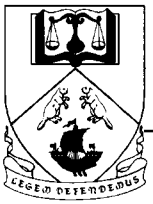

Articles

Lawyers as Agents

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This article addresses the nature and effect of the agency relationship that exists between a lawyer and his client. There are two aspects of this, the internal relationship and its external effects. Under the first heading are considered the duties of the lawyer towards his client, including his fiduciary duties, which have recently been broadened, and the obligation of the client to pay his lawyer. The external aspect of a lawyer's role as agent for his client raises the issue of the agent's authority which may be express, implied or apparent. The scope of that authority is vital. It is analysed in respect of two different situations. The first is where no litigation is involved, but the lawyer is required to deal with money on behalf of the client, contracts within the Statute of Frauds, *or notices. The second relates to the conduct of litigation. A number of important issues arise in this respect, of which the most important is the authority of a lawyer to compromise or settle an action. This is considered in some depth with special reference to English and Canadian cases, in order to elucidate the extent to which and grounds upon which a lawyer may validly affect his client's position.* G.H.L.F.

L'article suivant étudie la nature et les conséquences des relations d'agence qui existent entre un avocat et son client. On envisage deux aspects principaux: les relations internes et les conséquences externes. Le premier thème traite des obligations de l'avocat envers son client y compris les obligations fiduciaires, qui ont été elargies récemment, et de la responsabilité du client de régler les honoraires de son avocat. L'aspect externe du rôle de l'avocat, comme agent de son client, soulève la question de l'autorité de l'agent qui peut être expresse, implicite ou apparente. L'étendue de cette autorité est d'importance capitale. On l'analyse en tenant compte de deux situations différentes: La première n'implique aucun litige, plutôt l'avocat doit s'occuper des affires de son client, des contrats dans le

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cadre du Statute of Frauds, *ou des préavis. La deuxième situation sa rapport à la conduite du litige. De nombreuses questions se présentent, la plus importante étant l'autorite de l'avocat de régler une cause par compromis, ou de la résoudre. On a réfléchit longuement à ces questions en tenant compte des arrêts Anglais et Canadiens, afin de pouvoir élucider dans quelle mesure et sous quel motif un avocat peut affecter la position de son client.*

Lawyers, like taxi-cabs, are for hire. Unless they are full-time employees acting as in-house counsel, they are independent contractors, not servants: they contract to provide services, not service. Furthermore, unlike certain other independent contractors, lawyers may also be agents. Even a lawyer acting gratuitously, where services are provided free of charge in a legal clinic or similar operation, can be an agent. Payment of an agent is not a necessary prerequisite for the creation and existence of the relationship of principal and agent.[1] In such circumstances there is an agency relationship without a contract between lawyer and client. It is still the theory in England that there is no contractual relationship between the lay client and the barrister who represents him.[2] But a contractual relationship arises between a client and a solicitor whom he employs for advice or for representation in litigation. The distinction between solicitor and counsel has disappeared in many common law jurisdictions including Canada; it persists in England, although certain previously accepted consequences of that distinction have ceased to follow since the decisions of the House of Lords in *Rondel* v. *Worsley* and *Saif Ali* v. *Sidney Mitchell & Co.*[3] A negligent barrister can sometimes be held liable in negligence to his lay client in much the same way as a negligent solicitor.[4] But the distinction does not seem to have been of great importance in relation to the effect of acts by a solicitor or counsel performed on behalf of the client. The lack of any contractual relationship between counsel and client was not a barrier to the possibility that what counsel did on behalf of the lay client might bind and affect the legal position of the latter. Where this was the issue, the test was not whether a contract existed between the two but whether the act in question was within the scope of the authority of solicitors and counsel in general, or the particular solicitor or counsel involved. Only when the issue was the possible liability of a solicitor or counsel to the client did the question of contract become relevant.

[1]F.M.B. Reynolds, ed., *Bowstead on Agency*, 15th ed. (London: Sweet and Maxwell, 1985) at 210; G.H.L. Fridman, *Law of Agency*, 5th ed., (London: Butterworths, 1983) at 164.

[2]*Swinfen* v. *Lord Chelmsford* (1860), 5 H.&N.890 (Ex.).

[3](1967), [1969] 1 A.C. 191 (H.L.); (1978), [1980] A.C. 198 (H.L.).

[4]The distinction is between trial and pre-trial work; J.G. Fleming, *Law of Torts*, 6th ed. (London: Sweet and Maxwell, 1983) at 132-33. No such distinction seems to apply in Canada: *Demarco* v. *Ungaro* (1979), 21 O.R. (2d) 673 (H.C.). See also A. Linden, *Canadian Tort Law*, 3rd ed. (Toronto: Butterworths, 1982) at 135-37.

That was the situation under the older law. A sharp line was drawn between liability in contract for certain kinds of negligent acts and liability in tort for negligence. The absence of a contract between the parties necessitated an investigation of the legal policy involved in a decision whether or not to impose a duty of care independently of contract. The same developments may have occurred with respect to the liability of solicitors and counsel to non-clients. No contractual duties can arise between a solicitor or barrister and someone for whom he or she does not act. Under the older law this would have precluded any possible liability to such a person on the part of a solicitor or barrister in the absence of fraud or some other deliberate, wrongful act that might be tortious. In view of the evolving law of negligence, it may now be possible for liability to be imposed on a solicitor or barrister for conduct which causes harm to someone other than his client. This is the case in England and Canada where a solicitor's negligence resulted in the loss of an inheritance by a potential beneficiary.[5] Such liability does not stem from the law of agency. It depends upon the principles of the law of torts. An agent may become liable to a third party as a consequence of what the agent does for and on behalf of the principal. Liability of this kind is not imposed on the agent by virtue of his agency or under the doctrines of the law of agency; it is created by the application of settled principles of tort to the particular instance of an agent of the kind or class involved.[6] Whether such liability can or should be imposed is a question that must be answered by reference to the underlying policies and aims of the law of torts, not by a consideration of the purposes of agency and the legal consequences that flow from the employment of an agent.

There is one important qualification to this. The law of agency does govern the situation where the agent lacks authority to act as an agent in respect of the matter that is in issue and, while acting without authority, has innocently misled a third party. Under the doctrine of "implied warranty of authority" the agent may be liable *qua* agent to the third party, without proof of negligence or fraud.[7] This form of liability has been recognized and accepted by the courts for more than a hundred years, although its true juridical nature has yet to be clarified. All that is certain is that liability emerges from the fact that a party purports to act as an agent when he is not or, though an agent, lacks authority to do what he has done. That this may affect lawyers is made clear in an English decision of long standing.[8] If this form of liability seems beyond challenge both in general and in relation to the particular situation of lawyers, in order to elucidate its precise legal character, it is necessary to consider the effects of the employment of a lawyer on the relationships bet-

[5] *Whittingham* v. *Crease* (1978), 88 D.L.R. (3d) 353 (B.C.S.C.); *Tracy* v. *Atkins* (1979), 11 C.C.L.T. 57 (B.C.C.A.); *Ross* v. *Caunters* (1979), [1980] Ch. 297. The situation is the same in Australia: *Watts* v. *Public Trustee* (1979), [1980] W.A.R. 97 (S.C.).

[6] Cf. with respect to real estate brokers and other agents, *Chand* v. *Sabo Bros. Realty Ltd.* (1979), 96 D.L.R. (3d) 445 (Alta. S.C.A.D.); *Komarniski* v. *Marien* (1979), 100 D.L.R. (3d) 81 (Sask. Q.B.); *Olsen* v. *Poirier* (1978), 91 D.L.R. (3d) 123 (Ont. H.C.); *Roberts* v. *Montex Development Corp.* (1979), 100 D.L.R. (3d) 660 (B.C.S.C.); *Dodds* v. *Millman* (1964), 47 W.W.R. 690 (B.C.S.C.); *Bango* v. *Holt* (1971), [1971] 5 W.W.R. 522 (B.C.S.C.); *Northwestern Mutual Ins. Co.* v. *J.T. O'Bryan & Co.* (1974), [1974] 5 W.W.R. 322 (B.C.C.A.).

[7] *Collen* v. *Wright* (1857), 7 E.&B. 301 (Ex.), aff'd (1857), 8 E.&B. 647 (Ex.Ch.): *Bowstead, supra* note 1 at 457-63; *Law of Agency, supra* note 1 at 212-17.

[8] *Yonge* v. *Toynbee* (1909), [1910] 1 K.B. 215 (C.A.); discussed below.

ween the client and his lawyer, the client and those with whom his lawyer has dealt, and the lawyer and those with whom the lawyer has dealt purportedly on behalf of the client.

Before undertaking consideration of the agency relationship between a lawyer and his client, it should be pointed out that a lawyer may occupy another role vis-à-vis his client. He may be a trustee in certain situations, either expressly or by implication. Indeed, in a recent case which will be discussed it was the fiduciary aspect of a lawyer's relationship with his client that brought about the lawyer's liability to the client. In this essay, however, I am concerned with the role of lawyer as agent.

II

Agency law defines the consequences of an agency relationship between principal and agent as well as between principal and the third party or parties with whom the agent deals in the course of the performance of his duties as agent. To some extent principal and agent can determine those consequences. Where the principal confers a specific, express authority upon the agent, the powers of the agent with respect to the outside world are circumscribed by the instructions which he has received and the law pays particular attention to such instructions. Subject to the usual limitation of legality, principal and agent can exercise complete freedom of action with regard to the conferment of part or all of the principal's legal powers upon another. Thus a client can retain a lawyer for a particular occasion or purpose or can grant a general retainer. He can give precise instructions as to how the lawyer is to proceed. But this cannot affect a barrister's performance of his duties as counsel, since the way in which counsel behaves in court is controlled by his own discretion with respect to the conduct of a case and by the duty which counsel owes to the court. The latter is a "public" duty which has precedence over the contractual or other duties owed by counsel to his client.[9] Neither the discretion of counsel, nor the proper performance of the duty which he owes the court as its officer will always excuse counsel from liability to his client for the improper performance of his task as counsel. Counsel may not be liable for failing to call a witness or for refraining from asking a witness a particular question. Such failure or refusal may stem from counsel's perception of his duty towards the court, for example, if asking the question might involve some improper allegation that is outside the boundaries of professional conduct. Counsel will be liable, however, if he fails to attend a trial on behalf of his client thereby depriving his client of the representation for which the client has engaged him. Failure to appear at a trial without a reasonable explanation or excuse is professional negligence for which a lawyer in Canada (though perhaps not a barrister in England) can be held liable to the client.[10] The differentiation between instructing a lawyer as to the task he or she is to perform and purporting to control the method whereby that task is to be accomplished is clearly based upon the dual character of a lawyer. He represents his client in legal proceedings and in the conduct of certain non-litigious matters. At the same time he is expected to maintain certain

[9]This is the basis of the discussion in *Rondel* v. *Worsley, supra* note 3.

[10]*Demarco* v. *Ungaro, supra* note 4; *Saif Ali* v. *Mitchell & Co., supra* note 3.

standards of behaviour and to uphold respect for the law and the dignity of the legal process. In this respect a lawyer acting as a solicitor or as counsel serves another master. His function is to ensure that legal activities are carried on in accordance with the interests of the public at large, and not only in the interests of his particular client. A lawyer may be an agent, but one who fulfills a public as well as a private function.

