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plaintiffs was held not to be a defect which affected the merits of the case or the jurisdiction of the Court; in my opinion no ground has been made out, so far as this appeal is concerned, for interference with the decrees of the Courts below.

The only other question raised before us, namely, as to damages, was fully considered in the case of *Moll Schutte and Co.* v. *Luchmi Chand* (1), and I agree with the way in which it was then decided.

Appeal dismissed.

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July 3.

FULL BENCH.

Before Sir Arthur Strachey, Knight, Chief Justice, Mr. Justice Knox, Mr. Justice Banerji and Mr. Justice Aikman.

LALTA PRASAD (APPLICANT) *v.* NAND KISHORE AND OTHERS (OPPOSITE PARTIES).*

Civil Procedure Code, sections 102, 103, 157—*Order dismissing a suit for default of appearance—Construction of order—Application for restoration of suit—Pleadings—What constitutes an "Appearance".*

In construing an order alleged by one side and denied by the other to be an order under section 102 of the Code of Civil Procedure, the order will be considered as an order under section 102 if, apart from the mere description which the Court gives of its action, and apart from the actual fact of the plaintiff's appearance or non-appearance, the real meaning and substance of the Court's action is, that it dismisses the suit on the view, whether right or wrong, that the plaintiff appears and the defendant does not appear.

Where, his suit having been dismissed for default of appearance under section 102 of the Code, the plaintiff applies for its restoration, the defendant cannot contest the application *in limine* as one which cannot be entertained at all under section 103 by showing that at the time of the dismissal there was an appearance by the plaintiff in fact or in law; but as an answer to the application on the merits the defendant can raise the contention that the plaintiff was not prevented from appearing because in fact he did appear.

It is not an "appearance" within the meaning of section 102 of the Code when the plaintiff is represented only by a pleader who is without instructions enabling him to proceed with the case, and who is merely instructed to apply

*First Appeal No. 22 of 1899 from an order of Pandit Rai Indar Narain, Subordinate Judge of Farrukhabad, dated the 23rd January 1899.

(1) (1898) I. L. R., 25 Calc., 505.

for an adjournment. *Shankar Dat Dube* v. *Radha Krishna* (1) and *Soonderlal* v. *Goorprasad* (2) approved. *Mahomed Azeem-ool-lah* v. *Ali Buksh* (3) *Kashi Parshad* v. *Debi Das* (4) and *Kanahi Lal* v. *Naubat Rai* (5) referred to.

THIS was an appeal under section 588 (8) of the Code of Civil Procedure from an order rejecting an application made under section 103 of the Code by a plaintiff whose suit had been dismissed. The suit was instituted on the 19th of May 1898. Issues were fixed, and there were several adjournments of the hearing. On one of the adjourned dates certain evidence was taken, that is, the plaintiff gave evidence, one of the defendants was examined as a witness for the plaintiff, two other witnesses were examined on the same side, and certain documentary evidence was filed. There was then a further adjournment for the purpose of obtaining the attendance of certain other witnesses for the plaintiff who were not present. There were other adjournments which need not further be referred to, and at last the case came on for hearing on the 25th of November 1898. On that occasion the plaintiff was not present. There were present certain pleaders who had been engaged by the plaintiff, and also the defendants. The plaintiff's pleaders presented on his behalf an application for adjournment of the suit on the ground of his illness and also the illness of a friend. The pleaders in presenting this application stated that they were unable to proceed with the case, apparently by reason of the plaintiff's absence. The Court rejected the application for an adjournment and proceeded to pass the following order dismissing the suit:—"Up to the present this case has been adjourned four times since June 1898, on applications made by the plaintiff. Finally proclamations and warrants were issued for some of the plaintiff's witnesses, who have with difficulty been got to attend to-day; but the plaintiff has been called, and he himself is not present, and his pleaders being unable to proceed with the case, have made this application for adjournment. In the

(1) (1897) I. L. R., 20 All., 195.
(2) (1898) I. L. R., 23 Bom., 414.
(3) (1873) N.-W. P. H. C. Rep., 1873, p. 74.
(4) (1875) N.-W. P. H. C. Rep., 1875, p. 77.
(5) (1881) I. L. R., 3 All., 519.

