Suit No. 204 *of* 1869.

1870.
July 4.

JAGANNA'THDA'S GURU'BAKSHDA'S .....*Plaintiff.*

RA'MDA'S GURU'BAKSHDA'S *et al.* .....*Defendants.*

Compromise—Attorney's Power to compromise Suit without consent of Client—Consent Decree.

A decree (embodying the terms of a compromise), made in open court upon the consent of counsel duly instructed, is binding as between the parties to the suit, although the attorney of the defendant has no authority from his client to consent to such decree, or even though he is expressly directed not to compromise, provided such want of authority is not known to the other side.

Semble that such decree is binding as between the attorney and his client, provided it embodies a reasonable and proper compromise, and is not made against the express directions of the client.

THIS suit was brought by the plaintiff to recover from the defendants (who were five in number) possession of a certain *gurúdvár* (wherein the rites of the Hindú sect called Kabírpanthi were practised,) and the moveable and immoveable property appertaining thereto. The *gurúdvár* was situated at Mazagon, in the island of Bombay.

The plaintiff claimed to recover the premises under the will of Gurúbakshdás Govardhandás, *mahant* of the *gurúdvár*, in which he appointed the plaintiff as his successor in the mahantship of the *gurúdvár*. The plaintiff alleged that, after the death of the testator, he, the plaintiff, proceeded to Kamarda, to have his appointment confirmed, as was usual in such cases, by the Achárya or High Priest of the sect, and that during his absence the defendants possessed themselves of the premises, which they refused to vacate.

The defendants denied the execution of the alleged will, and claimed to be in lawful possession of the premises.

Before the institution of the present suit, the defendants Gopáldás Gurúbakshdás and Mándás Gurúbakshdás had applied for letters of administration to the estate of Gurúbakshdás Govardhandás on the Ecclesiastical Side of the Court. The plaintiff entered a caveat. The caveat was allowed, with costs against the said defendants.

1870.

JAGANNA'THDA'S GURU'BAKSHDA'S *v.* RA'MDA'S GURU'BAKSHDA'S *et al.*

On the 7th of January 1870, the suit having been called on for hearing upon consent of counsel on either side in open court, a decree was made by Bayley, J., which was subsequently drawn up. The decree, after declaring that the plaintiff was entitled to succeed as *mahant* to the *gurúdvár*, and all the property appertaining thereto, orders "that the defendants do deliver to the plaintiff all such *gurúdvár*, and immoveable and moveable property as they may have in their possession appertaining to the said *gurúdvár*, or that may have been mortgaged by them; and doth further order that the plaintiff shall allow the defendant Rámdás Govardhandás to reside in the *gurúdvár* at Nágpádá; and that the plaintiff do pay to each of the defendants Gopáldás Gurúbakshdás, Mándás Gurúbakshdás, Premdás Gurúbakshdás, and Baldevdás Gurúbakshdás Rupees ten every month during their lifetime, and that they be at liberty to occupy four rooms in the upper story of a *chál* situate at Grant Road, appertaining to the said *gurúdvár*, rent-free, during the full period of their natural lives, and that the plaintiff shall not eject any of the aforesaid defendants out of their respective premises during their lifetime, and the aforesaid defendants are not to sublet them, or any portion of them, to any person or persons; and should the defendant Rámdás Govardhandás be unwilling to stay with the plaintiff as proposed above, in that case he shall occupy a room in the aforesaid *chál*, besides the four already mentioned, and receive Rupees ten a month; and this court doth further order that the receiver (appointed herein) be discharged," &c. * * * "and this court doth further order that the plaintiff do pay Messrs. Macfarlane and Green, the attorneys for the defendants, the sum of Rupees two thousand one hundred and thirty, in full of all their claims, for defendants' costs of this suit, and that Náráyan Dinánáth, the receiver aforesaid, do pay the said sum on behalf of the plaintiff out of the moneys received by him; and this court doth lastly order that the defendants Gopáldás Gurúbakshdás and Mándás Gurúbakshdás be discharged from all the costs incurred on behalf of the caveator in the matter of the late Gurúbakshdás, and be relieved from the County Jail. Witness," &c.

