

It is to be regretted that we should have to deal with important civil rights by reference to principles which almost elude our grasp when we endeavour to give them a practical application ; but we must, in matters of inheritance, administer to the Hindu community such a law, however vague and nebulous, as it has been content to devise for itself, or to accept from tradition. By that law the widow of the *gotraja-sapinda* of a nearer collateral line appears entitled to precedence over the male *gotraja* in a more remote line, and we must accordingly pronounce against the claim of the plaintiffs.

Appeal dismissed.

Attorneys for the plaintiffs :—*Messrs. Tyabji and Sayani.*

Attorneys for the defendants :—*Messrs. Hearn, Cleveland, and Lee-Warner.*

[ORIGINAL CIVIL.]

Before Mr. Justice Pinhey.

MIRZA ALLY BEBANEE (PLAINTIFF) *v.* SYED HYDER HOOSEIN
(DEFENDANT).*

Practice—Setting aside ex parte decree—Substituted service of summons.

Where substituted service of the summons is ordered under section 82 of the Civil Procedure Code (X. of 1877), a sufficient time ought, under section 84, to be given for notice of the fact to reach the defendant, wherever he may be ; and, if an *ex parte* decree be obtained by the plaintiff, the Court, on being satisfied that the time fixed was insufficient, will set aside the decree.

THIS was an application by the defendant, under section 108 of the Civil Procedure Code (Act X. of 1877), to have a decree against him set aside, and the suit restored to the Court list.

The summons in the suit was issued on the 24th January, and the day fixed for the hearing was stated in the summons to be the 12th February.

On the 4th February an order to substitute service on the defendant was obtained by the plaintiff from a Judge in chamber, under section 82 of the Civil Procedure Code (Act X. of 1877), and on the same day service was duly effected as required by that section.

On the 12th February the case came on for hearing. The defendant did not appear, and an *ex parte* decree was accordingly

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passed against him under section 100 of the Civil Procedure Code.

On the 15th February the defendant obtained an order *nisi* to set aside the decree upon an affidavit in which he stated that he had left Bombay, four months previously, for the purpose of visiting his native place, Moradabad, in the North-West Provinces, that before his departure he had informed the plaintiff of his intention. He denied that he had absconded in order to avoid this suit, of which he alleged he knew nothing whatever until his return to Bombay on the 13th February, when he learned that an *ex parte* decree had been obtained against him by the plaintiff.

Badrudeen Tyabji, for defendant, in support of the order :—The mere fact that the plaintiff was not in Bombay, does not show he had absconded. Section 84 of the Civil Procedure Code requires the Court to fix a time for defendant's appearance when making an order to substitute service. This order does not show that this was done, and is, therefore, irregular. The substituted service was not effected until the 4th February. Time should have been allowed to enable the defendant to hear that service had been effected, and to attend at the hearing. He swears he was at Moradabad, which is four days' journey from Bombay. He could not possibly have attended the hearing on the 12th February. These circumstances made it only reasonable that, when the order to substitute service was made, a new date for the hearing should be fixed under section 84 of the Code. That section was evidently intended to meet such a case as this.

Inverarity, for plaintiff, *contra* :—This Court cannot go behind the order made in chamber for the substitution of service which was made on affidavits believed by the Judge. As to section 84 of the Code, the date fixed need not appear in the order. The Judge ordered that this summons should be affixed to the door of the defendant's house. This summons orders the defendant to appear on the 12th February. That, therefore, was the date fixed by the Judge under section 84. If no new date for the hearing was fixed, we must assume that the Judge did not think it necessary, and that he considered all the circumstances of the case.

This Division Court is really asked to set aside the decree on the ground that the order to substitute service should not have

been made. By section 83 of the Code the Court must hold that the defendant was personally served on the 4th February. He could, therefore, have been present in Court on the 12th February, even if he had been at Moradabad on the 4th. We don't believe the defendant was at Moradabad; and we now apply for leave to cross-examine the defendant on this point.

