

## THE LIABILITY OF AN ATTORNEY FOR ERRONEOUS ADVICE.

MUNSON PRIZE THESIS.

In treating this subject it is proposed to confine the discussion to the liability of attorneys-at-law for advice upon matters within the scope of their professional duties. For a discussion of the liability of attorneys-in-fact opens the entire subject of the law of agency, and a discussion of the liability of attorneys-at-law for advice upon matters of fact without the scope of their profession<sup>1</sup> could result in a little more than the enunciation of the common-sense rule that for the soundness of such advice they are not usually held liable at all. But they may be liable under an express contract<sup>2</sup> creating such liability, or where such advice amounts to a fraudulent<sup>3</sup> misrepresentation of a matter of fact, reasonably relied upon by the other party, and thereby causing such party pecuniary loss, the liability of attorneys-at-law herein being the same as that of non-professional men.

Where the distinction between attorneys and solicitors on the one hand and counsellors or advocates on the other prevails, as in England and to some extent in the United States Courts and the Courts of New Jersey,<sup>4</sup> the counsellors or advocates are not liable to their clients at all in an action, provided they act honestly with a view to their clients' interests. They are liable neither for ignorance of law nor for any mistake of fact.<sup>5</sup>

If an attorney or solicitor enters into an express contract with his client, guaranteeing, for a valuable consideration, the correctness of his advice, no reason appears why he should not be held to answer for all the damages actually resulting to his client by rea-

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<sup>1</sup> Such advice would be merely the expression of an opinion upon matters with respect to which the attorney is not specially qualified to speak. Cooley on Torts, 565-8, 2d ed.; 2 Kent Com. 485; 2 Parsons on Contracts, 778-9.

<sup>2</sup> Cf. Domat's Civil Law by Strahan, Cushing's ed. § 1137.

<sup>3</sup> Cf. Domat's Civil Law, *supra*: Cooley on Torts, 555, 556, 2d ed.

<sup>4</sup> Shearman and Redfield on Negligence, 4th ed., vol. II., § 557; 19 Amer. Law Rev. 677.

<sup>5</sup> Bishop on Non-Contract Law, § 704; Swinfen v. Chelmsford, 5 Hurl. & N. 890, 924 (1860); Pitt v. Yalden, 4 Burr. 2060 (1767); Shearman and Redfield on the Law of Negligence, 4th ed., vol. II., § 557, and cases cited; 28 Amer. Law Reg. 537, note; Purves v. Landell, 12 Cl. & F. 91.

son of a *bona fide* reliance upon such advice. For, when public policy or the law of the State are not thereby violated, *consensus facit legem*. No case upon this exact point has been found. But in several well-considered cases<sup>6</sup> there are important *dicta* which would undoubtedly be regarded as correct statements of the law.

The relation of attorney and client usually arises, not from express contract,<sup>7</sup> but from the consultation of the attorney and the payment to him of a retaining fee. And even if there be an express contract to create such relation, the attorney does not thereby impliedly guarantee the soundness of his advice or the success of legal proceedings to be instituted by him.<sup>8</sup> Under these circumstances the mutual rights and liabilities of attorney and client depend upon quasi-contract (*i. e.*, the contract which the law implies) or upon the duty<sup>9</sup> which the law imposes upon all who enter into that relationship. The obligation of the quasi-contract and that of the legal duty are identical; and for the complete discharge of either he must possess and exercise a reasonable degree of skill, diligence and care<sup>10</sup> in the exercise of his profes-

<sup>6</sup> *Babbitt v. Bumpus* (73 Mich. 331), 16 Amer. St. Rep. 585, 588; *Doster v. Scully*, 27 Fed. Rep. 782; *Purves v. Landell*, 12 Clark & F. 91: cf. *Weeks on Attorneys-at-Law*, § 317, and authorities cited.

<sup>7</sup> *Weeks on Attorneys*, §§ 183, 185-7.

<sup>8</sup> *Weeks on Attorneys*, § 290; *Purves v. Landell*, 12 Clark & F. 91; *Doster v. Scully*, 27 Fed. R. 782; *Babbitt v. Bumpus* (73 Mich. 331), 16 Amer. St. Rep. 585.

<sup>9</sup> 3 Black. Com. 163, 164; *National Savings Bank v. Ward*, 100 U. S. 195; *Dundee Mortgage, etc., Co. v. Hughes*, 20 Fed. R. 39; see also *infra* the authorities cited in notes 35 and 36.

