3.—*Decrees by Default in Civil Bill Courts in Ireland.*

BY R. P. CARTON, M.R.I.A., K.C.

County Court Judge of Clare.

[Read Friday, 27th February, 1903]

FOR many years past our Chambers of Commerce and Mercantile Associations have been calling for the establishment in the County Courts of Ireland of a summary power to obtain decrees by default for liquidated demands. In support of this claim the analogy of the power to obtain judgment by default in the High Court, and the provisions of the English County Courts Acts, enabling such decrees to be obtained outside Sessions, are relied on. It is urged that the want of such a power delays and sometimes defeats just and undisputed debts, and imposes upon creditors, and particularly upon trade creditors, the hardship and inconvenience of attending Quarter Sessions and proving demands to which no defence could or was intended to be offered. Time after time, at meetings of such bodies, papers have been read and resolutions have been passed clamouring for this addition to the jurisdiction of our County Courts. Our daily papers have teemed with letters, and influential deputations have waited on Lord Chancellors, all to the same effect. The Bill "to amend the law relating to County Courts in Ireland," which was introduced in the House of Lords by Lord Ashbourne in 1901, contained a clause framed on the 86th section of the English County Courts Act, 1888 (51 and 52 Vic., c. 43), giving the same power to obtain decrees by default in the Irish County Courts as was possessed in England. This clause was afterwards withdrawn, and was not re-introduced in what was substantially the same Bill again brought in by Lord Ashbourne in 1902, and passed by him through the House of Lords, but which never reached the Commons.

The agitation for this so-called reform in our County Courts law has recently set in again with renewed vigour. In November and December last a long and somewhat controversial correspondence occupied the columns of our Dublin newspapers for several days. The County Officers and Courts (Ireland) Act, 1877 (40 and 41 Vic., c. 56), gives a limited power to obtain decrees by default. By section 59 of that Act a creditor, by filing an affidavit stating the particulars of his debt and verifying the sum due, can issue what is termed a "default process," on which

if the defendant does not within seven days after service give notice of an intention to defend, the creditor may, on proof of the personal service of the process, but without any further proof than production of the affidavit, obtain a decree from the Judge at Sessions. In Clare I find that this process is being largely and increasingly resorted to. It is mainly used by firms and traders carrying on business in Dublin and the other principal cities, and in cases in which there is no answer to the demand. By the use of this form of process in such cases the inconvenience and expense of attending Sessions and producing books and documents are altogether avoided. The only objection that is or can be advanced against this mode of proceeding is that the decree can only be made by the Judge sitting at Sessions. I hope to show later on that there is not much reality in this objection.

I now propose to examine very briefly the grounds on which this change is asked for, and to give some reasons why in my opinion it should not be made. I wish, however, to guard myself by stating that what I am about to say has reference to rural districts only. While I was at the Bar I never had any County Court practice save an odd land case under the Act of 1870, or an occasional incursion into a Local Court of Bankruptcy. My experience of general County Court work was solely derived from having sat as *locum tenens* for the late Mr. Henn in the County of Galway, and from what I have observed and learned during the last four years during which I have sat as Judge in the County of Clare. In each of these Counties there is a large rural population consisting of small farmers, cottier tenants, and farm labourers. For a population such as this, I consider that the extended power of obtaining decrees by default which has been sought for would be inapplicable and unnecessary, and would be in many cases productive of much hardship and injustice.

It should never be lost sight of that the County Court is the "Poor Man's Court." To ensure that he gets full justice, the principal Act regulating these Courts provides that "every defendant in every Civil Bill "shall be entitled on the hearing of such Civil Bill to every defence which he may have at law or in equity" (14 and 15 Vic. c. 57, s. 96.) In a rural County, of which I think Clare may be fairly taken as typical, the creditors suing in the County Court for liquidated demands, may be divided roughly into the following classes:—(1) wholesale traders; (2) shopkepers in the county towns; (3) landlords and (4) local Banks or gombeen men. The debtors may be divided into, (1) shopkeepers in the county towns; (2) debtors for shop

goods; (3) debtors for rent and (4) debtors to the Banks or to the gombeen men.

