

1893

The Rights, Duties and Liabilities of Attorneys

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A T H E S I S

----- on -----

THE RIGHTS, DUTIES, AND LIABILITIES OF ATTORNEYS.

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Presented by

Edward L Randall.

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Cornell University. School of Law.

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1893.

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CHAPTER I.

V O C A T I O N.

The Bar - English and American compared. - The
Individual - Attorneys, Solicitors, Counsel etc. -
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English and American social institutions are, alone, characterized by a peculiar inherent similarity; moving about in their own kindred spheres, alike in general organism, yet widely differing in detail, moulded and swayed by a different people but of the same race, by a different land and physical conditions but of a relative climate, by different social, political, moral and economical influences; thus retaining a characteristic likeness which even time cannot efface. From their organization, throughout their various operations to the end, we trace both a marked similarity and a dissimilarity. So with the English and American Bar. In the Colonies the Bar reappeared upon new soil under a variety of circumstances and diversity of influences, consequently chang-

ing accordingly, still retaining the general salient features of the mother institution. Separating the two there is no clearly defined line of demarcation save the broad expanse of the Atlantic; the line cannot be drawn but it may be traced. Thus we note in their general features a likeness; they varying only in conformity to the change in social and physical influences and conditions of the two countries.

There is no distinction in this country between "barristers" and "attorneys"; every lawyer is permitted to take every kind of business: argue cases in the highest courts of his state and of the United States, prepare the case for trial and conduct it in person throughout all its proceedings in court, confer with the client and witnesses, gather evidence, issue the writ, prepare the complaint, in brief, conduct the cause through all its intricate proceedings from the issuing of the original writ to the issuing of execution on the final judgment. He may make whatever contract he pleases directly with his client, maintain an action to recover his fees, and *pari ratione*, may be sued for negligence in the perfor-

mance of his professional duty, while in England the "barrister" bargains with the client and the "attorney" with the barrister.

Turning, now, from the Bar to the individual we see a man pre-eminently fitted as a leader; we see him at the head of great reforms and combined movement of whatever nature. Scarcely do we find combined money, learning or skill without its being put in motion through the guidance of one learned in the law; his influence extends from municipality to state and from state to nation - he is chief among the secondary forces of public life.

He is thus valued as a leader because he is skilled and talented in his profession, and, like all other professions, it is one to be attained through moral merit and hours of arduous study. He professes to be skilled in the law and with the ponderous responsibilities he assumes, he must be, for let him remember that every eye is fixed upon his weaknesses and every ear is open to the detection of his errors.

His character is that of the assimilation of op-

posite qualities, a quick discernment with a profound understanding, an imagination with discreet judgment, a knowledge of books with a knowledge of mankind, cunning and shrewdness with sterling integrity, all those subtle qualities which make up the stature of the perfect man. In the words of Hoffman, "the word law is of a comprehensive signification, lawyer is still more so, embracing the richness and solidity of learning, the profundity of wisdom, the purity of morals, the soundness of integrity, the ornaments of literature, the amiableness of urbanity, the graces of modesty, and, generally, the decorations and amenities of life, and Raithby adds that "he who is a great lawyer must be a great and good man."

As an officer of the court of justice his object ought not, solely, to be the attainment of victory in his hotly contested forensic battles but rather to avail the client of full and complete justice, to do for the client what the ordinary layman cannot do for himself. And in order to do this he ought to be singularly familiar with the law governing his conduct as officer of the court, in relation to his client, and to the public. And it is

not presumptuous to assert that an attorney's first duty before entering his profession, is to study well those legal principles which govern his rights, duties and liabilities. And with this thought in view it will be the endeavor of this thesis to trace those primary principles through his relation to his client and to the court,

To more thoroughly enable the reader to appreciate the distinction and its origin above stated the various designations applied to lawyers and their distinction will here be noted. They are:

1. "Advocates." An advocate is defined to be "an officer of the court learned in the law, who is engaged by a suitor to maintain or defend his cause" having the exclusive privilege, in civil and ecclesiastical cases, of addressing the court, either by written or oral argument.

2. "Barristers." A barrister is one whose duty is limited to pleading at the bar. He cannot be an attorney nor can an attorney be a barrister at one and the same time.

3. "Attorneys." "An attorney" says Sir. Edward Coke, "signifieth one that is set in the turn, stead or place of another", thus giving it scope enough to include both attorneys in fact and attorneys at law, and Blackstone qualifies it by adding, "to manage his (suitors) matters of law." Attorneys in England could not address the court but merely prepared the case for trial, drafted legal documents, instituted suits, and brought them to an issue by proper pleadings. In this country an attorney at law is given a much more liberal meaning and may be defined to be an officer of a court of record, learned in the law, legally qualified, by admission to the bar, to prosecute and defend legal causes by authority of the retainer of his client. This definition will be seen to be broad enough to include those practicing in both courts of law and equity under our system while it also excludes mere ministerial acts.

4. "Counsellors." A counsel is one associated in the management of a cause acting as legal adviser in all matters requiring legal skill and judgment.

5. "Proctors." A proctor is one whose practice

is confined to admiralty and ecclesiastical courts.

6. "Solicitors." A solicitor is one who takes charge of, prosecutes or superintends affairs of a legal nature, unconnected with the courts of common law. By modern use distinguishing one who practices in equity from an attorney practicing in common law proceedings.

While these various distinctions are maintained in England, as a general rule in the United States the single term "attorney" includes all persons superintending legal causes of whatever nature and will be given this meaning as used in these pages. But to this general rule there are exceptions:

In the Federal courts a mere formal distinction is retained, the term "attorney" denoting those practicing on the law side of the court and the terms "counsel" and "solicitor" denoting those practicing on the equity side, given the meanings as above stated. As to solicitor and counsel in equity the distinction exists merely for the purpose of signing legal papers e.g. the pleadings. (Story's Equity sec. 47 n.): New Jersey, "a state curiously conservative in some points", still adheres

strictly to the distinction between attorney and counsel, the attorney having to practice as such for three years after admission to the bar, and undergo a rigid examination, before he can practice as a counsel, on the theory that it requires a more profound knowledge of the law to perform the duties of counsel.

To lay the basis for a thorough understanding of the legal principles which govern the attorney's relations to his client, to the court and to the public, it will be necessary to determine the nature and stability of his office as minister of justice. And this leads us to a discussion of the

Test Oath Cases.

"The profession of an attorney and counsellor is not like an office created by an act of Congress, which depends for its continuance, its powers, and its emoluments upon the will of the creator, and the possession of which may be burdened by any conditions not prohibited by the constitution. Attorneys and counsellors are not officers of the United States; they are officers of the court, admitted as such by its order upon evidence of

their possessing sufficient legal learning, and a fair private character. They hold their office during good behavior, and can only be deprived of it for misconduct, ascertained and declared by the judgment of the court, after opportunity to be heard has been offered."

Better words cannot be found than those of Mr. Justice Field in the great case of *ex parte Garland* (4 Wall. 333), to describe the nature of the office, and its relation to the courts and to the constitution. They are the very nuclei upon which the rights, duties, and liabilities of attorneys are founded, and it is curious to note that this important principle had not sooner been judicially stated. This case finally settled the long mooted inquiry, whether the vocation was characterized as an office, if so, what was its nature. Was it a government or state office; was it civil, political, or private; was it an office of "public trust" under the constitution? It also settled the stability and quality of the vocation and the property right therein. This case may be properly called the *Polar Star* in the law of attorneys. Mr. Justice Field continues: "The attorney and counsellor

being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him, to appear for suitors, and to argue cases, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency."

The facts of this case were, briefly, as follows: an act of Congress required all officers of honor or profit under the United States to take and subscribe a "test oath" to the effect that they had never borne arms against the United States, nor given voluntary aid to persons in armed hostility thereto, and that they had never sought, accepted, or exercised any office whatever, under any authority hostile to the United States.

Garland followed the state of Arkansas in the act of secession from the Union, was a representative in the Senate of the Confederate Congress, and by reason of such office could not take and subscribe the required oath. But he contended that such an expurgatory oath was unconstitutional and void, in which contention the

Supreme Court of the United States concurred.

According with the above view, and at about the same time, are cases to be found in Alabama, Virginia, New York, South Carolina and California.

The inquiry arose, indirectly, in our own state "In the matter of Oathes to be taken by Attorneys and Counsellors" (20 John. Ch. 492) Platt J. said: "The point is simply whether an attorney or counsellor holds an office of public trust, in the sense of the constitution. x x x x x x In my judgment, an attorney or counsellor does not hold an office, but exercises a privilege or franchise. As attorneys or counsellors they perform no duties on behalf of the government - they exercise no public trust."

Therefore we may conclude that an attorney at law is neither a state nor federal, civil, political or public officer; neither is he an officer of public trust under the constitution. He is simply an officer of the court (of record) holding such office as a vested right, rather than through grace, favor, or mere indulgence. This conclusion has been reiterated in the case of *In re Thomas* (27 Pac. (Colo.) 77) in which Helm C.J. after a

careful investigation said : "Our conclusion is that attorneys are not,per se,civil officers within the meaning of the constitutional phrase."

