. but did not shew the other part of the award which was omitted by the defendant. To which replication the defendant put in an insufficient rejoinder by way of estoppel, upon which the plaintiff demurred. And now in this term the plaintiff moved to have judgment: and Saunders for the defendant objected that the plaintiff could not have judgment, because it appeared by the record that the award was void, being all to be performed by the defendant and nothing by the plaintiff: and therefore if the award is void, it is not material whether the defendant has performed it or not, although he has pleaded a performance of it. And now he has acknowledged the contrary, by his waiver of the issue offered by the plaintiff, and pleading a bad rejoinder. And the plaintiff and defendant have both agreed, that the award pleaded by the defendant was the true award made by the arbitrators, which is altogether vitious. But if the plaintiff would have helped himself, he ought to have shewn the other part of the award before he assign the breach, which he has not done here; and therefore he cannot have judgment. And of such opinion was the whole court clearly. But they would not give judgment for the defendant, because they conceived it was a trick in pleading; but they gave the plaintiff leave to discontinue on payment of costs. And KELYNGE, Chief Justice, reprehended Saunders for pleading so subtlely on purpose to trick the plaintiff by the omission of the other part of the award. But it was a case of the greatest hardship on the defendant; for the bond of submission

is a reprehensible practice, and in flagrant cases may justify the trial court in withholding the complaint, or those portions of the complaint, from the jury, or possibly in granting a new trial, if it is reasonably probable that the presence of these extrinsic and inflammatory matters was due to bad faith, and they were such as may probably have unduly influenced the jury to the substantial detriment of the opposing party."—Root, J., in Johnstone v. Seattle, R. & S. R. Co., 45 Wash. 154, 156, 157, 87 Pac. 1125, 1126 (1906).

was only in the penalty of £2000., and the arbitrators had awarded him to pay £3100., being £1100. more than the real penalty of the bond; when in truth there was nothing at all due to the plaintiff, but he was indebted to the defendant. And afterwards the defendant exhibited an English bill in the Exchequer, disclosing bad practice of the plaintiff with the arbitrators, and had relief against the bond: and so this matter was at rest. Winnington and Sympson were of counsel with the plaintiff, but they did not see the defect of the pleading of their part until it was objected in court by the other side.

In re EGAN. (No. 3819.)

(Supreme Court of South Dakota, 1916. 157 N. W. 310.)

Original proceeding for the disbarment of George W. Egan. Respondent disbarred.

WHITING, J. * * * Svendsen Charge. Through the failure of his clerk to follow directions given by respondent, and through respondent's failure to read a certain affidavit before executing and filing same, respondent unwittingly filed, in the case of Svendsen v. Svendsen, then pending in the trial court, an affidavit in which it was charged positively, instead of upon information and belief, as intended by respondent, that opposing counsel had, by the payment of a money consideration, procured a false affidavit, and had filed the same in such court. Respondent's charge against such opposing counsel was false in fact. The fact that respondent's charge was in reality based upon information and belief was apparent from a reading of the whole affidavit in the light of other matters known to the trial court and attorneys. When, upon the hearing of the motion upon which respondent's affidavit was filed, respondent's attention was called to the fact that his allegations therein were positive, and not alleged to be upon information and belief, he did not "ask to correct such affidavit or to withdraw the same, but permitted it to remain without objection as a part of the record in said action prepared for use in the Supreme Court, and is now a part of the record in said action before said court." The referees conclude that respondent's conduct "was reckless and careless, and was such as deserves criticism and censure, but was not necessarily corrupt or dishonest." With this conclusion we fully concur.

Case Charges. In one action respondent himself made, and in another action he prepared and his client made, an affidavit for attachment wherein it was falsely charged that the defendant therein "has sold and disposed of part of his property and is about to assign and dispose of his property with the intent to defraud his creditors, and

said affiant deposes and says that said plaintiff is in danger of losing its said claim by reason of the facts aforesaid unless a writ of attachment issues." Such affidavits were made and used when respondent had "no sufficient reason for believing said statements to be true." The attachments were levied upon the home of the defendant, when defendant was the owner of a large amount of both real and personal property located in the same county, and not exempt from levy, all of which might readily have been learned by respondent by a search of the records or by inquiry in the office of the register of deeds of such county. The defendant in said actions thereafter brought an action against respondent and his clients to recover damages alleged to have resulted from the above wrongful acts. The verdict in such action was in favor of respondent. The referees conclude that respondent's conduct "was reckless, and the same deserves severe criticism and censure, but his license to practice as an attorney at law in the state of South Dakota should not be canceled by reason of said conduct." With such conclusion we agree. The law provides some harsh weapons to be used as necessary remedies under extraordinary occasions. We regret to say that there are a few lawyers, who "are the scandal of the profession, who act upon the assumption that the end of the client's interest or desire justifies the use of any means to further it." No attorney—no matter how just he believes the end sought to be, no matter how insistent his client may be—has any right to use or to direct the use of these extraordinary weapons on behalf of a client, unless he has reasonable cause to believe the occasion one contemplated by the laws authorizing the use thereof. Persistency in such unlawful practices might well warrant suspension, if not disbarment, of the wrongdoer.[48] * * *

The ultimate question presented to the court in a disbarment proceeding is: "Do all the facts established by the evidence prove to the satisfaction of the court that the respondent is unfitted to be an attorney at law?" In re Egan, 36 S. D. 228, 154 N. W. 521. * * *

It is with a full realization of all that our decision means to respondent that we now affirm the report of the referees and adjudge that respondent's license be canceled and his name stricken from the list of the attorneys of this state, and he be required to pay the costs of this proceeding.

[48] "The client will be often required, in the course of a cause, to make affidavits of various kinds. There is no part of his business with his client, in which a lawyer should be more cautious, or even punctilious, than this. He should be careful lest he incur the moral guilt of subornation of perjury, if not the legal offence. An attorney may have communications with his client in such a way, in instructing him as to what the law requires him to state under oath or affirmation, in order to accomplish any particular object in view, as to offer an almost irresistible temptation and persuasion to stretch the conscience of the affiant up to the required point."—George Sharswood, *An Essay on Professional Ethics* (5th Ed.) 111.

In re SCHREIBER.

(Supreme Court of New York, Appellate Division, First Department, 1915. 170 App. Div. 543, 156 N. Y. Supp. 398.)

Application on report of official referee upon charges against Jacob Schreiber, an attorney and counselor at law for professional misconduct. Respondent censured.

PER CURIAM. The respondent is charged with interposing in an action on four promissory notes, brought by the Century Bank of the City of New York against Lena Hobel and Max Hobel, an answer which contained a general denial. It is alleged that the respondent prepared the answer and caused his client to verify it when he knew that the material allegations of the complaint denied therein were in fact true; that thereafter the respondent admitted to the attorney for the plaintiff that the answers were served solely for the purpose of gaining time.

The respondent has put in an affidavit explaining the circumstances under which this answer was interposed. His excuse is that after the summons and complaint were served upon his client they were given to him to defend; that his client said over the telephone that he had no recollection of having signed the notes and did not remember a thing about them; that he was unable to have a personal interview with his client, and he prepared the answer and sent it to his client by mail, and it was verified and served on the plaintiff's attorney. He denies having said to the plaintiff's attorney over the telephone that the answers were interposed solely to gain time; but it is a little difficult to see for what other purpose they were interposed. He must have known that the notes held by a bank were either properly executed by the defendant in the action or were forgeries, yet he took no trouble to investigate his client's story; but the statement over the telephone that the client remembered nothing about the notes did not justify the respondent in interposing an answer which denied all the allegations of the complaint. It is a serious offense for an attorney to interpose an answer in an action which is false, and which he has at least reason to believe was not true, and on the respondent's own statement he must be convicted of professional misconduct.

The respondent, however, at the time he interposed this answer, had been but a few months admitted to the bar, and he does not seem to have realized the obligation of an attorney at law to the courts and the public; but in view of his youth and inexperience, and the circumstances detailed in his affidavit, which are corroborated by his client, the court is inclined to confine its discipline to a severe censure for the respondent's conduct in interposing such an answer under the circumstances, with an admonition to the respondent that, if he expects

to continue to practice law, he must be much more careful before interposing such an answer.

The respondent is therefore severely censured for his misconduct as aforesaid. Settle order on notice.

ANONYMOUS.

(Exchequer Chamber. Jenk. [4th Ed.] 58.)

Libertas res est inæstimabilis.

If the client in any suit, furnishes his attorney with a plea, which the attorney finds to be false, so that he can't plead it for the sake of his conscience; the attorney may plead in this case, quod non fuit veracitur informatus, and in so doing, he does his duty.[49]

In re BARNES.

(Court of Common Pleas, 1736. Barnes, 38.)

One Barnes, an attorney in Cumberland, had orders from a defendant to plead for him; and he sent directions to Mr. Eadnell, his agent, so to do; but Eadnell neglecting to plead, judgment passed against defendant by default. Defendant moved against Barnes, and a rule was made upon him to shew cause why he should not make defendant satisfaction, he being answerable for his agent's default. Upon shewing cause, it appeared that there was a just debt due to plaintiff of £44. and the costs, (had a plea been pleaded,) would have been greatly increased, so that defendant is benefited, and not prejudiced by suffering judgment to go by default. If defendant could have made a just defence, and no debt had been due, in case of a gross and wilful neglect, the Court would have punished the attorney; but there's no reason for it in this case. Rule discharged.

[49] "And if an attorney ought not wittingly to plead a false plea, a fortiori, a serjeaunt or an apprentice ought not to doe the same."—1 Coke, Inst. 215.

"In Pierce v. Blake, 2 Salkeld, 515 (1697), Chief Justice Holt says that 'if an attorney puts in a false plea to delay justice, he breaks his oath, and may be fined for putting a deceit on the court.' "—William Allen Butler, *Lawyer and Client* (1871) p. 24, note.

In 2 Herndon's *Lincoln* (1889) pp. 326, 327, Herndon tells of the time when he drew up and put in a sham plea in a case for the purpose of getting a continuance, as he knew the lawyers on the other side thought that the sham plea was sound in fact and would be afraid to go to trial. Lincoln, in reading the papers in the case, discovered this sham plea and, ascertaining from Herndon that it was sham, persuaded Herndon to withdraw it. Herndon adds: "By some agency—not our own—the case was continued and our client's interests were saved."

SMITH v. MATHAM.

(Court of King's Bench, 1824. 4 Dowling & Ry. 738.)

Archbold on a former day obtained a rule calling on the defendant's attorney to shew cause why he should not be struck off the roll, for signing a special demurrer with a fictitious name, purporting to be that of a barrister. The plaintiff had delivered a declaration erroneously entitled, to which the defendant's attorney demurred specially, and the demurrer was signed "T. Symes," as and for the signature of a barrister. Upon taking out a summons to amend the declaration on payment of costs, the defendant's attorney demanded a fee of 10s. 6d. for counsel's signature to the demurrer. After diligent inquiry and search at all the Inns of Court, it was ascertained that there was no gentleman at the English Bar of the name of Symes; whereupon the present rule was moved.

THE COURT granted a rule nisi.[50]

THREATENING DISBARMENT PROCEEDINGS IN ORDER TO COMPEL LAWYER TO PAY MONEY WITHHELD. N. Y. Committee. *Question 19:* (a) In settling an attachment case, the attorney for plaintiff demanded indemnity against sheriff's poundage, if any. I deposited with him $250. After some years I ascertained that no poundage had been paid or claimed, and demanded the return of the money, which was refused on the ground that such claim might still be presented. I then notified the sheriff to present his claim, if any, and received a letter stating that no such claim appeared on the books of the office. I renewed my demand on the attorney for the return of the deposit. It was again refused; this time on the ground that his client was as much entitled to it as mine. The return check shows that it was endorsed by and paid to the plaintiff's attorney. Am I warranted in putting the matter before the proper committee of the bar and asking discipline of the attorney?

(b) Am I justified in warning the attorney that I shall adopt this course?

A suit would exhaust the fund.

Answer: In our opinion it is not proper to submit a complaint to any committee of the bar, or to threaten to do so, for the purpose of collecting money from a lawyer; nor is it the function of this Committee to advise lawyers whether or not to prefer charges against other lawyers.

[50] In Bishop v. Willis, 5 Beav. 83, note (1749), matter scandalous as to plaintiff's solicitor was inserted by defendant's solicitor in defendant's answer and the defendant's solicitor put counsel's name to the answer without having any authority for so doing. "The court committed him, and ordered him to pay the costs of the scandal, which the Master taxed at £150."

FURNISHING CLIENT WITH BLANK SUMMONSES SUBSCRIBED BY ATTORNEY TO FACILITATE COLLECTIONS. N. Y. Committee. *Question 102:* Since the adoption of the new Municipal Court Code (Laws N. Y. 1915, c. 279, § 19), which authorizes the issuance of summonses by attorneys at law it is stated that some attorneys have permitted their clients to print blank summonses in large numbers, subscribed with the attorney's name, and to furnish their collectors with a pad of such printed summonses, so that the collector may fill the blanks and leave a copy of such summons with any customer who refuses payment.

In the opinion of the Committee, is such practice improper?

Answer: In the opinion of the Committee, the practice is unprofessional and illegal. An attorney should not delegate any professional function or power to his client. (See Matter of Rothschild, 140 App. Div. 583, 125 N. Y. Supp. 629, 1st Dept., 1910.)

In re KRAUSE.

(Supreme Court of New York, Appellate Division, First Department, 1915. 165 App. Div. 771, 151 N. Y. Supp. 299.)

Proceeding to disbar Richard Krause, an attorney, for professional misconduct.

INGRAHAM, P. J. The charges of professional misconduct against the respondent are set forth in the report of the official referee. They arise out of various actions and proceedings instituted by the respondent, as attorney, for one Dorothy L. Von Huber against Frederic S. Mason, between May 31, 1912, and November 13, 1912. * * * Here there were commenced against a defendant three actions in less than a week, and in these three actions there were four complaints. In these four complaints the defendant was first charged with a simple breach of promise of marriage; in the second, with a breach of promise of marriage, coupled with seduction; in the third, with the commission of rape on the 15th of April; in the fourth, with the commission of rape on the 18th of April; and then, these charges not having produced the desired result, in the subsequent November another summons and complaint was served, charging the defendant with sodomy. In addition there were an order of arrest, an application for a warrant, and a criminal summons, and finally a warrant. Certainly, if the respondent had simply desired to protect the interests of his client, he would have ascertained from her at his first interview just what her charge against the defendant was, and then brought a proper action to redress any injury that he was justified in thinking she had sustained, and prosecuted that action in an orderly and legal manner. The conduct of the respondent certainly

justifies more than a suspicion that these various proceedings were not for the real protection of his client, but for an ulterior purpose.

I do not think we are justified in overlooking this offense; but in the absence of any express evidence of an attempt to extort a settlement from Mason we are justified, in this case, instead of disbarring the respondent, in suspending him from practice for one year, and until the further order of the court, with leave to the respondent to apply for reinstatement at the expiration of such period, upon showing that he has actually abstained from practice and has otherwise properly conducted himself.[51]

PEOPLE ex rel. HEALY v. HOOPER.

(Supreme Court of Illinois, 1905. 218 Ill. 313, 75 N. E. 896.)

Application for disbarment of James H. Hooper. Rule made absolute.

BOGGS, J. * * * It was also proven that, in a number of other cases pending before justices of the peace, the respondent had pursued the practice of causing the cases to be dismissed for the purpose of inducing the defendants therein to believe that the suits had been there finally disposed of, and afterwards filed appeal bonds with the justices, thus bringing the cases into the county, circuit, or superior court without notice to the defendants, taking judgments by default, well knowing that the defendants thereto had been deceived into the belief that the cases had been dismissed and finally disposed of by the plaintiff in the justice courts, and intending that they should be so deceived and misled by the course pursued by him in the justice courts. It was also proven that in some of the other of these cases in which he, by his deceitful and fraudulent practice, had obtained judgments, he

[51] In State v. Johnson, 149 Iowa, 462, 128 N. W. 837 (1910), a lawyer was disbarred because, among other things, he had a man arrested for seduction and then brought suit against him for breach of promise and promised not to prosecute the criminal action if the civil action were settled, which was done. Sherwin, J., said: "That Johnson had the criminal charge made against Amunrud for the purpose of forcing the payment of civil damages and for no other purpose is very evident. It was a prostitution of the criminal arm of the law for personal financial gain, and it needs no citation of authority to sustain its condemnation. Johnson was also clearly a party to an implied agreement not to prosecute the criminal charge for seduction in the event of a satisfactory settlement of the civil suit, and such an agreement was illegal."

In Dishaw v. Wadleigh, 15 App. Div. 205, 44 N. Y. Supp. 207 (1897), it was held that an attorney could be sued for abuse of legal process where he subpœnaed a defendant in a cause to appear sixty miles from where he resided, when his testimony was unnecessary and when, upon an affidavit that the testimony was necessary, the attorney had the defendant arrested under attachment and brought to the court after the defendant failed to obey the subpœna. The attorney took these steps to coerce payment of the claim, which was small and which he thought defendant would pay rather than be so inconvenienced.

sought to further wrong and defraud the defendants therein, as he did Thayer, out of valuable real estate by directing that the sheriff should not seek the defendants to notify them of the issuance of the executions on such judgments or should not seek to find personal property wherewith to satisfy the executions, but should levy upon and sell real estate, the description whereof he gave him, with the purpose and intent upon his part that such real estate should be sold without the knowledge of the owners thereof that judgments had been entered against them, or that the real estate had been levied upon. * * * Such misconduct warrants a judgment of disbarment. 4 Cyc. 909–911. * * *

The statute of limitations has no application to delinquencies such as have been shown to exist. The court, in such cases, will consider any unexplained, unreasonable delay in presenting the charges, and also whether, by reason of such delay, the accused has been deprived of a fair opportunity of securing proof to meet the accusation; but the proceeding for the disbarment of an attorney is not barred by the express terms of the statute of limitations, nor will the courts establish a limitation, as to the time in which such proceedings may be instituted by analogy to the statute of limitations, unless, from the nature or circumstances of the particular case, it appears that it would be unjust or unfair to require the attorney to answer as to such occurrences. 4 Cyc. 915.

The rule will be made absolute, and judgment entered striking the name of respondent from the roll of attorneys of this court. Rule made absolute.

IV. The Preparation for Trial

A. B. A. CANON.

16. Restraining Clients from Improprieties. A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards Courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrong-doing the lawyer should terminate their relation.[52]

[52] In In re Robinson, 151 App. Div. 589, 136 N. Y. Supp. 548 (1912), an attorney for a railroad was disbarred because he approved vouchers for disbursements by detectives and investigators which apprised him of the fact that there was a systematic bribery of witnesses and subornation of perjury.

In re A SOLICITOR.

(High Court of Justice, Common Pleas Division, 1879. 23 Sol. J. 784.)

Herschell, Q. C., showed cause against a rule calling on a solicitor to answer certain charges of misconduct. It appeared that while certain proceedings were pending in the High Court the client for whom this solicitor acted produced, and the solicitor read, an opinion by a pleader, advising the defendant on his case, which the client in question had got by a bribe from a clerk of the defendant's solicitor.

Herschell (Horne Payne with him), urged that when the solicitor read it he did not know what it was; that it contained no new information, and that as soon as he could he got rid of the client.

Sir Henry James, Q. C. (Hollams with him), on behalf of the Incorporated Law Society, desired not to press harshly on the individual, nor to do more than to assert the honour of the profession. Whether the purloined opinion disclosed anything of advantage to the party for whom the solicitor acted or not was immaterial; the fact that he read the document, and did not inform the solicitor from whom it had been stolen of the fact that it had been obtained, was a breach of duty as between professional men.

Lord COLERIDGE, C. J. * * * I must say, for my own part, that I very much agree with what Sir Henry James has said, and I think he has put his finger upon the true point of misconduct in the solicitor in saying that, at least, he should have given warning to his honourable opponent that he had a traitor in his camp. I feel, on the other hand, very much the considerations Mr. Herschell has placed before us, and I do admit that a solicitor who has a client misconducting himself is placed in great difficulty, because he has conflicting duties to perform. He has the duty of honour towards his opponent, and he has the duty, no doubt, of professional confidence towards his client; and it is not always easy, I agree, exactly to draw the proper line between these conflicting duties.

But I think here it was clear that the solicitor should have let his opponent know, at least, that there was some one giving improper information. Whether he might not have sent back the opinion, and said, "I have seen this opinion unintentionally; I think you ought to know that, somehow or other, this has been obtained from your office; take care what you are about," I think it is a very great question too. * * *

Upon the whole—though not without some doubt—we come to the conclusion that the justice of the case will be sufficiently met by discharging the rule upon payment by the solicitor of all the costs incurred by the law society, or those who brought forward the matter; those costs to be taxed as between solicitor and client.[53]

[53] "However advantageous it may be in the conduct of a client's case to learn precisely what the evidence of the adversary may be, or the course of

COACHING OF WITNESSES. Geo. W. Warvelle, *Essays in Legal Ethics* (1902) pp. 112–115: A very important question is raised when we come to inquire into the extent to which a counsel may instruct the witnesses who are to testify in a trial. The law guards the production of testimony with jealous care. It will not even permit a leading question, if relating to a material issue, to be put or answered. This is not because the answer may not be true, but because it has been suggested by the manner in which the question was framed. In such a case the answer is not regarded as the free act of the witness, but rather as the suggestion of counsel, and because such answer has, to a certain extent, been molded by another, the testimony is rejected as incompetent.

182. If this is true of leading questions put during the course of a trial, what shall be said of the suggestions made to witnesses during the preparation for a trial? How far is an attorney justified in suggesting or dictating the answers that may or shall be made to questions that may be put, either by himself or opposing counsel, at the hearing? It must be confessed that the question is one of great difficulty in its proper solution.

183. It is generally conceded that a discreet and prudent attorney may very properly ascertain from witnesses, in advance of the trial, what they in fact do know, and the extent and limitation of their memory, as a guide to his own exertions, but this, it has been held, is as far as he may go, legally or morally.[54] His duty, it is contended is to extract the facts from the witness, not to pour them into him; and, while he has a right to learn all that the witness does know, he has no right to teach him what he ought to know. * * *

185. ADVISING WITNESSES. * * * While counsel may not assume the role of instructor, he may, with propriety, advise his own witnesses in respect to their testimony. The average witness will usually bring forward much that is incompetent, irrelevant and immaterial; it is a legitimate function for counsel to sift this and to inform the witness what is and what is not wanted. He may further advise the witness with respect to the character and methods of opposing counsel on cross-examination, and caution him in regard to same. He may instruct the witness as to what evidence is and what is not admissible, and suggest to him his conduct and demeanor while on the stand. In-

action he is planning to pursue, the lawyer should not resort to trickery to obtain the knowledge. Whatever knowledge comes to him in the natural course of events he is entitled to make use of, but for him to adopt underhanded methods to obtain it is contrary to legal ethics."—Gleason L. Archer, *Ethical Obligations of the Lawyer* (1910) § 61, pp. 140, 141.

"A lawyer is not to eavesdrop or listen at keyholes. There are honorable ways of acquiring a knowledge, more or less accurate, of the designs and doings of the other side."—John C. Reed, *Conduct of Lawsuits* (2d Ed.) § 121, p. 85.

[54] Matter of Eldridge, 82 N. Y. 161, 37 Am. Rep. 558 (1880).

deed, in many cases this would be his duty. It will rarely happen that men who are unused to the procedure of courts can take the stand without some previous advice, and do justice to either themselves or the parties.

186. * * * There is no impropriety in counsel advising his witness not to speak of certain matters unless specifically questioned with respect to same. This is not "coaching," in the sense in which that term is ordinarily employed. Neither is there anything improper in cautioning a voluble witness against saying too much, nor in urging a reticent one to tell all he knows, even though in so doing suggestions are required to be made. Again, the witness must frequently be shown the difference between what he actually knows and what he merely surmises, and, to do this, "instruction" is essential.[55]

[55] "'Coaching a witness' is sometimes spoken of by laymen as something akin to subornation of perjury, but rightly considered it is nothing of the sort. Your witnesses are presumably honest, but inexperienced. Some of them may never have entered a court room. It would be foolish, to say the least, to let witnesses, however desirous of telling the truth, take the stand without some idea of what is expected of them. You must be patient with many and severe with some, but make it your invariable rule to go over carefully with every witness, as well as with your client, the entire case, asking the questions largely as you will ask them in court and writing down the answers. You can and should cross-examine your client and his witnesses and point out what may be asked by opposing counsel. If they understand the case, as they will in greater or less degree, they will give their evidence understandingly because they will know how one part fits in with another. You may properly caution your witnesses that an answer, given in a certain way, while truthful, will be possibly used against them, and suggest putting it another way to advantage. Not only does proper coaching give the witness experience, it enables him to answer without faltering and hesitation, and keeps him from volunteering some foolish remark or uncalled for and unnecessary statement. He may, indeed, get off something of the sort despite all your warnings, but he is far less likely to do it, for if you have been over the matter sufficiently, he will stop after answering the question. Nothing that I can say to you will help you more as trial lawyers than that you must go over your case thoroughly with your witnesses.' "—Henry Burt Montague, *The Day's Work*, 9 Maine Law Rev. 160, 171.

"There is a great difference between 'coaching' a witness and preparing him for the witness stand. If a witness is 'coached' he is apt to be led to perjury, but if he is merely prepared, then, in my judgment, the cause of truth is advanced."—Francis L. Wellman, *Day in Court* (1910) p. 94.

In Thomas Edward Crispe, *Reminiscences of a K. C.* (1909, 2d Ed.) pp. 228, 229, it is said: "It is considered somewhat bad form to interview your witnesses except in criminal cases and in the case of experts, such as accountants, engineers, surveyors, and scientists, but without shame I confess I have done so frequently and have had the example of some eminent men to shield me."

In re THOMAS et al.

(Circuit Court of the United States, District of Colorado, 1888. 36 Fed. 242.)

Motion to disbar Charles S. Thomas and James M. Downing.

MILLER, Justice (orally). * * * The charge made against these parties is a very serious one. Stripped of its verbiage, it is that Mr. Thomas and Mr. Downing, being employed as attorneys in a contest in one of the courts, undertook—to use a short and expressive phrase—to "tamper" with the witness of the other side. The substance of the charge is that they, having received notice that the deposition of this witness, whose name is Oswalt, I believe, would be taken at Salt Lake City, sent an agent of theirs to find him out, and to get him away from Salt Lake City, so that the deposition would not be taken at all; and that they further brought him to this city, and that Mr. Thomas had private interviews with him, and that he was then spirited away, and registered at the hotel by a false name, so that even here he could not be found; and in various ways partaking of that character, that these attorneys undertook to thwart the ends of justice by contriving to get this witness out of the way, and also by offering him inducements to swear favorably to their client. If this charge were established by the evidence, I would have no hesitation in turning out the highest man that ever lived, if I had power to do it. The lawyer in this country is one of the administrators of justice. The judge who presides in the court is another, with more authority of position, and, perhaps, in some respects a more burdensome one. But the court, and the clerk, and the marshal, the sheriff, the jury, the lawyer all constitute ministers of justice; and a lawyer who consciously undertakes to thwart justice is unfit for the position, as much as the judge who accepts a bribe, or knowingly decides a case against the law and the right; and it should be understood that they are subjected to the same responsibilities. They have a duty, undoubtedly, to their clients; but that is not the first duty, as is generally supposed. Their first duty is the administration of justice, and their duty to their client is subordinate to that. With regard to what has been proved in this case, I am happy to say that I do not think the case is made out in that full sense of an intention to do the great wrong which is charged against these parties that it should be proved, to justify an order to dismiss them from the bar. With regard to Mr. Downing, I shall say no more in these remarks, because he must stand or fall with Mr. Thomas. Mr. Thomas very manfully takes the whole of this matter upon himself.

The instructions under which Mr. Eames, who did all this wrong, acted, were submitted by Mr. Downing to Mr. Thomas, as senior counsel in the case, who examined them, who approved of them, and who directed them to be delivered to Mr. Eames. It appears that this man Oswalt was familiar with the facts of the early inception of a mining

claim which is in contest between Mr. Tobey and a Mr. Wheeler, and that it had been difficult to find out where he was. It may perhaps be said it sufficiently appears that both sides were anxious to get hold of him. Certainly it appears that Mr. Thomas, for his client, the defendant Wheeler, had been seeking for the whereabouts of this man for a good while, and his first intimation about where he probably was, was the receipt of the notification given by counsel on the other side that Mr. Oswalt's deposition would be taken on commission at Salt Lake City. Thereupon he and Mr. Downing instituted proceedings by which Mr. Eames, who is not a lawyer, as I understand it, but is some kind of an agent that does not shine very creditably in this connection, was requested to go to Salt Lake City and find Oswalt, and have a conversation with him, and, as is averred, get him away from there and bring him here, where he could be interviewed by Mr. Thomas. It is very clear that Mr. Eames did go to Salt Lake, and found his man, had conversations with him, made him drunk, got him away so that the deposition could not be taken at the time appointed at Salt Lake, brought him to this place, took him to the office of Mr. Thomas, and Mr. Thomas had the conversation with him. Now, if it were clearly proved that Mr. Thomas gave directions and instructions to do all of this, I think his case would be a bad one. But Mr. Eames' instructions, so far as Mr. Thomas is concerned, are in writing, and what is not in writing depends mainly on the testimony of Mr. Thomas himself; and I must say, on behalf of Mr. Thomas, he swears with a great deal of apparent candor, with none of the usual effort to evade, and not to recollect, and get round things; and it is favorable to him, I think, that he states the case just as he understood it, and tells the truth. Mr. Thomas' view of some of these things may be unfortunate; and his explanation of why he did some of these things does not, in my opinion, come up to the highest standard of honor in the legal profession. He has views about those things which I would not approve. He has notions about the rights and duties of an attorney to look after his client's interests, and to seek interviews with his opponent's witnesses, and to bring them to his office, and things of that kind, which I do not think are justifiable. But we cannot expect every attorney of the court to be imbued with the very highest standard of legal ethics, and it would be a very dangerous rule that would throw every man over the bar whose views upon that subject were of a lower grade than those of gentlemen of a higher notion of the moral obligations of an attorney. It is somewhat like the general distinction between crimes punishable by statute and moral delinquencies, to which men must be left for their correction to the public sentiment of the community, or to religious principles, or to their general sense of right and wrong.

The main charge against Mr. Thomas, and the one which presses the hardest, is in these written instructions, which were prepared by Mr. Downing, were submitted to Mr. Thomas, considered by him very

fully, and handed to Mr. Eames as the guide of his conduct. I do not think it necessary to read those particular sentences which bear the hardest upon Mr. Thomas, but they do imply a desire that this witness shall be seen by Mr. Eames before this deposition is given; they do imply a desire that Mr. Thomas shall in some way have an opportunity of talking with Mr. Oswalt; they do imply a desire that Mr. Eames shall, in his interview with Mr. Oswalt, if he obtains one, endeavor to make a favorable impression on Oswalt in regard to Mr. Thomas' client (I think that is the worst expression in the instruction), that he shall have a talk with him, and that he shall try to incline him favorably to Mr. Thomas' client. Certainly that cannot be approved of. Certainly it is a thing that ought not to be done. Certainly the practice of the law would become a very bad thing if the lawyer opposed to a man shall go to his witness and seek to impress him favorably to their side, or against him for whom he is known or expected to be a witness. I disapprove of such a thing as that very much. I feel bound to say here that I do. But that is not the question that I am to decide. I am to decide whether Mr. Thomas was guilty of such moral delinquency and intention of wrong as disqualifies him for practicing law in this court. I cannot say it. I think Mr. Thomas acted very unwisely, very imprudently; did not act well in the matter. I should hate to see other attorneys here follow that example. But Mr. Thomas says, and swears (and there comes in the value of the frankness with which he does swear; he does not deny all that; he takes it upon himself)—he says: "I approved of these instructions, but I never thought for a moment of any improper inducements being held out to Mr. Oswalt to make him swear otherwise than what he would have sworn. It was no part of my advice that he should be tampered with by being made drunk, carried off to a hotel, or kept out of the way. I had no purpose of that kind; and the language does not necessarily imply it. I simply knew he was a very important witness for both sides, and that he had been hiding out of the way for months and months, and we wanted him as badly as the other side. I wanted an opportunity to know from his own mouth what he would swear to." That is the substance of what Mr. Thomas says, and I am inclined to think he tells the truth. I do not think he meant bribery, or intimidation, or any guilty means of achieving the object which he had in view. The trouble is that that kind of a thing is susceptible of misconstruction; not only misconstruction, it is susceptible of abuse, and it is one of the means which lead to abuse.

Now, under the English system of law by which counsel and attorneys practice in the courts of that country, and from which we derive most of our law upon the subject, the attorney and the counselor or barrister have separate and distinct duties. All this which Mr. Thomas undertook to do through Mr. Eames belongs in that country to the attorney at law, or the solicitor in chancery—the man who never appears in court at all, who gets up the testimony, who learns what

witnesses will swear, or at least what the witnesses on his side will swear to, who endeavors to inform the barrister or counselor what will be proved on the other side—and he, having ascertained all this, puts that into a paper called a "brief." That is the origin of the word "brief" in the practice of the law. This attorney, if it is a case at law, hunts all this up, ascertains, has his talk with his witnesses, learns from their own mouths what things they will testify to, and puts it down on paper, hands it to the barrister; and these are called "instructions" in the English practice. In those early days the lawyer made his speech before the evidence was offered. He says, "I am instructed that such and such things will be proven," and he refers to his paper, and he relies upon that instruction of the attorney; but he never has an interview with the witness, and it is considered unprofessional for him to have any talk in advance with a witness, even on his own side. But in this country that system has not prevailed. There is no separation of the duties of an attorney and a counselor. There is none in practice, although often those admitted to the bar are sworn in as attorneys and counselors both, but they perform the functions of both; and so the lawyer, placed as Mr. Thomas was, is very often compelled for himself to have interviews with his own witnesses, and to ascertain what they will testify to in the matter; and in the same way he must seek, either from his client or somebody else, to know what will be the case against him.

Now, in this double capacity, Mr. Thomas was seeking for light, and pursuing, as he supposed, the best interests of his client, as he swears; and I think did believe consistently with the proper course for a lawyer exercising both the function of an attorney and counselor. I think he was mistaken in the propriety of some of the efforts he made to discharge that duty. I should be sorry to have them prevail as the common modes of practice in this country. But, having read all the testimony in this case, and read the deposition and sworn answer of Mr. Thomas, I cannot feel that he was morally guilty of such intentional misconduct as justifies his expulsion from the bar. The motion to that effect is accordingly overruled, and also with regard to Mr. Downing.[56]

[56] In Stephens v. Hill, 10 M. & W. 28, a proceeding in the Court of Exchequer in 1842, "an attorney" was charged with persuading a witness, by threats and promises, to go away so as not to testify, and with giving a writing to another witness, who was relied on to help get the first witness away, indemnifying him from any damage he might sustain or be put to by reason of going away so as not to testify. The attorney insisted that a rule to show cause could not be granted since the offence charged was indictable, but the court ruled otherwise, though holding that the attorney would not be required to answer the matters of an affidavit, as that might compel him to incriminate himself. Lord Abinger, C. B., said of the offense charged: "I cannot conceive how any attorney employed to prosecute or defend a suit in a court of justice can be justified in using any influence, directly or indirectly, for the purpose of preventing a witness who has been subpœnaed by his adversary from coming forward to give evidence. The present charge is therefore one of a very serious nature, as the proceeding complained of would, if un-

COUNTENANCING CORRUPT PRACTICES BY CLIENT.

N. Y. Committee. *Question 9:* A. v. X. A.'s claim is undoubtedly dishonest, but serious difficulties will be encountered by X. in his defense. Y. has knowledge of certain material facts and is also in possession of certain documentary evidence which, without the slightest

checked, be an easy way for any attorney to win his causes." Page 33. As the "attorney" was really a solicitor, and so was not on the roll, the court simply prohibited him from practicing in that court.

In Murray v. Lizotte, 31 R. I. 509, 77 Atl. 231 (1910), an attorney was suspended from practice for a year because, knowing that a layman had acted as special investigator for the petitioner in a divorce suit, he employed him as special investigator for the respondent in the suit and agreed to pay him for evidence to be obtained against the petitioner, or, as the opinion put it, "to pay him the price of his treachery." Dubois, C. J., said: "It is probably a case where zeal outran discretion. However this may be, it is time that a salutary lesson be given, to the end that fidelity and loyalty may be duly recognized and appreciated, and that lapses therefrom may receive proper condemnation." 31 R. I. at page 529, 77 Atl. at page 239. The court later had to enjoin the attorney from doing various things which he insisted that a layman could do and that therefore he could do, though suspended, such as collect claims, give advice on legal matters, draw deeds and other legal documents, search and certify titles, etc. See In re Lizotte, 32 R. I. 386, 79 Atl. 960, 35 L. R. A. (N. S.) 794 (1911).

In In re O'Keefe, 49 Mont. 369, 142 Pac. 638, L. R. A. 1915A, 514 (1914), an attorney was suspended for writing to witnesses who had refused to give testimony that was material a letter which led them to believe that they would be paid a certain amount contingent upon the successful outcome of the case. The court said that it was immaterial that the promise was so worded as to make its illegality apparent, that the attorney never intended to pay the witnesses anything, that the attorney's intention was to procure only truthful testimony, and that the witnesses in fact gave truthful testimony. Sanner, J., for the court, said: "The material question is what effect such promises are calculated to produce upon a witness or upon his testimony, and it cannot be gainsaid that this effect is not in the direction of plain unvarnished truth. In such matters the exigencies of any given cause must yield to the larger demands of public good, and we decline to hold that it is proper in this state for an attorney to buy testimony, whether true or false."—49 Mont. at page 378, 142 Pac. at page 641.

On offering to pay a witness as ground for the discipline of a lawyer, see L. R. A. 1915A, 514, note.

In Dickens' Case, 67 Pa. 169, 5 Am. Rep. 420 (1871), the court found that Dickens as counsel in a case had endeavored to get opposing counsel drunk in order to have the advantage over him in the trial. Agnew, J., said: "This was a wicked act, as well as one which struck directly at the due administration of justice. In its effect and criminal purpose it differs none from tampering with a juror, corrupting a witness, or bribing a judge. It strikes directly at the interests of the opposite party, with as great force as if he lost his cause from the misconduct of juror, witness, or judge. The man who can do this thing is unfit to practice in a court where justice is administered, and should be expelled from its bar; or at least should be suspended from the practice until he has shown, by sincere amendment, that his offense is thoroughly purged."

In In re Bayles, 156 App. Div. 663, 141 N. Y. Supp. 1052 (1913), a trap arranged by an attorney to get his client's wife to commit adultery, or to seem to, so as to furnish ground for divorce, was held to be ground for the attorney's disbarment.

An attorney for a husband, who colluded with the wife to have it appear that the attorney and she were staying at a hotel as husband and wife, so the husband could get a divorce, was disbarred for manufacturing evidence in Matter of Gale, 75 N. Y. 526 (1879).

difficulty—by simply affixing or withholding his signature—could be used to aid A. or to strengthen X.'s defense. Y. is evidently a person not affected by conscientious scruples as to the sanctity of an oath. He has a claim of $——— against S., a person closely related to A., and has made an offer to B., defendant's attorney, to withhold his signature from said papers and to testify for the defendant if his claim against S. is fully paid by X. B. refuses to dicker with Y. and tells Y. that he will have none of his offers. B. feels that he is perfectly right in the matter, deeming the acceptance of such an offer absolutely and unqualifiedly unethical, immoral and dishonest.

So far, so good. But, now, what about X. and his interests? Is it B.'s duty to divulge to him the foregoing facts, he being ignorant thereof at this time? And, if X., upon learning these facts, should decide that his interests would best be served by accepting Y.'s offer, what attitude should B. assume? Under no circumstances will B. make a deal with Y., with or without instructions from X. Then, should B. withdraw from the case if X. does not agree with him as to the moral turpitude involved in making a deal with Y.?

Further, Y. being willing to aid A. upon the same terms, should that fact have any weight? Would X. be justified, under these circumstances, B. refusing to dicker with Y., in bowing to the inevitable and committing an obviously immoral act, although probably necessary to an otherwise absolutely honest defense?

Lastly, if your Committee is of the opinion that the foregoing matter should be brought to X.'s attention by B., and X. should accept Y.'s offer against B.'s wishes, would not B. be justified in refusing further to conduct X.'s defense? B. feels that he should not wink at such obviously nefarious and immoral conduct on Y.'s part and on X.'s possibly favorable attitude towards Y.'s offer. Is not B. right? . . .

Kindly treat this matter as though it were impossible to obtain evidence of the numerous crimes involved.

Answer: Neither the interests nor instructions of clients justify their lawyers in countenancing or utilizing corrupt practices. A lawyer is under no duty to submit to his client for his decision a proposition in fraud of justice. A mere difference of view between lawyer and client does not require the lawyer to withdraw. Under the circumstances suggested, the lawyer should not assist his client to avail himself of the corrupt activities of another. If so instructed by a client who will not be persuaded, in the opinion of the Committee he is justified in withdrawing from the cause.

V. Resort to Dilatory Proceedings and Technicalities

PROFESSION RESPONSIBLE FOR THE LAW'S DELAYS. Canon IX of the Code of Legal Ethics of the California Bar Association, as Adopted in 1910: The Bar admits its full responsibility for such of the law's delays as are not inherently necessary under our system of government. This Bar recognizes that it is an immediate and continuing duty on the part of the profession, on the Bench and at the Bar, to remedy the present tardy methods of conducting legal controversies. To that end the members of the Bar are admonished that code provisions and rules of court regulating pleadings, practice, and procedure are intended to facilitate and speed the administration of justice. Those in existence are recognized by the Bar as adaptable to that purpose if their spirit is insisted upon and obeyed by both Bench and Bar.

To the same end, the Association declares it to be not professional for a lawyer to take advantage of any imperfections in the machinery of the law, with the intent thereby to retard, delay, or restrict the speedy trial and conclusion of civil and criminal actions and proceedings, or the hearing of any demurrer, motion, or matter therein requiring a hearing.

It is not professional to interpose demurrers for the purpose of securing delay, nor to carp at trivial defects in a pleading not going to the merits; nor to move to strike out parts of a pleading where no useful purpose will be subserved thereby; nor to obtain by stipulation or by order more time to plead than is reasonably and fairly necessary; nor to neglect to demand a jury trial until on or near the day of trial; nor ever to demand a jury trial where the purpose of the demand is to delay the cause; nor to move or request a court to grant a continuance of a cause on statutory grounds without making a strictly legal showing, or upon any other grounds without making or causing to be made to the court and opposing counsel a full, truthful, and unexaggerated statement of the reason therefor; nor to refrain from notifying the court and opposing counsel, as far in advance of the time set for trial as the circumstances of the case will admit, of an intent to move for a continuance; nor to move for a change of venue or to make any other motion in an action or proceeding, merely to vex, harass, or annoy the opposite party, or to put him to needless expense, nor to make use of the delays necessary or possible in the law for the purpose of wearing out an antagonist or forcing him to a compromise.

It is the duty of the Bench and Bar to be punctual in attendance upon court.

It is the lawyer's duty, in the trial of causes, to expedite the work of the court by admitting the truth of all matters which he knows to be true, and not to consume its time by requiring proof, in the hope of

discovering and obtaining advantage from technical defects in an opponent's preparation or procedure.

The lawyer is ethically obligated, not only to his clients, but also to the Bar, to take upon himself no more business than he can properly and speedily dispatch. While reasonable courtesies in the matter of continuances are essential in the experience of every lawyer, it is unethical to expect, or to seek to obtain, postponements or delays in the trial of causes which are either unreasonable in number or duration, or which are not absolutely necessary.

DEFEATING HONEST CLAIM BY TECHNICAL DEFENSE THAT ACTION AT LAW BROUGHT WHEN ONLY SUIT IN EQUITY PROPER.

(Doctor and Student.[57])

Dialogue II, Chap. VII.—*The Sixth Question of the Student.*

A man maketh a feoffment to the use of him and of his heirs, and after the feoffor putteth in his beasts to manure the ground, and the feoffee taketh them as damage-feasant, and putteth them in pound, and the feoffor bringeth an action of trespass against him for entering into his ground, etc. Whether may any man, knowing the said use, be of counsel with the feoffee to avoid the action?

Doct. May he by the common law avoid that action, seeing that the feoffor ought in conscience to have the profits?

Stud. Yes, verily; for as to the common law the whole interest is in the feoffee, and if the feoffee will break his conscience, and take the profits, the feoffor hath no remedy by the common law, but is driven in that case to sue for his remedy by subpœna for the profits, and to cause him to enfeoff him again: and that was sometime the most common case where the subpœna was sued, that is to say, before the statute of R. 3. but sith the statute, the feoffor may lawfully make a feoffment. But nevertheless, for the profits received, the feoffor hath yet no remedy but by subpœna as he had before the said statute. And so the supposal of this action of trespass is untrue in every point as to the common law.

Doct. Though the action be untrue as to the law, yet he that sueth it ought in conscience to have that he demandeth by the action, that is to say, Damages for his profits; and as it seemeth, no man may with conscience give counsel against that he knoweth conscience would have done.

Stud. Though conscience would he should have the profits, yet conscience will not that for the attaining thereof the feoffor should make an untrue surmise. Therefore against the untrue surmise every

[57] From the edition by William Muchall published at Cincinnati in 1874.

man may with conscience give his counsel; for in that doing he resisteth not the plaintiff to have the profits, but he withstandeth him that he should not maintain an untrue action for the profits. And it sufficeth not in the law, ne yet in conscience, as me seemeth, that a man have right to that he sueth for, but that also he sue by a just means, and that he have both good right, and also a good and true conveyance to come to his right. * * *

Doct. Though the plaintiff hath brought an action that is untrue, and not maintainable in the law, yet the defendant doth wrong to the plaintiff in the with-holding of the profits as well before the action brought, as hanging the action; and that wrong, as it seemeth, the counsellor doth maintain, and also sheweth himself to favour the party in that wrong, when he giveth counsel against the action.[58]

[58] "How far it is right for a man to take advantage of the technicalities of the law is a moral question. His legal adviser is bound to take this into account. In some cases it is not immoral, in others it is, for a man to avail himself of a technicality. Why is not a lawyer bound to advise on that question also? How can he be said to discharge his duty if he refrains? It is at this point, as it seems to me, the ethics of my profession stand in need of improvement. It may well be that, if you only ask me as to the law, I have no standing to give you my opinion on the morality of its application to your case. But if you ask my advice as to what you shall do, or my assistance in doing it, then I hold that I am under a duty as a man, as a citizen, and as your counsel, to give you my opinion as to the morality of your proposed conduct, to dissuade you from doing an immoral thing, however legal it may be, and to refuse you my assistance, if you persist."—John Brooks Leavitt on *Lawyer and Client* in *Every-Day Ethics* (Yale University Press, 1910) pp. 55, 56.

