1947 *Present :* **Keuneman A.C.J. and Jayetileke J.**

ARUNACHALAM, Appellant, *and* MUTTUTAMBY *et al.*, Respondents.

S. C. 126—D. C. Jaffna, 724.

Compromise—Authority of Counsel—Absence of client—Matters within the action—Express consent—Restitutio in integrum.

Unless he has the express consent of his client the authority of an advocate to enter into a compromise is confined to matters which are raised within the action.

APPEAL from a judgment of the District Judge of Jaffna.

H. V. Perera, K.C. (with him *H. W. Thambiah, H. W. Jayewardene* and *Sharvanandan*), for tenth defendant, appellant.

N. E. Weerasooria, K.C. (with him *P. Navaratnarajah*), for plaintiffs, respondents.

Cur. adv. vult.

July 25, 1947. JAYETILEKE J.—

There are two matters before us :—(1) an application for *restitutio in integrum* dated March 21, 1945, in respect of a consent decree entered by the District Judge on September 30, 1944, (2) an appeal against an

order made by the District Judge on September 26, 1945, dismissing an application by the tenth defendant to have the said consent decree set aside. The question that arises for our decision in both matters is indentical, and we think we should deal with the application for *restitutio in integrum* as it is earlier in date. The facts which gave rise to this application shortly stated are these :—

The plaintiffs alleged in their plaint that, at a meeting of the congregation held on September 25, 1937, they and the first, second, third, fourth, fifth, sixth, and seventh defendants were appointed trustees of the Kirupahara Sri Subramaniaswamy Kovil, and that the eighth, ninth, tenth, eleventh, and twelfth defendants, claiming to be trustees of the said temple, were in wrongful possession of the temple and its temporalities. They prayed that they and the first, second, third, fourth, fifth, sixth, and seventh defendants may be declared the lawful trustees of the temple, and that the eighth, ninth, tenth, eleventh and twelfth defendants may be ejected from the temple and its temporalities. The first, second, third, fourth, fifth, seventh, eighth, ninth, tenth, and twelfth defendants filed an answer in which they denied that a meeting of the congregation was held on September 25, 1937, to appoint trustees. They alleged that they were hereditary trustees of the temple and that at a meeting of the congregation held on January 20, 1943, they and the second, fifth, and ninth plaintiffs, all the defendants and one Arumugam Muthuthamby were appointed trustees of the temple. They prayed for a dismissal of the plaintiff's action. The action came up for trial on August 30, 1944. On that day some of the plaintiffs and some of the defendants including the tenth defendant were not present in Court. Messrs. Kulasingham, Sambandan and Subramaniam instructed by Mr. Navaratnarajah appeared for the plaintiffs and Messrs. Ponnambalam and Shanmukam instructed by Mr. Somasunderam appeared for the defendants who had filed answer. While issues were being framed Counsel appearing on both sides informed the District Judge that the case was settled. Thereupon, the District Judge recorded the following terms of settlement :—

1. The temple in question is declared a public charitable trust.

2. That a scheme be settled by this Court for the management of this temple and its temporalities including the election of trustees, the qualification of voters, the qualification of trustees and the holding of meetings, &c.

3. The proceedings of the meetings of worshippers held on January 1, 1943, and January 20, 1943, are both held to be null and void and all business transacted by those two meetings is held to be illegal and of no force.

4. In view of the settlement arrived at now, the plaintiffs withdrew D. C. 520 Jaffna without costs.

5. After the scheme of management has been adopted by Court and after the trustees are duly appointed as per scheme that will be adopted by Court, the Court will enter a vesting order according to law.

6. No costs.

Thereafter, the District Judge made the following entry in the record :—

"Mr. Advocate Ponnambalam agrees to the above settlement on behalf of the defendants for whom he appears and who are absent today. Mr. Kulasingham consents to the above settlement on behalf of the plaintiffs who are absent today."

On November 7, 1944, the tenth defendant filed an affidavit and moved to have the decree entered in the case set aside on the ground that his lawyers had no authority from him to consent to the case being settled on the above-mentioned terms. The District Judge dismissed the application on the ground that Mr. Ponnambalam had the implied authority of the tenth defendant to consent to a reasonable settlement. While the inquiry into his application was pending in the District Court the tenth defendant made an application to this Court to have the consent decree set aside by way of *restitutio in integrum*. In addition to his own affidavit in which he alleged that he and his Proctor were not present at the trial, he filed an affidavit from Mr. Ponnambalam in which the latter has stated the circumstances under which he made the compromise. He says that, as the tenth defendant was not present in Court, he applied to the District Judge for an adjournment to enable him to consult the tenth defendant, but the District Judge refused his application, and he, thereupon, made the compromise on his own responsibility. On the materials before us, there can be no doubt that Mr. Ponnambalam made the compromise on his own responsibility in the absence of his client and of his Proctor. There is ample authority that this Court has the power to give relief by way of *restitutio in integrum* in a case where a compromise has been made by a person who had no authority to make it. Where Counsel is employed to conduct a case the ordinary rule is that he has implied authority, subject to any express instructions to the contrary, to compromise or abandon the claims of his client in respect of all matters within the scope of the suit or matter but not in respect of anything beyond the scope thereof—(*Bowstead on Agency—9th edition, page* 75).

