1948 *Present :* **Canekeratne, Windham, and Gratiaen JJ.**

WARNASURIYA, Appellant, *and* LUCY NONA *et al.*, Respondents.

S. C. 385—D. C. Matara, 16,577.

Counsel—Application for postponement—Refusal—Withdrawal from action—How far binding on client.

Counsel has, by reason of his retainer, complete authority over the suit and the mode of conducting it, and an abandonment of the action by him would be binding on his client.

APPEAL from a judgment of the District Judge of Matara.

E. B. Wikramanayake, for the plaintiff, appellant.—Postponement should have been granted in view of the circumstances in which it was asked for.

The plaintiff was not bound by the act of his Counsel in withdrawing from the case. Counsel cannot enter into any compromise without the consent of his client—*Carrison v. Rodrigues* [1]—and of the trial Judge—*Woutersz v. Carpen Chetty* [2]. The trial Judge was wrong in dismissing the action. He should have given the plaintiff an opportunity of going on with the case. He should have, at least, considered the evidence which had been already led. Proof of the registration of the *lis pendens* was not necessary as against the first defendant.

C. Chellappah, for the first defendant, respondent.—Counsel was plaintiff's agent, and where an agent makes a submission to Court in the presence of and on behalf of his principal, it binds the principal.

The application for postponement was made after the pinch of the case was ascertained. In the circumstances an adjournment could not have been allowed. See *Ponnudurai v. Amerasekere* [3]. The plaintiff having abandoned his case, it was not incumbent on the trial Judge to consider the evidence already led.

The Appeal Court will not interfere with the exercise of the trial Judge's discretion—*Simon Elias v. Jorawar Mull* [4]; *Maxwell v. Keun* [5].

H. W. Thambiah, with *S. Sharvananda*, for the second defendant, respondent.—The act of Counsel is the act of the party—*Andiappa Chettiar v. Sanmugam Chettiar* [6]. Section 24 of the Civil Procedure Code states that an advocate represents his proctor. See also *de Mel v. Gunasekere* [7] and *2 Hailsham, section 713.* Where a party is present and does not protest against Counsel's action, he is bound by such action—*Matthews v. Munster* [8]. In *Matcher v. de Abrew* [9] it was held that the Judge had exercised his discretion correctly in refusing a postponement.

[1] *I. L. R. (1886) 13 Caloutta 115.*
[2] *(1907) 3 Bal. R. 197.*
[3] *(1937) 2 C. L. J. 95.*
[4] *(1875) 24 Sutherland W. R. 202.*
[5] *(1928) 1 K. B. 645.*
[6] *(1932) 33 N. L. R. 217.*
[7] *(1939) 41 N. L. R. 33.*
[8] *(1887) 20 Q. B. D. 141 at 144.*
[9] *(1936) 38 N. L. R. 366.*

In *Ramapillai v. Zavier*[1] it was held that where an application for adjournment was refused, the party affected should have proceeded to call what evidence was available.

E. B. Wikramanayake, in reply.—The trial Judge did not exercise his discretion properly. The plaintiff should have been given an opportunity to go on with the case. *Woutersz v. Carpen Chetty*[2] makes it clear that the act of the plaintiff's Counsel in abandoning the case was wrong.

Cur. adv. vult.

March 24, 1948. CANEKERATNE J.—

This is an appeal by the plaintiff from a judgment dismissing his action, which was instituted on September 29, 1944, for a declaration that the defendant, now the first defendant, holds two allotments of land purchased on April 20, 1943, in trust for him. The first defendant is the wife of the plaintiff, but the parties have been living separate since August 3, 1944. On March 6, 1945, before summons was served on the first defendant the plaintiff applied for and obtained a notice on one G. P. David Silva who had purchased the rights of his wife in the case after the institution of the action and after the registration of *lis pendens* to show cause why he should not be made a party to the action. He was made the second defendant and filed an answer on April 17, 1945.

The case came to trial on September 7, 1945. The plaintiff was represented by his Proctor and Counsel; eleven issues were framed. The burden of proving the trust was on the plaintiff. The first witness called on his behalf was the plaintiff himself. While the plaintiff was being examined in chief by his Counsel he attempted to produce a letter written by the father of the first defendant to which objection was successfully taken by Counsel for the first defendant. Counsel for the plaintiff then applied for an adjournment of the trial in order to enable him to produce an extract of the encumbrance sheet to prove that *lispendens* has been registered. On the application being refused Counsel stated that his client cannot proceed with the case without producing the extract to prove the registration of *lis pendens* as against the second defendant. He also added that "he is not going on with the case". Counsel appears to have thought it inadvisable to press the case any further.

In appeal it is contended that a postponement should have been allowed. There are no circumstances in this case to show that the discretion has been improperly exercised by the trial Judge. Mr. Wikramanayake further contended that Counsel had no general authority, so as to be able to bind the client by the withdrawal of an action. No attempt has been made to show that there was any express dissent at the time on the part of the appellant to the procedure adopted by his Counsel. Counsel has, by reason of his retainer, complete authority over the suit, the mode of conducting it, and all that is incident to it, such as withdrawing the record, calling no witnesses and other matters which properly belong to the suit and the management and conduct of

[1] *(1946) 47 N. L. R. 281.* [2] *(1907) 3 Bal. R. 197.*

the trial. He is not simply the mouthpiece of the client, but is entitled to do everything which, in the exercise of his discretion, he may think best for the interests of the client in the conduct of the case. (See *Strauss v. Francis* [1]).

I am clearly of opinion that the abandonment of the action in the present case is binding on the client.

The appeal is dismissed with costs.

WINDHAM J.—I agree.

GRATIAEN J.—I agree.

Appeal dismissed.