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application no reasonable cause is given for adjournment. Sickness, or a friend being at the point of death, is not a proper ground for non-prosecution, especially when no certificate of sickness has been produced. It appears that for some reason there is intentional inaction on the part of the plaintiff. Under these circumstances the case cannot remain pending. The Court cannot waste its time over the business of such a negligent party. It is therefore ordered that the claim of the plaintiff be dismissed for default of appearance and for want of prosecution, with costs; the costs of the defendant to be borne by the plaintiff."

On the 22nd of December 1898 the plaintiff applied for restoration of the suit to its original number, urging that there was in fact sufficient and reasonable cause for his not having prosecuted the suit on the 25th of November.

The defendants filed a counter application pleading (1) that the case had not been dismissed in default of prosecution, (2) that the case had not been decided *ex parte*, (3) that the petitioner ought to have filed an appeal against the order of the Subordinate Judge, and (4) that no good reason for the petitioner's absence on the 25th November had been, or could be, shown.

The Subordinate Judge disallowed the plaintiff's application on the ground that the order dismissing the suit was not in effect an order under section 102 of the Code, that it was a dismissal for want of proof, and therefore the plaintiff's remedy was by appeal against the decree and not by application under section 103.

Against this dismissal the plaintiff appealed to the High Court.

Munshi *Gulzari Lal* for the appellant.

The order of the 25th November 1898 as rightly understood was an order under section 102 read with section 157 of the Code of Civil Procedure. It clearly says that the suit was dismissed "for default of appearance and want of prosecution" the evidence upon the record was not taken into consideration and the suit was not decided upon the merits. The Court in dealing with the

subsequent application under section 103 of the Code was not competent to go behind the order passed under section 102 and say that it was a wrong order and therefore an application under section 103 would not lie. The Court had only to interpret that order and to see whether it was really an order passed under section 102 and then to deal with the application under section 103 on the merits. I submit that the order of the 25th November was in substance and effect an order under section 102. The circumstances under which it was passed were exactly those under which an order under section 102 of the Code would be legally justified. The pleaders who presented the application for adjournment on that date on behalf of the plaintiff-appellant were not instructed to go on with the suit in case the application was refused. The following cases were referred to:—

Fazal Ahmad v. *Bahadur Singh* (1), *Hira Dai* v. *Hira Lal* (2), *Ramtahal Ram* v. *Rameshar Ram* (3), *Shankar Dat Dube* v. *Radha Krishna* (4), *Bhimacharya* v. *Fakirappa* (5), *Administrator-General of Bengal* v. *Lala Dayaram Das* (6), *Zeinulabdin Khan* v. *Ahmed Raza Khan* (7), *Jonardan Dobey* v. *Ramdhone Singh* (8), *Bhagwan Dai* v. *Hira* (9), *Shrimant Sagajirao* v. *S. Smith* (10), *Soonderlal* v. *Goorprasad* (11). The cases in I. L. R. 20 Allahabad and 23 Bombay are exactly in point. There seems to be no conflict of authority upon the point that an un-instructed pleader or counsel cannot represent a party in a court of justice.

Pandit *Sundar Lal* for the respondents.

Under section 157 of the Code of Civil Procedure if on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may dispose of the suit in one of the modes provided in chapter VII of the Code, or make such order as it thinks fit. The 25th November 1898 was the

(1) (1892) Weekly Notes, 1893, p. 25.
(2) (1885) I. L. R., 7 All., 538.
(3) (1886) I. L. R., 8 All., 140.
(4) (1897) I. L. R. 20 All., 195.
(5) (1867) 4 Bombay H. C., Rep., 206 A. C. J.
(6) (1871) 6 B. L. R. 688.
(7) (1878) L. R. 5 I. A., 233.
(8) (1896) I. L. R., 23 Calc., 738.
(9) (1897) I. L. R., 19 All., 355.
(10) (1895) I. L. R., 20 Bom., 736.
(11) (1898) I. L. R., 23 Bom., 414.

