in reply to the question of the lessee, that the sewer connected with the premises was in a good condition if he did not know the assertion to be false, he would not be liable to repair the drainage, though the sewer was entirely out of order. This, however, is not law in Pennsylvania: See Wolfe *v.* Arrott, 109 Pa. 473.

W. D. L.

DEPARTMENT OF PRACTICE AND PLEADING.

DALTON *v.* WEST END STREET RAILWAY CO.[1] SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Compromise of Suit by Attorney.

A compromise of a pending suit by an attorney, in violation of express instructions from his client, will not bind the latter; and when the parties can be placed in *statu quo*, and application is seasonably made, the Court has power to vacate any judgment founded on such compromise, and to order it and the compromise stricken from the files.

POWER OF ATTORNEY TO BIND CLIENT BY COMPROMISE OR SETTLEMENT.

By the very fact of his employment, an attorney-at-law acquires complete control of the action, in so far as the management and direction thereof, and the remedy sought, are concerned; and he has an implied authority to do any acts, or take any steps, which merely relate to the conduct of the suit, or the remedy; but he cannot take any measures, or enter into any agreement, which tends to affect the *right of action*, without some express additional authority from the client. Davis *v.* Hall, 90 Mo. 659; S. C., 3 S. W. Rep. 382. By virtue of this implied authority, he may waive the client's right of trial by jury by an agreement to refer the case to arbitrators: Thomas *v.* Hews, 2 C. & M. 327; Buckland *v.* Conway, 16 Mass. 396; Jenkins *v.* Gillespie, 10 Sm. & M. (Miss.) 31; Holker *v.* Parker, 7 Cranch, 436; Morris *v.* Grier, 76 N. C. 410; Bingham *v.* Guthrie, 7 Harris (Pa.), 418; Sargeant *v.* Clark, 108 Pa. 588. May withdraw a juror: Swinfen *v.* Ld. Chelmsford, 5 H. & N. 890; Strauss *v.* Francis, 1 L. R. Q. B. 379.

[1] Reported in 34 N. E. Rep. 261.

May restore an action after *non pros:* Reinhold *v.* Alberti, 1 Binn. 469. And, when several suits are brought by the same plaintiff against different defendants, the grounds of defence being the same in each case, the attorneys for the several parties may bind their clients by an agreement that all the cases should abide the final decision in one case: R. R. *v.* Stephens, 36 Mo. 150. It has also been held that the attorney may, without special authority, dismiss or discontinue the suit: Davis *v.* Hall, 90 Mo. 659; S. C., 3 S. W. Rep. 382; Gaillord *v.* Smart, 6 Cow. 385; Simpson *v.* Brown, 1 Wash. Ty. 247, but this is controverted in Filby *v.* Miller, 25 Pa. 264. And if allowable at all, can only be permitted when it is without prejudice, for an attorney has no power to release or abandon his client's claim to the defendant: Smith *v.* Dixon, 3 Metc. (Ky.) 438; Gilliland *v.* Gasque, 6 S. C. 406; Hickey *v.* Stringer, 21 S. W. Rep. 716.

On the other hand, an attorney cannot surrender any substantial right of his client, without the consent of the latter: Dickerson *v.* Hodges (N. J.), 10 Atl. Rep. 111. And it has even been held in that State that this applies to matters that relate to the conduct of the suit: Howe *v.* Lawrence, 22 N. J. L. 99; though, in view of the general rule as to such matters, it is difficult to understand how this can be true, unless there is proof of fraud or collusion on the part of the attorney.

