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THE PROPER LIMITS OF PROFESSIONAL RESPONSIBILITY AND DUTY.

THIS topic, always of considerable interest to the profession as well as the public, has, within the last few years, caused some public discussion in this country, which naturally tends to give it more or less of adventitious importance. We need not name any other instances than the defence of President Johnson by one distinguished counsellor and advocate, and the connection of another alike eminent, with the railway controversies in New York, to show what a singular amount of indefiniteness of views prevails in the public mind, as to the true limits of the duty and responsibility of counsel in regard to professional retainers. Some views were expressed in the public prints of the highest character in regard to the two instances alluded to, which indicated a crudeness of knowledge and a one-sidedness of view, in regard to these topics, that was truly amazing.

In the case of President Johnson, one of the leading journalists of the country announced opinions in regard to the discredit attaching to the agency of counsel in connection with the trial of President Johnson; which it would seem could only have proceeded from an entire misapprehension of all the just relations between counsel and client. And the long and acrimonious correspondence which was lately published between the other counsellor referred to and another not less prominent journalist, certainly proved, if it proved nothing else, that either the coun-

seller must have been a very bold and reckless man to avow such opinions as he did in regard to his own sense of professional duty, or else that his antagonist could not very clearly have understood its just limitations. There certainly must have been great assurance on one side or great misapprehension on the other, and possibly both.

We have no desire or design to discuss these cases, in particular, further than as they may afford incidental illustrations of the views we may have occasion to express; but the occurrence of any such divergence of opinion as unquestionably prevails in the minds of the best informed classes in our country, upon questions of such vital importance, in the successful progress of one of the most extensive and important interests of the country—the administration of public and private justice—will surely justify our devoting a brief portion of our space, to an attempt to present the just limits of right and duty between counsel and client, or attorney and client; for there can be no important difference in regard to the rights and duties of counsel and attorney with reference to the character of clients or their causes.

The first and fundamental inquiry, in this connection, will naturally be, whether there is any limitation which counsel can properly prescribe to themselves in regard to the character of their clients or of their causes. We do not, of course, here refer to that division of labor or business which will always obtain, as matter of taste or convenience or propriety among the different members of the profession, and indeed of all professions. It would be absurd to deny the right and propriety of any member of the profession to select such a department of service as he deemed most suitable to his talents or his tastes. But the inquiry is, whether in that particular chosen department of the profession, counsel has any just right absolutely to turn away any one who desires his professional aid, and is willing to submit a cause to his management and discretion? The question in this broad sense is probably not entirely without its difficulty, and without the qualification last stated—that the client is willing to submit his cause to the management and direction of his counsel—we should not hesitate to say, that counsel may be called upon to maintain causes in the interest and under the direction of clients, which no honorable member of the profession could fairly justify to himself. There are multitudes of causes

of such insignificance or of such vicious character, that they never should be brought into any court; and if already in court, should be taken out in the quietest and shortest way. And even beyond this, we cannot say that counsel are under any legal or moral duty of accepting all causes offered. Counsel are never in the position of common innkeepers, or common carriers, who are bound to serve all who come to the extent of their capacity, and in the precise order in which they offer. Counsel unquestionably have the right to select their clients in their own way. But they are bound not to adopt any rule of selection or exclusion which shall dishonor the profession.

It may be said too, with propriety and justice, that counsel are liable to misjudge in regard to the character of causes whether they will succeed or not, and whether they ought to succeed or not. That may be conceded; but no man who is fit for the profession need ever entertain serious doubt after making proper investigation in regard to the moral justice and propriety of a claim or a defence. We do not intend by this to make any invidious distinction between legal justice and moral justice. Counsel are, we believe, always at liberty to regard legal justice and moral justice as concurrent and coextensive; and to prosecute any claim of sufficient magnitude to justify prosecution, which they believe is legally maintainable; and to pursue any defence which they believe maintainable according to the fair and just application of the law.