PINHEY, J.:—By the first clause of section 108 of the Code of Civil Procedure an application may be made to set aside a decree passed *ex parte* against a defendant under section 100, and by the second clause of the section it is provided that 'if it be proved to the satisfaction of the Court that the defendant 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 decree.' In the present case I am satisfied that the defendant was prevented by sufficient cause from appearing when the suit was called on for hearing on the 12th February. The defendant has sworn in his affidavit in support of the application that he was not in Bombay when the plaint in this suit was filed on the 21st January last, as he went, four months ago, to his native place, Moradabad, in the North-West Provinces, for the recovery of his health, or, at least, for change of air. And it seems from the plaint that the plaintiff was uncertain of the whereabouts of the defendant, even if he did not know that the defendant had gone to Moradabad; for in the plaint he does not describe the place of present abode of the defendant in any way as contemplated by paragraph (c) of section 50; but he describes the defendant as 'a Mahomedan inhabitant *who lately resided in house No. 5, in Ghás Bazaar Street, outside the Fort of Bombay.*' On the plaint being filed, containing this description of the defendant, the summons issued in the usual way; and when it was certified to the Court that the defendant was not to be found at the place of last residence mentioned in the plaint, an order for substituted service was taken out in chamber on the 4th February. On that day substituted service of the summons was effected by affixing a copy to the door of the house specified in the plaint.

Section 83 of the Code of Civil Procedure provides that "the service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally." Mr. Inverarity

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argued that under this section the Court is bound to hold that the summons was served on the defendant personally in Bombay on the 4th of February; and as there was plenty of time for a defendant served in Bombay on the 4th to appear in Court on the 12th, Mr. Inverarity contended that the Court could not consider that the defendant was prevented by any sufficient cause from appearing at the hearing in Court on the 12th. But I am not prepared so to interpret section 83. Substituted service is made by that section as effectual as personal service: but what does "effectual" mean? Merely effectual for proceeding with the suit, and nothing more. It does not and cannot mean that substituted service on a man's house in Bombay is equivalent to personal service on that date; nor does it imply the absurd consequence that a man who happened to be shooting in Central India had personal knowledge of what was done at his house in Bombay on the day substituted service was effected. And that no such unreasonable interpretation of section 83 was contemplated, is clear from the next section 84, which provides that "whenever service is substituted by order of Court, the Court shall fix such time for the appearance of the defendant as the case may require." This section shows that, although substituted service may be ordered in Bombay, the Court is to take into consideration the time necessary for notice of the fact being conveyed to the place where the defendant really is, even if he be in America. Therefore, reading section 83 with the second clause of section 108, I have no doubt that the Court can, in such a case as this, hold that, as there is reasonable ground for believing that the defendant was at Moradabad and unaware of the existence of this suit, and, therefore, prevented from appearing when the case was called on for trial, the defendant is entitled to have the *ex parte* decree passed against him set aside, and to be allowed to make such defence to the suit as he may have. I, therefore, order (under section 108) that the decree passed in this suit on the 12th February be set aside. I make no order as to the costs of this application at present. They will best be considered when the suit is heard. When the suit is tried on its merits in the presence of both parties, it may be found that plaintiff improperly tried to snatch a decree behind defendant's back, or it may be found that the defendant was absent from Bombay because his creditors had made further

residence here impolitic. The latter supposition is, however, hardly reconcilable with his return since the 12th February.

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Decree set aside.

Attorney for the plaintiff :—*Mirza Hoosein Khan.*

Attorneys for the defendants :—*Messrs. Fletcher and Smith.*

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[ORIGINAL CIVIL.]

Before Sir Charles Sargent, Knt., Justice, and Mr. Justice Bayley.

L. A. WALLACE AND OTHERS (PLAINTIFFS) v. F. G. JEFFERSON
(DEFENDANT).*

February 15.

Practice—Inspection—Act X. of 1877, Section 130.

Under section 130 of the Civil Procedure Code (X. of 1877) a Judge has no discretion to refuse to allow inspection of documents relating to matters in question in a suit, provided they are not privileged.

Confidential communications between principal and agent, relating to matters in a suit, are not privileged.

Held, in a suit for an injunction to restrain the defendant from using certain trade marks, that telegrams and letters between the plaintiffs' firm in London and their managing agent in Bombay, relating to the subject-matter of the suit, were not privileged.

Bustros v. White (1) and *Anderson v. Bank of British Columbia* (2) followed.

In this suit, which was filed on the 8th November 1877, the plaintiffs prayed to be declared entitled to the sole and exclusive use of certain trade marks described in the plaint, and sought an injunction against the defendant to restrain him from using the same.

The plaintiffs were a firm carrying on business in London under the name of Wallace Brothers, and had branch firms in Manchester and Bombay. The defendant was a merchant in Bombay, carrying on business under the name of King & Co.

The plaintiffs refused to give the defendant inspection of certain documents relating to the subject-matter of the suit, and con-

* Suit No. 717 of 1877.

(1) L. R. 1 Q. B. D. 423.

(2) L. R. 2 Ch D. 644.