Accordingly, without special authority, an attorney cannot waive his client's right to redeem the property in the action, or any steps necessary thereto: Graves *v.* Long, 87 Ky. 441; S. C., 9 S. W. Rep. 297. Cannot agree that the dismissal of a suit shall operate as a bar to the maintenance of an action thereon for malicious prosecution: Marbourg *v.* Smith, 11 Kan. 554. Cannot bind a landlord who has brought suit to evict a tenant, by an agreement that if the tenant will submit to a default, execution shall not be issued for a week, or if issued, shall not be served within that time: Weiland *v.* White, 109 Mass. 392, nor make a valid agreement to extend the time of the payment of a judgment, or suspend proceedings thereon: Beatty *v.* Hamilton (Pa.), 17 Atl. Rep. 755; Lockhart *v.* Wyatt, 10 Ala. 231; Pendexter *v.* Vernon, 9 Humph. (Tenn.) 84. He cannot release the sureties upon a note or claim: Stoll *v.* Sheldon, 13 Neb. 207; Givens *v.* Briscoe, 3 J. J. Marsh (Ky.), 529; Sav. Inst. *v.* Chinn, 7 Bush. (Ky.) 539. Nor give an extension of time to the principal obligor on a note, especially when, if the act were valid, its immediate legal consequence would be the release of the sureties: Roberts *v.* Smith, 3 La. Ann. 205. Whether or not he has implied power to release property from the lien of an attachment is in some doubt. It seems to be the prevailing opinion that when the attachment is only an incident of the form of action, he may release it before judgment: Monson *v.* Hawley, 30 Conn. 51; Moulton *v.* Bowker, 115 Mass. 36; Levy *v.* Brown, 56 Miss. 83. But he certainly cannot release the lien of a judgment without express authority: Dollar Sav. Bk. *v.* Robb, 4 Brews. (Pa.) 106; Doub *v.* Barnes, 1 Md. Ch. 127; Phillips *v.* Dobbins, 56 Ga. 617. Even though he honestly believe that it will be for

the client's benefit: Wilson *v.* Jennings, 3 Ohio St. 528. So, too, without authority, he cannot assign or sell the client's claim: Russell *v.* Drummond, 6 Ind. 216; White *v.* Hildreth, 13 N. H. 104; Child *v.* Eureka Powder Works, 44 N. H. 354; Cord *v.* Walbridge, 18 Ohio 411; Rowland *v.* State, 58 Pa. 196; Penniman *v.* Patchin, 5 Vt. 346. Or judgment: Head *v.* Gervais, Walk. (Miss.) 431; Rice *v.* Troup, 62 Miss. 186; Campbell's App., 29 Pa. 401; Fassitt *v.* Middleton, 47 Pa. 214; Mayer *v.* Blease, 4 S. C. 10. Not even to one of several judgment debtors who has paid the full amount of the judgment, and desires to secure contribution from the others: Maxwell *v.* Owen, 7 Coldw. (Tenn.) 630.

When the defendant has been arrested on *ca. sa.*, after judgment, the plaintiff's attorney has no authority to release him, without receiving actual payment of the debt: Jackson *v.* Bartlett, 8 Johns. (N. Y.) 361; Kellogg *v.* Gilbert, 10 Johns. (N. Y.) 220; Simonton *v.* Barrell, 21 Wend. 362; Carter *v.* Talcott, 10 Vt. 471. Nor can he compromise a criminal prosecution on receiving part payment of funds misappropriated: Harper *v.* Nat'l Ins. Co., 56 Fed. Rep. 281.

In Chancery, counsel have power to bind their clients by consent decrees, without special authority, provided there be no fraud or imposition: Holmes *v.* Rogers, 13 Cal. 191; Williams *v.* Simmons, 79 Ga. 649; Jones *v.* Williamson, 5 Coldw. (Tenn.) 371, but it is very doubtful whether they possess the power in similar circumstances to confess judgment in a court of law. In Indiana, New York and Texas, it has been held that they have that power, and that the client, if injured, must look to the attorney for redress: Thompson *v.* Pershing, 86 Ind. 303; Denton *v.* Noyes, 6 Johns. (N. Y.) 296; Williams *v.* Nolan, 58 Tex. 708. But the weight of authority is opposed to that view: Preston *v.* Hill, 50 Cal. 43; Pfister *v.* Wade, 69 Cal. 133; Peo. *v.* Lamborn, 2 Ill. 123; Wadhams *v.* Gay, 73 Ill. 415; Edwards *v.* Edwards, 29 La. An. 597; Ohlquest *v.* Farwell, 71 Iowa, 231. In an early case in Iowa, Potter *v.* Parsons, 14 Iowa, 286, it was held, that the attorney for the defendant may make a valid agreement for judgment against his client, if coupled with a stay of execution; but this would seem to be overruled in Ohlquest *v.* Farwell, *supra.*