This peculiar characteristic of lawyers is exemplified by another aspect of the agency relationship — compensation. In other agency situations it is legitimate for principal and agent to agree on any method of remuneration. An agent may be compensated for his work by an agreed, fixed sum or by a calculable percentage of the profit obtained by the principal from the activities of the agent. It may be agreed that the agent may or may not be rewarded depending upon the success or failure of his enterprise.[11] Generally, lawyers are not to be rewarded in this manner. Contingent fees are forbidden in some jurisdictions in Canada, as well as in England.[12] The common law frowns upon such arrangements, because they suffer from the taint of champerty, the sharing of the proceeds of private actions. Champerty and maintenance were crimes and torts at common law. They were prohibited primarily on the ground that to permit such arrangements might encourage unjustified litigation; and possibly because they might seduce parties and lawyers to fabricate evidence in order to succeed thereby interfering with counsel's proper performance of his duty to the court.[13] The will to win is not per se objectionable. The will to win at all costs in order to earn a fee is much less acceptable. Hence in *Wild* v. *Simpson*, a majority of the English Court of Appeal would not recognize an agreement between a client and his solicitor under which the solicitor was to receive a percentage of the amount recovered by the client on a counterclaim if, and only if, the client recovered more than was sufficient to pay the client's creditors in full and all his legal expenses.[14] If the client lost on the counterclaim, the solicitor was not to look to the client for his costs except disbursements. The solicitor was originally retained to defend an action brought against the client by the third party. The counterclaim was later determined upon by the client. When the client lost on the counterclaim, the solicitor sued to recover his costs basing his claim on the original agreement, not the one relating to the counterclaim. It was held that the original agreement had been varied by the subsequent one made when the counterclaim was undertaken. This second agreement was champertous and therefore illegal. Hence no claim could be brought for breach of its terms. But it was recognizable to the extent that it rendered the earlier lawful agreement as to

[11] *Bowstead, supra* note 1 at 210-12; *Law of Agency, supra* note 1 at 164-66.

[12] *Wallerstein* v. *Moir (No. 2)* (1974), [1975] Q.B. 373 (C.A.); *Trendtex* v. *Credit Suisse* (1981), [1981] 3 W.L.R. 766 (H.L.). For Australia see *Clyne* v. *N.S.W. Bar Association* (1960), 104 C.L.R. 186 (Aust. H.C.). Contingent fees are allowed in Alberta under certain rigorous conditions: "Alberta Rules of Court", Alta. Reg. 338/83 rules 615-19. They are also allowed in British Columbia, Saskatchewan, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland, the Yukon and the North West Territories, although the conditions under which they are permitted and the requisite formalities that have to be followed differ as between the different jurisdictions: "A Slice of the Settlement" *The National* (9 October 1986) 12.

[13] *Law of Torts, supra* note 4 at 590-91 gives another reason for the early objection to maintenance and champerty. The torts have been abolished in England: *Criminal Law Act*, 1967, c.58, s. 14(1).

[14] (1919), 88 L.J.K.B. 1085 (C.A.).

payment of the solicitor inapplicable. No claim could be based on that agreement according to Atkin L.J., because it had not been completely performed.[15] The solicitor had prevented himself from such completion by his own act in making an illegal agreement. Therefore, he could not sue on a quantum meruit nor on the original agreement. It might have been thought that since the champertous second agreement was void for illegality, it should not have affected the first; a perfectly valid and lawful agreement to pay the solicitor his fees. The common law dislikes champertous contracts to such an extent that the court was prepared to give enough effect in law to the invalid second agreement to deprive the solicitor of any redress or compensation.

This particular restriction may be unique to lawyers, but they also share an important characteristic of all agents. They are expected to observe higher standards towards their principals than non-agents who may be employed in various activities. Lawyers as agents are treated as fiduciaries, as are express or constructive trustees, public officials and many others.[16] This involves lawyers in special obligations with respect to their clients' money or financial affairs. It is a well known fact that lawyers are under special duties with regard to trust accounts which they maintain for their clients. However, in a recent decision an Ontario court has indicated that the fiduciary nature of a lawyer's relationship with his client may have more far-reaching effects. The case is *Szarfer* v. *Chodos*.[17] A solicitor acted for the plaintiff in a wrongful dismissal action. While so doing he learned that the plaintiff was having marital difficulties. The plaintiff's wife worked in the defendant's office on a temporary basis as a legal secretary. Adultery took place on several occasions between the defendant and the plaintiff's wife. It caused the plaintiff distress when he discovered this. The plaintiff sued the defendant for breach of fiduciary duty in conducting an adulterous affair with the plaintiff's wife, and claimed general, special and punitive damages. The old common law action for criminal conversation was abolished in Ontario in 1978 under a provision "designed to supplement the abolition of the concept of marital unity by eliminating any cause of action which treated the wife as the husband's chattel".[18] It was also designed to abolish actions based on adultery. The issue in this case, however, was not whether injury had been caused to the plaintiff by the adultery. It was whether there was a claim for injury caused to the plaintiff by the defendant's use of confidential information for his own purposes: the action was founded on the allegation that the plaintiff's mental and emotional status was adversely affected by the defendant's misuse of confidential marital information. Callaghan A.C.J.H.C. held that a viable cause of action existed, based on (a) the fiduciary character of the relationship between solicitor and client, and (b) the solicitor's use of this confidential information gleaned in the course of that

[15] *Ibid.* at 1095.

[16] *Bowstead, supra* note 1 at 156-204; *Law of Agency, supra* note 1 at 152-63.

[17] (1986), 27 D.L.R. (4th) 388 (Ont. H.C.): cf., on a slightly different point, *H.L. Misener & Sons* v. *Misener* (1977), 77 D.L.R. (3d) 428 (N.S.S.C. A.D.).

[18] *Family Law Reform Act*, S.O. 1978, c.2, s.69: see now *Family Law Act 1986*, S.O. 1986, c.4, s.71; (1986), 27 D.L.R. (4th) 388 at 403 (Ont. H.C.).

relationship for personal advantage.[19] Apart from the consequence that the statute law dealing with criminal conversation and actions for damages for adultery was neatly finessed by a subtle use of legal principles formerly employed for a specific purpose, it must also be said that the obligations of a fiduciary have been extended in a manner not previously contemplated by generations of equity lawyers who gradually evolved a very strict approach to the relationship that exists between a fiduciary and a beneficiary. A fiduciary must not only keep his hands off his beneficiary's money; he must also keep his hands away from his beneficiary's spouse.

Given the learned judge's zeal to compensate a plaintiff who was undoubtedly injuriously affected by counsel's unethical behaviour, he was perhaps inclined to take the language of cases dealing with misuse of confidential information and Professor Waters' discussion of the equitable principles governing the obligations of fiduciaries somewhat too literally.[20] Insofar as the situation involves the duties of lawyers, it seems to add new dangers to the practice of law. As it applies to fiduciaries and therefore agents generally it invoves a retrograde approach to the law now contained in such statutes as the *Family Law Act* of Ontario.[21] Elsewhere I have discussed what I term the abuse of agency.[22] In this decision, I suggest, a new abuse of one aspect of agency can be seen in operation. It is one thing to require good faith of an agent and a proper concern for the welfare and interests of his principal. It is quite another to say that this obligation extends to the personal relationship between a principal and his or her spouse.

III

Consideration of the fiduciary duties of an agent indicates that the law is not only concerned with what a principal has expressly authorized or instructed his agent to do, but also with the obligations that arise *ex lege* once the relationship of principal and agent has been created. In fact many aspects of that relationship involve what is implicit rather than what is explicit. More often than not much is left unsaid between principal and agent and it is necessary for the law to fill in the gaps and provide the details of both the powers and the liabilities of agents. This is certainly true with respect to lawyers. A client may do no more than engage a lawyer to undertake certain legal business, such as the negotiation of a contract or to act on his or her behalf in legal proceedings. Bare authorizations make it imperative to discover what is entailed in the employment of a lawyer in this regard. This is vital not only from the point of view of determining whether the lawyer has carried out his instructions correctly, but also for the purpose of knowing whether what the lawyer has done

[19] *Ibid.*

[20] E.g., *Seager* v. *Copydex Ltd.* (1967), [1967] 2 All E.R. 415 (C.A.); *Peter Pan Mfg. Corp.* v. *Corsets Silhouettes Ltd.* (1962), [1964] 1 W.L.R. 96. (Ch.); R. Goff & G. Jones, *Law of Restitution*, 2nd ed., (London: Sweet and Maxwell, 1978) at 512-13: cf; *Phipps* v. *Boardman* (1966), [1967] 2 A.C. 46 (H.L.); D.W.M. Waters, *Law of Trusts in Canada*, 2nd ed., (Toronto: Carswell, 1984) at 710, 731.

[21] S.O. 1986, c.4.

[22] G.H.L. Fridman, "The Abuse and Inconsistent Use of Agency" (1982) 20 U.W.O.L.R. 23.

can affect the legal relations between the lawyer's client and the other party to a contract or litigation.

Much of the difficulty involved in determining the scope of a lawyer's authority in these various activities stems from the ambivalence of the lawyer's situation. Counsel represent their clients and are simultaneously officers of the court; private and public duties co-exist. Solicitors, referred to in earlier times and in some modern jurisdictions as attorneys, as if to emphasize their role as agents, are both men of the law and men of affairs (to employ in an English translation a well-known French phrase describing lawyers). They participate in the conduct of legal proceedings whether at the pre-trial stage or, as in Canada and many other common law jurisdictions, in court.They also act on behalf of clients where litigation is not contemplated or invoved. Consequently it is no simple matter to apply to lawyers the notion of "usual" authority, a component of an agent's implied authority and his ostensible or apparent authority.[23] Both implied and apparent authority can extend and enlarge an agent's actual, express authority. Both, to a certain degree, involve consideration of what an agent of the class or type in question would usually do when engaged upon the kind of function that is involved. How is one to determine what is "usual" for this purpose? Therein lies the difficulty. It is basically a question of fact calling for evidence of what is understood or accepted in the particular trade, profession, business or undertaking that is in issue. However, as with certain types of implied terms, judicial decisions may have produced a network of "usual" acts in relation to certain forms of activity such as stockbroking, the sale of real estate, factoring and, what is more relevant to the present discussion, fulfilling the functions of a lawyer.[24] Where such "usual" acts are involved, it would be more correct to say that one is dealing with implied rather than ostensible or apparent authority. The former is virtually a conclusion of law which is rebuttable only on proof of the negation of such authority by some express prohibition or limitation (the effect of which falls to be considered later). Conversely, apparent or ostensible authority is a conclusion of fact that is dependant on the particular circumstances and is not a matter of law which binds a court.

The courts have not always clearly differentiated between these two distinctive types of authority. Reference is made to "implied" authority when what is involved is really ostensible or apparent authority and vice versa. The notion of implied authority stems from what the courts have decided is necessary or usual, or sometimes customary to include within the scope of an agent's express authority.[25] On the other hand, ostensible or apparent authority is based upon representations, by words or conduct, made by the principal which induce in a third party the reasonable belief that the agent has authority to perform the act that is in question.[26] Although an attempt was made to state the difference plainly and positively by Diplock L.J. in *Freeman & Lockyer* v.

