

RELIANCE ON ADVICE OF COUNSEL

INACCURATE advice by attorneys may lead their clients to undertake conduct which normally would be subject to criminal penalties or civil liability.¹ In some circumstances proof that acts or omissions occurred in good faith reliance on the mistaken advice of counsel can be used as a defense to such liability. The utility of this defense is limited. Reliance may negative the existence of criminal intent, bad faith, or negligence; when proof of one of these elements is essential to liability, reliance on counsel will be a good defense. Thus, reliance may be interposed in defense to a charge of larceny or embezzlement,² to an assessment of penalties for failure to file federal tax returns,³ or to a stockholder derivative action alleging negligence of the corporation's directors.⁴ But reliance can never be a justification for an act which is unlawful or wrongful in itself. Thus, the defense cannot be used successfully in those situations where an act or omission is the only element necessary for the imposition of the penalty or liability. For example, proof of reliance will be of no avail with respect to a public welfare offense,⁵ a claim for compensatory damages for trespass or conversion,⁶ or a motion to punish for contempt of court.⁷ Even in some of these cases, however,

1. Errors committed by attorneys are actionable only if they are the result of negligence, incompetence, or fraud. In practice, few errors are found to fall within this class. In addition to the rather vague standards of competence required, errors may often be caused by an inaccurate or incomplete rendition of the facts by the client. And attorneys, generally, are hesitant to bring suit against or testify against other members of the profession. See generally Blaustein, *Liability of Attorney to Client in New York for Negligence*, 19 BROOKLYN L. REV. 233 (1953); Gardner, *Attorneys' Malpractice*, 6 CLEV.-MAR. L. REV. 264 (1957); Wade, *The Attorney's Liability for Negligence*, 12 VAND. L. REV. 755 (1959); Comment, *Malpractice at the Bar*, 26 TENN. L. REV. 525 (1959).

2. *State v. Patterson*, 66 Kan. 447, 71 Pac. 860 (1903); *People v. Long*, 50 Mich. 249, 15 N.W. 105 (1883) (dictum); *Buchanan v. State*, 5 So. 617 (Miss. 1839); *State v. Hunt*, 25 R.I. 75, 54 Atl. 937 (1903) (dictum).

3. *E. M. Green*, 11 B.T.A. 278 (1928) (dictum). In many cases reliance on the advice of a licensed accountant has the same effect as reliance on the opinion of an attorney. *E.g.*, *Burton Swartz Land Corp. v. Commissioner*, 198 F.2d 558 (5th Cir. 1952); *Haywood Lumber & Mining Co. v. Commissioner*, 178 F.2d 769 (2d Cir. 1950); *Hatfried, Inc. v. Commissioner*, 162 F.2d 628 (3d Cir. 1947).

4. *Spirit v. Bechtel*, 232 F.2d 241 (2d Cir. 1956); *Pool v. Pool*, 22 So. 2d 131 (La. App. 1945); *Litwin v. Allen*, 25 N.Y.S.2d 667 (Sup. Ct. 1940) (dictum); *Spering's Appeal*, 71 Pa. 11 (1872).

5. These offenses, which do not require *mens rea*, include illegal sales of intoxicating liquor, sales of impure or adulterated food or drugs, sales of misbranded articles, criminal nuisances, and violations of antinarcotic acts, traffic regulations, motor-vehicle laws, and general police regulations. See PERKINS, *CRIMINAL LAW* ch. 7, § 5, at 701-03 (1957); Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 62 (1933).

6. *United States v. St. Anthony R.R.*, 192 U.S. 524 (1904); *United States v. Homestake Mining Co.*, 117 Fed. 481 (8th Cir. 1902); *Abbott v. 76 Land & Water Co.*, 103 Cal. 607, 37 Pac. 527 (1894).

reliance may be taken into consideration by the court as a factor in mitigation of penalties or damages.⁸

Reliance on the advice of counsel tends to be regarded as a unique kind of defense, perhaps because courts view the law as an especially esoteric field of knowledge in which laymen cannot be held responsible for exercising their own judgment in the face of expert opinion. But other kinds of expert advice might also be used as defenses. Reliance on the advice of an accountant has been regarded as a defense in some cases involving tax fraud.⁹ A few state statutes relieve directors of liability for declaring illegal dividends if they have relied on statements by corporate financial officers.¹⁰ And in one case, a defendant who had been sued for malicious prosecution for having erroneously initiated a civil commitment proceeding was allowed to introduce, as proof of his good faith, evidence of advice from a family physician that the plaintiff was insane.¹¹ This development seems reasonable. Reliance on counsel is but a means of establishing "good faith" or "due care." If a problem requires the use of professional advice of a nonlegal nature, obtaining and relying on such advice should also satisfy these requirements. This Comment will focus on the elements necessary to constitute the defense of reliance on the advice of counsel, and will examine those areas of substantive law where that defense is frequently raised. The factors discussed, however, may prove applicable when reliance on other expert advice is offered as a defense.

ELEMENTS OF THE DEFENSE

Accurate Reliance

The first prerequisite to successful invocation of the defense of advice of counsel is that the advisee must follow the advice of his attorney without variation.¹²

7. *In re La Varre*, 48 F.2d 216 (S.D. Ga. 1930); *Queen & Co. v. Green*, 170 Fed. 611 (E.D. Pa. 1909); *Folsom v. State*, 216 Ark. 31, 224 S.W.2d 44 (1949). *Contra*, *Furrer v. Nebraska Bldg. & Inv. Co.*, 109 Neb. 1, 189 N.W. 295 (1922); *Rumney v. Donovan*, 28 Mont. 69, 72 Pac. 305 (1903).

8. Reliance is explicitly considered as a mitigating factor in contempt of court cases. *In re La Varre*, *supra* note 7; *Coffin v. Burstein*, 68 App. Div. 22, 74 N.Y. Supp. 274 (1902).

9. See note 3 *supra*.

10. See note 55 *infra*.

11. *Griswold v. Griswold*, 143 Cal. 617, 620-21, 77 Pac. 672, 673 (1904):

He was the family physician. He was supposed to . . . know more about the mental condition of plaintiff than any attorney at law could have known. If defendant had not consulted the family physician, but had gone to an attorney at law, it would certainly seem that he had much less ground for the prosecution than by pursuing the course he did.

Cf. *Richter v. Neilson*, 11 Cal. App. 2d 503, 54 P.2d 54 (1936).

12. See, *e.g.*, *People v. Long*, 50 Mich. 249, 251, 15 N.W. 105 (1883):

Respondent claimed to have acted in good faith . . . under the advice of counsel . . . Unfortunately for him he did not follow it. His counsel did not advise him to take the buggy secretly, but to take it, rendering what was due . . . If one relies upon legal counsel for protection against punishment for unlawful acts, he must show that he followed it.

Courts, however, have never defined what is meant by a "variation," nor have they indicated its consequences. Several alternative definitions can be postulated. An absolute standard would render the defense unavailable upon a showing of variation in the slightest degree. A better view, however, would be that a failure to follow advice constitutes a "variation" only when the reasonably prudent man, in making the deviation, would have realized that he was not following his lawyer's advice. When the layman of average competence and intelligence would not have been aware of the difference, he should not lose whatever protection reliance may afford. This reasoning is equally applicable to the situation where the client's insubstantial variation has made his actions unlawful. Here again there would seem to be no negligence on the part of the advisee if he recognized the existence of a problem requiring for its solution the attention of an attorney, retained competent counsel, and attempted to comply with his attorney's advice with all the care and diligence of a reasonable man. By the same token, where the client has committed a substantial variation he should forfeit the defense of reliance entirely, regardless of whether the consequence is to increase or even decrease the liability. Even a good faith belief that the modification will have no legal effect should not preserve the defense. It does not seem consonant with reasonable care consciously to deviate from expert advice regarding a problem outside the realm of personal competency.

