THE LAW: — BUSINESS OR PROFESSION?

JULIUS HENRY COHEN

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BY

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TO

MY WIFE

WHOSE ENCOURAGEMENT AND
INDULGENCE HAVE MADE
THIS BOOK POSSIBLE

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AN EXPLANATION AND AN ACKNOWLEDGMENT

LAWYERS like to talk over their cases — with lawyers. Whenever lawyers get together, the most engrossing and natural topic of conversation is their own professional experiences. This not alone because of interesting points of law that come up, but because there is a human interest in *cases*. Cases are acute incidents in human affairs. In fact, there is no other profession that furnishes so many opportunities for colloquial philosophizing and interchange of psychological information. The lawyer at every turn meets new aspects of human nature. Why does he not find similar interest in talking over his cases with laymen? The answer is that, when lawyer meets lawyer, each starts with a certain background of experience taken for granted in the conversation, while in conversation with laymen a long preliminary and footnote explanation is necessary before the point of the thing is understood. When he begins to talk about his cases to laymen, the lawyer usually becomes a bore. On the other hand, I have wondered why members of the Bar did not take more pains to give to laymen something of their background of experience, so that laymen would at least begin to understand those problems in which lawyer and layman both are interested. Such a problem is the one relating to the practice of the law itself. A layman might well inquire: Why should there be a class enjoying special privileges? Why should there be a group

of men amenable to summary court process for professional misconduct? Why any standards of professional conduct? Why shouldn't anyone be permitted to draw up papers, appear in court—argue about facts? What is the *raison d'être* of the whole professional scheme? Why shouldn't lawyers advertise or solicit business, as business men do? Why shouldn't they pay "commissions" for getting business?

As a matter of fact, these are very live questions at the moment to lawyers as well as laymen. All over the country laymen are asking themselves: Why are we not permitted to do things lawyers do, if we can do them better than lawyers? And lawyers are asking: If we are charged with maintaining professional standards, why should laymen break them down? In this connection, it is interesting to note, as a sign of the times, that a national group of business men, endeavoring to formulate canons of ethics for their guild, adopt as numbers I and II the following:

It is improper for a business man to participate with a lawyer in the doing of an act that would be improper and unprofessional for the lawyer to do.

It undermines the integrity of business for business men to support lawyers who indulge in unprofessional practices. The lawyer who will do wrong things for one business man injures all business men. He not only injures his profession, but he is a menace to the business community.*

We lawyers must be reminded over and over again that we are living in a democracy. It will not do for even the finest and best trained intellect to work out a

* Canons of Ethics, National Association of Credit Men. Bulletin of the National Association of Credit Men, Nov., 1912, p. 926.

sound piece of legislation or public policy and stop at that. Legislation and public policy become law in our country only through the votes of that great mass we call "the majority." That majority must be informed. It will follow leadership, but the leadership must be informed. If the information is unsound, the legislation and the public policy will be unsound. My correspondence as chairman of the Committee on Unlawful Practice of the Law of the New York County Lawyers' Association leads me to believe that there is a very considerable mass of misinformation and very little sound information concerning the basis and limitations of the practice of the law, — even among those who have the right to influence public opinion and to whom we turn naturally for example and leadership. On the other hand, there is a ready and a welcome response to anything that the lawyer has to say to business men upon the subject of the inter-relationship between the lawyer and the business man and their joint responsibility and interdependent duties. It is this interest and eagerness for information that have encouraged the writing of this book. It is intended to present the matter in readable fashion for both laymen and lawyers. This necessarily results in departure both from the style and substance of a text-book. Primarily this book is written so that layman as well as lawyer may grasp the deep-rooted and historically well-founded conviction that the profession has a value to the community, that a sound public policy underlies the limiting of the practice of law to those specially trained and qualified, and that in carrying out the principle of personal and direct responsibility of lawyer to client and to court a wholesome result is achieved for society. So much, then, for the purpose of the book.

In 1908, after at least three years of committee work upon the subject, the American Bar Association adopted its Canons of Ethics, which have since been approved by the State Bar Associations in 30 States. It is now eight years since Dr. Felix Adler presented to the public his conviction that the further solution of problems of ethics, in industry, in business, and in the professions, must come from the definite assistance of men who live with these problems; that it is not enough for our day and generation to have a general philosophy of ethics, but that there must be daily application of the philosophy to the fact, and that this can be best done by the experts in the line. It was Dr. Adler's suggestion that brought about the formation of a small group of lawyers, which since for some half-dozen years has met once a month, in the fall and winter, for the study of their own professional problems. Out of this group came the recommendation that the standing committee on professional ethics already attached to one of the Bar Associations should be clothed with the additional duty to consider, when consulted, those ethical problems presented to the lawyer in his daily practice and to give advice thereon. This idea came from Mr. Charles A. Boston, one of the members of the group, now Chairman of the Standing Committee on Professional Ethics of the New York County Lawyers' Association.* Since then, Mr. Boston has spoken to Bar Associations all over the country, has written articles upon the subject,† and his active efforts,

* The General Council of the Bar, for barristers, and the Statutory Committee of the Incorporated Law Society, for solicitors, perform a similar duty in England and the General Councils of the Bar in the respective provinces of Canada perform a somewhat similar duty in Canada.

† See Address delivered before New York County Lawyers' Associa-

following so opportunely upon the formulation of Canons of Ethics by the American Bar Association and so many State Associations, are largely responsible for the development in this country of a new and vital interest in the ethical relationship of the lawyer to his client, to the court, and to the public. It was this Committee on Professional Ethics which first directed attention to the injury to the New York community in the unlawful or unauthorized practice of the law by notaries public. The discussion of this phase of the matter in turn led to

tion on a Proposed Code of Professional Ethics, Oct. 6, 1910, printed by the Association and now out of print. A Proposed Code of Ethics recommended to the Board of Directors of the New York County Lawyers' Association, January 3, 1911, relating to the duties of lawyers and judges, and now out of print. Article entitled "A Code of Legal Ethics," published in *The Green Bag*, May, 1908. An Article in *Law Notes* on "Boards of Legal Discipline," August, 1909. Address before the Section of Legal Education of the American Bar Association at Milwaukee on The Recent Movement Toward the Realization of High Ideals in the Legal Profession, republished in the 1912 Volume of the Reports of the American Bar Association. Article on the "Work of the Committee on Professional Ethics of the New York County Lawyers' Association," *Bench and Bar*, December, 1912. Address on Legal Ethics before the Commercial Law League of America, Bulletin of said League, September, 1913. Article on "Disbarment in New York," presented to the New York State Bar Association, 1913, and published in its 36th Annual Report. Address on Practical Activities in Legal Ethics to the Law Association of Philadelphia, Nov. 14, 1913; reprinted by the Association and also in the *University of Pennsylvania Law Review*, December, 1913. Article on "Legal Ethics, Source and Formulation of Ethics Precepts," *Central Law Journal*, June 5, 1914. Article on "Legal Ethics, The Duty of a Lawyer to the Court," *Central Law Journal*, June 12, 1914; reprinted in *Paper Book*, July, 1914, Menasha, Wisc. Article on "The Lawyer's Conscience and Public Service," *Atlantic Monthly*, September, 1914. Address on Legal Ethics, Law School of Cornell University, Jan. 9, 1915; reprinted for private circulation. Address on Legal Ethics with Special Regard to Ambulance Chasing and the Disciplining of Attorneys, delivered before Minnesota State Bar Association, Aug. 5, 1915; Proceedings Minnesota State Bar Association, 1915, pp. 23–46.

concentrating attention upon the entire subject of unauthorized or unlawful practices and finally to the creation of another standing committee of the New York County Lawyers' Association, the Committee on Unlawful Practice of the Law.

To Dr. Adler and Mr. Boston, accordingly, I gladly make acknowledgment for inspiration and leadership in work that makes the natural occasion for this book.

The Sun, March 23, 1916.

COLUMBIA GUARDS THE BAR.

Law Students of Questionable Ethics Are Dropped From Rolls.

Columbia is taking steps to keep out of the legal profession men whose character and ethics are inconsistent with the standards of the profession, according to Dean Harlan F. Stone of the law school, who said yesterday that in the five years he has been at the head of the law faculty at least two students who had satisfactorily completed courses had been denied degrees and half a dozen more had been advised to leave the school.

Dean Stone said that in many cases it was practicable to steer a prospective lawyer whose ethics did not appear to be of the best away from the profession before he had received his legal training.

"In such a case," said the dean, "the student is called into the office and is told that Columbia would be much better off without him. He is advised too that he should not go into the law and in order that this may have effect we notify the Bar Association and the character committee in New York State and also the bar examiners of every State in the Union."

THE LAW—
BUSINESS OR PROFESSION?

BOOK I—BUSINESS?

CHAPTER I

DISBARMENT*

WHEN, a few Fridays back, the newsboy handed him his favorite evening paper, the well-poised reader of the most unsensational paper in New York discovered that though Villa had the day before captured and held four Americans as prisoners, that though Bryan had that very day made his first attack upon President Wilson's plea for preparedness, though the Warden of Sing Sing was again about to be investigated and the Bulgarians had all but smashed the outer fortifications of Nish — in spite of all these happenings — the make-up editor had assigned to the first column of the first page the news that "THIRTEEN LAWYERS ARE DISBARRED. SEVEN SUSPENDED AND SIX ARE CENSURED." The ways of these editor folk are dark and mysterious and the laity must be neither too quick nor too didactic to draw conclusions — indeed, it may be just the unlucky "thirteen" that put this news in the first column. Yet we venture

* The activities here reviewed relate mainly to New York City.

to surmise that in picking out the choice bits for the day with which to attract the tired reader, it is not wholly improbable that this professional-legal information was really selected for first place because it had first-place importance. And though other dailies did not put the news in so conspicuous a place, they did in fact treat it as though it were of marked significance.

But for many years, the same court had at least once a month and sometimes oftener busied itself in disbarring, suspending or censuring lawyers — until, upon a certain day (when, before proceeding with the hearing of appeals, the Court handed down a batch of orders of disbarment, suspension or censure) a certain French barrister, happening to be present was tempted to observe, "Ah! I see. First you dizbar all ze lawyers: then you hear ze cases."

But of all the complaints investigated by the Bar Association, not ten per cent are found to merit presentation to the Court.

The following tables from the records of the Appellate Division of the Supreme Court for the First Department (New York City) are significant:

ATTORNEYS ADMITTED

1905	615	
1906	560	
1907	521	
1908	445	
1909	465	
1910	323	
1911	364	
1912	482	
1913	418	
1914	255	
1915	274	(to Nov. 23)

	Disbarred	Attorneys Disciplined	*Suspended*	*Censured*
1905	4			
1906	9		2	1
1907	6		2	
1908	5		1	
1909	9		1	
1910	17		6	1
1911	18		3	
1912	17		3	7
1913	19		6	1
1914	23		6	5
1915 (to Nov. 23)	30		9	7

The nature of these proceedings, their cost in money and in energy to the profession is all familiar reading to lawyers * but the laity knows very little about it.

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

* See Mr. Boston's "Disbarment in New York" and Annual Reports, Committee on Professional Ethics, New York County Lawyers' Association.

property which was subject to condemnation or about to be condemned.*

It was in this case that the Court took occasion to say that

It is our duty to condemn conduct which tends to impair or defeat the administration of justice or degrade and impair the usefulness of the profession, and protect the State and the public from lawyers who prostitute the authority given to them for private gain by imposing on or defrauding their clients or the tribunals which are instituted to administer the law and protect those whose rights and interests are committed to their care. If this country is to be governed by law, it is essential that those charged with its administration should be honest in the discharge of the duties confided to and obligations imposed upon them.

These proceedings were brought to a successful conclusion by a body of lawyers — The Association of the Bar — through its Grievance Committee. This committee spends not less than twenty thousand dollars a year in the general task of disciplining lawyers for unprofessional conduct, and the able lawyer who acted as trial counsel for the Association — one of the leaders at the Bar — freely contributed time and attention to the case, which, if it had been paid for at the rates he charged his clients, would have meant many thousands of dollars.†

* Matter of Flannery, 150 App. Div. 369, at p. 388.

† The Treasurer's report of the Association of the Bar of the City of New York for 1914 shows that the Grievance Committee during 1913 spent $25,477.05 and received back from the city $10,941.11. The report of the same Association for 1915 shows that during 1914 the Grievance Committee spent $26,554.04, less refund from the city of $6,737.00. (See Year Books, 1914 and 1915.) The report of the New York County Lawyers' Association shows that between April 30, 1913, and April 30, 1914, that Association spent $3,332.91 in connection with the expenses of its Discipline Committee. (Year Book, 1914.)

Day after day and night after night, for a period of four years, in careful preparation, trial before the referee, appearances before the Appellate Courts, — first the Appellate Division, then the Court of Appeals, — and the painstaking, thorough presentation in printed brief and argument — he made this contribution to public service of his own personal time and skill, and in addition gave the services of sometimes one and at other times two and three other lawyers, paid members of his staff.

One of the cases reported in the news article referred to was that of a lawyer seventy years of age, who, in his prime, had been a national figure in one of the great political parties, former counsel for one of the largest city railroads, at one time enjoying — to use the Court's own language — "friendly and profitable relations" with the banking firm of J. P. Morgan & Co., which "had been broken off, in consequence, as he believes, and as is doubtless the fact, of his known intimacy with a person named Lamar (David Lamar), whose practices had made him a subject of suspicion and dislike to the firm . . . as well as to other bankers." This lawyer sought to rehabilitate himself with the banking house in question, and, to regain his lost standing, made it appear that he could be of value in controlling and influencing certain important congressional personages in whose behalf he represented himself to be acting.* The Court did allow his age and former position to influence it to the extent of *censuring*, instead of suspending or disbarring. But *censure*, for a man at the end of his professional career, is dire enough in such a case.

* Matter of Lauterbach, *New York Law Journal*, November 8, 1915, 169 App. Div. 534.

In another case, a lawyer who had been chief counsel for a railroad system was completely disbarred from practice. It was not charged that the lawyer had actually suborned perjury. It did appear, however, that there were payments through investigators and detectives to and for witnesses, payments for entertaining and keeping them away from their homes, payments of more than the usual witness fees, gratuities to court officers, clerks, and other attendants, money spent with jurors and one judge's secretary, payments to police officers, to physicians for adverse litigants, to hospital employees, and in addition there were large sums expended, the specific purpose of which was not stated.

With regard to these payments, the Court said:

> The payment of sums of money by a large corporation under such circumstances is most improper. It demoralizes the police force; justifies them in expecting payment for services which the law requires them to perform for the compensation which they receive from the public; and it was clearly the duty of any attorney, when any attempt was made to extort money by public officers, to inform the public officials rather than by acceding to the demand to obtain the advantage of a public officer's assistance.

The views of the Court regarding payments to witnesses are most instructive:

> To procure the testimony of witnesses it is often necessary to pay the actual expenses of a witness in attending court and a reasonable compensation for the time lost. It is often necessary to pay a reasonable fee to an expert in preparing to testify for a party in an action. And there are many incidental expenses in relation to the prosecution or defense of an action at law which can with propriety be paid by a party

to the action. But on the other hand, the payment of a sum of money to a witness to testify in a particular way; the payment of money to prevent a witness' attendance at a trial; the payment of money to a witness to make him "sympathetic" with the party expecting to call him; *these are all payments which are absolutely indefensible and which are really included in the general definition of subornation of perjury. 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.* The prevalence of perjury is a serious menace to the administration of justice, to prevent which no means have as yet been satisfactorily devised. But there certainly can be no greater incentive to perjury than to allow a party to make payments to its opponent's witnesses under any guise or on any excuse, *and at least attorneys who are officers of the court to aid it in the administration of justice must keep themselves clear of any connection which in the slightest degree tends to induce witnesses to testify in favor of their clients.*

It appeared in this case that long before this particular attorney had acted for the railroad, the company had installed the system. The attorney defended himself upon this score. The Court turned its 42 centimetre guns on this defense.

The action of the respondent in controlling and managing a system which had a direct tendency to accomplish that purpose is one that we cannot too severely condemn. *Attorneys, whether representing corporations or individuals, must clearly understand that any conduct which tends to participate in or approve the payment of money to witnesses or public officials to influence the administration of justice will be most severely condemned and considered a case for disbarment.*

. . . Whether the respondent devised the objectionable method of meeting accident claims, or inherited and developed it, is im-

material. In either case he was equally culpable. When the respondent took charge of the affairs of the Metropolitan Street Railroad Company as the head of its legal department, and thereafter conducted the legal affairs for that company he was under no obligation to continue or develop a system the tendency of which would be to subvert the administration of the law and directly tend to subornation of perjury. We cannot possibly justify conduct of this kind in an officer of the court, and it becomes our imperative duty to say that any attorney who takes part in such conduct should no longer continue a member of the profession.

And bringing home to the Bar the necessity for eliminating perjury in the trial of cases, —

So far it seems to have been impossible to devise any effectual method by which witnesses committing the most evident perjury, or those engaged in inducing such witnesses to commit perjury, can be made accountable. But what the courts can do is to see to it that its officers who appear for the various parties to these controversies shall have no hand in this bribery of witnesses or subornation of perjury, and to hold its officers, the attorneys who appear for the parties to a litigation and represent them on the trial of cases, to a strict accountability for their acts in relation to the litigation that comes before the court. *It will not do for an attorney who seeks to justify himself against charges of this kind to show that he has escaped criminal responsibility under the Penal Law, nor can he blindly shut his eyes to a system which tends to suborn witnesses, to produce perjured testimony, and to suppress the truth. He has an active affirmative duty to protect the administration of justice from perjury and fraud, and that duty is not performed by allowing his subordinates and assistants to attempt to subvert justice and procure results for his clients based upon false testimony and perjured witnesses.* . . . When one of these investigators presented an

account showing payments for a particular purpose, and asked for the respondent's approval of that account, he had an affirmative duty to perform to see to it that the money had been properly expended on behalf of his client and that his client should make the repayments, and he also had a further duty to the court and to the public to see to it that his assistants who were employed by him to aid in the defense of these actions had not used the money of his client to obstruct the administration of justice or to induce false testimony from perjured witnesses.*

I have quoted rather at length from this opinion, because it bears upon many phases of the matters we shall consider later.

In another of the group that made up the twenty-six reported was a case of an attorney who brought a suit to set aside a will. The Court was satisfied from the evidence that the suit was a suit to extort money. It said: "It appears quite clearly that the action against Mrs. Sabin was without foundation in law or fact, and that the respondent knew perfectly well when he brought it that it was groundless." The referee found that: "'The respondent's explanation of the commencement of this action . . . fails to set forth any theory, based upon statements made to him by his client or facts within his own knowledge, that warranted him in advising that the Sabin action could be maintained as a matter of law. So mythical and indefinite are the alleged possible causes of actions that might follow the summons, as stated by the respondent, that they could have no foundation in law or common sense, and, when all the facts and circumstances established by the testimony in this proceed-

* Matter of Robinson, 151 App. Div. 589; affirmed, 209 N. Y. 354. Italics ours.

ing are carefully weighed, the only reasonable inference is that the action was one step in a scheme in which Jones and the respondent were engaged to wring money from Mrs. Sabin.'" Upon this the Court determined that the effort was one to blackmail and that the attorney in participating therein was guilty of professional misconduct. * He was disbarred.

In still another case, it appeared that a friend of the attorney against whom charges were brought was engaged in publishing an Italian newspaper in the City of New York and worked among the Italian residents of that city. The Italian editor had been accused of receiving money for the Italians and appropriating it to his own use. The attorney, to shield his friend, wrote the latter several letters, evidently intended for publication, giving the impression that the editor was innocent and that he, the attorney, had in his possession money with which to meet the former's responsibility. The attorney admitted before the Court that the statements contained in the letters were false, but said that they were written to protect his friend from what he then believed to be a false charge against him. There was no relation of attorney and client with any of the people interested in the transaction. The Court said: "He apparently had the utmost confidence in Pecorini and believed him to be a sincere and well-meaning man, devoted to assisting his fellow country-men 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

* Matter of Lenney, *New York Law Journal*, Nov. 15, 1915, 169 App. Div. 509.

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, when he believed the charges were malicious and false, or for any other purpose.*" * Note here that what was written was not in connection with any legal proceeding nor performed by virtue of any professional relationship.

In another case the attorney was suspended for two years for dealing with his client's money as if it were his own and subjecting it to risk of loss. The Court said: "It matters not that respondent and his client were for some time unable to agree as to the amount to be paid, *or that respondent, as he claims, could at any time have made good the amount even if it had been lost in speculation.* The offense of which respondent was guilty, and it is a serious one, was in dealing with his client's money as if it were his own, and in subjecting it to any risk of loss whatever." †

In another case the attorney was authorized by his client to retain the sum of $17,619.59 for fees for professional services. Later the Court determined that $3,500 was the fair and reasonable value of his service. When charges of unprofessional conduct were presented, the Court held *that though the client consented to the retention of the larger sum:* ". . . *it is clear that he did so in reliance upon respondent's advice that the fee was a reasonable one such as reputable attorneys were in the*

* Matter of Edward S. Napolis, *New York Law Journal*, Nov. 12, 1915, 169 App. Div. 469.

† Matter of Amos H. Evans, *New York Law Journal*, Nov. 17, 1915, 169 App. Div. 502.

habit of charging in like circumstances, a statement which the client accepted because of his faith in his attorney and his ignorance of business affairs." *

In another, a lawyer was suspended from practice for two years under the following circumstances:

He presented to a City Magistrate as bondsmen for several defendants arrested upon a charge of burglary two persons, one of whom asserted that he was the owner of a house worth not less than $43,000 and the other that he was the owner of a house and lot worth not less than $40,000, when, as a matter of fact, these properties were worth no more than $26,000 and $23,000, respectively, and were each incumbered to the extent of $20,000. The respondent-attorney offered the bond to the Magistrate at the latter's house, and the latter inquired of the respondent, "Is this all right?" to which the respondent replied that it was. The Court held:

. . . that what was meant by the magistrate, and what respondent understood him to mean by the term "a good bond," was one which would really be sufficient security for the sum for which it was offered, and not a bond which falsely represented the value of the property offered as security, and when the magistrate asked respondent whether the bond offered was "all right," he undoubtedly meant to inquire, and respondent must have understood him as meaning, to obtain the respondent's assurance that the bond he offered was in fact a good one. He placed reliance upon respondent's honesty and good faith, and when he was told that the bond was a good one he was entitled to understand the respondent as asserting his knowledge, or at least his belief, that the bond was a "good one." It may be that the magistrate

* Matter of Louis H. Cohen, *New York Law Journal*, Nov. 16, 1915, 169 App. Div. 544.

was injudicious in placing reliance upon respondent's honor and truthfulness, but an explanation for his doing so may be found in the fact that, judging from the testimonials in his favor, respondent seems to have enjoyed at that time a good reputation with the judges with whom he was brought into contact.

The lawyer admitted that when he said the bond was "all right" he did not know the value of the real estate. Observe the Court's comment:

It is no excuse for respondent to say that he had no knowledge of the value of the property offered as security. If that was the case he should have so stated to the magistrate, but when he undertook to vouch for the excellence of the bond, he, in effect, professed to have knowledge of the value and to certify that it was sufficient. Of course, if he had stated what he now says is the truth, that is that he had no knowledge as to the value of the property or the responsibility of the sureties except what appeared on the face of their justification, the magistrate would have made further inquiry and probably would not have accepted the bail. As it was he did accept respondent's assurance and set the prisoners at liberty, whereupon they promptly forfeited their bail and fled the jurisdiction. As is pertinently and correctly remarked by the official referee: "It is just as wrong to assert that a particular statement is true without knowing whether it is true or false as it is to assert a thing to be a fact when the person making the assertion knows it to be false; and this is especially true when made by an officer of the court to a judicial officer, who, in deciding what to do in a proceeding is justified in depending upon and being governed by, more or less, the representations of counsel."

Note now the very explicit injunction to the Bar as to its duty to the Court:

No more serious offense can be committed against the administration of justice than for an attorney to take advantage of the confidence of the court or judicial officers, and by misrepresentation to induce such court or officer to take judicial action. 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 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.**

In a still more recent case 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. In disbarment proceedings against the lawyer, the Court said that if, under such circumstances, the seller of the property chances also to be a member of the Bar, in addition to responsibility for damages to the person injured, he may also "be called upon to answer for his conduct *to this Court.*" The Court disbarred him. It put the question squarely, "whether dishonesty and fraud in personal transactions shall disqualify an attorney

* Matter of Sachs, *New York Law Journal*, Nov. 29, 1915, 169 App. Div. 622.

from continuing as a member of the profession," and gave this comprehensive and enlightening answer:

An attorney engaged in the practice of law should primarily reserve himself for his profession only. In this profession he is held to the highest standard of ethical and moral uprightness and fair dealing. There seems to be no good reason why a lawyer should be allowed to be honest as a lawyer and dishonest as a business man. If he desires to go into business he must take the risk, if any is involved, and must see that his dealings as a business man are as upright as should be his dealings in his professional capacity.*

Lawyers have been disbarred in New York for conversion to their own use of clients' moneys; for fraud upon clients; for collusion with a wife to manufacture evidence in favor of her husband to enable him to obtain a divorce; for misapplying funds received from clients for specific purposes (though subsequently refunded after the order of the Court to do so); for charging a client for services not rendered; for falsely stating in a suit that the plaintiff (the client) was the true owner of certain stock, when in fact he was but a dummy; for assisting the client to leave the state so as to put him beyond the reach of process; for procuring the release upon bail of a person held as a fugitive from justice and then conspiring for his escape; for using a threat of criminal proceedings as a means of forcing a compromise of a suit; for trying to secure a verdict in favor of his client upon testimony which he knew to be false, — although he may not have suborned perjury — the Court declaring that it was the duty of the lawyer in such a case to dis-

* Matter of Edward A. Isaacs, *New York Law Journal*, May 2, 1916, 172 App. Div. 181. (See also editorial, *New York Law Journal*, same issue, p. 440).

close the fact to the Court upon its discovery and then to withdraw from the case; — for aiding and abetting a witness in perjury and procuring from an injured person apparent authority to commence an action where the person was incapable of signing her name and apparently incapable of realizing what she was doing; for falsely certifying as a commissioner of deeds to the acknowledgment of deeds before him.

Lawyers have been suspended for writing out answers to be given by a witness examined on commission and being present and reading some of the answers to the commissioner; for submitting a statement to the Court that the client had a good cause of action and securing further time to plead, after the client had ordered discontinuance of the action and had stated that she had no just claim; for depositing in his own account the funds of an estate of which his client was executor and using them to make good his individual overdraft; for agreement for a division of fees with a layman for getting negligence business; for trying to get the Court to accept pleas which he knew to be false, and delaying a just recovery; for practicing law under a firm name, containing names of two persons with whom he had no relations; for obstructing service of subpœna from a Federal Court in violation of a Federal law; for making false claim of privileged communication as counsel for a corporation of which he was also a director, whose knowledge as such was not so privileged — Here the Court said:

The respondent in this case was in the employ of clients who were supposed to have great wealth, and who were at the head of important corporations. *The impression that they are immune from civil or criminal prosecution for their*

acts seems to have pervaded the community of late years, and with it has grown up a sentiment among many members of the profession that, in carrying out their behest, a lawyer is performing his duty to the profession, and to the public and to the Courts. It is the importance or assumed importance of the client which is sought to justify acts which would be at once condemned in connection with a client who did not have great wealth or great prominence. *If the profession is to have the respect of the community; if it is to be trusted by courts and by others who have to do with the administration of justice, its members must realize that a crime is a crime whosoever commits it, and while the highest as well as the lowest criminal is entitled to the protection that the law gives, is entitled to have counsel of his selection, and is entitled to all the safeguards that have been devised for his protection, neither his wealth nor prominence will protect a lawyer in going outside of his professional obligations to shield him from the consequences of his acts.**

Lawyers have been suspended, for permitting a corporation to send out a threatening note over the lawyer's name falsely pretending to be sent pursuant to a law of the state, as well as giving to the corporation authority for its employees to sign the lawyer's name to dunning letters; for agreeing with an expert witness to pay him a percentage of the attorney's net fees in reducing a tax assessment; and for misstatements as to condition of litigation undertaken for a client.

Lawyers have been censured, for failing to disclose the lawyer's full relation to the parties in the litigation; for failing to inform a magistrate that he had induced a complainant to withdraw a complaint of petty larceny upon promise of restitution; for interposing conflicting affidavits in two separate actions — the Court saying:

* Matter of Robinson, 140 App. Div. 329 (p. 337).

"This makes a performance of a lawyer's obligation to be extremely accurate and entirely frank in his dealings with the Court in relation to such actions one of paramount importance." *

"We understand that this Court is charged with a supervision of its attorneys, and that if any attorney is convicted of dishonest and improper conduct which establishes that he is not a proper person to hold the office of an attorney of the Court, it is its duty to discipline him. If an attorney desires to continue to hold his office *he must be honest in his dealings, especially with his clients and those who have been his clients, and he cannot escape discipline for acts which involve a breach of his duty to a client by severing the relation with his client.*" †

In another case a lawyer had preferred criminal charges for the purpose of influencing the decision of civil cases in which he or his client was interested; it appeared that in one case the charge was baseless; in the other he offered to withdraw the charge in consideration of a payment of a civil claim. The lawyer contended that he had a legal right to institute the criminal proceedings to force payment of the civil claim. Here the Court said that a lawyer is never justified in using a criminal proceeding to collect a civil debt or enforce a civil right. ‡

To the contention that he had acted in good faith, without intentional misconduct, and only in mistaken zeal for his client, the Court said: "That such an explanation should be made by any member of the profession — by an attorney and counsellor at law — is an example

* For the foregoing and many other cases, see "Disbarment in New York," by Charles A. Boston.

† Matter of Beare, 158 App. Div. 469, 1st Dept., 1913.

‡ Matter of Abrahams, 158 App. Div. 595, 1st Dept., 1913.

of the absence of the high ideals that formerly existed and which controlled the members of the profession. If the bar is to regain the respect in which it has been held, it is essential that practices of this kind shall be condemned in the strongest terms by the courts and those guilty of such practices disciplined."

In all of these cases there was first a hearing given to the accused before the Grievance Committee of the Bar Association. There was careful investigation by the attorneys paid by the Association to give their entire time to such matters. There was a committee of lawyers not paid, who heard the charges; there were hearings before the referee, the Appellate Division of the Supreme Court and the Court of Appeals, and trial counsel were drafted from the ranks of the Association for the service.

In 1912 fifteen members of the Bar gave their services as counsel in proceedings instituted by the City Bar Association.* In 1913, thirty-two members of the Association similarly gave service.† In 1914, thirty-one members of the Association similarly gave service. The Committee on Grievances of the Association consists of nine members and a secretary, who, in 1914, held 77 meetings, considered 821 complaints against attorneys and 16 matters involving the administration of justice. It tried 82 cases of charges against members of the Bar, in 48 of which it recommended presentation of the name of the lawyer to the Appellate Division of the Supreme Court. ‡

I have made an inquiry among my friends to get some

* Year Book, Association of the Bar of the City of New York, 1913.
† *Idem*, 1914.
‡ *Idem*, 1915.

basis upon which to make an estimate of the contribution of professional service to this work. One of these drafted counsel — now a judge of the Supreme Court — informs me that he gave to one case alone one whole month of his time, and, in addition, the services of an assistant for about eighteen days; he attended some twelve different sessions before a referee, at which were taken 238 pages of testimony. He wrote first a brief of 36 pages for the referee, and then another brief of 43 pages for the Appellate Division. Another lawyer of distinction in our community gave his time in at least two cases, one of which extended from November in 1913 to March of 1915, and he prepared an elaborate printed brief for the Court and personally tried and argued the case. His time contribution was at least two months of actual personal work. Another says: . . . "it would be a conservative estimate to say that between three and four weeks of actual professional time was expended by me and by my assistants in the preparation and trial of the case and the making of the brief for the Appellate Division, and I think it would be nearer correct to say four weeks than to say three." During three years, this lawyer, as trial counsel, has conducted two cases and made a contribution of at least seven or eight weeks of actual professional work. Yet another, who was successful in four well-known cases and thinks that he is to be regarded as the most successful lawyer of any of the Bar Association counsel because he has done "the least possible amount of work in the cases that they have sent me," says: "You must ask ———— how much time he spent in the ———— case. It was prodigious, but then ———— was not only disbarred, but he soon died," obviously putting upon the shoulders of the Bar

Association counsel a tremendous responsibility, as well as a compliment. From the various responses I have received to my inquiries, all given in the most modest fashion and with the definite understanding that I mention no names, I am reasonably confident that of the thirty or forty counsel who are drafted each year by the Association, each one spends at least a full month of his professional time. If one allows but one month for a summer holiday, it is conservative to state that the contribution of each man so drafted is from eight to ten per cent of his available year of professional time. Bear in mind that none of these men is retired from active practice. Indeed, each is called because he is of proved competence as a trial lawyer and is engaged in active practice. I should not think of depreciating the value of their services by estimating what it might mean in dollars and cents. I was about to say that these services are given cheerfully, but I am reminded of the incident reported concerning the late Ezra Ripley Thayer, Dean of the Harvard Law School. In the course of his service upon the Grievance Committee of the Boston Bar Association, he was obliged to vote for the disbarment of a lawyer, who, it seems, had defrauded a client of a considerable sum of money. Thayer believed that it was done under stress of temptation. At his instance, there was added to the vote a provision, then apparently impossible of fulfilment, that disbarment proceedings should not be instituted if, by a certain time, the sum misappropriated was restored. It is said that later the same day Thayer visited this lawyer at his office and himself loaned him the funds necessary to make good his account with his client, and that not only then, but for some time thereafter, he had made a practice of visiting this man at

intervals and of using every friendly endeavor to place him on his feet both "professionally and morally." *

I do not mean to suggest that anything like the personal service of Thayer is general in the conduct of disbarment matters in New York. I do mean to imply that, while the service is rendered cheerfully, it is not a cheerful service for the prosecutor. May I, with the greatest temerity, put the question to business men — How many of your craft give ten per cent per annum of their time to eliminating from their industry or trade the black sheep that are freely roaming about?

* * * * * * * * * *

Out of this brief résumé of the exercise of disciplinary powers by one Bench and Bar — in this respect the most advanced in the land — must come the certain conviction that in what is generally supposed to be the city of greatest temptation and allurement, — at least in this country, — the Bench and the Bar are doing their full duty. Other courts and Bar Associations are doing a like work † — they are purging the profession of those who fall below the standards of the profession itself. No other profession or industry does like work. None can. It is made possible by reason of the Court's inherent jurisdiction over lawyers. It is because of the lawyer's position as an *officer of the Court* that the disciplinary process is made practicable. Destroy the conception of the Bar as a profession — as a branch of the judicial system, and you at once remove the basis upon which the lawyer may be brought to prompt and summary accountability. Take away the conception of the prac-

* *The American Law School Review*, November, 1915, quoting from the *Harvard Alumni Bulletin*.

† See *post*, pp. 311, 312.

tice of the law as a profession — make it a business — and at once you destroy the very basis of professional discipline. Here, then, is something of value to laymen as well as to lawyers — something of value to the entire community: Those who are ministers of justice must be, like Cæsar's wife, "above suspicion." Their robes must be stainless. And for sinning, the punishment is certain.

The make-up editor was right in giving first place to the news of disbarment proceedings. The community *is* interested — vitally interested in knowing that wrongdoing on the part of its lawyers is more readily ascertained and more quickly punished than any other wrongdoing in the community. And the punishment is dire. Destruction of reputation, destruction of the means of livelihood, public disgrace. What can be more severe?

Let that industry or business or profession which can write a similar chapter throw the first stone!

CHAPTER II

AS LAYMAN SEES LAWYER

WARREN, in his "History of the American Bar," gives us the basis for estimating the feeling of the layman toward the lawyer in London in the 17th Century by furnishing us with the titles of numerous tracts printed at that time, such as the following: *The Downfall of Unjust Lawyers; Doomsday Drawing Near with Thunder and Lightning for Lawyers* (1645); *A Rod for Lawyers Who are Hereby Declared Robbers and Deceivers of the Nation*; *Essay Wherein is Described the Lawyers, Smugglers and Officers Frauds* (1659).*

We are also indebted to him for quoting from the letter of John Adams written to William Cushing in 1756 as follows:

Let us look upon a lawyer. In the beginning of life we see him fumbling and raking amidst the rubbish of writs, indictments, pleas, ejectments, enfifed illatebration and one thousand other *lignum vitæ* words which have neither harmony nor meaning. When he gets into business, he often foments more quarrels than he composes, and enriches himself at the expense of impoverishing others more honest and deserving than himself. Besides, the noise and fume of Courts and the labour of inquiring into and pleading dry and difficult cases have very few charms in my eyes. The study of law is indeed an avenue to the more important offices of the State and the happiness of the human society is an object worth the pur-

* Charles Warren: "A History of the American Bar," pp. 6, 7.

suit of any man. But the acquisitions of these important offices depends upon many circumstances of birth and of fortune, not to mention capacity, which I have not, and I can have no hopes of being useful that way.*

He gives us, too, this most interesting extract from the "Letters of an American Farmer," written in 1787, by H. St. John Crevecoeur:

Lawyers are plants that will grow in any soil that is cultivated by the hands of others, and when once they have taken root they will extinguish every vegetable that grows around them. The fortunes they daily acquire in every province from the misfortunes of their fellow citizens are surprising. The most ignorant, the most bungling member of that profession will, if placed in the most obscure part of the country, promote litigiousness and amass more wealth than the most opulent farmer with all his toil. . . . What a pity that our forefathers who happily extinguished so many fatal customs and expunged from their new government so many errors and abuses both religious and civil, did not also prevent the introduction of a set of men so dangerous. . . . The value of our laws and the spirit of freedom which often tends to make us litigious must necessarily throw the greatest part of the property of the Colonies into the hands of these gentlemen. In another century, the law will possess in the North what now the church possesses in Peru and Mexico.†

He likewise refers to the letters of Benjamin Austin, "an able pamphleteer and Anti-Federalist politician of Boston," who wrote, in 1786, under the name of "Honestus," and whose letters had a widespread influence:

The distresses of the people are now great, but if we examine particularly we shall find them owing in a great meas-

* Charles Warren: "A History of the American Bar," pp. 79, 80.
† *Idem*, p. 217.

ure to the conduct of some practitioners of law. . . . Why this intervening order? The law and evidence are all the essentials required, and are not the judges with the jury competent for these purposes? . . .

The question is whether we will have this order so far established in this Commonwealth as to rule over us. . . . The order is becoming continually more and more powerful. . . . There is danger of lawyers becoming formidable as a combined body. The people should be guarded against it as it might subvert every principle of law and establish a perfect aristocracy. . . . This order of men should be annihilated. . . . No lawyers should be admitted to speak in court, and the order be abolished as not only a useless but a dangerous body to the public.*

It is clear that the prejudice against lawyers as a class or as a group is not a matter of recent origin.

In 1450 Jack Cade began the rebellion bearing his name with a proclamation in which he paid his respects to the law in this fashion: — "The law serveth as naught else in these days but for to do wrong, for nothing is sped but false matter by color of the law for mede, drede and favor." And Shakespeare made him a literary as well as a historical character.†

Earlier in Wat Tyler's rebellion in 1381, a similar outcry was made by the common people against the practice of the law.

* Charles Warren: "A History of the American Bar," p. 219.

† Dick: The first thing we do, let's kill all the lawyers.

Cade: Nay, that I mean to do. Is not this a lamentable thing, that of the skin of an innocent lamb should be made parchment? That parchment, being scribbled o'er, should undo a man? Some say the bee stings; but I say, 'tis the bee's wax, for I did but seal once to a thing, and I was never mine own man since." King Henry VI, Second Part, Act IV, Scene II.

In 1786, the people of Massachusetts began to feel like Cade and Dick the Butcher. The citizens of Braintree (near Boston) in town meeting, solemnly resolved: "We humbly request that there may be such Laws compiled as may crush or at least put a proper check or restraint on that order of Gentlemen denominated Lawyers the completion of whose modern conduct appears to us to tend rather to the destruction than the preservation of this Commonwealth." *

About this time Dedham instructed its legislative representatives to "endeavor that such regulations be introduced into our Courts of Law, and that such restraints be laid on the order of lawyers as that we may have recourse to the Laws and find our security and not our ruin in them" and if "such a measure should appear impracticable, you are to endeavor that the order of Lawyers be totally abolished. . . . "

Warren says that at the time Austin was writing in Boston the same conditions prevailed in all the states. In New Hampshire and Vermont there were general demands that courts should be abolished and the practitioners of law suppressed. "The debtors of Vermont set fire to their court-houses; those of New Jersey nailed up their doors. Lawyers were mobbed in the streets, and judges threatened." †

No one who has read his Dickens can fail to realize how the prejudice in his day was justified by actual experience. The heart of the story of "Bleak House" is a Chancery suit — Jarndyce and Jarndyce. You remember how, in the opening chapter, Dickens introduces us

* Charles Francis Adams: "Three Episodes of Massachusetts History," Vol. II, p. 897.

† Warren: "A History of the American Bar," pp. 217, 218.

into the High Court of Chancery at the trial of this famous case.

Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated, that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two Chancery lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce, without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant, who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled, has grown up, possessed himself of a real horse, and trotted away into the other world. . . .

Jarndyce and Jarndyce has passed into a joke. . . . The last Lord Chancellor handled it neatly, when, correcting Mr. Blowers the eminent silk gown who said that such a thing might happen when the sky rained potatoes, he observed, "or when we get through Jarndyce and Jarndyce, Mr. Blowers." . . .

And when the Chancellor suggests that several members of the Bar are still to be heard, eighteen learned lawyers, "each armed with a little summary of eighteen hundred sheets, bob up like eighteen hammers in a piano-forte, make eighteen bows, and drop into their eighteen places of obscurity."

And in his preface to the book, Dickens tells us that the case of Gridley, the man from Shropshire, "is in no essential altered from one of actual occurrence, made public by a disinterested person who was professionally

acquainted with the whole of the monstrous wrong from beginning to end." He goes on to say:

At the present moment there is a suit before the Court which was commenced nearly twenty years ago; in which from thirty to forty counsel have been known to appear at one time; in which costs have been incurred to the amount of seventy thousand pounds; which is a *friendly suit*. . . . There is another well-known suit in Chancery, not yet decided, . . . in which more than double the amount of seventy thousand pounds has been swallowed up in costs.

And in "David Copperfield," you remember the reply of Mr. Spenlow, of Spenlow and Jorkins, to David's question as to what he considered the best sort of professional business:

. . . a good case of a disputed will, where there was a neat little estate of thirty or forty thousand pounds, was, perhaps, the best of all. In such a case, he said, not only were there very pretty pickings, in the way of arguments at every stage of the proceedings, and mountains upon mountains of evidence on interrogatory and counter-interrogatory (to say nothing of an appeal lying, first to the Delegates, and then to the Lords); but, the costs being pretty sure to come out of the estate at last, both sides went at it in a lively and spirited manner, and expense was no consideration.

With these ideals prevailing in the minds of the lawyers of the day, is it any wonder that David, after his first visit to Doctors' Commons, says: "Altogether, I have never, on any occasion, made one at such a cosey, dozey, old-fashioned, time-forgotten, sleepy-headed little family-party in all my life; and I felt it would be quite a soothing opiate to belong to it in any character — except perhaps as a suitor."

Is this prejudice absent from our law to-day? Before the last Constitutional Convention was held in Albany, a group of lawyers devoted themselves seriously to devising a model Judiciary Article which should be considered by the Convention.* Following the news of their work, the *New York American* on March 26th, 1915, came out with a cartoon showing Elihu Root as a fox, completely blocking the entrance to the Constitutional Convention. Underneath it says: "There is evidently a plan to make Elihu Root the dominant force of the Constitutional Convention — and that means 'safety first' for corporations." The Constitution was subsequently beaten, as many of us believe, because it was prepared by lawyers who had attained eminence in their profession. To become counsel for great railway corporations or large banking interests is to destroy every opportunity for securing popular confidence. Although in Great Britain knowledge of business and finance and a long and wide experience in bankruptcy brought Sir Rufus Isaacs to the highest judicial post in the land, in this country an extensive practice in bankruptcy is accepted as sure indication of low professional standard. A leading lawyer of ability and experience — so I am credibly informed — lost, at the last moment, appointment as judge on one of our State Courts of Appeal because his enemies brought to the Governor's attention the active and frequent participation of his firm in bankruptcy practice.

Let us not delude ourselves. Whether it is inherited from Jack Cade or Dick the Butcher, or indigenous to our own local soil, the prejudice still thrives. Moreover, it has a basis in truth and reason.

* See *New York Evening Post*, March 18th, 1915.

In 1910, at Chattanooga, Woodrow Wilson took for the subject of the annual address to the American Bar Association, "The Lawyer and the Community." It will pay every lawyer to read this address once a year.* He said: "Lawyers are not now regarded as the mediators of progress. Society was always ready to be prejudiced against them; now it finds its prejudice confirmed." Again: "Society has suffered a corresponding loss, — at least American society has. It has lost its one-time feeling for law as the basis of its peace, its progress, its prosperity." And why?

Lawyers are specialists, like all other men around them. The general, broad, universal field of law grows dim and yet more dim to their apprehension as they spend year after year in minute examination and analysis of a particular part of it; not a small part, it may be, perhaps the part which the courts are for the time most concerned with, but a part which has undergone a high degree of development, which is very technical and many-sided, and which requires the study and practice of years for its mastery; and yet a province apart, whose conquest necessarily absorbs them and necessarily separates them from the dwindling body of general practitioners who used to be our statesmen.

And so society has lost something, or is losing it — something which it is very serious to lose in an age of law, when society depends more than ever before upon the law-giver and the courts for its structural steel, the harmony and coördination of its parts, its convenience, its permanency, and its facility. In gaining new functions, in being drawn into modern business instead of standing outside of it, in becoming identified with particular interests instead of holding aloof and impartially advising all interests, the lawyer has lost his old function, is looked askance at in politics, must disavow special engage-

* Vol. XXXV, Reports American Bar Association, pp. 419 *et seq.*

ments if he would have his counsel heeded in matters of common concern.

And the appeal in 1910 is as timely to-day:

Meanwhile, look what legal questions are to be settled, how stupendous they are, how far-reaching, and how impossible it will be to settle them without the advice of learned and experienced lawyers! The country must find lawyers of the right sort and of the old spirit to advise it, or it must stumble through a very chaos of blind experiment. It never needed lawyers who are also statesmen more than it needs them now, — needs them in its courts, in its legislatures, in its seats of executive authority, — lawyers who can think in the terms of society itself, mediate between interests, accommodate right to right, establish equity, and bring the peace that will come with genuine and hearty coöperation, and will come in no other way. . . .

. . . Has not the lawyer allowed himself to become part of the industrial development, has he not been sucked into the channels of business, has he not changed his connections and become part of the mercantile structure rather than part of the general social structure of our commonwealths as he used to be? Has he not turned away from his former interests and duties and become narrowed to a technical function?

Or, as Ex-President Taft says in the opening sentence of his book, "Ethics in Service": "It is not too much to say that the profession of the law is more or less on trial."

CHAPTER III

AS LAWYER SEES LAYMAN

JACK was coming in from San Francisco. Jim was going west. They bumped into each other at the great metropolitan terminal. In fifteen years neither had had glimpse of the other. "Why, Jim — how stout you've grown!" "Why, Jack, how gray you are — and bald!" Changes, imperceptible if they had worked daily side by side, had taken place in figure and form. No less striking — to the lawyer — are the changes in the complexion of business, hardly noticeable to those who for the past fifteen years have been riding in the harness of activity. From the window of his profession, the lawyer sees these changes. It is not the old friend of fifteen years ago. A little grayer, a little steadier, somewhat wiser and certainly more concerned with the deeper significance of things. Commenting upon the prevailing business morals of the early part of the Nineteenth Century, Ephraim D. Adams (writing on "The Power of Ideals in American History") made this significant observation: "To nations where church and state still held a relation which America had discarded, the decay of practical morality in America seemed inevitable. Such nations observed with scorn what seemed to them an irreconcilable contradiction between the keen business instincts of the Yankee, and his professions of religion. *One of the oldest British gibes at America pictures the Yankee storekeeper as instructing his clerk, preparing for*

the business of the morrow, to 'sand the sugar, flour the ginger, lard the butter, and then come in to prayers.'"

We are not so far away from David Harum and horse-trading of the shrewd country variety, nor from the wonderful fortunes made in fake patent medicines.*

A certain very popular remedy for reduction of fat, was found only recently — upon analysis — to consist of simple soft soap and water. It cost five cents to make up and sold for a dollar a bottle. In the days when the Britisher made his joke about the Yankee — even in the later days of David Harum — this kind of commercial transaction would have been regarded as clever and "good business" — entitling the inventor of the scheme to huge profits and a public monument. Within the year, the Department of Health in New York City passes a regulation requiring that all dealers in proprietary medicines shall file a statement of the ingredients of such proprietary articles — an ordinance of doubtful constitutionality. One manufacturer of gelatine capsules (October, 1915) writes his drug-store customers: "In the opinion of lawyers who have been consulted upon the matter, the ordinance is without validity. We write you, therefore, in order that you may understand that we do not propose to comply with the terms and conditions of the ordinance and in the event you or any other retailer is prosecuted by reason of the sale of our preparations, we will render to you all the assistance in our power to protect you." To which the retailer promptly replied: "We wish to thank you for your offer to protect us in breaking the law, but do not believe we shall have to avail ourselves of the proffered aid, as we have determined not to sell any preparation after December 31st

* See series of articles in *Harper's Weekly*, October, 1915.

which does not comply with the regulations of the Department of Health."* In what the Health Commissioner headlines as "An Epoch-Making Document" eleven of the leading whosesale druggists agree unreservedly to comply with the ordinance,† upon which the Commissioner comments: "*The wholesalers have performed a public-spirited act, for which they deserve the thanks of the community.*"

The movement for legislation, — for administrative action against impure foods, in favor of pure drugs, against fake advertising, all comes from an impulse for purification of commercial standards — and all tribute to them — the advertising profession deserves the credit for giving this impulse to business. One daily newspaper during 1914 started to build up — and we believe has succeeded admirably in building up — its entire advertising prestige upon a definite two-fold policy — first of guaranteeing the truthfulness of every advertisement in its columns, and second, of exposing mercilessly every fake to which its attention is directed. In one year "Several of the largest and most important shops in New York . . . definitely and openly abandoned the policy of 'value' and 'comparative price' advertising, and are confining their efforts to selling their merchandise not

* Weekly Bulletin of the Department of Health, City of New York, Nov. 13, 1915, p. 369.

† "The undersigned wholesale druggists and dealers in proprietary medicines have signified their intention of complying with Section 117 of the ordinances of the Board of Health of New York City in regard to the selling *only* of registered patent and proprietary articles.

"We also desire to go on record as favoring a Federal law regulating the sale of patent and proprietary articles, for the same reasons which brought about the passing of the above mentioned local ordinance." — Weekly Bulletin of the Department of Health, City of New York, October 23, 1915, p. 341.

for what it may once have been worth, or what they choose to estimate it as having formerly been worth, but on the solid basis of straightforward presentation. Many other stores, while not formally adopting this policy, have radically modified their methods to meet it."* To-day in a country store in Hamilton, N. Y., the proprietor announces: "A good size pair of blankets for a Dollar and the very poorest, sleaziest Comfortable you ever saw for a Dollar, and which will you select? Of course the Comfortable is heavy and the colors are bright, but what do you suppose can be on the inside when you stop to figure on materials." Here is no "sand the sugar" method. "There are the comfortables: take 'em or leave 'em, but at least if you take 'em you know what you are getting, and you can't expect much for a dollar."† The impression it is intended to convey is that the comfortables are really worth the dollar. What a change in the complexion of business! The movement for honest advertising was started, I have said, by the advertising profession. These men took up their work seriously as a *profession;* have, indeed, gone so far as to begin the formulation of a code of ethics for their work. A century ago who would have thought of a code of ethics for business men? To-day we find codes of ethics for insurance agents, for real estate brokers, for advertising men, for credit men, for grocers, as well as for engineers and architects.

In 1899, Thomas C. Platt, addressing him as "My Dear Governor," made a searching inquiry into the point of view of Theodore Roosevelt at the time he was making his early progress in politics. And Father Platt

* *New York Tribune*, Nov. 12, 1915.
† *Idem*, Nov. 19, 1915.

said: "But the thing that did really bother me was this: I had heard from a great many sources that you were a little loose on the relations of capital and labor, on trusts and combinations and indeed on those numerous questions which have recently arisen in politics affecting the security of earnings and the right of a man to run his own business in his own way, with due respect of course to the Ten Commandments and the Penal Code." This was the working philosophy of business interests in New York State in the year 1899, "the right of a man to run his own business in his own way, with due respect *of course* to the Ten Commandments and the Penal Code" — mostly the Penal Code.

In February of 1915 a New York daily sent an agent around to retail hat stores and bought hats represented to be of genuine foreign make. The labels were fraudulent. Each "genuine Austrian" hat was shown to have been made either in Danbury, Connecticut, or Newark, New Jersey, or some other good American town. In November there is formed an association of hatters and furnishers, with the avowed object "of combating the fake stores, doing away with false advertising, and helping the retail hatters and furnishers of the city." *

Within ten years we have a crop of books on "Honest Business" (Amos Kidder Fiske, editor of one of the leading business journals of the country), "Morals in Modern Business",† "Business: A Profession" (by Louis D. Brandeis), and scores of references to the change in business men's ideals in such books as Walter Weyl's "New

* *New York Tribune*, Nov. 30, 1915.

† A collection of papers written by Edward D. Page, George W. Alger, Henry Holt, A. Barton Hepburn, Edward W. Bemis and James McKeen, delivered before the senior class of the Sheffield Scientific School of Yale University and published by the Yale University Press.

