NOTES

ATTORNEY AND CLIENT — POWER OF ATTORNEY TO OBLIGATE CLIENT.—When a client puts a cause in the hands of an attorney, he thereby vests the attorney with a wide scope of authority to act in his behalf in order that he may bring about the desired remedy. By virtue of his employment the attorney has the implied power to do all acts that are reasonably necessary for the accomplishment of the purposes for which he has been retained, with the limitation that he may not, without express authority, waive or surrender any substantial legal right of his client.[1] The fiduciary relationship of attorney and client dictates that the attorney may do those things necessary and incidental to the promotion and protection of his client's interests. The client has put the attorney in a position of confidence; he has entrusted to him the guarding of his legal rights. By so doing he impliedly empowers him to pursue the ordinary methods of fulfilling his function. The attorney is not an agent who must look to his principal for authority to do each thing that would bind him. The client relies upon the attorney to obtain his legal remedy and the attorney can and should do all things that he as an attorney thinks are necessary to procure that remedy.

In the course of litigation the attorney is in complete control of his client's cause as it pertains to the remedy.[2] By his management of the cause he binds his client even though he act in contravention to his client's wishes.[3] His negligence is his client's.[4] The attorney's control is complete insofar as it concerns the remedy. But he cannot waive or surrender any substantial legal right of his client. Where, for example, the client desires to withdraw from the case or denies the authority of his attorney to prosecute it further, the attorney cannot use his position to continue, unless there be rights belonging to him against his client which the court will permit him to secure by force of his position.[5] Following the same principle, it has been held that a retainer to prosecute a suit does not constitute authority to bring a writ of error to reverse the judgment rendered in that suit.[6] So also, where an appeal has been taken, the attorney may not withdraw the appeal without the consent of his client.[7] In these cases the attorney attempts to deal with the legal right itself, not with the remedy for that right. That is beyond the scope of his authority. Only the client is in command of his rights and his attorney cannot usurp authority by acting on his own responsibility to defend or relinquish those rights.

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[1] See cases cited 6 C. J. 641, Sec. 146.
[2] See cases cited 2 R. C. L. 986, Sec. 63.
[3] McDowell v. Perrine, 36 N. J. Eq. 632 (E. & A. 1883).
[4] Hayes v. Stiger, 29 N. J. Eq. 196 (Ch. 1878).
[5] Sternberg v. Vineland Trust Co., 107 N. J. Eq. 255, 152 Atl. 370 (Ch. 1930).
[6] Delaney v. Husband, 64 N. J. Eq. 275, 45 Atl. 265 (E. & A. 1899).
[7] *In re* Koehler, 102 N. J. Eq. 133, 140 Atl. 15 (Ch. 1928).

But with those exceptions the attorney governs the cause. It is necessary to the orderly conduct of the proceedings and to the dignity of the court that its officer, the attorney, should control. By employing the attorney the client implies that the former knows better how to obtain the remedy and the methods to pursue. During the conduct of the case the attorney may incur reasonable expenses for services that are necessary or incidental to the conduct of the case and the preparation of the case for trial. He may contract for services and bind his client to payment therefor.[8] In a recent case it was held that an attorney, retained to prosecute a suit for damages arising out of an accident, has the implied authority to obligate his client to pay the fee of an expert witness to testify in behalf of such client.[9] In other states the same principle applies and there are cases holding that the attorney has the implied authority to obligate his client for not only expert's fees but other incidental expenses such as stenographer's services, bookkeeper's fees and printer's bills.[10] These are acts which are done to advance the client's interests. They relate to the remedy and do not involve the relinquishment of a substantial legal right. The attorney cannot be required to show special authority in the doing of these reasonable and ordinary things. It would be an unwise restraint blunting his zeal for the promotion of his client's interests. The client has put his cause in the attorney's hands; he has placed confidence in him; and the latter cannot prosecute the cause in a successful fashion if he is to look to the client for authority at every turn.

There is an exception, however, in the power of an attorney to bind his client for services rendered. It has been held that an attorney cannot bind his client by express contract or otherwise for the services of counsel.[11] He cannot obligate his client for the services of an associate or a substitute. He cannot refer to another what he has been personally engaged to do and compel his client to pay again.

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[8] See cases cited 2 R. C. L. 989, Sec. 67.

[9] Klein v. Boylan, 115 N. J. L. 295 (Sup. Ct. 1935).

[10] See Notes (1910) 23 L. R. A. (N. S.) 703, 704.

[11] Bentley v. Fidelity, 75 N. J. L. 828, 69 Atl. 202 (Sup. Ct. 1907) where the court holds: "It is entirely settled that a lawyer employed by a client to institute or defend a cause, cannot by the mere force of such employment delegate to another what he is engaged to do personally, and so cannot expressly or impliedly contract with that other that the client shall pay the latter for his services." And further: "There are many cases in other jurisdictions where mere knowledge that the counsel has acted as such will impute to the client the promise to pay for his services. This rests upon the general rule that where services are requested, or beneficial services are accepted, an implied promise arises to pay for them. But no such implied promise respecting payment of counsel fees arises in this state merely from the request that a person shall act as counsel or from the acceptance of services as counsel. Inasmuch as the services of counsel are assumed to be gratuitous, it follows that a delegation of power to an agent, or to a lawyer to engage counsel in this state, would carry with it no delegation of power to enter into a contract to pay a specific sum for such services."