<sup>10</sup> *Robinson's Elementary Law*, § 211; 3 Black. Com. 26, note 4 in *Cooley's* 3d ed.; 3 Black. Com. 164, note 10, same ed.; *National Savings Bank v. Ward*, 100 U. S. 195; *Dundee Mortgage, etc., Co. v. Hughes*, 20 Fed. R. 39; *Cox v. Sullivan*, 50 Amer. Dec. 386 (7 Ga. 144); *Goodman v. Walker* (30 Ala. 482), 68 Amer. Dec. 134; *Pennington's Ex'rs v. Yell* (11 Ark. 212), 52 Amer. Dec. 262; *Fitch v. Scott* [3 How. (Miss.) 314], 34 Amer. Dec. 86; *Gambert v. Hart*, 44 Cal. 542; 34 Amer. Dec. 89, note, containing many citations of authorities; *Citizen's Loan, etc., Ass'n v. Friedley* (123 Ind. 143), 18 Amer. St. Rep. 320; *Babbitt v. Bumpus* (73 Mich. 331), 16 Amer. St. Rep. 585, 588; *Ahlhauser v. Butler et al.*, 57 Fed. Rep. 121; 28 Amer. Law Reg. 536, note; *Thomas v. Schee*, 80 Iowa 237; *Cochrane v. Little* (71 Md. 323), 18 Atl. Rep. 698; *Cooley on Torts* 648-650; *Parker v. Rolls*, 14 C. B. 691; *Holmes v. Peck*, 1 R. I. 242; *Dearborn v. Dearborn*, 15 Mass. 316; *Varnum v. Martin*, 15 Pick. 440; *A. B.'s Estate*, 1 Tuck. 247 (N. Y. Surrogate); *Whitney v. Martine*, 88 N. Y. 535, 538; *Shearman & Redfield on Negligence*, Vol. II., §§ 558-9; *Pitt v. Yalden*, 4 Burr. 2060; *Godefroy v. Dalton*, 6 Bing. 460; *Hart v. Frame*, 6 Cl. & F. 193, 209, 210; *Eggleston v. Boardman*, 37 Mich. 14; *Stevens v. Walker*, 55 Ill. 151, S. C. 79 Ill. 193; *Weeks on Attorneys*, §§ 284-5; *Bishop on Non-Contract Law*, § 705. In some States there are statutes laying down similar rules.

sion, and conduct himself therein with the strictest integrity.<sup>11</sup> And what is reasonable skill, diligence, and care in any given case depends upon all the circumstances of that case.<sup>12</sup> The attorney cannot, in general, delegate his authority, nor can he, in the absence of express contract, avoid responsibility for the negligence or fraud of his clerks, agents, or partners.<sup>13</sup> He cannot, without his client's consent, make his own agents to be the agents of his client, and directly responsible to the latter. Their negligence and fraud within the scope of the duties entrusted to him by his client and by him to them are his negligence and fraud. Therefore, in the discussion following no distinction is to be made between the attorney's fraud or negligence and that of his clerks or partners.

The breach of the quasi-contract for, or legal duty of, integrity in the management of his client's affairs by the attorney's giving erroneous advice is usually fraud or breach of trust. And there can be few grosser breaches of the attorney's oath of office and legal duty than the fraudulent giving of erroneous advice to his client. For any loss that befalls the client by reason of fraudulent advice, the attorney will be held responsible in an appropriate action.<sup>14</sup> The duty which rests upon him as an officer of the Court and a man learned in the law takes him out of the reason, and

<sup>11</sup> Robinson's Elementary Law, § 211; 3 Black. Com. 164; *Mills v. Mills*, 26 Conn. 219; *Doster v. Scully*, 27 Fed. Rep. 782; *Ex parte Giberson*, 4 Cranch's C. C. Rep. 503, 506; *Purves v. Landell*, 12 Cl. & F. 91; *Fairfield County Bar v. Taylor* (60 Conn. 11), 22 Atl. Rep. 441; *Cooley on Torts*, 616, 618, 2d ed.; *Pisani v. Attorney-General for Gibraltar*, L. R. 5 P. C. 516; *Bispham on Equity*, §§ 92, 93, 231-2, 236, 238; 1 *Swift's Digest* 548-9; 1 *Comyn's Digest* 758; *Weeks on Attorneys*, §§ 258, 268; *Williams v. Reed*, 3 *Mason* 404, 418; *Bishop on Non-Contract Law*, § 706; examine State statutes.

<sup>12</sup> *Cox v. Sullivan* (7 Ga. 144), 50 *Amer. Dec.* 386; 34 *Amer. Dec.* 90, note; *Babbitt v. Bumpus* (73 Mich. 331), 16 *Amer. St. Rep.* 585, 589; *Hart v. Frame*, 6 Cl. & F. 193, 209-10; *Eggleston v. Boardman*, 37 Mich. 14; *Cochrane v. Little* (71 Md. 323), 18 Atl. Rep. 698; *Weeks on Attorneys*, § 285.