Democracy" and Walter Lippmann's "Drift and Mastery." Mr. Fiske writes: "The great need of the time is to get ethics into economics and morals into business." In his opinion, although the human race has been striving for ages to attain higher standards of conduct in the different relations of life, "The effort has been directed mainly to social and domestic relations to the neglect of economic and business relations." He thinks that "People have become 'indifferent honest' in their smaller dealings and their personal relations, where they come into immediate contact with each other" and that "Mere lying and cheating, even getting the better of each other in trade, has fallen into general disrepute because it comes so closely home to the individual and is so palpable." He finds room for much improvement, however, in business with a big "B," " in which transactions are on a large scale and widely extended," and which "has been too much regarded as a game where skill and finesse may be used without scruple, or as a kind of warfare in which strength and strategy must prevail to the discomfiture of those who are unable to hold their own in the struggle." * Mr. Page comes to very much the same conclusion. He thinks that "in the mad race for riches, busied with the furtherance of its own extraordinary economic development, the community has neglected to carry on, coincidently, the presentation and determination of what duties and what obligations are involved in the conduct arising from that development." And he is of opinion that "This neglect has permitted a margin of business competition under unethical conditions and according to unethical standards; the financial results of which may be seen in many

* " Honest Business," pp. 6, 7.

of the great fortunes, the methods of whose acquisition are obviously scandalous." * And Mr. Alger in the same volume sees in the "discontent which to-day is the prominent part of our self-criticism," a definite indication of the fact that we are getting better.† Rollo Ogden, the editor of the *Evening Post*, in the *Atlantic Monthly* for June of 1914, in an article entitled "The Survival of Ability," presented a very interesting colloquy between two fictitious characters, intended to indicate the newer attitude of men of affairs. Speaking of the men of the past generation, he says: "'They recall the "glorious days" of your fathers, when railroad presidents, as I have heard one of them say, had no law of either State or Nation to bother them, and could be both the law and the profits unto themselves; and because that special kind of opportunity has passed, these men, of lowered vitality and narrowed outlook, think that there will be no more cakes and ale. But you don't hear the men in big business who are under forty talk that way. As a matter of fact, they are not talking very much at all, but they are thinking hard, keeping their eyes open, and their wits about them, and are, so far as I can see, just as hopeful of large achievement, with its fitting reward, as were their fathers before them.

"' . . . However it may be with politics, . . . the spirit of a new life has been breathed over business. The old greed and selfishness and extortion and preying upon the needs of the feebler, and exploitation of the common resources, and monopolistic practices, have gone for good. They are not even defended any more. A new

* "Morals in Modern Business," p. 11.
† *Idem*, p. 23.

civic conscience has been created under the ribs of death, and even if a man were able to-day to coin money out of the wrongs and sufferings of his fellows, he would be ashamed to do it. He could not hold up his head in the community. Piling up wealth without any sense of social obligation, or any service to humanity, has become the great modern turpitude.'" *

In one of the latest books on the subject, Ex-President Taft, commenting upon the lack of conformity between practice and precept on the part of the lawyers, says: † "They fall into the same errors that their clients do, though with a better knowledge of their duties in this regard. They share what has been characteristic of our entire people in the last two decades. The minds of the great majority have been focused on business success, on the chase for the dollar, where success seems to have justified some departure from the strict propriety or fairness, so long as it has not brought on criminal prosecution or public denunciation."

The very title selected by Mr. Brandeis for his book, "Business: A Profession," is significant. To the lawyer, this movement in the business field naturally suggests the substitution of a professional ideal for a trade ideal. An ideal of service, rather than an ideal of advantage. In an address made to the Independent Retailers of the Metropolitan District, Dr. Lee Galloway, Professor of Commerce and Industry at the New York University, said (in substance): "There is one fact that the retailer should always bear in mind, and upon which too much cannot be said, and that is the *duty he owes to society*,

* Rollo Ogden: "The Survival of Ability," *The Atlantic Monthly*, June, 1914, p. 794.

† "Ethics in Service," p. 35.

and the obligations incumbent upon him in the reselling, or distribution of merchandise. Just so long as the retailer does not forget these responsibilities and renders *the service to society* which he should render, then just so long will he continue to play his important part in the machinery of society.

"Perhaps, the idea is well illustrated in the boy who has just completed his studies in college. He is reminded of his obligations to society, incurred through the expense and care that society has gone to to educate him. 'Now what are you going to do to repay society for what society has done for you?' is the question that is asked him as he leaves to take up his life's work. This question is one that might well be asked the retailer; *are you attempting to perform your special duty and incurred responsibilities to society?*

"We are now living in an age of '*Service First*,' and the duty of the retailer to his community or clientelle, is measured entirely by the *amount of service* he renders to the clientelle. . . . The public of to-day, and perhaps more so of to-morrow, are not quibbling over the matter of prices, and while they do not want to pay more for an article than that article is really worth, yet they are concerned in, and are insisting upon *service*, and they are willing to pay for it. Take the big utility organizations for instance, which are in constant contact with the public. Have they not long since recognized that the public demand is for service? Is it not something like 'At your Service,' 'We aim to Serve,' or some such message which they are putting before the people, rather than price reductions? This is so, because they know that *service rather than price is the demand of to-day.*

". . . The manufacturer produces; the retailer dis-

tributes. But he must distribute in the manner that *best serves society.*" *

Now it is this very idea of service — a philosophy as true to-day of other businesses as it is of railroads and retailers — that runs through the whole of the ethics of the legal profession. The lawyer is an officer of the court. As such he must *serve.* He is the confidant of his client; he must give *service.* He is the spokesman for large civic interests, he is a citizen, and as such, must *serve.* He is a member of his profession; there, too, he must serve — if need be, in the unpleasant task of segregating his weak and sinning brothers from the rest of the community. *His* competition has always been upon the basis of service. The Romans and the English carried out this principle in all its applications. Even in England to-day a barrister may not bring suit for his fees and there the contingent fee is denounced, and made illegal. It is not merely his conduct in court or connected with some judicial proceeding that is subject to professional criticism and review. The lawyer in or out of court must conduct himself as a man of the strictest and highest honor. It will be recalled that, in a recent opinion, a lawyer is severely censured for writing a letter to the press defending a friend, in which he knowingly made misstatements of fact, though he believed his friend to be innocent and though he had not been retained and did not receive nor expect any compensation. The doctrine of *caveat emptor* was not pleaded as a defense.

The changed complexion of business is very significant to the lawyer with some knowledge of the traditions of his guild. The profession of service offers fruitful analogies for the business man's newer philosophy. *No lawyer*

* *Women's Wear*, Nov. 12, 1915. (Italics ours.)

may represent conflicting interests. The application of this fiduciary principle to the system of interlocking directorates is obvious. *No lawyer may deal personally with the property of his client.* The application of this principle to sales at profit of one's "inside" purchases to the corporation of which one is a director may not be so obvious. But such applications are becoming more and more obvious. The ethics of trade are approximating the ethics of the profession.

Yet it would seem that while one part of society has been professionalizing commerce, another has been commercializing the profession.

CHAPTER IV

AN OFFICER OF THE COURT

WE are an insular people at best. Let us travel a bit in other lands. It may improve our vision.

China. In China there is no Bar.* That is, there are no lawyers authorized to practice in court. Even in criminal cases, the individual must make his own defense. He may get assistance from a class variously described as "expositors of the law" and "transcribers of documentary evidence." † Douglas, the Englishman, writing on "Society in China" says, "a man who attempted to appear for another in a court of justice would probably render himself liable to a penalty under the clause in the penal code, which orders a flogging for any person, who excites and promotes litigation." ‡ How many think of Paradise as a place where there are no lawyers and where attempted practice of the law is subject to immediate flogging! To an Englishman, however, who has seen, as Douglas says, the most acute and erudite judges receive and acknowledge assistance from members of the Bar "not only in intricate legal questions, but in the production and arrangement of evidence," and where the "litigants feel and know that every argument will

* See article by Charles W. Rankin, Dean of the Law School of Shanghai — *American Bar Association Journal*, Vol. II, No. 2, April, 1916, p. 284.

† Kidd: "China," p. 256.

‡ P. 107.

be used, and no point will be omitted to attain the presumably just object which they desire," the Chinese system of trials by a presiding mandarin resembles the administration of a London night-court. "The Chinese litigant . . . is at the mercy of a mandarin who is probably corrupt, and perhaps both ignorant and cruel, and he is well aware that his only hope of gaining a favourable hearing is by satisfying the greed and necessities of his judge." In Anatole France's play, "The Man who Married a Dumb Wife," it will be recalled that the learned judge could not concentrate his mind upon the intricacies of the case in hand until the advocate had seen to it that there was due addition to the kitchen larder, and thus the double misfortune of having a dumb wife in charge below. "Presents for his Honor" is the sesame to the opening of court. So in China the "lawyer" is a clandestine creature who lurks near the stage-door of justice and gets you in the back-way for a "fee" — heaven save the mark!

Denby, in "China and Her People," says: "There are no professional lawyers in China. But there is a class of persons who prepare law papers. They are accounted a shrewd and not very reputable class." * Martin, in his "A Cycle of Cathay," says: "In China there is a bench, but no bar. The legal profession is unrecognized by law, yet it is indispensable. . . . It would do much to promote justice if they were employed in open court to examine witnesses, instead of leaving the judge to obtain his evidence by torture." †

I am indebted to Mr. Suh Hu, a Chinese student at our own Columbia University, for the following infor-

* P. 204 (Vol. I), 1906.

† P. 116. But within the past few years, lawyers have begun to ap-

mation. The principle underlying the requirement that the parties appear in person is that the judge can better get at the truth of the case by observing the expressions and gestures, which it was felt would betray the character and reliability of the testimony offered by the witness. But this principle does not work in practice. It is found to be difficult for the innocent and timid peasant to plead his own case eloquently in a place where torture awaits him and all the severity of Chinese officialdom is used to scare away his wits. Yet, on the other hand, the expert criminal becomes expert in securing acquittal by assuming every appearance of innocence and honesty during the trial. (Indeed, in our own country, the great successes of trial advocates have been in tearing the sham of hypocrisy from the face of the lying witness.) The unofficial class of lawyers is called "chung-ssu" or masters of the lawsuit, while by their critics they are called "chung-guen" or rascals of the lawsuit. Their work consists first in drafting the brief containing the facts of the case, and secondly in coaching the client in appropriate ways of pleading and examination at the trial. In ordinary cases, such briefs are written by the scholars, but the most effective are those written by the professional brief writers, whose pens have been compared with sharpened swords. These lawyers keep themselves behind the scenes, and if they are caught in their coaching they are punished severely. In some parts of China there is an official brief writer (kwan-tai-shu), who has an office near the court. His duty is to draft the briefs for those who come to court, and for this

pear in China, though they found the public not ready for them and the courts still less ready for them (address of Edgar B. Allen, before Section of Legal Education, American Bar Association, 1916).

he charges a fixed sum of money for each brief. Besides this class of unauthorized lawyers, there is another profession, whose importance in the administration of the law in China cannot be overrated. This class is known as "shing ming ssu-ya" or counsellors in punishment and casuistry. They are an integral part of the administration, whether of the city or of the prefecture. They are employed directly by the magistrates and often enjoy high salaries. Their duty is to advise the magistrates, who themselves are not lawyers, in all questions relating to the law and the application thereof to specific cases. These advisers make up a rather powerful class and much of the bribery and trickery in the administration of the law is done through their agency. Most of them, strangely enough, are natives of one district — Shao-Shing — in the province of Che-Kiang. In China, even where there is trial by torture, skill in presentation of evidence or defense by argument gives rise to a professional class. The failure to recognize the legitimate function of such a class leads naturally to bribery and corruption. When justice rests upon reason and not upon authority, place is made for the lawyer to address his arguments in open court to the judge.

Japan. In Griffis' "The Mikado's Empire" appears a most instructive cut.* We see the prisoner, the *torturer*, secretary, and judge as "the chief or only personages at the trial" — all elaborately surrounded by horrifying instruments of torture. "Perhaps nothing demonstrates the immense advance of Meiji legislation more clearly," says John Gadsby, writing in 1914,† "than the public trials of the present day. Within the last fifty years and

* P. 569 (Vol. II, Tenth Edition, 1903).

† *Law Quarterly Review*, V. 30, p. 448, at p. 457.

under the rule of the Tokugawa Shogunate, prisoners appeared in fetters and, even if sufficiently fortunate to escape the application of torture, were certainly terrified by the presence of fearsome machines which at any moment might be brought into use to extort confession. But at the present day the accused is subjected to no personal restraints; he is examined directly and openly, almost exactly as he would be examined in the Criminal Courts of Europe. And he may be defended by any number of counsel, all of whom are permitted to examine, cross-examine, and make speeches on behalf of their clients." Griffis says: "The use of torture to obtain testimony is now entirely abolished. Law schools have also been established, lawyers are allowed to plead, thus giving the accused the assistance of counsel for his defense." *

These writers seem to think that the establishment of law schools and lawyers and pleaders and counsellors in the open, is something in the way of advance over torture and secret bribery by experts! †

Greece. Scott tells us in his "Evolution of the Law" ‡ that the development of advocacy in Greece came about much in the same manner as it is now evolving in the

* "The Mikado's Empire," p. 569. Those who would understand what Japan has done in the way of modern criminal procedure will find a complete study in "Mitteilungen der Internationalen Kriminalistischen Vereinigung," V. 19, 3rd Supplement.

† In September, 1913, the total number of graduates from the Imperial University in Tokio was 13,116. Of this number 4,438 were graduates in law, 1,890 in medicine, 2,989 in engineering, and 1,630 in literature. No other department ran into four figures. Mr. Alexander Tison, a member of the New York Bar, formerly Professor of Law in Japan, tells me: "The lawyers of Japan are numerous and well trained and do a great work. They may be depended upon to give a good account of themselves and to keep their profession on a high plane."

‡ 3rd Ed., p. 116.

Orient. The Greek litigant in the early days, like the Chinese of to-day, must needs conduct his own case, for fear advocates might carry undue weight with the judges. He might consult experts in the law and these experts might write out arguments which their esteemed clients might memorize and deliver as their own, after the fashion of some of our modern after-dinner speeches. Not till after Solon's time do we discover the famous advocates of Greece, — they were then called *pleaders*, and they served either as state's prosecutors, or defended accused persons, or appeared for litigants in civil suits.

Rome. Under the old Roman laws, the litigant was required to appear personally in court and was not permitted to retain the assistance of others, except in such actions as involved questions of personal liberty or affected the entire community. Later, when the inconvenience of this method in the administration of justice became apparent, suitors were allowed to call in persons who might in their behalf and in their name conduct the case.*

The term advocatus was not applied to a pleader in the courts until after the time of Cicero. Its proper signification was that of a friend who, by his presence at a trial, gave countenance and support to the accused. It was always considered a matter of the greatest importance that a party who had to answer a criminal charge should appear with as many friends and partisans as possible. This array answered a double purpose, for by accompanying him they not only acted as what we should call witnesses to character, but by their numbers and influence materially affected the decision of the tribunal. Not unfrequently (when some noble Roman who had gained popularity in his provincial

* Forsyth's "Hortensius," p. 87, Inst. Just. (Sandars), p. 469.

government had to defend himself against an accusation) an embassy of the most distinguished citizens of the province was sent to Rome to testify by their presence to his virtues, and deprecate an unfavorable verdict. Thus when Cicero defended Balbus he pointed to the deputies from Gades, men of the highest rank and character, who had come to avert, if possible, the calamity of a conviction. Although in this point of view the witnesses who were called to speak in favor of the accused might be called advocati, the name was not confined to such, but embraced all who rallied round him at the trial.*

From Sharswood we learn: "In all countries advanced in civilization, and whose laws and manners have attained any degree of refinement, there has arisen an order of advocates devoted to prosecuting or defending the lawsuits of others. Before the tribunals of Athens, although the party pleaded his own cause, it was usual to have the oration prepared by one of an order of men devoted to this business, and to compensate him liberally for his skill and learning. Many of the orations of Isocrates, which have been handed down to us, are but private pleadings of this character. He is said to have received one fee of twenty talents, about eighteen thousand dollars of our money, for a speech that he wrote for Nicocles, King of Cyprus. Still, from all that appears, the compensation thus received was honorary or gratuitous merely. Among the early institutions of Rome, the relation of patron and client, which existed between the patrician and plebeian, bound the former to render the latter assistance and protection in his lawsuits, with no other return than the general duty, which the client owed to his patron. As every patrician could not be a suffi-

* Forsyth's "Hortensius," p. 86.

ciently profound lawyer to resolve all difficulties which might arise in the progress of a complex system of government and laws, though he still might accomplish himself in the art of eloquence, there arose soon a new order of men, the jurisconsults. They also received no compensation." *

Greenidge † says: "When the Bar had become a profession we find that the prætor or provincial governor could suspend a particular advocate from practice in his court either temporarily or permanently; but it had not yet reached this stage in Cicero's time, and, although the prætor could undoubtedly exclude every one, except the parties directly interested, from his court, we know of no general rules which gave or refused permission to advocacy. The assistance rendered to litigants by this semi-professional class was of two kinds. Eloquence and deep knowledge of the law were not always united in the same individuals; while the possessors of the first gift appeared as pleaders (patroni), those who had the second assisted with their advice on legal points (advocati): although the 'advocates' in the strict sense were sometimes merely influential men who gave weight to the litigant's case by their presence on his side."

A writer in an English law review ‡ explains that "The theory that the services of Counsel are gratuitous, which has prevailed throughout western Europe, may be traced to the practice of Republican Rome. In these early days the Bar was the road to office, or since the advocates were usually men of wealth and position,

* Sharswood's "Ethics." Reports American Bar Association, XXXII (1907), p. 136 *et seq.*

† "The Legal Procedure of Cicero's Time," p. 148.

‡ 34 *Law Magazine and Review.* "Counsel's Fees," by Hugh H. L. Bellot.

pecuniary reward was viewed with indifference and regarded as degrading. With the Empire, however, office had lost its inducements both from a pecuniary and a political point of view. The profession of advocacy began to be followed for the sake of its emoluments, and although the old theory survived as a tradition, the scale of fees was carefully regulated by law."

In a more modern address * Mr. Boston summarizes the ethical conceptions of the Roman Bar. He finds that "It was there required that an advocate should render professional services when requested unless there was just ground of refusal; that he should prosecute or defend with diligence and fidelity even against the emperor; that he should not be blind or deaf; and should be of good repute; that he should not have been convicted of an infamous act; that he should not be advocate and judge in the same cause, nor be judge in such cause even after the termination of his advocacy; that after judicial appointment he should not practice as an advocate; if advocate in a cause he should not be witness therein; that he should use the utmost care and attention; that he should be liable for the damage caused by his fault; that his concept (or pleading) should contain no matter punishable or improper; that he should explain the law to his clients, and warn them against transgression and neglect; that he should advise them of the lawfulness or unlawfulness of their cause of action; that he should not undertake an unjust cause, or be used as an instrument of chicanery, malice or other unlawful action; that he

* Charles A. Boston: "The Recent Movement toward the Realization of High Ideals in the Legal Profession." Address delivered before Section of Legal Education, Aug. 29, 1912. Vol. XXXVII, A. B. A. Reports, pp. 765, 766.

should abstain from invectives against the judge, his adversary or opponent, both client and advocate; and that unpleasant truths, if necessary, should be mentioned by him with the utmost forbearance and in moderate language; that he should not betray his client's secrets, nor make improper use thereof, and he should preserve them inviolably, and should not testify concerning them — his punishment was the payment of all damages, a fine, or imprisonment, or suspension or removal; and the severest penalty was meted for the betrayal of his trust for the benefit of the opposition. At times he was forbidden to receive any reward; or to receive any prepayment; at times his compensation was regulated by law, in the absence of agreement; contingent fees were prohibited under penalty of revocation of license; and a conditional larger fee was prohibited unless the agreement was made after the conclusion of the cause; he might receive an annual salary, had a retaining lien and could enforce redress by petition to the court."

France. Herman Cohen, writing on "The Origins of the English Bar"* says: "Every Bar in the world seems to derive its ultimate origin from Rome. In this country (England) the chain is Rome, Gaul, France, Normandy, England." He found in the Capitularies of Charlemagne in 802 the first mention in France of the profession of the advocate. They provide, "That nobody should be admitted therein but men, mild, pacific, fearing God and loving justice, upon pain of elimination. . . ." He quotes Jones ("History of the French Bar") as his authority for the explanation of the dark obscurity enveloping the Bar between the time of Charlemagne (800) and St. Louis (1226–70). He believes the explanation for the darkness

* 30 *Law Quarterly Review*, pp. 464 *et seq.*

of all France during this period is to be found in "the barbarous usage which then prevailed of consigning the fate of all judicial contestations to duel which the latter prince abolished." Apparently, even in France, the existence of a trained Bar was regarded as a better institution for securing justice than the highly honored duel of the French gentleman. "Mine strong advocate shall protect me rather than mine strong right arm."

Paul Fuller tells us* that "A decree of Philip the Bold in 1274 and a later one in 1291, subjected advocates to a common discipline, and even at that early date, required them to take an oath, that they would plead none but just causes; would never demand an honorarium exceeding 30 livres; would never use opprobrious language, nor entail vexatious delays." To this day, "The most unquestioned probity is an essential to the acceptance of the candidate" for admission to the Bar. And as "guaranty that nothing can interfere with the applicant's exercise of his profession in the sole interest of justice" he must have an individual domicil, "over which the applicant has full control, where those in need of his assistance may call at any time without hindrance from others." In France — unlike our own country — the lawyer may not engage in any other occupation which may detract from his complete devotion to the interests of his clients. ". . . a lawyer may not therefore be a salaried employee and keep his place at the Bar." If he becomes the occupant of a public office he is immediately, though but temporarily, suspended from the Roll of Barristers, to which, says Mr. Fuller, "he may be reinstated upon regaining his freedom" — note Mr.

* "The French Bar." Address before The Association of the Bar of the City of New York.

Fuller's grim humor — "to give his time wholly to the profession." There is in our present day a very marked and increasingly strong public opinion that the lawyer engaged in public service shall not be counsel for private interests. Mr. Fuller reminds us that in 1913 it had been reported as an unusual circumstance that the distinguished Advocate and Statesman Poincaré, elected to the Presidency of the French Republic, had made a special request that during his incumbency of that office — accepted for the good of the public and the State — he should have the rare privilege of having his name retained upon the Roll of Barristers as a member of the Order to which he is devotedly attached. Not only was the petition granted, as we are told, but confirmed in a grand tribute from the Bar.

The applicant for admission to the Order of Barristers must have first received his degree as Licencie in law after three years of study in a recognized university. He files his degree with the Solicitor-General — the "hierarchical head of all state attorneys." Upon notice to the Bâtonnier of the Order — the head of the Order — the applicant is presented to the Court to take his oath of office. He then solemnly swears "that he will never say or publish, as counsel or advocate, anything contrary to the laws or regulations, to good conduct, to public peace, or the safety of the state; that he will never be wanting in the respect due to the courts, and to the public authorities." He is then put upon probation — enters upon the first stage of his profession, becomes an apprentice in his guild. He serves three years of this apprenticeship under the guidance of a member of the Order designated by the Bâtonnier. After this period — if he satisfies all the moral and educational requirements —

his name is inscribed upon the Roll of Advocates and he becomes a full-fledged member of the Order of Advocates.

In France, as in England, lawyers are divided into two classes, *Solicitors* as they are known in England, *Avoués* in France, and *Barristers* as they are known in England, *Avocats* in France. Before Justices of the Peace, the Conciliation Boards — charged with the passing upon disputes between employers and workmen — and commercial courts, parties may appear and plead personally. In other courts, they must appear by attorney or trial lawyer (avocat) or solicitor (avoué).*

Though France is a much older country and has a much older Bar, the problem of the expensiveness of litigation has not yet been solved even in that country. Our recent Government treatise on the subject † advises us that though "in commercial cases, the costs will rarely exceed 15 to 30 per cent of the amount in dispute" and though the defeated party bears all costs — "it is often stated by French lawyers that unless an amount of $100 is involved, it is not advisable to commence legal proceedings." For "inasmuch as the costs are not proportioned to the amount in litigation, a small case may often be as expensive as a more important one." On the other hand, it is to be noted that the workman has his industrial court where at practically no expense he can get relief. These industrial courts are an important factor in Europe.‡

Mr. Fuller tells us that the standards and traditions of the Order of Avocats in France are of the highest and

* Commercial Laws of England, Scotland, Germany and France. Department of Commerce, Bureau of Foreign and Domestic Commerce. Special Agents' Series (1915), No. 97, p. 94.

† *Idem*, pp. 94–5.

‡ Bulletin 98, Bureau of Labor Statistics, U. S. Department of Labor.

most exacting character and that what Camus in his Letters to the Profession in 1772 said of it then is still true to-day: "The exercise of the profession of the law should lead to honor, not to fortune. The first element which wins for a lawyer the esteem of sensible people is that he has set aside lucrative occupations, for the most part less painful and less laborious, to devote himself to one which promises little but honor to its most successful members." And that the character of the lawyer as now understood in France is as it was understood in 1772 by Camus: "To devote oneself and all one's faculties to the good of others; to give oneself up to long study in order to resolve the doubts which many of our laws engender; to become an orator, the better to assure the triumph of upright innocence; to consider the privilege of holding out a helping hand to the poor as a reward preferable to the most expressive gratitude from the rich and great; to defend the wealthy from interest and the indigent from duty. These are the traits which should characterise the lawyer."

In one of the annual addresses delivered by the Bâtonnier to the entire Order, including the probationers, M. Rousse, lamenting the love of luxury, the thirst for money, which "more modern methods were instilling into the public, and from which the traditions of the Bar had much to fear," said: "Equivocal customs, suspicious familiarity, harsh demeanor and sharp exactions hitherto unknown to us have too often taken the place of that good faith of olden times, the proud scorn of money, unfailing self-respect, all those noble chimeras that uplift and ennoble life; which are not perhaps requirements of duty, but are, indeed, the luxury of high souls, and which are known in a word by the name of honor.

"These faults and weaknesses are not those of the Bar alone, they are the faults and weaknesses of our time. The passion for wealth and for high places, political intemperance, love of popularity, exaggerated self-esteem; these are what we see everywhere about us, and which work to our discomfiture. If some few among ourselves have seemed to be more wrapped up in the rapid growth of their wealth than in the preservation of their dignity, it is because they have been swept on by this almost irresistible current of false doctrine and bad morals which threaten to carry the Bar as well as the country to evil."

Mr. Fuller reminds us that "Advocates plead wearing their caps. This privilege of standing covered before the Courts is a symbol of equality and independence which has its value; it evidences the freedom of speech which should be allowed to counsel, — as it was the privilege of the Spanish grandee not to uncover in the presence of the King; only from those who stand on an equality may the whole truth be expected. When Marshal Ney was brought to trial before the House of Peers on a charge of high treason for going over to the Napoleonic standard on the return from Elba, he was defended by the great Dupin, who was forced to uncover before this High Court, which claimed the right to ignore the requisite of ordinary judicial proceedings, and, according to Dupin, he was forced not only to uncover, by the removal of his barrister's cap, but by a corresponding hindrance to the freedom of his defense. This may explain his denunciation of the growing custom of judicial impatience."

If the profession of the law has its honors, he said, it has also its annoyances, and among these, the most trying,

against which lawyers in all times have most complained, and which on occasion has excited their resentment and animosity, — is to be needlessly interrupted, and hectored without cause, during the progress of an argument. Such interruptions are the more to be regretted that they are apt to bring on altercations between Court and Counsel in which self-love plays so great a part that it is difficult for counsel to hold an even balance and avoid excess, while the Court may well become at once Judge and Avenger.

The discipline of the Bar is by the Bar itself — by the Council of Discipline. Since 1662 this jurisdiction has resided in the Order of Barristers itself, with the exception that the disbarment of a member requires the sanction of the Court.

Spain. In Spanish-speaking countries, the term *abogado* (advocate) was applied to designate the professor of jurisprudence, who, when authorized by his client, dedicated himself to defend in judicial proceedings, in writing or orally, the interests or claims of litigants.*

Lawyers or advocates are not found in Spain until the time of King Alfonso X. Under the old Gothic law the parties litigant had to appear in person before the judges to defend and argue their cases. No one might represent another, except that husband might appear for wife, the head of the family for his servants, and high personages, like bishops, ricos hombres, or grandees, who either through privilege, or for fear that justice might not be administered properly, had to be represented by other persons, called "procurators."

* "Admission of Attorneys from the Spanish Standpoint," by Manuel Rodriguez-Serra. Proceedings before American Bar Association, Section of Legal Education, 1910, Vol. XXXV, p. 840.

When Spain began to study the laws of Rome, the study of jurisprudence extended throughout Castile and the Laws of Partidas, compiled by order of King Don Alfonso X, made the legal profession one of the institutions of State, and provided that no one could practice without first an examination by a court, after making a solemn oath, and registering his name in the Roster of Lawyers. Under the laws of Partidas (codified in the 13th Century) any person being well learned in the law could be admitted to practice.* The university degree of Licentiate or Doctor in Civil and Canon Law became an indispensable requisite to admission to practice and before entrance to the university, the students were required to pass examinations in subjects equivalent to the learning required for the degree of Bachelor of Arts. Though the profession was open to all classes of society, it was considered "so honorable and worthy that the mere fact of being a graduate of the law schools and having been admitted to practice, carried with it the privileges of nobility, and all of the exemptions appertaining to that class." †

The Spanish advocate must take oath (renewed each year) "to fulfil well and faithfully the duties of office and not to take nor continue causes in which, to their knowledge, their clients are not entitled to the remedy sought.

* "Admission of Attorneys from the Spanish Standpoint," p. 841.

† *Idem*, p. 842. In Spain, the Bar "has always held a high and privileged position in Society, which it is difficult to reconcile with the despotic character of the government. Almost all the universities were founded for the promotion of civil and canonical jurisprudence; and an advocate, by virtue of that character and without reference to birth, enjoys almost all the principal privileges of the nobility." — "The Continental Bar." *The Law Magazine*, V. 13, p. 287, at pp. 306–307.

"To swear that at any stage of the proceedings, on being required by the judges or the opposite party, they would cease to defend their clients, on learning that they are not entitled to judicial relief.

"To take charge of cases committed to them by the courts at the instance of litigants who could not find a lawyer.

"To require from their claimants a statement of the facts of their case signed by them, or by a reliable person, so that at all times it might be known by the client that the lawyer did for him what was proper and necessary.

"To defend gratuitously poor clients where there were no lawyers paid for that purpose. There were in all chanceleries and audiencias a number of attorneys for the poor, annually elected by the college of lawyers for that position.

"To assist faithfully and with great diligence to their clients, alleging the facts to the best of their knowledge, procuring true and convenient evidence, studying the law of each case for the better defense, personally examining the facts, and being responsible to their clients for all damages, losses and costs which they might suffer, due to malice, negligence or incompetency of the lawyer.

"To be moderate in their pleadings and particularly in their oral informations, and finally to keep and fulfil in so far as they are concerned, all laws and rules concerning the orders of trials and proceedings." *

Spanish lawyers are prohibited from stipulating "with their clients that the fees would be a percentum of the amount to be recovered, or what is called the contract of *quota litis* (the contingent fee). The violation of that rule was punished with permanent disbarment." The

* "Admission of Attorneys from the Spanish Standpoint," p. 842.

Spanish lawyer is charged not "To allege things maliciously, ask for extensions of time to prove already known facts, or what they believe could not profit or could not be proved; or to reserve exceptions to the end of the case or to the second instance, for the purpose of causing delay, or to advise their client to bribe witnesses, etc., and to allege laws, knowing that they are false or do not exist." *

* "Admission of Attorneys from the Spanish Standpoint," p. 843.

CHAPTER V

AN OFFICER OF THE COURT (CONTINUED)

Italy. Italy,* naturally, traces the origins of her Bar back to the time of Rome. There is a clear distinction between the advocates (the barrister in England or avocat in France) and the procurator (the solicitor in England or avoué in France). There are two Colleges (Bars) in Italy, one for the advocates and one for the procurators. Each of the sixty-nine provinces of the kingdom has generally a Court of Appeal, and in all these courts there is a College (a Bar) of advocates. The studies necessary to become an advocate require a total period of nineteen years, five years of elementary school, eight of classical studies, four of jurisprudence in the university and two of practice. A young man in Italy who has been diligent in his studies may become enrolled in the Order of Advocates at twenty-five or twenty-six. But before he may plead before the Supreme Courts of Cassation and the Council of State he must have practiced as a lawyer for at least five years. Each College of Lawyers (Bar) is governed by the Council of the Order, which is charged with the duty of maintaining the dignity and independence of the profession, "must repress abuses and faults of which advocates may be guilty,

* The paper by Signor Avvocato Gastone Del Frate, of Rome, Italy, on "The Italian Bar," read at the Association of the Bar (N. Y. City), Oct. 13, 1914, furnishes the basis for the statements made in this chapter concerning the Italian Bar

must interpose to settle questions between advocates and clients or between advocates and advocates." These Councils have power to admonish, to censure, to suspend for not longer than six months and to expel.

In Italy, a lawyer may not be a notary, a Stock Exchange broker, a mediator, or hold any office or public position which carries a salary from the government, except that of professor in a university. The advocates, as well as procurators, are "obliged to exercise their functions with probity and delicacy." They must give gratuitous service to the poor. They are responsible to their clients for any loss the latter may suffer by reason of the advocate's fraud, negligence or ignorance.

One privilege the Italian lawyer possesses which no American lawyer can ever hope to acquire. According to Signor Frate, he may speak as long as he pleases — that is, as long as he deems it in the interest of his client. Modern Italy changed the old Roman practice where the judge determined the time allowed the pleader by means of a *clessidra* or hydraulic clock. Signor Frate says, "In modern Italy it is not unusual, especially in criminal cases, for an advocate to speak for two or three days consecutively, and as one may be assisted by as many advocates as he wishes, it frequently happens that the defense consumes an alarming amount of time. . . . " Baron Reading, Lord Chief Justice of England, upon his recent visit to this country, said that his experience while seated on our U. S. Supreme Court bench — where time limit is strictly enforced against the lawyer — would lead him, upon his return, to admonish his profession in England upon this matter of time limit for argument. There will be grave danger of an exodus of English lawyers to Italy.

Russia. In Russia, prior to 1864, Peter the Great, taking as his model the inquisitorial procedure of Western Europe as he then found it, established a system in which lawyers played about as much part as Chinese lawyers play in their courts to-day. Leroy-Beaulieu tells us that the Russian courts "operated in shade and silence, away from the public, out of hearing of the litigants, out of sight of the accused. The procedure, both criminal and civil, was carried on in writing and under the seal of secrecy. The judges only appeared for the purpose of pronouncing sentence or rendering judgment." * This secrecy, combined with the fact that the judges were ill-paid, led to universal bribery and corruption. "The courts of justice, wrapped in gloom, were a sort of auction room, in which men's property and liberty were made the object of a shameless traffic. The lawyers who were entrusted with the interests of the litigants, were nothing more than brokers between judges and clients. Sentences were sold at auction; the symbolical scales of justice served to weigh not so much rights and titles as offers and presents." * On top of this came multiplication of courts — apparently on the theory that the more judges the more opportunity for corruption — until "documents accumulated from court to court, till none but the clerks who had written them could tell their gist; costs were piled up; and all this, combined with the confusion caused by the chaotic mass of imperial ukazes, ordinances and ancient laws — often inconsistent or flatly contradictory — made the administration of justice, if possible, more dilatory and capricious than in the old, unreformed English court of

* Anatole Leroy-Beaulieu: "The Empire of the Tsars and the Russians" (English Translation), Part II, p. 260.

chancery."* Wallace says: "Down to the time of the recent judicial reforms the procedure in criminal cases was secret and inquisitorial. The accused had little opportunity of defending himself, but, on the other hand, the State took endless formal precautions against condemning the innocent. The practical consequence of this system was that an innocent man might remain for years in prison until the authorities convinced themselves of his innocence, whilst a clever criminal might indefinitely postpone his condemnation." † "The judges were not so by profession; they were merely members of the official class (chinovniks), the prejudices and vices of which they shared." ‡ Wallace says: "Instead of endeavouring to create a body of well-trained jurists, the Government went further and further in the direction of letting the judges be chosen for a short period by popular election from among men who had never received a juridical education, or a fair education of any kind; whilst the place of judge was so poorly paid, and stood so low in public estimation, that the temptations to dishonesty were difficult to resist. . . . Even when a judge happened to have some legal knowledge he found small scope for its application, for he rarely, if ever, examined personally the material out of which a decision was to be elaborated. The whole of the preliminary work, which was in reality the most important, was performed by minor officials under the direction of the secretary of the court. In criminal cases, for instance, the secretary examined the written evidence — all evidence was

* "Encyclopædia Britannica," 11th Edition, Russia, p. 877.

† Sir Donald Mackenzie Wallace: "Russia," p. 563 (1881), p. 517 (1905).

‡ "Encyclopædia Britannica," 11th Edition, Russia, p. 877.

taken down in writing — extracted what he considered the essential points, arranged them as he thought proper, quoted the laws which ought in his opinion to be applied, put all this into a report, and read the report to the judges. Of course the judges, if they had no personal interest in the decision, accepted the secretary's view of the case. If they did not, all the preliminary work had to be done anew by themselves — a task that few judges were able, and still fewer willing, to perform. Thus the decision lay virtually in the hands of the secretary and the minor officials, and in general neither the secretary nor the minor officials were fit persons to have such power." *

M. Leroy-Beaulieu believes that the reforms of Alexander II, the "tsar emancipator," by which was introduced the judicial system established by the Statute (Sudebniye Ustavi) of November 20, 1864, constituted a fundamental change in the conception of the Russian state, which, by placing the administration of justice outside of the sphere of the executive power, ceased to be a despotism. The "epoch of the great reforms" (1855–65) included the liberation of the Serfs from the arbitrary rule of the landowners and the replacement of the old tribunals — justly called "dens of iniquity and incompetence" — by civil and criminal law courts.† This new system, taken partially from the English and partially from the French system,‡ separated the judicial from the administrative functions. (Note the similarity of the old system with the still prevailing system

* Sir Donald Mackenzie Wallace: "Russia," p. 559 (1881), pp. 511, 512 (1905).

† "Encyclopædia Britannica," 11th Edition, Russia, p. 904.

‡ Leroy-Beaulieu: "The Empire of the Tsars and the Russians" (English translation), Part II, p. 266.

of Chinese administration of justice.) Under the new system, the judges and courts were given a measure of independence, there was publicity of trials, oral procedure, and all classes were made equal before the law. Trial by jury was introduced in criminal cases and in one branch of the judicial system (viz.: the justices of the peace) judges were made elective.*

It is interesting to observe that in taking over part of the English system, the reform of 1864 brought in the elected justice of the peace with jurisdiction over petty causes, both civil and criminal; and the remainder of the system is modelled on the French system of nominated justices, sitting with or without a jury to hear important cases. The justices of the peace are not lawyers, are elected by the municipal dumas in the towns and by the zemstvos in the country districts, and hold office for three years.† Though these are noble landowners, they are reported to be almost exclusively of very moderate means and prejudiced in favor of the poor mujik rather than of the wealthy landlord. At the request of both parties to a suit, the acting justice of the peace calls in an honorary justice (pochetni mirovoy sudia). These "honorary justices" are men recruited mainly from the higher bureaucracy and army. Besides these, there were the Volost courts (under the law of 1861), made up of judges and juries, themselves peasants, elected by the peasants, which have jurisdiction in all civil cases involving less than 100 rubles. They act also as police courts in cases of petty thefts, they punish infractions of the religious law, husbands who

* "Encyclopædia Britannica," 11th Edition, Russia, p. 877.

† This office has since been reorganized. The elected justices of the peace have been replaced by appointive district judges.

beat their wives and parents who ill-treat their children. Flogging, as a penalty, instead of fine or imprisonment, is not unknown. As late as 1880 — we are advised by M. Leroy-Beaulieu * — the favorite method of paying one's fine was in vodka, which was often drunk in the court-room by both the parties to the suit and the judge. These peasant courts were abolished by the ukase of October 18, 1906.†

During the later years of Alexander II and the reign of Alexander III the bureaucracy gradually took back much of the reforms of Alexander II's early reign.

In 1881, Sir Donald Mackenzie Wallace, studying Russian conditions as they then appeared, said that a modern system "cannot be successfully worked without a large body of able, respectable, trustworthy advocates, and such a body has not yet been formed." ‡ But with a judicial system so recently developed, he could hardly expect to find a highly developed or well-disciplined Bar.

To-day the only university within the territory of Russia which is without a law school is the Siberian University (Tomsk).

The Bar, in the modern sense of the word, was unknown in Russia prior to the judicial reforms of 1864. Under the codes of 1864 the Bar became a self-governing body. Every counsellor-at-law is, by virtue of his office, a member of the General Assembly of Counsellors of his Judicial District. This Assembly meets periodically and elects a Council. The Council has exclusive juris-

* "The Empire of the Tsars and the Russians," Part II, pp. 284–5.

† "Encyclopædia Britannica," 11th Edition, Russia, p. 878, n. 3.

‡ Wallace: "Russia" (1881) p. 568. Cf. Edition 1905, Chapter XXXIII, The New Law Courts.

diction over admissions to the Bar, as well as disciplinary power over members of the Bar, though appeals from its decision may be taken to the Appellate Court of the Judicial District in which the matter arises. I am informed that appeals from the decisions of the Councils of the Bar are very rare.*

There are three grades of legal practitioners to-day in Russia. The first grade is Counsellor-at-Law ("Sworn Counsellor"). The second is Attorney-at-Law, whose Russian cognomen is "Assistant Sworn Counsellor," or "Associate Sworn Counsellor." And the third grade is Solicitor. Any graduate of good moral character from a university law school is eligible to admission to the second grade, but in order to secure admission must find a counsellor who, accepting him as "Assistant," becomes his "Patron." This Assistant must practice under the guidance of his Patron for five years, after the expiration of which time he first becomes eligible for admission to the first grade. There are no examinations provided by law. In 1874, because of the lack of law school graduates in sufficient number, producing a shortage of attorneys in a considerable number of the smaller towns and cities of Russia, the Government created still a lower grade of practitioner called Solicitor or "Private Attorney." This gentleman does not need to be a university graduate, passes an examination before a committee appointed by the Court, consisting usually of some of the judges, and is required to obtain a separate license from each Circuit Court before which he intends to practice and from each Appellate Court

* For the foregoing information and for information in the succeeding paragraphs I am indebted to Dr. Isaac A. Hourwich, member of the New York Bar, whose familiarity with modern Russian conditions is well known.

and Assizes of the Justice of the Peace as well. The status of the Attorneys-at-Law (second grade) was left indefinite by the codes. It is not clear whether they were to be permitted to practice in their own names or were merely to be regarded as law clerks employed in the offices of their Patrons. I am advised that the Russian judicial procedure does not involve the maintenance of a clerical staff such as we have in our own country. In civil cases the attorney draws his own pleadings, but all other papers, beginning with the summons and including all orders, notices, decisions, decrees and judgments, are drawn by the clerk of the court. In consequence, there is small demand for law clerks. The supply of university graduates for clerkships with Counsellors-at-Law was greater than the demand. Accordingly, during the first decade of the new institutions, these so-called "Assistants" were permitted to appear in court as practicing attorneys and their relation to their "Patrons" remained purely nominal. When the Government established the grade of Solicitors, it provided that Attorneys-at-Law should procure licenses as Solicitors, the distinction between a Solicitor and an Attorney-at Law residing only in the fact that the latter is eligible after five years to become a Counsellor-at-Law, while the former is not. In later years the St. Petersburg and Moscow Councils of the Bar adopted rules of practice modifying the status of the Attorneys-at-Law. "Commissions of Assistant Sworn Counsellors" were created, similar to the Councils of the Bar. All Attorneys-at-Law became, by right, members of the "General Assembly of Assistant Counsellors-at-Law." This Assembly meets periodically and elects, analogously to the procedure of the Council of the Bar, a Commission,

but this Commission has no jurisdiction over admission to the Bar nor disciplinary powers. It acts, however, in an advisory capacity, subject to the approval of the Council of the Bar. In St. Petersburg and in Moscow all the Attorneys-at-Law are divided into "Groups" which meet and discuss questions of law under the tutelage of some experienced Counsellor-at-Law who has been appointed for that purpose by the Council of the Bar. During the five years of his term, before he may apply for admission as Counsellor-at-Law, every Attorney-at-Law must read at least three papers. This is the full extent of the present supervision of the Counsellors-at-Law over their "Assistants." The Bar Associations described above existed in three Judicial Districts, namely, in the St. Petersburg, Moscow and Kharkov Districts. Dr. Hourwich writes me:

"After a lapse of about a dozen years the Russian Government became alarmed over its own liberalism in allowing a body of private citizens to meet and talk in public about their own affairs. As a result, when the new Codes were extended over the rest of the Empire, no Councils of the Bar were authorized. The jurisdiction over admission to the Bar, as well as disciplinary powers over members of the Bar, were conferred upon the Courts." But he says that, as a matter of actual practice, the Courts themselves established advisory bodies analogous to the Councils of the Bar. In Moscow Counsellors-at-Law are admitted and Attorneys-at-Law are regulated by the Council of the Bar, while in Odessa they are "recommended" for admission by the quasi-official Council and are admitted by the Court. In the latter instance, the action of the Court is a mere formality.

Wallace, writing of conditions as he observed them prior to 1881, said: "Now it seems to me that the professional moral standard of the Bar in Russia is still in an embryonic state, and that the individual members are, almost without exception, animated by a rapaciously commercial, mercenary spirit." As illustrative of the fine *business* aspect of the profession then prevailing — a sort of indicia of what our own Bar could do if it were to be lowered to "business" standards — Wallace tells us that the "lawyer" would make a contract with his client, contingent upon success * and that this applies also in criminal cases, where the remuneration is in inverse ratio to the severity of the sentence. By way of example — "after perhaps a good deal of hard bargaining" the prisoner would promise to pay 10,000 roubles (about $5,000) if he is acquitted, 5,000 if he is condemned to a year's imprisonment, and 1,000 if he is transported for fifteen years to Siberia, and with a fine eye to business first, the advocate takes good care that a substantial part of the fee is paid in advance. Wallace tells us of still worse practices that then prevailed. Lawyers not only sold their services "as dear as possible, but sometimes use dishonest means for raising the price." "One of the most common methods is to frighten the client by describing in vivid colors, or positively exaggerating, the dangers to which he is exposed." While the case is going on, it was frequently the case (1881) — says Wallace — for the lawyer to demand "a large sum for secret purposes — that is to say, for 'greasing the palm' of influential officials." And he observes: "Both of these devices are unfortunately only too often successful. The old belief that litigation and criminal

* Wallace: "Russia" (1881), p. 569.

procedure are a kind of difficult game, in which victory must always be on the side of the most dexterous player, irrespective of justice and equity, and that bribery and back-door influence are indispensable for success, is still deeply rooted in the popular mind." We begin now to understand why the Russian immigrant, coming during the eighties and nineties direct from this atmosphere of trickery, bribery, professional misconduct, judicial dishonor, and barter and sale of justice for money, upon arrival in America looked for a similar kind of administration of justice, for ". . . among the people, especially the uneducated mercantile classes," there was then "a blind, childish faith in the omnipotence of the most celebrated advocates, and some of these, dexterously using this faith for their own ends, have succeeded in amassing large fortunes in an incredibly short space of time." The Russian immigrant of 1890, 1900, or 1910, who drew upon his home experience for ideals of our profession was certain to think of us all as purchasable and purchasable for any kind of service. Wallace says that at that time (1881): "So lenient is public opinion in this respect, that professional reputation is not seriously affected by affairs which in England would lead to disbarring and disgrace. *Symptoms of a change for the better have indeed already appeared.*" Dr. Hourwich, commenting upon this, writes that this is now all "antique history," and he is confirmed by the fact that in the 1905 edition of his book Sir Donald Mackenzie Wallace has eliminated all of this reference to the lawyer. A lawyer who would to-day do any of the things described by Sir Donald Mackenzie Wallace in 1881 would be disbarred, if detected.

Dr. Hourwich says (1915): "After an acquaintance of

22 years with the courts and lawyers of this country (America), I am led to believe that on the whole the professional standing of the lawyers in Russia is higher than it is here. Of course, one must always bear in mind that this applies only to the Counsellors-at-Law, and the Attorneys-at-Law, who form a sort of aristocracy of the bar in Russia. The 'Solicitors' are, on the contrary, looked down upon as a lower estate." In thirty-five years — since Wallace wrote — the Bar in Russia has lifted its head out of the mire and muck of despotism, bureaucracy, chicanery and corruption. From 1864 to 1875 it was but "an *extempore* creation of the new judiciary institutions." When the new courts were first opened (1866), all classes announced themselves as lawyers on their own authority — "men without a profession, placemen without a place, discharged, retired army officers or non-commissioned officers, ruined tradesmen or bankrupt merchants. The bar suddenly became the haven of every human wreck destitute of means of existence, but possessed of sound lungs and larynx." * To protect themselves, the courts were obliged to impose some limitation. They issued certificates to anyone whom they considered deserving.† The attorneys of Russia have a Bar Association to-day.† The Bar of Russia is now a real guild. The young Russian Bar, says Leroy-Beaulieu, has risen to a really high intellectual standard, at least in the larger cities.‡ "In the course of these last fifteen years, so crowded with con-

* This applies only to the criminal branch of the court, where any citizen, not a member of the Bar, may appear as counsel for the prisoner, or defendant.

† See *ante*, p. 69 *et seq.*

‡ Leroy-Beaulieu: "The Empire of the Tsars and the Russians" (English translation), Part II, p. 335.

spiracies and political trials, not one of the accused has gone undefended."* He tells us that every Russian charged with political crime "has seen a man rise up by his side who has dared to do battle, in his name, with the representatives of authority, over the charges brought up against him." Again, they are accorded the honor of having been the first to claim and fight for free speech — in a country where the right of assembly is so completely denied. "In a country where military bravery is so common, they were the first called upon to give an example of the hitherto unfamiliar virtue of civil courage."† One of Leroy-Beaulieu's friends — a Russian lawyer — said: "You shall see yet that, in the history of Russia's political development, the bar will hold a broad place."

Leroy-Beaulieu makes this comment: "I do not know whether the future will justify this proud prophecy. Since I heard it, imperial decrees and restrictive regulations have been issued, which, by curtailing the offices of justice and by burying the most moving cases behind closed doors, out of public sight and hearing, threaten to set back the time when such predictions may be realized. A study of criminal justice and an examination into the exceptional laws decreed in consequence of attempts at political assassinations will enable us to realize what ordeals await the Russian bar and how hard it is sometimes made for it to pursue its noble task."‡ Yet the young Bar of Russia continues to make its ideals felt, courageously and intelligently, fighting even against the Government itself.

* Leroy-Beaulieu: Part II, p. 337.
† *Idem*, pp. 337–8.
‡ *Idem*, pp. 339–340.

Germany. If, crossing the border line, we travel into the land of the Central Powers — we must, of course, preserve strict neutrality — we shall find in Germany in this field, as in many others, a policy of preparedness older in point of time and thoroughness than in any other country.

"There is no student in Germany who is simply a 'student,' swimming in the broad stream of general knowledge. The German student has to decide immediately whether he is to be lawyer, physician, clergyman."*

Moreover, he must determine very early in his career whether his profession is to be that of lawyer or judge, for in Germany, unlike our own country, judges are not taken from the Bar, "the two careers do not follow each other but are parallel to each other. The tree begins to grow in two separate parts as soon as it is above the ground of preparatory education, which education, however, is common to both parts." †

The German lawyer in process of making goes to gymnasium when he is nine years old (after three years in a grammar school) and stays in gymnasium for a full nine years — at eighteen or nineteen he is ready to enter a university. He is then introduced first, in a scientific way, into the origin, the necessity, the importance and the meaning of the law, and he becomes familiar with the broad provinces of jurisprudence, both public and private law. He traverses the whole of European Continental jurisprudence; then he takes an examination for admission, following which he enters upon a highly practi-

* "The Education of the German Lawyer," Karl von Lewinski. Vol. XXXIII, American Bar Association Reports, p. 814, at p. 815.

† *Idem*, p. 814.

cal course like the training of a doctor in a clinic. At this point his educators become the judges and counsellor-at-law; he learns by actual practice in the courts. He gradually goes through all the different kinds of courts in Germany under the tutelage of a judge and he sees and studies all sorts of court-work from the Bench, sitting near his teacher. There are just about enough judges to make it practicable to give each novitiate the guidance of a judge. In addition, the student gets opportunity to see the work of the state's attorney and counsellors-at-law. Frequently, he must prepare and deliver a written opinion to his teacher-judge, which the latter corrects and discusses. After a year of this practice, the young man spends four more months apprenticed to a state's attorney, after which six months more with an experienced practicing lawyer, and then submits himself to a grilling examination before a commission of high standing, consisting of judges and lawyers of extensive experience.

By the time the lawyer gets his feet on this rung of the ladder — according to von Lewinski — he has become twenty-seven to twenty-eight years of age. He now branches off. From "assessor" he becomes either a state's attorney, a counsellor-at-law or a judge. If he becomes a lawyer his title is changed to "rechtsanwalt," which is equivalent to our American title of counsellor-at-law.

If he wants to become a judge, he becomes an "assistant judge" and for four or five years works on a compensation of about fifty dollars per month! His period of practical preparation covers a course of sixteen years' study.*

* Vol. XXXIII, American Bar Association Reports, p. 826.

No course in our country compares in severe drilling with this one. This general German system of legal preparedness, of course, begets an efficient lawyer and an efficient judge. The moral standards are quite as high as the intellectual standards. The lawyer takes oath "to fulfil scrupulously the duties of an advocate."

The result of all this preparation, as pointed out by Ernest Freund,* is to give the lawyers and judges a more thorough and more scientific knowledge of the law than we get in our own country. "There it can hardly happen that a lawyer is almost ignorant, either altogether or partially, in some department which is not his specialty. On the other hand, the German system excludes necessarily a great deal of talent which would more than make up for the defects of education by native shrewdness and experience. The result is on the whole that the Bar in Germany shows a higher average of character and learning than here; but it is quite certain that the leaders of the German Bar are not superior, if indeed they are equal, in ability, to our foremost lawyers." †

Austria-Hungary. In Austria-Hungary, after completing a university course, the student is thoroughly grounded in Roman law, canon law, German law, ancient history — besides taking a course in philosophy, legal history and comparative statistics. It is not uncommon for the student also to go through a course in forensic medicine.‡ He has to go through a seven years' practical training before being permitted to practice.

As early as 1723 the Hungarian lawyer was obliged

* Vol. I, "The Counselor," pp. 131 *et seq.*

† *Idem*, p. 135.

‡ Edw. S. Cox-Sinclair: "The Bar in Austria-Hungary." 35 *Law Magazine and Review*, 42.

to take oath among other things "that wittingly he would accept no unjust cause; that against the due course of the law no one he would defend; that law-suits he would not willingly protract; and that by no secret bargain he would defeat the rights of his client," and according to an old law of Hungary, "If an advocate played his client false he was punished as a common cheat; if he left his client unprotected, to the disadvantage of his client, he was stamped with infamy; even if he addressed the Court with irrelevance or at excessive length after being thereto admonished he was treated as being guilty of contempt of Court, and was amerced or imprisoned accordingly." *

* Edw. S. Cox-Sinclair: "The Bar in Austria-Hungary." 35 *Law Magazine and Review*, 42.