And we are not aware that any just charge of insincerity or moral blame can be laid at the door of any counsellor, on the ground of the doubtful character of a civil prosecution or defence. If any such standard of morality were to be applied to the profession, it would be far higher and purer than is demanded of any other profession or pursuit in life. We are all compelled, more or less, to act upon uncertainty in everything that we do. Not that we would justify proceeding to do an act of morally doubtful character—far from it. Is the man who attempts to pursue a desired or contemplated benefit, to be charged with moral obliquity because he is not certain of success? But it may be said the case is different in the law, where there are two parties, and to pursue a doubtful claim or defence is exposing us to the hazard of doing injustice to the opposite party, which should never be ventured upon where there is even a doubt in regard to

the result. But who shall or who can decide when a claim or defence is fairly hopeful?

It is just here, in our opinion, where the great divergence in the public mind upon this subject arises; and from which most of the public censure of the profession comes. We can all see, very clearly, that when counsel attempt to maintain a clearly bad cause or defence, there will be room for the perpetration of great injustice. Hence most unprofessional minds jump to the conclusion that in every cause the counsel, upon one side or the other, must be guilty of great moral turpitude, in attempting to maintain a cause which in their very consciences they know to be fatally bad. And those persons that have too much knowledge and sense of propriety to adopt any such extreme view of the morality of the legal profession, will still insist that in the course of professional life there must of necessity occur such a multitude of bad causes, in the practice of every counsellor, that he can scarcely be regarded as entirely free from moral guilt any portion of his life! There seem to us two very marked misapprehensions, in the public mind, upon this subject.

In the first place, the common mind does not, in any just proportion, give due credit for the very great uncertainty which really attends almost every cause in court which is ever brought to trial. The mere expense of unsuccessful litigation will drive almost every cause out of court before trial, unless there is some reasonable uncertainty either in regard to the law or the facts. The case almost never is brought to trial unless the counsel on both sides entertain some hope of success. Still, in a large number of causes—not one in ten—probably one in a hundred—there may arise a cause in regard to which there seems to be no great question to an impartial mind—in regard to which one might feel almost certain it must be decided in a particular direction. But even this tenth or hundredth cause may not seem so clear to the counsel employed as it does to the judge. And what is more amazing still, this tenth or hundredth cause, which the judge may esteem clear beyond all question—after it comes to be discussed again and again—may finally be decided precisely opposite to what at first the court had regarded so very certain and clear!

It is fair, perhaps, to illustrate this point by what we know to have actually occurred: since what has occurred, all must admit as likely to occur again—at all events to be a fair illustration.

Early in our judicial experience we found, at the close of a long term of jury trials, the usual number of exceptions to the rulings, at the different trials, and allowed them all; and, as usual, granted a stay of execution in all cases where the exceptions did not appear to be entirely frivolous. But there was one case that seemed to us so entirely of that character that we felt bound, in conscience, not to order a stay of execution. And to our utter amazement this very case was almost the only one of the term where the full court directed a new trial! And we believe the experience of the profession will justify the opinion that such cases are not of rare occurrence, where the most careful scrutiny and the most dispassionate judgment will not always be able to anticipate the ultimate decision of the court of last resort. There is nothing more obvious, as we advance along the road of human experience, than that there is no absolute infallibility in human judgment, except as we are compelled to recognise it in the degrees of tribunals from which there is no appeal. The apology of the chancellor to his subordinate for reversing his decrees, was met in no jesting spirit when he replied, "Never mind, I should do the same with your lordship's decrees, if I had the power."

The truth is, that 'all this clamor in the public voice, or from the public press, about the want of principle in the legal profession, because they are half the time engaged in prosecuting or defending bad causes, is simply absurd and ridiculous. It is in fact no more worthy of respect than the report of the countryman, after attending a term of court for the first time in his life, that it did not seem of much use going to law, since about as many causes seemed to be lost as gained. The truth is, some men will go to law, and will have their causes tried. There is a delight in the very uncertainty attending it, which is worth ten times more to them than it costs, and is in itself as inexplicable as the love of war, or the love of amusement, or ten thousand other passions, which seem quite incomprehensible to those who have no propensities in that direction.

And litigation answers some other very useful purposes beyond and aside of its interest for the immediate contestants; it affords the most exciting, and the most innocent, and often the most instructive pastime to the mere lookers-on anywhere to be found in the country—provided it is properly conducted, and is of a character to impress the mind with its importance and necessity.