As the compromise or settlement of a suit strikes directly at the root of the cause of action, it would seem on principle that an attorney has no implied authority to make it except upon payment of the full amount due; but the English decisions on this subject are far from being unanimous. In Fray *v.* Voules, 1 El. & El. 839, the authority was denied, and it was held that an attorney could not make even a compromise that was reasonable, *bona fide*, and for the client's benefit, and that if he did so, he would be liable to an action for damages, though the actual damage was but nominal. In Swinfen *v.* Swinfen, 24 Beav. 549, Romilly, M. R., ruled to the same effect; but on a previous motion in the same case in the Common Pleas, 18 C. B. 485, the court declared that they would not inquire into the authority of counsel to compromise, when done in the exercise of a sound discretion, and, in his opinion, for the best interests of his clients, on the ground that "it would be most fatal to the due

administration of justice, if we were to allow the authority of counsel to be thus questioned." *Sed quære?*

In Swinfen *v.* Ld. Chelmsford, 5 H. & N. 890, an action by the client against the counsel, growing out of the compromise in Swinfen *v.* Swinfen, *supra*, the more reasonable rule was adopted by the Exchequer that counsel may not bind their clients by any agreement collateral to the suit, and that, therefore, the compromise under consideration, which was that the plaintiff should give up her claim to the estate in question and receive an annuity instead, was not valid. But this ruling seems to admit that a *bona fide* compromise strictly germane to the subject-matter of the suit, as the acceptance of a less sum than that claimed to be due on a contract, or as damages for an injury, will be binding on the client, in the absence of fraud or imposition. Such has been the doctrine of many of the cases; Chown *v.* Parrott, 14 C. B. (N. S.) 74; Prestwich *v.* Poley, 18 C. B. (N. S.) 806; Thomas *v.* Harris, 27 L. J. Exch. (N. S.) 353; Re Wood, *Exp.* Wenham, 21 W. R. 104; Butler *v.* Knight, 2 L. R. Exch. 109. But some have gone even a step farther than this, and it seems to be now the settled rule in the English courts that an attorney, without special authority, has the implied power to bind his client by a *bona fide* compromise, even though made in violation of the client's express directions not to compromise, provided the other party also acts in good faith, and without knowledge of the prohibition: Brady *v.* Curran, 2 Ir. R. C. L. 314; Berry *v.* Mullen, 5 Ir. R. Eq. 368; Strauss *v.* Francis, 1 L. R. Q. B. 379.

In Wharton on Agency, §§ 590-2, and Story on Agency, 9th Ed., § 24 (note by Greenough), it is stated that the general rule in America is the same as that in England; but in this instance these usually accurate writers have fallen into error. There are a few cases which declare that a reasonable *bona fide* compromise, made without special authority, will not be disturbed; but those very cases admit that the attorney, merely as such, has, in strict adherence to legal principles, no right to make it: Holker *v.* Parker, 7 Cranch, 436; Whipple *v.* Whitman, 13 R. I. 512; S. C., 43 Am. Rep. 42; Roller *v.* Wooldridge, 46 Tex. 485.

The true American rule, as is shown by the vast preponderance of authority, is, that, without express instructions, an attorney has no power, merely from his employment as such, to bind his client by any compromise or settlement for any amount less than the whole sum due or claimed, or to release any substantial right of his client, whether the action be pending, or have proceeded to judgment. He can do no act which destroys the cause of action without receiving payment: Robinson *v.* Murphy, 69 Ala. 543; Pickett *v.* Bk. 32 Ark. 346; Ambrose *v.* McDonald, 53 Cal. 28; Trope *v.* Kerns, 83 Cal. 553; S. C., 23 Pac. Rep. 691; Derwort *v.* Loomer, 21 Conn. 245; Wadhams *v.* Gay, 73 Ill. 415; Miller *v.* Lane, 13 Ill. App. 648; Wakeman *v.* Jones, 1 Ind. 517; Miller *v.* Edmonston, 8 Blackf. (Ind.) 291; Repp *v.* Wiles (Ind.), 29 N. E. Rep. 441; Stuck *v.* Reese, 15 Iowa, 122; Martin *v.* Capital Ins. Co. (Iowa), 52 N. W. Rep. 534; Smith *v.* Dixon, 3 Metc. (Ky.) 438; Lewis *v.* Gamage, 1 Pick. (Mass.) 347; N. Y., N. H. & H. R.