In Good Faith

To establish a defense of reliance, the advice given by the attorney must be ostensibly correct. If the advice is patently erroneous the advisee cannot rely on it in good faith. This restriction applies regardless of whether the advisee did, in fact, recognize the error, for if the prudent layman of average intelligence would have comprehended the error, the reliance was not reasonably justified.¹³ An example of implied bad faith by reason of patent error can be found in *James v. West*.¹⁴ In that case the creditors of an estate asserted that the administrator

13. *E.g.*, *In re Perel*, 51 F.2d 506 (S.D. Tex. 1931); *In re Holbert*, 48 Cal. 627 (1874); *Carty v. Toro*, 223 Ind. 1, 57 N.E.2d 434 (1944). In some cases the courts have abandoned the "reasonable man" standard and inquired into the intelligence of the defendant in an effort at determining whether he could have reasonably accepted the advice. See *Willett v. Tichenor*, 220 S.W. 709 (Mo. App. 1920), where the defendant was convicted of contempt of court. "Were he [the defendant] illiterate or uneducated, I would be inclined to say that the advice of his counsel would furnish a complete excuse, but he is not." *Id.* at 710 (quoting from trial court opinion). Inability to detect erroneous tax advice has also been considered. See *Davis v. Commissioner*, 184 F.2d 86 (10th Cir. 1950); *Orient Inv. & Fin. Co. v. Commissioner*, 166 F.2d 601 (D.C. Cir. 1948); *cf.* *Helms v. Duckworth*, 249 F.2d 482 (D.C. Cir. 1957).

Where the advice rendered is flagrantly inaccurate, the courts sometimes take the position that the attorney either was not in possession of all the information, or was in collusion with the defendant. See *In re Perel*, 51 F.2d 506 (S.D. Tex. 1931); *In re La Varre*, 48 F.2d 216 (S.D. Ga. 1930); *Smith v. King*, 62 Conn. 515, 26 Atl. 1059 (1893).

See also *United States v. Anthony*, 24 Fed. Cas. 829 (No. 14459) (Cir. Ct. N.D.N.Y. 1873) (advice of counsel that law was unconstitutional ruled invalid defense).

14. 67 Ohio St. 28, 65 N.E. 156 (1902).

had acted improperly in making a distribution to the beneficiaries before payment of all claims against the estate. The administrator sought to rebut the allegation by showing that the distribution was made upon the advice of his attorney. The Ohio Supreme Court rejected his contention, on the ground that reliance on such advice was not reasonable when the statute clearly provided that all debts be first paid and distribution be made only of the remainder. Similarly, an individual cannot have a default judgment expunged merely because his attorney advised him that he need not appear in an action, or answer a complaint.¹⁵ It is held to be contrary to common sense completely to ignore a summons to defend an action.

Good faith also comprehends the requirement of full disclosure of all relevant information, because an attorney cannot be expected to render an accurate opinion of law without such information. Nondisclosure of information which the client thinks is relevant would be a clear indication of bad faith.¹⁶ Even if the client honestly thinks that the information is not relevant, nondisclosure may taint the defense. Relevancy is a question of law, peculiarly within the competence of the attorney. Hence, the layman should not assume the discretion to make the decision, and should bear the risk of loss if he does so. If the advisee is not aware of the information, but it is relevant, he will bear the risk of loss only if a reasonable investigation would have revealed it.¹⁷

Competent Counsel

The courts have imposed a dual criterion with respect to the competence of the attorney on whose advice the defendant claims reliance. The counselor must be qualified to practice law by being a duly licensed member of the bar; in addition, he must be a proficient practitioner. One court has held that the attorney relied on need not be admitted to practice in the jurisdiction in which

15. *Carty v. Toro*, 223 Ind. 1, 57 N.E.2d 434 (1944).

16. *In re Merritt*, 28 F.2d 679 (9th Cir. 1928); *Smith v. Hensley*, 107 Colo. 180, 109 P.2d 909 (1941); *Douglas v. United States Fid. & Guar. Co.*, 81 N.H. 371, 127 Atl. 708 (1924); *Mills v. Vollmer-Clearwater Co.*, 126 Wash. 73, 217 Pac. 3 (1923); *Nelson v. J. H. Winchell & Co.*, 203 Mass. 75, 89 N.E. 180 (1909). Distortion of facts, careless or intentional, works the same result. *Kitchen v. Rosenfeld*, 44 R.I. 399, 117 Atl. 537 (1922). *In re Holbert*, 48 Cal. 627 (1874) the defense of reliance was ruled improper when the defendant neither concealed nor distorted information, but he was aware that his attorney had not made sufficient inquiry into the facts.

For an extreme application of this rule, see *Levinson v. United States*, 263 Fed. 257 (3d Cir. 1920) (statement to counsel that transfer of money was a loan when jury later found it to be a payment for capital stock).

Some courts have held that a defendant cannot offer evidence of reliance without first establishing that counsel was aware of all the relevant facts. *State v. Oppenheimer*, 73 Kan. 104, 84 Pac. 588 (1906); *Louisville & N.R.R. v. Smith*, 141 Aja. 335, 37 So. 490 (1904). *But see Rainey v. Kemp*, 118 S.W. 630 (Tex. Civ. App. 1909).

17. *Atlantic Coast Line R.R. v. Ward*, 92 Fla. 526, 109 So. 452 (1926) (dictum); *Selden v. Cashman*, 20 Cal. 57 (1862).

the cause of action arose.¹⁸ The plaintiff in a malicious prosecution action conceded that reliance would otherwise have been a valid defense, but asserted that it was inapplicable because the advising attorney was not a member of the bar in the jurisdiction in which the prosecution had been instituted. The court held that any competent, reputable attorney who has been admitted to practice in any state in the Union is qualified to give advice on whether a criminal warrant should be sought under the laws of another state. The court apparently reasoned that because the advice of the "merest tyro in the profession"¹⁹ is often accepted as a defense it would have been ludicrous to deny the defense merely because the attorney was licensed in another state.

Courts have generally been insistent that an adviser be a bona fide member of the bar. Where the person giving legal advice is clearly not an attorney and the client is aware of this fact the defense is rejected; thus, the opinions of police magistrates, probate judges, and justices of the peace have been disregarded.²⁰ One decision indicates that the client's knowledge or good faith belief is irrelevant. Thus, in an action to recover damages for malicious prosecution, reliance was held not a valid defense where the defendant had consulted one who fraudulently held himself out as a duly licensed attorney.²¹ This strict standard seems difficult to reconcile with the good faith theory which underlies the defense. A better practice would be to inquire whether the layman of average prudence should reasonably have believed the advisor to be a

18. *Clogard Wardrobe Co. v. Normandy*, 158 Va. 50, 163 S.E. 355 (1932).

19. *Id.* at 57, 163 S.E. at 358.