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date of adjourned hearing of the case. Documentary evidence had already been filed. The Court could either dismiss the suit under section 102 of the Code, if the plaintiff did not appear, or dispose of the case on the merits on the evidence on the record. In the latter case the plaintiff's remedy is by way of appeal under section 540 of the Code, and not under section 103 of the Code. The plaintiff's pleader was present before the Court. Whether his presence was appearance under section 102 of the Code or not depended upon the instructions he had received—*Soonderlal* v. *Goorprasad* (1). There is nothing on the record to show that he had no instructions to appear. The order of the 25th of November 1898, read with the order under appeal, shows that the Court did not dispose of the suit under chapter VII of the Code, but on the merits. Therefore no application can be made under section 103 of the Code. There must be an order under section 102 of the Code, before an application under section 103 can be made—*Mahomed Azeem-ool-lah* v. *Ali Buksh* (2) and *Kashi Parshad* v. *Debi Das* (3). The case of *Kanahi Lal* v. *Naubat Rai* (4) also supports this contention.

Munshi *Gulzari Lal* in reply—The rulings relied upon by the other side do not really decide the point arising in this case. Some of them are clearly distinguishable and the others, I contend, were not rightly decided. The opening words of section 103 make it abundantly clear that a court in dealing with an application under that section should not reconsider its order under section 102 of the Code.

STRACHEY, C. J.—This is an appeal under section 588 (8) of the Code of Civil Procedure from an order rejecting an application by a plaintiff under section 103. The suit was instituted on the 19th of May 1898. Issues were fixed, and there were several adjournments of the hearing. On one of the adjourned dates certain evidence was taken, that is, the plaintiff gave evidence, one of the defendants was examined as a witness for the plaintiff,

(1) (1893) I. L. R., 23 Bom., 414.
(2) (1873) N.-W. P., H. C. Rep., 1873, p. 74.
(3) (1875) N.-W. P., H. C. Rep., 1875, p. 77.
(4) (1881) I. L. R., 3 All., 519.

two other witnesses were examined on the same side, and certain documentary evidence was filed. There was then a further adjournment for the purpose of obtaining the attendance of certain other witnesses for the plaintiff who were not present. There were other adjournments which need not further be referred to, and at last the case came on for hearing on the 25th of November, 1898. On that occasion the plaintiff was not present. There were present certain pleaders who had been engaged by the plaintiff, and also the defendants. The plaintiff's pleaders presented on his behalf an application for adjournment of the suit on the ground of his illness and also the illness of a friend. The pleaders in presenting this application stated that they were unable to proceed with the case, apparently by reason of the plaintiff's absence. The Court made an order rejecting the application for adjournment and also dismissing the suit. The earlier part of that order referred to the number of adjournments already granted, and then continued :—"The plaintiff was called and he himself is not present, and his pleaders, being unable to proceed with the case, have made this application for adjournment. In the application no reasonable cause is given for adjournment." The order went on to criticise the reasons put forward in the application, and to say that the plaintiff seemed to be "intentionally negligent." The order concludes with these words :—"Therefore it is ordered that the claim be dismissed for default of appearance and for want of prosecution, with costs." It will be observed that the order makes no reference to the evidence, oral and documentary, which had already been taken in the case. We construe that order as an order passed under the earlier portion of section 157 of the Code. In other words, the Court, in our opinion, regarded the case as one in which the plaintiff had failed to appear at the adjourned hearing, and proceeded to dispose of the suit in one of the modes directed in that behalf by Chapter VII, that is, under section 102 of that chapter. We have arrived at this construction by a consideration of the terms of the order as a whole, and more especially with regard

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to three points. The first is the expression *baghair haziri*, or "default of appearance." That is the expression which a Court ordinarily uses when dismissing a suit for default of the plaintiff's appearance. The second point is that if the suit had been dismissed otherwise than under section 102, one would have expected the order to have at least referred to the evidence previously adduced by the plaintiff. The third point is that in awarding costs to the defendant the Court awarded half the pleader's fees only, and in doing so obviously acted with reference to Rule 458 of the Rules of the 4th April 1894, which is applicable only to cases in which one of the parties does not appear, and which is not applicable where both parties appear and the case is decided after contest. We also construe that order as meaning that the pleaders for the plaintiff, though present and applying for an adjournment, were not duly instructed for the purpose of proceeding with the suit, or instructed otherwise than for the purposes of the application. The order refers to those pleaders as unable to proceed with the case, that is unable in consequence of the plaintiff's absence; and when, notwithstanding the presence of the pleaders, it describes the suit as dismissed for default of appearance, we think that the Court was presumably referring to those cases in which it has been held that the mere physical presence of a pleader not instructed except for the purpose of applying for adjournment, is not an appearance in the suit in the sense of Chapter VII of the Code.