The basis for the exception is the common law rule that the services of counsel are assumed to be gratuitous.[12] Since that is the rule, the corollary follows that the attorney cannot, without special authority, bind his client to pay for the services of counsel.

Attorneys, having complete control over the management of a suit, may enter into binding agreements with each other as to the conduct of a case. An agreement between attorneys, which is reduced to writing, signed and filed with the court, will be respected and enforced by the court.[13] So where attorneys agreed to postpone an appeal case for the term, that agreement was held valid.[14] Where the attorney concerns himself with the remedy, he may direct the case as he sees fit, and make binding agreements with opposing counsel. But where, in such agreement, there is no mutuality and by which an attorney has waived a substantial legal right of his client, without consent, the court will not enforce the agreement.[15] The attorney may not waive or surrender in any stipulation a substantial legal right of his client. Where counsel agreed to waive a defense available to their client, they were acting outside of their authority and such waiver was not binding upon the client.[16] It is obvious that an attorney cannot surrender his client's legal rights when he has been retained to defend or enforce all those rights in a particular cause. Although the attorney has complete power to manage the case, he cannot use that power to give away a right which he has been retained to secure or protect. Counsel's control is plenary as it affects the remedy, but when he attempts to barter away the cause of action or any part of it, he does not bind his client, unless he act with special authority.

Similarly, an attorney may not compromise his client's claim. An attorney may only enter into an agreement of settlement where he has express authority to do so.[17] Where a client authorized his attorney to settle on the best terms possible, after ascertaining the lowest amount the plaintiff would accept, the attorney's agreement

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[12] Schomp v. Schenck, 40 N. J. L. 195 (Sup. Ct. 1878); Hopper v. Ludlum, 41 N. J. L. 182 (E. & A. 1879); Zabriskie v. Woodruff, 48 N. J. L. 610, 7 Atl. 336 (E. & A. 1886).

[13] Caldwell v. Estell, 20 N. J. L. 326 (Sup. Ct. 1844).

[14] State, *ex. rel.* Butler v. Kitchen, 41 N. J. L. 229 (Sup. Ct. 1879); *cf.* Paret v. City of Bayonne, 39 N. J. L. 559 (Sup. Ct. 1877) holding that the attorney of a municipal corporation may consent to the submission to arbitrators of a cause against the municipality, although no such authority is shown to have been given under corporate seal.

[15] Howe v. Lowrence, 22 N. J. Eq. 99 (Sup. Ct. 1849); *cf.* Martin v. Lehigh Valley R. R. Co., 114 N. J. L. 243, 176 Atl. 665; Pierson v. Pierson, 119 N. J. Eq. 19 (E. & A. 1935).

[16] Texas Co. v. Adams, 101 N. J. Eq. 500, 138 Atl. 655 (Ch. 1927).

[17] Trenton Street Rwy. Co. v. Lawlor, 74 N. J. Eq. 828, 74 Atl. 668 (E. & A. 1908); Hygrade Cut Fabric Co. v. U. S. Stores Corporation, 105 N. J. L. 324, 144 Atl. 605 (E. & A. 1929).

was held binding.[18] The attorney may and should exercise his discretion where the remedy is concerned but the execution of a compromise is not that. Only the client may determine whether he should bargain his legal rights and whether his best interests will be served thereby. In the acknowledgment of satisfaction or discharge of a judgment, the attorney's authority is limited in the same manner.[19] An attorney has authority both impliedly and by statute to acknowledge satisfaction but he will not bind his client where he has accepted less than the amount due.[20] The client has the right to collect the full amount due and his attorney cannot relinquish that right.

Apart from the conduct of litigation, the attorney in handling his client's affairs has for the most part no more authority than any other agent. His authority is only what has been expressly given to him by his principal. Where a claim is put in his hands for collection, he cannot do anything but collect the full amount due. If a client places in his attorney's hands his security for a debt and authorizes him to collect that debt, the attorney has no right to give up the security unless he receives actual payment.[21] If an attorney, authorized to collect a debt, receives only part payment and gives a receipt in full, that receipt will not bind his principal.[22] The attorney cannot enter into any agreement to compromise the claim which will be obligatory upon his client.[23] The practice of placing bonds and mortgages in the hands of an attorney and authorizing him to collect interest on them is fairly common. But that practice does not carry with it implied authority to deal with the securities in any other way except to hold them and collect the interest on them as it accrues. The attorney has no authority, either implied or by way of estoppel, to receive payment on the principal, to cancel or deliver up the securities, or to execute an assignment thereof.[24]

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[18] Phillips v. Pullen, 50 N. J. L. 439, 14 Atl. 222 (E. & A. 1888).