The debtors to the wholesale traders would be mainly, if not entirely, the shopkeepers in the county towns. Against them the creditors have their remedy by the default process already referred to. The only objection against the sufficiency of this remedy is that the decree can only be obtained at Sessions, and that in the interval between the Sessions the debtor may abscond, and the debt may thus be lost. But when examined this objection seems to me to have little substance. If the debtor absconds he at once becomes amenable to the laws of bankruptcy. He would also become amenable to them if a decree or judgment for over £20 were levied on his goods. In either event his property would become divisible equally amongst his creditors, and the execution creditor would take nothing under his decree. The only effect of allowing a creditor for a sum less than £20 to obtain a decree for his debt during the interval between Sessions would be to allow such creditor to obtain a preferential payment, as any country trader against whom a decree for less than £20 could be obtained would to a certainty have other creditors. A race would thus be got up amongst the creditors, each one seeking preference for his own debt, whereas under the law as it stands, all start fair, for all must come to the Sessions where they will obtain decrees of equal priority.

It is, however, against the agricultural debtor that the extended default process would appear to me to be inapplicable, and likely in many cases to work hardship and injustice. His creditor, as I have said, would be in the main either the landlord for rent, the shopkeeper for shop goods, or the Bank, or the gombeen man for the overdue note. To creditors of any of these three classes the objection of probable loss of debt by absconding or by delay has no application. The agricultural debtor does not abscond. He is as long as he can pay his rent, or can find employment in his native county, firmly rooted in his little holding or his cabin home. The necessity for immediate process does not arise with him. It is only at certain times and seasons there is any use in processing him. And so in practice creditors always time their processes by local events. They are issued so as to fall in with the time when the debtor will be in funds from a well-known fair, or a gathered harvest, or, on the seaboard counties, when the proceeds of the kelp industry have been received or, in Connaught, when the yearly emigrants to England have brought back their hoarded and hard-won earnings.

The necessity of the personal attendance of the creditor

or a witness to prove the debt in an undefended case, and the inconvenience thereby entailed are largely relied on as grounds for the proposed change. The answer which has been offered more than once to the argument founded upon these grounds is that the creditor whether trader or money-lender has brought the inconvenience on himself by a "contributory culpability," in giving credit out of all proportion to the debtors' means. Much to the same effect was a passage in a leading article in the "*Times* of 31st January last, reviewing the returns of the working of the English County Courts for the past year. "It is at least questionable," the writer said, "whether the present facilities for collecting small debts are really for the public good. They encourage purchase on credit, and thereby discourage thrift. A temptation is held out to working men, and still more to their wives to run into debt." Some English Judges have gone so far in this direction as to suggest that no accounts for sums under £2 or £3 should be recoverable by action. I confess I am unable to adopt any of these views in their entirety. It would be a sad day for many a poor family if during an interval when no money was coming in, or if in other times of temporary need the local shopkeeper were to deny a credit. The pathetic scene in Zola's "Germinal," when La Maheude, the miner's wife pleads so earnestly with Maigrat, the local shopkeeper and money-lender, that notwithstanding a heavy score against her she wrings from him a further credit for her starving household of two loaves, some coffee, some butter, and a five franc piece, often finds a counterpart in many an Irish village, and goes far to displace the notion of "contributory culpability" on the part of the creditor. But the true answer in my opinion is that the inconvenience complained of has no substantial reality. The existing "default process" meets the case of creditors of the local traders. The creditors of the rural debtor are nearly all local. They reside mainly in the towns, or at all events within the county in which the Sessions are held, and if they or their witnesses have to come from any distance their expenses can be and are provided for.