But Warvelle says:

"256. * * * A client comes to his attorney for legal advice in respect of something that does not commend itself to the moral sense. May the attorney, after inviting the confidence of the client, refuse to advise him? No! decidedly, No! He might have refused to see him in the first instance, but, having admitted him and heard his plaint, his duty compels a response. He must advise him; he must advise him honestly. How shall this be done, and what, under such circumstances, would be honest advice?

"257. It has been said that when a lawyer is asked for his opinion upon a purely legal question his duty is discharged by stating the law as it is. But frequently the client seeks more. He desires advice not only with respect to present conditions but also concerning future conduct. What should be the attorney's attitude in such a case? Has he a right to sit as a judge of the moral quality of the client's actions? Surely, we must also answer this question in the negative. Therefore, if the client desires to know what course the law requires under particular circumstances, it is the duty of the legal adviser to explain it. But here his duty ends. He is under no obligation to further the unjust schemes of the client, and should refuse to become a party to them. It has been urged that the attorney, on such occasions, should take advantage of the opportunity to deliver to the client a moral lecture. The attorney should do nothing of the kind. He was consulted as a lawyer, not a moralist. His opinion was sought on a question of law, not morals, and the experience of the writer is that attempts of this kind on the part of the lawyer are generally hotly resented by the client. If he so desires he may show the client the iniquity of the scheme as a reason for declining to actively assist him, but this is enough."—Geo. W. Warvelle, *Essays in Legal Ethics* (1902) pp. 155, 156.

Hoffman's Resolution X: "Should my client be disposed to insist on captious requisitions, or frivolous and vexatious defenses, they shall be neither enforced nor countenanced by me. And if still adhered to by him from a hope

Stud. If the plaintiff do take that for a favour, and a maintenance of his wrong, he judgeth farther than the cause is given, so that the counsellor do no more but give counsel against the action: for though he give him counsel to withstand the action for the untruth of it, and that he should not confess it, and to make thereby a fine to the king without cause; yet it may not stand with reason that he may give counsel to the party to yield the profits. And therefore I think he may in this case be of counsel with him at the Common law, and be against him in Chancery, and in either court give his counsel, without any contrariosity or hurt of conscience. And upon this ground it is, that a man may with good conscience be of counsel with him that hath land by descent, or by a discontinuance without title, if he that hath the right bring not his action according to the law, for the recovering of his right in that behalf.

FAILURE TO DISCLOSE THAT WRONG PARTY HAS BEEN SUED WHERE SUCH FAILURE WILL ENABLE PERSON REALLY LIABLE TO ACQUIRE DEFENSE OF STATUTE OF LIMITATIONS. N. Y. Committee. *Question 53:* A. is the plaintiff, suing to recover $10,000 for injuries sustained in falling down unlighted stairs, in an apartment owned by B., a corporation, which is insured by B., a casualty company, for $5,000.

C. an attorney at law, is a stockholder in, secretary of and attorney for B., and is managing the apartment house.

A. believing C. to be the owner and ignorant of B.'s title, sues C., who notifies D. of the suit, and is requested by D. to act as its attorney and defend the action and not to disclose the name of the real owner to the plaintiff.

I. Is the attorney required to disclose, or is he justified in disclosing to the plaintiff's attorney, the fact that he is not the owner of the property, but that B. is the owner, his failure to disclose aiding in securing the running of the statute of limitation against B.?

II. Is it proper for C., the defendant, as a condition of defending the action, to require compensation for his professional services in so doing, from the casualty company which requests him to defend the action?

Answer: In the opinion of the Committee the attorney is under a high ethical obligation, by reason of his position as an officer of the

of pressing the other party into an unjust compromise, or with any other motive, he shall have the option to select other counsel."—David Hoffman, *A Course of Legal Study* (2d Ed.) Vol. II, p. 754.

"Many lawyers of the present day disdain to take advantage of a mere formal defect in an opponent's pleading, unless the opponent is clearly seeking an unjust end and the means of opposing him are doubtful or inadequate. In other words, their aim is to see that justice is done, and, unless it will further the ends of justice to take advantage of the technicality, they ignore it."—Gleason L. Archer, *Ethical Obligations of the Lawyer* (1910) § 75, p. 163.

court, and should not lend himself to such collusive arrangement to secure the running of the statute of limitation, nor accept a retainer or compensation therefor from the casualty company. He should promptly and affirmatively disclose that he is not the owner of the apartment. We are not agreed that the attorney is under any duty to disclose the ownership of B.[59]

MORAL DUTY OF COUNSEL WHERE THE CLIENT IS MORALLY IN THE WRONG. William Forsyth, *Hortensius* (3d Ed.) p. 399, and note 2: Let us put the case of a party who has been paid a debt due to him from another; but who has omitted to give a receipt, and knows that his former debtor has no means of proving the payment. Suppose we were to bring an action against the latter, and these facts were communicated to a counsel with his brief, and he knew that his client was seeking to recover his debt twice over,—his duty is clear and imperative. He must decline to appear in such a cause, and [must] leave the dishonest creditor to enforce his claim as he best may.

[*Author's Note:* It is to be hoped that such a case could not occur for the counsel receives his instructions solely through the medium of an attorney; and it would be equally the duty of the latter to refuse to be employed in the service of iniquity. So that the fraudulent attempt would be stopped in limine. Suppose, however, that a receipt has actually been given, of which the counsel has heard nothing; but when produced in court it turns out either that there is no stamp upon it, or an improper one. Ought he to take the objection, and thus enable his client to win the verdict, thereby in effect pocketing the money twice over? This is, I think, a question of some nicety, especially if the objection has occurred only to the advocate himself, and is not perceived by either the court or the client.]

[59] "For instance, there is a provision in the New York City Charter which requires persons having claims against the city to present them to the comptroller before bringing suit. The law is familiar to most counsel, and it is generally complied with. But it sometimes happens that an attorney, after his client's claim has been duly presented to the comptroller, will omit to state that fact in his complaint when action is begun in the courts. Now, what does the attorney for the city do when he observes this fatal omission in the formal papers? Does he go to his fellow practitioner and call his attention to the technical error, on the theory that the city does not desire to deprive any honest man of his just dues? Not as a rule. He carefully draws his answering papers in the manner best calculated to prevent his adversary from becoming aware of the error, and if possible he delays the trial until the claim is legally barred by lapse of time. Then he lets the case crawl up to trial on the calendars, and after a jury has been impaneled he unmasks his technical objection batteries, and shoots the case out of court with costs against the complainant. If the creditor is not absolutely barred, he may commence his proceedings over again, but rather than do this he is usually willing to compromise."—Frederick Trevor Hill, *Legal Defeaters of the Law*, 2 Putman's Monthly, 293, 294, 295.

ANDERSON v. GEORGE.

(Court of King's Bench, 1757, 1 Burrows, 352.)

Upon a rule for the plaintiff to shew cause "Why a verdict obtained by him for £16. should not be set aside, and a new trial ordered upon payment of costs."

The case appeared to be, That the plaintiff had sold goods to the defendant: who paid for them by a promissory note of one Hopley; which the defendant indorsed. The plaintiff demanded the money of Hopley: but indulged him with further day of payment, several times; till Hopley broke.

The only dispute between the parties was, "Which of them ought to bear the loss of this note." For the plaintiff was paid; if the loss ought to fall upon him, through his neglect or indulgence in giving further credit to Hopley.

There were two counts in the declaration: one, for goods sold; the other against the defendant as indorser of the promissory note.

When the cause came on to be tried, though both parties came to try the real merits of the question between them, viz. "Which should bear the loss of the note occasioned by Hopley's failure;" and the plaintiff's agents had the note in court; yet, finding upon their own evidence, "that the plaintiff had given repeatedly further credit to Hopely," they resorted to a trick, and rested their case upon proving the sale and delivery of the goods, which never was disputed. The defendant could not produce the note: it was in the plaintiff's custody. Relying upon its being the only ground of the plaintiff's case, the defendant had not given him notice "to produce it." The count stating it could not be given in evidence; and the defendant had not intitled himself to prove the contents, for want of notice to produce it; Lord Mansfield told them, at the trial, it was an improper artifice; that no verdict could stand which was so obtained. But the plaintiff refused to produce the note; and had a verdict of course.

It was now contended for the plaintiff that the verdict was regular, and the plaintiff in no fault: for, without notice, he was not obliged to produce the note. Therefore the verdict ought not to be set aside.

THE COURT thought the plaintiff had taken an unfair advantage, contrary to justice and good conscience. That the rules of practice must be general: but he who abused them in a particular case, should not shelter a trick by regularity. The plaintiff did not want notice to produce a note he had in court, and which he had laid in the declaration as his ground of action. Besides, he took a verdict for the price of the goods; though he had received satisfaction, the evidence of which was in his own custody, and suppressed.

They not only set aside the verdict; but set it aside without payment of costs: and declared, "the next time that a party should obtain a verdict in like manner, by an unfair unconscionable advantage, with-

out trying the real question, they would set aside the verdict, and make him pay the costs."

A new trial being ordered, this cause was tried at Guildhall, the sittings after this term: and the defendant had a verdict upon the merits, to the satisfaction of every body; the case being clear beyond a doubt.[60]

[60] "It were to bee wished Atturnies would practice more fairely, and give rules legally, and call one to another for pleas and answers, and not to lie upon advantages, and snap up Judgments, as some doe, without feare or wit, whereby they both trouble the Court to undoe what they have so unduely done, and put their Clients to needlesse expences: Whereas, if they should proceed fairely and deliberately, they might bring honour to the Court, reputation to themselves, and expedition to their Clients' causes."—Thomas Powell, *The Attourney's Academy* (1647) p. 42.

"Judge Brewer cites a striking example of the sort of spoke which the trickster can surreptitiously insert in the wheels of justice. A witness testified in a certain case that a person named Mary was present when a particular conversation took place, and the question was asked, 'What did Mary say?' This was objected to and after some discussion the judge ruled out the question. An 'exception' to this decision was immediately taken, and on appeal the higher court reversed the verdict and ordered a new trial on the ground that the question should have been answered. At the second trial the same inquiry was propounded and elicited the information that Mary said nothing!"—Frederick Trevor Hill, *Legal Defeaters of the Law*, 2 Putnam's Monthly, 293, 295, 296.

"Fidelity to his client is one of the first requisites in the character of an honorable practitioner at the bar. That fidelity requires that he should maintain all the just rights of his client; but it extends no further. It will not justify any attempt to evade the fair operation of the law, or to impede the administration of justice. A fault on either side of the true line of honorable professional conduct will equally meet the decided reprehension of the court." —Cranch, C. J., in Ex parte G. L. Giberson, 4 Cranch, C. C. 503, 506, Fed. Cas. No. 5,388 (1835).

In contrast to the reliance on technicalities in Anderson v. George, supra, note the action of Abraham Lincoln in a certain case: "In these early days Mr. Lincoln was once employed in a case against a railroad company in Illinois. The case was concluded in his favor, except as to the pronouncement of judgment. Before this was done, he rose and stated that his opponents had not proved all that was justly due to them in offset, and proceeded to state briefly that justice required that an allowance should be made against his client for a certain amount. The court at once acquiesced in his statement, and immediately proceeded to pronounce judgment in accordance therewith. He was ever ready to sink his selfish love of victory as well as his partiality for his client's favor and interest for the sake of exact justice."—Ward Hill Lamon, *Recollections of Abraham Lincoln* (1895) pp. 19, 20.

"The law does not ordinarily concern itself with questions of mere morality. Its casuistry is of a sternly practical kind, which often recognizes as legally right that which the judgment of the conscience must condemn as wrong. And thus instances not infrequently occur in which it may with apt propriety be said that it is morally wrong for a man to insist upon his legal rights."—Horace K. Tenney, *A Rule of Law Which is a Credit to the Bar*, Illinois State Bar Assoc. Rep. 1901, Pt. II, pp. 95, 96, 97.

"The question arises how far counsel may avail themselves of mere technicalities of law to gain their cause. We quite agree with Judge Sharswood that here very much depends on his estimate of the cause itself—whether in his conviction his client's cause is just or unjust. It may happen that a client whose cause is righteous is unable to command the evidence which would prove it; nay, that such evidence, though otherwise at command, is ruled out by these very legal technicalities. In such a case he is justified in parrying his adversary and putting him at bay by every resource, not contrary to

VI. The Trial of the Cause

(*A*) *General Principles*

A. B. A. CANONS.

15. How Far a Lawyer May Go in Supporting a Client's Cause. Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.*

It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.

The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne 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 attorney does not permit, much less does it demand of him for any client, violation

truth and honesty, which legal technics afford. He may not falsify. He may not, for example, procure delays by any false statements by himself or his clients as to the materiality of absent witnesses, or other difficulties. But he may make the most of whatever truth, fact or law, will most tend to thwart the adverse party. He may require him to prove every iota of his case, however technical and practically unimportant. But it is quite otherwise if he be convinced that justice is against him. While he may insist that the adverse claim be legally established, he is not justified in pressing mere technicalities to the utmost against it."—Unsigned Review in 43 Princeton Rev. 286, 302.

*Horace Binney wrote of himself: "I may say to my children that I never knowingly committed an injustice towards a client, or the opposite party. * * * I at all times disdained to practice any strategem, trick or artifice for the purpose of gaining an advantage over my adversary; and unless I thought him unfair, I was generally willing that he should see all my cards while I played them. I can truly say that I am not conscious of having lost anything by this candour, but, on the contrary, have repeatedly gained by it. If my client was at any time suspected, I had no reason to think that I was by either the court or the bar; and how many balancing cases, in the course of thirty-five years practice, this sort of reputation assisted, I need not say." —Charles Chauncey Binney, *The Life of Horace Binney* (1903) p. 443.

of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.[61]

20. NEWSPAPER DISCUSSION OF PENDING LITIGATION. Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An ex parte reference to the facts should not go beyond quotation from the records and papers on file in the Court; but even in extreme cases it is better to avoid any ex parte statement.[62]

B. B. A. CANON.

XXV.[63] RIGHT OF LAWYER TO CONTROL THE INCIDENTS OF THE TRIAL. The lawyer must be allowed to decide as to incidental matters pending the trial not affecting the merits of the cause nor prejudicial to the rights of the client, such as reasonable accommodation to op-

[61] "Every pleader who acts in the business of another should have regard to four things: First, that he be a person receivable in court. * * * Secondly, that every pleader is bound by oath that he will not knowingly maintain or defend wrong or falsehood, but will abandon his client immediately that he perceives his wrongdoing. Thirdly, that he will never have recourse to false delays or false witnesses, and never allege, proffer, or consent to any corruption, deceit, lie, or falsified law, but loyally will maintain the right of his client, so that he may not fail through his folly, or negligence, nor by default of him, nor by default of any argument that he could urge, and that he will not by blow, contumely, brawl, threat, noise, or villain conduct disturb any judge, party, serjeant, or other in court, nor impede the hearing or the course of justice. Fourthly, there is the salary. * * * A pleader is to be suspended if he is attainted of receiving a fee from both sides in one cause, or if he says or does anything in contempt of the judge. * * *"—*The Mirror of Justices*, Book II, chapter 5, 7 Selden Soc. Pub. 47, 48.

"And so, as it seems to me, we may sum up the whole matter of Professional Ethics, so far as the duties of the advocate are concerned, in the simple proposition that we are to present the facts of our side correctly, and quote the law correctly, and then make war for our client to the best of our ability in accordance with the rules of honorable warfare."—William Wirt Howe, *Professional Ethics*, 5 Va. Law Reg. 507, 518.

[62] "The Board [of Managers of the Chicago Bar Association] unqualifiedly condemns the trial of cases in the newspapers and the practice of seeking the lime light through inspired interviews. The better rule undoubtedly is for the lawyer who desires to maintain a scrupulous regard of the professional proprieties, to avoid all such meretricious publicity and let his professional work speak for itself. We recognize, however, that there are special circumstances where the client has the right to demand a dignified conservative statement of his attitude, and a clear explanation of his position, motives and intentions in the public press, and in such exceptional cases, if his client requests, it is the lawyer's duty to prepare such statement or explanation."—Edgar Bronson Tolman, President, in *Chicago Bar Association Annual Reports* (1912) p. 4.

[63] A revision of A. B. A. Canon 24.

posing counsel, agreeing to an extension of time for signing a bill of exceptions, filing or answering interrogatories, and the like. In such matters the client has no right to demand that his counsel shall be illiberal, or do anything repugnant to his own sense of honor and propriety.[64]

ANONYMOUS.

(Supreme Court of New York, 1828. 1 Wend. 108.)

On a motion to set aside a default for not pleading where a sufficient excuse was offered entitling the party to be let in on payment of costs, and where the attorney who had obtained the default declined opening it, on the ground that his client had instructed him not to waive the default, the court observed that such instructions were no excuse to an attorney. The client has no right to control him in the due and orderly conduct of the suit; that if the case was of such a nature as that there could be no doubt in the mind of the attorney, that according to the settled rules of practice the default would be opened by the court on the usual terms, it was his duty, when applied to for that purpose, to open the default, any directions of his client to the contrary notwithstanding, and not compel the party to apply to the court for relief.[65]

[64] "Let me suppose a case for illustration—a very possible case under recent conditions. Following a decision of the Supreme Court, the Circuit Court refuses to consider a bill of exceptions as not appearing to have been presented to the trial judge within the time required, and, no error otherwise appearing, renders judgment for the defendant in error. The plaintiff in error promptly files a petition in error in the Supreme Court, but, through a mistake in the dates, fails to file a printed record in that court within sixty days, so that his case is dismissed. Meantime the Supreme Court overrules its former decision, and it becomes apparent that, if this case is ever heard in the Supreme Court, the judgment by the circuit court must be vacated and the cause remanded to that court with instructions to consider the questions arising on the bill of exceptions. A motion to reinstate the case in the Supreme Court would perhaps be overruled, but if consented to by the defendant in error it would be allowed. Ought the defendant's counsel to consent? If his client refuse to allow his consent, what should he do? His client has gained an unjust advantage by error and mistake, and by consenting that the case should be reinstated in the Supreme Court the parties would be restored to their respective positions when the original error occurred in the circuit court. What is his duty? Now I insist that no lawyer has the right to knowingly aid in working an injustice; and no client has the right to demand of his counsel that he will sacrifice his own honor and fidelity to him." —W. Z. Davis, *Relation of the Bench and Bar*, 21 Ohio St. Bar Assoc. Rep. (1900) pp. 190, 200, 201.

[65] See Levy v. Brown, 56 Miss. 83, 89 (1878).

"It is well settled that, short of a compromise of a client's claim or a confession of judgment, the authority of counsel in a case extends generally to all the customary incidents of litigation and embraces all agreements, stipulations, and admissions appertaining to its conduct through the courts."—Hook, J., in Christy v. Atchison, T. & S. F. Ry. Co., 233 Fed. 255, 256, 147 C. C. A. 261, 262 (1916). On the implied authority of counsel in conducting litigation, see 132 Am. St. Rep. 148, note. See, also, 37 Am. Dec. 167, note.

THE ETHICS OF COURTESY CONTINUANCES. William L. Marbury, *The Lawyer of Fifty Years Ago and the Lawyer of To-Day*, 24 Green Bag, 64, 71: Suppose that, when a case is about to be reached for trial, counsel on one side or the other, or it may be counsel on both sides, have engagements of a business nature out of court. Counsel for the plaintiff goes to the counsel for the defendant and says, "If you force me to try this case to-morrow, I will lose an opportunity to make a large fee." Counsel for the defendant, realizing that he may have occasion in the future to ask similar indulgence, agrees to the postponement. Under our system, delays from this cause are almost inevitable, although not infrequently they are not justifiable on ethical grounds, clients not knowing anything about them.

CLIENT ACTING CONTRARY TO SOLICITOR'S ADVICE—COURSE TO BE TAKEN BY THE SOLICITOR. Opinion of the Council of the Law Society. *Law, Practice and Usage in the Solicitor's Profession* (1909) pp. 284, 285: 932. A client retained a solicitor to conduct an appeal to the Court of Appeal from a judgment of Mr. Justice Kekewich. In that appeal the client was unsuccessful, as the solicitor advised him he would be. The client was represented before the Court of Appeal by counsel. He then, contrary to the advice of the counsel and the solicitor, insisted on appealing to the House of Lords, but proposed to conduct his own case; and the question involved being of an intricate legal nature, the solicitor pointed out to him the folly of his decision, he being quite incapable of properly putting his case forward. The relations between the solicitor and the client were quite friendly, and the client was anxious for the solicitor to act for him in every matter in which he as solicitor could act. The solicitor asked whether he ought to decline to assist his client before the House of Lords, or whether his duty was to withdraw from the case altogether.

The Council saw no reason why the solicitor should withdraw from the case.—Opinion of Council [of the Law Society], November 1, 1888.

(*B*) *The Examination of Witnesses*

A. B. A. CANON.

18. TREATMENT OF WITNESSES AND LITIGANTS. A lawyer should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyer's conscience in professional matters.

He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf.[66]

PUTTING LEADING QUESTIONS TO THE CLIENT AT THE TRIAL. Gleason L. Archer, *Ethical Obligations of the Lawyer* (1910) p. 115: The lawyer owes his client the duty, when interrogating him in court, to studiously avoid putting leading questions. Such questions have the effect of discrediting the value of the testimony elicited, because they give the impression that the lawyer is prompting the witness.[67]

SMITH v. D. ROTHSCHILD & CO.

(Court of Appeals of Georgia, 1913. 13 Ga. App. 293, 79 S. E. 88.)

Action by D. Rothschild & Co. against W. J. M. Smith. Judgment for plaintiff. On levy of execution, Annie M. Smith, wife of the defendant, interposed a claim. During the trial of the claim, and while the claimant was on the stand as a witness, counsel for the plaintiff remarked in the presence and hearing of the jury that if the claimant "were let alone she would impeach herself." Judgment for plaintiff. Motion for a mistrial on account of the remark. Motion denied, and claimant brings error.

POTTLE, J.[68] * * * From the motion for a new trial it appears that the remark was made before the jury and in their hearing. In making the remark, counsel went beyond his right to comment upon

[66] "A client called suddenly upon counsel, and laid a heavy fee upon the table. 'I am,' said he, 'the defendant in a case which is now going on, and I wish to engage you and hope you will treat the opposing party with some severity as he has practiced great severity upon me.' 'Before I take your fee,' said the lawyer, 'let us understand each other. Do you wish me to treat the plaintiff with severity, whether I may think he deserves it or not? If I think he deserves it, I shall do it without your stipulation; and if I think he does not deserve it, I shall not do it for any fee you can pay.' Of course, the client saw his folly, and the case proceeded upon the fair and honorable terms of the counsel."—David Paul Brown, *The Forum; or Forty Years' Full Practice at the Philadelphia Bar* (1856) Vol. II, pp. 32, 33.

[67] "Every advocate is in honor bound not to transgress the rule against 'leading questions' when it really comes to important matters, but it is sometimes extremely difficult. Indeed, there are cases in which the court, in its discretion, may permit him to ask leading questions in the interests of justice, so that important testimony may not be lost."—Francis L. Wellman, *Day in Court* (1910) pp. 161, 162.

"But as Kemp, Q. C., once said to me when some one objected to his asking a leading question, 'What is the good of having a leader unless he asks leading questions?'"—Edmund D. Purcell, *Forty Years at the Criminal Bar* (1916) p. 126.

[68] The statement of facts is an abbreviated statement drawn from the opinion.

the evidence and the witnesses in argument to the jury. If the testimony of a witness authorizes the conclusion, an attorney may properly argue that the witness has shown himself to be unworthy of credit on account of the unreasonable and contradictory statements appearing in the testimony; but this is quite a different thing from telling the jury, while the witness is on the stand, that if he is let alone he will impeach himself. In harmful effect, this may be equivalent to testimony that the witness is of bad character and not worthy of credit; and a witness is impeachable only by legal evidence. In the case of a popular and influential attorney, such as was the counsel who made the remark in this case, an expression of his opinion as to the character of the witness is likely to have weight with the jury and prejudice the adversary's case. And especially is this true where the presiding judge, upon his attention being called to it, fails to rebuke counsel, and by his silence, in the minds of the jury, puts the stamp of his approval upon the remark so made. The court has several times indicated its disposition to require counsel and litigants to adhere to the rules of correct practice, that the trial may be orderly, and free from unfair and prejudicial matter, either of evidence or of argument. The object of all legal investigations is the discovery of the truth; but truth must be discovered by the application of rules of law to competent and relevant evidence, and after a trial in accordance with orderly procedure.

The remark made by counsel in the present case was doubtless inadvertent, and not intended to prejudice the adversary's case. But its harmful effect was not removed, either by a withdrawal of the improper remark and explanation by the counsel, or by a rebuke by the court; and as counsel for the claimant, by moving for a mistrial, promptly invoked a ruling from the court, we feel constrained to reverse the judgment overruling the motion for a new trial on this ground. Martin v. State, 10 Ga. App. 798, 74 S. E. 306; Clarke v. State, 5 Ga. App. 93, 62 S. E. 663; Pelham R. Co. v. Elliott, 11 Ga. App. 621, 75 S. E. 1062.

Judgment reversed.

IMPROPER CROSS-EXAMINATION. N. Y. Committee. *Question 43:* About twenty years ago A. was convicted of a felony. After serving about eight years of his sentence, he was pardoned and restored to full civil rights. Immediately after his pardon he set up in business and has continued in that business, at the same address, for about ten years. He is peaceful, respectable and well thought of. Recently he was compelled to bring two suits against B., both involving questions of fact. B.'s counsel knew of A.'s conviction, his pardon, his restoration to full civil rights and his subsequent clean private and successful business life. Yet, on the occasion of each trial (one before a jury),

B.'s counsel interrogated A. concerning his conviction of a crime, the sentence imposed, the time served, the charge and even made certain details of or consequences of the crime a part of his questions. Do you consider this conduct and these questions of B.'s counsel proper and ethical?

Answer: The committee considers that wanton, unnecessary or unreasonable inquiry or comment respecting the discreditable past history of a witness or party, is unethical and improper professional conduct; it cannot, however, assume to say that such inquiry or comment, whether admissible or not under the law of evidence, was, in the case suggested, wanton, unnecessary or unreasonable.[69]

[69] "Have you ever seen a witness so teased and harassed as to find no resource but in quietly submitting to be understood to have said what he never meant to say? I have heard of one eminent advocate in particular, who had a manner of putting words into a witness' mouth, and gathering them up, and returning them to him again, if he rejected them, till it became absolutely impossible for him not to seem to utter those words, and equally impossible for him to utter any other words which should contradict them. This gentleman was said to have himself given more evidence in causes, in this way, than his witnesses had done. * * * There is an anecdote of an eminent Serjeant at Law, who had distinguished himself by this sort of dexterity: When his constitution declined, and his spirits were broken, being seen often in tears and giving this explanation of his distress to his friends, 'I am thinking how many poor families I have ruined for the sake of a Nisi Prius victory.'"—Hortensius, *Deinology* (1789) pp. 232–234.

In speaking of the examination of a defendant accused in England of theft, Edmund D. Purcell says: "She gave her evidence with quiet simplicity and directness, but she was subjected to a cross-examination which was unfair, if not illegal. It was before the days of the Court of Criminal Appeal, and prosecuting attorneys had not acquired the moderation they now exhibit."—Edmund D. Purcell, *Forty Years at the Criminal Bar* (1916) pp. 169, 170.

"I think that the kind of skill by which the cross-examiner succeeds in alarming, misleading or bewildering an honest witness may be characterized as the most, or one of the most, base and depraved of all possible employments of intellectual power. Nor is it by any means the most effectual way of eliciting truth. The mode best adapted for attaining this object is, I am convinced, quite different from that by which an honest simple-minded witness is most easily baffled and confused. I have seen the experiment tried for subjecting a witness to such a kind of cross-examination by a practical lawyer as would have been, I am convinced, the most likely to alarm and perplex many an honest witness, without any effect in shaking the testimony; and afterward, by a totally opposite mode of examination, such as would not have at all perplexed one who was honestly telling the truth, that same witness was drawn on, step by step, to acknowledge the utter falsity of the whole. Generally speaking, a quiet, gentle and straight forward, though full and careful, examination, will be the most adapted to elicit truth; and the maneuvers and the browbeating which are the best adapted to confuse an honest simple-minded witness are just what the dishonest one is the best prepared for."—Archbishop Richard Whately's Note to Bacon's Essay *Of Judicature* in his 1868 Ed. of *Bacon's Essays*, pp. 556, 557.

(C) *The Lawyer as a Witness in his Client's Cause*

A. B. A. CANON.

19. APPEARANCE OF LAWYER AS WITNESS FOR HIS CLIENT. When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in Court in behalf of his client.[70]

COUNSEL AS WITNESS. Statement of the General Council of the Bar *The Annual Practice* (1917) p. 2428: A barrister should not accept a retainer in a case in which he has reason to believe he will be a witness, and if 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 jeopardising his client's interests.[71] An. St. 1911, p. 11. Nor should counsel accept a brief be-

[70] Hoffman's Resolution XXXV: "I will never be voluntarily called as a witness in any cause in which I am counsel. Should my testimony, however, be so material that without it my client's cause may be greatly prejudiced, he must at once use his option to cancel the tie between us in the cause, and dispense with my further services or with my evidence. Such a dilemma would be anxiously avoided by every delicate mind, the union of counsel and witness being usually resorted to only as a forlorn hope in the agonies of a cause, and becomes particularly offensive when its object be to prove an admission made to such counsel by the opposite litigant. Nor will I ever recognize any distinction in this respect between my knowledge of facts acquired before and since the institution of the suit, for in no case will I consent to sustain by my testimony any of the matters which my interest and professional duty render me anxious to support. This resolution, however, has no application whatever to facts contemporaneous with and relating merely to the prosecution or defense of the cause itself; such as evidence relating to the contents of a paper unfortunately lost by myself or others—and such like matters, which do not respect the original merits of the controversy, and which, in truth, adds nothing to the once existing testimony; but relates merely to matters respecting the conduct of the suit, or to the recovery of lost evidence; nor does it apply to the case of gratuitous counsel,—that is, to those who have expressly given their services voluntarily."—David Hoffman, *A Course of Legal Study* (2d Ed. 1836) Vol. 2, pp. 766, 767.

"And it might not be an injury to our profession if we supplemented the saying that 'a lawyer who pleads his own case has a fool for a client,' by suggesting that the lawyer who testifies in his client's cause, except as to mere matters of form or routine, or to supply undisputed facts, is very apt to have a knave for his witness."—William Allen Butler, *Lawyer and Client* (1871) p. 68.

[71] In England "it is doubtful whether a person who appears as counsel can give evidence in the same proceeding; such a course is very unusual."—2 Halsbury's *Laws of England*, 396.

As to matters arising in the cause after his retainer, "the advocate in England never gives evidence in behalf of his client because from time immemorial his mere statement regarding anything which happens in the course of his forensic employment is accepted by the court."—Edward S. Cox-Sinclair, *The Bars of United States and England*, 19 Green Bag, 702, 706.

fore an appellate tribunal when he has been a witness in the Court below. An. St. 1912, p. 11.

WILKINSON v. PEOPLE.

(Supreme Court of Illinois, 1907. 226 Ill. 135, 80 N. E. 699.)

Linder Wilkinson was convicted of perjury, and brings error. Reversed.

WILKIN, J. * * * It is insisted that the judgment below should be reversed because one of the attorneys who appears as counsel for the people and argued the case orally in this court was a leading and material witness on behalf of the prosecution in the court below. In justification of his conduct it is insisted that there is no law in this state, statutory or otherwise, forbidding an attorney to be a witness and at the same time an attorney in a case. Doubtless that is true, but courts have generally condemned the practice as one which should be discountenanced and of doubtful professional propriety. We said, speaking by Justice Breese, in Morgan v. Roberts, 38 Ill. 65, on page 86: "We are not advised that it is contrary to any statute or to any maxim of the common law to make the attorney in a cause a witness in the cause he is managing. This is a matter which appeals to the professional pride of an attorney and his sense of his true position and duty. In the English courts, in several cases, it was held that an attorney cannot appear in the same cause in the double capacity of witness and advocate, and it has been so ruled in Pennsylvania and in Iowa, on the circuit. In Indiana it was held by Judge McDonald, now United States district judge, that an attorney in a cause could not be permitted to testify to the general merits of the case. In Frear v. Drinker, 8 Pa. 521, the court said that it was a highly indecent practice for an attorney to cross-examine witnesses, address the jury, and give evidence himself to contradict the witness; that it was a practice to be discountenanced by court and counsel;[72] that it was sometimes indispensable that an attorney, to prevent injustice, should give

[72] Yet in Pennsylvania an attorney was allowed to recover a contingent fee, although the attorney was the principal witness for his client and although it was known at the time of the contract that he would be needed as a witness. Perry v. Dicken, 105 Pa. 83, 51 Am. Rep. 181 (1884). The contingent fee, however, was not his pay for testifying, but for legal services.

It was held in Luckhurst v. Schroeder, 183 Mich. 487, 149 N. W. 1009 (1914), that when the plaintiff's attorney of record becomes a witness for the plaintiff upon a material matter, it is proper to draw out, in cross-examination of the plaintiff, that the plaintiff is under a contract to pay his counsel a contingent fee, since the counsel's interest in the result of the suit has a bearing upon his credibility as a witness.

In Bailey v. Beall, 251 Ill. 577, 96 N. E. 567 (1911), in a per curiam opinion, it was held that, even though the attorney had ceased to act as counsel two months before he testified, the court below erred in not allowing the widest latitude in his cross-examination.

evidence for his client. It, however, leads to abuse, but at the same time, there was no law to prevent it. All the court can do is to discountenance the practice, and, when the evidence is indispensable, to recommend to the counsel to withdraw from the cause. This subject has engaged the attention of other courts and of this court, and, however indecent it may be in practice for an attorney, retained in a case and managing it, to be a witness also, we cannot say he is incompetent, and must leave him to his own convictions of what is right and proper under such circumstances." * * *

The foregoing language * * * was used in civil cases, and is peculiarly applicable to this case, in which the people are generally supposed to be represented by public officers. * * * The fact that he [the lawyer witness] does appear in this record in the unenviable attitude of a willing witness and a zealous attorney should not, perhaps, work a reversal of the judgment below if the record were in all other respects free from error, but we cannot overlook such professional impropriety when our attention is called to it. * * * Judgment reversed.[73]

[73] In Granon v. Hartshorne (1834) Fed. Cas. No. 5,689 (10 Fed. Cas. at page 966), Betts, District Judge, said: "I am anxious it should be understood that the unsupported testimony of a proctor for his client weighs very lightly in this court, and that the practice on the part of the proctors of supporting, by their own evidence cases they are conducting professionally will be discountenanced by every means compatible with the law." See, also, O'Donoghue v. Title Guarantee, etc., Co., 79 Ill. App. 263, 265 (1898); Edwards v. Edwards, 63 N. J. Eq. 224, 49 Atl. 819 (1901).

"It is unseemly for a member of the bar voluntarily to place himself in a position where his duty to his client requires him to address court or jury on the question what degree of credibility should be given to his own sworn testimony."—Lacombe, Circuit Judge, in New York Cent. & H. R. R. Co. v. Henney, 207 Fed. 78, 81, 124 C. C. A. 635, 638 (1913).

In Delaware the rule that attorneys in any way interested in a case cannot testify in the case without first withdrawing from it was held to apply to a student of law who had assisted his preceptor in the preparation of the case for trial and was still part of the preceptor's office force.—Wallace v. Wilmington & N. R. Co., 8 Houst. (Del.) 529, 18 Atl. 818 (1889).

In Onslott v. Edel, 232 Ill. 201, 208, 83 N. E. 806, 809, 13 Ann. Cas. 28 (1908) Scott, J., for the court, said: "Our views bearing upon the propriety of an attorney testifying in a case in which he is employed are stated at length in the case of Wilkinson v. People, 226 Ill. 135 [80 N. E. 699 (1907)]. The course pursued by the attorney in this case would not properly subject him to criticism, had the apparent necessity for his going upon the witness stand resulted from some unforeseen event that occurred in the progress of the trial; but that was not so. It must have been at once apparent to him upon the examination of the bill herein that his testimony would be material. Immediately upon that fact becoming evident, it was his duty to confer with his associate and his clients and then determine whether or not he would be a witness in the cause, and if he was to testify he should at that time have entirely severed his connection with the litigation. If the conclusion was that he should not testify, he and his clients should have abided by that decision, unless some emergency thereafter arose which was not anticipated at the time it was determined that he would not be a witness, making it important for the protection of his client's interest that he should testify. His withdrawal from the case was too long delayed."

On the right of a lawyer to testify in his own behalf or in behalf of his client, see 49 L. R. A. (N. S.) 422, note.

LAWYER TESTIFYING FOR CLIENT AFTER THE OTHER PARTY'S DEFAULT. N. Y. Committee. *Question 76:* Will you please advise us whether the following is a breach of legal ethics:

A. and B., copartners, receive a note for $50 from C. The note is drawn in the office of the attorney of A. and B., is signed by C. in his presence and delivered by the attorney to A. and B. The note is not paid at its due date. Subsequently suit is instituted on behalf of A. and B. by the same attorney in whose office the note is drawn, and the suit is brought in a Municipal Court. On the return day of the summons the attorney appears for A. and B., answers "action on a promissory note" and there being no answer for the defendant stated "ready for inquest." When the case is called the attorney takes the stand and testifies as to the note.

Answer: In the opinion of the committee, there is no breach of professional ethics when the attorney for the plaintiff testifies truthfully, of his own knowledge, upon an inquest taken after defendant's default in an action upon a promissory note.

Such a case is not within the reason of the general rule which forbids a lawyer to be counsel and witness in the same case. In the case stated the lawyer's testimony is formal, ex parte, and not disputed.

MAINE v. RITTENMEYER. (No. 30136.)

(Supreme Court of Iowa, 1915. 169 Iowa, 675, 151 N. W. 499.)

Action for services as attorney resulted in a judgment for plaintiff. The defendant appeals. Affirmed.

LADD, J. The plaintiff is an attorney at law, and claims to have been consulted frequently during the two years prior to March 7, 1912, by the defendant concerning the procurement of a divorce from her husband; that he advised her to postpone instituting suit until the death of her husband's father, as thereupon her husband would be likely to inherit considerable property and she to obtain a more liberal allowance as alimony; that her husband's father died in February, 1912, and he had the petition for divorce ready to sign on March 7th following; that she thereupon requested him to defer bringing the action, as her husband was doing better. He did so, and on the next day she employed Ranck & Messer, attorneys, to bring suit, which they did, and upon trial a decree of divorce fixing the alimony at $5,000 was entered. * * *

III. Counsel for defendant was called as a witness by plaintiff to testify with reference to the custom of charging clients for consultation. He insists that this was unfair practice. The exception might be disposed of by saying that no objection was interposed. If there had been, it might well have been overruled. A juror or the presiding judge

may testify, and we know of no reason for challenging the competency of an attorney or for construing the calling of him as a witness by the other side as unfair to his clients. Rather is it a compliment in thus presenting him to the jury as worthy of their confidence in spite of conflicting interests. There was no error. * * *

V. Exception was taken to the argument of the attorney for plaintiff, and this is supported by affidavit of counsel for plaintiff, and explained by affidavit of counsel for defendant. From a careful examination of these affidavits, we have concluded that honors were about even. One transgressed the proprieties of fair argument about as much as the other, and there is no occasion for interference by this court. Surely, if one attorney has declared that his opponent's client is "so crooked that he cannot hide behind a corkscrew," and calls upon the jury to "look at his little face; he is a crook," it would seem that his antagonist ought to be accorded the liberty of touching a juror's knee and assuring him that his client ought not to be blamed for suing opposing counsel's father-in-law. * * *

The judgment is affirmed.[74]

(D) *Utilizing Perjured Testimony*

B. B. A. CANON.

XXX.[75] UPHOLDING THE HONOR OF THE PROFESSION. Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. Counsel in the trial of a cause where perjury was committed who has sufficient evidence of the crime within his reach or control owes the profession and the public a duty to lay the matter before the prosecuting authorities. The lawyer should aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law, but the administration of justice.

[74] See ante, Chapter III, note 43.

[75] A revision of A. B. A. Canon 29.

In re SCHAPIRO.

(Supreme Court of New York, Appellate Division, First Department, 1911. 144 App. Div. 1, 128 N. Y. Supp. 852.)

INGRAHAM, P. J. The New York County Lawyers' Association presented a petition to this court asking for the disbarment of the respondent. * * *

If we accept the respondent's statement of the conditions under which this contract was made, his conduct becomes the more serious and indefensible. He had a witness who made a statement to him as to the facts to which he would testify. As the time of the trial approached, this witness threatened, unless he was given an interest in the recovery, to testify to a different state of facts which would be injurious to the respondent's client's cause of action. To prevent the proposed witness carrying out his threat, and testifying to facts which prevent a recovery, the respondent made a contract to pay to the witness a material part of the recovery if one was obtained. It would seem to be quite immaterial upon this investigation which was the true version—that which the proposed witness had first stated or that which he threatened to testify to unless his demand was complied with—although it might be material as to whether the respondent was guilty of a crime under section 813 of the penal law. But to give or offer to give a consideration to a proposed witness to testify in a particular way upon a trial whether the particular way in which the witness was to testify was true or not is clearly a violation of the duty of an attorney and a breach of his obligation to the court and to the state whose officer he is.[76] Whether he made this agreement with intent to perform it or not is immaterial. He made it to induce the witness to testify to particular facts where, according to the respondent's statement, the witness had threatened to testify differently, unless he was paid for the testimony that he was to give. The claim that the respondent repudiated the contracts by a simple message over the telephone is no possible defense. The offense was in making the agreements. The repudiation was evidently an afterthought. * * * And then the respondent * * * with knowledge that he had agreed to give to the witness a substantial part of the recovery if one was obtained, allowed the witness to swear that he had no interest in the recovery, and had no understanding as to what his pay was to be. Having made such agreements, his obligation to the court and to the public required that he should have called the attention of the court to the fact that such agreements existed, so that the jury in considering the testimony of the physician could understand that he

[76] In In re Robinson, 151 App. Div. 589, 600, 136 N. Y. Supp. 548, 556 (1912), Ingraham, P. J., said: "The payment of a sum of money to a witness to 'tell the truth' is as clearly subversive of the proper administration of justice as to pay him to testify to what is not true."

was interested in the recovery. We are therefore forced to the conclusion that the respondent was guilty of the most serious professional misconduct, if he was not guilty of a crime, under the provisions of the penal law before cited. * * *

It follows, therefore, that upon the respondent's own statement of his connection with this transaction he must be disbarred, and the application is therefore granted.[77]

(E) The Treatment of Other Lawyers

B. B. A. CANON.

VII.[78] PROFESSIONAL COLLEAGUES AND CONFLICTS OF OPINION. A client's proffer of assistance of additional counsel should be generously entertained and the matter should be left to the determination of the client. A lawyer should decline association as colleague if it is objectionable to the original counsel, but if the lawyer first retained is relieved, another may come into the case.

When lawyers jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination.[79] His decision should be accepted unless the nature of the difference makes it impracticable for the lawyer whose judgment has been overruled to co-oper-

[77] As was said by the court in In re Hardenbrook, 135 App. Div. 634, 643, 121 N. Y. Supp. 250, 258 (1909): "By proceeding with the trial after having become aware of the fact that it was based upon perjured testimony, the attorney made himself a party to the attempted fraud upon the court and the defendant." And as the case was one in which the attorney had a contingent fee the court added: "The fact that these contingent fees are recognized as lawful places the attorney in the position of being himself interested in the recovery, and, if possible, increases his obligation to be frank with the court, and not to join in any scheme by which the amount which he will personally receive would be increased." On the last point, cf. Matter of Klatzkie, 142 App. Div. 352, 126 N. Y. Supp. 842 (1911).

In People v. Beattie, 137 Ill. 553, 27 N. E. 1096, 31 Am. St. Rep. 384 (1891), the name of defendant was stricken from the roll of attorneys because, among other things, in a divorce suit for cruelty, desertion, and adultery, under a statute requiring residence in the state for one year next before filing the bill for divorce where the cruelty or desertion took place outside of Illinois, the attorney, after hearing his client swear, as he knew, falsely that she had resided in the state for one year before the filing of the bill, sought to take advantage of the perjury by urging, instead of withdrawing, the charge of cruelty by acts done outside the state. Without deciding that the attorney would have been justified in keeping silence, the court held that he was not justified in going ahead, even though he did not rely on the cruelty charge alone, but argued that the client was entitled to a decree for cruelty or adultery.

[78] A slight revision of A. B. A. Canon 7.

[79] In Finley v. Furniture Co., 119 Tenn. 698, 109 S. W. 504 (1907), an attorney was held properly taxed with one-half the costs of a bar committee investigation into his conduct in starting certain suits and in prejudicing the mind of the client of his associate and himself against the associate, so as to get the latter discharged from the case.

ate effectively. In this event it is his duty to ask the client to relieve him.

Efforts, direct or indirect, in any way to encroach upon the business of another lawyer, are unworthy of those who should be brethren at the Bar; but, nevertheless, it is the right of any lawyer, without fear or favor, to give proper advice to those seeking relief against unfaithful or neglectful counsel, generally after communication with the lawyer of whom the complaint is made.

A. B. A. CANONS.

9. NEGOTIATIONS WITH OPPOSITE PARTY. A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.

17. ILL FEELING AND PERSONALITIES BETWEEN ADVOCATES. Clients, not lawyers, are the litigants. Whatever may be the ill-feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the case.[80] All personalities between counsel should be scrupulously

[80] Hoffman's Resolution V: In all intercourse with my professional brethren, I will always be courteous. No man's passions 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 then alone to be consulted.—David Hoffman, *A Course of Legal Study* (2d Ed.) Vol. II, pp. 752, 753.

"Many years ago I was associated in the trial of an important cause with a successful lawyer who was regarded as an excellent trial lawyer. He was my senior and took the lead in the trial. The questions involved were important and by no means free from difficulty. My colleague began early in the trial to treat an opponent rudely and to lash his sensibilities at every opportunity. Sharp words flew back and forth across the counsel table. Both gentlemen were apparently losing their temper and I ventured to suggest to my colleague that the interests of our client would require of us the exercise of all [our] powers and that it was not worth while to waste them in useless altercation. He replied in a quiet whisper, 'Never fear! I shan't lose my temper, but I want to lose his. If we can get him red hot, he won't know anything.' He knew his man and the infirmity of his temper better than I did, and he succeeded in his plan. The plaintiff's attorney lost his temper and his good sense together, and the loss of his client's cause followed naturally enough. I do not mention my colleague's tactics as worthy of imitation, but as affording an illustration of the value of self-control and of the danger of losing it. The attempt to practice in this manner upon the known weakness of a brother is wholly indefensible, but on the other hand it was

avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling should also be carefully avoided.[81]

25. TAKING TECHNICAL ADVANTAGE OF OPPOSITE COUNSEL—AGREEMENTS WITH HIM. A lawyer should not ignore known customs or practice of the Bar or of a particular Court, even when the law permits, without giving timely notice to the opposing counsel. As far as possible, important agreements, affecting the rights of clients, should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing, as required by rules of Court.

