LAWYERS AND THE PUBLIC

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The substance of this paper was delivered as a public lecture at the Victoria University College, Wellington, New Zealand. It was one of a series of public lectures given by professors and lecturers at that College to mixed audiences.

I have not perhaps a right to assume that it will be admitted that the legal profession fulfils any useful function whatever in society. The opinion is not infrequently expressed, and sometimes not wholly without seriousness, that the lawyers might with advantage be altogether dispensed with. I remember hearing some seventeen years ago, when I first came to reside in Wellington, that a debate had a short time previously taken place in the Union Debating Society of Wellington on a motion in the following terms:

> That the legal profession is a parasite infesting the community, and ought to be extirpated.

This is, I think, the most pointed form in which I have ever heard such an opinion put forward, and the terms of the motion have never been effaced from my memory. They have constantly recurred to my mind, and have always been a source of very great pleasure to me. The mover of the proposed resolution was a well-known political doctor of this city. I do not use the expression in any offensive sense, but merely to indicate that he was (and he still is) a doctor of medicine (though not in practice) and at the same time a vigorous politician. I have always admired the perfect form and, I believe (from a medical point fo view), technical completeness of the motion brought down by the doctor against the lawyers on that occasion. The profession was a *parasite* - *infesting* the community - and ought to be *extirpated*. The motion was certainly not wholly serious on the part of the doctor, but I understand that the speech by which he supported it exhibited a certain element of genuine feeling, and that he was met with some feeling by certain members of the legal profession who were present. The debate, I understand, became warm. It is probable that a few things were said about the doctors also.

The profession of the law nevertheless continues to exist. It may therefore be presumed to have a function, and I propose to inquire what this function is.

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And, first, I will take a lay opinion. The subject is to some extent dealt with by Ruskin in "Unto this Last". "Five great intellectual professions", he says at p 31, "relating to daily necessities of life, have hitherto existed - three exist necessarily, in every civilised nation: The Soldier's profession is to *defend* it. The Pastor's is to teach it. The Physician's to *keep it in health*. The Lawyer's to *enforce justice* in it. The Merchant's to *provide* for it. And the duty of all these men", he says, "is on due occasion, to *die* for it. "On due occasion", namely: The Soldier, rather than leave his post in battle. The Physician, rather than leave his post in plague. The Pastor, rather than teach Falsehood. The Lawyer, rather than countenance Injustice". And then he asks as to "the Merchant - what is *his* 'due occasion' of death?" and the rest of his book is occupied with the case of the merchant. "It is the main question", he says, "for the merchant, as for all of us. For, truly, the man who does not know when to die, does not know how to live".

I might have contented myself with citing simply Mr Ruskin's statement that the lawyer's profession is to enforce justice, but I have quoted the passage in full because it contains the further emphatic proposition that it is the duty of the lawyer to die rather than countenance injustice, to which I shall return.

Some may think that Mr Ruskin was a man of genius, a moralist of deep insight, and a great master of language, but a man who lived too remote from the world of business for his ideas upon such a subject to be of any practical value. Some lawyers in England appear to have thought so at the time when the above passages were first published. "I hear", says Mr Ruskin in a note at p 78, "that several of our lawyers have been greatly amused by the statement in the first of these papers that a lawyer's function was to do justice. I did not intend it for a jest".

The lawyers who are said to have been amused would not, however, probably have denied that, theoretically at all events, the *raison d'être* of the profession is that it should assist in the administration of justice; though their experience of the practical working of things may have caused them to smile when Mr Ruskin put the matter so high as to assert that a lawyer must die rather than countenance injustice. The amusement of the lawyers referred to is to be accounted for, in my opinion, partly by the fact that they did not know themselves. The general proposition of Mr Ruskin, that the function of the profession is the administration of justice, has, I think, always been and is now admitted, or rather asserted, by the profession generally, and by some in terms as strong and high as those of Mr Ruskin himself.

The first title of the first book of the Digest of Justinian has the heading "De Justitia et Jure" - "Concerning Justice and the Law". And the first sentences of the Digest, taken from a work of Ulpian, may be translated as follows: "Before we give our attention to the law (jus) itself, we ought first to inquire whence it derives its name of *"jus"*. It is called so from 'justice'; for, as Celsus elegantly defines it, the law (*jus*) is the art of what is right and just, or

right and equitable (*boni et aequi*). For which reason we [ie the lawyers] may rightly be called priests: for we are given over to the service of Justice (*justitiam namque colimus*), and the knowledge which we profess is that of the right and equitable (*boni et aequi*)."