At the time when this consent-decree was made no witnesses had been examined in court, but several witnesses had been examined *de bene esse* on behalf of the defendants.

On the 5th of March 1870, *Anstey*, on behalf of the defendants, obtained a rule *nisi* to set aside the consent-decree of the 7th of January, on the ground that it had been obtained by fraud, and without the consent of the defendants.

The affidavit of the defendants Gopáldás Gurúbakshdás and Mándás Gurúbakshdás stated that Messrs. Macfarlane and Green were the defendants' attorneys in the suit; that the deponents, after the filing of the suit, had been put in jail by the plaintiff, in consequence of their not having paid the plaintiff's costs in the Ecclesiastical proceedings; that when in jail one Vithal Kalyán had come to them and told them that Náná Anandráv, a clerk of Messrs. Macfarlane and Green, Gomá Harnáth, and Jorá Sálá had proposed to him, Vithal, that if the defendants would consent to a reference of all matters in dispute in the suit to them, Náná, Gomá, and Jorá, and to him, Vithal, the plaintiff would get the deponents released from jail; that they consented to refer the suit, and a consent-paper, to the effect that "whatever Vithal, Gomá, and Náná should do for settlement of the matter in dispute would be consented to by the deponents," was subsequently drawn up by Vithal and signed by the deponents, for themselves and the other defendants; that the deponents had no authority from the other defendants to sign for them, and that on hearing of the consent-decree they instructed their attorney, Mr. Pestanji Dinshá, to write to the plaintiff and repudiate the decree, as obtained by fraud and without the knowledge and consent of the defendants.

The other three defendants made a joint affidavit, in which they stated that they had no knowledge of the reference-paper signed by the other two defendants, or of the circumstances connected with it, and that they had not authorised the other two defendants to sign any such paper on their behalf; that they had heard that the suit had come on for hearing on the 7th of January, and that a consent-decree was made in

1870.

JAGANNA'TH-DA'S GURU'-BAKSHDA'S *v.* RA'MDA'S GURU'BAKSH-DA'S *et al.*

it, but that they never consented to the decree or the terms of it, and that the decree had been obtained by fraud.

Vithal Kalyán made an affidavit confirming that of the first two defendants.

When the rule *nisi* was granted, it was directed that a copy of it, and of the affidavits on which it had been obtained, should be served upon Messrs. Macfarlane and Green.

The plaintiff made an affidavit in answer, denying that he was a party to the alleged fraud, and stating that two of the defendants, Baldevdás Govardhandás and Premdas Gurú-bakshdás, with Vithal Kalyán and Gomá Harnáth, were present in court when the consent-decree was obtained, and that these two defendants and Rámdás Govardhandás had subsequently acted in accordance with the terms of the decree, by quitting the *gurúdvár*, and taking up their residence in the *chál*, &c.

Mr. Macfarlane also made an affidavit, in which he stated that he and his clerk Náná had seen the three defendants who were not in jail, and had advised them to settle with the plaintiff, and that Náná explained to them the terms on which the plaintiff was willing to settle, which were subsequently embodied in the consent-decree, and that the said defendants consented to these terms; that he sent his clerk Náná to the jail to see the defendants, who were in confinement, and explain to them the proposed terms of settlement, and obtain their authority to settle. Náná confirmed this statement, and said that he saw the two defendants who were confined in jail, explained to them fully the terms on which the plaintiff was willing to settle, to which they agreed; that he subsequently obtained from them a paper which purported, and which he then believed, to be signed by all the defendants except Baldevdás.

The following is a translation of the paper:—

"JAGANNA'TH..... *Plaintiff.*

GOPA'LDA'S GURU'BAKSHDA'S, &c..... *Defendants.*

We, the undersigned, in respect of the above suit, (give in writing to) Parbhu Nánábhái Anandráv, and Vithal Kalyán and Gomá Harnáth (as follows):—The above plaintiff is willing to settle. Consequently, should

you three persons settle on our behalf in any manner whatever, the same is approved of, and binding on us and our heirs and representatives. You three persons are under no risk in respect thereof in any way whatever. Whatever you may do is (to be held) as done by ourselves. 5th January 1870.

