Present: Lascelles C.J. and Grenier J.

1912.

SCHRADER *v.* JOSEPH

469—C. R. Chilaw, 14,782.

Court of Requests—Money case—Absence of defendant when case called—Judgment for plaintiff—Civil Procedure Code, s. 823.

In a Court of Requests, if a plaintiff fails to appear at the proper time, namely, at the hour fixed for trial, or when the case is called on, his action is liable to be dismissed, subject to his right under sub-section (5) to institute a fresh action, if he satisfies the Commissioner that he was prevented from appearing from accident, misfortune, or other unavoidable cause; and in the same way a defendant is liable to have judgment entered by default against him if he does not appear at the appointed time, or when the case is called on, subject to his rights under sub-section (3) to have the judgment set aside on satisfying the Commissioner that he was prevented from attending by similar unavoidable cause.

Marikar v. Colombo Municipal Council[1] and *Hadjiar v. Kunjie*[2] over-ruled.

THIS case was referred to a Bench of two Judges by Wood Renton J. The facts are set out by Wood Renton J. as follows in his judgment (February 26, 1912):—

This is one of the numerous cases that come up in appeal owing to the default of parties or their legal advisers to appear on the day and at the time fixed for the hearing of actions in which they are concerned. The trial in the present case was fixed for December 7, 1911. The first defendant, who is the appellant, was absent when the case was called. So was his proctor, Mr. T. M. Fernando. The Commissioner of Requests, acting under section 823 (2) of the Civil Procedure Code, on a motion by the plaintiff-respondent's counsel, directed judgment to be entered in the respondent's favour. On the same day appellant's proctor filed an affidavit and for the reasons stated therein moved, under section 823 (3) of the Civil Procedure Code, that the judgment entered in the respondent's favour should be re-opened, and the case fixed again for trial. Notice of this motion was issued to the respondent. The motion was argued on December 8, and the Commissioner of Requests refused it with costs. The present appeal is brought against this refusal to allow the case to be re-opened. The Commissioner's decision is challenged in the petition of appeal, on the ground that he was wrong in holding that a good case for the re-opening of the

[1] *(1901) 2 Br. 240.*

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judgment had not been made out on the proctor's affidavit. The explanation which the proctor gave of his absence was that he did not come to Court on the day in question at the usual hour, namely, 10 A.M., as his wife was ill; that he intended coming to Court only when the Commissioner mounted the Bench; and that he had asked the appellant's witnesses to come and let him know as soon as the Commissioner had taken his seat in Court. He was duly informed of the Commissioner's arrival, and came to Court himself, but reached it only about five minutes after judgment had been entered in favour of the respondent. The proctor added that the appellant was not himself present in Court, inasmuch as his evidence was not required, and he had told him not to attend. The learned Commissioner of Requests, in my opinion, rightly held on this evidence that no case for re-opening the judgment under section 823 (3) had been made out, inasmuch as the proctor had not shown "that he was prevented from appearing in due time by accident or misfortune or other unavoidable cause." There was no allegation that his wife's iliness was sudden or so serious as to prevent him from being in Court in time, or in any event from having asked the Commissioner, either in writing or by the verbal application of some other proctor, to excuse his temporary absence. The appeal fails on this point—the only point taken in the Court of Requests on the motion for re-opening judgment.

Mr. Samarawickrama, however, raised a fresh point on the appellant's behalf at the argument before me. He contended—and this point is taken in the petition of appeal—that the case did not come under section 823 (3) at all, but that under section 823 (2) the Commissioner had no power to enter judgment on the day of the appellant's default, and that the appellant had the whole of the day of default on which to excuse his absence. In support of this contention Mr. Samarawickrama referred to the decisions of Moncreiff J. in *Marikar v. Colombo Municipal Council* [1] and of Wendt J. in *Hadjiar v. Kunjie*.[2]

I refer this case to a Bench of two Judges for the purpose of having the decisions above referred reconsidered. Apart from authority, the meaning of section 823 of the Civil Procedure Code seems to me to be clear. The cases above mentioned were decided under section 823 (1), which defines the procedure on default of the appearance of the plaintiff. But they are, in my opinion, equally applicable to section 823 (2), which deals with the default of appearance on the part of the defendant. Section 823 (2) provides that "If upon the day specified in the summons or upon any day fixed for the hearing of the action the defendant shall not appear or sufficiently excuse his absence, the Commissioner . . . . . may enter judgment by default against the defendant." The *ratio decidendi* of the two decisions on which Mr. Samarawickrama relied was that the language of the section