The injustice that might be worked to the rural debtor is my chief objection to extend the power of obtaining decrees by default. I do not go so far as did a writer in the *Irish Times* of 11th November last, signing himself, "Accountant," who said that "underlying the agitation for reform is the desire to sweep away unceremoniously every barrier which at present exists for the protection of the poorer class of debtors." I agree, however, with the same writer that the County Court was not established for the trader's benefit, but for "the dispensing

of equal justice between man and man." I believe it to be the duty of the County Court Judge to see that every defendant in every Civil Bill before him gets what the law entitles him to, "every defence which he may have at law or in equity." I think too that this right is one he is entitled to get whether the Civil Bill comes on as a defended or undefended case. Acting on this belief I feel my greatest difficulties, and the pressure of my greatest responsibilities in dealing with undefended cases, and I know that this feeling is shared with me by many of my more experienced colleagues. When a case is defended the Judge is relieved of much responsibility, for he may, as a general rule, safely leave the defendant's case in the hands of the Counsel or Solicitor he may have employed to defend him. But in the undefended case the Judge has to see that the case is fairly and reasonably proved, and that the defendant gets the benefit of every defence to which he is entitled. In a Civil Bill for shop goods, for example, strict proof of the actual sale or delivery of every item would not be required. The production of an honestly kept book or the proof of service of a detailed account not objected to would be received as sufficient. There is seldom any difficulty in undefended cases where a landlord is the plaintiff, whether in process for rent or ejectments for non-payment. The estate accounts are invariably well kept, and a mistake in the amount sued for, or the date when it accrued has very rarely come before me. The same observations apply to cases where the plaintiff is a Bank. In nearly all such cases the note sued on has been signed in the Bank House, and the signatures witnessed by one of its officials. I am glad to say I am not much troubled with the gombeen man as a suitor. Whether it is owing to the passing of the late Act, or the death of the two principal men of this class in the County, processes on notes for money lent have of late become few, and in the main represent older renewals of old dealings. If the trade were to revive so that the notes representing money lent were to come before me, I would consider it my duty to inquire into the actual amount of cash which had been paid to the maker of the note, so as to get at the rate of interest which had been charged for the loan, and then act accordingly. The cases, however, which present most difficulty are the undefended cases for shop goods. In many cases I am satisfied that the process never reaches the actual hands of the defendant. The power of service is very wide. The service of an ordinary Civil Bill may be effected "either by personal service of the Civil Bill process, or by leaving a copy at the detendant's house or place of residence, or at his office, warehouse, counting-house, shop factory, or place

of business with the wife, child, father, mother, brother, sister, or any other relation of the defendant, or of his wife, or with any servant or clerk of the defendant (the person with whom such copy shall be left being of the age of 16 years or upwards." (14 and 15 Vic. c. 57, s. 65.) The normal absence of the defendant from the house during the working hours of the day, makes personal service rare, and the careless habits of the other inmates all lessen the chances of the process actually reaching the defendant's hands. These chances are still further lessened by the motives for concealment of the service, when, as is often the case the goods have been ordered not by the defendant at all, but by his wife, his daughter, or his son. Again, in Clare as in other country parts of Ireland it is a common arrangement on the marriage of a farmer's son that his father in consideration of his daughter-in-law's fortune makes over the farm to the son, reserving certain rights, or as they are called, "freedoms." I have often found in cases like these as well as in cases of intestacy of tenants that the shopkeeper had treated any balance due by the former occupier as a debt "running with the land," and had debited the son or the actual occupier as the case might be, with the old balance.

I always require the trader's books to be produced in these undefended cases for shop goods. In many cases the books are fairly well kept, but sometimes the books display notions of book-keeping of a very rudimentary character. There will be errors in tots, payments although entered in a day-book not credited against the debits, balances wrongly brought forward in the same account, and sometimes balances against one account brought forward against another one. Acting on the statutory right of every defendant to have the benefit of all the defences the law allows him, I give him for example the benefit of the Statutes of Limitations, and the benefit of the wholesome provisions of the Tippling Acts. It is bad and pitiful enough when the wage earner spends cash in the publichouse on himself or his boon companions. But it is not to be tolerated that the check which the want of ready cash would impose is to be taken off, and that unlimited facilities for drinking are to be given by allowing the same wage earner without the price of even a "half one" in his pocket to run up a score for himself and his friends with a readily confiding publican. I had a case before me at the very last Session in which a Civil Bill was issued for £8 6s. 11d. with the innocently stated cause of action, "shop goods supplied." I found on examining the traders books that £4 12s. 4d. of the sum sued for was for "treats," extending over a period of about two years. I was glad

to give the Anti-Treating League a lift, and so I struck out all the items for "treats," and made a decree for the balance only.