Although it is not our intention to discuss the admission of attorneys,there is one point,the admission of women,passed upon in the above case which deserves our attention because of the rapid change in conformity to modern sentiment and because it is likely to become an important question. In the absence of constitutional or statutory inhibition,women will be admitted to the bar on equal terms with men. (In re Thomas,supra.) In the language of Helm C.J.,"The question is therefore squarely presented, are women entitled to admission to the bar of this state on equal terms with men? We have no disposition to postpone falling into line with the Supreme Court of the United States and other enlightened tribunals through the country that have finally, voluntarily or in obedience to statutory injunction, discarded the criterion of sex,and opened the door of the profession to women as well as men". This constitutes quite a departure from the old doctrine based

on "the wide difference in the respective spheres and destinies of men and women" and denying to women the right to enter the profession. (Bradwell vs. The State 16 Wall.130). But now women have a right to practice law on the same basis as men do, and in nearly all the states it has become recognized, either by statute or by the courts, that they may practice of a right when possessing the requisite legal learning. Is it just and fair that women having the right to follow all other honorable trades, professions, and vocations, should be barred from practicing the legal profession? Is this sole vocation more remote from her "sphere" or "destinies" than innumerable other vocations open to her? In re Thomas, justly decided, answers in the negative, and may be said to represent the trend of modern judicial opinion.

Having determined that the attorney is characterized as an officer of the court, and noting his relations thereto, the next chapter may naturally be devoted to an examination of the court's summary jurisdiction over him as its officer, for moral and professional delinquency,

CHAPTER II.

Summary jurisdiction - Striking from rolls -
Suspension - Contempt.

Summary jurisdiction is the power of the court to concisely and summarily deal with all matters coming before it, in the procedure of a cause, which, from their nature, and in the light of all the surrounding circumstances, require the prompt and speedy action of the court in order to relieve from, or intercept, some injury which, had the court proceeded in its ordinary plenary method, would probably have worked irreparable damage to the injured person whether a party in interest, the court, or a third person. Many are these cases, although in many instances simple and unimportant in themselves, which, if not determined with rapidity and precision, would vitally affect the cause of action and its remedy. So this jurisdiction as applied to and exerted over attorneys includes all cases of misconduct on behalf of the attorney which, if otherwise unchecked, might

irreparably prejudice some right or interest in the cause; for example, where the attorney is acting without authority. In this case the party may have the proceedings set aside and compel the attorney to pay costs.

The exercise of this jurisdiction is over the attorney as an officer of the court, rather than as a mere member of the profession. As the court has by its judicial act clothed him with his professional franchise it is within the inherent power of the court, when the attorney either by moral or professional delinquency has shown himself unfit to hold the responsible office, to strike his name from the roll of attorneys. "This is indispensable to protect the court, the administration of justice, and themselves." (Weeks on Attys. p. 140; People v. Allison 68 Ill. 151; In re Goodrich 79 Ill. 148.) This power of removal from the bar is possessed by all courts which have authority to admit attorneys to practice. But although possessing such inherent power the act of suspension or striking from the rolls, is of so serious and weighty nature, as to require the most deliberate action and sound discretion. On this point we have

the voice of the Supreme Court of the land through the words of Mr. Justice Field. Speaking of the power he said; "It is a power which should be exercised only for the most weighty reasons, such as would render the continuance of the attorney in practice incompatible with a proper respect of the court for itself, or a proper regard for the integrity of the profession", and in conclusion he said; "A removal from the bar should, therefore, never be decreed where any punishment less severe - such as reprimand, temporary suspension, or fine - would accomplish the end desired." (Bradley v. Fisher 13 Wall. 335) The end to be attained is protection rather than punishment.

In the matter of Eldridge (82 N.Y. 161, 167) the Court of Appeals confirmed an order forbidding Eldridge from practicing law for three years for the offense of perjury and subornation of perjury in procuring and presenting to a surrogate, a fraudulent deposition of a witness taken on a commission. Finch J., with his usual adroitness and precision, said; "our duty to an honorable profession, the need of preserving unsullied that high

standard of truth and purity by which alone an officer of justice should be measured, demands of us a cold and deliberate scrutiny, and firmness in declaring its result.

x x x x x His professional life is full of adversaries. Always in front of him there is an antagonist, sometimes angry and occasionally bitter and venomous.

His duties are delicate and responsible and easily subject to misconstruction. The question is important and it is best that we decide it". Continuing he states

the rule thus; "He may confess, he may explain, he may deny. If he confesses the court may at once render its judgment. If he explains, the court may deem the explanation sufficient or the reverse. But if he meets the accusation with denial, the issue thus raised is to be tried, summarily it is true, by the court itself, or by a referee, but never-the-less to be tried, and on that trial the accused is not to be buried under affidavits or swamped with hearsay evidence, but is entitled to confront the witnesses, to subject them to cross-examination, and to invoke the protection of wise and settled rules of evidence", and we may add, must have notice of

the grounds of complaint and citation offering him ample opportunity to confess, explain, or defend.

To justify striking an attorney's name from the roll the charge must be something affecting his conduct as officer of the court and not merely his everyday conduct as a private citizen; it must amount to a series of deceitful acts or a loss of moral or professional character. (People v. Allison supra.; In re Percy 36 N.Y.653) But these facts once appearing, for example, when there can be no reliance upon his word or oath, he is manifestly disqualified, and the courts not only have the power but it is their duty as well, to strike his name from the roll of attorneys. It must also be a charge affecting his motive and not merely his knowledge of law which, in itself, is not adequate cause to justify disbarment. It must be an act committed within the pale of his professional office and employment.

Impossible as it is to lay down any specific rules which clearly define the grievousness of the offense which will justify the court in striking an attorney's name from the roll, as a generic rule it may be said that any act consummated by him, within the scope of his

profession, which would render his continuance in practice incompatible with a proper respect of the court for itself, or a proper regard for the integrity of the profession and the administration of justice - in brief, any breach of moral or professional fidelity which shows him unsafe and unfit to be entrusted with the powers and duties of his office, will justify and even commend the court in ordering his name stricken from the rolls. With this general rule in mind, what will justify, or rather invite, a disbarment is a matter of sound judicial discretion.

The trouble lies in the fact that in our courts of original jurisdiction they, having usually witnessed the act of offense, are apt to be unjustly prejudiced. But our courts of appeal will proceed with all possible precaution, and where the court below has overstepped its jurisdiction in the matter, mandamus will lie and is the appropriate remedy to reinstate him to his professional office. (Ex parte Bradley 7 Wall. 364.)

Following disbarment we are to notice suspension from the bar; and it is only necessary to say that the

words above applying to disbarment are equally applicable to suspension which is a remedy for offenses of a less grievous nature; in the words of Field J., "a removal from the bar should never be decreed where any punishment less severe - such as reprimand, temporary suspension, or fine - would accomplish the end desired."

Summary jurisdiction also extends to compelling the attorney to disclose the whereabouts and occupation of his client, in obedience to a subpoena duces tecum to deliver up documents coming into his hands, and, upon application of the client, to compel him by attachment, to pay over money collected by him on behalf of the client; but this is a matter of judicial discretion. (*Schell v. The Mayor* 128 N.Y.67.),

Equally as important is their power to summarily proceed in cases of contempt. For the performance of any act inconsistent with his relation to the court (as insult, to, or disobedience to the order of, the court) or fidelity to his client, which results in any material wrong by which the court has suffered insult or disobedience, and the client suffered damage, respectively,

the attorney is liable to proceedings for contempt. The remedy for contempt is either by way of attachment or fine and penalty, the distinction being a mere matter of practice; in cases of contempt against the court in person resort is had to fine and penalty, while in cases of contempt resulting in pecuniary damage resort is had to attachment bringing the attorney corporally before the court that he may do the thing required or show cause why he has not or should not. "Contempt," as defined by one eminent jurist, "is a disobedience to the court, by acting in opposition to the authority, justice, and dignity thereof." It is either direct or consequential, for example, disobedience to an injunction of the court, and infidelity to the client, respectively. (2 Swift's Dig. of Com. 358) The following illustrations will serve to show the care with which attorneys must conduct themselves and avoid placing themselves in direct opposition of the prerogative of the court: A petition for rehearing contained the following statement; "how or why the honorable commissioner should have so effectually and substantially ignored and disregarded the uncon-

tradicted testimony we do not know." x x x x x a more disingenuous and misleading statement of the evidence could not well be made. x x x The decision seems to us to be a travesty of the evidence." In this case the attorney purged himself of any contemptuous intent but nevertheless the court fined him two hundred dollars for contempt. (McCormick v. Sheridan (Cal.) 20 Pac.24)

In the late case of The Matter of Goff before Recorder Smythe of New York City attorney Goff was fined two hundred dollars for alluding to the Recorder's "remarkable memory" which always helped the prosecution and hurt the defense (referring to the fact that the Recorder had assisted the memory of a witness when Mr. Goff was testing it.) Acts or words when stated in writing, may appear to have been entirely innocent, but may have been done or spoken in such a manner as to have been in the highest degree a breach of the respectful conduct due to courts when in the discharge of their duties, and of the decorum and good order that ought to be observed in their presence to enable them to properly perform their functions. An attorney trying the cause

of his client has, of course, rights as to the representative of a suitor and as an officer of the court which must be respected; but those rights can never extend to disagreeing or disobeying the authority, justice, dignity, or decorum of the court.

(Leftwich v. District Court (Minn.) 42 N.W. 598.)

Again has the Federal Supreme Court found occasion to speak, and in conclusion we quote from the words of Field J.: "The power to punish for contempt is inherent in all courts; its existence is necessary to the preservation of order in judicial proceedings, and to the enforcement of judgments, orders and writs of the court, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject they become possessed of this power." (Ex parte Robinson 19 Wall. 505.)