That being our construction of the order, what next happened was that on the 22nd of December 1898 the plaintiff made an application under section 103 of the Code for an order to set the dismissal aside. The Court rejected that application on the ground that the dismissal of the suit could not be treated as a dismissal for want of appearance of the plaintiff under section 157 read with section 102, but must be treated as a dismissal on the merits, and for want of proof, having regard to the fact that evidence had been taken and was on the record. The Court observed that the contention of the pleaders, that on the 25th

of November they had had no instructions, could not be maintained. It, however, did not go into any evidence as to the nature or extent of the pleader's instructions, no doubt because, in the view which it took of that case, that question was not material. The Court held that as the suit had not been dismissed for default of appearance, the application under section 103 could not be maintained. It therefore dismissed the application, and the plaintiff now appeals to us from that decision.

The contention of the plaintiff in this appeal is that the suit was in fact dismissed under section 157 read with section 102, and that his application under section 103 ought therefore to have been determined as such an application properly made, and on the merits. He contends that as he was not present on the 25th of November, and as his pleaders, though present, were not duly instructed in the suit, there was a dismissal of the suit for default of appearance under section 102. In support of that contention he relies on, amongst other authorities, the decision of this Court in *Shankar Dat Dube* v. *Radha Krishna* (1) and of the High Court of Bombay in *Soonderlal* v. *Goorprasad* (2).

The defendants support the decision of the Court below. They contend on two grounds that section 102, and therefore section 103, is not applicable to the case. The first ground is, that the order of dismissal does not purport to be passed under section 102, and on its true construction is not an order under that section. The second ground is that, even if the Court purported to act under section 102, or intended so to act, it could not legally dismiss the suit under section 102, because there was in law an appearance of the plaintiff within the meaning of section 102. It was further argued that the order dismissing the suit, as it could not be considered a legal order under section 102, must be treated as an order dismissing the suit in the ordinary way on the merits, or at all events not for want of appearance, and that the plaintiff's remedy was not by way of application under section 103, but by way of appeal. In support of this contention the learned advocate for the

(1) (1897) I. L. R., 20 All., 195. (2) (1898) I. L. R., 23 Bom., 414.

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defendants cited, amongst others, the cases of *Mahomed Azeem-ool-lah* v. *Ali Buksh* (1), *Kashi Parshad* v. *Debi Das* (2) and *Kanahi Lal* v. *Naubat Rai* (3).

The reply of the plaintiff to this contention is, first, that the order on its true construction is an order of dismissal under section 102; and secondly, that a defendant cannot, in reply to an application under section 103, be heard to say that an order purporting to be passed under section 102, was one which the Court had no power to make under that section, or to contend for any reason that, contrary to the meaning and effect of that order, the plaintiff had actually appeared when his suit was dismissed for non-appearance.

Now in the first place, as I have already stated, we construe the order of the 25th of November 1898, as an order by which the Court intended to act and believed itself to be acting under section 157 read with section 102. It is not necessary to repeat the reasons which I have already given for that construction. In the second place, what is the meaning of the opening words of section 103 of the Code "when a suit is wholly or partially dismissed under section 102?" Is it a dismissal under section 102 merely if the order says that it is passed under section 102? Or is it only a dismissal under section 102, if, irrespective of the language of the order, the suit was dismissed upon an actual non-appearance of the plaintiff in fact or law? Or is the suit dismissed under section 102 if, apart from the mere description which the Court gives of its action, and apart from the actual fact of the plaintiff's appearance, or non-appearance, the real meaning and substance of the Court's action is that it dismisses the suit on the view, whether right or wrong, that the defendant appears and the plaintiff does not appear? We think that the third of these views is the correct one. The mere naming of the section is not conclusive though, no doubt, it may be a useful piece of evidence in construing the order, which must be

(1) (1873) N.-W. P. H. C. Rep., 1873, p. 74.
(2) (1875) N.-W. P. H. C. Rep., 1875, p. 77.
(3) (1881) I. L. R., 3 All., 519.

