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ATTORNEYS AND COUNSELLORS

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When the lawyers of the American Colonies chose this title for themselves, they pre-empted the entire legal domain of the country with all its rights, privileges, business and emoluments. With full knowledge of the professional distinctions in the mother country, and especially of the separate powers, functions and privileges of the two great classes, Attorneys or Solicitors, and Barristers or Counsellors, they seem to have assumed the title, Attorneys and Counsellors, with genuine American prejudice against British classes in all vocations, and with democratic resolution to abolish such distinctions in their own calling. Succeeding generations of American lawyers, as tenants in common, ignoring English precedents, defying common law rules, refusing division apportionment or specialization, have maintained this titular union, each and every one claiming and having an interest in the whole territory and the right to plant and sow and reap and mow when and where he pleases.

This is both the theory and the condition; and all previous efforts to change either have proven fruitless. Bills offered in legislatures to classify legal practice and divide our profession, as in England, into two great classes, barristers and solicitors, corresponding with counsellors and attorneys, have uniformly been rejected; and generally the courts have declined to take any step toward promoting this classification. We are all admitted to the same bar, take the same oath and in most states have the same right to practice in any of the courts from the beginning; and only a few years waiting is required before obtaining admission to the highest tribunal of the land. *Ab initio* we are all attorneys and all counsellors, whatever that may signify; and that title we hold to the end, and as lawyers can gain no higher. It means everything, and nothing except—lawyers. We vary it slightly sometimes, and call ourselves "Attorneys and Solicitors;" but we mean nothing different by that term than that we ar lawyers, and can and will go anywhere or do anything befitting "Attorneys and Counsellors." Just where or what that may be is not defined, and one cannot surely know, unless he offends the sixth sense of some sensitive body and draws forth from court or from general counsel a warning *Cave!*

All sorts of rhetorical phrases are employed by orators and judges to describe the ideal lawyer, and formulate professional ethics, with the laudable purpose of elevating professional standards and regulating professional conduct, which agreeably excite professional sentiment and receive professional homologation, in the Scottish sense; and yet they prescribe rules and outline conduct as foreign to the American Attorney and Counsellor, as the precepts of the Pharisees or the formulary of the Vestal Virgins.

One expresses regret that the American lawyer does not occupy "that strictly professional relation to the case which the English barrister enjoys;" and another "cannot agree that the practice of law has become a business instead of a profession;" and still another thinks that contingent fees are the Iliad of all our woes, and those who take them degrade the name of lawyer. All this is a beautiful vision, transcendentally Utopian. But if we apply such impossible standards to the "Attorneys and Counsellors" what will become of the American lawyers?

This great army of American lawyers—more than 100,000 all Attorneys and Counsellors—are bound by the common tie of their oath of office to support the Federal Constitution, and the constitutions of their respective states; and also "truly and honestly to demean themselves in the practice of law according to the best of their knowledge, skill and ability."

The words may vary in the various states;[1] but the substance of the obligation taken is the same *ubique, semper et ab omnibus.*

The gist of the oath is *fidelity*, the indispensable and crowning virtue of the lawyer; he must be faithful to his client, to the court and to honor; this is the sum total of official duty—the Alpha and Omega of obligation. For breach of it in any part he is amenable to summary discipline by the courts, even to disbarment; and besides he is liable to prosecution or action, common law or statutory, for wrongs criminal or civil, to the state or any person natural or legal.

Most states have statutes against barratry; some against

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1. In Pennsylvania: "To behave himself in the office of Attorney according to the best of his learning and ability, and with all good fidelity to the Court or to the client. to use no falsehood nor delay any man's cause for lucre or malice."

In Tennessee: "Truly and honestly to demean himself in the practice of his profession to the best of his skill and abilities."

In England: "Truly and honestly demean himself in the practice of an Attorney according to the best of his knowledge and ability."

maintenance and champerty; and some against contracting for division of fees with persons not lawyers. Such statutes give lawful expression to the public policy of the state in regard to the conduct of lawyers, and, as law, demand the respectful obedience of all Attorneys and Counsellors.

But what shall we say of the practice and behavior of lawyers in those states which have no such statutes and policy? Is there any duty, legal or ethical, requiring obedience to the laws of other states, or conformity to the practice in other countries or to the rules and traditions of the English Inns of Court? Is the American Attorney and Counsellor at Law to be henceforth an English barrister shorn of contractual power and right to sue for his fees, a purely professional gentleman without faculty or privilege to transact legal business for his client or himself?

Such questions are not inopportune under present conditions and influences, and they are of vital importance to the general practitioners.

All agree that they are fairly honest and honorable, these Attorneys and Counsellors; and many believe that, take them as a whole throughout the entire country, these unbonded trustees of the business world, these repositories of the business and domestic secrets of all people, are not excelled by any class or vocation in probity, integrity, and uprightness. What proportion of these, do the professional puritans suppose, could truthfully say—during the past twelvemonth I have not received a contingent fee? One half? No. One fourth? No. Possibly one tenth if we count all those who are retained by salary to give their entire time and talent to the defense of corporations and these are unanimous in condemnation of contingent fees.