[19] Faughnan v. Elizabeth, 58 N. J. L. 309, 33 Atl. 212 (1895).

[20] Wycoff v. Bergen, 1 N. J. L. 214 (248) (Sup. Ct. 1794); see 3 NEW JERSEY COMP. STAT. (1910) p. 2960, sec. 22: "That whenever any party, in whose favor a judgment is rendered in the supreme court, circuit court or court of common pleas in this state, shall have received satisfaction of such judgment, it shall be the duty of said party, either by himself or his attorney forthwith to enter an acknowledgment of satisfaction upon the record of said judgment." And sec. 24: "That it shall be lawful for the attorney upon the record of such judgment to authorize and empower the clerk of the court in which said judgment was rendered to enter an acknowledgment of satisfaction upon the record of said judgment * * *."

[21] Terhune of Colter, 10 N. J. Eq. 21 (Ch. 1854); Dickerson v. Hodges, 43 N. J. Eq. 45, 10 Atl. 111 (Ch. 1887).

[22] Watts v. Frenche, 19 N. J. Eq. 407 (Ch. 1869).

[23] Superior Finance Corporation v. J. A. McCrane Motors, Inc., 11 N. J. Misc. 857, 168 Atl. 774 (Sup. Ct. 1933).

[24] Lawson v. Nicholson, 52 N. J. Eq. 821, 31 Atl. 386 (E. & A. 1894); Steadman v. Foster, 83 N. J. Eq. 641, 92 Atl. 353 (E. & A. 1914); Workman v. Eyler, 94 N. J. Eq. 526, 121 Atl. 515 (E. & A. 1922); Brewster v. Entz, 85 N. J. Eq. 469, 97 Atl. 156 (Ch. 1915).

An attorney cannot contract for his client no matter how intimately he be associated with his affairs and no matter how wisely he deem himself to be furthering his client's interests. In *Warwick v. Marlatt*,[25] where an attorney of a mortgagor attempted to enter into a settlement of account with the holder of the mortgage, who was heavily in debt to the mortgagor, it was held that he had no authority to bind his client by agreeing to waive the defense of usury in the mortgage debt in consideration of the holder's cancellation of certain judgments owned by him against the mortgagor. The attorney cannot contract for his client[26] nor can he change the terms of his client's contracts by a written agreement and bind him thereby, without special authority.[27]

It is apparent that in many situations the authority of an attorney is hardly any more than that of any other agent. His position as an attorney does not clothe him with authority to conduct his client's affairs as he wishes or deems best. If he is to create obligations binding upon his client or alter any of his legal rights, he must have special authority to do so. The client may retain him to prosecute a suit, from which he will derive authority to control the cause as it concerns the remedy, or he may appoint him agent for a special purpose, but from neither of these authorizations does an attorney receive the power to determine for his client his legal rights.

PRINCIPAL AND AGENT—LIABILITY OF A DEFRAUDER FOR BROKER'S COMMISSION.—The general rule is well settled by authority and good reason that to entitle a real estate broker to his commission, in the absence of a contrary agreement, all that is required of him is to bring to the vendor a purchaser who is ready, willing and able to buy upon the terms and conditions set forth by the vendor, or upon terms satisfactory to the vendor.[1] Should the agreement provide other-

[25] 25 N. J. E. 188.

[26] Wechsler v. Clarke, 7 N. J. Misc. 627, 146 Atl. 786 (Sup. Ct. 1929), holding that an attorney has no implied authority to buy window shades for property owned by his client and bind him for payment therefor; Callaway v. Equitable Trust Co., 67 N. J. L. 44, 50 Atl. 900 (Sup. Ct. 1902) holding that an inference that an attorney has authority to bind his clients to pay commissions to a broker for obtaining a tenant does not arise from the fact that he knew of such claim at the time he superintended the execution of the lease between the principals.

[27] Falkenstein v. Gibson, 108 N. J. Eq. 251, 154 Atl. 876 (E. & A. 1931).

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[1] Hinds v. Henry, 36 N.J.L. 328 (Sup. Ct. 1873); Crowley v. Myers, 69 N.J.L. 245, 55 Atl. 305 (E. & A. 1903); Courter v. Lydecker, 71 N.J.L. 511, 58 Atl. 1093 (Sup. Ct. 1904); Ryer v. Turkel, 75 N.J.L. 677, 70 Atl. 68 (E. & A. 1907); Owen v. Riddle, 81 N.J.L. 546, 79 Atl. 886 (E. & A. 1910); Freeman v. VanWagenen, 90 N J.L. 358, 101 Atl. 55 (Sup. Ct. 1917); Kruse v. Ferber, 91 N.J.L. 470, 103 Atl. 409 (Sup. Ct. 1918); Clark v. Griffin, 95 N.J.L. 508, 113 Atl. 234 (E. & A. 1920); Steinberg v. Mindlin, 96 N.J.L. 206, 114