AN IMPORTANT ASPECT OF PROFESSIONAL CONDUCT.

By F. R. GUBBINS, LL.B., Lecturer in Professional Conduct.

When the Faculty invited the writer to undertake the duty of initiating this Subject into the Law Course, he began by preparing a set of rules for his guidance in teaching. These rules, forty-one in number, he then laid before the Council of the Law Institute and several members of the Bench and the Bar for criticism which was duly meted out to them in good measure, both grave and gay.

His Honour, Mr. Justice Lowe in the course of a very important address to the 1945 students, said in lightsome mood that he saw little objection to the Law Institute formulating forty-one rules of conduct for the purpose of the lectures even though the number did exceed the number of Articles of the Established Church, which were only thirty-nine, and certainly these rules, like the Thirty-nine Articles have proved highly controversial.

His Honour, Mr. Justice O'Bryan, in the same year, at the invitation of the lecturer, treated his students to some very trenchant criticism of several rules, amongst the most serious casualties being Rule 3, which, when His Honour had finished with it, appeared only fit to fold its tents like the Arabs and as silently steal away.

Nevertheless, the Rules still number Forty-one and Rule 3 appears to have obtained some indirect justification for its continued existence from certain remarks made by Mr. Justice Lowe at the Law Institute dinner in November 1946.

The Text of the Rule in question is :—

> "3. A Barrister and Solicitor must not lightly involve his Client in litigation but rather shall try to settle by friendly means any dispute in which his Client may be concerned provided he can by such means get reasonable satisfaction for his Client."

Mr. Justice O'Bryan opened the attack by issuing a general warning against any tendency to eulogise extravagantly the virtue of settling claims by mutual compromise without litigation. He pointed out that in many cases it is necessary for the Client to fight to protect his reputation and that even in cases in which money is the sole thing at stake as a client cannot expect to get as good a return by settling as by fighting and winning there are many cases in which (the probability of success being very high) to compromise is on the average not the best service to the client. And His Honour pointed out that if settling became too general an outlook might be created which might very well encourage "spec" actions, by giving the impression that a plaintiff is always certain to get something if he only issues a writ and that a defendant will always force a reduction of the plaintiff's claim if he only shows fight, though the claim in the first case and the defence in the latter, if properly investigated by a Court, would have proved entirely unsupportable.

His Honour went on to ask if rather than advocating settlement in all cases lawyers would not be better employed in seeking to reduce the cost of litigation so as to make justice available to all without the danger of large costs involving the loser in ruin. He asked whether there is any

justification for Court fees in litigation and suggested that shorthand writers should be provided by the State for all Courts.

His Honour, Mr. Justice Lowe, at the Law Institute's annual dinner in November 1946, responding to the toast of " The Bench and Bar " said that in the Bar he was speaking not merely of those who practise at the Bar, but of all the legal profession apart from the Bench, and he suggested that through the agency of the Bench and the Bar, justice is dispensed with efficiency in the community ; but he pointed out emphatically that while we as a profession are generally satisfied with what we have done, it is not so with those who stand outside the profession, nor in all countries, either English-speaking or others where established Courts exist ; and His Honour desired us to dwell on the thought that wherever revolution has come—France, Germany or Russia—one of the first things that has been done is to erect people's Courts.

His Honour said that should make us realise that while we may feel satisfied with our dispensation of justice, there must be some reason for the general community to hold the view that the existing Courts are not discharging their functions in the way the whole community desires. Whether that is because they are not sufficiently speedy, whether they are too expensive in their operation or whether there are other causes also operating, Mr. Justice Lowe said he would leave to us as a profession to work out for ourselves ; and he said : " do not let us be complacent and think because the Courts are working well, they are incapable of improvement."

These statements by two of our Supreme Court Judges, deserve our deep thought. They raise in a compelling form an important aspect of professional conduct. Perhaps it would be truer to say that these statements raise for consideration not merely an important aspect, but the most important aspect of professional conduct. For the most important function of our profession is the dispensation of Justice. This function is not confined to the Bench only. The Bar, in the wide sense used by Mr. Justice Lowe, participate fully in this great duty and privilege, and it is not unreasonable to suppose that, as our method of dispensing justice does not meet with the complete approval of the community, there must be something wrong with our conduct as a profession.

Perhaps there is, or perhaps the features to which the community objects, are inherent in the problem of administering justice according to an impartial, impersonal and universally applicable rule of law.