CHAPTER VI

AN OFFICER OF THE COURT (CONTINUED)

English Bar. What is a Serjeant?

Who does not remember Serjeant Buzfuz, Mrs. Bardell's pompous and bullying lawyer in her breach of promise suit against Pickwick? We know, of course, that the English *barrister* is the great court-lawyer of England and the English solicitor the great business adviser and counsellor. And we know that the barrister has the right to appear in the high courts of chancery, while the solicitor may appear only in the lower courts. But what is a Serjeant? *

Everybody knows that he wears a wig. (Who thinks of an English court without a bewigged Bench and Bar?) "The barrister's wig, for his ordinary practice in the High Court, has a mass of white hair standing straight up from the forehead, as a German brushes his; above the ears are three horizontal, stiff curls, and, back of the ears, four more, while behind there are five, finished by the queue which is divided into tails, reaching below the collar of the gown. There are bright, shiny, well-curled wigs; wigs old, musty, tangled and out of curl; some are worn jauntily, producing a smart and sporty effect, others look like extinguishers." † ". . . but, when ar-

* See "Early History of the Serjeants and Their Apprentices," by Hugh H. L. Bellot, 35 *Law Magazine and Review* (5th Series), 138.

† Thomas Leaming: "A Philadelphia Lawyer in the London Courts," p. 5.

guing a case in the House of Lords he (the barrister) has recourse to an extraordinary head-dress, which is precisely the shape of a half-bushel basket with the front cut away to afford him light and air. This, hanging below the shoulders, has an advantage over the Lord Chancellor's wig in being more roomy, so that the barrister's hand can steal inside of it if he have occasion to scratch his head at a knotty problem, whereas his Lordship, in executing the same manœuvre, inevitably sets his awry and thereby adds to its ludicrous effect."* This "coif or covering," as it is called officially, has occasioned the antiquarians no little concern over its origin. In a little appendix to his "Ethics" (III) Sharswood says: "There exist some differences of opinion among judicial antiquarians as to the origin of the coif. It is supposed by some to have been invented about the time of Henry III, for the purpose of concealing the clerical tonsure, and thus disguising those renegade clerks who were desirous of eluding the canon restraining the clergy from practicing as counsel in the secular courts: Hortensius, 349. By others, it is referred to a much earlier period, when the practice in the higher courts was monopolized by the clergy, and those who were not in orders invented the coif to conceal the want of clerical tonsure: 1 Campbell's Lives of the Chief Justices, 85, note."

Sharswood says that in Fortescue's time sixteen years' continued study of the law was required before one could wear a coif, and no one could be appointed judge of the Superior Court who had not attained the degree of coif.

In 1839, the serjeants rebelled against an order of the

* Leaming: "A Philadelphia Lawyer in the London Courts," p. 45.

Crown, which was directed to the Judges of Common Pleas, and commanded them to open the Court to the Bar at large, upon the ground that it would help to despatch business. When the serjeants opposed this, Chief Judge Tindal (himself a former serjeant of great distinction) declared the order of the Crown to be illegal, saying that "from time immemorial, the serjeants have enjoyed the exclusive privilege of practising, pleading, and audience in the Court of Common Pleas. Immemorial enjoyment is the most solid of all titles; and we think the warrant of the Crown can no more deprive the serjeant, who holds an immemorial office, of the benefits and privileges which belong to it, than it could alter the administration of the law within the court itself." *

But Sharswood observes that under the Statute 9 & 10 Vict. c. 54, the privileges of serjeants in the Court of Common Pleas were extended to all barristers. So we learn that serjeants are *barristers* of an older tenure.

The oath of the serjeant is helpful to our study:

> You shall swear well and truly to serve the king's people as one of the serjeants-at-law; and you shall truly counsel them that you be retained with after your cunning and you shall not defer or delay their causes willingly for covetise of money and you shall give due attendance accordingly — so help you God.†

When we dig into the origins of the English Bar, we discover some very interesting and illuminating facts.

* 10 Bingh. 571; 6 *Id.* N. C. 187, 232, 235.

† "Early History of the Serjeants and Their Apprentices," by Hugh H. L. Bellot, 35 *Law Magazine and Review* (5th Series), 138, at p. 145.

Herman Cohen, an English lawyer,* sheds a shower of light upon this subject. He finds no trace of the professional lawyer in Anglo-Saxon England before the Conquest. "But he is there immediately afterwards — possibly immediately before." Cohen reports that there is preserved in the Chronicon of the Monastery of Abingdon (vol. II., p. 1 of the Rolls Series, 1858) "a writ of William I. (therefore before 1087) which is also printed in Bigelow's Placita Anglo-Normannica (1879, pp. 30–1)" headed by the latter: "*Abbot Athellelm v. Officers of the King.* The King by his writ directs that the customs of Abingdon, as they may be proved by the abbot, shall be respected. The rights of the Church proved by a charter of Edward the Confessor and by the testimony of the county; *the abbot being assisted by certain lawyers.*" Selden writes:† "In the Conqueror's 'fourth year, by the advice of his baronage, he summoned to London, *omnes nobiles sapientes et lege sua eruditos, ut eorum leges et consuetudines audiret,* . . . and afterwards confirmed them. . . . Those *lege sua eruditi* were common lawyers of that time . . . .' "

These, says our informant, "are the first known English professional and non-clerical lawyers" — that is, they only had one profession and that of law. ". . . they were not pleaders who went into court and litigated about great feudal interests in land or appeared for the Crown in causes célèbres, but were just persons whom any one could consult. If so, Selden's 'common lawyers' just hits them off."

* "Origins of the English Bar," *Law Quarterly Review,* Part I, Oct., 1914; Part II, January, 1915.

† Appendix to History of Tythes (Works, ed. 1726, Vol. III, col. 1334, "on c. VIII") cited by Cohen, "Origins of the English Bar," *Law Quarterly Review,* Part I, Oct., 1914, p. 466.

He quotes Foss ("Judges," vol. I, p. 160) for the statement: "The adoption at the Conquest of the laws of Normandy had rendered necessary the assistance of advocates from that country. The gradual combination of these with the English laws, and now (under Henry II) the application of the Roman law, many of the forms of which had been introduced into this island, had so materially increased the complexity of the study that it could only be pursued as a separate profession; requiring not merely that the advocates should be persons of learning and ability, but also that the judges should be masters of the science. He selected from the most eminent among them."

My English namesake found the beginnings of our friends the "serjeants" between 1150 and 1297. "Before and after 1181, says Mr. Bolland (Introduction 5 Year Book Series, lv), there were 'special officers in each hundred or wapentake who were made personally responsible for keeping the pleas of the Crown, such officers being known as *servientes hundredi or servientes Regis*.'"

Coke and Selden are Cohen's authorities for the statement that the Serjeants-at-law grew out of the *Servientes*. So the trail of the leonine gentleman leads back to this ancient lair.

What is probably the first Anglo-Saxon statute regulating the practice of the law was passed in 1275. (Stat. 1st of Westminster, c. 29).

"It is Provided also, That if any Serjeant, Pleader (*s'jaunt Cōtour*) or other, do any manner of Deceit or Collusion in the King's Court or consent (unto it) in deceit of the Court (or) to beguile the Court or the Party and thereof be attainted, he shall be imprisoned for a Year and a Day, and from thenceforth shall not be heard

to plead (*conter*) in (that) Court for any Man; and if he be no Pleader he shall be imprisoned in like manner by the Space of a Year and a Day at least; and if the Trespass require greater Punishment, it shall be at the King's Pleasure."

Again: "In 1300, c. 11 of the statute *Articuli super Cartas*, after prohibiting champerty, enacts: 'But it may not be understood hereby that any Person shall be prohibit to have Counsel of Pleaders (Consail de Contours) or of learned Men (*sages gentz*) in the Law for his Fee (*donant*) or of his Parents and next Friends.'"

In 1280 the citizens of London restricted appearance in courts to "such persons" as shall "reasonably understand and how becomingly to manage the business and the suits (*quereles*) of the substantial men. . . ." They prohibited all others from practicing, but permitted counsel as the litigant might wish.

We observe in this statute (1280) that one of the penalties for professional misconduct is *suspension* and that the citizens themselves desire protection against those who cannot "becomingly manage the business and the suits of the substantial men." To-day we seek to protect the "unsubstantial men" and we seek earnestly for those who can "becomingly manage" their business.

In 1292, Edward I ordered that the justices of the Court of Common Pleas should provide and ordain from every county attorneys and apprentices "of the best and most apt for their learning and skill who might do service to his court and people." * The ones so selected and only those were to attend the Court and transact business therein. One hundred and forty were then thought

* Pollock and Maitland's "History of English Law," Vol. I.

sufficient, but the justices were given power to add to or diminish this number as they saw fit.*

The ethics of the profession as they prevailed even at this time may be judged from the following extract from the *Miroir des Justices*, written in 1307 (reign of Edward II) by Andrew Horne: "Every pleader is to be charged by oath that he will not maintain nor defend what is wrong or false to his knowledge, but will fight for his client to the utmost of his ability; thirdly, he to put on before the Court no false delays; nor false evidence, nor move nor offer any corruptions, deceits, tricks or false lies, nor consent to any such, but truly maintain the right of his client, so that it fail not through any folly, negligence or default in him."

In 1404, King Henry IV forbade the election of lawyers to Parliament. Without asking that body for its approval or authority, he issued a "writ of summons" excluding all lawyers from "The High Court of Parliament." This resulted in the creation of a body of men who were termed the "Lack-learning" or "Dunce's" Parliament. Mr. Warren gives us this delightful morsel from an old law-writer, Sir Bulstrode Whitelock, in his *Notes upon the King's Writt*:

The King being in great want of money, and fearing that if the lawyers were parliament men they would oppose his excessive demaunds, and hinder his illegal purposes (according to their knowledge and learning in the lawes and publique affayres); to prevent this the King issued forth writs of summons with a clause of " nolumus " to this effect: " We will not that you or any other sherife of our kingdome or any other man of lawe by any means be chosen." This parliament was held 6 Hen. 4, and was called the lacke-learning parliament,

* Pollock and Maitland's " History of English Law," Vol. I.

either (saith our historian) for the unlearnedness of the persons or for their malice to learned men. It is stiled by Sir Thomas Walsingham in his *Margent* the "parliament of unlearned men," and from them, thus packed, the king (saith our author) obtained a graunt of an unusual taxe and to the people "full of trouble and very grievous." . . . They who will have a "nolumus" of learned senators must be contented with a "volumus" of uncouth lawes which I hope will never be the fate of England.*

In 1403 (reign of Henry IV), the profession was placed under the control of the courts. By this time it had increased to two thousand in number. An act was passed by Parliament, requiring that all applicants be examined and prohibiting admission to those who were not "virtuous, learned and sworn to do their duty." The form of oath then prescribed became later, in various forms, the oaths of admission to the Bar in most of the American colonies.

The Massachusetts oath of 1701 is almost exactly the form of oath in England in "The Book of Oaths":

You shall do no falsehood, nor consent to any to be done in the court, and if you know of any to be done you shall give knowledge thereof to the Justices of the Court, or some of them, that it may be reformed. You shall not wittingly and willingly promote, sue or procure to be sued any false or unlawful suit, nor give aid or consent to the same. You shall delay no man for lucre or malice, but you shall use yourself in the office of an attorney within the court according to the best of your learning and discretion, and with all good fidelity as well to the courts as to your clients.†

* Warren: "A History of the American Bar," pp. 25–26.

† *Idem*, pp. 77–78. This same oath was prescribed in Connecticut in 1708, in Pennsylvania in 1726, in Virginia in 1732.

We can visit the Inns of Court without a trip abroad by reading the interesting volume entitled "A Philadelphia Lawyer in the London Courts," by Thomas Leaming. We will learn that there are now four Inns of Court, in which the barristers and the solicitors of England are enrolled to-day. Leaming defines an Inn of Court "as an unincorporated society of barristers, which originating about the end of the XIII Century, possesses by immemorial custom the exclusive privilege of calling candidates to the Bar and of disciplining, or when necessary, of disbarring barristers." *

Their origin dates back to the time of Magna Charta, when the courts were permanently located convenient to Westminster. It is interesting to observe that they came into existence about the same time as did the London Trade Guilds. In order to secure teaching in the law, students gravitated to some ancient place "to profit by the teachings of a master lawyer of the day — just as the modern London club had its beginning in the convivialities of a casual coffee house." Sir John Fortescue, Chief Justice of the King's Bench, while in exile in the Duchy of Berne with Queen Margaret and Edward, Prince of Wales, only son of King Henry VI, wrote his treatise *De Laudibus Legum Angliæ.* Speaking of the Inns of Court, he says: "This place of studie is set between the place of the said Courtes and the Citie of London, which of all things necessaries is the plentifullest of all the Cities and townes of the Realme. So that the said place of studie is not situate within the Cittie, where the confluence of people might disturbe the quietnes of the students, but somewhat severall in the suburbes of the same Cittie, and nigher to the Courts, that the

* Leaming: "A Philadelphia Lawyer in the London Courts," p. 21.

students may dayelye at their pleasure have accesse and recourse thither without wearinesse." From these gatherings developed the powerful organizations known as the Middle Temple, the Inner Temple, Lincoln's Inn and Gray's Inn, which now form the English guild of barristers, owning extensive real estate of great value and controlling and regulating the admission to practice law in the courts.*

Solicitors, on the other hand, do not graduate from Inns, but applicants for admission are first apprenticed for a period of five years to some practitioner, and are submitted to examination before the Solicitors' Incorporated Law Society. If admitted to practice, upon recommendation of the Society, the solicitor becomes thereafter subject to the discipline of the Society. Leaming says: ". . . while the whole body of solicitors is, perhaps, not as liberally educated nor as polished as the Bar, the higher grade of solicitors are lawyers quite as well equipped, and gentlemen equally accomplished, as members of the Bar itself." †

The solicitor is the lawyer of business, who comes in direct contact with the client. On the other hand, he is not wholly an office lawyer. He does, in fact, appear as an advocate in some of the Courts and does conduct the litigation from his office. The barrister is the trial advocate and counsel and has no immediate contact with the client; yet his activity is not wholly confined to court practice — his opinions, as counsel, out of Court, are greatly sought and paid for liberally by solicitors.

* See "Early History of Legal Studies in England," by Joseph Walton, Q. C. (London, England). Vol. XXII, American Bar Association Reports (1899), p. 610.

† Leaming, p. 28.

Leaming tells us that when an Englishman speaks of his lawyer, he always means his solicitor, and that if he desires specially to impress his auditor with the seriousness of his pending legal difficulties, "He adds that his lawyer has been obliged to take the advice of counsel — perhaps of a K. C." *

Two societies now control the lawyers of England, the General Council of the Bar governing the barristers, the Statutory Committee of the Incorporated Law Society governing the solicitors.

Complaints against a barrister go to the General Council; if the charges are sustained then in serious cases they go to the Benchers of the Barristers' Inn. They nearly always follow the recommendations of the General Council. Leaming found very little difference in these deliberations and methods and those of corresponding disciplinary agencies in our own country, such as Bar Associations and Committees on Discipline.†

"In England, the Bar is well organized and governs the whole administration of the law, jealously resenting any interference with its ancient prerogative and preserving its own professional honor." ‡

From the time of Edward I down to the present, the English lawyer has always been regarded as an officer of the Court, subject to its control and discipline at all times, taking an oath of fealty. This oath, Sharswood says, is an oath of fidelity.§

"Fidelity to the court, fidelity to the client, fidelity to the claims of truth and honor: these are the matters comprised in the oath of office.

* Leaming, p. 50. † *Idem*, p. 68. ‡ *Idem*, p. 191.
§ Sharswood's "Ethics." Ed. American Bar Association, Vol. XXXII, American Bar Association Reports (1907), p. 58.

"It is an oath of office, and the practitioner, the incumbent of an office — an office in the administration of justice — held by authority from those who represent in her tribunals the majesty of the commonwealth, a majesty truly more august than that of kings or emperors. It is an office, too, clothed with many privileges — privileges, some of which are conceded to no other class or profession."

In our own country, there has not been much doubt as to the nature of the relationship of the lawyer to the Court. It is almost universally held that both the admission and disbarment of attorneys are judicial acts; and that one is admitted to the Bar and exercises his functions as an attorney "not as a matter of right, but as a privilege conditioned on his own good behavior and the exercise of a just and sound judicial discretion by the Court." *

In the State of New York, in the year 1860, Professor Theodore Dwight, then Dean of the Columbia Law School, submitted a learned brief to the Court of Appeals, which had under consideration an act of the Legislature requiring that the diploma of Columbia College should be accepted by the Court as adequate evidence of qualification for admission to the Bar.† Professor Dwight's brief has frequently been cited and referred to in support of a contrary proposition. But the decision in the case, holding the statute constitutional, has been severely criticised.‡

In 1889, the highest court in Illinois, reviewing a

* In re Thatcher, 80 Ohio St. 492, at p. 654.

† Matter of Cooper, 22 N. Y. 67.

‡ "The Constitutional Power of the Courts over Admission to the Bar," 13 *Harvard Law Review*, 233.

statute similar to the New York statute involved in the Cooper case, determined that it was *un*constitutional.* In that case, the Court expressed its views upon the practice of the laws as follows:

"The right to practise law is a privilege, and a license for that purpose makes the holder an officer of the court, and confers upon him the right to appear for litigants, to argue causes and to collect fees therefor, and creates certain exemptions, such as from jury service and arrest on civil process while attending court."

The Illinois Court based its determination almost wholly upon the history of admission of attorneys to practice in the Courts of England. "The statutes † (English Acts) always recognized that the admission of attorneys was a matter essentially belonging to the courts and a matter of judicial discretion, and only sought to protect the public against improper persons."

The Illinois Court said, moreover: "The attorney is a necessary part of the judicial system, and his vocation is not merely to find persons who are willing to have law suits. He is the first one to sit in judgment on every case, and whether the Court shall be called upon to act depends upon his decision."

More recently the Ohio Courts have been called upon to consider this matter. A lawyer by the name of Thatcher, apparently believing that the judges of his court were showing favoritism, bitterly and violently attacked one of the judges when the latter came up for reëlection. Upon charges that he had been guilty of unprofessional conduct in this and in other respects, he was disbarred.‡

* In re Day, 181 Ill. 73.
† See Maugham: "Attorneys," Appendix.
‡ 80 Oh. St. 492.

In the disbarment proceedings, the Court adopted and followed Chief Justice Sharswood's statement of the law:

"No question can be made of the power of a court to strike a member of the Bar from the roll for official misconduct in or out of court." *

Thatcher was disbarred June 25th, 1909. On April 18th, 1911, the Legislature of Ohio passed an act which by its terms authorized and empowered Thatcher to appear as an attorney and counsellor-at-law in all the courts of record of the State of Ohio, and all the rights and privileges of an attorney and counsellor-at-law were granted to and conferred upon him. "On his taking an oath of office before any person authorized to administer an oath, the said courts are directed to receive him as such attorney and counsellor-at-law." From the lowest to the highest courts of Ohio, the judges were unanimous in holding that this act was unconstitutional,† all of the judges agreeing that the great weight of authority throughout the country is that "the power to admit attorneys to practice in the courts is exclusively a judicial power and not legislative."

In passing, it is interesting to observe that the Court, in the Thatcher proceedings recognized Thatcher's right, as a citizen, to criticise and attack a candidate for an elective office, but they said that this right must not be abused. The Court also said that though the office is judicial and that the candidate is then serving as judge, it makes no difference in the basic principle involved.

* Ex parte Steinman, 95 Pa. St. 220.

† 12 Nisi Prius, New Series (Ohio), 273. 15 Ohio Circuit Court Reports, New Series, at p. 97. Affirmed, without opinion, per curiam, by Ohio Supreme Court, March, 1914, 108 N. E. 1133.

"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 be well informed or discriminative." * The Federal Circuit Court of Appeals held that it was "an essential part of the elective system, and as such it must be accepted," no matter how unfortunate its results in specific instances. "Nor does a citizen," says the Court, "lose this right to criticise because he is a lawyer." Nor is the lawyer-citizen's criticism of such a candidate confined to what is "'decent and respectful.' His criticism may be as indecent and disrespectful as the facts justify." On the other hand, the Court applies the rule of qualified privilege to such campaign utterances: "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 reasonable 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."

In passing upon the constitutionality of the legislative act, Judge Chittenden of the Common Pleas Court of Lucas County observed: "If the courts are stripped of power to regulate and control the conduct of the attorneys practicing at its bar, with reference to their practice, then indeed will this profession, which affords so many opportunities for improper conduct, be left open to ruthless and unprincipled persons without any restraint whatever." † This observation will become peculiarly

* Thatcher *v.* United States, 212 Fed. Rep. 801, at p. 807.

† 12 Nisi Prius, New Series (Ohio), 272, at p. 287.

See also In re Branch, 70 N. J. L. (41 Vr.) 537, 57 Atl. 431. The

pertinent when later on we come to consider the manner in which the courts have throughout the country performed this duty, in so far as they have admitted persons to practice law without previous or adequate training.

But it is perfectly clear and now the well settled law of the country that the lawyer is an "officer of the court." To-day he commands the great seal of the court, the seal that in King Edward's or in King Henry's day was, indeed, the great seal of the Crown. In King Edward's day, if a litigant wanted to bring suit his lawyer marched over to the clerk of the court and got out a writ of summons, written in Latin, with a great formidable seal upon it, and as impressive as it was mysterious to the layman. The great clerk of the Court took the attorney's word for it that the writ would not be abused. Likewise, if there were a case on trial and a witness was required, the attorney would go to the same clerk and get the same kind of a formidable writ, in this instance called a "writ of subpœna," and the poor unfortunate witness who happened to have been present, when the matter in suit came off, is hauled out of life's otherwise pleasant thoroughfare and dragged into the hard and uncomfortable old English witness box. The observations upon courts and lawyers generally made by a witness upon such oc-

Supreme Court of New Jersey neither licenses attorneys nor admits them to practice. They get the privilege of practicing by letters patent, issued by the Governor of the State upon the recommendation of the Supreme Court that the applicant is duly qualified, based upon examination either by the Court, or under its supervision. This feature of examination has been a distinctive attribute of the Supreme Court, existing without qualification since the enactment of the New Jersey Constitution in 1844. The Court held that an act passed by the Legislature in 1903, requiring the Supreme Court to recommend certain individuals for license to practice, was an unconstitutional act on the part of the Legislature.

casions — so far as I am able to ascertain — are about the same to-day as they were in King Edward's time.

All this business of writs and seals and clerks of court has been modernized. To-day our New York lawyer, seated at his desk, by pressing an electric button, summons one of his own clerks from one of the dozen rooms in his suite, turns over the papers to him, tells him to draw up a complaint and to get out a summons to be served upon the defendant. His clerk goes over a cabinet drawer, pulls out the appropriate printed form, fills in the names of the parties, draws up and has typewritten a complaint and to both summons and complaint signs the name of his employer — the lawyer. If he has been properly educated for his function, he will remember that in the performance of that act he is performing the task of an officer of the court; in fact — for the moment — is the successor of the Great Clerk of the Court. There is no big seal; there is no Latin. There is an absence of the droning sleepiness of the old clerk — we cannot afford to keep that kind in a modern law office — but if you will read your paper carefully, Mr. Defendant, you will see that it bears the name of "The People of the State of New York" (or some other State); that it summons you to appear and answer *in court*, and, Mr. Witness, if it be a subpœna issued to you to attend in court you will find in it the same old uncomfortable promise of punishment for contempt of Court if you fail to go. Now, in the control and issuance of this process of the court, the lawyer is acting as the court's officer, as we have learned in our historical pilgrimage. If, by bringing an unwarranted suit, he abuses the process entrusted to his care, he stands a fair chance of losing his uniform. In the Year of Our Lord 1916, Mr. Lawyer-

Man is still custodian of the Court's keys. Of course, Mr. Litigant may go into Court himself and may try his own hand at opening the door — possibly with the success unsober persons have, at times, in opening doors themselves. (In litigation, as in some other walks, it is safe to follow the rule: "If deeply immersed in trouble, take along a sober friend.")

This man of the Order of the Key takes an oath, Mr. Litigant, that you do not. You may misbehave; he may not. Short of contempt and discernible perjury, if you manage your own cause, *you* may make as many kinds of a fool of yourself as you choose. And even if you misbehave, you cannot be forever barred from practicing law in your own causes. If the lawyer-man misbehaves, the learned Court stands ready to strip him of his badge, his uniform and his key — by solemn decree he is forbidden coming ever again as spokesman for another, though ten thousand clients clamor for his service.

This, then, is the mystery of the Order of the Key: "Ye Gentleman who holds passport of character and learning must conduct himself always as becomes a gentleman. He may in his Client's cause say things his Client may not; yet he may not, in his Client's cause, do things his Client may. His passport is holden always under penalty of loss if he fail to observe his duty of fealty, to court, to client and community."

CHAPTER VII

THE AMERICAN LAWYER

It is time we packed our trunks and started for home. If we get past the submarines, we shall have plenty of time to reflect upon our observations while we scan our sketch book in an easy steamer chair. Leaving the land from which America first imported both its lawyers and its legal institutions, we shall come to our own shores carrying with us certain definite notions. For example, the idea that the Bar is a profession and not a business, we discover, is more than a tradition. It is imbedded in the law of all the lands we visited, save and except only China. We shall find in our home country, as the Legislature of Ohio discovered, that the lawyer is always an "officer of the court."

If we had come back via Japan, touching San Francisco first, we should have met in the Canons of the San Francisco Bar Association the call:

> The Bar Association of San Francisco calls upon all licensed practitioners at the San Francisco Bar to bear in mind that the profession of the lawyer for more than two thousand years has been recognized as essential to the social concept which is the basis of American civilization; that the ideals of the profession call not only for ability, learning, humanity and probity, but for a high-minded and unselfish obedience to the ethical truth that the lawyer, as an officer of the court, is obligated to aid in, and not to hamper or thwart the administration of justice.

We shall find that immediately following the Civil War this notion became fixed and imbedded in our national law, for when various enactments (state and federal) were passed, requiring lawyers to take "test oaths" — for example, that the applicant had not borne arms against the Government — our own United States Supreme Court held that attorneys "are officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character. . . . The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counsellors, and are entitled to appear as such and conduct causes therein." * And we have already discovered that, by reason of the status of the lawyer as officer of the court, he is held always "responsible to it for professional misconduct."

If we have a statistical turn of mind and like to plot curves, we shall find it interesting, in surveying the American Bar, to plot first a curve marking the peaks and valleys of the *ideals* of the profession, and then a curve marking the peaks and valleys of the *conduct* of the profession. (The second will probably never cross the first.) We shall not be surprised to discover a fairly level line of *ideals* and a most peaky, mountainous course of *conduct*, the American lawyer at times rising to great ethical heights in his daily life and at others falling to very low depths. If we have the pedagogue's bias, we shall be tempted to believe that lack of educational training will explain some of these sharp curves. And if we are ethicists in philosophy we shall doubtless find confirming evidence that absence or presence of moral training accounts for some of the declivities.

* Ex parte Garland, 4 Wallace, 333, at p. 378.

With the development of American commerce, export trade, shipbuilding, fisheries and slave-trading, a class of rich merchants arose in the community. There grew a demand for a trained body of men to draw contracts, to advise as to the law and to protect men in their rights. The need was first supplied by English barristers. Presently, men of birth and of education in the Colonies took up the law as a profession and became proficient. "Another leading influence," says Warren, "in changing the standard of ability and character among members of the Bar, and in spurring the development of adequate modes of legal instruction in the Colonies, was the growth of a class of Colonial lawyers who received their education in the English Inns of Courts." * Over one hundred and fifty lawyers educated in Inner and Middle Temple Inns in London between 1750 and 1775 began practicing in Maryland, Pennsylvania, Virginia and South Carolina. "In fact, it may be said without exaggeration that the American lawyer of the late Eighteenth Century was the product either of the English Inns of Court or of the American Colleges — Harvard, Yale, Princeton, Brown and the College of William and Mary." *

Warren is right in believing that it was this superior education and training which fitted the lawyer of the eighteenth century to become "the spokesman, the writer and the orator of the people," when they began to fight the aggressions of Royal Governors and judges and the British Parliament. When the War of the Revolution broke out, the lawyer "had become the leading man in every town in the country, taking rank with the parish clergyman and the family doctor." A century before the lawyer had been an object of contempt and his voca-

* Warren: "A History of the American Bar." p. 18.

tional activity had been restrained by restrictive legislation. When the practice of the law is left to "traders, factors, land speculators and laymen of clever penmanship and easy volubility" and professional attorneys are deputy sheriffs, clerks, and petty, ignorant judges, we should expect to find, as we do in fact find, stirring up of litigation for the sake of the petty court fees.

Judged by present standards, defects in the education of the lawyer there were many; but we are certain of one thing at least, that when the professional attorney was taken from the ranks of the scholar, he bred respect for his calling. The experience of our own country in the seventeenth and eighteenth centuries confirms our deductions from Chinese and Russian experience. An untrained, an uneducated, an unlicensed and an unregulated bar thrives upon pettifogging, bribery and corruption. It pollutes the streams of justice and brings down contempt upon the profession. The converse of the proposition is equally true.

Wherever preparatory training has been defective, admission to practice loose and professional discipline absent, the Bar even to-day, will be found stirring up litigation for the sake of fees.

CHAPTER VIII

THE AMERICAN LAWYER (CONTINUED)

WARREN bids us "to bear in mind that the word 'attorney,' as used in early records of Colonial cases and statutes, did not imply necessarily a man bred to the law or who made its practice an exclusive employment. These 'attorneys' were very largely traders, factors, land speculators and laymen of clever penmanship and easy volubility, whom parties employed to appear and talk for them in the courts. The few persons who acted as professional attorneys were at first mostly pettifoggers, or minor court officers such as deputy sheriffs, clerks and justices, who stirred up litigation for the sake of the petty court fees. This latter practice became such an evil that in most of the Colonies statutes were passed prohibiting such persons acting as attorneys." * Warren found in his study of the American Bar that the development of the law as a profession and the influence of the lawyer in the community was a matter of exceedingly slow growth in the early American colonies. He attributes this to seven different factors: first, that law as a science was in so rigid a condition that it failed to touch the popular life; second, that lawyers as a class were at the same time unpopular in England; third, the scarcity of opportunities for study and the lack of law schools; fourth, the hostility to lawyers of religious elements — like the Quakers — in the community; fifth, the jealousy

* Warren: A "History of the American Bar," pp. 4, 5.

felt by the merchants and wealthy landowners and planters at the exercise of power by any other class in the community; sixth, the participation in and interference by the Royal Governors in the judicial system of the Colonies; and, lastly, the ignorance and lack of legal education of the judges themselves.

Warren's study carries us forward to 1860. Prior to that time, the American Bar had its up and down curves of influence. But since 1860, our universities for liberal education have increased, there has been a broadening of the scope of the law, wider opportunities for the study of the science of jurisprudence, and a complete — too complete for some of us — separation from the influences of the Bar of other countries.

We have had, it is true, individual lawyers of great distinction. Their names occur to us instantly, — Hamilton, Jay, Marshall, Jefferson, Henry, Chase, Ellsworth, Lincoln, Choate. At times of great crises in our national history, American lawyers shine as great statesmen, great orators and great jurists, but the Bar as an organized Bar is a matter of comparatively recent growth in this fair land of many organizations.

Not till 1878 was it that 75 lawyers assembled at Saratoga Springs and organized "The American Bar Association," with the stated object of advancing "the science of jurisprudence," promoting "the administration of justice and uniformity of legislation throughout the Union," upholding "the honor of the profession of the law," and encouraging "cordial intercourse among the members of the American Bar" — not till 1908 did we get our present American Bar Association canons of ethics. Since then, our progress has been rapid, very rapid; but the fact remains that up to the middle of the

last decade the American Bar was slow to find itself, and, may we say it, is still a little groggy on its legs.

Warren's explanation will not suffice to cover the period since the Civil War. We must look further into the matter.

Ralph Barton Perry, in the December (1915) *Atlantic Monthly*, commenting on the Great War, observes that it takes national crises for the great majority of men to realize that they enjoy the benefits of national existence and "Then only is it realized that civic life is the fundamental condition of individual life, and that all forms of economic and cultural activity are vitally dependent on it"; hence that "The generation that has been born in this country since the Civil War has never had to make sacrifices for the State and has never been brought to such a realization. We have taken too much for granted. Like spoiled children we have assumed that the staple good of national security was provided by the bounty of nature, and have irritably clamored for the sweetmeats of wealth and higher education."

This observation of Perry's puts responsibility squarely upon the shoulders of the educated as well as the uneducated. Abbot in "Justice and the Modern Law" has very properly pointed out in what respects even the trained American lawyer has defaulted in performance of his full duty.

Taft accuses us of having been led astray, like our clients, by "the chase for the dollar." It was Sharswood, the American lawyer, who reminded us of Gibbon's deductions respecting the Roman Bar at one period of its history:

"The noble art, which had once been preserved as the sacred inheritance of the patricians, was fallen into

the hands of freedmen and plebeians who, with cunning rather than with skill, exercised a sordid and pernicious trade. Some of them procured admittance into families for the purpose of fomenting differences, of encouraging suits and of preparing a harvest of gain for themselves or their brethren. Others, recluse in their chambers, maintained the dignity of legal professors, by furnishing a rich client with subtleties to confound the plainest truth, and with arguments to color the most unjustifiable pretensions. The splendid and popular class was composed of the advocates, who filled the Forum with the sound of their turgid and loquacious rhetoric. Careless of fame and of justice, they are described for the most part, as ignorant and rapacious guides, who conducted their clients through a maze of expense, of delay, and of disappointment; from whence, after a tedious series of years, they were at length dismissed when their patience and fortune were almost exhausted." *

And, commenting on this observation of Gibbon's, Sharswood made answer to the title of our book by putting a question: "Is not this probably the history of the decline of the profession in all countries from an honorable office to a money-making trade?" — or, shall we say, in the language of another, "the descent from honor to affluence"?

The degree to which our profession has been commercialized since the Civil War, will explain in part the divergence between the curves of professional precept and professional conduct. Yet, if we have not missed the lessons gleaned from our survey of the foreign Bar, we

* Sharswood's "Ethics" — Reprint, Vol. XXXII. American Bar Association Reports, pp. 141–142, quoting Gibbon's "Decline and Fall of the Roman Empire."

shall ask: Why did it take so long for the American Bar to emerge from darkness, why so long to develop its own guild or collective impulse?

The causes lie close to the lines of evolution of American business, American politics, American industry, indeed, of our whole American morals. As Walter Weyl * and other students have observed, the men who started off this great American government were possessed of all the fine philosophy and temperament of born aristocrats. Even our Democracy was borrowed from aristocratic French philosophers. Our conceptions of to-day resemble Jefferson's about as closely as the Woolworth Building represents St. Paul's Church. In those leisurely days, we preached that every man should do pretty much as he pleased, and we *practiced* "sanding the sugar, larding the butter, flouring the ginger" and then "going into prayers." Not so far back the American — note the title — Sugar Refining Company weighed tons and tons of sugar on false scales. Within two decades we have been whisked about and hurdled over Interstate Commerce Commissions, Public Service Commissions, Minimum Wage Laws, Industrial Boards, Workmen's Compensation Acts, Income Taxes, Inheritance Taxes, until the surviving ladies and gentlemen of the generation passing — all reverence to them — scarce know "in these times what to invest in, the laws are so queer." Truth is, the conservatives have turned progressives, the progressives have turned socialists, and the socialists are looking about for new wearing apparel.

A new generation is on the scene, with "new ideals, new ambitions, new hopes for their country" and there is "a generation coming" which "desires leadership,

* "The New Democracy."

is willing to stand for principle and for true doctrines." * We have observed that in Russia the young Bar in less than a quarter of a century changed pretty much the entire tone of the present generation of lawyers. It is the younger generation, full of new impulse and new hopes for the future of the country, which will be called upon to take up the bleeding remnants of civilization after the Great War is ended and rebuild for our country, our businesses, our industries and our professions.

We are still strongly individualistic. Those of us who do not belong to a union, a guild or a profession are strongly anti-union, anti-guild, anti-bar or medical association. We still regard it as something quite out of harmony with our inherited training if the Stock Exchange puts a man off the floor for *unprofessional conduct*, and if, upon motion of their guild, a group of lawyers is disbarred, we think it so much out of the ordinary that we put the news at the top of the first column of the first page of our conservative newspaper.

Addressing advertising men recently, Samuel Hopkins Adams † told them that the lack of confidence in present-day advertisements was due to them, the members of his own profession. "Let us be frank with each other . . . (The fault is) partly yours and partly mine. Yours as representing businesses which advertise cheek by jowl with all manner of shady and crooked enterprises. Mine as representing the business of journalism, which, in general, accepts any and all advertising with only one question, 'Has it got the price?' Until we can stop

* Editorial, *New York Tribune*, Dec. 15, 1915.
† *New York Tribune*, Dec. 2, 1915.

associating with quacks and swindlers in paid print the taint will cling to all of us and to the business of advertising, in which all of us are interested." Here, then, is the germ of the American guild-idea: *Ours is a profession (advertising, medicine, law, credits, whatever our vocation). We are all in a boat. The sins of one of us are the sins of all of us. Come, gentlemen, let us clean house.*

Our Bar has fine traditions, it has furnished the country with great patriots, with great statesmen, with Presidents and Governors and Senators; but in 1916, when we are close to a great industrial crisis, — the greatest, I believe, in the history of the world — when the call for more lawyer-like methods to avert lawlessness and anarchy in industry reaches to the heavens for answer, how shamefully poverty-stricken is our corporal's guard of lawyers in the field. The President might well compose a message upon our unpreparedness in industrial matters. If I did not know that there were at least three living lawyers who had done something worth speaking about in this field, I should be sorely tempted to recall the exceedingly modest response of the great violinist, who, when asked to name the three greatest living violinists in the world, answered: "Violinists? Violinists? There is no such word."

Abbot makes this appeal to the Bar: "Whatever be the motive, however, when we who are practicing lawyers apply ourselves diligently to the discovery and exposition of the real principles of justice, when, in a word, we really qualify ourselves to understand and protect our clients' rights, then we shall achieve results of which no man dreams. . . . We shall solve all the legal, most of the economic, and many of the sociologic, prob-

lems that now press for solution, because, in one form or another, they present questions calling for judicial decision. Indeed, we shall do far more than that: so far as is humanly possible, we shall establish the moral law as the law of the land." * Of course, even my friend Abbot will permit the journalists and the economists to look in occasionally. In the first place, we cannot stop them from meddling with things they know nothing about, and in the next place, they challenge us with their criticism. Why not let them share our burdens?

Briefly, then, the explanation for the slowness of development of an American guild-consciousness and power is to be found primarily in our strong sense of the sanctity of individual rights, an element which we must never forget but which we must harmonize and correlate with another element — the sanctity of the community's rights. Obviously, this is not all. We shall find, as we proceed with the consideration of concrete problems, other factors of importance. At the moment, we shall barely hint at them: The combination of court advocate and business adviser in one office; the invasion of corporate agencies into the professional field; the intervention of laymen in business-getting for lawyers; the emphasis put upon the pecuniary motive; the actual pressure of competition — in brief, a dozen or more factors of large bulk, study of which is essential if we are to agree upon a program for making the modern practice of the law conform to the ancient precepts of the profession. This volume will fail of its purpose if it does not dig down and pull out these factors and post them conspicuously before a background of professional tradition — where we all, layman and lawyer, may revise our perceptions

* Everett V. Abbot: "Justice and the Modern Law," p. 83.

and judgments, facing the facts squarely, however uncomfortably, but always, let us hope, with an undiminished faith in the profession — confidence that this great sleeping giant will presently awake, break his lilliputian bonds and assert his fine strength.

CHAPTER IX

OUR BAR — 1850–1880

COTTON MATHER, in 1710, made what Warren aptly calls "The First American Address to Lawyers." It is worth reprinting here as an introduction to our survey of the American Bar.

It was a Passage in a Speech of an Envoy from His Britannick Majesty to the Duke of Brandenburgh, twenty years ago: "A Capacity to Do Good not only gives a Title to it, but also makes the doing of it a Duty." Ink was too vile a Liquor to Write that Passage; Letters of Gold were too Mean to be the Preservers of it. . . .

GENTLEMEN: Your Opportunities to Do Good are such, and so Liberal and Gentlemanly is your Education . . . that Proposals of what you may do cannot but promise themselves an Obliging Reception with you. 'Tis not come to so sad a pass that an Honest Lawyer may, as of old the Honest Publican, require a Statute merely on the Score of Rarity. . . .

A Lawyer should be a Scholar, but, Sirs, when you are called upon to be wise, the main Intention is that you may be wise to do Good. . . . A Lawyer that is a Knave deserves Death, more than a Band of Robbers; for he profanes the Sanctuary of the Distressed and Betrayes the Liberties of the People. To ward off such a Censure, a Lawyer must shun all those Indirect Ways of making Hast to be Rich, in which a man cannot be Innocent; such ways as provoked the Father of Sir Matthew Hale to give over the Practice of the Law, because of the Extreme Difficulty to preserve a Good Conscience in it.

Sirs, be prevailed withal to keep constantly a Court of Chancery in your own Breast. . . . This Piety must Operate very particularly in the Pleading of Causes. You will abhor, Sir, to appear in a Dirty Cause. If you discern that your Client has an Unjust Cause, you will faithfully advise him of it. You will be Sincerely desirous that Truth and Justice may take place. You will speak nothing which shall be to the Prejudice of Either. You will abominate the use of all unfair Arts to Confound Evidence, to Browbeat Testimonies, to Suppress what may give Light in the Case. . . . There has been an old Complaint, That a Good Lawyer seldom is a Good Neighbor. You know how to Confute it, Gentlemen, by making your Skill in the Law, a Blessing to your Neighborhood. You may, Gentlemen, if you please, be a vast Accession to the Felicity of your Countreys. . . . Perhaps you may discover many things yet wanting in the Law; Mischiefs in the Execution and Application of the Laws, which ought to be better provided against; Mischiefs annoying of Mankind, against which no Laws are yet provided. The Reformation of the Law, and more Law for the Reformation of the World is what is mightily called for.

In 1875 the Committee on Admissions to the Bar of the Association of the Bar of the City of New York, having surveyed the condition of the Bar at that time, was convinced that "The general standard of professional learning and obligation" of the Bar "was high during the first forty years of the nineteenth century." It found that about 1840 these standards began to decline and that the tendency "was steadily downwards until about 1870, when it reached its lowest ebb, when even the Bench was invaded by corruption, and found support in a portion of the Bar, and when tortured laws — that worst kind of torture — were in the metropolis the rule rather than the exception." The committee

fixes 1870 as the date when "the Bar awoke to a higher sense of its duties and a wave of reform set in which is still on the increase." * The chairman of this committee (Lewis L. Delafield) at about the same time, reading a paper before the American Social Science Association (September, 1876), observed that the low condition of the Bar at that point was traceable to the free admission of lawyers to practice. "The argument employed in favor of free admission is drawn from a supposed but mistaken analogy between the profession of the law and trade. . . . The law is not a trade, and it is not to the interest of the people that it should be . . . the law will become a trade unless the people realize the danger in time and insist upon their right to require those qualifications on the part of lawyers which form the consideration for the franchises they enjoy, and without which the state is bestowing valuable rights and receiving nothing in return."

In 1879 the first Committee on Legal Education and Admissions to the Bar of the American Bar Association complained of the marked difference between preparation for the Bar in foreign countries and preparation in this country.† The committee said that if the schools of law in America were what they ought to be, "every advantage which is attainable would be offered by them." ‡

The committee found it difficult to deny that there were then in existence American colleges not deserving of commendation, institutions where the course was unjustifi-

* Report of the Committee on Admissions to the Bar, Association of the Bar of the City of New York, 1875, p. 11.

† Report, Committee on Legal Education and Admissions to the Bar. American Bar Association Reports 1879, pp. 214 *et seq.*

‡ *Idem*, pp. 216, 217.

ably limited and circumscribed, where the term of study was too brief for useful purposes, and where students "unfit by reason of deficient education and want of contact with liberal studies, to wrestle with the difficulties of the law" were invited to take up the study and the committee found that there had already grown up "a spirit of competition to attract greater numbers" by institutions of alleged learning and where examinations "are such only in name," taking the place of "a searching scrutiny of the student's acquirements . . . and where degrees are thrown away on the undeserving and the ignorant."

Two years later a similar committee addressed a circular letter to members of the Bar throughout the country, inquiring concerning the conditions for admission to the Bar as they then prevailed.*

From Maine it learned that the history of regulation in that State was one of which the profession was not especially proud, though responsibility did not rest upon lawyers. From the organization of the State down to 1843, standards were high, but in 1843, "under the impulse of prejudice against lawyers, diligently excited by a class of demagogues, the legislature swept away all existing rules and enacted . . . (that) 'Any citizen of this state, of good moral character, on application to the Supreme Court, shall be admitted to practice as an attorney in the judicial courts in this state.'" This statute continued, without modification, down to 1859. The Bar of Maine, respecting itself and the office, during this period peremptorily refused to recognize as entitled to fellowship those who had availed themselves of the statutory privilege, without previous study. In 1859

* American Bar Association Reports, 1881, pp. 238 *et seq.*

the law was modified. But in Maine not till 1881 were there enacted statutes that insured even a tolerably good preliminary education. At that time, in brief, there were required public examination by the court, two years' training in a law office, and proof of good character.

From New Hampshire the Committee learned that in 1842 a great outcry had been raised against the profession. "It was said that they were exclusive; that they did not represent the people; that the judges were lawyers, and that the court and bar conspired together to shut out the most deserving people in the state." Whereupon here, too, the law was revised and license to practice law was required for every citizen of 21 or over, of "good moral character" who applied. Under this "Moral Character" statute, the court held that it had no right to inquire into the qualifications of candidates. "Any one who could get two certificates of good moral character from persons known to the court, was entitled to admission as a matter of right." In New Hampshire, as in Maine, the Bar treated these gentlemen as the black sheep of the profession and never recognized their right to act as members of the Bar at bar meetings. This class went by the name of "moral character" lawyers. "It became a standing jest that they were so called because they had no character, either moral or otherwise."

Perfectly scandalous conditions arose until in 1872 the law was amended so as to give the Court power to pass upon the "suitable qualifications" of applicants. After that there was a marked change and for the better.

Observe the order of evolution of public opinion: First, prejudice against the Bar. Second, legislation, opening the doors wide for everybody to practice law.

Third, scandal, injury to the whole community. Fourth, legislation, providing for strict regulation and enforcement of standards by the courts.

In 1881, the New Hampshire rules of Court required public examination, clear evidence of satisfactory moral character, actual study in a law office for three years.

From Vermont, the committee learned that at that time before an applicant could be admitted to practice, he must establish to the satisfaction of the Court that he is of good moral character, that he has studied in a law office for at least five years (with deduction of two and a half years if graduated from a university or, in the discretion of the Court, an allowance for academic study short of a full collegiate training).

In Massachusetts, under the statute of 1876 in force in 1881, any citizen of the age of 21, of good moral character, could, *on the recommendation of an attorney*, petition for admission, whereupon the Court assigned a time and place for the examination and if satisfied, admitted him.

In New Jersey, then as now, there were two grades of attorneys and counsellors. Admission as attorney was based upon four years' clerkship, and an examination in open court, before the full bench at Trenton. Not until he shall have practiced three years is the attorney admitted as a counsellor.

In Pennsylvania, there was a Board of Examiners, consisting of ten members of the Bar, whom the applicant was required to satisfy of his qualifications, after three years' study in a law office. Evidence of adequate preliminary education required examinations in grammar, arithmetic, algebra, universal history, particularly that of England and America, spelling, etymology and geography — shades of Temple Bar!

Not till 1880 were there any rules in Delaware to govern educational qualification for the Bar. The rules of 1880 provided for examination, three years' study under direction of a member of the Bar of Delaware of at least ten years' standing, and proof of integrity and good character.

In Maryland, the committee's correspondent reported that up to that time (1881) there was not any "means provided by public authority for promoting and facilitating the study of the law." Only recently had the Law Department of the University of Maryland been established at Baltimore. "Any white male citizen of Maryland, above the age of twenty-one years," who had been a student of law for two years, or a graduate of the Law Department of the University of Maryland, could apply to a Board of Examiners, which, after hearing evidence of his knowledge, and proof that he had been a student of law for two years, or a graduate of the Law Department of the University, and of his "probity and general character" could recommend his admission.

The committee's informant told them that the examining committee relied mainly on the recommendations of the law school professors or lawyer under whom the student studied and was inclined to "set his mistakes down to *mauvaise honte*, or some cause of the kind, and to trust that he yet possesses sterling knowledge," and that in consequence the examinations had become "more and more a mere form," candidates being rarely rejected.

From Virginia, the committee learned that at that time any two judges could admit an applicant to practice upon his taking an oath of good conduct, and upon certificate of good character.

In West Virginia, that any three judges could grant a license to anyone who should pass examination and produce a certificate from a county judge that he is a person of honest demeanor, and is over twenty-one.

There were no standards of qualification "except such as any one or more of the examining judges may in each particular case adopt." "A more liberal and simple method of filling the ranks of the profession" — says the committee's correspondent — "could hardly be devised."

In South Carolina, after 1868, a circuit judge could admit to practice, and after three years' practice the licensee was then admitted to practice in the courts of last resort. In 1879, the legislature passed an act, by which any citizen of twenty-one years or over, who can pass the examinations prescribed by the Supreme Court, and can produce a certificate of a practicing attorney that he is of good moral character, could be admitted.

In Alabama, the rules were so loose as "to enable any lawyer in respectable standing to have admitted to practice any young man whom he is willing to introduce to the court."

In Arkansas, the Court admitted upon evidence satisfactory to it of "the requisite qualifications of learning and ability" — whatever that might mean.

In Missouri, "a strict examination in open court . . . as to his qualifications . . ." and "satisfactory testimonials of good moral character" were required.

"In St. Louis, especially, candidates for the bar are *now* (1881) subjected to quite a reasonably strict examination and it is quite a common thing for applicants to be refused admission; something which seldom hap-

pened before this statute was passed." Prior to that time, the examinations were both "private and perfunctory."

In Tennessee, the report was that the examinations were "perfunctory, and the grant of license comes as a matter of course. I don't remember of but one instance where license was refused. I remember my own came to me without any examination at all."

Kentucky had, in 1881, the same qualifications it had as when the State was admitted to the Union. The applicant must be of age and produce a certificate from the county court that he is a person of honesty, probity, and good demeanor. "We have not placed very strict guards against granting licenses, because the applicants are usually well known to the judges." And the committee's correspondent thought "that the standard of admission to the bar cannot now be placed in this country (think of it, 1881)! at the elevated point fixed in London or Paris . . . our legislatures would never establish such a complex machinery for the education of the bar, or exact such accomplishments for admission to its privileges as those required in France." So in Kentucky, "for all practical purposes, the certificates and examinations are things of the merest form. It is a most rare occurrence for any candidate . . . to be rejected."

In Ohio, the requirements were equally loose, with the exception that proof of two years' study in a law office was required, and the certificate of an attorney that he "believes him to be a person of sufficient knowledge and ability to discharge the duties of an attorney and counsellor-at-law."

In Indiana, by the Constitution of 1852, *every person*

of good moral character was — the language of the statute was "shall be" — entitled to admission to practice law in all courts of justice.

The Bar Association correspondent said, "In the face of such a constitutional provision it is, of course, impossible for the profession to use any means towards its own elevation, except such as consist in example and individual and associated effort."

In Illinois, "As a general thing there was much looseness, and hardly a case occurred where admission was refused." Shortly prior to 1881, the rules of the Supreme Court were modified so as to require examinations in open court, proof of at least two years' training in a law office or law school and evidence by affidavit that "he is a man of good moral character." But even in 1881, we find the fact to be that few questions are asked, and nearly all applicants are admitted, and rejections are "rare exceptions."

From Wisconsin, Iowa, and Nebraska came the same testimony.

The correspondent from Nebraska complained that "There is great difficulty in compelling adequate preparation for admission to the bar in the Western States. The pressure of young men is excessive. The profession here is full of men without considerable general culture. They cannot, therefore, well appreciate it, nor are they naturally disposed to require it of others. Those of them who, by force of their own character and labor, have to a degree supplied the deficiencies of early training and duly value the advantages of adequate preparation for the bar, are vastly outnumbered by those who have not attained to the elevation of a due estimate of those advantages."

Charles Francis Adams in his Autobiography writes * of his own admission to the Massachusetts Bar in 1858:

"Meanwhile, as a lawyer I was not proving myself a success. I showed just what I was by getting myself admitted to the bar after about twenty months of desultory reading, and decently prepared for practice in my own eyes only. George T. Bigelow was then Chief Justice of the Supreme Court of the Commonwealth; or became so shortly after. I knew Judge Bigelow well, we being neighbors at Quincy, and I was on terms of intimacy with his family. One day, without consulting any one, I took it into my head that I would be examined for entrance at the bar; and, what followed shows the loose way in which admissions were then granted. I asked Bigelow to examine me. He ought to have asked me a few questions as to my length of study, etc., and then, in a good-natured, friendly way advised me to wait a while longer. Instead of that, however, he told me to come at a certain time into the Supreme Court room, where he was then holding court; and he would examine me. I did so, and the clerk of the court at his direction handed me a list of questions, covering, perhaps, one sheet of letter paper. I then sat down at the clerk's desk, and wrote out answers to such of them as I could. I remember well that on several of the subjects in question I knew absolutely nothing. A few days later I met the Judge on the platform of the Quincy station, and he told me I might come up to the court room and be sworn in. I did so; and became a member of the bar. I was no more fit to be admitted than a child. The whole thing illustrated my supreme incompetence, and the utterly

* Pp. 41–42.

irregular way in which admission to the bar was then obtained."

We may close this survey of conditions in America prior to 1881 by recounting one of the examinations for admission to the Bar taken from Judge Baldwin's book, "Flush Times of Alabama and Mississippi" and quoted by Robert M. Hughes, a member of the Bar of Norfolk, Va., in a review of legal education in America: —*

Sometime in the year 1837, during the session of the Circuit Court of N. Mississippi, Mr. Thomas Jefferson Knowly made known unto his honor his respectful desire to be turned into a lawyer. Such requests at that time were granted pretty much as a matter of course. Practicing law, like shin-plaster banking or a fight, was pretty much a free thing; but the statute required a certain formula to be gone through, which was an examination of the candidate by the court, or under its direction. The judge appointed Henry G. ——— and myself to put him through. . . .

