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to persons accused by the police or by other persons, and not to witnesses. Mr. Anding, accordingly, discharged Malká under section 215 of the Code of Criminal Procedure.

Thereupon Mr. J. Elphinstone, Magistrate of Dharwar, reported the proceedings for the orders of the High Court, as he felt a doubt as to the correctness of Mr. Anding's view. It appeared to him that the words "by any person," not being in any way qualified, included witnesses as well as persons accused of an offence.

KEMBALL, J. :—The Court concurs with the District Magistrate in thinking that Mr. Anding's view is wrong. It, therefore, annuls his order of discharge, and directs that the trial of Malká be proceeded with and disposed of according to law. Section 122 of the Code of Criminal Procedure clearly contemplates two distinct cases: one is that of a person coming forward to state what he knows; the other is that of a person accused by a police officer of an offence who comes forward to confess his guilt. With regard to the former, the section provides that the statement made by him shall be recorded in the manner prescribed for recording evidence—that is to say, under section 331 of the Code of Criminal Procedure, on oath or affirmation; whereas in the case of an accused person confessing to an offence of which he is accused, the Code, by section 345, enacts that neither oath nor affirmation shall be administered to him.

Order accordingly.

[ORIGINAL CIVIL.]

Before Sir M. R. Westropp, Knt., Chief Justice, and Mr. Justice Bayley.

July 5.

LUCKMIDA'S VITHALDA'S (ORIGINAL PLAINTIFF), APPELLANT, *v.* EBRAHIM OOSMAN (ORIGINAL DEFENDANT), RESPONDENT.*

Ex-parte decree, right of appeal against—Code of Civil Procedure (Act X. of 1877), chap. XXXIX and sections 588-591—Summary procedure on negotiable instruments.

Held—An appeal lies from an order, made under section 534 of the Civil Procedure Code of 1877, refusing to set aside an *ex-parte* decree.

THIS was a summary suit brought by plaintiff upon a promissory note under the provisions of chapter XXXIX of the Civil Pro-

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cedure Code of 1877. The summons was served upon the defendant on the 26th January 1878. The defendant, however, did not obtain leave to appear and defend, and an *ex-parte* decree was passed against him on the 7th July 1878.

On the same day upon which the decree was made, the defendant applied, under section 534 of the Civil Procedure Code of 1877, to have the decree set aside, and obtained a rule *nisi*. On the 28th March, Pinhey, J., discharged the rule, and declined to set aside the decree. The defendant then obtained a rule *nisi*, calling on the plaintiff to show cause why his memorandum of appeal against the decree of the 7th July and the order of the 28th March should not be admitted, and execution of the decree stayed. The rule now came on for argument.

Inverarity, for plaintiff, showed cause:—We contend that there is no appeal from an order, made under section 534 of the Code, refusing to set aside an *ex-parte* decree. No appeal is given in chapter XXXIX, which deals with suits like the present. Section 588 does not give an appeal, and section 591 applies only to orders made *prior to decree*, and not to an order, like the present, which was made subsequent to the decree, and which could not affect the decision of the case. The only orders appealable under section 591 are orders by which the Judge may have been misled in deciding the case, and which must have been made prior to the decree. How can the order, now appealed from, have affected a decision which was arrived at weeks before the order was made? If an appeal is permitted to a defendant, who, *after* a decree has been made, asks leave to come in and defend the suit, it cannot be refused to a defendant who before decree has been refused leave by a Judge in chamber, and, if this be allowed, a defendant by appealing might indefinitely postpone the decision of a suit, and thus the whole policy of chapter XXXIX would be upset, and the summary remedy, intended to be given in cases of negotiable instruments, would be taken away.

Macpherson, for defendant, in support of the rule:—There is no section in this Code which forbids an appeal in suits brought under chapter XXXIX, and, therefore, the general provision of section 540 applies. The earlier words of section 591 include all orders of whatever kind, and that section provides for appeals in

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cases of such orders only as involve error, defect, or irregularity "affecting the decision of the case." These words "affecting the decision of the case" do not apply to "such orders," but to the previous words "error, defect, or irregularity."

We contend that the order appealed against, did involve an error affecting the decision of the case. The "decision of the case" is not arrived at until the Judge has disposed of the application (if any) under section 534. It is only under that section that a defendant, who has not got leave to defend, can be heard. Even taking "decision" as synonymous with "decree" it may be affected by an order subsequent to it as well as by an order prior to it. Section 591 is much more comprehensive than the corresponding section 363 of the Code (Act VIII.) of 1859 by which no appeal was given from an order "*prior to* decree." These words are omitted in the new Code.

The *ex-parte* decree made in a summary suit, like the present, cannot be distinguished from *ex-parte* decrees generally. Under section 540 an appeal would lie against an *ex-parte* decree; but no appeal could possibly succeed, unless an application has been previously made, under section 108, to set aside the decree. The appeal would, therefore, really lie against the order made after decree under section 108. It is clear that "decree" and "decision" are not convertible terms. An appeal against an *ex-parte* decree, under section 100, would include an appeal against the order made under section 108. By section 119 of Act VIII. of 1859 no appeal was permitted against an *ex-parte* decree; but a defendant could apply to the Court to set aside a decree, and if the application was rejected, an appeal against the order of rejection might be brought. Section 591 of the new Code preserves this right of appeal. There is no other provision in this Code allowing appeals from *ex-parte* decrees.

[*Inverarity* referred to section 588, clauses *f* and *v*, as provisions allowing appeals from some *ex-parte* decrees.]