CHAPTER III.

The Law of Attorney and Client.

Retainer - Authority - Appearance - Effect
of unauthorized Appearance - Doctrine of
Noyes v. Denton - Resumé.

We now direct our attention to the most important division of our subject, the Law of Attorney and Client, which finds its basis in the correlative rights and duties incumbent upon them by virtue of their relation as attorney and client, a relation characterized by the utmost honesty and fidelity, the very essence of the relation, and without which justice would be hampered and diverted. How could it be otherwise when property and, as often, life, liberty, and reputation are at stake? For without this fiduciary seal, *uberrimae fidei*, it is idle to hope for that which, in the eye of the law, is its aim, the promotion of justice. It is a relation founded upon the utmost good faith.

To discuss these relations, their incidents, and the

law governing them, in their natural and logical order let us assume that the client is about to retain his attorney for the trial of a case, treating them in their natural and usual order as they arise in the trial of the ordinary cause.

The suitor seeks his counsel and "lays his case," whatever it may be, by a statement of the facts in the case, and from thence a quasi relation of attorney and client exists. Finding the cause meritorious and the client desirous of employing him, and the attorney agreeing to act, the retainer is complete and he is clothed with all the indicia of the relation; from that instant the relation of attorney and client is absolute and relates back to the time of laying the case. The retainer may be defined generally to be a mutual contract founded upon the utmost good faith, the one to act as attorney and the other to accept his services. There are two essentials to the retainer, viz., (1) The agreement of the attorney to act as such for the party, and (2) the agreement of the party to have the other for an attorney.

(Weeks on Att'ys. p. 328).

But the retainer may be either express or implied, parol or written; but as a matter of safety, convenience, and good practice it is never to be forgotten, that it is best in all cases to have a written retainer signed by the client. The great importance of this will be seen later when the question is asked, is the judgment good, did the attorney have authority? The contract of retainer may be either special, as to put in a special appearance, or general, to conduct a proceeding from the beginning to its termination.

Deserving of a passing remark is the right to counsel by suitors. Prior to 1688 in England in criminal offenses of a high nature, as felonies and treasons, the right was denied. Mr. Weeks commenting upon it, says: "Persons ignorant and unaccustomed to public assemblies, perhaps feeble in body or intellect, or in both, were put upon trial on charges which might consign them to the most ignominious death, with able counsel opposed and all the machinery of the law in active operation against them, and yet refused the right." But suffice it to say that now such a barbarous practice is not in vogue and suitors are accorded to the fullest extent the

right of counsel.

Not uncommon is the retainer of a law firm by the client, and the question arises as to the effect of a dissolution of such partnership upon the retainer. Inasmuch as the contract of retainer of a law firm is an entire contract, and imposes a joint and several liability upon them, neither a dissolution of the partnership nor any secret agreement between the attorneys can affect the contract. The dissolution only affects their professional business undertaken after such dissolution and cannot relate back and affect the contracts entered into prior thereto. " A dissolution of a partnership subsisting between attorneys, has reference to new business to be undertaken, and does not affect engagements already made, at least so far as their clients are concerned. The rights of suitors imperiously demand this! And the same principle is also applicable to their individual engagements when forming a partnership. (Walker v. Goodrich 16 Ill. 34)

By virtue of his license he has a right to appear for any suitor who may retain him, and by virtue of his retainer has a general license to appear for the particu-

lar person, the legal presumption always being in his favor. And only in cases which justify grave doubts do the courts require him to produce special authority. An authorized appearance by the attorney, in good faith, gives perfect jurisdiction over the suitor, and his subsequent action is conclusive against the suitor both in law and equity. This is not doubted.

But the effect of an UNAUTHORIZED APPEARANCE presents another and most interesting and important question. What is the effect of a judgment in such a case? Does it bind the client and to what extent? Is it void, voidable, or conclusive? Who may attack such a judgment? Is the pecuniary responsibility of the attorney a controlling or misleading factor in the solution? In seeking to solve these problems we will confine our attention chiefly to New York cases, for it is believed that better satisfaction can be given by treating definitely of the law in our own state merely, in view of the limited space that can be here devoted to its discussion.

Noyes v. Denton (9 Johnson 296) From this leading case in 1810, there originated what is known in this

state as the "Doctrine of Noyes v. Denton," which strictly applied the rule that an unauthorized appearance by a responsible attorney is binding upon the person for whom he appeared even though the person gave the attorney absolutely no authority and may have been ignorant of the very existence of the suit, not having been served with process, and that for any injury resulting to him therefrom such person must pursue the attorney to recover. But to this exceptions were made if there was any fraud or collusion between the attorney and the other party, and in case the attorney was insolvent. Chancellor Kent in writing the opinion remarked that "the case may not seem correct if we reason from first principles." It was assailed by Johnson J. in *Williams v. Van Valkenburg* (16 How. Pr. 144) as unjust in principle although he says, "I do not, however, propose at this day to abrogate the rule as it now stands."

The doctrine was ignored in the case of *Allen v. Stone* (10 Barb. 547). In this case one Chalmers hired someone to trump up an account in favor of Stone against Allen, he then began suit against Allen in the name of

Stone, appeared before the justice as Stone's attorney and swore to his authority to appear. But this was false. He obtained judgment against Allen, the case was appealed to Common Pleas and Chalmers retained an attorney to defend the writ of error, the writ of error was set aside, judgment affirmed and execution issued. On petition of the defendant showing the facts this court reversed the rule setting aside the writ of error and the judgment of the Common Pleas reversed with costs. The question arose, was the plaintiff Stone bound by the unauthorized appearance of Chalmers and liable for costs. We quote at length the irresistible reasoning and conclusion of Hand J. "That a man's rights may be affected, and he, perhaps, ruined by the act of an attorney whom he never employed, and may never have known, and without any notice whatever, is a position that must be sustained, if at all, by mere force of authority. It has no foundation in reason or justice, is intolerable in practice, and contrary to a fundamental principle that every man should have a day in court before he is condemned. It also violates another principle, that one cannot act for another without authority express or

implied. And it is pretty difficult to see why the one for whom the attorney professes to act, and not he that deals with the pretended agent, should be turned over to the latter for redress, thereby reversing the ordinary rule in such cases. By what reasoning can a solvent attorney be said to be retained and an insolvent one not? His solvency has nothing to do with the retainer. And why should one who in fact has never been in court, and is ignorant of the very existence of the suit, be responsible, as against one who has throughout been an actual party litigant? The plaintiff was held for costs only from the time he had notice and opportunity to defend. It is difficult to see how the learned judge's argument can be answered - is it not conclusive in logic?

But notwithstanding the Court of Appeals have reached a different conclusion. In *Alexander v. Livingston* (37 N.Y. 502) when an attorney prosecuted an action of ejectment in the name of the grantors and grantee, at the grantee's request, and without the knowledge or consent of the grantors, against the defendant in adverse

possession when the deed was made, and the recovery was denied with costs,, the court decreed that the grantors were liable to the defendants in costs, notwithstanding such prosecution was without their knowledge and consent, and solely at the instance of the grantee. Woodruff J. in writing the opinion, said; "It would be at variance with the scheme and plan upon which we universally administer the law, if a defendant could be prosecuted by a responsible attorney, in full authority to practice in the courts, and after successfully and in good faith defended, as the case might be, through all the tribunals of justice, and to final judgment in the court of last resort be required to submit to an order setting aside the proceedings, and be left to again be prosecuted for the same cause of action, on the mere ground that the attorney had no authority from the plaintiff to bring the action." Now that sounds well but we would like to ask, what more conclusive ground could be imagined why an agent should not act, than that he had no authority, was in fact no agent at all ? Which would be the greater hardship, to compel the defendant to submit to an order setting

aside the unauthorized proceeding, or to compel the so-called plaintiff, ignorant of the existence of the case, to pay the costs in such a proceeding? Why ought not the party who has been subjected to an unauthorized litigation pursue the offending attorney, rather than cast that hazard and burden upon one who has done nothing to deserve it, who has given no consent, and who has not been in court, no, not even knows that such a case existed until a bill of costs was thrust upon him? The learned judge says, "the answer lies in the suggestion already made, that the law warrants a party in giving faith and confidence to one, who, by law, is authorized to hold himself out as a public officer, clothed with power to represent others in court." But the answer is altogether untenable. As we have already seen the attorney is not a public officer. His license does not give him the right to appear for any suitor, but only those who see fit to retain him; and until such retainer is complete, until its essential elements are present, until their minds have met and agreed, there is absolutely no authority in the attorney to appear - clearly

the learned judge misapprehended the situation.

The question was fairly before the court in *Brown v. Nichols* (42 N.Y.26) and the court said (Smith, Ingalls and Grover J.J., dissenting), "we think it ought to be the settled law of the state, that the judgment may stand."

The doctrine of *Denton v. Noyes*, unfortunately, is without question the established law of this state. In the last case before the Court of Appeals, *Vilas v. P. & M. R.R. Co.* (123 N.Y.440), the court in the words of Andrews, J., commented upon the doctrine as follows, after admitting the injustice of the doctrine; "But it has been followed and must be regarded as the law of the state. We are bound under decisions to follow the doctrine in cases where it is strictly applicable. It is to such cases *stare decisis*. But we are not disposed to extend the doctrine to cases fairly and reasonably distinguishable, and the fact that a defendant, against whom a judgment has been obtained here upon the authorized appearance by an attorney, and who was not served, was a non-resident during the pendency of the proceedings, and was not within the jurisdiction, does, we think, constitute such a dis-

inction as renders the rule in that case inapplicable."