We took Jefferson with us, in the recess of court, over to a place of departed spirits — don't start, reader, we mean an evacuated doggery, grocery, or juicery, as, in the elegant nomenclature of the natives, it was variously called; the former occupant having suddenly decamped just before court, by reason of some apprehensions of being held responsible for practicing *his* profession without license.

Having taken our seats, the examiners on the counter, and the examinee on an empty whisky barrel, the examination began.

Here is a sample of one of the questions and answers:

"Q. Is the wife entitled to dower in the husband's lands, if she survives him, and he dies insolvent?

"A. Why then in course not.

"Q. Why not?

* Vol. XXXIX, American Bar Association Reports, 1914, pp. 853–854.

"A. Why not? Why, squire, it stands to reason: For then you see, the husband might gather a whole heap of land, and then just fraudulently die to give his wife dower rights to his land. I know plenty of men about here mean enough to do it."

The examination ended by the candidate's asking the committee not to make any report, saying:

"You needn't make any report of this thing to the judge. I believe I won't go in. I don't know as it's any harder than I took it at the fust, but then, you see there's so d——d much more of it."

CHAPTER X

A THIRTY YEARS' WAR FOR PREPAREDNESS

In 1878 — the very first year of its existence, the American Bar Association began a war upon ignorance. Every report of the Committee on Legal Education since pleads for adequate preparation for admission to the Bar. By 1892 the subject was of such prime importance that out of 237 pages of printed discussions, addresses and reports, 90, or more than one-third, is wholly devoted to the one subject of education for the Bar. In 1893, the Association created a "Section of Legal Education," which thereafter met annually in connection with the meeting of the Association and dealt specially with this branch of its work. The American Bar found its task not unlike that of the French Bar of a previous day. "Why is it — the French jurists argued — and argued unanswerably — that, while a physician is compelled to prove his professional qualifications by a diploma, government does not enforce a similar test in the case of the candidate for the privileges of a practicing lawyer?" * There is not a volume of the American Bar Association Year Books since 1878 that does not contain evidence of an increasing amount of activity in the direction of better vocational preparedness. The lawyers of 1879 in the American Bar Association exclaimed with d'Aguesseau (A. D. 1696–99):

* Report, Committee on Legal Education and Admissions to the Bar. American Bar Association Reports, 1879, pp. 217–218, citing Pandectes Francaises, Vol. I, pp. 2, 21, 247.

"The profession of the law is as ancient as justice, as noble as virtue itself. But it necessarily results that it calls for all the solicitude of government. It concerns too closely the fortune, the honor, and the life itself of citizens to be left neglected. Those, whose purpose it is to practice it, ought to be held to make proof of their studies, of their capacity, of their good morals, and of their probity." *

The American Bar has had a hard battle. It has had to fight ignorance and prejudice for every inch of the ground they have yielded. Moreover, it did battle with the two strongest tendencies in American democracy; *first*, the tendency in the direction of commercial supremacy — the tendency which put emphasis upon wealth as a center of power; and *second*, the strong individualistic upbringing of our people. Our seniors were combating "alien and virulent heresies" — like Henry George's "Progress and Poverty." They warned their brethren, "you will find its pages soiled by the hands of many readers and inked by the pens. . ." of "mechanic and laborer."† One of the ablest men in my own State (the late Richard L. Hand) speaking as late as 1905, in an address to the Association upon the subject of "Government by the People," urged the Bar to remember that in this country, as distinguished from all others, "With us, *the citizen does not exist for state or church, but both state and church exist for the citizen.*"‡

Yet in the very same volumes where are reported these expressions of political philosophy, other and sometimes

* American Bar Association Reports, 1879, p. 214.

† Address of the President, James M. Woolworth. Vol. XX, American Bar Association Reports (1897), p. 250.

‡ Vol. XXVIII, American Bar Association Reports (1905), p. 423.

the same gentlemen were appealing gravely to the Bar to believe that the State created lawyers — who certainly were citizens — not for their own benefit, as individuals, but for the benefit of the State. In bursts of eloquence, they urged upon their profession the maintenance of the guild ideal, the ideal of the merger of the individual's personal life in the larger life of the community — the ideal of service rather than that of profit.

In their conception of the relationship of the individual to the State, the lawyers of the previous generation believed thoroughly that the State existed primarily for the development and progress of the individual, yet they fought the same individualistic philosophy when it took the shape of the Indiana constitutional provision that "every person of good moral character" was of right entitled to practice law. In a land where all men were treated as *equals*, our seniors pleaded that, so far as practicing law was concerned, men should be treated as *un*equals; that it was for the protection of *all* that individual activity should be curbed and restrained; that it was of *social* importance that the Bar should not be wide open, but that, on the contrary, as the late Judge Brewer put it, "The door of admission to the Bar must swing on reluctant hinges, and only he be permitted to pass through who has by continued and patient study fitted himself for the work of a safe counsellor and the place of a leader." * A preachment for a privileged Aristocracy, forsooth, in a live Democracy! How difficult, then, when there were divided counsels among the allies! The war is not won yet.†

* Address before American Bar Association, 1895. Reports, Vol. XVIII, p. 450.

† While this book is going through the press, Elihu Root makes his

In addressing the Association of American Law Schools at the meeting at Montreal (1913), Ex-President Taft, speaking upon "The Social Importance of Proper Standards for Admission to the Bar," said:

It has been the habit in many states to regard the practice of the law as a natural right, and one which no one of moral character can be deprived of. Such a view of course ignores the importance of the profession to society and looks at its practice only as a means of earning a living. Laymen can readily be made to see that society should be protected against the malpractice of the medical profession and surgery by men who know nothing of disease or the effect of medicine, or the handling of a surgical instrument. It is, therefore, comparatively free from difficulty to secure laws prescribing proper educational qualifications for those holding themselves out as physicians or surgeons. The danger to society of the misuse of the power which a lawyer's profession enables him to exercise is not so acutely impressed upon the layman until he has had some experience in following bad advice. A legal adviser cannot ordinarily injure his client's bodily health, but he can lead him into great pecuniary loss and subject him and his family to suffering and want. The more thorough the general education of one who proposes to be a lawyer, the more certainly his mind will be disciplined to possess himself of the principles of law and properly to apply them.*

A committee of the National Economic League, consisting of such distinguished men as Charles W. Eliot, Moorfield Storey, Louis D. Brandeis, Adolph J. Rodenbeck and Roscoe Pound, studying the subject of effi-

stirring address to the American Bar Association (Proceedings at Chicago, Aug. 31, 1916) in which he says: "The constant pressure of Democratic assertion of individual rights is always towards reducing the difficulty of bar examinations."

* Reports of American Bar Association, Vol. XXXVIII, p. 924.

ciency in the administration of justice, give as the first main point in a list of the several remedies for inefficiency, "Proper training of the legal profession." In the course of this report (1914) they state:

> Of late there has been a steady growth of sentiment within and without the bar which has produced more adequate requirements of preliminary study and preliminary general education in a majority of the states. But this improvement is the work of a few years, is still in progress in many states, and has much farther to go everywhere. In no state is there any requirement that those who come to the bar have that minimum of general education which will enable them to deal properly with the social and economic questions which our polity commits to the courts.*

This committee regards it as "quite futile" to attempt reforms addressed only to judicial machinery, so long as the public in so many of our jurisdictions insists upon treating the practice of the law as a mode of earning a livelihood which should be open to everyone and refuses to exact those requirements of preliminary education and thorough professional training which are required not merely to make the lawyer an efficient agent in the public administration of justice through thorough presentation of causes, but also to make him an effective public servant through initiation and promotion of improvements in legal institutions and doctrines.†

As late as 1914, the Committee on Legal Education of the Minnesota State Bar Association (compare conditions of "ambulance chasing" in Minnesota, *post*, page 181) reports that it found that in that State as much

* Preliminary Report on Efficiency in the Administration of Justice, The National Economic League, pp. 12, 13.

† *Idem*, p. 12.

or more preliminary education is required of those who seek a license to practice medicine, dentistry, horse-doctoring, or nursing, than is required to secure a license to practice law. This committee compared the preliminary qualifications required for six occupations: (1) *law*, (2) *medicine*, (3) *dentistry*, (4) *horse-doctoring*, (5) *nursing*, (6) *horse-shoeing*. It found that in the State of Minnesota as to *medicine*, an applicant must to-day pass an examination set by a board of examiners, and that before being admitted to take such examination, the applicant must have completed a four years' course in an approved medical school. He is required not merely to *study* medicine four years. He must have *successfully completed* a course of that length. The committee further observes that such a course cannot be taken in any sort of medical school meeting two or three nights a week, but must be in an *approved* medical school, meaning thereby one approved by the Association of American Medical Schools. In *dentistry* it found that before an applicant may receive a license to practice his profession, he must prove that he is a graduate of an approved dental college. In *nursing*, that one who wishes to be licensed as a registered nurse must pass an examination, first showing that she has had a preliminary education equivalent to a four years' high school course and that she has been graduated from a nurses' training school after a course of three years. That as to *horse-doctoring*, the applicant for license to practice must pass an examination before the state board, after proving that he is a graduate of a regularly organized veterinary college with a course of three sessions. The horses and mules of the Commonwealth of Minnesota, observes the committee, are not to be subject to the

ministrations of a person who has merely *studied* veterinary medicine for three years. He must have carried on such studies *efficiently* and *successfully* for that period. In *horse-shoeing*, anyone who wishes to practice in Minnesota the profession of horse-shoeing, including the shoeing of mules, must pass an examination duly set by the state board, after furnishing proof that he has served three years as an apprentice under the instruction of a master horse-shoer. When the committee came to qualifying for practicing *law* in its home State, it found that any person might be admitted to the profession of law, either upon passing an examination set by the State Board of Bar Examiners, or upon producing a diploma from a law school incorporated in the State or established by authority of its laws and approved by the Supreme Court. And that as to his professional studies, he need only show that he has *studied* law for a period of not less than three years either in a law school or in the office of a practicing attorney, or both. The committee specifically calls attention to the fact that all that is required is that the applicant show that he *studied* for three years, that the rule contained nothing about the *kind* of law school in which the studying must be done, and that as to admitting graduates of Minnesota law schools, the privilege extended not only to the law graduates of the State University, whose training is subject to the control of the State, *but also* to graduates of *any law school incorporated under the* laws of the State. Says the committee:

When it is remembered that any three persons, whether lawyers or not, are entitled to take out articles of incorporation for a law school with a high-sounding name, without putting up any money and without giving any evidence of

possessing adequate facilities for giving legal instruction; and that lawyers, with that kindliness and courtesy which is so characteristic of the profession, can seldom resist an insistent invitation to "come around and deliver a lecture or so to the boys"; that the acceptance of such an invitation puts them on the faculty list; and that the Supreme Court naturally objects to making invidious distinctions, we can readily see that the diploma privilege in Minnesota, if it was ever wisely accorded, has now been extended far beyond the limit of reason and the true interests of the profession. In our judgment it should be abolished, and all applicants for admission to the bar should be required to pass a suitable examination set by the State Board of Law Examiners.*

More interesting still: — the required preliminary education of the lawyer in Minnesota covers (1915) "One year's Latin; English History, American History, English Composition and Rhetoric; Common School Branches." The committee says: "It is only the horseshoers and the lawyers who escape any particular requirement as to preliminary education."

Is it any wonder that this committee quotes the President of the Carnegie Foundation who, in announcing a survey of legal education and admission to the Bar in the United States, said that while the medical profession may be called a *learned* profession, the same cannot be said of the legal profession?

In 1905, Henry H. Ingersoll described before the Section of Legal Education of the American Bar Association one kind of law school that turned out lawyers even in his day.

Let me describe to my friend one of them. This is one

* Report Minnesota State Bar Association Proceedings (1914), pp. 72, 73.

that existed in our state. It was organized by a single person under a charter obtained from the state in pursuance of a general law, in which the president was the mother-in-law of the incorporator-in-chief and where half a dozen men unknown to the members of the Bar and to the community generally composed the faculty; where the degree of LL.D. was conferred without a single hour's attendance upon the school; where men simply wrote requests from a distance for a degree, and where the institution, upon receipt of the requisite fees as fixed by the incorporator, gave the degree. In the state at that time there existed a law authorizing any person possessing the degree of LL.D. from any law school in the state to be admitted to the Bar. Now that is a fake law school according to our understanding. We have all sorts of law schools in America, and I repeat that I do not think my friend from Pennsylvania ever saw one in his state like the one I have described. In a state where they have no Board of Examiners, with a statute which permits any person holding a degree from such an institution to be admitted to the Bar, we have persons admitted to practice of a character such as I will instance: A man about thirty years of age came to me one day and said, "Judge, I want to study law in your office." I replied that I did not take law students into my office. He said, "So I understand, but I want to go to the law school in the university." I said that the term did not begin until September; this was early in the spring. He said, "I know that too, but I want to get ready to study law." I said, "Have you ever studied history?" He said, "No." I said, "Let us go down to the book store and get some books." "All right," he said. "You know, Judge, father is dead now, and I have plenty of money and lots of spare time on my hands, and I want to be a lawyer." We went to a book store and I bought for him a history of the United States and a history of England of the high school kind. He took the books and thanked me, and went away. From that day he has never been in my law office nor has he been at the law school of the

university. That was about the first of March. Sometime in May I opened the morning paper and I was astounded to find an item stating that that man had been admitted to practice law in the courts of Tennessee, four months before the time when, by his own confession, he was ready to begin the study of law. Now that is what can happen in a state where there is no uniformity of standards and no board of law examiners, where two circuit judges or two chancellors, or the faculty of any law school may license a person to practice law.

I am happy to say that in the last three years we have changed all that in our state, and those of us who, as law professors, had the power to license have, after ten years' effort, succeeded in getting the legislature to take the power away from us and confer it solely upon the Supreme Court. Through that tribunal we have erected a uniform standard now.*

In Indiana, as late as 1900 there was introduced an amendment to the Constitution (which, it will be recalled, provided that "Every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice") by which amendment the General Assembly was authorized to *prescribe what qualifications shall be necessary for admission to practice law in all courts of justice;* 100,000 more votes were cast for the amendment than against it, but it did not receive a majority of the votes then cast for presidential electors and governor. The Supreme Court felt constrained, therefore, to hold that the amendment had not been carried by the constitutional majority required by law for the ratification of such an amendment, and that in consequence an applicant for admission

* Vol. XXVIII, Reports of American Bar Association (1905), pp. 574, 575.

to the Bar could not be required to submit to an examination as to his qualifications, educational or otherwise, although there then existed and still exists a statute providing for examination as to such qualifications.*

The territory of ignorance yet to be conquered still bulks large before us. But ground has been taken and though the enemy is not yet in full retreat, we may report that we are still occupying ground from which he has fled and to which he is not likely soon to return.

Up to 1871, in this country the private law office was the principal school for legal training.† The first law school was established in Litchfield, Connecticut, in 1784 by Tapping Reeve and was closed in 1833, after enrolling 1,024 students.‡ The second was the Harvard Law School established in 1817.

In 1887 and 1888, there were in the entire country 49 law schools, with 293 professors and instructors and 3,667 students.§

In 1891, the Committee on Legal Education reported that, having communicated with the Chief Justice of each State, it found that in the following States there were no requirements for any specified period of study or legal education prior to application: Alabama, Arkansas, California, Florida, Georgia, Michigan, Mississippi, Missouri, Nevada, New Hampshire, North Carolina, Pennsylvania, South Carolina, Tennessee, Virginia and West Virginia,¶ and that at that time (1891) the di-

* Thornton: "Attorneys at Law," Vol. I, §§ 43–44 (p. 59), citing In re Denny, 156 Ind. 104, 59 N. E. 359, 51 L. R. A. 722 (decided by divided court).

† Vol. XIX, American Bar Association Reports (1896), p. 521.

‡ *Idem*, p. 522.

§ *Idem*, p. 315.

¶ *Idem*, p. 301.

plomas of at least four law schools with *one*-year law courses were sufficient for admission to the Bar without further examination.*

The New York State Board of Examiners held its first examination in January, 1895.† Up to June, 1896, it had examined 1,051 applicants, of whom 433 were graduates of colleges or universities, the latter coming from 69 different institutions of learning, ranking in the order of applicants (except that Harvard and Princeton sent the same number) Yale, College of the City of New York, Harvard, Princeton, Columbia, Cornell, Hamilton, Amherst, University of the City of New York, and Williams. Of 1,050 examined, 793 had had training in a law school, while 257 had only experience in an office, or practically 25% were "law office graduates." Of the 793 who had attended law schools, 116 failed to pass or about 14%. Of the 257 who had not attended law school, 68 failed to pass, or about 26%.

Of the 433 graduates of colleges and universities, 51, or about 11% failed to pass. Of the 652 who were not graduates of colleges, 133, or about 20%, failed to pass. Of the 192 who had attended neither college nor a law school, 51, or over 26%, failed to pass. This shows that even in its first year the New York State Bar Examiners adopted rigorous tests of legal knowledge, tests that have become increasingly rigorous ever since.

In 1896–1897 there were in our country 76 law schools, in which were enrolled 10,000 law students. Of these law schools, seven, having 222 students, still provided a law course of but one year's duration; forty-five, having

* Vol. XIV, American Bar Association Reports (1891), p. 314.

† See paper by Austen G. Fox, Vol. XIX, American Bar Association Reports (1896), p. 550.

4,817 students, provided a law course of but two years' duration, and the remainder provided a course of three years or longer.*

In 1913–14, there were 122 law schools, with approximately 20,000 pupils. Of these, only one had a curriculum of but one year, 17 had curricula of two years, and the remainder required at least three years for graduation and of these eleven evening schools required four years of study. Some of the stronger schools, including Harvard, Columbia, Yale, Pennsylvania, Michigan, Chicago, Wisconsin, Minnesota, Stanford and California, now offer courses that will require from four to six years to complete at the normal rate.†

At present there are more than 150 schools, with over 20,000 students.‡ In 1893 at least half of the men in training for the American Bar were not attending any law school, but were getting their legal education entirely from private study or in private offices.§ "Unquestionably the fact that so large a portion of the American bar then and before then had been trained in this unsatisfactory way accounts for many of the defects in the practice and administration of law which have been the objects of such widespread and violent criticism during the last few years."

By 1914, there had been "a rapidly growing tendency for the prospective lawyer to seek a law school for his legal education, and fortunately there has been con-

* Vol. XX, American Bar Association Reports (1897), pp. 384 *et seq.*

† "Recent Progress in Legal Education." Chapter X, U. S. Bureau of Education Report, 1914, p. 230.

‡ The Carnegie Foundation for the Advancement of Teaching. Bulletin No. 8, Report by Dr. Josef Redlich.

§ "Recent Progress in Legal Education." Chapter X, U. S. Bureau of Education Report, 1914, p. 226.

currently an equally marked improvement in American law schools. *In these two tendencies lies the greatest hope for a better, simpler, and more systematized body of law, and for a more direct, speedy, and just administration of the law in the future.*" *

In 1899, Harvard Law School made it a requirement for entrance that the student should have completed a full college course. Pennsylvania announces this requirement for 1915-16. Columbia, Chicago, Stanford, Western Reserve and California require the completion of the college course or of three years of such course upon a combined college-law curriculum. Cornell, Michigan, Wisconsin, Minnesota, Illinois, Missouri, Nebraska, the University of the Philippines and some others require two years of college work for admission. A number of others require one year. North Dakota enters the race for learning with announcement that in 1917 the law school will require two years' preliminary college work.

The conclusion of the expert of the U. S. Department of Education* is "that (1914) *all* or nearly all of the university law schools of the country are now, or within two years will be, requiring at least two years of college work." Professor Bates warns us, however, that there are still proprietary schools run for profit, which do not take into account "the larger interests of the State, the profession, and the requirements of justice" and which grant diplomas on low standards of admission and of work. "Unless this tendency is checked, much of the good that the better university schools are attempting to accomplish, at the expense of loss in students and

* Henry M. Bates, Dean of the Law School, University of Michigan, "Recent Progress in Legal Education." Chapter X, U. S. Bureau of Education Report, 1914, p. 227.

money to themselves, will be offset by the schools run mainly for revenue only." And, says Professor Bates, "This is no idle speculation, but a real condition, which must be grappled with vigorously and promptly." Why, if ours is a Business — not a Profession?

"Twenty-five years ago," says Professor Bates, "examinations for admission to the bar were in most States either unknown or more a subject of jest than of serious attention. To-day more than three-fourths of the States have what may reasonably be considered acceptable laws relating to admission to the bar — laws that are administered either by the courts directly or by boards of examiners appointed by them or provided for in the statute. The examinations are not always scientifically conducted, but in most of the States they are honest and genuine tests, to pass which requires at least a reasonable degree of proficiency. Most of the States now require, as preliminary to the taking of bar examinations, a high-school education and the completion of three years of law study. The State of Michigan has made a distinct advance in requiring that those applicants for the bar who are not graduates of a respectable law school shall have studied law at least four years instead of the three required of law-school graduates. This puts an effective and very salutary check in that State upon the practice of going to the bar by unregulated office or private study or by means of instruction in correspondence law schools." *

In 1913, the Trustees of the Carnegie Foundation for the Advancement of Teaching approved a plan for the Study of Legal Education in the United States covering

* "Recent Progress in Legal Education." Chapter X, U. S. Bureau of Education Report, 1914, pp. 236, 237.

an examination of existing law schools, of bar examinations, and of the relation of these matters to the quality of legal practice. Mr. Alfred Z. Reed was entrusted with this work and began it in the spring of 1913. The amount of material to be dealt with has proved to be so enormous and complex that the Foundation reports (1914) that at least a year and a half will probably elapse before a final report can be presented.

In the meantime, it set on foot an inquiry into methods of instruction in the law, and in 1914, Dr. Josef Redlich, of the Faculty of Law and Political Science in the University of Vienna, to whom was assigned the work, completed his report on "The Common Law and the Case Method in American University Law Schools." This report is a valuable contribution upon the subject here considered and should be in the hands of every student of legal education in our country.

Dr. Redlich finds much of encouragement in the present curricula of our law schools, but he puts his finger unerringly on the weak spot — there is a lack of training in fundamental concepts and legal ideas common to all divisions of the common law. "Or," as Dr. Redlich says, "to express it in a word current in European pedagogy, the beginners in American law schools should be given a legal *Propädeutik*, or preparatory course, which in a simple yet scientific manner shall set forth the elements of the common law; shall furnish, that is to say, a comprehensive view of the permanent underlying concepts, forms, and principles, not forgetting the elementary postulates of law and legal relationships in general. The more rigorously *casuistic* the case method of instruction which then follows necessarily has to be, the more important it seems to me it is to make clear to the students

at the very beginning certain fundamental facts and guide-posts of the law which are removed from all casuistry and theoretical controversy. Only in this way will their future studies rest upon a solid and scientifically grounded foundation."

Those "furriners" always hectoring us upon our own deficiencies! Trying to impose their Kultur upon us! Think of it, Dr. Redlich even proposes that the modern law student of our country "should be able to grasp the general scientific theory of the law as one of the great dominating phenomena of human civilization and human thought!" And along comes a Carnegie Foundation — which should at least be neutral, if not *for* the Allies, and gives to this Austrian gentleman the seal of its approval! Verily we have fallen upon strange days. A Program of Preparedness for Peace!

I am reminded that but recently the Warden of Sing Sing (himself a Harvard "grad") gave it as the result of his observation that "The most dangerous man is not the criminal who comes up from the crowd. It is the educated criminal who, because of his education and his craft, and the misuse of his opportunities for good who is the real menace to society. The most monstrous and most contemptible man I have ever met, either in prison or out, is a college graduate." * Education for the Bar must include ***moral training*** — if it is to be education for the Bar.

* *New York Tribune*, Dec. 13, 1915.

CHAPTER XI

A NEW IMPULSE AND AN OLD TRADITION

IT was a most significant communication that occupied a page of a recent periodical.* It came from a troubled business man, one who testified that he owned and operated a successful business, requiring his whole personal attention, but that, having a surplus, he sought, like many others, investment through well-known bankers, in railway and industrial enterprises. He read of the criticisms of the management of these enterprises; he could not travel back and forth to stockholders' meetings nor adequately investigate the "conditions of labor employed by these corporations"; and yet as a stockholder he felt, with evident sincerity, a sense of personal moral responsibility for the financial and industrial management of these companies. He asks, What shall I do to meet my responsibility? Under the title "Lending and Spending," the editors advise him that in truth he is correct in believing that "As a part owner in these companies he has a personal responsibility for their behavior"; that his dilemma is "very real"; and they remind him that "Stockholding is private property shorn of all its glamor, stripped of all its feudal graces, and crippled in all its moral obligations." I shall not stop to consider the suggestion of an "Investors' League" (based substantially on the underlying principle of the Consumers' League) which the editors offer this bewild-

* *The New Republic*, Dec. 11, 1915.

ered and conscientious correspondent, nor shall I quote more of the editorial than its closing lines: "Lending must be socialized as well as spending, and if the lenders ignore the responsibility, the community will seek some other means to accomplish the result." For my purposes, the significance of this event lies in its sharp contrast with the "sand the sugar, lard the butter" attitude prevalent under the nineteenth century code of commercial ethics. That even one investor in corporate securities feels poignantly his social responsibility and seeks earnestly for means of meeting that responsibility is for me a signpost in our travels of the last quarter-century. It seems but yesterday that Professor Ross brought vividly home to every doorstep the modern crimes arising out of unsocial practices in business. In Chapter III (*ante*, p. 33) there is a partial description of metamorphoses in business transpiring beneath our very eyes. Unless we grasp the meaning of these changes in American thought, we shall pass by an understanding of the momentous changes taking place in the practice of the law.

The education of the Bar of the eighteenth and nineteenth centuries was essentially Anglo-Saxon. Our legal and vocational concepts are British. We were taught the *noblesse oblige* of a little aristocracy in a big democracy, to be step-godfathers of an existing all-perfect legal system. We accepted as final the economic and social philosophy of the English school of economists and our classic text for after-dinner orations was the greatness of a land in which was fully granted to each individual the right to pursue his own life and pile up as much as he could of nature's treasures. As the thrilling movies of 1890–1910 were unreeled to us — the revela-

tions of corporate finance, the insurance and railroad scandals, the sweatshop and tenement conditions — the municipal graft — we were stirred to a realization that conscience must have a part in our business and vocational as well as our Sunday life, and we were led to new ethical interpretations of duty. There was slow but sure emergence from our free-for-all society of a vague, indefinite, but persistent power, which, for want of better nomenclature, we called our "social conscience." Impelled by its force, we straightway subjected American life to its scrutiny.

We went up to our old, musty garret, got out our still useful though discarded religious sentiments, and threw out the moth-eaten and threadbare clothing we called our thought. We swept away the cobwebs of mind that had accumulated through years of failure to clean house. In truth, we had not visited our upper stories in many a year. When we did not work, we played — in order to work; and when we played, we played as though it were work. Suddenly we were stirred. Our brains were shocked into revolution as the blind man suddenly recovering sight, or the deaf suddenly brought to hearing. Not a little surprised that the old machine up there could still be made useful, we began to *think*. We began the evolution of a new public opinion — we are still evolving. Not that our thinking was superfine. But we *thought*; that was something. We tested everything from breakfast foods to sex relationship, from advertising to religion, from business to law, by the same inexorable standard of truth. We marched up to the cathedral, battered down the front door, and with no politeness and less reverence, we charged at the priest — What is it you are preaching and wherefore?

In similar spirit, we went to Wall Street, and Colorado, to Bethlehem, to Indianapolis. It made no difference to us whether it was Mr. Morgan or Mr. Gompers, Mr. Rockefeller or Mr. McNamara — "On your conscience, gentlemen, what are you doing and why are you doing it?" If the answers were not in concordance with our fresh, young standards of social responsibility, we pitched into the gentleman, and for his punishment chose either the jail or the social pillory. Meanwhile, each of us remained quite unconscious of the recoil upon his own vocational standards and conduct of the powers thus released and added to by his contribution as a member of the community. Those socialists with their queer philosophy — still queer as a social solution — dragged in their forty-two centimetre guns loaded with facts, and fired them at us, until bursting upon us like burning torpedoes, they waked us from our complacent slumbers. When the community was sufficiently incensed, it went after the *lawyers*, just as it went after the priests and the magnates. "What are *you* doing and *why* are you doing it?" Then came the revival of an old sport — the baiting of the lawyer. The law was at fault — just as Jack Cade said. The lawyers made the laws. Wherefore, let's hang them all.

And we, poor things, must each of us plead *mea culpa*, for we had occupied a place of leadership and had led not. We had carried the keys to the Halls of Justice. And the doors were often locked. We were the officers of the court. And the slaves of trade. We fell down, we fell down hard. "Oh, my countrymen, what a fall was there!" In the dawn of a new public opinion, the sun burst and found us asleep, like that old Nuremberg watchman in *Die Meistersinger*.

We had failed to train ourselves properly for our true place in society; we were deficient in methods of moral training for our acolytes; we could have made a mighty contribution to the new philosophy which is to be American democracy's great gift to the world, and we did not. We carried under our robes a philosophy of social service that, for two thousand years, like a holy grail had been handed down through our Guild. And we kept it hidden under our robes.

We awoke, slowly, like our old friend Rip, to find the country made over during our slumber. And there we were, sleepy-eyed and bewildered by the change.

CHAPTER XII

THE FORMULATION OF PRINCIPLES FOR THE GUIDANCE OF THE AMERICAN BAR

By 1897, the criticism described in the previous chapter resounded loudly within and without the cloistered walls of our profession. In 1895, the late Justice Brewer (Associate Justice of the United States Supreme Court) reminded us that, "It takes something more than a $200 silk night shirt to make a man a leader in social forces, and whatever of prominence and notoriety money may purchase, it never purchases the power to change the currents of life."* In 1897, the Committee on Legal Education reported: "Your Committee has under consideration the desirability of instruction in the legal and moral duties of lawyers; in other words, whether a need exists for some special training in the ethics of the law, training which is systematic and to be had in course, instead of being accidental and incidental."†

Quoting Milton's description of lawyers of his day as "Grounding their purposes, not on the prudent and heavenly contemplation of justice and equity, which was never taught them, but on the promising and pleading thoughts of litigious terms, fat contentions and flowing fees," the committee says: "It is a sad truth that to-day many members of the profession degrade their calling by taking the most sordid and self-interested

* Vol. XVIII, American Bar Association Reports, 1895, p. 443.
† American Bar Association Reports, 1897, p. 377.

view of the cases which are entrusted to them. Contingent fees. . . . A system of canvassing and direct solicitation, supported by an army of agents, runners, evidence scrapers and suborners of perjury. . . . The courts are choked with cases of this character to the exclusion of other business." * Will contests — "The trade has also sprung up in some quarters of purchasing for small and inadequate sums the interest of a legatee in an estate, the unhappy Esau selling his birthright for a mess of pottage because of the law's delay and his own cruel necessities. . . . Professional advertising by all the means known to the business world is notoriously common. . . ."†

How without special study in ethics, asks the committee, can even the instructed lawyer "give judicious advice upon the . . . lawyer's duties . . . as an adviser . . . in drawing pleadings . . . advising upon evidence . . . in consultation . . . pleading . . . drawing deeds and wills . . . as a peacemaker . . . as an arbitrator . . ." How can he possess "the lawyer's regard for professional confidence, the lawyer's humanity, the lawyer's charity," how can he play his part as "a citizen, . . . a legislator, . . . (or) a judge"? ‡ The committee advises the active practitioner or diligent judge in moments of leisure to study the books which are here reprinted in the note. §

* American Bar Association Reports, 1897, p. 378.

† *Idem*, p. 379.

‡ *Idem*, pp. 380–381.

§ "The Study and Practice of the Law," by John Raithby (London, 1798); "Reflections on the Study of the Law," by Richard W. Bridgman (London, 1804); "Advice on the Study and Practice of the Law," by William Wright (London, 1824); "The Lawyer, His Character and Rule of Holy Life after the manner of George Herbert's Country Parson," by Edward O'Brien, an Irish Barrister (Philadelphia, 1843); "Lawyers and

And the committee (George M. Sharp, Henry Wade Rogers, Hampton L. Carson) makes this final appeal: "If anything is to be done in the way of inculcating proper sentiments and of counteracting the evil effects of the introduction of modern business methods" — Hear ye, hear ye, all ye business men! — "into the practice of the law, it is high time" — eighteen hundred and ninety-seven! — "that all those who hold their profession as above price should unite in an effort to bring to the attention of teachers as well as practitioners the need of devoting a definite portion of time in each student's course to a consideration of subjects which will never, except by accident" — disbarment proceedings perhaps? — "become a part of his professional knowledge when once embarked upon the active duties of his career." *

About 1900 the graduates of the modern law schools began to take their stand in Bar Associations, in Citizens' Unions, in City Clubs and in other places. [The future historian will not overlook — lest he may, this note should be brought to his attention —the records of the New York City Bar Association Grievance and Judiciary Committees, the Committees on Legislation of the Citizens' Union and the City Club, and the Bar Association Committees on Law Reform (1900–15). He will find there many contributions to public service by the lawyers of that day.]

Clients, Their Relation, Rights and Duties," by William Allen Butler (New York, 1871); "Legal Ethics," by George Sharswood, Fifth Edition (Philadelphia, 1896); Anthon's "Law Student" (New York and Philadelphia, 1850); J. I. Clark Hare, "Ethical Basis of Jurisprudence" (Philadelphia, 1882); and a "Manual of Elementary Practice," by C. LaRue Munson (Indianapolis, 1897).

* American Bar Association Reports, 1897, p. 382.

In 1905, in Rhode Island, the President of the American Bar Association, Henry St. George Tucker, addressing the meeting, said: "I feel that I cannot close this already too long drawn out address without a reference to a remarkable address delivered by that remarkable man, Theodore Roosevelt, before the Harvard Alumni at Cambridge in June last. My justification for a reference to it, I trust, will be found in the quotation which I give from the speech. In speaking to the Alumni, he says:

This nation never stood in greater need than now of having among its leaders men of lofty ideals, which they try to live up to and not merely to talk of. We need men with these ideals in public life, and we need them just as much in business and in such a profession as the law. . . . Every man of great wealth who runs his business with cynical contempt for those prohibitions of the law which by hired cunning he can escape or evade is a menace to our country, and the country is not to be excused if it does not develop a spirit which actively frowns on and discountenances him. The great profession of the law should be that whose members ought to take the lead in the creation of just such a spirit. We all know that, as things actually are, many of the most influential and most highly remunerated members of the Bar in every center of wealth make it their special task to work out bold and ingenious schemes by which their very wealthy clients, individual or corporate, can evade the laws which are made to regulate in the interest of the public the use of great wealth. Now, the great lawyer who employs his talent and his learning in the highly remunerative task of enabling a very wealthy client to override or circumvent the law is doing all that in him lies to encourage the growth in this country of a spirit of dumb anger against all laws and of disbelief in their efficacy. Such a spirit may breed the demand

that laws shall be made even more drastic against the rich, or else it may manifest itself in hostility to all laws. Surely Harvard has the right to expect from her sons a high standard of applied morality, whether their paths lead them into public life, into business or into the profession of the law, whose members are so potent in shaping the growth of the national soul.

"The serious charge made by the President in the above against some of the members of our profession must give us pause; his recognized position in the country in stimulating lofty ideals in life, as well as his recognition of the position of our profession in moulding public sentiment in the country, forces upon us, willingly or unwillingly, as an Association, the inquiry, not only whether the charge be true, but also the broader inquiry whether the ethics of our profession rise to the high standard which its position of influence in the country demands; surely no more important question than this can be forced upon the profession. I am one of those who believe that the profession of the law is more potential for good than any other profession, excepting the Christian ministry, and in some respects more powerful for good than even that high profession. Its power for evil is correspondingly great." *

* * * * * * * * * *

"No more difficult question can be presented to this Association, or to those auxiliary associations in the different states, than that of purging its membership of the unworthy member who brings dishonor upon the whole profession. Instances of irregularity and dishonesty will only be known to those of the local Bar where

* Vol. XXVIII, Reports of American Bar Association (1905), pp. 383, 384.

the derelict conducts his immoral practices; personal, social and even political ties render it trying and embarrassing to bring the guilty to justice, but if our profession is to receive the reward which is its just due, and is to accomplish the high aim for which it is destined, this work must be undertaken and carried out fearlessly and thoroughly." *

At the same session, Alfred Hemenway of the Boston Bar, speaking of "The American Lawyer," said: "It has been recently stated by one who has a wide experience on the Bench of the Superior Court of Massachusetts that 'the provisions of the statutes relating to employers' liability furnish grounds for probably one-quarter of the civil jury cases tried in court at the present day.' This percentage is not normal. Such litigation smacks of maintenance. It suggests a reason for other states to follow the precedent of Alabama, where a statute was recently passed making it a misdemeanor for an attorney to employ runners to solicit practice, and requiring the public prosecuting officer, upon complaint of the Council of the State Bar Association, to institute proceedings for any violation of the statute. This statute is noteworthy, inasmuch as it makes criminal what before was dishonorable and unprofessional. A rule of ethics becomes a rule of law. It is a warning to the ambulance chaser. It is a statutory acknowledgment of the dignity of the legal profession. It is a happy sign." †

These stirring appeals were followed by the chairman of the Executive Committee offering this resolution: —

"Resolved: *That a Committee of Five be appointed,*

* Vol. XXVIII, Reports of American Bar Association (1905), p. 387.
† *Idem*, pp. 403, 404.

of which the retiring President shall be Chairman, to report at the next meeting of the Association upon the advisability and practicability of the adoption of a code of professional ethics by this Association." * The resolution was unanimously adopted. It gave birth to a movement, the consequences of which cannot even yet be foreseen.

At the 1906 meeting held in Minnesota, the committee promptly reported favorably upon the "advisability and practicability" of the adoption of such a code of ethics† and its recommendation calling for a committee from Bench and Bar to draft a series of canons of professional ethics "suitable for adoption and promulgation" by the Association was adopted unanimously. ‡ At the 1907 meeting (Maine) the committee made a further report § in which it submitted a compilation of all the codes of ethics adopted in different States of the Union, and reprinted the famous Hoffman resolutions in regard to professional deportment.

In 1908, the committee, consisting of Henry St. George Tucker, Lucien Hugh Alexander, David J. Brewer, Frederick V. Brown, J. M. Dickinson, Franklin Ferriss, William Wirt Howe, Thomas H. Hubbard, James G. Jenkins, Thomas Goode Jones, Alton B. Parker, George R. Peck, Francis Lynde Stetson and Ezra R. Thayer, reported a full set of canons of ethics, after having submitted its 1907 report to each member of the Association and to the Secretary of every State Bar Association in

* Vol. XXVIII, Reports of American Bar Association (1905), p. 132.

† Vol. XXIX, Reports of American Bar Association (1906), pp. 600–604.

‡ *Idem*, p. 35.

§ Vol. XXXI, Reports of American Bar Association (1907), pp. 676–736.

the United States. It was adopted at this meeting (Appendix A).

(At that time there were in existence codes of ethics, more or less complete, in Bar Associations in the following States: Alabama, California, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Virginia, Washington, West Virginia and Wisconsin.

In addition, committees of Bar Associations of Illinois, Kansas, Massachusetts, Montana, New York, Ohio, Pennsylvania and Vermont had aided in the formulation of the present code).

By 1914 — six years later — the Bar Associations of thirty States had adopted it.* At the Missouri State Bar Association meeting held in September, 1914, the recommendation to adopt the code was adopted:

The American Bar Association in 1908 adopted canons of practice which have met with the highest praise. They have not had the publicity which their merit deserves. They ought to be the strict rule of every lawyer's conduct. They should be expressly approved by our highest court and promulgated as its standard of professional action. We recommend that the Association ask the Supreme Court to publish these canons in an early volume of the Missouri Reports.†

* Arkansas, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington. [See Report of Committee on Professional Ethics, Vol. XXXIX, Reports of American Bar Association (1914), p. 559.]

† Vol. XXXIX, Reports of American Bar Association (1914), p. 562.

As we have already seen, in New York State these canons are to-day part of the specified subjects of examination for admission to the Bar, and in at least one case have been referred to as the basis for judicial action in disbarment proceedings.*

It is no exaggeration to say that the concentration of the attention of the entire Bar of the country upon the matter of professional deportment, the thoughtful and analytical consideration of each one of these canons, did more to stimulate the improvement of professional standards of conduct than any single event in the history of the American Bar. When we look back to the meager training of the Bar prior to 1880, the slow movement in the direction of education and the relative celerity with which the 1905 movement went forward, we shall admit that, however deficient the Bar may have been in the past, or still is, these events indicate that at the core it is a healthy, sound profession. Of course, these canons are not perfect. Two or three books could be written commenting upon their deficiencies. But they represent beleaguered territory conquered. They are guideposts for the ignorant and warning signals to the wickedly inclined. They are not self-enforcing. They are educative. Much still is left to be done. Radical reorganization of the American Bar is still necessary if the disciplinary power of the Bar is to be efficiently exercised.†

* See In re Newman, 172 App. Div. 173.

† "The Bar has attempted to discipline itself. It has failed because it has possessed no solidarity. To the layman the Bar doubtless looks like a well-organized body but nothing could be further from the truth. . . ." "But the third and greater reason for organization is the need for self-government and this need cannot be met by voluntary organization. . . ." "At present the self-respecting members of the profession

In 1914 in Burlington, Iowa, the Committee on Disbarment of Attorneys * reported in favor of establishing machinery for the purpose of proceeding against attorneys guilty of unprofessional conduct. The chairman of the Committee, in presenting these recommendations, said:

I might suggest that thirty or more years ago when the boys were so precocious that they only needed nine months reading of the law for admission to the Bar, that dear old and learned man, Chancellor Hammond, used to tell us to read Sharswood's Legal Ethics, which covered at least some of the duties and responsibilities of the lawyer. They then taught professional ethics in the law schools. But after a while all of us got into the activities of commercial life, during the "steel age," as it is called, of the last half of the nineteenth century, and the lawyer was becoming commercialized, and they quit teaching professional ethics in the schools; and according to the reports of the Supreme Court of the United States and of some of the various investigating committees, I think it might be called the s-t-e-a-l age. We almost abandoned the thought of there being any ethics in our profession and law schools quit teaching it and lawyers quit practicing it.†

But the easy days are over. The Bar is now awake. It has found and will find more ways of making its ideals real — its canons of ethics actual governing rules of conduct.

admit the existence of an undesirable element but can do very little by way of discipline. Responsibility for disciplining does not rest on the Bar nor has the power been delegated. The public does not realize the essential helplessness of the profession to purge itself." — Herbert Harley, Interpretation of the Theory and Purposes of the American Judicature Society, 62 *University of Pennsylvania Law Rev.*, pp. 13–14.

* Justice Deemer, Proceedings Iowa State Bar Association, 1914.

† Proceedings Iowa State Bar Association, 1914, pp. 168, 169.

CHAPTER XIII

APPLYING ETHICS TO DAILY LIFE IN ONE PROFESSION

If the Bar during 1830–50 appeared to be barren of inspiring ideals, it only reflected during this period, as it did at others, the tendency of the times. Surveying "The Power of Ideals in American History," * Dr. Ephraim D. Adams (Professor of History, Leland Stanford University) says that it is the result of his study "that formal religion did not then lead in the world of ideals, nor even in the true moral purpose of a people eagerly seeking spiritual growth." As late as 1876, he says, "The nation was apparently without ideals, save those of industrial progress. Religion shared in this apathy, spending its energy in seizing what it could of the tide of national prosperity, erecting splendid church edifices, and, as the close personal contact of the pioneer days was lost in the growth of towns and cities, retreating to the stronghold of religious dogma. *But creeds no longer satisfied the ideals of the spirit.*" To-day, says Dr. Adams, "One great recognized ideal of America . . . is *service, and it is an active force,* everywhere that thoughtful and spiritual-minded men work, in the professions, in business, in labor, in politics . . . to-day *service is the keynote of American religion.*"

In 1876, men were breaking away from old creeds and dogmas and seeking new harbors and places of refuge.

* Dodge Lectures on the Responsibilities of Citizenship. Delivered at Yale University. Yale University Press.

It was in this year — just forty years ago — that Dr. Felix Adler founded the Society for Ethical Culture, upon the broad platform of *Service in Life*. Immediately attacking such problems as political ethics, tenement-house conditions, education, and social reform, he devoted himself to stimulating ethical thought in every active field of endeavor. "We are here — no matter who put us here, or how we came here — to fulfil a task. We cannot afford to go of our own volition until the last item of our duty is discharged." * He applied ethics to daily life, accepting the teachings of the prophets and leaders of the past so far as they could be applied to modern problems, and challenging with keen analysis and criticism further and better solutions. "To put forth power in such a way as to be provocative of power in others is the ethical aim that should guide men in all vocations and in all their relations." † "The moral view of the professions leads their representatives to subordinate the claims of ambition and of material gain to the enduring interests of science, of justice, and to all the permanent social interests that are confided to their keeping." ‡

Dr. Adler made this contribution to modern ethical thought, namely, that, *duty* being a matter of daily vocational service, preachment without active application is of no avail. Therefore, *each* vocation — business, industry, the professions — must solve its own ethical problems — that is, starting with a well-grounded philosophy of service, those in the vocational field must find the way. Thus he turned to the lawyers as well as the

* Felix Adler: "Life and Destiny," p. 3.
† *Idem*, p. 13.
‡ *Idem*, p. 52.

business men, and spurred them to the formation of groups for the study of *applied ethics.*

Such a lawyers' group was formed in 1908. Mr. Boston has disclosed his own membership in the Group — I cannot improve upon his description of its method of operation:

I am myself a member of a group of lawyers, who meet socially, at the suggestion of the leader of the New York Society for Ethical Culture, to discuss among themselves the practical questions that come under their observation, where the application of principles of ethics to actual situations becomes necessary or advisable. This group has met for two years past; it includes deans of law schools, professors in law schools, judges, prosecuting officers, public officials, and active practitioners, all members of the bar, in good professional repute; all, men of many years' actual experience; each, in the discussions at meetings of the group, bent upon applying the principles of ethics, as he understands them, to the situations, from actual problems, that are discussed; each, required at every meeting at which he is present to give his solution, with his ethical reasons; and the views of each are subject to unlimited criticism from each of the others; no casuistry and no sophistry is encouraged, indulged or tolerated; each aims at the conscientious expression of his own views, based upon his individual comprehension of the fundamental principles of ethics, philosophically considered. Yet there is rarely an occasion when differences of opinion do not arise respecting the proper application of recognized principles.*

The need of rational application of recognized principles to actual problems brought about the formation of

* Address on the Proposed Code of Professional Ethics delivered before New York County Lawyers' Association, Oct. 6, 1910, p. 30.

the Group. In December of 1908, the invitations which, as temporary secretary, I was permitted to address to a selected group of members of the Bar, stated that "The need for such a Group was accepted by all present" at a meeting held at the Bar Association * and that it was frankly recognized that to gather together in New York City once a month a group of busy lawyers would be exceedingly difficult. The Group, however, came into being, still exists — has been held together for eight solid years, and remains vigorous and active, though small in number. "It was finally decided" — my old files of 1908 tell me — "that the work to be undertaken was of such grave importance and likely to be of such widespread consequence that we were justified in assuming that two dozen men could be found in our City who would pledge themselves to attend once a month regularly, each to write a paper not oftener than once in two years. . . . The organization . . . to be kept entirely private and confidential — for the present at least; it being the intention of those interested to assume no special claim to virtue, to assume no right to speak for others, but merely, for themselves, to make clear the application of certain fundamental principles to the newer and more complicated situations presented to the lawyer in his daily practice. If in the course of this work, it were found that something of public value had been contributed or discovered, publicity could then be considered, either for the papers and the discussion, or for some public activity, either in the way of constructive legislation or agitation for special reforms." It has kept true to its promise. The identity of the membership is still known to but few. The Group emerged into the limelight of

* Dec. 4th, 1908.

publicity, so far as I know, but once in its entire existence. At the time of the recent New York State Constitutional Convention (1915), we discussed in private what in our opinion would serve as the best kind of judicial system for New York. Out of a concurrence of opinion then secured came a "draft of a judiciary article for the new constitution," which was put forth as the voluntary contribution of its membership.* (In a note I give the names of the gentlemen who, in this connection, were not fearful of signing their names to this concededly liberal proposal.†)

Mr. Abbot will confess, if the indictment be drawn in due form, that his book "Justice and the Modern Law" was the outcome of papers presented by him and dissected by his colleagues in the Group, tempered somewhat by their criticism. (I am almost inclined to confess that much of what is herein presented as original thought is clothing taken from my confrères' wardrobes during these social gatherings, though I should find difficulty in distinguishing and labeling what is "mine" and what is "his'n.")

I shall not attempt to catalogue all the topics we covered. Here are some: "Recent Activity in the Formulation of Codes of Legal Ethics" — "The Duty of the Lawyer with Respect to the Courts" — some of these titles strangely resemble subsequent publications — "Certain Problems connected with the Subject of Divorce" — a subject always provocative of violent and belligerent discussion — "The Relation of the

* See *New York Evening Post*, March 18th and 19th, 1915.

† Everett V. Abbot, Albert Sprague Bard, Charles A. Boston, Stewart Chaplin, Julius Henry Cohen, Joseph E. Corrigan, Abraham L. Gutman, Henry W. Jessup, Laurence Arnold Tanzer and Edmond E. Wise.

Lawyer to Legislation" — "Some Problems arising in the Criminal Court" — "Some Ethical Problems arising out of Bankruptcy Practice" — they keep on arising — "Unethical Real Estate Practices" — "Problems arising in Patent Practice" — "The Ethics of the Use of One Lawyer's Work by Another" — "Several *Small* — note the adjective — Problems in Corporate Ethics."

Enough has been said to indicate that serious thought was bestowed upon vital daily problems of ethical conduct in our profession.

Out of this Group came what is now known as "*The Legal Ethics Clinic.*"

Mr. Boston had undergone three years of active experience in the Group when he decided that its method of applying principles to actual problems should be made an organic function of the organized Bar. There was then in existence a Standing Committee on Professional Ethics of the New York County Lawyers' Association, consisting of twenty-one members, charged with the duty of taking "original action" or coöperating with the American Bar Association "and other associations . . . in all matters tending to the elevation of the standard of professional honor and conduct." Mr. Boston, the chairman of the committee, by his efforts and through his initiative, secured the following amendment of the By-Laws: *

"*This Committee shall be empowered, when consulted, to advise inquirers respecting questions of proper professional conduct. . . .*"

Naturally, he was continued as chairman of the committee, — an office which he has held ever since and is likely

* January 4, 1912.

to hold as long as he can be kept in it. Reporting in 1914 to the American Bar Association for the Committee on Professional Ethics, the late Dean of the Harvard Law School, Ezra R. Thayer, said of the work of this committee:

The New York County Lawyers' Association has given another striking instance of what thoughtful members of the Bar experienced in affairs can do in the way of practical help to their fellow-lawyers and to the community in its so-called "Legal Ethics Clinic." This phrase has been aptly used to describe the work of the committee of that association on professional ethics in answering properly formulated questions concerning the application of the recognized principles of ethics to situations actually arising in practice. This undertaking has displayed in a new and interesting way the quality of the common law which Lord Haldane so aptly described "not as something that waits to be embodied in abstract codes before it can be said to exist, but as what we ourselves are progressively and coöperatively evolving." The response which has met this new departure and the widespread interest in the committee's work have attested the value of such an attempt to deal with evils by preventive methods; and the committee's published reports of its answers to questions have for a common lawyer the peculiar interest which accompanies the test of any general propositions by their application to concrete realities. These answers and an interesting exposition of the committee's work will be found in the report of the Committee.

At this writing, some one hundred hypothetical questions have been answered.* These questions and answers are published regularly in *Bench and Bar*, West Publish-

* See Year Books, New York County Lawyers' Association, 1914 and 1915.

ing Company's *Docket, Case and Comment*, and as opportunity permits in the following additional periodicals: *American Journal of International Law, The Banking Law Journal, The Central Law Journal, Columbia Law Review, New York Law Journal, Harvard Law Review, Illinois Law Review, Law Notes, The American Law School Review, Martindale's American Law Directory, Insurance Law Journal, University of Pennsylvania Law Review* and the *Virginia Law Register*. They are printed in a convenient pamphlet distributed gratuitously by the West Publishing Company.

The far-reaching effect of the work can be estimated by recital of a few facts: The committee has a mailing list of 370 names and reaches practically all of the law schools and bar associations in the country. The Mississippi State Bar Association, the Alleghany County (Pa.) Bar Association, the St. Louis Bar Association, the Cleveland and Nashville Bar Associations have either established similar committees or added this work to existing committees. One Secretary writes:

> This movement originated in seeing published accounts of a similar committee of your association, and realizing what a wonderful amount of good can be done, not only to the profession, but to the people at large by getting the lawyers to avail themselves of the services of such a committee.

The Dean of Harvard writes: "I need hardly say that I deem a complete file a very important feature of our library." The Librarian of the Harvard Law Library wrote: "I suppose that the interest in these questions is as keen throughout the country as it is here." The Dean of the Law School of the University of Maine writes:

Problems in legal ethics based on the publications of the Committee on Professional Ethics of the New York County Lawyers' Association are submitted to the whole class and solutions called for and the actual solution by the Committee given and discussed. This is most valuable and we are greatly indebted to the Committee . . . for aiding us in making our instruction both interesting and effective.

The professor of Legal Ethics in Syracuse University: "I have taken several of my questions directly from the list of questions submitted to your Committee." The professor of Legal Ethics in the Washburn Law School at Topeka, Kansas: "I am keen to have a complete copy in our school."

In the Law School of the University of New York, these questions and answers, as well as the Canons of Ethics of the American Bar Association are used as the basis of instruction in legal ethics. In the course of three to five lectures at the Law School of Northwestern University on legal ethics, the students use these questions and answers.*

Commendation has come respecting the committee's work and its use as an aid in instruction in legal ethics from instructors in the Universities of Virginia and West Virginia, and judges of the Supreme Courts of Appeal of West Virginia and Illinois.† "Applications for sets of the questions and answers, or for reprints of the Chairman's addresses upon Legal Ethics, have been received from instructors or deans of the following institutions: Western Reserve Law School, Cleveland, Ohio; University of Pennsylvania; Hamilton College of Law,

* *American Law School Review*, Nov., 1915, Vol. 4, No. 1, p. 44.
† Year Book, New York County Lawyers' Association, 1915, p. 118.

Chicago; University of Colorado; Evening Law School of the Boston Young Men's Christian Association; University of Missouri; State University of Illinois."