The above passage from the Digest is referred to in Pollock and Maitland's History of English Law (i 187[1]). Speaking of Bracton, the learned authors say that, though "the main matter of his treatise is genuine English law laboriously collected out of the plea rolls of the King's Court", his debt to the Roman lawyers is inestimably great - that but for them "we should have missed not only the splendid plan, the orderly arrangement, the keen dilemmas, but also the sacerdotal spirit of the work". They add in a note, citing Bracton's almost literal repetition of Ulpian's words, "This old phrase is no cant in Bracton's mouth; he feels that he is a priest of the law, a priest for ever after the order of Ulpian". And the text would evidently have justified them in substituting "Justice" for "the law", and in saying that Bracton felt himself to be "a priest of Justice and a minister of her sacred laws".

But that, it will perhaps be said, is an old-fashioned way of thinking and speaking about things: men neither say nor think such things in these times. An address was delivered in the year 1900 in this city of Wellington by the Chief Justice of the Colony at the opening meeting of the Wellington Law Students' Association. In concluding that address His Honour used these words:

> His hearers must never forget that their profession was a noble and an honourable one, and that it could only remain noble and honourable when those in its ranks had high ideals and high aims, and always remembered that the object of the profession is the dispensing of justice.

One often hears a barrister or solicitor spoken of as "an officer of the Court". This is not a mere fancy on the part of those who use the phrase. If you look at our Law Practitioners' Act, 1882, you will find that barristers are spoken of as "barristers of the Court" and solicitors as "solicitors of the Court", "the Court" being interepreted to mean "the Supreme Court of New Zealand", and the Court has a summary jurisdiction over them as barristers and solicitors of the Court. They are, as a matter of law, officers of the Supreme Court of New Zealand.

And what is the Supreme Court of New Zealand? As at present constituted it exists under and derives its authority from The Supreme Court Act, 1882, section 4 of which is in the following words:

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1 2 ed, p 208.

> There shall continue to be in and for the Colony of New Zealand a High Court of Justice, called as heretofore the Supreme Court, which shall be a Court of record for the administration of justice throughout the Colony.

So that it is clear that in the eye of the law also the function of the profession is the administration of justice, its members being officers of a High Court of Justice, charged with the administration of justice throughout the Colony.

I think, therefore, that we may take it as established both as a matter of opinion, professional as well as lay, and as a matter of law, that the function of the legal profession ought to be and is the administration of justice.

It will probably, however, be objected to this that the phrase "the administration of justice" means really nothing more than "the administration of the law", and that the law is by no means synonymous with justice; that is the law with which the Courts and the profession are concerned, and that with justice they have no concern whatever. "It may be law", the public sometimes say, "but it is not justice". And the lawyers have often to agree with the public.

And it is of course, quite certain that, with one slight exception to which I will afterwards refer, it is justice according to law only which the Courts have any power of enforcing, and in the enforcement of which the profession can take any part. Although by section 4 of the Supreme Court Act, 1882, the Supreme Court is constituted a High Court of Justice for the administration of justice throughout the Colony, the jurisdiction which is given to it (by section 16 of the same Act) is all "jurisdiction which may be necessary to administer the laws of the Colony".

The Supreme Court Act, however, assumes that in administering the laws of the Colony the Court will, as far as practicable, be administering justice. The operation of the law is intended to be the working out of justice. The object of the constitution of the Court, and of the institution of the legal profession, is "the dispensing of justice".

What then is this "justice" which the law admittedly only imperfectly realizes, but which it is intended as far as possible to give effect to?

Of the modern works with which I am acquainted, the two which give the fullest discussion of the idea of justice are the volume of Mr Herbert Spencer's Principles of Ethics, published under the title of "Justice", and Professor Sidgwick's Methods of Ethics. Mr Spencer resolves Justice into an equality of freedom. Professor Sidgwick agrees that "the prominent element in justice as ordinarily conceived is a kind of equality: that is, impartiality in the observance or enforcement of certain general rules allotting good or evil to individuals". He finds a difficulty, however, in arriving at a conclusion as to what kind of equality it is that is really aimed at by the sense of justice as ordinarily felt, and he