R. *v.* Martin (Mass.), 33 N. E. Rep. 578; Eaton *v.* Knowles, 61 Mich. 625; Fitch *v.* Scott, 3 How. (Miss.) 314; Levy *v.* Brown, 56 Miss. 83; Davidson *v.* Rozier, 23 Mo. 387; Walden *v.* Bolton, 55 Mo. 405; Spears *v.* Ledergerber, 56 Mo. 465; Semple *v.* Atkinson, 64 Mo. 504; Roberts *v.* Nelson, 22 Mo. App. 28; Moye *v.* Cogdell, 69 N. C. 93; Watts *v.* French, 19 N. J. Eq. 407; Hamrick *v.* Combs, 14 Neb. 381; Shaw *v.* Kidder, 2 How. Pr. (N. Y.) 243; Mandeville *v.* Reynolds, 5 Hun. (N. Y.) 338; S. C. Aff., 68 N. Y. 528; Beers *v.* Hendrickson, 45 N. Y. 665; De Mets *v.* Dagron, 53 N. Y. 635; Barrett *v.* Third Av. R. R. Co., 45 N. Y. 628; Chambers *v.* Miller, 7 Watts. (Pa.) 63; Filby *v.* Miller, 25 Pa. 264; Stokely *v.* Robinson, 34 Pa. 315; Housenick *v.* Miller, 93 Pa. 514; Mackey *v.* Adair, 99 Pa. 143; Twp. of North Whitehall *v.* Keller, 100 Pa. 105; Isaacs *v.* Zugsmith, 103 Pa. 77; Brockley *v.* Brockley, 122 Pa. 1; Smith *v.* Bossard, 2 McCord, Ch. 406; Bradford *v.* Arnold, 33 Tex. 412; Adams *v.* Roller, 35 Tex. 711; Smith *v.* Lambert, 7 Gratt. (Va.) 142; Vail *v.* Jackson, 15 Vt. 314; Granger *v.* Batchelder, 54 Vt. 248; Crotty *v.* Eagle, 35 W. Va. 143; Kelly *v.* Wright, 65 Wis. 236; Holker *v.* Parker, 7 Cranch, 436; Pierce *v.* Brown, 8 Biss. C. Ct. 534. "The attorney has no right to commute the debt of his client, to release the person of his debtor when in prison by virtue of a *ca. sa.*, or to enter a *retraxit* in a suit, to execute a release, or to do any other act which destroys the cause of action without receiving payment:" Smith *v.* Lambert, *supra*. *A fortiori*, does this rule hold good when the client has given positive instructions not to compromise; Dalton *v.* R. R. (the principal case) (Mass.), 34 N. E. Rep. 261, or when there is a marked discrepancy between the amount due or claimed and the amount for which the compromise is made, as in Hamrick *v.* Combs, 14 Neb. 381, where the compromise was for about one-third the face value of a good judgment. "When the sacrifice is such as to leave it scarcely possible that, with a full knowledge of every circumstance, such a compromise could be fairly made, there can be no hesitation in saying that the compromise, being unauthorized, and being therefore in itself void, ought not to bind the injured party. Though it may assume the form of an award or of a judgment at law, the injured party, if his own conduct has been perfectly blameless, ought to be relieved against it. This opinion is the more reasonable because it is scarcely possible that, in such a case, the opposite party can be ignorant of the unfair advantage he is gaining. His conduct can seldom fail to be tainted with some disingenuous practice; or, if it is not, he knows that he is accepting a surrender of the rights of another from a man who is not authorized to make it:" C. J. MARSHALL, in Holker *v.* Parker, 7 Cranch, 436.