What proportion of American lawyers could say: I have been strictly professional during the past year, have kept myself clear of business? Even a smaller proportion than those who take no contingent fees—for, here the general counsel and their followers could not be counted.

It is notorious that the vast collection business of America, small and great, is all conducted by lawyers for contingent fees; we pay ourselves out of the sums collected; no collection, no fee.

And is not this *business* too! What shall we call the skilful piloting of the vast fleets of corporation craft over the shoals of law and finance but *business?* What other than "*business*" shall we call the soliciting of patent-rights and the searching and passing upon legal titles? None of these things pertain to the functions of the English barrister, whose fees are earned by the

conduct of cases in court; who confines himself almost exclusively to the duties of advocacy. His field is grand, but not varied; his function lofty and purely professional. Often he does not know his client—never sees him. He takes no fee from him, transacts no business for him, does not even prepare his case for trial. All this has been done by the solicitor, even to the pleadings before the barrister is called into the case, which often happens within a week or even a day before the trial, when the solicitor hands him simultaneously his fee and his brief, showing him the matter of contention and the witnesses to prove his case, with full account of the peculiarities and antecedents of each, to which is added oral elaboration.

A few counterparts of the English barrister, professional paragons, there may be at the American bar, possibly one in a hundred, not more. What shall we say, then, of the ninety and nine attorneys and counsellors who transact business, or take contingent fees—are they unworthy? In every city and county of the United States they may be found, the trusted confidants of the millions, handling their moneys without bond, buying and selling their land, administering their trusts, drawing their deeds and wills, counselling parents, and husbands and wives, closeting domestic skeletons, managing business, directing affairs, controlling corporations and conducting lawsuits, doing all uprightly, honorably, conscientiously; and yet they are transacting business, and taking contingent fees not only on collections but in actions for injuries to person, property and reputation—fees not unlawful nor unworthy, but earned by diligent, skilful, faithful service in open field and honorable contest.

Why contrast the American attorney and counsellor with the English barrister only, when a vast majority of English lawyers are not barristers, but solicitors conducting the affairs of their clients as do American lawyers in an honorable, lawful way, and deserving all praise for it and receiving their reward?

Why say that the vocation of the American lawyer is "not a business, but only a profession," in these teeming times, when three-fourths of the business of the country is transacted by corporations, creatures of the law, endowed, empowered and regulated by law, and of necessity guided by the hands of lawyers, most of whom rarely appear in court?

And why censure the majority of American attorneys and counsellors for taking fees, permitted by law, fairly and honestly earned and not derogatory to professional obligation or character?

This censure has never been directed against the commercial lawyers for charging commissions on their collections. And yet what is that but taking contingent fees? Is this exemption from blame awarded because they represent the creditor class or because the actions which they bring are *ex contractu?* Their functions surely belong to "business" rather than "profession;" and surely there is no logic or law for censuring one class of lawyers for plaintiff, those who bring actions to obtain compensation for breaches of social and legal duty, and passing without query, even, the class who sue for breaches of contract. The clients of the former are human beings, deserving well of the profession and of society, and as much in need of faithful, diligent, skilful service, as the the merchant, or broker, or short loan man, who has the chattel mortgage on the last piece of household and kitchen furniture, to secure his discounts. Why the distinction and the adverse classification?

This new ethical movement for the regulation of attorneys and counsellors, if not originated by the great insurance, railway, mining and manufacturing corporations, seems to have their undivided support. The presidents, directors and general counsel greatly admire those noble professional institutions of London, the Inns of Court, and unanimously appreciate and approve their stringent rules and venerable authority. They are true exponents of the common law, existing "time whereof the memory of man runneth not to the contrary," and their customs and usages speak to them with the authority of the ages. Their members not only may not take contingent fees—they may not invoke the aid of the courts to collect the fees they have earned, whether upon express or implied contracts; nor may they soil their hands with any of the details or drudgery of preparation of cases. They are "called to the bar," set apart and consecrated to the higher labors of the profession and may not pursue business methods; a legal aristocracy; professional earls; whose wives and daughters at all social functions may enjoy the sweet sense of precedence over their envious sisters, the wives and daughters of mere solicitors, and thereby may "maintain the establishment;" gentlemen of independent fortune rarely relying upon their fees for their support.

This justly distinguished body of gentlemen, the English bar, professional sacrosancts of a foreign land, are held up for imitation to the American attorneys and counsellors, and our decadence deeply deplored in the hall of the general counsel. We are actually doing the work of solicitors and attorneys, the

business of the profession. Just as in England, our clerks "introduce" clients—as also do other attorneys and solicitors—and may stipulate for part of the fees. Like the English solicitors, we may make advances for our clients and pay the expenses of his action; or, since lawing may be done on credit in America, we may become his surety for costs, to the end that he may obtain legal justice in the courts; and some, even, have shocked the delicate sense of honor of the General Counsel by receiving conditional fees from the victims of negligence, or fraud, or their helpless widows in the unequal contest for compensation which they must need wage with their powerful and conscienceless adversaries.