In *Strauss v. Francis*,[1] Blackburn J. said :—

"Mr. Kenealy has ventured to suggest that the retainer of Counsel in a cause simply implies the exercise of his power of argument and eloquence. But Counsel have far higher attributes, namely, the exercise of judgment and discretion on emergencies arising in the conduct of a cause, and a client is guided in his selection of Counsel by his reputation for honour, skill, and discretion. Few Counsel, I hope, would accept a brief on the unworthy terms that he is simply to be the mouthpiece of his client. Counsel, therefore, being ordinarily retained to conduct a cause without any limitation, the apparent authority with which he is clothed when he appears to conduct the cause is to do everything which, in the exercise of his discretion, he may think best for the interests of his client in the conduct of the cause;

[1] *L. R. 1 Q. B. 379 at p. 381.*

and if within the limits of this apparent authority he enters into an agreement with the opposite Counsel as to the cause, on every principle this agreement should be held binding."

In *Swinfen v. Lord Chelmsford*[1] Pollock C.B. said :—

"We are of opinion that, although Counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it, such as withdrawing the record, withdrawing a juror, or calling a witness, or selecting such as in his discretion he thinks ought to be called, and other matters which properly belong to the suit, and the management and conduct of the trial, he has not, by virtue of his retainer in the suit, any power over matters that are collateral to it. For instance, we think, in an action for a nuisance between the adjoining lands, however desirable it may be that litigation should cease, by one of the parties purchasing the property of the other, the Counsel have no authority to agree to such a sale, so as to bind the parties to the suit without their consent, and certainly not contrary to their instructions and we think such an agreement would be void."

In the case before us, express authority has been given by the tenth defendant in his proxy to his Proctor to make a compromise. It reads :—

"and generally and otherwise to take all such lawful ways and means and to do and perform all such acts, matters and things as may be useful and necessary in and about the premises as our said Proctor or his or their substitute or substitutes may consider necessary towards procuring or carrying into execution any judgment, or order, or a definitive sentence, or final decree to be made and interposed herein ; and from any judgment order or decree interlocutory or final of the said Court, to appeal and every bond or recognizance whatsoever necessary or needful in the course of proceedings, for the prosecution of such appeal, or for appearance or for the performance of any order or judgment of the Said Court, for and in our name and as our act and deed, to sign and deliver and to appoint, if necessary one or more substitute or substitutes Advocate or Advocates both in the District Court and in the Supreme Court and again at pleasure to revoke such appointment anew ; and also if the said Proctor shall see cause the said action or suit to discontinue, compromise, settle or refer to arbitration ; and every such compromise, settlement, or reference in our name and our behalf to settle and sign, I hereby promising to release all kinds of irregularities and to ratify, allow, confirm, all and whatsoever the said Proctor or Proctors or his or their substitute or substitutes or the said Advocate or Advocates shall do herein."

The question that arises for our decision is whether the compromise that was made on August 30, 1944, by Mr. Ponnambalam is within the legitimate scope of his authority. What is within the authority of Counsel is thus stated by Lord Halsbury in Volume 2 of the Laws of England at page 398 :—

"The authority of Counsel at the trial of an action extends, unless it is not expressly limited, to the action and all matters incidental to it and to the conduct of the trial, such as withdrawing the record or a

[1] *29 L. J. Exch. 382 at p. 397.*

juror, calling or not calling witnesses, consenting to a reference or a stet process or a verdict, undertaking not to appeal or on the hearing of a motion for a new trial consenting to the reduction of damages."

In *Mathews v. Munster*[1] the headnote is as follows:—

"On the trial of an action for malicious prosecution the defendant's Counsel, in the absence of the defendant and without his express authority, assented to a verdict for the plaintiff for £350 with costs upon the understanding that all imputations against the plaintiff were withdrawn. Held that this settlement was a matter within the apparent authority of Counsel and was binding on the defendant."

It appears to me to be clear from the authorities that Counsel's authority to compromise is confined to matters which are raised within the action. In *Kempshall v. Holland*[2] which was an action for breach of promise of marriage it was held that, although the plaintiff's Counsel may settle with the defendant's Counsel that money be paid by the defendant to the plaintiff and that judgment be entered for the defendant, he cannot, without the express consent of the plaintiff, settle that the defendant's letters shall be given up and that the plaintiff shall no longer molest him.

In *Ellender v. Wood*[3] the plaintiff sued the defendant for breach of promise of marriage coupled with seduction. Prior to the institution of the action, the defendant had, by a deed, entered into an agreement to pay the plaintiff an allowance of £2/10 a week during her life in consideration of her agreeing not to molest or in any way annoy him. At the trial, a settlement of the action and all claims against the defendant was arranged by plaintiff's Counsel, in the absence of the plaintiff and without her consent, on the terms of the defendant paying to the plaintiff £100 and costs. The plaintiff disputed the validity of the compromise on the ground that her Counsel's authority did not extend to the release of her claims against the defendant on the deed. It was held that, though the agreement had been set up by the defendant in a counter claim, the plaintiff's claims under the deed were not distinctly raised in the action and, therefore, her Counsel had no authority to consent to a release of those claims.

The present action is essentially one for ejectment of the defendants from the temple and its temporalities. The questions that arose for the decision of the Court were (1) whether the plaintiffs were the trustees of the temple, (2) whether the defendants were in wrongful possession. Mr. Perera urged that the matters dealt with in clauses 1, 3, and 5 of the terms of settlement were not raised in the action and that they did not come properly within the authority of Counsel to compromise. I think there is considerable substance in his contention and I agree with it. Though some of the terms of the settlement are binding on the parties, I think it is desirable that the whole of the settlement should be set aside and the parties placed in *statu quo ante*. I would, accordingly, set aside the decree entered in the case and send the case back for trial in due

[1] *(1887) L. R. 20 Q. B. D. 141.*
[2] *14 R. 336 C. A.*
[3] *4 T. L. R. 680.*

course. The tenth defendant will be entitled to the costs of this application. I make no order as to the costs of this appeal. The costs of the abortive trial and of the inquiry will be in the discretion of the trial Judge.

KEUNEMAN A.C.J.—I agree.

Sent back for trial.