(Signed) GOPA'DA'S GURU'BAKSHDA'S.
" MA'NDA'S GURU'BAKSHDA'S.
" PREMDA'S GURU'BAKSHDA'S.
" RA'MDA'S GURU'BAKSHDA'S."

There were several other lengthy affidavits filed on either side.

The rule came on for argument before WESTROPP, C.J.

The Honorable A. R. Scoble, Acting Advocate General (with him *Latham*), for the plaintiff, showed cause.

McCulloch appeared for Messrs. Macfarlane and Green.

Anstey supported the rule.

Cur. adv. vult.

4th July 1870. WESTROPP, C.J. (after stating the facts of the case, said):—The case has a double aspect, involving as it does two questions of a somewhat different nature—(I.) whether the consent-decree of the 7th of January is binding upon the defendants as against the plaintiff, and (II.) whether it is binding as between the defendants and their attorneys, Messrs. Macfarlane and Green. The first question is directly in issue upon this motion, and although I cannot now decide the second, I will, with a view to prevent further litigation, express my opinion upon it. Assuming for the present that the defendants did not know of, or did not consent to, the decree that has been made, I am, for the following reasons, of opinion that as between the defendants and the plaintiff the former are bound by its terms, and cannot now set it aside.

The case of *Swinfen* v. *Swinfen* (*a*) was much relied on in the argument for the defendants. The circumstances of that case were very peculiar. It was a suit for the specific performance of an agreement of compromise which had been entered into by the counsel for the plaintiff against her expressed wishes, and without the consent of her attorney.

(*a*) 27 L. J. Ch. 35, 491.

1870.

JAGANNA'THDA'S GURU'BAKSHDA'S *v.* RA'MDAS' GURU'BAKSHDA'S *et al.*

The Master of the Rolls, Sir John Romilly, refused to compel a specific performance of the agreement, and dismissed the bill. In doing so he expressed his opinion that an attorney had not power to bind his client by a compromise entered into without that client's authority, but his opinion has not been approved by the Common Law Judges; and in suits for a specific performance of an agreement it must be remembered that Courts of Equity have a discretion vested in them as to whether they will compel a party specifically to perform an agreement or not, and in exercising such discretion will consider whether, under all the circumstances, it will be equitable to grant such relief; and in that case the Master of the Rolls was of opinion that it would be inequitable to compel Mrs. Swinfen to specifically carry out an agreement which was entered into against her positive instructions.

Before that bill had been filed in Equity, the same question had come before the Court of Common Pleas on a rule calling upon Mrs. Swinfen to show cause why an attachment should not be issued against her for disobedience of a rule of court that had been drawn up in accordance with the agreement of compromise (*b*). That rule was discharged upon a technical point, but Mr. Justice Cresswell and Mr. Justice Willes were strongly of opinion that the compromise was binding upon Mrs. Swinfen, and from that view the remaining Judge, Mr. Justice Williams, did not dissent. Cresswell, J., there said: "It is said that the compromise which was entered into by the counsel for the respective parties at Stafford was without the authority or consent of Mrs. Swinfen, the plaintiff. I think the court cannot for a moment listen to an objection of that sort, and I am glad to find there is abundant authority for our holding that the client is absolutely and conclusively bound by what the counsel on her behalf assented to. I think it would be most fatal to the due administration of justice if we were to allow the authority of counsel to be thus questioned. And there is not any hardship or inconvenience in this: for if the client

(*b*) *Swinfen* v. *Swinfen*, 18 C. B. 485.