appears to doubt whether justice as ordinarily conceived can be wholly resolved into any kind of equality. He criticises, amongst other views, the view that justice may be resolved, simply, into equality of freedom. "Ideal justice seems", he says, "to demand that other things should be divided equally besides freedom, or at least justly (if justice be not identical with equality, but merely exclusive of arbitrary inequality)". This difference, or apparent difference, of opinion between Mr Spencer and Professor Sidgwick seems due to the fact that the term Justice has at least two distinct senses in common modern usage. The fundamental proposition of Mr Spencer's book, the ground, really, upon which his law of equal freedom is made to rest, is stated by him (at p 115) in the following terms: "Each individual ought", he says, "to receive the benefits and the evils of his own nature and consequent conduct: neither being prevented from having whatever good his actions normally bring to him, nor allowed to shoulder off on to other persons whatever ill is brought to him by his actions". Now there is one sense of the term Justice, as ordinarily understood, to which, I think, that statement completely answers. Justice, in a strict sense of the term, strict Justice, as I will venture to call it, would, I think, be generally considered to have been completely done, if the principle of that statement had in any way been entirely realized. Justice, however, in another sense of the term, what I will venture to call Ideal Justice (using an expression of Professor Sidgwick's, though not in the sense in which he uses it), would not, I think, be generally considered to have been satisfied with even such a result. Ideal Justice aims, I think, at nothing less than an equality of good. It is not content, I assume, that men should be born into the world with such unequal "natures" leading to such unequal "consequent conduct" and to such unequal measures of good and evil. It aims, therefore, at an equality of development: not necessarily a uniformity, but, on the whole, an equality, of development: physical, mental, moral, and spiritual: which is itself the main part of an equality of good, and which, when added to something like an equality of external conditions, would make up a complete equality of good. It will however, I think, be generally agreed that it would be a true equality of freedom, a true equality of external conditions, a system under which each individual would truly be allowed to receive the benefits and truly be made to suffer the evils of his own actual nature and consequent conduct, that would tend most to the bringing about of an equality of development, that would tend most, therefore, to the establishment of a true equality of good. If this is so, then it is through the enforcement of strict justice alone that ideal justice can be ultimately established.

It is with the enforcement of strict justice that the law, therefore, immediately concerns itself, the realisation of ideal justice being, however, its ultimate aim.

If any one could devise a system of distribution, in regard to which he could establish to the satisfaction of all that it would in practice carry into effect the principle embodied in Mr Spencer's proposition, he would be hailed on all hands as having indeed discovered the principles of the perfect State, the State in which justice would indeed be realized. No one has, however, as yet succeeded in doing so.

Take, for instance, the ideas of Mr Spencer himself upon the subject. From the proposition already stated he deduces first his law of equal freedom. So far all will probably follow him. If he can establish and maintain a true equality of freedom, he will have done, certainly, all that is required. But how does he propose to do so? By enforcing simply the following universal rights (I give them by the names by which he calls them): the right, namely, to physical integrity, the rights to free motion and locomotion, the rights to the uses of natural media, the right of property, the right of incorporeal property (patent rights and copyright), the rights of gift and bequest, the rights of free exchange and free contract, the right of free industry, the rights of free belief and worship, and the rights of free speech and publication. This state of things has, of course, never even approximately been realized, even when the doctrines of free contract and free industry were in their fullest vogue, for amongst the rights to the uses of the natural media, which should belong equally to every individual, Mr Spencer includes the right to the use of the land. His principles could not, therefore, be even approximately applied without, as a first condition, a complete solution of the land question. But, further, even if it be assumed that the land question has been first solved in accordance with his own principles, by securing to each individual, that is to say, an equal right to the use of it, or an equal share in its total unimproved value, it seems to be the opinion of other competent authorities, who have probably given more special attention to this particular point than Mr Spencer, that the mere enforcement of contract could not establish, or at the least could not maintain, a distribution of the joint products of the industry of the community in anything like proportion to the services contributed. If so, then the fundamental principle of strict Justice would be by no means realized. This appears to be the opinion of Professor Sidgwick. He discusses the reasons which, to use his own language, "have led some political thinkers to hold that Justice requires an entirely different mode of distributing payment for services from that at present effected by free competition, and that all labourers ought to be paid according to the intrinsic value of their labour as estimated by enlightened and competent judges". "And certainly", he goes on to say, "this appears a nearer approximation to what we conceive as Divine Justice than the present state of society affords". He finds, however, grave difficulties about this method also. I do not say, therefore, that it has his full authority. It is a method certainly very different from that advocated by Mr Spencer, but contended for by some thinkers perhaps equally competent to pronounce upon the subject.

It would seem, then, since moralists are not agreed, that the lawyer, as such, is justified in assuming that to be just which the law treats as being so.