read and construed as a whole. But, although the Court may describe an order of dismissal, as being made under section 102, the order, taken as a whole, may show that the description is an error, and that the Court was not really dismissing the suit on the view that the plaintiff was not appearing. So, too, if section 102 is not named, and even if some other section, whether section 158 or any other, is named, still it may be that that is a mere misdescription, and that nevertheless the real reason for the dismissal is that in the Court's view the defendant appears and the plaintiff does not appear. In such a case, notwithstanding the misdescription, there is in substance and in fact a dismissal of the suit for non-appearance of the plaintiff, and therefore a dismissal under section 102, although that dismissal may be absolutely wrong, either because the Court was mistaken in supposing that the plaintiff did not appear, or for any other reason. If the Court was mistaken in supposing that the plaintiff did not appear, still, whether the mistake was one of fact or of law, the appearance would not make the dismissal one not ordered under section 102, it would only make the dismissal under that section a wrong one. In other words, a suit is dismissed under section 102 if the dismissal is based on the state of things contemplated in that section, that is, if the Court's reason for the dismissal is its view that the plaintiff has not appeared.

If that is the correct view of the meaning of the opening words of section 103, referring to a suit being dismissed under section 102, it follows that a plea by the defendant, in answer to the plaintiff's application under section 103, that the order under section 102 was illegally made, is irrelevant. Section 103 allows the plaintiff to apply for an order to set the dismissal aside, where the suit has been in fact wholly or partially dismissed under section 102. If there has been such a dismissal in the sense I have explained, whether right or wrong, the plaintiff is entitled to apply to the Court to set it aside, and it is no answer to such an application to say that the order sought to be set aside was illegal for any reason whatever. Therefore the defendant cannot contest the

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application *in limine* as one which cannot be entertained at all under section 103 by showing that at the time of the dismissal there was an appearance by the plaintiff in fact or in law. But what can the defendant do? He is entitled to meet in any way that is relevant the plaintiff's allegation, which is the only ground on which such an application can succeed, that the plaintiff was prevented by any sufficient cause from appearing when the suit was called on for hearing. In order to succeed the plaintiff must prove that he was so prevented from appearing. The defendant may prove that the plaintiff was not prevented from appearing. Those terms would undoubtedly cover a contention by the defendant that the plaintiff was not prevented from appearing because, in fact, he did appear, so that the contention that there was such an appearance in fact and in law, though it cannot be used as a bar to the application under section 103 *in limine* would still be material on the merits of the application and as a ground for dismissing it under the section.

Now in the present case the plaintiff did not appear in person. If he appeared at all, it was by his pleaders. If his pleaders were not duly instructed and able to answer all material questions relating to the suit, if they were instructed only to apply for an adjournment, then Pandit Sundar Lal concedes that according to the authorities, and particularly according to *Shankar Dat Dube* v. *Radha Krishna* and *Soonderlal* v. *Goorprasad*, with which we agree, the plaintiff did not appear at all. Therefore all depends on two questions: first, were the pleaders duly instructed in the sense of these authorities? and, secondly, if they were not, and if consequently there was no appearance by the plaintiff on the 25th of November 1898, was he prevented by any sufficient cause from appearing?

These questions have not been considered by the Court below. It did not consider them because of the erroneous view which it formed of the nature of the order of dismissal. It should have treated that order as a dismissal of the suit under section 102, and

disposed of the application solely with reference to the circumstances contemplated by section 103. The order must be set aside as in effect passed on a preliminary point, and the case must go back to the Court for the application under section 103 to be disposed of on the merits. In this judgment I have not thought it necessary to discuss in detail the various cases that have been cited. If any of them, being decisions of this Court, and especially the cases reported in N.-W. P. H. C. Rep., 1873, p. 74, N.-W. P. H. C. Rep., 1875, p. 77, and I. L. R., 3 All., 519, contain anything inconsistent with the views expressed in this judgment, they must be considered overruled to that extent. The appellant will have his costs of this appeal. The other costs will abide the result.

KNOX, J.—I fully agree with the order proposed and with the reasons given for the same.