<sup>13</sup> *Dickson v. Wright* (52 Miss. 585), 24 *Amer. Rep.* 677; *Smalley v. Greene* (52 Iowa, 241), 35 *Amer. Rep.* 267; *Rust v. Larue* (4 Littell, 412), 14 *Amer. Dec.* 172; *Cornelius v. Wash* (Breese, 98), 12 *Amer. Dec.* 145; 14 *Fed. Rep.* 786, note; 28 *Amer. Law Reg.* 542, note; *Weeks on Attorneys*, §§ 244-247.

<sup>14</sup> *Weeks on Attorneys*, § 259; 1 *Swift's Digest*, 558-9; 1 *Comyn's Digest*, 758; *Cooley on Torts*, 616-8, 2d ed.; 3 *Black. Com.* 163-4; *Perry on Trusts*, §§ 202-3, 4th ed.; *Fairfield County Bar v. Taylor* (60 Conn. 11), 22 Atl. Rep. 441; *Howell's Annotated Stat. of Mich.* § 7182; *National Savings Bank v. Ward*, 100 U. S. 195; *Doster v. Scully*, 27 Fed. Rep. 782; cf. *Domat's Civil Law* by *Strahan*, § 1137.

therefore out of the operation, of the rule which holds misrepresentation of a matter of law with intent to deceive not to be such fraud as to afford ground for rescission of a contract or for an action of deceit.<sup>15</sup> Matters of law are the facts with which he deals. And he is probably liable for the correctness of his opinions even concerning these facts, provided they be given in the performance of professional duty, and with the expectation that they will be relied upon.<sup>16</sup> The Court also will not suffer such an affront to its dignity to remain unnoticed, but will summarily mete out justice to its offending officer.<sup>17</sup>

If the attorney does not have, or, though possessing, does not exercise reasonable and ordinary knowledge, skill and diligence in the practice of the law, and in consequence thereof erroneously advises his client, such ignorance or such failure to employ his knowledge is held to be actionable negligence.<sup>18</sup> Any loss which the client may suffer in consequence of such negligent advice may be recovered from the attorney.<sup>19</sup> This rule is almost universally recognized where the English common law affords the basis of the legal system. In all cases of this sort the right of action is founded on negligence;<sup>20</sup> and the real question at issue is whether or not, in view of all the circumstances of the individual cause, the attorney is guilty of negligence.<sup>21</sup> In the decided cases the point is

<sup>15</sup> Cooley on Torts, 568, 2d ed. and note; 2 Parsons on Contracts, 786; Benjamin's Prin. of Contracts, 75; Hickey v. Morrell, 102 N. Y. 454.

<sup>16</sup> Cooley on Torts, 567, 2d ed.; 2 Parsons on Contracts, 778-9.

<sup>17</sup> Fairfield County Bar v. Taylor (60 Conn. 11), 22 Atl. Rep. 441; 3 Black. Com. 29; Cooley on Torts, 616-8, 2d ed.; Perry on Trusts, § 846, 4th ed.; 1 Comyn's Dig. 754.

<sup>18</sup> National Savings Bank v. Ward, 100 U. S. 195—this case by inference supports the proposition stated; Dundee Mortgage, etc., Co. v. Hughes, 20 Fed. R. 39; Citizens' Loan Fund, etc., Ass'n v. Friedley (123 Ind. 143), 18 Amer. St. Rep. 320; cf. Hilleglass, Adm'r v. Bender, 78 Ind. 225; Doster v. Scully, 27 Fed. Rep. 782; Chase et al. v. Heaney, 70 Ill. 268; 28 Amer. Law Reg. 544, note citing Gihon v. Albert & Shaw, 7 Paige (N. Y. Ch.) 278; Estate of A. B., 1 Tuck. (N. Y. Surr.) 247; Baikie v. Chandless, 3 Camp. 17, 20; 1 Parsons on Contracts, 114; Cochrane v. Little et al. (71 Md. 323) 18 Atl. Rep. 698; 2 Shearman & Redfield on Neg., § 574, 4th ed.; Thomas v. Schee, 80 Iowa, 237; Purves v. Landell, 12 Cl. & F. 91; Kemp v. Burt, 4 Barn. & Ad. 424. And he is liable even if he advises gratuitously, Donaldson v. Haldane, 7 Cl. & F. 762, 770-772; cf. Weeks on Attorneys, §§ 304, 311-313.

<sup>19</sup> See cases cited in preceding note.

<sup>20</sup> Weeks on Attorneys, § 283; 3 Black. Com. 164; also the cases cited in note 18.