Justices Courts, not being courts of record, know no attorneys at law, but all persons who appear there for suitors are mere agents or attorneys in fact, hence the doctrine of *Noyes v. Denton* does not apply in those courts, and a judgment on an unauthorized appearance is a nullity.

(*Sperry v. Reynolds* 65 N.Y.179.)

The latest and most important innovation of the doctrine is seen in the late case of *Post v. Charlesworth* (21 N.Y. Supp.168). A firm of attorneys appeared, without authority, for a married woman, having an inchoate right of dower, in an action for partition, and judgment was rendered against the plaintiffs. She moved for an order compelling the attorneys to pay the judgment and save her harmless. The court granted this motion and ordered the attorneys to pay the judgment, and said; "If the parties can protect all the parties who have any rights in the premises, without driving them to the annoyance, trouble and expense of an action it should do so." In this case it was the plaintiffs' only remedy short of an action against the attorneys directly.

With all due deference to that great and profound jurist who originated the doctrine, it seems to us to be unsound reasoning and altogether a harsh and unjust doctrine. The proposition that, by the admission of the court to practice as an attorney, power is conferred upon him to confer jurisdiction upon the court as to all mankind, by his appearance, without any authority whatever therefor, is a proposition destitute of reason and at variance with all the analogies of the law as scarcely to be capable of discussion. On the ground that the suitor invariably appears by attorney, and the mere prima facie presumption that the attorney's appearance is authorized, they argue that the appearance of the attorney is legal as to the court and the opposing party. But this is begging the whole question. The courts also insist that the rule is required on the broad ground of public policy; that without it, neither the court nor opposite party could rely, with entire safety, upon the validity of the appearance of an attorney. How far public policy may be made to expand, in the hands of an ingenious judge, we do not know, nor will we

attempt to say; but the question comes to this, so far as policy is concerned, is it not better to require the opposite party to inquire into the power of an attorney when there is any possible doubt, before any injury has arisen from his acts, in case he does not possess it, or to hold a party bound by a judgment in an action, of the existence of which he is ignorant, and by the result of which he may be ruined? Again it is insisted that the cases will be of rare occurrence; this may be true, but this affords but little consolation to a person irreparably injured by a judgment in an action of which he has known nothing. The injustice remains the same when applied to the particular case. The stamp of approval given this doctrine is nothing short of paving the way for the consummation of an act, for the abuse of which, the attorney's name may be stricken from the roll, not to mention the fact that it is contrary to that great landmark in the protection of constitutional rights that "no person shall be deprived of life, liberty or property without due process of law." "The antiquity of the doctrine neither commands my respect nor excites my admiration. It is in derogation of the rule that a

man does nothing when he acts neither in person nor by agent or attorney duly authorized. It is subversion of his right of defense and trial by jury, and strips from him the protection of the doctrine that his property shall not be taken save by the judgment of his peers." (Bean v. Mather 1 Daly 440) It transgresses every cardinal rule of agency as well as the first principles of justice.

To this doctrine there is an exception. As was said in one case the court will "set aside the judgment if the attorney was a beggar or a suspicious character." If, however, an attorney will, intentionally confess judgment against a party, without the least color of authority, does not fall within the description, "suspicious character", it is difficult to imagine one that will. It is also to be remembered that the reason given by the courts, in saying that they would set aside the judgment if the attorney was insolvent, is, that otherwise the client might be injured. But to this it has been suggested, that an attorney who is base enough to confess a judgment against another, knowingly, and without the least

shadow of authority, will very easily, by flight or fraud, elude both the power of the courts to punish him, and the payment of any damages that might be recovered against him.

In conclusion we voice the words of Judge Van Ness dissenting in *Noyes v. Denton*: "If it be once understood to be the law of the land, that every attorney of this court may appear for any man in the community, whether he be sued or not, and confess valid judgment against him, without his knowledge or consent, whereby his person may be taken in execution, or his property swept away, without giving him an opportunity to prepare for the shock, I speak with all due deference, I tremble for the consequences. The whole profession instead of being what it yet is, honored and respected, will, I fear, soon be considered, in fact to be what a part has already been called, *hostes humani generis*."

From the origin of the doctrine down to the late case of *Post v. Charlesworth* its application has been traced, and we must accept the law as it is found actually existing, and not as we would like it. And from

the above cases we will endeavor to deduce the principles to a few convenient rules:

1. An unauthorized appearance by an attorney will confer jurisdiction upon the court over the person in whose name he appears, subject to the following rules.
2. The unauthorized appearance of an attorney is binding upon the person for whom he appears, even though such person, was not served with process, gave the attorney no authority, and was ignorant of the existence of the suit. Exceptions. (1) Where there is fraud or collusion between the attorney and the opposite party, or (2) where the attorney is insolvent, the proceedings will be set aside. (3) Proceedings had on such an appearance in a Justices Court are a nullity. (4) When such person not served with process, is a non-resident of the state during the pendency of the proceedings, and is not within the jurisdiction, the proceedings will be set aside.
3. When the suitor has been injured by such appearance his remedy is by an action against the offending attorney. Exceptions. (1) In proper cases, e.g., unauthorized appearance in a partition suit where all the rights of all parties interested can be protected, the

court, in its discretion, will order the attorney to pay the judgment and costs and save such person harmless.

(21 N.Y. Supp. 168.)

4. The proper proceedings preliminary to relief in the above cases is by direct application to the court, by motion, in the action in which the unauthorized appearance was entered, asking, that the proceedings be set aside, judgment opened with opportunity to defend, or an order granted compelling the attorney to pay the judgment and costs, as the case may be. (See cases above cited)

5. It should be remembered as an appendix to each of the above rules, that the doctrine has been given a limited construction and that the courts will on all possible occasions limit its applications, in reasonable cases.

CHAPTER IV.

Powers by virtue of Retainer other than Appearance - Agency - Management of Suit - Extent of - Solemn Admissions - Compromises - Submission to Arbitration - Service of Notice - Effect Judgment on Retainer - Delegating Trust - Termination of Relation.

The power of the attorney to appear generally for a suitor, and thus confer jurisdiction upon the court, having been discussed, we are next to examine his rights and duties in the preparation, conduct and trial of the cause. And in doing so we are always to reflect that it is a fiduciary relation merging from a contract and governed by the principles of Agency, but it is here preferred to call it an agency proper: for the better opinion is that without deputed power, either express or implied, the attorney at law has no better right to act than an attorney in fact. Assuming such authority, what is its scope? Their authority is exceptionally

extensive, including not only that which expressly given by the letter of the retainer, but that which is legally implied from the nature of the employment. It extends in fact to everything that is necessary for the accomplishment of the acts for which he is retained: to perform all acts which, through his superior knowledge of the law, he may decide to be legal, proper and necessary in the trial of the particular cause, from its beginning to its final determination. It covers all acts done, either in or out of court, necessary or incidental to the prosecution and management of the suit, and which affect the procedure and remedy, only, and not the cause of action. By necessity his authority is liberally construed; for he acts in many instances of doubt and discretion, and exigencies are likely to arise, in the progress of the cause, that demand the exercise of discretion when there is no opportunity to consult with a client, and he is sometimes obliged to act upon reasons which, at the time, cannot be explained; and it is only a just implication that the authority of the attorney extends to the management of the cause in all the exigencies

which arise during its progress. To illustrate : he may sue out the necessary writs, prepare the complaint, submit to arbitration, take an appeal, demand payment of judgment, direct and control execution, and make admissions in the trial of the cause, and the like. But he cannot compromise the claim, release a party, assign the cause of action nor stipulate not to take an appeal. The attorney then, has general authority to bind his client in all things coming within his province as an attorney. And even though the act be injudicious, if made in the usual course of practice it is absolutely binding upon the client in regard to his dealings with the opposite party. The grounds of fraud, collusion, and want of jurisdiction alone are defences. Indeed this has been the rule from an early day for we find it stated in Glanville (Beames's Ed. Chap. IV) as follows: "The principal is to be distrained ~~to~~ abide by what has been done by his attorney, whether it be so done by judgment or by record." The rule is now well settled that "an attorney is the representative of his client in court, is authorized to commence and conduct that cause to final

judgment and execution, and to do whatever is usual and necessary to bring about that end, through all the forms and stages of legal proceedings." (Derwort v. Loomis, 21 Conn. 244)

During the progress of the trial the attorney may make "solemn admissions" and bind his client. But to have binding force they must be made strictly within his professional capacity and in the due course of proceedings. Unsolemn admissions or those made in casual conversation are not binding upon the client. In order to bind the client they should be distinct, formal, and made for the express purpose of dispensing with formal proof of facts at the trial. The distinction is found in the nature and extent of his authority, he being retained to manage the cause and nothing more - hence admissions not made to that end are inadmissible. (Treadway v. Company 40 Ia. 526; 1 Greenl. Ev. sec. 186; Stephen's Ev. Chace's Ed. p. 47)

Naturally the next and important question would be asked, can an attorney compromise his client's cause of action and discharge it, without special authority?

