

NALLAN *v.* OSSEN.

D. C., Colombo, 10,074.

Time, calculation of—Summary procedure under chapter LIII. of the Civil Procedure Code—Sundays and public holidays.

In the calculation of the time within which a defendant is to obtain leave to appear and defend on a summons under chapter LIII. of the Civil Procedure Code, Sundays and public holidays are to be included ; but when the last day of the period allowed falls on a Sunday or public holiday, the defendant may move on the next Court day.

THE facts of the case appear in the judgments.

Dornhorst and Pereira, for appellant.

Sampayo, for respondent.

5th August, 1897. WITHERS, J.—

This appeal concerns an important point of practice. A liquid claim was presented to the Court under chapter LIII. of the Code, and summons went out in conformity with the claim. The material part of the summons runs thus :—“ You are hereby summoned to obtain leave from the Court within seven days from the service hereof, inclusive of the day of such service, to appear and defend the action, and within such time to cause an appearance to be entered for you, in default whereof the plaintiff will be entitled at any time after the expiration of such seven days to obtain a decree,” &c. The summons was served on the 31st May last, so that the seventh day fell upon a Sunday. The next day, Monday, the defendant appeared before the Court below and obtained leave to defend ; eight days' time was allowed the defendant to file answer. On the 8th June plaintiff moved the Court to vacate its order granting leave to the defendant to put in his answer, and to enter up judgment for the plaintiff on the ground that the Court's order was made *per incuriam*, the defendant being out of time.

The question for decision is, was the last day, Sunday, to count one of the seven days, or as that was a *dies non*, was Monday to take its place ?

The judge held that Monday was in time, and hence this appeal. Against this order refusing plaintiff's application was cited a judgment reported in *1 S. C. R. 131 (De Silva et al. v. Hendrick et al.)*. That case concerned an action under section 247' of the Civil Procedure Code, where the party aggrieved has fourteen days' time from the date of the adverse order to institute his action. In that case the fourteenth day fell on a Sunday, and the action was instituted on the following Monday.

1897. Mr. Justice Dias and Mr. Justice Lawrie, who composed the
 July 30 and Court of Appeal, decided that Monday was too late.
 August 5.

WITHERS, J. They followed the ruling of the Full Court in the case of *Casie
 Lebbe v. Idroos Lebbe Marikar* reported in 9 S. C. C. 182. It
 was there held that in the computation of the fourteen days under
 section 247 Sundays and public holidays are included.

Mr. Dornhorst, who appeared for the appellant, very properly
 called our attention to a case in the Civil Minutes, which came
 up before Mr. Justice Dias in appeal from District Court, Chilaw.
 There Mr. Justice Dias observed: "The rule with respect to the
 "computation of time I take to be this, that in all cases in which
 "by Ordinance or rules of Court any act is required to be done
 "within a particular number of days without expressly excluding
 "intervening Sundays and public holidays, these days should be
 "reckoned exclusive of the first and inclusive of the last day,
 "unless the last day should happen to fall on a Sunday or public
 "holiday, in which case the reckoning is made exclusive of that
 "day also."

This ruling at first sight appears to conflict with the ruling in
De Silva v. Hendrick, but when one bears in mind the distinction
 between acts of a party and an act required by the law or a Judge
 the cases are quite reconcilable. In this case the Court required
 the defendant to appear and obtain leave within seven days.

The seventh day was a *dies non*, on which no judicial act could
 be done. The next Court day was therefore available to the
 defendant under Mr. Justice Dias' ruling in the Chilaw case. I
 must confess I thought that was the recognized practice of our
 Courts in the case of acts required by law; at the same time I
 can find nothing about it in the old rules of practice. I propose
 therefore that we should follow the Chilaw case and affirm the
 judgment.