<sup>21</sup> Whiteman v. Hawkins, L. R. 4 C. P. Div. 13, 19; cf. Weeks on Attorneys, §§ 283, 285; also cases cited in note 12.

much mooted as to whether or not attorneys are liable to respond in damages to their clients save for the consequences of gross negligence. Since the establishment of the modern theory that any failure to exercise the care and skill demanded by all the facts of a given case is actionable negligence,<sup>22</sup> any discussion of the degrees of negligence is of doubtful advantage. Yet in this instance it will not be amiss to consider a few of the leading cases. An examination of the American cases shows that our courts are now practically unanimous in holding attorneys to the exercise of reasonable and ordinary skill and diligence in the performance of all professional duties.<sup>23</sup> This rule, if we recognize the "degrees of negligence," would make American attorneys liable for ordinary negligence, though, in some of the cases cited, the courts have called such negligence gross, basing their opinions upon English authorities.

The English decisions are nearly unanimous in fixing liability upon attorneys only when they are chargeable with "gross negligence, *crassa negligentia*."<sup>24</sup> But this apparent difference in the English and American rules of law lies chiefly in the different terminology employed to characterize similar states of fact. For in the English cases we find "gross negligence" constantly spoken of as the failure to use "due and reasonable skill and care;"<sup>25</sup> and the cases wherein we find attorneys held not liable are precisely like those American cases in which attorneys are acquitted of all negligence. It would appear from this, that the English attorneys are in fact held to quite as strict a performance of professional duty as are their American brethren.

Much misconception of the English rule has apparently resulted from inaccurate reading of Lord Mansfield's opinion in the case of *Pitt v. Yalden*.<sup>26</sup> This case came up on an application for a summary rule that the attorney should pay the debt for which suit was brought and costs of action, because of his mistake upon a point of law which had been settled in the higher courts. Lord Mans-

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<sup>22</sup> Anderson's Dictionary of Law, p. 704, under "gross, ordinary, and slight negligence."

<sup>23</sup> See American cases and authorities cited in note 10; contra, *Lynch v. Commonwealth*, 16 Serg. & R. 368.

<sup>24</sup> Cooley on Torts, 778, 2d ed.; *Crosby v. Murphy*, 8 Irish C. L. R. 301, 310; the English cases cited in note 10; *Purves v. Landell*, 12 C. & F. 91, 102; *Bulwer v. Gilman*, 4 M. & G. 108, 125; *Baikie v. Chandless*, 3 Camp. 17, 20; *Laidler v. Elliott*, 3 B. & C. 738; *Weeks on Attorneys*, §§ 285, 293.

<sup>25</sup> See the authorities cited in the preceding note.

<sup>26</sup> 4 Burr. 2060.

field, in that case, lays down the rule as follows: "An attorney ought not to be liable, in cases of reasonable doubt." Here the law was settled, but the attorney was from the country and probably did not know of the recent decisions settling the point. So his lordship says, "I think it is not a clear case enough for the court to proceed in a *summary* way. \* \* \* In this case the plaintiff ought to be left to his *action*." Neither the fact nor the quantity of the debt sued for had been ascertained, and the point really decided was, that under these circumstances the attorney should not be held liable in a *summary* way, in the absence of sufficiently gross negligence.

In *Crosbie v. Murphy*,<sup>27</sup> it is said that an attorney is not liable for a less degree than gross negligence. But, in *Parker v. Rolls*,<sup>28</sup> an attorney is declared responsible for the exercise of a *reasonable* amount of care and skill; and in *Godefroy v. Dalton*,<sup>29</sup> Tindal, C. J., in attempting to trace the dividing line between reasonable skill and diligence on the one hand, and gross negligence on the other, says, that an attorney is not liable "for error in judgment upon points of new occurrences, or of nice or doubtful construction, or of such as are usually intrusted to men in the higher branch of the profession of the law."

An examination of the American cases and authorities hitherto cited shows, that the rule here declared is very generally accepted by the courts of this country, as containing a correct exposition of the law. In the comparatively recent case of *Whiteman v. Hawkins*,<sup>30</sup> Denman, J., in commenting on the judge's charge in the lower court, said: "If his judgment turned upon any supposed distinction between different degrees of negligence,—if he thought that to render the defendant liable to substantial damages it was necessary to establish gross negligence as contradistinguished from a want of due care and attention to his business as a solicitor,—I think he was wrong."<sup>31</sup>

But attorneys who, in good faith, advise their clients erroneously as to the rule of law, whether written or unwritten, its existence, interpretation, or application, where its uncertainty in these respects is so great as to render probable a disagreement upon it among lawyers of average learning, ability and diligence,

<sup>27</sup> 8 Irish C. L. 301.

<sup>28</sup> 14 C. B. 691.

<sup>29</sup> 6 Bing. 460.

<sup>30</sup> L. R., 4 C. P. Div. 13.

<sup>31</sup> *Ibidem*, p. 19.

are not liable to make good any losses that may come to their clients by reason of the latter relying upon such advice.<sup>82</sup>

Thus in *Marsh v. Whitmore*,<sup>83</sup> an attorney, who accepted as law the decision of the highest court in his State, was held not to be chargeable with negligence in acting upon such decision in advance of a contrary decision upon the same point, by the United States Supreme Court.