29. UPHOLDING THE HONOR OF THE PROFESSION. Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. The lawyer should aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.

REPUDIATION OF ORAL STIPULATION. N. Y. Committee. *Question 31:* Is it proper professional conduct for a lawyer to repudiate an oral stipulation, by which he agreed, in return for a favor which has been granted and cannot be revoked, to admit on the trial of an action a certain fact in issue, which might, at the time, have been proved by the issuing of a commission, but has since become difficult

stupidly foolish for the plaintiff's attorney to allow himself to be goaded into a frenzy at the very time when he needed, as he well knew, the full possession of his powers, and the clearest and coolest calculation as to their use."—Henry W. Williams, *Legal Ethics and Suggestions for Young Counsel* (1906) pp. 105, 106.

[81] Of Sir Matthew Hale when at the bar it is said that: "To others, his conduct was fair, kind and obliging. Instead, in the progress of a cause, of taking triumphant advantages where the arguments of a junior, on the opposite side, betrayed either inexperience or imbecility, he would often give strength to weakness, supply what was defective, and, in noticing the objections themselves, commend, if possible, the gentleman who had pressed them."—J. B. Williams, *Memories of the Life, Character and Writings of Sir Matthew Hale* (1835) p. 171.

or impossible to prove? He contends that the promise was made without his client's express authority; that his client, learning of the promise during final preparation for trial, insisted upon its withdrawal; and that he must give his client the benefit of the court rule which makes oral stipulations unenforceable, just as it would be his duty to plead the statute of frauds in a case to which it applies.

Answer: In the opinion of the committee: The repudiation of an oral stipulation is to be condemned. The committee regards such conduct as improper.[82] It directs attention also to the following decisions holding the client to be estopped under such circumstances: Mutual Life Ins. Co. of N. Y. v. O'Donnell, 146 N. Y. 275, 280, 40 N. E. 787, 48 Am. St. Rep. 796; People v. Stephens, 52 N. Y. 306, 310, 311.

CLIENT'S VIOLATION OF HIS LAWYER'S AGREEMENT FOR A CONTINUANCE. Report of May 1, 1916, of the Committee on Professional Ethics of the Bar Association of St. Louis: (3) May 24, 1915. *Question:* A. as counsel had filed suit, and the defendant was represented by B. Both counsel agreed upon a continuance. Plaintiff, knowing this, went before the justice at the first setting and secured judgment and did not notify his counsel A. until after the time for appeal. A. asked his client to consent to set aside the judgment, but that was not done. Later plaintiff sought to collect the judgment through the Legal Aid Society and B. claimed plaintiff in these circumstances was not entitled to its assistance. Plaintiff denied to Aid Society knowing of the agreement of continuance. Mr.

[82] Hoffman's Resolution IX: "Any promise or pledge made by me to the adverse counsel shall be strictly adhered to by me; nor shall the subsequent instructions of my client induce me to depart from it, unless I am well satisfied it was made in error; or that the rights of my client would be materially impaired by its performance."—David Hoffman, *A Course of Legal Study* (2d Ed.) Vol. II, p. 753.

"Justice requires that agreements fairly made between attorneys or parties in the progress of a cause, relating to the conduct of the suit, should be fairly and faithfully enforced, not because they are technical contracts and legally binding upon the parties, but because the administration of justice is thereby facilitated. An agreement to waive an irregularity, to postpone or delay a trial, to take short notice of argument, to permit a cause to be brought to hearing summarily, these, and arrangements like them, do not partake of the essence of legal contracts. They are founded upon no consideration, they require no mutuality; if violated, no action lies for their breach. The court may refuse to enforce them, unless reduced to writing and filed, or they may enforce them, in whole or in part, at their discretion. In short, they are regarded as a part of the machinery for the conduct of the cause, entirely under the control of the court, and they will be enforced, or not, as the substantial rights of the parties and the ends of justice may require. And undoubtedly, in the exercise of this discretion, courts will see that if a mutual agreement be made or a consent be given, or a waiver of right be made upon one side, in consideration of a consent or a waiver of right upon the other, that it shall not be partially enforced to the prejudice of the rights of either."—Green, C. J., in Howe v. Lawrence, 22 N. J. Law, 99, 104, 105 (1849).

Calhoun, for Aid Society, desired to know whether it should represent the plaintiff.

Answer: The Committee answered, declining to decide the controverted questions, and advising Mr. Calhoun if in his opinion the plaintiff, in violation of an agreement for a continuance, obtained the judgment, Society should not represent him in suit for revival.

CHAMBERLAIN v. LINDSAY.

(Supreme Court of New York, 1874. 1 Hun, 231.)

Appeal from an order made at the Special Term, granting a new trial on the grounds of surprise and newly-discovered evidence.

This action was brought by the plaintiffs, merchants at Manchester, England, to recover from the defendants, the sum of $1,283 in gold, on two acceptances given by the defendants to plaintiffs at Manchester, and payable in London, and a balance due for goods sold the defendants by the plaintiffs, in England.

The answer admitted the acceptance and the sale of the goods, and set up that the defendants were discharged by virtue of a certain composition deed made with their creditors, pursuant to the English bankruptcy law. Pursuant to a stipulation signed by the plaintiffs' attorney, the English statutes relative to bankruptcy proceedings and the composition deed were read in evidence. The deed was executed by Lindsay, by John Kerr, his attorney, and by the defendant, Chittick, personally. It was dated December 3, 1869, and registered on the 30th day of December.

The deposition of the defendant, Chittick, taken before the trial, was read in evidence, from which it appeared that he was not in England from the 27th day of November, 1869, until September, 1870. The plaintiffs moved the court to direct a verdict in their favor, on the grounds: (1) That the bankrupt act of Great Britain had no extra-territorial force; (2) that the deed was not properly attested as to the defendant, Lindsay, the power of attorney having been executed in New York, and not before an attorney or solicitor, as prescribed by the act; and (3) that the deed was not registered within twenty-eight days from the date of its execution. The motion was granted, and a verdict directed in favor of the plaintiffs for $14,217.78. Defendants' counsel then moved for a new trial on the grounds of surprise and newly-discovered evidence, claiming that they were induced to believe, by the stipulations of the plaintiffs' counsel, and from statements made by him, that there was no disputed question of fact, and that the only contest on the trial, would be as to the legal effect of the proceedings; that, on a new trial, they would prove that when the deed was executed by the defendant, Chittick, it was delivered in escrow, to be held until it was executed by Kerr, the attorney of Lindsay, and that it was

not executed by him until the 11th of December. The motion was granted, and, from the order directing a new trial, the plaintiffs appealed. All the facts appear in the opinion.

DANIELS, J. * * * Both parties to the action were admitted to be British-born subjects. The plaintiffs were engaged in business as merchants in Manchester, England, and, during November and December, 1869, the defendants were engaged as merchants, carrying on business in New York and in England. The debts in controversy were contracted and payable in England. Upon this state of facts, the parties, as to the transactions involved in this action, were subject to the laws of that country, so far as proceedings affecting the demands were taken there.

During the latter part of the year 1869, a composition deed was executed by the debtors, and assented to and approved by the requisite number and amount of their creditors, which, by the terms of the English bankrupt laws then in force, effected their discharge from their debts, upon compliance with the terms and provisions of the law under which it was entered into.

These terms and provisions appeared to have been all complied with, excepting the one requiring the deed to be produced and left at the office of the chief registrar, for the purpose of being registered, within twenty-eight days from the date of its execution by the debtor. Whether that was done within the time prescribed, was apparently the point on which the cause was finally disposed of at the trial. For as the deed could be, and was, executed by one of the debtors by means of a power of attorney, that cannot be regarded as a defect in the defendants' defense, on which they could have been properly or probably defeated.

The deed itself was dated on the 3d of December, 1869, and it was registered, as the law required it to be, on the thirtieth of that month. So that, on the face of the paper, the law seemed to have been literally complied with in that respect. But before the trial took place, the debtor, who in person executed the deed, was examined as a witness in the case at the instance of the plaintiffs, and, without his attention being in any manner directed to the precise time when the deed was executed, testified that he left England for New York on the 27th day of November, 1869. This circumstance rendered it at once apparent that he could not have executed the deed on the 3d day of December, the day of its date, but must have done it on or before the 27th of November. No inquiry was made for an explanation of this circumstance, nor was the attention of the witness, in any manner, directed to its existence, and the fact itself seems to have escaped the observation of the defendants' attorney and counsel. It plainly might have been discovered by a reasonable degree of attention to the evidence given by the witness, in view of the date appearing upon the face of the deed. And for that reason, if the application had pro-

ceeded solely upon that ground, the omission to devote that degree of attention to the case, before the trial was brought on, would have formed a complete answer to it.

Parties to legal proceedings are required to use attention and diligence in the proper preparation of their causes for trial; and if either fails to do that, and, consequently, is defeated when he might otherwise have succeeded, the fault is his own, for which the courts can ordinarily supply no remedy. But it is claimed, by the defendants' attorneys and counsel, that they were prevented from discovering this discrepancy between the statements of the witness and the date of the deed, by assurances received from the plaintiffs' counsel, which induced them to anticipate an entirely different objection to the defense made under the composition deed. And sufficient reason is disclosed by the affidavits used upon the application, to warrant the conclusion that such was the case. It is not supposed that the plaintiffs' counsel really designed to deceive the attorney for the defendants with whom their interviews were held. But it is quite apparent that they designed to respond to his inquiries, as to the position they intended to take by way of answer to the defense, in such a manner as would not be likely to disclose the real defect they had then discovered to exist. They had the undoubted right not to respond at all, for it was no part of their duty to disclose the precise course which they designed to take in the trial of the cause, or the reason on which they would endeavor to recover a verdict for the indebtedness sued upon. But when they waived that, and undertook to respond to the inquiries made, it should have been done in such a manner, as not to leave a palpably erroneous impression on the mind of the person making them.

When the stipulation was made, agreeing upon certain evidence to be given on the trial, one of the attorneys for the defendants, inquired of one of the plaintiffs' counsel what they relied on in opposition to the deed, or what their point was in the case. And the reply was made by asking the question, "What effect do you suppose the English bankruptcy law has on American debtors?"

The ordinary effect of such an interview, would be to produce the conclusion, that the legal effect, alone, of the proceedings under the bankrupt law, was to be rendered the subject of contest at the trial.

It was calculated to lure the attorney, particularly if he was apt to be confiding as to his adversary's statements, into the belief that no formal omissions existed in the documents relied upon by the defendants as their defense. And it was not unreasonable that the trial should be undertaken with that expectation existing on the part of the defendants. The natural course to be taken, would be to prepare and fortify the defense, so far as that objection required it to be done, and devote no particular attention to it in other respects.

Upon another occasion, preceding the trial, when an application was made by the defendants' counsel, to dismiss the case from the calen-

dar of short causes, one of the plaintiffs' counsel stated, by way of answer to it, "that he believed the case would turn only on questions of law, and that the facts were not in dispute." And yet the fact required for the proper presentation of the questions of law, which was found to be controlling in the case, was one which did require to be proved, and it was proved by the deposition of one of the defendants.

The trial was opened, and proceeded in such a manner as to indicate the existence of care in avoiding all disturbance of the conviction abiding in the minds of the defendants' attorneys. And it was not until the case was in a condition to be finally disposed of, that their minds were enlightened upon the real point in controversy in the action. Then they asked leave to have a juror withdrawn, for the trial to stand over until further preparation could be made to meet the plaintiffs' objection, but that was refused on account of a supposed want of authority to conform to that request. The case was adroitly managed by the counsel for the plaintiffs, and their conduct might deserve the admiration of observers, were it not for the possibly disastrous effects resulting from it to the defendants.

It is the duty of courts of justice, to secure the trial and disposition of legal controversies appearing before them, in conformity to the legal rights of the parties, so far as that may be practically done; and the sanction of the ingenious devices made use of in the present case, which probably misled the defendants' attorneys and counsel to their prejudice, would plainly violate that obvious duty. While parties and their counsel are not obliged to inform those opposed to them, what their precise course of action may be upon the trial, they certainly are obliged to avoid saying and doing what may have a direct tendency to mislead them. And if they do not, and gain an advantage by means of an erroneous impression, voluntarily produced for the purpose of affording an opportunity to secure it, the court is bound to deprive them of it, where that appears to be required to promote and attain the ends of justice.

The defendants showed, in support of their application, that they could prove that the deed was delivered in escrow at the time when it was executed by the first debtor, and so remained until after the 3d of December, 1869, which they insist will answer the statutory requirement that it should be left for registry within twenty-eight days after its execution. The solicitor, whose affidavit was produced in support of the defendants' motion, stated that the deed would only take effect, as an executed instrument, from the time when the event happened on which it was held in escrow, while three other eminent English barristers, among whom is the present lord chancellor, have concurred in a different opinion.

Under ordinary circumstances, this preponderance against the defendants would properly lead to a denial of their motion. For there would be plausible ground, at least, for concluding that another trial

could not change the result. But there is, after all, a probability that the defendants' solicitor may prove to be right in his views, notwithstanding the authority opposed to him. And as long as it is the duty of the court to withhold encouragement from the course of practice which prevented the defendants from presenting the point at the trial, that probability is sufficient to justify an affirmance of the order. * * *

Order affirmed, with costs to abide the event.[83]

USE OF LETTERS MARKED "PRIVATE AND CONFIDENTIAL." Opinion of the Council of the Law Society, *Law, Practice and Usage in the Solicitor's Profession* (1909) p. 305. 1008. A letter written by one solicitor to another in the course of negotiations respecting an alleged trespass was headed "Private and Confidential." The negotiations fell through, and proceedings for an injunction were taken, and the letter was put in evidence. The matter was thereupon brought to the notice of the Law Society, and they were asked whether they considered that anything could justify a solicitor in making use, in evidence, of a letter marked "Private and Confidential."

The Council stated, in reply, that they were unable to say that under no circumstances would a solicitor be entitled to make use in evidence of a letter marked "Private and Confidential." Their opinion was that in business matters between professional men such letters should not be written, as the recipient might have a duty to discharge towards his client which would override any consideration between the solicitors personally.—Opinion of Council, November 3, 1882.

[83] In In re Galland, 172 App. Div. 611, 158 N. Y. Supp. 695 (1916), a lawyer against whose clients a judgment was recovered asked the judgment creditor's lawyer to withhold the issuance of execution until he could find out what his clients wanted to do, and, while the execution was thus withheld on his request, he proceeded to assist his clients to mortgage their only property not exempt, and also to prepare voluntary petitions in bankruptcy to be used, as later they were used, in case the judgment creditor refused to accept a compromise offer. Clarke, P. J., for the court, said: "We agree with the learned official referee that it is not in accord with the standard of the fair dealing and straightforward conduct required of members of the profession in their professional relations with each other to take advantage of a favor extended by way of withholding process during negotiations for a settlement to actively aid in changing the financial status or condition of the client, so as to make process ineffectual upon the breaking off of the negotiations. We do not think in the matter at bar, however, that respondent was actuated by an evil design, or for his own personal gain or profit, but rather that he acted upon a mistaken notion of his duty to his clients. His previous character and standing are such that we are of the opinion that the ends of justice will be entirely satisfied by the administration of a censure for his abuse of the professional courtesy of witholding of process pending negotiations by active participation in changing the existing financial conditions of his clients." 172 App. Div. 614, 158 N. Y. Supp. 697, 698.

(F) *Offers of Evidence and Remarks and Arguments of Counsel*

A. B. A. CANONS.

22. CANDOR AND FAIRNESS. The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.

It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a text-book; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.

A lawyer should not offer evidence, which he knows the Court should reject, in order to get the same before the jury by argument for its admissibility, nor should he address to the Judge arguments upon any point not properly calling for determination by him. Neither should he introduce into an argument, addressed to the Court, remarks or statements intended to influence the jury or bystanders.

These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice.

23. ATTITUDE TOWARD JURY. All attempts to curry favor with juries by fawning, flattery or pretended solicitude for their personal comfort are unprofessional. Suggestions of counsel, looking to the comfort or convenience of jurors, and propositions to dispense with argument, should be made to the Court out of the jury's hearing. A lawyer must never converse privately with jurors about the case; and both before and during the trial he should avoid communicating with them, even as to matters foreign to the cause.

DAMAGES—MENTIONING IN COURT AMOUNT CLAIMED. Statement of the General Council of the Bar, *The Annual Practice* (1917) p. 2414: There is a general understanding that it is irregular for plaintiffs' counsel to mention during the trial the amount claimed by way of damages.[84] An. St. 1898–99, p. 11.

NEW TRIAL—MENTIONING PREVIOUS TRIAL TO THE JURY. Statement of the General Council of the Bar, *The Annual Practice* (1917) p. 2414: The Council reported that they had consulted several of His Majesty's Judges and leading members of the Bar on the above point, and it appeared that there was no definite rule on the subject. So far as the Council could ascertain, the preponderance of opinion appeared to be that it is not usual for counsel in opening his case to mention to a jury the fact that the action had been previously tried, but that to do so would not constitute a breach of professional etiquette unless done for the purpose of prejudicing the opposite party to the action. The Council do not think that there is anything improper in the conduct of counsel in merely letting the jury know (without mentioning the result) that the matter had previously been before the Court. An. St. 1910, p. 12.

FALSE STATEMENT TO JURY CONCERNING LEGALLY IRRELEVANT FACT, IN ORDER TO COUNTERACT INJURIOUS IMPRESSION CREATED BY ADVERSARY'S EXAMINATION OF TALESMEN TO ASCERTAIN THEIR FITNESS AS JURYMEN. N. Y. Committee. *Question 127:* In the trial of an action to recover damages for personal injuries resulting from the alleged negligence of the defendant (it happens that he is insured by a Casualty Company) he is represented by the attorney for the Casualty Company. The plaintiff's counsel in empanelling the jury asks the usual questions as to whether any of the panel is a stockholder or an employé or officer of a Casualty Insurance Company. When the defendant's counsel begins his examination of the jury he states that while the plaintiff's counsel has the legal right to make such an inquiry to ascertain whether the financial investments of any of the

[84] "Neither the fact that money has been paid into court by the defendant, nor the amount paid in, can be communicated to the jury. R. S. C. O. XXII, r. 22."—James Robert Vernam Marchant, *Barrister-at-Law* (1905) p. 99.

"In opening a case, counsel for the prosecution 'ought to state all that it is proposed to prove, as well declarations of the prisoner as facts, so that the jury may see if there be a discrepancy between the opening statements of counsel and the evidence afterwards adduced in support of them, unless such declarations should amount to a confession, when it would be improper for counsel to open them to the jury' as the circumstances in which the confession was made may render it inadmissible in evidence."—Id. pp. 110, 111.

jurymen may create a mental bias or prejudice against the particular class of litigation, these questions have no materiality in the present trial because the defendant is not insured by any Casualty Company and any judgment recovered against him will have to be paid by him personally.

As stated before, the facts are otherwise. The defendant is insured by a Casualty Company, and any judgment of $5,000.00 or less will have to be paid by the Casualty Company.

Is the misstatement of the fact to the jury, in the opinion of the Committee, reprehensible; or is it justifiable upon the theory that the questions of the plaintiff's counsel might have created in the minds of the jury the assumption that the defendant was insured, thereby forming a prejudice against him?

Answer: In the opinion of the Committee, the conduct of the defendant's counsel was obviously improper. The supposed unfairness to the defendant of the questions of the plaintiff's attorney in empanelling the jury is, in the opinion of the Committee, no justification for the false statement of the defendant's counsel, and this notwithstanding the fact that on the one hand in the State of New York at least, Section 1180 of the Code of Civil Procedure permits such questions to be addressed to the jurors as a good ground for a challenge to the favor, while under the decisions of its Court of Appeals questions to witnesses designed to show the interest of a Casualty Company as an insurer in such actions are inadmissible. (See Cosselmon v. Dunfee, 172 N. Y. 507, 65 N. E. 494; Loughlin v. Brassil, 187 N. Y. 128, 79 N. E. 854; Simpson v. Foundation Co., 201 N. Y. 479, 95 N. E. 10, Ann. Cas. 1912B, 321.

OFFERS OF IMPROPER EVIDENCE. George W. Warvelle, *Essays in Legal Ethics* (1902) pp. 111, 112: As previously remarked, a lawyer, a licentiate of the courts, is presumed to be conversant with the rule of evidence, and, being so conversant, is expected to conform to their requirements in the trial of causes. The temptation to overstep the bounds is often very great, particularly with a witness who is either timid or stupid, and, in such cases, courts are ever inclined to construe the rules with great liberality. But while counsel may be pardoned for an infraction of the rules, where his only object is to elicit competent evidence, no such clemency can be extended to one who deliberately and persistently endeavors to submit evidence that is clearly incompetent and which, as a lawyer, he is presumed to know is incompetent. Yet this is a common offense on the part of many who would resent the imputation of unfair practices, and no little ingenuity is often employed to draw out statements that are promptly stricken out, yet, having in fact been heard by the jury are not without in-

fluence in the framing of the verdict. This has always been regarded as highly improper, and he who resorts to such methods places himself on the plans of the shyster and pettifogger.

180. Another device is to make an offer of proof with an argument for its admission, the argument being intended not for the court but for the jury. It has been said that the offer of evidence which counsel knows the court must reject as incompetent, for the mere purpose of the effect which the argument of its admissibility will have upon the jury, is an artifice unworthy of a lawyer. As a general proposition, this is true; and where the practice is persistently followed the offender should be subjected to discipline. It is hard, however, to draw the line at all times between the proper and the improper in the presentation of testimony, and while counsel often offer incompetent testimony, and strenuously insist that it shall go to the jury, it is difficult to say, in many cases, that the motive is not honest.

McCARTHY v. SPRING VALLEY COAL CO.

(Supreme Court of Illinois, 1908. 232 Ill. 473, 83 N. E. 957.)

Action by Patrick McCarthy against the Spring Valley Coal Company. From a judgment of the Appellate Court affirming a judgment for plaintiff after requiring a remittitur, defendant appeals. Reversed and remanded.

This is an action on the case in the circuit court of Bureau county to recover damages for personal injury sustained in the appellant's coal mine. * * *

DUNN, J. * * * Complaint is made of the conduct of counsel for the appellee in the course of the trial. The counsel who made the opening statement to the jury began: "In this case Patrick McCarthy, 33 years of age, with a wife and five children," when he was interrupted with an objection, which the court sustained. * * *

The statement to the jury that the appellee had a wife and five children was manifestly improper. Its only object could have been to enhance the damages by getting before the jury, in this improper and unprofessional manner, facts calculated to arouse their sympathy, which counsel knew could not in any legitimate way be brought to their attention. To admit evidence of such facts is error. Jones & Adams Co. v. George, 227 Ill. 64, 81 N. E. 4, 10 Ann. Cas. 285. The fact once lodged in the minds of the jury could not be erased by an instruction, and appellee by this statement secured the benefit of the fact to the same extent as if he had introduced evidence to prove it. * * *

The Appellate Court required a remittitur of $2,000 from the judgment as the alternative of a reversal on account of the effect on the minds of the jury of the improper statement in regard to appellee's wife and children. Such remittitur does not, however, cure the error. Jones & Adams Co. v. George, supra. It is impossible to tell the ef-

fect, on the verdict, of the impressions wrongfully conveyed to the jury's mind by the improper conduct of counsel.

The judgment will be reversed, and the cause remanded for a new trial. Reversed and remanded.[85]

WESTERN UNION TELEGRAPH CO. v. FURLOW. (No. 24

(Supreme Court of Arkansas, 1915. 121 Ark. 244, 180 S. W. 502.)

SMITH, J. Appellee recovered judgment for the sum of $600 to compensate the mental suffering sustained by her as the result of appellant's alleged negligent failure to promptly deliver a telegram sent by her to her father, * * * a Mr. Young, that she and her baby would reach Thornton that night. * * *

We are also of the opinion that the court should not have permitted counsel, in his closing argument, to bear witness to the good character of Mr. Young. The attorney who made this argument is the prosecuting attorney of his district, and was addressing a jury of his own county, and the purpose of the argument was to assure the jury that had known Mr. Young from boyhood, and knew his veracity was beyond question. With this assurance the jury would be more likely to believe Mr. Young than the operator, and its effect would be to induce the jury to disregard the statement of the operator in regard to the notations on the telegram. This attempt to bolster up the evidence of Mr. Young was improper and prejudicial.

For the errors indicated, the judgment of the court below will be reversed, and the cause remanded.[86]

[85] "We fully appreciate that, in the heat of argument, fervor and partisanship are to be expected from counsel, and that, within their proper field, they constitute a virtue, rather than the reverse; but this cannot justify departure from the field of argument and discussion of the facts disclosed by the evidence, into the field of testimony by the counsel, to establish other facts. Counsel have no right to avail themselves of the opportunity of addressing the jury in argument to make assertions upon their own knowledge, which, if admissible at all, could be so only under the sanction of a witness' oath."—Dodge, J., in Gutzman v. Clancy, 114 Wis. 589, 596, 597, 90 N. W. 1081, 1084, 58 L. R. A. 744 (1902). See Brown v. Swineford, 44 Wis. 282, 28 Am. Rep. 582 (1878).

"And when abuse of the privilege of argument is allowed, against objection, to such an extent that it appears probable that the verdict was thereby affected, a new trial will be granted. The law guarantees every litigant a fair and impartial trial, and this has not been secured where the verdict has been influenced by considerations outside of the evidence."—Hydrick, J., in State v. Duncan, 86 S. C. 370, 374, 68 S. E. 684, 685, Ann. Cas. 1912A, 1016 (1910).

[86] "The boundaries which separate legitimate argument from an attempt to introduce covertly facts which may have a bearing on the case, but which are unconnected with the evidence, are often delicately drawn and difficult to determine; but this only accentuates the duty and the great responsibility of the trial lawyer. His true position before the court and before the jury is that of an aid and assistant. He is an officer of the court, amenable to its authority and subject to its correction. It is said: 'How-

MAINE v. RITTENMEYER.

(Supreme Court of Iowa, 1915. 169 Iowa, 675, 151 N. W. 499.)

See ante, p. 451, for a report of the case.

ARGUING FOR PRESUMPTIONS WHICH COUNSEL KNOWS TO BE INCONSISTENT WITH THE ACTUAL FACTS. David Paul Brown, *The Forum, or Forty Years' Full Practice at the Philadelphia Bar* (1856) Vol. II, pp. 37–39: An action of ejectment was brought, many years ago, to recover a large tract of land lying in ——— county. The defendants relied, for their defence, upon an adverse possession of upwards of twenty-one years. The facts, so far as they are necessary to be known, are these: The defendants entered upon a tract of several hundred acres, and cleared and occupied some four or five acres, leaving the remainder of the tract unenclosed and unimproved. Subsequently, however, to the original occupancy, they caused the rest of the tract to be marked off, the trees to be notched, etc., etc. The case came on for trial—as to the three or four acres, there was no difficulty; but the struggle rested upon the rest of the tract. The defendants' counsel sent for the axe-carrier, who had notched the trees, but upon his private examination it appeared clearly, that the appropriation of the "debatable land" had been made but twelve years before the action brought. Then arose the question of ethics—and the first question was, whether they should examine their witness? Of course that was easily disposed of, and the

ever unrestricted he may or ought to be in the use of all the forms of rhetoric, such as invective, satire, ridicule, or humor, and every variety of illustration drawn from the facts in evidence, or from facts hypothetically assumed, he ought not to be allowed in argument to make himself a witness and state facts either within or without his own knowledge touching the case under discussion, unless he shall have first been sworn and submitted himself to cross-examination.' It would seem utterly vain and useless to caution jurors in the progress of a trial against listening to or participating in conversations out of the courtroom in regard to the merits of a case on trial, if they are to be permitted to listen in the jury box to statements of facts, not in evidence, calculated to have a bearing upon their judgment, enforced and illustrated by all the eloquence and ability of learned, zealous, and interested counsel. 'Statements of fact not proven and comments thereon are outside of the cause; they stand legally irrelevant to the matter in dispute and are therefore not pertinent. If not pertinent, they are not within the privilege of counsel.' Too often are illegal questions asked of witnesses and improper remarks made by counsel in the presence of the jury with the knowledge or the belief that, although they may be excluded, they will nevertheless abide or linger in the minds of the jury and probably produce the desired result. If it be said that reversal of the judgment in such cases may work a hardship upon appellee, it results from the conduct of him who stands as his sponsor in the trial. We know of no more effective way of repressing the wrong and maintaining the integrity of the profession in the administration of the law."—Crum, J., in Alabama Iron & Fuel Co. v. Benenante, 11 Ala. App. 644, 655, 66 South. 942, 945, 946 (1914).

witness was dismissed. This being done, the case went to the jury upon the evidence and inferences as they previously stood, and the trial eventuated in a verdict for the defendant for the entire tract. The counsel for defendant, however, were compelled, upon the argumnt, to urge presumptions upon the jury; which, though consistent with the evidence submitted, were, of course, inconsistent with the actual state of the case, as it would have been exhibited by the axe-bearer. This verdict, though gratifying to professional pride, was not very satisfactory to the conscience of the counsel; and having met the plaintiff, who was a man of wealth and liberality, they suggested to him, that as their clients were poor men, and as the case had been tried, they thought some terms might be agreed upon to settle the question forever, and to give the defendants a marketable title. "Very well," said the plaintiff, "the property is worth ten dollars an acre, but as you have got a verdict, and as you say the occupants are poor, let them pay me a dollar an acre for the land, and I will execute a deed to them." The money was paid—the conveyance executed, and the controversy ended.

Upon this case being mentioned to some members of the bar, different opinions were expressed in relation to it. A gentleman of a high moral standard, and an eminent lawyer, expressed the opinion, that the course pursued was entirely justifiable. First, because the counsel were not bound to call the witness, who would destroy their client. Secondly, that they were permitted to maintain that, upon the evidence the plaintiff was not entitled to recover. Another gentleman admitted the first proposition, but observed, in relation to the second, "that the defence did not rest upon any alleged insufficiency of the plaintiff's title, but upon maintaining affirmatively the possession of the defendant for twenty-one years, and endeavoring to induce the jury to believe what his counsel knew was not the fact," which was utterly inconsistent with every principle of moral philosophy. Even in a criminal case, which is the severest test to which counsel can be subjected—though counsel may contend that the case for the prosecution is not made out by the evidence—they have no right to contend that presumptions may be built upon the evidence, which, although the evidence may possibly warrant them, the counsel know to be contrary to fact and truth.

SECTION 4.—DISCHARGE AND WITHDRAWAL OF COUNSEL

TENNEY v. BERGER.

(Court of Appeals of New York, 1883. 93 N. Y. 524, 45 Am. Rep. 263.)

EARL, J. This action was commenced to recover for legal services rendered by the plaintiff to the defendant, as attorney in the proceedings in the Surrogate Court of the city of New York, in reference to the probate of the will of the late Cornelius Vanderbilt, who was the father of the defendant. In her answer she alleged that the plaintiff was retained under a special agreement, by which he was to receive for his services whatever sum she saw fit to give him; that he was to act as her attorney until the termination of the proceedings; that he violated his agreement by abandoning the proceedings and refusing to act as her attorney therein long before the same were terminated, without any lawful or sufficient reason therefor and against her wishes and remonstrances, and that he thus violated his agreement. * * *

Under the last retainer the plaintiff went on and rendered services, from time to time, until on or about September 28, 1878, when one S. was employed by the defendant as additional counsel, without the knowledge of the plaintiff or any consultation with him, and the first the plaintiff knew of the employment was when he saw him in court sitting beside the other counsel in the case. The next day he wrote a letter to the defendant in which he complained of the introduction of S. into the case as counsel without consulting him, and expressing his determination, on that account, to withdraw from the case. That letter led to interviews between the plaintiff and the defendant and one of her counsel, in which she attempted to dissuade him from his determination. But he persisted, informing her that he had personal and professional objections to being associated with Mr. S. in the case and withdrew from the case.

The rule of law undoubtedly is, as claimed by the defendant, that an attorney who is retained generally to conduct a legal proceeding enters into an entire contract to conduct the proceeding to its termination, and that he cannot abandon the service of his client without justifiable cause and reasonable notice. This rule has been laid down in many authorities. Menzies v. Rodrigues, 1 Price, 92; Stokes v. Trumper, 2 K. & J. 232; Creswell v. Byron, 14 Vesey, 272; Nicholls v. Wilson, 2 Dowl. (N. S.) 1032; Harris v. Osbourn, 2 C. & M. 629; Whitehead v. Lord, 11 E. L. & Eq. 589; Wadsworth v. Marshall, 2 C. & J. 665; Davis v. Smith, 48 Vt. 54; Bathgate v. Haskin, 59 N. Y. 535; 2

Greenl. Ev. § 142; Weeks Attorneys, §§ 255, 316; Cordery Solicitors, 62. If an attorney, without just cause, abandons his client before the proceeding for which he was retained has been conducted to its termination, he forfeits all right to payment for any services which he has rendered. The contract being entire he must perform it entirely in order to earn his compensation, and he is in the same position as any person who is engaged in rendering an entire service, who must show full performance before he can recover the stipulated compensation. While the attorney is thus bound to entire performance, and the contract as to him is treated as an entire contract, it is a singular feature of the law that it should not be treated as an entire contract upon the other side; for it is held that a client may discharge his attorney arbitrarily without any cause at any time, and be liable to pay him only for the services which he has rendered up to the time of his discharge. Ogden v. Devlin, 45 N. Y. Super. Ct. 631; Trust v. Repoor, 15 How. Prac. 570; Gustine v. Stoddard, 23 Hun, 99.[87]

What shall be a sufficient cause to justify an attorney in abandoning a case in which he has been retained has not been laid down in any general rule, and cannot be. If the client refuses to advance money to pay the expenses of the litigation, or if he unreasonably refuses to advance money during the progress of a long litigation to his attorney to apply upon his compensation, sufficient cause may thus be furnished to justify the attorney in withdrawing from the service of his client. So any conduct on the part of the client, during the progress of the litigation, which would tend to degrade or humiliate the attorney, such as attempting to sustain his case by the subornation of witnesses or any other unjustifiable means, would furnish sufficient cause.[88] The attorney is always interested to know with whom he is to be associated in the trial of a cause. The counsel is supposed to be his superior, and is usually employed on account of his superior ability, experience, reputation or professional standing, and after an attorney has engaged in a cause, it would seem to be quite proper that he should be consulted as to the person who is to bear the important relation to him of counsel. The client would certainly have no right, against the protest of the attorney, to introduce as counsel in the case a person of bad character, or of much inferior standing and learning—one not capable of giving discreet or able advice. It would humiliate an attorney to sit down to the trial of a cause and see his case ruined by the mismanagement of counsel.

The relations between attorney and counsel, too, are of a delicate and confidential nature. They should have faith in each other, and their relations should be such that they can cordially co-operate. While

[87] On the right of a client to discharge a lawyer at will, see 19 Ann. Cas. 592, note. On the right to discharge where the lawyer is employed for a contingent fee, see 14 L. R. A. (N. S.) 1095, note; 38 L. R. A. (N. S.) 389, note.

[88] On the right of counsel to withdraw from litigation because of the client's misconduct, see 35 L. R. A. (N. S.) 960, note; Ann. Cas. 1912D, 640, note.

a client has the undoubted right to employ any counsel he chooses, yet it is fair and proper, and professional etiquette requires, that he should consult the attorney and other counsel in the case so that they can withdraw, if for any reason they do not desire to be associated with him. Here the plaintiff was assured when he was retained, that Mr. Lord and Mr. Black had been employed as counsel in the proceedings, and that he was to act under their advice and direction, and when she employed Mr. S. without the knowledge or consent of the plaintiff, thus placing him in a subordinate position to S. also, she furnished him with a reasonable cause for withdrawing from the case.

We do not think that the rule that an attorney is bound to an entire contract should be very rigidly enforced, while the client is left with the right arbitrarily to discharge him at any time.

We do not think the plaintiff waived his objection to be associated with Mr. S. by remaining in the case, without objection, one day after he knew of S.'s retainer. He certainly was not required to rush out of the courtroom the moment he observed his presence, and thus abandon the case. He was bound to give his client reasonable notice, and that he did, on the very next day after he had learned that S. had been introduced into the case. * * *

The judgment should be affirmed.[89]

WITHDRAWAL BY COUNSEL BECAUSE OF ABUSE BY CLIENT. N. Y. Committee. *Question 55:* A lawyer asks what course he ought to pursue in order to terminate his relations with a client who, it appears, finds fault with his advice, writes him a grossly abusive letter, and does not avail himself of counsel's offer to consent to a substitution.

It appears that the retainer was to collect a claim for services upon a contingent fee under a written contract which provides that the client, who, it appears, is also a member of the bar, "shall be free to decide . . . policy, amount of settlement, acceptance of verdict, appeals, etc." An action in the Supreme Court under the retainer was commenced. In the complaint the defendant was named with the addition of an alias, which the court on his motion struck off. Plaintiff insisted upon an appeal being taken from the order made on that motion, although his counsel advised him that the order was not appeal-

[89] On the right of counsel to withdraw from a suit, see Whitehead v. Lord, 7 Ex. 691 (1852). Lord Abinger remarked in Nicholls v. Wilson, 11 M. & W. 106, 107 (1843), that: "It is possible to conceive of circumstances under which an attorney might be justified in abandoning proceedings without any notice."

On the death of a lawyer employed for a contingent fee, or his withdrawal, without the client's fault, before final adjudication, as affecting his compensation, see 52 L. R. A. (N. S.) 380, note.

able. The appeal is pending and the time of plaintiff to reply to a counterclaim set up in defendant's answer is about to expire.

Counsel complains that from the beginning his client has pestered him with unnecessary and offensive epistles and has acted personally in an abusive manner.

Answer: As it appears that the client has made the continuance of the relations between him and his counsel intolerable and has thus precluded the performance of the contract by the counsel, the committee is of the opinion that counsel would be justified in applying to the court in which the action is pending, on notice to the client, to be allowed to withdraw from the case upon such terms as the court may deem proper; leaving the client to any remedy at law upon the contract to which he may think himself entitled by counsel's refusal to act longer under the retainer. Until relieved by the court, counsel should take the proper steps to protect the interests of his client in the litigation.[90]

[90] "What is a sufficient cause to justify an attorney in abandoning a case in which he has been retained has not been laid down by any general rule, and in the nature of things cannot be; but where, as in this case, the plaintiff, even if he has any ground for communicating with his attorneys, instead of doing so by mail under the secrecy of the postal laws, seeks to degrade and humiliate them by sending a telegram, in which he states that they have been guilty of falsehood and gross fraud and neglect, and that he does not intend to stand their abuse any longer, it must be held that such conduct is equivalent to a discharge of his counsel, and a breaking off of the confidential and delicate relation theretofore existing between them. Such conduct must result in the destruction of all faith in each other and render it impossible for them to further co-operate."—Stone, J., in Genrow v. Flynn, 166 Mich. 564, 568, 131 N. W. 1115, 1116, 35 L. R. A. (N. S.) 960, Ann. Cas. 1912D, 638 (1911).

"The court does not understand that when a headstrong and wayward client does not go to the office of her attorney for counsel, but separates herself from him at a distance in the country, without notifying him or inviting his counsel, that the ethics of the legal profession demand that he should go and hunt her up and thrust upon her, uninvited, his interference and counsel." —Philips, District Judge, in Bunel v. O'Day (C. C.) 125 Fed. 303, 309 (1903).

CHAPTER IX

PECUNIARY RELATIONS OF LAWYERS AND CLIENTS

SECTION 1.—FEES AND REBATES

I. The Right to Collect Fees[1] and Disbursements

B. B. A. CANON.

XIV.[2] Suing a Client for a Fee. Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his own self-respect; and lawsuits against clients should be resorted to only to prevent substantial injustice or imposition.

KENNEDY v. BROUN.

(Court of Common Pleas, 1863. 13 C. B. [N. S.] 677.)

Erle, C. J. In this case the defendants obtained a rule to show cause why the verdict for the plaintiff should not be set aside, and either entered for the defendants if there was no evidence of a debt, or for a new trial if the verdict was against the evidence.

The material facts upon the first question are, that, in the course

[1] "The most common designation of a lawyer's compensation carries with it the idea of the trust which it rewards. The word 'fee,' so familiar to the ear of the lawyer—a familiarity, however, which never 'breeds contempt'—is derived from the old French 'fe' and the Latin 'fides,' and is akin to the Saxon 'feoff' or 'fief,' denoting something which is given by one and held by another, upon an oath or promise of fidelity."—William Allen Butler, *Lawyer and Client* (1871) pp. 16, 17.

"(A. D. 1784, Aetat. 75.) Sir James Johnston happened to say that he paid no regard to the arguments of counsel at the bar of the House of Commons, because they were paid for speaking. *Johnson*—'Nay, sir, argument is argument. You cannot help paying regard to their arguments, if they are good. If it were testimony, you might disregard it, if you knew that it were purchased. There is a beautiful image in Bacon, upon this subject: testimony is like an arrow shot from a long bow; the force of it depends on the strength of the hand that draws it. Argument is like an arrow from a crossbow, which has equal force though shot by a child.' "—James Boswell, *Life of Samuel Johnson, LL. D.* (Everyman's Library, 2 Vol. Ed.) Vol. 2, p. 514. The reference to Bacon in that passage is an error. "Dr. Johnson's memory deceived him. The passage referred to is not Bacon's, but Boyle's, and may be found, with a slight variation, in Johnson's Dictionary, under the word Crossbow."—Malone's note.

[2] A revision of A. B. A. Canon 14.

of the suit between Swinfen and Swinfen, the plaintiff, a barrister, became the advocate of Mrs. Swinfen, who with her husband are the now defendants; that, during the continuance of that litigation, she made repeated requests to him for exertions as an advocate, and repeatedly promised to remunerate him for the same; and that, after the end of the litigation, she spoke of the amount of this remuneration; and, for the purpose of the present judgment, we assume that she admitted the amount of debt due for such remuneration to be 20,000*l.*, and promised to pay it.

These facts are no evidence to support the verdict, if the promise of the defendant did not constitute any obligation: and we are of opinion that it did not.

We consider that a promise by a client to pay money to a counsel for his advocacy, whether made before, or during, or after the litigation, has no binding effect; and, furthermore, that the relation of counsel and client renders the parties mutually incapable of making any contract of hiring and service concerning advocacy in litigation. * * *

The facts of the present case forcibly show some of the evils which would attend both on the advocate and the client if the hiring of counsel was made binding. In this case, the advocate, by disclosing words of intimate confidence which passed in moments of helpless anxiety, has raised the phantom of a contract for a sum of monstrous amount; and of this we hope we may say that there is no one in the profession of the plaintiff who would be willing to accept from him this verdict for 20,000*l.* as a gift. In the present case, too, if the client compares the competence and peace secured for her by her former advocate with the perils and the miseries of wearisome litigation derived from her later advocate, the contrast may suggest to her that gratuitous advocacy is preferable to contract as a mode of remunerating advocates.

But it is not merely on such considerations as these that this law is based. The incapacity of the advocate in litigation to make a contract of hiring affects the integrity and dignity of advocates, and so is in close relation with the highest of human interests, viz. the administration of justice.

We are aware, that, in the class of advocates, as in every other numerous class, there will be bad men, taking the wages of evil, and therewith also for the most part the early blight that waits upon the servants of evil. We are aware also that there will be many men of ordinary powers, performing ordinary duties without praise or blame. But the advocate entitled to permanent success must unite high powers of intellect with high principles of duty. His faculties and acquirements are tested by a ceaseless competition proportioned to the prize to be gained, that is, wealth and power and honour without, and active exercise for the best gifts of mind within. He is trusted with interests and privileges and powers almost to an unlimited degree. His client must rely on him at times for fortune and character and life.

The law trusts him with a privilege in respect of liberty of speech which is in practice bounded only by his own sense of duty; and he may have to speak upon subjects concerning the deepest interests of social life, and the innermost feelings of the human soul. The law also trusts him with a power of insisting on answers to the most painful questioning; and this power, again, is in practice only controlled by his own view of the interests of truth. It is of the last importance that the sense of duty should be in active energy proportioned to the magnitude of these interests. If the law is, that the advocate is incapable of contracting for hire to serve when he has undertaken an advocacy, his words and acts ought to be guided by a sense of duty, that is to say, duty to his client, binding him to exert every faculty and privilege and power in order that he may maintain that client's right, together with duty to the court and himself, binding him to guard against abuse of the powers and privileges intrusted to him, by a constant recourse to his own sense of right.

If an advocate with these qualities stands by the client in time of his utmost need, regardless alike of popular clamour and powerful interest, speaking with the boldness which a sense of duty can alone recommend, we say the service of such an advocate is beyond all price to the client; and such men are the guarantees for the maintenance of his dearest rights; and the words of such men carry a wholesome spirit to all who are influenced by them.

Such is the system of advocacy intended by the law requiring the remuneration to be by gratuity. But, if the law allowed the advocate to make a contract of hiring and service, it may be that his mind would be lowered, and that his performance would be guided by the words of his contract rather than by principles of duty,—that words sold and delivered according to contract, for the purpose of earning hire, would fail of creating sympathy and persuasion in proportion as they were suggestive of effrontery and selfishness; and that the standard of duty throughout the whole class of advocates would be degraded. It may also well be, that, if contracts for hire could be made by advocates, an interest in litigation might be created contrary to the policy of the law against maintenance; and the rights of attorneys might be materially sacrificed, and their duties be imperfectly performed by unscrupulous advocates: and these evils, and others which might be suggested, would be unredeemed by a single benefit that we can perceive.

The subject has been often and ably discussed; so that we have already said more than sufficient. We would only add, that, in the growth of the English law, the advocates have been important agents in establishing the liberty of thought and speech and action which has resulted from the contests in courts where such liberty has been contended for. The English advocates in our historical trials are entitled to be gratefully remembered: and it must not be forgotten that their minds were trained in the practice of advocacy without any contract.

So also the Roman jurists are entitled to be gratefully remembered, because their intuitive sense of right showed to them where right was in the conflicts of interest perpetually arising as the relations of man to man multiplied: and their words have helped to guide succeeding generations in their search for right when similar conflicts arose. And it must not be forgotten that throughout the Roman system it was held that an advocate and a professor of law would be degraded by a contract of hiring, and that his reward was to be gratuitous. * * *

On principle, then, as well as on authority, we think that there is good reason for holding that the relation of counsel and client in litigation creates the incapacity to make a contract of hiring as an advocate. It follows that the requests and promises of the defendant, and the services of the plaintiff, created neither an obligation nor an inception of obligation, nor any inchoate right whatever capable of being completed and made into a contract by any subsequent promise. * * *

It follows that the rule must be made absolute to enter the verdict for the defendants. * * * Rule absolute accordingly.[3]

[3] "Their lordships are willing to assume that the law of England, so far as it concerns the right of the Bar of England to sue or make agreements for payment of their fees, was rightly applied in the case of Kennedy v. Broun, 13 C. B. (N. S.) 677 [1863]; but they are not prepared to accept all the reasons which were assigned for that decision in the judgment of Erle, C. J. It appears to them that the decision may be supported by usage and the peculiar constitution of the English Bar, without attempting to rest it upon general considerations of public policy."—Lord Watson in Queen v. Doutre, L. R. 9 App. 745, 751 (1884).