[1] *(1901) 2 Br. 240.*

[2] *(1903) 1 A. C. R. 3.*

gives the defendant the whole of the day specified in the summons or fixed for the hearing of the action for the purpose of appearing or excusing his absence, and that consequently judgment cannot be entered against him in default till the whole of that day has expired. In support of this view reference was made to section 823 (4), which provides that " If upon the day specified in the summons or upon any day fixed for the hearing of the action neither party appears when the case is called on, the Commissioner shall enter judgment dismissing the plaintiff's action, but without costs." With the greatest respect, I do not think that the use of the words " when the case is called on " in clause (4) is sufficient to justify the highly artificial interpretation placed by the decisions in question on the language of clause (1), and by necessary inference also of clause (2). The practical results of such an interpretation of the law would be most serious. As we all know, there is widespread carelessness in this Colony on the part both of litigants and of their legal advisers, in the Courts of first instance, with regard to the duty of being present and ready for trial when their cases come on for hearing in the ordinary course of things. If we are to adopt the interpretation of section 823 (1) and (2) laid down in the cases of *Marikar v. Colombo Municipal Council* [1] and *Hedjiar v. Kunjie*,[2] Commissioners of Requests would very often find their work at a standstill. One party or other, in the majority of the cases fixed for the day, would be absent, and no order could be made until the following day. There is no suggestion either in clause (1) or clause (2) of section 823 of the Civil Procedure Code of any duty being imposed upon the Commissioner to stay his hand on default of appearance by the plaintiff in the one case or by the defendant in the other. The words in both clauses, " shall not appear or sufficienty excuse his absence," clearly point, I think, to default in appearance, or failure to furnish a sufficient excuse, when the case comes on for hearing; and the words " may enter judgment by default against the defendant " in clause (2) are explained by the proviso which requires the Commissioner in land cases, and empowers him in any case in which he may deem it necessary or expedient, to hear evidence in support of the plaintiff's claim. The words in clause (1) " the plaintiff's action may be dismissed," are equally capable of explanation by a reference to the proviso " that if the defendant when called upon under section 809 shall admit the claim of the plaintiff, the Commissioner shall enter judgment for the plaintiff according to law." The construction of section 823, which I am venturing to suggest as a correct one, on the one hand prevents the work of Commissioners of Requests from being paralysed or impeded by default of appearance on the part of plaintiffs or defendants, and on the other hand works no hardship or injustice to any litigant. If a plaintiff or defendants is unable to appear on the day fixed for the hearing of the case—and it is his

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duty, I think, where no special hour of attendance has been named, to be present in Court on any such day from the time when the Court sits till the case is disposed of—he may explain his absence before judgment is given. If owing to his default judgment is given against him, he may, if a plaintiff, apply under clause (5) for permission to institute a fresh action, and if a defendant, move under clause (3) to have the judgment against him opened.

I have thought it right to express my opinion on the important question of practice raised by Mr. Samarawickrama's argument in appeal. But, as I have already said, I hold that the case must be referred to two Judges in order that it may be decided. As I have myself formed a strong opinion on the point, I desire to take no part in its decision.

Samarawickrama, for the defendant, appellant.—*Marikar v. The Colombo Municipal Council*[1] and *Hadjiar v. Kunjie*[2] are authorities in favour of the appellant. The *ratio decidendi* of these cases applies to the interpretation of section 823, sub-section (2). The words " or sufficiently excuse his absence " in sub-section (2) refers to what may happen in the course of the day after there has been a default of appearance. It cannot refer to what may happen at the time the case is called. The excuse cannot possibly be made by any one but the defendant or his proctor. If either of them is present, then there is no absence.

The defendant has the whole day for making his excuse. The plain meaning of the expression " upon the day specified " is that defendant has the whole day for making his excuse. Where the Legislature intended to specify a particular point of time, it has done so in express terms—see sub-section (4). Where different expressions are used in the same enactment (*a fortiori* in the same section) a difference of meaning is intended.

The Courts would not lightly interfere with decisions giving an interpretation to an Ordinance which have been followed for a long time.

Sansoni, for the plaintiff, respondent.—Sub-section (3) says that the defendant must " satisfy the Commissioner that he was prevented from appearing in due time." The words " in due time " presupposes that the defendant should have appeared at an appointed hour, and that he has not the whole day for his appearance. Sub-section (5) provides the same remedy against orders made under sub-sections (1) and (4). That suggests that both sections should be interpreted in the same way; that is to say, the words " when the case is called on " in sub-section (4) must be held to be the meaning of the words used in sub-section (1) as well. If there is no default, unless the defendant is absent the whole day, then there is no necessity for sufficiently excusing later in the day a default which does not exist. The

[1] (1901) 2 *Br.* 240.

[2] (1903) 1 *A. C. R.* 3.

defendant need not be present either in person or by his proctor to make the excuse; the excuse may be made by letter, &c., at the time the case is called. The contention of the appellant would, if followed, disorganize the Courts and reduce section 823 to an absurdity.

Samarawickrama, in reply.

Cur. adv. vult.

March 7, 1912. LASCELLES C.J.