The usual remedy for the client who is injured by the unskillful or negligent advice of his attorney is an action at law for damages.<sup>84</sup> Where the common law system of pleading prevails, the action in which relief is usually sought is trespass on the case,<sup>85</sup> or *assumpsit*,<sup>86</sup> the former basing the right of action on the breach of a legal duty, the latter on the breach of the implied or quasi-contract. Under code pleading, the civil action,<sup>87</sup> of course would be employed. Under either system the question of negligence is left to the determination of the jury, under proper instructions by the court.<sup>88</sup> The proper party plaintiff, and, where

<sup>82</sup> Weeks on Attorneys, §§ 290-293; *Purves v. Landell*, 12 Clark & F. 91, 102-7; *Kemp v. Burt*, 4 Barn. & Ad. 424; *Hart v. Frame*, 6 Clark & F. 193; *Godefroy v. Dalton*, 6 Bing. 460; *Laidler v. Elliot*, 3 B. & C. 738; *Baikie v. Chandless*, 3 Camp. 17; *Pitt v. Yalden*, 4 Burr, 2060; *Bulmer v. Gilman*, 4 M. & G. 108, 125; *Parker v. Rolls*, 14 C. B. 691; *Goodman v. Walker* (30 Ala. 482), 68 Amer. Dec. 134; *Fitch v. Scott* [3 How. (Miss.) 314], 34 Amer. Dec. 86; 34 Amer. Dec. 89, note; *Citizen's Loan Fund, etc., Ass'n v. Friedley* (123 Ind. 143), 18 Amer. St. Rep. 320; *Babbitt v. Bumpus* (73 Mich. 331), 16 Amer. St. Rep. 585; *Ahlhauser v. Butler et al.*, 57 Fed. R. 121; *National Savings Bank v. Ward*, 100 U. S. 195; 28 Amer. Law Reg. 536-546; *Doster v. Scully*, 27 Fed. Rep. 782.

<sup>83</sup> 21 Wallace 178.

<sup>84</sup> Weeks on Attorneys § 295; 3 Black. Com. 163.

<sup>85</sup> Weeks on Attorneys §§ 295, 300; 3 Black. Com., 163-4; 7 Com. Dig. 756; Com. Dig., Action on the case for a deceit; Cooley on Torts 618, 2d ed.; *Dearborn v. Dearborn*, 15 Mass. 316; *Stevens v. Walker & Dexter*, 55 Ill. 151; *Cochrane v. Little* (71 Md. 323), 18 Atl. Rep. 698; 2 Chit. Pl. 373, note; *Laidler v. Elliot*, 3 B. & C. 738; *Kemp v. Burt*, 4 Barn. & Ad. 424; and many other cases cited in preceding notes.

<sup>86</sup> 2 Chit. Pl. 373, note; *Wilcox et al. v. Plummer*, 4 Peters 172; *Varnum et al. v. Martin*, 15 Pick. 440; *Hopping v. Quin*, 12 Wend. 517; *Babbitt v. Bumpus* (73 Mich. 331), 16 Amer. St. Rep. 585; and many cases in the preceding notes; Weeks on Attorneys, § 300.

<sup>87</sup> Pomeroy's Code Remedies, § 44.

<sup>88</sup> 2 Shearman & Redfield on Neg. § 565; *Cochrane v. Little et al.* (71 Md. 323), 18 Atl. Rep. 698; *Walpole's Adm'r. v. Carlisle*, 32 Ind. 415; *Reece v. Righy*, 4 Barn. & Ad. 202; *Hunter v. Caldwell*, 10 Qu. B. (Ad. & El. N. S.), 69, 81-2; *Hill v. Featherstonhaugh*, 7 Bing. 569; *Bracey v. Carter*, 12 A. & E. 373; Weeks on Attorneys, § 297; 34 Amer. Dec. 90, note; *contra*, *Gambert v. Hart*, 44 Cal. 542.

fraud is wanting, the only one who may maintain the action against the attorney for negligent and erroneous advice, is the one who has consulted the attorney in such a way as to cause the relation of attorney and client to spring up.<sup>39</sup> For it is the relationship of attorney and client which creates the legal duty or raises the quasi-contract to enforce which the action is brought. Neither the payment of a retaining fee nor any compensation by the client is essential to the subsistence of this relationship.<sup>40</sup> But, if the erroneous advice be given fraudulently or collusively, then whoever has a right reasonably to rely upon it and is deceived thereby to his damage, may maintain his action.<sup>41</sup> Otherwise, the attorney is not liable to one who is not his client.<sup>42</sup> Nor is he liable for advice given in response to a casual inquiry, a so-called "street opinion."<sup>43</sup>

