JUDGMENT.—As regards the offence of theft with which all the accused were charged, the jury were properly directed by the learned Judge and the appeals of the second and third accused have already been dismissed. With regard to the charge under section 328, Indian Penal Code, the Judge only took the opinion of two of the jurors, as assessors. He ought undoubtedly, under the provisons of sections 269(3) and 309 of the Code of Criminal Procedure, to have taken the opinion of all the jurors as assessors. We do not feel satisfied that his failure to do this can be treated as an "omission" or "irregularity" to which section 537 of the Code of Criminal Procedure applies. We accordingly set aside the conviction under section 328, Indian Penal Code. The Judge passed one sentence in respect of both offences. We modify the sentence by sentencing the accused to four years' rigorous imprisonment under section 380 of the Indian Penal Code.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar.

SOMAYYA, PETITIONER,

v.

SUBBAMMA, RESPONDENT.*

1903. February 13, 16.

Civil Procedure Code—Act XIV of 1882, *ss.* 103, 108 *and* 558—*Application to restore—Prevented by sufficient cause from appearing—Power of Court to restore where sufficient cause not shown.*

The affirmative provisions in sections 103, 108 and 558 of the Code of Civil Procedure that a plaintiff or appellant (as the case may be) may prove that he was "prevented by sufficient cause" from appearing or attending when his suit or appeal was called on and dismissed, do not imply the negative, namely, that an application for restoration cannot be granted unless sufficient cause is shown. The effect of the enactments is that, if sufficient cause is shown, restoration is made obligatory on the Courts, there being no discretion in the matter; whereas, in other cases the merits of the applicant's case will form an important element for consideration when the Court is asked to exercise its discretion.

* Civil Miscellaneous Petition No. 954 of 1902 presented under section 558 of the Code of Civil Procedure for the re-admission, on the file of the High Court, of Civil Revision Petition No. 123 of 1902 dismissed for default of prosecution on the 13th August 1902 (Small Cause Suit No. 745 of 1901 on the file of the Court of the District Munsif of Ellore).

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APPLICATION under section 558 of the Code of Civil Procedure to re-admit an appeal, dismissed for default of prosecution. On Civil Revision Petition No. 123 of 1902 coming on for hearing before the High Court on the 13th August 1902 and the vakil for the petitioner representing that he was not furnished with funds to purchase printed papers and the petitioner himself not appearing in person, the petition was dismissed. Subsequently, the petitioner alleged by affidavit that, being informed by his pleader at Ellore that he (petitioner) should furnish necessary funds to his vakil at Madras with regard to the above petition, he immediately sent money direct to the vakil at Madras which reached him on the 15th August 1902 (two days after the dismissal of the petition). The petitioner further alleged that he lived at an out-of-the-way place, where the delivery of letters was not regular and, consequently, the vakil at Madras got the money order and instructions late. The respondent's vakil contended that the facts disclosed in the petitioner's affidavit, or otherwise ascertained on reference to the record, did not establish that the petitioner or his vakil was prevented from any sufficient cause from attending when the petition was called on for hearing and, that being so, that the Court had no discretion to restore the petition to file for any other cause.

T. V. Vaidyanadha Ayyar for petitioner.

V. Ramesam for counter-petitioner.

JUDGMENT.—This application for setting aside the order dismissing Civil Revision Petition No. 123 of 1902 for default of prosecution is opposed by the respondent. The case was called on in due course on the 13th August 1902, but was dismissed for default as the petitioner's vakil represented that he had not been furnished with the necessary funds for purchasing printed papers and as the party did not appear in person. The respondent's vakil contends that the facts disclosed in the petitioner's affidavit, or otherwise ascertained on reference to the record, do not establish that the petitioner or his vakil was prevented by any sufficient cause from attending when the petition was called on for hearing and, that being so, the Court has no discretion to restore the petition to file for any other cause. It is certainly difficult to hold upon the facts that the party or his vakil was prevented by a sufficient cause from appearing when the case was called on, on the 13th August; but I cannot accede to the contention that the Court has no power for just and sufficient cause to restore the petition to file

