1897.
October 26.

BRAMPY *v.* PERIS.

D. C., Colombo, 9,016.

Ex parte *trial—Notice to defendant in default—Right of defendant to cross-examine at* ex parte *trial—Evidence—Adjournment.*

Where a defendant takes time to answer but fails to answer on the appointed day, the Court may fix the case for *ex parte* hearing. At such hearing the defendant has, under the Civil Procedure Code, no right to cross-examine the plaintiff or his witnesses.

If the Court is dissatisfied with the evidence adduced at an *ex parte* trial it should, in an order, point out in what respects the evidence already recorded is defective and then adjourn either to a day named or *sine die*. The plaintiff may put the cause on the roll when he is able to supplement the defective evidence.

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THE land which formed the subject of dispute in this case was bequeathed by a husband and wife to Peris and Juan. After the death of the testators their executor entered into possession of the land and sold the same to the plaintiff, for the purpose of defraying the expenses incurred by the executor in proving the will. After the sale the plaintiff was put in possession, but Peris ejected him from the land and cultivated it on the strength of his title as legatee. The plaintiff now sued Peris in ejectment, praying for a declaration of title.

On the returnable day of summons the defendant obtained time to file answer, but he failed to file it, and the case was fixed for *ex parte* hearing on the motion of the plaintiff.

At the *ex parte* hearing the defendant appeared and cross-examined the plaintiff and his witnesses. The District Judge, after referring to the proceedings in the testamentary case, declined to uphold the sale to the plaintiff by the executor and dismissed his action.

The plaintiff appealed.

Morgan, for appellant.

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The defendant appeared by a proctor in the District Court, and of consent he got time till the 16th August to file answer.

He failed to do so.

On 18th August, on plaintiff's motion, a day was fixed for the *ex parte* hearing, of which notice was given by the Court to the defendant.

Why this notice was given I do not know.

Of course a defendant who has not answered may, like all the rest of the world, attend a public court, but he has no right to take part in an *ex parte* hearing.

If he is cited and takes part the hearing ceases to be *ex parte* and becomes *inter partes*.

I am aware that in proceedings under the old Rules and Orders of 17th June, 1844, the practice was to allow a defendant in default to cross-examine the plaintiff and the witnesses at an *ex parte* trial (see *obiter dicta* in the cases reported in *Austin, p. 111*, and *1 Lorenz, p. 170*), but I am not prepared to concede that these cases are of authority in interpreting our Code.

In my opinion the defendant ought not to have been allowed to cross-examine at the *ex parte* hearing: I am of the opinion that he must adduce some proof. He must make out a fair *primâ facie* case. I wonder why in such cases the plaintiff does

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not more frequently call the defendant, and from his lips get an admission of indebtedness ; but whatever be the evidence it must be sufficient to satisfy the Judge, who is not bound to give a decree until he is satisfied. If he is dissatisfied, he should in an order point out in what respects the evidence already recorded is defective and then adjourn either to a day named or *sine die*.

The plaintiff may put the cause on the roll when he is able to supplement the defective evidence.

In this case the plaintiff proved he had paper title ; the objections to that title could not be tried until pleaded by the defendant, who was wilfully in default.

I am of opinion that the dismissal of this action was wrong. I would set aside and remit to the District Court to pass a *decree nisi* of which the defendant is entitled to notice by section 85.

These are *ex parte* proceedings. The plaintiff must bear his own costs.

BROWNE, A.J.—

In this case plaintiff sued averring that a land specially devised to defendant had been sold by the executor in July, 1894, to him, the plaintiff, as the defendant had failed to contribute to the executor defendant's share of the expenses incurred in the testamentary proceedings, but that defendant in July, 1895, had taken forcible possession of the land ; and he prayed ejectment of defendant and restoration to possession and costs.

Defendant appeared and moved for time to file answer, but failed to file any, and the case was set down for *ex parte* trial with notice to defendant thereof in accordance with the practice in that Court, that when for such a reason as here an *ex parte* trial does not take place in ordinary course notice of the fixture is given to the defendant. Defendant appeared personally at the *ex parte* trial.

The executor gave his evidence of his sale to plaintiff and was not cross-examined. Plaintiff gave his evidence that he was placed in possession of the land on the date of his purchase, but that the land was then under cultivation by defendant, who took the crop, and that when plaintiff on 9th July, 1895, went to the land to put up a dam and prepare it for cultivation, defendant refused to allow him to do so. Defendant cross-examined him and elicited that plaintiff was only 22 years of age and in employment at Rs. 2 or Rs. 2·50 per month, and paid the Rs. 150 for the land, Rs. 100 out of his savings and Rs. 50 by money given by his master, a relative of the executor.

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The District Judge, after perusal *ex mero motu* of the testamentary proceedings, held that the executor had no right to sell the land, and that there was reason to suspect the plaintiff was but a nominal purchaser for either the executor or his relative or for both of the land at an under-value, and he dismissed plaintiff's action. I should be glad if to shorten the work of our Courts it were ruled that in cases of default of pleadings the procedure at an *ex parte* trial should be no more than in England under Order 27, rules 7 and 8—that judgment should be entered (final) for the land, and (interlocutory) that the plaintiff do recover against the defendant the value of the (as here) damages to be assessed, which judgment is made final on the assessment. But section 85 requires that if defendant shall fail to file his answer on the day fixed therefor and plaintiff then appears, the Court shall hear the case *ex parte* and enter only a decree *nisi*.

No doubt it was always recognized by us in our former practice that at such a hearing defendant might appear and cross-examine with a view to make the Court so dissatisfied with proof led that it would require further proof, and even dismiss the action if the evidence adduced does not sustain the claim. But in my opinion plaintiff on the occurrence of any doubt in the mind of the Judge as to his right to judgment should have opportunity given him to dispel that doubt ere his action were finally dismissed to the absolute extinction of his claim for ever, and I cannot see he had that opportunity here given him.

I agree that the dismissal should be set aside and decree *nisi* entered for the plaintiff.

As to the considerations which influenced the Acting District Judge, I do not see it to be *primâ facie* apparent that plaintiff's title to the land was the result of any mal-practice on the part of the executor of which plainitff was cognizant. No doubt if the executor has injured the estate he can be made personally responsible for it by the heirs or devisees. At present I do not see defendant ever took title by assent of the executor to the bequest, for he sold this land to pay expenses of the administration.