THE LIABILITY OF A SOLICITOR FOR THE UNLAWFUL ACTS OF A CLIENT ACTING ON ADVICE GIVEN HIM

"No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer merits stern and just condemnation."[1]

No lawyer worthy of the name will dispute the above statement, but a more interesting and more difficult question arises when we consider just what offences he commits and what liabilities he incurs when wrong or improper advice is meted out by him to the client who comes to his office for consultation. The purpose of this paper is to delve into the legal conjuries of crimes and pitfalls possible and see what an unholy mess we can brew for the unfortunate lawyer.

A legal problem should never be discussed without having at its centre some actual or suppositious set of facts. Samuel Johnson has truthfully remarked that 'example is more efficacious than precept' and it seems self-evident that *in vacuo* legal meanderings are too apt to lead one onto difficult ground. Thus, in opening this paper, an attempt will be made to state two simple sets of facts, which should be kept in mind throughout the discussion, affording a practical basis for what may at times prove a highly theoretical problem.

As situation number one, the following circumstance is supposed. In New Brunswick, adultery is a crime. A, a lawyer, is consulted by his client B, whose life is made miserable by a nagging wife, as to how B can free himself from her. A advises B to commit adultery, feeling certain on the facts that B's wife will sue for divorce. B follows A's instructions and is convicted of the crime of adultery. At once these questions suggest themselves; whether A is guilty of counselling B to commit a crime; whether he is guilty of conspiracy; whether he is liable for the tort of deceit; whether he is guilty of an attempt or of acting as an accomplice before the fact to a crime (and therefore a party

[1] Canon No. 32 of The Canons of Professional Ethics of the American Bar Association.

thereto), and whether B can recover damages against A in the tort of negligence or for 'equitable fraud.'

As situation number two the following circumstance is supposed. A is consulted by B as to whether he can legally remarry, having secured a divorce from his wife in circumstances as to domicile which would not permit of a divorce under our law; let us say that he has secured a Reno divorce. A, knowing that if he tells B his divorce is nugatory, B's hopes for happiness will be shattered, informs B that in his opinion he is legally divorced, feeling certain that the matter will never reach the criminal courts. B remarries, and is prosecuted for bigamy. Here the same questions arise as in situation number one. Has A been keeping on "the windy side of the law?"

Unfortunately, there is a great dearth of Canadian material on the solicitor-client relationship and the English and American authorities seem merely to skirt the outer fringes of the relationship, leaving the rest in obscurity. The writer is therefore free to approach the problem in his own way. He will discuss the questions in the following order and manner:

(a) As to the crime of counselling;
(b) As to negligence and equitable fraud;
(c) As to the tort of deceit;
(d) As to attempt;
(e) As to violation of the law in other instances, such as conspiracy, contempt.

A. As to the Crime of Counselling.

Section 69 of the Criminal Code of Canada provides that every one is "a party to and guilty of" an offence who "counsels or procures any person to commit the offence." There is no doubt that *qui facit per alium facit per se*, but the question must always be as to what constitutes the necessary *actum per alium*. Crankshaw classifies this necessary procurement as follows: it "may be direct—by hire, counsel or command, or by conspiracy; or it may be *indirect*—by expressly evincing, (that is evincing by some words or actions), a liking for, approbation of, or assent to anothers' criminal design of committing an offence."[2] He continues: "But a mere silent acquiescence would not be sufficient. Nor would words that amount to a bare permission." Our problem therefore is, whether the mere giving of advice constitutes a sufficient *actum*. In view of the reliance placed by

[2] Criminal Code, 5th ed., p. 78.

the client in the solicitor, it does. In view of the solicitor-client relationship, such advice amounts to direct counselling, and is more than acquiescence or bare permission or any indirect means.

