1939 *Present :* **de Kretser and Wijeyewardene JJ.**

DE MEL *et al. v.* GUNASEKERA *et al.*

277—D. C. Kalutara, 20,599.

Advocate—Appearance on date of trial—Application for postponement—Withdrawal of Counsel on refusal—Proceedings inter partes.

On the day fixed for trial an Advocate entered an appearance for the defendants and applied for a postponement, which was refused.

The Advocate thereupon withdrew from the case, intimating that he had been instructed only to apply for a postponement.

Held, that the proceedings were *inter partes.*

[1] *(1891) 1 Cey. Law Rep. 90.*

[2] *(1930) 32 N. L. R. 45.*

[3] *(1935) 4 Cey. Law Weekly 103.*

APPEAL from an order of the District Judge of Kalutara.

Colvin R. de Silva and Barr Kumarakulasingham, for defendants, appellants.

N. M. de Silva, for first to fourth plaintiffs, respondents.

Cur. adv. vult.

July 3, 1939. DE KRETSER J.—

This was an action for recovery of land. Certain of the defendants filed answer through a Proctor, and a date was fixed for trial. On that date one of them, at least, attended Court, and an Advocate entered an appearance on behalf of all of them. He asked for a postponement on the ground that the defendants had been prevented by a Vidane Arachchi from leaving their homes and so could not get ready for trial, and he called one of the defendants; after which the Court called the Vidane Arachchi and thereafter refused a postponement. There is nothing on the record to show which of the parties appeared, and whether the respective Proctors appeared or not, but the appeal has been urged on the assumption that only the defendants who was called appeared, and that their Proctor did not appear.

It would seem that upon the postponement being refused the Advocate withdrew, intimating that he had been instructed only to apply for a postponement and had no further instructions. Apparently the Court acquiesced in his withdrawing, but again there is nothing to show that it approved of his doing so. The learned Judge thereupon remarked that the case was really proceeding *ex parte*, and after recording the evidence of one of the plaintiffs he entered judgment for the plaintiffs.

It is contended on approval that there was no appearance on the part of the defaulting defendants, and that the Court should in fact have proceeded *ex parte* and have entered a decree *nisi*; and that even before doing so it should have framed issues. I have only to add that the defendants claimed title by prescriptive possession, and that plaintiffs had a long chain of title and a decree obtained many years previously by a predecessor in title against, it was alleged, defendants' predecessors in title.

The main point argued was that the appearance of Counsel was not an appearance on behalf of the defendants-appellants, and that the decisions of this Court applied to a Proctor applying for a postponement and then withdrawing, and not to the circumstances of the present case. If Counsel's appearance amounted to an appearance by them, then the Judge was correct in proceeding as if the trial was *inter partes*.

It is conceded that if a defendant applied for a postponement and then withdrew, the trial would proceed *inter partes*. It is also conceded that if a Proctor acted similarly the proceeding would be *inter partes*, but it is argued that Counsel having appeared for a limited purpose, his appearance was for that purpose and no other, *i.e.*, a party may not limit his appearance, nor may a Proctor, but they may both do so if they appear by an Advocate. This seems a startling proposition, and its only foundation is that a Proctor

holds a proxy from his client and therefore represents him, but a Counsel does not represent him ; yet it is conceded that if he did appear for a part of the trial and then withdrew, the trial would be considered one *inter partes.*

In the large majority of cases an application for postponement would be made by the Proctor, and so most of our decided cases deal with such applications by Proctors, and there being a tendency to give relief where the Proctor's appearance happened to be 'casual', a Bench of four Judges (*Andiappa Chettiar v. Sanmugam Chettiar*[1]) decided that, if a Proctor happened to be present when the case was taken up for trial, he should be regarded as appearing for his clients unless he expressly stated that he did not. This case left untouched the decisions which held that when the Proctor did move and applied for a postponement, that was an appearance by his clients for all purposes.

It seems to me that, apart from authority to which I shall refer, the argument proceeds on a misconception. It is difficult to get any authority from the Indian Courts for the reason that in that country they use the term "pleader", and pleader includes an Advocate ; and that a pleader represents his client is made clear by his being expressly referred to in the section corresponding to section 24 of our Code.

In India, however, a pleader is appointed in writing and resembles a Proctor in Ceylon rather than an Advocate. In that country Barristers stand on a different footing.

In *Rampertab Mull and another v. Jakeeram Agurwallah and others*[2] the Court held that where Counsel applied for a postponement and on this being refused left the Court not having been further instructed, there was an appearance by the party and the proceedings were *inter partes.* Counsel in this case was not a "pleader".