When he finds, therefore, that in the Common Law men are generally bound by their contracts freely and deliberately entered into, he must assume (so far as that rule is accepted in his jurisdiction) that on the whole justice will be done by the enforcement of such contracts. When, on the other hand, he finds that in New Zealand, in respect of a large proportion of business transactions, the law is that men shall not be individually free to

contract, but that their services shall be paid for (to use the expression of Professor Sidgwick) "according to its intrinisic value ... as estimated by enlightened and competent judges", namely, by an Arbitration Court, he must assume that, in that department of business at all events, justice will be done by the enforcement of the rates of pay which have been fixed by that Arbitration Court.

"What then?" it may be said. "It is with the law only, after all, that the lawyer is in any way concerned. His function may be the administration of justice, but it is justice according to law only, after all, with which he need in any way concern himself". In a sense - yes, but in another sense - no. He must accept the view of the law in all cases as to which it has been deliberately and unmistakably expressed, in all cases which the law has clearly had in contemplation and the mode of dealing with which it has unmistakably prescribed. But cases must inevitably arise which the law has not had in contemplation, for which it has made no adequate provision, and in regard to which the application of the rules which it has in fact prescribed will work injustice. "Lex", said Lord Bacon, "non sufficit casibus; sed ad ea quae plerumque accidunt aptatur: sapientissima autem res tempus (ut ab antiquis dictum est), et novorum casuum quotidie auctor et inventor". (De Augmentis Scientiarum, Aph 32.) "The law cannot meet all cases; it is framed to suit those things which for the most part happen; but Time (as has been said by the ancients) is the most fertile of things, every day the author and inventor of new circumstances". It is in the nature of anything which can be called a *system* of law that cases should sometimes arise which it will fail to mee, that cases should perhaps often arise which it cannot wholly meet. Vast and complex as any system of law may be, the concrete world of fact, to which it has to be applied, is vaster and more complex still. The very fact that it is a *system* framed and cognisable by man implies that, so far as it has been really framed at all, it is of a *definite*, in other words of a *finite*, nature. The world of fact, on the other hand, is *infinite*. It has often been suggested that, in view of this necessary defect in any definite system of law, Courts of Justice ought not to be bound by anything in the way of hard and fast rules, that the commission of every judge should be to deal with every case in such manner as he shall find "to stand with equity and good conscience". Such a power is, as is well known, given to a limited extent to magistrates in this country (in cases, that is to say, in which the amount involved does not exceed £20), the same power having long been in the hands of Courts for the recovery of small debts in England. The judges of the superior courts both in England and in the Colonies have also what is called "a discretion" in regard to many matters. The recent tendency has been to extend the principle of judicial discretion, at all events in matters of procedure. It is possible that the principle may receive further application in the future. But there is a danger, or there has been always felt to be a danger, attending it. "The discretion of a Judge", said Lord Camden, "is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper, and passion. In the best, it is often-times caprice; in the worst it is every crime, folly, and passion to which human nature is liable".

The same idea is expressed, in a somewhat less severe form, in the celebrated passage in Selden's Table Talk, comparing the law with equity as it was in his day:

> Equity is a roguish thing. For law we have a measure - know what to trust to. Equity is according to the conscience of him that is Chancellor; and as that is larger or narrower, so is Equity. It is all one as if they should make the standard for the measure that we call a foot, a Chancellor's foot. What an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot. It is the same thing in the Chancellor's conscience.

There is a passage in Pollock and Maitland's History of English Law (vol ii p 561[2]), which has some reference to this matter. After discussing the old "forms of action", as they were called and the great variety, complexity, and rigidity of the rules of procedure specially applicable to each in medieval times,

> "Let us not", the learned authors say, "be impatient with our forefathers. "Discretion" is not of necessity "the law of tyrants" [referring of course to Lord Camden's dictum upon the subject], and yet we may say with the great Romanist of our own day that formalism is the twin-born sister of liberty. As time goes on there is always a larger room for discretion in the law of procedure; but discretionary powers can only be safely entrusted to judges whose impartiality is above suspicion and whose every act is exposed to public and professional criticism. One of the best qualities of our medieval law was that in theory it left little or nothing, at all events within the sphere of procedure, to the discretion of the justices. They themselves desired that this should be so and took care that it was or seemed to be so. They would be responsible for nothing beyond an application of iron rules."