The rule in England is that a compromise, bona fide, prudent and beneficial to the client, and not made in defiance of his instructions, will be sustained. But the rule in the United States may be said to be settled, that an attorney by virtue of his general retainer merely without special authority, express or implied, has no right whatever to compromise his client's cause of action, notwithstanding some dicta and many loose statements to the contrary. In *Preston v. Hill* (50 Cal.43) the court said : "That in the United States the rule, as settled by an almost uniform current of authorities, is that an attorney, by virtue merely of his retainer as such, and without express authority from his client, has not the power to bind the client by the compromise of a pending action." In *Weeks on Attorneys* (sec. 228), commenting upon this case, it is said that the court is clearly in error as to there being any "uniform current of authorities", and that there are numerous cases to the contrary, citing several cases. But not one of those cases support this contention. But in one case the court casually remarks that they would not hesitate to

say that an attorney has such power; but this was purely a dictum. We have failed to find, in any of the reports, a case holding that an attorney has the authority by virtue of his general retainer, to compromise his client's cause of action. The rule is aptly stated in the words of Ellsworth J. thus: "The general question of the authority of an attorney, has often been discussed in courts of justice, and many cases are to be found in which distinctions, of more or less importance, have been taken. But in none of them is it held, that an attorney, who is clothed with no other authority than what is incidental to his retainer, can compromise and discharge the claim." (Derwert v. Loomer 21 Conn. 244, 245) On what imaginable theory can it be said that an attorney can compromise his client's cause by authority flowing impliedly from his general retainer, when by the very nature of the retainer he is to prosecute the cause to final judgment and execution? All these loose statements by judges and text writers as to bona fide compromises binding the client, and those stating the test to be, did the attorney, in making the settlement, act as

good and diligent men of his class are accustomed to act, are incorrect, misleading, and contrary to the principles and theory of agency, as well as the overwhelming and uniform current of authorities throughout the country. There is no such thing, known to the law, as a negligent compromise, all compromises made without special authority are negligent.

Although it is well settled that the attorney cannot compromise the client's cause of action, yet it is as well settled that he can submit the cause to arbitration and bind his client thereby, even without his consent or knowledge. In 1813 the question came before the Federal Supreme Court and Marshall Ch. J., said; "It is believed to be the practice throughout the Union for suits to be referred by consent of counsel without special authority. Were it otherwise, courts could not justify the permission which they always grant, to enter a rule of reference (to arbitration) when consented to by the counsel on both sides." (*Halker v. Parker*, 7 Cranch 436). This is merely one legal mode of trying the disputed question, to which the client's cause may be sub-

mitted because it is a mode of which the courts approve. But he cannot submit the cause to arbitration when no suit is pending; nor can he by any agreement in pais. It must be submitted in the cause in a formal manner. An authority to act in pais could only be inferred if it existed at all, from his employment before the institution of the suit as attorney, and such employment confers no such authority. (Daniels v. New London 58 Conn. 156) That an attorney is clothed with the power to formally submit the case to arbitration, is attested by an almost unbroken series of decisions. Incidental to the general authority to act in all the exigencies of the case, seems to be his power to stipulate that the plaintiffs cause of action shall not abate with his death before final judgment. (Cox v. R.R. Co. 63 N.Y. 414)

One of the principal rights as well as duties of an attorney is to receive service of notice of any step taken in the proceeding; in fact he is the proper person on whom to serve such a notice. And notice to him is notice to his client, for the reason that he is one standing in the place or stead of his client. And resting

on the same basis is the well settled rule, that an attorney has authority, by virtue of his retainer, to demand and receive payment of his client's money; and again payment to the attorney is payment to the client. But he cannot receive anything but money in payment of the debt.

His rights and duties thus defined, the question arises, what is the effect of judgment upon his retainer? When does his authority terminate? We have handed down to us, an old common law rule that with the entry of final judgment, the authority of the attorney is revoked, except that for a year and a day he may enforce the judgment by execution. This has never been strictly followed. His general powers cease with judgment, but there remains the mere power to control the execution; thus, his powers are reduced to one particular, namely the enforcement of execution, but as to that he has complete control in every respect. (78 Md.225)

Throughout these numerous acts we have seen that the client imposes upon the attorney a confidence and special trust of a personal nature; that the relation is a fiduciary one. On this account he cannot delegate his

trust nor substitute another in his stead, without special consent from the client. He can employ subordinates and delegate the ministerial acts, but he cannot delegate his professional discretion, confidence or trust. But with the client's consent he can employ associate counsel or appoint a substitute at the client's expense.

Already we have had occasion to remark that the attorney's authority continues until the final termination of the cause; but the client may terminate it before, and so may the attorney after reasonable notice, but in the absence of proof to the contrary, the presumption is that it continues until the litigation is finally terminated. Their relations may be prematurely severed by the death of either attorney or client, or by any cause which permanently incapacitates the attorney from performing his professional functions.

CHAPTER V.

Duties toward, and Dealings with the Client.

Degree of Good Faith etc. - Duties in preparing for trial - Reasonableness of Fee -

Dealings with Client - Purchases pendente lite - Duty in procuring Title - Rendering Accounts.

Principles, which guide the attorney in the fulfillment of his trust and which restrain him in his dealings with his client, are quite as important, and even more delicate than, any we have yet discussed; and they are next to be examined.

It is hardly necessary to reiterate the degree of fidelity existing in the relation, but it is the controlling element which determines the destinies of each transaction between attorney and client. The very highest degree of fairness and good faith are essential; and all dealings between the client and his legal adviser will be

searched with jealous scrutiny, and the courts will, when the slightest opportunity offers itself, relieve the client from the results of any undue influence. The attorney is bound to the "most scrupulous good faith." All communications made to him in the furtherance of the cause are stamped with the seal of inviolable secrecy, and under no circumstances should they be disclosed; a breach of this rule would be considered inconsistent with moral as well as professional decorum.

The first duty of the attorney is to notify his client of all adverse retainers or interests which might in any way prejudice his own discretion, or the rights of the client. The client has a right to expect this, for otherwise his interests would be subjected to the greatest peril.

The attorney ought, as soon as practicable, to make a careful investigation of all the facts in the case and inform himself of the evidence by a careful personal perusal; by communications with his client; by the examination of witnesses, documents and all the papers in the

case. He ought not always to be content with the client's version of the case, nor proceed upon mere hearsay, suggestion, or suspicion, but make a personal investigation of all possible proof, taking down in writing all the important testimony in the form of a brief of facts. In some cases a full preliminary investigation should be insisted upon, even though the client may desire to dispense with it, and especially when the contemplated cause is of a penal nature. Experience has taught, that all assertions of rights, all claims and demands, out of the ordinary course, require extra-ordinary care and investigation, on the part of those professionally engaged, before lending their aid to enforce them. "If attorneys would sift the evidence to the very bottom in support of claims they are asked to enforce or resist, before lending the sanction of legal proceedings, much trumpery litigation would be avoided, and many scandalous imputations and glaring attempts at fraud and extortion choked at the very outset, to the great benefit of the community and the honor and credit of the profession."

Before instituting the suit, consideration should be had: (1) As to the most appropriate and effectual remedy or redress, and (2) to the requisite notices and steps necessary to commence the action. One should know his case even more intimately than he does the law which governs it; he should know beforehand every point that is to be made and exactly what evidence can be produced in its support; he should have a definite theory of his case. He ought also to examine and cross-examine his witnesses and reduce the proof to as nearly a certainty as may be before the trial. "The machinery of trials," says Reed, "will run with far less friction if witnesses and counsel understand each other in advance." The history of all great cases, of profound and irresistible argument, and of brilliant victories at the bar, reveals but a reproduction of the counsel's familiarity with his case.

To these suggestions, which would be incomplete without, may be added an equally as important one; never advise a client that his cause is a meritorious one, worthy of litigating, primarily for the fee to be derived

from it. If there is any one hindrance to justice deserving more than another of censure, with the lower class of the profession, this is the most iniquitous. It prejudices the layman and he learns to distrust the justice of the law, the respect of the court, and the integrity of the profession. So also should the fee never be exorbitant or extortionate. In the words of one learned lawyer, "the morality of a lawyer may be measured by the reasonableness of his fees." He ought always to conduct himself so as not even to admit a suspicion that he falls within Lord Brougham's definition of an attorney as "a learned gentleman who gets the property of one man out of the hands of another, and keeps it himself." Besides professional devotion and integrity, he should treat his client with that courtesy and respect that might be expected from a member of the honorable profession.

The nature of the relation of attorney and client, as a general rule, forms a considerable objection to any collateral dealings between the two during its continuance. In the legal sense there is so great an inequal-

ity between the transacting parties, so much habitual exercise of power on the one side and habitual submission on the other, that the courts impute an exercise of undue influence, and hence all such dealings undergo a jealous scrutiny by the court; especially is that so in a court of equity. This is because of the opportunity, in some cases amounting to invitation almost, to avail himself of the clients necessities, gratuity, liberality or credulity, and of his influence over him, to his own personal advantage. Hence, in all cases of gifts, conveyances, or contracts, from the client to the attorney, there is a strong presumption against them and the onus is upon the attorney to show, to the satisfaction of the court, that the dealings were in entire good faith, open and unprejudiced. The rule is thus stated: "the attorney who bargains, in a matter of advantage to himself, with his client, is bound to show that the transaction is fair and equitable; that he fully and faithfully discharged his duties to his client without misrepresentation or concealment of any fact material to the client; that the

client was fully informed of his rights and interests in the subject matter of the transaction, and of the nature and effect of the contract, sale, or gift, and was so placed as to be able to deal with his attorney at arms length."

