1945 *Present:* **Keuneman and Rose JJ.**

AUSTIN DE MEL, Appellant, *and* KODAGODA, respondent.

8 Inty.—D. C. Colombo, 14,802.

Decree nisi—*Absence of plaintiff—The point of time at which a decree* nisi *is deemed to be "passed"—Application to set aside—Cannot be inquired into after the period of 14 days has elapsed—Civil Procedure Code, s. 84.*

Under section 84 of the Civil Procedure Code the "passing" of the decree *nisi*, on the non-appearance of plaintiff, is not completed until the necessary form has been drawn up and approved and signed by the court. The starting-point of the period of fourteen days within which the decree *nisi* can be set aside is the date on which the decree *nisi* is "passed", and not the date on which the court merely gives instructions to prepare a decree *nisi* to be passed thereafter.

Where the plaintiff came into court within the fourteen days and had, within that period, succeeded in giving notice to the defendant and fixing the inquiry for the setting aside of a decree *nisi* but was prevented from "showing good cause" within the period in consequence of a preliminary objection taken by the defendant, which in fact was wrongly allowed by the District Judge—

Held, that, once the period of fourteen days had elapsed, it was not open to the District Judge to take up the inquiry into "good cause" nor was it open to the Supreme Court to do so in appeal.

Per KEUNEMAN, J.—"I would urge upon the legislature the need of a speedy amendment of section 84 so that the unreasonable hardships imposed upon the plaintiff may be removed".

APPEAL from an order of the District Judge of Colombo.

H. V. Perera, K.C. (with him *D. W. Fernando*), for the plaintiff, appellant.

N. Nadarajah, K.C. (with him *W. Mutturajah*), for the defendant, respondent.

Cur. adv. vult.

March 20, 1945. KEUNEMAN J.—

In this case, on November 26, 1943, trial was fixed for February 15, 1944. On the latter date the plaintiff and his proctor were absent and

the defendant was represented by counsel. The journal entry of that date reads:—

" 15.2.44. Case called

Adv Mr. Wickremanayake for deft.
Pltff and proctor absent.
Enter D. N. dismissing pltff's action with costs to be made absolute on 3.3.44.
M. A. S."

The intials M. A. S. are the initials of the presiding judge Mr. Samarakoon. Thereafter the journal entries read:—

" 1.3.44. D/N entered.

3.3.44. Fourteen days having elapsed since the entering of the decree nisi dismissing pltff's action with costs, Proctor for Deft moves that the Court be pleased to make the Decree Nisi absolute.
A needles motion, the order being absolute automatically.
R. F. D."

R. F. D. are the initials of the judge then presiding, Mr. Dias. This judge has verified the fact that the decree nisi presented to him was signed on March 3, 1944.

On March 13, 1944, the plaintiff moved by affidavit showing cause for setting aside the decree nisi. This was fixed for inquiry on March 15, 1944, and on that date the District Judge upheld an objection that the application was out of time as fourteen days had elapsed since February 15, 1944. The District Judge thought it unnecessary to consider the merits of the application.

The plaintiff appeals from this order, and argues that the period of fourteen days did not begin to run until March 3, 1944, and that on the date of inquiry (March 15, 1944) the period of fourteen days had not elapsed. He contends that the District Judge did not " pass the decree nisi " within the meaning of section 84 of the Civil Procedure Code until March 3.

Under section 84 where the plaintiff fails to appear on the date of hearing and where the defendant is present or represented and does not admit the plaintiff's claim or consent to a postponement, " the court shall pass a decree nisi in the Form No. 21 in the First Schedule or to the like effect, dismissing the plaintiff's action, which said decree shall at the expiration of fourteen days from the date thereof become absolute, unless the plaintiff shall have previously, on some day of which the defendant shall have notice, shown good cause by affidavit or otherwise for his non-appearance."

Certain points are of significance. First, the court must pass the decree nisi. I think this means that the court must authenticate a document which he regards as the decree nisi, and Form 21 itself shows that the court must sign the document. Further, the form is specifically mentioned in the section, and it is necessary that the court should pass a decree in that form or " to the like effect ". It has been suggested that where the court signs a document containing the essential details contained in Form 21, it may be taken that he has passed the decree nisi although

the document has not been formally drawn up in the office, and that an entry of such a kind made among the journal entries would be sufficient. I agree with the argument, but at the same time it is a question to be determined in each case as to whether the court was in fact passing the decree nisi or merely giving an instruction to the office to prepare a decree nisi to be passed thereafter.

The difference in the case where a trial has taken place may be noted. After the trial the judge has to pronounce judgment (sections 184-187). As soon as may be after the judgment is pronounced " a formal decree bearing the same date as the judgment " is drawn up in accordance with Form 41 or " to the like effect " (section 188). Here there is a definite direction in the Code that the decree must bear the date of the judgment. But section 188 cannot be applied to section 84 where no judgment is pronounced and the only action which the court is required to take is to " pass a decree nisi."

The District Judge was of opinion that the signing of the decree was a ministerial act which may be done at any time and that the decree when signed speaks as from the date on which the court ordered that it should be drawn up. This argument no doubt applies to a decree which follows on a judgment, but under section 84 the " passing " of the decree nisi cannot be completed until the necessary form has been drawn up, and in my opinion the " passing " becomes effective when the form so drawn up is approved and signed by the court.