This rule practically amounts to no more than a reaffirmation of the acknowledged principle that he who deals with a special agent must look to the extent of his authority. The debtor in such a case is put on inquiry as to the authority of the attorney and settles with him at his own peril: Miller *v.* Lane, 13 Ill. App. 648. And it makes no difference what form the transaction may take,

whether it be entitled by the parties in award or a judgment, or be honestly styled a compromise, it will still be subject to avoidance by the courts: Holker *v.* Parker, *supra;* Stokely *v.* Robinson, 34 Pa. 315. Even if the client lives in another State, express authority must be obtained before the compromise will be valid: Granger *v.* Batchelder, 54 Vt. 248; S. C., 41 Am. Rep. 846.

An attorney retained to secure possession of real estate by legal proceedings, cannot bind his client by an agreement to pay the party in possession a sum of money in consideration of the surrender of the premises: Stuck *v.* Reese, 15 Iowa, 122. And when there are several plaintiffs, those only who assent to the compromise will be bound, and the attorney must account to those who do not assent for the full amount of the claim: Repp *v.* Wiles (Ind.), 29 N. E. Rep. 441.

This rule is not iron-clad, however, and it may be abrogated by equitable considerations. As we have seen, the courts will be slow to disturb a reasonable compromise made by the attorney in a *bona fide* belief that he is acting for the best interests of his client: Holker *v.* Parker, *supra*; Whipple *v.* Whitman, 13 R. I. 512; S. C., 43 Am. Rep. 42; Roller *v.* Wooldridge, 46 Tex. 485; Bonney *v.* Morrill, 57 Me. 368; Black *v.* Rogers, 75 Mo. 441; Peo. *v.* Quick, 92 Ill. 580; Re Heath's Will (Iowa), 48 N. W. Rep. 1037. Such a compromise will also be held valid, where there is no time or opportunity for consultation with the client, and his interests may be seriously imperilled by delay: Union Mut. Life Ins. Co. *v.* Buchanan, 100 Ind. 63; Brockley *v.* Brockley, 122 Pa. 1. So, when the plaintiff is only a titular party, and a fair and judicious compromise is made with the knowledge and assent of the real party in interest, it will be upheld: Whipple *v.* Whitman, *supra.*

As the attorney cannot, without express authority, compromise for less than the amount due or claimed, neither can he, unless specially authorized, receive anything but money in payment of a debt or satisfaction of a judgment: Gullett *v.* Lewis, 3 Stew. (Ala.) 23; McCarver *v.* Nealey, 1 G. Greene (Iowa), 360; Graydon *v.* Patterson, 13 Iowa, 256; Drain *v.* Doggett, 41 Iowa, 682; Bigler *v.* Toy, 68 Iowa, 687; Perkins *v.* Grout, 2 La. An. 328; Phelps *v.* Preston, 9 La. An. 488; Keller *v.* Scott, 10 Miss. 81; Baldwin *v.* Merrill, 8 Humph. (Tenn.) 132; Anderson *v.* Boyd, 64 Tex. 108. And this money must be legal currency of the United States: Bailey *v.* Bagley, 19 La. An. 172; Lord *v.* Burbank, 18 Me. 178. But a payment made in Virginia, in 1862, in confederate currency, then the only currency, was held good, as the client had not expressly forbidden it: Pidgeon *v.* Williams, 21 Gratt. (Va.) 251. Similar payments, however, made in Louisiana and West Virginia, during the war, were held not valid: Davis *v.* Lee, 20 La. An. 248; Harper *v.* Harvey, 42 W. Va. 539. But when the creditor, on being informed of the payment, did not notify the attorney of his objections to receiving such money, he was held concluded by his silence: Johnson *v.* Gibbons, 27 Gratt. (Va.) 632.