The inquiries are not confined to the membership of the Association or to New York practitioners

but have come as well from Brooklyn, Jamaica, White Plains, Elmira, Rochester, Glens Falls and Ithaca, within the State, from inquirers who in some instances have offered as their explanation that no committee performs the same function in their own community. Inquiries have also come from Clintonwood, Virginia; Shamrock, Texas; Kansas City, Missouri; Santa Cruz, Los Angeles and San Francisco, California, and Mammoth Springs, Arkansas.

Nor do our published answers constitute all of the work done by the Committee, or because of its existence. The Chairman is frequently consulted in personal interviews by lawyers who prefer that method of procedure, and the Committee's correspondence conducted by him is voluminous. The diversified character of the inquiries is likewise instructive; they are not confined to lawyers, but have included law students, laymen, a clergyman and a newspaper editor, all seeking the expression of opinions upon the propriety of conduct.

The character of the inquiries propounded to the Chairman, where his personal opinion was sought or accepted, without the formality of a question propounded to the Committee, and without binding it, serves to illustrate the very wide scope of usefulness of such a body, and the wide extent of the subjects which can be involved in the exercise of its functions.

The committee reports further: "It is not alone by our own firesides that we need to look after members of our local profession, for the Chairman has received two

inquiries, one from New Orleans, the other from Buenos Ayres, respecting the standards imposed upon New York lawyers by their oaths and our laws."

One of the Bar Examiners from North Dakota said:

And at the last session we paid particular attention, just for the purpose of an experiment, to propounding, upon our oral examination, questions prepared by the Committee on Legal Ethics in New York (referring not to questions prepared by us but to the questions propounded to us and the answers given by this Committee).

The Secretary of the Nashville Bar Association recently said:

In the future we shall further expect our Grievance Committee to act as an advisory court to lawyers upon the propriety or impropriety of a proposed step, thus encouraging them to consult the committee, in advance, in doubtful cases and so steer clear of unfortunate situations. Such a work has been and is being exceedingly well done by the New York Lawyers' Association and their answers to the hypothetical questions propounded have acquired almost the force and weight of judicial decisions on matters of professional ethics.

The committee prefaces every answer with the following announcement:

In answering questions this Committee acts by virtue of the following provisions of the by-laws of the Association, Article XVI, Section III:

"This Committee shall be empowered when consulted to advise inquirers respecting questions of proper professional conduct, reporting its action to the Board of Directors from time to time."

It is understood that this Committee acts on specific questions submitted *ex parte*, and in its answers bases its opinion on such facts only as are set forth in the question.

In 1915 it made the following additional announcement:

In the opinion of the Committee it has now been discharging its function of advising respecting proper conduct for a sufficient time to justify it in making a further announcement as to the nature and operation of this work.

It is gratified to say that it has received abundant evidence that its exercise of this function is regarded as extremely useful. It has been widely commended by lawyers and legal periodicals and members of the faculties of law schools. Few criticisms have reached the Committee, but certain suggestions have been made which we deem it proper to note:

1. That obviously improper and petty practices should not be dignified by the Committee's publishing its questions and answers concerning them;

2. That the publication of such questions and answers may give the erroneous impression that obviously improper conduct is debatable;

3. That the Committee is apt to be the victim of frivolous questions, propounded to put it in a false or frivolous light;

4. That the Committee is in danger of establishing impracticable standards, by offering counsels of perfection.

In answer to these suggestions the Committee desires to say, that it is not unaware of the substantial dangers attending its activities. In directing attention to conduct it is guided by the tried and accepted traditions of an honorable and useful profession, and by widely acknowledged principles of ethics, and by what it conceives to be tenets held by the most upright members of the Bar for sound reasons. It recognizes that questions may occasionally be propounded to it which are designed to accomplish some ulterior purpose of which it may not be advised. It reserves the right to

reject and ignore questions frivolous or improper, or to refrain from the publication of its answers thereto, but it is conscious that questions which to some minds, schooled in the best traditions of the profession, appear frivolous, or call for an obvious answer, really present serious problems to members of the profession who have been without similar ethical advantages in their training, or else that such questions may be asked to direct public and professional attention to some practice which, though reprehensible, is being indulged in, or is in danger of being adopted, by some who ought to have its objectionable nature brought to their attention. The fact that a question is asked or answered does not, therefore, necessarily import that the inquirer is in doubt, or that the answer is not obvious or that the objectionable practice is common. The Committee prefers to assume, as a general proposition, that it is consulted in good faith, and for reasons advantageous to the public and the profession, and to the due administration of justice. It does not consider that it should be deterred from the conscientious performance of its functions by fears which may be entertained of the occasional results, though it always welcomes advice which will tend to make its service more effective.

The scope of the subjects covered by these questions and answers may be gathered from the List of Topics appended in a note.*

* Advertising.
Annulment of Marriage.
Attorney and Client.
Bankruptcy.
Clerks.
Collection Agency.
Collections.
Compensation:
(a) Of Attorney.
(b) By Attorney.
Creditors' Committee.
Demand of Damages.
Disciplinary Measures.
Division of Fees.
Divorce.
Employment:
(a) Acceptance.
(b) Inconsistent.
Expenses.
Fees.
Firm Name.
Gratuitous Services.

Those who are interested enough to pursue the details of this work further are invited to peruse the reports of the committee in the Year Books of the Association. For the purposes of this volume, it will be enough to select and append (Appendix B) only such questions and answers as bear upon problems in Part II.

* * * * * * * * * *

If the reading of the preceding chapters or later on the recital of existing scandals in the profession produces a sinking feeling of despair, then, brother of the Bar, or lay reader, turn back these pages to Chapter I or read again this and the preceding chapter. You will, I am sure, draw in some fresh and assuring hope. You will see that though the bacilli of typhus or tuberculosis are still mowing down their victims, there is a growing battalion waging battle with the enemy. The Bar of America was late — let us admit it — in catching up with the traditions and ideals of its ancient guild. *But*

Guaranty of Lawyer's Honesty or Efficiency.
Judicial Ethics.
Judge.
Law List.
Law Students.
Managing Clerk.
Marriage (see Divorce).
Name.
Partnership.
Patent Attorneys.
Privileged Communications.
Receiver.
Referee.
Relation to Client.
Relation to Other Attorneys:
(a) Friendly Relations.
(b) Foreign Attorneys.
(c) Adverse Relations.
(d) Attorneys of Other States.
(e) Employer.
Relation to Court.
Relation to Former Preceptor.
Relation to Third Persons.
Relation of Third Persons to Attorney.
Salary.
Solicitation.
Students of Law.
Threats.
Trade Organization.
United States Attorneys.
Usury.
Witness.

(Year Book, New York County Lawyers' Association, 1915, pp. 125–126.)

it has found itself at last. There was much crunching and rumbling of huge web-frames and bulwark plates, but *the old boat has found herself at last!*

The *Dimbula* picked up her pilot, and came in covered with salt and red rust. Her funnel was dirty-grey from top to bottom; two boats had been carried away; three copper ventilators looked like hats after a fight with the police; the bridge had a dimple in the middle of it; the house that covered the steam steering-gear was split as with hatchets; there was a bill for small repairs in the engine-room almost as long as the screw-shaft; the forward cargo-hatch fell into bucket-staves when they raised the iron cross-bars; and the steam-capstan had been badly wrenched on its bed. Altogether, as the skipper said, it was "a pretty general average."

"But she's soupled," he said to Mr. Buchanan. "For all her dead weight she rode like a yacht. Ye mind that last blow off the Banks? I am proud of her, Buck."

"It's vera good," said the chief engineer, looking along the dishevelled decks. "Now, a man judgin' superfeecially would say we were a wreck, but we know otherwise — by experience. . . ."

* * * * * * * * * *

"Well, I'm glad you've found yourself," said the Steam. "To tell the truth, I was a little tired of talking to all those ribs and stringers. Here's Quarantine. After that we'll go to our wharf and clean up a little, and — next month we'll do it all over again." *

* From Kipling's "The Ship That Found Herself."

BOOK II—PROFESSION?

CHAPTER XIV

"IT PAYS TO ADVERTISE." DOES IT?

In mercantile life the advertiser is king. There seems to be no territory on which his conquering feet may not tread. Shall he inherit all the crowns, reign over us all, or in some professions still is he a mere pretender, unentitled to the throne? For two thousand years "blowing one's own trumpet" was not for the lawyer or the doctor. Shall the lawyer of to-day advertise his qualities as the merchant offers his wares? Is there good reason for the ancient and persistent condemnation of this practice?

Suppose you made the best shoe in the country. Suppose you had a plant, with fine equipment, all the necessary material, etc. All that you lacked was *customers*. Suppose, moreover, you were told that you could not send a salesman on the road to offer your wares or even tell how good they were, could not advertise in any newspapers, could not circularize, could not pay commissions for securing orders — in short, could do nothing to make known by any of the usual methods the character and nature of your product to those who did not know you or the product. You would say that under such circumstances you were severely handicapped in doing business. Quite right. Now, suppose it was the rule of your craft, the trade regulation of your industry that *no one* should

solicit trade or advertise or pay commissions; yet, in spite of these natural obstacles you had — let us say — for two decades observed the code and had by sheer weight of your skill and the merit of your product built up a trade and a good will all over the country. What would you say about the fellow who *did* advertise, who *did* solicit, who *did* pay commissions?

I venture to say that, without much difficulty, you would come to the conclusion that *either* the rule against advertising or soliciting should be *wholly* abolished or that it should be enforced against *everyone* alike.

Let us pursue the matter a bit further. We will say that you have made enough shoes to put by enough to send your son through a university, through a law school, through a law office, and that, finally — maintaining always the standards of the profession which you yourself honor sufficiently to desire him enrolled in its ranks — your son reaches the age of twenty-five or twenty-six and opens up a law office in your city. His personal character, known to a few friends, his diligence at college (and possibly respect and friendship for you) bring him at first the small commercial litigation with which all lawyers of the preceding generation began their practice. Gradually (all the while, mind you, coming to "Dear Dad" for the occasional check to make up deficits in office expenses) he gets to be known, toward the thirties, as a keen, wide-awake chap, of knowledge in the law, good judgment, a fine adviser, a good trial lawyer, thoroughly trustworthy in all his dealings, respected by the courts and by his clients. Let us say that by thirty-five or thirty-six he has built up the best commercial practice in your part of the country.

Now, there is in the same city the son of Thompson —

of more or less shady reputation — who got through some law school or other of brief term, where a diploma was passport enough to secure admission to the Bar. He starts in, with little ability and with less character. Indolent yet crafty, he soon becomes known in your part of the country for what he really is, until he scarce can find a client in the county who will confide in him. Now comes along "The Lawyers' Touts, Inc.," whose particular business in life is to scour the country for law business, and they offer your son the attractive opportunity of representing in your city the trade agencies, the collection agencies, the trade associations of some of the large cities of the country — if he will but pay them on the basis of the business they secure for him. Of course, the proposition may not be put as bluntly as this. He will be asked to insert his card in a "directory." But everyone knows it is pure *touting* — as we shall see clearly a few chapters on. Your son, we will say, because he has been properly bred and trained, turns down the offer. Thompson's son accepts. Presently he is the leading bankruptcy lawyer in town and your son — has the character and respect of your community but not much else. Let us assume, however, that in spite of the unfair competition, your son continues to maintain his practice. Thompson's son, however, brings a new reputation to your community. You suddenly awaken to the fact that it is a place where men are readily petitioned into bankruptcy, where there are "quick settlements," and your friends in the shoe line begin to think of the whole profession (which includes your son, do not forget) as Jack Cade did in his time, or as Charles Macklin thought: "The law is a sort of hocus-pocus science, that smiles in yer face while it picks yer pocket; and the

glorious uncertainty of it is of mair use to the professors than the justice of it."

That I am not exaggerating as to actual conditions, let me quote from the communication from the secretary of the National Association of Credit Men to the Chairman of the Committee on Professional Ethics of the American Bar Association in November, 1915:

A very careful observation leads me to believe that a large proportion of the bad debt waste may be attributed to the advice and guidance of conscienceless Attorneys.

Beyond contradiction, unnecessary compositions are advised, crooked failures arranged, and frequently the unthinking led in the devious wastes by Attorneys and the question now arises, what is the American Bar Association going to do with these units of the profession, and will the association exercise that diligence for their suppression that we are endeavoring to bring about for the prevention and correction of commercial fraud?

At the meeting of the State Bar Association of Georgia held in 1914,* the Committee on Legal Ethics and Grievances reported:

. . . the attention of the Committee has been called to a practice which is said to obtain more or less, in this State. It is said that members of the profession have sought to obtain representation of claims in the bankrupt courts — not merely for the purpose of obtaining the commission upon the collections made upon such claims, but with the purpose of controlling the election of trustees, voting upon compositions, and in other ways, by a representation of the majority in amount and number of claims, controlling largely the administration upon the bankrupt's estate.

* See Report, State Bar Association of Georgia, p. 269.

Condemning this practice as "very reprehensible," the Committee quotes from Judge Samuel B. Adams, a former Chairman:

There is no room for debate on the proposition that a lawyer cannot seek business or employment. This matter is foreclosed by his oath of office, which solemnly obligates him to the practice of his profession according to law, and the law forbids, with penal sanctions, such methods. A lawyer who seeks business is, therefore, a forsworn man — is a lawbreaker — and publishes the fact that he is a proper subject for disbarment. We cannot exaggerate the unworthiness and perniciousness of this evil.

At the meeting of the State Bar Association of New York held in January, 1916, the Committee on Legal Ethics reported:

There has come to the observation of members of your Committee circulars by associations (whether of attorneys or not does not appear, but carrying a name implying that they are made up of attorneys), which, in consideration of a pecuniary payment, will extend the general services of a tout, incorporated, for the period of one year or until discontinued on written notice, and particularly addressed to furnishing the lawyer who pays for this service, facilities for securing the control of bankruptcy cases by advance information with regard to the names and addresses and claims of the creditors of the bankrupt in any part of the United States.

Now these practices are become only too common throughout the country. I could write out the story with blank spaces, and members of the Bar all over the land would fill in for me the names of the men who are doing these things and the names of the cities in which

such things are happening. The evil consequences follow as certainly as typhoid epidemics follow the use of polluted drinking water. Appeals to the cupidity of men increase the volume of unwarranted litigation, make a gamble or play of the administration of justice, and degrade the profession.

What will you do about it? Will you advise your son to join Thompson and the whole tribe of touts and advertisers; to give up his chosen vocation? The hour has arrived for choice. You *must* make it.

Many things are brought to my notice as chairman of the Committee on Unlawful Practice of the Law of the New York County Lawyers' Association. Obviously, I may not disclose such matters as are confidential. I shall, however, refer to some matters which are not confidential — things which anyone may find who takes the pains to investigate. For example, there is published a bright and well-decorated double page in a certain legal magazine for October, 1915, the advertisement of a "Day-Reference & Law List" — "A Medium whereby Attorneys are brought in *Direct* touch with *Creditmen*," where "should the services of an ATTORNEY be required, it is only necessary to turn over the pages and find the name of one listed." And for the purpose of inducing lawyers to put their names in this publication and pay the price of admission, on the back of this page is the following statement: "All CREDITMEN holding this publication are followed up at regular intervals *with request for business*.* If interested, APPLY AT ONCE." Another more enterprising concern sends out to attorneys all over the country a carefully prepared circular, which "offers lawyers many attractive and indispensable serv-

* Italics ours.

ices," including the "securing not only claims for collection, but matters of important litigation." Criticising other concerns which "make vigorous efforts in the first instance to control business, after which they relax and endeavor to live on their past reputations, at the expense of attorneys unfamiliar with our Service," this concern assures attorneys that they are "wasting more money each year for worthless representation than they are earning out of all the good substantial connections to which they subscribe." That, indeed, they "*pay more for the connections* * than they are really worth," and become "disbelievers in the entire plan to the serious injury of themselves and those engaged in the business," — now note the business — of "*making an honest effort in good faith to control items for their attorneys.*" * In the circular is contained the following gem: — "*The control of an important bankruptcy matter carries with it large fees for the attorneys, but prompt action is always necessary, as there are other attorneys anxious to control claims in the same proceeding.*" * And we are assured by this concern that it has "no equals in New York in this particular branch of the work, on account of our long and favorable acquaintance with the Boards of Trade and leading agencies in the City." This concern also assures its prospective lawyer-clients that it spreads among "Agencies, Boards of Trade and law firms all failure, bankruptcy, assignment and all other information tending toward the impairment of credit, and in consideration for this information, all claims growing out of the same are forwarded to the attorneys whom we represent." Where a list of creditors is mailed to the concern, they assure us that they

* Italics ours.

"promptly ascertain what agencies in ———— could best handle it, and through their coöperation *we are invariably able to secure the claims.*" * On the last page of this folder appears the following: "You Know the Law. We Know the Facts. Let us Combine Our Knowledge and Share the Benefits." And in the summary on the second page of the folder is the proposition:

"3. All connections which you desire will be applied for by us, or your own application augmented by our endorsement.

"4. Wire or write us of all actual or impending failures, mailing a list of creditors immediately. We will proceed to secure the claims for you by interviewing the creditors and agencies in your behalf.

"5. We will send at your request a list of the chief Forwarding Agencies and Boards of Trade of New York City, and will personally call on them from time to time during the life of your contract, and do such other work by way of influencing business to your office, as can possibly be done." In the accompanying letter, this concern advises lawyers that "Our proposition means that this office becomes your business getting headquarters in ————." For this extraordinary service the lawyer is expected to sign a contract, which, addressed to this concern, says: "When we send you a list of creditors, you are to promptly ascertain the Agencies who can and will exert every effort to secure the claims and send them to us." The services are offered sometimes at a very low rate, for one of the propositions that I have seen offers all of this valuable and comprehensive work for the modest sum of Five Dollars per year.

Lest one suppose that this organized business method

* Italics ours.

of touting is confined to bankruptcy matters, let me refer to another situation known to quite a number of lawyers in New York. There are several concerns in New York who, by the same kind of efficiency that builds up newspaper service, secure prompt information of deaths or injuries occasioned by railway accidents. In such cases, often while the body lies uncommitted to its grave and the family are in the throes of grief, a representative will call and leave a printed circular, the first page of which will state the names of the lawyers, one of whom may be an ex-judge. On the first page of the literature will appear an introduction of these attorneys as "well-known attorneys of New York City" who "have conducted successfully many accident cases in New York, New Jersey and Connecticut. Judge So-and-So is one of the best trial lawyers . . . and is well known in all the courts. He has obtained a great number of verdicts for his clients, and a list of some of them with names and addresses of clients and the amounts obtained, is herein set forth. These verdicts are a matter of public record and can be verified by anyone interested. Mr. So-and-So has secured large settlements in a very short time. You can safely trust your case in the hands of lawyers who have accomplished results." Then will follow a carefully prepared list, in the first column of which will appear the names of clients and their addresses, in the next columns the names of the defendant companies who have been sued, and in the last column the amounts of the verdicts secured, and across the face, written in ink, is the statement of the proposition, "Will take the case on 25%." "In one case a client complained to his regular lawyer that fifteen such unwelcome efforts had been thrust upon his attention in one day as the result of a serious

accident to a child, and while the parents were in an agony of distress over its condition. Some of the documents of solicitation which were put into the hands of the father were transmitted to his regular counsel, who in turn transmitted them to the chairman of this committee." *

These practices are not limited to New York City. In Minnesota the promotion of litigation has become a fine art. Here not only is local business drummed up but the practice of importing litigation into the State has grown to such an extent as to arouse the indignation of the taxpayers, who found themselves providing courthouses and judges mainly to furnish lawyers with commercial opportunity. This development in Minnesota is the perfectly natural consequence of the unsound decision of its highest court — holding that soliciting professional employment and paying a client's living expenses pending trial of a law suit are not illegal.† In the proceedings of the State Bar Association of Minnesota for 1914 the Ethics Committee reported that the soliciting of accident cases against railroads operating lines which came into the State of Minnesota had "grown to be a very formidable and well organized business." From its report it appears that in 1914 there were then pending personal injury actions against railroads having lines running into the State of Minnesota brought by non-residents of the State (each of whom presumably had a remedy in his own State) in which recoveries were sought for $6,358,522. Of these, 198 cases were in one

* From Report, Committee on Professional Ethics, New York County Lawyers' Association, Dec. 30, 1915.

† Johnson *v.* Great Northern Railway Company, 128 Minnesota Reports, 365.

county, 65 in another, 33 in another, 45 in other counties, making a total of 341, and of these cases 209, or approximately two-thirds, were in the hands of four law firms.

One of these firms makes a specialty of this class of cases and claims to have branch offices in 32 cities, with solicitors, in such cities as Winnipeg, Houston, New York, Los Angeles and Jacksonville. One firm employs 45 salaried railroad employees as solicitors, maintains a hospital and medical staff for the purpose of providing medical treatment for non-resident injured persons while they are awaiting trial, employs lecturers, and sends out literature to railroad employees, reminding them generally that the courts of Minnesota are the most desirable forum in which to try personal injury cases; that juries in Minnesota are more liberal than in other States; that five-sixths of a jury may find a verdict, and that results can be reached in their courts much more quickly than in the courts of other States.

The investigation of the committee disclosed that cases were brought into Minnesota that should have been tried in Wisconsin, Montana, Illinois, Mississippi and at least a dozen other States. One of these firms of attorneys, having an office in St. Paul, claims to have recovered verdicts in eighteen months in such actions amounting to $134,000. These practices apparently produced such a strain upon the courts in various counties of the State and increased the taxes for the maintenance of judicial proceedings to such an extent that the taxpayers were aroused. The Ethics Committee felt called upon to present legislation to curb this practice.

The Supreme Court of Tennessee (deciding just op-

posite to the Supreme Court of Minnesota) in 1906 declared:

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 solicitations, under the facts shown in this case. . . . 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.*

In this case a distinguished member of the Bar appeared before the highest court of the State (1906) and argued that the open solicitation of personal injury suits from passengers on a railroad train constituted no violation of professional propriety nor vitiated the contracts of employment so secured! This argument illustrates clearly the ideas then prevailing among a certain element of the Bar.

It is mere cant and hypocrisy for attorneys to denounce the solicitation of cases. Those who have business have sought it, some by advertising, some by recommendation, some by pipe lining, some by indirect request, and some by direct solicitation. Shall all be disbarred? Shall all sought retainers be nullified? If not, then where shall the line be drawn? Shall it be the line of propriety? If so, who shall draw the line? The majority of the profession, or its best members? And who shall elect the best? And by whomso-

* Ingersoll *v.* Coal Creek Coal Co., 117 Tenn. 263; 98 S. W. 178; 119 Am. St. Rep. 1003; 9 L. R. A. (N. S.) 282.

ever drawn, how shall it be done? Such lines befit a "*court d'honneur;*" but obviously no such standards of judgment as to legal rights can obtain in a court of law.

Condemning "solicitation of business, directly or indirectly on the part of members of the legal profession," as "highly reprehensible, lowering the standard of the profession," John T. Lellyett, of the Nashville Bar, offered at the 1914 State Bar Association of Tennessee meeting * resolutions calling upon the Bar to take active steps to disbar attorneys guilty of such practices. As chairman of a discipline committee, he reported that one man had testified before him as follows: —

I was a fireman and was making a hundred dollars a month; I went into partnership with a lawyer and made so much money with him in getting these damage cases that I threw up that job of a hundred dollars a month because it was so inadequate.

The witness also said: "You needn't talk to me — there are a whole lot of them here and I can call them out to you everywhere, men who are making money, joining in with lawyers, in partnership with them, getting half of the fee recovered in damage suits and doing it as a business. It is a business."

At the 1914 meeting of the State Bar Association of Alabama, a member of the Bar who had made special investigation offered to read to the meeting an alphabetical list of members of the Bar in the City of Birmingham who had violated the statutes of Alabama forbidding the soliciting of business and the payment of a consideration for getting business. This lawyer said:

* Report of Proceedings State Bar Association of Tennessee, 1914, p. 82.

It remains an indisputable fact, that, whenever a person is injured, or killed, upon a railroad or street railway in the City of Birmingham, *or in the Birmingham District*, there will be at the home of the injured, or killed, within the next twenty-four hours following the accident a representative from a number of prominent law firms; who go on foot, on motorcycles, on street cars, in buggies, and automobiles; and for no other purpose than that of soliciting business for the respective firms represented by them. . . . It is not an infrequent case that money is paid to get cases into the hands of attorneys; and it is a case of the longest pole with the largest persimmon which reaches the goal. . . . You would be shocked, beyond expression, if I were allowed to tell you of the prominent law firms who are guilty of the practice referred to.

That his charges were not wholly unfounded appears from the report of the Central Council of that Association made at the same time:

But seriously, the Central Council has to report that the conditions of practice in Alabama — at least in the cities — is so completely changed from what it was even when we began practicing law, that it is much harder for a young lawyer to-day to follow the ethical ideals of his profession than the older lawyers imagine. Amid the public rush for money and the honor offered to those who show ability to make it, the young man equipped to pursue an intellectual occupation like the law, stands no better than an employed accountant. And as the distinction and success which should come to him rightly only after years of patient effort, can often be attained by *disregarding ethics in winning a practice, most of the young lawyers enter the practice by way of the ambulance or the runner's desk.**

* 1914 Report Alabama State Bar Association, p. 9.

So naïve are lawyers in some parts of our country concerning the matter of advertising and soliciting that one in a comparatively important city not two hundred miles away from New York writes me:

. . . I am taking the liberty to ask you for a bit of information. Will you be good enough to tell me who would be good people in New York to send a list of creditors to in bankruptcy cases? I understand there are different concerns who are good at soliciting claims in different lines. If you could give me names of the different agencies who would solicit in the different lines I would greatly appreciate it, as follows:

Shoe Dealers,	Clothing,
Dry Goods,	Jewelers,
Millinery,	Hardware, etc.

. . . I appreciate of course it is ineffable * to solicit claims in bankruptcies except in the one instance where an attorney represents a number of creditors and where the bankrupt is trying to control it. In such cases I understand it is proper for an attorney to start a counter-movement and solicit claims for purpose of getting rid of an undesirable trustee.

At a meeting of an organization of lawyers, list men and collection agencies held in Chicago in September, 1914, a publisher of a prominent list arose and charged in specific terms that certain of his co-members and com-

* (Sic).

Effable: Utterable; capable of being explained; explicable.

Ineffable: 1. Incapable of being expressed in words; unspeakable; unutterable; inexpressible: as, the *ineffable* joys of heaven; *ineffable* disgust. (Century Dictionary.)

The stenographic lines which make up *unethical* when written hastily closely resemble *ineffable*. Perhaps the first word was used too infrequently in the office to enable the young lady to recognize it when she came to read her notes. Or perhaps *ineffable* more accurately described her own emotions. Who can tell?

petitors, engaged in the business of publishing law lists, "are buying law business from mercantile and collection agencies, paying therefor either in cash or by way of free representation in their publications." He introduced resolutions, reciting this charge and stating, further, that "such practice is contrary to the law, and when participated in by lawyers is unprofessional." These resolutions, passed unanimously by the meeting, condemned "in most positive terms such practice" and called for an investigation into the charges, with direction that the names of those found guilty should be published.* The investigation by the committee to which the matter was referred resulted in a report a year later that "the committee has not had any evidence submitted to it justifying any conclusion that could now be submitted to the League; *it is satisfied that such practices have existed in the past*, and it recommends that the matter be pursued further." †

Commenting upon this buying of law business, one of the publishers of a law list said editorially:

It (buying and selling law business) involves not only a violation of the law, but in its very nature requires that all persons engaged in it, shall deny the facts regarding it. The selling of Law business by certain Collection Agencies is fast bringing about a feeling of resentment on the part of the Lawyers, who in the final analysis, are the men who pay this ever-increasing and utterly foolish tax.

How does this result come about? Nothing more simple. There is at any given time a certain aggregate of commercial law business, including collections and matters for litigation,

* Bulletin of the Commercial Law League of America, Vol. XIX, No. 9, September, 1914, p. 670.

† *Idem.* Vol. XX, No. 10, October, 1915, p. 570.

to be sent out from forwarding centers to the Lawyers representing Law Lists throughout the country. The Forwarders must have this business promptly and efficiently handled. To facilitate and accomplish the desired results, these Forwarders must have in constant use in their offices one or more well selected and reliable lists of able and efficient Lawyers whose integrity is vouched for by the List publishers. . . .

Now, what happens when some List publisher enters the field to buy law business? He goes to some leading Forwarder and says in effect, I will give you, say, $5,000 per year if you will send your claims out to the attorneys listed in my publication. An agreement is reached and a contract made. Similarly, other contracts are made, and so a big fund of cash is used by the List publisher in "influencing" Forwarders to use his List.*

* * * * * * * * * *

Enough of these sordid practices — *ineffably* sordid — have been recited to set us thinking. Observe that none of these practices would offend our sense of propriety if they had been carried on by a business man seeking business. We should make no objection to the undertaker offering his services, to the real estate broker asking for his commission, to the salesman requiring pay for selling our shoes, or any introducer or middleman requesting his reward. As for advertising, we should find no fault if the undertaker did send us a list of his patrons, the broker a list of his principals and successful transactions, or the salesman a statement of his total sales in previous years for the firms which had employed him. Why do we instinctively recoil at these things when the *business* is the practice of the law?

* *The Clearing House Quarterly*, October, 1914, pp. 7–8.

Let us pass for the moment the more or less conclusive point that it is condemned by professional canons of ethics, penal codes, Bar associations and the courts, and that the lawyer who indulges in such practices subjects himself at once to professional discipline and advertises by his conduct not his worth and character but his complete failure in both. In short, let us examine the matter as though there were no existing provision of law or ethical code condemning it.

The telephone, the typewriter, the railroad, the newspaper, the advertising billboard — all were absent in Cicero's or Cotton Mather's time. We are a fresh, young, complex, individualistic people. Why should we be bound by these hoary traditions of the past? My advertising friends remind me that even the churches are advertising — why shouldn't the lawyers follow the lead of the ministers? *

Of course, if the general sentiment of the Bar was against them, the canons forbidding such practices and the penal code provisions making them criminal would be changed. But no lawyer has come forward to condemn them as hoary or obsolete. On the contrary, every ethics committee in the land is making these standards more explicit and more definite, and seeking by law to extend the field of their application. The Committee on Professional Ethics of the New York County Lawyers' Association has but recently answered Question 96 in the following way: —

Q. In the opinion of the Committee would there be professional impropriety in a member of the Bar addressing a

* In the *New York Tribune* for several months in the Spring and Fall of 1915, there appeared a large advertisement admonishing the reader to "Go to Church To-morrow."

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 accounting 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?

A. 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.

A committee of the New York State Bar Association reported in 1910:

Although it is well known that the practice of unprofessional solicitation is indulged in by many lawyers, who desire to be considered men of standing in the profession, there is not a lawyer from Montauk to Buffalo, even among those who indulge in the practice, who will in a body of lawyers stand up and admit that he engages in it. Men who denounce it in public, practice it in private. Some will even defend it in others, when not courageous enough to admit doing it themselves. This argues such a lowering of the tone of the profession, that it is obvious that there will be difficulty in having remedial legislation placed upon the statute book until it comes as the demand of a substantially united Bar or an outraged public. In other words, the Bar as a whole must be brought to a realizing sense of the necessity of doing something to stem this tide of demoralization. This means a

campaign of education for the purpose of demonstrating that the true interests of individual lawyers are on the side of a high plane of professional ethics.*

In its preamble to Answer No. 47 (1913) the Committee on Professional Ethics of the New York County Lawyers' Association says:

In answering this series of questions the Committee is guided by its view that the practice of the law is a profession and not a trade or a business; therefore some methods which are unobjectionable in a trade or business may still be open to criticism in an attorney because they detract from the objects for which his profession exists. It is a profession, not only because of the preparation and qualifications which are required in fact and by law for its exercise, but also for the primary reason that its functions relate to the administration of justice, and to the performance of an office erected and permitted to exist for the public good, and not primarily for the private advantage of the officer. Such private advantage, therefore, can never properly be permitted to defeat the object for which the attorney's office exists as a part of the larger plan of public justice.†

The *Bar* is not receding in its ethical interpretations of such conduct. On the contrary, it is bending every effort in the direction of stricter observance of the rule.

In July, 1915, the Central Council of the State Bar Association of Alabama reported a proposed statute for the regulation of the practice of the law, in which was

* Report of the Special Committee on the Abuses of the Contingent Fee. Report of New York State Bar Association, Vol. XXXIII, 1910, p. 327.

† See Address by Elihu Root on Public Service by the Bar, to American Bar Association, Chicago, August 30, 1916 (delivered while this book is going through the press).

included a formal oath to be taken by every member of the Bar. In this oath appears the following:

That I will neither promise, nor give, nor offer to promise or give, a valuable consideration to any person as an inducement to placing, or in the consideration of having placed in my hands, or in the hands of any partnership of which I am a member, or with which I am connected, a demand of any kind for the purpose of bringing suit, or making claim against another.

That I will not employ any person to search for, or procure clients, to be brought to me, or to any partnership of which I am a member, or with which I am connected, nor will I knowingly accept employment in any claim or cause which has been solicited by another person who has or is to receive pecuniary compensation from the claimant for any service rendered or to be rendered by such other person in relation to such claim or cause.

That I will not solicit the placing in my hands, or in the hands of any partnership of which I am a member, or with which I am connected, a demand of any kind for the purpose of bringing suit or making claim against another.

That I will not divide, or agree to divide, upon any basis, directly or indirectly, any fee which may be promised, or paid, to me, with any person, or persons, other than a regularly licensed attorney at law, who may be associated with me in the cause in which said fee shall be promised or paid.

So help me God.*

Section 25 of the proposed act contains provisions for removal or suspension from practice for violation of these, as well as other, provisions of the act.

The Supreme Court (in New York City) as recently

* Proceedings of Alabama State Bar Association, 1915, pp. 100–1. The Act was prepared for submission to the Legislature. It was not acted upon in 1915 by the Association.

as November, 1915, suspended a lawyer from practice for a year who published an advertisement reading as follows:

> . . . . . .
> A white lawyer who is a colored man's friend.
> Endorsed by leaders of the community.
> . . . . . .
> Accident, criminal and matrimonial actions a specialty.
> Suite. . . . . Tel. . . . . .
> Residence. . . . . .
> Res. tel. . . . . *

The Court here said that the lawyer had violated the New York Penal Code provision forbidding advertising to procure divorces, † but it held further:

But even if we should be of the opinion expressed by the Official Referee that the publication of the advertisement in question did not amount to a crime under Section 120 of the Penal Law, still the respondent in publishing that advertisement was guilty of professional misconduct which cannot be allowed to pass unnoticed. . . .

For a lawyer to advertise for business has long been recognized by the profession at large as grossly undignified and

* For obvious reasons, I have deleted names and addresses.

† "Section 120. *Advertising to procure divorces.* Whoever prints, publishes, distributes or circulates, or causes to be printed, published, distributed or circulated any circular, pamphlet, card, hand bill, advertisement, printed paper, book, newspaper or notice of any kind offering to procure or to aid in procuring any divorce, or the severance, dissolution, or annulment of any marriage, or offering to engage, appear or act as attorney or counsel in any suit for alimony or divorce or the severance, dissolution or annulment of any marriage, either in this state or elsewhere, is guilty of a misdemeanor. This section shall not apply to the printing or publishing of any notice or advertisement required or authorized by any law of this state."

improper and has been distinctly condemned by the 27th Canon of the Code of Ethics adopted generally by the Bar Associations of this country and specifically adopted by the New York State Bar Association on January 28, 1909. While this Code has never been incorporated in our statutes, it has been so far recognized by the Supreme Court that a General Rule of Practice requires that a copy of the Code shall be furnished to each lawyer upon his admission to the Bar. Not only has the respondent repeatedly violated this Rule of Ethics, but he has undertaken so cunningly to phrase his advertisement as to violate in spirit and in effect, if not in words, a distinct statutory provision adopted to meet an acknowledged evil. We are unwilling to lend our countenance to the violation by indirection of so laudable a statute as that which the respondent sought to evade.*

In Tennessee, the Court holds that a contract of employment solicited by a lawyer is void and unenforcible † and the lawyer may not recover his fees — because such solicitation is against public policy.

The Bench and the Bar are united in an open conspiracy in restraint of trade — trade in the practice of the law. Why? The doors are fairly wide open for *admission* to the Bar. Granted the preliminary requirements of education and character, neither poverty, race, religion nor social position stand in the way of becoming a lawyer. There must be a reason for this persistence of the traditional antipathy toward solicitation and advertising by

* In the Matter of Samuel E. Neuman, *New York Law Journal*, Nov. 18, 1915, 169 App. Div. 638.

† Grocers and Merchants Bureau *v.* Gray, *New York Law Journal*, June 17, 1915 (Circuit Court); *New York Law Journal*, Dec. 8, 1915 (Court of Civil Appeals), Vol. 6, Reports Court of Civil Appeals of Tenn.

lawyer and doctor. What is it? This old oak has strong and firm roots. Shall it be cut down or torn up to make way for modern shrubs?

Let us grant all that the advertising gentry say concerning their work — there are some things even *they* cannot advertise. The breath of frost will kill the finest Beauty rose, though the sturdy pine will hold its head high above the snow. There are some things so delicate, so subtle, so like the rose, that the cold air kills them. Even advertising for church-going takes but the form of a preachment upon "Going to *church*." It does not say "Go to Dr. Jones; he is the best preacher and has the largest audiences." It does not say: "Dr. Brown will heal your soul for a dollar any Sunday morning at ten." Nor does it urge upon you any particular church. No. It says: "Have you cast aside the custom and teaching of your younger days? Have you flung out of your mind — out of your life — the habit of Church-going — that habit your Father and Mother once taught you? Are you walled in — shut off from something that calls for *your* active interest? Are you mentally blind?" * Its advertising is limited to appealing to men to resume old habits of church-going. It names no church. It names no minister. When a church itself advertises, it confines its advertisements to a simple announcement of time and place and speaker, with an invitation the Church may always make: "Come all ye that labor and are heavy laden."

Mr. Shoe-Man, you have shoes to sell. You may praise your product. Your son has to sell — knowledge? Yes. Services? Yes. And something more. Do you recall Sharswood's definition of the oath of "fealty"

* *New York Tribune*, December 18, 1915, p. 3.

he took? * Is your son not pledged to give loyalty to his client, to preserve inviolate his client's sacred confidences, to forget self in service for another? Can such fealty or service be bought and sold? It is the legend — I hope a true as well as a "moral story" — of a rich woman, much sought after, who remained single, until, in a railroad accident, she found in the eyes of the railroad official who rushed to her aid the self-sacrificing loyalty she had long sought. Out of it came the bond.

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.

In a certain club a flattering young man diligently cultivated acquaintanceship among the members. His motive became apparent — he was an insurance agent. Did he add to his clubability? When he was found out, did it add to his practice? Wherever personal confidence is the basis of a relationship, it is born of good will. Such a good will can be brought about by actual service. The young lawyer who has no practice must establish this good will. He can do so by service — unselfish service. If he joins clubs or political or civic or religious organizations, he will acquire just the good will he deserves. Men intuitively learn to pick out the "climber" and set him apart from "the fine fellow."

Those of us who know how hard it is, in middle life, to take the time for public work from private service, welcome the young men, fresh from law school, buoyant and full of energy, ready to try out their brains upon the

* See *ante*, p. 91.

knotty problems of the day. We need them — how much we need them, on legislative committees, on research committees — wherever the lawyer's training is needed for the solution of pressing problems. Can the lawyer create a good will by unselfish devotion to the public weal? I know that he can — if he put his ideals above his profit. He must entirely and at once dismiss from his mind the thought that such association will bring business. It will not. It will beget *confidence* — if he earns it; and as confidence is the fabric of which professional retainer is made, it will come as friendship comes, in gentle zephyrs, when most unexpected. Where two people find faith in each other and one needs the other's confidential counsel, there is the beginning of the lawyer's practice. Can such a confidence be secured by advertisement? It can. It is done every day in the week — *but not by advertising one's self*. The reputation of a lawyer is made up of advertisement more than he has reason to suspect. Every one of us is talked about behind his back. And by the time he reaches forty-five every man is tagged and labeled, sometimes in different quarters with different and conflicting tags and labels. Young man, let your friends and your enemies do your advertising for you. A really effective enemy, properly chosen because of the things he stands for and you do not, will do more to build confidence in you than many intimate friends.

The shoes are good, Mr. Shoe-Man. *You* may say so — if it be true. And you may spread the glad tidings and no one will blame you that you make profit out of selling shoes — though, if you have caught the drift of Chapter III, you will bear in mind that here, too, *service* is set above profit. But in the case of the lawyer,

advertising of one's own willingness to be trusted as a man of unselfish devotion — for 10% of the amount involved — frosts the rose before it has chance to bloom. It nips in the bud the flower that grows only in warm atmosphere. Take it out of the nursery and stick it in the snow, lawyer-advertiser, and see what becomes of it!

Mr. Shoe-Man, would *you* repeal these two of the Canons of Ethics of the American Bar Association? —

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. *Stirring up Litigation, Directly or Through Agents.* It is unprofessional for a lawyer to volunteer advice to bring a law-suit, 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 *attachês* 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.

CHAPTER XV

FEE OR HONORARIUM

THE compensation of the lawyer has been a fruitful subject for discussion in all times. Is it *fee*, or *compensation*, *reward*, or *honorarium?* Sir John Davies, Attorney-General to James I in Ireland, appears to have been the first to bring the theory of an *honorarium* into England. In the preface to his report in 1628, he writes of the professors of the law "for the fees or rewards which they receive are not of the nature of wages or pay, or that which we call salary or hire, which are indeed duties certain and grow due by contract for labour or service, but that which is given to a learned Councillor is called *honorarium*, and not *merces*, being indeed a gift which giveth honour as well to the taker as to the giver; neither is it certain or contracted for, no price or rate can be set upon Counsel, which is invaluable and inestimable."

Going back to the middle of the first century, we find Quintilian in his *Orations* discussing the theory of gratuitous services, contending that though one possessed of a competency ought not to make a trade of his profession, yet one constrained to earn his livelihood need not refuse to accept pecuniary rewards. "A virtuous advocate therefore," he concludes, "will not seek to get more than is sufficient for him, and even one, whose poverty obliges him to receive fees, will not take them as a debt due to him, but receive them as an acknowledgment; being well aware that the obligation is still on his side. For

in truth the services of Counsel ought not to be sold, nor, on the other hand, go unrewarded."

And Bellot, quoting him,* comments: "When Quintilian wrote, the Roman Bar was passing through a transitional period, and the writer was endeavoring to reconcile modern practice with ancient custom."

Sir Davies' view was expressly adopted by Blackstone (in 1763): "Counsel's fees were given to him, not as *locatio vel conductio*, but as *quiddam honorarium;* not as salary or hire, but as a mere gratuity which a Counsellor cannot demand without doing wrong to his reputation."

On the other hand, an English jurist inquired in 1819: "Was it ever understood by any man that gentlemen who are put to the most enormous expense in rendering themselves competent to appear in a Court of Justice as advocates, are to act for nothing? No man is so ignorant or so stupid as to suppose that this can be the case." †

But the law of *England* as it stands to-day was settled in 1863.‡ "We consider," said the Court, "that a promise by a client to pay money to a Counsel for his advocacy whether made before or during or after 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."

In Republican Rome the lawyer rendered service for his client gratuitously, but later when compensation became the custom and lawyers demanded excessive

* 34 *Law Magazine and Review*, p. 401.
† Best, J., in Morris *v.* Hunt, 1 Chit. 544.
‡ Kennedy *v.* Brown, 13 C. B. (N. S.) 677; 9 L. T. 736.

fees, the *Lex Cincia de donis et muneribus* (204 B. C.) * prohibited compensation of any kind by client to patron. Under the same law, the client could recover back fees already paid, and prevent the enforcement of promised fees. Signor Frate reminds us † that Cicero boasted of having earned more than twenty million sesterces through his professional labors, and that the Emperor Augustus tried to repress the lawyers of his time by reinforcing the *Lex Cincia*. Claudius fixed the maximum of fees at 10,000 sesterces and Nero suppressed fees absolutely. In Italy, both in the Middle Ages and to-day, however, a lawyer may sue for his fees. In the determination of the fees to be paid by client to lawyer, the classic jurists (Gotofredo, De Salario, Genua MDCLXVI) fix the following as the governing criteria: 1st, *ex ipsa impensi laboris natura atque ratione* (upon the kind and the particular difficulties of the service); 2nd, *ex qualitate personæ* (upon the quality and value of the advocate); 3rd, upon the specialty which the advocate attributes to himself; 4th, upon the usual or unusual nature of the service rendered.‡

To-day in America, the American Bar Association canons provide:

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,

* Passed at the instance of Marcus Cincius Alimentus; afterwards re-enacted by Emperor Augustus. Sharswood's Ethics, Vol. XXXII, American Bar Association Reports, p. 139.

† Address on "The Italian Bar," Note 4.

‡ *Idem.*

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.

Signor Frate says that the historical reason for the Roman gratuity (gratuita) of the office of advocate, arose from the fact that the defense was the "natural and social protection due from the *patrones* to their *clientes*, namely, to those who were socially under them. The advocate is no longer the orator whom ancient Romans admired and consulted while he 'sauntered about in the forum' (*transverso ambulantem foro*) as a great artist or a great philosopher." *

In our own country, to-day, we permit the attorney

* Address on "The Italian Bar," — Note 4.

to receive fees and to sue for them as upon any ordinary contract to pay for services. Moreover, we permit him to agree upon a contingent fee — that is, to be a participant in the results. Such a practice would not be tolerated in England, Italy, France, or Belgium.

In this country, it has been a constant source of debate.* In 1835 Chancellor Walworth of the Supreme Court of the State of New York severely censured an attorney for withholding money from his client under claim of an agreement for a contingent fee, and threatened to remove him from office unless he returned it.†

The American Bar Association canon upon the contingent fee provides:

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.

The records of the American Bar Association show that the form of this canon provoked more debate than any other in the committee and upon the floor of the meeting which adopted it. Though this canon has been very generally adopted by local Bar Associations throughout the country, the Boston Bar Association has expressed its views differently. Canon XIII of the present canons of the Boston Bar Association provides as follows:

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

* See American Bar Association Reports, 1908. Report of Committee New York State Bar Association on Contingent Fees, 1908.

† Matter of Bleakley, 5 Paige Ch. 311.

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 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 interest, 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.

The contingent fee (*pactum de quota litis*) is absolutely prohibited by the Italian Civil Code (paragraph 1458). Prior to the Code, it was at one time treated as a crime and punished with criminal penalties. Mr. Choate, in an address made to the New York State Bar Association after his return from England, gave it as his opinion that "the chief cause of detraction from" the Bar's "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 of the cause and of the client? If he has bargained for a share of the result, what answer can we make to such a 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 all 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?" *

In Belgium, contingent fees are prohibited. Cox-Sinclair, writing on "The Bar in Belgium," says:

The rules regarding the professional remuneration of the advocate are founded on the bed-rock rule that the knowledge, eloquence, and reputation of an advocate are not the subject of a mercantile transaction. Any remuneration ought to be a free gift, the voluntary recognition of the gratitude of the client, although. . . . Belgian jurisprudence recognizes the right of the advocate to recover his fees by action at law.†

In France Mr. Fuller says:

As early as the year 1345, by a Royal Ordinance, any agreement by counsel for compensation by an interest in the

* Vol. XXX, Reports of New York State Bar Association, 1907, pp. 72–73.

† 34 *Law Magazine and Review*, p. 271.

result of the litigation was forbidden, as well as the purchase of a cause of action, and this was confirmed by an Ordinance two centuries later — 1560. To this day, it remains the inflexible rule of the French Bar. Traditions have preserved it with the greatest strictness, and any such arrangement is held to be incompatible with the dignity and with the independence of the lawyer, — an independence essential to the proper exercise of his profession. By a still earlier Ordinance, in the year 1263, it was enacted that lawyers could agree with the clients for their honorarium provided it did not exceed thirty livres, which still represents in actual count thirty francs, though in the real value considerably more. Although this limitation was repeated by a regulation of the Court of Parlement, two centuries later, it is fair to say that in practice this limit was not adhered to, and the courts exercised control over the honorarium, reducing the charge if it appeared exorbitant and taking into account the importance and the duration of the litigation as well as the local customs and the standing of the lawyer.

The traditions of the Bar forbid the bringing of a suit to recover fees; the honorarium is still treated as a voluntary offering, and if not freely paid by the client, no proceeding must be undertaken to enforce the collection, nor must the payment be insisted upon by letter or personal pressure. Nor must payment in advance be exacted in order to escape the possibility of an ungrateful client. If payment in advance is made, it must be freely made. Although a lawyer may return the papers and decline further service, this must be done in such manner as to afford the client ample opportunity to retain other counsel, and the retention of papers as a means to enforce payment would entail the ostracism of the lawyer guilty of it.*

The worst offenses of touting are associated with the contingent fee. It leads naturally to the solicitation and

* Address on "The French Bar," pp. 15–16.

advertising for business. Its general practice is to-day at the root of much of all the evils in the practice of the law, and sooner or later will be controlled either by rules of court or by legislation.

By the contingent fee arrangement, the lawyer becomes *principal* as well as adviser. How can he preserve the disinterested temper of the advocate when he is interested in the pecuniary result? He becomes in fact his own counsel. He violates the familiar injunction against having "a fool for a client," in that he is his own lawyer. There are many just cases in which the lawyer performs a real service to society by taking his pay out of the results of the litigation. And where the client is poor, this is perhaps the only way by which he may get adequate professional assistance. But to permit it generally, and without regulation, as is now the practice, is to assume that the practice of the law is like a business in that one may, in a court of justice, freely speculate with one's energies and skill, as one may upon the Stock Exchange.

The New York Court of Appeals held * (1915) that the employment of a lawyer upon a contingent fee does not make it the client's duty to continue the lawsuit and thus increase the lawyer's profit. "The lawsuit is his own. He may drop it when he will. Even an express agreement to pay damages for dropping it without his lawyer's consent, would be against public policy and void. . . . The law will not . . . under the coercion of damages, constrain an unwilling suitor to keep a litigation alive for the profit of its officers."

In that case, the lawyer claimed that if the litigation had gone on, he would have made twenty-five per cent

* Andrewes *v.* Haas, 214 N. Y. 255.

of $180,000. He was offered full pay for the actual services performed, which consisted merely of the drafting of a complaint. But he claimed that he was entitled to the profits that would have come to him if his clients had pressed the case to a successful conclusion.

The Court said (per Cardozo, J.): "*The notion that such a thing is possible betrays a strange misconception of the function of the legal profession and of its duty to society.*" Of course, if the law is a *business*, then the lawyer-plaintiff was right and the Court was wrong, for on the *business* theory, he was clearly entitled to recover as damages the profits which he would have earned if the "business enterprise" had been carried through.

The contingent fee — let us admit — stands by itself. It is not defended in debate save upon the ground that it enables the worthy poor to secure able counsel. Yet every practitioner knows that the contingent fee arrangement is more often a convenience for the rich to join with a lawyer in speculation over the results of a lawsuit. But to reason from its prevalence to the conclusion that the Bar has become a business or trade is to take the anomaly for the rule.

Now, let us admit that times have changed. Let us grant that to-day the Lawyer must be a Business Man. A lawyer has reminded us that the presidents of two of the three largest life insurance companies of the world are lawyers; that the executive head of the Union Pacific Railroad is a lawyer; that the presidents of all the street railroads on the island of Manhattan — subway, elevated and surface cars — are lawyers. That the head of the United States Steel Corporation is a lawyer; that the President of the United States Rubber Company was formerly Attorney-General of Rhode

Island. That the heads of the American Biscuit Company, the Mergenthaler Linotype Company and the International Paper Company are lawyers. The presidents of large trust companies are nearly always lawyers and nearly all the great private banking firms in New York have one or two lawyer-partners.* The list could be very much lengthened. These men are not the counsel for the corporations, but have been drafted from their profession to take over the actual management and operation of great enterprises. As Mr. Wollman pointed out, the training of the modern American lawyer not only gives the lawyer a broad knowledge of men and things, but makes him quick to absorb and use the knowledge of the real expert. It is significant of the development of the Bar of our generation that the successful lawyers — the men who have attained supremacy — are men who combine business skill with the professional training of the law.

Walk into a modern law office and you will think you are in the executive office of a large business institution. Departmentalized into as many branches of the law as are practiced by the firm, with a long list of senior or junior partners, each with his own particular specialty, a managing clerk, with a score of assistants, typewriters, telephone operators, secretaries, bookkeepers, cashiers, a comprehensive library — in a word, the lawyer's office is an office for the transaction of modern business. The old days Dickens wrote about are gone. There is nothing cosy or somnolent about our 1916 law office. Indeed, we complain that the click of the typewriter and

* Henry Wollman: "Commerce and Commercial Law," West Publishing Co.'s Docket, Vol. 2, No. 8, p. 1254 (Oct., 1914). See also "The American Lawyer," John R. Dos Passos.

the whir of the telephone bell drive us to distraction or to the Bar Association Library for reflection or study. No one attempts to do analytical work in a law office. "The silences" must be cultivated elsewhere. The office lawyer of to-day is an administrator, an executive, a business manager as well as an adviser to business men. His bill for services to-day covers rent, telephone, typewriting, library, clerks, junior lawyers — a thousand and one expenses such as a modern business budgetizes and charges up to "overhead charges." Very often, sixty per cent of the fee is *cost* in any accurate sense of accounting. The business problem of administrative efficiency must likewise play a large part in a modern law office. The business must be done and well done. Living in such an atmosphere, with his office window closer to the Stock Exchange than it is to Trinity Church — only the tombstones and graves save poor Trinity from being entirely squeezed out by business — the modern New York lawyer catches the atmosphere he breathes and fast loses the larger perspective of his profession.

Let us admit all these things. What then? There are inconsistencies between precept and practice lurking in every corner of our professional life. We must force these little devils out in the open and courageously shake hands with them. There is danger ahead. *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. We have not set our own house in order — we have only begun. Are we ready to solve all the future problems of society — as friend Abbot * suggests? Let

* "Justice and the Modern Law," p. 83.

us begin with our own problems. Let us talk about our problems openly. Let us take the public into our confidence. They need to understand us and our problems quite as much as we need to understand ourselves.