But, one will say, the solicitor simply sits back in his chair, and utters mere words of advice, on which the client is free to act or not to act. How can such passivity constitute counselling? Let us look at the meaning of the word "counsel." The best American and English dictionaries define the word thus: "to give advice to; to advise, admonish or instruct, as a person; to advise or recommend, as an act or course; to give or offer counsel or advice to; to recommend (a plan, suggestion, etc.); to consult".[3] Clearly this definition would cover the case of our solicitor in the two situations above. The legal meaning corresponds with the dictionary meaning. Sir Charles Fitzpatrick, C.J. in *Brousseau* v. *The King*[4] says "I construe 'counsel' used in collocation with 'procure' to mean 'advise' or 'recommend'." The term "incitement" used by the English courts seems a much stronger term than "counselling" and yet acts closely corresponding to mere advice, such as sending a letter,[5] even one which never reaches the intended receiver,[6] have been held to constitute the offence of incitement.[7] It may best be stated here that the difference between the crime of incitement or counselling and that of being a party to the crime counselled is that, as Russell says,[8] the gist of the former is that "the person incited has not committed the crime to which the incitement relates," whereas to be a party to an offence that offence must have been committed.[9] One would think from a strictly grammatical reading of section 69 that it could not possibly cover the situation where the crime has not been consummated, but the legal view is otherwise and "section 69 . . . clearly makes a person who counsels or procures another to commit an offence, guilty of a specific offence, whether the person so counselled actually commits the offence he is counselled to commit or not."[10] It therefore seems quite clear that if our lawyer is guilty of the crime of counselling, he is guilty also as party to the committed offence, if consummated.

[3] Webster's International Dictionary and the Shorter Oxford English Dictionary.

[4] 56 S.C.R. 22, at 23; 28 C.C.C. 435.

[5] See *Reg.* v. *Ransford*, 13 Cox C.C. 9.

[6] See *R.* v. *Banks*, 12 Cox C.C. 393.

[7] See also *R.* v. *Roderick*, 7 Car. & P., 795; *R.* v. *Phillips*, 6 East 464 *R.* v. *Woods*, 22 Cr. App. R. 41; *R.* v. *Cope*, 16 Cr. App. R.

[8] *Russell on Crimes and Misdemeanours*, 8th ed., p. 201.

[9] Per McGillivray J.A., in *R.* v. *Stewart*, [1934] 1. W.W.R. 423; for an interesting case in incitement to commit perjury see *R.* v. *Cole*, 3 O.L.R. 392; also *Benford* v. *Sims*, [1898] 2 Q.B. 641.

[10] Per Davies J. in *Brousseau* v. *The King*, 56 S.C.R. at p. 24; see also Sir Charles Fitzpatrick,C.J. at p. 23 and Anglin J. at p. 25.

The fact that the client does not know the act he does is a crime does not free the counsellor from the guilt of the crime of counselling. One would think this to be common sense, but in the case of *The Queen* v. *Welham*[11] Patterson J. remarked: "I very much doubt whether a man can be indicted for inciting a felony when the party charged to have been incited does not intend in what he does to commit a felony." Sir James Stephen considers this case to have been improperly reported and that the situation there must have been that of an attempt to commit a felony by an innocent agent, and not an incitement to commit a felony.[12] This appears a logical conclusion and the present writer agrees with Mr. Greaves (editor of the sixth edition of Russell) that the guilt of the inciter cannot depend on the state of mind of the incited, and that "the state of mind and intention of the inciter coupled with the act of incitement, constitute the offence" and quite clearly this opinion represents the Canadian and the modern English view on the subject.

There remains the question: is the lawyer's "passive" advice "counselling"? In the American case of *Firpo* v. *United States*,[13] the situation was as follows: the defendant, an attorney, was consulted by a sixteen year old deserter from the army and by his father who wished to secure the son's release from military service. The attorney gave advice to the boy as to how to escape detention. A federal statute made it a crime to "harbor, conceal, protect or assist any soldier . . . who may have deserted." The attorney was held not guilty of the offence sanctioned by this statute. Concerning this case the learned editors of the Harvard Law Review very properly remark: "The duty of an attorney toward his client is limited by a counter duty as an officer of the court not to perpetrate any fraud upon the court, nor to obstruct the administration of justice, not to bring the court into contempt by advising a client to disobey its orders. While the conduct of the attorney here was therefore unprofessional, he was not guilty of the crime charged unless the advice given was equivalent to assistance. Advice has been characterized as mere words as distinguished from assistance, which implies some affirmative act in aid of the principal. . . But an accessory has been defined as one who procures, advises, or assists . . . and the test of whether one is an accessory seems to be the rendering of some personal help to the principal to elude punishment. Advice which points out ways and means of escape may be far

[11] 1 Cox C.C. 192, at 193.
[12] Russell, p. 201.
[13] 52 Chicago Leg. News, 210 (Circ. Ct. App.).

more valuable to a criminal than the loan of a horse or money, which will make the lender an accessory. Accordingly, such advice as was given in the principal case ought to have been held to constitute assistance and to make the advising attorney guilty of the crime created by the statute."[14]

