1932 *Present:* **Macdonell C.J., Garvin S.P.J., Lyall Grant J., Maartensz A.J.**

ANDIAPPA CHETTIAR *v.* SANMUGAM CHETTIAR.

7—C. R. Gampola, 9,651.

Appearance—Presence of proctor—No instructions—What constitutes appearance—Representative capacity—Proceedings inter partes—Evidence for plaintiff—Civil Procedure Code, ss. 24, 146, 823.

The presence in Court, when a case is called, of the proctor on the record constitutes an appearance for the party from whom the proctor holds the proxy, unless the proctor expressly informs the Court that he does not, on that occasion, appear for the party.

Where, in an action, the claim of the plaintiff is traversed in the answer, and there is an appearance for the defendant, evidence should be taken in support of the plaintiff's case.

CASE referred by Macdonell C.J. to a Bench of four Judges.

The facts, as stated in the reference, were as follows: In a Court of Requests case plaint was filed and answer was filed and day of trial was fixed. On that day, November 25, 1930, plaintiff's proctor of record appeared, and defendant's proctor of record also appeared by the defendant was absent without excuse, and defendant's proctor stated that he had " no instructions " and " no material on which to proceed with the case". Thereupon the learned Commissioner wrote in the journal " It is useless to frame issues and I enter judgment for plaintiff as prayed with costs," and he issued a decree in due form. Thereafter on December 18, 1930, the journal says as follows:—" Proctor for defendant files affidavit from defendant and moves for the reasons stated therein that the Court be pleased to re-open the judgment entered against defendant and permit him to proceed with the case. I am unable to grant this application. On the trial date (November 25, 1930), the defendant was absent without excuse and Mr. Van Langenberg, who appeared for him, stated that he had no instructions and was unable to proceed with the case in the absence of material. As no defence could be made, I considered it useless to frame issues and entered judgment for the plaintiff as prayed for. This judgment was entered, not *ex parte*, because the defendant was present through his proctor, (section 24 C. P. C.), but *inter partes*, and this being so, I have no power to set it aside under section 823 (3) C.P.C." The defendant appealed on January 7, 1931, from this order of December 18, 1930, and it was conceded in argument that he was in time in doing so.

Navaratnam (with *E. B. Wikramanayake*), for defendant, appellant. —Where a proctor appears in Court and states that he has no instructions, the trend of the earlier decisions is that it would depend on the circumstances of the case whether or not there was an appearance (*Kandappa v. Marimuttu*[1]). In this case the Commissioner has entered judgment for plaintiff without going to trial. Where the defendant has filed

[1] *14 N. L. R. 395.*

answer and does not appear on the day of trial, the Court must insist on the plaintiff leading evidence before he can be entitled to judgment (*Phais Mohamedu Khan v. Mariamina*[1]). In this case even if there was an appearance for the defendant the order is irregular.

Counsel also referred to *Senanayake v. Cooray* [2], *Perera v. Goonetilleke* [3], *Scharenguivel v. Orr* [4], and *Cannon v. Telesinghe* [5].

Garvin (with his *Gratiaen*), for plaintiff, respondent.—The Indian Code defines an appearance. Our Code does not. When a proctor has filed a proxy it is his business to see that he gets the necessary instructions. The later decisions of the Supreme Court are to the effect that a proctor cannot avoid an *inter partes* judgment merely by stating that he has no instructions.

February 1, 1932. MACDONELL C.J.—

This was a case referred by me to a Bench of Four Judges so as to obtain a definite ruling on two matters upon the former of which there is a conflict of authority. The reference is in the following terms:—

" (1) was there on November 25, 1930, an appearance for the defendant in this case ?

(2) was the judgment of November 25, 1930, a judgment *inter partes* or judgment by default, *ex parte* ?"