If we turn back to the chapter in which we considered business *as a profession*, we shall discover that the note of *service*, first, and *reward* next, is the dominant note of to-day. We discern that the railroad president, the head of the big telephone company, the retailer, the financier, the employer — each is forced by public opinion to treat his vocation as a part of the entire social scheme and finds deserving praise or condemnation as he harmonizes and fits in his own activities with the general needs and purposes of society as a whole. The lawyer is set apart as an officer of the court to aid in the administration of justice. He is not paid a salary, or a wage, nor does he make profits. He never can be fully compensated for his work. As Quintilian said, he does not take his fees "*as a debt due to him, but receive(s) them as an acknowledgment; being well aware that the obligation is still on his side. For in truth the services of Counsel ought not to be sold, nor, on the other hand, go unrewarded.*" The intimate personal service of a true counsellor, of a true advocate, is beyond price. The loyalty, the devotion, the days and exhausting nights of study and research and thought. The sweat of his blood for some poor, miserable wretch who scarce knows and little understands the labor bestowed upon him. Can the minister of the gospel be paid for bringing comfort to the spiritually sick? A psychologist wrote a book called "Physician to the Soul," in which he pointed out how much of medical advice is purely mental and spiritual. None knows better than the lawyer how often he is the sole physician to the troubled soul. The busi-

ness man on the verge of bankruptcy, the despairing wife, shunning at once the glare of the courts and the scandal of the newspaper, the poor, sinning brother who has gone wrong, or the son, about to commit suicide, after spending the funds put into his trust. No confidence too great, no labor too arduous, no hours too long, for the true member of his guild. Can his services be bought? If he truly understands the nature of his reward, it will always be an *honorarium* — it can never be otherwise.

But I hear the young man in the corner whisper: "All very well, for men who have succeeded to preach such doctrine; but how about us who even now have to earn a living?" The answer is simple, though hard. Recently, a public official in New York was removed from office because, in addition to the salary paid him, he received income from stocks or bonds of a Power Company which it was part of his duty to supervise. A statute devised in the public interest forbade his holding both the office and the stock or bonds. He could have either office or investment, but not both. He did not offer as a defense, "I needed the additional income; the salary was not enough." Or, when charged with practicing law on the side — he was a lawyer and a good one — "I could not live on the income of the office alone." Public opinion expects public officers to be satisfied with the reward of their office and if they are not, that they shall not accept the office. Federal judges serve for pay equal to about one-fourth of what — at least in New York — most of them could earn in practice. If you cannot live on what you earn in the office you accept, then you have no business to be in that office. If you cannot be a soldier without staining your uniform,

give up the uniform. If trade is your aim, go into trade — you will make more money. If business is your forte, go into business; you will win greater honor and glory. But when you go into the law, note well, before you begin, that just as you would live on a minister's salary of $500 a year, support a family and keep clean, the uniform or cloth you wear must be kept spotless. Our calling asks for no greater personal sacrifices than the minister's, the teacher's or the doctor's. We're all in the same difficulty. No one will endow us, and we are dependent upon earnings made in accordance with the standards of our profession. The State ought to pay us a salary. Some day, perhaps, it will. (Then there will be fewer lawyers.) Just as we are abolishing *fees* for marshals, for sheriffs, for county clerks, for district attorneys, and courts — we still pay referees in bankruptcies "commissions" — some day we will abolish the fee system of compensation to lawyers. The State will accept the principle that the "lawyer is an officer of the court," as it has accepted it in the case of the judge, the district attorney, and the sheriff. When that time comes there may not be many of us left, and perhaps society will be better off. In the meantime, we are free to decline the office if we do not like its limitations upon our freedom. No one can compel us to practice our profession.

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?

We must reach the young men now preparing to join our ranks. But we must reach the men now in the ranks. They need to learn the basic principles of their chosen profession. The task bulks large before us, but most assuredly not so large as it bulked before the young Russian Bar thirty years ago. And the Russian lawyers took their lives in their hands, for the honor of their profession.

CHAPTER XVI

"FEE SPLITTING"

It was but recently disclosed to the general public that for two years the American College of Surgeons — the national organization of doctors practicing surgery — had imposed upon its members a new pledge more closely related to modern conditions than the Hippocratic oath. This new revision includes the following: "I pledge myself, as far as I am able, to avoid the sins of selfishness; to shun unwarranted publicity, dishonest money seeking, and commercialism, as disgraceful to our profession; *to refuse utterly all secret money trades with consultants and practitioners;* to teach the patient his financial duty to the physician, and *to urge the practitioner to obtain his reward from the patient openly;* to make my fees commensurate with the service rendered and with the patient's rights; and to avoid discrediting my associates by taking unwarranted compensation." * The most interesting part of this pledge is the clear condemnation of the practice of dividing secretly the surgeon's remuneration with the attending doctor who brings the patient to the surgeon. "Fee-splitting," as it is called, has been long recognized in the medical profession as one of its darkest sins. It was reported in the press of November, 1915, that the New York County Medical Society was then divided into two factions, one a group calling itself "businesslike" and another

* *New York Times*, Nov. 15, 1915.

insisting still that theirs, like ours, is "a profession, not a trade." The latter faction, it is reported, has so far triumphed. Editorially commenting upon the conflict within the group of doctors over the matter of splitting fees, the *New York Tribune* said: "The abominable abuses to which such a system is subject are sufficiently obvious, and the poverty of many practitioners is a poor excuse. If fee splitting is defensible on any score, there can be no reason for secrecy; let it then be practiced openly, that the patient may know what he pays for. Secret transactions of this sort between practitioners and consultants can by no means be defended unless the art of healing is to be reduced to the lowest commercial level." *

A moment's careful analysis will bring us to an understanding of the fundamentally sound ethical basis for the ancient and modern condemnation of the "splitting of fees." When you go to your doctor, you go to him for impartial advice — advice in *your* interest, not his. Let us say that, after careful diagnosis of the condition of your child, he gives you his opinion that a surgical operation is both justified and desirable. Now comes the next question, all-important to you — Who shall perform the operation? Naturally, you turn to your doctor — again for impartial disinterested advice. What shall be the basis of his judgment? Obviously, careful survey of the whole field of surgeons, careful discrimination and a judgment as to who of all the available men is most likely to be the best for this particular operation. Now, introduce into this judicial act the factor of personal profit to the doctor — will you then expect it to be *dis*interested and *im*partial? Shall he be led to decide

* Nov. 22, 1915.

upon the basis of who pays him the largest commission for bringing the case? If commissions are permitted, then there will be competition and a race to see who will pay the highest commission. To avoid such a practice, to avoid, further, leading the judge — your attending physician — into temptation, the profession as a whole erects a canon prohibiting payment of *all* commissions. Obviously, "splitting fees" is merely paying a commission.

In short, to secure impartial and disinterested professional service from the attending doctor, the temptation of private profit is wholly eliminated. Just as the judge or the public service commissioner must have no interest in matters coming before him for judicial determination, the rule becomes imperative in this instance because the doctor is a judge. Because "to err is human," we remove what we know to be a natural temptation. As we try to prevent murder by making it a crime to carry concealed weapons, so we try to prevent unhealthy professional practices. The rule is a rule of preventive social hygiene. There is a very old rule in equity. No one who occupies a position of trust may deal personally with the property in his trust — he may neither buy from nor sell to himself, even though the estate actually profit by the transaction. For though ninety-nine are so honest that they will deal with themselves and yet benefit or profit the trust estate, there may be one — and it is the one the law seeks to restrain — who will not be so dependable.* Therefore the universal rule prohibiting all dealing by the trustee with himself concerning the property in his charge. This rule rests upon centuries of human experience. It is justified by our own knowledge of what

* Davoue v. Fanning, 2 Johnson's Chancery Reports, 252.

transpires in ordinary life when personal advantage conflicts with fidelity to trust. "No man can serve two masters." It is the basis for the condemnation of the "interlocking directorate" in banks, life insurance companies and the like, for we know what happens when men charged with fiduciary duties are deflected by the prospect of personal profit.

We have learned, too, that this principle comes into play in every-day business. In many European cities almost the better part of compensation to cooks and stewards is the commissions they receive from tradesmen from whom they purchase for their principals. Do you want your cook to trade with the butcher that gives her the largest commission? You know *you* will pay in the end. In New York, it had become so prevalent a practice to make presents to those in control of the award of contracts, or the purchase of merchandise, and resulted so injuriously to business and trade morals, that the Legislature added the following section to our Penal Code:

Sec. 439. *Corrupt influencing of agents, employees or servants.*

Whoever gives, offers or promises to an agent, employee or servant, any gift or gratuity whatever, without the knowledge and consent of the principal, employer or master of such agent, employee or servant, with intent to influence his action in relation to his principal's, employer's or master's business; or an agent, employee or servant who without the knowledge and consent of his principal, employer or master, requests or accepts a gift or gratuity or a promise to make a gift or to do an act beneficial to himself, under an agreement or with an understanding that he shall act in any particular manner to his principal's, employer's or master's business; or

an agent, employee or servant, who, being authorized to procure materials, supplies or other articles either by purchase or contract for his principal, employer or master, or to employ service or labor for his principal, employer or master, receives directly or indirectly, for himself or for another, a commission, discount or bonus from the person who makes such sale or contract, or furnishes such materials, supplies or other articles, or from a person who renders such service or labor; and any person who gives or offers such an agent, employee or servant such commission, discount or bonus shall be guilty of a misdemeanor and shall be punished by a fine of not less than ten dollars nor more than five hundred dollars, or by such fine and by imprisonment for not more than one year.

In passing upon the constitutionality of this statute, the New York Court said:

The statute is zealous to banish the very appearance of evil, and requires of such an agent complete and unswerving devotion to his one master. Business experience demonstrates the necessity for such a statutory bulwark of fidelity. Without such a statute, under the fierce competition of modern life, purchasing agents and agents to employ labor can be lured all too readily into the service of hopelessly conflicting interests; nor is this a mere matter of metaphysical speculation. . . . Sound public policy, commercial honor and the good faith of fiduciaries and trusted employees imperatively demand some such measure in the written law.*

The *raison d'être* of the rule against the splitting of doctors' fees is the same as that for the rule against paying bonuses to purchasing "agents, employees or servants." In common parlance, we call payments of

* People *v.* Davis, *New York Law Journal*, Jan. 3, 1916.

this sort "graft." For a long time business treated it as "*honest* graft." To-day, like fraudulent advertising, the payment of tips or gratuities to purchasing agents has found its place in our Penal Code.

Leaming tells us concerning the ethics of the English Bar:—

"*Commissions or Presents from Barristers:*

"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." *

The Committee on Professional Ethics of the New York County Lawyers' Association has said:

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.†

* * * * * * * * * *

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 prac-

* An. St. 1899–1900, p. 6. Leaming: "A Philadelphia Lawyer in the London Courts," p. 75.

† Appendix B-Q, 42.

titioner 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 Consol. Laws, c. 40, § 274.) *

* Appendix Q, 47–II (a).

Since the writing of the text, the foregoing conclusions have been confirmed by the Appellate Division, First Department, in the Matter of Julius A. Newman, (*New York Law Journal*, May 1, 1916), 172 App. Div. 173, in which the Court censured the lawyer and admonished the Bar generally, as follows:

"As, however, the respondent at the time of the act complained of was a young man of about twenty-six years of age, only two years at the bar, with little or no experience, and as the proposition was brought to him by the agency, we think that the ends of justice will be sufficiently attained by this disapproval of the character of the relations existing between him and the collecting agency and his censure for his participation therein with a warning to those who may hereafter participate in like transactions."

Concerning the relationship of the collection agentship of the lawyer, the Court said:

"The fact of his appearing as attorney of record in litigated proceedings established by record evidence of the highest character the relation of attorney and client. From the amounts so collected by him he retained 20 per cent. as remuneration for services rendered in collecting the claim as the result of litigation and of this he agreed to pay 10 per cent. to the collection agency. What was this? Was it a payment by him of a proportion of his fee taken from his client's money, collected by him, to the person or agency procuring the client for him, or, was the 10 per cent. which he retained compensation paid to him by the collecting agency, who, he claims, was his real client for services rendered to it? Whatever way we look at it, it is clear that there was a splitting of the fees between an attorney and the person or party, not an attorney, and not competent to practice law, for legal services rendered to a third person whose attorney of record he was and with whom the relation of attorney and client legally existed.

* * * * * * * * * * *

"The respondent therefore did promise and give a valuable consideration to the agency as an inducement to placing or in consideration of placing in his hands a demand for the purpose of bringing an action thereon as prohibited by section 274 of the Penal Law.

"We are clearly of the opinion that the relation was one which this

And recently, in answering Question 98:

A. B., an attorney, is in partnership with C. D., a layman, in the collection business, and, under the partnership agreement, divides the earnings of that business with C. D. He does not divide with C. D. the fees which he may receive upon any act or service performed under his name and by virtue of his office as an attorney. A part of the partnership earnings, however, is derived from commissions charged upon collections made by attorneys to whom claims are sent by the partnership. Is there any impropriety in the above practice?

ANSWER

In the opinion of the Committee, it is improper for a lawyer to engage in partnership with a layman and divide fees. (See Q. & A. 47, Ia, Ib, IIa.)

A fee charged for professional services is none the less a reward for professional services because it is called "a commission." Lawyers in other States, who are dividing with a collection agency here the compensation they receive for professional services, are themselves, in the opinion of the Committee, guilty of unprofessional conduct. That the service excludes the bringing of suit or appearance in court does not change the inherent character of the situation. In performing the service the lawyer's professional skill and responsibility are engaged. There is no objection to a lawyer engaging in the collection of an account (see Q. & A. 47, Ib), but when he does so, he does so as a lawyer and is subject to the ethics of his profession.*

Court cannot sanction or approve. An attorney of record will not be permitted to deny that the relation of attorney and client exists between himself and the person for whom he appears and conducts litigation. 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 procuring of business."

* Appendix B, Q, 98.

Leaming tells us that "solicitors * are to be found in every town in England, whereas barristers, with minor exceptions to be noted, all hail from the London Inns of Court. People living in the country or in provincial towns, especially the larger ones, such as Liverpool and Manchester, of course consult local solicitors. If litigation is contemplated, the solicitor advises his client and conducts the sparring and negotiations which usually precede a lawsuit. But when actual warfare opens, the provincial solicitor generally associates himself with a London solicitor who is known as his 'agent'; and hence 'agency business' constitutes a considerable portion of the practice of a large firm of town solicitors. The Manchester or Liverpool solicitor does all the work and receives the fees up to the time he sends the 'proofs' to the agent — that is, the documents, statements of witnesses reduced to affidavits, and the other items of evidence — and dispatches the witnesses to the trial in London, which usually, however, he does not attend himself, although, of course, he sometimes does so. The London solicitor retains the barrister, and is thereafter in complete charge of the case. The newspaper reports of trials of cases from the provinces, after giving the names of the barristers, always mention the London solicitor as agent for the country solicitor whose name also appears. The fees are shared from the time of association; one-third to the country, and two-thirds to the town solicitor. This is not unlike the manner in which our lawyers handle business in States other than their own — but it is much more systematized." †

* Solicitors are lawyers who are mainly advisers — as distinguished from Barristers, who are trial advocates. See *ante*, p. 90.

† Leaming: pp. 169–170.

This system of solicitors and solicitors' agents — the "town" solicitor taking charge and the "country" solicitor doing a large part of the work — a joint service, with a joint reward, is probably the origin of the system existing in this country of "forwarders" and "receivers" sharing the one fee in the proportion of one-third to the forwarder and two-thirds to the receiver. But in England as in this country, where both receiver and forwarder are lawyers, the sharing of the fee is based upon a relationship of correspondents, who, for the purposes of the case, have associated themselves in a joint task. The client retains his own lawyer, who, in turn, retains for the client his customary out-of-town associate in the place wherein the litigation is to be brought. The division of the fee is justified upon the theory of professional association, in which two members of the Bar share in a common service. Just as you could, with propriety, pay two doctors a joint fee for a complete service in which both participate, so you may pay two lawyers one fee for a joint service in which each performs his part. Partnerships in the practice of medicine are not generally known in this country. Indeed, the law partnership as we know it is an American development. But there would seem to be no more ethical objection to a copartnership of physician and surgeon than there is to a copartnership between general adviser and trial lawyer.

Now let us turn to another situation, where the *forwarder* of a piece of professional work is a layman and the *receiver* is a lawyer. If the layman is the principal himself, of course, there is no "splitting of fees" and no "commission." In American commercial practice, the division of one-third and two-thirds is the pretty generally

accepted practice.* And the minimum fees for collections are standardized. (They are graduated from 10% down, according to the amount involved.) Among collection agents and commercial lawyers the granting of the one-third of the standard fee to the *principal*, either directly or indirectly, is condemned as a species of unfairness by which some clients derive advantages over others. Thus, among collection agencies and commercial lawyers who do divide fees, it is a cardinal rule that "house agencies" so called, or private "collection departments" or devices shall not participate in the division.† When the lay agent combines with the lawyer, — the former being the forwarder and the latter the receiver, — the entire responsibility for *professional* service rests upon the lawyer. The fee fixed for such service belongs properly to him. When he gives any part of it to the lay agent, he gives up a part of *his* fee, — he is, in fact, "splitting fees"; he has formed an unethical partnership. Let us see where the practice leads to. As we have seen, a lawyer may not drum up business, — may not solicit. On the contrary, a lay collection agent *may* solicit — in fact builds up the business by solicitation and by advertising. If the lawyer were to employ salesmen or drummers, he would not only violate the canons of his own profession, but would (in various states) render himself subject to criminal punishment. Since the lay agent does not share in the professional responsibility, what does he get the one-third commission for? Obviously, for developing and promoting the employment. Is there any conceivable difference between employing

* See *Bulletin, Commercial Law League of America*, October, 1915, p. 487.

† *Idem*, pp. 487–488.

"John Doe," your own clerk, as a runner for business, and employing "John Doe, Inc., Collection Agency" for the same purpose? It is sometimes argued that the one-third is paid to the collection agency forwarder for "services" in aiding the lawyer — by looking up witnesses, getting evidence, forwarding documents, etc. This was considered by the Committee on Professional Ethics of the New York County Lawyers' Association in Question 47 and Question 74 and conclusively answered.* 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.† But if the payment is merely for aid in *doing*, rather than in *getting*, the job, why this insistence that when the principal or his "house agent" is perfectly willing to render the same assistance, *he* may not have the credit of the one-third?

The splitting of fees between lawyers and laymen is

* See Appendix B.

† That there is great confusion upon this subject is indicated by the insistence on the part of collection lawyers that the one-third "commission" shall not go to a "house agency." Now a "house agency" is a collection bureau established by the principal himself. It often performs the same kind of preliminary service that the regular collection agency performs. If the one-third of the fee is for contribution of service in the *doing* of the job, rather than in the *getting* of it, obviously there could be no reason for outlawing the "house agency." If the principal, either directly or indirectly through the "house agency," is willing to perform the same kind of service as the regular forwarder, why shouldn't he get the benefit of the one-third? Isn't it obvious that objection is made to giving it to the principal himself because the one-third is a "commission" for producing the business?

improper for the same reason that it is improper to pay a bonus to a buyer for getting him to give you an order, but in the case of the lawyer it is more serious, because as "an officer of the court" he is sharing the emoluments of his office with a layman and inducing the creation of law practice by paying a consideration — all of which, as we have seen, is injurious to the community.

The Supreme Court of Nebraska * held that a contract between an attorney at law and one who is not such an attorney, by which the latter agrees to procure the employment of the former by third persons for the prosecution of suits in courts of record, and also to assist in looking after and procuring witnesses whose testimony is to be used in the cases, in consideration of a share of the fees which the attorney shall receive for his services, is against public policy and void. In rendering its decision the court expressed the following sentiments: "It is also apparent that it was the policy of the legislature to fix a high standard of professional ethics to govern the conduct of attorneys in their relations with clients and courts, and to protect litigants and courts of justice from the imposition of shysters, charlatans, and mountebanks. It seems to us that the contract in issue is but a thinly veiled subterfuge by which the plaintiff, who, it is conceded, was not a member of the bar, and who had never complied with any of the provisions of chapter 7, *supra*, for the purpose of authorizing him to engage in the practice of law, undertook to break into the conduct of proceedings of a court of record, to which he was not a party, by attempting to form a limited and silent partnership with one who had complied with the provisions of

* Langdon *v.* Conlin, 93 N. W. 388.

the law and was entitled to the emoluments of the profession."

In 1915, things became so bad in the State of Missouri that the Legislature of that State passed the following law: —

It shall be unlawful for any licensed attorney in the State of Missouri to divide any fees or compensation received by him in the "practice of law" or in doing "law business" with any person not a licensed attorney or any firm not wholly composed of licensed attorneys, or any association or corporation, and any person, firm, association or corporation violating this section shall be deemed guilty of a misdemeanor and upon conviction therefor shall be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars and costs of prosecution, which fine shall be paid into the treasury of the State of Missouri. Any person, firm, association or corporation who shall violate the foregoing prohibition of this section shall be subject to be sued for treble the amount of any and all sums of money paid in violation hereof by the person, persons, association or corporation paying the fees or compensation which shall have been so divided and if such person, persons, association or corporation shall not sue for, or recover the same within two years from the date of such division of fees or compensation, the State of Missouri shall have the right to and shall sue for and recover said treble amount, which shall, upon recovery be paid into the treasury of the State of Missouri. It is hereby made the duty of the attorney-general of the State of Missouri or the prosecuting attorney of any county or city in which service of process may be had upon the person, firm, association or corporation liable therefor, to institute all suits necessary for the recovery of said sums of money by the State of Missouri.

The editor of the *Central Law Journal*,* commenting on this, says:

This section hardly declares any new rule of law, as it has already been held to be the law that laymen are not entitled to share in the emoluments of the practice of law and may not recover on such contracts. The section is important, however, as making the penalty more severe, and the enforcement of the law for that reason more effective.

The argument that the one-third is paid the lay agency for contribution of service in the professional work of collection is specious for another reason. The compensation is *contingent*, contingent upon the successful outcome of the work of the lawyer. If the lawyer is not successful, the compensation is not paid, either to him or the lay agent. Since the compensation is contingent upon the lawyer's success, it is *his* fee which is divided. Separating the charge and saying one shall have two-thirds and the other one-third, each for his own services, is merely "beating the devil around the stump." The Attorney-General of the State of New York, passing upon this very point in the proceedings against the National Jewelers Board of Trade, said:

A somewhat slight change was lately made under pressure of criticism in this practice so that the one-third paid into the treasury of the defendant and the two-thirds ultimately received by the attorney were separated as two distinct items of charge, but this does not in my judgment affect the status or the legal effect of the transaction in the slightest

* Alexander H. Robbins, July 3, 1915, citing following cases: Alpers *v.* Hunt, 86 Cal. 78, 24 Pac. 846, 21 Am. St. Rep. 17, 19 L. R. A. 483; Langdon *v.* Conlin (Neb.), 93 N. W. 388; Burt *v.* Place, 6 Cowan (N. Y.), 431; Munday *v.* Whisenhunt, 90 N. C. 458; Lyon *v.* Hussey, 82 Hun, 15.

degree. The fee is collected by virtue of the ability and success of the attorney based to some extent upon information and aid furnished by the corporation, but the corporation retains a certain definite fixed proportion of the sum made available by reason of a legal proceeding or the activity of a trained and licensed lawyer.

As it was frankly put in 1912 by a lawyer:

Certain concerns known to the profession as forwarders; Law and Collection Agencies, Adjustment Bureaus, etc., by diligent solicitation and extensive advertising have practically succeeded in obtaining the collection business of the country. What they can get by draft or bull-dozing they collect, and the remainder is handed over to some member of the bar for further effort and it is only sent to him on condition that one-third of a certain definite fee must be handed over to the party who has been so "kind" as to solicit this business for him. In many cases this business has been obtained from the lawyer's own town and possible client.

Nobody can blame these gentlemen for their business acumen, but the pity of the system is that far too many lawyers have placed themselves in a fawning position for this business. They cater to this class of business producers, and oftentimes solicit and beg for it and even outbid each other in their efforts to obtain it. They in fact say to the forwarder, "Please, mister, send me the claims that you cannot get yourself and I will give you one-third of what I earn. Please give me a job."

The legal padrone, on the other hand, usually has a list of correspondents, and to be placed on this list costs the attorney from three dollars to one hundred dollars a year.

This is for the privilege that at some time the padrone may give him a job. And if a job is obtained the padrone must have his one-third of the wages or the lawyer is stricken from the rolls and receives no more jobs from this source.

Is not this fair a statement of the situation with many of these associations or agencies, and does it become the dignity of the profession to submit to such exactions or to countenance them in any way? *

When a lay agency makes a regular business of supplying lawyers (as we shall see in subsequent chapters), it is *practicing law unlawfully*.

* J. M. in the *Junior Partner* for September, 1912, p. 42.

CHAPTER XVII

THE MATTER OF BUSINESS ENTERPRISE IN THE LAW

In a case arising in Michigan (1857) the Court said that "champerty" (that is, the promotion of litigation for private profit) "presents a strong temptation to engage in it: that of pecuniary profit; one that has a charm which captivates the man of intellect and learning and genius, as well as the more stupid and unlearned, and one which, unfortunately, presents stronger inducements to those of the legal profession than to any others, because they are better qualified to calculate the chances of success, and they can prosecute suits at less actual expense, and, consequently, hazard less in the chances of litigation. Comparatively few of that profession have all the business that they have time to attend to; and if one devotes time which would not otherwise be actually occupied, to the prosecution of a doubtful claim, the client paying the ordinary expenses, and he fails to succeed, he is not the poorer for his exertions; whereas, if he succeeds, he is paid, not only for his services, but for the risk of their loss. He has a strong temptation, too, with the chance of such a bargain before him, to deceive his client, and to represent a title or claim as doubtful, or difficult to be established, when he believes it to be clear and easily established." *

The effort of society to prevent the promotion of litigation, the stirring up of strife by vexatious and specu-

* Backus *v.* Byron, 4 Mich. 535.

lative litigation which "would disturb the peace of society, lead to corrupt practices, and pervert the remedial process of the law" goes back to the Roman law. The old English lawyers denounced champerty.* Blackstone referred to those who engage "in it as *the pests of civil society*" and refers to the severe penalties imposed upon those engaged in the practice by the Roman law.†

In the early common law it was considered to be an offense against public justice for any man to furnish aid or assistance to another in a litigation. About the close of the eleventh century the Norman conqueror, having put the country under his heel and taken the property of the natives from them, proceeded to divide all of the lands in the kingdom into "sixty thousand knight's fees, and distributed them among his followers. The principle was well adapted to the occasion. Indeed, it was appropriate during the whole period that the violence and injustice of the feudal system prevailed." ‡

In 1538 Henry VIII completed suppression of the monasteries in England and proceeded to take away their estates and divide them among his courtiers and parasites. With equal consistency in 1540 he seized and dispossessed the Knights of Malta of their estates and revenues and it was in this very year (32 Hen. VIII, ch. 9) that Parliament enacted and confirmed the statutes against maintenance and champerty and declared it to be unlawful to purchase any estate unless the vendor or the person under whom he claimed had been in possession within one year preceding the purchase.§

* Thornton: "Attorneys at Law," Sec. 384, p. 659.
† 4 Blackstone Com. 135, 136.
‡ Thornton: "Attorneys at Law," Sec. 383, p. 657.
§ *Idem*, pp. 657, 658.

"The race of intermeddlers and busybodies is not extinct. It was never confined to Great Britain; and the little band of refugees who landed from the Mayflower on the coast of New England were not entirely free from the vice of intermeddling in the concerns of other people. It is as prevalent a vice in the United States as it ever was in England, and we do not see but that a law restraining intermeddlers from stirring up strife and litigation betwixt their neighbors is wholesome and necessary."*

In our own country it is the law to-day that one of the most odious forms of crime against justice is for an *attorney* to purchase a lawsuit, and it has frequently been referred to as shocking "the moral sense of all right-minded people." †

The New York Penal Law of to-day provides:

Buying demands on which to bring an action.

An attorney or counselor shall not:

1. Directly or indirectly, buy, or be in any manner interested in buying, a bond, promissory note, bill of exchange, book debt, or other thing in action, with the intent and for the purpose of bringing an action thereon.

2. By himself, or by or in the name of another person, either before or after action brought, promise or give, or procure to be promised or given, a valuable consideration to any person, as an inducement to placing, or in consideration of having placed, in his hands, or in the hands of another person, a demand of any kind, for the purpose of bringing an action thereon, or of representing the claimant in the pursuit of any civil remedy for the recovery thereof. But this subdivision does not apply to an agreement between attorneys and counselors, or either, to divide between themselves the compensation to be received.

* Duke *v.* Harper, 66 Mo. 51, 27 Am. Rep. 314.

† Thornton: "Attorneys at Law," Sec. 395, pp. 676, 677.

3. An attorney or counselor convicted of a violation of any of the provisions of this section, in addition to the punishment by fine and imprisonment prescribed therefor by this section, forfeits his office.

4. An attorney or counselor, who violates either of the first two subdivisions of this section, is guilty of a misdemeanor; and, on conviction thereof, shall be punished accordingly, and must be removed from office by the supreme court.

Limitation of preceding section.

The last section does not prohibit the receipt, by an attorney or counselor, of a bond, promissory note, bill of exchange, book debt, or other thing in action, in payment for property sold, or for services actually rendered, or for a debt antecedently contracted; or from buying or receiving a bill of exchange, draft, or other thing in action for the purpose of remittance, and without intent to violate that section.*

The canons of ethics (of the American Bar Association) provide:

10. *Acquiring Interest in Litigation.* The lawyer should not purchase any interest in the subject-matter of the litigation which he is conducting.

And printed on the back of the official copy of the canons issued by the Association are these words of Abraham Lincoln:

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser — in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. Never stir up litigation.

* New York Penal Law, Secs. 274, 275.

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, whereupon to stir up strife and put money in his pocket? A moral tone ought to be enforced in the profession which would drive such men out of it.

You will recall that Canon 28 forbids "stirring up strife and litigation" — describes it as "not only unprofessional" but as "indictable at common law" and declares it to be "disreputable" to "breed litigation," to seek out "those with claims for personal injuries or those having any other grounds of action." It is even declared to be "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."

Thus, by ancient tradition, established code of ethics and penal law, the lawyer has charged upon him a direct and insistent duty to discourage litigation and at all hazards to avoid stirring up strife. Let us now give attention to existing conditions under which we exact from the lawyer conformity to the ideal. The survey of "ambulance chasing" in New York, Alabama and Minnesota (it can be found in other States) and of "buying and selling law business" all over the country must already convince us that *soliciting business*, however commendable in other fields of human endeavor, tends in the practice of the law to the breeding of strife and the promotion of litigation. Likewise, for two thousand years, it has been the consistent teaching of experience that general speculation by the lawyer in the profits of litigation results in a lowering of the Bar and an injury to the community. Consider for a moment the consequences if it were generally the practice to pay sur-

geons upon the basis of large reward if the patient recovers, nothing if he dies. How many doctors would hazard unnecessary operations when success is so well rewarded, failure is not compensated at all, and the patient takes the risk? Now, what should we expect if the contingent fee arrangement were to be extended to that field of professional endeavor most directly and immediately in contact with daily business? If it is the lawyer's duty to avoid litigation, of course it is his duty to keep debtors out of bankruptcy if he can; for bankruptcy is a litigation, an expensive and costly administration of the law. Let us see how the existing system breeds bankruptcy proceedings as a swamp breeds mosquitoes.

The business house finds a debtor delinquent. It sends the claim "for collection." Does it pay the lawyer as it pays the physician, for time consumed and service rendered? No. It is "ten per cent. if you collect — nothing if you do not." Now, the collection may involve a lawsuit — a difficult lawsuit; it should always involve the highest fealty to the interest of the creditor-client. Yet the lawyer is put to the temptation of earning more by serving himself, at the possible expense of his client. It may be to the interest of the creditor, even if the debtor be temporarily embarrassed, to keep the latter *out* of the bankruptcy court. Have you ever realized how values are shattered when moved through the portals of the bankruptcy court? Moving does not improve the condition of fine and delicate furniture.

If the debtor needs time, if he cannot produce ready cash, what is the readiest and surest way of compensation for the lawyer's services? Why, of course, bankruptcy. Did not the "Lawyers' Touts, Incorporated"

advise us that large fees could be earned by "controlling the claims"? Your one little claim is the opening card in the game. With it, you may communicate with the debtor's lawyer, secure a list of the claims and with the able assistance of our friends, the *Touts*, control the votes which will put the management of the entire estate in your hands. For you must know, dear reader, that in bankruptcy, as in ward politics, everything turns on the control of the votes. A good vote-getter in bankruptcy gets on — a poor one does not. By the votes you elect the trustee — you become the trustee's counsel — you get a job which you know will be paid for — out of the estate. True, your fee is subject to the supervision of the court and the creditors. But at least you get something. Your client won't pay you no matter how much work you do, except out of the recovery. He says "Business *is* business" and accordingly you take him at his word and make business for yourself.

Is it not strange that so simple and common a proposition has yet to find understanding in the minds of business men? No man can afford to give his time, support an extensive and efficient staff upon speculative litigation, when he can earn more doing something else. Even to-day ability is rewarded in some fields of professional endeavor and no man who possesses the rare combination of character and ability need starve upon the bones and crusts of garbage cans. Obviously, the lawyer who can earn even his salt and maintain his self-respect will search for a better and more wholesome atmosphere. The consequence is as certain as mosquitoes in a swamp. The field becomes crowded with those who can do no better elsewhere. Profit is dependent on controlling claims. Controlling claims is dependent on

touting. Consequence: general, organized systematic prostitution of the Commercial Bar. The practice of the law in bankruptcy is to-day the best and most comprehensive illustration of what becomes of the Law when it is treated as a Business instead of as a Profession. Commercial law practice requires high skill and training and many high-minded men are practicing in bankruptcy to-day. It is not my purpose to deprecate their work. But they know the difficulties as well as I do.

It was, perhaps, inevitable that Neighbor Law, living in close quarters with Neighbor Business, should come to accept the daily habit — even the dialect — of Business. Much of it is good. We are better business men because of the contact. We are more efficient. We practice with more economy. And we have learned the virtues of promptness, celerity and diligence in our work — virtues, if we remember our Dickens correctly, we sorely needed. We are no longer a sleepy, drony lot. To-day we are quick; quick, too, as mimics of our clients. In the acquisition of the good side of business, was the contingent fee a good thing for us or for Business?

It makes the lawyer a partner in an enterprise in which he has not equal rights. — As matter of duty, he must look out for his partner before he looks out for himself. As matter of fact, it encourages him to do the very reverse.

As long as clients persist in seeking something for nothing, they should not be disappointed if they receive nothing for something. Obviously, modern commercial practice requires the highest kind of unselfish devotion and skill to the client's interest. That kind of devotion and skill is not obtainable save from the lawyer who has self-respect enough to know and observe the ethics of his profession. Can you buy such service on a contin-

gent basis? You know you cannot, for whenever you realize that you need *that* kind of service, you go where you can get it, and you pay for it.

The almost universal 10% of recovery collection and bankruptcy fee arrangement will not be changed by lawyers, collection agencies, or list men. It will be changed when the business men of the country wake up to the fact that the evils of bankruptcy practice are due to conditions for which they share responsibility. Decrying the profession, repealing or even amending the bankruptcy law will not cure the evil. All lawyers are not base. All business men are not stupid. The combination required is one of two minorities — one in my profession and the other in yours. We are to-day preaching one set of principles and practicing another. You hold the lawyer accountable as an *officer of the court*. You brand him as unworthy of his profession if he does not conform to ideals essentially the ideals of a profession. Yet in the same hour and upon the same day, you call upon him to act as though his were a trade or business and you do it at the point of instant service. The sordid tale of "Collections and Bankruptcy," more than twice told in every business community, is a tale of the *contingent fee* and *solicitation* — practices unquestionably justified if the law is a business, universally and justifiably condemned if it is a profession.

You, business man, ask for loyal devotion to a single client's interest; you ask the lawyer to avoid dragging you into court; you want him disbarred if he does anything below the high standards of his own profession, and you want all this in an atmosphere — which, mind you, you help to create — where it is all "hustle, bustle, rustle, tussle, for a dollar more for me."

CHAPTER XVIII

A COMMERCIAL INVASION

JUST about the time that the Bar of the nation awoke from its slumbers and became aware of its community function, its traditional ideal of service went through a professionalizing renascence, and set in motion — let us hope, never to stop — an organized movement to lift *up* the profession, there came a new strength to the movement to drag it *down*, to kill its professional ideal at birth, to destroy its sense of fealty to court, to client and to community; to substitute for its historical tradition of *service* the current standard of the market place, — "*Profits first*" — in short, to *commercialize* instead of *professionalize* the practice of the law. This movement, born in the offices of capable business men, received power and support from members of the Bar — let us record it with shame. In truth, while one branch of the profession was working to lift it *up*, another was dragging it *down*.

A member of the Bar wrote in 1912, under the title "Commercialism Defended":

> "Oh! how can a modest young man e'er hope
> for the smallest progression,
> The profession's already so full
> Of lawyers so full of profession?"

The popular tendency to decry the commercialism of the profession, although an excellent theme for discussion at Bar

Association meetings, banquets, etc., etc., is neither consistent with the present conditions nor in keeping with the spirit of the times.

A profession that has to be so largely connected with commercial transactions must of necessity be influenced by commercial conditions. The successful lawyer of the present generation must be the master of commercial theories and not their uncomprehending critic.

The student of history may well admire and praise the professional ethics of the lawyer of two centuries ago, *but the practical fact is, that the profession to-day is composed largely of men without independent means, of men who must derive their livelihood from the practice of the profession, no matter how high their standard of ethics, no matter with what religious devotion they turn back to the standard of ethics of their forefathers, the practical necessity of bread and butter forces the Bar of the United States to reluctantly admit the commercialism of the profession and to reluctantly accept the disgusting financial remuneration of such commercialism. . . .**

This "bread and butter" theory of the profession was sooner or later bound to bring its reaction. As in the days of which Gibbon wrote, when the commercial spirit enters our profession, the community suffers the consequence. Do not forget, lay reader, that you make Judges out of Lawyers and if you make cheap lawyers, you make cheap judges. And, *justice according to law* is justice administered by *judges of the law.*

Through the incorporated soliciting agent, the collection agent, the title and trust company, the trade bureau or association, lawyers aided in violating the standards of their profession by using such agencies as touts for business and jobbers in professional service.

* The *Junior Partner*, September, 1912, p. 36, per T. O. B.

One thing did these gentlemen forget — that was, strangely enough, the Law. Their conduct had already received officially the professional condemnation of their guild. "It is . . . 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." * But the *law*, gentlemen of the law, you forgot!

Some very simple legal propositions were entirely forgotten — it took disbarment proceedings before members of the Bar became even aware of their existence. If they had stopped, looked and listened before crossing, they would have escaped collision with the oncoming lightning express. A warning even now is not untimely for those who need yet to be reminded that "Safety First" is a good rule in practicing law as in crossing railroads. In the first place, the effort to commercialize another profession of service had brought laymen into the criminal courts. A department store had hired dentists and held out to the public that it would supply skillful practitioners in that line of work Our Court of Appeals held † that a corporation could not practice dentistry merely by hiring efficient dentists to perform such services. In another case, a corporation formed for "manufacturing, mining, mechanical and chemical purposes" engaged in the business of rendering treatment to the public for diseases of the skin and for the cure of natural deformities, hiring concededly competent doctors for the purpose. It was convicted of violating the statute

* Canon 27, American Bar Association Code, Appendix A.

† Hannon *v.* Siegel-Cooper Co., 167 N. Y. 244.

forbidding the practice of medicine by anyone not registered as a physician.*

In the next place, any thoughtful consideration either of the doctrine of *ultra vires*, or the nature of the lawyer's franchise, would have led members of the Bar (who had any learning as *lawyers*) to foresee what would happen to any combination of laymen with lawyers in the practice of the law. For, lay reader, "ultra vires" means *without* or *beyond* power. A corporation is not a human individual; it is a legal thing existing only because it has a charter from the State. Do you not recall that your lawyer told you that your corporation could not do business in any State without permission or license, and that the theory of taxation of corporations is that the State may tax what it creates? Now, of course, the State never gave *power* to any corporation to practice law. How could it, if lawyers were sworn in as officers of the court and held personally responsible for their conduct?

There is abroad in the land the rather foolish and uninformed notion that the reason corporations cannot practice law in New York is because there is a special statute prohibiting it.† But this statute only makes criminal what was *ultra vires* and what, if the lawyer participates in the doing of it, is a *disbarrable offense.*

In 1910, our Court of Appeals said concerning this legislation: "Recent legislation simply emphasizes and protects the established policy of the state. . . . "‡ The offense in that case arose before even the statute went into effect. The Court's reasoning is so clear that

* People *v.* Woodbury Dermatological Institute, 192 N. Y. 454.

† New York Penal Law, § 280.

‡ Matter of Co-Operative Law Co., 198 N. Y. 479 (May, 1910), per Vann, J., at p. 484.

it is quite difficult to comprehend how any lawyer could be found to argue otherwise — always assuming, of course, that our profession is a "learned profession." Judge Vann said — it will pay to study the reasoning as we proceed: "The practice of law is not a business open to all" — Here is the root difficulty. Historically and legally the statement was true. But it was a matter of lay opinion in the United States during the period of 1850 to 1880 that anybody was good enough to be a lawyer and in some Western States to-day, as we read a few pages back, horse doctors are more "men of learning" than lawyers. In days when everyone "ought to be free to practice anything," why, of course, law *is* a business open to all — or should be. But we had gone forward in New York State and when Judge Vann wrote in 1910, he could in truth say — at least as to his own State — it "is not a business open to all, but a personal right, limited to a few persons of good moral character" — the judge meant, of course, that this was the basis of qualification — "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." Prior to 1878 no court in this country could have set down this statement of qualifications as a true statement of fact. "The right to practice law is in the nature of a franchise from the State conferred only for merit." A franchise is in essence a grant of the State's power for a State service. That is, the community organized as a legal entity turns over a portion of its power, as in the grant of eminent domain to a railroad corporation, or in the health enforcing provisions of the Department of Health, or in the police enforcing powers of sheriffs and other peace offi-

cers. These powers of the community, delegated to selected individuals, are held subject always to accountability to the State for the manner in which they are exercised. "It cannot be assigned or inherited but must be earned by hard study and good conduct." It is, accordingly, a *personal* franchise, not a *property* right. "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." Note this, takes "an oath of office," the lawyer holds an office, — "and has become an officer of the court." Here do we find the clear line of connection between the Bar of our country and the Bar of all civilized countries — "subject to its discipline, liable to punishment for contempt in violating his duties as such, and to suspension or removal." If it be true that in China an unlicensed Bar pollutes the streams of justice, and in Russia a licensed Bar develops freedom and higher standards of ethics, then this element so clearly expressed by Judge Vann is something of real value to our community. If disbarring practitioners who fall below standard has a community value to Russia and China, then this element, too, is of vital moment to us.

The rest of Judge Vann's opinion follows as two plus two makes four: "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.*)" But Judge Vann did not stop here. "The relation of attorney and client . . . involves the highest trust and confidence." Should it not always be so? "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." In short, the lawyer's confidential service, like the doctor's, is *personal;* it is not merchandise which can be manufactured, advertised, jobbed in or sold over the counter. You cannot measure it in yards, nor weigh it in pounds. To put someone in between the lawyer and the client is to destroy the very essence of the relationship. No matter how important he may be in other walks of life, the middleman is out of place here, out of tune, jars and breaks the harmony of something too delicate for words. In China and in Russia (before the reforms), they had such middlemen; in China they still call them "rascals of the law."

As Judge Vann says: "There would be no remedy by attachment or disbarment to protect the public from im-

* When anything is prohibited directly, it is prohibited also indirectly.

position 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 itself, but in the business of conducting litigation for others."

The evil consequences of the practice of the law by corporations and associations of laymen having become acute in New York, the Legislature in 1910 passed an amendment to the Penal Law (now Section 280), making clearly criminal what had been *ultra vires*.*

* "It shall be unlawful for any corporation or voluntary association to practice or appear as an attorney-at-law for any person other than itself in any court in this state or before any judicial body, or to make it a business to practice as an attorney-at-law, for any person other than itself, in any of said courts or to hold itself out to the public as being entitled to practice law, or 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, or in any other manner to assume to be entitled to practice law or to assume, use or advertise the title of lawyer or attorney, attorney-at-law, or equivalent terms in any language in such manner as to convey the impression that it is entitled to practice law, or to furnish legal advice, services or counsel, or to advertise that either alone or together with or by or through any person, whether a duly and regularly admitted attorney-at-law, or not, it has, owns, conducts or maintains a law office or an office for the practice of law, or for furnishing legal advice, services or counsel. It shall be unlawful further for any corporation or voluntary association to solicit itself or by or through its officers, agents or employees any claim or demand for the purpose of bringing an action thereon or of representing as attorney-at-law, or for furnishing legal advice, services or counsel to, a person sued or about to be sued in any action or proceedings or against whom an action or proceeding has been or is about to be brought, or who may be affected by any action or proceeding which has been or may be instituted in any court or before any judicial body,

In 1912, in two articles on "The Illegal Practice of the Law *vs.* The Unprofessional Practice of the Law" and "Coöperation *vs.* Solicitation in Bankruptcy," * after reviewing the abuses, I said: "The responsibility is squarely

or for the purpose of so representing any person in the pursuit of any civil remedy. Any corporation or voluntary association violating the provisions of this section shall be liable to a fine of not more than five thousand dollars and every officer, trustee, director, agent or employee of such corporation or voluntary association who directly or indirectly engages in any of the acts herein prohibited or assists such corporation or voluntary association to do such prohibited acts is guilty of a misdemeanor. The fact that any such officer, trustee, director, agent or employee shall be a duly and regularly admitted attorney-at-law, shall not be held to permit or allow any such corporation or voluntary association to do the acts prohibited herein nor shall such fact be a defense upon the trial of any of the persons mentioned herein for a violation of the provisions of this section. This section shall not apply to any corporation or voluntary association lawfully engaged in a business authorized by the provisions of any existing statute, nor to a corporation or voluntary association lawfully engaged in the examination and insuring of titles to real property, nor shall it prohibit a corporation or voluntary association from employing an attorney or attorneys in and about its own immediate affairs or in any litigation to which it is or may be a party, nor shall it apply to organizations organized for benevolent or charitable purposes, or for the purpose of assisting persons without means in the pursuit of any civil remedy, whose existence, organization or incorporation may be approved by the appellate division of the supreme court of the department in which the principal office of said corporation or voluntary association may be located. Nothing herein contained shall be construed to prevent a corporation from furnishing to any person, lawfully engaged in the practice of the law, such information or such clerical services in and about his professional work as, except for the provisions of this section, may be lawful, provided that at all times the lawyer receiving such information or such services shall maintain full professional and direct responsibility to his clients for the information and services so received. But no corporation shall be permitted to render any services which cannot lawfully be rendered by a person not admitted to practice law in this state nor to solicit directly or indirectly professional employment for a lawyer." (Added by L. 1909, ch. 483. Am'd by L. 1911, ch. 317, in effect Sept. 1, 1911. Am'd L. 1916, ch. 254.

* *American Legal News*, Vol. XXIII, No. 11, November, 1912. No. 12, December, 1912.

upon the shoulders of our profession. *First* of all, we have done nothing to follow the example of the doctors, in eliminating the illegal practice of our profession. *Second*, we have condoned the offense of the 'druggists' in our field, by doing precisely what they do. And *third*, we have become *particeps criminis* in the practice, by sharing our fees with them. How long are we going to be blind?"

In June, 1913, George W. Bristol wrote his article in the *Yale Law Journal* on "The Passing of the Legal Profession," in which he instanced many examples of the corporate invasion into the field of law.

In July, 1913, at Cape May, the President of an organization of lawyers, collection agencies and law list publishers, said:* ". . . the League should give expression of its views of laymen assuming the functions of the lawyer and practicing law without license, under the guise of a corporate existence, agency, bureau or otherwise. There should also be considered the common indulgence of some agencies in practices which would not be countenanced by the profession, whose province they seek to invade." The convention unanimously passed the following resolution: ". . . In seeking to limit the practice of the law to those authorized, laymen and lawyer alike must agree that the lawyers of the country are performing a service to those who entrust their affairs to professional guidance. The growing custom of business men practicing law either in the form of trust companies, corporations, notaries public or agencies, is properly condemned by the courts and by the profession; it has grown to such an extent that the Com-

* *The Bulletin of the Commercial Law League of America*, Sept., 1914, p. 612.

mercial Law League of America in convention assembled now calls upon the profession generally to take more vigorous action in prosecution of offenders against the penal laws, and where necessary to secure further legislation inhibiting the illegitimate practice of the law. . . ."

It is never difficult to secure from lawyers for trust companies unequivocal condemnation of touting for business when you refer to ambulance chasing for negligence or divorce cases, nor is it difficult to secure from collection agents condemnation of touting when you specifically refer to the touting of a trade association in behalf of some lawyer. Likewise, credit men will freely condemn the law lists, the collection agencies and the lawyers for such evil practices, and yet forget that in their own adjustment bureaus the principle underlying the condemnation recoils upon themselves. It is just as wrong for trade associations to practice law as it is for trust or title companies. It is just as wrong for collection agencies to tout for commercial lawyers as it is for runners to tout for negligence or divorce lawyers. The collection agencies blame the lists, the lists blame the collection agencies, the trade associations blame the lists and collection agencies, and they all blame the lawyers. The truth is that what is sauce for one is sauce for all. And each is to blame.

The Bar, however, is now meeting its responsibility squarely. In 1913, the New York County Lawyers' Association appointed a Special Committee to consider this whole subject. This committee made a comprehensive report * reviewing (a) the practice of the law by notaries; (b) the practice of the law by persons pre-

* Year Book, New York County Lawyers' Association, 1914, p. 235.

tending to be lawyers; (c) the practice of the law by corporations; and (d) the practice of the law by collection agencies, and found a very wide and prevalent series of illegal and unprofessional acts. It said: "There are two ways of attacking the unlawful practice of the law. If an attorney be engaged in the unlawful practice of the law, either as an employee of a trust company, corporation or agency, he himself is guilty of unprofessional practice, and is subject to discipline by the court. His patron or client is liable to prosecution under the criminal law, and if a corporation, is subject to action for its dissolution by the Attorney General. No step can be taken, however, without careful consideration of the specific charge, the evidence in support thereof, and without, in the case of the lawyer, giving him an opportunity to be heard.

"Your Committee believes that any effort systematically made to reach offenders, both professional and non-professional, will receive the hearty coöperation of the courts and of the district attorneys, but that the work to be done efficiently, must be done systematically and with the highest professional skill." * The Committee recommended that there be created † "A permanent bureau for the reception of complaints, examination of witnesses, weighing of evidence and prosecution of cases . . . as a permanent branch of the work of the Association, either separately or in conjunction with the bureau now maintained by the Committee on Discipline . . ." and ". . . that the details of the work be placed in charge of an attorney, in like manner as cases are handled by your Discipline Committee and by

* Year Book, New York County Lawyers' Association, 1914, p. 242.
† *Idem*, pp. 243, 244.

the Grievance Committee of the Association of the Bar. . . ."

The Committee said it had "in hand already, sufficient evidence to justify prosecution in specific cases," but believed, "nevertheless, that it is not equipped for the task that is presented, and that if it undertook the prosecution of these cases it might hinder rather than aid in the ultimate eradication of the evil. . . ." It urged that if the work were to be done, it be done thoroughly, and explained that the first step in this direction was "the proper organization, systematization and planning of the work."

It concluded its report with these statements: "A very distinguished jurist stated to your Chairman that he believed the Bar had failed to perform its duty in this direction, and was chargeable with gross neglect. It had, without hesitancy, and with full recognition of its responsibility to the public, organized and maintained agencies for the elimination from the profession of those who were guilty of unprofessional conduct, and it was steadily raising the standards to which the profession must conform. Yet, it had done nothing to protect the community from the insidious and dangerous effect of the practice of the profession by persons not responsible to the court as its officers, and not affected in any wise by professional ethical standards, nor prepared in any wise to meet the duties of advising clients.

"Your Committee believes that the community calls upon lawyers generally to perform this service, as it has called upon the medical profession to perform like service. And if your Association responds to the call by performing this service efficiently and valiantly, it will

add to its dignity, its power, and earn the gratitude and respect of the entire community." *

By virtue of this report, unanimously approved by the Association, there was created "The Standing Committee on Unlawful Practice of the Law" (amendment to the constitution on January 8, 1914). The committee began its work on April 15, 1914. Dean Ezra Thayer, reporting for the Committee on Professional Ethics of the American Bar Association, has since reviewed its activity: —

Statutes prohibiting practice by unauthorized persons are familiar, but like other criminal statutes they do not enforce themselves, and prosecuting officers under our system are in no position to enforce them without systematic and organized assistance from without. Obviously the most careful provisions fixing moral and educational qualifications for admission to the Bar amount to little if persons who evade these requirements and trade on the ignorance of the community are permitted to go unpunished. Without vigilance and organized effort such a situation is only too likely to arise in large cities in which notaries public can easily impose upon foreigners coming from countries where notaries by virtue of their office exercise powers very different from those exercised with us; and the Bar cannot escape just reproach if it sits indifferent and disregards its peculiar opportunities to learn of these practices. This matter has recently been taken up by the New York County Lawyers' Association, which appointed a special committee to receive complaints and hear evidence touching unlawful practice by corporations or individuals. The committee after a careful investigation reported that it found extensive violation of the law by notaries public, persons falsely pretending to be lawyers, corporations, and collection agencies. The

* Year Book, New York County Lawyers' Association, pp. 244, 245.

Association thereupon at its annual meeting in 1914 amended its By-laws by providing for a Standing Committee on the Unlawful Practice of the Law, and that committee has already taken an active part in proceedings which have just been brought to a successful conclusion, and have put an end to the unlawful maintenance of a collection agency by a large incorporated Board of Trade. The report of the First Deputy Attorney-General of New York, to whom was referred the application for the institution of an action to vacate the charter of the corporation in question, referred in the following language to the work of this committee:

I do not hesitate to say that the position taken by this disinterested body, highly representative of the best aims of our profession, has had much weight in the conclusions which I have ultimately arrived at, as will be hereafter stated, and I believe that a debt of gratitude is due to these gentlemen for the interest they have taken in this matter, for their attendance upon the hearings, and for the erudite brief which has been presented on the submission of this case.*

George W. Wickersham, President of the Association of the Bar of the City of New York, addressing the Chicago Bar Association in 1914, said: †

The County (Lawyers') Association has especially identified itself with two branches of work; first, systematic instruction in professional ethics; and secondly, the prosecution of persons and incorporations engaged in the unlawful practice of the law . . . the Committee on the Unlawful Practice of the Law . . . is doing most valuable work in checking the growth of corporate industry in the field of professional relation to which I referred in the early part of this address. More particularly, this Committee is conduct-

* Vol. XXXIX, American Bar Association Reports, 1914, pp. 567, 568.
† *New York Law Journal*, November 25, 1914.

ing a systematic campaign against the practices of certain Law and Collection, or Commercial Agencies, in securing control of a large number of claims and employing counsel to prosecute them under agreements by which the Agency entirely controls the proceedings, and its attorneys divide with their corporate employers in agreed proportions the fees received by them for their services.