In section 24 of our Code, a party is allowed to appear by his Proctor, and the section goes on to say that "an Advocate, instructed by a Proctor for this purpose, represents the Proctor in Court". That does not limit his appearance, nor do the words "instructed for this purpose" limit it. Those words only mean that a party is not to be bound by some act of an Advocate appearing without instructions, or appearing improperly with instructions obtained direct from the party. If then a Proctor represents a party by virtue of his appointment, and especially where his appointment authorizes him to retain an Advocate—as it does in this case—the Advocate represents the Proctor. That means that his appearance is the appearance of the Proctor, and we are in exactly the same position as a Proctor who attempts to limit the nature of his appearance.

The question must not be confused with the responsibility of the Advocate, for it may be that his contract is with the Proctor, and having fulfilled his contract he is under no further obligation. The question is whether there has been an appearance by the party, and I cannot doubt for a moment that there has been. The Advocate's appearance for a limited purpose was the Proctor's appearance for a limited purpose, and that again was the appearance of the party for a limited purpose.

Turning to Chapter 12 which deals with default of appearance, we first get section 84 which refers to the defendant appearing in person or by

[1] *33 N. L. R. 217.* [2] *I. L. R. 23 Cal. 991.*

Proctor. It cannot be denied that the Proctor has a right to appear by an Advocate. Section 85 deals with the default on the part of the defendant; it will not be denied that here again he may appear by an Advocate instructed by his Proctor. There is no reference in either section to limited authority, and all that both sections deal with is *appearance* and *no appearance*. If a party appears, even to move for a postponement, he has appeared.

Section 72 has an explanatory note to the effect that " a party appears in Court when he is there present in person to conduct his case or is represented by a Proctor or other duly authorised person ". It will be noted that the Proctor *represents* the party, and exactly the same word is used in section 24 in describing the position of an Advocate: he " represents " the Proctor. An Advocate would also be a duly authorized person. It is a case where the maxim " *Qui facit per alium facit per se* " applies. If the argument is pressed to its logical conclusion, it would mean that if a trial took more than a day, Counsel may not appear on the second day on the ground of not being obliged to do so, and if Proctor and clients keep away the case will go partly *inter partes* and partly *ex parte*. That is a position which cannot be tolerated, nor would it be conceivable where a proper sense of responsibility exists.

To look at it from another point of view, on a trial proceeding *ex parte* a decree *nisi* is entered and the defendants have an opportunity of curing their default by showing that they had reasonable grounds for not appearing. Now, when a postponement is applied for on specified grounds and is refused, what other reasonable grounds would such a defendant have? His only ground would have to be that the Court should have granted his application, and that would be inviting the Court, perhaps presided over by another Judge, to reconsider its previous order, and this a Court cannot do. And this position is the same whether the application is made by a party or by a Proctor or by an Advocate. There is therefore no reason why any distinction should be drawn between an appearance by a Proctor and one by an Advocate. The truth is that there is no such thing as a limited appearance.

There are two local cases dealing with similar applications by Advocates. In *Woutersz v. Caruppen Chetty* [1] Counsel applied for a postponement on the ground of his client's illness and " left the matter in the hands of the Court ". On the application being refused he withdrew. This Court held that Counsel had no right to withdraw without the consent of the Judge, but that it was his duty as an Advocate to go on with the case as far as he could. The Court had given judgment for the defendant and this Court refused to interfere. It does not seem to have been contended that his obligation was limited or that a decree *nisi* should have been entered.

In Volume 23 page 397 of *Halsbury's Laws of England* will be found this statement :—

> " If Counsel is instructed, he ought to have control over the case and conduct it throughout. His authority may be limited by the client, but only to a certain extent; and it is not becoming for him to accept a brief limiting the ordinary authority of Counsel in this

[1] *3 Bal. 197.*

respect, or to take a subordinate position in the conduct of a case, or to share it with the client, even if the litigant is himself a barrister; the litigant must elect either to conduct the case entirely in person or to entrust the case entirely to his Counsel. If a litigant instructs Counsel, the litigant cannot himself be heard, unless he revokes his Counsel's authority and himself assumes the conduct of the case, and when a case is fairly before the Court and Counsel is seised of it, his authority cannot be revoked."

In the case of *The Public Trustee v. Karunaratne*[1] the application was made by an advocate, and perhaps this appeared in the record, but the judgment of this Court which treated the decree as one entered *inter partes* makes no specific mention of this fact.

There remains the question whether the Judge should have framed issues. It is not clear whether the first defendant followed his Advocate out of Court or remained. The Judge's note rather suggests he left, for the Judge's note means that though in law the case was proceeding *inter partes* it was in fact *ex parte*. The issues in the case were simple and apparent and could not but have been present to the Judge's mind, and I do not think the omission to frame issues affects the case. In any event section 36 of the Courts Ordinance prevents us from interfering on a point like this where substantial justice has been done, and I think it has in this case.

I dismiss the appeal with costs.

WIJEYEWARDENE J.—I agree.

Appeal dismissed.