This case has been referred to us by Mr. Justice Wood Renton in view of the decision of Moncreiff J. in *Marikar v. Colombo Municipal Council* [1] which was followed by Wendt J. in *Hadjiar v. Kanji.*[2]

The point referred to us turns on the construction of section 823 (2) of the Civil Procedure Code, and raises the question as to the exact point of time at which a defendant, who fails to appear in a Court of Requests, is liable to have judgment entered against him by default. The material words of section 823 (2) are the following:—

> "If upon the day specified in the summons or upon any day fixed for the hearing of the action the defendant shall not appear or sufficiently excuse his absence, the Commissioner, upon due proof of service of summons, notice, or order requiring such appearance, may enter judgment by default against the defendant."

Then follows a proviso that in land cases, and in other cases in which the Commissioner deems it necessary or expedient to hear evidence in support of a plaintiff's claim, he shall order him to adduce such evidence on a day to be fixed for that purpose.

The construction of sub-section (1), which relates to a default of appearance on the part of the plaintiff, and is expressed in language which is almost identical with sub-section (2), was considered in the two above-mentioned cases. There it was held that the plaintiff had the whole of the day fixed for his appearance within which to appear, so that his action could not be dismissed until the expiration of that day. There can be no question but that the decisions under sub-section (1) are equally applicable to sub-section (2), so that the practical question for determination is whether the construction there laid down is correct and ought to be followed. Reading the section as a whole, and without reference to authorities, I should have had no doubt but that the words "if upon the day specified in the summons. . . . . the defendant shall not appear or sufficiently excuse his absence. . . . . " refer to default at the time, if any, at which the defendant was required to attend, and if no time was fixed, to the time when the case is called on for hearing. The section refers to default on the part of the defendant in doing something which he ought to do, and there can be no doubt but that it is the

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duty of the defendant, in the absence of any rule of procedure to the contrary, to appear either at the time the case is fixed for hearing or when the case is called on. The practical inconvenience which would result from the construction of the section laid down in the two above-mentioned cases has been clearly set out in the judgment of my brother Wood Renton. It is so great as to render it almost impossible for Commissioners of Requests to dispose of their cause lists in a prompt and business-like manner. The *ratio decidendi* in these two cases appears to have been the difference between the language employed in sub-sections (1) and (2) relating respectively to default on the part of the plaintiff and defendant, and sub-section (4) relating to the case where neither party appears. The language employed in the latter section is, " If upon the day specified in the summons or upon any day fixed for hearing of the action neither party appears when the case is called on, the Commissioner shall enter judgment dismissing the plaintiff's action, but without costs." From the presence of the words " when the case is called on " in sub-section (4), and from their absence in sub-sections (1) and (2), it is argued that the default referred to in the last two sections does not mean failure to appear when the case is called on. The difference between the wording of sub-section (4) and sub-sections (2) and (3) is noticeable and difficult to account for, but I do not think that it could be fairly inferred from this difference of phraseology that it was the intention of the Legislature to introduce a rule which, as my brother Wood Renton has pointed out, is inconvenient, impracticable, and contrary to the recognized lines of legal procedure. Every other consideration appears to me to tell in favour of the construction of the section being so construed that if a plaintiff fails to appear at the proper time, namely, at the hour fixed for trial, or when the case is called on, his action is liable to be dismissed, subject to his right under sub-section (5) to institute a fresh action, if he satisfies the Commissioner that he was prevented from appearing from accident, misfortune, or other unavoidable cause; and in the same way that a defendant is liable to have judgment entered by default against him if he does not appear at the appointed time, or when the case is called on, subject to his rights under sub-section (3) to have the judgment set aside on satisfying the Commissioner that he was prevented from attending by similar unavoidable cause. It is a sound principle of construction that, in all cases open to doubt, the intention which is most agreeable to convenience and established legal principles should be presumed to be the true one. I do not think that the words " sufficiently excuse his absence " in sub-section (1) and (2) stand in the way of this construction of the section, for it is quite possible for a plaintiff or defendant, who is prevented from attending by some unavoidable cause, to bring the fact to the notice of the Commissioner either before, at, or immediately after the time when the case is called on.

With the greatest respect for the learned Judges who decided *Marikar v. Colombo Municipal Council* [1] and *Hadjiar v. Kunjie*,[2] I am unable, for the above reasons, to adopt their reading of the section under consideration, which I think has been correctly expounded by my brother Wood Renton, with whom I agree that the appeal in this case ought to be dismissed with costs.

GRENIER J.—

I entirely agree with my Lord and my brother Wood Renton in the construction they have placed upon section 823 (2) of the Civil Procedure Code. At the argument I think I expressed myself strongly in favour of such a construction, and I have had no reason since to change my opinion. If the construction relied upon for the appellant were to be adopted, it would be very difficult, if not thoroughly impracticable, to carry on the work in Courts of Requests. I would dismiss the appeal with costs.

Appeal dismissed.