THE STATUS AND ETHICS OF THE LEGAL PROFESSION

[An Open Letter to an Advocate.]

Dear X,

I take it that an obligation is laid upon me, when you who have honoured me by being my pupil, still further honour me by the following request; which for the benefit of casual readers I will set down at length. You write:—

> 'Yesterday I spent the whole afternoon with Mr. Justice Y. He was my master in the Law.
>
> 'He is full of anxiety for the future: for the whole ethical position of Judge, Advocate, Solicitor and Witness. It is quite a new anxiety to him; the fruit of his experience on the Bench, I fancy.
>
> 'It is clear that something must be done by a Master of Ethics. Now as you have been dealing with these matters in St. Thomas during the year, they will be fresh in your mind.
>
> 'Will you be good enough to write an essay on the Ethics of Advocacy? You told us during your lectures on the *Summa* of St. Thomas that you looked to the professions of Law and Medicine by the retention and the restoration of their traditions to save the State.
>
> 'One of these professions now asks you of your charity to give it back a statement of its tradition and its own ethical ideal.'

I have said that this request honours all too much the one to whom it is addressed. But I need hardly add that it honours still more the one by whom it was addressed. Let me forget my own limitations in an attempt to offer you the intellectual alms you seek.

It is the name you mention in your letter that reassures me against my limitations. St. Thomas

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Aquinas has deserved well of the men who have wedded the Law. In his *Summa Theologica* he has given the jurists of all time what had not been given them even by the jurists of Byzantium. The jurists who bequeathed to posterity the Justinian Code gave a Code; in his treatise *De Lege* St. Thomas gave a Science of Law. That he composed this unique treatise at Bologna, the classical home of Law as a Science, is but a guarantee that he was helping men of the future to build, by himself building, upon the men of the past. No thinker, not even Plato or Aristotle, had been his pioneer in this Science. Yet almost all thinkers, and not merely Plato or Aristotle, gave something to the synthesis which his master-mind made of Law. Into that synthesis were welded all the great principles of all the ultimate sciences: not only the practical wisdom of Rome, but all the psychology and ethics and metaphysics of Greece; and all the faith and vision of the followers of Moses and of Jesus Christ.

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For the purpose of clear thinking we may define *status* (or office) as 'permanent social position resting on permanent social services.' In other words, it is a totality of social rights growing out of a totality of social duties.

The primary social *status* is that of parenthood within wedlock. Only such parenthood gives to the commonwealth the fundamental social service of BEING.

The secondary states do not give Being, but only this or that mode of WELL BEING. These states or offices or professions are three:—the Legal, the Medical, the Ecclesiastical.

Of these the primary in time, though not perhaps in importance, is the Legal State or Profession. It

is undeniable that the Law is a necessary estate because man, being a Social Animal, and social action needing the ordering or ordinance of a common will or law, there must be some of the community who will ascertain and promulgate and apply the Law.

To the Legal Profession, as a Guild or Union (akin to a Trade Union) is entrusted the custody of that General Justice which issues in Law. Not that the judiciary is legislative or executive; but that the legal profession as such must give its scientific guidance both to the legislature that promulgates, and to the executive that applies, the promulgated law.

Hereupon you may consider the importance of the legal profession in the importance to its subject-matter—namely, Law. Few words are for the moment more used by men of other sciences; yet few words are more apt to be misunderstood and misapplied by all save by the men whose profession and science essentially and directly deal with Law.

Grave hurt came to the Sciences, both Physical and Psychical, when the scientists sought to unify their empiric findings by a category borrowed from the legal science. To the jurist LAW is not a fixed unalterable thing. As the expression of WILL, and indeed of FREE WILL, it admits of new adjustments to changing circumstances. Again, exception and privileges are of its very essence. All this flexibility of Law the jurist understands. But the Scientist, in taking over from the jurist the category of LAW, failed to understand, as jurists understand, the need of modifying the rigidity of a general rule with the principle of exception and privilege. Had the scientists understood Law, as understood by the jurists, we should have been spared the irrational theory of iron laws of nature which admit of no exceptions. In other words, the lengthy mid-Victorian

discussions on the possibility of miracle (*i.e.*, exception) would have been obviously irrelevant.