[23] *Bowstead, supra* note 1 at 95, 290-91; *Law of Agency, supra* note 1 at 59, 106-07.

[24] *Shell (U.K.) Ltd.* v. *Lostock Garages Ltd.* (1976), [1977] 1 All E.R. 481 at 487-88 (C.A.), Lord Denning.

[25] *Law of Agency, supra* note 1 at 58-68.

[26] *Bowstead, supra* note 1 at 284-92.

Buckhurst Park Properties (Mangal) Ltd., cited frequently in Canadian courts, there lingers in the language of some judges a sense of confusion as between implied and ostensible authority, which is compounded, if not caused, by the frequent use of the expression "usual" authority to denote circumstances in which authority may be implied or may be "apparent".[27] Yet it is vital to distinguish the two. Each has a different purpose and effect.

Implied authority is designed to extend an undoubted agent's express authority by taking into account whatever an agent of the kind involved would naturally and normally do, or have power to do, for the proper performance of his duties. Acts done within the scope of an agent's implied authority bind the principal and render the agent free from liability for alleged breach of duty. Ostensible or apparent authority may exist in someone who is not an agent at all, or may have the effect of enlarging the authority of someone who is an agent. It serves to protect a third party who has dealt in good faith with the agent, in the belief that the agent was acting with propriety. Acts done in the exercise of ostensible or apparent authority bind the principal, however an agent or non-agent who acts in such a way may be liable to the principal (or the one who is treated as a principal vis-à-vis the third party) on various grounds — fraud, negligence, or breach of duty. It follows there may be a marked and vital distinction between the implied authority of a lawyer with respect to certain matters and his ostensible or apparent authority. An examination of the cases indicates that as a matter of law, certain acts are within the scope of a lawyer's authority by implication, whereas other acts may come within the scope of his authority only if the lawyer in question, in contrast with lawyers as a class, has been held out by the client as having the power to act in such a way. In many areas this distinction is very clear. In relation to compromises or settlements however, no such clarity exists.

IV

The nature and scope of a lawyer's authority may be examined from the two points of view previously mentioned — activities unrelated to litigation, and activities that occur in the course of legal proceedings. Since most of the cases are English, they involve acts by counsel or by solicitors. For Canadian purposes this distinction is not significant. With respect to non-litigious matters it would seem that a lawyer as such has no implied authority to receive payment of a debt owed his client; payment to the lawyer is not, therefore, payment to the client barring subsequent proceedings for the debt, even where the lawyer was employed to sue the defendant who subsequently paid the debt.[28] Admittedly this was the decision in a case in which the lawyer employed another to locate the defendant to obtain payment with the instructions that if the defendant did not pay, the party delegated the task of receiving payment was to return the matter to the plaintiff's attorney. But it would appear from other cases that if a country solicitor employs a local lawyer to perform on his and

[27](1963-64), [1964] 1 All E.R. 630 at 644 (C.A.).

[28] *Yates* v. *Freckleton* (1781), 2 Doug. 623 (K.B.); but see *Powel* v. *Little* (1747), 1 Bl.8 (K.B.); cf. *Bank of Montreal* v. *Casa* (1975), 10 O.R. (2d) 274 (H.C.).

the client's behalf, the act of such local lawyer will be the act of the original lawyer.[29] Therefore, it may be argued that payment to the lawyer's local agent was not payment to the client, implying that even if payment had been made directly to the client's lawyer that would not have sufficed to discharge the debt. Only if the client received the money — which would presumably amount to ratification of the lawyer's action as long as the client knew what the money was and where it came from — would the payment be valid and discharge the debtor.[30] This applies not only to money owed to the client, or to money which was paid by way of compromise (of which more will be said later), but also to purchase-money belonging to the client, money due to him under a mortgage, or money received by the lawyer for the purposes of investment generally as opposed to money received for the purpose of being invested on a particular security.[31] Hence in *Bourdillion* v. *Roche*, one partner in a firm of solicitors could not be held liable for the misappropriation by the other partner of money received by the latter, unless the party sought to be held liable was a party to the transaction.[32] It was not within the authority of the partners to receive such money; therefore the act of the partner who did receive such money was not an act pertaining to the agency relationship between the partners. A contrast was drawn by the court between the position and functions of a solicitor or attorney and those of a "scrivener".[33] It would appear from what was said that scriveners, a class of persons who seem to have disappeared from modern life, were employed to receive and invest money on behalf of their clients. Such agents would have the kind of implied authority to deal with money that is lacking on the part of lawyers.

The receipt of money, therefore, is not part and parcel of the everyday, accepted duties of a lawyer. Lawyers are not debt-collectors, nor are they conduits through which money that should be paid to a client can be channelled in the ordinary course of business. As a corollary of this, lawyers are not agents with authority to bind their clients by an acknowledgement of a debt, so as to oust the operation of a statute of limitations. A person is not an agent for the purpose of making an acknowledgement unless he is duly authorized to make it.[34] However, it is not necessary that the agent should have authority to acknowledge a mortgage as the solicitor did in the course of the correspondence with the plaintiff's solicitor in *Wright* v. *Pepin*.[35] There the defendant's solicitor had written to the plaintiff's solicitor about a mortgage of property by the defendant. It was held that this amounted to an acknowledgement of the existence of the mortgage, the enforcement of which was in issue in

[29] *Griffiths* v. *Williams* (1787), 1 T.R. 710 (K.B.); *Withers* v. *Parker* (1859), 28 L.J. Ex. 292, aff'd (1860), 29 L.J. Ex. 320 (Ex. Ch.).

[30] *Bowstead, supra* note 1 at 64-65; *Law of Agency, supra* note 1 at 79-80; *Macaulay* v. *Polley* (1897), [1897] 2 Q.B. 122 at 123 (C.A.) A.L. Smith L.J.; or if the principal held out the solicitor as a person allowed to settle the matter and by so doing became estopped from denying his authority.

[31] *Viney* v. *Chaplin* (1858), 27 L.J. Ch. 434 (C.A.); *Bourdillon* v. *Roche* (1858), 27 L.J. Ch. 681 (V.C.).

[32] *Ibid.*

[33] See *Wilkinson* v. *Candlish* (1850), 19 L.J. Ex. 166; *Harman* v. *Johnson* (1853), 2 E.&B. 61 (Q.B.).

[34] *Bowring-Hanbury's Trustee* v. *Bowring-Hanbury* (1942), [1943] Ch. 104 (C.A.).

[35] (1954), [1954] 2 All E.R. 52 (Ch.).

subsequent litigation. When an action was brought on the mortgage the defendant wished to plead limitation as a bar. This plea failed. Although the defendant's solicitor did not have implied, and certainly not express, authority to acknowledge the existence and validity of the mortgage and the debt due thereunder, she was authorized to take steps to put the defendant's affairs in order. In the course of doing this the fatal letter was written. It bound the defendant.

A similar problem has arisen in relation to the Statute of Frauds, which requires a note or memorandum in writing of certain contracts, signed by the party to be charged or some other person "thereunto by him lawfully authorized".[36] A solicitor could be expressly authorized to sign a document that fulfills the requirements of the Statute, such that the principal could be sued on the contract.[37] What if no such express authorization has been established? In *Smith* v. *Webster*, it was held that a letter from the defendant's solicitor to the plaintiff which set out sufficient details of the contract to satisfy the Statute was not a note or memorandum under the Statute.[38] The solicitor had not authority to write a letter containing the terms of the contract, only to prepare a formal document to be sent to the other party for approval. Ultimately an agreement was to be signed by the parties themselves, not their agents. Other decisions suggest that there may be occasions when a solicitor can sign a note or memorandum and thereby bind his principal under the Statute of Frauds. This may be the case where the solicitor is empowered to sign a document as a record of the contract that is eventually in issue or is authorized to complete the contract.[39] Similarly, when counsel signed a defence to a statement of claim which referred to the transfer of property by the defendant to X under a contract of purchase and sale, this bound the defendant and entitled the defendant to claim that the property in question belonged to X.[40] Thus a lawyer's signature will fulfill the requirements of the Statute of Frauds when the lawyer is expressly authorized to do what would naturally and reasonably include the signing of a document recognizing the existence of a contract within the Statute. Differences in outcome result from differences in the nature of the work the lawyer is expressly authorized to do for his client. Correspondence does not necessarily involve admissions about contracts whereas pleadings do if the admission is relevant to the proceedings in which the pleadings are required. Similarly, making records of contracts and completing them must entail signing documents that acknowledge the existence and the terms of such contracts.

A further question surrounds the ability of a lawyer to receive notices on behalf of his client. Generally a lawyer does not have this authority. This is

[36] *Ibid.* at 56 Harman J.

[37] Cf. *H. Clark (Doncaster) Ltd.* v. *Wilkinson* (1965), [1965] Ch. 694 (C.A.).

[38] (1876), 3 Ch. D. 49 (C.A.).

[39] *John Griffiths Cycle Corp.* v. *Humber & Co. Ltd.* (1899), [1899] 2 Q.B. 414 (C.A.); *Daniels* v. *Trefusis* (1913), [1914] 1 Ch. 788; *North* v. *Loomes* (1919), [1919] 1 Ch. 378.

[40] *Grindell* v. *Bass* (1920), [1920] 2 Ch. 487.

established forcefully in *Singer* v. *Trustee of the Property of Munro*.[41] The trustee of a bankrupt firm of solicitors applied for release from the trusteeship. Before this could be done, the trustee was obliged to give notice of his intention to all the creditors. In his affidavit the trustee swore that he had sent notices to the creditors at their respective addresses but the notice to the applicant had been sent to the applicant's solicitors in England, though the applicant lived in France. The order of release was granted. The applicant applied for an order to reverse the decision to grant the release on the grounds that he had never received proper notice under the bankruptcy rules. Walton J. held that the trustee should have informed the court that he had sent the notice to an address other than the address of the creditor in question. Had he done so, and provided he had a reasonable explanation, he might well have been excused. The release was held to have been obtained improperly in that it had been granted on evidence that was in part untrue. The crucial point, it is suggested, is that contrary to the trustee's belief, albeit honestly held, notice to the applicant's solicitor did not constitute notice to the applicant without express authority to the solicitor to receive such a notice. In the absence of such express authority, it was not part of the duties or functions of a solicitor to receive notices on behalf of his client. This decision suggests that a solicitor possesses only limited powers to act for a client in business, as contrasted with legal matters. The discharge or release of a trustee in bankruptcy may involve the legal process; but whether such discharge or release should be granted involves a decision by the creditor on the financial merits of the case. The creditor must himself know of the prospect of such release. The language of Walton J. was sufficiently broad to comprehend other business situations in which notice may be relevant, such as notices to quit or to terminate a lease and notice of facts which would preclude a finding that a party was a bona fide purchaser for value without notice in certain circumstances involving property title. In all such instances therefore, a lawyer must be expressly authorized to receive the appropriate notice before a party seeking to rely on such notice can safely assert that the principal is deemed to have received the notice himself.

V

When one turns to the position of lawyers in relation to the conduct of legal proceedings, there is a body of case law which is at once strong and ambiguous. The courts appear to have taken quite contradictory attitudes to the same issue. For the purposes of the ensuing discussion, a division will be made between various acts of a lawyer which do not involve the compromise or settlement of litigation on the one hand and the difficult area of the effect of a compromise or settlement on the other.