or the attorney has reason to think that the counsel is taking a course that will prejudice his interest, he may withdraw his brief, and so put an end to his authority to represent the client before the court. But if counsel duly instructed take upon himself to consent to a compromise which he, in the exercise of a sound discretion, judges to be for the interest of this client, the court will not inquire into the existence or the extent of his authority. I am extremely happy to find that the decisions abundantly bear us out in thinking this objection cannot be permitted to prevail." The rule in that case was discharged, as there was no proof before the court that its process had been disobeyed by Mrs. Swinfen. The next report of the case is in Vol. I. of the Common Bench Reports, N. S., at page 364. After the first rule had been discharged, a new rule was obtained upon affidavits which stated that a demand to comply with the rule of court had been made on Mrs. Swinfen, and that she refused to comply with it. The Judges on that occasion were Cresswell, J., Williams, J., and Crowder, J. The two former did not withdraw from the views they had expressed on the former occasion, but, as Crowder, J., was of a different opinion, the rule for an attachment was discharged, as the court thought that it was impossible for it to treat the plaintiff as guilty of contempt for refusing to perform an agreement by which one member of the court thought she was not bound. So that, so far as the opinion of the majority of the Judges of the Common Pleas is concerned, there is nothing in that case to support the argument of the defendants' counsel. It is true that the Master of the Rolls was of a different opinion, but his opinion has not since been acquiesced in by the Common Law Judges at least.

The first case in point of date after *Swinfen* v. *Swinfen* was *Chambers* v. *Mason* (*c*), decided in 1858. In that case it was held that where a cause is compromised by the counsel and attorneys in court in the presence of the client, and after conference had with him with a view to an arrangement, and the client does not dissent, and the terms of the

(*c*) 5 C. B., N. S., 59.

1870.

JAGANNA'THDA'S GURU'BAKSHDA'S v. RA'MDA'S GURU'BAKSHDA'S *et al.*

compromise have been embodied in an order of *Nisi Prius*, subsequently made a rule of court, the arrangement will not be disturbed upon a suggestion by the client that, *though present* when it was made, he did not understand what was going on. Willes, J., after delivering the judgment of the court (Crowder, Willes, and Byles, JJ.) to that effect, said: "For my brother Byles and myself, I have to add that we also are prepared to give judgment for discharging the rule with costs, upon the ground that, according to the expressions expressed by the majority of the court in *Swinfen* v. *Swinfen*, 18 C. B. 485 and I. C. B., N. S., 364, the authority of counsel to make the compromise ought not to be inquired into in this proceeding *between the parties*."

In *Fray* v. *Voules* (*d*) the question arose between a client and his attorney, and not between the plaintiff and defendant. It was there held that an attorney was not justified in entering into a compromise against the express directions of his client, although the compromise was for the benefit of the client, but the inference, from what Lord Campbell, C. J., there says, is that the compromise would have been binding, notwithstanding such directions, as between the parties.

Chown v. *Parrot* (*e*) was also an action against an attorney by his client, and it was held that an attorney, retained to defend an action, is not guilty of actionable negligence if he enters into a compromise without the consent of his client, provided he acts *bonâ fide* and with reasonable care and skill, and the compromise is for the benefit of the client, and is not made in defiance of his express prohibition. Now if that be good law between attorney and client, *à fortiori* it is binding between the plaintiff and defendant. I do not mean it to be understood that I am of opinion that the compromise would be binding if the opposite party were aware that his opponents refused to consent to the arrangement; but nothing of that sort is alleged here. The general doctrine is laid down by Erle, C.J.: "I apprehend," he says, "the rule of law is well established that the general authority to conduct a cause gives

(*d*) El. & El. 839. (*e*) 1 C. B., N. S., 74.

the attorney authority to compromise. The reason why the compromise is held to be binding upon the client is because the attorney is his general agent for that purpose. I think that is well established by *Fray* v. *Voules*, 1 Ellis and Ellis 839, where it was held that an attorney who makes a compromise in defiance of the express directions of his client not to do so is guilty of a breach of duty." Willes, Byles, and Keating, JJ., express similar opinions, and Keating, J., says: "Attorneys must of necessity, in the absence of express instructions to the contrary, have the authority alleged, which, I think, affords a complete defence to the charge of negligence; though it may be that the general authority of the attorney may be limited by express instructions."