For this reason it seems not impossible that if the modern physical and psychical scientists are to find themselves, they must be helped to self-help by the men who have made and still understand the term and concept LAW.

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The Legal Profession, like the ecclesiastical and the medical professions, has social rights and even a social dignity of its own. Its primary right is that of self-determination. It is an *imperium in imperio*, choosing whom it will for full citizenship in its kingdom. The legal profession alone determines who shall belong and on what educational and even social conditions they shall belong to the legal profession. It communicates—and excommunicates!—its privileges.

Moreover, its full citizens, the Judges, have a fixed and high social position; to which with a fine exercise of justice is attached a salary or wage sufficient to preserve the inviolability and dignity of the judicial office.

Enshrined within these outer forms there is more medievalism than is often readily acknowledged by the student of legal history. Towards the making of an advocate, and therefore still more towards the making of the judge, as towards the making of a monk, must go the noviciate, during which the novice, whether monk or advocate, must show the qualities befitting his craft. When the noviciate is drawing to a close he is examined and voted on by the Guild of Monks or Jurists. If they judge him fit for the craft, of serving the Court of Heaven or pleading in the Court of Law, he is admitted to profession, and is officially given an outer garment or habit as a token

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of the status he holds before his fellow-citizens. In England the robes of advocate and judge are among the most honoured badges of social rank.

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And now I touch with diffidence the saying which almost startled you when first I uttered it in a lecture on the *Summa* of St. Thomas. To quote your own written words: 'You told us during your lectures on the *Summa* that you looked to the professions of Law and Medicine, by the retention and restoration of their traditions and ideals, to save the State.'

That word of mine, as it was not uttered casually, is still the conviction of my mind; which would stand unshaken even if the two great professions did not keep their high traditions—and the State was lost!

To explain fully this uttered conviction would need a book; whereas I have but a page. Be patient with me whilst I attempt the impossible task of compressing without killing a vital issue.

All that has been hitherto said means that the almost sacred profession or status of the jurist is social position granted for social service. This service is the safeguarding of justice by the human expedient of Law.

LAW has been nobly defined in terms of Justice as: *Ars boni et aequi.*

To give this good and just thing to the citizens is the indispensable social service rendered by the legal profession. Hence just as the ecclesiastical profession is the custodian of Moral Goodness, and the medical profession is the custodian of Bodily Health, so is the legal profession the custodian of Social Justice.

But this wardenship over justice has ultimate and exacting duties; because the wardens of justice must see that legislation must be justice, or it is not law.

St. Thomas gives us the principles we need in these words: '*Jus divinum, quod est ex gratia, non tollit jus humanum quod est ex naturali ratione*' (*Summa*, 1ª 2ae, Qu. 10, Art. 10). The divine law cannot contradict human law based on natural reason. Again, when dealing with the maxim: *Quod principi placuit legis habet vigorem*, Aquinas explains: '*Voluntas de his quae imperantur, ad hoc quod legis rationem habeat, oportet quod sit aliqua ratione regulata; Et hoc modo intelligitur quod voluntas principis habet vigorem legis; alioquin voluntas principis magis esset iniquitas quam lex*' (*ibid.*, 1ª, 2ae, Qu. 90, Art. 1, ad. 3). In other words, the ordinance of the Sovereign Will in order to be Law must be in accordance with Natural Reason or Justice; otherwise, it is 'iniquity' rather than Law. Now if Law is the Art of Goodness and Equity, the custodians of Law are the enemies of inequity.

The great social service, therefore, to be rendered by the legal profession is that of informing the common conscience and sovereign power that any proposed legislation is or is not against natural justice or equity.[1] Degradation must at last overwhelm a people whose jurists are so careless about natural equity that for them nothing is *extra vires* (beyond the powers) of the legislature; and that whatever is done by the sovereign power—whether a majority or a minority power—is well done. Such a confusion between *Will* and *Good Will* can end only with grievous hurt to the commonwealth. Not expediency nor compromise must be the decisive test of legislation; but conformity with natural Reason and the natural rights of men. If it be urged that this test is difficult to apply, we need only say that the building up of a Common-

[1] See *e.g.* The criticism of the Statute of Frauds: XLIII, L.R.Q., p. 2, and Holdsworth *History of English Law*, Vol vi, 396.

wealth of Freemen is a consummate feat, to be committed only to the experts in the *Ars Boni et Aequi* —the Profession of the Law. If that profession fails to serve the commonwealth by the example of single-minded advocacy of Justice and Equity, the lesser arts and crafts will sicken even unto death.