The amount of money which is expended in maintaining the courts of justice and by the parties litigant, especially in the rural districts, is often more than compensated by the amusement and instruction it affords, and by the diversion which it produces from other less salutary and more contagious entertainments for the people. We believe it is not uncommon for preaching moralists to bemoan the sad influences of litigation upon the country. And it must be confessed there are many sad cases of individual disaster and family ruin to be found upon the records of our courts. But the evil is very far from being an unmixed one. It is a slow process at the worst, and a man is not likely to persevere in taking the poison after his evil passions are sufficiently cooled; and those causes, where large sums are involved, and protracted litigation becomes indispensable, commonly cure the parties without serious detriment to others. And it must be confessed upon all hands, we think, that a well-conducted term of court affords more interesting amusement and more salutary instruction to those who give their attendance there, than can be found anywhere else, at the same expense. It is, in our judgment, superior to itinerant theatres, or lectures; or for that matter, we might safely say, theatres or lectures of any kind, stationary or ambulatory. It is superior to agricultural exhibitions, or cattle shows of any kind; or menageries, or circus performances, or musical displays of any character. Indeed we feel that we may safely affirm that the amusement and instruction afforded to those who attend the sittings of a well-conducted *nisi prius* term of court, is superior to any which can be obtained in the same time and at the same expense in any other mode. But this of course depends altogether upon the fact whether the court is conducted by able and independent judges, and upright and well-instructed counsellors, or the contrary. But that being granted, there is a truth and a reality about a jury trial that is as much more satisfactory and improving than any mere play, as a real battle is superior to a mere sham-fight. We have allowed ourselves to fall into this somewhat extended digression for the purpose of illustrating the fallacy secondly above alluded to, viz.: the very great absurdity of those who assume to pass an indiscriminate condemnation upon all the members of the legal profession, because they are so unfortunate as to be employed half the time upon the losing side of causes! Just as if every cause need not have both a gaining and a losing

side! Or what is scarcely less absurd, as if the losing side was necessarily and always the wrong side—or, what is still more absurd, just as if every counsellor must know just how every cause would be decided by the court—or, still more wonderful—by the jury. The truth is, that no man can tell with any degree of certainty how any cause will be determined until it is tried; and even then almost half the causes have to be determined by what is, in the first expression of opinion, either a divided court or a divided jury. It is often said by judges who have had much experience, that if the parties or even the counsel could know the secrets of the consultation room, they would never have any more confidence in courts. And the same is unquestionably true to a greater degree even, in regard to the consultations of the jury room. And we have sometimes thought that the mistrust which evidently exists in the mind of the legal profession to a considerable extent in regard to the jury, as a mode of trial in civil causes, might arise from the fact that the secrets of the jury room were held no more sacred. It is impossible to deny that no place more nakedly exposes the real weakness, not to say imbecility of human judgment, than the final consultation, in the determination of causes in courts of law. In all courts sometimes causes must be decided by compromises and concessions, where the first call of voices produce an equal division; sometimes, and more commonly perhaps, under conviction of error, and sometimes without it. And it is by no means uncommon, where one member yields his opinion on the ground of juniority of rank, as is the rule in the English courts, in order to create a majority, that the attempt to prepare an opinion in that direction will bring the majority upon the other side. For nothing is more common than for the judge to convince himself of error in attempting to maintain his views in a carefully studied and written opinion. And tradition gives us entirely reliable evidence of some cases, where, upon an equal division, the four members of the court, in attempting to prepare opinions in vindication of their original views, have exactly changed places with each other; and thus maintained the equal division still, after every member of the court had changed places. While most of these illustrations are drawn more from tradition and history than from memory, we must say that we entertain no question or doubt they are all entirely true to fact, and that authentic his-

tory would produce many more of the same character, and that what we have said falls very far short of exhibiting the whole doubt and uncertainty which hangs over the best contested litigation in civil suits; and with all this it is truly surprising how very large a proportion of the causes are finally decided in a manner most satisfactory both to the public and to the parties.