BROWNE, J.—

I had occasion to consider the question raised in this appeal
 two years ago when sitting as District Judge (C 5,647, D. C.,
 Colombo), and I then made order, in accordance with which the
 Acting District Judge has now acted in allowing the defendant
 to appear before the Court and obtain leave to appear and defend
 when the last of the days mentioned in the special summons
 under chapter LIII. has fallen on a Sunday, and he applied on
 the next Court day thereafter. I believe my order was right, and
 would affirm this order for the following reasons.

A distinction is to be observed between cases where the party
 is of himself alone to do an act and those where the act is to be

done by the Court, and as Voet expresses it (11, 12, 4), "*cum judex ipse sine copiam factururus esset.*" His remarks in section 14 I would refer to the former class.

1897.
July 30 and
August 5.

BROWNE, J.

To that former class belong, under reasons already given, the acts of the party under *IV. 18, 67, 53*, "within thirty days to state the objection to the Court" (25,483, D. C., Chilaw, *S. C. M.*, 4th February, 1887), and under section 247, Civil Procedure Code, "may institute action within fourteen days" (9 *S. C. C.* 182 and 1 *S. C. R.* 131), and the filing of appeals, civil or criminal. The rule as to these is that the first day is excluded from computation, while all Sundays and holidays are included, and that the last day is also included, but that if it shall fall on a Sunday the party is allowed to do the act on the next Court day. This question about the last day falling on Sunday arose in 25,483, D. C., Chilaw, and was there decided, but in 9 *S. C. C.* 182 and 1 *S. C. R.* 131 there had to be considered only the inclusion of Sundays and holidays apart from the question of the last day being a Sunday.

These decisions therefore do not conflict. The rule I have recited I gather from Chitty's *Archibald's Practice*, 14, ed. 2, 1, 435, and *Dowling's Practice Cases*, 200.

But where the act is to be done by the Court, and the Court makes holidays, or the last day is a Sunday, the party is to be given the first day thereafter on which the Court will act.

Instances of such acts are as follows. Under the summary procedure on Bills of Exchange, Act 18 & 19 Vict., chap. 67, section 2, it was provided that a Judge should upon application within twelve days from the service of the special writ of summons give defendant leave to appear and defend under certain conditions; and in *Lewis v. Calor*, 1 *F. and F.* 906, it was held that Rule 174 of Hilary Term 1853 applied, and that when the last day for appearance fell on a Sunday defendant had the next day for entering appearance.

When the Court offices were closed on the last day for giving a *capias* because it happened to be Good Friday, the creditor had time given him to issue it till the next office day, which was the following Wednesday. (*Huges v. Griffith*, 32 *L. J.* 47).

As a like consequence of Easter holidays, a defendant was allowed time till the following Wednesday when the last date for entering appearance to a specially endorsed writ of summons fell on a Good Friday (*Newford v. Hitchcock*, *ibid.*, 169), Erle, C.J., "holding appearance to a writ of summons is the combined act of the party and the Court. It is an act which cannot be done by the party alone without the presence of an officer of the Court."

1897,
*July 30 and
 August 5.*

BROWN, J.

In accordance with the first and last of these instances I ruled, and still consider that when the Court here summoned the defendant to obtain leave to appear, &c., within a certain number of days from that date, still future and uncertain by reason of the uncertainty of the date on which summons should be served, it specified so many days on which the Court itself would be open to give the defendant audience, and that the debtor had right to claim audience on the last working hour or moment of those days. It would be a mockery of procedure and an injustice, when four days were allowed as sufficient to a Colombo resident, to refuse him leave to appear when he was served on the eve of Good Friday and the four following holidays.

In deciding cases as to time under section 247 the Courts have not yet discussed whether the institution of an action is or is not under our Civil Procedure Code "the combined act of the party and the Court," especially when a plaintiff in a Court of Requests has a right to state his case personally in open Court, and should therefore have on the fourteenth day such Court open to him to make his statement. I should be quite prepared for this reason to follow my Lord, the Acting Chief Justice, on the doubt he expressed regarding that decision.