LETCHIMEN *v.* THERAWAPPA.

1895.
August 19 and 26.

D. C., Kandy, 9,331.

Action by summary procedure on promissory note—Leave to defend—Defence without security or payment of claim into Court—Civil Procedure Code, chapter LIII., and ss. 704 and 706.

Where in an action by summary procedure on a promissory note under chapter LIII. of the Civil Procedure Code the defendant pleaded payment partly in cash and partly in notes since retired—

Held, that the defence in itself could not be regarded as one marked by bad faith or not *primâ facie* sustainable, and the case was not, therefore, one in which the defendant should under section 704 be required, as a condition of his being allowed to appear and defend to pay into Court the sum mentioned in the summons or to give security therefor.

THE facts of the case sufficiently appear in the judgment.

Dornhorst, for appellant.

Cur. adv. vult.

26th August, 1895. WITHERS, J.—

This is an action by an indorsee of a promissory note overdue to recover from the makers a sum of Rs. 2,518·18, and it is brought under chapter LIII. of the Civil Procedure Code.

The defendants applied on affidavits for leave to defend, and the District Judge has given them leave so to do on paying into Court the said sum of Rs. 2,518·18. He required this condition because he says he felt reasonable doubt as to the good faith of the defence, which, in short, is payment partly in cash and partly in notes since retired.

The question for us to decide is, whether the District Judge was justified in imposing this restriction. Unfortunately, the District Judge has assigned no reason for his doubt as to the sincerity of the defence; and hence I am much embarrassed in the consideration of the question. It seems to me that the defendants have put forward a case which deserves inquiry, unless it is marked by bad faith. For my part, I cannot regard it in that light, and hence I am unable to support the judgment appealed from. Nor can I say that I think the defence not to be *primâ facie* sustainable; and it is only on this or the other ground that a Court can require payment of the sum claimed as a condition of defence under chapter LIII. of the Code. See section 704 :—

" .....the defendant shall not be required, as a condition " of his being allowed to appear and defend, to pay into Court the " sum mentioned in the summons or to give security therefor,

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"unless the Court thinks his defence not to be *primâ facie* sustainable, or feels reasonable doubts as to its good faith."

On affidavits disclosing a defence, a defendant is entitled to have permission to defend, subject to certain terms (see section 706).

This section is substantially taken from section 20 of the Statute 18 and 19 Vict. clause 57, and Act passed to protect holders of bills of exchange and promissory notes against frivolous and vexatious defences to actions on these instruments.

On the English Statute, Baron Bramwell pronounced as follows :—"The intention of the Bills of Exchange Act was that where "there was no pretence for a defence the party sued should not "be allowed to defend, and the holder should have judgment as of "course ; but that if the defendant had a real—I do not say good—"defence, he should have leave to appear and set it up. As cases, "however, sometimes occur where an apparently real defence is "shown, but its sincerity is doubtful, there the defendant is let "in to defend only on the terms of his bringing the money into "Court. Now, I cannot say that there is here no pretence for a "defence ; on the contrary, I think there is a good pretence. I do "not say that the defence is well founded, but it raises a fair question "between the parties."

This was the case of *Agra and Masterman's Bank v. Leighton*, reported in *L. R. 2 Ex. p. 56*.

On the whole, I come to the conclusion that the defendants should be let in to defend on giving security for putting in their answer or answers on a day to be named by the District Judge, attending on that day, or any other day appointed by the Court for the fixing and recording of issues and for the trial thereof ; and in failure to comply with those terms they will be declared to be in default of answering.

BROWNE, J.—I agree.