But our main purpose has been to present, in an intelligible form, the very great absurdity of charging the counsel, in any class of causes, with wanton disregard of his professional oath in accepting retainers in doubtful causes. While we should be disposed to accord entire freedom to counsel in the selection of their causes, we should not regard it as entirely consistent with the most delicate professional taste, to refuse a retainer upon one side of any cause, and afterwards to accept one upon the other side of the same cause; unless where it was very clear that the cause was unjust and oppressive in one direction, and called loudly for rebuke and indignation towards one party, and for commiseration and vindication of the other party. It cannot be denied that cases of this character might sometimes arise; but certainly not where the parties were at all equal in point of position and influence. In most cases where counsel felt disposed to decline a retainer upon one side of a litigation, they should certainly not accept one upon the other. And upon careful scrutiny it will appear, we think, that there are very few causes in the courts where the most conscientious and scrupulous counsellor might not accept a retainer upon either side. We do not, as a general thing, believe that a good cause has much to fear from having a conscientious counsellor, however talented, retained upon the other side. And we should be disposed to believe that the basest and most discreditable work to the profession is not done by the most unscrupulous members of it, merely as such, but by those who are both unscrupulous and at the same time somewhat dull in comprehension. We are sure that our own experience would tend to the conclusion, that it is far more difficult to keep a beetle-headed, stubborn-willed, and reckless counsellor within the proper limits of reason and justice than to produce the same result with one who has more comprehension and more delicacy, although possibly no more conscientious regard to the exact requirements of his professional position. But of course this is said entirely in a general way, and must have many exceptions.

And as we may be tolerably certain that all counsellors will be able to convince themselves of the justice of their client's cause, since they will naturally accept his version of the facts, it is perhaps safe to affirm that more injustice in courts is probably produced by the agency of counsel who are both able and conscientious, and who are misled by the unscrupulous misrepresentation of their own clients, than in any other one mode. For clients of this character, if they are as sagacious and farseeing as they are unscrupulous, will naturally comprehend the importance of having counsel whose character is above suspicion, and who have also the sagacity to comprehend, and the adroitness to present, at the proper time and in the most acceptable form, some plausible excuse for any apparent short-comings which may possibly be developed in the course of the trial. So that we may safely conclude, that if any great iniquity is perpetrated in the conduct of the trial of civil actions, it will most likely be done either by reckless counsellors who have no very nice appreciation of the necessity of avoiding the appearance of evil, and no very delicate sense of the highest degree of professional honor, or else through the agency of the most accomplished members of the profession, both in point of ability and culture as well as of professional purity and honor, who have been made to believe their clients possessed of the same high sense of morality and justice with themselves, and who are never able to disabuse their minds of this impression until the evil purpose of the client is irretrievably accomplished.

We do not suppose there is any possible remedy for this unfortunate liability to the miscarriage of justice, so long as we live under a free government. The main cause of complaint against counsel, so far as others besides their clients are concerned, is then, not because they suffer themselves to be retained by unworthy clients, or in behalf of dishonest or dishonorable claims or defences, but because they conduct cases dishonorably after they are retained. The great evil in our country, we are persuaded, so far as the public is concerned in the conduct of counsel, is not that they sometimes have dishonorable clients or hopeless causes, but that they submit themselves to be dictated to by such clients, in matters where they are bound by every principle of honor and self-respect to dictate to the client—that instead of standing before the court as the representative of a highly cultured and honorable profession, to present such testi-

mony and such views of the law as they know, or believe to be true and just, they condescend to offer evidence, not unfrequently, in which they have not the slightest confidence themselves, perhaps, either in its truth or its relevancy, merely to shift the responsibility from their own shoulders to those of the court. And it is most unquestionable that a great deal of what may fairly be regarded as sheer pettifogging, is done by counsel of considerable practice and comprehension, merely to gratify their clients, and because it will count on the score of compensation. It would be disgusting to all refined tastes, and scarcely less than sickening, to enter into the detail of practices which occupy the time and wear out the patience of our courts; all of which comes in a very large degree from this very evil, than which nothing can be less calculated to improve and elevate the character of the profession.

