[HIGH COURT OF AUSTRALIA.]

THE AUSTRALASIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY LIMITED . . . } PLAINTIFFS;

AND

HOLLAND . . . . . DEFENDANT.

Practice—High Court—Action for foreclosure of mortgage—No appearance entered for defendant — Order for taking accounts — Order nisi for foreclosure—Sticking up in Registry—Notice to defendant to be present—Rules of the High Court 1911, *Part I., Order LV., r.* 6.

H. C. OF A. 1915.

MELBOURNE, *June* 18.

ISAACS J.

In an action in the High Court for foreclosure of a mortgage where an order has been made for taking accounts and for foreclosure in the event of non-payment of the amount found to be due, the accounts must be taken in the presence of both parties or after proper notice, actual or constructive, to the defendant to be present, notwithstanding that the defendant has not entered an appearance in the action.

Where in such an action the defendant has not entered an appearance, the order for taking accounts and for foreclosure in the event of non-payment of the amount found to be due must, under the *Rules of the High Court* 1911, Part I., Order LV., r. 6, be stuck up in the Registry in addition to being filed there.

MOTION.

An action was brought in the High Court by the Australasian Temperance and General Mutual Life Assurance Society Ltd., of Melbourne, against Thomas William Holland, of West Wyalong, New South Wales, for foreclosure of a mortgage dated 30th October 1911 from the defendant to the plaintiffs of an interest under a will.

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No appearance was entered by the defendant, and on 20th July 1914 *Isaacs* J. made an order for an account of all moneys owing under the mortgage and for foreclosure in the event of the defendant not paying the amount certified to be due within six months after the date of the certificate. The certificate was given on 17th September 1914, and the amount was not paid within the prescribed time.

A motion was now made by the plaintiffs, on notice dated 31st May 1915, for a final order for foreclosure.

The other material facts are stated in the judgment of *Isaacs* J.

Sproule (*Lewers* with him), for the plaintiffs, referred to *Farden* v. *Richter* (1); *Hopton* v. *Robertson* (2).

ISAACS J. In this case an order for foreclosure of an interest under a will was made on 20th July 1914. The order *nisi* was not served personally because the defendant has not appeared in the action. But it was not stuck up in the Registrar's office as required by Order LV., r. 6, although it was filed, because no request to the Registrar was made for that purpose. The Registrar made an appointment at the instance of the plaintiffs to take accounts. This appointment was not served upon or brought to the knowledge of the defendant, or stuck up in the Registrar's office. Proceedings have gone on under the order *nisi* without any service upon the defendant in any way. The amount has been ascertained and costs taxed *ex parte*, and these moneys have not been paid. I am now asked on notice of motion which was, however, stuck up in the Registrar's office, to make the foreclosure absolute.

The defendant does not appear on this motion, notwithstanding the fact that the present notice of motion was stuck up. I regard it as an elementary requirement of justice and as essential—in the absence of express provision or authority to the contrary—that the ascertainment of the sum due should be in the presence of both parties or after proper notice, actual or substituted, to be present. As that was not done, it is, apart from all else, a sufficient ground to refuse this application. I

(1) 23 Q.B.D., 124. (2) (1884) W.N., 77.

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certainly think, however, that the order *nisi* itself should also have been stuck up, as the only means of service available.

The application is refused.

Motion dismissed.

Solicitors, for the plaintiffs, *Darvall & Horsfall.*

B. L.

[HIGH COURT OF AUSTRALIA.]

IN RE EATHER v. THE KING.

H. C. OF A. 1915.

MELBOURNE, *June* 15.

Griffith C.J., Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ.

Practice—High Court—Appeal from Supreme Court of State—Criminal matter—Special leave—Judiciary Act 1903-1912 (*No.* 6 *of* 1903—*No.* 31 *of* 1912), *sec.* 35 (1) (*b*).

The High Court has, under sec. 35 (1)(*b*) of the *Judiciary Act* 1903-1912, an unfettered discretion to grant or refuse special leave in every case, but a *primâ facie* case showing special circumstances must be made out.

The statement of the practice of the High Court in granting leave to appeal in criminal cases, as formulated in *Eather* v. *The King*, 19 C.L.R., 409, is not to be regarded as authoritative.

The learned Chief Justice made the following statement from the Bench:—

Since the decision of the Court in *Eather* v. *The King* (1) it has been ascertained that the rule of practice as formulated in that case is interpreted by the members of the Court in different senses. The case cannot, therefore, for the future be regarded as an authority.

As we interpret sec. 35 (1) (*b*) of the *Judiciary Act*, the Court has an unfettered discretion to grant or refuse special leave in every case, but we think that the term "special leave" connotes the necessity for making a *primâ facie* case showing special circumstances.

I speak for all the members of the Court except my brother *Barton*, who is absent from the Commonwealth.

B. L.

(1) 19 C.L.R., 409.