"A barrister cannot recover his fees by action or any legal process from the solicitor who instructs him. * * * But when a solicitor has received a specific sum from his client to pay counsel's fees in non-litigious business and admits such receipt, counsel have been allowed to prove in the bankruptcy of the solicitor for such fees. In re Hall (1856) 2 Jur. N. S. 1076. * * * Where a solicitor who has received money for counsel's fees dies, and his estate is being administered by the court, counsel have been, it is said, admitted to prove in the administration for such fees."—James Robert Vernam Marchant, *Barrister-at-Law* (1905) p. 46.

"It is never expected, it never has been the practice, and in many instances it would be wrong, that counsel should be gratuitously giving up their time and talents without receiving any recompense or reward. It is the recompense and reward which induce men of considerable ability, and certainly of great integrity, and with every qualification which is necessary to adorn the bar, to exert their talents. It is the emolument in the first instance, to a certain degree, that induces them to bear the difficulties of their profession, and to wear away their health which a long attendance at the bar naturally produces; and it is of advantage to the public that they should receive those emoluments which produce integrity and independence; and I know of nothing more likely to destroy that independence and integrity than to deprive them of the honorable reward of their labors. But it is said that counsel can maintain no action for their fees. Why? Because it is understood that their emoluments are not to depend upon the event of the cause, but that their compensation is to be equally the same whether the event be successful or unsuccessful. They are to be paid beforehand, because they are not to be left to the chance whether they shall ultimately get their fees or not; and it is for the purpose of promoting the honor and integrity of the bar that it is expected that all their fees should be paid at the time when their briefs are delivered. That is the reason why they are not permitted to maintain an

In re SOLICITOR.

(Divisional Court, 1910. 22 Ont. L. Rep. 30.)

An appeal by the solicitor from the order of Middleton, J., 21 O. L. R. 255, directing an attachment to issue against the solicitor, unless he should, within two weeks, deliver a bill of costs or a statement in writing that he made no claim against the client for costs and disbursements. * * *

RIDDELL, J. Whatever the form, the substance of this application is to have a declaration that a solicitor obtaining money for his client is entitled to retain thereout an amount promised him—agreed in writing to be paid to him—by his client, as a "retainer."

The word "retainer," like most others in our language, has more than one meaning: e. g., it may mean the act of employing a solicitor or counsel, or it may mean the document by which such employment is evidenced; but in the present instance its meaning is a preliminary fee given to secure the services of the solicitor and induce him to act for the client. It is needless to cite authorities or quote dictionaries to establish this as the meaning—this is well recognised in the profession.

A client may give his solicitor or counsel a preliminary fee in this sense—if so, it is a present—it does not at all diminish the fees properly chargeable and taxable against the client, and does not appear in the bill. It is not expected and it needs not to appear in any account—

action. It is their duty to take care, if they have fees, that they have them beforehand, and therefore the law will not allow them any remedy, if they disregard their duty in that respect. The same rule applies to the case of a physician, who cannot maintain any action for his fees. He therefore is to receive his fees at the period of time when his attendance occurs. These are the reasons why the gentlemen of these two professions can maintain no action for their fees; but is it to be supposed that men are to waste their lives to qualify themselves for their profession, without receiving any emolument? That never can be imagined; and the constant course which has been adopted shows that it never could be so understood. If this is not the right rule, the courts of Westminster Hall have been in error for centuries, because they have been in the constant habit of allowing to plaintiffs when they succeed the fees of counsel on the one hand, and to the defendant the fees of their counsel when they succeed, on the other hand. This is the invariable rule acted upon on the taxation of costs."—Bayley, J., in Morris v. Hunt, 1 Chitty, 544, 550–552 (1819).

"It is to a great extent a fallacy also to say that counsel fees cannot be sued for at law. They are sued for every day in the year. In England as a rule, the client does not confer directly with the counsel. He goes to an attorney or solicitor and lays his case before him. The attorney prepares a written case, and lays it before counsel for his opinion, and he pays the counsel his fees for his opinion, and when the case is ready for trial or argument the attorney prepares a brief and delivers it to the counsel along with his fee. The attorney knows he is obliged to pay the counsel, and that he could not get the counsel to do one act for him if he did not pay him. The client is bound by law to pay all these counsel fees. The counsel cannot sue him for them, but the attorney who has paid them for him can sue him by calling them 'money paid for the client at his request.' "—Wilson, J., in McDougall v. Campbell, 41 U. C. Q. B. 332, 346 (1877).

it is not taken into account at all in determining the amount at any time payable to the solicitor or barrister or by him, and has no influence or effect in the financial relations between client and legal adviser.

A promise to pay a retainer is not enforceable—and, if the professional man is content to take a promise to pay a "retainer," instead of insisting upon payment in cash, he must rely upon the honour and generosity of his client—a promise to pay a retainer is void. * * *

The appeal should be dismissed with costs.[4]

BARRISTERS' AND SOLICITORS' FEES. Francis L. Wellman, *Day in Court* (1910) pp. 17–20: When an important case is to be reached for trial, a brief of all the statements of the witnesses, case gossip, material for cross-examination, law points, etc., is submitted to some one of the twenty-five King's Counsel, with the price that will be paid for the trial marked upon the brief.[5]

[4] On general and special retainers in England, see ante, p. 377, note. "In England there is no such thing known as a retaining fee to a solicitor. It is a fee paid to counsel only, and is paid to secure his services either in a particular suit or generally for any suit the client may be interested in. I do not think the argument that, the solicitor being in this country both solicitor and counsel, the retaining fee is chargeable as if paid by the solicitor to retain his own services as counsel, a sound one. If employed as solicitor, it is his duty to devote himself to further the interests of his client, and he certainly could not consistently with that duty hold a brief as counsel for the other side, so his services, if he intends acting as counsel, are already secured. A retaining fee to a solicitor is just a gift without any consideration; and the same rule must apply to it as to any other gift from a client to a solicitor." The Judge's Secretary [T. W. Taylor] in In re McBride, 2 Ch. Chamb. (Ont.) 153. In Galloway v. Corporation of London, L. R. 4 Eq. 90 (1867), a contract under which a solicitor was to be paid a fixed yearly salary for transacting the client's business and was to transact business for no other client was approved. It was a case involving the situation of a city solicitor, but Vice Chancellor Wood did not distinguish between city clients and other clients.

[5] "UNMARKED BRIEFS.—Except in a few well recognised and exceptional cases, such as appearing for a public department, or for the police in criminal prosecutions, a Barrister should not appear in Court upon a brief which has no fee marked upon it. An. St. 1912, p. 15.

"ARBITRATIONS—UNMARKED FEES AT.—It is a wholly irregular and improper practice to leave the question of fees to be dealt with after the award is published. An. St. 1905–06, p. 12."—Statements of the General Council of the Bar, *The Annual Practice* (1917) p. 2418.

"COLLECTIVE BRIEFS—BREWSTER SESSIONS.—It is not allowable for Counsel to accept a collective brief from a solicitor to oppose a number of applications for new licenses made by different applicants, but Counsel must have a separate brief with a separate fee for each case. An. St. 1896–97, p. 10."—Id. p. 2419.

"AGREEMENT TO TAKE LESS FEE THAN ALLOWED ON TAXATION.—It is a breach of professional etiquette habitually to accept a less fee on a brief in the County Court than that commonly allowed on taxation to a successful party in an action for the amount of the claim in question, e. g., a fee of one guinea in a claim under the Employers' Liability Act for 300 pounds. The propriety of the amount of a brief fee must be determined in each case by reference to the circumstances of the particular case. It would not be a

For instance if it is proposed to defend an ordinary damage suit, the custom is to mark about £20. on the brief, and the King's Counsel accepts or rejects it as he likes. If he accepts it, he agrees to the fee, which is to cover the first five hours in court. If, for example, a case begins at two o'clock one day, the £20. retainer is supposed to cover all services until two o'clock on the following day, when the King's Counsel is supposed to make an arrangement for a "refresher," which in a £20. retainer would be about £10. for the second five hours.

The Solicitors, on the other hand, are only allowed to charge fixed fees; that is, fees arranged by statute, and there can be no deviation from these fees unless by a special agreement with the client, which agreement must be in writing and signed by the client himself; and even then, so great is the protection of the public against overcharges by Solicitors, the agreement with the client can later be submitted to the court, and, if considered by the court excessive, reduced, and the original contract in writing abrogated.[6]

The Solicitor is allowed to charge ten shillings for an interview with any client who brings a case to him, and he can charge no more unless under a special contract in writing.

He is allowed to charge three shillings six pence for each letter; so many shillings for an interview with a witness, according to the time occupied, etc. He charges for each filing of a paper, and, although the price of everything he does is regulated by statute in as much detail as the price of groceries would be, yet there is so much red tape in a solicitor's office in preparing a case for trial that in the most ordinary litigation, even in a plaintiff's suit for an accident, the statutory fees will run up to about £80. or $400.

Of course, among Solicitors of the first rank, these fees are often disregarded by the Solicitor's apprising his client at the outset that his opinion "will cost 100 guineas," or 500 guineas, as the case may be, and by the client agreeing to pay this sum in advance. In such a case the provisions of the statute are altered by mutual agreement. But in the great majority of cases the statutory fees are strictly adhered to. It should be noted, however, that in England these fees of Solicitors as well as Barristers are part of the taxable costs of a case and are added to the judgment, the losing party having to pay his adversaries' expenses as well as his own.

breach of professional etiquette to accept a less fee than that commonly allowed on taxation if in other respects it were a proper one. An. St. 1906–07, p. 12."—Id. p. 2418.

[6] In England "the client who instructs his solicitor rarely makes any agreement as to compensation, which in conveyancing matters is a question of ad valorem scale, and in matters of litigation or other matters outside the scale is a question of items for actual work upon a fixed basis, subject to adjustment on taxation by the proper officer of the court, who is called the taxing master; so far as the barrister is concerned, the solicitor who instructs him and through whom alone the barrister receives his instructions marks on the brief or instructions the proper fee and the brief or instructions are then accepted or rejected by the barrister without bargain."—Edward S. Cox-Sinclair, *The Bars of United States and England,* 19 Green Bag, 702, 706.

In important cases, when it comes to submitting the brief to the Barrister, the fees often run up to a thousand guineas, or more, according to the nature of the case and the amount involved.[7]

It is considered in England against the etiquette of the profession to take any contingent fee whatsoever, and any Solicitor making a bargain with his client to accept a percentage of his recovery in lieu of his rightful fee would be immediately struck off the rolls, and any Barrister guilty of such conduct would be disbarred.[8]

[7] "SPECIAL FEES.—That upon the question as to what special fees are recognised by the practice of the profession, and are not taken as part of the brief fee, the usage of the Bar appears to be as follows:

"A Barrister is considered to be prepared to take any brief in the Courts in which he professes to practise, at a proper professional fee, according to the length and difficulty of the case. Any Counsel is at liberty to say that he will not practise in a particular Court without a special fee of a named amount, or that he will not go into Court at all without a special fee of a named amount, but such special fees when asked should, according to the practice as hitherto understood at the Chancery Bar, be asked in all cases, or in all Courts, except the one or more in which the Barrister usually practises. At the Common Law Bar the practice has been governed rather by the rules of the various Circuits, and the special fees to be taken by members of Circuits accepting briefs on other Circuits have been fixed by the rules of the Circuits, and not by the individual members of the Bar. It appears to have been generally understood on all Circuits that no one should take a special fee, properly so called, on his own Circuit. There appears, however, to be no objection in principle, to a Counsel having a special fee for going out of town to a Circuit of which he is a member, or to particular towns on that Circuit, provided that the special fee is taken in all such cases. In no case ought a fee, which is really a brief fee given for getting up a case in order to conduct it in Court and for conducting it there, to be divided and marked in part as a special fee merely for the purpose of paying a less fee to other Counsel engaged in the case."—Statement of the General Council of the Bar, adopting a statement of the Bar Committee made in 1890–91. *The Annual Practice* (1917) p. 2421.

"AGREEMENT TO TAKE FIXED FEE FOR ALL CASES.—It is a breach of professional etiquette to make an agreement with a Solicitor to do all the cases of a particular class at a fixed fee in each case, irrespective of the amount claimed or of the circumstances of each case. An. St. 1906–07, p. 12."—Statement of the General Council of the Bar, *The Annual Practice* (1917) p. 2417.

[8] "The English barrister's relation to the business of his clients is always strictly and absolutely professional, just as much so as that of the physician or the surgeon. Whether he tries or argues a cause, or revises a pleading or a contract, or gives an opinion on the facts submitted, he acts without any possible interest in the matter, or any relation to it other than the purely professional one. The rigid rules of the profession by which he is bound absolutely forbid him to take a contingent interest or share in any controversy in which he acts professionally, and the slightest violation of this rule would compel his disbarment. And so the whole community knows that, in proportion to his skill and capacity and judgment, they may absolutely confide in his professional conduct and that no private or personal interest in the subject of the controversy can bias him, to mislead or confuse the counsels of the court. In the same way his compensation is not dependent upon the amount involved or upon the result of the controversy, but upon his own eminence and reputation. So that when I told some leading barristers that our Court of Appeals had decided that the amount involved and the result as to winning or losing were material factors in the measurement of the lawyer's compensation, they fairly scouted the idea.

"There is no doubt that two important changes in our system have seriously

In mediæval times the theory of the law was that the Barristers would charge nothing for their services. In those days there was a pocket in the rear of the gown in which the client would deposit such moneys as he chose for the Barrister and his Clerk. Even to this day the Barrister has no standing in court as a plaintiff suing for his fees. He either receives them in advance or he trusts to his Solicitor. Neither can a Barrister be sued for any erroneous opinion he may give.

In the height of the court season in London, as already stated, there are so few King's Counsel in active practice that oftentimes a Barrister will find himself obliged to conduct two and three trials at a

detracted from this strictly professional attitude of the American advocate and laid him open to question. I mean the fact that we have not maintained the distinction between the two branches of the profession, but every one of us is a barrister, a solicitor and an attorney. But the chief cause of detraction from our absolute independence and disinterestedness as advocates is that fatal and pernicious change, made several generations ago by statute, by which lawyers and clients are permitted to make any agreements they please as to compensation—so that contingent fees, contracts for shares, even contracts for half the result of a litigation, are permissible, and I fear not unknown. How can we wonder, then, if the community implicates the lawyer who conducts a cause with the morale [morals?] of the cause and of the client? If he has bargained for a share of the result, what answer can he make to such criticism? And how can we blame the community when it suspects that such practices are frequent or common, and even sanctioned by eminent members of the profession, if they confound us in one indistinguishable crowd, and refuse to accord to any of us that strictly professional relation to the cause which the English barrister enjoys? And how can the courts put full faith in the sincerity of our labors as aids to them in the administration of justice, if they have reason to suspect us of having bargained for a share of the result? * * * Here again comes in another unfortunate result of our system of contingent fees, which has resulted in blocking our calendars with thousands of experimental and speculative lawsuits, in arrears, in at least one of our departments for two or three years, which it is quite impossible for our judges to cope with."—Joseph H. Choate on *The English Bar* in his *American Addresses* (1911) pp. 307–309, 312.

"It should not be inferred that in England there is no lapse from such standards. It requires some diligence to discover individual shortcomings, but inquiry will develop that even 'ambulance chasing' is not unknown—although greatly reprehended and despised. If the American observer, on watching the trial of an action, perhaps against an omnibus company, for personal injuries, will cautiously comment upon the array of solicitors and counsel representing a plaintiff apparently not possessed of a six-pence, and express wonder that he is able to afford it, the information will be forthcoming that some solicitor's clerk was probably in a neighboring 'pooblic' and, hearing of an accident, had followed the injured man, perhaps to the hospital, and got the case for his master, whose remuneration would depend upon the result. Pressing the inquiry further as to whether the solicitor advances the barrister's fees, it will reluctantly be admitted that some barristers have relations with solicitors that should not be looked into too closely—in other words that their fees are contingent. But it will also be added that they are taking great risks of exposure."—Thomas Leaming, *A Philadelphia Lawyer in the London Courts* (1911) pp. 83, 84.

"Agreement to Wait for Fees until Received by Solicitor.—It is a breach of professional etiquette for Counsel to whom a brief has been delivered by a Solicitor to agree with that Solicitor that he, Counsel, will wait for payment of the fees payable on that Brief until that Solicitor shall have received them from his lay client. An. St. 1906–07, p. 12."—Statement of the General Council of the Bar, *The Annual Practice* (1917) p. 2417.

time. His habit, therefore, is to allow his Junior in each trial to proceed without him as far as possible in the unimportant parts of the case while he travels from one court to another trying to keep abreast of all his different litigations.

This, however, can always be avoided by any client who wishes to pay double or treble fees to be sure of having his Counsel remain in court throughout the entire trial.

SUITS IN FORMA PAUPERIS. Opinion of the Council of the Law Society, *Law, Practice and Usage in the Solicitor's Profession* (1909) p. 288: 943. A member inquired whether there was any objection to a solicitor and counsel taking their fees, or a reduction thereof, for conducting a divorce case instituted in forma pauperis.

The Council stated that they were not aware of any case in which remuneration had been taken in the circumstances mentioned, and that the practice, if it exists, is one of which they cannot approve, as it is contrary to the principle governing suits in forma pauperis.—Opinion of Council, November 16, 1894.

SUITS IN FORMA PAUPERIS—REMUNERATION OF SOLICITOR. Opinion of the Council of the Law Society, *Law, Practice and Usage in the Solicitor's Profession* (1909) pp. 291, 292: 956. A member called attention to Opinion No. 943 and to the remarks of the President of the Probate Division in the case of Richardson v. Richardson and Plowman, [1895] P. 276.

The Council stated in reply that the remarks of the President certainly did seem to support the view that a solicitor retained by a pauper petitioner or respondent in Divorce may receive fees from him; but they could not agree that the practice if it existed was a desirable one, nor reconcile it with Order 16, Rule 27, applicable to the Chancery and Common Law Divisions of the High Court.—Opinion of Council, February 1, 1900.

SUITS IN FORMA PAUPERIS—GUARANTEE OF COSTS. Opinion of the Council of the Law Society, *Law, Practice and Usage in the Solicitor's Profession* (1909) p. 291: 955. A member inquired whether it was proper for him to act for a client suing in forma pauperis, and at the same time to enter into an arrangement with a relative of the client for the payment of his costs.

The Council expressed the opinion that the position of a solicitor appearing for a litigant in forma pauperis is inconsistent with his having arranged for payment of his professional charges.—Opinion of Council, November 25, 1898.

TRAVELLING EXPENSES—SEASON TICKET HOLDER. Opinion of the Council of the Law Society, *Law, Practice and Usage in the Solicitor's Profession* (1909) p. 314: 1040. A solicitor had a first-class contract ticket which enabled him to travel over a considerable portion of the county in which he carried on business. He had purchased this ticket chiefly for office use. It had been his custom if he went on an office journey to places within the limits of his contract ticket not to charge his client anything for railway fare. He asked for the opinion of the Council whether in the circumstances stated he was entitled to charge first-class return fare, or any other sum.

The Council expressed the opinion that he was not entitled to charge the client with first-class return fare, and seeing the practical impossibility of apportioning the amount paid for the contract ticket in the first place between personal and business journeys, and secondly between the various clients, the Council came to the conclusion that no portion of the sum paid could be charged to the clients.—Opinion of Council, July 25, 1901.

NEWNAN v. WASHINGTON.

(Supreme Court of Tennessee, 1827. Mart. & Y. 79.)

CRABB, J. This is an action brought by the defendant in error, an attorney at law, against the defendant, upon a quantum meruit for professional services. The defendant says, that the plaintiff cannot recover, because the profession of the law is of an honorable character, and services rendered by its professors gratuitous. The law in England is certainly as contended for, both in relation to counsellors and physicians. But the doctrine has not prevailed in this state, with regard to either. It has been common here, for professional men, as well as other persons who have labored for the benefit of their employers, to sue for and obtain what they reasonably should have for their services, in the opinion of an impartial jury. * * *

In the opinion of this court, the law should be so; it is consonant with the nature of our institutions, that faithful labors should be rewarded by reasonable remunerations; and he who works at the bar, and he who works at the plane—the physician, the farrier, the carpenter, and the smith, should all possess an equality of rights, and be paid what they reasonably deserve to have, according to the nature and value of their respective services.

We have here no separate orders in society—none of those exclusive privileges, which distinguish the lawyer in England, in order to attach him to the existing government, and which constitutes him a sort of noble in the land—rising, by regular gradation, from an apprentice's humble seat in Westminster Hall, until he becomes a sergeant, and then is invited to a seat within the bar as King's counsel—after a little time receives some sinecure appointment, or is placed on the bench

for life, with a salary of many hundred pounds sterling; or is appointed solicitor general to the king, or the queen, or attorney general, or perchance, attains to the highest professional honors, by taking his seat on the woolsack; equal, whatever may have been his birth, or his origin, to the proudest peer he looks upon.

None of these privileges are possessed by the advocates and attorneys of Tennessee. True, the latter may be promoted, (if promotion it may be called,) from a lucrative practice at the bar, to a troublesome and unproductive, though honorable, seat on the bench.

But, upon the whole, a lawyer in England is as different from a lawyer here as a man clad in a plain suit of black or blue, his head such as nature made it, is unlike him in appearance who has his body surrounded with a long robe and his head covered with a large wig.

It cannot be seriously thought that the general assembly intended the tax fee, which is directed to be included in the bill of costs in each suit, as the sole reward of professional exertion. According to this doctrine, the advocate who has perhaps spent as much money as would afford him the means of sustenance during life, for the purpose of qualifying himself successfully to plead the cause of the injured, must labor for the litigant, by day and by night, throughout a protracted controversy; and if, in the end, he should be victorious, and secure to his client an estate, he will receive the liberal compensation of two dollars and fifty cents—and if he should happen to be conquered, he must content himself with nothing.

But it is contended, that on the score of public policy, such actions should be discountenanced, and the client be left to give, and the counsel to receive, whatever the liberality of the former may prompt him to offer, or the conscience of the latter induce him to ask. On this point, it is believed, the weight of the argument is clearly on the part of the adjudications of Tennessee.

Leave the doctrne as desired, and the happy moment will always be selected by the unconscientious, when the anxious suitor is elevated by hope, or depressed by fear, to extort unreasonable advances in the shape of gratuities. But let it be known, that industry and attention, and ardor, will be certainly compensated by reasonable payment, and you encourage forbearance on the part of the attorney or advocate. He is not tempted to get what he can, while the fever of his client is up—he waits in security until his labors are performed, his services rendered: knowing that he will at last receive what a disinterested jury shall award. We, are, therefore, of opinion that the judgment of the circuit ought to be affirmed. Judgment affirmed.[9]

[9] New Jersey seems to be the only state in the United States not holding this view. The New Jersey rule approximates that of Canada. It is epitomized by Reed, J., in Bentley v. Fidelity & Deposit Co., 75 N. J. Law, 828, 829, 69 Atl. 202, 203, 127 Am. St. Rep. 837, 15 Ann. Cas. 1178 (1908), an action which was brought to recover for services rendered by plaintiffs as attorneys and for services rendered by plaintiffs as advocates, as follows:

"As to that portion of the claim for services as attorney no recovery was

UNION SURETY & GUARANTY CO. v. TENNEY et al.

(Supreme Court of Illinois, 1902. 200 Ill. 349, 65 N. E. 688.)

This is an action of assumpsit on the common counts by the appellees, constituting a firm of attorneys in Chicago, to recover for retainer and legal services.

CARTER, J. * * * The contract merged all previous negotiations, * * * and called for the payment, at once, of a retainer of $1,000 to appellees. A "retainer," as the word implies, is the act of the client in employing his attorney or counselor. The word is also used to denote the fee which the client pays his attorney when he retains him to act for him, and thereby prevents him from acting for his adversary. Here was a special contract for a retaining fee of $1,000, and a recovery could be had on such a contract without proving any services at all, for the retainer precedes the rendering of services. If appellant, after retaining appellees as counsel, chose not to avail himself any further of their services, that was its privilege, but could furnish no ground for a refusal to pay the stipulated retaining fee. * * *

Judgment affirmed.[10]

possible in the action without a taxed bill of costs. Strong v. Mundy, 52 N. J. Eq. 833–836 [31 Atl. 611 (1895)]. There was no such bill produced at the trial. As to that part of the plaintiffs' claim which represented fees for advocacy, or counsel fees, it is entirely settled in this state that no action will lie for them, unless the claim is supported by an express contract entered into between the defendants and the plaintiffs to pay a specific sum. Without such express agreement, a fee paid is regarded as an honorarium, and no legal liability to pay it arises from the rendition of services alone. Schomp v. Schenck, 40 N. J. Law, 195 [29 Am. Rep. 219 (1878)]; Hoffer v. Ludlum, 41 N. J. Law, 182 [1879]; Zabriskie v. Woodruff, 48 N. J. Law, 610 [7 Atl. 336 (1886)]."

On a lawyer's right to recover compensation for legal services rendered, see 127 Am. St. Rep. 841, note.

[10] "That there are two classes of retainers by which the services of attorneys, solicitors, or counsellors are secured is believed to be common, if not universal. First, general retainers. These have for their object the securing, beforehand, of the services of a particular attorney or counsellor for any emergency that may afterwards arise. They have no reference to any particular service, but take in the whole range of possible future contention, which may render attorneyship necessary or desirable. Counsel thus retained is not at liberty to accept employment or render services adversary to the interest of the client thus retaining him. He is, as to such client, monopolized. A special retainer has reference to a particular case or to a particular service. * * * It, however, imposes obligations, pro hac vice, equally binding with those enjoined by a general retainer. It forbids the acceptance of adversary employment, or the performance of adversary services. It exacts undivided loyalty and allegiance to the client, equal to that demanded by the veriest despot that ever scourged a people. In that particular service his talents and skill are not his own; they are bought with a price. These he must bestow with all the zeal and earnestness of his nature and in all the methods which truth and honesty can sanction. The obligation hath this extent; no greater."—Stone, C. J., in Agnew, Adm'r, v. Walden & Son, 84 Ala. 502, 504, 505, 4 South. 672, 673 (1887).

For the English rule as to general and special retainers, see ante, p. 377, note. On the right of a lawyer to a retaining fee, see 19 Ann. Cas. 489, note.

TREAT v. JONES.

(Supreme Court of Errors of Connecticut, 1859. 28 Conn. 334.)

Book debt. The plaintiff was a counsellor at law, and brought the suit to recover for professional fees and disbursements.

The case was referred to an auditor, who found that the defendant employed the plaintiff to defend him in certain public prosecutions and that the services were rendered and money paid by the plaintiff in so defending him; and found that the defendant was indebted to the plaintiff in the sum of $48, if the plaintiff was entitled to recover anything. But the auditor further found that, shortly before the prosecutions referred to, the defendant with sundry others was engaged in a riot, and that the plaintiff was one of the instigators of the riot and encouraged the defendant and others to take part in it, by promising to defend them, by urging them on, and by shouting and swinging his hat; and that the account of the plaintiff was wholly for services rendered and money paid by him for the defendant, in prosecutions against the defendant for the riot.

Upon these facts the auditor submitted the question as one of law to the court, whether the plaintiff was entitled to recover. The superior court rendered judgment for the plaintiff, and the defendant brought the case before this court by motion in error.

SANFORD, J. * * * The fair import of the whole finding is that, to induce the defendant to engage in the riot, the plaintiff promised to defend him against the expected prosecutions and that, when the prosecutions came, the defendant requested the plaintiff to perform his promise, and he did so. The plaintiff can not now repudiate his promise and compel the defendant to make him further compensation. It would be a reproach to the law, if its courts could be made the instrument of enforcing a claim like this.

It is claimed that the plaintiff is not seeking to enforce an illegal contract, because the auditor finds that "the plaintiff was employed by the defendant as his counsel," etc. But he is seeking to enforce a contract which originated in his own illegal instigation to the commission of a crime, without which instigation that crime might not have been committed, and so no occasion for the plaintiff's services have arisen.

The contract on which the recovery is claimed was incurably vitiated in its origin by the plaintiff's illegal conduct in relation to it, and the groundlessness of the plaintiff's claim is equalled only by his effrontery in bringing it to the notice of the court.

The judgment of the superior court must be reversed. In this opinion the other concurred.

Judgment reversed.

II. The Method of Computing Fees

B. B. A. CANON.

XII.[11] Fixing the Amount of the Fee. In fixing fees, lawyers should avoid charges which overvalue their advice and services, as well as those which undervalue them. A 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.[12] The reasonable requests of brother lawyers, and of their widows and orphans without sufficient means, as well as all other helpless persons, should receive special and kindly consideration.[13]

In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will pre-

[11] A slight revision of A. B. A. Canon 12.

[12] In holding that, in determining the proper amount of an attorney's fee in a suit to set aside a divorce, the wealth of the husband cannot be considered by the jury, the Iowa Supreme Court said: "We think no court has ever said that, with the facts the same, a reasonable compensation for a professional service for a poor man is worth less than the same service for a rich man. It is likely true that less is often taken from the poor than from the rich, but the reason is not because of a difference in what the service is reasonably worth, but because of a disposition of professional persons to charge less in such cases, even to the extent, in some cases, of making a gratuity, or a mere trifle. The practice is to be commended, but not under a rule that they may, while thus giving to one, take, because of that fact, from another. If it be the rule that fees may be enhanced because of the wealth of the client, we do not see why, in a case where the client is poor, that fact may not be shown to lessen the compensation, and such a rule has never obtained."—Granger, J., in Stevens v. Ellsworth, 95 Iowa, 231, 242, 63 N. W. 683, 686 (1895).

[13] In Graydon v. Stokes, 24 S. C. 483 (1886), the right of one attorney to charge another for legal services rendered is adjudged. McGowan, J., said: "While there does exist, in certain localities at least, a 'courtesy' among gentlemen of the bar not to charge each other, but when requested by a brother lawyer to render him services in the line of their profession without fee or reward, yet where such 'courtesy' exists, it does not touch the legal rights of the parties."—24 S. C. at page 486.

So, in Thigpen & Herold v. Slattery (La.) 73 So. 780, 783 (1917), Monroe, C. J., said: "There is, no doubt, a rule of courtesy among the members of the bar, as among members of other professions, agreeably to which each will render services to the other without expectation of reward other than such as may come by way of similar service, and a case might, perhaps, be presented in which that rule would be applied as the law which should govern it; but the facts and the evidence disclosed by the record do not authorize the conclusion that this is such a case. The courtesy of a profession is not to be strained to meet the demand of one who, having practically withdrawn from the profession and thereby disabled himself from reciprocating in kind, demands the courtesy as an aid to the accumulation of wealth in another pursuit; and, if the defendant herein availed himself of plaintiffs' services upon the assumption that no charge would be made for them, he has himself, alone, to blame, for the evidence fails to show any such relation between him and plaintiffs or any such custom as would authorize that assumption."

clude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other business while employed in the particular case or antagonisms with other clients;[14] (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the certainty or the uncertainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.[15]

In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.[16]

[14] On the right of a lawyer to compensation for debarring himself from representing antagonistic interests, see 19 L. R. A. (N. S.) 960, note.

[15] "Every pleader who acts in the business of another should have regard to four things: * * * Fourthly, there is the salary, concerning which four points must be regarded—the amount of the matter in dispute, the labour of the serjeant, his value as a pleader in respect of his [learning] eloquence, and repute, and lastly the usage of the court. A pleader is to be suspended if he is attainted of receiving a fee from both sides in one cause."—*The Mirror of Justices*, Book II, Chapter 5, 7 Selden Soc. Pub. 47, 48.

In Succession of Percival, 138 La. 543, 551, 70 South. 505, 508 (1915, 1916) Land, J., said: "In an early case it was held that the measure of the reward of professional services is the exertion of legal knowledge, the responsibility incurred and the labor bestowed. Dorsey v. Creditors, 5 Mart. N. S. [La.] 399 [1827]. In another case the court held that the difficulties of the case. the amount in controversy, and other attending circumstances must be considered, in connection with the physical and mental labor, and responsibility incurred. Hunt v. Orleans Cotton Press Co., 2 Rob. [La.] 404 [1842]."

"Attorneys and solicitors are entitled to have allowed to them, for their professional services, what they reasonably deserve to have for the same, having due reference to the nature of the service and their own standing in the profession for learning, skill and proficiency; and, for the purpose of aiding the jury in determining that matter, it is proper to receive evidence as to the price usually charged and received for similar services by other persons of the same profession practicing in the same court. Vilas v. Downer, 21 Vt. 419 [1849]."—Clifford, J., in Stanton v. Embrey, 93 U. S. 548, 557, 23 L. Ed. 983 [1876].

"In estimating the value of professional services, there is a personal element which neither the applicant, the court, nor his brother lawyers who may be called on as witnesses, can or ought to ignore. The same services rendered by a young lawyer with the ink on his license scarcely dry, and by a veteran of forty years' experience, who may have occupied high judicial position, will, properly enough, be measured by each by a very different standard, and will entitle each to very different compensation."—Cooper, Ch., in Bowling v. Scales, 1 Tenn. Ch. 618, 621 (1875).

On what is a reasonable attorney's fee, see Ann. Cas. 1916B, 263, note.

[16] "The prosecuting attorney of an Ohio county is reported to have declared in a public address: 'The practice of the law has long since ceased to be a profession and has become a business.' If it is true, it certainly is to be lamented. We do not believe that it is true. * * * The essence of a professional man consists in his learning and his ethical soundness. It cannot be doubted that the bar to-day is as learned as at any period in American history. * * * And as for ethics, the ambulance chaser is scorned while the drummer is an honored member of the business world. The dishonest lawyer

is disbarred by his fellows; when did business men ever drive a rogue out of trade unless he cheated them?"—20 Law Notes, 22.

"First, what shall we say of the charge of 'commercialism'? Obviously, in the beginning it needs definition. The complaint cannot be that the lawyer seeks (and with some earnestness) pecuniary return. To-day, as always, 'the laborer is worthy of his hire.' What complainant means, I think, is that the lawyer to-day is more ready than formerly to sacrifice the higher and more obligatory aims of his professional work to mere money-reward; that, more specifically, the lawyer's usefulness as a helper in the great business of promoting justice, and the lawyer's appropriate and best reward of reputation for ability and character, mean less to him than formerly, and money more. How about this charge, as now given precision? There is no evidence of it, and there is much evidence against it. Bad men in the law there are, as everywhere else in the world; more bad men, perhaps, there are in the law to-day than ever before, because there are many more lawyers; but that the average professional standard has fallen there is nothing to show or to suggest."—Lloyd W. Bowers, *The Lawyer To-day*, 38 Amer. L. Rev. 823, 825.

"No one supposes that the physician is calculating his fee when he counts the pulse of his patient, or that the clergyman weighs the souls of his parishioners in the balance with his salary. It is not for the fee of his client, not even for the professional repute which follows success, and which is dearer than money, that a lawyer, truly devoted to his profession, gives his days and nights to his client's cause. It is to satisfy his own sense of duty, and for this he will go far beyond the service which would be doled out for a stipulated price."—William Allen Butler, *Lawyer and Client* (1871) p. 74.

"He is a poor-spirited fellow who conceives that he has no duty but to his clients and sets before himself no object but personal success. To be a lawyer working for fees is not to be any the less a citizen whose unbought service is due to his community and his country with his best and constant effort. And the lawyer's profession demands of him something more than the ordinary public service of citizenship. He has a duty to the law. In the cause of peace and order and human rights, he is the advocate of all men, present and to come."—Elihu Root, *Some Duties of American Lawyers to American Law*, 14 Yale Law Journal, 63, 65.

"There is one other thought to remember, gentlemen, and that is that when you begin your practice it is to be for a lifetime. It is not with the expectation of making money quickly. It is going to be years. You may be fifteen years getting on your feet. To be sure, you have got fifteen or twenty profitable years after that. But your profitable years will come only after you are forty or forty-five. You will then earn the rewards for the work you have done. You will be favored with your clients. No man is so happy as the professional man who stands well in his profession, knowing that he has earned all that he has got in reputation or in money. Build for that thirty or forty years and you will build firmly. But do not forget that you can build but slowly. The first year I practiced my receipts were $273. The second year I received $400. The third year I received $460. The fourth year it was $720. In a year or two more it was $1,800; the next year $2,100; the next year $2,200; the next year $3,000. That was about ten years from the time I began. Then it reached $4,000; then $4,500; then $5,000; then $6,000; then $7,000; then $10,000; and I am not going any further—this evening."—Frank J. Loesch, *The Acquisition and Retention of a Clientage*, 1 Illinois Law Review, 455, 469.

"Of the entire body of about eight thousand lawyers in the city of New York, probably ten per cent. are in receipt of very respectable incomes. One-tenth of the eight hundred may be in receipt of incomes of fifty thousand dollars or more; another hundred may be receiving between twenty-five and fifty thousand; another one hundred and fifty between fifteen and twenty-five thousand; and the remainder will receive from ten thousand to nearly fifteen thousand. If the incomes of lawyers were revealed, it would probably occasion surprise to find how few lawyers receive more than twenty-five hundred dollars a year."—Theron G. Strong, *Landmarks of a Lawyer's Lifetime* (1914) p. 465.

EGGLESTON v. BOARDMAN.

(Supreme Court of Michigan, 1877. 37 Mich. 14.)

MARSTON, J. Plaintiffs brought an action upon the common counts to recover for services rendered as attorneys in several different causes.

In considering the several questions raised in this case, we will examine them in their order as arranged in the brief of defendant's counsel.

1. The first, third, sixth and seventh exceptions depend upon the same question of law, and are fairly stated by defendant's counsel in the following request, which they desired the court to give the jury but which was refused:

"When an attorney is employed to argue a case in the supreme court, the value of his services in the absence of any express contract, is the amount of labor performed in the case, without any reference to the value of the property in litigation."

In support of this proposition counsel insist that in the absence of a special contract, one day's work in an important cause is worth no more than the same services in a suit of less magnitude; that as well might any laborer or mechanic charge extra wages per day when fortunate enough to secure a large job; that where work requires a different kind of skill or workmanship, then, of course, such charge should be made as the skill required would command, but the same skill and workmanship upon an important piece of work, would bring no more per day than when it was applied to a lesser job; and that the same knowledge of practice and rules of law are required of the attorney or solicitor in one case as the other.

We cannot concur in this reasoning, the effect of which, if adopted, would be to establish a scale of compensation for professional services, when the amount to be paid was not specially agreed upon, dependent upon the skill and professional standing of the person employed, and the actual time by him devoted to the work, but without any reference to the real nature of the questions he was called upon to investigate, or the amount in controversy, and the increased care and responsibility arising therefrom.

Whenever an attorney or solicitor is retained in a cause, it becomes his implied duty to use and exercise reasonable skill, care, discretion and judgment in the conduct and management thereof. It would be very difficult to lay down any definite rule or principle, applicable alike to all cases, as to the care and skill required. Each case must be governed by its own peculiar facts and circumstances, and the amount in controversy must in every case play a very important part in the determination of this question. The lapidary who cuts, polishes and engraves a precious stone of exceedingly great value, must exercise much more care, skill and judgment than would be required in the performance of like work upon one of but ordinary or little value, and he

would be entitled to demand and receive a correspondingly increased compensation in the former case, than he would in the latter, although the time spent by him in such case was the same. The common carrier charges much more for carrying jewels, gold, bank-bills or valuable papers, than for more bulky and less valuable things, although the latter may be vastly more heavy, cumbersome and in fact much more expensive to transport.

The right to increased compensation in these cases and in many others that might be mentioned, is universally recognized. No one questions such right, yet what causes the difference in compensation? Nothing but the increased responsibility dependent upon the value of the article, in the case of the carrier; in the other case, the same fact, coupled, perhaps, with the skill of the person who performs the work.

The artist who transfers to the canvas the living likeness, destined perhaps to become immortal as a work of art, is entitled to a vastly higher compensation than he would be for spending the same time in painting buildings, even although the quantum of work done in the latter case might be estimated by the square yard. The recompense to be paid the sculptor who conceives, molds and produces his masterpieces of form cannot be measured and fixed by a standard based alone upon the time he spent in their production. Nor in cases where they were merely executed under his direction, could his reward be fixed upon the same standard as of those who performed the manual labor under his personal supervision. The productions of the composer, the poet and the author cannot be valued by the time apparently spent in their preparation. They are formed of a combination of ideas which may have cost their authors years of application to complete.

The lawyer, who in order to excel in his profession, has devoted years to preliminary studies and has spent much labor and money to thoroughly fit him for his calling, so that he might be able to act as an advocate in court, or as a counsellor to guide and direct others,—to furnish them from his vast storehouse of knowledge, ripened and perfected from long experience, with such ideas and suggestions which, when carried out and followed up, would lead to success,—how shall his services be estimated?

It is very evident that the responsibility, the care, anxiety and mental labor is much greater in a case where the amount in controversy is large than where it is insignificant. * * *

As we discover no error, the judgment must be affirmed.[17]

[17] "It requires no greater labor to draw a complaint or answer, or to render any other specific service in a case in which the amount involved is $1,000,000, than in one in which it is $100. And yet, every lawyer knows that the labor bestowed upon a case is, as a general rule, in proportion to the magnitude of the interest involved. While the labor in drawing a pleading may be no more when the amount involved is large than when it is small, yet the

LINCOLN ON FEES. Ward Hill Lamon, *Recollections of Abraham Lincoln* (1895) pp. 17–19: Early in our practice [18] a gentleman named Scott placed in my hands a case of some importance. He had a demented sister who possessed property to the amount of $10,000, mostly in cash. A "conservator," as he was called, had been appointed to take charge of the estate, and we were employed to resist a motion to remove the conservator. A designing adventurer had become acquainted with the unfortunate girl, and knowing that she had money, sought to marry her; hence the motion. Scott, the brother and conservator, before we entered upon the case, insisted that I should fix the amount of the fee. I told him that it would be $250, adding, however, that he had better wait; it might not give us much trouble, and in that event a less amount would do. He agreed at once to pay $250, as he expected a hard contest over the motion.

The case was tried inside of twenty minutes; our success was complete. Scott was satisfied, and cheerfully paid over the money to me inside the bar, Mr. Lincoln looking on. Scott then went out, and Mr. Lincoln asked, "What did you charge that man?" I told him $250. Said he: "Lamon, that is all wrong. The service was not worth that sum. Give him back at least half of it."

I protested that the fee was fixed in advance; that Scott was perfectly satisfied, and had so expressed himself. "That may be," retorted Mr. Lincoln, with a look of distress and of undisguised displeasure, "but I am not satisfied. This is positively wrong. Go, call him back and return half the money at least, or I will not receive one cent of it for my share."

I did go, and Scott was astonished when I handed back half the fee.

This conversation had attracted the attention of the lawyers and the court. Judge David Davis, then on our circuit bench, called Mr. Lincoln to him. The judge never could whisper, but in this instance he probably did his best. At all events, in attempting to whisper to Mr. Lincoln he trumpeted his rebuke in about these words, and in rasping tones that could be heard all over the court room: "Lincoln, I have been watching you and Lamon. You are impoverishing this bar by your picayune charges of fees, and the lawyers have reason to complain of you. You are now almost as poor as Lazarus, and if you don't make people pay you more for your services you will die as poor as Job's turkey!"

labor in the examination of authorities and documents preliminary to drawing it, and the care bestowed upon the pleading itself, would be much greater in one case than in the other. This extra care and labor must be compensated; and it may be measured with some degree of accuracy by the amount involved in the suit."—Mullin, P. J., in Garfield v. Kirk, 65 Barb. (N. Y.) 464, 468 (1873).

[18] Lamon was "one of Lincoln's numerous circuit partners."—Ida M. Tarbell, *Life of Abraham Lincoln* (1909) Vol. II, p. 268.

Judge O. L. Davis, the leading lawyer in that part of the State, promptly applauded this malediction from the bench; but Mr. Lincoln was immovable. "That money," said he, "comes out of the pocket of a poor, demented girl, and I would rather starve than swindle her in this manner."

That evening the lawyers got together and tried Mr. Lincoln before a moot tribunal called "The Ogmathorial Court." He was found guilty and fined for his awful crime against the pockets of his brethren of the bar. The fine he paid with great good humor, and then kept the crowd of lawyers in uproarious laughter until after midnight. He persisted in his revolt, however, declaring that with his consent his firm should never during its life, or after its dissolution, deserve the reputation enjoyed by those shining lights of the profession, "Catch 'em and Cheat 'em." [19]

DUTY TO TESTIFY AS TO THE VALUE OF LEGAL SERVICES. N. Y. Committee. *Question 17:* A lawyer who states that he has had great difficulty in securing testimony in behalf of his client from lawyers as to the value of legal services, in a litigation between the client and a former lawyer, involving that value, has applied to the Association to designate lawyers who will act as expert witnesses in his case. His application has suggested the formulation of the following question:

Is it the ethical duty of a lawyer, when called on to give testimony as an expert witness concerning the value of legal services, to testify as a witness giving his opinion of such value on a proper question submitted to him, in a litigation where it is charged that another lawyer has greatly overcharged the latter's client, or may any number of lawyers who are appealed to give testimony respecting the value of such services, the nature and extent of which are not in dispute, decline to testify on the ground that they do not care to express an opinion adverse to a charge made by another lawyer and which is in litigation?

Answer: We are of the opinion that mere considerations of courtesy or fraternity should not deter members of the legal profession from testifying in respect to the value of legal services, when it is contended

[19] In People v. Bamborough, 255 Ill. 92, at page 96, 99 N. E. 368, at page 370 (1912), a lawyer who had withheld $1,000 of his client's money for his fee when $225 was ample was disbarred for so doing. Hand, J., for the court, said: "The relation existing between attorney and client is a confidential one, and when an attorney gets the money or property of his client into his hands, he cannot, in a disbarment proceeding, justify its retention under the pretense that he is holding it as fees, when, as here, it clearly appears the amount claimed for fees is unreasonable and extortionate." See, also, In re Hahn, 84 N. J. Eq. 523, 94 Atl. 953 (1915).

