1943 *Present :* **de Kretser and Wijeyewardene JJ.**

AMARASINGHE, Appellant, *and* WEERATNA, Respondent.

*223—D. C. Colombo, 13,463.*

**Ex-parte *trial—Decree* nisi *entered on plaintiff's affidavit—Failure to give notice of decree* nisi *to Defendant—Civil Procedure Code, s. 179.***

**Where a case has been fixed for *ex-parte* trial decree *nisi* may be entered on an affidavit filed by the plaintiff.**

**Where notice of a decree *nisi* which was entered after an *ex-parte* hearing was not served on the defendant, who was aware of the decree *nisi*, and had moved to have it vacated,—**

***Held*, that failure to serve notice of decree *nisi* on the defendant was not a fatal irregularity.**

APPEAL from a judgment of the District Judge of Colombo.

*H. W. Jayewardene* for defendant, appellant.

No appearance for plaintiff, respondent.

*Cur. adv. vult.*

March 24, 1943. DE KRETSER J.—

Answer was due on February 13 and was not filed on that date. The case was then fixed for *ex-parte* trial. On February 25 the defendant filed a petition and affidavit and a medical certificate and moved for time to file answer. In the interval a decree *nisi* had been entered and he moved that decree *nisi* entered be vacated. So an inquiry was held and the judge decided that the defendant had no excuse for his default and he dismissed his application. He thereupon made the decree absolute. It is impossible for us to say that the refusal to allow the defendant to file answer was wrong.

Objection has been taken to the procedure followed in the case, viz., allowing the decree *nisi* to be entered on the affidavit filed by the plaintiff. It so happens that both my brother and myself are aware of the practice that has prevailed for many years in the District Court of Colombo and which was initiated by Justice Schneider when he was District Judge of Colombo. It is certainly a procedure which had not been questioned and it is supported by section 179 and section 427 of the Civil Procedure Code. Section 179 certainly indicates that the order should be made for each particular case and that sufficient reason should be given, whereas

the present facts seem to be based on some general order which was made. The only result of our giving effect to this objection would be to order a formal inquiry to be held. We do not think this rule of procedure should be so strictly observed. As substantial justice has been done and more especially as it is the result of an order which in effect the court makes from time to time, we do not think we should interfere with the order of court. Even if we did it would not help the defendant.

The question next arises that though a decree *nisi* was entered, it had not been served on the defendant, and in spite of that fact the learned judge had made the decree absolute. The question is whether he should go through the prescribed formality. The defendant knew of the existence of a decree *nisi* and we think it would be an abuse of the process of the Court to insist on this formality and it is our duty to see that such abuse does not occur. We therefore think we need not interfere with the order made.

The appeal is dismissed.

WIJEYEWARDENE J.—I agree.

*Appeal dismissed.*