Such practices have received emphatic condemnation from our courts, and are also prohibited by statute. But such prohibitions are of little value without constant watchfulness and vigorous effective prosecution of offenders against them; and this is a work which a company of lawyers is peculiarly fitted to perform.

We began the story of this volume with an account of what the Bar is doing in the way of disbarring lawyers.* Every time a lawyer is disbarred, it makes one less competitor for those who remain. Later we devoted several chapters to illustrating what it meant to the community to have educated lawyers. Yet making the door of admission "swing on reluctant hinges" eases up competition for those already in the field. I make no doubt that some of the enthusiasm of my brethren in all these movements is due to an impulse to make competition easier for those who have paid and still pay the heavy price of education, of training, and observance of the ethical code of conduct governing the profession. But the main impulse behind these activities of the Bar is, I sincerely believe — I *know* — to preserve and keep clean, — in the interest of the community, — a profession whose existence is primarily for the benefit of the community. As *we* are witnesses of unprofessional practices, as *we* know its consequences, as *we* know the

* See Chapter I.

value of preliminary training, so, because of our nearness to the fact, the community calls upon us for initiative, for guardianship and for zeal. In the matter of the practice of the law by notaries public, by corporations, by lay agencies, the community's interest is above our own. Our duty arises, as it does in the matter of discipline and education of the Bar, because of our contiguity with the situation. We are complainants in the criminal court, because the offense is committed in our presence and under our eyes. If the lay members of the community call upon us to discipline, to educate, — it must aid us in the *preservation of the function of the lawyer;* it must help us in the process of educating the lawyer and his lay brother to understand that the lawyer is the holder of a franchise, is an *officer of the court.* The unlawful practice of the law is interwoven with the unprofessional practice of the law, for in ninety and nine cases out of every hundred, a lawyer is found participating in the act.*

The Committee on Discipline of the New York County Lawyers' Association reports (January, 1916) that it has "devoted a great deal of attention during the past year to the practice of law by corporations, a subject peculiarly within the province of another Committee of this Association, but deserving the attention of the Committee on Discipline *by reason of the fact that in al-*

* In 1913, the Committee on Solicitation of Business of the Chicago Bar Association † reported that its attention had been drawn to numerous cases where corporate organizations and names were used as shields behind which lawyers solicited business. In each instance the offending lawyer was summoned before the Committee and censured. The Committee considered specifically the framing of a statute to prevent corporate solicitation of law business for lawyers.

† See Report Chicago Bar Association (1913).

most every instance of such unlawful practice it has been found that the activities of the corporation, in the direction complained of, have been made possible through the co-operation of a member of the Bar." Again: "The attention of the Committee has been directed during the past year to practices on the part of certain members of the Bar which are believed to be in direct contravention of Sections 274 and 280 of the Penal Law. For example, it has become a common practice of many collection agencies, incorporating companies, credit organizations, etc., to undertake in behalf of their subscribers, services which can properly be rendered only by members of the Bar. This practice *is made possible in most instances only by the coöperation of and actual participation therein by attorneys*, acting sometimes under yearly retainer but more often recompensed by a share in the fee charged for the services rendered."

In those cases where the lawyer is not found as a participant, as in the case of notaries imposing upon ignorant and illiterate foreigners, trained to regard the "notary" as a quasi-lawyer (as he is in the countries from whence they come), the injury to the community and the profit to the lawyer is all the greater. In the Matter of Raymond,* a will contest arose involving an estate of over a million dollars, where the will had been drawn inaccurately by a notary. The report of the case shows that the contest elicited the services of several lawyers. In the Matter of Knight, † the record shows that nine lawyers were employed in a will contest arising out of a will drawn by an employee of a trust company upon the basis of inaccurate knowledge of the law.

* *New York Law Journal*, June 26, 1914, 86 Misc. (N. Y.) 359.
† *Idem*, Nov. 30, 1914, 87 Misc. (N. Y.) 577.

In 1914 the New York State Bar Association created a Committee on Prevention of Unnecessary Litigation. It announced in its circular (November 2, 1914) that "law, like medicine, is of two kinds, preventive and remedial. Law is preventive only when it is constructive and then only when it is so constructive as to obviate all cause for dispute. It becomes remedial only after a cause for dispute has actually come into existence.

"Prevention must be at the source. It must be at a time before the facts upon which a dispute can be based become fixed. For example it must be at the time of writing a will, contract or other instrument or at least before such a document goes into effect." In 1915 it made a report, in which it detailed instance after instance of litigation created through unskillfully prepared contracts and wills. In 1916, in its report (January) it refers to the creation of the Committee on Unlawful Practice of the Law by the New York County Lawyers' Association as instancing the effort of the profession to eliminate "litigation otherwise preventable" arising "through unskillful advice" and it urges the State Bar Association to coöperate with this committee in "preventing the unlawful practice of the law by notaries, lay agencies and corporations." The committee quotes in full a letter from the chairman of the Committee on Arbitration of the Chamber of Commerce of the State of New York, commending the Bar Association for its efforts toward the prevention of strife. That gentleman writes that: "'Prevention of Unnecessary Litigation' is a broad platform on which all honorable lawyers and laymen can stand. It embraces the doctrine of good will and elimination of waste in time and expense, to say nothing of the trouble and inconvenience that may be

avoided." He regards the effort as "worthy of the honorable traditions of the profession" and observes that "It exemplifies the fact which is too often overlooked, that the true character of the lawyer should be that of an aid to prosperity as well as a friend in adversity." This business man evidences the fact that "The most successful business men are to-day . . . taking measures, not heretofore thought of, to prevent disputes at their source; . . . are recognizing that prevention is more effective than cure." And he believes that this attitude of mind is "certain to create a greater demand for better and more carefully drawn legal documents." That, "With greater confidence and better understanding between the layman and the lawyer, the latter's office will become a necessary and welcome part of the business man's work" and is certain "to result in laymen consulting counsel more freely before the facts upon which a dispute can arise become fixed." In the opinion of this business man "a great opportunity is at hand for coöperative usefulness between commercial organizations and the legal profession."

Yet it is a common notion abroad in the land that in the movement to restrain the unlawful practice of the law the lawyers are influenced only by a sordid motive to conserve for themselves the returns from professional employment. I submit, upon the record, that the heading of the following article is as misleading as it is unjust:

LAWYERS SEE TRADE THEFT

Accuse Notaries of Practising Law Without License in Queens

Under the direction of the grievance committee of the Queens County Bar Association action is to be taken against

notaries public and real estate men who practise law without a license.

Recently there has been a renewal of activity in the real estate market in Queens, and the lawyers say that they have discovered notaries and brokers who solicit clients on the ground that they will advise them and draw up all necessary legal papers.*

A New Hampshire judge wrote: "It has been supposed that the members of the bar were opposed to the interference of such persons (unqualified practitioners) in such matters, because it might tend to injure the business of the profession. But nothing can be further from the truth than such a supposition. When those who are not qualified to act as counsel engage in the practice of the law, their blunders are much more likely to increase, than their interference to diminish, the business and emoluments of the profession. No, it is from much better, much higher, much more honorable motives, that the bar withhold all countenance from ignorant obtruders. It is to preserve to the administration of justice some degree of order and regularity, and some degree of purity, that they do this; and this case is a strong illustration of the soundness and utility of the principle upon which they act." †

* *The Tribune*, Nov. 29th, 1915.
† Bean *v.* Quimby, 5 N. H. 94.

CHAPTER XIX

THE PRACTICE OF THE LAW BY TITLE AND TRUST COMPANIES

ADDRESSING the Chicago Bar Association in November, 1914,* former Attorney-General Wickersham, President of the Association of the Bar of the City of New York, spoke of "the commercialization of those relations of life which hitherto have called for the especial guidance and service of him to whom, more than to any other, unless it be the family doctor, 'all hearts were opened, and from whom no secrets were hid.'" He referred to the family counsellor, and took as his text conditions as he found them in New York City: "Anyone traveling to-day in the New York Subway railroad may read among the advertisements that ornament its cars, that of a prominent Title and Trust Company which invites the reader to select it as the Trustee of his last will and testament, and proffers the services of its counsel to prepare for him that solemn instrument." And Mr. Wickersham properly observes that "Nothing could better illustrate the change which our modern civilization has wrought in the attitude of the public towards the lawyer, than such an advertisement, exhibited in hundreds of cars to countless thousands of readers — no doubt with great profit to the Incorporated Trustee."

* Address on "Bar Associations — Their History and Their Functions," *New York Law Journal*, Nov. 25, 1914.

Such advertisements appear no longer in New York cars or in New York newspapers.

In Kansas City, addressing the Bar of that city in November — just a week prior to Mr. Wickersham's address — W. H. H. Piatt, of the Kansas City Bar, * thus described conditions in Kansas City: "Trust companies and other corporations are now actively by such placards as 'Have you drawn your will? It is the most important document you will ever sign. See our trust department,' soliciting the drawing of wills, the preparation of incorporation papers, the appointment of themselves as process attorneys and the examination of titles by their law departments, or trust departments, as they may style them, charging an attorney fee for the work and having it done by attorneys employed by such corporations on a salary." Or, as he reported on another occasion, have conspicuous signs posted like this: †

YOUR WILL

is the most important document you will ever sign. It should be prepared by an expert in the law of wills and administration. This may be done in our Trust Department.

CONSULTATION FREE.

Such things have now been changed in Missouri — in one brief year. Mr. Piatt sends me the booklet of a

* *The Kansas City Bar Monthly*, Vol. XVI, December, 1914, No. 9, p. 336.

† *Idem*, Vol. XVIII, March, 1915, No. 3 p. 370.

prominent Missouri trust company, issued in 1915, headed "Estates, Trusteeships, Wills," in which, under the heading "Wills," appears this:

"No layman should attempt to write his own will, even though a simple one, nor attempt to copy it in whole or in part from another will. It is work, the character of which justifies the employment of a lawyer of ability." Now note:

"The X (the advertiser) Trust Company does not undertake to prepare wills. Its officers are ready, at all times, to confer with persons who have in mind the making of a will, and suggestions can often be made, in respect to the practical management of estates held in trust, which may be of assistance in wording accurately the provisions of a will."

The article on Wills gives this same injunction:

"The use of a blank form in the making of wills is not practicable. Each individual will demands special wording and calls for the utmost care in its preparation. Not only must the will be signed and witnessed in accordance with statutes, differing somewhat in different states, but the technical words required to carry out the intentions of the testator must be selected with painstaking caution or such intentions may be defeated."

The change in the conduct of Missouri trust companies * has come about through changes in the law, which will be reviewed in the next chapter.†

As a sign of the change in attitude of trust companies in New York City, I quote from an advertisement of a

* See Report, Committee on Unlawful Practice of the Law to Kansas City Bar Association, *Kansas City Bar Monthly*, April, 1916, at p. 501.

† See Chapter XX, "The Missouri Idea of the Unlawful Practice of Law," *post*, p. 277 *et seq.*

leading trust company appearing in the New York Times of August 14, 1916:—

WHAT DO YOU DO WHEN YOU MAKE A WILL

The following steps must be taken:

* * * * * *

We recommend that you take the matter up with your family lawyer. He, better than you possibly could, will interpret your wishes. He understands the necessary legal phraseology, for, after all, your will *is* a legal document.

* * * * * *

In June, 1914, Judge Kelly, in the Borough of Brooklyn, made this observation in passing upon a case wherein a trust company engaged in condemnation proceedings: *

The profession of the law, one of the oldest known to civilization, involving the most sacred confidence between man and man, with its past of high ideals and service to humanity, has in the last quarter of a century suffered much from the inroads of the new financial and business methods in this great land of ours. Whether by ill-advised attempts by corporate employers to dominate and direct attorneys and coun-

* United States Title Guaranty Co. *v.* Brown, 86 Miscellaneous Reports (N. Y.), 287; affirmed, 166 App. Div. 688; affirmed, Court of Appeals, 217 N. Y. 628. See also Matter of United States Title Guaranty Company, *New York Law Journal*, March 10th, 1916.

sel in the conduct of litigation, whether by so-called title companies or casualty insurance corporations, the old ideals in the relation of attorney and client, which meant so much to mankind, have suffered and have been threatened with demoralization. This is wrong. The loss of the individual personal relation involved in the attempt by corporations to practice law is so serious to the community that it is against public policy, and I am inclined to think *malum in se*, but at any rate there is no question that in this state it is unlawful by force of the statute.

In Gauler *v.* Solicitors' L. & T. Co., 9 Pa. Co. Ct. R. 634, a Pennsylvania judge said:

This defence is based on the notion that not only may title insurance companies do conveyancing, but that they must be employed to do it in order to hold them on their policies. This is a great mistake. They have no right whatever to do conveyancing, draw deeds, write wills and the like. Their conduct in this respect is a usurpation on the commonwealth. No Act of Assembly authorized them to do any such acts, and in these days of corporate greed, it is well to remind them that the law under which they are allowed to insure titles, and to make such contracts, agreements, policies and other instruments as may be required therefor (Act of May 9, 1887, P. L. 159), authorizes them to make and perfect only such contracts as may be required to insure titles, and not to make or convey them. The argument that unless they are permitted to draw deeds and convey titles, they will have none to insure, is as specious as would be an argument that a fire insurance company should be allowed to make contracts to build houses in order to insure them.

We are here dealing with an evolution in both business and law that will warrant careful analysis. One phase

of it concerns the examination and insuring of titles to real estate. In France the business of conveyancing and drawing deeds is not in the hands of those whom we would call lawyers. Almost all the deeds in France have been drawn by the French notaries.* The French notary, however, is himself a professional man with a quasi-lawyer status and a guild ideal not unlike our own. "As a body, the notaries of France occupy a place in the public esteem equal to, if not higher, than that accorded any other man or set of men in public office. The disciplinary powers of the Chambers are rarely invoked and malfeasance in office has been practically unknown for the past hundred years." † In some parts of the United States, too, there grew up a class of men known as "Conveyancers and Searchers of Titles." They did the work of reporting accurately upon the public records affecting titles, and preparing deeds and mortgages; but they never undertook to bring lawsuits or to express legal opinions.

The method of reëxamining a title for every new purchaser, pulling down musty old registers' and county clerks' books and each time going back to the earliest inception of the title was, as we now see it, a wasteful and extravagant way of doing business. And as there were in 1890 or thereabouts many defective titles, a lawyer's opinion was hardly a guaranty of safety in purchasing property. As real estate became more and more a marketable commodity, it was inevitable that there should come about simplification of conveyancing

* "The Teaching of the Law in France," Thomas Barclay. Vol. XXII, American Bar Association Reports (1899), p. 593.

† "History of the French Notarial System," William W. Smithers. Annual Bulletin, Comparative Law Bureau, A. B. A., July, 1912, at p. 31.

and certainty of marketability. There had not yet been devised any adequate system either of State conveyancing or State guarantee, such as had been worked out in other countries. With our American genius for invention, accordingly, there was devised *the corporate title insurance company*, which not only established a plant in all respects duplicating the public records and furnished searches guaranteed for their accuracy upon which lawyers could rely, but also undertook to *insure* titles. This met with a ready and hearty response from both layman and lawyer. The title insurance companies have since performed a great social service in reducing the waste and extravagance which accompanied transference of real estate titles in the old days.

Now, let us pause to examine another movement — of equal importance. Every estate created by deed of trust or by will must be administered and administered with a knowledge of banking, of investments, and with careful regard to financial return. Trust companies having been organized under regulation by the State freely offered their services as executors and trustees under wills and deeds of trust. Many lawyers advised their use, for, being corporate and subject to the supervision of the Banking Department, a trust *company* was often more dependable than an individual trustee; the company had a life longer than "two lives in being," could indeed, outlive many generations, and was tolerably certain never to abscond nor to make foolish investments. Thus trust companies came into the field to perform a necessary and useful function.

These two — the title companies and the trust companies — in some instances merged and in New York developed a common and joint business. In furnishing

trustee, banking, and insurance service — in searching titles and reporting thereon, there was benefit and not harm to the community. But presently some lawyer — or was it a business man? — discovered that law *business* could be developed through the avenues thus opened to the confidences of laymen. The thought expressed by Mr. Wickersham in his Chicago address never seemed to have occurred to these men:

> What is to become of the old time relation of mutual confidence and esteem between counsel and client, if the most sacred and solemn act of life shall be dealt in as merchandise, and formulated by the employees of incorporated commercial companies, instead of by the trusted adviser and friend of a lifetime, the repository of family secrets, the moderator of asperities, the harmonizer of difficulties, the wise guide who restrains the angry parent or the jealous husband from irreparable acts of injustice, and from testamentary declarations which may constitute legacies of hate.

Nor did anyone seem to realize that if it were a crime for the negligence lawyer to hire a clerk to go out and chase ambulances for negligence cases, it was equally wrong for another, perhaps better educated, lawyer to sit in his office and let a title company with a fine sounding name *tout* for professional employment for him. As we have seen, the American Bar Association Code of Ethics adopted in 1898 condemned such practices in most vigorous language. (See Canon 28.) But, worse still for the transgressor, the Bar Associations had begun to bring discipline proceedings against the little ambulance chasers and when the officer arrested these offenders *in flagrante delicto* they squalled: "Mister, why don't you go after the Big Boys? They're worser than we are."

Of course, a discrimination between Broadway, corner of Cedar Street, and Broadway, corner of Duane Street, could not last. The distinction was not a distinction in principle. Touting for business by a lawyers' title or trust company was just as bad as touting for business by a lawyers' collection agency.

In January, 1915, the Committee on Unlawful Practice of the Law reported to the New York County Lawyers' Association a lawyer's opinion from which I now quote:

"The drawing of deeds and the searching of titles was at one time the work of men not always educated as lawyers and not always admitted to the practice of the law. With the coming in of modern corporate methods, the searching and examination of titles became a natural part of the insurance of titles, and insurance of titles was a matter of importance in the easier transfer of real estate.

"Title companies were chartered, primarily, to insure titles. To examine and search titles was an incident to this *insuring* function. It will be observed that that portion of the law of the State which relates to title companies is made a part of the Insurance Law.

"To the extent that searching or examining a title was or is a professional service, it is clearly now a corporate function to a limited degree. To attempt wholly to stop its exercise would be futile. And no consideration of the economic effect upon the Bar should influence our judgment. To the extent that these things are in the interest of and benefit the community, the Bar should raise no objection. It is only when the community is clearly injured that we have, as lawyers, the right to protest. What is the community interest back of Sec-

tion 280 of the Penal Law? It is, clearly, that the professional relationship of attorney and client shall not be hawked about as merchandise bought and sold by jobbers, that advice and counsel as well as appearance in court shall be based upon professional responsibility direct to client, that, in short, the lawyer shall not serve two masters, a corporate employer and a solicited principal. These considerations are community interests. Back of them is the knowledge that, like the confidence of the confessional, the sacredness of the personal relationship is worth preserving for the community.

"What, then, is the community's interest in preventing title companies from offering publicly the services of lawyers? — in offering to draw wills? — in offering to furnish advice not related to the examination or insuring of a title? . . .

". . . Trust companies derive their powers from the Banking Law and perform the functions of banking, not insurance. They may act as executors or trustees, but no professional service formerly performed by lawyers is turned over to them as in the case of title companies, nor is professional service an incident of their work.

"The real point, then, to consider is to what extent the title companies are performing functions *not* authorized by their charters. If the title company is to insure a title, may it draw the deed upon which the policy is to be issued? May it draw the contract for the purchase and sale of the property? May it offer to draw the deed and furnish the services of a lawyer in that connection, in order that it may have the opportunity of insuring the title? May it conduct litigation for the purpose of perfecting a title in the name of a possible insurer? To what extent are these things 'necessarily incident'

to the exercise of the authorized, specifically granted powers contained in its charter? These are the matters we must consider.

"On the other hand, those things which they do as *title companies* must be distinguished from those things which they do as *trust companies*. Now, it is clear that in so far as they perform the functions of *trust* companies, they have no greater powers than any other corporate trust company. . . .

". . . 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 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? . . .

"So far as the attorney is concerned, the violation of the standards of professional ethics is clear. . . . The only argument presented by counsel for the title companies is that, to be permitted to draw the instruments by which the office is created, is a necessary incident

to the exercise of their charter powers to act as trustees or executors. What is the meaning of the words 'necessary or incidental to' as used in this connection? Careful review of the cases demonstrates that these words do not cover any practices that may be indulged in as an incident, but justify only practices as are so naturally cognate to the performance of the charter function as to make it a part of the function itself.

"Obviously to become a trustee or executor under a will does not require that the trustee or executor shall draw the will or the trust deed. Indeed, so modern is the practice of trustees in publicly offering themselves as fiduciaries that it only began when trustees and executors were permitted to don the corporate form. No one would have thought of a private individual publicly advertising to become trustee or executor under a will and agreeing additionally, as an inducement, that he would have his own lawyer draw the trust deed or will. How, then, can it be said that the drawing of the instrument creating the office is a necessary and incidental exercise of the charter power to act as such an officer? If this position taken by counsel for the title companies is unsound, then their entire reasoning falls to the ground, in so far as it is applicable to those advertisements relating to trusts; and this applies with equal force to all the trust companies. 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. . . .

"We are clear that to furnish a legal opinion either orally or in writing with reference to a title concerning which the company is not asked to search or insure, is as much beyond its scope as the furnishing of legal service about some business other than title insurance. . . . From the quotation in *Gauler* v. *Solicitors' L. & T. Co.*, 9 Pa. Co. Ct. R. 634, it would seem that drawing the contract or deed which was to form a perfect title to be insured was not an incident 'to the service of insurance.' So far as the Committee knows this authority has never been questioned.

"The foregoing opinion is the result of very careful consideration of the evidence, of the law and of the standards of professional conduct that are accepted by the profession."

This opinion, representing the deliberate legal thought of a committee of lawyers, has — so far as I know — never been questioned by disinterested lawyers.

CHAPTER XX

THE MISSOURI IDEA OF SUPPRESSING THE UNLAWFUL PRACTICE OF LAW

THE editor of the *Central Law Journal* (Alexander H. Robbins) will forgive me if I borrow his title for this chapter.* In a very excellent and most readable article (now distributable in pamphlet form), Mr. Robbins has analyzed the effect of the three Missouri statutes that went into effect June 19, 1915.

The first is the "Unlawful Practice of the Law Act." This act † defines the practice of the law "to be and is the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court of record, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies." And it defines the law business — "to be and is the advising or counseling for a valuable consideration of any person, firm, association or corporation as to any secular law or the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights or the doing of any act for a valuable consideration in a representative capacity, obtaining or tending to obtain

* *Central Law Journal*, July 3, 1915.

† Missouri Sessions Acts (1915), p. 99.

or securing or tending to secure for any person, firm, association or corporation any property or property rights whatsoever."

In so far as appearance in court as an advocate or in a representative capacity or drawing papers, pleadings and other documents for use in any court of record, this was the established law of the country before the act was passed. Under a New Hampshire statute of (February 17) 1791, "the plaintiff or defendant in any cause, prosecution or suit, being a citizen of this state, may appear, plead, pursue or defend, in his proper person, or by such other citizen of this state, being of good and reputable character and behavior, as he may engage and employ, whether the person so employed be admitted as an attorney at law or not." The New Hampshire courts held: "This statute gives in express terms to every citizen of this state the right to have his cause managed by any person of good moral character, whom he may see fit to employ; and we think this right includes, as a necessary incident without which it cannot be safely enjoyed, the right to instruct those who may be thus employed and to have the trust and confidence thus reposed preserved inviolate in all cases. But while we are disposed to give to every citizen the full enjoyment of all his rights in this respect, we are not willing to give any countenance to those, who, without the necessary qualifications, undertake to advise as counsel and to commence suits in their neighborhood."*

But Mr. Robbins points out that "advanced ground is taken when this exclusive privilege is extended to include appearances before 'any body, board, committee or commission, constituted by law or having authority

* Bean *v.* Quimby, 5 N. H. 94.

to settle controversies.' Such provision at least dispels whatever doubts may have existed as to the character of such 'practice,' and prevents any but licensed attorneys from appearing in a representative capacity before city or state boards of arbitration or public service commissions and other quasi-judicial bodies."

In the definition of "*law business*," the change is drastic "at least in local custom if not in the law." Mr. Robbins states that it had been the prevailing practice in the State from whence all who come must needs be shown "for real estate agents, notaries, trust company clerks and others to draw wills, deeds and other legal documents, for which the usual fee has been five dollars in simple cases, although larger fees have been charged in more important cases. Many of such deeds and documents, drawn by laymen, while in form unobjectionable, have not infrequently been found to be defective when essaying fully to cover or protect substantial rights of the parties concerned, such defects being due, no doubt, to the fact that the conveyancer's knowledge of the law was usually limited to the most elementary principles and to matters of mere form." Mr. Piatt reported a case of a prominent member of the Kansas City Bar, a young man held in high esteem by all, who recently said to him: "The practice of law by laymen only makes business for the lawyers. I will give you an example in a case of my own. Some time ago an old German here in business died intestate, being survived by his widow and six children. Two of the boys wished to continue the business. They were advised by their banker, a gentleman prominent in that business, to take a quit-claim deed covering the business, personal property and real property of deceased. This was done

and a fee of $100 was paid the banker for his services. Within a short time they found themselves not only in a serious entanglement but violent dispute as to the ownership of the property. A several-sided lawsuit resulted in which I was retained, and which, after some time in court, we compromised by undoing what the quit-claim deed had done. I was paid a good fee for my services in getting the matter finally adjusted. Some family bitterness was engendered and the courts and lawyers all came in for condemnation and criticism by all of these people, the banker included." The incident related by this lawyer is not an unusual or exceptional case, nor is argument necessary to show that the taking of the fee and the giving of advice or the pretending to do the work of a lawyer in the premises were unlawful or that the injury to law and society by the incident in question was greater than the benefit flowing to law and society by reason of all the fees received in the case.

And another: ". . . a large landowner in the eastern part of this county desiring to leave his only child, a daughter, an equal estate with his wife, her mother, employed a nearby banker to write his will. Upon his death the real estate, by reason of the terms of the deed, instead of passing one-half to his wife and one-half to his estate, as he and his wife supposed, all passed to her. A year or so later she married and this new husband, being of an investigating and investing turn of mind, discovered the true conditions of the title, brought about an estrangement between mother and daughter and deprived the daughter of the inheritance her father had sought to leave her." In a recent case in New York *

* Matter of Raymond, *New York Law Journal*, June 26, 1914, 86 Misc. Rep. (N. Y.) 359.

one of the Surrogates said: "But as long as wills continue to be executed under the supervision of notaries public, who presume to take the place of lawyers, and as long as those who execute wills under such conditions continue to practice such questionable economy, probate courts will be constrained to reject many of such instruments."

Mr. Robbins says that in securing the passage of the Missouri statute a "great majority of the lawyers of the state took very little interest in this legislation" and suggests that the lawyer's business has been helped rather than hindered by the incompetent intermeddling by laymen in technical application of the principles of law even to such apparently simple forms as deeds and wills.

A recently retired Judge of our Supreme Court told me of a case in his younger days where, for want of a service that a client of his could have got from him for possibly ten dollars, he earned what in those days was a large fee ($5,000) in litigation that went clear through to the Court of Appeals. (The client adapted a contract from a form in a book entitled "Every Man His Own Lawyer." The judge, with a twinkle, suggested that the Bar could well afford to reprint this book and distribute it gratuitously among laymen.)

Section 2 of the Missouri "Practice of the Law" act defines those who may engage in "the practice of law" or who may "do law business." This section provides as follows:

"No person shall engage in the 'practice of law' or do 'law business,' as defined in section 1 hereof, or both, unless he shall have been duly licensed therefor and while his license therefor is in full force and effect, nor

shall any association or corporation engage in the 'practice of the law' or do 'law business' as defined in section 1 hereof, or both. Any person, association or corporation who shall violate the foregoing prohibition of this section shall be guilty of a misdemeanor and upon conviction therefor shall be punished by a fine not exceeding one hundred dollars and costs of prosecution and shall be subject to be sued for treble the amount which shall have been paid him or it for any service rendered in violation hereof by the person, firm, association or corporation paying the same within two years from the date the same shall have been paid and if within said time such person, firm, association or corporation shall neglect and fail to sue for or recover such treble amount, then the state of Missouri shall have the right to and shall sue for such treble amount and recover the same and upon the recovery thereof such treble amount shall be paid into the treasury of the state of Missouri. It is hereby made the duty of the attorney-general of the state of Missouri or the prosecuting attorney of any county or city in which service of process may be had upon the person, firm, association or corporation liable hereunder, to institute all suits necessary for the recovery by the state of Missouri of such amounts in the name and on behalf of the state."

So far as the definition goes, this is merely declaratory of existing law. The strength of the statute lies in the penalty provided, which Mr. Robbins believes is "exceedingly effective." "With a watchful bar association committee, careful to detect violations of the law, it would be impossible for unqualified and unlicensed individuals or corporations to hereafter make merchandise of the law and trick the public into arrangements

which can but result in great financial loss, disappointment and resulting contempt for the law and its administration."

As for "*Division of fees between Lawyers and Laymen,*" Section 3 of the same law provides:

"It shall be unlawful for any licensed attorney in the state of Missouri to divide any fees or compensation received by him in the 'practice of law' or in doing 'law business' with any person not a licensed attorney or any firm not wholly composed of licensed attorneys, or any association or corporation, and any person, firm, association or corporation violating this section shall be deemed guilty of a misdemeanor and upon conviction therefor shall be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars and costs of prosecution, which fine shall be paid into the treasury of the state of Missouri. Any person, firm, association or corporation who shall violate the foregoing prohibition of this section shall be subject to be sued for treble the amount of any and all sums of money paid in violation hereof by the person, persons, association or corporation paying the fees or compensation which shall have been so divided and if such person, persons, association or corporation shall not sue for or recover the same within two years from the date of such division of fees or compensation, the state of Missouri shall have the right to and shall sue for and recover said treble amount, which shall, upon recovery be paid into the treasury of the state of Missouri. It is hereby made the duty of the attorney-general of the state of Missouri or the prosecuting attorney of any county or city in which service of process may be had upon the person, firm, association or corporation liable therefor, to in-

stitute all suits necessary for the recovery of said sums of money by the state of Missouri."

This statute makes penal what was before clearly illegal.

But Missouri is thorough. When she starts out to do a job, whether it is a pageant or a statute to stop injurious practices, she makes a model hard for New Englanders to beat. She tacked on to her "Banking Act" the following section:*

"When any corporation shall have been named as executor in any will hereafter executed, and shall have qualified as such the presumption shall be that such will was not prepared by a salaried employee of said corporation; but upon the application of any heir, devisee or legatee, made in the probate court of the county for the removal of such executor said presumption may be rebutted by evidence satisfactory to the court hearing such application, unless said will or some codicil or certificate attached thereto shall contain a recital that at or before the execution of said will, the testator had advice or counsel in relation thereto from some one not under salary from said corporation. In the absence of such recital, the court may on such application and upon satisfactory evidence that said will was prepared by a salaried employee of said corporation, revoke the appointment of, and remove such corporation as such executor."

Mr. Robbins makes the following commentary upon this statute: "This section is quite conservative in its operation, and yet strong enough to deter any trust company from undertaking the risk of permitting wills to be drawn by 'salaried employees' in cases where they are to be named as executor. It is not likely that the

* Missouri Sessions Acts (1915), Sec. 132, p. 170.

recital in the will that the testator has had the benefit of independent legal advice, which practically makes the will incontestable on this ground, will be of as much of an advantage to the trust companies as some may be inclined to believe, since it is not conceivable that testators would readily agree to declare an untruth in such a document as a last will and testament or wish to endanger the disposition of their property by any subterfuge from which no direct advantage is to be gained."

These provisions, says Mr. Robbins, "will be regarded by students of sociological jurisprudence as being only a further evidence of the growing tendency of society to protect itself from fraud and incompetency on the part of those who hold themselves out as being skillful in the practice of the various trades and professions, and viewed in this light are to be regarded as a very proper exercise of the police power of the state and not as being in the interest of any trade or profession."

If this book has any useful purpose to serve, it is to demonstrate that Mr. Robbins' conclusion rests upon a sound base of moral philosophy and social experience. The community has tried the free and unrestricted practice of the law by the unlearned and the unrestrained and has established its cost.

CHAPTER XXI

THE LAW, GENTLEMEN, THE LAW

"*Ignorantia Legis Neminem Excusat.*"

THIS maxim, which, translated into plain, ordinary English, means "Ignorance of the law is no defense," has been flung often at the unsuspecting layman by the lawyer when the former has sorrowfully said, "Well, I did not know *that* was the law" — but what shall we say of the ignorance of the law by the *lawyer*, especially when the law in question is the law of his own function? Perhaps there is no matter of law upon which the Bar is so generally ignorant as that branch of it relating to the performance of its own function. In a recent case involving disciplinary proceedings against two members of the Bar, their conduct subsequent to the filing of the charges commended them "strongly" to the consideration of the court for the reason that "Not only did they frankly meet the charges and stipulate all the facts, but they have severed their relations with the Corporation Company . . . and have discontinued the practices for which they were criticized by the complaining association." The facts were not disputed by the lawyers; they "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 Court said that "while we cannot wholly overlook their acts which clearly amounted to professional miscon-

duct, we find no occasion for administering any further discipline than a censure." *

Even the Committee on Legal Ethics of the New York State Bar Association (1916) says: "A much mooted question which lies at the very threshold of this subject-matter is, 'What constitutes the practice of law?'" although here the committee says that "while it is difficult to formulate an answer to this question sufficiently comprehensive to apply to a wide range of cases, yet in the belief of the committee, that difficulty largely disappears when consideration is given to a definite and certain state of facts." Now, if lawyers had stopped to think, they would have realized that their function in society was that of a profession and not of a trade or business. As the Court recently said in the State of Massachusetts, in justifying the qualifications of legal education 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 prin-

* Matter of Pace and Stimpson, *New York Law Journal*, Jan. 10, 1916, 170 App. Div. 818.

ciple 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. 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.*

If the lawyer is an officer of the court, then clearly he is amenable to the discipline of the court. Obviously, once the State licenses those who may practice a profession *all others who pretend to engage in the profession without such license are violating the law.* Since we have found that in ninety-nine cases out of a hundred the lay agency engaged in the illicit or unlawful practice of the law has a lawyer confederate — an "officer of the court" — the latter gentleman is obviously amenable to the disciplinary powers of the court. Now, the assumption that the practice of the law relates merely to appearance in court is so barren of support as to require very little argument to dispose of it. But, quite apart from argument, it has been for many years the settled law of the country, — as has been recently expressed in the State of New York, — † that "'It is too

* In re Bergeron (Supreme Judical Court of Massachusetts, March 4, 1915), 220 Mass. 472, 107 N. E. Rep. 1007.

† Matter of Pace and Stimpson, *New York Law Journal*, Jan. 10, 1916, 170 App. Div. 818.

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, and the management of such actions and proceedings on behalf of clients before judges and courts, and, in addition, conveyancing, the 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 the 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.). . . '*

"Thornton on Attorneys-at-law, in Section 69, defines the practice of law in the same terms. In Eley *v.* Miller, 7 Ind. App. 529, 535, 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 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.'"

These principles have been recently upheld in three or four matters wherein the briefs of the Committee

* Matter of Duncan, 83 S. C. 186–189; 65 S. E. Rep. 210.

on Unlawful Practice of the Law of the New York County Lawyers' Association have been submitted to the court.* In one of these cases a Delaware corporation sent through the mails to attorneys in New York certain printed advertisements or pamphlets, one of which contains the following statements:

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

"Telephone . . . 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."

The Court said: "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

* Matter of Pace and Stimpson, *New York Law Journal*, Jan. 10, 1916, 170 App. Div. 818. Report of the Attorney-General in the Matter of the application for the institution of an action to vacate the charter and annul the corporate existence of the National Jewelers Board of Trade, reported in the *New York Law Journal*, Sept. 14, 1914; Meisel *v.* National Jewelers Board of Trade, *New York Law Journal*, May 4, 1915, 90 Misc. Rep. (N. Y.) 19, aff'd, 169 App. Div. 927; Grocers and Merchants Bureau *v.* Gray, *Nashville Banner*, Feb. 26, 1915, *New York Law Journal*, June 17, 1915 (Circuit Court); *New York Law Journal*, Dec. 8, 1915, Vol. 6, Reports of the Court of Civil Appeals of Tennessee (Court of Civil Appeals).

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."

In another case,* a trade association undertaking to file proofs of claims in bankruptcy for members was held to be practicing law. As the Court said:

"The promissory notes required examination as to execution and the form of the signature, i. e. whether the maker was liable in an individual or representative capacity, whether signed in a trade name as distinguished from an individual name, etc. Inquiry was necessary concerning the inception and delivery of the notes, whether for value or accommodation and as to any possible defenses or counterclaims. Acting on this information, the client would be advised whether to proceed. The next step would be the preparation of proof of claims. This is a legal instrument, and the mere fact that it is on a printed form and might be filled out by a layman does not change its character, any more than the fact that confessions of judgment, bills of costs, affidavits of

* Meisel *v.* National Jewelers Board of Trade, 90 Misc. 19; affirmed, 169 App. Div. 927.

service and many simple forms of pleading on notes and for goods sold and delivered are frequently printed changes their character. The subsequent steps that ordinarily occur, such as joining with one or another group of creditors in the selection of a trustee, expediting or opposing the disposition of the assets of the bankrupt estate, the consideration of proposed compromises, reorganizations and substitution of securities for claims, the various problems incidental to receivership, the form in which dividends are received and receipted for, and innumerable other details intervening between the filing of the petition in bankruptcy and a discharge, all involve at one stage or another proceedings on behalf of the client in courts, the preparation of legal instruments of various kinds, the rendition of legal advice and action taken for the clients in matters connected with the law. These services require special knowledge, the fidelity of the relation between attorney and client, responsibility to the courts and, for success, experience in what is generally recognized as a special line of legal work. Frequently the relation requires actual appearance in court and the conduct of litigation. That such proceedings are contemplated and provided for by this Board of Trade in its relations to its clients is shown by its printed form of voucher, containing provision for 'costs,' 'suit fee' and 'fees.' That the services involved and contemplated by this Board of Trade in representing plaintiff in the bankruptcy of Wedgren and prosecuting his claim therein were legal services seems too plain to require further consideration. Similarly, in representing him and prosecuting his claim against the Pacific Jewelry Company, whose property was in the hands of a general assignee for the benefit of creditors, the services were

legal services, and for the most part, similar in kind to those already enumerated. Ordinarily, a proper representation of the creditor in such matters involves an examination of the assignment, consideration of its validity, the sufficiency and form of the assignee's bond, an examination of schedules, alertness against the allowance of improper claims, keeping track of suits brought by and against the assignee, the accounting, and a multitude of other important details that will at once occur to any practicing lawyer."

In the Nashville case, the Court says, where a trade association undertook "to furnish defendant legal advice about commercial matters, but" did "not provide that defendant may select his counsel, nor . . . that he shall come in contact with the attorney at all, but the contrary" seemed "to be contemplated":

> There would then be no face-to-face conference between counsel and client, and the information on which the attorney would give advice would reach him second-hand, and the advice would reach the subscriber also at second-hand. The attorney may not know the name, character, and standing of the subscriber, while such subscriber may not know the name, reputation, character and standing of the attorney giving the advice. Would this be safe? Would not the advice of the attorney to some extent at least depend upon his personal knowledge of the parties and their environments and might not further information be frequently necessary to enable the attorney to give wholesome, correct and accurate advice?
>
> Then, again, of what value would such advice be to the party coming through an agency of this kind, where the attorney giving it is or may be wholly unknown to the subscriber? He may know nothing of the attorney, his reputa-

tion, standing or legal ability, and could he with safety act upon it in important commercial matters? Does not the value of the advice of counsel to the client consist at least in part of his known character and ability and the confidence the client reposes in him? Would it not be much wiser and would not the interest of the general public be better conserved to allow the client to select and pay his own attorney, known to him for his character, learning and ability, in whom he can confide implicitly and on whose judgment and advice he can rely with confidence? *

Bearing in mind what has been said in previous chapters concerning the solicited commercial business, the following paragraph from the opinion of Judge Daniel of the Tennessee Circuit Court is pregnant with meaning:

If this collecting agency corporation can solicit such business, and for a price certain furnish the attorney, might not like contracts be solicited, obtained and counsel furnished in other classes of claims and collections, as, for instance, for personal injuries? And, if so, some industrious attorney working in the background and through a corporation, ostensibly a collecting agency, could secure and control that class of business. To sanction such contracts as the one under consideration would open up vast possibilities for a class of lawyers to engage in this questionable conduct and thus encourage this vicious practice already too prevalent in this state.†

In Tennessee it is the settled rule that "All contracts and agreements concerning business solicited by an attorney, directly or indirectly, are void and will not be

* Grocers and Merchants Bureau *v.* Gray, *Nashville Banner*, Feb. 26, 1915; *New York Law Journal*, June 17th, 1915.

† *Idem.*

enforced by the courts." [Ingersoll *v.* Coal Creek Coal Co., 117 Tenn. 263; Ingersoll *v.* Coal Creek Coal Co., 9 L. R. A. (N. S.) 282.] This is also the law of Missouri and Nebraska.* In New York an agreement by a lay collection agency to bring suit or to furnish legal advice is in violation of the law.† In New York State the payment of a consideration for the soliciting of legal retainers is not only criminal, but a disbarrable offense in the case of the attorney.‡

Obviously, wherever the service is actually performed by a lawyer, it is the practice of the law, even though the service might have been performed by a layman. In the *Matter of Rothschild*,§ a lawyer who, for an annual consideration, permitted his clients to send out dunning letters on his letter paper, was suspended by the Court. The Court, after quoting the provisions of the Penal Law inhibiting the practice of the law by those not admitted to the Bar, said:

These sections illustrate the policy of the State in prohibiting those holding the responsible office of attorney and counselor at law from allowing others to practice law in their names; and while the Legislature has only made it a crime for an attorney to knowingly permit any person not being his law clerk or partner to sue out any process or to prosecute or defend an action in his name, for an attorney to authorize persons not in his employ or under his control to sign letters

* See Alpers *v.* Hunt, 86 Cal. 78, 24 Pac. 846, 21 Am. St. Rep. 17, 19 L. R. A. 483; Langdon *v.* Conlin (Neb.), 93 N. W. 389; Burt *v.* Place, 6 Cowan (N. Y.), 431; Munday *v.* Whisenhunt, 90 N. C. 458; Lyon *v.* Hussey, 82 Hun, 15.

† Buxton *v.* Lietz, 136 N. Y. Supp. 829; 139 N. Y. Supp. 46. Matter of Julius A. Newman (App. Div., *N. Y. Law Journal*, May, 1916).

‡ See Matter of Shay, 133 App. Div. 547.

§ 140 App. Div. 583.

or communications threatening legal proceedings is entirely inconsistent with the performance of the duties assumed by a person upon becoming a member of the profession. An attorney holds a public office. He assumes duties to the State, as well as to his clients, and when acting in his professional capacity in giving advice to his clients, or acting for his clients he is performing a function of his office and is responsible for the methods which he or his representatives adopt in the performance of his duties. We think it inconsistent with the performance of the duties assumed by an attorney when he accepts his office to sell the right to use his name as an attorney; and to enter into any arrangement by which others who are not directly connected in business with him as partners or clerks are authorized to sign letters in his name, or to use his name in the transaction of their business, is a serious violation of an attorney's duties to the State and serious professional misconduct. The arrangement testified to in this case was not at all a professional employment. The respondent was to perform no professional services for the furniture company for which he was to be paid a fee. What he did was to allow this furniture company or its employees to use his name as an attorney to enforce the collection of their demands and to authorize the employees of the furniture company to sign his name to communications for that purpose, and for that he was to receive a sum of money. He says that he agreed with another employee of the company that the agents that he appointed should only sign such letters in the form which he had approved; but, as before stated, there was no such limitation of authority in the power of attorney, and no notice of such a limitation was given to the agents appointed by the respondent, and what has happened in this case was sure to happen under such an arrangement. Communications were sent prepared by those who were not under the obligations which are assumed by and imposed upon an attorney and the name of the attorney thus used for illegitimate and improper purposes. The mak-

ing of such an arrangement and giving such a power of attorney was a violation of the obligation assumed by the respondent and was necessarily inconsistent with the proper performance of his duties, and could have but one result, namely, to prostitute the office which the respondent held for many years and to bring it into disrepute and disgrace.

For convenient reference, I have gathered together in an Appendix the leading authorities on what constitutes the practice of the law.*

* Appendix C.

CHAPTER XXII

THE PRACTICE OF THE LAW BY COLLECTION AGENCIES

As we have seen, the lawyer is responsible when he permits his letter-head to be used for the purpose of dunning a debtor.† Any layman receiving a dunning latter written and signed by a lawyer knows that it is merely the preliminary step to a lawsuit. Such a letter says by implication: — "As an officer of the court, I have examined this claim and I believe that it is sufficiently well founded to justify the bringing of a suit, which I am prepared and am authorized to do unless you pay without bringing suit." Mr. Boston said in his very close analysis of this subject:

I should be inclined to distinguish the making of a collection upon demand, from the enforcement of the demand by litigation, the one being essentially the exercise of the lawyer's professional functions, and the other not being strictly so. But the difficulty of making this distinction lies in the fact that it is doubtless because the collector is a lawyer that he receives the claim; and the courts take this view, because they enforce by summary process, the honest accounting by the lawyer for the money, though it was not collected by suit. I assume that if a lawyer is employed to do an act, which a layman is fully competent to do, yet if the fact of his selection was due to his being a lawyer, a single such employment of a single lawyer might not be regarded as a professional employment; but that where such employment

† *Ante*, pp. 297–298.

of lawyers, in preference to others, becomes customary, it may fairly be characterized as professional employment, although others may also be similarly employed. Such seems to me to be the case with the business of making collections; it is not inherently legal business; there is no substantial reason why others may not legitimately engage in it; but if a lawyer is selected to attend to it, it is because of his professional standing, and in transacting it, it is a part of his professional duty to conduct himself in it with the same degree of integrity and in the observance of the same ethical principles which should characterize the performance of his strictly professional duties.*

There seems to be a lingering impression that where a collection agency or trade association is a *forwarder*, it may employ lawyers as "collection agents" to collect without suit, and the distinction between their work as lawyers and their work as collection agents is offered as the excuse. Such a distinction was asserted in the second National Jewelers Board of Trade case, † the manager of the collection bureau testifying that it was his opinion that when the Association turned over a claim for purposes of collection that did not involve suit, then the person who acted as collector could be treated as a "collector" and the business regarded as not "law business," — even though the person to whom the claim is sent is admitted to the Bar.‡ But he testified also that where a suit was to follow the failure to collect without suit, the same lawyer who handled the "collection" was employed. There is very little doubt that,

* *American Legal News*, August, 1913, p. 15.

† *New York Law Journal*, March 2, 1916.

‡ Record, Proceedings before the Attorney-General, April 21, 1915, pp. 128–129.

when the question is finally presented to the courts, the employment of a lawyer to dun will be treated as the practice of the law.

In the Meisel case * Judge Shearn (writing for the Appellate Term of the New York Supreme Court) pointed out that when a claim is turned over to be "forwarded" for collection, the evidence of the debt, transcripts from the creditor's books, the correspondence, a statement of the case — all these things are turned over and received under circumstances which would, in the case of attorney and client, be treated as *privileged;* the dunning letter is merely preliminary to a suit to be brought by a lawyer; and the moneys when collected go to a "client." If, in addition, the lay agency divides fees with the lawyer — usually contingent upon the successful outcome of the lawyer's work — can there be any doubt that the agency or association is furnishing legal services — is, indeed, practicing law illegally and in violation of its charter?

* 90 Miscellaneous Reports (New York), 19; affirmed, 169 App. Div. 927.

CHAPTER XXIII

TRADE ASSOCIATIONS

In Question and Answer 47,* the Committee on Professional Ethics of the New York County Lawyers' Association undertook to meet the varying phases of the problem of the trade association, especially in matters of bankruptcy.† Of course, a trade association primarily brought into existence by a lawyer for the ulterior purpose of developing his practice is just as much of an offense against decency as any other touting for professional opportunity. Where the association, however, is *bona fide*, where, for example, it seeks to raise the standards of its own industry, makes an effort to deal collectively with trade problems, it deserves commendation instead of prosecution. Indeed, in one field of endeavor — the dealing with organized labor — it is not only desirable but inevitable.‡ How can a trade association perform its legitimate functions collectively for its members when these involve the service of a lawyer?

The elimination of commercial fraud by organized effort is a proper reason for trade association. To this end, the right to organize and maintain an investigation and prosecution department and to engage counsel in the service cannot be doubted. In these situations,

* See Appendix B.

† See also articles "The Illegal Practice of the Law vs. The Unprofessional Practice of the Law," and "Co-operation vs. Solicitation in Bankruptcy," by the author, *American Legal News*, November and December, 1912.

‡ See "Law and Order in Industry" by the author (Macmillan, 1916).

however, the association is performing service not for any individual member, but for itself, and the lawyer is acting as the personal adviser for but one client, — that is, the organization; he is its representative in a movement to improve trade conditions. Now, in the modern handling of insolvencies, the very existence of the abuses we have surveyed led to the creation of trade associations or bureaus designed to prevent their recurrence. If it be true that the management of an insolvent's estate depends upon the assent of his creditors — that this assent must be secured by coöperative action — what more natural than that a group of business men, themselves interested, should employ a common attorney? In this territory, however, grow the thorns of our legal and ethical difficulties, against which we must be on guard. Obviously, the mere recommendation by an association to its interested members that, in their common interest, they put all their claims in the hands of a single attorney is in no sense a violation of law or of professional ethics. But suppose the trade association, mimicking the methods of the collection agency, organizes an "adjustment bureau," undertakes a general collection agency business, charges fees, divides fees with lawyers, employs lawyers to serve the individual members, conducts bankruptcy proceedings; is it not violating the law quite as effectively as any other lay or corporate agency?

Obviously a communication like the following indicates the existence of a very definite violation of the law:

> We beg to advise you that we are filing an involuntary petition in bankruptcy against.....We understand that their assets consist of a stock of merchandise at.....,

....., having an approximate value of..... and real estate in.....and.....

We have been not able to learn that this debtor has been guilty of any disreputable practices but in order that we may be fully advised on this point we should be glad to have you forward us any statements you may have had submitted to you or any information you may have from any source which would enable us to conduct a searching examination.

We are enclosing blank proof of claim and power of attorney for your convenience and request your coöperation for the purpose of realizing the utmost out of this estate for creditors. A considerable number of our members are heavily involved.

Our rates for handling matters of this sort are 10% of the amount realized. . . .

The following is taken from the annual "Report of the Legal Department for the Year Ending September 30, 1914," of a certain Western Board of Trade:

The Legal Department of the.....Board of Trade, *in addition to the preparation of all legal papers connected with assignments, extensions and settlements, the advising of the creditors' committees, and generally attending to all legal matters pertaining to the large business of the Association, furnishes legal services in all court proceedings involving claims filed with the Board.*

The following statistics will indicate the extent of the court work done in this department during the year ending September 30, 1914:

Actions prosecuted through the attorneys by attachments.....	196
Number of creditors represented.....	715
Amount of creditors' claims.....	$ 91,805.51
Voluntary bankruptcy proceedings recorded.....	158
Number of creditors represented.....	1,696
Amount of creditors' claims.....	$231,758.79

Involuntary bankruptcy proceedings recorded	72
Number of creditors represented	712
Amount of creditors' claims	$103,509.10
Probate estates recorded	26
Number of creditors represented	123
Amount of creditors' claims	$ 5,548.78
Other actions prosecuted and defended, including foreclosure proceedings, bills in equity, stockholders' liability suits arising out of assignment and bankruptcy matters, etc.	27
Number of claims represented	34
Amount involved	$ 23,515.77
Total number of cases recorded in the Law Department during the year	479
Total claims filed by the attorneys for the Board	3,280
Total amount of claims filed	$456,137.95

"Of the 479 actions recorded, 212 have been closed and settled, leaving 267 still pending."

These facts are no longer the subject of controversy. Their legal effect is clear. *They constitute the unlawful practice of the law, and participation therein by lawyers is a disbarrable offense.* If it were not for the general darkness so long enshrouding both layman and lawyer, laymen would long since have recognized that they were, with one hand, encouraging fraudulent practices in bankruptcy which, with the other, they were seeking to check. Obviously, the lawyer with a local association annex as a tout for law business is quite as bad as the lawyer with a collection agency annex as a tout. The man who will divide fees in one instance will divide them in another.

When the bankruptcy rules were passed, it was not intended that there should appear a class of "attorneys-in-fact" who would make a regular business of appearing in bankruptcy. Rule IV of the "General Orders in Bankruptcy" provides:

Proceedings in bankruptcy may be conducted by the bankrupt in person in his own behalf, or by a petitioning or opposing creditor; but a *creditor* will *only* be allowed to manage before the Court his individual interest. Every party may appear and conduct the proceedings by attorney, who shall be an attorney or counselor authorized to practice in the Circuit or District Court. The name of the attorney or counselor, with his place of business, shall be entered upon the docket, with the date of the entry. All papers or proceedings offered by an attorney to be filed shall be endorsed as above required, and orders granted on motion shall contain the name of the party or attorney making the motion. Notices and orders which are not, by the act or by these general orders, required to be served on the party personally may be served upon his attorney.

The Chamber of Commerce of the State of New York (as well as numerous trade associations) furnishes facilities for the disposition by arbitration of commercial controversies, in order to prevent avoidable litigation. Thus, too, trade associations organized to prevent the trade waste of insolvency proceedings furnish convenient meeting places or agencies for enabling their members to secure information of impending failures, or arranging for coöperative effort in meeting such situations as they arise. Similarly, for the purpose of prosecuting and eliminating fraudulent practices, the trade associations act — as they frequently do — in framing and urging the passage of legislation like the "False Statement Law" or the "Bulk Sales Law." The insolvent debtor may meet interested creditors at the rooms of the association of which they are members; the latter may appoint a committee; the committee may even go so far as to recommend the retention of a single counsel for all

creditors interested. But when the committee or the association undertakes *as a business* to handle claims in bankruptcy, assignments, settlements, — charges fees for the service to individual creditor-members, — it is going beyond the scope of its charter and is in many States committing a penal offense. It is undertaking in such cases to perform not a service *for the association*, but an individual and personal service for the member interested. It is doing the work of a lawyer for a client and the *client* is the interested member.