The burden of proof in all cases rests upon the client to prove the existence of the duty on the part of the attorney, the breach thereof, and the resultant damage to himself.<sup>44</sup> Although the rule is otherwise, some authorities hold that the action cannot be sustained even for nominal damages without proof of actual loss.<sup>45</sup> The universal measure of damages in this class of cases is the loss actually sustained by the client as the natural and proximate con-

<sup>39</sup> National Savings Bank *v.* Ward, 100 U. S. 195; Dundee Mortgage, etc., Co. *v.* Hughes, 20 Fed. Rep. 39; Robertson *v.* Fleming, 4 Macq. Scotch App. Cases, 167, 177, 200; Cooley on Torts, 780, 2d ed.; Fish *v.* Kelly, 17 C. B. N. S. 194, 205; 2 Shearman & Redfield on Neg. § 562: for exception to the rule, cf. Nat'l Savings Bank *v.* Ward, *supra*, and Levy *v.* Langridge, 2 M. & W. 519, 531, and 4 M. & W. 337; Weeks on Attorneys, §§ 127, 293.

<sup>40</sup> Weeks on Attorneys, § 313; Donaldson *v.* Haldane, 7 Cl. & F. 762, 770-3; Cooley on Torts, 780, 2d ed.; 2 Shearman & Redfield on Neg. § 562.

<sup>41</sup> Fish *v.* Kelly, 17 C. B. N. S. 194, 205; National Savings Bank *v.* Ward, 100 U. S. 195; Fairfield County Bar *v.* Taylor (60 Conn. 11), 22 Atl. Rep. 441; Weeks on Attorneys, § 127; see also authorities cited in note 14; cf. Derry *v.* Peek, L. R. 14 App. Cas. 337; and Litchfield *v.* Hutchinson, 117 Mass. 195.

<sup>42</sup> See authorities cited in note 39.

<sup>43</sup> Fish *v.* Kelly, 17 C. B. N. S. 194, 205; Cooley on Torts, 780 2d ed.; Weeks on Attorneys, § 292.

<sup>44</sup> 2 Shearman & Redfield on Neg. § 566; Quinn *v.* Pelt, 56 N. Y. 417; Weeks on Attorneys, §§ 293, 298.

<sup>45</sup> In support of rule, see Weeks on Attorneys, §§ 292, 293; Godefroy *v.* Jay, 7 Bing. 413, 419; 2 Shearman & Redfield on Neg. § 573; *contra*, Fitch *v.* Scott [3 How. (Miss.) 314], 34 Amer. Dec. 86; Jay *v.* Morgan, 35 Minn. 184, cited in 28 Amer. Law Reg. 539; *ibidem* 545; Weeks on Attorneys, § 299, p. 596 in 2d ed.

sequence of his acting in reliance upon his attorney's advice,<sup>46</sup> and the amount of such loss is to be ascertained by the jury.<sup>47</sup>

But clients less frequently seek the aid of the courts to enforce this liability, than they interpose the plea of negligence as a defense to an action by the attorney for his fees. At common law it would seem that the client could not avail himself of this defense under the general issue unless he had, by reason of the attorney's negligence, lost all possibility of benefit from the attorney's services.<sup>48</sup> But no reason appears why such defense, though going to reduce the damages merely, could not have been employed, *pro tanto*, under a plea of confession and avoidance; and the attorney's negligence might have been made the foundation of a cross action.<sup>49</sup> Negligence of the attorney causing damage to his client is undoubtedly a good defense under code practice, whether it goes to destroy, or merely to reduce, the value of his services.<sup>50</sup> But not, if the client subsequently with full knowledge ratifies his attorney's action and accepts the benefits thereof.<sup>51</sup> Fraudulent conduct on the part of the attorney is likewise a good defense.<sup>52</sup>

The right of the client to sue his attorney for injury caused by the latter's fraudulent or negligent advice may be barred by the Statute of Limitations, or be defeated by the client's consenting

<sup>46</sup> 28 Amer. Law Reg. 545; *Stevens v. Walker & Dexter*, 55 Ill. 417, S. C. 79 Ill. 193; *Quinn v. Van Pelt*, 56 N. Y. 417; 2 *Shearman & Redfield on Neg.* § 753, cf. § 567, note; *Sedgwick on Damages*, § 831, 8th ed.; *Whiteman v. Hawkins*, L. R. 4 C. P. Div. 13, 19; *Eccles v. Stephenson*, 3 Bibb. 517, 520; *Cox v. Sullivan* (7 Ga. 144), 50 Amer. Dec. 386; *Cox v. Livingston* [2 *Watts & Serg.* (Penn.) 103], 37 Amer. Dec. 486; *Pennington's Ex'rs v. Yell* (11 Ark. 212), 52 Amer. Dec. 262; 34 Amer. Dec. 95-6, note; *Weeks on Attorneys*, §§ 293, 319.