The first question is the more important of the two questions referred, since it is as to it that there is a conflict of authority. I am clearly of opinion that there was an appearance for the defendant in this case. He had given a proxy to a proctor who had filed the same. so that there was a proctor of record for defendant, and this was an appearance in Court authorized by law to be made in an action which could be made by a proctor duly appointed by the party interested; see Civil Procedure Code, section 24. The proctor of record was present in Court and stated certain matters in connection with the case on behalf of his client, the defendant, viz., that he had no instructions; this was clearly an appearance for the client; per Lyall Grant J. in *Scharenguivel v. Orr* [4]. " It has never been held that a proctor for a plaintiff who has received a proxy and instructions for the preparation of a plaint is entitled to avoid a final judgment against his client merely by stating on the date fixed for trial that he has received no instructions." That was the converse case, appearance of proctor retained for plaintiff, plaintiff himself being absent, but I think the dictum holds good equally where, as in the present case, the client is defendant in the action. When the proctor of record is in Court when a case he is retained in is called, then either the client is also personally present or he is not. If he is personally present, then beyond question he has appeared. If he is absent, then the presence of his proctor of record is *primâ facie* an appearance for him in the absence of anything appearing to the contrary. The proctor of record is there when the case is called; then, if he wishes his presence in Court not to be reckoned an appearance for the defendant, he should make that clear to

[1] *5 S. C. C. 65.*
[2] *15 N. L. R. 36.*
[3] *5 C. W. R. 6.*
[4] *28 N. L. R. 302.*
[5] *30 N. L. R. 372.*

the Court forthwith. This is necessary in the interest of the Court itself, to inform it if, notwithstanding the presence of the proctor in Court, the occasion is not to be treated as an appearance; the Court needs this information that it may know how to proceed. This is necessary also in the interest of the proctor himself, that there may be some entry in the journal of the case to show what he did for his client on the case being called. While on the one hand a proctor who has accepted a proxy cannot disclaim his client as long as such proxy continues to be of effect, still I think it would be to place proctors in a position hardly tolerable, were it to be ruled that if a proctor is in Court when a case for which he has accepted a proxy is called, his presence must be reckoned an appearance for the defendant without any option to the proctor to say that it must not be so reckoned. The proctor may have been engaged in the case just disposed of, and may likewise be engaged in the case next on the day's list, and it would be burdensome—and perhaps farcical—to require him to go out of Court when the case is called the defendant in which, being his client, is absent without having given him instructions, on pain of his continuing presence in Court being compulsorily reckoned an appearance for the absent defendant. Consequently it seems but reasonable that the proctor should have the right to inform the Court that, though he is physically present, he does not on this occasion appear for the defendant whose case has just been called. But it seems to me that it is his duty to make it clear that he does not on this occasion appear for that client, and that if he does not so make it clear, his presence in Court will *ipso facto* be an appearance for that client. A few words only will be necessary, provided that they make it clear that he does not on this occasion appear for his client, and he can add, if he so desires, the reason why, which in the great majority of instances will be that he is without instructions, but those few words making it clear that on this occasion he does not appear for his client are necessary and must be uttered, otherwise his presence in Court must be reckoned an appearance for his client. The substance of what he says will of course be entered forthwith in the journal of the case. This rule, if adhered to, will be a minimum of extra trouble to proctors, and to the secretary of the Court alike, but it is a rule necessary to be observed in all such cases—*i.e.*, proctor present when case is called but defendant absent—since the Court must be informed whether the proctor though present yet is not appearing for defendant on that occasion, and it is a rule which must be observed to prevent dispute arising thereafter as to whether there was or was not, when the case was called, an appearance for defendant therein.

The decided cases on this point fail to give a clear ruling thereon. The decisions in some at least of the earlier cases incline to the view that I am prepared to adopt, namely, that the presence of the proctor is an appearance for the defendant, though certainly none of them suggest that the proctor has or should have the right to say that, though present, he does not appear for the defendant. Thus in the Court of Requests case of *Pieris v. Fernando* [1], it was held that where defendant was absent on the day fixed for trial of a case, but his proctor on the record appeared for him, answer having been filed, and on the evidence adduced by