Although agents are not usually allowed to delegate their tasks to another agent, it has been held that a country solicitor authorized to institute a suit on behalf of his client was justified in employing an agent for that purpose in London where the Court of Chancery sat.[42] Clearly it was an implied part of

[41](1981), [1981] 3 All E.R. 215 (Ch.); cf. the situation with respect to real estate agents in *Woeller* v. *Orfus* (1979), 27 O.R. (2d) 298 (H.C.).

[42]*Solley* v. *Wood* (1852), 16 Beav. 370 (Ch.).

the country solicitor's authority that he could delegate the commencement of proceedings, as this was a necessary — and in the early 19th century perhaps a usual — way of fulfilling his duty as an agent. However, if the town agent of a country solicitor were given authority for a particular purpose, he was not permitted to institute other proceedings on behalf of the client.[43] Moreover, a retainer given by a country solicitor did not justify the issuance of a writ by a London firm of solicitors on behalf of the client and the country solicitor. The London solicitors had not been authorized to issue a writ in the name of the client.[44] Chitty J. pointed out an important aspect of agency in general and the employment of lawyers in particular: "A man employs a solicitor because he has confidence in him, and it is that confidence which renders it necessary for a litigant to have the assistance of one solicitor rather than another".[45] This seems to contradict the approach in the case referred to earlier involving the issuance of a bill in Chancery. Perhaps the reason for the differing result lies in the kind of authority given by clients to country solicitors. Instructions to commence an action necessarily imply the power to do whatever is necessary for that purpose; however, authority for such a specific purpose does not necessarily imply power to do something not within the originally authorized purpose. Nor does a general retainer, without specific instructions to sue, authorize a country solicitor to use another agent to begin an action. In the Canadian context, such situations might arise if a lawyer in one province made use of an extra-provincial lawyer or if a rural lawyer thought it necessary to employ an urban lawyer. It would then become important to determine whether the authority given to the first lawyer could extend to the employment of the second lawyer, and if so, the scope of such authority.

An important if controversial qualification must be noted. Regardless of whether the authority of a lawyer to commence an action is characterized as express or implied, the decision of the English Court of Appeal in *Yonge* v. *Toynbee* indicates that it ceases to operate if and when the client becomes insane or otherwise loses legal capacity.[46] Even if the lawyer is ignorant of the change in the client's status, there is no automatic continuance of the lawyer's authority. Once a lawyer is expressly authorized to undertake litigation, there is no apparent or ostensible authority that extends the duration of his express authority any more than there is any ostensible or apparent authority that can extend the scope of his express authority. In *Yonge* v. *Toynbee*, solicitors acting for a defendant in an action entered an appearance and delivered a defence on behalf of the defendant without knowledge of the supervening insanity of their client. The defendant's solicitors were personally liable for the plaintiff's costs incurred in responding to the defence as they were acting without authority. They breached the "implied warranty of authority" which underlies any action of an agent purporting to act on behalf of a principal

[43] *Malins* v. *Greenway* (1847), 17 L.J. Ch. 26.

[44] *Wray* v. *Kemp* (1884), 26 Ch. D. 169.

[45] *Ibid.* at 172.

[46] (1909), [1910] 1 K.B. 215 (C.A.).; *Bowstead, supra* note 1 at 513-16; *Law of Agency, supra* note 1 at 357: unless the authority has been given by deed: *ibid.* 509-10, 350 respectively: cf. *Powers of Attorney Act*, R.S.O. 1980, c. 386.

when he is not an agent or when he lacks the authority to act as he has.[47] The nature of this liability is still an open question.[48] The term "warranty of authority" suggests a contractual basis for the liability. But it is hard, if not impossible, to find any contract between the "agent" and the third party who is injuriously affected by the "agent's" behaviour. In the absence of fraud or negligence, neither of which was present in this case, it is difficult to conceive of any tort that was committed by the solicitors. Nor does this seem to be a situation in which the law of restitution or unjust enrichment is relevant.

The effect of the decision in *Yonge* v. *Toynbee* is to place lawyers at considerable risk. Although acting in good faith and without negligence, they appear to be absolutely liable if their authority is withdrawn by operation of law. It has been held that where an agent loses authority to act but — without fault on his part — is ignorant of that loss, such agent may continue to have authority on the basis of estoppel, so as to bind the principal to the third party with whom the agent has transacted after the cessation of the agent's original authority.[49] If this is correct, as is suggested, it should follow that the agent would not be personally liable to the third party for any alleged breach of the implied warranty of authority. There seems no reason why such an approach should not be taken with respect to solicitors in the position of those in *Yonge* v. *Toynbee*. To hold the solicitors personally liable in such a case is unreasonable and inconsistent with the policy of the law with respect to transactions involving insane parties where the insanity is unknown to those dealing with the insane party. It should not make any difference that the insane party is dealing through an agent, as long as there is ignorance of the insanity on the part of both agent and third party.

Once a lawyer has been entrusted with the conduct of litigation, it would seem that he has a very large measure of control over what will happen. Thus, where a solicitor was acting under a general retainer in relation to proceedings, it was held in a Canadian case that he had the power to discontinue the action.[50] As early as 1696 it was held that waiver of a client's rights by a lawyer might bind the client.[51] In the latter case, the plaintiff's attorney waived the fact that the defendant had pleaded joinder of issue outside the proper time after he had signed judgement on behalf of his client. Later the client wished to deny the joinder of issue. It was held that the client was bound by the attorney's conduct and could not now insist on the enforcement of the original judgement. In a similar vein, where a solicitor's town agent took money paid into court by the defendant, the solicitor's client could not later sue on the

[47] Cf. the authorities cited *supra* note 7.

[48] *Bowstead, supra* note 1 at 458-60; *Law of Agency, supra* note 1 at 213-14.

[49] *Smout* v. *Ilbery* (1842), 10 M.&W. (Ex.); *Drew* v. *Nunn* (1879), 4 Q.B.D. 661 at 668, Brett L.J.; *Re Parks* (1956), 8 D.L.R. (2d) 155 (N.B.S.C.A.D.): cf. *Wilkinson* v. *Young* (1972), 25 D.L.R. (3d) 275 (Ont. H.C.): *Bowstead, supra* note 1 at 522-25. See also, for England, the *Enduring Powers of Attorney Act*, 1985, c.29.

[50] *Kennedy* v. *Gunnar-Nesbitt Aviation Ltd.* (1973), 38 D.L.R. (3d) 288 (Alta. S.C.T.D.).

[51] *Latuch* v. *Pasherante* (1696), 1 Salk. 86 (K.B.); cf. *Smith* v. *Troup* (1849), 18 L.J.C.P. 209.

debt.[52] As Pollock C.B. subsequently stated, the act of the solicitor's agent was the act of the solicitor.[53]

A number of cases in the 19th century involved issues relating to admissions or other statements made by attorneys or solicitors and counsel in the course of proceedings between the principal and another party. Sometimes such statements were uttered in court, sometimes outside the courtroom. Sometimes they were made directly to the other party; at other times to some third person, the other party's agent or a stranger. On such distinctions of fact have been founded distinctions as to the authority of the attorney or counsel and, in consequence, the binding or non-binding effect of such statements. Thus an offer made by the plaintiff's attorney in the hearing of X to do something in relation to the defendant, although the offer was within the attorney's authority, was inadmissible in evidence so as to affix the plaintiff with such offer.[54] It would have been otherwise, so it was said, if the offer had been made directly to the defendant himself. Nor was an admission by an attorney in a conversation, made with a view to obviating the necessity of proving facts admitted at the trial, evidence against the attorney's principal.[55] Nor was a statement made by counsel out of court binding on the client. So when counsel said that he would forebear for a certain time to move to make a rule nisi absolute pending the hearing of the rule nisi, but the rule was later made absolute before the time mentioned by counsel, it was held that the rule could not be reopened and re-argued.[56]

It would appear that only admissions of disputed facts by a solicitor are binding on the client. Hence in *Petch* v. *Lyon*, a statement by the plaintiff's attorney to the defendant's attorney that a debt was owing from the late husband of the defendant and not the defendant herself, could not be given in evidence against the plaintiff.[57] It was not something that affected the issues at stake in the trial; it was merely loose conversation. Nor will an admission about one set of proceedings bind the client with respect to other proceedings.[58] However, if the statement is relevant to the matter in question, such as the ownership of a vessel against the owners of which the plaintiff was bringing an action, then such a statement will bind the client.[59] So too will an admission by counsel in court or before a judge in chambers, even if unsupported by an affidavit. It will be regarded as true and therefore admissible in evidence.[60] However, a modern English case throws this proposition into some

[52] *Griffiths* v. *Williams* (1787), 1 T.R. 710 (K.B.).

[53] *Withers* v. *Parker* (1859), 28 L.J. Ex. 292, aff'd (1860), 29 L.J. Ex. 320 (Ex. Ch.).

[54] *Wilson* v. *Turner* (1808), 1 Taunt. 398 (C.P.).

[55] *Young* v. *Wright* (1807), 1 Camp. 139 (K.B.).

[56] *Richardson* v. *Peto* (1840), 1 Man. & Gr. 896 (C.P.).

[57] (1846), 9 Q.B. 147.

[58] *Blackstone* v. *Wilson* (1857), 26 L.J. Ex. 229.

[59] *Marshall* v. *Cliff* (1815), 4 Camp. 133 (K.B.).

[60] *Haller* v. *Worman* (1861), 3 L.T. (N.S.) 741 (K.B.).

doubt.[61] In *H. Clark (Doncaster) Ltd.* v. *Wilkinson* the vendor of property was not bound by an admission made by counsel with respect to the authority of the vendor's original solicitor to sign a contract of sale on the vendor's behalf.[62] In this instance the plaintiff had not acted to his detriment on the fact of the admission. It was a triable issue whether the solicitor who signed the contract had express authority to do so. If he lacked such express authority, then as noted earlier, he would not have had authority to sign the contract of sale and purchase — and the vendor would not have been bound. The Court of Appeal stated that an admission made by counsel in the course of proceedings can be withdrawn unless such an admission gives rise to an estoppel.[63] It should be noted that Lord Denning M.R. distinguished an admission of this kind from a compromise entered into by counsel, which might bind the client on the basis of counsel's ostensible authority.[64] Plainly Lord Denning was distinguishing between the implied authority of counsel, or a solicitor, to make admissions relevant to the proceedings in which he is engaged and the ostensible or apparent authority of counsel, or a solicitor, to enter into an agreement under which the client settles an action. What lawyers can do to commence or carry on proceedings may fall within the implied authority of a lawyer in the sense that has been explained. What a lawyer can do with respect to the settlement of proceedings may involve the notion of ostensible or apparent authority, which, as noted, turns upon very different considerations of law and fact.

VI

The most important and complex aspect of a lawyer's authority as an agent involves the settlement or compromise of an action. In 1890 Kekewich J. referred to the valuable power of compromise that was placed in the hands of counsel, valuable that is to say from the point of view of the client.[65] The power and right to settle can be utilized effectively by parties to an action to achieve a satisfactory and perhaps less costly resolution of a dispute. Insofar as the settlement of an action by a lawyer with or without his client's consent can bind the client, it is obvious that considerable power resides in a lawyer's hands. The courts are also extremely interested in the settlement or compromise of an action, at least where the action has been commenced and is in the process of coming before a court. Hence the cases indicate that where a settlement or compromise is entered into in the face of the court or after proceedings have been started, the consent of the court may be required. The requirement of such participation may lead to the possibility that a settlement or compromise may be upset by a party, even though that party's lawyer had agreed to the settlement.[66]

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[61] See also *Dawson* v. *Great Central Rly. Co.* (1919), 88 L.J.K.B. 1177 (C.A.).