We have sometimes felt disposed to question the wisdom or justice of that rigid exclusion of attorneys and solicitors in the English practice from all intimacy with the barristers of every grade; and which absolutely cuts off the client from all possible consultation or communication with his counsel under all circumstances. To an American almost nothing could appear more unreasonable, or less calculated to bring causes to speedy trial upon their actual and exact merits. We have sometimes been amazed that solicitors, of more ability and legal learning than the counsel employed in a cause, would tamely submit to all this formality and often downright disrespect at their hands. But it must be confessed, the system is not altogether without its compensatory advantages, in giving an air of decency and dignity to the going forward of trials in court. The client there naturally feels that he has no more right to dictate to his counsel than he has to the court; that the members of the bar, from the highest to the lowest grade, are veritable officers of the court, and such officers as have duties to the court of a prior and holier obligation than any which they can assume towards their clients—not that such higher obligations towards the purity of the administration of justice have any tendency to lessen the ardor of counsel in the vindication of the just rights of their clients; or in any manner to interfere with the most exclusive devotion to their interests, within the proper sphere of what clients have the right to expect of counsel—very far from it. Indeed it may

truly be said, that counsel who are properly imbued with the deep sense of their duties to the courts and to the purity of the administration of justice, would be the last men to shrink from the fullest performance of their duties to their clients, however difficult and unpopular they might become. The man who is true to himself and to the higher duties of conscience and justice, can scarcely be suspected of falsehood towards any man.

“ This above all—to thine own self be true ;
And it must follow as the night the day,
Thou canst not then be false to any man.”

And in this particular it must be confessed, for some reason, the English bar possesses very decided advantages over our own. It may not be altogether owing to the separation of the counsel from the attorneys and solicitors, and especially from the clients—but we have no doubt this may have something to do with it. The manner in which rich clients in our country too often assume to treat a dependent counsellor, or indeed all counsel, must go far to convince any one that there is little chance to vindicate the purity of the administration of justice through the bar, among us. It requires, sometimes, all the dignity and self-respect which counsel can summon to their aid, to save themselves from positive insult at the hands of purse-proud clients. They seem to suppose that counsel are their merest tools ; to undertake all the dirty work on their behalf which their desperate schemes may demand, whether it may consist in shaping testimony to meet the emergencies of the cause, or in approaching the jury, and possibly the court. even, through such instrumentalities as these men hope, and sometimes believe, influence and even money will procure. If counsel hesitate, they are admonished of what other distinguished members of the bar stand ready to undertake, and to accomplish ; and if this admonition fails to lead them into the deadly imminent breach demanded, their places are soon filled by others, and they are informed that nothing more will be required of them than to send in their bills, which, ten to one, are never paid—or, if paid at all, it is only after much haggling and many deductions.

We do not intend to represent that all this occurs in the ordinary routine of practice at our bar. But something very much akin to this is most undeniable, in a large amount of the best pay-

ing practice, in the American courts, at the present day. Most of the work is done indeed out of court, and more commonly by a very subordinate grade of the profession, in point of culture and character; much of it is mere routine and does not require the higher order of talent; and more of it, perhaps, is of so questionable and unprofessional a character, that the most sensitive moral perceptions would be liable to prove more an embarrassment than a help. Able and upright counsel are sometimes consulted in advance, in order to know what the law is; and when the cause comes to a hearing, counsellors of good character and comely attire, both inwardly and outwardly, are imperiously demanded, in order to make the fairest show in court. And we can well suppose, that, on such occasions, many of the most honorable members of the profession may be, more or less, connected with causes in the most honorable manner, which in the course of their progress from inception to maturity, may have passed through very narrow straits. They may have been compelled to do so, in order to escape piratical craft sailing in an opposite direction.