The last two sentences of this passage point to another aspect of the matter. The possession of an overriding power of deciding in any case according to what they should consider to be "equity and good conscience" would throw a very great responsibility upon the judges, which most, it is certain, would be very loath to assume. In small matters, within the limits within which such a power is in the hands of a magistrate in this Colony, the corresponding responsibility is of course comparatively small, though the case is sometimes important enough to the parties concerned. But even in such cases the power, although fully possessed, has been very sparingly exercised. The number of cases which have been decided by magistrates or justices expressly upon grounds of "equity and good conscience" is exceedingly small when compared with the vast number which have been disposed of according to law or according to the view of the law taken by the magistrate or by the justices. It is probable that this is partly due to a disinclination to assume the responsibility of exercising such a power. It is, however, mainly due to this, that in the vast majority of

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2 2 ed, p 563.

cases the law does do substantial justice, that in the vast majority of cases a plain man, having all the circumstances before him, cannot, at all events, see his way to do any better justice than by applying the law to the best of his ability. It may be argued from this that no great harm could come of extending the power; that it might be given to all the Courts and without any limit as to the amount involved; that, still, the vast majority of cases would be decided according to law, but that in exceptional cases, where the law itself could not do justice, the power would be exercised, and that failures of justice (or those, at all events, arising merely from defect of the law) would thus be prevented. I can only say that the opinions which I have just cited, and the history of attempts, in the direction suggested, in other countries, seem to point to a necessity for the very greatest caution in such a matter. The public often complain of the uncertainty of the law, as it is.

However that may be, it is the law, simply, in the *enforcement* of which the lawyer can, at the present time, take any part. In the vast majority of cases a true application of the law to a true view of the facts of the case will do substantial justice. Though it is the rules of law which are in terms applicable which alone can be *enforced*, it is justice at which the law aims, it is justice which it is the function of the lawyer to *bring about*, if in any way he can.

I return, therefore, to the statement that the function of the lawyer, the service which he is as far as possible to render to the public, is the bringing about of justice.

Some perhaps will be inclined to say that in theory the lawyer renders service to the public as an officer of a High Court of Justice, an official, as it were, of the great Public Department of Justice, but that, in practice, he is a mere agent of his client, in consideration of a fee received or to be received from his client, whose interest alone he is concerned to consider, and does in any way consider, unless indeed it be his own personal interest only. Now it is perfectly true that the lawyer is, in practice, the agent of his own client. This, however, in no way conflicts with the statement that his function is the bringing about of justice, for, if he is in any way what he ought to be, then it is in the interests of justice that the client should have him for an agent. And it is true that it is the interest of his client which it must always be his most immediate concern to secure and protect. This also, however, is in general in the interests of justice. But it is *not* true that it is the interest of his client along which he is in any way concerned to consider. At no stage of any transaction, in no department of his professional activity, can his true duty to his client be in conflict with his paramount function, from which indeed his duty to his client is derived and upon which it depends, the function namely of contributing, so far as in him lies, to the bringing about of justice. He becomes the agent of his client, he concerns himself most immediately with the interest of his client, because it is, in general, in the interests of justice that he should do so; but he will endeavour always, so far as in him lies, to bring about in every transaction that which is just and reasonable in the interests of all concerned, and in no department of his activity will he ever lose sight of everything but the interest of his client;

in every department there are limits set, in the interest of public justice, to what he may do in the interest of his client, limits which, if he has any true sense of the position which he occupies, he will consider it imperative that he should observe.

The idea that, whatever the theory of the matter may be, the practice of the profession of the law, and more especially of the profession of an advocate, is necessarily incompatible with habitual conformity to the highest ethical standard, is a very prevalent one, and is not confined to the ignorant. In a work published during the year 1899 by Mr Lecky - The Map of Life - the subject of the ethics of advocacy is to some extent dealt with. The portion of the work relating to the matter is headed "Moral Compromise in the Law" - an ugly-sounding phrase. I desire to quote the following passage from pp 101 and 102:

> In the interests of the proper administration of justice it is of the utmost importance that every cause, however defective, and every criminal, however bad, should be fully defended, and it is therefore indispensable that there should be a class of men entrusted with this duty. It is the business of the judge and of the jury to decide on the merits of the case, but in order that they should discharge this function it is necessary that the arguments on both sides should be laid before them in the strongest form. The clear interest of society requires this, and a standard of professional honour and etiquette is formed for the purpose of regulating the action of the advocate. Misstatements of fact or of law; misquotations of documents; strong expressions of personal opinion, and some other devices by which verdicts may be won are condemned; there are cases which an honourable lawyer will not adopt, and there are rare cases in which in the course of a trial he will find it his duty to throw up his brief. But necessary and honourable as the profession may be, there are sides of it which are far from being in accordance with an austere code of ideal morals. It is idle to suppose that a master of the art of advocacy will merely confine himself to a calm dispassionate statement of the facts and arguments of his side. He will inevitably use all his powers of rhetoric and persuasion to make the cause for which he holds a brief appear true, though he knows it to be false; he will affect a warmth which he does not feel, and a conviction which he does not hold; he will skilfully avail himself of any mistake or omission of his opponent; of any technical rule that can exclude damaging evidence;[3] of all the resources that legal subtlety and severe cross-examination[4] can furnish to confuse dangerous issues, to obscure or minimise inconvenient facts, to discredit hositle witnesses. He will appeal to every prejudice that can help his cause; he will for the time so completely identify himself with it that he will make its success his supreme and all-absorbing object, and he will hardly fail to feel some thrill or triumph if, by the force of ingenious and eloquent pleading, he has saved the guilty from his punishment, or