even if it is not established that the party or his vakil was prevented by sufficient cause from attending. As I read section 103, Civil Procedure Code, which relates to original suits and section 558 which relates to appeals, the Court *is bound* in the former case to restore a suit to the file if the party was prevented by any sufficient cause from appearing, whatever may be the merits of the suit, and, in the latter case, the Court *may*, but it is not bound to, re-admit the appeal even if non-apperance was due to inevitable cause. I see no warrant, whatever, for importing by way of addition either into sections 103 and 108 or sections 558 and 560, Civil Procedure Code, negative words to the effect that the Court shall not set aside an order of dismissal or decree passed *ex parte*, if the party or his vakil was not prevented by sufficient cause from appearing [see Hardcastle's 'Construction of Statutes,' third edition, pages 262, 263]. No doubt statutory enactments, although expressed in affirmative language, may sometimes be construed as having a negative implied; but such implication must be a necessary and reasonable one (see pages 264, 265). There is nothing in any of the above sections of the code to imply that the application for restoration cannot be granted unless there was sufficient cause which prevented the appearance, though, if there was such a cause, it is made *obligatory* on the Courts in the case of original suits to set aside the order of dismissal or decree passed *ex parte*, as the case may be. Such a narrow construction of the sections would lead to most startling results and serious consequences, which certainly could not have been intended by the Legislature. A suit may be dismissed for default of appearance, because, in the opinion of the Judge, the vakalat authorizing the vakil to appear for the absent party is invalid or has been exhausted, or the vakil is not entitled to practise in his Court, or the person who appears as plaintiff or defendant in the case is not the real party but personates such party. There can be no appeal against such an order (*Gilkinson* v. *Subrahmania Ayyar*(1)), and a revision petition under section 622, Civil Procedure Code, can rarely, if ever, be of any avail, nor can a review be applied for to the successor of the Judge who passed the order except on the ground of the discovery of new and important matter or evidence (section 624, Civil Procedure Code); and, if an

(1) I.L.R., 22 Mad., 221.

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application for review be made to the Judge who passed the order but is rejected by him or his successor, there can be no appeal against the order so rejecting it. In such cases the applicant's remedy can only be, in my opinion, to apply, under section 103, Civil Procedure Code, for an order to set aside the dismissal. But, according to the contention of the respondent's vakil, he can have no such remedy, for the petitioner does not pretend that he did not appear, and therefore he does not profess to establish that there was a sufficient cause which prevented him or his vakil from appearing. His very grievance is that the appearance of his vakil ought to have been recognized by the Judge, the vakalat being, in law, a valid and subsisting one or that he himself appeared, and that the Judge was wrong in holding that the person who actually appeared before him was not the applicant, but some one who personated him. If, under the sections already referred to, an order dismissing a suit or appeal for default or a decree *ex parte* can be set aside only if it be established that the applicant was prevented by sufficient cause from appearing, it would follow that an application for restoration can be made only on alleging such a ground and on no other; but we find that the sections provide only generally that an application may be made for setting aside an order of dismissal for default of appearance or a decree passed *ex parte* against a defendant or respondent. I take this provision to mean that the application may be based upon any ground which would be a just and proper one for granting the application and not that the application can be based upon one ground only, viz., that the applicant was prevented by sufficient cause from appearing. In the instances already given and other similar instances which might be mentioned, the party aggrieved can only apply, under section 103, either to the Judge who passed the order or decree or to his successor, and, if his application is not granted, he has a right of appeal, under clauses 8, 9 and 27 of section 588, Civil Procedure Code.