In the present case it has been argued that the essential particulars required by Form 21 are contained in the journal entry of February 15, 1944, and that the entry of that date must be regarded as " of like effect " to Form 21, and that the District Judge has approved of and authenticated this entry by annexing his initials thereto, and that he must be regarded as having passed the decree nisi on February 15.

It is however difficult to arrive at this conclusion. The words " Enter D/N " read more naturally as an instruction to the office, to prepare and present to the judge a decree nisi drawn up in proper form, and it has certainly been so understood in the office, for a decree nisi was drawn up and presented to the judge on March 1, and was actually signed on march 3, by the judge then presiding in the court. Further, the fact that the judge has on February 15, merely appended his initials to the journal entry instead of his full signature reveals a degree of informalitty which is hardly in keeping with the " passing " of a decree nisi.

In this case I am of opinion that the decree nisi was not " passed " until March 3, and that the plaintiff was within time on the date of inquiry, namely, March 15.

Unfortunately for the plaintiff, that is not the end of his difficulties in connection with his appeal, for it has been argued for the defendant that we cannot now remit this matter to the District Judge for determination of the question whether " good cause " exists for setting aside the decree nisi. Three decisions have been cited to us.

In *Annamalay Chetty v. Carron* [1] Schneider J. examined the terms of section 84 and drew attention to the marked difference between the case of default by the plaintiff and that of default by the defendant. He

[1] *3 C. L. Rec. 48.*

continued—"The difference in the procedure is undoubtedly made advisedly. I can conceive of instances where it would be a distinct hardship on a plaintiff to deny to him an opportunity to show cause against the decree because the period of fourteen days has expired. He may have been prevented from attending court or showing cause within the prescribed period by unavoidable circumstances or circumstances beyond his control. He may be be prevented from showing cause within that period because he was prevented by no fault of his from notifying the day to the defendant or to the defendant's proctor. The defendant may have died or have had no proctor on the record, or have purposely evaded service of the notice, In all these cases it does seem unjust to deprive a plaintiff of the opportunity to show cause why the decree should not be allowed to stand. But my duty is to interpret the law as I find it, not to try to adapt it because of the hardship which may arise from a correct interpretation of it. In view of the unequivocal language of section 84 I do not find it possible to escape from giving to the words of the section their plain meaning and effect, namely, that cause must be shown upon a day of which the defendant shall have had notice and before the decree nisi has become absolute by the expiration of the period of fourteen days. It is clear that no cause was shown within the prescribed period ". De Sampayo J. agreed with this decision.

The same point came up again in *Mohideen v. Marikar* [1] where Soertsz J. accepted the ruling in *Annamalay Chetty v. Carron.* He expressed his feeling of surprise when the argument based upon that case was first presented to him. " At one stage of the argument I inclined to the view that what a plaintiff was required to do within fourteen days was to begin proceedings to have the decree set aside, that is to say I felt that " show good cause " must be understood to mean to make out a good *prima facie* case for setting aside the decree nisi by submitting an affidavit, for instance, as was done in this case. But the latter part of section 84 which reads ' in case of such cause being shown the court shall set aside the decree ' debars me from construing the same words when they occur in the earlier part of the section in the manner I suggested. It seems quite clear that the setting aside of the decree must be obtained, if at all by good cause being shown, not merely by good cause being attempted to be shown, within fourteen days ". Nihill J. agreed with this decision.

In *de Saram v. de Silva* [2] the matter again came up. Soertsz J. pointed out that " section 84 provides for the entering of a decree nisi due to become absolute by mere effluxion of time, by the lapse of fourteen days, unless *previously* the plaintiff has succeeded, with notice to the defendants, in showing cause for it to be set aside ". Nihill J. agreed.

What is the position in the present case? The plaintiff has come into court within the fourteen days and has succeeded in giving notice to the defendant and fixing the inquiry for a date within that period. But he has been prevented from " showing good cause " within the period in consequence of the preliminary objection taken by the defendant, which in fact was allowed by the District Judge. In view of the decisions I have cited it is not open to the District Judge now, after the period of fourteen days has elapsed, to take up the inquiry into " good cause ",

[1] *41 N. L. R. 249.* [2] *41 N. L. R. 419.*

nor it it open to us to do so in appeal. This is a real case of hardship, I may almost say of injustice. But as long as these decisions stand I have no alternative but to follow them.

We have been urged to submit the point covered by the decisions to a Divisional Bench for final determination. I am no less conscious than were the learned Judges who decided those cases that hardship and injustice can be caused to a plaintiff by the interpretation given of the section. I would urge upon the legislature the need of a speedy amendment of section 84 so that the unreasonable hardships imposed upon the plaintiff may be removed. But I regret that in the present case I do not feel justified in submitting this matter to a Divisional Court for final decision. For one thing, as regards the actual circumstances disclosed in the affidavit, I incline to the view that while they may be regarded as misfortune to the plaintiff, it is at the least doubtful whether they can be regarded as " good cause " for depriving the defendant of the decree nisi which he has obtained.

The appeal must be dismissed. The defendant has however set up a preliminary objection which on examination cannot be supported in appeal, and in all the circumstances I think the fair order to make is that there be no costs to either party of the inquiry on March 15, 1944, or of this appeal.

Rose J.—I agree.

Appeal dismissed.