The next case is that of *Prestwich* v. *Poley* (*f*). That goes further than the others, and extends the attorney's authority to his managing clerk. The marginal note is to the effect that an attorney has a general authority to compromise an action on behalf of his client, provided he act *bonâ fide* and reasonably, and not in defiance of the direct and positive instructions of the client; and this authority seems to extend to a managing clerk having the general management of the business. That was an action brought to recover the price of a piano, and the plaintiff's attorney settled the action on the terms of the defendant agreeing to return the piano and pay a certain sum for costs. The plaintiff repudiated the agreement, and gave notice of trial. It was held that the plaintiff was bound by the compromise. In delivering judgment, Erle, C.J., after referring to the facts, says: "I do not limit my judgment to the consideration of the question as between the parties. It is clear that there was no express prohibition to the attorney to compromise, and the question for us to determine is whether the general retainer as attorney gave authority to compromise the action in this way. It is conceded that the attorney on the record has a general control and authority over the procedure in the action, and that it is competent to him to settle the action by taking a less sum than that demanded by the plaintiff. But it is said he has no

(*f*) 18 C. B. N. S. 806.

1870.

JAGANNA'THDA'S GURU'BAKSHDA'S v. RA'MDA'S GURU'BAKSHDA'S *et al.*

authority to take goods for money. I do not see why he should not. If the cause had proceeded to its natural result —to judgment and a writ of *fi. fa.*—for aught I know, the sheriff might have taken this very piano in execution. I am unable, therefore, to say that the plaintiff's attorney has in any respect gone out of the ordinary and proper course of his duty in the arrangement he has effected." The Chief Justice then refers to some cases, and comments on *Swinfen* v. *Swinfen*. "That case," he says, "was remarkable in all its circumstances, and in the course of litigation to which it gave rise. It can hardly be referred to as a decision which is to afford a guide in any case not similarly circumstanced. The judgment of the Master of the Rolls went very much upon the ground of the extraordinary departure from the usual course of events on the trial of an issue directed to inform the conscience of the Court of Chancery. They are, to my mind, to be considered as applicable only to the peculiar state of facts disclosed throughout every stage of that eventful case." And Keating, J., explains the case of *Swinfen* v. *Swinfen*. He says: "I may take this opportunity of saying that that case, so far as the decision in this court is concerned, has not been fully understood, because not only the three Judges (18 C. B. 485) adhered to the opinion they there expressed, but, further, the motion which was afterwards refused was for an attachment for disobeying a rule of court. The opinions of the majority were not allowed to prevail, because it was thought, and properly, that if one member of the court entertained a doubt, it was not a case for the summary coercive power of the Court. In the Court of Chancery the case of *Swinfen* v. *Swinfen* was treated as resting on very peculiar grounds."

The last case to which I shall refer is *Butler* v. *Knight* (*g*), which carries the law one step further. It was held there that if in an action the plaintiff continues the authority of his attorney after judgment, by allowing him to proceed to obtain satisfaction, the attorney retains the power to bind his client by a compromise. There the attorney of the

(*g*) Law Rep. 2 Ex. 109.

plaintiff, contrary to her instructions, after verdict, compromised the claim; and Kelly, C.B., says: "If the plaintiff attempted to enforce her judgment against Ruffe (the execution-creditor), or brought an action on that judgment, Ruffe might safely plead the compromise with her through the medium of her attorney, or apply to the court on this ground to stay proceedings."

Now to apply the law to the present case. If Mr. Macfarlane was not authorised by the defendants to enter into this arrangement; if the authority conferred by the so-called reference-paper was an authority to refer only, and not to settle; if even he were directed not to settle, there is nothing to show that the plaintiff knew of this; and, the plaintiff being ignorant of the want of authority on the part of Mr. Macfarlane, I hold that the compromise was binding between the plaintiff and the defendants.

His Lordship then expressed his opinion on the second question, to the effect that, as a matter of fact, Mr. Macfarlane had authority from the defendants to consent to the decree, and that they were swearing falsely when they stated that it was made without their knowledge; that the terms of the compromise were fully explained to them; that that compromise was a reasonable and proper one; that the so-called reference-paper was an authority to settle, and not to refer to arbitration; and that two of the defendants were in court when the decree was made. The rule was, accordingly, discharged. The costs of the plaintiff were ordered to be paid by the defendants.

Rule discharged with costs.

Attorneys for the applicants: *Pestanji & Ghándibhái.*

Attorneys for the plaintiff: *Dallas & Lynch.*