(Weeks on Attorneys sec. 268.) And it is said in *Tyrrell v. The Bank of London* (10 H.L.C. 26, 43) that "there is no relation known to society, of the duties of which it is more incumbent upon a court of justice to strictly require a faithful and honorable observance, than the relation between solicitor and client."

The rule is applied when the attorney takes a security from his client or when he bargains for a greater compensation than when first retained. So in cases of purchase, pendente lite, of property from the client, and the attorney must make a full disclosure of all facts that might in any way influence the decision of the court as to their respective rights and interests.

(*Youmans v. James*, 27 Kan. 195; *Rogers v. Marshall* 3 McCreary 76 and note; *Payne v. Avery* 21 Mich. 524, 543) An attorney cannot in any case, without the clients consent

buy and hold otherwise than in trust, any adverse title or interest touching the thing to which his employment relates; and if he does so buy he holds the title for his client as beneficiary, who may recover the property by tendering the amount of the purchase money with interest. (Baker v. Humphrey, 101 U.S. 494) and, it is almost needless to add that the attorney cannot acquire conflicting interests to his client by adverse possession while the relation continues.

Sometimes the attorney is called upon to purchase or mortgage property for his client, and in such cases he only undertakes to investigate and insure the legal requisites of the title - its validity in the eye of the law - and not its pecuniary value. He may though by special agreement be imposed with the duty of securing it in point of value. (Hayne v. Rhodes 2 Queen's Bench 342)

One thing that every good attorney will do, is to render proper and accurate accounts to his client; and, as he stands not only as agent but in a fiduciary relation, it is peculiarly imperative that such accounts should be

simple, fair, and accurate; for if there is a shadow of undue influence cast over the transaction, equity will open the account even though a long time has elapsed. We have already seen that the court has power to summarily compel the attorney to deliver over money to his client. As in the case of all trust relations the attorney should from the beginning keep separate accounts, and never under any circumstances mix his funds with those of his clients; and if he does commingle them, or fails to keep proper accounts, the legal presumption is against him, and for any loss occasioned for neglect e.g. improper entry in his bank books, he is personally liable. (Nattner v. Dolan 108 Ind. 500). The reports contain not a few painful examples of attorneys who have negligently commingled their own funds with those of their clients, and who have been put to great inconvenience thereby.

CHAPTER VI.

Liability of Attorney for Negligence.

Degree of care, skill, negligence etc. - What is a reasonable degree - Gross negligence and gross ignorance - Liability for - client's remedy - Compensation v. Negligence - Set off in New York - Abandoning cause of action.

The indispensable and natural liability of the attorney for the negligent performance of the duties we have heretofore examined, we are next to discuss. The rule is well settled that when an attorney undertakes to conduct a legal controversy that he professes himself to be reasonably well acquainted with the law and the rules of practice of the courts, and that he is bound to exercise in such proceedings a reasonable degree of care, prudence, skill and diligence. (Savings Bank v. Ward 100 U.S. 195, 198) In that case Mr. Justice Clifford said; "it must not be understood that an attorney is liable for every mistake that may occur in practice, or that he

may be held responsible to his client for every error of judgment in the conduct of his client's cause.

Instead of that, the rule is that if he acts with a proper degree of skill, and with reasonable care, and to the best of his knowledge, he will not be held responsible . x x

x x x x If he fails in any of these respects he may, not only forfeit all claim to compensation, but may also render himself liable to his client for any damage he may sustain from such neglect." There is no doubt that

the test is, whether the attorney has exercised a "reasonable degree" of care, skill, diligence, and his best knowledge; but the difficult question in the particular case is, what is a "reasonable degree" of those essentials ? And in determining this let it be re-

membered that he has not only absolute control of the management of the case, its procedure and remedy, but, especially in the United States where the dual system no longer exists, a sweeping field of discretionary power, in the exercise of such control. The best approximate

test that we have been able to find is stated by the learned judge in the case of the Savings Bank v. Ward, su-

pra, as follows: Unless the client is injured by the deficiencies of his attorney, he cannot maintain an action for damages; but if he is injured the true rule is that the attorney is liable for the want of such skill, care, and diligence as men of the legal profession commonly possess and exercise in such matters of professional employment." The degree of skill is to be measured with reference to the particular duty which he undertakes to perform (*Jackson v. Clopton*, 66 Ala. 29). It would be extremely difficult to determine the exact measure or degree by which the care, skill, and diligence which an attorney impliedly undertakes to exercise in the conduct of the cause, or to indicate precisely the line of demarcation separating reasonable skill and diligence from that *crassa negligentia*, or *lata culpa*, which exposes him to an action for damages. He does not profess to win the case at all events, nor to know all the law, but he does profess to exercise a fair, reasonable and competent degree of skill. He is held to know the rules of practice, the ordinary rules of pleading and evidence, the existence of statutes and rules of court, and their

construction in cases free from doubt, and of matters which are ordinarily known and exercised in his department of the profession, in similar cases. And for a non-observance of these he would be liable; while on the other hand he is not held to know points of nice and doubtful construction, those of new occurrence, nor those usually entrusted to specialists in his profession. In the application of these rules each case stands upon its own peculiar circumstances, remembering always that even judges and the most learned of the profession differ radically upon points of vast importance. The law is not an exact science, there is no attainable degree of skill or excellence at which differences of opinion or doubts in respect to questions of law are removed from the minds of lawyers or even judges. He is responsible only when the offense amounts to *lata culpa* or *crassa negligentia*. "He will be liable if his client's interests suffer on account of his failure to understand and apply those rules and principles of law that are well established and clearly defined in the elementary books, or which have been declared in adjudged cases that have

been reported and published at sufficient length of time to have become known to those who exercise reasonable diligence in keeping pace with the literature of the profession." (Citizens Loan Association v. Friendly, 123 Ind. 143) But a metropolitan standard is not to be applied to a rural bar, and it is to be remembered that a specialist must exercise that skill usually exercised in his department of the profession. (Wharton on Neg. sec. 750-751). And to some extent local custom may vary the rule. Whether he is negligent or not is a question for the jury with proper instruction by the court, except in California where it is held to be a question for the court to decide. The same principles apply as well to mistakes or blunders by the attorney. He may not be able to summon any more skill, but every attorney can devote the required time, attention, and care to the cause; and for a want of proper attention the courts deal less leniently with him. A lack of such attention is gross negligence. But he is protected by the presumption that he has diligently discharged his duty, and not only must gross negligence or ignorance be shown affirmatively but also their extent and damage to the client. (Staples

v.Staples 85 Va.76.)

-- Client's Remedy.--

It is not within the scope of this thesis to enter into a minute discussion of the appropriate remedies in such an action against the attorney, nor particular cases where they apply, but to give the general rules which will bring approximate results when applied with discretion in the light of surrounding circumstances.

A very nice and not altogether settled question arises in the following inquiry, how far is negligence on behalf of the attorney a defense to an action for his fees ? This question is made difficult of solution and of exact results, because the law is now being developed and is not entirely settled; besides the different states so widely differ in their views. But it is believed that they may be arranged in two classes, viz; first, those states which take a liberal view and allow any amount of competent evidence of gross negligence as admissible in defense, pro tanto; and, second, those states which allow only evidence of gross negligence which makes

entirely worthless the attorney's employment. But without discussing the doctrine generally, let us take up the law in our own state and endeavor to establish a rule; the best results may be attained by following the cases down to the present time. Beginning with the case of Runyan v. Nichols, (11 John. R. 547) in 1814, the question arose, whether in an action by an attorney against his client to recover his fees, the client could set up the plaintiff's negligence in conducting the suit, as a bar pro tanto. The court were of the opinion that he could, but held that it could not be pleaded in general issue, but must give previous notice. In 1817 on the same principle it was decided that in an action to recover for work and labor done, the defendant to reduce the amount of recovery, could show that work was done negligently by the plaintiff. (Grant v. Button 14 John. R. 377) In 1834 it was held that an attorney could not recover compensation in prosecuting a cause, when the judgment was set aside for irregularities on account of his negligence. (Hopping v. Queen 12 Wend. 517) In Gleason v. Clark (9 Cowen 57) the court commenting upon

the doctrine said: "If this species of defense goes to destroy the plaintiff's claim entirely, it is proper under the general issue; if merely to reduce the damages notice should be given. This seems to be the rule collected from Runyon v. Nichols, supra, and Sill v. Rood (15 John. R. 231). In Van Wallhoffen v. Newcombe (10 Hun 240) the court uses the following language: "The law requires that every counselor shall possess and use adequate skill and learning, and that he shall employ them in every case, according to the importance and intricacy of the case; and if a cause miscarries in consequence of culpable negligence or gross ignorance of an attorney, he can recover no compensation for any services which he has rendered, but which were useless to his client by reason of his neglect or ignorance." In 1883 two cases came before Court of Appeals both substantially involving the same facts, viz; the attorneys had been guilty of gross negligence and even abuse in their duty to the client by which he was injured far more than benefited. In an action by the attorneys for their fees the court held that the injury to the client was a

complete defense to such action. (Chatfield v. Simmons 92 N.Y. 209; Andrews v. Tyng 92 N.Y. 16) In Carter v. Talcott (36 Hun 396) the court said, "And the person or persons employing them are in that manner deprived of their legal rights, then they will not only forfeit all legal claims for compensation, but in addition to that be justly held responsible for any loss or injury sustained by means of such conduct." If analogy controls it seems that negligence is the proper subject of set off pro tanto; on this basis it has been decided in an action by a surgeon for professional services, that malpractice is a proper subject of set off and if not so set off in the trial court it will be deemed to be waived and cannot be pleaded in the courts above. (Gates v. Preston 41 N.Y. 113; Blair v. Bartlett, 75 N.Y. 150)

Reasoning from analogy it is difficult to see why such negligence on the part of the attorney may not be pleaded as a set off pro tanto. If it is allowed to defeat the whole cause of action by the attorney, what rule of law is there to stand between such a defense and a set off pro tanto? Indeed, it springs out of the contract

between attorney and client and the relation merging from such contract; it has its life and death in such relation and is intimately connected therewith. Such conduct tends to defeat the object of the professional employment and is properly an equity which may be set up in defense of the attorney's recovery. It is "a cause of action arising out of the contract or transaction" and we fail to see any reason why it may not be set up as a defense pro tanto to the attorney's recovery, as well as an absolute defense. And if an opinion, in anticipation of a decision on that point, is proper, it is that the Court of Appeals would not hesitate to hold such negligence a proper defense pro tanto; and that under our present system of pleading such defense might be pleaded in the general issue. That such rule is a salutary one, and well calculated to do final and complete justice between the parties, and most expeditiously and least expensively, cannot be doubted.