This comment is cited for the purpose of showing that it is quite clearly recognised in some quarters in the United States that advice such as that given by a lawyer constitutes the advisor an accessory, and that some opinion goes to the further point of characterizing such legal advice as assistance. There therefore appears to be no doubt that the American authorities consider legal advice as at least counselling. As one last reference, we refer to the statement of the Court in *Goodenough* v. *Spencer*;[15] "No attorney or counsel has the right, in the discharge of professional duties, to involve his client by his advice in a violation of the laws of the state; and when he does so, he becomes implicated in the client's guilt, when, by following the advice, a crime against the laws of the state is committed. The fact that he acts in the capacity and under the privileges of counsel, does not exonerate him from the well-founded legal principle which renders all persons who advise or direct the commission of a crime guilty of the crime committed by compliance with the advice or in conformity with the direction which may be given."

Thus in the two situations posed above, no matter how well-meaning the advice and actions of the lawyer, he is without doubt guilty of the crime of counselling, if that crime is not consummated, and of being a party to the actual crime committed if such crime be committed,[16] leaving aside for the readers' reflection the question whether any third party can ever be a party strictly speaking to adultery or bigamy.

B. *As to Negligence and 'Equitable Fraud'*

For the purpose of discussing the solicitor's liability to the client in negligence, it will be necessary to vary the two problems stated in the introductory portion of this paper. We shall assume that such advice as was given was not given intentionally, but

[14] 33 H.L.R. 859. Note also that by s. 2 Penal Laws (Consolidated Laws of New York) a lawyer who advises a client to do an act forbidden by law and punishable by fine becomes principal in any misdemeanours committed thereby.

[15] 46 How. Prac. (N.Y.) 347, at 350.

[16] For a discussion of the law involved in this point see Kenny's *Outlines*, 13th ed., p. 87 *ff*.

negligently, and shall consider the legal position then occupied by our unfortunate solicitor.

The law on the subject is admirably stated by Lord Cottenham in *Hart* v. *Frame*[17] thus: "Professional men, possessed of a reasonable portion of information and skill according to the duties they undertake to perform, and exercising what they so possess with reasonable care and diligence in the affairs of their employers, certainly ought not to be held liable for errors in judgment, whether in matters of law or discretion. Every case, therefore, ought to depend upon its own peculiar circumstances; and when an injury has been sustained which could not have arisen except from the want of such reasonable skill and diligence, or the absence of the employment of either on the part of the attorney, the law holds him liable. In undertaking the client's business, he undertakes for the existence and for the due employment of these qualities and receives the price of them." He does not undertake at all events to gain the cause,[18] and as Abbott C.J. so aptly put it,[19] "God forbid that it should be imagined that an attorney or a counsel or even a judge is bound to know all the law."[20]

On the other hand it appears that the solicitor is liable only for "gross ignorance or gross negligence in the performance of his professional services."[21] It is thus apparent that the mere giving of erroneous advice on a doubtful point will not suffice to render the lawyer responsible, but that what has been termed "*crassa negligentia*"[22] must be established, in consequence of which negligence the client has suffered damage. It seems to be a moot point whether such liability for negligence is one in tort or one *ex contractu*.[23] Dicta in the celebrated case of *Nocton* v. *Ashburton*[24] seem to favour liability as based *ex contractu*, but nothing actually turns on this point, for be the action founded in tort or contract, it is quite clear that although to sustain an action of deceit[25] nothing short of proof of a fraudulent intention in the strict sense will suffice, yet "an action for damages for

[17] 7 E.R. 670, at 676.
[18] *Lanphier* v. *Phipos* (1838), 8 C. & P. p. 475.
[19] *Montriou* v. *Jefferys* (1825), 2 C. & P. 133; 172 E.R. 51.
[20] See also *Wilson* v. *Tucker*, 171 E.R. 805; *Parker* v. *Rolls*, 139 E.R. 284; *Aldis* v. *Gardner* (1844), 1 Car. & Kir 564; *Lavanchy* v. *Leverson* (1859), 1 F. & F. 615.
[21] Per Lord Campbell in *Purves* v. *Landell*, 8 E.R. 1332; see also *Barnes' Case*, 94 E.R. 795.
[22] *Faithfull* v. *Kesteven* (1910), 103 L.T. 56; see also *Barkie* v. *Chandess*, 170 E.R. 1291, and *Kettle* v. *Wood*, 5 L.J. (O.S.) K.B. 173.
[23] *Davies* v. *Lock* (1844), 3 L.T.O.S. 125.
[24] [1914] A.C. 932.
[25] See *infra*, Section C.