All this becomes crucial in these days when, as some men aver, not justice but material wealth has become the explicit aim of state-craft. Now, when a people begins to swerve from the way of justice, the three great professions are tempted to compromise. The ecclesiastical profession is tempted to make (or at least to call) evil good. The medical profession is tempted to make evil healthy. The legal profession is tempted to make evil lawful. And as the medical profession is chiefly tempted against the commandments 'Thou shalt not commit adultery' and 'Thou shalt not kill,' the legal profession is chiefly tempted in the matter of the commandments 'Thou shalt not steal,' 'Thou shalt not bear false witness.'

So much, then, must the *bonum et aequum* be the aim of the legal profession that for no consideration must either the judge sell his judgment or the advocate sell his advocacy to what does hurt to an individual or the community. If the advocate knows with certainty that a cause is untrue in itself and hurtful either to an individual or the community, his counsel and pleading for that cause would be a direct co-operation with evil. Moreover, as he cannot knowingly defend such an unjust cause even with facts that are true, so neither can he defend even a just cause with allegations that are untrue. No advocate can lie even to defend justice or truth. Still less can he (be he Counsel or Solicitor) suggest or elaborate a falsehood which under oath his client will substantiate as the truth. If this advocacy of or by untruth

is sold for a price, the craft of the lawyer is dragged in the mire, and the later satirist of Rome is found to be a prophet. *Romae . . . . omnia cum pretio.*

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Here we pass by a real though subtle transition into the second way whereby the traditions of the legal profession may help to save the State. The first tradition is the supremacy and inviolability of justice and truth. The second tradition of the profession which serves justice and truth is that this service shall exclude a mere commercial attitude towards material wealth.

This traditional attitude of the legal profession towards the reward of their services may be formulated thus :

A man's state should not be measured by his wealth but a man's wealth should be measured by his state. It is the noble tradition of the Law that no true Judge or advocate should seek wealth rather than justice. We have not yet come upon such degraded days as would reject the medieval satire :

> *' Lex est defuncta*
> *Quia Judicis est manus uncta.'*[2]

That an avaricious lawyer is still fair game for modern satire is but a sign that the legal profession has as its ideal, not the pursuit of wealth, but a hunger and thirst after justice. This abstract view of the profession is confirmed by the fact that the men whose names are honourable in the history of the profession are conspicuous not for their wealth, but for their learning and integrity. Indeed, we should have ' to search with lamps ' the records of the Law before

[2] Which a modern satirist has translated :

> ' The Law is deceased
> Since the Judge's palm was greased ' !

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we could discover one who might be classed for his wealth with the money magnates of finance or trade.

If we ventured to express the attitude of the legal profession towards wealth we could express it only in terms of a Living Wage—or again as a Just Price. And this Wage or Price of the judge or advocate is not a relationship of a person to a commodity (for this is a non-entity), but it is a relationship of a commodity towards a person. Thus we have lately read in a pathetic 'last message' how a master of modern finance *made* £750,000 in one day. That such profit could be made in one day by one man, who added not one item to the country's real wealth, is but a sign that the country's organisation is diseased. There is no comparison between the unreal service of such a financier and the *real* service of a learned and just advocate or judge. Yet it is still the tradition of the legal profession that these real services shall be recompensed not by any measure of wealth which the man of law may demand, but by such reward simply as will enable him to live the honoured life of advocate or judge. 'Honour,' says Adam Smith, 'is a great part of the reward of all honourable employments.'

To sum up, I believe the Legal profession may help to save the State by a new affirmation of its old ideals, and by a strict adhesion to those two principles which are among its noblest traditions:

First, Social Status based on Social Service;
and, second, Reward based on Social Status.

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