The next question in natural order is, can the attorney abandon his client's cause of action? In answer to this the courts say, no, the contract of re-

tainer is an entire contract to conduct the proceedings to final termination; It would work great harm to the client if the attorney could, at any time he chose for any frivolous cause, abandon the suit. He can only abandon the service for justifiable cause, and reasonable notice to his client; and if he, without just and ample cause, abandons the service, before the final determination of the cause, he forfeits all right to payment for any services already rendered by him. The contract being entire he must perform it entirely in order to earn his compensation. The remaining question is, what shall constitute "justifiable cause?" As one court has said, "it has not been laid down in any general rule, and cannot be." If the client refuses to advance money to pay the expenses of the litigation, or unreasonably refuses to advance money during the progress of a long litigation to his attorney to apply upon his compensation or for any conduct on the part of the client, which would tend to degrade or humiliate the attorney, such as attempting to sustain his case by subornation of witnesses or any other unjustifiable means, would furnish sufficient cause to abandon the case. It was held that where

the client, without his attorney's consent, employed an assistant counsel with whom the attorney's relation was such that they could not cordially co-operate, the attorney was justified in withdrawing from the case, and the client was still held liable for services rendered.

(Tenney v. Bergen 93 N.Y. 524) Although the attorney is thus bound to entire performance, and the contract as to him is treated as an entire one, it is a singular feature of the law that it should not be treated as entire on the other side; for it is held that a client may discharge his attorney arbitrarily, without any cause, at any time, and be liable to pay him only for the services which he has rendered up at the time of his discharge. (Eliot v. Lawton 7 Allen 274, 276.)

CHAPTER VII.

Compensation for Legal Services - Under
Civil and Common Law - Rule changed in
America - Reasonable Compensation - What is -
"Contingent Fees - Their evil Effect - Their
beneficial Effect - The Limit - Their legal
Effect in New York.

The practice of the law, through a series of evolutions, has now become to be considered as something substantial and as possessing a pecuniary worth to the recipient of such services. It is recognized, not only as an honorable calling, but one of the common vocations by which the practitioner earns a livelihood. Obligations assumed and duties performed by virtue of his retainer are accompanied and balanced by the co-relative obligation of the client to compensate the attorney what his services are reasonably worth or the amount agreed upon between them. From the origin of the relation back in the civil law of Rome the duties of advocate were purely gratuitous or honorary and on the

other hand his fee or reward was not legally obligatory but was a mere honorarium, a token of thankfulness. So in England the barrister or advocate could not sue for his fees on the theory that his services were purely gratuitous and honorary not based upon any contract for labor or services; and at the same time the barrister was secure from all actions for gross negligence etc. But this view was clearly defective and inappropriate to the free and practical ideas of American people, and when the question arose was promptly repudiated by all the courts except those of Pennsylvania and New Jersey. But later in those states and in England statutes have conformed the law to the prevailing American view; and now in all the states it is unquestioned that the attorney may recover his fees, whatever they are reasonably worth; and by virtue of the retainer there is an implied promise to pay for them on a quantum meruit. Assuming this right exists and is asserted the question arises, what is the measure of compensation, what is the quantum meruit, and how is it determined? What that sum should be is determinable by the importance of the contest, the labor and responsibility of counsel, and every circumstance

attending the cause which, according to established usage, serves to guide to a conclusion as to what is the proper professional charge in such a state of circumstances ." (Holly Springs v. Manning, 55 Miss. 380, 388)

In determining the amount of his compensation the following facts should be considered: (1) The greatness of the cause pecuniarily and otherwise, (2) The labor and care bestowed by the attorney, (3) His professional standing, learning, ability and skill, (4) Length of litigation, (5) The usage of the court, and (6) The customs of the locality. The usual charge of the ordinary attorney in a like cause is the standard; not what the attorney or client may think but what is the usual charge. Hence in all cases professional compensation is gauged not so much by the amount of labor, as by the amount in controversy, the ability of the attorney, and the result of the effort. It is one of the delicate judicial inquiries and requires every material fact to appear. Interest on the amount of compensation begins to run from the time the account is rendered; and the Statute of Limitations from the recovery of judgment in the cause in which he acted as attorney. (Mygott v.

Wilcox ,45 N.Y. 306)

Discussing the attorneys action on a contract for compensation, its extent, what contracts may be enforced etc. we enter a field not altogether settled and on which there is a great diversity of opinion, due partly to the innovation upon the rigid English rule and partly to the standard of public policy by which the relation of attorney and client is measured. Under the strict English rule of maintenance and champerty an attorney was not allowed to contract for any contingent compensation nor to advance any bonus whatsoever to aid in the conduct of the cause; and any contract to that effect was held illegal. But in this country those rigid rules found but little favor, and in some states have been entirely repudiated. Treating this subject of "contingent fees", it would be but time idly spent in trying to reconcile the conflicting views in all the states or to deduce any rule applicable generally, within the limited space which can be devoted to its discussion. Our endeavor will be, in the light of former discussions, to find the true place of the contingent fee

in the lawyers Code of Ethics, to what extent its use is evil and on the other hand to what extent commendable, giving particular attention to the law of our own state. An agreement by an attorney with his client ; (a) to conduct the proceedings of a cause and to receive in compensation a fee contingent upon, or in proportion to, his success; or (b) when the attorney furnishes the expenses of the litigation in consideration of having placed in his hands a claim to prosecute; or (c) to purchase the clients cause of action for the purpose of bringing suit thereon; or (d) to pay to the attorney, in case of success, payments or "refreshers" after and in addition to the first agreed compensation, have from the origin of such practices down to the present time, been considered by the ablest and most honorable jurists as dangerous to the administration of justice and as corrupting the morale of the profession. Foremost among those who have supported the practice has been Judge Countryman his little book entitled "Compensation for legal services." To show the importance of the question we quote, viz; "It is a question which will unavoid-

ably meet each one of you at the threshold, and will attend you at every step of your practice at the bar."

He argues that such contracts are commendable if made in honesty and good faith. He says : "It is a voluntary relation of employment or labor, and like all other relations of this character, is merely the result of voluntary contract between the parties involving the obligation of service on one side and of compensation on the other. x x x x There is no conceivable rule of ethics, by which the same terms of service can be regarded as just and right in the contracts of ministers, merchants, and mechanics, and wrong or immoral only between attorneys and clients:" and, he argues, that they may with perfect propriety "agree in advance on the terms of their advocacy or stipulate for contingent compensation out of the proceeds of the litigation" etc; and he asks; "Is there indeed one rule of morals for the guidance of the advocate in his relation to others, and a different rule for the rest of mankind ?" The Albany Law Journal answered "unhesitatingly there is". But with all deference, do they not leave the distinguishing

point untouched; is it not perfectly clear when we say that the morals are the same in all cases but it is the application of the same morals to widely differing circumstances and vocations, that justifies the distinction ? It would be preposterous to say that the employment of an advocate, and that of a mechanic or doctor are similar to any extent. It is only true in this far, that they are both the results of agreement and in both cases there is compensation. To place them in the same category would be to strip the attorney of his office in the court as minister of justice, his position as trustee and keeper of his clients inviolable secrets, and in short, to transfer him from the vantage ground of legal adviser, on which the client is dependent, to that of a mere laborer or servant; and to strip the retainer of that fiduciary nature and the confidence reposed. It is an indisputable fact that if there is any one relation where there is an inequality between the parties it is that of attorney and client; the continuous dependence of the client and the influence over him by the attorney, the confidence reposes in the attorney, his superior skill and knowledge of the law, and

his complete control of the proceedings in the cause, gives him a legal and moral advantage over his client which is looked upon by the courts with searching diligence. In this very fact of inequality between attorney and client, and his possible, and, in some cases, actual, influence over juries and judges, lies the secret of the conservative policy of the law which stamps such contracts as antagonistic to the client, to the court, to the administration of justice, to the integrity of the Bar, and consequently to the community. To say that the use of contingent fees does not lend a great opportunity coupled with an inducement to resort to chicanery and defeat the administration of justice, would be contrary to facts. It is this fact which fills the reports of our State and National Bar Association with pleas for professional purity; and it was this evil which led Samuel Hand to urge before our Bar Association in 1879 that contingent fees "were universally regarded in the profession as disreputable, unworthy, and demoralizing, and tending to degrade the profession and impair the administration of justice;" and