Perhaps a just and benevolent Dictator, above all law, might be able to dispense promptly and cheaply a brand of justice more consistent and predictable than justice dispensed by the judicial method of English-speaking countries, because one might guess from his former conduct, what he would do in one's own case, but amongst a multitude of Judges this is impossible. In a multitude of counsellors, there is wisdom but there is also disagreement. The community appears to have three main grounds of objection to our profession's method of dispensing justice. They are, cost, delay (both before and at trial) and uncertainty of result. As to the first of these, cost, His Honour Mr. Justice O'Bryan gave us a lead, with a proposal to relieve litigants from the burden of Court fees and shorthand writers. The provision of shorthand writers in all Courts

would, doubtless, reduce cost and delay at the trial to some extent, but neither of these proposals would operate on either objection at all substantially.

The cost of litigation is due mainly to the charges of the Bar (in the wide sense used by Mr. Justice Lowe) and whether anything can be done about it is a problem to which the whole profession might very well devote its best attention, since our survival as dispensers of justice may depend upon its solution.

Whether the hopes expressed in Parliament when the *Legal Profession Practice Act* 1891 was passed into law, would have proved true or false if the Act had ever come into practical operation, is certainly a factor to be considered.

Dr. R. M. Jackson, LL.D. lecturer in law in the University of Cambridge in his book *The Machinery of Justice in England* indicates that there is a substantial body of English opinion in favour of the amalgamation of the legal profession and he expresses the view that it will be desirable some time but he doubts whether it will cheapen litigation very much. Of course, in England, as in Victoria, it has not been tried in practice and some light might be thrown on the question of costs by enquiring how costs of litigation in South Australia, Tasmania, Western Australia and New Zealand, where the amalgamation of the profession is in actual operation, compare with the costs of litigation in Victoria.

James Bryce in his *American Commonwealth*[1] comparing the English and American Bar Systems says that the Amercian system is better for the Junior Bar and he says :

> " The gain to the client is still clearer ; and even those (very few) American Counsel who say that for their own sake they would prefer the English plan, admit that the litigant is more expeditiously and effectively served where he has but one person to look to and deal with throughout. It does not suit him, say the Americans, to be lathered in one shop and shaved in another."

Mr. Justice O'Bryan in his address to students advised lawyers to employ themselves in seeking that the cost of litigation be reduced so that justice shall be available to all without the danger of large costs involving the loser in ruin, but the reforms he suggests would not go far in remedying this serious position. Something much more radical is needed. It is the duty of the State to administer justice as between citizens and to protect not only the person of a citizen but his property and rights.

Mr. Justice Lowe in his speech to members of the Law Institute said that we see with increasing frequency Governments assuming many functions which in earlier days would have been thought taboo and perhaps one more function that Governments might be asked to assume is the function of dispensing justice to all without delay and without cost to the individuals concerned in cases where they have properly engaged in litigation. There is not space in this article to discuss fully how the propriety of the action should be determined. No doubt the winner would be considered to have engaged in litigation properly and perhaps the trial

1. Ch. 4.

Judge might certify that the loser had a case which, although not upheld in the event, was quite properly brought to trial, or if in the course of the hearing and appeal any one or more of the Judges favoured the losing case (as often happens) then perhaps automatically it should be deemed to be a proper case for the loser to have brought before the Courts.

Mr. Justice O'Bryan said that in many cases it is necessary for the Client to fight to protect his reputation and certainly it is very important that he should, but the celebrated wit and law reformer, A. P. Herbert, in his *Riverside House* depicts a man grievously defamed by a wealthy Newspaper, but utterly unable to face the risk of litigation to protect his good name, because if he won the case it would cost him £1000 over and above what he might get from the paper, and if he lost he would have to pay over £5000 in costs which would land him in the Bankruptcy Court.

Of course, the two objections, cost and delay, act and react upon each other, because the longer the hearing the greater the cost, and both of them are to some extent controllable by Bench and Bar.

If prompt attention in solicitors' offices from the issue of the writ to the cause appearing in the list were regarded as desirable professional conduct and if at the trial Counsel considered it his duty to make all his submissions as brief as may be consistent with efficiency the trial would, no doubt, be accelerated.

Mr. Justice Joseph Walton used to tell a good story about a noted King's Counsel on the Northern Circuit who was commonly called Mr. Tom Jones. He was a man of some fullness of style and one day when arguing a case before Chief Justice Cockburn he developed his argument at considerable length.

At last the Chief Justice said " Mr. Jones, time is passing." Whereupon Mr. Jones replied : " Let it pass, my Lord."