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3 If the rule appealed to is law, it is not only the right but the duty of the lawyer to call attention to it. All rules are called "technical" by those against whom they operate - ED.

4 How else are you to find out whether a hostile witness is lying or not? - ED.

snatched a verdict in defiance of evidence. It is not surprising that a profession which inevitably leads to such things should have exicted scruples among many good men."[5]

The description is unfair in two respects: first, because it confuses the conduct of a civil cause with the defence of a prisoner on trial for his liberty or life, in regard to which the degrees of latitude allowed as right are very different; and secondly, because it makes no distinction between the conduct of one civil cause and another, according to the merits or the particular circumstances of each case. The greatest masters of the art of advocacy, in my experience, are not men who will use all their powers in every cause. They are men, rather, who have a sense of what is fitting upon each occasion, and who act accordingly.

I have cited this passage, however, chiefly to bring out a single point. It is in the interests of the proper administration of justice, says Mr Lecky, it is indispensable, that there should be a class of professional advocates; but, necessary and honourable as the profession may be, there are sides of it which are far from being in accordance with an austere code of ideal morals; the practice of it leads inevitably to things which are inconsistent with such a code. And in another place (at pp 111, 112) he says that "at best there must be many things in [the profession] from which a very sensitive conscience would recoil". This is, in my opinion, a false and a pernicious doctrine.

It is false, because upon no rational theory of morals can it be theoretically true, and because, further, it is not in accordance with the facts of the practice of the profession as actually carried on. It is pernicious because nothing is more calculated to bring about that very state of things which it falsely represents as existing.

"The clear interest of society requires" something "from which a very sensitive conscience" must nevertheless "recoil". It is a position which it is, I think, surprising to find taken up at the present day by a person of Mr Lecky's standing.

The language employed by Mr Lecky is, I think, worthy of a little further consideration. "Necessary and honourable", he says, "as the profession may be, there are sides of it which are far from being in accordance with an austere code of ideal morals", "at best there must be many things in [it] from which a very sensitive conscience would recoil". The two expressions are apparently used as synonymous. That which "a very sensitive conscience" must require is that which is "in accordance with an austere code of ideal morals". Now the comment which I would wish to make upon this is the following. It is clear, in the first place, that no *code*, whether of *ideal* or of any other kind of morals, can entirely answer to the

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5 Exactly the same may be said of the minister of religion committed to preach particular doctrines, and of the politician committed to the platform of his party. Mr Lecky's strictures appear to me quite unworthy of his abilities: not to say that the matter was dealt with once for all by Dr Johnson in a passage too familiar for citation. See L Q R xv 263 - ED.

requirements of the conscience. Just as, for the reasons already mentioned, no *system* of law can, from its very nature, be wholly adequate to the doing of complete justice, so no *code* of morals can, from its very nature, be wholly adequate to the determination under all circumstances of that which is right. A code of morals can, from its very nature, be wholly adequate to the determination under all circumstances of that which is right. A code of morals is, however, a useful, and in fact indispensable, aid to the right direction of conduct in practical life, just as a system of law is a useful, and in fact indispensable, aid to the practical administration of justice. But the measure of the value of a code of morals, just as the measure of the value of a system of law, lies in the degree to which it is adapted, though it cannot be wholly adapted, to the requirements of every department of life as it is, in the extent to which it makes provision, though it cannot make full provision, for every phase of the actual. The code, however in entire conformity with which the profession of an advocate cannot, in Mr Lecky's opinion, be carried on, is described by him as "an austere code of *ideal* morals". This expression in itself indicates what is in my opinion otherwise abundantly clear. The code of morals which Mr Lecky has in view is one, not framed as far as possible to meet every phase of the actual, but applicable only in some ideal, in the sense of non-existing, condition of things. Moreover it is an *austere* code. *Austere* - severe, harsh, rigid, stern, are the meanings given in Webster. "Rigid" is evidently the sense applicable in the present instance. A rigid code, not framed to meet, as far as possible, the requirements of the actual, conceived indeed as authoritative without reference to its adaption to the actual, and in fact grossly inadequate to meet its requirements, such is the code which Mr Lecky has in view when he uses the language which I have quoted. In exact accordance with such a code, it may be at once admitted, the profession of an advocate cannot by any possibility be carried on. It does not seem to have struck Mr Lecky that further approximation to the moral ideal cannot come of a fixed set of rules, but only of the moral instinct of right-minded and rightly informed men called on to act in new circumstances of difficulty. It is the code which is defective, not the conduct which is wrong. That, I think, is the philosophical answer to the position taken up by Mr Lecky.