20. *Sutton v. McConnell*, 46 Wis. 269, 50 N.W. 414 (1879) (police magistrate); *Anderson v. Fletcher*, 228 Ill. App. 372 (1923) (judge of county court); *James v. West*, 67 Ohio St. 28, 65 N.E. 156 (1902) (probate judge); *Elwell v. Russel*, 71 Conn. 462, 42 Atl. 862 (1899) (town clerk); *Warth v. Hyman*, 40 N.E.2d 849 (Ct. App. Ohio 1941) (clerk of municipal court); *Jones v. MacCanochie*, 162 Pa. Sup. 124, 56 A.2d 284 (1948) (justice of the peace); *Mauldin v. Ball*, 104 Tenn. 597, 58 S.W. 248 (1900) (justice of the peace); *Kumor v. Graham*, 39 N.M. 245, 44 P.2d 722 (1935) (magistrate); *Evans v. Michaelson*, 146 Va. 64, 135 S.E. 683 (1926) (justice of the peace). *But cf.* *Saunders v. Baldwin*, 112 Va. 431, 71 S.E. 620 (1911) (conviction by justice of the peace conclusive evidence of existence of probable cause in suit to recover damages for malicious prosecution). The opinions of the officials are rejected as the basis for a defense because, while they may have greater legal knowledge than a layman, rendering advice is not their function and they lack the mantle of legal competence conferred upon members of the bar. See *Kennedy v. Crouch*, 191 Md. 580, 62 A.2d 582 (1948). See also *Williams v. Confidential Credit Corp.*, 114 So. 2d 718, 720 (Ct. App. Fla. 1959):

Although individual justices of the peace may have broad experience and knowledge of the law, the courts may not conclusively presume that they are qualified to determine whether probable cause for an arrest exists. This is especially true in Florida where such officers are not required to have legal training.

In a suit to recover damages for malicious prosecution, reliance by the defendant on the advice of the prosecuting attorney may be accorded the same weight as the advice of a member of the bar. See *Gladfelter v. Doemel*, 2 Wis. 2d 635, 87 N.W.2d 490 (1958) (dictum); *Smith v. Hensley*, 107 Colo. 180, 109 P.2d 909 (1941) (dictum).

21. *Murphy v. Larson*, 77 Ill. 172 (1875).

bona fide counselor-at-law. This would be compatible with the treatment of disclosures made to a nonattorney. If the client in good faith believes that the adviser is a member of the bar, disclosures made to him will be embraced in the attorney-client privilege.²² This reasoning should also be relevant in situations where the attorney was, unknown to his client, temporarily or permanently prohibited from the practice of law.

A more subjective, and hence less severe, standard is used to determine whether the attorney relied on possessed the intelligence and ability of a skillful member of the legal profession. A presumption of competence, based on the attorney's status as a member of the bar, generally satisfies the defendant's burden of going forward on this point.²³ To rebut this presumption plaintiff would have to introduce evidence of general ill-repute or specific acts of incompetence known to the defendant at the time he received the advice.²⁴ Arguably, this presumption of competence has been rendered less tenable by the trend toward increasing specialization within the legal profession. Perhaps an individual should not be justified in seeking advice with respect to a patent problem from an attorney who he knows deals almost entirely with problems involving domestic relations. On the other hand, it might still be reasonable to assume that legal education gives practitioners sufficient familiarity with legal materials to enable them to render a satisfactory opinion.

Intimately related to the issue of competency is the problem of interest. If an attorney stands to realize appreciable personal benefits from the adoption of a particular plan of action by his client, his interest may well influence his opinion on that plan's legality.²⁵ This problem arises frequently in the corporate context. For example, if an option plan bestows stock of considerable value upon the corporation's general counsel, directors may not be justified in relying on his advice that the plan is lawful. But not every form of interest in

22. See 3 WIGMORE, EVIDENCE § 2302 (3rd ed. 1940); *People v. Barker*, 60 Mich. 277, 297, 27 N.W. 539 (1886); *State v. Russell*, 83 Wis. 330, 53 N.W. 441 (1892).

23. See *Horne v. Sullivan*, 83 Ill. 30, 32-33 (1876). See also *In re Slater*, 88 N.J. Eq. 296, 102 Atl. 384 (1917); *Closgard Wardrobe Co. v. Normandy*, 158 Va. 50, 163 S.E. 355 (1932); *Gramling-Spalding Co. v. Parker*, 3 Ala. App. 325, 57 So. 54 (1911); *Estate of Barbikas*, 171 Cal. App. 2d 452, 341 P.2d 32 (Dist. Ct. App. 1959).

24. See *Flaks v. Clark*, 143 Md. 377, 122 Atl. 383 (1923); *In re Hayes*, 40 Misc. 500, 82 N.Y. Supp. 792 (Surr. Ct. 1903).

25. See *Adkin v. Pillen*, 136 Mich. 682, 100 N.W. 176 (1904). It is generally considered to be a jury question whether the attorney's interest was so substantial as to make the advisee's reliance unjustified. *L. Bucki & Son Lumber Co. v. Atlantic Lumber Co.*, 121 Fed. 233 (5th Cir. 1903); *Charles City Plow & Mfg. Co. v. Jones*, 71 Iowa 234, 32 N.W. 280 (1887). *But see* *Union v. United Battery Service Co.*, 35 Ohio App. 68, 171 N.E. 608 (1929); *Smith v. Hensley*, 107 Colo. 180, 109 P.2d 909 (1941) (decided advisee could not rely on advice of her husband when their interests were identical); *cf. Smith v. King*, 62 Conn. 515, 26 Atl. 1059 (1893) (the court inferred from the advice itself that the attorney was biased).

In *Emler v. Fox*, 172 Ky. 469, 189 S.W. 469 (1916) it was held that political affiliation alone was insufficient to disqualify the attorney's advice from constituting the basis of a complete defense.

the corporation's course of action will taint an attorney's advice. Courts have allowed the defense in some cases where the corporation relied on the legal advice of officers, directors, or stockholders.²⁶ For example, in the Iowa case *Charles City Plow & Mfg. Co. v. Jones*,²⁷ Jones counterclaimed that the corporation had wrongfully attached his property. The corporation sought to defend this counterclaim by showing that it had relied on the advice of its attorneys. The trial court instructed the jury to disregard evidence given in support of the defense because the corporation's attorneys were stockholders in the company and, in one instance, a corporate officer. The appellate court remanded the case for a new trial on the ground that counsel were not necessarily rendered incapable of giving accurate advice by their indirect pecuniary interest in the result. The question of justifiable reliance in good faith was held to be one for the jury.

Interest of the attorney would not seem to be relevant, however, when the client is unaware of the fact. The only apparent reason for barring the defense of reliance when the attorney is biased is the fact that a reasonable man would not rely on such advice²⁸—the same reason that courts refuse to accept reliance on patently erroneous opinions. If the client, through no fault of his own, is not alerted to the existence of some secret interest on the part of his attorney, his reliance on advice received seems as reasonable as in any other circumstances. The cases establishing the "interest" rule do not directly treat this issue, for the attorney's interest was apparent in all. But at least two courts have explicitly included the factor of knowledge by the client in stating the rule.²⁹

Questions of Law

Lay individuals in positions of trust and responsibility often encounter problems requiring the opinion of an attorney. Indeed, in such circumstances the individual has the duty to consult a member of the bar, and he will be liable for losses resulting from his failure to do so.³⁰ When the layman seeks this

26. *L. Bucki & Son Lumber Co. v. Atlantic Lumber Co.*, 121 Fed. 233 (5th Cir. 1903); *Harvey-Watts Co. v. Worcester Umbrella Co.*, 193 Mass. 138, 78 N.E. 886 (1906); *Atlantic Coast Line R.R. v. Ward*, 92 Fla. 526, 109 So. 452 (1926); cf. *Bailey v. Babcock*, 241 Fed. 501 (W.D. Pa. 1915).