There is one form of criticism upon the legal profession liable to create in some minds a very decided misapprehension; we refer to that which comes through the public newspaper press. Most of the public political press is so exclusively of a partisan character, that no reliance whatever can be placed upon any of its strictures, upon general moral duty or propriety. It will approve or condemn any cause, or any man or class of men, without the slightest regard to the decency or propriety of their course. The only inquiry is, whether it will subserve the interests of their party, or the contrary. This was very forcibly illustrated by the attempt to bring in question the right of prominent Republicans to act as counsel for President Johnson, on the Impeachment Trial. It did not seem to be doubted, that any counsellor who belonged to Mr. Johnson's party, or entertained views in common with him, upon the general constitutional policy of the country, might with perfect propriety act as his defender. But it was coolly and unblushingly maintained by some, that any counsellor belonging to the party who moved and sustained the prosecution, could not assume that attitude without himself incurring the guilt of a high misdemeanor. There would seem but one degree of absurdity and folly deeper than this, into which human stolidity could fall; and that would be to maintain, that

any one, knowing facts exculpatory of the President, could not be allowed to testify to them on his trial without incurring the guilt of perjury, unless he belonged to the same political party as the accused. But that if called upon to give such testimony, being of the opposite party, he should swear persistently, in the face of truth, in order to save the interests of the party.

We need not discuss the question of guilt or innocence in parties accused of crime as the test of the right of counsel to undertake their defence. No one unless very simple or a monomaniac upon the subject, we suppose, will contend that no guilty man is entitled to have the aid of counsel in his defence. That has been accorded to all grades of criminals from the lowest to the highest. Nor will any rational man contend that the cause of one accused of crime must be even doubtful, in order to justify counsel acting on his behalf. The blackest and the basest of criminals, as well as those most questionably accused, are equally entitled to all the aid which counsel can afford in their defence. The state has no legal right to demand the conviction of any one accused of crime until it produces proof of the offence, which shall exclude all reasonable doubt of guilt. The accused must be not only guilty, but he must be proved guilty, before the public can demand his conviction and punishment. The counsellor too, who appears on behalf of the accused, has the same right to demand his acquittal, which the accused himself would have. And as the accused himself would not be under the slightest moral obligation to plead guilty, merely because he was guilty; so, also, the counsel would stand in the same position on the trial. He might, with the strictest regard to truth and the purest conscience, demand the acquittal of his client on account of any legal defect either in the accusation or the evidence, although he might believe or even know that his client, was veritably guilty of the offence. The law will not allow counsel to concede away his client's rights in criminal causes. It is the duty of the court to see that counsel do not in criminal causes sacrifice the legal rights of the accused; and where the counsel do not detect or insist upon all legal defences in such cases, it is the duty of the court to protect the rights of the accused. And the same has been decided in regard to civil causes, even where the omission of counsel was merely of a technical character. The court is bound to decide all causes according to the legal and just rights

of the parties, whether insisted upon by counsel or not, whether civil or criminal.

How then, it may well be asked, could any one object to allowing any counsellor to assist one accused of high crimes and misdemeanors before the highest tribunal in the nation in his defence? Simply upon the ground that party ties were superior to professional duties it is said. Such men and such journalists, by their advice, would do all in their power to create a new reign of terror in our country, not inferior to that of the French republic, in the days of Marat, Robespierre, and Danton. We have all just reason to express devout thankfulness that the government of the country has hitherto escaped such hands. It is greatly to be feared that such strictures proceed from the same spirit which set on foot the rack and the wheel, in former ages, and which inspired the barbarities of the Holy Inquisition, in its *auto de fe* and its other awful atrocities; and which has been the bane and the disgrace of all times and all countries, in some form, and which we perhaps have no just claim wholly to escape.

There is one mode of defence which counsel are sometimes tempted to pursue in criminal causes, which it has been said should never be resorted to except under the clearest convictions of its truth, i. e., charging another person with the commission of the offence for which the accused is upon trial. There is great temptation in the mind of counsel to do this, in all doubtful cases. In cases where the body of the offence, the *corpus delicti*, is conceded or clearly proved, the inquiry promptly arises, if the accused is not guilty, who is? The counsel seems to be called upon to show who else might have committed the offence. And this very naturally leads counsel into a course of argument, to show that some other one actually did commit the offence. Possibly there is no serious objection to this course of pleading, where counsel are really ignorant as to who really did commit the offence, and have fair ground of argument against others. But even then, it is far better to argue that some other one might have done it. But where the client, as is more commonly the fact, really does communicate to his counsel the fact of his own guilt, there could be no justification whatever in throwing suspicion of guilt upon one whom the counsel must know to be innocent. But it might even then be fairly argued that the proof does not clearly identify the guilty party.