[62] (1965), [1965] Ch. 694 (C.A.).

[63] *The Clifton: Kelly* v. *Bushby* (1835), 3 Knapp. 375 (P.C.).

[64] (1965), [1965] Ch. 694 at 703.

[65] *Lewis's* v. *Lewis* (1890), 45 Ch. D. 281 at 283.

[66] *Shepherd* v. *Robinson* (1919), [1919] 1 K.B. 474 at 477 (C.A), Bankes L.J.; *Neale* v. *Gordon Lennox* (1902), [1902] A.C. 465 at 470-72 (H.L.), Lord Halsbury, Lord Macnaghten; *Pineo* v. *Pineo* (1981), 45 N.S.R. (2d) 576 (S.C.T.D.).

Various factors have been considered relevant to the legal effect of these settlements. Unless a client has expressly authorized his lawyer to compromise an action or has ratified such a compromise after it has been concluded, it becomes necessary to determine whether a lawyer can effectively bind his client by a settlement on the basis of some other form of authority, whether implied or ostensible. Although the precise nature and limits of that authority remain unsettled, certain clues may be found in the cases as to the situations in which a compromise by a lawyer may bind his client. It must also be borne in mind that even though a compromise may be effective between the client and the other party to the compromise, the very fact that a compromise has been entered into by a lawyer on his client's behalf may involve that lawyer in liability to his client. This might happen if he acted without actual express authority, or without authority implied from his employment as a lawyer.[67] Moreover, even if a lawyer is expressly authorized to enter into a compromise or settlement, he may still be in breach of duty to his client if the settlement was made negligently or fraudulently.[68] It must not be thought that because a lawyer is endowed by his client or the law with authority to compromise or settle an action, he may not be in breach of his agency obligations when he does so. The failure to distinguish these two aspects of the legal consequences of a compromise may have led courts into difficulties over the years.

Around the year 1860, three cases raised the issue of an attorney's power to compromise an action.[69] *Fray* v. *Voules* held that an attorney who compromised an action when he had been instructed not to settle would be liable to his client for nominal damages, even though the compromise had been made on the advice of counsel retained by the attorney under the latter's own retainer for the conduct of the cause.[70] Liability arose despite the bona fides of the attorney, and the fact that settlement was reasonable and for the benefit of the client. Lord Campbell C.J. raised, without answering, the question whether such a compromise would be binding as between the agent and third parties even though it was ultra vires between the attorney and his client.[71] In *Chown* v. *Parrott* an attorney who entered into a compromise without the consent of his client though not against an express prohibition, was not guilty of negligence as long as he acted bona fide, with reasonable care and skill and for the benefit of his client in making such compromise.[72] Again the issue was as between attorney or agent, and client or principal. It was not until *Prestwich* v. *Poley* in 1865 that the binding nature of a compromise became the issue.[73] A

[67] *Butler* v. *Knight* (1867), L.R. 2 Ex. 109; *Fray* v. *Voules* (1859), 1 E.&E. 839 (Q.B.); *Thompson* v. *Howley* (1976), [1977] 1 N.Z.L.R. 16 at 25 (S.C.).

[68] *Welsh* v. *Roe* (1918), 87 L.J.K.B. 520; *Chown* v. *Parrott* (1863), 14 C.B.N.S. 74 (C.P.).

[69] For an earlier decision see *Swinfen* v. *Swinfen* (1857), 24 Beav. 549 (Ch.), (1858), 2 De G.&J. 381 (C.A. Ch.); on which see Brightman L.J. in *Waugh* v. *H.B. Clifford & Sons Ltd.* (1981), [1982] 1 All E.R. 1095 (C.A.).

[70] (1859), 1 E.&E. 839 (Q.B.).

[71] *Ibid.* at 847. Presumably he had forgotten about *Latuch* v. *Pasherante* (1696), 1 Salk. 86 (K.B.) (See text at note 51 *supra*), which was recalled by Farwell J. in *Re Newen* (1903), [1903] 1 Ch. 812 at 818.

[72] (1863), 14 C.B.N.S. 74 (C.P.).

[73] (1865), 18 C.B.N.S. 806 (C.P.); see also *Strauss* v. *Francis* (1866), L.R. 1 Q.B. 379; *Butler* v. *Knight* (1867), L.R. 2 Ex. 109.

was employed as an attorney to sue B for the price of a piano sold and delivered to B. A agreed to take back the piano if B should pay the cost by installment. A's principal, the client who had sold the piano to B, repudiated this agreement and sued B. The question for the court was whether the action should be stayed on the ground that it had been settled without express authorization by the client. Nonetheless the court held that the compromise bound the client as it was made within the general scope of the attorney's authority as an agent. The decision might have been different if the attorney had agreed to accept other goods in satisfaction of B's liability. This last point hints at the idea of something "collateral" to the action which the lawyer is engaged to deal with, that later became of some importance. In the words of Montague Smith J.: "The attorney is the general agent of the client in all matters which may reasonably be expected to arise for decision in the cause."[74]

The attitude of the court in this case was that a lawyer retained to deal with litigation on behalf of a client had a "general authority" to act on the client's behalf, which included authority to compromise the action as long as he acted bona fide, reasonably, and not in defiance of direct and particular instructions. The tenor of the language used by the court suggests that it was implied authority that was meant by the term "general authority". Although the issue arose between client and the third party defendant in the action, and not between principal and agent, the court was concerned with the nature of the authority given to the attorney. Hence the importance of the absence of any express prohibition against compromise. Since the attorney was not expressly forbidden to settle, he was implicitly empowered to do so. As Farwell L.J. observed in the later case of *Re Newen*, where the English Court of Appeal endorsed the principle of *Prestwich* v. *Poley* and earlier decisions: "It is within the scope of a solicitor's authority to compromise, and if he uses all due diligence and acts bona fide and reasonably, no action will lie against him, but if he has been expressly forbidden to compromise and he does compromise, then however beneficial that compromise may be, an action will lie against him for disregarding that express negative direction".[75] In that case, a compromise was entered into by solicitors in Liverpool, engaged by the defendants' London solicitors. The compromise bound the defendants even though there was no privity between them and the local agents. In holding this the court followed earlier decisions referred to above, where acts by a country solicitor engaged by a solicitor in London bound the London client (and vice versa).[76] In this case it was also held that a letter from the defendants' London solicitors to the Liverpool solicitors did not amount to an express prohibition of any settlement. A similar attitude to the agent's authority to compromise was taken in *Little* v. *Spreadbury*, where the clinet had agreed to a compromise, but later argued that the actual compromise entered into by the solicitors of both parties

[74](1865), 18 C.B.N.S. 806 at 816 (C.P.): it was also held that the managing clerk of the attorney having the general conduct of the attorney's business enjoyed the authority of the attorney.

[75](1903), [1903] 1 Ch. 812 at 817; viz., *Latuch* v. *Pasherante, supra* note 71; *Chown* v. *Parrott, supra* note 72.

[76]*Supra* notes 42-44: cf. *Withers* v. *Parker* (1859), 28 L.J. Ex. 292, aff'd (1860), 29 L.J. Ex. 320 (Ex. Ch.).

did not accord with the terms which she agreed to accept.[77] Her claim was denied and she was found liable for breach of the agreement reached in the compromise. The court made it clear that the solicitors had authority to bind their client; they had the power to compromise with respect to the subject matter of the action, though not with respect to collateral matters.

The authority to compromise arose once a writ had been issued. Once this had occurred the solicitor of a party to the action had implied general authority, according to McCardie J. in the subsequent case of *Welsh* v. *Roe*, to compromise or settle the action.[78] No limitation on this power imposed by the client could affect the solicitor's power unless brought to the notice of the other side. McCardie J. drew a distinction between the effect of such a compromise on the parties to the action and its effect as between client (principal) and solicitor (agent). While the client might be bound by the compromise, the solicitor could be liable to the client if the compromise were effected negligently or in violation of his instructions.[79] The power to compromise could not be exercised, however, before an action was brought unless specific instructions to that effect had been given. There was no implied authority entrusted to a solicitor to settle prior to his being given control of an action.[80] However, in *Butler* v. *Knight* in 1867, it was held that in some situations a solicitor could effect a binding compromise without express instructions to do so after judgement had been rendered.[81] While as a general proposition the force of an attorney's retainer and his power to bind the client by a compromise ceased when judgement was rendered, the attorney did have implied authority to recover the amount of the verdict.[82] Therefore it would appear that he could settle with the judgement debtor and bind his client even if in so doing he violated his duty, as Pigott B. stated.[83] This decision seems open to question in view of the later remarks of both Horridge J. and Atkin J. in *Re a Debtor (No. 1 of 1914)* in which it was held that a solicitor's retainer to conduct an action did not include the authority to compromise the action after judgement by assenting to the execution by the defendant of a deed of arrangement of his property to a trustee for the benefit of his creditors.[84]

From the 1860s to 1919, English courts developed the idea that a solicitor or attorney had implied authority to bind his client by a compromise once the lawyer or attorney had been entrusted with the task of pursuing an action. That authority would suffice to create an effective compromise with another

[77](1910), [1910] 2 K.B. 658 (C.A.). See also the earlier case of *Matthews* v. *Munster* (1887), 20 Q.B.D. 141, app'g the differentiation of "collateral" matters that was formulated by Pollock C.B. in *Swinfen* v. *Lord Chelmsford* (1860), 5 H.&N. 890 at 922 (Ex.): discussed by Brightman L.J. in *Waugh* v. *H.B. Clifford & Sons Ltd.* (1981), [1982] 1 All E.R. 1095 at 1103, 1104 (C.A.).

[78](1918), 87 L.J.K.B. 520.

[79]*Ibid.* at 521.

[80]*Macaulay* v. *Polley* (1897), [1897] 2 Q.B. 122 (C.A.).

[81](1867), L.R. 2 Ex. 109.

[82]*Ibid.* at 113, Kelly C.B.

[83]*Ibid.* at 114.

[84](1914), [1914] 2 K.B. 758 at 761 (C.A.).

party, although it might not protect the lawyer from liability to his client if the latter had expressly countermanded the power of the lawyer to compromise, or the lawyer had acted otherwise than bona fide, or unreasonably, or against the interests and not for the benefit of his client.[85] Nor would any such compromise bind the client if the client had assented to it under a misapprehension or mistake as to its meaning and effect.[86] Moreover, there were cases which stated that the client's consent to a compromise or settlement could be withdrawn if this was done before an order was issued by the court, unless the withdrawal of such consent was the result of a change of mind rather than an awareness of a previous misapprehension.[87] In such instances the agreement was reached by counsel, not a solicitor or attorney. The authority of counsel to agree to a settlement was also clear as long as counsel acted within the scope of his instructions.[88] Thus, in contrast with the general implied authority of a solicitor or attorney to compromise, even possibly where a prohibition against settlement had been made by the client, the authority of counsel to compromise extended only as far as his specific instructions. However whether the compromise was arrived at by counsel or a solicitor, it would not be binding on the client if it had been reached contrary to instructions and such prohibition had been brought to the attention of the other party.