The construction contended for on behalf of the respondent is not only not warranted by the grammatical interpretation of the sections but is also one which would unduly hamper the judicial discretion of Courts in restoring to file, for just and sufficient cause, cases which have been dismissed for default or disposed of *ex parte*. Besides the instances already referred to and similar ones, there may be cases in which, without any default or blame on the part

of a suitor, the suit or appeal may have been dismissed for default of appearance of his vakil, next friend or guardian *ad litem*, as the case may be, and the non-appearance of such vakil, next friend or guardian may be due to their negligence or they may fail to prove that they were prevented by sufficient cause from appearing when the case was called on. It would be impossible to lay down a hard and fast rule that a party who, under the law, can engage as his pleader only a person who has been enrolled as a pleader by the Court or that an infant who can appear only by a next friend or a guardian *ad litem* appointed by the Court must necessarily suffer for the non-appearance of his pleader, next friend or guardian and seek his redress, if any, only against him. It may be that the party who has thus suffered is only able to obtain a decree for nominal damages or a fruitless decree for substantial and adequate damages against such pleader, next friend or guardian, and in the majority of cases it will be impracticable to establish before the Court in which he sues for damages, which may happen to be a Court of Small Causes, that he could ultimately have succeeded in the suit or appeal which was pending in the High Court or some other tribunal and which has been dismissed for default. And in a large class of suits in which the claim is not a mere pecuniary one, compensation by way of damages will be no remedy at all. The Courts have sufficient disciplinary jurisdiction over pleaders as such, as well as over next friends and guardians *ad litem* of infants, and ample power to subject parties to terms as to costs when relieving them on reasonable and proper grounds from the serious and in some cases irreparable consequences of refusing to restore to file cases which have been dismissed for default or in which decrees were passed *ex parte*. The distinction is that when appearance was prevented by a sufficient cause the Court has no discretion in the matter under the code and must restore the case to file whatever may *primâ facie* be the merits of the suit or the defence thereto; whereas in other cases when there may be other just and reasonable cause for restoring a case to file, the merits of the applicant's case will form a very important element in the exercise by the Court of its judicial discretion.

Applying these principles to the present case I should be disposed to hold that there was a reasonable excuse for the petitioner's delay in remitting the necessary funds to his vakil at Madras, which remittance in fact reached him two days after the dismissal of the

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petition, and to restore the revision petition to file if there were really any merits in the revision petition, or he would be subjected to any serious hardship if the application were refused. But it is far from apparent that upon the merits the decree passed against him is unjust or contrary to law. Moreover it is merely a decree for a sum of about Rs. 48; nor is it clear upon the face of the plaint that the suit is one which is excepted from the jurisdiction of a Court of Small Causes.

For the above reasons I dismiss the petition with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1903. February 2, 3.

GOPALA CHETTI (PLAINTIFF), APPELLANT,

v.

SUBBIER (DEFENDANT No. 2), RESPONDENT. *

Civil Procedure Code—Act XIV of 1882, *s.* 148—Ex parte *decree against two defendants—Application by one defendant only to set aside the decree—Defence peculiar to that defendant—Order of Court setting aside entire decree as against both—Validity.*

First defendant had executed a promissory note in plaintiff's favour. Plaintiff now sued first defendant on the note, as the maker, and he joined the first defendant's nephew as second defendant on the ground that the note was for a debt binding on the family, including second defendant. Neither defendant appeared and the District Munsif passed a decree *ex parte* against both. Later, the second defendant alone applied under section 108 of the Code of Civil Procedure that the *ex parte* decree might be set aside. The Munsif accordingly set it aside *in toto* as against both defendants. When appealing against the final decree, plaintiff took the objection that the order was contrary to law, and claimed that the decree should not have been set aside as against first defendant and asked to have it restored:

Held, that the decree should be restored as against first defendant; whatever doubt might exist in a case in which the decree sought to be set aside under section 108 proceeds on a ground common to the applicant and another defendant who has not applied under that section, the decree should not have been set aside *in toto* in a case like this where the defence of the second defendant was peculiar to him. *Mahomed Hamidula* v. *Tahurennissa Bibi*, (I.L.R., 25 Calc., 155), commented on.

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* Second Appeal No. 1088 of 1901 presented against the decree of A. C. Tate, District Judge of Chingleput, in Appeal Suit No. 83 of 1900, presented against the decree of J. S. Gnaniyar Nadar, District Munsif of Trivellore, in Original Suit No. 641 of 1899.