negligence may lie, without evidence of an actual intention to deceive, where a confidential relationship exists, such as that of solicitor and client, so that the person to whom a representation was made was entitled to rely, and did in fact rely, upon it, and sustained damage in consequence."[26]

Nocton v. *Ashburton* was a case in which the defendant, acting as confidential solicitor, advised the plaintiff to release a part of a mortgage security, whereby the security had become insufficient, and plaintiff had suffered loss in consequence. In the absence of *dolus malus*, the House of Lords held that, although deceit could not be found, yet plaintiff could be relieved on the ground of a breach of duty arising from the fiduciary relationship. Viscount Haldane there declared:[27] "Although liability for negligence in word has in material respects been developed in our law differently from liability for negligence in act, it is none the less true that a man may come under a special duty to exercise care in giving information or advice. I should accordingly be sorry to be thought to lend countenance to the idea that recent decisions have been intended to stereotype the cases in which people can be held to have assumed such a special duty. Whether such a duty has been assumed must depend on the relationship of the parties, and it is at least certain that there are a good many cases in which that relationship may be properly treated as giving rise to a special duty of care in statement." It thus appears that in the absence of *mens rea*, as Viscount Haldane says, an action can be maintained for negligence in a fiduciary relationship such as that of solicitor and client. Thus, whatever doubt be cast upon the decision of *Derry* v. *Peak*[28] in relation to the tort of deceit, that case and *Nocton* v. *Ashburton* have now firmly established the proposition, that, at least in such a fiduciary relationship as that of solicitor and client, the solicitor is responsible for at least gross negligence.

Nocton v. *Ashburton* does not define what constitutes negligence in the solicitor-client relationship and we must therefore assume that, in keeping with the earlier cases on the point, such negligence must be gross. It may perhaps be noted that, though the cases state the solicitor to be responsible for gross negligence only, yet that he is bound merely to exercise "reasonable skill and reasonable care" in giving advice. It can thus be seen that there exists a twilight zone between the care he must exercise and the

[26] *Nocton* v. *Ashburton*, p. 932.
[27] At pages 945 and 948.
[28] 14 App. Cas. 337; for a discussion concerning this case see Section C, *infra*.

care that renders him liable for negligence, that is, he may fail to exercise reasonable care and reasonable skill and yet not be guilty of such negligence as to be termed "gross." As to what the solicitor's standing is in this twilight zone is a moot point, but in view of the wide *dicta* in *Nocton* v. *Ashburton* it may be that the solicitor would be liable for negligence that does not reach the zone of grossness, for if we base liability on contract or quasi-contract, does not the solicitor undertake to exercise "reasonable skill and reasonable care", and consequent on his failure to exercise such skill, would he not be responsible for breach of contract, or rather, of a fiduciary relationship? The writer of this paper is in favour of the latter view, it being both consonant with reason, with the old cases which decide what the solicitor's duty *is*, and with the *dicta* in *Nocton* v. *Ashburton*, and no possible argument could be raised that "the utterer of a negligently formed opinion could escape liability on the ground that it was not reasonable for the hearer to rely on the mere opinion of another" in a case where the relationship of solicitor and client necessarily promises such reliance.[29]

It thus appears settled that a remedy by action[30] will exist where the relationship of solicitor and client exists,[31] the question of gross negligence (assuming gross negligence to be necessary) being one for the jury,[32] where damage has been found.

To sum up, there is now no doubt that, on whatever basis the liability be placed, the solicitor is (for gross negligence at least) liable. In considering the two problems posed *supra*, it will thus be a question on all the "peculiar circumstances" of these cases as to whether the jury will find such negligence as renders the solicitor liable, and that future cases may reveal that the basis of the liability to be one *ex contractu*, in which case the solicitor's liability may be more strenuous than theretofore. It may also be noted that Salmond[33] and Underhill[34] state that there can be liability in such a situation on what they term "constructive or equitable fraud"[35] and term the remedy therefor an equitable remedy, for which proposition they cite *Nocton* v.