Section 531 of the Code corresponds with the 4th section of Act V. of 1866. Under sections 4 and 7 of this Act and section 119 of Act VIII. of 1859 we would have had a right of appeal before the new Code came into force. That right is not expressly taken away by the new Code.

[*Inverarity* :—Section 119 of the old Code gave an appeal against an order of rejection only in appealable cases.]

WESTROPP, C.J. :—The Civil Procedure Code of 1859, section 119, provided that no appeal should lie from a judgment passed *ex parte* against a defendant who did not appear, or from a judgment against a plaintiff by default for non-appearance ; but it gave power to the parties to apply to the Court, by which the judgment was passed, to set aside the judgment. The concluding portion of the section is in these words : "In all cases in which the Court shall pass an order, under this section, for setting aside a judgment, the order shall be final; but in all appealable cases, in which the Court shall reject the application, an appeal shall lie from the order of rejection to the tribunal to which the final decision of the suit would be appealable." It, therefore, appears that, although there was no appeal against the judgment, yet there was an appeal where the Court rejected an application to set aside a judgment. That was the rule as to *ex-parte* decrees generally.

Section 363 of the same Code (VIII. of 1859) provided that no appeal should lie from any order passed in the course of a suit and relating thereto *prior to decree ;* but, if the decree were appealed against, any error, defect, or irregularity in any such order affecting the merits of the case, or the jurisdiction of the Court, might be set forth as a ground of objection in the memorandum of appeal. Section 364 of the same Code runs thus : "No appeal shall lie from any order passed after decree *and* relating to the execution thereof, except as is hereinbefore expressly provided." That latter section was afterwards varied by section 11 of Act XXIII. of 1861.

Subsequently to the passing of the Code of 1859, the Bills of Exchange Act (V. of 1866) was passed. One of the provisions of that Act (section 4) gave this Court power, under special circumstances, to set aside the decree made in a suit brought under that Act, and to give leave to the defendant to appear and to defend the suit : so that, although a defendant had not come in within seven days, as required by the Act, yet he might, under this section, appear and make his defence on the decree against him being set aside.

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The Legislature in the new Code of 1877 has consolidated the provisions of the old Code of 1859 and of the summary Bill of Exchange Act (V. of 1866).

In the provisions relating to the setting aside of *ex-parte* decrees, the new Code of 1877 departs from the provisions contained in the Code of 1859. This latter, by section 119, expressly prohibited appeals against *ex-parte* decrees. The former does not contain any such prohibition; and section 540 is wide enough to sanction such appeals. Section 108 embodies a portion of section 119 of the old Code, and permits a defendant, against whom an *ex-parte* decree has been passed, to apply to the Court to set it aside; but it contains no provision forbidding an appeal against the Court's refusal of such an application. Section 534, which is a portion of the chapter (XXXIX) of the Code of 1877 substituted for Act V. of 1866, provides that the Court may, under special circumstances, set aside the decree, stay execution, and give the defendant leave to appear and defend the suit.

If the Court make an order to set aside the decree, stay execution, and give leave to the defendant to appear and defend the suit, we think the Court "affects the decision of the case," and by refusing to do so it also "affects the decision of the case," inasmuch as it thereby upholds the decree against the party applying to have it set aside. We make this observation with especial regard to section 591 to which we shall presently advert.

Section 588 deals with what may be styled immediate appeals from orders, and it specifies the cases in which such appeals are allowed, amongst which our attention has been particularly called to those mentioned in clauses *f* and *v*; but we do not perceive how any argument can be founded on them, which ought to lead us to infer that section 591 is inapplicable to such an order made after decree as that sought to be appealed against in the present case. Section 588 also contains an express prohibition of immediate appeals from any other orders than those specified in that section. The term "immediate appeal" is not used; but section 591 shows that such an appeal is meant, for it provides that if any decree be appealed against, any error, defect, or irregularity in such order affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal. That provision is, in

substance, the grant of an ultimate appeal against any order affecting the decision of the case, but making such ultimate appeal contemporaneous with an appeal against the decree.

It is most important to observe that the words "prior to decree," which appeared in section 363 of the old Code, are omitted from section 591 of the Code of 1877, and thus that section is left applicable to orders affecting the decision of the case, whether such orders were made before or after the decree. The words "affecting the decision of the case" are substituted for the words "affecting the merits," which appear in section 363 of the Code of 1859. This latter alteration appears to us to be rather more verbal than material.

Section 7 of Act V. of 1866 rendered the provisions of the Civil Procedure Code of 1859 and the rules made under it, applicable to proceedings taken under Act V. of 1866, so that a defendant, against whom an *ex-parte* decree under that Act had been passed, was entitled, under section 7, to take advantage of the provisions of section 119 of the Civil Procedure Code of 1859 and to apply to the Court to set such decree aside. If he did not succeed in his application, he had the right, under the same section, to appeal against the order of refusal. It appears to us that the object of the Legislature in omitting from section 591 of the new Code the words "*prior to decree,*" which were in section 363 of the old Code, was to allow the defendant, when appealing—as we think he has a right to do—against the decree, to appeal also against the order made after the decree refusing to set the decree aside. That is probably the reason why a special provision was not made, in section 588, for an immediate appeal in cases of this kind. It would be useless to give the right to appeal against the order of refusal, unless there was also given an appeal against the decree. We have consulted our brother Sargent, and he has come to the same conclusion upon this question, which we admit to be not free from doubt and difficulty, but we think we are are giving the proper construction to the provisions of the Code. The appeal must be admitted. Costs of this motion to be costs in the appeal.

Rule absolute to admit the appeal.

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

Attorneys for the defendant:—*Bhaishunker Nanabhoy.*