The courts appear to be of the opinion that a director's, officer's, or shareholder's identity with the corporation is not absolute but depends on the degree of his financial commitment. Where the advisor's interest is substantial, the courts do say that he is, in effect, advising himself. See *L. Bucki & Son Lumber Co. v. Atlantic Lumber Co.*, *supra*.

27. 71 Iowa 234, 32 N.W. 280 (1887).

28. See *White v. Carr*, 71 Me. 555, 557 (1880) ("but when the attorney is directly interested in the subject matter of the suit, and his interest is known to the client, the client has no right to presume that he will give him an unbiased opinion").

29. *White v. Carr*, *supra* note 28; *Union v. United Battery Service Co.*, 35 Ohio App. 68, 171 N.E. 608 (1929).

30. See *Litwin v. Allen*, 25 N.Y.S.2d 667, 699 (Sup. Ct. 1940) ("This transaction . . . was unusual; it was unique, yet there is nothing in the record to indicate that the advice of

advice, and his attorney errs, the client is not held responsible for any ensuing loss or liability. But this insulation is not absolute. To render the defense applicable the advice must pertain to a question of law which is outside the scope of the advisee's competence.³¹ Delineation of those questions which come within this rule will be attempted in the second section of this Comment, which treats the several areas of law where this defense is frequently raised.

THE DEFENSE APPLIED

Trusts and Estates

A trustee, executor, or administrator stands in a fiduciary relationship to the beneficiaries of a trust or estate, and in that position he is required to exercise the degree of competence with which the average person of reasonable intelligence and business acumen would manage his personal affairs.³² When that standard of competence is not met and the trust suffers pecuniary damage as a consequence, the trustee must assume the liability and undertake reimbursement of the loss.³³ Many of the functions which the trustee must perform and the decisions which he must make revolve about questions of a legal nature. Where the solution to a legal question is necessary, the due care standard makes consultation with an attorney mandatory and, accordingly, the trustee will be permitted to invoke the defense of reliance to protect himself from his attorney's errors.³⁴ The defense does not extend, however, to questions such as the management of investments;³⁵ advice on the subject from a qualified in-

counsel was sought.") ; *In re Demmerle's Executor*, 130 Misc. 684, 691, 225 N.Y. Supp. 190, 198 (Surr. Ct. 1927) ; *In re Wanamaker's Trust*, 340 Pa. 419, 17 A.2d 380 (1941) ; *Pearson v. Gillenwaters*, 99 Tenn. 446, 42 S.W. 9 (1897) ; *Estate of Barbikas*, 171 Cal. App. 2d 452, 341 P.2d 32 (Dist. Ct. App. 1959).

31. For example, advice on a question of fact is not a defense. *Williams v. Confidential Credit Corp.*, 114 So.2d 718 (Ct. App. Fla. 1959). And if the advisee committed an error of judgment with respect to a transaction, advice that the transaction was lawful will be no protection. See *New Haven Trust Co. v. Doherty*, 75 Conn. 555, 54 Atl. 209 (1903) ; *Bailey v. Babcock*, 241 Fed. 501 (W.D. Pa. 1915) ; *In re Westerfield*, 32 App. Div. 324, 53 N.Y. Supp. 25 (1898).

32. See *Estate of Barbikas*, 171 Cal. App. 2d 452, 341 P.2d 32 (Dist. Ct. App. 1959) ; *In re Sharp's Estate*, 61 N.J. Eq. 601, 606, 48 Atl. 327, 329 (Prerog. Ct. 1901) ; 2 SCOTT, TRUSTS §§ 174, 204 (2d ed. 1956).

33. *In re Belcher's Estate*, 129 Misc. 218, 221 N.Y. Supp. 711 (Surr. Ct. 1927) ; *James v. West*, 67 Ohio St. 28, 65 N.E. 156 (1902) ; see 2 SCOTT, TRUSTS § 205 (2d ed. 1956).

34. *Estate of Barbikas*, 171 Cal. App. 2d 452, 341 P.2d 92 (Dist. Ct. App. 1959) ; *Pearson v. Gillenwaters*, 99 Tenn. 446, 42 S.W. 9 (1897) ; *In re Hazeltine's Estate*, 182 Atl. 357 (1936) ; *In re Sharp's Estate*, 61 N.J. Eq. 601, 48 Atl. 327 (Prerog. Ct. 1901) ; *In re Joost's Estate*, 50 Misc. 78, 100 N.Y. Supp. 378 (Surr. Ct. 1906) ; *In re Demmerle's Executor*, 130 Misc. 684, 225 N.Y. Supp. 190 (Surr. Ct. 1927) ; *Bradley's Appeal*, 89 Pa. St. 514 (1879).

35. *In re Holbert*, 48 Cal. 627 (1874) ; *In re Belcher's Estate*, 129 Misc. 218, 221 N.Y. Supp. 711 (Surr. Ct. 1927) ; *In re Pinchefski*, 166 N.Y. Supp. 204 (App. Div. 1917) ; *In re Westerfield*, 32 App. Div. 324, 53 N.Y. Supp. 25 (1898). But a trustee is not limited to obtaining advice; the attorney can perform such functions as the collection of claims, *In re Slater*, 88 N.J. Eq. 296, 102 Atl. 388 (Prerog. Ct. 1917), and serving as escrow agent, *Estate of Barbikas*, 171 Cal. App. 2d 452, 341 P.2d 32 (Dist. Ct. App. 1959).

vestment counselor, however, has been held to furnish a defense of reliance analogous to the advice of counsel plea.³⁶

Trustees invoke the defense of reliance on counsel most frequently with respect to investment of trust funds,³⁷ collection of debts due the trust,³⁸ and defense or initiation of suits on behalf of the trust.³⁹ Where an attorney incorrectly advises that a contemplated investment is lawful, courts must determine whether the investment was patently unauthorized or unlawful. If it was, reliance will afford no protection. Thus, a trustee will not be relieved from responsibility where an investment is made upon security below the standards of quality established by statute,⁴⁰ or where an investment inures to the trustee's benefit.⁴¹ Of course, if the trustee fails to exercise proper business judgment with respect to a lawful act, as where he allows funds to lay idle in a savings account for an unreasonable length of time, he faces liability notwithstanding the advice of counsel that the act itself was lawful.⁴² And the trustee must be careful to ask the correct question. If he does not, reliance on the answer to the question which he does ask may not serve as a defense. For example, in one case the administratrix was surcharged by the referee for failure to sell subscription rights to a new issue of corporate stock. The rights were issued with respect to shares which had been owned by the decedent. When the corporation issued the subscription rights, the administratrix's attorney advised her that the law did not permit the estate to purchase additional stock of this nature. No inquiry was made as to whether the rights could be sold. The court held that reliance on counsel's advice regarding the legality of additional purchases did not relieve the administratrix of the duty to investigate the possibility of sale.⁴³

How to collect debts due the trust or estate is another question which trustees frequently pass on to attorneys. This question involves more of an element of legal tactics—weighing time, expense, and probable outcome of

36. *In re Dodge's Estate*, 39 N.Y.S.2d 186 (Surr. Ct.), *aff'd*, 266 App. Div. 845, 43 N.Y.S.2d 512 (1943). See generally 2 Scorr, *TRUSTS* § 171.2 (2d ed. 1956).

