ALLIE *v.* MOHIDEEN.

D. C., Colombo, 5,454.

Civil Procedure Code, chapter LIII.—Summary procedure on action on promissory note and claim for money lent—Right to summons thereon—Leave to defendant to appear and defend—Power of Court to call on defendant to give security.

The summary procedure allowed by chapter LIII. of the Civil Procedure Code is applicable only to actions in which the claim is for money due upon certain classes of documents.

When a plaintiff has a second cause of action as for money lent, he is not entitled to a summons in the form No. 19, and the plaint should be returned for amendment.

If a defendant shows sufficient cause why the decree passed against him for default of appearance should be set aside, he is entitled to be allowed to enter into his defence, and he cannot be called upon to give security except for good reasons.

THIS was an action on a promissory note alleged to have been made by the defendant in favour of the plaintiff. The plaint contained two causes of action : one upon the note itself, and the other for money lent in respect of the very sum which was secured by the note.

The plaint was accepted and summons in the form No. 19 allowed on the first cause of action alone, under section 703 of the Civil Procedure Code. As defendant did not enter appearance

on the returnable day, decree was entered against him. Thereafter his counsel moved to set aside the decree, and to be permitted to appear and defend the action.

The District Judge allowed the motion on condition that defendant gave security for the amount claimed and filed his answer on or before a day named.

The defendant appealed against that part of the order which required him to give security for the amount claimed as a condition precedent to his defending the action.

Bawa, for appellant.

Sampayo, for respondent.

Cur. adv. vult.

24th January, 1895. LAWRIE, A.C.J.—

The summary procedure allowed by the 53rd chapter of the Code is applicable only to actions in which the claim is for money due on certain writings. When a plaintiff has a second cause of action, such as a claim for money lent, he is not entitled to a summons in the form No. 19.

Here the plaintiff sued on a promissory note, but, probably fearful lest some technical defect might be found in the note or in the stamp, he added to the claim on the note a claim for money lent. The District Judge properly refused to give summons as prayed for. He ordered summons to issue on the first prayer only. It would have been better had the learned Judge returned the plaint for amendment by the deletion of the second count, but although the second count still remains in the plaint the defendant has not been summoned to answer to it, and for the purposes of this appeal I think we may treat the action as laid only on the note.

The defendant did not appear within the time fixed in the summons, and decree was entered for the amount of the note. After decree the defendant appeared, and the Court set aside the decree. The District Judge was satisfied that there existed special circumstances which justified him in doing so, and that there were such is plain from the fact that the plaintiff acquiesced and did not appeal, but when the Judge gave leave to the defendant to appear and defend, he imposed the terms that he should find security for payment of the whole sum claimed. The learned Judge gave no reason for attaching that condition.

If a defendant shows sufficient cause why the decree should be set aside, he is entitled, as a matter of right, to be allowed to enter into his defence, and he can be forced to give security only for some good reason.

A defendant in an action under the 53rd chapter must disclose a defence. If that defence be not *primâ facie* sustainable, or if the Court feels reasonable doubts as to its good faith, it may impose the terms of payment into Court or of finding security. Possibly when a decree has been entered, the Court may impose terms for some other good reason. The discretion given in the 707th section may possibly be greater than that given in the 704th, but in the ordinary case the directions of the 704th section must apply to the terms which the Judge is permitted to impose when he sets aside a decree. By satisfying the Court that there are special circumstances why the decree should be set aside, and by filing affidavits of a defence, the defendant put himself in the same position as he would have been in had he appeared in time. I see no reason why he should be required to find security in the former, if he would not have needed to find it in the latter.

The defence here is that the defendant did not make the note. That is a defence *primâ facie* sustainable. The learned Judge does not say that he had any reason to doubt its good faith. In these circumstances, I am of the opinion that the defendant has been unduly prejudiced by that part of the order which requires him to find security, and I recommend that that be deleted.

I would give the defendant the costs of the appeal; he did not appear in time in the District Court and he must bear the costs in the Court below.

I agree to the addition proposed by my brother Withers.

WITHERS, J.—

I agree in the order proposed by my brother Lawrie, and am inclined to add a direction that paragraphs 4 and 5 of the plaint be struck out, unless plaintiff elects to treat this as an ordinary regular action. Chapter 53 must be strictly construed, and in my opinion no plaintiff should be allowed to proceed under this chapter who joins with a claim for a debt or liquidated demand in money upon a bill of exchange, promissory note, cheque, instrument or contract in writing, or a liquidated amount of money, a claim on a contract which does not answer to any of the preceding kinds of contract. It matters not one whit to my mind that the second cause of action is for the same amount as that claimed under the first cause of action, as is the case here when the debt on the contract of money lent at defendant's request forms the consideration for which the promissory note was given, and is the subject of plaintiff's alternative claim.