On charging one with exacting excessive compensation for goods or services as libel or slander, see 40 L. R. A. (N. S.) 79, note.

that a lawyer has overcharged or attempted to overcharge a client, and the controversy is the subject of litigation.[20]

III. Contingent Fees

A. B. A. CANON.

13. Contingent Fees. Contingent fees, where sanctioned by law, should be under the supervision of the Court, in order that clients may be protected from unjust charges.[21]

B. B. A. CANON.

XIII.[22] A lawyer should not undertake the conduct of litigation on terms which make his right to reasonable compensation contingent on his success, except when the client has a meritorious cause of action but no sufficient means to employ counsel unless he prevails; and a lawyer should never stipulate that in the event of success his fee shall be a fixed percentage of what he recovers or a fixed sum, either of

[20] In Lee v. Lomax, 219 Ill. 218, 221, 76 N. E. 377, 378 (1905) Cartwright, J., said: "Two attorneys, with a complaisance not unusual in such cases, testified that the [attorney's] charges were not unreasonable and the services were worth somewhat more than the charges. Evidence of that kind is admissible, but it is in the nature of opinions and generally influenced by a desire to be obliging and to conform to the views and wishes of brother attorneys, and it is never binding on the court. Courts are entirely capable of forming and exercising an independent judgment on the question."

On the admissibility and necessity of expert evidence as to the value of legal services, see Ann. Cas. 1914D, 369, note.

[21] "It should be borne in mind that the American Bar Association was not framing a statute, but was trying to frame an ethical canon which could be subscribed to in every state, whether the given state did or did not legalize contingent fees and whether (where it did recognize such fees to be legal), it did or did not already provide a particular method of supervision. * * * If the code were a bill to be passed by the legislature, its failure to point out a specific method of supervision would be highly objectionable, but it is not such a bill. The code is simply a statement of a few of the important ethical principles which all lawyers should be bound by and may very appropriately provide that the court should supervise contingent fees, whenever clients claim them to be exorbitant or in anyway unjust, without pointing out the method of supervision."—George P. Costigan, Jr., *The Canons of Legal Ethics*, 21 Green Bag, 271, 276.

"Canon 10 says that the lawyer should not purchase any interest in the subject-matter of the litigation which he is conducting. * * * The right to a contingent fee is virtually a right in the thing which is the subject of litigation. Patten v. Wilson, 34 Pa. 299. A. sues B. for damages for a personal injury. A. employs X. as an attorney, agreeing to let X. have one third or one fourth of the sum recovered. Yet, the thirteenth canon does not forbid contingent fees. * * * Does the canon do anything more than by implication suggest that contingent fees should not be 'unjust charges?'"—Anonymous writer in 20 Dickinson Law Rev. 1, 12, 13.

[22] A substitute for A. B. A. Canon 13.

which may exceed reasonable compensation for any real service rendered.

Such practices tend to corrupt and discredit the Bar. Lawyers who try to get business by charging nothing unless they succeed, even though they leave the size of their fees to be determined by the amount and character of their services, are constantly tempted to promote groundless and vexatious suits. Those who go further and bargain that, if successful, their fees shall be fixed sums or percentages, are not only apt to become public pests, but are in constant danger of abusing or betraying their own clients. When making such a bargain the lawyer's superior knowledge and experience give him an advantage which tempts him to overreach his client. By making it, he, in effect, purchases an interest in the litigation. Consequently, unhappy conflicts between his own and his client's interests, in respect to the settlement or conduct of the suit, are always likely to arise; his capacity to advise wisely is impaired; and he is beset by the same temptations which beset a party to be dishonest in preparation and trial.

BOX v. BARNABY.

(Court of King's Bench. Hob. 117a.)

Box an attorney brought an action upon the case against Barnaby for these words: Thou art a common maintainer of suits, and a champertor, and I will have thee thrown over the bar the next term. And after a verdict for the plaintiff, upon a motion in arrest of judgment, the Court gave judgment for the plaintiff only upon the word champertor, for there is maintenance lawful and unlawful, and where the word is indifferent it shall be taken in mitiorem partem; now an attorney may and ought by his office to maintain his clients' causes. And yet in an action of maintenance he cannot plead not guilty, but must justifie. And an attorney may well be said a common maintainer, because he is common to as many as will retain him. And the words of throwing over the bar are utterly of an uncertain sense; but indeed it is a slander of an attorney, and that in his vocation of attorney to be a champertor, for that is not only beyond but against his office. And therefore 20 or 21 E. I. Rastal, tit. Champerty 3, that pleaders and attorneys take pleas to champerty. And I hold, that if an attorney follow a cause to be paid in gross, when it is recovered, that is champerty.

But when it is objected, that the word [champertor] was a word of art not to be understood by the vulgar, and so no damageable slander, no more than words in Latin or Welsh, except you say, that the hearers understood it; it was resolved, that this being English, and of a certain and single sense, the Court cannot doubt but it was understood.

PENRICE v. PARKER.

(High Court of Chancery, 1673. Finch, 75.)

The Plaintiffs by their Bill demand 200*l.* which they affirm the Defendant agreed to give their Father, (who was a Counsellor at Law) for his Advice and Pains in several Causes, in which the Defendant was concerned.

To which the Defendant demurred, and for cause shewed, that if he should answer the Bill, it would draw him under a Penal Law, it being against the Course of all Courts of Justice for any Counsellor at Law, to make such a Contract as in the Bill is suggested for his Fees in a gross sum, to be paid upon the Event of any Cause. Therefore this is a Bill of such a Nature, as ought not to have any Countenance in a Court of Equity.

THE COURT allowed the Demurrer.[23]

GREENLEAF v. MINNEAPOLIS, ST. P. & S. S. M. RY. CO.

(Supreme Court of North Dakota, 1915. 30 N. D. 112, 151 N. W. 879.)

Action by D. C. Greenleaf against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed and remanded.

[23] In England a contingent fee contract calling for a percentage of recovery is not recognized, but the courts have recognized the existence of "a speculative action." Such an action is defined by a county judge, as reported in 120 Law Times, 288, as one where the solicitor agrees "to run the action free of cost and recoup himself out of any damages that might be recovered." The solicitor's fees in such an action are contingent, but when he gets them, which is only if his client recovers, he gets only the fees allowed by statute. With reference to speculative actions, the Court of Appeal in Rich v. Cook, 110 Law Times, 94 (1900), approved the language of "the late Lord Chief Justice" (Lord Russell of Killowen) in Ladd v. London Road Car Company (1900), which, as quoted in 110 Law Times, at page 80, is as follows: "In reference to the subject of speculative actions generally, I think it right to say, on the part of the profession and the class of persons who were litigants in such cases, that it was perfectly consistent with the highest honour 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 honour of the profession that the solicitor should take up the action. It would be an evil thing 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 classes 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 honestly satisfied himself by careful inquiry that an honest case existed."

Champerty, on the other hand, is professional misconduct calling for discipline. In re A Solicitor [1912] 1 K. B. 302.

BRUCE, J. This is an appeal from an order sustaining a general demurrer to a complaint. The only question involved is whether an attorney who has made an agreement with his client in a personal injury action for a percentage "of any amount, received, recovered or obtained from the said defendant by reason of the injuries sustained by him, either in settlement or by action," and who subsequently serves upon the defendant a notice of an attorney's lien based upon such agreement, can recover from such defendant such percentage on the amount which the said defendant has paid to the plaintiff in settlement of the claim and action, before judgment, and without the knowledge or consent of the said attorney. More specifically the question is: Does subdivision 3 of section 6293, R. C. 1905 (section 6875, Compiled Laws 1913), provide for attorneys' liens in the case of unliquidated claims for personal injuries? We think it does. * * *

We realize, of course, that there are some authorities which hold that the invalidity of an agreement which provides that the client shall not settle the controversy without the consent of the attorney renders the whole contract invalid; the preliminary oral negotiations and the right to recover for the reasonable value of the services being merged in the written contract, and the written contract being void. See Kansas City Elevated Co. v. Service, 77 Kan. 316, 94 Pac. 262, 14 L. R. A. (N. S.) 1105; Moreland v. Devenney, 72 Kan. 471, 83 Pac. 1097; Bowman v. Phillips, 41 Kan. 364, 21 Pac. 230, 3 L. R. A. 631, 13 Am. St. Rep. 292. The cases cited, however, do not seem to express the general rule, and we prefer to follow that general rule which seems to be that: "Where a contract between an attorney and his client is valid except as to the clause prohibiting either from settling without the consent of the other, this clause may be stricken from the contract and the balance of it upheld." See Newport Rolling Mill Co. v. Hall, 147 Ky. 598, 144 S. W. 760; Jackson v. Stearns, 48 Or. 25, 84 Pac. 798, 5 L. R. A. (N. S.) 390.[24]

[24] In Matter of Snyder, 190 N. Y. 66, 71, 72, 82 N. E. 742, 744, 14 L. R. A. (N. S.) 1101, 123 Am. St. Rep. 533, 13 Ann. Cas. 441 (1907), in declaring void as against public policy a clause in a contingent fee contract which prohibited the client from settling the litigation without the consent of the attorney, Hiscock, J., said: "Courts are not unmindful of the fact that the system of contingent compensation has the merit of affording to certain classes of persons the opportunity to procure that prosecution of their claims, which otherwise would be beyond their means, and that the attorney should be protected from any dishonest attempt to deprive him of his compensation. On the other hand, no one having had an opportunity for observation can well close his eyes to the fact that this same system many times promotes litigation which is so unjustifiable that it does not even rise to the level of being speculative, and which, being carried forward by unlawful and forbidden methods, leads sometimes to the enforcement of unjust recoveries from unfortunate defendants, sometimes to the exaction of unconscionable compensation from ignorant or helpless clients, and always to stirring up discord and lawsuits. In view of the relief which courts render against settlements made with the dishonest purpose of cheating attorneys of their just compensation, it does not often happen that a reputable attorney undertaking legitimate litigation for a contingent compensation is deprived of his just dues, and there seems to be

The holding which we make, however, in no way interferes with this right of settlement when legitimately and honestly pursued. * * *

It is perfectly clear that a lien would have existed in favor of the attorney on any judgment that might have been obtained, and that such a lien would not have been against the policy of the law, even though the action happened to be a tort action. It seems to be equally clear that if a settlement had been agreed upon in the action and the attorney had been afterwards employed to sue on and to enforce that contract of settlement, a lien could have been given to him in the matter. What supposed rule of public policy, then, does a statute violate which, though not depriving the client of the right to settle when and how he pleases, gives to the attorney through whose services that settlement has presumably, in a large measure, been made obtainable, a lien upon whatever amount may be agreed to be paid?

Counsel is entirely in error in his assumption, made upon the oral argument, that contingent fees in personal injury suits are frowned upon by the law. Their validity is now, at least in America, everywhere recognized,[25] and it is a matter of common knowledge, or should

no substantial necessity for approving a form of contract which would enable unworthy members of the profession to increase existing evils through a power to manipulate and nullify any disposition upon the part of their clients to settle their differences."

On the validity of a provision in a contract of legal employment prohibiting the client from settling his claim without the lawyer's consent, see 13 Ann. Cas. 444, note; Ann. Cas. 1913D, 306, note; 14 L. R. A. (N. S.) 1101, note.

[25] "In many cases it has been considered that the mere agreement that the attorney should conduct the suit for a part of the money or thing recovered rendered the contract champertous and void; but it is now generally held that this alone is not enough, and that, to vitiate the contract on this account, it is essential that it should also appear that the attorney was to carry on the suit at his own expense, although in some cases it has been said that the attorney who furnished his services upon the contingency of success was, in a measure, sustaining the suit at his own expense. In Massachusetts the contract is said to be champertous where the attorney agrees to look solely to the fund or thing recovered, with no personal claim against the client. In many of the states, statutes have been enacted leaving the client and his attorney free to make such contracts in reference to the latter's compensation as they deem best. In several of these states, as, for example, in New York, the statutes have provided a complete and elaborate code governing the relation of attorney and client and have practically or expressly abolished all of the common-law rules respecting champerty and maintenance. The right of the courts to refuse to enforce unconscionable agreements is, however, not affected by these statutes."—Floyd R. Mechem, *A Treatise on the Law of Agency* (2d Ed.) Vol. 2, §§ 2237, 2238.

"It is not against public policy for an attorney to loan his client money with which to pay costs of suit, nor to advance the money necessary to carry on the suit, as needed, when such advances are made as a loan, with the express or implied understanding or agreement for its repayment, and there is no contract of indemnity against the clients' liability to pay costs. A contrary rule would embarrass the profession in its legitimate practice, and render attorneys a constant mark for dishonest clients. This is so because it is seldom that for some cause attorneys are not required to advance fees with which to commence suit and to pay officers and witnesses and other necessary expenses, when their clients may not be accessible, or when they may have a meritorious cause, but [may be] so impecunious as to be unable to meet, at the time, the necessary expenses." Miner, J., in Potter v. Ajax Mining Co., 22 Utah,

be a matter of common knowledge to every lawyer and judge, that the American Bar Association has refused to disapprove of them and, although recognizing their liability to abuse, has merely sought to guard against that abuse. The code of ethics of the American Bar Association goes no further than to say that: "Contingent fees, where sanctioned by law, should be under the supervision of the court, in order that clients may be protected from unjust charges." See 34 Am. Bar Ass'n Reps. p. 1163.

The reason is very clear, and that is that the original reason for the protest against contingent fees and champertous contracts no longer exists, and not only the American bar, but the American Legislatures, have long since come to recognize the fact. The English rule against contingent fees has never in fact generally prevailed in America, and even that rule was the result of an effort to cover up and perpetuate injustice rather than to prevent it. It was the result, indeed, of two great arbitrary confiscations of the property; those perpetrated by the Norman Kings when they dispossessed the Saxon proprietors and parceled their lands among their own retainers and those perpetrated by the Parliament of Henry VIII when the churches were dispossessed and the same division of property took place. Those in control did not want titles litigated or suits encouraged, and hence the rules against champerty and maintenance, while those against contingent fees have only been justified in England in later days by a resort to the fiction that the attorney is not a "laborer entitled to his hire," but an aristocrat beneath whose dignity it is, and who therefore is not allowed to contract for any fees at all. "The dignity of the rôle instead of any principle of policy, furnishes all the argument that can be brought to the support of the rule." Chief Justice Gibson in Foster v. Jack, 4 Watts (Pa.) 334. See Lytle v. State, 17 Ark. 608; Foster v. Jack, supra; Davis v. Webber, 66 Ark. 190, 49 S. W. 822, 45 L. R. A. 196, 74 Am. St. Rep. 81. Here in America not only is the contingent fee generally allowed, but in many cases it is socially necessary. The poor man who loses his legs or arms in an accident is perforce pauperized and liable to become a public charge unless some redress can be obtained from the guilty party, and that cannot be had without the help of counsel. Contingent fees are abused, and the ambulance chaser is abroad, but so also is the defaulting client who refuses to pay for service rendered, as well as the unconscionable

273, 290–291, 61 Pac. 999, 1003 (1900). Attorneys who do agree to pay the costs under a contingent fee contract are subject to discipline, where such an agreement constitutes champerty. In re Evans & Rogers, 22 Utah, 366, 62 Pac. 913, 53 L. R. A. 952, 83 Am. St. Rep. 794 (1900).

"A contingent fee is only permitted to attorneys as reward for skill and diligence exercised in the prosecution of doubtful and litigated claims, and is not allowed for the rendition of mere minor services which any layman or inexperienced attorney might perform."—Dent, J., in Dorr v. Camden, 55 W. Va. 226, 234, 46 S. E. 1014, 1017, 65 L. R. A. 348 (1904).

claim agent.[26] These evils, however, can be cured by legislation or by proper court supervision, and their cure by no means necessitates the abolition of the contingent fee. The refinements of ethical theory indeed cannot overcome plain ethical facts. If contingent fees in personal injury suits are not permissible, how in the majority of instances can a poor man get any redress at all? When, indeed, the states everywhere provide for employers' liability acts which shall be enforced by the states themselves, or poor men's lawyers who shall not be mere fledgling volunteers, but competent attorneys, then and not till then can the contingent fee be done away with.[27] * * *

[26] In Whinery v. Brown, 36 Ind. App. 276, 281, 75 N. E. 605, 607 (1905), Robinson, J., said: "While the propriety of contracts for contingent fees has been vehemently debated, yet, when such contracts are fairly made between counsel and clients, made in good faith and free from fraud and imposition, they are not illegal, and are as obligatory as between other parties. It may and does happen that persons who have rights, but no means to pursue them, are obliged to resort to this means of procuring legal redress. And it is the duty of the courts to carefully scrutinize such contracts to see that no improper advantage is taken either of the ignorance or necessity of those who enter into them, and, if it appears that they are obtained by any undue influence of the attorney over the client, or by fraud or imposition, or that the compensation is clearly excessive, the party aggrieved will be protected. The fact that the practice of stipulating beforehand for professional fees, contingent on the result of the litigation, is sometimes abused, and exposes the profession to misapprehension and illiberal remark, is not sufficient excuse for refusing to enforce such a contract, when characterized throughout by 'all good fidelity to the client.'"

"There are, however, some cases in which it is not easy to see any good reason why a bargain for a conditional fee may not be properly made. As an illustration, let us suppose a case in which the right of your client and the result of the proposed litigation depends upon a legal question which is unsettled. The question is not whether your facts will bring the case within a known rule, but whether upon your facts you are entitled to relief. If your client proceeds, it must be upon your opinion as to the probable holding of the courts upon his facts. In this case there is nothing inequitable in a bargain that shall give you part of the fruits of success, if you succeed in establishing your position, and that shall, on the other hand, relieve your client from all obligation to pay you if you fail."—Henry W. Williams, *Legal Ethics and Suggestions for Young Counsel* (1906) p. 69.

Of the argument for contingent fees in Edwin Countryman's book on the *Ethics of Compensation for Professional Services* (1882), Mr. Charles E. Grinnell has said: "It would have added to the value of Judge Countryman's address, and to his book, if he had added a discussion of the actual effect of an habitual practice for contingent fees. This seems to us to be the turning point of the discussion, so far as its value to the profession is concerned. * * * It is often right to bargain for contingent fees, but it may be, and probably would be for many lawyers, an unfortunate mistake to cultivate a practice of that sort in the ordinary affairs of common men of moderate means."—16 Amer. L. Rev. 240, 242, 249.

[27] "It is to be remembered that the legalization of the contingent fee took place shortly after the beginning of that which we now call the age of machinery. With the advent of steam and the vast variety of machines for its application to the services of mankind came a multitude of casualties. This resulted in bringing into our higher courts a class of litigants, whose litigation theretofore had only involved controversies in small transactions, occupying the attention of minor courts, and calling for the services of inexpensive lawyers. In the new era brought about by steam the poor man found himself pitted, not against another poor man, but against corporations entrenched in

The statute, as we construe it, by no means gives to the attorney this right [i. e., to prevent the client from settling and disposing of the action]. If it did so it would express the public policy of the Legislature, and we find nothing in the Constitution to prevent the establishing of that public policy. It does not, however, do so. It merely gives to the attorney a lien on the amount of "money due his client in the hands of the adverse party in an action or proceeding in which the attorney claiming the lien was employed from the time of giving notice in writing to such adverse party, or the attorney of such party." There was no money due in the hands of the adverse party until the settlement was made, and that settlement, under the common law and under the statute the client was at liberty to make even without the consent of his attorney. Immediately, however, that the settlement was made, the controversy became liquidated, and there was a sum of money due and owing to the plaintiff and in the hands of the defendant. See Standidge v. Chicago R. Co., 254 Ill. 524, 98 N. E. 963, 40 L. R. A. (N. S.) 529, Ann. Cas. 1913C, 65; 2 R. C. L. 108. Then and not till then did the lien vest, but at that time it was valid and operative. It vested and was operative merely upon the amount which had been agreed to be paid to the client, and the attorney, having no right to dictate the terms of settlement, could not claim a lien upon any greater amount. See 2 R. C. L. 108. * * *

The judgment of the district court is reversed, and the cause is remanded for further proceedings according to law.[28]

HADLOCK v. BROOKS.

MERROW v. SAME.

(Supreme Judicial Court of Massachusetts, Suffolk, 1901. 178 Mass. 425, 59 N. E. 1009.)

Consolidated actions by one Hadlock's administrator and by one Merrow against William Gray Brooks to recover certain attorney's fees due the said estate, and on an order for a portion thereof drawn in favor of said Merrow. From a judgment in favor of plaintiffs, defendant brings exceptions. Exceptions overruled.

BARKER, J. In each of these cases, tried together before the superior

wealth and power. * * * The injury which called for redress had deprived him of the only means he had. Thus it became imperative to provide for the compensation of his attorney out of the proceeds of his litigation. There was no other way."—From the Report of Committee on Contingent Fees in 31 N. Y. Bar Assoc. Rep. (1908) pp. 100, 101.

[28] On contingent fee contracts, see 1 Ann. Cas. 299, note. On the right of a lawyer with such a contract to an implied or equitable lien on the fund recovered, see 27 L. R. A. (N. S.) 634, note. On the rights of such a lawyer where the client compromises the cause of action without his consent, see 45 L. R. A. (N. S.) 750, note; 18 Ann. Cas. 1115, note.

court with a jury, there was a question whether Hadlock, who acted as senior counsel for the children of Henry Gray in the case of Codman v. Brooks, 159 Mass. 477, 34 N. E. 689, and Id., 167 Mass. 499, 46 N. E. 102, was employed under a champertous agreement. The defendant's evidence tended to show that by the terms of Hadlock's employment his compensation was to be a percentage of whatever sum should be recovered by his clients in the litigation, and also that it was to be contingent upon their success in securing such a recovery in the action. In the case brought by Hadlock's administratrix the defendant, Brooks, in substance asked the court to rule that, if he employed Hadlock as counsel in the case of Codman v. Brooks under an agreement by the terms of which Hadlock's fees and compensation were contingent upon the recovery of some part of the money held by Codman, and were to be paid out of the fund so recovered, the agreement was illegal, and that Hadlock was not entitled to any compensation for any services rendered thereunder. In the case brought by Merrow the defendant, Brooks, asked the court to rule that, if Hadlock made an agreement with the defendant, Brooks, or those he represented, to render legal services in the case named on condition that his compensation was to be paid out of the fund recovered, the agreement was illegal and void, and that if Merrow knew the nature of the agreement, and the order sued on was given and accepted for the purpose of securing to Merrow payment of such compensation, or a part thereof, Merrow could not recover.

The court declined to give these requests, and gave the following as an instruction applicable to both cases: "He [the defendant] says that the contract which took place was champertous, and therefore illegal, and therefore a void contract, and no contract at all. What is the meaning of a champertous contract? It is this: If, in the assumed case of you going to a lawyer to hire him to take a certain case, you said to him: 'I haven't any money, and unless I win this case I shan't have any money to pay you. Will you take this case, charge me either a certain percentage, or such amount as you think best, if you win the case, and, if you lose the case, charge me nothing?'—that is a champertous contract; that it is an illegal contract, and is a void contract. There are contracts that look a great deal like it upon the face of it that are not void; that is, are not champertous. It is competent for the parties to say, 'I have no money, and I can't pay you until I get the verdict.' If they stop there, if they simply make it a question of the time of payment, it is perfectly competent. It is perfectly competent for the client to say, and the lawyer to agree to it, 'I will pay you, if you are successful, a quarter of what you recover;' if they don't add the further condition, 'nothing if you don't recover.' Or, in other words, to put it in brief, if they make the payment of any fee at all contingent on the success, that is a champertous contract; but any other kind of a contract they may make,—and there are infinite

varieties of it, and there are infinite ways in which they may make the size of the fee depend upon the result, and they may make the time of payment dependent upon the result," etc.

In the Merrow case the jury was further instructed as follows: "The defendant says that the original contract upon which this was based was a champertous, illegal, and void contract, and that, therefore, this contract, being made by the parties, and by a man who knew that the contract was champertous, illegal and void, is in itself void. To put it in another way: that this contract, being based upon a void contract, is in itself void; and that I instruct you is true. If you find that the contract, in the first place, was champertous, as I have described it,—that is to say, if you find that it was a contract such as I have described as champertous,—and you find that Mr. Merrow knew the facts about the contract, then this contract is itself void. But bear in mind this thought: That Mr. Merrow may not have ever heard the word 'champertous.' Mr. Merrow very likely never did. Mr. Merrow may not have known that it was illegal. The point is, was the contract a contract whereby Mr. Hadlock was to receive nothing if unsuccessful, and receive a considerable fee if successful, and did Mr. Merrow know of these facts?"

As between an attorney at law and his client, it is of the essence of champerty that the attorney, having no previous interest to justify him, upon recovery is to have as his own some part of the thing recovered, or some profit out of it. Thurston v. Percival, 1 Pick. 415; Lathrop v. Bank, 9 Metc. 489; Lancy v. Havender, 146 Mass. 615, 16 N. E. 464. But an agreement that one not previously interested, and who agrees to prosecute a suit, upon recovery shall have a share of the thing recovered, is not, for that reason alone, champertous. The bargain, to be illegal, must have the further element that the attorney's services shall not constitute a debt due him from the client, and that his prospective share is to be the only compensation which the attorney shall receive. If, in effect, he "agreed to look for his compensation to that alone which might be recovered, and thus to make his pay depend upon his success," the bargain is champertous and void. Ackert v. Barker, 131 Mass. 436, 438.[29] "Where the right to compensation is not confined to an interest in the thing recovered, but gives a right of action against the party," the agreement is not champertous. Blaisdell v. Ahern, 144 Mass. 393, 395, 11 N. E. 681, 684, 59 Am. Rep. 99. See Scott v. Harmon, 109 Mass. 237, 12 Am. Rep. 685. But the contract may be illegal without stipulating in terms that compensation is to be solely by way of an interest in the thing to be recovered. That element of illegality may be inferred from an agreement to prosecute at one's own expense and risk unless successful. Belding v. Smythe, 138 Mass. 530. See Williams v. Fowle, 132 Mass. 385, 388. As was held in Blaisdell v. Ahern, there may be circum-

[29] See Butler v. Legro, 62 N. H. 350, 13 Am. St. Rep. 573 (1882).

stances in which the attorney may lawfully agree to give his services without charge if the suit should not be successful; and if, in case of success, and not otherwise, the attorney's fees are to constitute a debt due from the client, and give a right of action against him to recover them, so that the attorney's right is not confined to an interest in the thing recovered, it is immaterial that the avails of the suit, or a part of them, are pledged as security, or that such avails are the means and the security on which the attorney relies for payment. And, as was also said in Blaisdell v. Ahern, there may be circumstances in which an agreement by an attorney to give his services in the prosecution of a suit with the understanding that they are to be free unless the suit is successful may partake of the worst evils of maintenance.

In view of this statement of the law of champerty as it has been held by this court, the instructions requested by the defendant were erroneous. The request in the case brought by the administratrix would require the jury to find champerty at all events if Hadlock's fees were to be contingent upon success, and to be paid out of the fund recovered, whereas both of those things might concur, and yet, if there was a personal obligation upon his employer to pay his compensation, his employment would be legal. The request in the other case would require the jury to find champerty at all events if Hadlock agreed to render his services on condition that his compensation was to be paid out of the fund recovered, whereas under many circumstances such a stipulation alone does not constitute champerty. The exceptions to the refusal to give these requests must, therefore, be overruled.

* * *

Exceptions overruled.[30]

[30] In Taylor v. Rosenberg, 219 Mass. 113, 106 N. E. 603 (1914), where the contract provided that the attorney for the owner in condemnation proceedings should be paid a percentage of the damages recovered for the condemnation of the land, it was held that the contract was not champertous, since the attorney was sure to get something and the only uncertainty was as to how much.

Of Wilhite v. Roberts, 4 Dana (Ky.) 172 (1836), and Ramsey v. Trent, 10 B. Mon. (Ky.) 336 (1850), it has been said: "These two decisions are to the effect that if the client has $10,000 on deposit to his credit in the National Bank of Kentucky, and also has $10,000 standing to his credit in the National Bank of Commerce, and becomes involved in litigation affecting the money in one of these banks, he will be permitted to contract with his lawyer to pay him one-half of the deposit in the other bank, as compensation for his services, in the event of success, or he may agree to pay him a sum equal to one-half of the $10,000 actually in controversy. To agree to pay one-half of the $10,000 in suit is champerty. To agree to pay one-half of the $10,000 not involved in the suit is not champerty."—Wilbur F. Browder, *Lawyers' Fees Historically Considered*, 50 Amer. L. Rev. 554, 565.

HERMAN v. METROPOLITAN ST. RY. CO.

(Circuit Court of the United States, Southern Division of New York, 1903. 121 Fed. 184.)

LACOMBE, Circuit Judge. This cause was tried after plaintiff had settled it with defendant, receiving a sum satisfactory to himself and executing a general release, which was set up in a supplemental answer. The settlement and release was without notice to plaintiff's attorney, who had served notice of lien for his compensation. The jury found, in answer to specific questions, that defendant was negligent, that plaintiff was free from negligence, and that the amount of damage sustained by the plaintiff was $500. Testimony has since been taken to show for what amount the lien of plaintiff's attorney should be sustained. He undertook to prove that he had a contract with plaintiff for 50 per cent. of any recovery, the plaintiff to pay all disbursements. The only evidence to support this proposition is his own testimony, which the plaintiff contradicts. The court is not satisfied that such a contract was made, but, if it were, it was so utterly unconscionable as to be void. Matter of Fitzsimons, 77 App. Div. 345, 79 N. Y. Supp. 194. The action was to recover damages for injuries resulting from an ordinary street accident, a collision between a car and a truck. To constrain or persuade a client into agreeing to give half the recovery, and to pay all the disbursements besides for preparing and trying such a case, is an abuse of confidence, which, in the language of the case cited, "it would not be in the interest of public policy or professional ethics" to approve.

The services actually rendered seem to be fairly worth about $150. Inasmuch as plaintiff has released his claim, no verdict can be rendered giving him any part of the damages found; he has already been paid them. Verdict, however, will be directed for $150, to which and to the judgment thereon the lien of plaintiff's attorney will attach. Inasmuch as the recovery is less than $500, the judgment will be without costs.[31]

[31] See Muller v. Kelly, 125 Fed. 213, 60 C. C. A. 170 (1903).

On the refusal of the court to enforce an unreasonable express contract of a lawyer for compensation for services, see Ann. Cas. 1914B, 983, note.

"The question, however, as to whether such a contract is unconscionable, is one of fact, depending upon the character of the claim and the amount of services to be rendered in prosecuting it to judgment. An agreement to pay an attorney one-half of the recovery where the action was to recover a penalty of $50 would not by any person be considered to be improper; but if it was for $50,000 it might be considered quite improper. So that the mere fact that the attorney under the agreement was to receive one-half does not render it unconscionable, unless it appears from the evidence that it was induced by fraud or, in view of the nature of the claim, that the compensation provided for was so excessive as to evince a purpose on the part of the attorney to obtain an improper or undue advantage over his client."—Haight, J., in Morehouse v. Brooklyn Heights R. Co., 185 N. Y. 520, 525, 78 N. E. 179, 181, 7 Ann. Cas. 377 (1906).

"Avoid contingent fees. The danger to the profession in that class of busi-

BARNGROVER et al. v. PETTIGREW.

(Supreme Court of Iowa, 1905. 128 Iowa, 533, 104 N. W. 904, 2 L. R. A. [N. S.] 260, 111 Am. St. Rep. 206.)

Suit at law to recover for services rendered in divorce proceedings between the defendant and his wife. The plaintiff Barngrover is an attorney and the plaintiff Hughes is a detective. They learned that Mrs. Pettigrew was about to commence an action for a divorce from the defendant, and so informed him, and before notice of suit was served entered into a written agreement with him, which is as follows: "The first party has employed second party to prepare evidence in, and try in the district court of Union county, Iowa, for first party, the suit entitled Jessie Pettigrew v. J. S. Pettigrew, in which said first party is defendant; and said second party undertakes to furnish proof, in the trial of said cause, of the plaintiff's infidelity to first party, and to secure him a divorce from his wife on his cross-petition to be filed in said suit; and as compensation for said services, first party agrees to pay second party as follows: Twenty-five dollars cash, the receipt of which is hereby acknowledged, and then, when second party is successful in securing him a divorce from his wife on his cross-petition, or in case first party shall compromise said suit, or do any other act or thing to prevent second party from accomplishing said end, the further sum of $1,000. Said sums to be in full compensation for their services; and in case of the failure of said Barngrover and Hughes to obtain said divorce, except by reason of some act or thing done hereafter by the said Pettigrew, then the said second party will be entitled to receive only the said sum of $25 in hand paid; and it is further agreed that, in case the $1,000 is paid by first party to second party, then said second party will pay defendant's witness fees in said case, or depositions taken by him." The petition set out this contract and asked a recovery thereon, and also asked a recovery on a quantum meruit, alleging, further, that the suit between the defendant and his wife had been compromised, and that she had been permitted to secure a divorce without opposition. The answer put in issue the legality of the agreement, and on the trial there was a directed verdict for the defendant after the close of the plaintiffs' evidence. The plaintiffs appeal. Affirmed.

ness is that it commercializes it, and the lawyer forgets his client and sometimes the fact that the thing he is in the cause for is justice, and sets his eyes only on the cash that he sees at the end of the litigation. Of necessity this is destructive of all ethical principles and must lower the ideals of the honorable practitioner. I wish it were possible to secure a statute in every state prohibiting a contingent fee except upon a petition to the court in the given case, in which, for good reasons, the court might allow it and in its allowance fix the fee that may be taken if the issue in the case be a successful one. More than that, it would be well for the profession if disbarment were provided for the taking of an excessive percentage of a client's verdict in a cause, whether taken under antecedent contract or otherwise."—John Franklin Fort, *Legal Ethics* (1908) pp. 10, 11.

SHERWIN, C. J. The clearly expressed object of the agreement was to bring about a dissolution of the marriage contract and to put an end to the various duties and obligations resulting from it. It is therefore against sound public policy and void. The marriage relation is sacred, and one which the law will encourage and maintain when formed. Its dissolution will not be left to the caprice of the parties themselves, nor will it be permitted to rest on the interference of strangers. Hence any agreement conditioned on the obtainment of divorce, or intended or calculated to facilitate its obtainment, is void. Such is the settled policy of the law as expressed in the universal rule adopted by the courts. 9 Cyc. 519, and cases cited; 15 Am. & Eng. Enc. Law, 956, and cases cited; Stokes v. Anderson, 118 Ind. 533, 21 N. E. 331, 4 L. R. A. 313; McCurdy v. Dillon, 135 Mich. 678, 98 N. W. 746.

The agreement also provides that the appellants shall pay the defendant's witnesses out of the $1,000 so received, and is champertous. Boardman & Brown v. Thompson, 25 Iowa, 487; Adye v. Hanna, 47 Iowa, 264, 29 Am. Rep. 484.[32]

The appellants contend that, if the agreement be held to be invalid, they are still entitled to recover the reasonable value of their services on a quantum meruit. But the law will not imply a promise to pay for services which are in derogation of public policy, any more than it will enforce a specific contract having that object in view; and when a

[32] In Jordan v. Westerman, 62 Mich. 170, 28 N. W. 826, 4 Am. St. Rep. 836 (1886), a contract under which lawyers were to prosecute for the client a proceeding for divorce and alimony, they paying the costs, and were to receive all alimony and expense money awarded up to $300 and one-half of any additional sum so awarded, was held "void upon the plainest reasons of public policy." The court pointed out that it covered temporary alimony, which was given for support, and which the law could not permit the wife to bargain away in advance, and that a fraud on the court would be worked if the court were to be induced to award to the wife for her necessity what was really going to the lawyer. The court also pointed out that the contract tended directly to prevent a reconciliation between the parties to the divorce suit.

In Newman v. Freitas, 129 Cal. 283, 292, 61 Pac. 907, 910, 50 L. R. A. 548 (1900), Van Dyke, J., said: "Contracts for contingent fees paid attorneys were not tolerated at all at common law, but in this and perhaps most of the states such contracts are favored. This is on the ground that otherwise a party, without the means to employ an attorney and pay his fee certain, and having a meritorious cause of action or defense, would find himself powerless to protect his rights. In divorce cases, however, the law has taken care that the wife shall not be without assistance in proper cases either to prosecute or defend such actions. The court in its discretion may require the husband to pay as alimony any money necessary to enable the wife, not only to support herself, but also to prosecute or defend the action, and is given ample power to enforce such order. The reason or necessity therefor does not exist in such cases as in the others for allowing contingent attorneys' fees, and where the reason ceases the rule or law also ceases."

See 33 L. R. A. (N. S.) 1074, note.

In Adye v. Hanna, 47 Iowa, 264, 29 Am. Rep. 484 (1877), an agreement between attorneys and client whereby in consideration that the client would appeal a certain case and pay the attorneys a specified fee for prosecuting the appeal, the attorneys agreed to pay any judgment which might be obtained against the client, was held to be against public policy, because (1) it encouraged litigation by taking away from the client any motive for settlement; and (2) it exposed the attorneys to too great temptations to pervert justice.

plaintiff cannot establish his cause of action without relying on an illegal contract, or on services which by their very nature contravene public policy, he cannot recover. Pangborn v. Westlake, 36 Iowa, 546; Reynolds v. Nichols & Co., 12 Iowa, 398; Miller v. Ammon, 145 U. S. 421, 12 Sup. Ct. 884, 36 L. Ed. 759; Pollock's Principles of Contracts, 253–260. In the light of this well-settled rule, it is manifest that there can be no recovery here on a quantum meruit; for the services rendered, as shown by the record, were along the line specified in the written agreement. The appellants cite many cases wherein recovery on a quantum meruit was allowed where the contract was found to be illegal. In many of the cases champertous contracts were involved, and in all the services actually rendered were not in themselves illegal;[33] while in the case at bar, as we have seen, the services rendered were in themselves illegal, because their object was to procure a divorce for the defendant.

The judgment of the district court was clearly right, and it is affirmed.

Affirmed.

SOUTHWORTH et al. v. ROSENDAHL.

(Supreme Court of Minnesota, 1916. 158 N. W. 717.)

BROWN, C. J. The facts in this case, though in some respects disputed or left in doubt by the evidence, may for the purposes of the decision be conceded to be substantially as follows: Defendant was the owner of certain real property the title to which was somewhat involved, the particulars with respect to which are immaterial, and certain litigation was pending in the courts concerning the same in which he was plaintiff. Plaintiffs in this action, attorneys at law, were retained by him to take charge of and conduct the litigation in his behalf, and to institute such other or further actions or proceedings as the attorneys should deem necessary to the protection of his rights in and to the property. Plaintiffs claim that at the time of such retainer it was expressly agreed that, if successful in the litigation, they should receive

[33] "We are of opinion that to permit an attorney to recover upon a quantum meruit the value of his services rendered under an unlawful agreement, by which he undertook to carry on litigation at his own risk and without costs to his client for a part of the recovery, would be to encourage the making of such contracts on the part of attorneys, and would furnish an easy expedient for escaping the consequences of entering into contracts in violation of laws based upon considerations of public policy." Buchanan, J., for the court, in Roller v. Murray, 112 Va. 780, 787, 72 S. E. 665, 667, 38 L. R. A. (N. S.) 1202, Ann. Cas. 1913B, 1088 (1911). But the weight of authority seems to favor a recovery upon a quantum meruit where the contract is void solely because the contract was for a contingent fee, or because the attorney was to prosecute the litigation at his own expense. See Wald's Pollock on Contracts (3d Ed.) pp. 451, 452, note; 2 L. R. A. (N. S.) 261, note; 38 L. R. A. (N. S.) 1202, note.

and defendant would pay them as and for their compensation the sum of $10,000; but, if they failed in their efforts to clear up defendant's title, they should receive no compensation at all. The property involved was valued at about $100,000. There is no controversy in the evidence as to the employment of plaintiffs to conduct the litigation, though defendant denied that he agreed to pay them $10,000 if they were successful in the suit. But for the purposes of the case we assume that he did so agree. Subsequent to the retainer plaintiffs rendered certain services in the pending action, the nature and extent of which does not fully appear and is not important. Thereafter, and without notice to plaintiffs or either of them, defendant amicably settled and compromised the matter in litigation with the adverse party, and the litigation was thus brought to an end, dispensing with the further services of plaintiffs. Plaintiffs then brought this action to recover the amount of the agreed compensation, namely, $10,000. A verdict was returned for defendant, and plaintiffs appealed from an order denying a new trial. * * *

It has been held by some of the courts that, where an attorney is employed for a particular litigated controversy with an agreement for a fixed compensation in the event of a successful termination of the case, and thereafter the client, without cause or justifiable reason, discharges the attorney and employs another who proceeds with the matter to a successful end, the attorney is entitled to the agreed compensation. Moyer v. Cantieny, 41 Minn. 242, 42 N. W. 1060; Brodie v. Watkins, 33 Ark. 545, 34 Am. Rep. 49; Webb v. Trescony, 76 Cal. 621, 18 Pac. 796; Kersey v. Garton, 77 Mo. 646; 2 Thornton, Attorneys at Law, § 450. This doctrine finds support, and in fact is founded upon the general principle of liability where one party to an executory contract wrongfully prevents the other from performing the same.[34]

[34] The New York rule, on the other hand, which restricts the discharged lawyer to a quasi contract recovery, is founded on the right of a client to discharge his lawyer.

"That the client may at any time for any reason or without any reason discharge his attorney is a firmly established rule which springs from the personal and confidential nature of the relation which such a contract of employment calls into existence. Matter of Dunn, 205 N. Y. 398, 98 N. E. 914, Ann. Cas. 1913E, 536 [1912]. If the client has the right to terminate the relationship of attorney and client at any time without cause, it follows as a corollary that the client cannot be compelled to pay damages for exercising a right which is an implied condition of the contract. * * * The discharge of the attorney by his client does not constitute a breach of the contract, because it is a term of such contract, implied from the peculiar relationship which the contract calls into existence, that the client may terminate the contract at any time with or without cause. We are aware that in certain jurisdictions a contrary rule has been adopted, and that it has been held that where the attorney is employed to perform services for an agreed sum and is discharged without cause and thereby prevented from the performance of the contract, the attorney may recover the full contract price. Scheinesohn v. Lemonek, 84 Ohio St. 425, 95 N. E. 913, Ann. Cas. 1912C, 737 [1911]; Bartlett v. Odd Fellows Sav. Bank, 79 Cal. 218, 21 Pac. 743, 12 Am. St. Rep. 139 [1889]; French v. Cunningham, 149 Ind. 632, 49 N. E. 797 [1893]; Moyer v. Cantieny, 41 Minn. 242, 42 N. W. 1060 [1889]; Kersey v. Garton, 77 Mo. 645

But the rule can have no application to the case at bar; for there was no wrong as against plaintiffs in the act of defendant in compromising the matters in dispute with the adverse party. Plaintiffs' contract of employment was subject to an exercise of that right by defendant. The Cantieny Case, supra, upon which plaintiffs to some extent rely, is not controlling; for there the attorney was discharged by the client, and the case was thus brought within the general rule of liability just referred to. There are, however, authorities which directly support the contention that the attorney is entitled to the agreed compensation in the case of a settlement by the client as well as in the case of a wrongful discharge of the attorney. Cheshire v. Des Moines City Ry. Co., 153 Iowa, 88, 133 N. W. 324, and authorities cited in 2 Thornton, Attorneys at Law, § 456. The theory supporting the decisions so holding is that by the settlement the client waives full performance by the attorney, entitling him to the agreed compensation. But that theory of the law is not supported by the weight of authority. 2 Thornton, Attorneys at Law, § 457; French v. Cunningham, 149 Ind. 632, 49 N. E. 797; Semmes v. Western Union Tel. Co., 73 Md. 9, 20 Atl. 127; Harris v. Root, 28 Mont. 159, 72 Pac. 429; Duke v. Harper, 8 Mo. App. 296; In re Snyder, 190 N. Y. 66, 82 N. E. 742, 14 L. R. A. (N. S.) 1101, 123 Am. St. Rep. 533, 13 Ann. Cas. 441. It is not in harmony with the trend of our own decisions upon the subject. * * *

The fact that in actions for the recovery of money the amount of the settlement is made the basis of measuring the agreed per centum fee of the attorney in no way conflicts with the theory that his compensation in a case of this kind should be measured by the reasonable value of the services rendered. This is not a percentage agreement, but one for a fixed amount in an action involving rights and interest in real property, and the rule of quantum meruit is appropriately ap-

[1883]; Myers v. Crockett, 14 Tex. 257 [1855]; Mt. Vernon v. Patton, 94 Ill. 65 [1879]. * * *

"These decisions in other jurisdictions are not consistent with the principles which define the nature of the contract under which an attorney is employed, as those principles have been declared by the decisions of this court. Our own decisions clearly established the right of the client to terminate the contract with or without cause, and it follows from this rule, by necessary implication, that if the client has the right to terminate the contract, he cannot be made liable in damages for doing that which under the contract he has a right to do. * * * The rule secures to the attorney the right to recover the reasonable value of the services which he has rendered, and is well calculated to promote public confidence in the members of an honorable profession whose relation to their clients is personal and confidential. What has been said declaratory of the rule that the attorney is limited to a recovery upon a quantum meruit does not relate to a case where the attorney in entering into such a contract has changed his position or incurred expense, or to a case where an attorney is employed under a general retainer for a fixed period to perform legal services in relation to matters that may arise during the period of the contract. The plaintiff's right of action is limited to a recovery for the reasonable value of services rendered."—Seabury, J., Martin v. Camp, 219 N. Y. 170, 176, 114 N. E. 46, 48 (1916).

See 14 L. R. A. (N. S.) 1095, note; 38 L. R. A. (N. S.) 389, note.

plicable. Western Union Tel. Co. v. Semmes, 73 Md. 9, 20 Atl. 127; Duke v. Harper, 8 Mo. App. 296. Nor does the further fact appearing in the case at bar that the parties agreed that the property involved in the litigation was worth the sum of $100,000 in any proper view change the rule.

This covers the case on the merits. Plaintiffs cannot recover the agreed compensation. They are limited to the reasonable value of their services, which cannot be recovered in this action, for the complaint is not so framed. Yet the judgment to be rendered herein will not defeat a subsequent action therefor. Leonard v. Schall, 132 Minn. 446, 157 N. W. 723.

Order affirmed.[35]

EMPLOYING DETECTIVE ON CONTINGENT FEE. N. Y. Committee. *Question 2:* "I am attorney for one Mrs. A.; on January 2d, I commenced proceedings against her husband in the Magistrates' Court, which resulted in his being placed under bond to pay his wife the sum of $5.00 per week. On the trial of this proceeding it developed that the husband had obtained a decree of divorce in Nevada, and that he had remarried. I have learned from reliable sources that prior to the second marriage the second Mrs. A. had been living with Mr. A., and that the said second wife had knowledge of the first marriage. I have been instructed to bring suit for alienation of affections, and in such suit it will be necessary to prove knowledge on the part of the second wife of the first marriage, and also cohabitation. My client is unable to pay for the detective services necessary, and I have a private detective who is willing to make search for the witnesses upon a contingency, that is, a percentage of any sums that may be recovered. My associates here seem to think that such an agreement would contravene the rules of ethics. I have spoken to Mr. B., who seems to think that there is nothing inherently bad in the agreement, but he has referred me to you for authoritative opinion."

Answer: Resolved, that the inquirer be advised that this Committee disapproves the course suggested in the question submitted.