37. *E.g.*, *In re Clark's Will*, 136 Misc. 881, 242 N.Y. Supp. 210 (Surr. Ct. 1930), *aff'd*, 232 App. Div. 781, 249 N.Y. Supp. 923, *rev'd*, 257 N.Y. 132, 177 N.E. 397 (1931); *Miller v. Proctor*, 20 Ohio St. 442 (1870); *In re Whitecar's Estate*, 147 Pa. 368, 23 Atl. 575 (1892); *In re Kohler's Estate*, 348 Pa. 55, 33 A.2d 920 (1943); *In re Skinner's Estate*, 215 Iowa 1021, 247 N.W. 484 (1933).

38. *E.g.*, *In re Slater*, 88 N.J. Eq. 296, 102 Atl. 897 (Prerog. Ct. 1917); *In re Joost's Estate*, 50 Misc. 78, 100 N.Y. Supp. 378 (Surr. Ct. 1906); *Neff's Appeal*, 57 Pa. 91 (1868).

39. *E.g.*, *In re Dammerle's Ex'r*, 130 Misc. 684, 225 N.Y. Supp. 190 (Surr. Ct. 1927); *In re Wanamaker's Trust*, 340 Pa. 419, 17 A.2d 380 (1941); *Pearson v. Gillenwaters*, 99 Tenn. 446, 42 S.W. 9 (1897).

40. *Miller v. Proctor*, 20 Ohio St. 442 (1870); *In re Westerfield*, 32 App. Div. 324, 53 N.Y. Supp. 25 (1898).

41. *In re Skinner's Estate*, 215 Iowa 1021, 247 N.W. 484 (1933). See also *James v. West*, 67 Ohio St. 28, 65 N.E. 156 (1902) (improper distribution from estate).

42. *In re Whitecar's Estate*, 147 Pa. 368, 23 Atl. 575 (1892).

43. *In re Belcher's Estate*, 129 Misc. 218, 221 N.Y. Supp. 711 (Surr. Ct. 1927).

litigation—than does the determination of investment legality, but the requirements and results are the same. Failure to obtain and follow reasonable advice will render the trustee personally liable for resulting losses.⁴⁴ But where the attorney renders an opinion, the trustee can rely on this advice even if the attorney recommends a procedure other than suit on the debt. For example, in *Neff's Appeal*⁴⁵ a beneficiary objected to acceptance of the trustee's accounting because of the latter's failure to collect in full a note due the estate. In lieu of suit, counsel had advised the procurement of insurance on the debtor's life. Although this course of action did not realize the full amount of the debt, the trustee was held not surchargeable for the unpaid balance.

A trustee is not responsible for the incompetence or fraudulent acts of his attorney unless the trustee did not exercise due care in retaining or continuing to employ the lawyer.⁴⁶ Where the testator's counsel has been retained to manage the estate, the trustee will be partly relieved of the duty to investigate the integrity of the attorney. "An executrix is not liable for secret stealings by her attorney where no negligence on her part is established. *And this is especially true where his honesty and responsibility are vouched for by [the] testator.*"⁴⁷

Corporate Directors and Officers

The standard of due care to which corporate directors and officers must adhere as fiduciaries is substantially the same as that imposed upon trustees, administrators, and executors.⁴⁸ Thus, the situations in which reliance on the advice of counsel can be invoked as a defense are similar. Directors must consult counsel on questions which require expert knowledge,⁴⁹ but advice with respect to legality will not protect them from liability or loss which is the result of their own bad judgment.⁵⁰ Where the directors follow their attorney's advice with respect to collection of corporate claims, reliance may be invoked even if a corporate director or officer benefits from the course of action adopted. The defense has been allowed, for example, when directors have released the corporation's president from putative liability to the company on the advice of counsel that the claim was of doubtful validity.⁵¹ The defense has been allowed

44. See *In re Sharp's Estate*, 61 N.J. Eq. 601, 48 Atl. 327 (Prerog. Ct. 1901) (dictum); *Bradley's Appeal*, 89 Pa. St. 514 (1879) (dictum).

45. 57 Pa. 91 (1868). See also *In re Joost's Estate*, 50 Misc. 78, 100 N.Y. Supp. 378 (Surr. Ct. 1906); *In re Wanamaker's Trust*, 340 Pa. 419, 17 A.2d 380 (1941).

46. *In re Slater*, 88 N.J. Eq. 296, 102 Atl. 897 (Prerog. Ct. 1917); *In re Bender's Estate*, 278 Pa. 199, 122 Atl. 283 (1923); *In re Pinchefski*, 179 App. Div. 578, 166 N.Y. Supp. 204 (1917); *Estate of Barbikas*, 171 Cal. App. 2d 452, 341 P.2d 32 (Dist. Ct. App. 1959).

47. *In re Bender's Estate*, *supra* note 46, at 204, 122 Atl. at 284. (Emphasis added.)

48. See BALLANTINE, CORPORATIONS § 63 (1946) (citing cases).

49. *Litwin v. Allen*, 25 N.Y.S.2d 667, 699 (Sup. Ct. 1940). See also *International Paper Co. v. Gazette Co.*, 182 Mass. 578, 582, 66 N.E. 636, 637 (1903).

50. *Bailey v. Babcock*, 241 Fed. 501 (W.D. Pa. 1915); *New Haven Trust Co. v. Doherty*, 75 Conn. 555, 54 Atl. 209 (1903).

51. *Holland v. Presley*, 255 App. Div. 667, 8 N.Y.S.2d 804 (1939).

even when the directors themselves benefit from the transaction. *Spirit v. Bechtel*⁵² involved a question relating to the income tax treatment of stock options granted to key employees, including two directors. Under one approach, the recipients would have paid taxes on the options at ordinary income tax rates, and the corporation would have taken a deduction for compensation in computing its taxable income. The alternative treatment would have resulted in substantial tax savings to the employees, but the corporation would have lost the deduction for compensation. Counsel advised that the corporation had no right to treat the options as compensation, and that the revenue laws permitted only the treatment beneficial to the recipients. On the basis of this advice the directors voted to waive any rights the corporation might have had to the deduction. Counsel's advice turned out to be erroneous. Plaintiff, a stockholder, brought a derivative suit to charge the directors for the lost tax savings, claiming that the alleged conflict of interest dictated the course of action pursued. The court held that the directors were justified in relying on the advice.⁵³ Judge Frank, dissenting, would have adopted a rule placing the risk of erroneous advice on those who are advantageously affected by it, rather than on the shareholders, who had no part in the decision.⁵⁴

A few state statutes extend the defense of reliance to protect a director who declares an illegal dividend in reliance on the representation of a corporate financial officer.⁵⁵ This situation generally arises where the corporation's books of account erroneously show the corporation's financial condition to be such that a dividend could lawfully be declared. If the director relies in good faith on these records, believing them to have been accurately prepared by the company's accountants, he is protected from liability. In the absence of such a statute, one court has held directors liable for accountant's errors, on a strict theory of agency.⁵⁶ This more stringent approach seems unjustified, at least where directors have relied on the results of an audit by a Certified Public Accountant. The prerequisites for obtaining a license to practice as a Certified Public Accountant are, in most states, quite strict,⁵⁷ and would seem to endow the accountant's opinions with as much reliability as those of a duly licensed attorney.

52. 232 F.2d 241 (2d Cir. 1956), Note, 66 YALE L.J. 611 (1957).