[1] *1 S. C. Rep. 67.*

plaintiff the Commissioner entered up final judgment, then the appearance of the proctor took the case out of section 85, which at that time seems to have applied to Courts of Requests, and final judgment was rightly entered, and that the Commissioner had no power to set aside such final judgment on application by the defendant. Again in the District Court case of *Gargial v. Somasunderam Chettiar*[1], where the defendant's proctor appeared on the day of trial, applied for a postponement which was refused, and then retired from the case declining to take further part in the proceedings, it was held that the proctor must be taken to have appeared for his client. But other cases, some of them later than the two just cited, have tended to relax this principle without however setting up any other principle in its place. Thus in the District Court case of *Mohammedu Lebbe v. Kiri Banda*[2], it is stated that on the day fixed for trial the defendant was absent and that the proctor, though physically present, took no part in the proceedings. Wood Renton J. said that he thought it would be straining the law to hold that a client is bound by the mere casual presence in Court of the proctor who, so far as the record showed, had no instructions on behalf of his client and could only be said to represent that client in virtue of the fact that his name appeared as proctor on the record, and Hutchinson C.J. concurred. Again in the District Court case of *Perera v. Gunatilleke*[3], where on the day of trial the defendant's proctor of record appeared but said he had no instructions and where the client was absent, Wood Renton C.J. said that the mere physical presence of the proctor, together with his statement that he had no instructions, would not constitute an appearance for the defendant such as would give the proceedings the character of an *inter partes* trial. It is just this difficulty, " the casual presence " or " the mere physical presence ", in Court of a proctor, who has " no instructions ", which the rule laid down above seeks to meet. In the Court of Requests case of *Kandappa v. Marimuttu*[4], where the facts were that answer had been filed and that on the day of trial the defendant was absent, but that the proctor who was there for other cases as well, mentioned that the defendant had asked him to appear but had given him no instructions, Wood Renton J. said: " It appears to me that cases of this kind turn very largely on questions of fact, and it is not desirable nor do I propose to attempt to lay down any general rule." So also in the District Court case of *Senenayake v. Cooray*[5], Middleton J. said: " It is somewhat difficult to say in such a case what is the principle upon which a Court should act in deciding whether there is an appearance or not, but I think each case should be determined upon its own 'circumstances.'" From what is laid down in the last two cases cited, I would respectfully dissent; it is precisely the refusal to lay down a definite rule and the deciding each case on its own circumstances which lead to uncertainty—with the concomitants, further litigation, delay and increased costs—and on the contrary I prefer to lay down a definite rule, that enunciated above, which I think should be followed. I may add that the latest decision on the matter, that of Akbar J. in the Court of Requests case of *Cannon v. Telesinghe*[6], is in substance to a like effect to the rule now laid down.

[1] *9 N. L. R. 26.*
[2] *3 Bal. 200.*
[3] *4 C. W. R. 6.*
[4] *14 N. L. R. 395.*
[5] *15 N. L. R. 36.*
[6] *30 N. L. R. 372.*

The matter referred is the case of a defendant whose proctor is present in Court when his case is called, but I apprehend that with regard to a plaintiff a similar rule in the interpretation of section 84 of the Civil Procedure Code, if it be a District Court case, of section 823 (1), if it be a Court of Requests case, should *mutatis mutandis* meet all difficulties.

The second question referred is, was the judgment of November 25, 1930, a judgment *inter partes* or a judgment by default, *ex parte?* I am satisfied that since there was an appearance for defendant who had by his answer on the record traversed the plaint, there could have been a good judgment *inter partes* only if some evidence had been taken in support of the plaintiff's plaint; wanting any such evidence the judgment delivered on November 25, 1930, was at most a judgment *ex parte*. Section 184 of the Civil Procedure Code contemplates judgment in a District Court case being given " upon the evidence which has been duly taken or upon the facts admitted in the pleadings or otherwise, " and when section 827 applicable to Courts of Requests says " the Commissioner shall hear and determine the action according to law", it is to the provisions of section 184 that it is referring in a case such as this, namely, where there has been an appearance and where the plaint has been traversed. The Court of Requests case of *Pieris v. Fernando*[1], cited above, though very shortly reported, makes it clear that in such circumstances, evidence must be taken in support of plaintiff's claim if the judgment is to be one *inter partes;* it is simply an exemplification of the rule, *probatio incumbit ei qui dicit non qui negat.* If there had not been an appearance but a default, then section 823 (2) of the Civil Procedure Code would apply and the Commissioner would take evidence only if the title to, interest in, or right to the possession of land were in dispute or if it were a case in which he " deemed it necessary or expedient to hear evidence in support of the plaintiff's claim." In this connection I would refer to *Phais Mohamedu Khan v. Mariamina*[2], which in the present state of the law would be a wrong decision. That was a case of default by defendant, consequently even though there was on the record a denial of plaintiff's claim, still it would have been necessary for the Commissioner following section 823 (2) to take evidence only if a question as to land were in dispute or if he deemed it necessary or expedient. But in the case before us to make the judgment good *inter partes*, evidence should as a matter of law have been taken in support of plaintiff's claim since that claim had been denied by the defendant on the pleadings and there had been an appearance for the defendant.