[29] See article by Jeremiah Smith, 14 H.L.R. p. 184 at p. 197.
[30] Not by motion; see *Re Jones* (1819), 1 Chit. 651; *Frankland* v. *Lucas*, 58 E.R. 219.
[31] The relationship must be strictly that of solicitor and client. See *Barker* v. *Lambert* (1849), 13 L.T.O.S. 139; *Moss* v. *Solomon* (1858), 1 F. & F. 342; *Robertson* v. *Fleming* (1861), 4 Macq. 167; *Fish* v. *Kelly* (1864), 144 E.R. 78.
[32] *Hunter* v. *Caldwell*, 116 E.R. 28; *Hales* v. *Paddock* (1843), 7 J.P. 29.
[33] *Salmond on Torts*, 9th ed., p. 611.
[34] *Underhill on Torts*, 14th ed., p. 306.
[35] See section C, *supra*.

Ashburton and other cases. This is quite correct where there is a failure of the duty in the fiduciary relationship to be honest but we must remember that our problem here is to render the solicitor liable for a breach of duty to take reasonable care to be accurate.[36]

C. *As to the Tort of Deceit*

Winfield defines deceit as "a false statement of fact made by A knowingly or recklessly (i.e. not caring whether it be true or false) with intent that it shall be acted upon by B, who does act upon it and thereby suffers damage."[37] Salmond[38] and Harper[39] state the same principle with no material variation, while Underhill varies it slightly, defining it as "a false and fraudulent misrepresentation with intent to induce another to act upon it in the belief that it is the truth, and is actionable at the suit of that other if he is so induced and suffers damage in consequence".[40]

But, whatever shades of variation there are in the definition, it seems quite clear from the cases on the point that the following elements are necessary:

(1) The *Scienter*. The gist of the problem of mental element in deceit lies in the defendant's knowledge of the falsity of the representations he makes.[41]

Of all the necessary elements of deceit, this has proved the most troublesome. In the much maligned case of *Derry* v. *Peek* it is laid down that a false statement is not actionable as a tort unless it is wilfully false, and that mere negligence in the making of false statements is not actionable either as deceit or

[36] In *Nocton* v. *Ashburton*, Viscount Haldane at p. 952 said: "The Court of Chancery exercised an exclusive jurisdiction in cases which, although classified in that court as cases of fraud, yet did not necessarily import the element of *dolus malus*. The Court took upon itself to prevent a man from acting against the dictates of conscience as defined by the Court, and to grant injunctions in anticipation of injury, as well as relief where injury has been done. Common instances of this exclusive jurisdiction are cases arising out of breach of duty by persons standing in a fiduciary relation, such as the solicitor to the client, illustrated by Lord Hardwicke's judgment in *Chesterfield* v. *Janssen* (1750), 2 Ves. Sen. 125. I can hardly imagine that those who took part in the decision of *Derry* v. *Peek* imagined they could be supposed to have cast doubt on the principle of any cases arising under the exclusive jurisdiction of the Court of Chancery. No such case was before the House, which was dealing only with a case of actual fraud as to which the jurisdiction in equity was concurrent"; and see the Restatement of the Law of Torts, vol. 2., s. 311, as to advice which results in damage to the bodily security of the client.

[37] *Winfield on Torts*, p. 399.

[38] *Salmond on Torts*, 9th ed., p. 609.

[39] *Harper on Torts*, 1st ed., p. 446.

[40] *Underhill on Torts*, 14th ed., p. 306.

[41] Harper, p. 454; and see Bowen L.J. in *Angus* v. *Clifford*, [1891] 2 Ch. 449, 471 and Lord Herschell in *Derry* v. *Peek* (1889), 14 App. Cas. 337, 371.

as any other kind of tort.[42] This statement is much too wide, as is clearly seen from the discussion *supra* on the topic of negligence, and as Salmond says:[43] "The rule in *Derry* v. *Peek* is subject to the following exceptions:—(b) where there has been a breach of a special duty recognized and enforced by the Court of Chancery, whether arising from the fiduciary relationship of the parties or the special circumstances of the case, the defendant will be liable for 'constructive fraud', and even though he has no fraudulent intention." Salmond then goes on to say that in such a case no damages can be given for deceit. This statement is probably correct as far as it goes, but if it is meant to infer that there can be no liability for deceit in the solicitor-client relationship, it may be incorrect, for as Salmond himself says,[44] "there seems no real reason to doubt that an action will lie for a fraudulent misrepresentation of law."[45]