The orderly development of this area of the law was disrupted, however, by the decision of the House of Lords in 1902 in *Neale* v. *Gordon Lennox* which may be said to have made the question of a lawyer's authority to compromise or settle unclear.[89] The plaintiff in a slander action authorized her counsel to agree to the reference of the action to a form of arbitration on condition that the defendant made a disclaimer of all implications on the plaintiff's character. This limitation on the authority of counsel was not communicated to the other party. The plaintiff's counsel agreed to the reference but failed to obtain the requested disclaimer. An order for the reference was made by the court. The plaintiff's counsel did not act under any misapprehension or mistake as to the extent of his authority. The question was whether the order for a reference should be set aside and the case be allowed to go for trial. The Court of Appeal held that the order should stand, because the purported limitation on counsel's ostensible authority (as it was described in the Court of Appeal) would not operate without notice to the other side. In coming to this conclusion the Court of Appeal followed earlier authorities discussed above, save for the characterization of counsel's authority to settle as "ostensible", rather than as implied. It may be suggested that the court confused ostensible with implied authority in this instance. Prior decisions seemed to consider that the authority of a lawyer to act in this way was implied into the appointment to act in the matter.

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[85] I.e., by acting collusively with the other side: see McCardie J. in *Welsh* v. *Roe*, *supra* note 68 at 520.

[86] *Lewis's* v. *Lewis* (1890), 45 Ch. D. 281; *Shepherd* v. *Robinson* (1919), [1919] 1 K.B. 474 (C.A.).

[87] *Holt* v. *Jesse* (1876), 3 Ch. D. 177 (V.C.); *Harvey* v. *Croydon Union Rural Sanitary Authority* (1884), 26 Ch. D. 249 (C.A.).

[88] *Swinfen* v. *Swinfen* (1858), 2 De G.&J. 381 (C.A. Ch.); *Furnival* v. *Bogle* (1827) 4 Russ. 142 (Ch.).

[89] (1902), [1902] A.C. 465 (H.L.), rev'g (1902), [1902] 1 K.B. 838 (C.A.).

The House of Lords reversed this decision. In the view of their lordships, counsel had no authority to refer an action against the wishes of his client or on terms different from those which his client was prepared to accept. A reference may be set aside although the limit on counsel's authority was not made known to the other side. The court was not bound to sanction an agreement made by counsel which was not, in the opinion of the court, a proper one. This seems to run counter to the 19th century cases. Lord Halsbury, however, emphasized the importance of counsel's position as an officer of the court and held that the court would not be deprived of its general authority over justice by an unauthorized act of counsel.[90] He also pointed out that there might be various reasons why the court should not approve a compromise or settlement between counsel, even though the other party had acted on the apparent authority of counsel to enter into the agreement.[91] Lord Lindley suggested that the ordinary principles of agency, on which previous decisions were based, were only part of what was to be considered.[92] The attitude of the House of Lords, therefore, appears to have been that at least where an agreement to refer a case was involved in contrast with the more usual situation of a compromise or settlement of an action, the issue was not one simply for the law of agency; it concerned the administration of justice and the role of the court in litigation. Perhaps the case may be distinguished on the basis that it involved a reference, not a compromise. Perhaps it may be distinguished on the ground that the court had acceded to the reference sought by the parties under the mistaken belief, induced by counsel, that the parties had agreed to such a reference, so that to uphold the court's order might have meant perpetuating a deception upon the court. Perhaps in the special circumstances of the case agency alone did not govern the situation.[93] Unless some distinction along these lines can be made, the case seems to invalidate much of what had been previously decided. Furthermore, the reference by the House of Lords to the "apparent" or "ostensible" authority of counsel to settle a case seems to contradict prior references to the "implied" authority of solicitors, attorneys or counsel in matters of this sort. Unless the House of Lords meant "implied" when they spoke of "apparent" authority, the judgement in this case introduces a new element of confusion into an already perplexing area.

An early commentary on this case is found in *Little* v. *Spreadbury*.[94] Bray J. distinguished the *Neale* case by pointing out a difference between cases where the court was involved and those where the contract between the parties could be carried out without the intervention of the court.[95] Lord Coleridge J. was of the opinion that the client could always repudiate a compromise or settlement on the ground of mistake as long as this was done at the earliest possible moment, after knowledge of the mistake and before any order was drawn

[90](1902), [1902] A.C. 465 at 470 (H.L.): cf. Lord Macnaghten at 472.

[91]*Ibid.* at 470-71.

[92]*Ibid.* at 473.

[93]It was distinguished as a special case by Watkins J. in *Marsden* v. *Marsden* (1972), [1972] 2 All E.R. 1162 at 1166 (Fam.).

[94](1910), [1910] 2 K.B. 658 (C.A.).

[95]*Ibid.* at 662-63.

up by the court. Moreover, if the other side had acted on a compromise it was inequitable for such compromise to be avoided, and the client would be bound despite his attempt at withdrawal.[96] The reasoning of Bray J. would support the validity of the decision in *Neale*, while allowing other courts to distinguish it in appropriate cases. The argument of Lord Coleridge J., on the other hand, would seem to invite the conclusion that the decision in *Neale* was both incorrect on the facts and wrong in principle. McCardie J., in *Welsh* v. *Roe*, while holding that a compromise was binding even if the solicitor agreeing to it had been prohibited from settling the case as long as the other side was in ignorance of that prohibition, also stated that a collusive compromise was void. One entered into negligently, however, might allow the client an action for breach of duty against the solicitor and in special cases the court might refuse to permit enforcement of a compromise.[97] This last comment was substantiated by a reference to the *Neale* case.

What then are these special circumstances? The answer is not clear, however, in the subsequent case of *Shepherd* v. *Robinson* Bankes L.J. purported to divide "compromise" cases into two groups.[98] He referred specifically to "two distinct lines of authority relating to compromises said to have been made by counsel against the wishes or instructions of their clients". In the first line of cases the question was whether the act of counsel had been within the scope of his authority. In this respect the learned Lord Justice spoke of the "apparent", not implied authority of counsel to compromise in all matters connected with the action and not merely collateral to it. Here lack of notice by the other party of any limitation on counsel's apparent authority would mean that a compromise was binding on the client, once counsel had agreed and the agreement was embodied in some order of the court. The second line of authority, in which the *Neale* case figured prominently, held that before a consent order had been drawn up and perfected, the consent given by counsel or a solicitor may be withdrawn by the client if the counsel or the solicitor gave it under a misapprehension. In such cases the court would not proceed further with the drawing up and perfecting of the order, and would not lend its authority to compel observance of an agreement arrived at through a mistake. But in *Neale* it would seem difficult to find that counsel acted under a misapprehension. The client's instructions were clear and unambiguous. The counsel involved was an eminent member of the bar. Moreover, the order to refer the case had already been drawn up by the court.

The suggestion is made, therefore, that early attempts to explain the decision in *Neale* to make it conform to the tenor of a series of prior cases have not been convincing. Further reference to the *Neale* case was made more recently in *Marsden* v. *Marsden*.[99] During the hearing of a divorce action, counsel for the wife, contrary to express instructions, undertook on the wife's behalf to release a Class F charge on the matrimonial home and abandon her interest in

[96] *Ibid.* at 665.

[97] (1918), 87 L.J.K.B. 520 at 523.

[98] (1919), [1919] 1 K.B. 474 at 477 (C.A.).

[99] (1972), [1972] 2 All E.R. 1162 (Fam.).

it. Against express instructions counsel entered into an agreement with counsel for the husband providing for the maintenance of the wife and children. The husband's counsel did not know of the limitation on the authority of counsel for the wife. The agreement was accepted by the court and the judge made an order in terms of the agreement. That order was perfected. On the same day as the order was perfected, either contemporaneously with the perfection of the order or at some time beforehand, the wife applied to the court to set aside the order. She had informed the court a day or two previously of her intention to make that application. Watkins J. held that the order should be set aside. Although normally orders that had been perfected could not be set aside, the court did so on this occasion since notice of the intention to apply to have the order set aside had been given before perfection and a refusal to set the order would result in grave injustice to the wife. In this respect the *Neale* case was both followed and distinguished. Watkins J. also held that where, unknown to the other party, the usual authority of counsel to compromise had been limited by express instructions and counsel had entered into a compromise for which he had no authority, the court could interfere, setting aside the compromise and the order based on it if grave injustice would be done by allowing the compromise to stand.

The judgement of Watkins J. is founded on a line of reasoning which suggests that: (a) the authority of counsel to compromise, where not express, is implied, not apparent or ostensible; (b) to limit that authority the client's instructions must be clear and unequivocal; (c) courts may nonetheless intervene in an agreed compromise otherwise binding on a client where to refrain from setting it aside might lead to grave injustice. But this discretion should not lightly be invoked. As Watkins J. said: "Applications have failed in the past although an applicant has been present in court and heard, without understanding them, the terms of the compromise announced".[100] He also made it clear that a court would not interfere after perfection of an order. The *Neale* case turned on its own special facts in that the plaintiff took out the order only for the purpose of applying to have it set aside (a strange sequence of events if in fact that is what really occurred).[101] *Marsden* is clearly a very strong case for the exercise of discretion by the court. It leaves open to question, however, whether, and if so when, a court may intervene when counsel or a solicitor has acted without authority or indeed contrary to express instructions which would revoke any such authority. The case also raises again the dispute as to whether the lawyer's authority to settle or compromise is implied or ostensible.

Ostensible authority was declared to be the basis for a lawyer's power to bind his client through a compromise by Somers J., of the Supreme Court of New Zealand in *Thompson* v. *Howley* in 1976.[102] In the course of a comprehensive discussion of the English decisions, the learned judge set out what he understood to be the law. First, a solicitor having commenced an action had ostensible authority to settle, which entitled a third party to accept a suggested settlement, unless any limitation in that authority was brought to the notice of

[100] *Ibid.* at 1165.

[101] *Ibid.* at 1166.

[102] (1976), [1977] 1 N.Z.L.R. 16 (S.C.).

the third party before settlement. Second, consent given by mistake by counsel could be withdrawn before any order was made by a court, where the assistance of the court is sought as part of the agreement to enforce a compromise. Third, a client would be bound by a compromise effected by his solicitor (despite express instructions to the contrary) unless such limitation on the solicitor's authority was expressed to the other party before a settlement was reached. Fourth, apparent authority to settle was not necessarily coextensive with a solicitor's actual authority. Fifth, a solicitor was liable to his client if he compromised an action contrary to instructions and it would be no defence for him to say that the settlement was beneficial to the client or entered into on the advice of counsel. Sixth, express authority to settle on particular terms necessarily implies a prohibition to settle on other terms. Seventh, a solicitor retained to commence an action has no authority as between his client and himself by virtue of such action to settle.