In the present case the proctor for defendant on December 18, 1930, asked the Commissioner of Requests to reopen the judgment of November 25, 1930. The Commissioner quite rightly refused to do so, since the proceedings whereon that judgment was pronounced were *inter partes*, whatever may have been the flaw in those proceedings and in the judgment thereon. Then the defendant's only remedy was by appeal but the time for this had elapsed before December 18, 1930, and a *fortiori* before January 7, 1931, when he actually did enter his appeal. But I think that in view of the uncertainty of the law on one at least of the points raised in this case, the Court should in revision give relief to the

[1] *7 S. C. Rep. 67.* [2] *5 S. C. C. 65.*

defendant in the following terms, namely, that conditionally on his paying the costs incurred on November 25, 1930, and on December 18, 1930, and of this appeal within a short period, say 14 days after this judgment is delivered, he be at liberty to defend but that failing payment of those costs within the period fixed, the judgment of November 25, 1930, should stand.

GARVIN S.P.J.—

I agree generally with the Chief Justice. In the case of a party, the test of his appearance or non-appearance is his presence or absence, when the case or proceeding to which he is a party is called in Court. But a party may make an appearance by a proctor duly appointed by him. It is conceivable that a proctor on the record for what may appear to him to be good and sufficient reason may not wish to make an appearance on behalf of his client. He may nevertheless be compelled to attend Court in connection with other business and as a result be present in Court, when the case is called. At the same time a Court must know and have some means of ascertaining whether a party appears and the ordinary test of such appearance must be the presence of the party or his proctor. If the proctor, though present, does not wish his presence to be construed as an appearance on behalf of his client, he must immediately inform the Court that he does not desire to and is not entering or making an appearance in the case. This must be done clearly and unambiguously. It is not sufficient, as in the case under consideration, to say that he has no instructions. A proctor who has no instructions may nevertheless do much for his client and in his interests. The Court, as I have said, is entitled to know at the outset whether the proctor is making an appearance for his client or not and unless he states that he is not making such an appearance, it is entitled to treat his presence as an appearance and to proceed as if the party had appeared.

In the case under consideration, inasmuch as appearance had been entered by or on behalf of both parties, this was an *inter partes* trial. Had the defendant appealed, he would I think have succeeded on the ground that there was no evidence to support the judgment in favour of the plaintiff. He did not appeal from the judgment and mistook his remedy. I agree that, in view of the uncertainty of the law hitherto existing as to what constituted an appearance by a proctor on behalf of his client, relief should be given in exercise of this Court's revisory powers.

LYALL GRANT J.—

The points of reference are:—

(1) Was there on November 25, 1930, an appearance for the defendant in this case?

(2) Was the judgment of November 25, 1930, a judgment *inter partes* or a judgment by default *ex parte*?

The claim made in the Court of Requests was for Rs. 259.46, the balance due by the defendant on an account for monies lent and goods delivered.

One item of the account was a loan of Rs. 750. There was also an item for interest Rs. 34.12.

The defendant filed answer denying indebtedness and stating that the item of Rs. 750 was incorrect and that it ought to be Rs. 500. He admitted the correctness of the other items (with the exception of the item for interest).

On the trial date the defendant was not personally present and had sent no excuse. His proctor appeared and stated that he had no instructions and was unable to proceed with the case in the absence of material. The learned Commissioner considered it useless to frame issues and entered judgment for the plaintiff.

On December 18, 1930, the defendant's proctor filed an affidavit from the defendant and moved the Court to reopen the judgment on the footing that the decree was a decree by default and made *ex parte*.

The Commissioner of Requests held that the judgment was not an *ex parte* decree. The defendant was present by his proctor and therefore the Commissioner had no power to set it aside.

On this point section 24 of the Civil Procedure Code provides that—

> "Any appearance in any Court required or authorized by law to be made by a party to an action in such Court, may be made by the party in person, or by a proctor duly appointed by the party to act on behalf of such party . . . ."

In *Pieris v. Fernando*[1], Dias J. held that where on the day of trial the defendant was absent but his proctor appeared for him that the defendant had appeared and the judgment was a final one. The report shows that the plaintiff gave evidence but it is not stated what part, if any, the defendant's proctor took in the case.

Gargial v. Somasundram Chettiar[2] related to a District Court case. The defendant's proctor on the day of trial moved for a postponement on the ground that owing to his client's absence he was unable to get ready for the trial. On his motion being refused, he withdrew from the case and declined to take part in the proceedings. It was held by Layard C.J., Wood Renton J. agreeing, that this constituted an appearance by the defendant and that the trial was *inter partes*.