[35] On the right of a lawyer to a contingent fee as affected by a settlement between the client and the opposing party, see 18 Ann. Cas. 1115, note; 45 L. R. A. (N. S.) 750, note. On the method of computing the fee where the suit is compromised for a certain sum and attorney's fee, see 22 L. R. A. (N. S.) 776, note.

IV. Sharing Fees

DEALINGS BETWEEN MEMBERS OF THE BAR AND SOLICITORS. *Consolidated Regulations of the Four Inns,* Revised May 22, 1916: 46. Any dealings between Members of the Bar and Solicitors as regards sharing costs or profits in any shape are incompatible with the discipline of the Bar and are prohibited.[36]

SHARING FEES. N. Y. Committee.

Question 56: I invite the expression of the opinion of the committee in respect to the following suggestion about which I have been recently consulted:

A receiver and his counsel agree to divide their fees, i. e., the receiver to pay to his counsel one-half of the commissions which the court might allow to him, and the counsel to pay the receiver one-half of the amount which the court awarded to him as counsel for the receiver.

Query: 1. Was this agreement void as against public policy?

2. If not void, was it proper according to proper ethics?

Answer: In the opinion of the committee, the agreement is contrary to the proper rules of professional conduct, and it is probably illegal.[37]

[36] "In our judgment, where solicitors represent conflicting interests in litigious proceedings of any kind, any arrangement or understanding or practice whereby a share of profit, whether called 'agency' or by any other name, is paid by one of the solicitors to another, is wrong in principle and fraught with risk to the welfare of clients, and to the administration of justice. It must, not infrequently, involve a temptation to him who receives a share of his opponent's profit to neglect, if not to sacrifice, the true interest of his client where the opponent is taking steps which make costs for the common gain, according to such a practice, of both solicitors. It cannot be right that those who are paid to guard conflicting interests should enter into such pecuniary relations with each other as make it profitable to the legal representative of one of the interests to acquiesce, if not to assist, in needless and wasteful proceedings on the part of the representative of another interest. The temptation may be resisted, or the court may effectually intervene, and no harm may result; but the agreement or practice which creates such a temptation ought not to find a place in the work of a great and honorable profession."—Kennedy, J., in In re Four Solicitors, [1901] 1 K. B. 187, 189.

[37] In In re Newman, 172 App. Div. 173, 158 N. Y. Supp. 375 (1916), a lawyer was censured because he made an agreement with a collection agency under which it received one-half the fees charged by him for business furnished him by the agency. The state statute prohibited an attorney or counselor from promising or giving a valuable consideration to any person as an inducement to placing, or in consideration of having placed, in his hands a demand of any kind for the purpose of bringing an action thereon, and the court held the contract with its collection agency to be in violation of that statute. The court further said: "Nor can this court sanction the splitting of fees by an attorney with a layman or a corporation, or a voluntary association not authorized to practice law, as an inducement or reward for the procurement of business." Because of the youth and inexperience of the lawyer only a censure was ordered.

Question 26: John Doe, a lawyer, and Richard Roe, a layman, are executors of a will, the amount of the estate being about $180,000. Doe, the lawyer, is the active executor; Roe, the layman, being passive. Both are to be allowed full commission as executors. The usual proceedings in the settlement of the estate are taken. There is no litigation. The transfer tax proceedings and the executors' accounting are conducted in the name of Jacob Fen, as attorney of report. Doe and Fen are personal friends of long standing, having had offices together for many years. Each has entire confidence in the other as a man of excellent standing at the bar. The sum of $3,000 for counsel fees is charged in the accounts and, in view of the work done and to be done, is a reasonable compensation for settling the estate. The papers are all drawn by Doe, on the theory that in so doing he is merely acting for Fen, the attorney of record, and not as executor. Fen appears in court whenever necessary. Doe pays to Fen, the attorney of record, $1,000, and presents to him for his signature a voucher for $3,000, as if it had been in fact paid to him. This is evidently on the theory that as Doe did much of the work as a lawyer, Fen is to be considered as having received $3,000 and paid to Doe $2,000 for doing much of the work.

Query No. 1: Can Fen properly sign a receipt for $3,000 when in fact he only gets $1,000, the remaining $2,000 being really retained by Doe?

Query No. 2: Would there be any difference in the fact of the transaction, so far as the question of ethics is concerned, if Doe were to draw an executor's check to the order of Fen for $3,000, and Fen were then to draw his check to the individual order of Doe for $2,000?

Query No. 3: According to the correct ethical standard, is it or is it not proper for an executor, who is a lawyer and who does legal work for the estate, which he is not bound to do and which he may properly pay another lawyer to do, to do it in the name of the other lawyer and be paid by that other lawyer?

Answer: In the opinion of the Committee, all three queries should be answered in the negative. Except where a will provides for payment to one named as executor of extra compensation for legal services, our courts uniformly refuse to allow any such compensation, for the obvious reason that a trustee or executor must have no pecuniary interest in the legal fees he has to pay out of the trust estate. The exception above noted is based on the testator's express authority: therefore it is not professional to accomplish by indirection what would be set aside if disclosed to the court. The concealment of the facts from the court is highly improper.

The Committee does not pass either way upon the statement that $3,000.00 is a reasonable charge for an unlitigated administration.

Question 42: A. is a practicing attorney in this state. B. is a member of the bar of a Western state, but has moved to New York City.

B.'s business in New York City is looking after his own investments. In the course of B.'s business a considerable amount of legal work comes to him, which he can not handle because he is not a member of the bar of this state, and he desires to turn over all such legal matters to A. for attention, upon condition that A. will give B. a portion of the fees received in such matters.

Is it the opinion of your Committee that it would be unprofessional for A. to make such an agreement with B.?

Answer: The Committee is of the opinion that any division of fees by a lawyer should be based upon a sharing of professional responsibility or of legal services, and no such division should be made except with a member of the legal profession associated in the employment as a lawyer. Any other division would appear to be a mere payment for securing professional employment, which is to be condemned.

If in the question propounded, the employment of B. is by clients to whom he assumes responsibility by reason of his office as a lawyer in the Western state, we should not consider the division improper per se, though it is still possible that section 274 of the Penal Law [Consol. Laws, c. 40] might condemn it.

On the other hand, the question seems to mean that the employment is not the result of the Western lawyer's practice for clients in his own state, but rather the creation of employment as a lawyer in New York by reason of the Western man's activity as a business man in New York. If this interpretation be correct, we would consider the division improper; it might even be a violation of section 274 of the Penal Law [prohibiting an attorney from buying demands on which to bring action] under some circumstances which we do not assume to construe.

Question 47, II: E. F., a collection agency, receives a claim for collection. Following failure to collect without suit, it sends the claim to A. B., an attorney who performs legal services in connection therewith.

(a) May A. B. divide his fee with E. F.?

Answer: No. The division of professional fees with those not in the profession detracts from the essential dignity of the practitioner and his profession; and admits to its emoluments those who cannot lawfully perform its duties. If the legal services involve the bringing of suit, such a division appears to be prohibited by our Penal Law. (See section 274.)

(b) May A. B. receive a salary from E. F., E. F. charging its patron for the entire service, inclusive of the professional service, A. B. making no charge direct to the patron?

Answer: No. A lawyer may receive a salary from a collection agency for services rendered to that agency, but if the lawyer render professional services to the patron of the agency the lawyer should make his charge directly to the patron, otherwise the agency would be deter-

mining the charge to be made for the lawyer's services, and would be sharing in the lawyer's fee, or making a profit on the lawyer's professional work.

(c) May A. B. charge for his own service a specific sum, which he retains wholly for himself, E. F. charging for its own service a specific sum which it retains wholly for itself, E. F. guaranteeing its patrons the faithful discharge of the duties of A. B., including payment over of all collections by A. B. for the patron?

Answer: The method of charging is unobjectionable, but it is derogatory to the essential dignity of the profession for a lawyer under such circumstances to permit another to guarantee expressly his honesty or efficiency.

(d) Does it alter the situation that all legal matters coming through E. F. are referred to A. B. within his territory?

Answer: No.

Question 68: A highly respectable, well-established real estate firm is purchasing options upon real estate which is subject to building restrictions. Whether they obtain options or not on all of the lots in the tract, they are entering into agreements with the owners to remove the restrictions at a certain sum, and simultaneously therewith taking a retainer from the owners of the property to an attorney named, authorizing him to institute suit to remove said restrictions, and stipulating in the retainer that the attorney is to look to the real estate firm for his compensation. Thereafter the real estate firm enters into an agreement with the attorney to institute the actions and agrees to pay him his disbursements, and if he succeed, a sum less in amount than the said real estate firm is receiving. The attorney does not depend upon the owners paying the real estate firm. He receives his money direct from the real estate firm, and the real estate firm must collect their charges from the owners.

Query: Does the attorney transgress professional ethics?

Answer: In the opinion of the committee, the action of the real estate firm in securing the retainer for the lawyer, under the circumstances, amounts to an offer of his services for a consideration moving to the real estate firm, and we disapprove of the participation of the lawyer therein. Such trading in the services of a lawyer detracts from the essential dignity of the profession. The committee considers that arrangements of joint adventure, where an intermediary exploits an attorney for its own profit, are to be discouraged by reputable members of the profession. (See Answer to Question 47, subd. II a, b, c, III b, c, IV b, VII a, IX c.)

Question 113: Some years ago I obtained a judgment for a client, but was never able to collect it, and thereafter lost track of the judgment debtor.

Recently a firm of laymen gave to my client information as to the present location of the judgment debtor and as to property out of which the judgment could be made good.

I, thereupon, acting under this information, issued an execution to the sheriff and collected the money.

The informants now claim that they are entitled to be paid for the work performed by them, and for the information given which resulted in the collection of the judgment; and I am of the opinion that they are entitled to a fair compensation.

Would it be proper for me to pay these people a fair compensation for their services, or would this be considered splitting a fee with a layman? I might add that my client signed an agreement authorizing these laymen to bring an action to collect the judgment for a contingent fee of 50%, but this was before I was instructed to proceed.

Answer: The Committee, of course, does not approve of any subterfuge to deprive the informant of just compensation, but in its opinion the division of the attorney's fee with the informant is improper. Any compensation to the informant should be paid by the client. The Committee sees no objection to an equitable adjustment of the attorney's fee to enable his client to compensate the informant.

Question 120: Will you kindly advise us if in your opinion there is anything improper in the following transaction?

A. and B. are attorneys, each representing various creditors of C., who has been adjudicated a bankrupt. At the meeting for the purpose of electing a trustee, A. and B. agree to act together, one to be elected trustee and the other to act as attorney for the trustee, and in the event of their success to divide all fees and commissions equally. Neither attorney represents the bankrupt nor any conflicting interest.

Answer: In the opinion of the Committee, the arrangement suggested in the question is improper. The trustee, as the name implies, is acting in a fiduciary capacity. It is contemplated by the Bankruptcy Act that a trustee and his attorney shall be selected by reason of their fitness, and not by reason of their willingness to share their compensation with each other. The trustee may not make a secret profit out of his office. The amount which the Court allows him is presumably adequate compensation. It is his duty to oppose the allowance asked by his attorney, if in his opinion the sum asked is excessive. To have a part interest in the attorney's fee tends to warp his judgment and incapacitates him from discharging his full duty. Nor should an attorney make an arrangement by which he shares a fee earned from a trust estate with the trustee individually. Even though the parties act with entire honesty, the whole arrangement is, in the opinion of the Committee, contrary to public policy in accordance with well-established rules.

Question 121: A. is engaged in the collection business and is not an attorney. He represents various clients. B. is an attorney, and is

retained by A. to institute certain actions and draw certain papers in actions in the name of clients of A., and is to receive his fee from A. at an agreed price for each item of work performed.

Is it permissible for an attorney in this manner to accept retainers from a person engaged in the collection business who is not an attorney; and does it make any difference whether A. and B. are in the same office or have separate offices?

Answer: Even if the practice in this case is not illegal, as being in principle the splitting of fees between a lawyer and a layman, or as permitting a collection agency to practice law, still it is improper in the opinion of the Committee, which has frequently stated that the relation between the client and the lawyer should be a direct personal relationship. (See Questions and Answers 47 II b, 68 and 74.) In the opinion of the Committee, it makes no difference whether A. and B. are in the same office, or have separate offices.

V. Rebates and Witness' Fees

SOLICITORS PARTICIPATING IN AUCTIONEER'S COMMISSIONS. Opinion of the Council of the Law Society, *Law, Practice and Usage in the Solicitor's Profession* (1909) p. 314: 1038. A solicitor received a letter from an auctioneer intimating that if at any time he had clients requiring temporary accommodation of money and would place particulars before him he would be pleased to recognise the compliment in substantial form should business result. The solicitor inquired whether in the opinion of the Council the conduct of business upon the lines proposed was proper.

The Council replied that they strongly disapproved of the practice of solicitors participating in auctioneers' commissions.—Opinion of Council, May 16, 1901.

LAWYER'S RECEIPT, FROM AUCTIONEER CONDUCTING PARTITION SALE, OF PART OF HIS COMMISSION. N. Y. Committee. *Question 111:* A., an attorney, represents an estate, a portion of which is real estate. In partition proceedings an order of sale is made, and A., representing substantially all parties and particularly the plaintiff in the partition proceedings, puts the matter into the hands of an auctioneer. The property is sold at a satisfactory price, and the auctioneer makes the usual charge. After the transaction is completed, the auctioneer, who has previously said nothing about the matter, asks A. to accept a check for one-half of his commission, stating that he does so in appreciation of A.'s bringing the business to him.

(a) Does A.'s duty to his clients prevent him from accepting the check?

(b) If so, would the objection be removed if A. inquired of his clients whether they had any objection, and they answered that they had not?

(c) If he has no duty to his clients, is there any other consideration which should prevent him from accepting?

Answer: In the opinion of the Committee, the lawyer's duty prevents him from accepting the check without the knowledge and consent of his clients;[38] but irrespective of his duty to his clients, the sharing of the auctioneer's fees is beneath the proper professional dignity.

ACCEPTANCE OF COMMISSIONS OR REBATES BY LAWYERS FROM THIRD PERSONS. N. Y. Committee. *Question 124:* Is it the opinion of the Committee that it is improper for an attorney to accept any commission on or rebate from the charges of printers, stenographers, auctioneers or other persons serving the legal profession for work or services performed in litigation, or in other matters in which his client is interested,

(a) Without first revealing his intention so to do to his client;

(b) Even with his client's knowledge and consent?

[38] "If possible, do not receive any compensation in your client's business, except from your client himself; but if circumstances compel you to break the rule, tell your client what you receive."—Everett V. Abbot, *Some Actual Problems of Professional Ethics*, 15 Harvard Law Review, 714, 724.

"Whereas, it has for many years been customary for newspaper publishers in the city of Chicago in rendering bills for the publishing of legal notices to make a gross charge, the receipt of which is acknowledged in the certificate of publication, and, upon payment by the attorney or master in chancery, to make a deduction in the nature of a rebate; and

"Whereas, abstract companies in rendering bills for abstracts of title policies furnished on the order of an attorney, make a gross charge from which, if the bill is paid within a certain time, a ten per cent. rebate is forwarded to the attorney; and

"Whereas, bonding companies, mortgage brokers, bond dealers and other corporations and persons dealing with lawyers are accustomed to offering and paying rebates or commissions to lawyers on business procured through them; and

"Whereas, there is some difference of opinion among Chicago lawyers on the question whether such rebates or commissions can properly be retained by lawyers receiving the same for their own benefit: Now, therefore,

"Be it resolved, that it is the sense of the Chicago Bar Association:

"1. That it is unethical for any lawyer to fail to account to his client for any rebate or commission received by him, whether of the nature particularly referred to in the preambles hereof or of any similar or kindred nature.

"2. That it is illegal for a master in chancery to charge for, or report the payment of, a higher amount for the cost of publishing legal notices than the net amount charged by the newspaper therefor.

"3. That newspaper publishers be and they are hereby requested to abandon the practice of certifying in their certificate of publication the receipt of a larger amount than the one called for in their bills to lawyers or masters in chancery.

"4. That abstract companies be and they are hereby requested to plainly state in their bills for abstracts or title policies that they are subject to a fixed discount, if paid within a certain time named."—A resolution adopted by the Chicago Bar Association at the annual meeting on June 29, 1910.

Answer: So long as the saving thereby effected is placed to the credit of the client's account with the attorney, and the client is advised thereof, the Committee sees no impropriety in the course suggested. The vice lies in concealment from the client. (See Question and Answer No. 111.)

BROKERAGE CHARGES BY ATTORNEY FOR MORTGAGEE. N. Y. Committee. *Question 112:* (a) An attorney represents an estate which is the mortgagee; the mortgage expires; there is no question raised as to the sufficiency of the real estate security but the attorney for the estate insists on a fee of $200 for his services as a condition for the securing of an extension of the mortgage. Is there anything improper or unethical under such circumstances in the charge of the attorney?

(b) The attorney insists that the insurance policies be taken out by him on behalf of the mortgagee and rejects policies taken out by the mortgagor. The attorney seeks to secure the brokerage on the insurance policies or a portion thereof. Is the attorney justified in this practice if there is no provision in the mortgage giving the mortgagee the right to take out the insurance? If there is such a provision is it ethical for the attorney to participate or share in the commission or brokerage secured through the issuance of such insurance policies? Would it vary the situation if the attorney had an insurance brokerage business connected with his office and conducted under a different name? Under any circumstances would the attorney be justified in offering to permit the mortgagor to take out the insurance if the attorney received a part of the brokerage or commission and would not such practice be unethical?

Answer: In the opinion of the Committee:

(a) It is not proper for the attorney to demand or receive any compensation for inducing his client to grant an extension, nor as a condition of securing an extension. But there is no impropriety in the attorney demanding and receiving as compensation for his services actually rendered in the transaction a reasonable amount to be paid by the mortgagor, commensurate with the service, and depending upon the circumstances of the particular case.

(b) Questions of statute law which may be involved, are not considered by the Committee. Assuming that the course suggested involves no violation of statute, the Committee is of the opinion that the attorney should not use his position arbitrarily or to oppress the mortgagor. The attorney's conduct should be dictated by his client's interests and not by selfish motives. The attorney is not justified in rejecting a policy so that he may secure the brokerage or a part of it, nor is he justified in demanding a portion of the brokerage as a condition of allowing the mortgagor to place the insurance.

ACCEPTANCE OF FEES FOR TESTIFYING AS WITNESS TO WILL. N. Y. Committee. *Question 101:* A. and B., lawyers, were engaged in individual practice. A. drew up a will for a client of his. B. was asked to become an attesting witness. The will was duly executed, and A. and B. duly witnessed the same. The testator died seven years afterward. Probate of the will was opposed on the ground of fraud, incapacity and undue influence. There was a trial in the Surrogate's Court and then again, several years afterward, a protracted trial in the Supreme Court, at both of which the probate was allowed and sustained. At each of these B. was put to inconvenience and loss of time as a witness or for holding himself in readiness as such. No subpœna was issued, B. having voluntarily offered to be on hand on every occasion. At the close of the litigation, the attorney for the executor and proponent voluntarily forwarded a check to B. for $50.00.

Is it the opinion of your Committee that it would be unprofessional for B. to accept the same?

Answer: In the opinion of the Committee, it would not be improper for B. to accept the check voluntarily proffered by A. B., though a lawyer, was merely a subscribing witness to the will, and testified as such. The check was not given under any agreement antecedently made or exacted, nor conditioned in any way upon the giving of particular testimony, nor upon the success of the litigation, nor made to depend upon the amount involved in the probate proceedings; but was a gratuity in partial compensation for B.'s loss of time while attending court.

VI. Withdrawal of Counsel for Nonpayment of Fees

MORDECAI v. SOLOMON.

(Court of King's Bench, 1755. Sayer, 172.)

Upon a rule to shew cause, why the plaintiff's attorney should not pay the costs of a judgment of nonpros, and the costs of the present application it appeared; that the plaintiff's brother had frequently employed the attorney, and always paid him well; that the plaintiff's brother had undertaken to pay the attorney in this cause, but that he did not bring some money applied for by the attorney; that judgment of nonpros was signed for making up the issue; and that the plaintiff was in prison for not paying the costs of the judgment.

The rule was made absolute.

And by THE COURT—When an attorney has commenced a suit upon the credit of a client, he ought to proceed in it, although the client do not bring him money every time he applies for it.[39]

[39] "My notion of the rule is that an attorney has a right to call upon the client, from time to time, on reasonable notice, to make advances, and, for the

Besides making the rule absolute, it was thrown out by the Court, that it be would be proper for the attorney to take care, that the plaintiff should be immediately discharged out of prison.

REFUSAL OF COUNSEL TO ACT FURTHER ON THE EVE OF TRIAL UNLESS HIS FEES ARE PAID OR SECURED. N. Y. Committee. *Question 18:* Is it the opinion of the Committee that an attorney, who has received a retainer, but who has no express agreement with his client for his compensation, may properly notify his client upon the eve of trial for which he has made preparation, that he will not appear at the trial, nor proceed further with the suit, nor consent to the substitution of another attorney, nor release any of the client's papers in his possession and essential to the proper trial of the action, unless his client pays or secures to his satisfaction the payment of a bill which he has rendered, and which he deems reasonable compensation for his services to the date of his conditional refusal to proceed further in the cause?

Answer: The suggested conduct of an attorney upon the eve of the trial of the case for which he had been retained is unethical and should be condemned.

PEREMPTORY NOTICE OF REFUSAL TO ACT FOR CLIENT BECAUSE OF NON-PAYMENT OF FEES. N. Y. Committee. *Question 15:* Over a year ago a client, whom we had represented for some time, introduced to us a Mr. X., who requested us to represent him in various matters. Our relations continued on a pleasant basis for a period of several months, during which time we undertook litigation in various courts for X.

About three months ago we informed X. that we would no longer be able to act as his attorneys, unless he paid us for our services. Mr.

purpose of taking the cause to trial, to supply him with adequate funds, not to pay his costs, but the expenses out of pocket."—Bayley, B., in Wadsworth v. Marshall, 2 Cr. & J. 665, 666 (1832).

"It is true that an attorney cannot suddenly, and without notice, abandon a client to his prejudice and inconvenience; but if he gives reasonable notice, he is at liberty to discontinue the conduct of a cause, and is not bound, at all events, and at great expense, to proceed to the end of a suit and all the proceedings arising out of it."—Bosanquet, J., in Vansandau v. Browne, 9 Bing. 402, 410 (1832).

"It may be said that an attorney is not obliged to continue in the service of his client without pay. However this may be, he certainly is not at liberty to desert his client and take up against him in the same cause or a similar cause based upon substantially the same facts, for the purpose of getting better pay, or even any pay. To allow such change of sides would reduce the attorney to a mere mercenary, always open for employment by the highest bidder."—Cassoday, J., in In re O———, 73 Wis. 602, 620, 42 N. W. 221, 226 (1889).

X., who originally paid us a retainer of $200, agreed that we were entitled to receive a sum of several times that amount for services performed to the then date, and stated that he would arrange to let us have a check in a few days.

Since that time Mr. X. has studiously avoided our office and ignored all communications. We appear as attorneys for him in a number of litigated matters. We do not desire to continue to represent a client of this type. We have requested him to have other attorneys substituted in our place, but he has paid no attention to our requests. We wish to drop all of his matters, but we do not wish to be accused of having been unfaithful to the trust originally reposed in us as attorneys by the client.

We would appreciate advice from you as to the manner in which we should proceed in order to be permitted to cease acting as his attorneys.

Answer: Upon the facts as stated, the Committee does not consider that the attorneys are required by any professional obligation to continue to represent the client; it is of the opinion that a peremptory notice to the client that after a certain specified date, sufficiently far away to enable him to secure and substitute new attorneys, they will not act as his attorneys, is proper. This answer, however, does not deal with the attorney's legal right to compensation upon taking such course, nor with the legal procedure essential thereto.[40]

VII. Return of Fees

TURNER v. PHILLIPS.

(Cases in King's Bench, at the Sittings at Nisi Prius, 1792. Peake, 166.)

Assumpsit for money had and received.

The Plaintiff being a party in a former cause, had given the Defendant a brief to attend as one of his counsel on the trial of that cause; and the Defendant not having attended the trial, the present action was brought to recover back the fee given to him on that occasion.

Lord Kenyon advised an agreement between the parties, saying, that whether Mr. Phillips would chuse to return the fee or not, was for

40 "The client may discharge his solicitor; but I do not know, that a solicitor, whatever may be his reasons for declining to proceed, can claim a lien, if he does not carry the business through to a hearing."—Lord Chancellor Eldon in Cresswell v. Byron, 14 Ves. Jr. 271, 272 (1807).

Where an attorney refuses to go on with a case or hold further intercourse with his client because of nonpayment of fees, the court may permit the substitution of another attorney and the retiring attorney may even lose his lien for his fees. Matter of H———, 93 N. Y. 381 (1883). But, as to the lien, see Matter of Dunn, 205 N. Y. 398, 98 N. E. 914, Ann. Cas. 1913E, 536 (1912).

On the lien of lawyers, see 51 Am. St. Rep. 251, note.

his own consideration; but if the cause was to proceed he should feel himself obliged to interpose, and the parties might apply to the court, if they were dissatisfied with his opinion. His Lordship alluded to the case of Chorley and Balcot, 4 T. Rep. 317. Vide Fell v. Brown [Peake] 96, the cases cited in the note on that case, and 3 Bl. Com. 28, 9., lately decided, and mentioned the general opinion of the Profession, that the fees of Barristers and Physicians were as a present by the client, and not a payment or hire for their labour.

Upon this the parties agreed to settle the cause out of Court, but Garrow, who held a brief for Mr. Phillips, said that he had not been guilty of the negligence imputed to him, for that it never was intended that he should attend the cause, but the fee was given him as a compliment for the trouble he had taken in the former stage of it.[41]

DEATH OF COUNSEL AFTER PAYMENT OF FEE. Opinion of the Council of the Law Society, *Law, Practice and Usage in the Solicitor's Profession* (1909) p. 293: 962. Solicitors delivered a brief to counsel and paid the fee. No consultation was held, but one of the members of the firm spoke to the counsel about the case. The counsel died before the case came on for hearing.

The Council expressed the opinion that the solicitors should not apply for the return of the fee paid.[42]—Opinion of Council, October 29, 1869.

[41] On the retention of fees by counsel, though counsel was unable to attend, an editorial on *Absent Counsel* in the London Times for June 7, 1913, said: "Things are better than they were. Not long ago there were notorious offenders; rapacious counsel who took fees with indifference as to the likelihood of their being present in court; bold brigands who never untied the papers left with them. Abuses of this sort are far fewer and less flagrant than they were. But they are not absolutely unknown. They occur often enough to create scandal and to leave in clients' minds a sense of injustice."

"RETURN OF FEE.—Where a Barrister accepts a brief upon an express undertaking that he will personally attend throughout the case, he ought, if he does not so attend, to return the fee. An. St. 1898–99, p. 9."—Statement of the General Counsel of the Bar, *The Annual Practice* (1917) p. 2419.

[42] "Although the relation of attorney and client is terminated by the attorney's death, his representatives may recover the fair value of the services rendered by him down to the time of his decease and such disbursements as he may have made. * * * It has also been held * * * that the client may recover back unearned fees which were paid to the attorney in advance."—Edward M. Thornton, *Attorneys at Law* (1914) Vol. 2, pp. 801, 802.

On the death of a lawyer employed for a contingent fee as affecting his compensation, see 52 L. R. A. (N. S.) 380, note.

SECTION 2.—GIFTS TO LAWYERS

WHIPPLE v. BARTON.

(Supreme Court of New Hampshire, 1885. 63 N. H. 613, 3 Atl. 922.)

Assumpsit, to recover the excess over ten dollars paid by the plaintiff out of his pension money to the defendant for his services as an attorney in procuring a pension. Facts found by the court. Upon the question whether the payment was exacted by the defendant, or was a voluntary gift, there was no preponderance of evidence in favor of the defendant.

CARPENTER, J. It is unnecessary to consider the effect of U. S. Rev. St. § 5485. To establish a gift from a client to his attorney, in whatever form the question may arise, it is incumbent upon the latter to show affirmatively not only that it is voluntary, but also that it is made with full knowledge on the part of the client of all material facts known to the attorney, and that it is not brought about by any undue influence, either actively exerted or arising from the relation between them. The presumption is against its validity. Nesbit v. Lockman, 34 N. Y. 167; Whitehead v. Kennedy, 69 N. Y. 462; Cowee v. Cornell, 75 N. Y. 99, 31 Am. Rep. 428; St. Leger's Appeal, 34 Conn. 435, 91 Am. Dec. 735; Newman v. Payne, 2 Ves. Jr. 200; Gibson v. Jeyes, 6 Ves. Jr. 278; Wood v. Downes, 18 Ves. Jr. 120; Savery v. King, 5 H. L. Ca. 627; 1 Sto. Eq. Jur. §§ 310–312. No preponderance of evidence being found in favor of the defendant, the plaintiff prevails.

Judgment for the plaintiff.[43]

[43] "The law of this Court as to gifts by a client to his solicitor, I think, is perfectly established. The principle is that the relation of solicitor and client is one of such high confidence on the part of the client that the solicitor is considered to have an amount of influence over the mind and action of his client which, in the eye of this Court, while that influence remains, makes it almost impossible that the gift can prevail. The principle of influence vitiates the gift; but the presumption of influence may be rebutted by circumstances short of the total dissolution of the relation of solicitor and client. That relation is only looked at as creating the influence; and, as soon as circumstances of evidence are introduced which remove all effect of the influence, whether the relation subsists or not, if the influence of that relation is removed there is no incapacity on the part of the solicitor to become the object of his client's bounty, and to be the recipient from his client of a gift which will be valid at law and in equity."—Sir John Stuart, V. C., in In re Holmes' Estate, 3 Giff. 337 (1861).

In O'Brien v. Lewis, 4 Giff. 221, 234 (1862), in considering whether defendants, who were solicitors and attorneys in partnership, could retain £300. given to them by a client during professional employment, Sir John Stuart, V. C., also said: "In cases of this kind, where the court has to decide whether the gift is valid, the court acts upon the high ground of public policy and al-

though the transaction may have been as reasonable a one as ever was entered into, and although the motive for the gift may have been natural and proper, yet it has been held by all the greatest judges in this court that upon the ground of public policy a gift under such circumstances shall not be permitted to stand."

So in Morgan v. Meriett, 6 Ch. D. 638, 645 (1877), Bacon, V. C., said: "The law I take to be as plainly settled on the subject as any law existing in this country, that while the relation of solicitor and client subsists the solicitor cannot take a gift from his client. That is the rule of law, a rule which, if it was necessary for me to justify it, I should say was requisite for the safety of society."

On gifts to members of the lawyer's immediate family, see Welles v. Middleton, 1 Cox, 112 (1784); Goddard v. Carlisle, 9 Price, 169 (1821); Willis v. Barron [1902] A. C. 271.

"To say of a barrister that he had allowed the fee marked upon his brief to be increased, after the case had been heard and determined, is a slander on a barrister in the way of his profession and actionable per se. Snow v. Etty (1887) 22 L. J. (Newsp.) 292."—James Robert Vernam Marchant, *Barrister-at-Law* (1905) p. 45.

"A solicitor cannot, in ordinary circumstances, take a gift from his client in a matter in which he is the solicitor, because there is from that relationship in itself a presumption of undue influence; a presumption which, of course, may be rebutted. It may be rebutted in various ways; most frequently by proving that the solicitor told his client: 'I cannot take this unless you have independent advice; consult an independent solicitor, put the matter before him, and he must explain the matter fully to you.' That is one instance."—Cozens-Hardy, M. R., in In re Coomber, [1911] 1 Ch. 723, 726. In that case it was held that independent advice is had if the client is made to understand fully the nature of the act and the consequences of that act even though the independent adviser does not advise for or against the doing of the act. On the necessity of independent advice, see 16 L. R. A. (N. S.) 1087, note.

"I am inclined to think that the only competent independent advice that should be given to a man who says he has arranged to make a gift to his solicitor is to tell him not to do so."—Cozens-Hardy, L. J., in Wright v. Carter, [1903] 1 Ch. 27, 62.

In Lloyd v. Coote, [1915] 1 K. B. 242, it was held that a solicitor could not rely on acknowledgments of indebtedness to him which he obtained from the widow and executrix of the estate of his client without seeing that she had independent advice and without informing her that the indebtedness of her husband to him was barred by the statute of limitations. At the time of getting the acknowledgments the solicitor was acting for the executrix in the administration of the estate and the court treated the acknowledgments as an advantage which the solicitor could not retain, though one justice intimated that he would have been indisposed to apply the doctrine as between the original client and the solicitor.

"It has been for many years well settled that no one standing in a fiduciary relation to another can retain a gift made to him by that other, if the latter impeaches the gift within a reasonable time, unless the donee can prove that the donor had independent advice, or that the fiduciary relation had ceased for so long that the donor was under no control or influence whatever. The donee must show (and the onus is on him) that the donor either was emancipated, or was placed, by the possession of independent advice, in a position equivalent to emancipation. * * * Further, in my judgment, the donee does not discharge this burden by showing that his own solicitor acted for both parties. A solicitor who accepts such a post places himself in a false position; if he acts for both, he owes a duty to both, to do the best he can for both. But the court requires that the donor should be placed in as good a position as if he were in fact emancipated. The solicitor, therefore, must be independent of the donee in fact, and not merely in name, and this he cannot be if he is solicitor for both. Again, his duty is to protect the donor against himself, and not merely against the personal influence of the donee,

EGAN v. BURNIGHT.

(Supreme Court of South Dakota, 1914. 34 S. D. 473, 149 N. W. 176.)

Action by George W. Egan against Alice E. Burnight. From judgment for plaintiff, and denial of new trial, defendant appeals. Reversed.

WHITING, J. This action was brought to recover a sum claimed due on an express contract. The complaint set forth that plaintiff was retained by defendant on March 20, 1911, to look after her interests in a divorce action then pending against her; that he was to secure the withdrawal of certain objectional matters contained in the petition for divorce, to make a satisfactory settlement between defendant and her husband of their property interests and the custody of their children, and, unless a satisfactory settlement was made, to appear in a fight of said divorce case in open court; that defendant agreed to pay plaintiff $1,000 for his services; that plaintiff had succeeded in procuring the withdrawal of the objectional matter contained in the petition for divorce, and had secured an adjustment of property interest and custody of children satisfactory to defendant; and that defendant had failed to pay the said $1,000 or any part thereof. Defendant entered a general denial, except that she admitted employing plaintiff to assist in the defense of said divorce action; she alleged she had paid him $250 for the services he performed, and that such sum was all said services were worth. The cause was tried to the court and a jury. There was evidence tending to show that plaintiff was retained by defendant and that, after he had performed certain services under such retainer, and while the relation of attorney and client existed, a contract was entered into, under which contract he was to continue to represent her in such divorce proceedings, and under which she was to pay him the sum of $1,000 whether the issues in such divorce action were adjusted out of court or settled upon a trial. At the close of all the evidence, defendant moved for a directed verdict, which motion was based upon the fact that the contract, if any, was entered into after the relation of attorney and client had come into existence. * * * The motion was overruled. * * * The jury returned a verdict for plaintiff in the full amount claimed; judgment was entered thereon, a new trial was denied, and this appeal was taken from such judgment and order denying a new trial. * * *

Section 410, C. C. P., provides in part that: "The amount of fees of attorneys, solicitors and counsel in civil and criminal actions must be left to the agreement, express, or implied, of the parties."

in the particular transaction."—Farwell, J., in Powell v. Powell, [1900] 1 Ch. 243, 245–247.

"A solicitor who lends money on mortgage to his client on any but strictly usual terms would be wise if he always required the intervention of another solicitor. If that is not done, he must preserve evidence that the circumstances were explained to the client."—Jessel, M. R., in Cockburn v. Edwards, 18 Ch. D. 449, 455 (1881).

In speaking of a similar section in the Code of New York, the court in Haight v. Moore, 37 N. Y. Super. Ct. 161, well said: "The Code, in extending the rights of attorneys by allowing them to contract with their clients as to compensation beyond the allowances given by statute, relieved attorneys from a disability which before existed, but did not relieve their dealings with their clients from the supervision which the courts have at all times exercised. The reasons for that supervision exist as strongly as ever, and the Code has in no respect changed or interfered with them. Whenever a contract between an attorney and client gives benefits or advantages to the attorney, the court will scrutinize it with great care. All presumptions are in favor of the client, and against the propriety of the transaction, and the burden of proof is upon the attorney to show, by extrinsic evidence, that all was fair and just, and that the client acted understandingly." * * *

In Hill v. Hall, 191 Mass. 253, 77 N. E. 831, a case involving a purchase by a client from his attorney, the court announced the rule controlling transactions between attorneys and clients while the relation of attorney and client exists, as follows: "The attorney must see to it that his client is so placed as to be enabled to deal with him at arm's length, without being swayed by the relation of trust and confidence which exists between them. This principle is established both in England and in this country. It is one example of the general doctrine which the law applies to dealings between parties who stand in a fiduciary relation to each other. Smith v. Kay, 7 H. L. Cas. 750. 'The broad principle on which the court acts in cases of this description is that wherever there exists such a confidence, of whatever character that confidence may be, as enables the person in whom confidence or trust is reposed to exert influence over the person trusting him, the court will not allow any transaction between the parties to stand, unless there has been the fullest and fairest explanation and communication of every particular resting in the breast of the one who seeks to establish a contract with the person so trusting him.'"

In Elmore v. Johnson, 143 Ill. 513, 32 N. E. 413, 21 L. R. A. 366, 36 Am. St. Rep. 401, the court said (the underscoring being ours): "In England 'it is a settled doctrine of equity that an attorney cannot, while the business is unfinished in which he has been employed, receive any gift from his client, *or bind his client in any mode to make him greater compensation for his services than he would have a right to demand if no contract should be made during the relation.*' Weeks on Attorneys at Law [2d Ed.] § 364. More than 50 years ago, the English doctrine was adopted by the Supreme Court of Alabama in an able opinion in the case of Lecatt v. Sallee, 3 Port. [Ala.] 115 [29 Am. Dec. 249], where it was held that '*an agreement made by a client with his counsel after the latter has been employed in a particular business, by which the original contract is varied and greater compensation is secured to the counsel than may have been agreed upon when he was first retained, is invalid and cannot be enforced.*' The reason for

the doctrine is to be found in the nature of the relation which exists between attorney and client. That relation is one of confidence, and gives the attorney great influence over the actions and interests of the client. In view of this confidential relation, transactions between attorney and client are often declared to be voidable, which would be held to be unobjectionable between other parties. The law is thus strict, 'not so much on account of hardship in the particular case, as for the sake of preventing what might otherwise become a public mischief.' Lewis v. J. A., 4 Edw. Ch. [N. Y.] marg. page 599, top page 622."

In the case of Bar Ass'n of Boston v. Hale, 197 Mass. 423, 83 N. E. 885, the court used the following words, applicable to the facts of this case: "The respondent did not put himself at arm's length from his client before carrying out this transaction with her; he did not see that she had independent advice, or secure her time to consider this important matter." * * *

The following facts are, under the authorities cited, conclusive against plaintiff: At the time it is claimed this contract was entered into, plaintiff was the retained attorney for defendant, retained to represent her in the divorce action, and as such to represent her in all matters pertaining to such action. Plaintiff had led defendant to believe that he was willing, even desirous, of doing everything she desired him to do in such action, even to the setting aside of the tentative agreement [between defendant and her husband about their property rights and the custody of their children]. She came to his office in the full belief that he, as her attorney, was willing and anxious to set aside such tentative agreement, if such was her desire. It is at least doubtful whether she knew that the tentative agreement included an agreement to withdraw the objectionable matter from the divorce petition. With her mind fully made up to have the tentative agreement set aside, in the hope that by so doing she would get a greater allowance from her husband's property, and also, perhaps, believing that it was only by so doing that she could hope to get the said objectionable charges withdrawn, she is, without any warning, and in the presence of a third person, a stranger to her, met with the proposition that, before her attorney will discharge his further duties as such attorney, she must agree to pay him $1,000 in addition to the former payment, part of which was still unearned, and this regardless of the amount or value of services he might be called upon to perform. She was not advised to seek independent advice before entering into such contract—she was not even advised to go home and think the matter over—but was permitted, without such independent advice from some disinterested source, and without taking further reflection, to enter into an agreement which plaintiff now claims to be binding upon her. Under these facts, even conceding the motives of plaintiff to have been the best, and that he honestly and wisely advised her that it was against

her interests to open up the tentative agreement, and that he had no intent of, in any manner, overreaching or defrauding her, yet the contract is unenforceable. If the contract was void or voidable when entered into, no amount of services thereafter performed by plaintiff could render such contract enforceable. * * *

But if there were no other ground for holding the contract unenforceable, it must be so held, owing to the terms thereof. * * * Before allowing defendant to agree to pay him $1,000, it was incumbent upon plaintiff to fully explain to her the law—to advise her that, if he saw fit to continue as her attorney, he could only recover according to their previous conversation, or else but the reasonable value of his services (Dickinson v. Bradford, supra [59 Ala. 581, 31 Am. Rep. 23]), and further, to advise her that, having accepted her employment, he could not lawfully withdraw from her service merely because she might refuse to enter into a satisfactory agreement as to future fees. The law does not give to an attorney, once retained in a case, the option to require from his client, as a condition to his further service in the matter for which he has been retained, that such client enter into an express contract as to compensation, where theretofore there had been no contract or a different contract. Furthermore, plaintiff was bound to explain to defendant that, if he withdrew from the case, he was bound to repay to her at least the unearned portion of the $250, which, under the evidence, would have been some $150. To put it another way, before plaintiff can claim to have advised defendant fully in relation to her rights and his duties, he must show advice that was as full, free, and void of all personal consideration on his part as would have been the advice of any disinterested attorney to whom she might have gone, and this in relation to the agreement to pay the $1,000 as well as in relation to any other matter pertaining to the opening up of the case.

But was the contract, if in every other respect fair and just, one that was reasonable as to its terms? It will not do to say that, because plaintiff may have performed services thereunder reasonably worth $1,000, the contract was a reasonable one. The services thereafter rendered may be controlling, in a proper action, in determining what plaintiff should recover, yet they in no manner throw any light upon the reasonableness of the contract, which depends, not only upon what did happen thereunder, but also upon what might happen thereunder—its reasonableness is to be determined, not only by the value of the services which it might become necessary to perform thereunder, but also by the value of the least services that might, in the contemplation of the parties, have constituted a full performance. A satisfactory settlement reached by one day's efforts would have been a full performance of the alleged contract. We have no hesitancy in declaring that, if the alleged contract was entered into at the time claimed, it was unreasonable in its terms. * * *

We may well close with the following from Waterbury v. City of

Laredo, 68 Tex. 565, 5 S. W. 81: "The rule which denies to an attorney the right to make an agreement with his client after an employment in a particular business, by which the contract is so raised as to secure greater compensation to the former than was first agreed upon, is wholesome, and has its foundation in principles adopted to secure clients against imposition. It tends to preserve the purity of the bar and to accomplish the ends of justice, and it ought not to be departed from unless in some case peculiar in its facts. This case presents no facts which can take it without the rule."

The judgment and order denying a new trial are reversed.[44]

In re ABRAHAMS (a Solicitor).[45]

(Court of Chancery, 1870–71. 15 Sol. J. 136.)

This was an adjourned summons requiring Mr. Michael Abrahams, solicitor, of Old Jewry, to show cause why he should not be struck off the rolls. It appeared that in 1867 a Mr. Joseph Suche, of Joseph Suche & Co. (Limited), called on Mr. Abrahams and asked him to act for the company in enforcing their claim against the Contract Corporation for £10,000., and offered him £500. for his costs. Mr. Abrahams declined to act, as he often acted as the solicitor for the Contract Corporation, and Mr. Suche employed Messrs. Linklater & Co., who took out a summons, which was adjourned into Court, and Mr. Abrahams was employed by the liquidator of the Contract Corporation to oppose the summons. The Master of the Rolls, in June, 1868, decided in favour of the claim. The liquidator, by Mr. Abrahams, gave notice of appeal; but the notice was withdrawn at the desire of the creditors' representative, Mr. Ayles. A few days after the notice of appeal was withdrawn, Mr. Suche called on Mr. Abrahams, and, after thanking him for the fair way in which he had opposed his

[44] "The plaintiff in error contends that where an attorney undertakes litigation without a contract as to his fees, he has no right thereafter to demand of his client a new contract, and that if he does and such contract is entered into, it will not be binding upon the client. That proposition cannot be sustained. It is only where an attorney has at the beginning or after the commencement of the litigation an express contract as to the amount of his fee that he is forbidden to demand a new contract, even if the work proves to be more arduous and extensive than he anticipated. In such a case, if he does demand a new contract and, on refusal thereof, he abandons the litigation, it may be held that he forfeits all compensation for his services."—Gilbert, J., in Chambers v. Gilmore, 193 Fed. 635, 637, 113 C. C. A. 503, 505 (1912).

"All dealings between solicitor and client during the progress of business with which the solicitor is intrusted by his client are to be anxiously scrutinized in equity, in order to protect the client from his own acts done under the influence or ascendency which the solicitor is supposed to acquire over him. The parties stand on unequal ground: and generally principles of public policy require this care and vigilance on the part of the courts."—McCoun, V. C., in De Rose v. Fay, 3 Edw. Ch. (N. Y.) 369 (1839).

[45] The principal case presents an unusual situation which it is convenient to discuss here, although logically it does not belong here.

claim, departed, leaving a £500. note on the table. Mr. Abrahams carried this sum to the credit of Mr. Suche in his books, but in September last, hearing that reports were abroad as to his receipt of the money, he laid a statement of the facts before the Chief Clerk (Mr. Church), and he communicated with the Master of the Rolls, who ordered the present summons to issue.

THE MASTER OF THE ROLLS, who had reserved judgment from the last day of Michaelmas Term, said that he had come to the conclusion that Mr. Abrahams exerted himself to the utmost in favour of his client, the liquidator, that he brought the case fully before the Court, and suppressed nothing. His Lordship believed that Mr. Abrahams had, up to the day when the bank-note was left on his table, forgotten all about the previous offer of £500. for his costs, and that it supplied no motive to actuate him in conducting the opposition to the claim. By what species of infatuation Mr. Abrahams came to accept the note his Lordship could not conceive. The impropriety of the act, and the consequences which must ensue if such an act were passed over, needed no comment. Considering the high character Mr. Abrahams had received from several firms of the highest character in the profession, his Lordship had convinced himself that he might, without undue lenity, reduce the penalty to be inflicted. As the case was one in which no appeal would lie from his decision he had taken the opinion of the Lords Justices, and they concurred in the decision he was about to pronounce—namely, that Mr. Abrahams be suspended for one year from the 1st of January next, and pay the costs of the application.

