Suit No. 777 *of* 1865.

1866.
Feb. 5.

THE ORIENTAL FINANCE CORPORATION, LIMITED. *Plaintiff.*
THE MERCANTILE CREDIT AND FINANCE CORPORATION, LIMITED .....*Defendant.*

Judgment by default—Application for Order to set aside—"Sufficient Cause"—Bonâ fide *Mistake—Act VIII. of* 1859, *Secs.* 114 *and* 119.

On an application, made under Sec. 119 of Act VIII. of 1859, to set aside a judgment by default:—*Held* that the words "prevented by any sufficient cause from appearing" should be read so as to include the case of the absence of the plaintiffs' counsel or attorney, when such absence has been caused by a *bonâ fide* mistake.

Under such circumstances a judgment by default under Sec. 114 was set aside upon payment by the attorney for the plaintiff of the costs of the hearing.

THIS case had been called on for hearing on the 18th of November 1865, before Sir M. R. Sausse, C. J.; and the plaintiff not appearing when called, and the defendant appearing by counsel, judgment by default against the plaintiff was passed, pursuant to Sec. 114 of Act VIII. of 1859.

On the 22nd of December the plaintiff obtained a *rule nisi*, calling on the defendant to show cause why the judgment passed on the 18th of November should not be set aside.

This rule was obtained on the affidavit of W. H. Crawford, the plaintiff's attorney, which stated that he was not on the 18th of November aware, until after the case had been called on, that the case was on the board for hearing on that day: That it was the duty of one of his clerks to examine every evening the board for the next day, and to inform him what cases, in which he was engaged as attorney, were on the board for hearing: That on the 17th of November his said clerk had neglected his duty, and did not inform him that the present case was for hearing on the 18th: That he had fully intended appearing by counsel for the plaintiffs; and was prevented from doing so only by this *bonâ fide* mistake on his part, in thinking that there were not any of his cases on the board for the 18th of November: That the

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suit was to recover a sum of Rs. 4,30,000 ; and that the plaintiffs were advised, and believed, they had a valid claim against the defendant. Mr. Crawford, by his said affidavit, offered personally to pay the costs of all parties occasioned by the mistake on his part.

Bayley (Feb. 3) moved to make absolute the order of the 22nd of December.

The Honourable J. S. White, Acting A. G. (*Green* with him), *contra* :—There is really no excuse attempted to be given by the plaintiff's attorney. He merely states that he did not do what he admits it was his duty to do ; and offers to pay all costs. It does not even appear that any counsel had been instructed for the plaintiffs ; or that any briefs had been given out. So that, even supposing Mr. Crawford to have known, on the evening of the 17th of November, that the case would be heard the next day, it does not appear that he would have been ready to go on with the plaintiff's case. It is suggested that there is a very large amount at stake in this case ; but, it is submitted, that can make no difference in the rule. If this case be reinstated, it will always be a mere question of costs, whether a judgment by default will be set aside or not.

Bayley in reply :—We submit that the plaintiff's attorney not being aware of the fact, that the case was fixed for hearing on the 18th of November, is "sufficient cause" for the non-appearance of the plaintiffs ; and that, under the terms of Sec. 119 of the Code, the Court will set aside the judgment by default.

Cur. adv. vult.

COUCH, C. J. :—Upon looking at Sec. 114 of the Civil Procedure Code, I find that a very important change in the law is introduced by it. By that section "judgment by default" is made final ; and the plaintiff is precluded by the judgment from instituting any fresh suit for the same cause of action. This is a very important distinction between judgment by default, and a nonsuit, which would have been ordered under the old law.

Taking this into consideration, I think that Sec. 119 should receive a liberal construction; and that the words "prevented by any sufficient cause from appearing," should be read so as to include the case of the absence of the plaintiffs' counsel or attorney, when the absence has been occasioned by a *bonâ fide* mistake.

In the present case, even, supposing the attorney for the plaintiffs to have been guilty of negligence, I do not think it would be right to leave the client to an action against his attorney as his only remedy. I think I should rather adopt the course which would be adopted in England, under similar circumstances, namely, that the judgment by default should be set aside, upon the terms of the attorney for the plaintiff personally paying the costs of the hearing. Acting upon this rule, I think the judgment should be set aside: the attorney for the plaintiff personally to pay the costs of the defendant's appearance at the hearing, and costs of this motion.

The order will be that, upon payment of those costs, the judgment is to be set aside, and the suit proceeded with, as if no judgment had been passed.

NOTE.—The following are the sections of the Code referred to:—

Sec. 114.—"If the defendant shall appear, in person or by a pleader, and the plaintiff shall not appear, in person or by a pleader, the Court shall pass judgment against the plaintiff by default; unless the defendant admit the claim, in which case the Court shall pass judgment against the defendant upon such admission. When judgment is passed against a plaintiff by default, he shall be precluded from bringing a fresh suit in respect of the same cause of action."

Sec. 119.—"In all cases of judgment against the plaintiff by default, he may apply, within thirty days from the date of the judgment, for an order to set it aside; and if it shall be proved to the satisfaction of the Court that the plaintiff was prevented by any *sufficient cause* from appearing when the suit was called on for hearing, the Court *shall* pass an order to set aside the judgment by default, and shall appoint a day for proceeding with the suit."

For a similar decision of the Appeal Court (COUCH, C.J., and WESTROPP, J.,) see *Hardatrái Shrikisandás* v. *Victoria Finance and Bullion Association*, 3 Bom. H. C. Rep., O.C.J. 60.—ED.