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THE CEYLON GEMMING AND MINING COMPANY *v.* SYMONS.

D. C., Colombo, 6,987.

Decree absolute for default—Appeal—Civil Procedure Code, s. 87—Extension of time to file answer—Default of defendant due to Court taking time to consider its order on motion to take plaint off the file.

Where a defendant appeared on the day appointed in a decree *nisi* for showing cause, and the Court not being satisfied with the cause shown entered an order making such decree absolute, *held, per* BONSER, C.J., and WITHERS, J., that an appeal lay to the defendant from such order.

Judgment in *Silva v. Grero* (*1 N. L. R. 67*) commented upon.

LAWRIE, J.—In the circumstances of the case, the order appealed from was not one making absolute a decree *nisi*, but one refusing to set aside a decree *nisi*.

Where a defendant took fourteen days' time to file his answer, and on the last day on which he became entitled to file answer he moved that the plaint be taken off the file, and the Court having taken time to consider the defendant's motion refused it some days after, *held, per* LAWRIE, J., that the fact that the Court took time to consider its order should not prejudice the defendant, and he should have been allowed to file his answer on the day on which his motion to take the plaint off the file was refused.

THE facts of the case appear in the judgment of BONSER, C.J.

Van Langenberg, for appellant.

Dornhorst, Wendt, and *De Saram*, for respondent.

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4th December, 1896. BONSER, C.J.—

This is an appeal from an order of the District Judge of Colombo disallowing an application to set aside a decree *nisi* and making the decree absolute. Mr. Dornhorst, who appeared for the respondent, took a preliminary objection that an appeal would not lie. The appeal came originally before my brother Lawrie and myself; but there being a question as to the construction of sections 86 and 87 of the Civil Procedure Code, I thought it right to have the case argued before the Full Court.

The facts of this case—in so far as it is necessary to go into them in order to dispose of this preliminary objection—are as follows:— The defendant had time until the 7th March to put in his answer. On the morning of that day he moved that the plaint be taken off the file. The Judge did not make an order on that motion on that day, but reserved judgment. It appears by the affidavit of the defendant's proctor that he had the answer ready on that day to be filed, but pending the decision of the Judge he thought it unnecessary to incur the expense of filing the answer. In the course of a day or two the District Judge made his order refusing the application. Thereupon the defendant tendered this answer, but the District Judge held that he was out of time, and the plaintiff having moved that the action should be set down for *ex parte* hearing, he made an order that the case should be heard *ex parte* on the ground that the defendant was in default for not filing answer within the time allowed him. The defendant did not appeal against that refusal, but (as I conceive quite properly) waited till the decree *nisi* was served upon him. The decree *nisi* was in the ordinary form. It called upon the defendant to attend on a day named to show cause why the decree *nisi* should not be made absolute, and notice of such decree was duly served upon him. He attended in accordance with that notice and submitted the reasons, which he contended were reasonable grounds for not filing his answer within the time. The Acting District Judge was not satisfied that the grounds were reasonable, and accordingly made the decree absolute. From that order, refusing to set aside the decree *nisi*, this appeal has been brought.

Now, the procedure with reference to the penalties for default in entering appearance, or for other default in the course of an action, is contained in sections 86 and 87 of the Civil Procedure Code. It appears to me to be shortly this. If the defendant, taking the ordinary case of defendant not appearing to the action, does not appear, the Court makes a decree *nisi* against him. A copy of that decree is served upon him with a notice that he is to attend and explain, if he can, the reasons for

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not appearing. These reasons may be various. It may be that he was never served with the summons; it may be that some inevitable accident prevented him from attending. Many things may occur which would afford a satisfactory explanation of non-appearance. The defendant either appears in accordance to the notice, or he does not. If he appears, then the Judge hears his explanation, and decides whether it is satisfactory or not. If it is satisfactory the Court sets aside the decree, and orders the case to be proceeded with in the ordinary way. If the Judge finds the reasons to be unsatisfactory, then he makes the decree absolute. But if the defendant does not appear in answer to the notice, then, without more, the decree is made absolute. But it may be that there is some satisfactory explanation forthcoming for his not attending in obedience to the notice; it may be that he was never served with the notice, or it may be that an inevitable accident prevented his attending to place before the Court the reasonable grounds which he had for not appearing in the first instance. Section 87 provides that notwithstanding the decree has been made absolute, the defendant may still come before the Court and explain, if he can, his reasons for not obeying the notice. If he satisfies the Court that he was prevented from appearing to show cause against the notice for making the decree absolute by reason of accident, or misfortune, or by not having received "due "information," the Court will set aside the decree in that case also, and will let him in to allege the reasons which he had for non-appearance in the first instance. Section 87 provides that "no "appeal shall lie against any decree *nisi* or absolute for default." There has been some difference of opinion as to the meaning of the words "absolute for default." It would be presumptuous for me to say that these words are clear. Some members of this Court—whose opinions are entitled to the greatest respect—have held that they have one meaning, other members that they have another meaning. For my own part, I cannot help thinking—though in differing from my brother Withers, I do so with misgiving—that the true construction of "decree absolute for default" is that the decree is made absolute in consequence of the defendant not having attended to show cause against the decree being made absolute, on notice. In the case of *Silva v. Grero* (*1 N. L. R. 67*) my brother Withers was of opinion that the decree absolute for default meant a decree absolute irrespective of whether the party appeared in obedience to the notice or not. Mr. Acting Justice Browne seems to have taken a different view, and my brother Lawrie, although he agreed with the judgment, yet, in his reasons, expressly reserved the question