A little later the Chief Justice said : " Mr. Jones there are other cases in the list." Mr. Jones replied : " Yes, my Lord, there are, but not one save this in which my client takes the slightest interest."

This is an amusing story told by Pollock in his *Life of Mr. Justice McCardie* as an illustration of Counsel's fearless discharge of his duty to his client ; but it may be questioned whether this " fullness of style " (in other words, loquacity) is really useful. It is submitted that on the whole Counsel will serve their clients best by preparing their submissions with such care that they may be made fully with suitable brevity.

The third objection, however, uncertainty of result, seems to be uncontrollable. The result of a law suit is usually so unpredictable that the Commercial community cannot be blamed or wondered at for preferring their own systems of commercial arbitration, and it is submitted that a perusal of the reports of Courts of Appeal will justify retaining Rule 3 in the curriculum of Professional Conduct. It is not unusual to find that a Judge of first instance is reversed by a Bench of three by a judgment of two to one, so that in the event, each party has in his favour two Judges of equal standing and the judgment goes to one rather than the other by what seems to be pure chance.

To a large extent, this uncertainty is inherent in our system in which each Judge properly exercises his own judgment on the facts and law

presented to the Court, but it is suggested that something might be done by the adoption of certain rules of conduct.

For example, it would be probably in a general way of benefit to litigants if Courts of Appeal adopted a practice of upholding decisions unless they are clearly wrong, and it would lead to greater certainty if Judges gave heed to the warning of Francis Bacon that their Office is *jus dicere* and not *jus dare* ; to interpret law, and not to make law or give law.

It is very disconcerting to the Bar in its wide sense to find that a rule which has been regarded as law for many years is changed by a judicial decision on account of some judicially apprehended change of custom or public policy. If such a change is deemed desirable it would probably be better effected by an Act of Parliament which can preserve all just exceptions, and is not necessarily retrospective.

It is suggested as possible that the modern widening of the franchise so that Parliament really represents the community has rendered obsolete the old system " Where Freedom slowly broadens down from precedent to precedent."

In conclusion, a short reference to cases may be of interest to readers as illustrating from actual experience the inconvenient uncertainty of our method of dispensing justice. Many years ago a member of the Jewish community in Melbourne died leaving a Will by which he provided a forfeiture of life interest by a child marrying outside the Jewish faith (the exact words are not quoted here). A child undoubtedly infringed the condition and in 1929 leading Counsel (now a member of our Supreme Court Bench) advised without doubt and basing his opinion on well recognised authority, that this condition was valid, and that the child having broken it, forfeiture had been incurred. The result of this opinion was that portion of the income of the forfeited life estate went to another child who received it for the ensuing fifteen years. It may be accepted as quite certain that Counsel's opinion was right at the time it was given and that any other good lawyer would have given the same advice in 1929. However, in 1943, the House of Lords in *Clayton v. Ramsden*,[2] held void for uncertainty a condition which is indistinguishable from that in the Melbourne Will. The decision of the House of Lords reversed the Court of Appeal[3] which in a considered and very able judgment had decided that the condition was not void for uncertainty. The result is that a beneficiary who was paid income for many years in accordance with a generally accepted view of the law has now to refund it. (*Sed Contra*).[4]

If the law had been altered by Parliament the alteration would have been made prospective only, or at least there would have been some exception to prevent hardship, but when the accepted view is reversed by judicial decision, what is for all practical purposes an alteration of the law has full retrospective effect, because technically the Court's decision is merely a declaration of the existing law.

Events such as this must leave even the ablest lawyers uncertain and inclined to exclaim with Rabbi Ben Ezra : " Now who shall arbitrate "

2. [1943] A.C. 320.
3. *Re Samuel*, [1942] Ch. 1.
4. *In re Ettelson*; *Ettelson v. Webster*, (1946) V.L.R. 217 and *Re Diplock's Estate*; *Diplock v. Wintle*, (1947) 1 All. E.R. 522.—[Ed., J.L.]

and a humble Solicitor desiring beyond all things the good of his client is driven to the conclusion that very often settling is safer than fighting; while those who stand outside the profession (to use the phrase of His Honour Mr. Justice Lowe) may be induced to side with the supporters of Jack Cade who according to Shakespeare desired to kill all lawyers.

Perhaps, they would not really wish to kill us, but signs are not wanting to show that unless we can improve our services as dispensers of justice, we shall be bypassed and left to perish at our leisure.