Referred Case.

1869
March 18.

Thomas Shortt, Junior, *et al*.... ... ... *Plaintiffs.*
Abdul Rahiman. ... ... *Defendant.*

Jurisdiction—Small Cause Court—Payment—Set off—A Consignor has no right to credit a Consignee with the proceeds of a sale of goods not accepted.

The plaintiffs consigned goods to the defendant, and drew a bill for Rs. 2,711-9-6 against them on the defendant in favour of the Chartered Mercantile Bank. The bill was accepted by the defendant, and, when presented for payment, was dishonoured.

The bill was paid for honour by the attorney of the plaintiffs. The goods arrived, and (the defendant having refused to pay the bill) were sold by the plaintiffs, after notice to the defendant, at his risk, and realised Rs. 1,655-15 4. The plaintiffs refused to hold a survey on the goods unless the defendant paid the amount of the acceptance.

The plaintiffs sued the defendant in the Small Cause Court, for the amount of his acceptance giving him credit for the proceeds of the goods, and abandoning the excess

Held, that the plaintiffs were not entitled to do so, as the claim on the bill was not brought within the jurisdiction of that Court by payment or admitted set-off.

Case stated for the opinion of the High Court, under sec. 55 of Act IX. of 1850, and. sec. 7 of Act XXVI. of 1854, by John O'Leary, First Judge of the Bombay Court of Small Causes :—

"In this case the plaintiff in the summons, as originally framed, sought to recover from the defendant the sum of Rs. 930-10-2, being the balance alleged to be due to the plaintiff by the defendant on a certain bill of exchange, drawn on the defendant by the plaintiff and accepted by the defendant, for the sum of (including noting charges and interest) Rs. 2,711-9-6, after giving credit to the defendant for the proceeds of certain goods, against which the said bill was drawn, and which goods, it was alleged, the fefendant refused to accept, Rs. 1,655-15-4; and for a sum of Rs. 125, which the plaintiff alleged was due by him to the defendant in respect of a certain agreement between them, making in all the sum of Rs. 1,780-15-4, for which the plaintiff was willing to give credit to the defendant.

"The defendant first pleaded that the Court had no jurisdiction in the case, inasmuch as the said sum of Rs, 125, for

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which the plaintiff sought to give credit to the defendant was not a payment on account, or an admitted set-off, and could not be used to bring the plaintiff's claim below the sum of Rs. 1,000.

"The plaintiff then proposed to amend his statement of the particulars of his claim by striking out the sum of Rs. 125, and suing for Rs. 1,055-10-2, and abandoning the excess.

"I allowed the amendment.

"The defendant did not apply for any postponement of the case on the summons being so amended, but contended that this Court, having held that the summons, as it originally was framed, disclosed a cause of action beyond its jurisdiction, had no power to make the amendment aforesaid.

"I overruled this objection, and proceeded with the hearing of the case.

"The facts were, that the defendant had ordered certain goods of the plaintiff, and the plaintiff had drawn on the defendant, in favour of the Chartered Mercantile Bank of India, London, and China, a bill of exchange against the said goods, which had been duly accepted by the defendant.

"This acceptance, having become due on the 28th of January 1868, was duly presented for payment to the defendant and protested for non-payment; and the attorney of the plaintiff, having paid the amount of the acceptance to the Chartered Mercantile Bank, for the honour of Shortt & Co., now sued the defendant in the name of his principal.

"The defendant having refused to pay the acceptance, the goods against which it was drawn having arrived were, after notice to the detendant, sold at his risk, and realised a net amount of Rs. 1,655-15-4.

"From the evidence, and correspondence between the parties which was put in evidence, it appeared that the defendant had purchased the goods in question by a sample and objected to take delivery of the goods, alleging that he believed them to be inferior to the sample, and that the

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plaintiff refused to hold a servey until the defendant paid the amount of the acceptance, and that the defendant based his opinion, that these goods were inferior to the sample, on the fact that other goods of a similar kind had recently been received by him from the plaintiff, which were inferior to the sample, and in respect of which the plaintiff had made him an allowance.

"I was of opinion that the defendant was liable on his acceptance, and that the plaintiff was entitled to give credit for the amount realised by the sale of the goods, and I found for the plaintiff for Rs. 1,000 and costs, and I certified the plaintiff's advocate's costs, subject to the opinion of the High Court, as requested by the defendant, on the following points:—

"(1) Had I power to make the amendment mentioned after coming to the conclusion that the case, as originally framed, was beyond my jurisdiction.

"(2) Was the case after such amendment within the jurisdiction of this Court.

"(3) Whether the plaintiff, having refused to hold a survey of the goods which had been sold by sample, was entitled to sell them at the risk of the defendant and set off the amount realised in the present action.

The case was argued before Couch, C. J., and Westropp, J., on the 18th of March 1869.

Pigot and *Mayhew* for the plaintiffs.

They contended that the case was governed by *Ewart, Latham, & Co.* v. *Haji Muhammad* (a); that there was an implied authority given by the defendant to the plaintiffs to sell the goods on his account, the property in them having passed to the defendant. They cited Chitty on Contracts, p. 390, 1; Tit. "When Vendors may resell," and *Maclean* v. *Dunn*(b).