<sup>47</sup> 28 Amer. Law Reg. 545, note; *Eccles v. Stevenson*, 3 Bibb (Ky.) 517, 520; 34 Amer. Dec. 95-6, note.

<sup>48</sup> *Sedg. on Damages*, § 1037, 8th ed.; *Gleason v. Clark*, 9 Cowen, 57; *Hill v. Featherstonhaugh*, 7 Bing. 569; *Bracey v. Carter*, 12 A. & E. 373, 376; *Templer v. McLachlan*, 2 B. & P. N. R. 136; *Huntley v. Bulwer*, 6 Bing. N. C. 111; *Hopping v. Quinn*, 12 Wend. 517; *Weeks on Attorneys*, §§ 302, 341; cf. *Montriau v. Jeffries*, 2 Car. & P. 113; *Elkington v. Holland*, 9 M. & W. 659.

<sup>49</sup> *Weeks on Attorneys*, §§ 302, 341.

<sup>50</sup> *Weeks on Attorneys*, § 341. *Caverley v. McOwen*, 123 Mass. 574; *Bowman v. Tallman*, 40 How. Pr. R. 1 (N. Y. Ct of App.); *Reilly v. Cavanaugh*, 29 Ind. 435.

<sup>51</sup> *Weeks on Attorneys*, § 247; *The U. S. Mort. Co. v. Henderson et al.*, 111 Ind. 24, 34.

<sup>52</sup> *Weeks on Attorneys*, § 341; *Brackett v. Norton* (4 Conn. 517), 10 Amer. Dec. 179; *Dickinson v. Bradford* (59 Ala. 581), 31 Amer. Rep. 23; cf. the authorities cited in notes 11 and 13.

thereto, or by the client's negligence materially contributing to his own loss. The Statute of Limitations runs from the accruing of the right of action, *i.e.*, the act of negligence, unskillfulness, or fraud.<sup>53</sup>

Besides the client's remedy by action at law for damage caused by his attorney's erroneous advice, there is the more speedy remedy by invoking the exercise of the court's summary jurisdiction. If the damage due to the erroneous advice is ascertained, and if such advice was given by the attorney in his professional capacity fraudulently, the court, whether of law or of equity, may issue a rule requiring the attorney to show cause why he should not be ordered to compensate his client for such damage.<sup>54</sup> Or, the rule may be to show cause why an attachment should not issue against him.<sup>55</sup> And, in some cases, when the negligence or misconduct is flagrant, this remedy may be granted even though the client does not claim fraud on the part of the attorney.<sup>56</sup> If either rule is made absolute, the client is adequately compensated without the delay incident to an action at law. And this remedy may be invoked by one, not a client, who has suffered loss through an attorney's having negligently given erroneous advice to a court of chancery concerning a trust fund in court, even though fraud is not so much as suspected.<sup>57</sup> The ground for the exercise of this authority is the right inherent in the court to protect the dignity of the administration of justice from the reproaches to which the malpractice or fraudulent conduct of its officers would subject it.<sup>58</sup> The remedy afforded to the client is incidental merely to this higher purpose.

A bill in equity will lie to have the attorney decreed a trustee by construction of law, where, as a result of his erroneous advice, he has gained possession of, or title to, property which ought, in

<sup>53</sup> *Wilcox et al. v. Plummer*, 4 Peters, 172; *Rhines' Adm'rs v. Evans*, 66 Penn. St. 192; 38 Amer. Dec. 270, note; *Roberts v. Armstrong's Adm'r* [1 Bush (Ky.) 263], 89 Amer. Dec. 624; *Weeks on Attorneys*, § 320; *Wood on Limitations*, § 122.

<sup>54</sup> *Cooley on Torts*, 618, 2d ed.; *Weeks on Attorneys*, §§ 77, 94; cf. *in re Dangar's Trusts*, L. R. 41 Ch. Div. 178; *Perry on Trusts*, §§ 202, 203; *Pitt v. Yalden*, 4 Burr, 2060.

<sup>55</sup> *Weeks on Attorneys*, §§ 94, 97; 4 Black. Com. 283-287; 1 Comyn's Dig. 758.

<sup>56</sup> *Pitt v. Yalden*, 4 Burr, 2060; *Weeks on Attorneys*, §§ 77, 97; *In re Dangar's Trusts*, L. R. 41 Ch. Div. 178, 196-7.

<sup>57</sup> *In re Dangar's Trusts*, L. R., 41 Ch. Div. 178, 196-7.