In *Mohammedu Lebbe v. Kiri Banda*[3], the proctor was present in Court but took no part in the proceedings whatever. Wood Renton J. held that the mere casual presence in Court of the defendant's proctor did not constitute an appearance.

In *Perumal Chettiar v. Goonetileke*[4], the defendant's proctor appeared and asked for a postponement on the ground of the defendant's absence. Hutchinson C.J. held that this constituted an appearance by the defendant.

In *Kandappa v. Marimuttu*[5], the proctor was present in Court in connection with other cases and when the case was called stated that the defendant had asked him to appear in the case but had given him no definite instructions and that he was not prepared to take any further steps in the case. He did not apply for a postponement.

[1] *(1892) 1 S. C. Rep. 67.*
[2] *(1905) 9 N. L. R. 26.*
[3] *(1907) 3 Balasingham 200.*
[4] *(1908) 4 Balasingham 2.*
[5] *(1911) 14 N. L. R. 395.*

On these facts Wood Renton J., while guarding himself from laying down a general principle, said he was not prepared to say that the Court of Requests was wrong in holding that there had been default by the appellant and that the respondent was entitled to judgment.

The appeal in that case was brought by the defendant against the Commissioner's refusal to reopen the case and the appeal was dismissed.

In *Senanayake v. Cooray*[1], a District Court case, the defendant was absent on the trial date and his proctor stated that he had no instructions. The District Judge heard the case and entered judgment for the plaintiff. Middleton J., with whom Lascelles C.J., agreed, considered that the fact of the defendant's proctor being casually in Court and stating that he had no instructions did not constitute such an appearance for the defendant as to make the trial one *inter partes*.

Middleton J. went on to say that it was clear from the pleadings and on the plaintiff's evidence that it was hazardous for the District Judge to enter judgment for the plaintiff in a matter of title to immovable property as he did.

In *Perera v. Goonetileke*[2], the proctor whose name appeared on the record for the defendant stated that he had no instructions from his client who was absent. It was held by Wood Renton C.J., with whom Shaw J. agreed, that the District Judge was wrong in giving judgment for the plaintiff without hearing evidence, *i.e.*, he was wrong in treating the case as *inter partes* and not *ex parte*. This judgment proceeded on the authority of *Senanayake v. Cooray* (*supra*).

In *Scharenguivel v. Orr*[3], the plaintiff was absent on the day of trial. His proctor was present and stated that he had no instructions from his client. On the defendant's motion the action was dismissed. The plaintiff appeared later by other proctors who filed proxy with cancellation of the former proctor's proxy and asked that the decree be set aside.

The learned District Judge treated his decree as a *decree nisi* and held an inquiry under section 84. He found that the plaintiff had been negligent and refused to reopen the case. On appeal the District Judge's view was upheld on the ground that no sufficient cause had been shown why the case should be relisted.

Speaking *obiter* however, I expressed an opinion that the decree might be considered to have been passed *inter partes*, and I endeavoured, possibly not too successfully, to distinguish the cases of *Senanayake v. Cooray* (*supra*), *Perera v. Goonetileke* (*supra*), and *Kandappa v. Marimuttu*[4].

My brother Garvin agreed and we both considered that when a suitable opportunity presented itself, the judgments in *Senanayake v. Cooray* (*supra*), *Perera v. Goonetileke* (*supra*), and *Kandappa v. Marimuttu* (*supra*) should be reviewed.

In *Cannon v. Telesinghe*[5], Akbar J. held that where the defendant was absent but his proctor was present, the Court of Requests was wrong in entering judgment by default. The case was sent back for trial. The report does not show what part, if any, the defendant's proctor took in the proceedings.

[1] *(1911) 15 N. L. R. 36.*
[2] *(1917) 4 C. W. R. 6.*
[3] *(1927) 28 N. L. R. 302.*
[4] *(1911) 14 N. L. R. 395.*
[5] *(1929) 30 N. L. R. 372.*

On a further review of the authorities, I see no reason to alter my opinion that the appearance by a proctor holding a proxy is *primâ facie* the appearance of his client. The explanation in section 72 of the Civil Procedure Code makes this clear:—"A party appears in Court when he is there present in person to conduct his case, or is represented there by a proctor or other duly authorized person."