"are not changed in their character, because they may possibly have ceased to be illegal; that the character of these practices remains the same as ever; that they are still, as ever, demoralizing and deteriorating in their tendency; that they do, as ever, tend to barratry, to stirring up of suits, the encouragement of litigation and the tampering with evidence. That they are an easy and tempting source of large profits to able and adroit lawyers; that such cases, with proper management, are sure to succeed before juries, and it is rare that a case cannot, on some question, be got before the jury; that the communistic tendencies of the present time produce enormous verdicts - fortunes in themselves; that such temptations are calculated to drag away the profession from its moorings, and its regular steady business, to these barratrous speculations; that while there may be no harm in arranging a contingent fee with a poor man, who applies to an attorney, yet the tendency of permitting such arrangements is to set members of the profession advertising for such cases, soliciting at the expense of all manly and professional dignity, persons who are known

to have causes of action, and inducing them to constantly violate the statutes against the advancement of monies as an inducement to placing suits in their hands; that worthless persons, having nothing, risking nothing, are induced under this system to present and swear through simulated causes of action, relying on attorneys to furnish all necessary monies and divide the profits if successful. All these mischiefs and irregularities are injurious to the standing before the world and to the inward tone of the profession." Can it be conceived that there is any serious argument to detract from the truthfulness and force of this replete statement? We think not. The policy of the law has ever been to subordinate the interests of the attorney to those of the client, and to sanction the practice of contingent fees is to disregard this well settled principle, by giving the attorney a pecuniary interest antagonistic to the client and to the court.

Having noticed its evil effects, what is the exact limit to which such contracts may be sanctioned? Has it any place in the lawyers Code of Ethics, and, if so, where and to what extent? There are not a few cases

arising where there is a pronounced wrong, a meritorious cause of action, and an indigent client, who, without the aid of a contingent fee contract, would be utterly unable to pursue a just remedy and thereby be subjected to permanent injury. He would be entitled to legal remedy, but otherwise he would be unable to avail himself of it; he is an object of charity; in such cases the attorney is justified and even commendable, in accepting a retainer, at the client's request, upon a contingent compensation. But there has sprung up, through the fertile growth of the contingent fee, a class of lawyers, or rather pettifoggers, "negligence" or "accident" lawyers, whose business is chiefly confined to accident cases on contingent fees, and who, whenever there is a railroad wreck, or the like, appear upon the scene first of all, even before doctor or undertaker, and solicit the cause of some poor unfortunate who, in the excitement and suffering, is in a fit state of mind to make almost any kind of a contract. This class of lawyers actually exist, and they are sure sooner or later to receive, from their professional brothers their just denomination as despised,

disreputable pettifoggers unworthy of the name lawyer and of the professional distinction the courts have conferred upon them. It is this kind of pettifoggery in its innumerable costs, silently working its way, that plays havoc in the sphere of professional honor. And if these remarks are true as to contingent fees, a fortiori, it is true of purchases of the client's cause of action in whole or in part, by the attorney.

We will not then repudiate, as wholly inadmissible the taking of contingent fees, on the contrary, they are sometimes perfectly proper, and are called for by public policy, no less than by humanity. With this explanation let it be resolved with David Hofforn, "never so to purchase my client's cause, in whole or in part, - but still reserve to myself, on proper occasions, and with proper guards, the professional privilege, (denied by no law among us) of agreeing to receive a contingent compensation, freely offered, for services wholly to be rendered, and where it is the only way by which the matter can either be prosecuted, or defended;" under all other circumstances regarding contingent fees as abnoxious.

Turning now from the ethical side of contingent fees, to the legal side, let us endeavor to ascertain their exact status in the law of our own state as regulated by statutes and adjudicated cases. In *Merritt v. Lambert* (10 Paige 352) Chancellor Walworth pronounced against a contract where the attorney was to share in the subject matter of the litigation, saying; "the alleged agreement was void as being contrary to public policy, as it placed the interests of the solicitor directly in conflict with his paramount duty to his client." But in a later case (1824) it was decided that the doctrine of maintenance and champerty were obsolete except so far as embraced in our statutes, and that a contract by which the attorney was to have a part of the thing recovered in consideration of prosecuting the suit and bearing the expenses of the litigation, was valid and enforceable (*Thallimer v. Brinckerhoff*, 3 Cow. 623, 643; *Sedgwick v. Stanton* 14 N.Y. 296). This was a marked innovation upon the former rule, but has continued to be the law. This matter is now regulated by the Civil Code (sec. 73-74) Section 73 forbids the purchase of obligations by any attorney for the purpose

and with the intent of bringing suit thereon. But this section does not apply to purchases for the purpose of bringing a suit thereon in a court not of record.

(Goodell v. The People, 5 Parks Cr. R. 206) Neither does it apply to purchases in good faith for the purpose of protecting some legal or equitable right, nor to a case where some other purpose, even though slight, contributed to inducing the purchase, and the intent to sue was merely incidental or contingent. (Moses v. McDivitt 88 N.Y. 62); nor does it apply where suit was already pending. (Whetmore v. Hegeman 88 N.Y. 69) Section 74 forbids the giving of any valuable consideration or the promise of any valuable consideration "as an inducement to the placing or in consideration of having placed" in the hands of such attorney a demand of any kind for the purpose of bringing suit thereon. But these sections are substantially a re-enactment of the earlier statutes. (Browning v. Morrin 100 N.Y. 148)

NOTE. Merely a passing remark will be given the States generally, classifying them briefly and conveniently under their proper heads as follows; (1) Those states

Statutes like the above in New York give the utmost freedom to contract for contingent fees and still deny the right to give a valuable consideration for the purpose of inducing a litigation. It undoubtedly contemplates a case in which the action might never have been brought but for the inducement of such valuable consideration held out by the attorney. The leading case of *Fowler v. Callan* (102 N.Y.395) goes a long way in settling the interpretation of the statute. The facts of that case were as follows; Proceedings having been commenced against a devisee under a will, he gave the plaintiff, an attorney, a deed for one undivided half part of

in which the common law of maintenance and champerty have been abrogated: Texas, California, New York, and Michigan. (2) Those states where such doctrine is distinctly or by express implication recognized: Maine, Kansas, Alabama, Ohio, Oregon, West Virginia, Maryland, Virginia, South Carolina and New Hampshire. (3) In the following states to be champertous the attorney must stipulate to pay the costs of the action: Delaware-Georgia, Illinois, Iowa, Missouri, Wisconsin, Minnesota, Mississippi, Tennessee

the property taking back his covenant to conduct the defense to a close, paying all the costs and expenses of the litigation, and indemnifying the devisee against the same. The court decided that this was no violation of the statute. Finch J. delivering the opinion, said : "The agreement appears to have been purely one of compensation. x x x x The contract in no way induced the litigation. That was already begun and existed independently of the agreement, and originated in other causes. It did not tend to prolong the litigation. It made it to the interests of the attorney to close it as promptly as possible, and at as little cost and expense as prudence would permit. The plaintiff therefore stirred up no strife, produced no litigation. X x x x The statute presupposes the existence of some right of action, valueless unless prosecuted to the judgment, which

and Rhode Island. (4) In the following states the English rule is strictly adhered to; Indiana, Kentucky, Massachusetts and North Carolina. (5) In New York and Louisiana it is entirely governed by statute.

the owner might or might not prosecute on his own behalf, but which he is induced to place in the hands of a particular attorney by reason of his agreement to loan or advance money to the client. It contemplates a case in which the action might never have been brought but for the inducement of a loan or advance transferred by the attorney, and in which the latter by officious interference procures a suit to be brought and obtains a retainer in it." This opinion of the learned judge is the best exposition of the law in this state on the subject of contingent fees to be found anywhere. But, however, if in that case the legatee had not been threatened with litigation it would have presented a different question and one now open in this state. It is to be remembered that in the above case the litigation was already commenced and the court lay particular stress on the fact that in it "there was no vicious element of inducing litigation or holding out bribes for a retainer." In the case supposed, where no litigation had been commenced, we see no reason why it would not be within the mischief covered by the statute. There would be a bare

possibility that such an inducement on the part of the attorney would not induce the litigation, but a strong probability that it would. It is this strong probability which the statute seeks to guard against; it is a preventative remedy. Such an inducement would, in all probability, tend to stimulate the client to litigation and accelerate the strife, if indeed it did not actually induce the litigation; and it can make no difference whether the inducement was held out in the attorneys' office or several blocks from his office. And it seems that such transaction would be grievous enough to fall within the Code provision; and in this conclusion we are supported by the case of *Oshee v. Lazzarone* (15 Supp. 933) although not a strong case and no reasons are offered for its support.

In conclusion the writer may refer again to the incentive which has led him to investigate this particular subject, namely; that he considers the first duty of an attorney, before starting on his professional journey, is to study well those legal principles governing his rights, duties and liabilities; and if his efforts, more

or less laborious, have succeeded in presenting in an acceptable manner the salient features which characterize the relation of attorney and client, cleared the mist from any point heretofore obscure, brought together and systematized doctrines heretofore uncertain, mingled with the discussion ethics enough to bring out the reasons for the legal principles, and thus paved the way, in any degree, for an easier and more pleasant travel through the labyrinth of professional relations, his efforts have been amply rewarded.