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whether an appeal could lie in a case like the present. My misgiving is somewhat lessened by observing that in the case of *Natchiappa Chetty v. Muttukangany* (*2 C. L. R. 110*), where judgment was delivered by my brothers Lawrie and Withers, it would seem that the Court did make a distinction between an order made absolute after argument and an order made absolute in default of appearing on notice to show cause. But in neither of the cases referred to does it appear that the attention of the Court was called to the concluding words of section 87, which are as follows :— "The order setting aside or refusing to set aside the decree shall be "accompanied by a judgment adjudicating upon the facts and "specifying the grounds upon which it is made, and shall be liable "to an appeal to the Supreme Court." Mr. Dornhorst argued that provision only refers to an order refusing to set aside a decree absolute, but the Ordinance does not say so. There is only one decree made, and that decree is made in the first instance conditionally, and subject to its being set aside or subsequently made absolute. But it is one and the same decree, and for my own part I do not think that we are bound to read that clause as though the word "absolute" were inserted after the word "decree." Certainly, the reason of the thing is in favour of allowing this Court to review the reasons given by the District Judge as well for refusing to set aside a decree *nisi* as for refusing to set aside a decree absolute, and I am of opinion therefore that we ought to adopt a benevolent construction of this provision, and not place the rigid construction contended for by Mr. Dornhorst, which would in many cases amount to denial of justice to a defendant. This construction is not inconsistent with the words in the 87th section. "No appeal shall "lie against any decree *nisi* or absolute for default." I understand these words to be merely an affirmation of a principle well recognized in procedure : that is to say, that if a party does not appear, and an order is made against him for non-appearance, he cannot go direct to a Court of Appeal. He must apply to the Court below and endeavour to get himself right with that Court in the first instance. I think therefore that the preliminary objection should be overruled. We reverse the order of the Acting District Judge refusing to set aside the decree *nisi*, and we set the decree *nisi* aside on these terms : that the defendant must go to trial at the earliest date that the District Judge fixes for the trial. We leave it to the District Judge to fix that date, but he will fix as early a date as the state of business of his Court will permit. The defendant must file answer within three days from the receipt of this record by the Court below, and must not apply for any postponement of the trial.

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LAWRIE, J.—

In this case the defendant was served with summons. He entered appearance by a proctor and obtain fourteen days' time to file answer. On the 7th of March, the day on which answer was due on affidavit, he moved that the plaint be taken off the file on the ground that the plaintiff company had no *locus standi*. The Court took time to consider the motion, and on the 11th made an order refusing it, and also refused to allow the defendant to file answer on the ground that the fourteen days had expired, and then the District Judge fixed the case for *ex parte* hearing. This in my opinion is a wrong order. The defendant having moved that the case be taken off the file could not consistently file answer on the 7th of March. If the Court on that day had refused that motion I assume that the defendant would then have field his answer. The fact that the Court took time to consider its order ought not to prejudice the defendant on the well-known maxim *actus curiæ neminem gravabit*. Against the order fixing the case for *ex parte* hearing the defendant might have appealed. He received notice of the decree *nisi*, a notice which invited him to show cause why it should not be made absolute. He showed cause and moved the Court to set aside the decree *nisi*. In my opinion the 87th section prescribes the procedure in such a case. The District Judge ought to have made an order setting aside or refusing to set aside the decree, and should have accompanied it by a judgment adjudicating upon the facts and specifying the grounds upon which it was made. Such an order is liable to an appeal to this Court. Instead of making a separate order of this kind the District Judge made this decree *nisi* absolute. But his omission to adjudicate on the facts and to specify the grounds of his refusal to set aside the decree *nisi* must not prejudice the defendant, on the same principle that an act of the Court shall prejudice no man. Our present decision is not, I think, contrary to the enactment that no appeal shall lie against any decree *nisi* or absolute for default. I do not regard this as an appeal against a decree absolute for default, but as an appeal against an order refusing to set aside a decree *nisi*.

WITHERS, J.—

My colleagues have persuaded me that there is an appeal from an *inter-partes* order making a decree absolute. I am all the more glad to join in the present judgment, as it gets rid of the anomaly forcibly pointed out in argument by Mr. Pereira in the case of *Silva v. Grero*.