Mr Lecky may, however, be more shortly, and perhaps more forcibly, answered in a way which will recommend itself more immediately to common sense. If the profession of an advocate is a necessary one, as it admittedly is, then it is right that men should practise it; and, if it is right that men should practise it, nothing is more certain than that there must be a right way or ways in which it can and ought to be practised. And so also in regard to every other branch of the profession - or indeed to any other profession or calling. Fulfilling as it does a necessary function, the question can never be whether there is any way in which it can be rightly carried on, the question always can only be what is that right way, which certainly exists, and in which it ought to be carried on. Neither will it serve to say that in practice there must inevitably be a deflection from that which is right. In one sense it is true, but it is equally true of all human activity to say that human nature and faculties are not

infallible. It may be difficult often to know what it is that is right - difficult often in the press of business requiring an immediate decision. Errors of judgment must certainly be at times committed. But to say of any necessary or useful profession or occupation of any form, that is to say, of human activity, I do not care how high, I do not care how humble, the end of which is good, that the following of it must inevitably either pervert the moral sense, or lead to the doing of one single act or the speaking of one single word contrary to the bidding of the moral sense, is in my opinion to preach a false and a pernicious doctrine.

There is a right way of practising the law. The question only can be - what is that right way? The general answer evidently is, that it is that way which is most calculated to promote the ends of justice. It is the particular application of this general principle to the various situations in which a lawyer is in practice called upon to act, with which is concerned that branch of the Science of Applied Ethics known as the Ethics of the Legal Profession.

Were any one to set himself to work to write anything in the nature of a scientific treatise upon the Ethics of the Legal Profession, his main business would consist in the collection, ascertainment, and arrangement of the established rules and well-recognised methods, according to which it has been and is being carried on by those who have in the past practised it and are in the present practising it according to its best traditions. He might be able to formulate and define, perhaps, in some directions, in which there may at the present be a general sense only of what it is that is fitting. He might be able to make suggestions here and there, which would, of course, be open to criticism and discussion. But in the main his business would consist in the ascertainment and recording of well-established rules and traditions. Those rules and traditions represent, in fact, the accumulated experience of the profession as to what are the methods of practising it, in all its branches, which are, in fact, most calculated to promote the end for which the profession is established, the dispensing of justice.

Let no one therefore suppose that the proposition which I have been maintaining in this paper has about it, if properly understood, anything which can be considered to be in the least degree Quixotic or visionary. The most fruitful source of misunderstanding in connection with the whole subject lies, I think, in the fact (for I think it is a fact) that people are apt very often to forget that it is not his own business which the lawyer has to transact, but the business of his client. This is a very obvious fact, no doubt, but people are apt to forget it. It is the client's interest which is always at stake, the client's rights which are always involved. If in any case the law, owing to its necessary imperfection, gives the client rights which are more than in justice he is entitled to, the full enforcement of which must therefore work injustice, it is in the justness of the client only that the proper remedy can lie. The lawyer cannot, nor has he any right to, make his own conscience the conscience of his client. It is with the client that the decision must rest, and it is the instructions of the client