53. The court distinguished a remarkably similar case which had reached the opposite result, *Truncale v. Universal Pictures Inc.*, 76 F. Supp. 465 (S.D.N.Y. 1948), solely on the basis that "[T]here the defendants, who caused the corporation's consent to be filed with the Commissioner, had not been advised by counsel that the corporation had no right to claim a tax deduction on account of the options." 237 F.2d at 247.

54. *Ibid.*

55. ARK. STAT. ANN. § 64-605 (1957); CAL. CORP. CODE § 829; DEL. CODE ANN. tit. 8, § 172 (1953); NEV. REV. STAT. § 78.295 (1959); OHIO REV. CODE ANN. § 1702.30 (Page, 1953); TENN. CODE ANN. § 48-212 (1955).

56. *Quintal v. Greenstein*, 142 Misc. 854, 256 N.Y. Supp. 462 (Sup. Ct. 1932).

57. Each state, the District of Columbia, Puerto Rico, and the Virgin Islands, have statutes regulating the practice of public accounting. Every jurisdiction employs, in whole or in part, the uniform CPA examination prepared by the American Institute of Certified

Torts

Where all the elements of good faith reliance are established, advice of counsel is a complete defense to an action to recover damages for malicious prosecution. To succeed in such an action the plaintiff must allege and prove the malicious intent of the original complainant, and the lack of reasonable cause for instituting the previous prosecution. Although reliance on the advice of counsel will rebut either of these elements, the courts generally emphasize the reasonable cause factor.⁵⁸ The requirement that the advising attorney be competent is apparently liberally applied; all that need be shown is his status as a duly licensed member of the bar.⁵⁹ Indeed, in one case the appellate court chastised the trial judge for requiring the defendant to prove not only that his adviser was an attorney but also that he was "learned and skilled in his profession."⁶⁰ But the requirement that the client must disclose all relevant information to the advising attorney is strictly adhered to, to guard against possible abuse of the defense through factual distortions calculated to result in favorable legal advice.⁶¹

Public Accountants. STANDARDS OF EDUCATION AND EXPERIENCE FOR CERTIFIED PUBLIC ACCOUNTANTS 31, 37 (University of Michigan 1956). Approximately 80% of all candidates fail this test each time it is given. *Id.* at 95. Of those candidates with college and postgraduate degrees, approximately 40% achieve passing grades. *Id.* at 58. All jurisdictions require that a candidate for the examination be a high school graduate, and most will not license applicants until they have had some kind of practical experience. A recent trend has been to allow cross substitution of education and experience requirements. *Id.* at 31-34. These regulations are generally administered by State Boards of Accountancy.

A certified public accountant's license to practice may be revoked for noncompliance with standards of conduct established by statute or promulgated by state Boards of Accountancy. See, *e.g.*, CAL. BUS. & PROF. CODE § 5100; ILL. REV. STAT. ch. 110 1/2, § 44 (1957); N.J. STAT. ANN. § 45:2-8 (1937); N.Y. EDUC. LAW § 7408; MICHIGAN STATE BOARD OF ACCOUNTANCY, RULES OF PROFESSIONAL CONDUCT (1943); NEW JERSEY STATE BOARD OF PUBLIC ACCOUNTANTS, CODE OF ETHICS (1940); VERMONT BOARD OF ACCOUNTANCY, RULES OF PROFESSIONAL CONDUCT (1944).

For the rule relating to the advice of certified public accountants in tax matters, see note 88 *infra*.

58. See, *e.g.*, *Williams v. Confidential Credit Corp.*, 114 So.2d 718 (Ct. App. Fla. 1959); *Union v. United Battery Service Co.*, 35 Ohio App. 68, 171 N.E. 608 (1929); *Cloggard Wardrobe Co. v. Normandy*, 158 Va. 50, 163 S.E. 355 (1932).

Infrequently, a complainant will seek the advice of an attorney, present to him fairly and accurately all the relevant facts, but still be motivated solely by malice. In such a situation, where the prosecution is instituted for reasons other than "the cause of public justice, the fact that the defendant followed the advice of counsel is no defense." *Kumor v. Graham*, 39 N.M. 245, 724, 44 P.2d 722, 247 (1935); *Evans v. Michaelson*, 146 Va. 64, 135 S.E. 683 (1926); *Gladfelter v. Deemel*, 2 Wis. 2d 635, 87 N.W.2d 490 (1958).

59. See cases cited note 23 *supra*. With respect to the use as a defense of reliance on the advice of nonlawyers, see notes 20-21 *supra*.

60. *Horne v. Sullivan*, 83 Ill. 30, 32 (1876).

61. See *Seaboard Oil Co. v. Cunningham*, 51 F.2d 321 (5th Cir. 1931); *Smith v. Hensley*, 107 Colo. 180, 109 P.2d 909 (1941); *Kitchen v. Rosenfeld*, 44 R.I. 399, 117 Atl. 537 (1922); *Smith v. King*, 62 Conn. 515, 26 Atl. 1059 (1893); *cf. Emler v. Fox*, 172 Ky. 469, 189 S.W. 469 (1916); *Adkin v. Pillen*, 136 Mich. 682, 100 N.W. 176 (1904).

Similarly, reliance on counsel's advice may also be a complete defense to other actions in tort where a necessary element is the existence of negligence, or malicious or fraudulent intent.⁶² For example, in *Lane v. Fenn*⁶³ a common stock prospectus contained the erroneous information that the issuing corporation held a franchise to construct a telephone system in New York City. Plaintiff purchased stock in reliance on the prospectus and, when his shares became worthless, brought suit against the corporation's directors to recover damages for fraudulent misrepresentations. Because the directors had relied upon the advice of competent counsel to the effect that the franchise was valid, the court held that the absence of bad faith or fraudulent intent defeated the plaintiff's cause of action. The court noted, however, that the defense of reliance would not have been a bar to an action for rescission and restitution on the ground of mutual mistake, which does not require any showing of intent.⁶⁴

In actions for trespass, wrongful attachment, and wrongful conversion, reliance is only a partial defense. Actual damages will be awarded upon a finding that the defendant committed the acts alleged, regardless of any advice he may have received. But a defendant can avoid the imposition of punitive damages by showing that he relied upon the advice of reputable counsel that he had a valid claim to the property attached, converted, or trespassed upon.⁶⁵ *United States v. Homestake Mining Co.*⁶⁶ was an action to recover damages for conversion of timber on a federal forest reserve. The defendant's attorney had previously made an agreement with the Secretary of the Interior permit-

62. See *Nelson v. J. H. Winchell & Co.*, 203 Mass. 75, 89 N.E. 180 (1909) (action to recover damages for trademark infringement); *Ashland Auto Sales v. Stock*, 217 Ky. 594, 290 S.W. 487 (1927) (action to recover double rent for unlawful holding over on a lease); *Elwell v. Russel*, 71 Conn. 662, 42 Atl. 862 (1899) (action to recover damages for misrepresentation as to ownership of land); *Douglas v. United States Fid. & Cas. Co.*, 81 N.H. 371, 127 Atl. 708 (1924) (action to recover damages against insurance company for negligently failing to settle a claim against insured); *Brewer v. Forest Gravel Co.*, 172 La. 828, 135 So. 372 (1931) (action for cancellation of lease for willful failure to pay full rent).

63. 65 Misc. 336, 120 N.Y. Supp. 237 (Sup. Ct. 1909).