These distinctions are not yet clear in the minds of laymen throughout the country — as, indeed, they are not yet clear to lawyers — but so soon as they become clear, the trade associations having high and noble purposes to serve will cease to discredit their standing and to defeat their purposes by engaging in practices clearly unlawful, and destructive of the high ethical function of the Bar, whose standing they themselves seek to conserve.

Once the fine men in charge of these trade movements realize that it is in their own interest that the practice of the law should remain a *profession*, instead of a trade, they will cease the doing of those acts in and by their organizations which inevitably make a *trade* of the profession.

BOOK III — WHICH?

CHAPTER XXIV

WHICH SHALL IT BE?

UPON the theory that the practice of the law is a profession, the business men of the country are now calling upon the organized Bar to expel from its ranks those who fall below the standards of the profession and to furnish the laymen of the country with more effective machinery to accomplish the result. The work done by the Bar, described in the first chapter of this book, not only receives unstinted approval from laymen, but is made the basis for urging its further extension. Addressing the Chairman of the Committee on Professional Ethics of the American Bar Association, the Secretary of the National Association of Credit Men writes (January, 1916): —

At the annual meeting of the Officers and Directors of the National Association of Credit Men, in Kansas City on September 22nd, the following resolution was adopted unanimously:

"Recognizing the difficulties in prosecuting dishonest attorneys, and that the need is growing of abilities to do this just as effectually as dishonest merchants may be prosecuted, the conclusion was reached unanimously that the American Bar Association and local Bar Associations should be appealed to for coöperation in this important work, and of a

nature more efficient than is the coöperation obtainable usually from such Associations at the present time; and it was furthermore concluded that the abilities to prosecute dishonest attorneys should be fostered by such reasonable statutes as might be necessary to supplement the coöperation obtainable from the American and local Bar Associations."

In explanation, Mr. Boston, we have been led after an impartial and unprejudiced observation, to locate a large proportion of our bad debt waste to unfairness and fraud, originated or encouraged by commercial lawyers.

A fair presentation of this subject could not be made unless it were recognized that the unfair and dishonest merchant is responsible for much that is unlawful and unethical in the legal profession, but you will recognize that without the aid and encouragement of a lawyer, the premeditated or emergency fraud would not be considered or consummated in a large proportion of the cases.

Recognizing, therefore, the extent of iniquity in the legal profession, we believe as an organization, striving hard to elevate the standards and practices of business, that our progress in this direction is impeded by the difficulties of reaching the lawyer who is equally guilty with the merchant in the concealment and suppression of assets, and the obtaining of improper compositions, characters of evil that are piling up unnecessarily our annual toll to losses through bad debts.

As the Chairman of the Committee on Professional Ethics of the American Bar Association, I am presenting to you the resolution adopted by our Officers and Directors at their annual meeting, with a brief explanation of the reasons which led to this action, and it is my sincere hope that the subject may be presented with great earnestness by you and your Committee to the American Bar Association, and through you, the influence spread to State and smaller Bar Associations throughout the Nation, until there is aroused an

indignation against the commercial lawyer who will prostitute his profession for personal gain.*

* No association does work as comprehensive and effective as the Association of the Bar of the City of New York and the New York County Lawyers' Association. In speaking to the South Dakota Bar Association in January, 1914, Charles P. Bates, of Sioux Falls, said: "It is a well-known fact, and we have all seen it and realized it, that individual lawyers, bar associations, and even the courts frequently seem loath to commence disbarment proceedings or take action of any kind against an attorney even in cases of actual dishonesty and the misapplication of funds entrusted to him, and this, I believe, is one of the strongest reasons why the standard of professional honor is not higher at the present time than it is. There are notable exceptions to this general rule, perhaps the most notable being the two bar associations of the City and County of New York, which for some six or eight years past have taken active, earnest and intelligent action along this line, and the grievance committee of each of these associations has done a wonderful lot of good in purging the membership of unworthy persons." The Chicago and Boston Bar Associations are doing good work. (See recent Year Books, Chicago and Boston Bar Associations.) In the State of Alabama there is a Central Council of the State Bar Association, which, in 1896, was given power by statute to oversee the Bar and to bring disciplinary proceedings against attorneys. In 1914, the South Carolina Bar Association secured the enactment of a statute (28 Statutes at Large, p. 588. See Proceedings South Carolina Bar Association, 1914, p. 16) giving to its Grievance Committee the powers of a "Commission on Inquiry," with authority to subpœna witnesses and to present to the Attorney-General cases warranting disbarment or suspension. As Mr. Lellyett said to the Tennessee Bar on "What is the Status of the Ethics of the Bar" (Report of Proceedings, Tennessee Bar Association, 1914, p. 77): ". . . the bar seems to be awakening. They seem to have realized that many things are being done which detract from the high standard of the legal profession."

The Minnesota State Bar Association has recently appointed an Ethics Committee, with authority to act as a sort of "'vigilance committee' charged with protecting the courts and the public from unprofessional conduct by lawyers." In its public announcement, the official circular letter to attorneys of the State contains the following: "If the business of investigation and prosecution of complaints of professional misconduct is left to the voluntary action of individual lawyers or casually organized committees, the offenders are apt to go unwhipped of justice; since experience has demonstrated that the instrumentalities which the Legislature has provided for dealing with such cases are not efficient for

Now note the laymen's conception of the lawyer: *

The time is imminent, in my opinion, when attorneys should understand that they are servants of the State and the Courts, and advisors, not servants of their clients. . . .

The time *is* imminent. Yet this proposition carries with it certain corollaries, two of which have been recognized and accepted by a laymen's organization: —

I. *It is improper for a business man to participate with a lawyer in the doing of an act that would be improper and unprofessional for the lawyer to do.*

II. *It undermines the integrity of business for business men to support lawyers who indulge in unprofessional practices. The lawyer who will do wrong things for one business man in-*

the purpose. Under present conditions such abuses can be effectively dealt with only by regularly organized Bar Associations; and it is believed that the Minnesota State Bar Association, by reason of the strength of its membership and the extent of its influence, is the best agency for that purpose, and ought to assume the burden.

"The present Ethics Committee of the State Association has been organized with a special view to active work along the lines indicated. The committee is made up of men of wide experience, high ideals and strong convictions respecting the standards of professional conduct and the duty of lawyers to protect courts, the profession and the public from fraud, trickery, dishonesty and oppression by those licensed to practice law. The Chairman, and the members of the committee are pledged to give prompt and thorough consideration to any complaint of professional misconduct on the part of any lawyer in Minnesota, whether a member of the Association or not, by whomsoever presented; and the personnel of the committee is a guaranty of the ability, thoroughness and disinterestedness with which investigations will be conducted."

In Iowa and in Tennessee, as we have seen, the Bar Associations are active in establishing disciplinary machinery. While this book is going through the press, the American Bar Association appoints a Special Committee to deal with this subject.

* Continuation of letter from Secretary of Credit Men to Chairman Committee on Professional Ethics, A. B. A.

*jures all business men. He not only injures his profession, but he is a menace to the business community.**

In a recent letter addressed to its members this lay organization says:

"The honest and capable lawyer is not likely to make the most noise." A commercial lawyer whose professional ideals are beyond question is responsible for this sentiment.

We can as justly suspect the attorney who advertises as we can the medical practitioner who advertises. The attorney equipped to give the most efficient service and who cannot be induced to do that which is contrary to the ethics of his profession, must be found out by inquiry and the exercise of discretion. . . .

We must eliminate, if possible, the unfair and unprofessional lawyer, and the elimination may be brought about by the adherence to honest ideals by the credit man and the exercise of diligence in selecting lawyers who are honest as well as capable.

We may say with confidence that the time is imminent, also, when business men will realize that in the modern lawyer the quality of trustworthiness is as important as the quality of celerity, and that loyalty to the ideals of the profession is quite as much a requisite as business acumen. Neither he who cringes nor he who fawns, neither he who supplicates nor he who panders is to be the elect. Every office has its own essential dignity. Manners proclaim the man. The lawyer of self-respect respects his office, and respecting his office becomes worthy of the respect of his clients.

The business men the country over must search out

* These canons of ethics, together with two others, were contained in the report of the Committee on Commercial Ethics of the National Association of Credit Men, which report was adopted on June 20th, 1913.

the men of self-respect and of dignity and utilize the *power of the retainer* to repress the pettifogger and the tout.

I believe the *power of purchase* in the consumer can be effectively utilized for the solution of many of our industrial difficulties.* I believe, likewise, that the *power of retainer* can be effectively utilized for the purpose of solving many of our professional difficulties. Let us consider this for a moment: —

There cannot be a relation of attorney and client without a client. The creation of the relation is to-day often the result of the intervention of a third party, working for profit. Why an intervenor? Why shouldn't the client find his own lawyer, as he does his own doctor? Why shouldn't he *select* upon the basis of established reputation and ability?

A may want to sell B goods. When the sale is completed, there is still the matter of credit. To establish a credit involves knowledge of financial standing. For this purpose, we have established agencies for securing information; agencies, it is true, performing the service as a business, but at the peril of lawsuit if the information is recklessly inaccurate. Who would think of permitting the individual reported upon to pay Dun or Bradstreet *on the basis of credit secured thereby?* Yet this is the basic method for almost all existing list reporting upon lawyers. The lawyer pays *according to business produced.*† Obviously, better agencies for securing information about lawyers must be devised. A thoroughgoing system of reporting, covering the whole country,

* See Chapter XX of the author's "Law and Order in Industry" (Macmillan, 1916).

† *Ante*, p. 179.

with no possibility whatever of payment by the lawyer reported upon, under the supervision and management of a National Council of Lawyers (whose standing would be adequate guaranty of impartiality), would meet a very urgent need on the part both of lawyers and laymen. By way of illustration, I outline the scope of such information:

(a) Name of the lawyer.
(b) His firm.
(c) Graduate of what university? What law school?
(d) When admitted to practice? Where?
(e) General nature of his practice.
(f) List of important cases handled by him.
(g) Names of clients to whom reference may be made.
(h) What is his reputation for integrity?
(i) What is his reputation for efficiency?
(j) Is he financially responsible?
(k) What is his general standing in the community?

Such information could be secured with the aid of lawyers who would scorn to advertise or solicit — the very lawyers the business man wants most.

CHAPTER XXV

CONCLUSION

EX-JUSTICE HUGHES very properly observes that the judicial function "is not . . . likely to be disturbed so long as judges in the discharge of their delicate and difficult duty exhibit a profound knowledge and accurate appreciation of the facts of commercial and industrial activity, and by their intelligence and fidelity in the application of the constitution according to its true intent commend its guaranties to the judgment of a fair-minded people, jealous alike of public rights and individual opportunities." * The judiciary is recruited from the Bar. How shall judges exhibit this "profound knowledge and accurate appreciation of the facts of commercial and industrial activity" if they have not been properly trained and equipped as lawyers for their function? The Bar is the training school for judges. We must permit freedom of access to the Bar, but this freedom of access must be *conditioned* upon adequate moral and professional training. The schools of law must be open to all men, but "The door of admission to the Bar must swing on reluctant hinges, and only he be permitted to pass through who has by continued and patient study fitted himself for the work of a safe coun-

* Address of Mr. Justice Hughes before the New York State Bar Association, January 14, 1916, on "Some Aspects of the Development of American Law," *New York Law Journal*, Jan. 15, 1916.

selor and the place of a leader." * The teaching in the law school must be different from that taught in the time of Sir John Fortescue who, describing the knowledge furnished in the Inns of Court in his day said:

There they learn to sing and to exercise themselves in all kinde of harmony. There also they practice dauncing and other Noblemen's pastimes, as *they* used to do, which are brought up in the King's house. . . .

In our country we shall never permit the Bar to become recruited from the ranks of the sons of the wealthy alone, but the passage through the universities and the law schools of poor men's sons shows clearly that these obstacles are overcome in our day as they were overcome in the past by men of real merit. The American law schools must never justify Fortescue's description of the Inns of Court of his day:

Nowe by reason of this charges, the children onely of Noble men doe studie the Lawes in those Innes. For the poore and common sort of the people, are not able to bear so great charges for the exhibition of their children. And Marchaunt men can seldome finde in their hearts to hinder their marchandise with so great yearly expenses.

The progress of our country depends upon its laws. And the laws depend upon the lawyers.

"The mind of the lawyer is the essential part of the machinery of justice; no progress or reforms can be made until the lawyers are ready. Their influence at the bar, on the bench, and in legislation is practically omnipotent. The progress of the law means the progress of the lawyer,

* Hon. David J. Brewer, Justice of the Supreme Court of the United States. Vol. XVIII, American Bar Association Reports (1895), p. 450.

not of a few talented men who are on the outposts of legal thought, but the great army of the commonplace who constitute the majority in every occupation." * The administration of the law is *Justice* itself.

"If the world be a harp, justice windeth up the strings, stirreth the fingers, toucheth the instrument, giveth life to the airs and maketh all the excellent harmonies. If the world be a music box, framed of days and nights as of white and black notes, justice directeth and composeth; if it be a ring, justice is the diamond; if it be an eye, justice is the soul; if it be a temple, justice is the altar." † We are in the midst of a great world crisis — the depth of whose meaning is but dimly apprehended at the moment. Out of it will come new thoughts, new policies, new conceptions of State and individual. Out of it, let us hope, will come a better way.

"The nobility of a people lies not in its capacity for war, but in its capacity for peace. . . . The task of war is to destroy life; the task of peace is to create it; to organize labor so that it shall not incapacitate men for leisure; to establish justice as a foundation for personality; to unfold in men the capacity for noble joy and profound sorrow; to liberate them for the passion of love, the perception of beauty, the contemplation of truth." ‡

In the establishment of justice, in the creation of new institutions, in inculcating a respect for law and order in and for its own sake, in bringing about better and more just relations between man and man, the lawyer is called

* Quoted in Report of the Committee on Legal Education and Admission to the Bar. Vol. XX, American Bar Association Reports (1897), p. 365.

† "Holy Court" of Father Causain, translated by Sir F. Hawkins.

‡ G. Lowes Dickinson: "The War and the Way Out." *Atlantic Monthly*, April, 1915.

upon to play his part. *That* is his profession — his chosen guild. When his time of farewell comes, let him not say with Blackstone: *

A formal band
In furs and coifs around me stand,
With sounds uncouth and accents dry,
That grate the soul of harmony.
Each pedant sage unlocks his store
Of mystic, dark, discordant lore,
And points with tottering hand the ways
That lead me to the thorny maze.

Let him rather say:

A formal band
In priestly robes around me stand,
With hearts of gold and accents pure
That make the soul of harmony.
Each earnest sage unlocks his door
To welcome culture, knowledge, lore,
And points with eager hand the lights
That lead me to the unclimbed heights.

* "Lawyer's Farewell to his Muse."

APPENDIX A

CODE OF ETHICS ADOPTED BY THE AMERICAN BAR ASSOCIATION

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.

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 unsuitable 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.

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.

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.

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 or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.

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.

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 coöperate 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.

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.

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.

10. Acquiring Interest in Litigation.

The lawyer should not purchase any interest in the subject-matter of the litigation which he is conducting.

11. Dealing with Trust Property.

Money of the client or other trust property coming into the possession of the lawyer should be reported promptly, and except with the client's knowledge and consent should not be commingled with his private property or be used by him.

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.

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.

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.

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 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 wrongdoing the lawyer should terminate their relation.

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.

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.

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.

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.

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 au-

thority 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.

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.

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.

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 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. 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. 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 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.

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.

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.

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.

APPENDIX B

SELECTED QUESTIONS AND ANSWERS OF COMMITTEE ON PROFESSIONAL ETHICS OF NEW YORK COUNTY LAWYERS' ASSOCIATION BEARING ON MATTERS DISCUSSED IN THE BOOK

Question No. 1

A member of the Bar submitted to the Committee a sample 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 No. 3

An attorney directed the attention of the Committee to the following advertisement:

"WANTED — In collection business I started, an attorney as associate and outside man to call on trade for business, a hustler; percentage of profit. Box ———, this office."

The attorney expressed the view that such advertising should be discouraged and invited the action of the Committee.

Answer

The Committee agreed with the view that such advertising should be discouraged, and concluded that its proper action would be to call the attention of the periodical to the Committee's view. It addressed the editor as follows:

"The Committee believe that it would be for the benefit of the Bar at large if this sort of advertising were discouraged, and have after careful deliberation decided to call this advertisement to your attention, not at all with any idea of interfering with your business or attempting to dictate the policy of your paper, but merely for your information, in the belief that you would gladly coöperate with them in any form of action intended to raise the ethical standing of the Bar. The matter is therefore respectfully submitted to you for your consideration."

The Committee, through its secretary, was subsequently advised that the periodical in question would do all in its power to prevent such advertisements from appearing in the future.

Question No. 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

In the opinion of the Committee such a practice is not proper.

Question No. 8

Whether it is proper professional conduct for attorneys to solicit employment by the use of literature such as the following:

"Dear Sir:

"We submit to you herewith a form of retainer setting forth the plan under which we are employed as attorneys and general counsel by many large and small firms and corporations.

"We would appreciate the privilege of an appointment with you at your office or ours, to explain the moderate terms and the advantages of this arrangement.

"Yours very truly, ————

Retainer.

"Dear Sirs:

"We hereby retain you as our attorneys and general counsel in New York City in connection with any and all legal matters which

we may refer to you, for the term of years from the date hereof, at an annual compensation for all legal services hereunder of dollars ($), payable in equal quarterly instalments at the end of each quarter year.

"We understand that within the term hereof we are to have the right to call upon you for all legal services of every kind and nature in and about our regular business, including all matters of litigation and negotiation, and we are to have the privilege of consultation and advice at all reasonable times.

"In the event that any member or representative of your firm is required to leave New York City in connection with our legal business, we agree to pay you additional compensation for such service at the rate of dollars ($) per day for each day or part of a day so actually and necessarily spent outside said city.

"After the expiration of the term herein limited, the arrangement herein set forth shall continue until terminated upon thirty days' written notice by either party to the other.

"This retainer shall take effect upon your acceptance hereof in writing.

"Yours respectfully, ———

"By ———.

"Note. — We do not desire to displace by our proposition any existing satisfactory relation."

Answer

This method of solicitation of employment by members of the Bar is unworthy, does not conform to the ethical standards of our profession, and should be condemned.

Question No. 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 No. 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 cost, 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

In the opinion of this Committee such solicitation of business is improper.

Question No. 23

Is it proper professional practice for an attorney and counselor of the courts of record of the state of New York to announce to the public by card that a foreign attorney, naming him, and who has not been admitted to practice as an attorney of the courts of the state of New York, has become associated with him in the practice of law, with special reference to foreign countries, stating the names of the countries?

Is such association in the state of New York for such purposes proper professional practice?

Is it proper practice for such attorneys to circulate in New York state cards in the forms below:

ANNOUNCEMENT.
JOHN DOE,
Counselor at Law,
.....Street, New York.
Dated,.....191..

I beg to announce that Mr.....(naming foreign attorney) has this day become associated with me in the practice of the law with special reference to (mentioning foreign countries) matters.

CARD.
(Full Name of Foreign Attorney.)
Counselor at Law,
..... Street,
New York.

Answer

In the opinion of the Committee, it is improper professional practice for an attorney and counselor of the courts of record of this state to announce to the public by card that a foreign attorney, naming him, who has not been admitted to practice as an attorney in the Courts of this state, has become associated with him in the practice of law, even with special reference to specifically-named foreign countries, unless the announcement to the public clearly discloses that the foreign attorney has no right and no intention to practice in this state. Therefore, the circulation of a card in the form submitted to us would be improper.

Question No. 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?

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

PRINTED CARD.

A., B. & 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 question 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.

Question No. 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; the 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? 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 No. 29

A company about to publish a periodical to be devoted to the interests of those engaged in a certain occupation desires to retain me for the purpose of giving free legal advice to its readers, the advice, however, to be limited solely to such questions as would arise by reason of the readers' occupations. This free legal advice is not to include questions which may arise by reason of personal business of any of its readers, but is to be strictly limited as above stated.

The questions are: (1) Would this company by advertising and offering free legal advice to its readers be practicing law? (2) Would I be committing any breach of the ethics of the profession by permitting myself to be retained for the aforesaid purpose?

Answer

This Committee cannot assume to advise lawyers as to the legality of acts done or contemplated by their clients. As to the lawyer's conduct, the question submitted, in our opinion necessarily involves a construction of the penal statute (section 280, Penal Law [Consol. Laws, c. 40]), which has yet in this connection to be judicially construed. For this reason the Committee withholds any expression of its judgment.

Question No. 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.

"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 No. 36

An individual engaged in the printing business, and making a specialty of case and brief printing, presents the following question:

"In the opinion of the Committee on Professional Ethics is there impropriety in my advertising in connection with my business the following:

"'First Class Briefs Written for the Profession by Able Lawyers. Also Cases on Appeal Prepared'
—and in my employing for my customers lawyers to write briefs and to prepare cases on appeal, making arrangements with them for their compensation by me out of the compensation received by me for the combined work of furnishing to my customers cases on appeal and briefs written by my said lawyers and printed for the use of my customers at my printing establishment?"

Answer

While this question appears to be propounded by one not a member of the profession, yet since it involves questions of "proper professional conduct" the Committee expresses its opinion as follows:

The course of action suggested would in our opinion be improper, for the following reasons:

1. A printer so advertising, even if he were not violating the letter of section 270 of the Penal Law (Consol. Laws, c. 40), which makes it unlawful for a person who has not been duly admitted to the bar to practice law, would certainly be acting contrary to the spirit of that provision.

2. Section 280 of the Penal Law makes it unlawful for a corporation to furnish legal services or advice in this way. We think the principle which underlies this provision applies equally to an individual who is not a lawyer, and makes it equally improper for him to furnish legal services in this manner.

3. The relation between attorney and counsel is of a personal and fiduciary nature, and imposes obligations and responsibilities which cannot be fully realized unless the attorney and counsel deal with each other directly.

4. The relation of the writer of a brief to the court is one the dignity and responsibility of which are inconsistent with the scheme proposed.

5. The offer by a third party, not an attorney, to furnish or sell the legal services of members of the bar (in this case undisclosed),

is derogatory to the dignity and self-respect of the profession, and would tend to lower the standards of professional character and conduct.

Question No. 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.

Question No. 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 cannot 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.*

* Section 274 of the Penal Law is as follows:

Sec. 274. Buying demands on which to bring action. An attorney or counsel shall not:

1. Directly or indirectly, buy, or be in any manner interested in buying, a bond, promissory note, bill of exchange, book debt, or other thing in action, with the intent and for the purpose of bringing an action thereon.

2. By himself, or by or in the name of another person, either before or after action brought, promise or give or procure to be promised or given, a valuable consideration to any person, as an inducement to placing, or in consideration of having placed, in his hands, or in the hands of another person, a demand of any kind, for the purpose of bringing an action thereon, or of representing the claimant in the pursuit of any civil remedy for the recovery thereof. But this division does not apply to an agreement between attorneys and counselors, or either, to divide between themselves the compensation to be received.

3. An attorney or counselor convicted of a violation of any of the subdivisions of this section, in addition to the punishment by fine and imprisonment prescribed therefor by this section, forfeits his office.

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, under some circumstances which we do not assume to construe.

Question No. 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.

4. An attorney or counselor, who violates either of the first two subdivisions of this section, is guilty of a misdemeanor; and, on conviction thereof, shall be punished accordingly, and must be removed from office by the Supreme Court.

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 shopkeeper 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 No. 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 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 settle-

ment. 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," etc.

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, which Canon reads in part as follows:

"..... 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....."

Question No. 47

A list of questions submitted to the Committee on Professional Ethics by the sub-committee appointed at the conference of the

(a) Committee on Professional Ethics,

(b) Committee on Unlawful Practice of the Law,

(c) A Special Committee of Lawyers, organized to aid in elevating the professional standards of the practice of commercial law.

The several specific interrogatories appear below immediately preceding the answers thereto.

Preamble to Answer No. 47

In answering this series of questions the Committee is guided

by its view that the practice of the law is a profession and not a trade or a business; therefore some methods which are unobjectionable in a trade or business may still be open to criticism in an attorney because they detract from the objects for which his profession exists. It is a profession, not only because of the preparation and qualifications which are required in fact and by law for its exercise, but also for the primary reason that its functions relate to the administration of justice, and to the performance of an office erected and permitted to exist for the public good, and not primarily for the private advantage of the officer. Such private advantage, therefore, can never properly be permitted to defeat the object for which the attorney's office exists as a part of the larger plan of public justice.

With these considerations firmly in mind the Committee expresses its opinion in answer to the specific inquiries, as follows:

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.

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 Consol. Laws, c. 40, § 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 determining 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.

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 coöperation in the handling of debtors' 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.

(b) May A. B. divide with G. H. such fees in bankruptcy matters referred to him by G. H., as he may receive as attorney, either for petitioning creditors, receiver or trustee?

Answer

No. The Committee's views of the impropriety of such division of professional fees are expressed in answer II (a) above.

(c) May A. B. pay to G. H. in the situation referred to in subdivision (b) above for services rendered to him by G. H.?

Answer

The vice of such a payment for services is the temptation to make it a cloak for compensation for the solicitation of business for A. B., or a cloak for an unequal preference to the members of G. H. We would see no impropriety in a reasonable compensation to the association for services actually rendered if these two dangers were clearly eliminated in a particular case and the amount and

mode of the payment were fully disclosed in the proceeding or settlement.

(d) May G. H. in matters in which it desires the coöperation 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. 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 is to be condemned for reasons already assigned.

IV

(a) May E. F., an existing collection agency, where the cooperation of creditors other than regular patrons or subscribers of E. F. seems desirable, circularize such creditors, urging them to place their claims with E. F. 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

It may be that the act of E. F. is the unlawful practice of law within the scope and reasoning of Matter of Coöperative Law Co., 198 N. Y. 479, 92 N. E. 15, 32 L. R. A. 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879, Matter of Associated Lawyers Co., 134 App. Div. 350, 119 N. Y. Supp. 77, and Matter of the City of New York, 144 App. Div. 107, 128 N. Y. Supp. 999. The Committee expresses no opinion upon this question of law. If E. F.'s act be unlawful, the lawyer should not participate in any emolument resulting therefrom; but if it be lawful for E. F. to circularize creditors "in order that A. B. may conduct legal proceedings," still it is unprofessional for A. B. to permit such solicitation of professional employment for him by E. F., since he cannot properly so solicit it for himself.

(b) May A. B. divide with E. F. such fees in bankruptcy matters referred to him by E. F. as he may receive as attorney either for petitioning creditors, receiver or trustee?

Answer

No — in view of our answer to IV (a).

(d) Does it make any difference in the situation referred to in IV (a) above whether A. B. performs gratuitously or not the service for such creditors who are not regular patrons to E. F.?

Answer

No — for the reason already stated in II (a).

(c) May A. B. pay to E. F. in the situation referred to in IV (a) above for services rendered to him by E. F.?

Answer

No.

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 coöperation is in the best interests of the estate?

Answer

No. The coöperation 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 coöperation, always provided it is not a mere device to solicit employment for the attorney.

VI

(a) May A. B., an attorney, receive claims or proxies where such claims or proxies have been secured through circularization by a creditors' committee formed in XYZ, a bankruptcy proceeding?

Answer

We see no impropriety in the action suggested, provided the committee is not a cloak used by A. B. to procure employment.

(b) Does it make any difference that A. B.'s clients are the committee?

Answer

No — with the limitations already suggested.

(c) Does it make any difference that A. B. suggested the formation of the committee?

Answer

No. If the suggestion was in his client's interest, and not as a cloak, as already indicated.

(d) Does it make any difference that the proxies run to the members of the creditors' committee as attorneys, in fact, A. B. appearing as counsel for the committee?

Answer

No. It appears preferable that the proxies should run as suggested because that course seems less liable to abuse as an objectionable cloak to solicitation of employment for the attorney.

VII

(a) May A. B. receive from C. D., a collection agency, claims in the XYZ bankruptcy proceedings, solicited by C. D., and appear as attorney in such bankruptcy proceedings, acting under power of attorney for such claimants?

Answer

A lawyer should not be debarred from accepting professional employment from a collection agency. We have already indicated the abuses to be avoided, and to which a lawyer should not lend himself. [See answers above to IV (a), (b), (c) and (d).]

(b) May A. B. receive from C. D. claims in such bankruptcy proceedings, and appear as attorney for or act under power of attorney for such creditors, C. D. being specifically authorized by the claimant to select an attorney for him, and as his agent notifying A. B. that it delivers the claim acting as such agent.

Answer

In a case not obnoxious to the criticism suggested in IV (a) and (b) above, the relationship between the attorney and client is direct, and therefore we see no impropriety in A. B.'s acceptance of employment by the creditor.

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 reorganization 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 reorganization 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 reorganization plan or in the request for coöperation 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 coöperate. 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.

(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 coöperation, 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 collections but not legal business, to print upon its stationery and in its advertisements "A. B., Attorney," or "A. B. Counsel?"

Answer

No.

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 fee.

(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 guaranteeing 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.

Question No. 48

I am advised that it is not unusual in this community for auctioneers, who conduct sales of real property in foreclosure suits, to divide their auctioneer's fee with the referees who are appointed

by the courts to make such sales. Does not the committee consider such a practice on the part of referees to be unprofessional?

Answer

The Committee is not apprised otherwise than by the question that the practice mentioned is ever indulged; it would be loath to believe that it is either usual or not unusual, but it considers that such action would be grossly improper.

Question No. 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.....
Counselor 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 No. 50

At a social entertainment given by citizens who are members of a single race, to honor a distinguished man of their number, a

program was published and circulated containing paid advertisements, of which one is the following:

Telephone.....
Residence Phone.....
LARGE ACCIDENT, MATRIMONIAL & CRIMINAL ACTIONS A SPECIALTY. ALL MATTERS STRICTLY CONFIDENTIAL.

.....(name)
LAWYER
..... (address) .....
A..... (stating advertiser's race) lawyer who is a .....(stating race of distinguished guest) man's friend. Indorsed by leaders of the community. Has estimable record in all courts.

Is it the opinion of the Committee that this is proper professional advertising?

Answer

In the opinion of the Committee the advertisement set forth in the question is improper. (See Canon 27 of the American Bar Association.)

Question No. 51

There are some collection agencies in town which are incorporated and which solicit bills for collection. It is their custom to turn over some of them to lawyers for suit. In such cases the collection agency always wishes to deal with a lawyer as if it were his client and wishes collections remitted to it instead of directly to the creditor. In your opinion, is not that method of doing business improper? This question arises frequently and is quite troublesome because, so far as I know, there has been no adjudication of the matter.

Answer

In the opinion of the Committee, the patron of the collection agency is the client, but the Committee sees no impropriety in the

lawyer's complying with the wish of the collection agency in remitting to it; assuming (as the Committee does) that the agency is the authorized agent of its patron to deal in his behalf with the lawyer. (See our answers to Question No. 47.)

Question No. 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 to 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.

Question No. 57

A well-known corporation of high standing has issued a circular letter in which it says:

"We will be glad to give expert testimony as to the value of property which may be needed in court proceedings, settlement of estates or condemnation proceedings."

Is it the opinion of the Committee that a lawyer can properly employ and pay a corporation to procure an individual to give expert testimony on the above subjects, assuming that the individual avails himself of data derived from the corporation's records?

Answer

In the opinion of the Committee the question should be answered in the affirmative. We assume that a corporation may carry on

the business of appraising property, and, as a corporation can only act through its agents or employees, an appraisal furnished by a corporation is necessarily an appraisal of an individual employed by a corporation; but as such appraisal cannot, in general, be used in legal proceedings, without the testimony of the individual who made it, the employment of a corporation to make an appraisal to be used in legal proceedings necessarily implies the right to furnish the testimony of the agent or individual who made such appraisal, for the purpose of sustaining it.

Question No. 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 No. 62

Will the Committee please advise me of its views respecting the professional propriety of the following advertisement inserted

in local papers by an attorney at law, who was formerly the local attorney for the corporation mentioned therein:

"Having severed all relations between myself and the..... Company, I am now in position to accept and prosecute all claims against said Company." (Attorney's Signature.)

Answer

We deem the advertisement highly improper. It is a direct invitation to prosecute claims against a former client, with the implied suggestion that the new clients will derive some advantage from the former confidential relation.

Question No. 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 turn, 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, quoted in answer No. 46. See also our answer to Question 58.

Question No. 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 (Consol. Laws, c. 30) 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 (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. (See Matter of Kaffenburgh, 188 N. Y. 49, 80 N. E. 570.)

Question No. 68

A highly respectable, well-established real estate firm are 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 No. 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 40 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.

Question No. 72

Is it proper professional conduct for lawyers, members of a legislature which has passed a law instituting a state commission authorized to approve and supervise the operations of a certain class of corporations, for the performance for the public of certain acts authorized by the law, to permit such a corporation to advertise for such business and solicit the patronage of the public by announcements stating that such lawyers, designating them by their official titles as members of the legislature, are their counsel?

Answer

In the opinion of the Committee the conduct suggested is improper; the reference to the position of the counsel as members of the legislature is too apt to create the impression that that fact gives their client an improper advantage.

Question No. 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 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.

Question No. 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 intrusted 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 employees 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 employees has lightened the labors of the counsel, 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 employees, 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 employees 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 prejudge 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 lawyer'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.

Question No. 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 employee in the office as being a member of the Bar.

Question No. 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.

Question No. 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 lawsuit 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 anonymity 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 Nos. 42, 47 and 98, and to Canons 27 and 28 of the American Bar Association.)

Question No. 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 Attorneys, 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 coöperation of the United States Attorneys and their assistants to these ends is relied upon with confidence.

"Respectfully,

"T. W. Gregory, Attorney General."

Question No. 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. But see Answers to Questions 36, 46, 58 and 65; and Number 27, Canons of Ethics of American Bar Association.

Question No. 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 No. 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 num-

ber 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 this 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 No. 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%. His attorney sends out a circular letter to all of the cred-

itors 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.

Question No. 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 accounting 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 announce-

ment 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.

Question No. 98

A. B., an attorney, is in partnership with C. D., a layman, in the collection business, and, under the partnership agreement, divides the earnings of that business with C. D. He does not divide with C. D. the fees which he may receive upon any act or service performed under his name and by virtue of his office as an attorney. A part of the partnership earnings, however, is derived from commissions charged upon collections made by attorneys to whom claims are sent by the partnership. Is there any impropriety in the above practice?

Answer

In the opinion of the Committee, it is improper for a lawyer to engage in partnership with a layman and divide fees. (See Q. & A. 47, I a, I b, II a.)

A fee charged for professional services is none the less a reward for professional services because it is called "a commission." Lawyers in other States, who are dividing with a collection agency here the compensation they receive for professional services, are themselves, in the opinion of the Committee, guilty of unprofessional conduct. That the service excludes the bringing of suit or appearance in court does not change the inherent character of the situation. In performing the service the lawyer's professional skill and responsibility are engaged. There is no objection to a lawyer engaging in the collection of an account (see Q. & A. 47, I b), but when he does so, he does so as a lawyer and is subject to the ethics of his profession.

Question No. 102

Since the adoption of the new Municipal Court Code (N. Y.

Laws 1915, ch. 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 A. D. 583; 1st Dept., 1910.)

Question No. 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, I 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 au-

thority 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.

Question No. 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 mem-

bers 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, as construed in Matter of Co-operative Law Co., 198 N. Y. 479; Matter of National Jewelers Board of Trade, New York Law Journal, March 2, 1916; Meisel *v.* National Jewelers Board of Trade, 90 Misc. Rep. 19, and is therefore prohibited to members of the New York Bar.

APPENDIX C

What Constitutes Practice of the Law

An attorney's acts in starting a suit, issuing process, appearing and generally conducting proceedings in court are clearly official and authorized only by virtue of his position as an officer of the court. That these acts constitute practicing law and that they cannot lawfully be done by any one other than an admitted attorney is beyond question. Kaplan *v.* Berman (1902), 37 Misc. 502; McKoan *v.* Devries (1848), 3 Barb. 196; Newburger *v.* Campbell (1880), 58 Howard's Practice, 313; Weir *v.* Slocum (1848), 3 Howard's Practice Reports, 397; Robb *v.* Smith (1841), 4 Ill. 46; Cobb *v.* Judge of the Superior Court, 43 Mich. 289 (1880); McClintock *v.* Laing (1871), 22 Mich. 212. (Notice of depositions given by a person not an attorney may be ignored.) People *v.* May (1855), 3 Mich. 598. (A case of a district attorney). Harkins *v.* Murphy (1908), 51 Texas Civil Appeals, 568; State v. Russell (1892), 83 Wisc. 330. (A case of an assistant district attorney.) See Rader *v.* Snyder (1869), 3 W. Va. 413.

In Weir *v.* Slocum (supræ), the Court said at p. 398:

"This is an attempt on the part of a person who has not been admitted as an attorney, to practice as such, under the name of agent. If this can be done, then the law which requires a regular admission to authorize a person to practice becomes a dead letter."

In Cobb *v.* Judge of the Superior Court (supra), the Court held that an attorney, being an officer of the court, must have the requisite learning and moral character, and that the court must have some power to discipline him for misconduct by disbarment or suspension. At p. 291, the Court said:

"Attorneys are licensed because of their learning and ability, so that they may not only protect the rights and interests of their

clients but be able to assist the court in the trial of the cause. Yet what protection to clients or assistance to courts could such agents give?"

The principle also covers the submission of briefs by non-attorneys, and the courts will ignore such briefs. Ellis *v.* Bingham (1900), 7 Idaho, 86; Leaver *v.* Kilmer (New Jersey, 1903), 54 Atl. 817; Fallon *v.* State (1910), 8 Ga. App. 476.

In Ellis *v.* Bingham (supra), the Court said:

"A brief has been filed on behalf of the respondent, signed by persons who are not members of the bar of this court. We cannot receive or recognize such briefs, and said brief is ordered stricken from the files. The action of the parties who filed such brief is in violation of the statutes and rules of this court, and such practice cannot be tolerated."

It would certainly not be too broad a generalization to say that, at the very least, everything connected with the management of the prosecution or defense of any proceeding in court constitutes practice of the law and is restricted to qualified attorneys. See Kelly *v.* Herb (1892), 147 Pa. State, 563; Perkins *v.* McDuffee (1874), 63 Maine, 181; Bullard *v.* Van Tassell (1848), 3 Howard's Practice, 402.

Moreover, it is well settled that the courts will not countenance doing indirectly acts which it is unlawful to do directly, so that, if a corporation or an unlicensed individual seeks to mask his practice of the law by employing one or many licensed attorneys to do his legal work and appear in the courts for him, the corporation or unlicensed individual will, nevertheless, be held to be practicing law.

In Matter of Coöperative Law Co., 198 N. Y. 479, at p. 483, the court (Vann, J.) said of a corporation:

"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.)"

In Matter of City of New York (1911), 144 App. Div. 107, the Court said, at p. 109:

"It is well settled that a corporation cannot practice law either directly or indirectly by employing lawyers to practice for it."

In Buxton *v.* Lietz (1912), 136 N. Y. Supp. 829, the court said, at p. 831:

"Counsel for the plaintiff, however, contends that the plaintiff is not to be likened to a corporation engaged in the practice of the law, and again, that the prohibitions apply to corporations and not to individuals engaged in the business of a mercantile agency for collection on behalf of clients. This contention, however, is not sound, for the reason that the plaintiff is not an attorney and counselor at law, and, since he cannot practice directly, he is prohibited from practicing indirectly by employing an attorney and counselor at law to institute suits or actions on behalf of his 'clients' when necessary." Affirmed (Appellate Term, 1st Department, 1913), 139 N. Y. Supp. 46.

P. 47: "The appellant contends that, at the time the contract was made, on March 10, 1911, it was not illegal, because chapter 483 of the Laws of 1909 merely prohibited a corporation from practicing law, and that the amendment to the law made by chapter 317 of the Laws of 1911, so as to make the prohibition therein contained apply to voluntary associations, did not go into effect until Sept. 1, 1911, which was after the contract in suit was made. We think that the argument urged by the appellant is immaterial to the question at issue. Quite apart from the statutory provisions referred to, the plaintiff and his assignor, not being duly licensed to practice law, had no right to contract to do so, and any contract made for this purpose was illegal. The principle upon which this ruling rests is so fully discussed in Matter of Coöperative Law Co., 198 N. Y. 479, etc., that further discussion seems to us unnecessary." *

Thornton on Attorneys at Law at Sec. 69 says:

"In almost all jurisdictions unlicensed persons are prohibited from practicing law, — . . . It is too obvious for discussion that the practice of law is not limited to the conduct of cases in courts.

* See also Matter of Julius A. Newman, Appellate Division, 1st Department, January, 1916, 172 App. Div. 173.

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 and the management of such actions and proceedings in behalf of clients before judges and courts, and in addition conveyancing, the preparation of legal instruments of all kinds, and in general all advice to clients and all actions taken for them in matters connected with the law."

And this statement can be said in a general way fairly to represent the result of the cases, some of which contain equally explicit and general statements on the subject.

Eley *v.* Miller (1893), 7 Ind. App. 529, was a case where a county auditor sought to recover fees for drawing bonds and contracts in a certain proceeding regarding a public ditch. It was ***held***, first, that he was entitled to no fees other than those given by statute; and, second, that under an express statute prohibiting county auditors from practicing law, he was not entitled to recover. At p. 535, the Court said:

"It may be said that writing and preparing the contract and bond is not practicing law. As the term is generally understood, the practice of the law is the doing or performing services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger sense it includes 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 court."

In re Duncan (1909), 83 S. C. 186. In 1908 Duncan had been disbarred. Subsequently one J. S. was convicted of crime and sentenced to pay ten dollars or serve a term in prison. He was unable to obtain ten dollars, so he went to jail. His wife applied to Duncan to raise money to procure his release. Duncan took five dollars in cash as his fee, which it was understood he was entitled to retain, and a mortgage for ten dollars from her to secure him for advances, and agreed to procure his release. Owing to the fact that the magistrate who had sentenced J. S. had subsequently

retired from the bench, the proceedings dragged for some time. The wife of the prisoner became dissatisfied so Duncan returned the five dollars and cancelled the mortgage. The Court *held* his action in this matter amounted to practicing law and was a contempt of Court. At p. 189, the Court said:

"The question is, whether the services undertaken and performed by Duncan constituted the practice of law. 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 the 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 those 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.'

"Under these definitions there can be no doubt that Duncan engaged in the practice of law." Savings Bank *v.* Ward (1879), 100 U. S. 195. The Court, after stating that an attorney is liable for want of reasonable care in his profession, said, at p. 198:

"Such liabilities frequently arise, and an attorney may also be liable to his client for the consequences of his want of reasonable care or skill in matters not in litigation. Business men not infrequently seek legal advice in making or receiving conveyances of real property, and it is well settled that an attorney may be liable to his client for negligence or want of reasonable care and skill in examining titles in such cases, whether the error occurs in respect to the title of property purchased or in the covenants in the instrument of conveyance, where the property is sold." Commonwealth v. Branthoover (1900), 24 Pa. County Court Reporter, 353. The Court said, at p. 353;

"An attorney-at-law is an officer in a court of justice whose profession and business it is to prepare and try cases in the courts and to give advice and counsel on legal matters to those employing him."

The following cases show more specifically what acts have actually been held to constitute or not to constitute the practice of the law.

It has been held that conducting condemnation proceedings, even where the party performing the services disclaims any intention of doing legal work and alleges that he merely made investigations as to matters of fact, appraisals, etc., is practicing law. Matter of City of New York, 144 App. Div. 107. Matter of Bensel (1910), 68 Misc. 70.

It has been held that services in procuring a pardon are not legal services, and that it is, therefore, no defense to the action for such services that the plaintiff was not an attorney. Bird v. Breedlove (1858), 24 Ga. 623. At p. 625, the Court said very summarily:

"Neither of these reasons was sufficient.

"(1) As to the first . . . .

"(2) As to the second — what law is there that restricts business of this sort to attorneys at law? We know of none.

"Judgment affirmed."

This case would seem, however, to be *contra* in general spirit at least to In re Duncan (supra).

So in Dunlap *v.* Lebus (1901), 112 Ky. 237, it was *held* that there was no law prohibiting anyone, though not an admitted attorney, from procuring a reduction of the tax and being paid for such service. The Court said that this was not practicing in any court, and that the questions involved were merely ones of fact, which might be presented as well by any layman as by a lawyer. But see opinion per Greenbaum, J., in People *ex rel.* Holzman *v.* Tax Commrs., N. Y. Law Journal, Feb. 25, 1916, and also per Phibbin, J., in People *ex rel* Rockland Erie Realty Co. *v.* Purdy, N. Y. Law Journal, April 29, 1916.

There have been several cases where an unlicensed individual

performed legal services both in the nature of conducting cases in court and in the nature of legal advice, and upon his bringing action for such services the fact that he had not been admitted to the bar was set up as a defense. The courts in all these cases *held* that the plaintiff could not recover, and while they failed expressly to pass upon the question, this decision necessarily implies that the giving of legal advice was as much unauthorized as the conducting of cases in court; for, had the former been authorized, a recovery at least for the value of those services should have been allowed. Tedrick *v.* Hiner (1871), 61 Ill. 189; East St. Louis v. Freels (1885), 17 Ill. App. 339; Ames v. Gilman (1845), 10 Metc. 239.

Another situation is presented by Nolan *v.* St. Louis & San Francisco R. Co. (1907), 19 Okla. 51. Here a preliminary notice which was a condition precedent to the cause of action involved was signed, not by the plaintiff, but by his attorney. The defendant claimed that this was insufficient without the showing of any authority upon the part of the attorney; but it was claimed for the plaintiff that an attorney, being an officer of the court, his authority was presumed. The Court said that this was true while he was acting as an attorney; that the giving of this notice, although it was not a proceeding in court, was within the scope of his professional business, and his oath of office; that the court would have authority to discipline him for a false assumption of authority in such a case, and that, therefore, the presumption was that the authority did exist.

In People *v.* Schreiber (1911), 250 Ill. 345, the Court was called upon to construe a statute making it unlawful for any person not regularly licensed to practice law to hold himself out as an attorney at law, or represent himself as such. The defendant maintained an office, had a rather pretentious law library, made collections, prepared conveyances, examined abstracts, negotiated loans, closed real estate deals, advised parties as to their legal rights, and generally performed such services for his clients as are usually performed by attorneys. He also stated to his clients that he was a lawyer, and did all the legal business he could get, except that he did not try cases or appear in courts of record. Without entering

into any discussion which would be of any value in making generalizations upon this subject, the Court held that his acts were clearly in violation of the statute.

In Evans *v.* Funk (1894), 151 Ill. 650, the plaintiff was a judge of the Probate Court. A statute of Illinois (Revised Statutes, Chapter 13, Sec. 10) prohibited a judge of the Probate Court from practicing as an attorney or counselor at law in the court in which he presides. A will in this case had been admitted to probate by the plaintiff Evans, acting as such judge. The heirs at law thereupon filed a bill in chancery in the Circuit Court to set aside the probate. Before this bill came to trial, Evans put through negotiations for the settlement of the entire matter and got a fee for his services. It was held that this act was practicing as an attorney in the court in which he presides within the statute, and that the fee paid could be recovered back thereunder.

In the case of Commonwealth *v.* Barton (1902), 20 Pa. Superior Court Reporter, 447, funds were entrusted to an attorney by his client to be invested by him. He embezzled the funds and was indicted under a statute making it a distinct crime to commit embezzlement as an attorney. It was *held* that he was guilty within this statute. At p. 449, the Court said:

"In Pennsylvania the profession of attorney includes much more than the mere management of the prosecution and defense of litigated cases. Unquestionably the professional relation of attorney and client may be established as to the investment of money. Where this relation exists and by virtue of it money is entrusted to the attorney to be paid to a borrower, or otherwise invested, upon satisfactory security being given, he holds it for safe custody pending the consummation of the loan or other investment. This is as much a part of his duty as attorney as is the exercise of his judgment upon the legal sufficiency of the security offered."

In the recent decision of L. Meisel & Company *v.* National Jewelers Board of Trade, decided at the April Term, 1915, by the Appellate Term, First Department, New York Supreme Court, reported in 90 Misc. 19; affirmed, 157 N. Y. Supp. 1133, it appeared that the appellant, a membership corporation organized

as a Board of Trade "for purposes other than pecuniary profit," claimed the right to represent a creditor in bankruptcy proceedings or in proceedings on behalf of the creditor in the matter of the general assignment of a bankrupt for the benefit of creditors, to advise the creditor in such proceedings, to undertake and do all the things appertaining to the prosecution of the creditor's claims in such proceedings, to take the steps necessary to protect the creditor's interest therein, and make a charge for such services. The Court, following the definition in the Duncan case (83 S. C. 186) that the practice of law "is not limited to the conduct of cases in courts . . . ." but "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," *held* that the acts referred to did constitute the practice of the law. The Court also quoted, with approval, the decision in Savings Bank *v.* Ward, 100 U. S. 195: "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." The discussion by the Court in the Meisel case is of value in determining what legally constitutes the practice of the law:

"Now consider the services ordinarily incident to representing a creditor and enforcing his claim in bankruptcy matters, such as the Wedgren case herein involved. The promissory notes required examination as to execution and the form of the signature, i. e., whether the maker was liable in an individual or representative capacity, whether signed in a trade name as distinguished from an individual name, etc. Inquiry was necessary concerning the inception and delivery of the notes, whether for value or accommodation and as to any possible defenses or counterclaims. Acting on this information, the client would be advised whether to proceed. The next step would be the preparation of proof of claims. This is a legal instrument, and the mere fact that is is on a printed form

and might be filled out by a layman does not change its character, any more than the fact that confessions of judgment, bills of costs, affidavits of service and many simple forms of pleading on notes and for goods sold and delivered are frequently printed changes their character. The subsequent steps that ordinarily occur, such as joining with one or another group of creditors in the selection of a trustee, expediting or opposing the disposition of the assets of the bankrupt estate, the consideration of proposed compromises, reorganizations and substitution of securities for claims, the various problems incidental to receivership, the form in which dividends are received and receipted for, and innumerable other details intervening between the filing of the petition in bankruptcy and a discharge, all involve at one stage or another proceedings on behalf of the client in courts, the preparation of legal instruments of various kinds, the rendition of legal advice and action taken for the clients in matters connected with the law. These services require special knowledge, the fidelity of the relation between attorney and client, responsibility to the courts and, for success, experience in what is generally recognized as a special line of legal work. Frequently the relation requires actual appearance in court and the conduct of litigation. That such proceedings are contemplated and provided for by this Board of Trade in its relations to its clients is shown by its printed form of voucher, containing provision for "costs," "suit fee" and "fees." That the services involved and contemplated by this Board of Trade in representing plaintiff in the bankruptcy of Wedgren and prosecuting his claim therein were legal services seems too plain to require further consideration. Similarly, in representing him and prosecuting his claim against the Pacific Jewelry Company, whose property was in the hands of a general assignee for the benefit of creditors, the services were legal services, and for the most part, similar in kind to those already enumerated. Ordinarily, a proper representation of the creditor in such matters involves an examination of the assignment, consideration of its validity, the sufficiency and form of the assignee's bond, an examination of schedules, alertness against the allowance of improper claims,

keeping track of suits brought by and against the assignee, the accounting, and a multitude of other important details that will at once occur to any practicing lawyer."

In the recent decision in the case of The Grocers and Merchants' Bureau *v.* Gray, Circuit Court, State of Tennessee, First Circuit (reported "Nashville Banner," Feb. 26, 1915, — "New York Law Journal," June 17, 1915), Daniel, J., where the plaintiff was a trade organization in these respects similar to the National Jewelers Board of Trade, performing similar services, the Court said:

"Attorneys at law are officers of the court in which they are admitted and allowed to practice. They must be of good moral character and must take an oath to support the constitution of Tennessee and of the United States. They are under oath just as much as the judge of the court is under oath. They are a necessary part of the machinery designed for the fair and impartial administration of justice. The position and practice of any attorney at law imply and require something higher than simply an endeavor to secure favorable results for his client. They are so completely a part of the court that the presiding judge may exercise summary jurisdiction over them to the extent of depriving them of their office and striking them from the rolls." This case has since been affirmed and the principles adopted by the Court of Civil Appeals (see "New York Law Journal," Dec. 8, 1915 — Vol. 6, Reports of the Court of Civil Appeals of Tennessee).

In Planters' Bank *v.* Hornberger, 4 Cald. 571–572, the Supreme Court of this state, speaking through Special Judge Edward H. East, said:

"An attorney is a man set apart by the law to expound to all persons who seek him the laws of the land, relating to high interest of property, liberty and life. To this end he is licensed and permitted to charge for his services. The relation he bears to his client implies the highest trust and confidence. The client lays bare to his attorney his very nature and heart, leans and relies upon him for support and protection in the saddest hours of his life. Knowing not which way to go to attain his rights, he puts

himself under the guidance of his attorney and confides that he will lead him aright."

In the Lawyers' Tax Cases, 8 Heisk. 631, Chief Justice Nicholson, in quoting from the Garland case among other things, said:

"It is said by a majority of the United States Supreme Court in the case of Ex parte Garland, 4 Wall. 378, that "the order of admission is the judgment of the court that the parties possess the requisite qualifications as attorney and counsellor and are entitled to appear as such and conduct causes therein. From its entry the parties became officers of the court and are responsible to it for professional misconduct."

And on page 632 Chief Justice Nicholson quotes from the opinion of Mr. Justice Miller in the same case as follows:

"They (attorneys) are as essential to the successful working of the courts as clerks, sheriffs and marshals, and perhaps as the judges themselves, since no instance is known of a court of law without a bar."

During the past year the State of Missouri has passed a statute in which the practice of the law is defined as follows:

"Section 1. The 'practice of the law' is hereby defined to be and is the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such a capacity in connection with proceedings pending or prospective before any court of record, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies. The 'law business' is hereby defined to be and is the advising or counseling for a valuable consideration of any person, firm, association or corporation as to any secular law or the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights or the doing of any act for a valuable consideration in a representative capacity, obtaining or tending to obtain or securing or tending to secure for any person, firm, association or corporation any property or property rights whatsoever." Missouri Sessions Acts (1915), p. 99.

In the Matter of Pace and Stimpson, 170 App. Div. 818, the Appellate Division, 1st Department, New York, held that the incorporation of corporations "and the furnishing of forms, information and personal attention in connection therewith" is practicing law, the Court adopting the definition in Matter of Duncan (supra) and Savings Bank *v.* Ward (supra).

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