THE
AMERICAN LAW REGISTER

FOUNDED 1852.

UNIVERSITY OF PENNSYLVANIA

DEPARTMENT OF LAW

SUBSCRIPTION PRICE, $3.00 PER ANNUM. SINGLE COPIES, 35 CENTS.

Published Monthly for the Department of Law by DANIEL S. DOREY, at 115 South Sixth Street, Philadelphia, Pa. Address all literary communications to the EDITOR-IN-CHIEF; all business communications to the TREASURER.

SCHEME TO DEFRAUD; VIOLATION OF MAIL REGULATIONS; PLAUSIBILITY; TREASURE FINDING. *United States* v. *Fay* (District Court, E. D. Mo.), 83 Fed. 839. The accused had written to one Howard, claiming to possess preternatural powers, and had obtained $50 from Howard on the positive assurance that, with mental vision, he would penetrate into the bowels of the earth and locate certain treasure supposed to be hidden under Howard's farm. He was charged with violating Section 5480, U. S. Revised Statutes, which provides that, "If any person having devised, or intending to devise, any scheme or artifice to defraud, or be effected by either opening, or intending to open, correspondence or communication with any other person by means of the postoffice establishment, . . . shall, in and for executing such scheme or artifice, or attempting to do so, place any letter or packet in any postoffice of the United States . . . he shall upon conviction, etc."

Section 5480 involves three matters of fact: (1) That those charged devised a scheme to defraud; (2) that the postoffice establishment was to be a medium in effecting the scheme; (3) that, in carrying out the scheme, the person charged either deposited a letter or packet in the postoffice or received one therefrom: *Stokes* v. *U. S.*, 157 U. S. 187 (1894); *U. S.* v. *Smith*, 45 Fed. 561 (1891), and cases there cited. These three constituents of the offense were present in *Fay* v. *U. S.*, yet District Judge Adams sustained a motion to quash the indictment on the ground that the scheme to defraud must be in the nature of a plausible device—one in itself reasonably adapted to deceive persons of ordinary comprehension and prudence.

This is leaving out of account the subjective guilt of the accused, and allowing the judge to discharge him if his pretence be of a monstrous character. It would seem that this is not only obscuring the statute, but giving immunity as well to the most brazen swindlers like Fay—men of whose stripe have certainly succeeded for ages in imposing upon the credulous by means of just such statements as Fay made. Where the promise exceeds the bounds of reason, there is little logic in saying that forthwith the element of fraud is lost. See *U. S.* v. *Reed*, 42 Fed. 134 (1889), in which case an even more preposterous assumption of second sight was held to be within the scope of the statute. See, also, *U. S.* v. *Staples*, 45 Fed. 193 (1891), and Circuit Justice Brewer's opinion in *Weeber* v. *U. S.*, 62 Fed. 740 (1894), that it is immaterial whether the man sought to be defrauded—or any other man—would be really affected by the scheme, which in that case, as in *U. S.* v. *Fay*, was transparent.

Judge Adams said of Fay's plan: "A manifest hoax and humbug, like a proposition to take a person on a flying trip to the moon, to fit out a traveler for a submarine voyage to China, or any which belies the known and generally recognized laws of nature, cannot deceive any rational being." Without dwelling on our advances in science, which make yesterday's marvel a commonplace of to-day, it is enough to remark that, in our present state of progress, the absolute range of physical possibility is a poor test and a shifting one, likely to be misapplied even on the bench. For at least submarine navigation is not wholly impossible; it is not repugnant to the principles of physics; and were Edison or Tesla to advertise such an invention, he would be believed by thousands of shrewd, sensible people.

ATTORNEY AND CLIENT; RELEASE BY CLIENT; SUBSEQUENT CONDUCT OF ATTORNEY; DISBARMENT. *In re Boone* (U. S. Circuit Court, N. D. of California), 83 Fed. 944. Respondent, an attorney, had assisted a client in obtaining a decree establishing the validity of certain patents. After the termination of his employment, he wrote to the attorney of an adversary of his client in another suit involving the same patents, falsely stating that he

possessed information that the said decree was obtained by fraud and could be reversed. This statement was made with the purpose of casting discredit on the decree, and with the end in view of obtaining employment against his former client, and, if successful, of using the knowledge he had confidentially acquired against him. Held, by Morrow, J., that this conduct was sufficient ground for disbarment.

In the Mirror of Justices, Chap. 2, Sec. 5, it is said, "A pleader is suspendable when he is attainted to have received fees of two adversaries in one cause." The case before us shows that the disability of an attorney to render professional services against a client is not confined to the same suit. Cases may arise, and the present one is an instructive example, where, though the professional relation no longer exists, the attorney would still be equally false to the obligations of secrecy and fidelity in rendering professional services against a former client.