<sup>58</sup> *Weeks on Attorneys*, § 77; 4 Black. Com. 284; *In re Dangar's Trusts*, L. R. 41 Ch. Div. 178, 196-7.

fairness and honesty, to go to the client, and the court will compel the attorney to execute such trust.<sup>59</sup> In cases of actual fraud the remedy will be summarily decreed.<sup>60</sup> The relation of attorney and client being one of special trust and confidence, any unfair advantage taken of this relationship will be closely scrutinized, and slight unfairness will be seized by the court as affording ground for granting appropriate relief. In all dealings between attorneys and clients, the former must display the highest degree of good faith, and advise their clients fully as to their legal rights and all other matters essential to enable the clients to stand upon an equal footing with them in the transaction.<sup>61</sup> But laches will bar the plaintiff's right to maintain a bill in equity for the wrong done him.<sup>62</sup>

And it is generally held that equity has no jurisdiction to make the solicitor or attorney—his motives being honest—responsible to his client for mere negligence or imprudence, especially while the loss or injury is only apprehended.<sup>63</sup>

To the court as well as to the client, the attorney owes the duty of exercising care, skill and integrity, whether in advising the court or a client. For, in so advising, provided the advice be within the scope of his professional duties, he acts in the capacity of an officer of the court. And upon this ground the court has jurisdiction and authority to remove its incompetent servant by striking him from the rolls.<sup>64</sup> But this authority will rarely be

<sup>59</sup> Perry on Trusts, §§ 202-3; cf. Weeks on Attorneys, § 296.

<sup>60</sup> Perry on Trusts, § 203; cf. authorities cited in note 54.

<sup>61</sup> Perry on Trusts, § 202; Cooley on Torts, 616-618, 2d ed.; Bispham's Principles of Equity, §§ 92, 93, 231, 232, 236, 238; Bingham v. Salene, 3 Amer. St. Rep. 152; Kisling v. Shaw (33 Cal. 425), 91 Amer. Dec. 644; Miles v. Ervin, 16 Amer. Dec. 623; Henry v. Raiman (25 Penn. St. 354), 64 Amer. Dec. 703; Rogers v. Marshall, 13 Fed. Rep. 59; Pacific R. R. Co. v. Ketchum, 101 U. S. 289; also the authorities cited in note 11.

<sup>62</sup> Weeks on Attorneys, § 94, p. 198; Perry on Trusts, § 202; especially if no substantial injustice be done.

<sup>63</sup> Frankland v. Lucas, 4 Sim. 586; British Mut. Investment Co. v. Cobbold, L. R. 19 Eq. 627; Chapman v. Chapman, L. R. 9 Eq. 276, 296; contra, *in re* Dangar's Trusts, L. R. 41 Ch. Div. 178, 196-7, in case of solicitor.

<sup>64</sup> Weeks on Attorneys, §§ 77, 80, 81; 3 Black. Com. 26-29; *In re* Wallace, L. R. 1 P. C. 283; see note in 40 Amer. Rep. 642; Delano's case (58 N. H. 5), 42 Amer. Rep. 555; *Ex parte* Brownsall, Cowp. 829; Anderson v. Bosworth (15 R. I. 443), 2 Amer. St. Rep. 910; see note in 2 Amer. St. Rep. 847; People v. Appleton (105 Ill. 474), 44 Amer. Rep. 812; 95 Amer. Dec. 333-345, note; 13 Fed. Rep. 820, note; *Ex parte* Garland, 4 Wall. 333; *Re* Titus (Sup. Ct.), 50 N. Y. S. R. 636; Perry on Trusts, § 846.

exercised save as punishment for breaches of integrity,<sup>65</sup> as for fraudulently giving erroneous advice<sup>66</sup> to the damage of the client, or for some other breach of his official oath.<sup>67</sup> But it is probable that, if the erroneous advice should indicate so great a degree of ignorance, or so great want of care and diligence as to demonstrate the attorney's utter unfitness to discharge the duties of his office, the court would on this ground alone disbar him.<sup>68</sup> For the general rule is, that the court has power to strike its attorneys from the rolls on the ground of unfitness to be members of the profession.<sup>69</sup>

*William Bradford Bosley.*

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<sup>65</sup> See generally the authorities cited in note 64; 2 Shearman & Redfield on Neg. § 561; Weeks on Attorneys, § 83.

<sup>66</sup> *Fairfield County Bar v. Taylor* (60 Conn. 11), 22 Atl. Rep. 441.

<sup>67</sup> Weeks on Attorneys, § 80, pp. 160, 163; *Strout v. Proctor*, 71 Me. 288.

<sup>68</sup> *Contra*, *Bryant's case*, 24 N. H. 149 (1851); but this decision proceeded on the ground that the statute prescribed no educational qualifications for admission to practice.

<sup>69</sup> *Ex parte Cole*, 1 McCrary 405; see note in 13 Fed. Rep. 820; *Dicken's case* (67 Penn. St. 169), 5 Amer. Rep. 420; *Ex parte Robinson*, 19 Wall. 505, 512; Weeks on Attorneys, § 80, p. 156.