As to the necessity for a *dolus malus* in deceit, Viscount Haldane says in *Nocton* v. *Ashburton*:[46] "I do not wonder that the decisions in *Derry* v. *Peek* and *Angus* v. *Clifford* have on this point given rise to some heartburning. But the principle laid down that a *mens rea* is essential, was no new one, nor is it now open to question." This is not to be taken as saying that there can be no recovery in deceit when there is also a duty, for the mere fact that there is also a recovery in another branch of law does not prevent recovery in deceit where all the necessary elements are present. In the same case Viscount Haldane says:[47] "It must now be taken to be settled that nothing short of proof of a fraudulent intention in the strict sense will suffice for an action of deceit" and "so far as the equity jurisdiction in cases in what is called fraud is concurrent only and exercised in actions for mere deceit apart from breach of special duty, an actual intention to cheat has now to be proved."[48]

As to what constitutes a wilfully false statement, although no amount of negligence will be sufficient, it is not essential for the defendant to have known it to be false, it being sufficient if he did not genuinely and honestly believe it to be true.[49] In the two problems posed there was knowledge of the falsity

[42] 14 App. Cas. 337.
[43] Salmond, p. 611.
[44] *Ibid.*, p. 609.
[45] See *West London Commercial Bank* v. *Kitson*, 13 Q.B.D. 360.
[46] 14 App. Cas. at p. 949.
[47] *Ibid.*, p. 953.
[48] As to adverse criticisms on *Derry* v. *Peek* see 5 L.Q.R. p. 410 (Pollock) and 14 H.L.R. p. 184 (Jeremiah Smith); for applauding criticisms see 6 L.Q.R. p. 72 (Anson) and 42 H.L.R. p. 733 (Bohlen).
[49] Salmond, p. 610.

of the opinion given, and therefore the solution is not difficult, but it is well to keep the law in mind. It appears immaterial that the solicitor's motive is a commendable one. Harper says: "When the intention of the defendant in making the false representation is fraudulent, his motive in making them is immaterial. He may, in fact, be motivated by the highest impulses of humanity and friendship, measured from the purely subjective viewpoint, and still be liable if he knowingly makes false representations."[50] Nor is it essential that the statement should benefit the person making it, for it is sufficient if it was made intending to deceive, and was "followed by loss which a reasonable man might have contemplated."[51]

(2) There must be a false statement of fact, and not of law. Such statement may be either oral or written, or perhaps even through conduct, for as Lord O'Hagan said in *Ward* v. *Hobbs*,[52] "conduct may amount to representation as clearly as any form of words." But be this as it may, it seems clearly obvious that a lawyer in giving advice will at least make an oral statement, although his conduct in some instances may prove as eloquent a representation as do his words.

A lawyer advises, gives opinions and although an expression of opinion may in some circumstances not be a statement of fact, but a statement of belief in a certain fact, which may be an honest or non-existent belief, yet if there is an expression of non-existent belief, there is no doubt that such is a false statement of fact, for as Bowen L.J. said in *Edgington* v. *Fitzmaurice*,[53] "the state of a man's mind is as much a fact as the state of his digestion."

One may ask, how can a false statement of law constitute a "statement of fact" under Winfield's definition? There is a great dearth of authority on this point, and although there may be weighty arguments for and against such a view, it seems evident that a deliberate misstatement of the law is clearly ground for deceit, at least where the parties are not on equal footing. "Thus, professional lawyers dealing with each other at arm's length would doubtless be deemed equals, and if one falsely alleged to the other something purporting to be a pure proposition of law this could scarcely ground an action for deceit. *But if a solicitor did the same thing to his lay client, he ought to be liable.* It is not easy to see what argument can be

[50] Harper, p. 453.
[51] Underhill, p. 309; and see *Smith* v. *Chadwick*, 9 App. Cas. 187 at 201.
[52] (1878), 4 App. Cas. 13.
[53] 29 Ch. D. 459, at 483.

produced the other way. To urge that every one is presumed to know the law is to carry into the law of deceit a distinction between law and fact which, artificial enough in any event, was never invented for the purpose of shielding swindlers."[54] It thus appears evident that a wilfully false statement of opinion is actionable as a tort.

(3) The statement must be made with intent that the plaintiff shall act upon it.[55] No comment is needed on this point, save to say that it is a moot question whether a lawyer giving advice ever intends anything else than that the client shall act upon it, or whether it may be considered that a lawyer *intends* anything, that he acts merely as an automaton dealing out advice, with no feeling one way or the other whether it will be acted on or not. The former view is probably the most logical and it is quite evident that at least in one of the problems set out in the introductory remarks to this paper, the solicitor did in fact intend the client to act upon it, albeit for the client's own benefit, or so the lawyer thought.