SECTION 3.—OTHER PECUNIARY TRANSACTIONS

A. B. A. CANON.

10. ACQUIRING INTEREST IN LITIGATION. The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting.[46]

[46] "The stirring up of lawsuits has always been under the ban of a just public opinion, and the purchase by lawyers of causes of action is included in the censure."—William Allen Butler, *Lawyer and Client* (1871) p. 19.

In Berrien v. McLane, Hoffman, 421, 423 (1840), Hoffman, J., said that the doctrine that gifts and agreements between a client and his advocate are not necessarily void "is not applicable to the case of an agreement for a transfer of part of the property in litigation, made during that litigation. Such an agreement I hold to be utterly void, not merely presenting itself with suspicion attached to it, and calling for jealous scrutiny; but one incapable of being explained or sustained by any circumstances of adequacy or equity." See, to the same effect, Rogers v. Marshall (C. C.) 13 Fed. 59 (1882). In the absence, however, of a statute making the transaction void, the weight of authority is contra. See note in 23 L. R. A. (N. S.) 679, 680.

"An attorney buying from his client can never support it unless he can

B. B. A. CANON.

XI.[47] Money of a client or trust property coming into a lawyer's possession should always be reported promptly, should never be used by him for a private purpose, and should not be exposed to risk by being commingled with his own.

prove that his diligence to do the best for the vendor has been as great as if he was only an attorney dealing for that vendor with a stranger. That must be the rule."—Lord Eldon, in Gibson v. Jeyes, 6 Ves. Jr. 266, 271 (1801).

"There is no necessary incapacity for dealing between an attorney and client, but the burden rests upon the attorney who bargains with his client in a matter of advantage to himself to show that the transaction is fair and equitable, that the client was fully informed of his rights and the nature and effect of his contract, and was so placed as to be able to deal with his attorney at arm's length. Morrison v. Smith, 130 Ill. 304 [23 N. E. 241 (1889)]."—Dunn, J., in Ringen v. Ranes, 263 Ill. 11, 17, 104 N. E. 1023, 1025 (1914). See 18 Ann. Cas. 123, note.

In Thomas v. Turner's Adm'r, 87 Va. 1, 12, 12 S. E. 149, 153 (1890), Lewis, P., points out that "all dealings between attorney and client for the benefit of the former are not only regarded with jealousy and closely scrutinized, but they are presumptively invalid, on the ground of constructive fraud; and that presumption can be overcome only by the clearest and most satisfactory evidence. The rule is founded in public policy and operates independently of any ingredient of actual fraud, or of the age or capacity of the client, being intended as a protection to the client against the strong influence to which the confidential relation naturally gives rise."

"The absence of full information and independent advice is always regarded a strong circumstance against the validity of the transaction."—Woods, J., in Ex parte Gadsden, 89 S. C. 352, 364, 71 S. E. 952, 957 (1911).

"But it was argued in the present case that, although a solicitor or other agent may not avail himself of information obtained during his employment to obtain a good bargain from his client, the rule does not apply if the client has become bankrupt and the purchase is from the trustee in bankruptcy. * * * I entirely dissent from that argument. The test is whether the purchase would be a benefit obtained to the prejudice or at the expense of the client. In this case it is possible that the property may produce enough to pay all the creditors and leave a balance for the bankrupt. Even if not, it would pay a considerable dividend to the creditors. Is it no injury to the client that the solicitor should put this money into his own pocket instead of paying it to the bankrupt, or to his creditors? * * * In my opinion the trustee represents and stands in the place of the bankrupt for this purpose, viz., that the solicitor could not be allowed to hold as against the trustee an advantage obtained by him on a purchase from the trustee by means of the knowledge which he had gained whilst solicitor for the bankrupt."—Kay, J., in Luddy's Trustee v. Peard, L. R. 33 Ch. D. 500, 520, 521 (1886).

In Zeigler v. Hughes, 55 Ill. 288 (1870), it was held that an attorney employed to foreclose a mortgage remained attorney after the foreclosure and sale until the end of the redemption period, and hence could not buy during that period from the creditor who had purchased at the sale without being frank with his client and paying him an adequate price.

On the right of a lawyer to purchase from the adverse party the subject-matter of the employment, see Ann. Cas. 1915C, 953, note.

[47] A revision of A. B. A. Canon 11.

PURCHASE BY CLERK IN OFFICE OF ATTORNEY FOR ASSIGNEE FOR CREDITORS OF DOUBTFUL CLAIM IN FAVOR OF THE ASSIGNED ESTATE—HIS DUTY UPON REALIZATION. N. Y. Committee. *Question 116:* I request the opinion of your Committee upon the following situation:

A clerk in the office of the attorney for the assignee for the benefit of creditors purchased, before the final accounting, and for the sole purpose of disposing of all the assets of the estate, a claim of the assigned estate against another bankrupt estate. The nominal consideration was actually passed. Before this sale was made, the attorney for the assignee inquired of the attorney for the trustee of the bankrupt estate whether any dividend would subsequently be declared, and was informed in definite terms that there was no prospect of any further dividends. Subsequently a dividend was actually declared by the bankrupt estate, and the law clerk, who is the owner of the claim, is now a practicing attorney. At the time he bought this claim, although he was employed in the office of the attorney for the assignee, he was an entire stranger to the business of this estate and had not the slightest part in any manner in the administration of the estate. He now wishes to know whether there is any impropriety in his claiming or accepting the proceeds of this dividend.

Answer: In the opinion of the Committee, a clerk employed in the office of the attorney for an assignee for the benefit of creditors occupies such a relation to the administration of the trust that a purchase by him from the assignee, of a claim belonging to the estate is improper. Nevertheless, since the purchase has been effected and a dividend declared, we think that the purchaser should accept the proceeds and dispose of them as a trust-fund. Even though all the parties acted in entire good faith and with the sole motive of closing up the estate with the least possible expense, yet the protection of trust estates generally requires the rigid enforcement of the salutary rule established by courts of equity respecting the purchase of trust property by a trustee or those associated with him.

In re DOBBS.

(Supreme Court of New York, Appellate Division, First Department, 1916. 160 N. Y. Supp. 173.)

Application for the punishment of Willoughby B. Dobbs, an attorney and counselor at law, for professional misconduct. Respondent suspended.

CLARKE, P. J. * * * Moreover, the respondent admitted that he used the money received in settlement [of a will contest] as if it was his own, depositing a part of it in his general account, which at times was insufficient to meet the amount due to his clients. While the respondent claims that he was at all times in a position to pay the amounts due, his obligation to his clients required him to keep their money entirely separate from his own. As said in Matter of Cohn, 141 App. Div. 511, 126 N. Y. Supp. 218: "An attorney . . . is under the strictest obligation to keep it separate from all other moneys in his hands. Any appropriation of the money for any purposes other than to pay to his client is a violation of his personal obligation to his client, and requires that he be disciplined." [48]

The respondent not only mingled his clients' money with his own, but also used it for his own purposes, and refused to account for and pay it over to his clients, asserting his right to it under the guise of moneys disbursed on their account. His testimony was not frank nor honest. He exaggerated his disbursements, and gave unbelievable evidence as to a tender. * * *

The respondent should be suspended for one year, with leave to apply for reinstatement at the expiration of that term, upon proof of his compliance with the conditions to be incorporated in the order to be entered hereon. Settle order on notice.

[48] "Money collected by an attorney for his client belongs, of course, to the client, not a part of it merely, but all of it—not a balance after deducting the fee of the attorney, but the total sum collected. The fund may be charged with a lien in favor of the attorney to the extent of his fee, and the attorney may have a right to retain his compensation on a settlement with the client; but the ownership of the entire sum is none the less in the client. * * * The relation between the attorney, who has collected and withholds the client's money or chattels, and the client, is not that of debtor and creditor primarily, but that of trustee and cestui que trust. * * *"—McClellan, C. J., in Macdonald v. State, 143 Ala. 101, 109–110, 39 South. 257, 259 (1905).

"The accusation that Mr. Duncan failed to keep his client's money separate from his own in bank, but that he checked it out and used it for his own purposes—this the respondent admitted to be true, but asserted that he was always ready and able to raise and replace the amount. Such conduct in an attorney may be and is, we think, represensible for its laxity, but it is not necessarily fraudulent, and it does not furnish ground for disbarment. This has been distinctly held by the English courts in the case of Guilford v. Sims, 76 E. C. L. 369 [1853]."—Benet, Acting Associate Justice, in In re Duncan, 64 S. C. 461, 483–484, 42 S. E. 433, 441 (1902).

"It is entirely inconsistent with the proper performance of the duty which an attorney at law owes to his client to mix the client's money with his own

money, and to draw on his bank account, in which his client's money is deposited, for his personal expenses, and to be remiss in promptly accounting to his clients for the money which he has collected for them. For this conduct we think the respondent should be censured."—Ingraham, P. J., in In re Lampke, 165 App. Div. 899, 900, 149 N. Y. Supp. 622, 623 (1914).

In Naltner v. Dolan, 108 Ind. 500, 8 N. E. 289, 58 Am. Rep. 61 (1886), a firm of attorneys had an account in a bank "in which all money collected for, and belonging to, their various clients was deposited and checked out in the firm name, but such moneys were not mingled with their own." The account was not an attorney or trust account, there being nothing "to designate or preserve its trust character." The court held that the attorneys were responsible for loss occurring through the insolvency of the bank. In other words, the court applied the rule applicable where the attorney mixes his client's money with his own in his bank account. Robinson v. Ward, Ryan & Moody, 274 (1825).

On when the statute of limitations begins to run against an action to recover money collected by an attorney, see 17 L. R. A. (N. S.) 667, note.

CHAPTER X

MISCELLANEOUS TOPICS

SECTION 1.—LOBBYING

B. B. A. CANON.

XXVII.[1] PROFESSIONAL ADVOCACY OTHER THAN BEFORE COURTS. A lawyer may render professional services in pressing claims before departments of government or in obtaining or preventing the passage of legislation, upon the same principles which justify his appearance before Courts and subject to the same rules of ethics. In appearing for a client before any legislative or other body, or in approaching a member of the legislature, it is not only unprofessional but highly reprehensible for him to conceal his attorneyship, or to use any means other than fair argument to influence action.

SPALDING v. EWING.

(Supreme Court of Pennsylvania, 1892. 149 Pa. 375, 24 Atl. 219, 15 L. R. A. 727, 34 Am. St. Rep. 608.)

Action on a contract by Harvey Spalding against Washington Ewing. Plaintiff had judgment, and defendant appeals. Reversed.

STERRETT, J. This action to recover fees alleged to have been earned by plaintiff is founded on the following contract, signed by defendant: "Landenberg, Pa., 1882. I here guaranty that myself, claimant for additional pay as postmaster, (at Chandlersville, Landenberg,) shall without delay, upon the receipt of draft for amount which may be collected, remit the amount of fee due his attorney, Harvey Spalding, which is understood to be twenty-five per cent. of collection, to the said Harvey Spalding, at Washington, D. C." The character of the services rendered in pursuance of, and doubtless contemplated by, this contract will be best understood by referring to plaintiff's deposition, given in evidence on the trial.

After stating that the power of attorney from defendant was procured by a person employed "to obtain powers of attorney in such

[1] A revision of A. B. A. Canon 26.

cases," and that the postmaster general had "for years restricted the payment of defendant's claim," etc., the plaintiff testifies as follows: "I applied to congress for a legislative mandate to compel the postmaster general to make the necessary readjustments of defendant's salary and the salary of other postmasters, and this application was resisted by the postmaster general. From session to session of congress I made application to committees having jurisdiction, urging the enactment of the mandate applied for, and after several years' labor in that behalf I obtained the enactment by congress on the 3d of March, 1883, of the mandate applied for, which act is known as the 'Spalding Act,' by reason of my services in that behalf. Afterwards the postmaster general tried to avoid complying with this mandate, and I carried on proceedings which compelled him ultimately, in a degree, to comply with the law. * * * I also made arguments on his behalf before the different committees, when in 1886 the appropriation to pay the first allowance was stricken out of the appropriation bill in the house of representatives, and I saw the necessary report was made to congress of the second allowance, and I took the necessary means to have the appropriations made. The defendant's claim was always resisted by the officers of the post-office department, and by the most laborious and protracted service on behalf of the defendant I compelled the payment of the said claims, notwithstanding such resistance." In his answer to the fifth interrogatory, after again speaking of his long-continued service, the plaintiff says: "It was never possible to collect either of these claims without my said service, for the officers of the post-office department, at every stage of the case, down almost to the time of collection, resisted the payment of the claims." In answering the sixth interrogatory, he further testifies: "That, after he had expended time and money for the defendant, and compelled the payment of a claim not otherwise collectible, the defendant has by a variety of misrepresentations tried to cheat witness out of his fees." Plaintiff's son testified, among other things, that his father, "as attorney for Ewing and many others, did secure for them the allowance previously denied, and which, without his aid, they never would or could have secured."

It thus appears by the depositions above referred to that defendant's claim and many similar claims against the post-office department had been considered and rejected. As testified by plaintiff, "the postmaster general for years resisted defendant's claim." The burden of plaintiff's undertaking appears to have been the procurement of what he terms a "legislative mandate," the avowed object of which was to compel recognition of the claims rejected, and so long resisted, by the post-office department. It is very evident from the uncontradicted testimony of plaintiff and his son that strictly professional services, such as preparing petition to congress, drafting the necessary bill, furnishing such statement and proofs of said claims as were necessary to a proper understanding of their merits, etc., must have constituted a very

significant part of the "several years' labor," "the most laborious and protracted services," the numerous "applications to committees," "from session to session of congress," etc., testified to by him. According to his own account of it, the work of engineering the bill through congress, despite the strong and determined opposition of the post-office department, must have been multiform, persistent, and so conspicuously effective that plaintiff was honored with the paternity of the "legislative mandate" by calling it the "Spalding Act."

The plaintiff's evidence is not susceptible of any other inference than that, in the main, the services contemplated by the contract in suit, and actually rendered in pursuance thereof, were such as have been repeatedly pronounced contrary to public policy. In Clippinger v. Hepbaugh, 5 Watts & S. 315, 40 Am. Dec. 519, the condition of the obligation to pay $100 was that the obligee should succeed in procuring from the legislature the passage of a law authorizing the obligor and his wife to sell and convey certain real estate devised to the latter and her children. In refusing to sustain the contract, this court said: "It is not necessary to say that a certain compensation for such services may not be recovered; but we are clearly of opinion that it would be against sound policy to sanction a practice which may lead to deceit, improper and corrupt tampering with legislative action. It is not required that it tends to corruption. If its effect is to mislead, it is decisive against the claim; and that such is its tendency no human being can reasonably doubt. * * * The law will not aid in enforcing any contract that is illegal, or the consideration of which is inconsistent with public policy and sound morality, or the integrity of the domestic, civil, and political institution of the state. * * * It matters not that nothing improper was done or was expected to be done by the plaintiff. It is enough that such is the tendency of the contract, that it is contrary to sound morality and public policy, leading, necessarily, in the hands of designing and corrupt men, to improper tampering with members, and the use of extraneous secret influence over an important branch of the government. It may not corrupt all; but if it corrupts or tends to corrupt some, or if it deceives or tends to deceive or mislead some, that is sufficient to stamp its character with the seal of reprobation before a judicial tribunal."

The same general principle is recognized in the following cases: Hatzfield v. Gulden, 7 Watts, 152, 31 Am. Dec. 750; Bowman v. Coffroth, 59 Pa. 19; Ormerod v. Dearman, 100 Pa. 561, 45 Am. Rep. 391. In the last case the present chief justice, referring to the authorities, said they "establish the principle that contracts which have for their subject-matter any interference with the creation of laws, or their due enforcements, are against public policy and therefore void." In Burke v. Child, 21 Wall. 441, 22 L. Ed. 623, the validity of a contract to procure the enactment of a law authorizing the payment of a private claim was fully considered by the supreme court of the United

States. After referring to Clippinger v. Hepbaugh, supra, and three other American cases, viz., Harris v. Roof's Ex'rs, 10 Barb. (N. Y.) 489; Rose v. Truax, 21 Barb. (N. Y.) 361; Marshall v. Railroad Co., 16 How. 314, 14 L. Ed. 953, in all of which such contracts were held to be against public policy, that court said: "We entertain no doubt that in such cases, as under all other circumstances, an agreement, express or implied, for purely professional services is valid. Within this category are included drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics as professional services rendered in a court of justice, and are no more exceptionable. But such services are separated by a broad line of demarcation from personal solicitation, and other means and appliances, such as the correspondence shows were resorted to in this case. There is no reason to believe that they involved anything corrupt or different from what is usually practiced by all paid lobbyists in the prosecution of their business."

After showing that the prohibition against contracts to procure either general or private legislation rests upon a solid foundation, the court further says: "To legalize the traffic of such services would open a door at which fraud and falsehood would not fail to enter and make themselves felt at every accessible point. It would invite their presence, and offer them a premium. If the tempted agent be corrupt himself, and disposed to corrupt others, the transition requires but a single step. He has the means in his hands, with every facility, and a strong incentive, to use them. The widespread suspicion that prevails, and charges openly made and hardly denied, lead to the conclusion that such events are not of rare occurrence. Where the avarice of the agent is inflamed by the hope of a reward contingent upon success, and to be graduated by a percentage upon the amount appropriated, the danger of tampering in its worst form is greatly increased. It is by reason of these things that the law is as it is upon the subject. It will not allow either party to be led into temptation where the thing to be guarded against is so deleterious to private morals and so injurious to the public welfare. We have said that for professional services in this connection a just compensation may be recovered. But where they are blended and confused with those that are forbidden, the whole is a unit and undivisible. That which is bad destroys that which is good, and they perish together. Services of the latter character, gratuitously rendered, are not unlawful. The absence of motive to wrong is the foundation of the sanction. The tendency to mischief, if not wanting, is greatly lessened. The taint lies in the stipulation for pay. Where that exists, it affects fatally, in all its parts, the entire body of the contract."

The principle under consideration is not restricted to contracts involving the procurement of legislation for a contingent compensation. It has been frequently recognized and applied in other transactions involving questions of public policy. Some of the instructive cases in which that has been done are the following: Tool Co. v. Norris, 2 Wall. 48, 56, 17 L. Ed. 868; Oscanyan v. Arms Co., 103 U. S. 261, 26 L. Ed. 539; Woodstock Iron Co. v. Richmond & D. Extension Co., 129 U. S. 643, 9 Sup. Ct. 402, 32 L. Ed. 819. In the first of these, an agreement, for compensation, to procure a contract from the government to furnish its supplies, was held to be against public policy, and could not be enforced. Mr. Justice Field, delivering the opinion of the court in that case, said: "The principle which determines the invalidity of the agreement in question has been asserted in a great variety of cases. It has been asserted in cases relating to agreements for compensation to procure legislation. These have been uniformly declared invalid, and the decisions have not turned upon the question whether improper influences were contemplated or used, but upon the corrupting tendency of the agreements. * * * Agreements for compensation, contingent upon success, suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception."

As has been seen by reference to plaintiff's testimony, the contract in suit contemplated the procurement of the "legislative mandate" compelling the post-office department to recognize certain claims which had theretofore been considered and rejected. The procurement of that legislation was the burden of plaintiff's undertaking. He has explained the difficulties encountered in accomplishing it, as well as the reasons therefor. The undisputed facts of the case bring it within the principle recognized in the authorities above cited, and defendant's second point should have been affirmed.

Judgment reversed.[2]

[2] On the validity of a contract for services to procure legislation, see 30 L. R. A. 737, note; 4 L. R. A. (N. S.) 213, note.

Sharswood, in mentioning the fact that "scarce a session of one of our legislatures passes without rash and ill-considered alterations in the civil code, vitally affecting private rights and relations," points out that "such laws are frequently urged by men, having causes pending, who dare not boldly ask that a law should be made for their particular case, but who do not hesitate to impose upon the legislature by plausible arguments the adoption of some general rule, which by a retrospective construction will have the same operation. It is a practice which lawyers are bound by the true spirit of their oath of office, and by a comprehensive view of their duty to the Constitution and laws, which they bear so large a part as well in making as administering, to discountenance and prevent. It is to be feared that sometimes it is the counsel of the party who recommends and carefully frames the bill which, when enacted into a law, is legislatively to decide the cause. It is time that a resort to such a measure should be regarded in public estimation as a flagrant case of professional infidelity and misconduct."—George Sharswood, *Professional Ethics* (5th Ed.) p. 24.

LAWYERS AND THE PUBLIC. Edward M. Shepard, *Lawyers and Corporate Capitalization,* 18 Green Bag, 601, 603: The relations of great corporations to the lawyers who have advised them have sometimes, perhaps often, seemed sinister to the American people. I know, as no doubt you do, enough of that body of lawyers to realize that among them are men of all kinds; and that some are merely acute and high-class janizaries whose consciences are for hire with their professional abilities. There are, however, exceptions. It is my long and deliberate belief that, in respect of disinterested wisdom on public questions or of a high and rigorous standard of morals for public trusts and the duties of citizenship, no men can be found in any calling superior, on the average, to lawyers, including even the men who have professionally served corporate interests. To say the contrary would disparage the discernment of the corporations even more than it would the morality of the lawyers. * * *

When, however, it has happened, as it sometimes has, and, I am sorry to say, more often than we could wish, that a lawyer addressing the public or public officers, and assuming the guise of disinterested concern for the public welfare, has really and truly spoken in behalf of undisclosed clients whose retainers were secretly in his pocket, he has done not only something which is inconsistent with the flawless integrity belonging to the true lawyer, but something which ought to be abhorrent to every right thinking man.

LAWYERS AND LEGISLATIVE MEASURES. Louis D. Brandeis, *The Opportunity in the Law,* 39 Amer. L. Rev. 555, 560–562: For nearly a generation the leaders of the bar, with few exceptions, have not only failed to take part in any constructive legislation designed to solve in the interest of the people our great social, economic and industrial problems; they have failed likewise to oppose legislation prompted by selfish interests. They have often gone further in disregard of public interest. They have at times advocated as lawyers legislative measures which as citizens they could not approve, and have endeavored to justify themselves by a false analogy. They have erroneously assumed that the rule of ethics to be applied to a lawyer's advocacy is the same where he acts for private interests against the public as it is in litigation between private individuals.

The ethical question which laymen most frequently ask about the legal profession is this: How can a lawyer take a case which he does not believe in? The profession is regarded as necessarily somewhat immoral, because its members are supposed to be habitually taking cases they do not believe in. As a practical matter I think the lawyer is not often harassed by this problem, partly because he is apt

to believe at the time in most of the cases that he actually tries, and partly because he either abandons or settles a large number of those he does not believe in. In any event, the lawyer recognizes that in trying a case his prime duty is to present his side to the tribunal fairly and as well as he can, relying upon his adversary to present his case fairly and as well as he can. As the lawyers on the two sides are usually reasonably well matched, the judge or jury may ordinarily be trusted to make such a decision as justice demands.

But when lawyers act upon the same principle in supporting the attempts of their private clients to secure or to oppose legislation, a very different condition is presented. In the first place, the counsel selected to represent important private interests possesses usually ability of a high order, while the public is often inadequately represented or wholly unrepresented. That presents a condition of great unfairness to the public. As a result many bills pass in our legislatures which would not have become law if the public interest had been fairly represented; and many good bills are defeated which if supported by able lawyers would have been enacted. Lawyers have, as a rule, failed to consider this distinction between practice in the court involving only private interests and practice before the legislature or city council where public interests are involved. Some men of high professional standing have even endeavored to justify their course in advocating professionally legislation which in their character as citizens they would have voted against.

Furthermore, lawyers of high standing have often failed to apply in connection with professional work before the legislature or city council a rule of ethics which they would deem imperative in practice before the court. Lawyers who would indignantly retire from a court case in the justice of which they believed, if they had reason to think that a juror had been bribed or a witness had been suborned by their client, are content to serve their client by honest arguments before a legislative committee although they have as great reason to think that their client has bribed members of the legislature or corrupted public opinion. It is this confusion of ethical ideas which has prevented the bar from taking at the present time [1905] the position which it held formerly as a brake upon democracy, and which I believe it must take again before the serious questions now before us can be solved.[3]

[3] "With the growing complexity of the social structure, legislation has come to affect more and more the private and pecuniary interests of individuals, and as a consequence, selfish motives prompt more than ever to interfere with and influence political action. The lobby has become an established institution, and, unfortunately, lawyers, or men claiming to be lawyers and to be acting as such, make up the major part of its membership. There are some, a very few, matters coming before a legislature for determination which are purely private in their nature, and as to these there may be proper scope for the exercise of a lawyer's functions. But the great mass of matters with which a legislature has to deal, and respecting which lobbyists are employed,

SECTION 2.—TRANSFERS OF PROPERTY IN FRAUD OF CREDITORS

LINDSLEY v. CALDWELL.

(Supreme Court of Missouri, Division No. 2; 1911. 234 Mo. 498, 137 S. W. 983, 37 L. R. A. [N. S.] 161.)

Action by Laura D. Lindsley against Clinton L. Caldwell. From a judgment for plaintiff, defendant appeals. Affirmed. * * *

FERRISS, J. * * * The evidence for the plaintiff is clear and satisfactory that she was the owner of this stock; that she had permitted Stevenson to use her property in St. Louis not for the purpose of hindering and delaying his creditors, but as a loan to enable him to extricate himself from financial difficulty, and that he had so used the property; that this particular stock was placed in the name of the defendant who was acting as attorney for plaintiff's agent, with the understanding and agreement that he was to indorse the certificate in blank and turn it over to plaintiff's agent; that defendant, in violation of this agreement, refused to turn over the stock; that he asserted no legal or equitable ownership in same, but held it for the avowed purpose of compelling Stevenson to give him a written acknowledgment that he (Stevenson) owed defendant $15,000 for legal services. * * *

2. The defendant, recognizing no doubt the weakness of his position so far as his attempt to hold this stock as security for his fees is concerned, defends upon the further ground that the transfer of this stock to him by Stevenson was made for the purpose of hindering and delaying the creditors of Stevenson; and he invokes the rule that where a conveyance is made for such purpose, and an attempt is made by the grantor to regain the property, equity, because of the corrupt purpose which prompted the conveyance, will leave the parties where it finds them. We are of the opinion, however, that this unhappy de-

are of public import. They present, not questions of individual right dependent upon past transactions and determinable by existing law, but questions of what the law, as a general rule of conduct, shall be for the future. As to these every man has the right, and the same right—and it is not only a right but a duty—to use his best efforts to secure action in conformity with his convictions. His services in this regard are, however, not the subject of a professional retainer. As a citizen the lawyer has no peculiar prerogatives, and he may no more sell his influence than he may sell his vote. In the court room he must be the zealous servitor of his client, and there the utmost of professional zeal is consistent with personal honor. On the hustings, at the polls, and in or about legislative halls, his country is his client, and 'the hand of Douglas is his own.' The profession owes it to itself by every means in its power to make plain that a lobbyist is not a lawyer, and to make sure that a lawyer is not a lobbyist."—Frederick W. Lehmann, *The Lawyer in American History*, 3 Neb. State Bar Assoc. Proc. 145, 162.

fense is not available to the defendant. The rule which he invokes does not apply to a case like this, where the grantee is the confidential attorney of the grantor, and receives the conveyance as such. The rule applicable to this case is clearly expressed in 3 Am. & Eng. Ency. Law, p. 338, and is as follows: "Even where the conveyance by the client to his attorney is for the declared purpose of hindering and delaying the creditors of the client, it cannot be sustained as against him by the attorney or his assignee with notice; the parties are not regarded as being in pari delicto, and equity will refuse to sustain such a conveyance." The leading case cited to support the text is Ford v. Harrington, 16 N. Y. 285, which held that, although the object of the assignment was to perpetrate a fraud on the creditors, yet on account of the relations existing between attorney and client, the attorney must be compelled to restore what he had acquired under the assignment. Therefore, even if the defendant should succeed in establishing as a fact that Stevenson was the real owner of this stock, and that the purpose of the transfer of the stock to defendant was to hinder, delay and defraud the creditors of Stevenson, still the defendant would have no right to hold the stock as againt Stevenson.

This case was very fully tried by the circuit court, and great latitude was allowed the defendant in the introduction of testimony and examination of witnesses. The findings of the court are fully sustained by the evidence, and its judgment and decree are affirmed.[4]

SECTION 3.—COUNTENANCING FUTURE VIOLATIONS AND EVASIONS OF LAW [5]

ADVICE AS TO ILLEGAL ACT. N. Y. Committee. *Question 27:* Is it proper for a lawyer to advise a client, in reply to a query seeking his advice, that in his opinion it would be better for the client to pay a fine prescribed by a certain penal statute than to obey its directions?

Answer: In the opinion of the Committee, the question should be answered in the negative.

[4] On the right of a client to recover property placed in the name of his attorney in order to defraud creditors, see note in 37 L. R. A. (N. S.) 161.

On transfers by clients to third persons in fraud of creditors, Sharswood says: "Another particular may be adverted to: The attempt to cover property from the just demands of creditors. It is to be feared that gentlemen of the Bar sometimes shut their eyes, and, under the influence of feelings of commiseration for an unfortunate client, feign not to see what is really very palpable to everybody else."—George Sharswood, *An Essay on Professional Ethics* (5th Ed.) 112.

[5] See, also, section on Confidential Communications, ante, p. 82.

If a lawyer in this state advises a client to do an act forbidden by law and punishable by fine, it would appear that he becomes a principal in a misdemeanor by virtue of section 2, Penal Law (Consolidated Laws of New York, c. 40). Cf. section 27.

It is the lawyer's duty when asked to advise, to instruct the client as to the measure of the penalty prescribed by the law; but he should stop there. For the lawyer, as an officer of the law, owes a peculiar duty to the state and a duty to the profession. He violates his duty to the state when he deliberately becomes party to a crime; and violates his duty to the profession, because deliberate participation in crime by a lawyer tends to bring both the law and the legal profession into contempt.

We are not considering those cases where there is a bona fide intention to test the validity of a law.[6]

In re An ATTORNEY.

(Supreme Court of New York, Appellate Division, Third Department, 1915. 170 App. Div. 922, 154 N. Y. Supp. 703.)

PER CURIAM. * * * It is evident that the attorney is carrying on the collection agency. The fact that his wife has signed a certificate that she is carrying on the business does not release him from responsibility, as he and not his wife is chargeable with the acts

[6] "Clients sometimes disclose to their lawyers an intention to do an illegal act. * * * Perhaps the client wishes to commit an assault and battery upon an enemy, and desires to know if there is not a way of evading the law by provoking the enemy to strike the first blow; or perhaps he has committed embezzlement and desires to know where he can flee to escape punishment; or perhaps he wishes to burn his property to secure the insurance and desires to know certain technicalities of insurance law. It is the lawyer's duty in all such cases to advise the client against the intended act. It is his further duty to absolutely refuse to give him any information on the desired point."—Gleason L. Archer, *Ethical Obligations of the Lawyer* (1910) § 34, pp. 92, 93.

"No attorney or counsel has the right, in the discharge of 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, 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 privileges of counsel does not exonerate him from the well-founded legal principle which renders all persons who advise or direct the commission of crime guilty of the crime committed by compliance with the advice or in conformity with the direction which may be given."—Daniels, J., in Goodenough v. Spenser, 46 How. Prac. (N. Y.) 347, 350, 351 (1874).

"You [lawyers] are not a mere body of expert business advisers in the field of civil law or a mere body of expert advocates for those who get entangled in the meshes of the criminal law. You are 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."—Woodrow Wilson, *The Lawyer and the Community*, 35 Amer. Bar Assoc. Rep. (1910) 419, 435.

complained of. In carrying on the collection agency the attorney violated the proprieties of his profession in a manner which subjects him to the discipline of the court in two respects.

The accounts for collection are given to the agency under an agreement that the agency may assign them. They are assigned to a party in an adjoining town, and sued in his name, in justice court, in that town. He has no interest in the matter, except he receives a small fee for allowing the use of his name and verifying the complaint. Substantially all the claims received are put in judgment, with the understanding between the agency and the clients that the costs of putting the claim in judgment shall be borne by the agency unless the claim is collected. If the amount of a claim, or the aggregate of several claims, justifies, action is brought in Supreme Court. If collected without suit, the agency receives 25 per cent. of the amount collected; if with suit, 50 per cent. The assignments are made in bulk, sometimes 50 or 100 at a time, and the suits brought in a wholesale manner. Subdivision 5 of section 2869 of the Code of Civil Procedure deprives a justice of the peace of a town adjoining a city of jurisdiction of an action brought against a resident of the city, unless one of the parties plaintiff is a resident of such town. The theory of the statute is that a resident of a city shall not be called into justice court outside of his city except by an actual resident of the town where suit is brought. Where an attorney receives hundreds of claims at a time (the debtor and creditor both being residents of the city), and causes them to be assigned to a resident of a town adjoining the city for the sole purpose of bringing suits in that town, he is evading the statute and depriving the defendants of a privilege which the law has secured to them. The assignments are merely colorable; the actions are, to all intents and purposes, prosecuted by the claimants who live in the city, and the assignments are merely instruments made for the purpose of evading the statute. There may be individual cases which would justify a transfer so as to bring a suit in an adjoining town; but where transfers are made by wholesale, and actions brought in the manner shown, the practice is unprofessional, and the attorney is evading the law, and thereby depriving the defendants of a right which the statute intends they shall have.

Section 274 of the Penal Law has been taken from the Code of Civil Procedure, and may now be considered as an act regulating attorneys, and applies to the person, rather than to the court in which he practices. It prohibits an attorney from promising or giving any valuable consideration to any person, as an inducement to place or in consideration of having placed in his hands a demand for the purpose of bringing an action thereon, or of representing the claimant in the pursuit of any civil remedy for the recovery thereof. The understanding with the agency by which it is to put all claims in judgment, and if the claim is not collected that the agency pays the cost of collection, is

fairly within the spirit of this prohibition. Stedwell v. Hartmann, 74 App. Div. 126, 77 N. Y. Supp. 498, affirmed 173 N. Y. 624, 66 N. E. 1117.

It is due to the attorney to state that he claims the actions in the adjoining town have not been brought there for the purpose of annoying or making unnecessary expense to defendants, but in order to effect a considerable saving in costs to the agency, as the fees of a justice in the town are much less than those of a city magistrate. * * *

We therefore hold the matter, to give him an opportunity to correct the practices of the agency in the two respects mentioned, and if they are corrected within a reasonable time no further action will be taken in the premises. Otherwise, the matter will, upon notice, be given further consideration.

WERNIMONT v. STATE ex rel. LITTLE ROCK BAR ASS'N.

(Supreme Court of Arkansas, 1911. 101 Ark. 210, 142 S. W. 194, Ann. Cas. 1913D, 1156.)

See, ante, p. 120, for a report of the case.

ASSISTING IN A REMARRIAGE OF A CLIENT OUT OF THE STATE DESPITE A DIVORCE DECREE PROHIBITION OF REMARRIAGE. N. Y. Committee. *Question 12:* A. defended a divorce action brought against X., against whom a decree of absolute divorce was rendered in New York state. The final decree having been signed, and X. desiring to marry the co-respondent, sought the advice of A. as to how this could be done by her without incurring any penalty in the state of New York. A. advised her to go to Connecticut and marry there, and furthermore accompanied her and the co-respondent to Connecticut and "gave her away."

Do you consider that A. has done anything which should subject him to censure?

Answer: The question involves two inquiries. The first relates to the lawyer's duty to his client, to wit:

(1) Is the lawyer censurable for having advised his client that she might lawfully proceed contrary to the letter of the decree?

The second involves the lawyer's duty to the profession and perhaps to the Court and to the community:

(2) Is he censurable for having facilitated and taken part in a marriage ceremony which was contrary to the letter of the decree?

A minority of this Committee are firm in the conviction that the conduct of the attorney is censurable in respect to both aspects of the question. A majority agree that:

(1) It was not improper for the lawyer, when asked to advise upon that point, to inform his client that the prohibition against the remarriage of the guilty party contained in the decree in a divorce action, is a penalty which neither has, nor was intended by the Legislature to have, any effect beyond the borders of the State; and to advise her that she might contract a marriage in Connecticut which would be recognized as valid in New York, and would not be punishable as a contempt of Court.

(2) The attorney's conduct in facilitating and participating in the marriage ceremony in Connecticut is likely to be misunderstood, owing to the very general misapprehension as to the scope of such a decree. For this reason such conduct tends to diminish public respect for the profession, if not for our courts and their decrees, and (unless justified by circumstances not disclosed in the question, and done with the purpose of avoiding still greater evils to follow) is open to criticism.

The Committee had before them sections 6 and 8 of the Domestic Relations Law (Consol. Laws, c. 14), and cases such as Thorp v. Thorp, 90 N. Y. 602, 43 Am. Rep. 189, and Van Voorhis v. Brintnall, 86 N. Y. 18, 40 Am. Rep. 505.

SECTION 4.—SOME ADDITIONAL DUTIES TO CLIENTS AND THEIR RELATIVES

MORAL DUTY TO A TESTATOR AND HIS RELATIVES. Samuel Warren, *The Moral, Social and Professional Duties of Attorneys and Solicitors* (1870 Amer. Ed.) pp. 257–259: Suppose, for instance, you should, in your conscience, believe your client incapable of making a will, while he, and those about him think otherwise: what will you do? Suppose you should refuse to be concerned, and death intervene, followed by intestacy: Even the medical attendant concurring with the relatives and attendants in thinking that the testator was capable of making a will? Well, gentlemen, even in an extreme case like this, I conceive it to be your duty to act firmly in conformity with the dictates of your own conscience, and refuse to carry into effect what you believe to be only spurious wishes and intentions. * * * In a case of this description, you should be guided, to a great extent, by the opinion of the medical attendant, especially if he be a person of established character for ability, experience and honor. * * * Your diffidence should be great in proportion to his confidence, in a matter so peculiarly within his province, so frequently the subject of his observation and experience. * * * In such cases, I think I should be guided not a little by the nature of the will which it was

proposed to make. If its provisions appeared reasonable, just and suitable to the position of the testator and his family—in duly consulting the interests, for instance, of his wife, children and near relations, or old and valued friends—that of itself would afford most cogent evidence that the testator possessed a true disposing mind. If, on the other hand, he proposed to make an unjust, a cruel, or capricious disposition of his property—disinheriting a child, or children, making no provision, or a grossly inadequate one, for a deserving wife—or alienating his property for absurd, unworthy, or disreputable purposes; I should be strongly disposed to let that circumstance turn the scale, and should refuse to be any party to framing an instrument which would act so unjustly, unreasonably or tyrannically. Nay, I question whether I would give any assistance to a testator, however mentally sound, if so morally unsound; gravely pausing, at all events, before I gave irrevocable operation to death-bed caprices, prejudices and antipathies.

INSTRUCTIONS FOR WILL RECEIVED FROM A THIRD PARTY. Opinion of the Council of the Law Society, *Law, Practice and Usage in the Solicitor's Profession* (1909) pp. 312, 313: 1033. A solicitor prepared a will for testatrix on the instructions of her daughter, who requested that the will when prepared should be handed to her, in order that she might obtain her mother's signature. The solicitor declined to adopt that course, and said that the testatrix must either come to his office and sign the will after he had the opportunity of going through it with her, or he would have to attend the testatrix at her house. The daughter alleged that her mother was ill.

The Council expressed the opinion that the course adopted by the solicitor was quite correct.—Opinion of Council Feb. 1, 1900.

RIGHT TO DECEIVE CLIENT OF UNSOUND MIND. N. Y. Committee. *Question 87:* A lawyer's former client has been duly and legally committed to an asylum as a person of unsound mind; but he conceives himself to be wholly competent and therefore illegally restrained; he frequently solicits the lawyer's assistance to secure his release; the lawyer has no doubt of his incompetency or of the propriety of his commitment and retention, and knows of no justifiable ground for assisting him; but the lawyer is advised by his client's physician that it will improve his client's physical and mental condition to believe that the lawyer will assist him, and consequently both physician and members of the incompetent's family have importuned the lawyer to deceive his client into the false, but to him reassuring belief, that his lawyer is endeavoring to secure his release.

In the opinion of the Committee should the lawyer refuse to humor his client and to yield to the importunities?

Answer: However laudable the physician's proposal may appear from a medical point of view, the lawyer in the case suggested is, in the opinion of the Committee, not warranted in using the fact of his official position to carry out the deception.

SECTION 5.—SOME ADDITIONAL DUTIES TO THIRD PERSONS

In re NAPOLIS.

(Supreme Court of New York, Appellate Division, First Department, 1915. 169 App. Div. 469, 155 N. Y. Supp. 416.)

Proceeding by the Bar Association of New York City against Edward S. Napolis, an attorney, for professional misconduct. Respondent censured.

INGRAHAM, P. J. These charges grew out of certain transactions of one Pecorini. Respondent was a friend of Pecorini, who was engaged in publishing an Italian newspaper in the city of New York and working among the Italians who were residents of the city. Pecorini had been accused of receiving money for Italians and appropriating it to his own use, when respondent, to shield Pecorini from such charges, wrote to Pecorini several letters, which evidently were intended for publication—one stating: "I have had two checks ready since July 15th, and if you had only made up your mind some time ago as to the best way to send this money, so that it could surely reach the interested parties, they might have had it a long time ago." And another stating: "The check for $300 which I received from you on July 15th was deposited by me on September 10th." As a matter of fact, the respondent had not had two checks ready to send to these people since July 15th, and did not receive Pecorini's check on July 15th, but the day the first letter was written, on September 10th, Pecorini gave to the respondent his check for $300, which was afterwards collected, and it appears that the money was subsequently transmitted to those entitled to it.

Respondent makes a full and complete statement of his relations with Pecorini, and, while admitting that the statements contained in these letters were false, expresses his regret that he had written them, stating that they were written to protect Pecorini from what he then

believed to be false charges against him. The respondent apparently had no relation of attorney and client with any of those interested in this transaction. He apparently had the utmost confidence in Pecorini, and believed him to be a sincere and well-meaning man, devoted to assisting his fellow countrymen in this country. There was no motive, except to endeavor to protect Pecorini from what he considered an unjust and malicious attack upon him. While the respondent is to be censured for writing falsehood in any letter, as he freely admits his fault and expresses regret therefor, the court would hardly be justified in proceeding to discipline him further on this charge than to express its condemnation of any statement by a member of the profession that was not true, for the purpose of protecting another from charges, even when he believed the charges were malicious and false, or for any other purpose.

The other charge which requires notice is one arising from the fact that Pecorini brought to the respondent an affidavit purporting to be made by one La Spina, and which was signed by him. The affidavit was not entitled in any legal proceeding, and it did not appear for what use it was intended. Pecorini requested the respondent, who was then a notary public, to affix his signature to the jurat. Respondent called La Spina on the telephone, recognized La Spina's voice, and swore him to the affidavit over the telephone, and then affixed his name and official title to the jurat. This affidavit does not appear to have been intended to have been used in any judicial or legal proceeding, and, so far as appears, was not so used. Of course, such a method of administering an oath is entirely illegal and unauthorized, and respondent in acting as he did was guilty of a misdemeanor; but he has also submitted a full and frank answer to this charge, has admitted the offense, and has not sought to exonerate himself by false statements to the court, or by a denial of any of the facts stated. The offense is a serious one, and receives the severe condemnation of the court. It is inconceivable that a member of the profession should so far forget his duty to the profession and to the public as to violate his duty and commit an offense against the criminal law. Of course, the respondent was not responsible for the truth of the facts stated in this affidavit. He now says, and apparently with truthfulness, that he did not read the affidavit, and that his sole knowledge of its contents was what Pecorini told him in relation to it. He admits that statements made in this affidavit are false, and if there was real ground for believing that the respondent knew that the statements were false, there would be a situation presented requiring discipline; but there is nothing in these charges or the facts as presented which would justify a finding that the defendant had any personal advantage, pecuniary or otherwise, in his relations with Pecorini, or which induced him to place himself in the position in which he is in relation to these transactions.

The court again wishes to express its condemnation of the acts of notaries taking acknowledgments or affidavits without the presence of the party whose acknowledgment is taken or the affiant, and that it will treat as serious professional misconduct the act of any notary thus violating his official duty. In this case, however, considering the youth and inexperience of the respondent, his enthusiastic belief in the good work that Pecorini was doing, his confidence in the man himself, the absence of any possible motive that would lead him to commit the offenses with which he is charged, and his full and frank disclosures to the court, the court will confine its discipline to a severe censure of the respondent for the acts specified, without proceeding to further discipline. All concur.

DUTY OF LAWYER TO A THIRD PERSON WHO IS IN FACT TO HIS KNOWLEDGE RELYING UPON HIM. N. Y. Committee. *Question 90:* A. and B. come into the office of C., an attorney, and A. employs him to draft a deed conveying certain property to B. Before the deed is drawn, C. discovers that the title to the property is defective. Should he divulge this fact to B., who has had nothing to do with his employment?

Answer: In the opinion of the Committee, the question implies that B. reposes trust and confidence in C. as a lawyer; and in effect that the lawyer is asked to represent both parties. Therefore, in the opinion of the Committee, C. should disclose the defect to both A. and B. If C. is not acting for B., the Committee is of the opinion that C. should only continue to act for A. after advising B. to secure separate counsel.

ABRAHAM LINCOLN'S CORRECTION OF A MISTAKE. William H. Herndon and Jesse William Weik, *Herndon's Lincoln* (1889) vol. 2, p. 345: A widow who owned a piece of valuable land employed Lincoln and myself to examine the title to the property, with the view of ascertaining whether certain alleged tax liens were just or not. In tracing back the title we were not satisfied with the description of the ground in one of the deeds of conveyance. Lincoln, to settle the matter, took his surveying instruments and surveyed the ground himself. The result proved that Charles Matheney, a former grantor, had sold the land at so much per acre, but that in describing it he had made an error and conveyed more land than he received pay for, and his land descended to our client, and Lincoln, after a careful survey and calculation, decided that she ought to pay to Matheney's heirs the sum which he had shewn was due them by reason of the erroneous conveyance. To this she entered strenuous objections, but when as-

sured that unless she consented to this act of plain justice we would drop the case, she finally, though with great reluctance, consented. She paid the required amount, and this we divided up into smaller sums proportioned to the number of heirs. Lincoln himself distributed these to the heirs, obtaining a receipt from each one.

SECTION 6.—THE LAWYER'S DUTIES SUMMARIZED

B. B. A. CANON.

XXXIII.[7] THE LAWYER'S DUTY IN ITS LAST ANALYSIS. No client, corporate or individual, however powerful, nor any cause, however important, is entitled to receive, any service or advice which countenances disloyalty to the law whose minister the lawyer is, or disrespect of the judicial office, which he is bound to uphold, or corruption of any person exercising a public office or private trust, or deception or betrayal of the public interests. By rendering any such improper service, the lawyer merits stern condemnation. He advances the honor of his profession and the real interests of his client when he renders service or gives advice tending to impress upon the client exact compliance with the strict principles of law and morals. Above all, a lawyer will find his highest honor in a deserved reputation for scrupulous fidelity to private trust and public duty, with the vigor and oppenness of an honest man and a patriotic and loyal citizen.