If a defendant is too poor to employ a Solicitor, then although he may have a good answer to the plaintiff's demand or some part of it, or fair grounds to entitle him to have an order making the decree payable by instalments, the case must come on as an undefended case. It often happens with me, and I am sure with other Judges, that in such cases the defendant appears in person and asks to be heard. Over and over again after hearing what the defendant had to say, I have either dismissed the case altogether, or reduced the amount of the demand, or when the debt was due made the decree payable by instalments.

The useful and salutary supervision which the Judge can thus exercise in undefended cases would be entirely done away with by the proposed change. Out of Sessions the duty of issuing decrees would be handed over to an official, most probably the Clerk of the Peace, or some underling in his office. His duty would be limited to seeing that there was an affidavit of the service of the Civil Bill, and an affidavit that the sum sued for was due. His duty would be ministerial only. He would not be called on, and would have no opportunity or power to make any inquiry into the nature of the debt or the liability of the person sued to pay it. The first intimation that the poor farmer or cottier tenant or farm labourer would have that a decree had been obtained against him would be the arrival of a special bailiff to dismantle his humble home.

The English Act of 1888 contains a provision that the creditor applying for a judgment on default may have it made payable by such instalments as he shall have in writing consented to take. A similar provision was inserted in the default section of Lord Ashbourne's Bill of 1901, which was afterwards withdrawn as already stated. This most beneficial power to debtor and creditor alike of making a decree payable by instalments would be entirely swept away from the proposed decrees by default except at the will of the creditor.

I wish to repeat what I stated at the outset that the views I have advanced and the objections I have taken apply to rural districts only. I have endeavoured to show that in such districts at all events there is no sufficient danger or inconvenience to the creditor to require the change which has been so persistently demanded. I have, too, given my reasons for the opinion. I very strongly hold that the change would, so far as the rural debtor is concerned, work much hardship and injustice. I think

I may claim for my opinion that it is at least impartial and disinterested. The proposed change would mean for the County Court Judge a very substantial diminution of his work and his responsibility.

4.—*Suggested Improvements in County Court Procedure.*

BY JAMES J. SHAW, K.C.,

County Court Judge of Kerry.

[Read Friday, 27th February, 1903.]

"UNDER the present County Court jurisdiction and procedure, it is almost impossible to recover debts." These are the first words of a printed statement adopted by the joint Committees of the Dublin Chamber of Commerce, and the Dublin Mercantile Association. They are sufficiently startling, and, if true, call for very drastic reforms in County Court Procedure. But when I find that about 50,000 decrees are obtained in Ireland every year, 5,500 out of the Belfast Recorder's Court alone, and that the vast majority of these are for shop and other debts, I think the statement that "it is almost impossible to recover debts," in the Irish County Courts must be regarded as very rash. My own experience is that there is not the slightest difficulty in recovering a just debt in the County Court if creditors avail themselves of the facilities that are offered them. The only difficulty that ever arises is from the delay of creditors in suing for their debts. Shop keepers in county towns hardly even think of suing their customers till the debt is nearly barred by the Statute of Limitations, and thus create difficulties of proof for themselves, and give opportunity for the raising of defences which the lapse of time and the fallibility of human memory render it hard to meet satisfactorily.

But it is much easier to obtain a decree than to realize the money which the decree represents; and in my opinion the chief defects in the County Court system relate to the mode of execution of decrees. If traders found as little difficulty in executing their decrees as they do in obtaining them, their lot would be a comparatively happy one. I wish to draw attention to two or three defects in the powers of the County Courts as to the execution of decrees, and I am glad to say that as regards the existence of these defects and the mode of remedying them, I am almost entirely in agreement with the authorities of the Dublin Chamber of Commerce and the Dublin Mercantile Association.