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We think it may be said in this case that Gonesh did not think that the snake would bite the boy. But we think that the act was done with the knowledge that it was likely to cause death, but without the intention of causing death. We think Gonesh should be sentenced to three years' rigorous imprisonment. Gopi, we think, abetted Gonesh, and is punishable under ss. 114 and 304, Indian Penal Code; but as he took a less active part in the matter, he should be rigorously imprisoned for one year only. We sentence the prisoners accordingly.

Verdict set aside.

APPELLATE CIVIL.

Before Mr. Justice Morris and Mr. Justice White.

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TARUCK NATH MULLICK, MANAGER OF THE COOCH BEHAR CHUKLAJUT ESTATE, ON BEHALF OF THE COURT OF WARDS (PLAINTIFF) *v.* JEAMAT NOSYA (DEFENDANT).*

Practice—Procedure when Defendant does not appear—Hearing ex parte—Civil Procedure Code (Act X of 1877), s. 100—Evidence—Refreshing Memory—Evidence Act (I of 1872), s. 159.

When the plaintiff in a suit appears at the hearing, and the defendant does not appear, the proper procedure to follow, is that prescribed by s. 100 of Act X of 1877, whether the defendant has been summoned only to appear and answer the claim, or has in addition been summoned to attend and give evidence.

It is not necessary, before proceeding to hear and determine a suit *ex parte* under s. 100, that all the process prescribed by law for compelling the attendance of the defendant as a witness should be exhausted. It is sufficient that due service of the summons upon the defendant is proved. If such proof is not given, the courses to be adopted are one or other of those mentioned in clauses (*b*) and (*c*) of s. 100 according to the circumstances of the case.

The plaints and records in a number of suits upon bonds instituted by the same plaintiff against different persons were destroyed by fire. The suits were

* Small Cause Court Reference, No. 10 of 1879, made by Baboo Chundee Churn Roy, Munsif of Julpigoori, to H. Beveridge, Esq., District Judge of Rungpore, and forwarded by him to the High Court on the 14th April 1879.

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re-instituted, and duplicate copies of the plaints were filed. The only evidence of the contents of the bonds, from which the plaints were prepared, consisted of a register kept by the plaintiff's gomastas of the names of the executants of the bonds, the matter in respect of which the bonds had been given, the amounts due thereunder, and the names of the attesting witnesses. From this register the duplicate plaints had been prepared.

Held, that though the register was not secondary evidence of the contents of the bonds, yet it was a document which might be referred to by a witness for the purpose of refreshing his memory, under s. 159 of the Evidence Act.

THIS suit was originally instituted in January 1878 to recover the sum of Rs. 16, the price of three maunds of rice, which was alleged to have been advanced to the defendant during the famine of 1874, after having taken a bond from him. The bond, together with the original records of the suit, was destroyed by fire in March 1878. In September 1878 the plaintiff re-instituted this suit, together with five or six hundred other analogous cases, of which the records had been destroyed by the fire. The duplicate of the plaint in this case, when filed, was accompanied by an affidavit made by a mookhtear of the plaintiff, who acknowledged that he had no personal knowledge of the case, and the Munsif called upon the plaintiff to give further evidence of the facts stated in the plaints. From a report, dated the 21st September 1878, of the proceedings before the Munsif, it appeared that the gomastas of the plaintiff, when they sent the bonds on which the suits were instituted to the plaintiff's vakeel for the purpose of preparing the plaints, did not keep any copies of the bonds, but kept a register in a tabular form, in which the names of the executants of the bonds, the quantity of rice lent to them, its price, the instalments in which the price was to be paid, and the names of the attesting witnesses to the bonds, were entered. The fresh plaints were prepared from the entries contained in this register. The plaintiff subpœnaed the defendants as his witnesses, but none of them appeared. The Munsif considered that he could not allow the register to be used as secondary evidence of the contents of the bonds. It was contended, on behalf of the plaintiff, that the Court ought to decide against the defendants, because they did not appear to give evidence; but, subject to

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the decision of the High Court on the following points; the Munsif dismissed the suits:—

(1.) Whether, under the new Civil Procedure Code (Act X of 1877), a Court can decide a case against the defendant, simply on the ground that the defendant, being summoned to appear and give evidence, has failed to do so, when the plaintiff gives no evidence at all in support of his case in consequence of all his documentary evidence being destroyed in the fire while they were under the custody of the Court.

(2.) Whether it is necessary that, before deciding a case against the defendant for his failure to appear and give evidence in the case brought against him in answer to the summons of the Court, that all sorts of processes prescribed by law for compelling the attendance of a witness must be issued as held in the case of *Bustee Narain Roy* v. *Sham Soonder Nundee* (1). The position of parties to the suits under the new Civil Procedure Code being no wise different from that of other witnesses.

Mr. *Kilby* and Baboo *Unnoda Prosad Banerjee* for the plaintiff.

The judgment of the Court was delivered by

WHITE, J. (MORRIS, J., concurring).—In answer to the queries referred to this Court by the Munsif of Julpigoori, we are of opinion:—

(1.) That, under the new Civil Procedure Code (Act X of 1877), when the plaintiff appears and the defendant does not appear, the proper procedure is that prescribed by the 100th section of that Code, whether the defendant has been summoned only to appear and answer the claim, or has, in addition, been summoned to attend and give evidence.

(2.) That it is not necessary, before proceeding to hear the suit *ex parte* under s. 100, that all the process prescribed by law for compelling the attendance of the defendant as a witness should be exhausted. It is sufficient that the service of the summons upon the defendant is duly proved. If such proof is not given, the courses to be adopted are one or other of those mentioned in clauses (*b*) and (*c*) of s. 100 according to the circumstances of the case.

(1) 2 W. R., Act X Rul., 43.

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With reference to the statement of the Munsif, that he has directed this case and the six hundred and twenty-nine analogous cases to be dismissed, subject to the opinion of this Court on the two questions above answered, we would point out that, having regard to the facts stated in the reference, and the proceeding of the 21st of September which are incorporated with it, the reply which this Court has given to the above questions does not justify the Munsif in directing the dismissal of the suits.

The proper time for determining whether the plaintiff offers, or can offer, sufficient evidence to warrant a decree in his favor, is, not when the duplicate plaint is filed, but after a summons to appear and answer the claim has been served upon the defendant, and the case comes on in due course for its first hearing. If the case is then ripe for proceeding with *ex parte* under s. 100, the plaintiff is entitled to succeed if he gives *primâ facie* evidence in support of his claim.

The bonds having been destroyed by fire without any fault of the plaintiff, secondary evidence of their execution and contents is the only evidence which it is in the power of the plaintiff to produce.

One of the classes of the secondary evidence of a document is oral evidence (s. 63, cl. 5 of the Indian Evidence Act). Although the register in a tabular form, which is referred to in the proceedings of 21st September 1878, may not be in itself secondary evidence, yet it may be a document with which a witness may refresh his memory under s. 159 of the Indian Evidence Act; and, if so, he may be able by the aid of the register to give evidence both as to the execution and contents of the bonds upon which the Court can act and pass a decree in favor of the plaintiff.

Having regard to the above observations, the Munsif will probably think it proper to review his directions regarding the dismissal of the suits, and give the plaintiff a reasonable opportunity of producing proof in support of his claims. The plaintiff is placed in a position of peculiar difficulty in consequence of the disastrous fire that has taken place, and is fairly entitled to the consideration of the Court.