The learned judge pointed out that a solicitor would be liable for compromising contrary to instructions, or compromising on terms different from those authorized by the client.[103] However, it was not clear whether he would be liable to his client if he compromised without authority but not against an express prohibition.[104] If authority to settle existed, it must be granted expressly or properly implied by law as a necessary concomitant of the retainer in particular instances.[105] Neither principle nor authority led to the proposition that the retainer of a solicitor carried with it an actual authority to settle an action the solicitor has been retained to commence except where there are express instructions to settle.[106] A solicitor required the authority of his client to settle. In some situations actual authority is expressly conferred. On other occasions, such authority must be implied. The suggestion in *Thompson* is that such an implication is an extension of actual, express authority as a matter of law. However, the judgement also refers to ostensible authority, which is a matter of implication from fact — some conduct on the part of the client. Does the consent of the client to a compromise, where not expressly given, stem from a necessary implication of law in the absence of a clear indication to the contrary; or does it emerge from the fact that the client has engaged a solicitor or counsel to take charge of a case, again without any limitation of authority (*a fortiori* where no notice of any such limitation has been passed on to the other side in the litigation)? The answer is not clear.

Against the line of decisions noted earlier which indicate that a lawyer's authority to settle is implied into his employment in a case, there is not only the judgement of the House of Lords in *Neale* and the ambiguous language of the New Zealand decision, but also the judgement of Brightman L.J. in the recent English case of *Waugh* v. *H.B. Clifford & Sons Ltd.*[107] The learned Lord Justice began by distinguishing between:

[103] *Ibid.* at 25.

[104] *Ibid.*

[105] *Ibid.*

[106] *Ibid.* at 25-26.

[107] (1981), [1982] 1 All E.R. 1095 (C.A.).

> the *implied* authority of a solicitor to compromise an action without prior reference to his client for consent, and... the *ostensible or apparent* authority of a solicitor to compromise an action on behalf of his client without the opposing litigant being required for his own protection either (i) to scrutinise the authority of the solicitor of the other party, or (ii) to demand that the other party (if an individual) himself signs the terms of compromise or (if a corporation) affixes its seal or signs by a director or other agent possessing the requisite power under the articles of association or other constitution of the corporation.[108]

After considering many of the leading cases Brightman L.J. stated that it was well-established that the solicitor or counsel retained in an action had implied authority as between himself and his client to compromise without reference to the client, provided that the compromise did not involve matter "collateral to the action"; and ostensible authority, as between himself and the opposing litigant to compromise the action without actual proof of authority, subject to the same limitation.[109] The implied authority of a lawyer was not as extensive as his ostensible authority (although this had never been decided before by any case).[110] His lordship illustrated the difference by citing the example of a solicitor purporting to settle a defamation action. He would have ostensible authority to compromise even if he were offering a very large sum on the part of his client; it would be officious for the other party's solicitor to demand to be satisfied as to the other's authority to make the offer. But it did not follow that the offering solicitor would have his client's implied authority to agree to damages on so large a scale without the agreement of his client.

> In the light of the solicitor's knowledge of his client's cash position it might be quite unreasonable and indeed grossly negligent for the solicitor to commit his client to such a burden without first inquiring if it were acceptable.[111]

Thus an opposing litigant need only ask himself whether the suggested compromise contains matter "collateral to the suit". The magnitude of the compromise or the burden which its terms impose on the other party are irrelevant. However, the solicitor who is offering a compromise may have to ask many more questions when deciding whether he can safely compromise without reference to his client.[112]

The above analysis was applied to the case before the court where ostensible, not implied authority was involved. In this respect Brightman L.J. thought that courts should not place too restrictive a limitation on the ostensible authority of lawyers to bind their clients to a compromise. A matter should not be thought "collateral" to an action unless it really involved extraneous

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[108] *Ibid.* at 1102, italics in the original.

[109] *Ibid.* at 1105: notice of the restriction of a solicitor's authority to bind his client to a compromise would affect the situation; but a statement that the client was prepared in principle to compromise on certain specific terms was not an intimation that the client had withdrawn the ostensible authority to the solicitor to compromise on any other terms: *ibid.* at 1107.

[110] *Ibid.* at 1105.

[111] *Ibid.*

[112] *Ibid.*

subject matter.[113] Hence it was within the ostensible authority of the defendants' solicitors in this case to agree to terms of compromise which involved the handing back of defective houses in return for a price reflecting their current value in proper condition. There was no difference, except in the relative importance of the subject matter, between this case and the case of the sale of an imperfect chattel.[114]

The solution in the case before the court was undoubtedly sensible. It is more debatable, however, whether it was necessary to differentiate the two kinds of authority with which a lawyer is endowed in order to achieve the result. The theme of this essay has been that lawyers *qua* lawyers may be endowed with implied authority to do various things that are incidental to the proper performance of their duties as representatives of their clients. Insofar as such implications are made by the law, there is no need to postulate an apparent authority to do such things. The latter, in any event, is dependent on what a reasonable man would believe the particular agent in question has been empowered to do. Employment as a lawyer might raise certain reasonable expectations in parties with whom such lawyers deal, such as the lawyer for the opposing side in litigation. This can only be the case however, because the law in the past has supported and encouraged, even created, the belief that lawyers are entitled to do certain things, including compromise an action once they have been appointed to represent someone and especially when they have been appointed to have the conduct of an action. The foregoing discussion has been directed towards clarifying what the law has determined lawyers can and can not do in respect of those matters which have been entrusted to them by their clients. A distinction has been made between situations not involving litigation and those in which the lawyer has been engaged to conduct a suit against another party, whether on behalf of the plaintiff or the defendant. The logical consequence of this, it is suggested, is that the wider power of a lawyer, exceeding his express authority, is derived from implication of law, not from any holding out by the client.

If a lawyer has implied authority to compromise, as Brightman L.J. suggests, it seems difficult to deduce as a result that the lawyer who goes too far, though without fraud, negligence, or other misconduct, has been guilty of a breach of duty. On the other hand, if the lawyer's authority is founded on a representation by his client, a holding out which gives rise to ostensible or apparent authority, then the liability of a lawyer who has no power to compromise, or the power to compromise only on certain terms, will follow even if the lawyer has not been fraudulent or negligent. The mere breach of his instructions or the assumption of authority when it is lacking suffices to create liability. All this is plainly indicated in the earlier cases. When Brightman L.J. spoke of a lawyer's lack of implied authority to agree to damages on a very large scale, what he was doing in fact, it is respectfully suggested, was putting a limit on a lawyer's implied authority. Any lawyer should now know that a lawyer dealing with him, and purporting to compromise, may not have authority to do so where large sums of money are involved and should obtain

[113] *Ibid.* at 1106.

[114] *Ibid.*: cf. *ibid.* at 1107.

proof that the lawyer with whom he is dealing has been given express authority to compromise on such terms. Prior to *Waugh* v. *H.B. Clifford & Sons*, it might have been argued that the lawyer's implied authority to compromise extended to whatever scale of damages were involved; this is no longer possible. May it be concluded, however, that a lawyer who purports to settle on terms which involve large sums of money has been held out as having authority to do so, as Brightman L.J. suggests? Only if in the particular circumstances, some conduct by the lawyer's client could reasonably lead the opposing solicitor or counsel to hold such a belief. This may well be the case, just as it might be the case that if large sums of money are involved in the litigation the lawyer's implied authority may extend to settlement on terms involving a great sum of money.

The attempted rationalization formulated by Brightman L.J., involving a dichotomy between implied and ostensible or apparent authority, is not well-founded. It oversimplifies, and paradoxically, confuses the situation. Moreover, it ignores some fundamental notions of the law of agency. Implied authority is real or actual authority and depends upon what may be implied as between principal and agent by reason of necessity, custom, previous dealings or statute. Ostensible authority is dependent on whether the agent was "held out" by the principal as having authority. It is a question of fact in every case. Brightman L.J. seems to suggest that in every instance a solicitor or counsel will always have such ostensible authority to compromise as between himself and the opposing litigant, unless there is notice to the contrary. In this respect the learned judge appears to have forgotten the essential distinction between implied and ostensible authority and the formulation of these two types of authority by Diplock L.J. in *Freeman & Lockyer* v. *Buckhurst Park Properties (Mangal) Ltd.*[115]

VII

Canadian courts have been more concerned with the compromises or settlements than with any other aspect of the authority of lawyers. In their approach to the issues and problems they have been guided by developments in the English courts. Their attitudes and language may be said to reflect the uncertainty and confusion already noted. Like their English counterparts, Canadian judges have been concerned about balancing the need to uphold compromises entered into in circumstances in which the other side might be entitled to rely upon the lawyer's authority with the desire to avoid injustice by holding a client bound by an unfair settlement or compromise. Consequently they have held that a compromise is unenforceable if incomplete or vague, if entered into under mistake or duress, or was the result of misapprehension on the part of the client or his lawyer.[116] They have stated that a change of mind will not entitle a client to repudiate a negotiated settlement unless it is defeasi-

[115](1963-64), [1964] 1 All E.R. 630 at 644 (C.A.).

[116]*Pollock* v. *Wicks* (1926), [1927] 1 D.L.R. 205 (Sask. C.A.); *Propp* v. *Fleming* (1968), 64 W.W.R. 13 (B.C.C.A.); *Yannacopoulos* v. *Maple Leaf Milling Ltd.* (1962), 37 D.L.R. (2d) 562 (B.C.S.C.); *McKenzie* v. *McKenzie* (1975), 55 D.L.R. (3d) 373 (B.C.S.C.), aff'd on other grounds, (1976), 69 D.L.R. (3d) 765 (B.C.C.A.).

ble on one of the grounds just mentioned.[117] They have echoed the distinction between settlements not yet embodied in an order of a court and those which have been "perfected".[118] Underlying every case in which this problem has been considered, however, is the central issue of the authority of a lawyer to make settlements or compromises. It is accepted in Canada, as it would appear to be in England, that the authority of a lawyer to settle or compromise must be qualified by factors such as mistake, misapprehension and, of course, prohibition by the client when communicated to the other side. Agreement on these factors, however, does not resolve the problem of determining the juridical nature of the lawyer's authority.

Earlier cases speak of an agent's "general authority" to compromise an action and bind his client.[119] In 1966 however, in *Scherer* v. *Paletta*, Evans J.A., speaking for the Ontario Court of Appeal, referred to the "apparent authority" of a lawyer to bind his client to a particular compromise, though he also mentioned the discretionary powers of the court.[120] That apparent authority arose from the retainer which a lawyer received to act for his client and the usual activities of a lawyer. Two years later the British Columbia Court of Appeal reverted to the expression "general authority" in *Propp* v. *Fleming*, which applied *Scherer* v. *Paletta*.[121] That general authority to compromise an action could not be attacked subsequently unless the solicitor misapprehended his instructions. In that instance there was no such misapprehension. The court accordingly ordered a stay of the action except for the carrying out of the terms of the settlement. Consistently with this approach, an Alberta judge in a subsequent case held that a solicitor acting under a general retainer had the power to discontinue an action (no question of a settlement being involved).[122]

A Manitoba court was faced with the issue in *Philipp* v. *Southam* in 1981.[123] Here the plaintiff specifically instructed his solicitor not to settle. A subsequent agreement between the plaintiff's solicitor and the defendant was not enforceable as it was made without the plaintiff's authority. Therefore the plaintiff's action could not be dismissed.[124] The court noted that a solicitor acting under a general retainer, in the absence of any restriction, had charge of the conduct of the action and all things incidental thereto. This included the power to compromise, to negotiate a settlement and to do all things necessary in the action provided he did so with the honest belief that he was acting in the

[117] *Re Solicitor* (1942), [1942] O.R. 604 (C.A.); *Re Rose* (1943), [1943] O.W.N. 457 (C.A.).