64. *Id.* at 341, 120 N.Y. Supp. at 241. Similarly, the erroneous advice of counsel is not a valid ground for reformation of a written contract. *Edythe Nelson, Inc. v. 500 Fifth Avenue, Inc.*, 73 N.Y.S.2d 299 (Sup. Ct. 1947); *Sol Apfel, Inc. v. Kocher*, 61 N.Y.S.2d 503 (Sup. Ct. 1946); *Halbe v. Adams*, 163 N.Y. Supp. 895 (App Div. 1917).

65. *United States v. St. Anthony R.R.*, 192 U.S. 524, 542-43 (1904); *Scalise v. National Util. Serv., Inc.*, 120 F.2d 938 (5th Cir. 1941); *Conn. v. Rice*, 204 Fed. 181, 191 (5th Cir. 1913); *United States v. Midway No. Oil Co.*, 232 Fed. 619, 632-34 (S.D. Cal. 1916); *United States v. Mullan Fuel Co.*, 118 Fed. 663 (D. Mont. 1902); *Kirby v. First Nat'l Bank*, 64 S.D. 404, 266 N.W. 883, 884-85 (1936); *Abbott v. 76 Land & Water Co.*, 103 Cal. 607, 37 Pac. 527 (1894); *Union Mill Co. v. Prenzler*, 100 Iowa 540, 69 N.W. 876 (1897); *Charles City Plow & Mfg. Co. v. Jones*, 71 Iowa 234, 32 N.W. 280 (1887); *Gramlin-Spalding Co. v. Parker*, 2 Ala. App. 403, 57 So. 54 (1911); *Selden v. Cashman*, 20 Cal. 57 (1862); *Mills v. Vollmer-Clearwater Co.*, 126 Wash. 73, 217 Pac. 3 (1923); *Rainey v. Kemp*, 118 S.W. 630 (Tex. Civ. App. 1909).

66. 117 Fed. 481 (8th Cir. 1902).

ting the corporation to cut timber for use in its mines. The government alleged that the Secretary had no authority to make such an agreement and sought to recover damages for *willful* conversion. The court conceded that every man is presumed to know the law but distinguished between those who willfully and those who inadvertently violate it:

The error in his advice . . . was not so plain that a layman could be fairly charged with knowledge of its existence, and the fact that the defendant committed this trespass under the advice of reputable counsel that it was acting within its legal rights goes far to establish its good faith, and to dispute the claim of the government that it ever intended or was attempting to secure an unconscientious advantage by cutting and using the timber.⁶⁷

Crimes

Reliance on advice of counsel as a defense has been restricted to offenses which are the criminal counterparts of the civil action of conversion, such as larceny, embezzlement, and obtaining money under false pretenses.⁶⁸ Courts in these cases apparently feel that if there is a reasonable doubt as to the ownership of property, criminal conviction of a party advised by counsel that he may assert his rights would serve no purpose. Any party injured by the wrongful taking is adequately protected by civil remedies. Reliance does not constitute a defense to other crimes, and attempts to interpose it have been made and rejected in cases involving bigamy,⁶⁹ adultery,⁷⁰ obstruction of public roads,⁷¹ and sale of goods without a valid license.⁷²

Arguably, criminal statutes which provide that violations must have been committed "knowingly" or "willfully" would allow a defense of reliance on advice that the act was not illegal. But the tendency of the courts has been to construe such statutes otherwise.⁷³ In *People v. McCalla*,⁷⁴ for example, the defendant was charged with knowingly selling securities without a permit from the Corporation Commissioner, a criminal violation of the California Corpor-

67. *Id.* at 488.

68. See *People v. Schultz*, 71 Mich. 315, 38 N.W. 868 (1888); *Buchanan v. State*, 5 So. 617 (1889); *People v. Sheasby*, 255 Pac. 837 (1927); *State v. Oppenheimer*, 41 Wash. 618, 84 Pac. 588 (1906); *State v. Patterson*, 66 Kan. 447, 71 Pac. 860 (1903); *State v. Hunt*, 25 R.I. 75, 54 Atl. 937 (1903); *cf. People v. Long*, 50 Mich. 249, 15 N.W. 105 (1883).

69. *Staley v. State*, 89 Neb. 701, 131 N.W. 1028 (1911).

70. *State v. Goodenow*, 65 Me. 30 (1876).

71. *Ward v. State*, 42 Tex. Crim. 435, 60 S.W. 757 (1901).

72. *State v. Foster*, 22 R.I. 1631, 46 Atl. 833 (1900). See also *United States v. Anthony*, 24 Fed. Cas. 829 (No. 14459) (C.C.N.D.N.Y. 1873) (unlawful voting).

73. See *Licavoli v. United States*, No. 15764, D.C. Cir. Feb. 16, 1961; *People v. Marcus*, 261 N.Y. 268, 185 N.E. 97 (1933); *Thompson Ross Sec. Co.*, 6 S.E.C. 1111, 1122-23 (1940) ("In our opinion, a 'willful' act . . . does not mean that the registrant must be aware of the fact that he is violating the law; he may willfully violate the law even though he is completely ignorant of the legal consequences of his act.") *But cf. Williamson v. United States*, 207 U.S. 425, 453 (1908).

74. 63 Cal. App. 783, 220 Pac. 436 (1923).

ate Securities Act.⁷⁵ The court rejected as irrelevant the defendant's offer to prove that he had relied in good faith upon counsel's advice that the instruments sold were not "securities" within the meaning of the Act. The court construed the term "knowingly" to mean with knowledge of the essential facts forming the basis of the violation, and declared that "from such knowledge of the facts the law presumes a knowledge of the legal consequences."⁷⁶

Contempt of Court

As a general rule, reliance on the erroneous advice of competent counsel will not relieve an individual of his responsibility for acting in accordance with court orders, and will not enable him to escape conviction and punishment for contempt if he disregards the orders.⁷⁷ The contempt of court citation serves a dual function. The contemnor must be punished for flouting the court's order, and the dignity and authority of the court must be vindicated in the eyes of the public.⁷⁸ Because conviction alone fulfills the latter function, however, courts will often take good faith reliance into consideration in mitigation of the penalty imposed.⁷⁹ The most common type of error by attorneys is misinterpretation of the court's order. Courts appear to give more weight to the fact of reliance where the order is confusing or ambiguous than where the acts committed were obviously prohibited.⁸⁰

Bankruptcy

In bankruptcy proceedings reliance on erroneous legal advice is frequently offered to counter an allegation of fraudulent concealment of assets. The defense may be successful if a genuine doubt exists regarding a bankrupt's in-

75. Now CAL. CORP. CODE § 25500.

76. 63 Cal. App. at 793-95, 220 Pac. at 440-41. The court explained, "for the effective protection of the public, the burden is placed upon the individual to ascertain at his peril whether his act is prohibited by the statute." *Ibid.*

77. See, e.g., *In re La Varre*, 48 F.2d 216 (S.D. Ga. 1930); *Evans v. International Typographical Union*, 81 F. Supp. 675, 688 (S.D. Ind. 1948); *Weston v. John L. Roper Lumber Co.*, 158 N.C. 270, 73 S.E. 799 (1912); *State ex rel. O. Hommel Co. v. Fink*, 111 W. Va. 334, 161 S.E. 557 (1931); *Carr v. District Court*, 147 Iowa 663, 126 N.W. 791 (1910); *In re Henn*, 113 N.J. Eq. 155, 166 Atl. 138 (Ch. 1933); *Folsom v. State*, 216 Ark. 31, 224 S.W.2d 44 (1949); *Licavoli v. United States*, No. 15764, D.C. Cir., Feb. 16, 1961 (Congressional subpoena). *Contra*, *Dinsmore v. Louisville, N.A. & C.R.R.*, 3 Fed. 593 (D. Ind. 1880); *Furrer v. Nebraska Bldg. & Inv. Co.*, 109 Neb. 1, 189 N.W. 295 (1922).