[7] A revision of A. B. A. Canon 32.

APPENDIX

HOFFMAN'S FIFTY RESOLUTIONS IN REGARD TO PROFESSIONAL DEPORTMENT [1]

I.

I will never permit professional zeal to carry me beyond the limits of sobriety and decorum, but bear in mind, with Sir Edward Coke, that "if a river swell beyond its banks, it loseth its own channel."

II.

I will espouse no man's cause out of envy, hatred or malice toward his antagonist.

III.

To all judges, when in court, I will ever be respectful; they are the law's viceregents; and whatever may be their character and deportment the individual should be lost in the majesty of the office.

IV.

Should judges, while on the bench, forget that, as an officer of their court, I have rights, and treat me even with disrespect, I shall value myself too highly to deal with them in like manner. A firm and temperate remonstrance is all that I will ever allow myself.

V.

In all intercourse with my professional brethren, I will always be courteous. No man's passions 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

[1] These resolutions were written by David Hoffman, of the Baltimore Bar, for the assistance of the young practitioner. Hoffman said: "We therefore submit to him the following resolutions, to be adopted by him as guides, never to be departed from, and to which he will ever be faithful. We have preferred to frame them in the manner of resolutions, rather than of didactic rules, hoping they may thereby prove more impressive, and be the more likely to be remembered."—David Hoffman, *A Course of Legal Study* (2d Ed., 1836) Vol. II, p. 751. The resolutions are found there on pages 752–775.

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 then alone to be consulted.

VI.

To the various officers of the court I will be studiously respectful, and specially regardful of their rights and privileges.

VII.

As a general rule, I will not allow myself to be engaged in a cause to the exclusion of, or even in participation with, the counsel previously engaged, unless at his own special instance, in union with his client's wishes; and it must, indeed, be a strong case of gross neglect or of fatal inability in the counsel, that shall induce me to take the cause to myself.

VIII.

If I have ever had any connection with a cause, I will never permit myself (when that connection is from 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.

IX.

Any promise or pledge made by me to the adverse counsel shall be strictly adhered to by me; nor shall the subsequent instructions of my client induce me to depart from it, unless I am well satisfied it was made in error; or that the rights of my client would be materially impaired by its performance.

X.

Should my client be disposed to insist on captious requisitions, or frivolous and vexatious defenses, they shall be neither enforced nor countenanced by me. And if still adhered to by him from a hope of pressing the other party into an unjust compromise, or with any other motive, he shall have the option to select other counsel.

XI.

If, after duly examining a case, I am persuaded that my client's claim or defense (as the case may be), cannot, or rather ought not to be sustained, I will promptly advise him to abandon it. To press

it further in such a case, with the hope of gleaning some advantage by an extorted compromise, would be lending myself to a dishonorable use of legal means in order to gain a portion of that, the whole of which I have reason to believe would be denied to him both by law and justice.

XII.

I will never plead the Statute of Limitations when based on the mere efflux of time; for if my client is conscious he owes the debt, and has no other defense than the legal bar, he shall never make me a partner in his knavery.

XIII.

I will never plead or otherwise avail of the bar of Infancy against an honest demand. If my client possesses the ability to pay, and has no other legal or moral defense than that it was contracted by him when under the age of twenty-one years, he must seek for other counsel to sustain him in such a defense. And although in this, as well as in that of limitation, the law has given the defense, and contemplates, in the one case, to induce claimants to a timely prosecution of their rights, and in the other designs to protect a class of persons, who by reason of tender age are peculiarly liable to be imposed on,—yet, in both cases, I shall claim to be the sole judge (the pleas not being compulsory) of the occasions proper for their use.

XIV.

My client's conscience and my own are distinct entities: and though my vocation may sometimes justify my maintaining as facts or principles, in doubtful cases, what may be neither one nor the other, I shall ever claim the privileges of solely judging to what extent to go. In civil cases, if I am satisfied from the evidence that the fact is against my client, he must excuse me if I do not see as he does, and do not press it; and should the principle also be wholly at variance with sound law, it would be dishonorable folly in me to endeavor to incorporate it into the jurisprudence of the country, when, if successful, it would be a gangrene that might bring death to my cause of the succeeding day.

XV.

When employed to defend those charged with crimes of the deepest dye, and the evidence against them, whether legal or moral, be such as to leave no just doubt of their guilt, I shall not hold myself privileged, much less obliged, to use my endeavors to arrest or to impede the course of justice, by special resorts to ingenuity—to the artifices of eloquence—to appeals to the morbid and fleeting sym-

pathies of weak juries, or of temporizing courts—to my own personal weight of character—nor finally, to any of the overweening influences I may possess from popular manners, eminent talents, exalted learning, etc. Persons of atrocious character, who have violated the laws of God and man, are entitled to no such special exertions from any member of our pure and honorable profession; and, indeed, to no intervention beyond securing to them a fair and dispassionate investigation of the facts of their cause, and the due application of the law; all that goes beyond this, either in manner or substance, is unprofessional, and proceeds, either from a mistaken view of the relation of client and counsel, or from some unworthy and selfish motive which sets a higher value on professional display and success than on truth and justice, and the substantial interests of the community. Such an inordinate ambition I shall ever regard as a most dangerous perversion of talents, and a shameful abuse of an exalted station. The parricide, the gratuitous murderer, or other perpetrator of like revolting crimes, has surely no such claim on the commanding talents of a profession whose object and pride should be the suppression of all vice by the vindication and enforcement of the laws. Those, therefore, who wrest their proud knowledge from its legitimate purposes to pollute the streams of justice and to screen such foul offenders from merited penalties, should be regarded by all (and certainly shall by me) as ministers at a holy altar full of high pretention and apparent sanctity, but inwardly base, unworthy, and hypocritical—dangerous in the precise ratio of their commanding talents and exalted learning.

XVI.

Whatever personal influence I may be so fortunate as to possess shall be used by me only as the most valuable of my possessions, and not be cheapened or rendered questionable by a too frequent appeal to its influence. There is nothing more fatal to weight of character than its common use; and especially that unworthy one, often indulged in by eminent counsel, of solemn assurances to eke out a sickly and doubtful cause. If the case be a good one, it needs no such appliance; and if bad, the artifice ought to be too shallow to mislead any one. Whether one or the other, such personal pledges should be very sparingly used and only on occasions which obviously demand them; for if more liberally resorted to, they beget doubts where none may have existed, or strengthen those which before were only feebly felt.

XVII.

Should I attain that eminent standing at the bar which gives authority to my opinions, I shall endeavor, in my intercourse, with my junior brethren, to avoid the least display of it to their prejudice. I will

strive never to forget the days of my youth, when I too was feeble in the law, and without standing. I well remember my then ambitious aspirations (though timid and modest) nearly blighted by the inconsiderate or rude and arrogant deportment of some of my seniors; and I will further remember that the vital spark of my early ambition might have been wholly extinguished, and my hopes forever ruined, had not my own resolutions, and a few generous acts of some others of my seniors, raised me from my depression. To my juniors, therefore, I shall ever be kind and encouraging; and never too proud to recognize distinctly that, on many occasions, it is quite probable their knowledge may be more accurate than my own, and that they, with their limited reading and experience, have seen the matter more soundly than I, with my much reading and long experience.

XVIII.

To my clients I will be faithful; and in their causes zealous and industrious. Those who can afford to compensate me, must do so; but I shall never close my ear or heart because my client's means are low. Those who have none, and who have just causes, are, of all others, the best entitled to sue, or be defended; and they shall receive a due portion of my services, cheerfully given.

XIX.

Should my client be disposed to compromise, or to settle his claim, or defense; and especially if he be content with a verdict or judgment, that has been rendered; or having no opinion of his own, relies with confidence on mine, I will in all such cases greatly respect his wishes and real interests. The further prosecution, therefore, of the claim or defense (as the case may be), will be recommended by me only when, after mature deliberation, I am satisfied that the chances are decidedly in his favor; and I will never forget that the pride of professional opinion on my part, or the spirit of submission, or of controversy (as the case may be) on that of my client, may easily mislead the judgment of both, and cannot justify me in sanctioning, and certainly not in recommending, the further prosecution of what ought to be regarded as a hopeless cause. To keep up the ball (as the phrase goes) at my client's expense, and to my own profit, must be dishonorable; and however willing my client may be to pursue a phantom, and to rely implicitly on my opinion, I will terminate the controversy as conscientiously for him as I would were the cause my own.

XX.

Should I not understand my client's cause, after due means to comprehend it, I will retain it no longer, but honestly confess it, and advise him to consult others, whose knowledge of the particular case may probably be better than my own.

XXI.

The wealthy and the powerful shall have no privilege against my client that does not equally appertain to others. None shall be so great as to rise, even for a moment, above the just requisitions of the law.

XXII.

When my client's reputation is involved in the controversy, it shall be, if possible, judicially passed on. Such cases do not admit of compromise; and no man's elevated standing shall induce me to consent to such a mode of settling the matter: the amende from the great and wealthy to the ignoble and poor should be free, full and open.

XXIII.

In all small cases in which I may be engaged I will as conscientiously discharge my duty as in those of magnitude; always recollecting that "small" and "large" are to clients relative terms, the former being to a poor man what the latter is to a rich one; and, as a young practitioner, not forgetting that large ones, which we have not, will never come, if the small ones, which we have, are neglected.

XXIV.

I will never be tempted by any pecuniary advantage however great, nor be persuaded by any appeal to my feelings however strong, to purchase, in whole or in part my client's cause. Should his wants be pressing, it will be an act of humanity to relieve them myself, if I am able, and if I am not, then to induce others to do so. But in no case will I permit either my benevolence or avarice, his wants or his ignorance, to seduce me into any participation of his pending claim or defense. Cases may arise in which it would be mutually advantageous thus to bargain, but the experiment is too dangerous, and my rule too sacred to admit of any exception, persuaded as I am that the relation of client and counsel, to be preserved in absolute purity, must admit of no such privilege, however guarded it may be by circumstances; and should the special case alluded to arise, better would

it be that my client should suffer, and I lose a great and honest advantage, than that any discretion should exist in a matter so extremely liable to abuse, and so dangerous in precedent.

And though I have thus strongly worded my resolution, I do not thereby mean to repudiate, as wholly inadmissible the taking of contingent fees—on the contrary, they are sometimes perfectly proper and are called for by public policy, no less than by humanity. The distinction is very clear. A claim or defense may be perfectly good in law, and in justice, and yet the expenses of litigation would be much beyond the means of the claimant or defendant—and equally so as to counsel, who, if not thus contingently compensated in the ratio of the risk, might not be compensated at all. A contingent fee looks to professional compensation only on the final result of the matter in favor of the client. None other is offered or is attainable. The claim or defense never can be made without such an arrangement; it is voluntarily tendered, and necessarily accepted or rejected, before the institution of any proceedings.

It flows not from the influence of counsel over client, both parties have the option to be off; no expenses have been incurred; no moneys have been paid by the counsel to the client; the relation of borrower and lender, of vendor and vendee, does not subsist between them,—but it is an independent contract for the services of counsel to be rendered for the contingent avails of the matter to be litigated. Were this denied to the poor man, he could neither prosecute nor be defended. All of this differs essentially from the object of my resolution, which is against purchasing, in whole or in part, my client's rights, after the relation of client and counsel, in respect to it, had been fully established—after the strength of his case has become known to me—after his total pecuniary inability is equally known—after expenses have been incurred which he is unable to meet—after he stands to me in the relation of a debtor and after he desires money from me in exchange for his pending rights. With this explanation I renew my resolution never so to purchase my client's cause, in whole or in part; but still reserve to myself, on proper occasions, and with proper guards, the professional privilege (denied by no law among us) of agreeing to receive a contingent compensation freely offered for services wholly to be rendered, and when it is the only means by which the matter can either be prosecuted or defended. Under all other circumstances, I shall regard contingent fees as obnoxious to the present resolution.

XXV.

I will retain no client's funds beyond the period in which I can, with safety and ease, put him in possession of them.

XXVI.

I will on no occasion blend with my own my client's money. If kept distinctly as his it will be less liable to be considered as my own.

XXVII.

I will charge for my services what my judgment and conscience inform me is my due, and nothing more. If that be withheld it will be no fit matter for arbitration, for no one but myself can adequately judge of such services, and after they are successfully rendered, they are apt to be ungratefully forgotten. I will then receive what the client offers, or the laws of the country may award,—but in either case he must never hope to be again my client.

XXVIII.

As a general rule I will carefully avoid what is called the "taking of half fees." And though no one can be so competent as myself to judge what may be a just compensation for my services, yet when the quiddam honorarium has been established by usage or law, I shall regard as eminently dishonorable all underbidding of my professional brethren. On such a subject, however, no inflexible rule can be given to myself, except to be invariably guided by a lively recollection that I belong to an honorable profession.

XXIX.

Having received a retainer for contemplated services, which circumstances have prevented me from rendering, I shall hold myself bound to refund the same, as having been paid to me on a consideration which has failed; and, as such, subject to restitution on every principle of law, and of good morals,—and this shall be repaid not merely at the instance of my client, but ex mero motu.

XXX.

After a cause is finally disposed of, and all relation of client and counsel seems to be forever closed, I will not forget that it once existed; and will not be inattentive to his just request that all of his papers may be carefully arranged by me, and handed over to him. The execution of such demands, though sometimes troublesome, and inopportunely or too urgently made, still remains a part of my professional duty, for which I shall consider myself already compensated.

XXXI.

All opinions for clients, verbal or written, shall be my opinions, deliberately and sincerely given, and never venal and flattering offerings to their wishes or their vanity. And though clients sometimes have the folly to be better pleased with having their views confirmed by an erroneous opinion than their wishes or hopes thwarted by a sound one, yet such assentation is dishonest and unprofessional. Counsel, in giving opinions, whether they perceive this weakness in their clients or not, should act as judges, responsible to God and man, as also especially to their employers, to advise them soberly, discreetly, and honestly, to the best of their ability, though the certain consequence be the loss of large prospective gains.

XXXII.

If my client consents to endeavors for a compromise of his claim or defense, and for that purpose I am to commune with the opposing counsel or others, I will never permit myself to enter upon a system of tactics, to ascertain who shall overreach the other by the most nicely balanced artifices of disingenuousness, by mystery, silence, obscurity, suspicion, vigilance to the letter, and all of the other machinery used by this class of tacticians to the vulgar surprise of clients, and the admiration of a few ill-judging lawyers. On the contrary, my resolution in such a case is to examine with great care, previously to the interview, the matter of compromise; to form a judgment as to what I will offer or accept; and promptly, frankly, and firmly to communicate my views to the adverse counsel. In so doing no lights shall be withheld that may terminate the matter as speedily and as nearly in accordance with the rights of my client as possible; although a more dilatory, exacting, and wary policy might finally extract something more than my own or even my client's hopes. Reputation gained for this species of skill is sure to be followed by more than an equivalent loss of character; shrewdness is too often allied to unfairness, caution to severity, silence to disingenuousness, wariness to exaction to make me covet a reputation based on such qualities.

XXXIII.

What is wrong is not the less so from being common. And though few dare to be singular, even in a right cause, I am resolved to make my own, and not the conscience of others, my sole guide. What is morally wrong cannot be professionally right, however it may be sanctioned by time or custom. It is better to be right with a few, or even none, than wrong, though with a multitude. If, therefore, there

be among my brethren any traditional moral errors of practice, they shall be studiously avoided by me, though in so doing I unhappily come in collision with what is (erroneously, I think) too often denominated the policy of the profession. Such cases, fortunately, occur but seldom, but when they do, I shall trust to that moral firmness of purpose which shrinks from no consequences, and which can be intimidated by no authority, however ancient or respectable.

XXXIV.

Law is a deep science; its boundaries, like space, seem to recede as we advance; and though there be as much of certainty in it as in any other science, it is fit we should be modest in our opinions, and ever willing to be further instructed. Its acquisition is more than the labor of a life, and after all can be with none the subject of an unshaken confidence. In the language, then, of a late beautiful writer, I am resolved to "consider my own acquired knowledge but as a torch flung into an abyss, making the darkness visible, and showing me the extent of my own ignorance." (Jameson.)

XXXV.

I will never be voluntarily called as a witness in any cause in which I am counsel. Should my testimony, however, be so material that without it my client's cause may be greatly prejudiced, he must at once use his option to cancel the tie between us in the cause, and dispense with my further services or with my evidence. Such a dilemma would be anxiously avoided by every delicate mind, the union of counsel and witness being usually resorted to only as a forlorn hope in the agonies of a cause, and becomes particularly offensive when its object be to prove an admission made to such counsel by the opposite litigant. Nor will I ever recognize any distinction in this respect between my knowledge of facts acquired before and since the institution of the suit, for in no case will I consent to sustain by my testimony any of the matters which my interest and professional duty render me anxious to support. This resolution, however, has no application whatever to facts contemporaneous with and relating merely to the prosecution or defense of the cause itself; such as evidence relating to the contents of a paper unfortunately lost by myself or others—and such like matters, which do not respect the original merits of the controversy, and which, in truth, adds nothing to the once existing testimony; but relates merely to matters respecting the conduct of the suit, or to the recovery of lost evidence; nor does it apply to the case of gratuitous counsel,—that is, to those who have expressly given their services voluntarily.

XXXVI.

Every letter or note that is addressed to me shall receive a suitable response, and in proper time. Nor shall it matter from whom it comes, what it seeks, or what may be the terms in which it is penned. Silence can be justified in no case; and though the information sought cannot or ought not to be given, still decorum would require from me a courteous recognition of the request, though accompanied with a firm withholding of what has been asked. There can be no surer indication of vulgar education than neglect of letters and notes; it manifests a total want of that tact and amenity which intercourse with good society never fails to confer. But that dogged silence (worse than a rude reply) in which some of our profession indulge on receiving letters offensive to their dignity, or when dictated by ignorant importunity, I am resolved never to imitate—but will answer every letter and note with as much civility as may be due, and in as good time as may be practicable.

XXXVII.

Should a professional brother, by his industry, learning and zeal, or even by some happy chance, become eminently successful in causes which give him large pecuniary emoluments, I will neither envy him the fruits of his toils or good fortune, nor endeavor by any indirection to lessen them, but rather strive to emulate his worth, than enviously to brood over his meritorious success, and my own more tardy career.

XXXVIII.

Should it be my happy lot to rank with, or take precedence of my seniors, who formerly endeavored to impede my onward course, I am firmly resolved to give them no cause to suppose that I remember the one, or am conscious of the other. When age and infirmities have overtaken them, my kindness will teach them the loveliness of forgiveness. Those again, who aided me when young in the profession shall find my gratitude increase in proportion as I become the better able to sustain myself.

XXXIX.

A forensic contest is often no very sure test of the comparative strength of the combatants, nor should defeat be regarded as a just cause of boast in the victor, or of mortification in the vanquished. When the controversy has been judicially settled against me, in all courts, I will not "fight the battle o'er again," coram non judice; nor endeavor to persuade others, as is too often done, that the courts were

prejudiced—or the jury desperately ignorant—or the witnesses perjured—or that the victorious counsel were unprofessional and disingenuous. In such cases, Credat Judæus Apella!

XL.

Ardor in debate is often the soul of eloquence, and the greatest charm of oratory. When spontaneous and suited to the occasion, it becomes powerful. A sure test of this is when it so alarms a cold, calculating and disingenuous opponent, as to induce him to resort to numerous vexatious means of neutralizing its force—when ridicule and sarcasm take the place of argument—when the poor device is resorted to of endeavoring to cast the speaker from his well-guarded pivot, by repeated interruptions, or by impressing on the court and jury that his just and well-tempered zeal is but passion, and his earnestness but the exacerbation of constitutional infirmity—when the opponent assumes a patronizing air, and imparts lessons of wisdom and of instruction! Such opponents I am resolved to disappoint, and on no account will I ever imitate their example. The warm current of my feelings shall be permitted to flow on; the influences of my nature shall receive no check; the ardor and fullness of my words shall not be abated—for this would be to gratify the unjust wishes of my adversary, and would lessen my usefulness to my client's cause.

XLI.

In reading to the court or to the jury, authorities, records, documents or other papers, I shall always consider myself as executing a trust, and as such, bound to execute it faithfully and honorably. I am resolved, therefore, carefully to abstain from all false or deceptious readings, and from all uncandid omissions of any qualifications of the doctrines maintained by me, which may be contained in the text or in the notes; and I shall ever hold that the obligation extends not only to words, syllables, and letters, but also to the modus legendi. All intentional false emphasis and even intonations in any degree calculated to mislead, are petty impositions on the confidence reposed, and, whilst avoided by myself, shall ever be regarded by me in others as feeble devices of an impoverished mind, or as pregnant evidences of a disregard for truth, which justly subjects them to be closely watched in more important matters.

XLII.

In the examination of witnesses, I shall not forget that perhaps circumstances and not choice have placed them somewhat in my power. Whether so or not, I shall never esteem it my privilege to disregard

their feelings, or to extort from their evidence what, in moments free from embarrassment, they would not testify. Nor will I conclude that they have no regard for truth and even the sanctity of an oath, because they use the privilege accorded to others, of changing their language and of explaining their previous declarations. Such captious dealing with the words and syllables of a witness ought to produce in the mind of an intelligent jury only a reverse effect from that designed by those who practice such poor devices.

XLIII.

I will never enter into any conversation with my opponent's client, relative to his claim or defense, except with the consent and in the presence of his counsel.

XLIV.

Should the party just mentioned have no counsel, and my client's interest demand that I should still commune with him, it shall be done in writing only, and no verbal response will be received. And if such person be unable to commune in writing, I will either delay the matter until he employs counsel, or take down in writing his reply in the presence of others; so that if occasion should make it essential to avail myself of his answer, it may be done through the testimony of others, and not by mine. Even such cases should be regarded as the result of unavoidable necessity, and are to be resorted to only to guard against great risk, the artifices of fraud, or with the hope of obviating litigation.

XLV.

Success in any profession will be much promoted by good address. Even the most cautious and discriminating minds are not exempt from its influence; the wisest judges, the most dispassionate juries, and the most wary opponents being made thereby, at least, more willing auditors—and this, of itself, is a valuable end. But whilst address is deservedly prized, and merits the highest cultivation, I fully concur in sentiment with a high authority, that we should be "respectful without meanness, easy without too much familiarity, genteel without affectation, and insinuating without any art or design."

XLVI.

Nothing is more unfriendly to the art of pleasing than morbid timidity (bashfulness—mauvaise honte).

All life teems with examples of its prejudicial influence, showing that the art of rising in life has no greater enemy than this nervous and senseless defect of education. Self-possession, calmness—steady

assurance—intrepidity—are all perfectly consistent with the most amiable modesty, and none but vulgar and illiterate minds are prone to attribute to presumptuous assurance the apparently cool and unconcerned exertions of young men at the bar. A great connoisseur in such matters says, that "what is done under concern and embarrassment is sure to be ill done"; and the judge (I have known some) who can scowl on the early endeavors of the youthful advocate who has fortified himself with resolution, must be a man poor in the knowledge of human character, and, perhaps, still more so in good feelings. Whilst, therefore, I shall ever cherish these opinions, I hold myself bound to distinguish the arrogant, noisy, shallow, and dictatorial impudence of some, from the gentle, though firm and manly, confidence of others—they who bear the white banner of modesty, fringed with resolution.

XLVII.

All reasoning should be regarded as a philosophical process—its object being conviction by certain known and legitimate means. No one ought to be expected to be convinced by loud words—dogmatic assertions—assumption of superior knowledge—sarcasm—invective; but by gentleness, sound ideas, cautiously expressed by sincerity—my ardor without extravasation. The minds and hearts of those we address are apt to be closed when the lungs are appealed to instead of logic; when assertion is relied on more than proof; and when sarcasm and invective supply the place of deliberate reasoning. My resolution, therefore, is to respect courts, juries, and counsel as assailable only through the medium of logical and just reasoning; and by such appeals to the sympathies of our common nature as are worthy, legitimate, well-timed, and in good taste.

XLVII.

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.

XLIX.

Avarice is one of the most dangerous and disgusting of vices. Fortunately its presence is oftener found in age than in youth; for if it be seen as an early feature in our character it is sure, in the course of a long life, to work a great mass of oppression, and to end in both intellectual and moral desolation. Avarice gradually originates every species of indirection. Its offspring is meanness; and it contaminates every pure and honorable principle. It cannot consist with honesty scarce a moment without gaining the victory. Should the young practitioner, therefore, on the receipt of the first fruits of his exertions, perceive the slightest manifestations of this vice, let him view it as his most insidious and deadly enemy. Unless he can then heartily and thoroughly eradicate it, he will find himself, perhaps slowly, but surely, capable of unprofessional—mean—and, finally, dishonest acts, which as they cannot be long concealed, will render him conscious of the loss of character; make him callous to all the nicer feelings; and ultimately so degrade him, that he consents to live upon arts, from which his talents, acquirements, and original integrity would certainly have rescued him, had he, at the very commencement, fortified himself with the resolution to reject all gains save those acquired by the most strictly honorable and professional means. I am, therefore, firmly resolved never to receive from any one a compensation not justly and honorably my due; and, if fairly received, to place on it no undue value; to entertain no affection for money, further than as a means of obtaining the goods of life,—the art of using money being quite as important for the avoidance of avarice, and the preservation of a pure character, as that of acquiring it.

With the aid of the foregoing resolutions, and the faithful adherence to the following and last one, I hope to attain eminence in my profession, and to leave this world with the merited reputation of having lived an honest lawyer.

L.

LAST RESOLUTION: I will read the foregoing forty-nine resolutions twice every year during my professional life.

CANONS OF PROFESSIONAL ETHICS OF THE AMERICAN BAR ASSOCIATION [2]

ANNOTATED

TOPICAL INDEX [3]

I.—PREAMBLE.

In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing Justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality

[2] "It might be too high praise to say that this Code, as finally approved, could not have been made better. But the question for the American lawyer is not whether a more perfect one could be made. It is whether this Code, having been framed after long deliberation and extensive correspondence by a capable Committee representing all parts of the United States, and adopted with practical unanimity after full opportunity for discussion by the American Bar Association, ought not, as a whole, to receive his support.

"If this Code is accepted by the bar associations of every state as a fair general statement of the main duties of members of the legal profession, a great purpose will be well accomplished. An authoritative criterion will be supplied, by which every lawyer can be safely guided, when he is in doubt as to the conduct he should pursue in respect to any of the questions which oftenest prove a source of perplexity. The law student will have a mentor always at hand. The courts will hesitate less in enforcing the discipline of the bar, since professional misconduct will be, more than ever before, a sinning against the light."—Simeon E. Baldwin, *The New American Code of Legal Ethics*, 8 Columbia Law Review, 541, 546, 547.

For the history of the adoption of the A. B. A. Canons in the different states down to 1914, see 39 Amer. Bar Assoc. Reps. 559.

Of the canons of the American Bar Association the Illinois Supreme Court has said: "These canons are not of binding obligation and are not enforced as such by the courts, but they constitute a safe guide for professional conduct in the cases to which they apply."—Dunn, J., for the court, in Ringen v. Ranes, 263 Ill. 11, 17, 104 N. E. 1023, 1025 (1914).

[3] Prepared by Nathan William MacChesney, Esq., of the Chicago Bar, formerly President of the Illinois State Bar Association. This index is published by the Chicago Bar Association and the Illinois State Bar Association.

of its administration. The future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.

II.—The Canons of Ethics.

No code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life. The following canons of ethics are adopted by the American Bar Association as a general guide, yet the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned: [4]

1. The Duty of the Lawyer to the Courts. It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.[5]

Annot. Attacking or criticising court as ground for disbarment, see Attorney and Client, Cent. Dig. §§ 59, 60; Dec. Dig. § 43.

Attacking or criticising court as constituting contempt, see Contempt, Cent. Dig. §§ 6–10; Dec. Dig. § 6.

Suspension or removal of judge and liability of judge for official acts, see Judges, Cent. Dig. §§ 42–45, 165–180; Dec. Dig. §§ 11, 36, 37.

Remarks and conduct of judge on trial of case in general, see Criminal Law, Cent. Dig. §§ 1520–1535; Dec. Dig. §§ 654–658; Trial, Cent. Dig. §§ 80–84; Dec. Dig. § 29.

2. The Selection of Judges. It is the duty of the Bar to endeavor to prevent political considerations from outweighing judicial fitness in the selection of Judges. It should protest earnestly and actively against the appointment or election of those who are unsuit-

[4] "Laws will not make a community virtuous, nor will canons of professional ethics make dishonorable men honorable. Nevertheless, in a democratic community, good laws help to raise and to strengthen the standard of social virtue, and canons of professional ethics similarly tend to raise and to strengthen the standard of professional honor."—The Outlook, Vol. 89, p. 408 (June 27, 1908).

"Such a code is valuable chiefly as the expression of public opinion, and its value, therefore, will depend upon the degree of social courage with which the standard it furnishes is enforced by the bar in different communities."—The Outlook, Vol. 90, p. 142 (Sept. 26, 1908).

[5] See note to this canon, ante, p. 163.

able for the Bench; and it should strive to have elevated thereto only those willing to forego other employments, whether of a business, political or other character, which may embarrass their free and fair consideration of questions before them for decision. The aspiration of lawyers for judicial position should be governed by an impartial estimate of their ability to add honor to the office and not by a desire for the distinction the position may bring to themselves.[6]

ANNOT. Appointment, eligibility, and qualification of judges, see Judges, Cent. Dig. §§ 1–23; Dec. Dig. §§ 1–5.

3. ATTEMPTS TO EXERT PERSONAL INFLUENCE ON THE COURT. Marked attention and unusual hospitality on the part of a lawyer to a Judge, uncalled for by the personal relations of the parties, subject both the Judge and the lawyer to misconstructions of motive and should be avoided. A lawyer should not communicate or argue privately with the Judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a Judge special personal consideration or favor. A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due the Judge's station, is the only proper foundation for cordial personal and official relations between Bench and Bar.

ANNOT. Attempting to influence court as constituting contempt justifying disbarment of attorney, see Attorney and Client, Cent. Dig. § 60.

4. WHEN COUNSEL FOR AN INDIGENT PRISONER. A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf.

ANNOT. Assignment as counsel by the court, and skill and care required of attorney, see Attorney and Client, Cent. Dig. §§ 31, 218; Dec. Dig. § 23; Criminal Law, Cent. Dig. §§ 1500–1505; Dec. Dig. § 641.

5. THE DEFENSE OR PROSECUTION OF THOSE ACCUSED OF CRIME. It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound by all fair and honorable means, to present every defense 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.[7]

The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts

[6] See B. B. A. revision of this canon and notes, ante, p. 163.

[7] See note to this paragraph of this canon, ante, p. 309.

or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.[8]

ANNOT. Defense of criminal in general, see Attorney and Client, Cent. Dig. §§ 31, 218; Dec. Dig. § 23; Criminal Law, Cent. Dig. §§ 1496–1506; Dec. Dig. § 641.

Misconduct of counsel, ground for new trial, see Criminal Law, Cent. Dig. §§ 2197–2201; Dec. Dig. § 919.

Functions of office and powers and duties of prosecuting attorneys, see District and Prosecuting Attorneys, Cent. Dig. §§ 1, 34–37; Dec. Dig. §§ 1, 8, 9.

6. ADVERSE INFLUENCES AND CONFLICTING INTERESTS. It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.[9]

ANNOT. Acting for adverse parties in different capacities or receiving compensation from adverse party, see Attorney and Client, Cent. Dig. §§ 27–30, 208, 229, 307; Dec. Dig. §§ 19–22, 113, 130.

7. PROFESSIONAL COLLEAGUES AND CONFLICTS OF OPINION. A client's proffer of assistance of additional counsel should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client. A lawyer should decline association as colleague if it is objectionable to the original counsel, but if the lawyer first retained is relieved, another may come into the case.

When lawyers jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted unless the nature of the difference makes it impracticable for the lawyer whose judgment has been overruled to cooperate effectively. In this event it is his duty to ask the client to relieve him.

Efforts, direct or indirect, in any way to encroach upon the business of another lawyer, are unworthy of those who should be brethren at

[8] See B. B. A. revision of this paragraph of this canon, and notes ante, pp. 284, 285.

[9] See B. B. A. revision of this canon and notes, ante, pp. 375, 376.

the Bar; but, nevertheless, it is the right of any lawyer, without fear or favor, to give proper advice to those seeking relief against unfaithful or neglectful counsel, generally after communication with the lawyer of whom the complaint is made.[10]

ANNOT. Change and substitution of attorneys, see Attorney and Client, Cent. Dig. §§ 110–131; Dec. Dig. §§ 75, 76.

8. ADVISING UPON THE MERITS OF A CLIENT'S CAUSE. A lawyer should endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation. The miscarriages to which justice is subject, by reason of surprises and disappointments in evidence and witnesses, and through mistakes of juries and errors of Courts, even though only occasional, admonish lawyers to beware of bold and confident assurances to clients, especially where the employment may depend upon such assurance. Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation.[11]

ANNOT. Negligence of attorney in advising client, see Attorney and Client, Cent. Dig. §§ 221, 222; Dec. Dig. § 109.

9. NEGOTIATIONS WITH OPPOSITE PARTY. A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.[12]

ANNOT. Duties and liabilities of attorney to adverse parties and third persons, see Attorney and Client, Cent. Dig. §§ 38, 39, 61; Dec. Dig. §§ 26, 38.

10. ACQUIRING INTEREST IN LITIGATION. The lawyer should not purchase any interest in the subject-matter of the litigation which he is conducting.[13]

ANNOT. Right of attorney to purchase demands for suit, and effect thereof as ground for disbarment, see Attorney and Client, Cent. Dig. §§ 26, 51, 239–263; Dec. Dig. §§ 18, 38, 122–125.
Champertous agreements, see Champerty and Maintenance, Cent. Dig. §§ 36–44, 47–51; Dec. Dig. § 5 (6, 8).

11. DEALING WITH TRUST PROPERTY. Money of the client or other trust property coming into the possession of the lawyer should be re-

[10] See B. B. A. revision of this canon and note, ante, pp. 454, 455.
[11] See B. B. A. revision of this canon and notes, ante, pp. 368, 369.
[12] See note to this canon, ante, p. 412.
[13] See notes to this canon, ante, pp. 376, 532.

ported promptly, and except with the client's knowledge and consent should not be commingled with his private property or be used by him.[14]

ANNOT. Authority of attorney as to disposition of client's money or other property, see Attorney and Client, Cent. Dig. § 143; Dec. Dig. § 80.
Accounting and payment to client, see Attorney and Client, Cent. Dig. §§ 232–238; Dec. Dig. §§ 116–121.

12. FIXING THE AMOUNT OF THE FEE. In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. A 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. The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.

In determining the amount of the fee, it is proper to consider: (1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other business while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.[15]

ANNOT. Right of attorney to compensation, contracts therefor and value and amount thereof, see Attorney and Client, Cent. Dig. §§ 292–350; Dec. Dig. §§ 130–145, 151, 152, 154, 155.

13. CONTINGENT FEES. Contingent fees, where sanctioned by law, should be under the supervision of the Court, in order that clients may be protected from unjust charges.[16]

ANNOT. Validity and effect of agreement for contingent fee, see Attorney and Client, Cent. Dig. §§ 351–357; Dec. Dig. §§ 146–150.
Agreement for contingent fee as constituting champerty, see Champerty and Maintenance, Cent. Dig. §§ 22–51; Dec. Dig. § 5.

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[14] See B. B. A. revision of this canon, ante, p. 533.

[15] See B. B. A. revision of this canon and notes, ante, pp. 488, 489.

[16] See note to this canon, ante, p. 495. The B. B. A. substitute for this canon is found ante, pp. 495, 496.

14. Suing a Client for a Fee. Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self-respect and with his right to receive reasonable recompense for his services; and lawsuits with clients should be resorted to only to prevent injustice, imposition or fraud.*

Annot. Right of action for fees, defenses and practice, see Attorney and Client, Cent. Dig. §§ 358–377; Dec. Dig. §§ 157–169.

15. How Far a Lawyer May Go in Supporting a Client's Cause. Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.

It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.[17]

The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne 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 attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.[18]

Annot. Nature of office of attorney and duty to follow client's instructions, see Attorney and Client, Cent. Dig. §§ 21, 220; Dec. Dig. §§ 14, 108.
Argument and conduct of counsel, see Criminal Law, Cent. Dig. §§ 1655–1693; Dec. Dig. §§ 699–730; Trial, Cent. Dig. §§ 267–316; Dec. Dig. §§ 106–133.

16. Restraining Clients from Improprieties. A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards Courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrong-doing the lawyer should terminate their relation.[19]

Annot. Termination of relation by withdrawal of attorney, see Attorney and Client, Cent. Dig. § 121; Dec. Dig. § 76 (1).

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* See B. B. A. revision of the canon, ante, p. 474.
17 See B. B. A. revision of this sentence in note, ante, p. 309.
18 See notes to this canon, ante, pp. 441, 442.
19 See note to this canon, ante, p. 424.

17. Ill Feeling and Personalities Between Advocates. Clients, not lawyers, are the litigants. Whatever may be the ill feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the case. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling should also be carefully avoided.[20]

Annot. Conduct toward other attorneys, ground for disbarment, see Attorney and Client, Cent. Dig. § 61; Dec. Dig. § 38.
Use of abusive language and retaliatory statements and remarks by attorneys, see Trial, Cent. Dig. §§ 308, 310; Dec. Dig. §§ 126, 129.

18. Treatment of Witnesses and Litigants. A lawyer should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyer's conscience in professional matters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf.[21]

Annot. Duties and liabilities to adverse parties and to third persons, see Attorney and Client, Cent. Dig. § 38; Dec. Dig. § 26.
Use of abusive language and retaliatory statements or remarks, see Trial, Cent. Dig. §§ 308, 310; Dec. Dig. §§ 126, 129.

19. Appearance of Lawyer as Witness for His Client. When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in Court in behalf of his client.[22]

Annot. Competency of attorneys as witnesses, see Witnesses, Cent. Dig. §§ 79, 121–123; Dec. Dig. § 67.

20. Newspaper Discussion of Pending Litigation. Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An ex parte reference to the facts should not go beyond quotation from the

20 See notes to this canon, ante, pp. 455, 456.
21 See note to this canon, ante, p. 445.
22 See note to this canon, ante, p. 448.

records and papers on file in the Court; but even in extreme cases it is better to avoid any ex parte statement.[23]

ANNOT. Publications relating to pending proceedings as constituting contempt, see Contempt, Cent. Dig. §§ 15, 16; Dec. Dig. § 9.

21. PUNCTUALITY AND EXPEDITION. It is the duty of the lawyer not only to his client, but also to the Courts and to the public, to be punctual in attendance, and to be concise and direct in the trial and disposition of causes.

ANNOT. Absence of counsel as ground for continuance, see Continuance, Cent. Dig. § 51; Dec. Dig. § 20; Criminal Law, Cent. Dig. §§ 1313, 1320; Dec. Dig. §§ 587, 593.

Absence of counsel as ground for new trial, see Criminal Law, Cent. Dig. § 2205; Dec. Dig. § 920; New Trial, Cent. Dig. §§ 173, 174; Dec. Dig. § 87.

22. CANDOR AND FAIRNESS. The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.

It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a text-book; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.

A lawyer should not offer evidence, which he knows the Court should reject, in order to get the same before the jury by argument for its admissibility, nor should he address to the Judge arguments upon any point not properly calling for determination by him. Neither should he introduce into an argument, addressed to the Court, remarks or statements intended to influence the jury or bystanders.

These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice.[24]

ANNOT. Argument and conduct of counsel in general, see Criminal Law, Cent. Dig. §§ 1655–1693; Dec. Dig. §§ 699–730; Trial, Cent. Dig. §§ 267–309; Dec. Dig. §§ 106–133.

Regulation of professional conduct of attorneys and conduct ground for disbarment, see Attorney and Client, Cent. Dig. §§ 45, 51, 53, 54, 61; Dec. Dig. §§ 32, 38, 41, 42.

Conduct constituting contempt, see Contempt, Cent. Dig. § 21; Dec. Dig. § 10.

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[23] See note to this canon, ante, p. 442.

[24] See B. B. A. revision of this canon and note, ante, p. 164.

23. ATTITUDE TOWARD JURY. All attempts to curry favor with juries by fawning, flattery or pretended solicitude for their personal comfort are unprofessional. Suggestions of counsel, looking to the comfort or convenience of jurors, and propositions to dispense with argument, should be made to the Court out of the jury's hearing. A lawyer must never converse privately with jurors about the case; and both before and during the trial he should avoid communicating with them, even as to matters foreign to the cause.[25]

ANNOT. Argument and conduct of counsel in general, see Criminal Law, Cent. Dig. §§ 1655–1687; Dec. Dig. §§ 699–726; Trial, Cent. Dig. §§ 267–316, 729; Dec. Dig. §§ 106–133, 305.

Argument and conduct ground for new trial, see Criminal Law, Cent. Dig. §§ 2197–2201, 2255, 2265; Dec. Dig. §§ 919, 932; New Trial, Cent. Dig. §§ 43, 44, 92, 97–99; Dec. Dig. §§ 29, 47, 49.

24. RIGHT OF LAWYER TO CONTROL THE INCIDENTS OF THE TRIAL. As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposite lawyer to trial when he is under affliction or bereavement; forcing the trial on a particular day to the injury of the opposite lawyer when no harm will result from a trial at a different time; agreeing to an extension of time for signing a bill of exceptions, cross-interrogatories and the like, the lawyer must be allowed to judge. In such matters no client has a right to demand that his counsel shall be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety.[26]

ANNOT. Authority of attorney as to conduct of litigation, see Attorney and Client, Cent. Dig. §§ 161–189; Dec. Dig. §§ 87–96.

Duty of attorney to follow instructions of client, see Attorney and Client, Cent. Dig. § 220; Dec. Dig. § 108.

25. TAKING TECHNICAL ADVANTAGE OF OPPOSITE COUNSEL—AGREEMENTS WITH HIM. A lawyer should not ignore known customs or practice of the Bar or of a particular Court, even when the law permits, without giving timely notice to the opposing counsel: As far as possible, important agreements, affecting the rights of clients, should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing, as required by rules of Court.

ANNOT. Binding effect of agreements between counsel, see Attorney and Client, Cent. Dig. § 171.

Validity of oral stipulations, see Stipulations, Cent. Dig. §§ 5–13, 63; Dec. Dig. §§ 6, 19.

26. PROFESSIONAL ADVOCACY OTHER THAN BEFORE COURTS. A lawyer openly and in his true character may render professional services before legislative or other bodies, regarding proposed legislation

[25] See B. B. A. revision of this canon, ante, p. 165.

[26] See B. B. A. revision of this canon, and note, ante, pp. 442, 443.

and in advocacy of claims before departments of government, upon the same principles of ethics which justify his appearance before the Courts; but it is unprofessional for a lawyer so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding to influence action.[27]

ANNOT. Validity of lobbying contracts, see Contracts, Cent. Dig. §§ 587–589; Dec. Dig. § 126.

27. ADVERTISING, DIRECT OR INDIRECT. The most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, 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 procure business by indirection through touters of any kind, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills or offering retainers in exchange for executorships or trusteeships to be influenced by the lawyer. Indirect advertisement for business by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer's positions, and all other like self-laudation, defy the traditions and lower the tone of our high calling, and are intolerable.[28]

ANNOT. Advertising to secure divorces as ground for disbarment, see Attorney and Client, Cent. Dig. § 51; Dec. Dig. § 38.

28. STIRRING UP LITIGATION, DIRECTLY OR THROUGH AGENTS. It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital attachés or others who may succeed, under the guise

[27] See B. B. A. revision of this canon, ante, p. 537.

[28] See notes to this canon, ante, pp. 241, 242, and ante, pp. 255, 256.

of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services. A duty to the public and to the profession devolves upon every member of the Bar, having knowledge of such practices upon the part of any practitioner, immediately to inform thereof to the end that the offender may be disbarred.

ANNOT. Stirring up litigation and other unprofessional conduct, ground for disbarment, see Attorney and Client, Cent. Dig. §§ 47–84; Dec. Dig. §§ 34–61.

Barratry in general, see Champerty and Maintenance, Cent. Dig. §§ 1–51; Dec. Dig. §§ 1–6.

29. UPHOLDING THE HONOR OF THE PROFESSION. Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. The lawyer should aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.[29]

ANNOT. Learning and good character as necessary qualifications for admission to practice law, see Attorney and Client, Cent. Dig. §§ 4, 5; Dec. Dig. § 4.

Right of attorney to institute disbarment proceedings against brother attorney, see Attorney and Client, Cent. Dig. § 67; Dec. Dig. § 51.

30. JUSTIFIABLE AND UNJUSTIFIABLE LITIGATIONS. The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong. But otherwise it is his right, and, having accepted retainer, it becomes his duty to insist upon the judgment of the Court as to the legal merits of his client's claim. His appearance in Court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination.[30]

ANNOT. Nature and extent of attorney's duty as to bringing, defending, or conducting civil causes, see Attorney and Client, Cent. Dig. §§ 217, 220; Dec. Dig. §§ 106, 108.

Bringing fictitious or unauthorized action as constituting contempt, see Contempt, Cent. Dig. § 24.

31. RESPONSIBILITY FOR LITIGATION. No lawyer is obliged to act either as adviser or advocate for every person who may wish to be-

[29] See B. B. A. revision of this canon, ante, p. 452.

[30] See note to this canon, ante, p. 391.

come his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what business he will accept as counsel, what causes he will bring into Court for plaintiffs, what cases he will contest in Court for defendants. The responsibility for advising questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions.[31]

ANNOT. Duties and liabilities of attorney to adverse party and third persons, and instructions of client as excuse for conduct, see Attorney and Client, Cent. Dig. §§ 38, 39, 220; Dec. Dig. §§ 26, 108.

Nature of attorney's duty, and skill and care required in conduct of business, see Attorney and Client, Cent. Dig. §§ 217, 218; Dec. Dig. §§ 106, 107.

32. THE LAWYER'S DUTY IN ITS LAST ANALYSIS. No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive, nor should any lawyer render, any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.[32]

ANNOT. Duties, privileges, disabilities, and liabilities of attorneys in general, see Attorney and Client, Cent. Dig. §§ 21, 26–29, 217–291; Dec. Dig. §§ 18–21, 106–129.

Acting under advice of counsel as defense to contempt charge, see Contempt, Cent. Dig. § 82; Dec. Dig. § 28 (2).

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31 See note to this canon, ante, p. 392.

32 See B. B. A. revision of this canon, ante, p. 554.

THE OATH OF ADMISSION.

The general principles which should ever control the lawyer in the practice of his profession are clearly set forth in the following Oath of Admission to the Bar: * * *

I DO SOLEMNLY SWEAR:

I will support the Constitution of the United States and the Constitution of the State of .....;

I will maintain the respect due to Courts of Justice and judicial officers;

I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the Judge or jury by any artifice or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval;

I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice. SO HELP ME GOD.

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