[118] *Yannacopoulos* v. *Maple Leaf Milling Ltd.* (1962), 37 D.L.R. (2d) 562 (B.C.S.C.).

[119] *Re Rose, supra* note 117; *Roman Catholic Archepiscopal Corp. of Winnipeg* v. *Rosteski* (1957), 23 W.W.R. 113 (Man. Q.B.).

[120] (1966), 57 D.L.R. (2d) 532 at 535 (Ont. C.A.).

[121] (1968), 64 W.W.R. 13 (B.C.C.A.).

[122] *Kennedy* v. *Gunnar-Nesbitt Aviation Ltd.* (1973), 38 D.L.R. (3d) 288 (Alta. S.C.T.D.).

[123] (1981), 9 Man. R. (2d) 413 (Q.B.).

[124] *Ibid.* at 420 citing *Norquay* v. *Broggio* (1905), 2 W.L.R. 108 (Y.T.S.C.); *McLaws* v. *Wellband* (1912), 20 W.L.R. 657 (Man. K.B.).

best interests of his client.[125] Such a solicitor might be liable if he exceeds his instructions. But the opposing solicitor was entitled to rely on the fact that the other was the solicitor of record, and was under no obligation to enquire into the latter's authority to negotiate. Such statements do not clarify whether the solicitor's authority is implied or apparent. In neither case would the opposing solicitor be under any duty to enquire into the legitimacy of the other solicitor's negotiation of a settlement, at least in the absence of some suspicious circumstances. However it might be reasoned from the remarks as to the liability of a solicitor exceeding instructions that ostensible or apparent, rather than implied authority is meant. Since, as previously explained, implied authority is part of an agent's actual authority, an agent acting within such authority, by definition, cannot be said to exceed his authority. This would not be the case where an agent acts with apparent authority. What he does in such circumstances may bind his principal to a third party; but it leaves the agent open to an action by the principal for acting without authority, hence the criticism which has already been made of the remarks of Brightman L.J. in the English case of *Waugh* v. *H.B. Clifford & Sons Ltd.*

Apparent authority was the basis for the decision in *Landry* v. *Landry* which concerned an agreement between counsel for a husband and counsel for a wife in a divorce action.[126] The agreement bound the husband. It was not necessary, said Hart J.A., to show that counsel had full authority to make such an agreement.[127] Although it is not clear, it seems that the learned judge meant that it was unnecessary to demonstrate that counsel had express or actual authority. In other words, as was pointed out in the New Zealand case of *Thompson* v. *Howley*, the ostensible or apparent authority of a lawyer is not co-extensive with his actual authority; it may go beyond what was agreed between client and lawyer as to the powers of the latter in the conduct of litigation.[128] A much fuller discussion is found in the judgement of Hallett J. in *Pineo* v. *Pineo*, which purported to follow *Scherer* v. *Paletta*.[129] The plaintiff sued for damages for the failure of her ex-husband to comply with the terms of an agreement relating to the division of property upon separation prior to divorce. Hallett J. held that the husband's solicitor had apparent authority to negotiate a settlement; consequently the husband was bound. The learned judge purported to follow earlier Canadian and English authority in holding that: (i) there could be no enforcement of a compromise arrived at through mistake; (ii) once a court has given effect to a compromise it must stand; (iii) a compromise made by counsel against the wishes or instructions of his client will bind the client as long as it was within the scope of counsel's authority and related to matters that were connected with the action and not collateral to it. The settlement of property between these separated spouses was not collateral to the pending divorce. Since a divorce petition had been issued, the solicitor for the husband had apparent authority to deal with the question of property.

[125] Citing *Rogan* v. *Prud'homme* (1924), [1925] 1 W.W.R. 479 (Man. K.B.).

[126] (1981), 25 R.F.L. (2d) 101 (N.S.S.C.A.D.).

[127] *Ibid.* at 104.

[128] (1976), [1977] 1 N.Z.L.R. 16 (S.C.).

[129] (1981), 45 N.S.R. (2d) 576 (S.C.T.D.).

Since the settlement had been approved by the court, the husband could not withdraw in the absence of evidence of any potential grave injustice. The second line of authorities referred to by Bankes L.J. in *Shepherd* v. *Robinson* did not apply.[130]

Shepherd v. *Robinson* was a case in which the compromise was not effective. The case was returned to the list for hearing because the defendant had instructed his solicitor not to settle. As the compromise was consented to under a misapprehension, and not effectuated by the court, it was not enforceable aginst the wishes of the defendant. In the absence of such explicit instructions against settlement, the husband in *Pineo* v. *Pineo* was bound by what his solicitor had done. There was no question or suggestion of any misapprehension on the part of the solicitor. In other words, once a solicitor has been retained to act in some litigation and has been given authority to compromise the action or negotiate a settlement, that authority cannot be attacked unless the solicitor misapprehended his instructions. This proposition was expressed by Estey J. in the Saskatchewan case of *Revelstoke Companies* v. *Moose Jaw*, in which the learned judge followed *Propp* v. *Fleming* and *Scherer* v. *Paletta*.[131] A settlement or compromise will be binding on the ground that it was made by a solicitor acting with authority unless: (a) his authority was limited and the other side had notice of this prior to the signing of the minutes of settlement; or (b) the minutes of settlement were incomplete or vague; or (c) some question of the validity or enforceability of the settlement existed by reason of fraud or lack of capacity. If the settlement had been entered into by mistake on the part of the solicitor, Estey J. indicated that the principal's remedy would be against his solicitor rather than against the other party to the settlement.[132] Accordingly the defendant could not upset a settlement negotiated by his solicitor. The plaintiff was entitled to judgement in accordance with the agreement reached between the parties' solicitors. But the "authority" to which Estey J. referred is not clear. His language seems to indicate some express authority to settle. The facts of the case and the decisions on which the learned judge relied involve authority that is not express, but either implied or, as in *Pineo* v. *Pineo*, apparent.

Reliance was placed on the judgement of Bankes L.J. in *Shepherd* v. *Robinson* most recently by Nathanson J. of the Supreme Court of Nova Scotia in *Begg* v. *East Hants (Municipality) and Nova Scotia (Director of Assessment)*.[133] In this instance, however, unlike *Pineo* v. *Pineo* and, presumably, the *Revelstoke Companies* case, the circumstances fell within the second line of cases set out by Bankes L.J. — those where the compromise was entered into under a mistake or a misapprehension. The plaintiff bought land at a tax sale and received a tax deed from the municipality. The Crown asserted ownership of the land, which meant that the land had been assessed incorrectly. After a title search had been carried out by the provincial Department of

[130](1919), [1919] 1 K.B. 474 at 477 (C.A.).

[131](1983), [1984] 1 W.W.R. 52 (Sask. Q.B.).

[132]*Ibid.* at 60.

[133](1986), 74 N.S.R. (2d) 231.

Lands and Forests it was learned that the Crown had only an undivided half-interest in the land. The plaintiff then sued the municipality joining the Director of Assessment as a defendant. An appraisal of the land set its value at $13,298. The director offered to settle the action by buying the plaintiff's one-half interest for $6,649. The offer was refused. The director then offered to have the land surveyed and sub-divided at the Crown's expense, so that the plaintiff could choose which half he wanted and the Crown would then convey him its interest in that portion, in return for which the plaintiff could convey his interest in the remaining half and discontinue his action against the director. The director claimed that a settlement based on this offer was negotiated between his solicitor and the plaintiff's which was accepted by the latter on behalf of the plaintiff. The director applied for an order to give effect to the settlement. The plaintiff claimed that he had authorized his solicitor to negotiate a settlement with the Department of Lands and Forests (which was not a party to the action), not with the director, against whom he intended to maintain a claim for damages. The learned judge held that no settlement as alleged by the director had ever been reached. Consequently, it was unnecessary for the judge to consider whether, had such a settlement been reached, it would have bound the plaintiff. Nonetheless he did consider the issue, although everything said by him in this regard must be treated as *obiter dicta*.

After quoting the language of Bankes L.J. in *Shepherd* v. *Robinson* on the "two distinct lines of authority" relating to compromises, Nathanson J. held that the case before him came within the second line of cases. Any settlement that might have been negotiated between counsel would necessitate the court issuing a consent order. When the plaintiff discovered that his solicitor had agreed to a settlement, he informed the solicitor for the director of the error and withdrew his consent. In such circumstances, the court should not compel observance of an agreement arrived at by mistake. This was a case, therefore, in which the solicitor had authority to settle with X, but instead settled with Y. He exceeded or disobeyed his instructions, presumably not through malice, fraud or any intent to act improperly, but under a mistake or misapprehension as to the contents of his authority. This situation falls quite clearly within the decisions which limit the instances in which a lawyer may be able to bind his client when he lacks actual, express authority to settle or compromise. But it throws no light on the vexed question of the nature of the lawyer's authority when he has not been instructed to settle. The suggestion is made that, in view of the limitations placed by the law on the extent to which a lawyer may bind his client by a settlement he has negotiated and concluded, such as mistake, misapprehension, vagueness, fraud, incapacity and notice of want of authority given to the other side, the proper inference to draw is that the lawyer's authority to settle is derived not from any holding out by the client, which would involve apparent or ostensible authority, but from the implication by the law of some addition to the lawyer's express authority stemming from his employment as lawyer to handle litigation, a matter of implied authority.

VIII

The time has come to put together these various situations, cases and ideas in the hope of formulating some principle or set of principles governing the conduct of lawyers as agents. Were it not for the "compromise" cases, this task might be comparatively easy. In the absence of clear instructions to the contrary, a lawyer might be considered as having a certain implied authority, consisting of the power to perform a number of different acts on behalf of his client without the need for any specific consent in advance from that client, in addition to whatever express authority had been entrusted to him. Everything within that implied authority would constitute the lawyer's "general authority" to act for his client. That general authority would be wider where litigation was involved than in other circumstances. Litigation involves different tasks and therefore gives rise to a wider general authority than does the performance of non-litigious activities. The juridical nature of the lawyer's authority, however, would be the same whatever the task; only its content might differ. The "compromise" cases, with their talk of ostensible or apparent authority and their emphasis on the extension of a lawyer's authority through a holding out by the client, especially to an opposing litigant or his lawyer, present a barrier to the simple and orderly exposition of a lawyer's legal situation. They introduce a new factor or feature. This is the nebulous concept of "holding out" which is dependent on the precise interpretation of the facts of each individual case, not on general principles of law. When courts allow what a lawyer has done to bind his client instead of concentrating on what the law should legitimately include within the scope of a lawyer's authority to act for his client, they have invoked the idea of estoppel without using the language and ideology of estoppel in the course of their explanations.

The contention is that on grounds of principle as well as for pragmatic reasons, it would have been better and may still be possible for the courts to expound the position of lawyers in terms of implied authority rather than to rationalize the wide and vital powers of a lawyer on the more unsatisfactory, problematic, and less factually and legally certain ground of ostensible or apparent authority. This approach is consonant with the internal logic of the principles of agency and more practical in terms of its utility. Whether or not it is too late to do this in England is a matter of debate. In Canada it is still possible.