78. See, e.g., *Folsom v. State*, 216 Ark. 31, 224 S.W.2d 44 (1949).

79. *Queen & Co. v. Green*, 170 Fed. 611 (C.C.E.D. Pa. 1909); *Ulman v. Ritter*, 72 Fed. 1000 (C.C.D.W. Va. 1896); *Coffin v. Burstein*, 68 App. Div. 22, 74 N.Y. Supp. 274 (1902); *Rumney v. Donovan*, 28 Mont. 69, 72 Pac. 305 (1903); *Folsom v. State*, 216 Ark. 31, 224 S.W.2d 44 (1949).

80. See *Queen & Co. v. Green*, *supra* note 79; *Dinsmore v. Louisville, N.A. & C.R.R.*, 3 Fed. 593 (D. Ind. 1880); *Folsom v. State*, 216 Ark. 31, 224 S.W.2d 44 (1949); *Rumney v. Donovan*, *supra* note 79; *Furrer v. Nebraska Bldg. & Inv. Co.*, 109 Neb. 1, 189 N.W. 295 (1922).

terest in a particular asset, and if his attorney advises that the property need not be included in his schedule of assets. The bankrupt's good faith reliance will prevent the denial of his discharge. But because the rights of innocent creditors are at stake and, perhaps, because the statutory grant of a discharge has been construed as a privilege, courts in these cases have been particularly strict in insisting upon full disclosure of information to counsel and in disregarding reliance on patently erroneous advice.⁸¹

Taxation

The Internal Revenue Code imposes civil penalties on individual and corporate taxpayers for the commission of a variety of errors in the computation of their tax liability, including failure to file the proper tax or information returns,⁸² failure to pay current or estimated taxes,⁸³ and failure to make required deposits of taxes.⁸⁴ Where these errors are committed willfully or with fraudulent intent, criminal penalties may also be imposed.⁸⁵ Reliance may be a bar to the imposition of civil penalties because this proof of good faith negates the existence of willfulness or fraudulent intent. Thus, in *Davis v. Commissioner*,⁸⁶ the taxpayers were assessed a penalty equal to fifty per cent of their tax deficiency, on the allegation that the deficiency was due to fraud with intent to evade taxes. The taxpayers were neither highly educated nor familiar with tax laws, and their returns were prepared by a tax expert to whom they furnished all their books and records. Upon these facts the court found insufficient proof of fraud. Under some sections, civil penalties are assessed "unless it is shown that such failure [to file returns] is due to reasonable cause and

81. *In re Merritt*, 28 F.2d 679 (9th Cir. 1928); *In re Breitling*, 133 Fed. 146 (7th Cir. 1904); *In re Soroko*, 34 F. Supp. 825 (S.D.N.Y. 1940); *In re Perel*, 51 F.2d 506 (S.D. Tex. 1931); *In re Russell*, 52 F.2d 749 (D.N.H. 1931).

Prior to its amendment in 1938, § 14 of the Bankruptcy Act, 44 Stat. 663 (1926) (amended by 52 Stat. 850 (1938), 11 U.S.C. § 32 (1958)), provided that within twelve court, in its discretion, could extend the time for filing by six months "if it shall be made to appear . . . that the bankrupt was unavoidably prevented from filing it within such time" In some cases the bankrupt sought to show that his failure to petition for discharge within the prescribed period was the fault of his lawyer. In the majority of cases the courts held that the inadvertence or negligence of the bankrupt's attorney was insufficient reason for allowing the exception. *In re Schaefer*, 80 F.2d 387 (9th Cir. 1935); *In re Taylor*, 22 F.2d 499 (2d Cir. 1927); *In re Berghorst*, 24 F. Supp. 494 (W.D. Mich. 1938); *In re Adams*, 12 F. Supp. 755 (D. Mont. 1933). See also *In re Balzer*, 12 F.2d 94 (S.D. Cal. 1926). *Contra*, *In re Swain*, 243 Fed. 781 (D. Mass. 1917); *Cohen v. Keller*, 108 F.2d 495 (2d Cir. 1940); *In re Powers*, 42 F. Supp. 356 (D. Mass. 1941); *In re Ewing*, 8 F. Supp. 285 (D.N.J. 1934).

82. INT. REV. CODE OF 1954, §§ 6651, 6652.

83. INT. REV. CODE OF 1954, §§ 6653, 6654, 6655.

84. INT. REV. CODE OF 1954, § 6656.

85. INT. REV. CODE OF 1954, §§ 7201-07.

86. 184 F.2d 86 (10th Cir. 1950).

not due to willful neglect . . .”⁸⁷ The courts have uniformly held that reliance on the advice of an attorney or accountant constitutes reasonable cause for the failure to file.⁸⁸

Recognition of the defense in cases involving tax offenses is compelled by the mechanics of our taxing system. Individuals are obliged to be their own personal tax assessors and to apply the intricacies of a highly complex statute to their finances. Since compliance with this duty often necessitates turning the matter over to an expert, it would be unreasonable to punish the taxpayer when this effort to comply goes awry.

87. INT. REV. CODE OF 1954, § 6651 (personal holding companies).

88. The defense appears most frequently in cases involving personal holding company returns. See *Burton Swartz Land Corp. v. Commissioner*, 198 F.2d 558 (5th Cir. 1952); *Haywood Lumber & Mining Co. v. Commissioner*, 178 F.2d 769 (2d Cir. 1950); *Orient Inv. & Fin. Co. v. Commissioner*, 166 F.2d 601 (D.C. Cir. 1948); *Hatfried Inc. v. Commissioner*, 162 F.2d 628 (3d Cir. 1947); *Walnut St. Co. v. Glenn*, 83 F. Supp. 945 (W.D. Ky. 1948); cf. *Tarbox Corp.*, 6 T.C. 35 (1946).

For the use of this defense under similar provisions, see, e.g., *In re Fiske's Estate*, 203 F.2d 358 (6th Cir. 1953); *Spouting Rock Beach Corp. v. United States*, 176 F. Supp. 938, 943 (D.R.I. 1959); *C. R. Lindback Foundation*, 4 T.C. 652, 667 (1945); *E. M. Green*, 11 B.T.A. 278 (1928) (dictum). See also *Dayton Bronze Bearing Co. v. Gilligan*, 281 Fed. 709 (6th Cir. 1922) (assessment of penalty for failure to file special tax return required by Munitions Act).

In most of the above cases, the advice relied upon was that of a certified public accountant, whose advice in tax matters stands on an equal footing with that of an attorney. The advice of a noncertified accountant will not suffice. *Tarbox Corp.*, 6 T.C. 35 (1946). This is because only Certified Public Accountants are permitted to practice before the Treasury in tax matters. “To accord the status of ‘experts’ . . . to accountants for representation purposes and then to hold that taxpayers who entrust to them the task of preparing their returns run the risk of paying heavy penalties should they err in the discharge of their assignment creates an absurd situation.” *Hatfried Inc. v. Comm'r*, 162 F.2d 628, 634 (3d Cir. 1947).