which the lawyer has, in the last resort, to carry out, if he is to act at all. It is always open to him, if he chooses, to refuse to make himself the instrument of what he thinks injustice. Nothing, however, is more certain than that the laying down of such a rule, of a rule, that is to say, that he is in all cases to make his own opinion of what is just the test of whether he will act or not, so far from tending to promote the ends of justice, would have an entirely contrary effect. It is in the interests of justice that the profession should as far as possible consist of just men. It is in the interests of justice also that the business to be transacted should as far as possible be transacted by just members of the profession. The just member of the profession is, therefore, not in general to drive away his client. He is not to seek in general to impose upon his client his own views of right and wrong, whatever he may do in the way of diplomatic counsel or suggestion. He is not in general to obtrude himself upon his client, when he clearly sees that no good can result from his so doing. He is in general to keep his client, if he can, and in the doing of the business of his client, he is in all ways which are reasonable and practicable to do what it may be really open to him to do in the direction of justice. I do not say that he must always keep his client. There are many things, certainly, which the lawyer may not do for any client. What these things are, up to what point the lawyer is to go, beyond what point he may not go, it is the business of the ethics of the profession to define, and it is with these things that the rules and traditions of the profession have in fact concerned themselves the practice of the profession, in those ways, in all respects, and at all times, which are most calculated to promote the ends of justice, so far from being an impossible ideal, is in fact no more than the maintenance of what has, broadly speaking, been already realized. It is the practice of the profession in accordance with the established rules, the recognized traditions, of the profession as it exists today. These rules may in the future be improved, those traditions may no doubt be added to: there is nothing human that is perfect; they represent, however, it is certain, the best answer which has yet been given to the question in what way the profession in which they have been developed may best promote the end for which it has in fact existed.

If what I have been saying is true (and there can, I think, be no real question that it is), then it is a matter, certainly, of very great importance that these rules and traditions of the profession to which I have been referring should be collected and recorded, that they should, if possible, be further formulated. They ought, in my opinion, to be taught in every Law School - not left to be gathered merely in the course of practice.

But just as in the past no rules as to specific matters, no particular traditions, could have wholly served the purpose for which they were intended without the aid of that general tradition (which has in fact existed and in which all other rules and all other traditions have in fact had their origin) - the general tradition, namely, that the function of the profession is the promotion of justice, so, in the future, no code which could be drawn up, however complete, could wholly serve its purpose, unless it began and ended with that great rule from which all others must in fact have been derived, the rule, namely, that it is the duty

of the lawyer under all circumstances, and at all times, in all ways in which he practically can, to so act that justice may, as far as possible, result.

If the lawyer does that, if he obeys in all things the rules of his profession, those rules which experience has approved as best calculated to promote the ends of justice, if he does all that he reasonably and practically can to bring about the ends of justice, then, although he may be concerned with much injustice, he "countenances" none. If he does less, however, he must in truth be said to "countenance injustice". It is in this sense, I think, that Mr Ruskin's proposition must be understood. Understood in this sense, it is true, certainly, that the lawyer must die "rather than countenance injustice". And I have no hesitation in saying that of most lawyers it can in truth be said that they are prepared to die and do die daily, "rather than countenance injustice".

One point more in conclusion. At the outset of this paper I referred to an opinion which is sometimes expressed, and sometimes, I believe, really entertained, that the lawyers might, with advantage, be altogether dispensed with. There is a modified form of this view which I wish now, in conclusion, to speak of. It is sometimes thought that though the lawyers are undoubtedly necessary, they are necessary only because of the wickedness of the public, that, as the law was, so have the lawyers also been added because of transgressions - the word "transgression" being used in the sense of "wilful transgression", in whatever sense it may have been used in the original. Even in this modified form, however, the opinion can, I think, be demonstrated to be erroneous. Dr Holland, in his Elements of Jurisprudence, gives a number of definitions of "Law as a Rule of Action" selected from the works of the greatest writers upon the subject. Amongst these is a definition by the great German jurist, Savigny. It is practically identical with that previously given by Kant (and also quoted by Dr Holland), and with that also which was afterwards independently arrived at by Mr Herbert Spencer. A free, but I think a correct, translation of this, using however in one respect the language rather of Kant than of Savigny, would be as follows: "The Law is the sum-total of the Rules by which are determined the limits of the sphere within which each individual can freely and securely live and move" - without, that is to say, invading the like sphere of, or impinging upon, any other individual. Now the limits of the sphere of each require to be determined, not solely, nor perhaps principally, because of any tendency of most to wilfully transgress them, but largely at all events, because, unless they were determined, and beforehand known, men could not freely and securely move at all. With the best of wills collisions must occur. Men must not only will to keep the law, but they most also know the law they will to keep. They must not only will to do justice, but they must also know how to do it. It is not the wickedness of the public only, but its ignorance also, which is the *raison d'être* of the lawyer. The profession of the law will therefore continue until unto perfect goodness there shall have been added also perfect knowledge, until, that is today, the end of all things shall have been accomplished. Not until then will ideal justice

have been completely realized. Not until then will the service which the lawyer owes to the public have been fully rendered.