It appears that the action of deceit is commonly thought of as being brought where the misrepresentation of fact has led the plaintiff into some venture which concerns his commercial, financial or economic advantage, whereas if it has led to danger to his person or property, it is treated as a matter of negligence.[56] This distinction may not be completely happy, as is shown by *Langridge* v. *Levy* (the celebrated Nock gun case),[57] where a statement that a gun was of a certain make was held actionable in deceit, "Although the statement was important primarily as an assurance that the article was safe for use and the plaintiff's damage lay in a personal injury caused by his use of the article in the belief that it was as represented."[58]

Nevertheless, it is generally the situation that the client in following the advice given does suffer some commercial, financial or economic advantage. Let us assume for the purpose of argument that this is so, although the two situations *supra* are not too happy in this regard.

In the light of the law as set out above, there appears to be little doubt that in the case of our solicitor, he has made a fraudulent statement to the client, intending the client to act

[54] Winfield, p. 407.
[55] *Langridge* v. *Levy* (1837), 4 M. and W. 337.
[56] See Bohlen, *Misinterpretation as Deceit, Negligence or Warranty*, 42 H.L.R. p. 733.
[57] (1837), 150 E.R. 863.
[58] Bohlen, 42 H.L.R. at 734.

hereon, and that as a reasonable man he should have foreseen that it was possible that as a result his client might be indicted for bigamy or adultery. The statement made is one as to the opinion held by the solicitor, and there can therefore be no doubt that such is a statement of fact, for it is a statement of how the solicitor felt concerning the situations presented to him. He deliberately misrepresented his own feelings and to reiterate, since "the state of a man's mind is as much a fact as the state of his digestion" there has been the necessary element of factual statement.

Of course, where the solicitor honestly entertains the opinions he gives, no matter how grossly negligent he is in so entertaining them, it is quite clear that he will not be held liable in deceit, but for negligence of "equitable fraud" if he is liable at all.

D. *As to Attempts*

Section 72 of the Criminal Code of Canada provides that "every one who, having an intent to commit an offence, does or omits an *act* for the purpose of accomplishing his object is guilty of an attempt to commit the offence intended whether under the circumstances it was possible to commit such offence or not."

The construction of this section in reference to our present problem is admirably summed up by Masten J.A. in *R.* v. *Gordon and Gordon*[59] where he says: "Generally, under the provisions of section 72, a person who merely counsels cannot be said to have attempted to commit the offence counselled for his intention is not to commit it but to have some other person do it and until that other person commits the offence or attempts to commit it the person who incites cannot, in the absence of some special provision, be guilty of the offence counselled or of an attempt to commit it. In order to constitute an attempt there must be some act done with intent to commit the crime and forming a part of a series of acts which would constitute its real commission if not interrupted." Linking this interpretation of section 72 up with the interpretation put on section 69 by Sir Charles Fitzpatrick in *Brousseau* v. *The King*[60] it is quite apparent that the solicitor may be guilty of counselling where the offence has not been committed, yet where an attempt to commit the offence has been made, section 69 constitutes the counsellor a party to the offence which in this case would be an attempt to commit the offence.[61]

[59] [1937] 1 W.W.R., 455, at 461.
[60] 28 C.C.C. 435; 56 S.C.R. 22.
[61] *Tremeear's Criminal Code*, 4th ed., p. 88.

At common law this conclusion appears quite logical, for as Lord Reading C.J. said in *R.* v. *Robinson*[62] "there must be some act beyond mere preparation if a person is to be charged with an attempt". The act of counselling, before any attempt is made to carry out the deed counselled must in this respect be characterized as mere preparation.[63] Otherwise the lawyer would be guilty of an attempt to commit a crime which was never attempted, though logically much argument can be brought forward to say that the lawyer should be so guilty for it seems an anomalous situation that whether or not a person is guilty of an attempt should depend on the actions of a third party. However, since the Criminal Code, the problem is not a common law problem and the attempt concerned is not the attempt of the lawyer but an attempt of the person counselled, and we need only consider section 69 in this regard.

Much also may be made at common law of the argument that the lawyer's advice is too remote to constitute an attempt, for an attempt, in the words of Stephen[64] is an *act* done with intent to commit the crime and forming part of a series of acts which would constitute the actual commission if it were not interrupted. Nevertheless, in view of the fact that section 69 renders one who counsels a party to the crime counselled if committed, it seems logical to assume that the counsellor would also be a party to an attempt to commit such crime. Note that Masten J.A. in *R.* v. *Gordon and Gordon* (*supra*) clearly states that if an attempt is made, the counsellor is a party to such attempt.