We have not in Ceylon the qualifications imposed in the Indian Code, Order V., Rule 1, that the proctor must be duly instructed and able to answer all material questions relating to his client.

If the proctor has due notice of the day fixed for trial, it seems to me that it is his duty to inform his client of the date fixed (assuming that no other notice is issued from the Court) and to obtain his client's instructions.

If he has not done so, his failure, in a question with the opposite party, must be imputed to the client. If he has done so and the client has failed to instruct, I am unable to see why the client should get any advantages.

As I understand it the reason for allowing a *decree nisi* in cases of default is because there may be an excellent reason for non-appearance, *e.g.*, no notice of the date may have been served or there may be some other convincing reason for the person's non-appearance.

In *Gargial v. Somasundram Chettiar*[1], the proctor gave what appeared to be a strong reason to support an application for postponement, viz., that his client and necessary documents were in India.

It was however there laid down that an application for postponement constitutes an appearance which bars the client from applying later to set aside the decree.

I find it difficult to see why the statement that the proctor has no instructions, no reasons being given, should place the litigant in a better position than that in which he is placed by an application being made on his behalf for a postponement on the ground that for stated reasons his proctor has no instructions.

I would answer the first question in the affirmative. The second question depends on whether the learned Commissioner of Requests was right in giving judgment for the plaintiff without calling evidence and on that framing issues.

On that point section 827 refers us back to the general principles governing procedure in District Courts. The claim in the present case was not a liquid one and could not be dealt with under Chapter 53.

The answer raised an issue in regard to the claim for a sum of Rs. 750. I do not think therefore that the learned Commissioner was right in applying the proviso to section 146. The defendant had made a defence, and the burden of proof lay on the plaintiff. (Evidence Ordinance, section 101 and 102.)

This point is decided in *Phais Mohamedu Khan v. Mariamina*[2]. In that case the defendants were not present either personally or by proctor but sent an excuse and a request for a postponement. The request was refused and decree was entered for the plaintiff. No suggestion was made that the case was not heard *inter partes* but this

[1] *(1905) 9 N. L. R. 26.*

[2] *(1882) 5 S. C. C. 65.*

Court held that the Commissioner was wrong in not taking evidence before giving judgment for the plaintiff. A similar decision was given in *Meedin v. Meedin.*[1]

For the reasons given in answering the first terms of reference, I think that there was an appearance by the defendant and that the judgment was therefore not *ex parte*.

It purported to be *inter partes* but was not properly entered, inasmuch as the plaintiff was not called upon to give evidence in support of a claim to which a specific defence had been entered.

MAARTENSZ A.J.—

This was an action for the recovery of a sum of Rs. 259.46 alleged to be due from defendant according to the particulars of account filed with the plaint.

The defendant in his answer disputed the correctness of the amount and repudiated liability. When the case came on for trial on November 25, 1930, the defendant was " absent without excuse " and his proctor Mr. Van Langenberg said that he had no instructions and no material on which to proceed with the case.

The learned Commissioner then made the following order:—" It is useless to frame issues and I enter judgment for plaintiff as prayed with costs. " When the defendant moved under section 823 (3) of the Civil Procedure Code to have the order set aside he held that " the judgment was entered not *ex parte*, because the defendant was present through his proctor (see 24, C. P. C.) but *inter partes*, and that he had no power to set it aside ".

The questions referred for consideration by the Full Bench on the appeal of the defendant from this order were:—

(1) Was there on November 25, 1930, an appearance for the defendant in this case?

(2) Was the judgment of November 25, 1930, a judgment *inter partes* or a judgment by default *ex parte*?

As regards the first question, there is a difference of opinion as to whether a party who was personally absent has or has not appeared by his proctor when his proctor was present and told the Court that he had no instructions.

I agree with my Lord the Chief Justice that a definite rule should be laid down for the guidance of proctors and the Courts of original jurisdiction; and that the rule should be that a proctor present in Court when his case is called, if he does not desire to enter an appearance for an absent party whose proxy he has filed should definitely state to the Court that he is not entering an appearance, and that otherwise his presence in Court should be deemed an appearance for that party.

In accordance with this view, I would hold that the judgment entered by the learned Commissioner on November 25, 1930, was a judgment *inter partes* and the appeal is out of time; but as there is a conflict of authority, I agree to the order proposed by the Chief Justice.

[1] *(1909) 5 Appeal Court Reports 42.*

Set aside.