BANERJI, J.—I am of the same opinion, but desire to make a few observations. Two points have been conceded, and in my opinion rightly conceded, by the learned advocate for the respondents. The first is that if the dismissal of the plaintiff's claim was in fact and in law a dismissal under the first part of section 157 of the Code of Civil Procedure, that is, a dismissal under section 102, on the ground of the plaintiff's failure to appear at the adjourned hearing of the suit, the plaintiff has a remedy under section 103. The second point is, that the mere presence of a pleader at the hearing is not an appearance within the meaning of the Code unless the pleader was duly instructed and able to answer material questions relating to the suit. On both these points the course of rulings in this Court in recent years, and in the other High Courts is to the effect that in the former case an application can be made under section 103, and in the latter, that the party represented by a pleader without instructions must be deemed not to have appeared. There is no reason to depart from this consensus of rulings. The learned advocate for the respondents contends that whenever an application is made under section 103, the first question to be determined is, whether the order which is sought to be

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set aside could legally have been made under section 102. With this contention, and the rulings which support it, I am unable to agree. What the Court has to determine is, whether the order of dismissal was, in fact, made under section 102; that is, whether it was made on the ground that the plaintiff did not appear and the defendant did appear, not whether that order was rightly or legally made. When a Court has dismissed a suit on the ground that the defendant has appeared and the plaintiff has not appeared, that is a dismissal under section 102, and an application can be made under section 103 to set aside such a dismissal. The plaintiff's success upon that application depends on his ability to prove that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. The defendant may, for the purpose of showing that no such cause existed, prove that, in fact, the plaintiff had appeared, and that he was not prevented by any sufficient reason from appearing at the hearing: but that is a question which must be determined for the purpose of considering whether the plaintiff has been able to substantiate his application under section 103 to set aside the dismissal. In this case, as has been shown in the judgment of the learned Chief Justice, the Court did, in fact, dismiss the suit on the ground that there was no appearance on behalf of the plaintiff. That being so, the plaintiff was entitled to apply under section 103 for the setting aside of that dismissal, and the Court below was wrong in refusing to entertain the application. I agree with the order proposed by the learned Chief Justice.

AIKMAN, J.—I also am of the same opinion. The learned Subordinate Judge says that the order of dismissal which was passed on the 25th November, 1898, amounted to a dismissal for want of proof. I am clear that this is a mistake. It would have been open to the Subordinate Judge in the present case to say that the evidence on the record was insufficient to prove the plaintiff's case, and that therefore the suit was dismissed. Had he said so, that would have been a decree against which the plaintiff's remedy would have been by way of appeal. But what he did say,

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was that the suit was dismissed for default of appearance. That is clearly an order passed under the first part of section 157 read with section 102 of the Code, and the plaintiff adopted the proper course by applying under section 103 for an order to set the dismissal aside. The argument that because the Court may have been mistaken in thinking that there was no appearance by the plaintiff, the order must be taken to have been one not passed under section 102 is, in my opinion, utterly fallacious, and I would dissent from anything there may be in the judgments cited which would support such reasoning. I concur in the order proposed.

Appeal decreed and cause remanded.

APPELLATE CIVIL.

1899
July 6.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Banerji.

DHAN KUNWAR AND ANOTHER (OPPOSITE PARTIES) *v.* MAHTAB SINGH AND OTHERS (OBJECTORS).*

Civil Procedure Code, Section 244—Execution of decree - Sale in execution Decree satisfied—Amendment of decree in favor of judgment-debtors —Application by judgment-debtors to recover surplus from decree-holders.

Where by a sale in execution the decree as it stood at the time when execution was taken out had been fully satisfied, but the decree was afterwards amended at the instance of the judgment-debtors, and in consequence of the amendment the decree-holders were found to have realized more from the judgment-debtors than they were entitled to, it was *held* that it was competent to the judgment-debtors by application under section 244 of the Code of Civil Procedure to recover such surplus from the decree-holders.

THIS was an appeal under section 10 of the Letters Patent from the judgment of a single Judge of the Court. The facts of the case, so far as they are necessary for the purposes of this report, appear from the judgment, which was as follows:—

"This appeal relates to a decree bearing date the 25th July 1895. Of that decree the ancestors of the present respondents

* Appeal No. 11 of 1899, under section 10 of the Letters Patent.