The problem, however, is not so simple as at first may appear for if we say that a person is guilty of counselling where the act counselled has been committed and that the act must be committed for him to be a party thereto, we must logically say that that person has, in the words of section 69, counselled the client to commit the attempt, which he has *not* counselled (except perhaps by implication) having counselled the commission of the *act* not an attempt, in order to constitute him a party to such attempt. This, however, may be drawing too fine a distinction, for there must of course be an implied counselling to attempt such offence in the counselling of the offence.

[62] [1915] 2 K.B. 342, at 349.

[63] See *R.* v. *Banks*, 12 Cox C.C. 393, where it was held an offence to attempt to incite a lad to commit a felony by sending him a letter which did not reach him; it thus appears that a person may be guilty of an attempt to counsel, a situation which can of course never arise where the client and lawyer are face to face in the latter's office, though it may arise where the advice is rendered by means of correspondence.

[64] Stephen's Digest of Criminal Law, 6th ed. p. 41.

For the purpose of this section, it is best not to consider the two problems posed, but to consider problems where the deed counselled is one more logically capable of an attempt thereon.

E. *As to Violation of the Law in Other Instances*

Little need really be said on this point, save to point out that "a lawyer is under the same obligation to be an honest man as every other member of the community. He has no right to sell his services to aid rogues in their wrong doing or to aid them to escape from the consequences thereof".[65] Once he steps outside the bounds of his profession he assumes the cloak of an ordinary man and his responsibility is for everything he does, be it theft, conspiracy, or any other offence.

For the purposes of this paper mention may be made of the crime of conspiracy. Kenny defines conspiracy as "the agreement of two or more persons to effect any unlawful purpose, whether as their ultimate aim or only as a means to it."[66] In the two problems posed *supra* we have two persons, and we have an unlawful purpose but the question is, have we the necessary agreement? Both Sir R. S. Wright and David Harrison in their works on conspiracy do not define with any lucidity what exactly constitutes agreement. They, in common with Kenny, are satisfied to state simply that there must be an agreement. Webster's Dictionary defines the word as "a concurrence in or engagement that something shall be done or omitted; an exchange of promises, mutual understanding, arrangement or stipulation". The shorter Oxford Dictionary defines it thus: "A coming into accord; a mutual understanding; a covenant, or treaty."

Quite clearly the writer considers the mere rendering of legal advice does not without more, constitute a conspiracy between the client and the solicitor. In the two situations posed, the client is completely passive, an innocent tool in the hands of the lawyer. There is no meeting of minds, no agreement, no promises are given to do or refrain from doing, any act, no mutuality, no covenant, no coming into accord. Since the agreement is the substantive crime, it appears that there is here no conspiracy.

Of course, a situation may arise where the lawyer and client actually do come together and agree, and in that case,

[65] 'Legal Ethics' (an address delivered to the Department of Law of the University of Pennsylvania) 54 U. Penn. L.R. p. 1, at p. 10.
[66] Kenny, *Outlines*, p. 289.

of course, each being aware as to the actual facts and as to the other's intention, conspiracy is possible. If there is an announcement and acceptance of intentions, we have conspiracy, but where as here, the lawyer locks up his intentions in his mind and there is no possibility of the client accepting what he does not know viz; that adultery is a crime or that if he marries again he commits bigamy, the question of conspiracy cannot possibly arise.

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It will thus be seen that a lawyer who through negligence or a misplaced sense of duty or fraud renders advice to a client which causes injury to the client in following out that advice, is legally in a very difficult position. This paper is not meant as a warning to the legal profession. No such warning is necessary, since the legal profession in this country is for the most part above reproach. It is merely meant to point out to the lawyer the possible pitfalls and to suggest to him that only by the efforts and honest-dealing of an efficient and unimpeachable legal profession will the day come when all humanity can look in appreciation to the courts of our country, where, as Victor Hugo says[67] "dans l'obscurité, la laideur, et la tristesse, se dégageait une impression austere et auguste. Car on y sentait cette grande chose humaine qu'on appelle La Loi; et cette grande chose divine qu'on appelle La Justice."

Above all, we of the legal profession must recognise

> . . . . . The moral beauty
> Of making worldly interest
> Subordinate to sense of duty.[68]

R. AUSTIN PARSONS.

Halifax.

[67] Victor Hugo, *Les Miserables*, VII, Ch. 9, as quoted by Kenny, *Outlines* p. 534.

[68] W. S. Gilbert, 'The Pirates of Penzance' Act 1.