M,Culloch (with him *Branson*), for the defendant:—This is not mere question of form, but goes to the merits of the

(a) 4 Bom. H. C. Rep., O. C. J. 133 (b) 4 Bing. 722.

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case. If plaintiffs are to be allowed to sue on the bill, giving credit for the proceeds of the goods, it throws upon the defendant the *onus* of proving that the goods were not according to the sample, which it is impossible for him to do, as he was not allowed to hold a survey on them; whereas if the plaintiffs sue for damages, they will have to show that the goods were such as the defendant was bound to accept. The property in the goods did not pass to the defendant, and the claim of the plaintiffs is not for goods bargained for and sold, but for damages: *Lamond* v. *Davall* (c). If this is anything but a claim for damages, it is a set-off; but a set-off must be acknowledged: *Avards* v. *Rhodes* (d). The case of *Ewart, Latham, & Co.* v. *Haji Muhammad* is easily distinguished. The plaintiffs there were the defendant's agents to sell, and they were authorised to apply the proceeds in liquidation of their claim against the defendant. He also cited *Woodhams* v. *Newman* (e). and Bullen and Leake on Pleading, P. 446.

Mayhew in reply.

Couch, C.J.;— In this case the learned Judge of the Small Cause Court states that the facts were as follows. [His Lordship read the case],and then the Judge says that he was of opinion that upon these facts he had jurisdiction to try the case.

Now the second question put goes to the root of the matter, and if we are of opinion that that must be answered in the negative, it will not be necessary for us to answer the third or the first. The suit in the original and amended plaint is on a bill of exchange for Rs. 2,711-9-6, and the balance is arrived at by giving credit for the sum of Rs. 1,655-15-4,which was the amount produced by the sale of the goods. Unless the plaintiffs were entitled to do that, the suit was not within the jurisdiction of the Court. I think the learned Judge was wrong in holding that the plaintiffs were entitled to give credit to the defendant for that

(c) 30 Q. B. 103 (d) 22 L. J. Ex. 106.
(e) 7 C. B. 654;18 L. J.,C. P. 213.

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sum. According to the case of *Avards* v. *Rhodes*—which has not been, as far as I know, overruled, nor have I any reason to doubt the authority of the decision in it—in order to bring a claim within jurisdiction of the Small Cause Court there must be a payment or an admitted set—off. The plaintiffs cannot bring their claim within the jurisdiction by offering to give credit for any sum they may choose to allow.

In this case I think the defendant neither expressly nor impliedly anthorised the plaintiffs to sell the goods, and apply the proceeds in reduction of their claim upon the bill, nor did he assent to that being done, The facts show that so far from his doing that, he was disputing his liability to pay the bill, as the goods did not agree with the sample. He certainly did not assent to that course of conduct on the part of the plaintiffs, nor would the law give power to the plaintiffs to self on behalf of the defendant goods, which were those of the plaintiffs themselves and which it does not appear whether the defendant was, or was not, bound to accept.

No doubt, the plaintiffs, if they though fit to sell the goods might do so, and might treat the amount realised by the sale as the measure of their damages in an action for not accepting. But that is not what they have done. They have sold the goods as the goods of the defendant, and they sue on the bill, and set off the proceeds of the goods against it and take advantage of that to avoid the necessity of bringing an action for not accepting the goods.

If they sue upon the bill in the Small Cause Court, they must reduce its amount so as to bring it within the jurisdiction of that Court by payment or admitted set—off. They may sue in this Court of this bill, or, if anxious to sue in the Small Cause Court, they may sue there for not accepting the goods; but their position in that case would be different, for the *onus* would lie upon them of proving that the goods were equal to the sample. It is not, I think, a matter which goes merely to the form of the action, and the plaintiffs have no reason to complain if they are held bound to show that the balance they sue for is brought within the jurisdiction of the Court by payment or admitted set—off.

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The second question must, therefore, be answered in the negative, and judgment be given for the defendant, on the ground that the claim of the plaintiffs is not within the jurisdiction of the Court, but, as the plaintiffs had the opinion of the learned Judge in their favour, each party should bear his own costs of this application.

WESTROPP, J.—I agree with the Lord Chief Justice in thinking that in this case the learned Judge of the Small Cause Court had not power, either on the original or the amended summons, to entertain the case. I say nothing as to his power to make the amendment.

Till it is shown to us that the case of *Avards* v. *Rhodes* is overruled, we ought, I think, to follow that case.

The present case is different from *Ewart, Latham, & Co.* v. *Haji Mohammad Siddik (ubi supra)*, and the difference consists in this, that we there held that the proceeds of the goods were agreed to be applied in part payment; there was authority from both parties to a common agent to sell the goods, and apply the proceeds obtained in payment of the purchase money. Here there was no authority on the part of the defendant to the plaintiffs to sell the goods; their doing so was an act of their own. They are not thereby authorised to set off the amount realised in reduction of the bill, and so bring the case within the jurisdiction. That they could only do if there were a set-off admitted by the defendant. That it is not so admitted is plain, for the defendant say he was not bound either to accept the goods, or pay anything in respect of the bill.