United States v. *Costen*, 38 Fed. 24 (1889), was a case very similar. An attorney was counsel for complainant in certain litigation. After acting as such for some time, he ceased to be thus employed, and subsequently offered his services to the other side and advised its counsel that he was in possession of facts of great importance to that side; but that he desired the fact of his employment concealed. Mr. Justice Brewer, upon this showing, granted the application for disbarment. In the present case there was a formal release from all the "duties, burdens, obligations and privileges pertaining to the relation," and permission to the attorney to engage his services "pro or con as he may see fit." But such an agreement, if it could possibly be construed as respondent wishes, would be totally void and inoperative as contrary to public policy. An attorney has never been permitted to divulge any matter communicated to him in professional confidence: *Benjamin* v. *Coventry*, 19 Wendell (N. Y.), 353 (1838); *Bank of Utica* v. *Merserau*, 3 Barbour Ch. Rep. 528 (1848). And facts communicated have been held confidential, even though the counsel declined to be engaged for the client: *Bank of Utica* v. *Merserau* (*supra*). So, likewise, where the employment has terminated, the obligation to refrain from divulging confidential communication still remains.

The general principles governing these cases are well settled. Any conduct on the part of an attorney showing his unfitness for the confidence and trust which attend the relation of attorney and client, or indicating such a lack of personal honesty, or of good moral character, as to render him unworthy of public confidence, constitute a ground for his disbarment: 3 Am. & Eng. Ency. of Law (2d Ed), p. 302, and cases there cited. By admitting an attorney, the court presents him to the public as worthy of its confidence, and it is the duty of the court, after full and satisfactory proof of his delinquency, to withdraw its endorsement: *Davies' Case*, 93 Pa. 116 (1880).

Two recent cases of disbarment have attracted considerable attention in Philadelphia. In one case, before Judge Arnold, the practice of hunting up and purchasing law suits was exposed: 55 Leg. Int. 199 (1898). In the other case an attorney, while acting as counsel for certain parties, borrowed money from his clients on the security of a forged mortgage: 55 Leg. Int. 208 (1898), Judge Biddle. Fortunately such cases as these do not often appear in the reports.

ACTION FOR PERSONAL INJURIES; COMPULSORY EXAMINATION OF PLAINTIFF. In *O'Brien* v. *City of La Crosse*, 75 N. W. (Wis.) 81 (May 3, 1898), an action was brought for a personal injury sustained by reason of a plank in an alleged defective sidewalk suddenly flying up and striking the plaintiff, causing permanent injuries. The defendant moved for an order that the plaintiff, who had already been examined by defendant's physicians, be compelled to submit to further examination, even against the advice of plaintiff's physician. This request was denied, and the defendant excepted. It was held that there was no error in the refusal, the right to examine in the absence of statute resting entirely in the discretion of the court.

There can be no doubt of the accuracy of the principle laid down. The case is exactly parallel with that of *Hess* v. *Lowrey*, 122 Ind. 225 (1889). There the defendant had failed to make a motion for the physical examination of the plaintiff until after the close of the plaintiff's evidence. The court said that while it was undoubtedly true that the court may, in its discretion, require the plaintiff to submit his person to a reasonable examination by competent physicians and surgeons, when necessary to ascertain the nature, extent and permanency of injuries, yet under the circumstances there was no error in refusing the order.

In *St. Louis S. W. Ry. Co.* v. *Dobbins*, 30 S. W. 887, (1895), the Supreme Court of Arkansas said that it was entirely within the discretion of the lower court to direct whether such an examination should or should not be made. See also *Railroad Co.* v. *Childress*, 82 Ga. 719 (1889); *Railroad Co.* v. *Brunker*, 128 Ind. 542 (1890), *Railroad Co.* v. *Hill*, 90 Ala. 71 (1889).

In a case of interest to Pennsylvania lawyers, *Petit* v. *Brewer*, 8 W. N. C. 253 (1880), the Court of Common Pleas denied the defendant's right entirely to compel the plaintiff to submit to a physical examination. The defendant had ordered of the plaintiff a set of false teeth for his wife. Plaintiff had made them and delivered them to defendant, who retained them, but refused to pay for them. The plaintiff contended that it was essential to his case to prove that the teeth fitted the mouth of the person for whom they were made. He therefore moved for an order of court to compel the wife's appearance. In refusing the motion the court said that such an order would be a tyrannical exercise of power, wholly without authority of law and contrary to the Bill of Rights of Pennsylvania.