The attorney cannot take in payment, or as collateral security, with-

out special authority, notes of third persons: Cook *v.* Bloodgood, 7 Ala. 683; Jeter *v.* Haviland, 24 Ga. 252; Jones *v.* Ransom, 3 Ind. 327; Garvin *v.* Lowry, 15 Miss. 24; Langdon *v.* Potter, 13 Mass. 318; Kent *v.* Chapman, 18 W. Va. 485. Or of himself: Cook *v.* Bloodgood, *supra;* Vanderline *v.* Smith, 18 Mo. App. 55. Bonds: Smock *v.* Dade, 5 Rand (Va.) 639; Wilkinson *v.* Holloway, 7 Leigh. (Va.) 277; Kent *v.* Ricards, 3 Md. Ch. 392; Kent *v.* Chapman, 18 W. Va. 485. Drafts: Portis *v.* Ennis, 27 Tex. 574. Depreciated money or bank paper: Chapman *v.* Cowles, 41 Ala. 103; West *v.* Ball, 12 Ala. 340; Trumbull *v.* Nicholson, 27 Ill. 149. County warrants: Herrman *v.* Shomon, 24 Kan. 387. An assignment of a judgment: Clark *v.* Kingsland, 9 Miss. 248. Or a debt secured by mortgage: Walker *v.* Scott. 13 Ala. 644. Nor can he take other property, real or personal, as land: Huston *v.* Mitchell, 14 S. & R. (Pa.) 307; Stackhouse *v.* O'Hara, 14 Pa. 88. Wood: Pitkin *v.* Harris, 69 Mich. 133. Houses, merchandise, &c.: Comrs. *v.* Rose, 1 Desau. (S. C.) 461. *A fortiori* he cannot take in payment or satisfaction a debt due by himself, to another, or permit the debtor in the action to set such a debt off against the plaintiff's claim on settlement: Gullett *v.* Lewis, 3 Stew. (Ala.) 23; Cost *v.* Genette, 1 Port. (Ala.) 212; Craig *v.* Ely, 5 Stew. & P. (Ala.) 354; Keller *v.* Scott, 10 Miss. 81; Vanderline *v.* Smith, 18 Mo. App. 55; Hamrick *v.* Combs, 14 Neb. 381; Wilkinson *v.* Holloway, 7 Leigh, (Va.) 277; Wiley *v.* Mahood, 10 W. Va. 206. But cases can be readily imagined in which the note of a third person of responsibility would be far better than the security of even a judgment against the debtor; and in these it is hardly likely that the courts would enforce the technical rule, even if the client were foolish enough to object: See Livingston *v.* Radcliff, 6 Barb. (N. Y.) 201; Dolan *v.* Van Demark, 35 Kan. 305.

Though he cannot take part of the debt or claim in satisfaction of the whole, an attorney may, nevertheless, receive partial payments: Hall Safe & Lock Co. *v.* Harwell, 88 Ala. 441; Pickett *v.* Bates, 3 La. An. 627. And when a note is collected part in money, and a security is given for the balance, the money payment is good *pro tanto:* Davis *v.* Severance (Minn.), 52 N. W. Rep. 140.

But, as in all other cases of unauthorized action by agents, these acts of the attorney may be ratified by the client, by conduct as well as by words: Peo. *v.* Lamborn, 1 Scam. 123; Nolan *v.* Jackson, 16 Ill. 272; Jennings *v.* McConnel, 17 Ill. 148; Trumbull *v.* Nicholson, 27 Ill. 149; Melvin *v.* Ins. Co., 80 Ill. 446; Wetherbee *v.* Fitch, 117 Ill. 67; Moye *v.* Cogdell, 69 N. C. 93; Terhune *v.* Colton, 10 N. J. Eq. 21.

A compromise is good, if made in the presence of the client, and he does not dissent: Chambers *v.* Mason, 5 C. B. (N. S.) 59. If he acquiesces in it, after being fully informed of the transaction, by remaining silent, or by receiving the fruits of it: Abbe *v.* Rood, 6 McLean (U. S.) 106; Mayer *v.* Foulkrod, 4 Wash. C. C. 503; Maddux *v.* Bevan, 39 Md. 485; Semple *v.* Atkinson, 64 Mo. 504. Or by neglecting to dissent from or repudiate the compromise within a reasonable time: Swinfen *v.* Swinfen, 24 Beav. 549; Black *v.* Rogers, 75 Mo. 441; Benedict *v.* Smith, 10