And how powerful and united these great corporate influences are,—witness the general distribution of annual railroad passes, for the past two decades, to the occupants of the bench, and, on occasions, the provision of the special car, well stocked and manned for a trip to Maine or Florida, to Minnesota or California; and recall the charming candor of President Milton Smith's explanation—that the railroad lawyers preferred to appear before judges thus equipped and obligated.

Witness, too, that when the mayor of a great city was grappling in legal contest with a great *quasi* public corporation for the protection of the municipality and its citizens against pecuniary rapine and plunder he could not find for counsellor among his fellow-citizens a single lawyer, worthy, able and willing to perform so noble a civil duty, lest, forsooth, he might transgress the rules of corporate courtesy, and offend his client, though it had no legal interest in the cause. And if a great and greatly plundered city cannot, either for money or civic loyalty, gain a lawyer to serve its righteous cause, what chance has one of the four thousand annual victims of railroad carelessness, or the ten thousand of mining or manufacturing negligence, to get the services of competent counsel unless he, or (generally) she, can offer some inducement to a lawyer equipped for such a Herculean task?

Well does the lawyer know the "influences" he must encounter in his long struggle, in which demurrers, continuances, rules for additional security, mistrials, caused by "ringers" in the jury-box, new trials granted *exgratia* or otherwise, and, more dangerous than all during this "law's delay" and the hunger and want following the death of the "bread-winner," the secret and constant plying of his client by skilled agents and hired kinsmen or friends with the offer of "something sure" instead of the

uncertainty of a verdict already so long deferred as to make the heart sick—and shall he wage this unequal contest for years maybe, without promise of reward for his fidelity, fortitude and constancy?

But for these virtues, and more, in her faithful, generous attorneys and counsellors, what hope for compensation for the unlawful killing of her husband could the widow Schlemmer have had for correcting the instructed non-suit of the State judges, who refused her the practical benefit of section 8 of the railway regulation act, and pronounced her husband guilty of contributory negligence in raising his head a few inches too high while making a murderous coupling of cars not lawfully equipped with an automatic coupler?[2] How could she, in her widowhood and want, have undergone the expense of the writ of error to a State Supreme Court to get legal justice in the Federal Supreme Court, unless some good kind friend, like her counsel, had advanced the money and skill for her benefit?

And yet, say the corporation moralists, you must not stipulate for a contingent fee, although it would be proper to await the result and then take or accept proper compensation! Indeed! Sit as judge in your own case, or "have a scrap" with your client over your fee at the end, when agreement beforehand might have avoided both horns of the ugly dilemma! Is there any good reason for leaving the solid ground of common sense and flying into the empyrean for solution of this practical problem of ethics?

The courts of civilization are substitutes for the bludgeon and torch of barbarism, and those suffering legal wrongs are invited to come to them for redress. Widows and orphans of killed employees must have lawyers to enable them to accept the invitation. The American attorney and counsellor is rarely a gentleman of fortune who can afford to carry on such litigation without fee or reward or the hope or promise thereof. If the statutes of champerty and maintenance forbid contingent fees and material assistance, he obeys them, and does the best he can for himself and client, and if successful, in some way gets *quantum meruit* at the end. But if the laws do not forbid it, and both himself and client prefer to this uncertainty a definite arrangement, a fixed *per centum* of the recovery, what principle of ethics can forbid the agreement, or deny to himself and client

2. *Schlemmer v. Railway Co.*, U. S. Sup. Ct. Advance Sheets, 15 April, 1907, p. 407.

in limine the right of contract enjoyed by all other citizens, subject to the same legal and equitable rules?

Some object to the lawyer's interest in the result! But we are taught by the doctors of the law that devotion to the client's interest is a lawyer's duty and a virtue. And can it be harmful that his *quantum* of interest is certain rather than uncertain? In nine cases out of ten, the lawyer has no recourse or hope for compensation except out of the recovery. Others affect to believe that such services to such parties should be rendered gratis! That is surely a chivalric view of the subject, and may control many; but most lawyers are in practice, as other men in other occupations, not for health nor for glory, but to earn an honest living for themselves and their families and to lay aside something for the rainy days.

In fine, the American attorney and counsellor lives in all the stress and storm of the strenuous life, at the very storm center of it. He is of flesh and blood like other men and must strive and cry for his good living. He must keep the law, of course, in its letter and its spirit, and must teach others so to do. But when he is so doing he has the same right of contract and of legal protection as other men. And the words of censure and depreciation uttered against him for claiming and exercising his right,—when not the fruit of cant and hypocrisy or the product of sordid interest and gain,—are readily referable to a sublimated spirit of ethereal ethics, ill fitting the practical business life of the American attorney and counsellor of the twentieth century.

Henry H. Ingersoll.