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Oct. 7.

Referred Case.

Blackwell and Co. ... ... *Plaintiffs.*

Sumar Ahmed. ... ... *Defendant.*

Small Cause Court—Jurisdiction—Splitting cause of action—Act IX of 1850, Sec. 31.

The defendant, as broker for the plaintiffs, guaranteed all transactions entered into by the plaintiffs with native firms through the defendant.

Some of these native firms, in respect of such transactions became indebted to the plaintiffs, and the defendant wrote to the plaintiffs requesting them to sue such defaulting firms.

The plaintiffs accordingly sued six of such firms, and sent a letter to the defendant claiming from him payment of the taxed costs incurred in all the suits, amounting to Rs. 7,553-10-6.

The defendant having failed to pay, the plaintiff sued him in the Small Cause Court to recover payment of the taxed costs incurred in one of the suits amounting to Rs. 433.

Held that the plaintiffs in doing so were splitting their cause of action within the meaning of Sec. 34 of the Small Cause Court Act (IX. of 1850).

Case stated for the opinion of the High Court, under Sec. 55 of Act IX. of 1850, and Sec. 7 of Act XXVI. of 1864, by John O'Leary, First Judge of the Bombay Court of Small Causes :—

"In this case the plaintiffs claimed from the defendant and his two partners, whose names were subsequently struck out of the summons, the sum of Rs. 572-0-9.

"The principal claim of the plaintiffs was a sum of Rs. 433, with interest on the said sum of Rs. 433, being the amount of a bill of costs paid by the plaintiffs to their Solicitors, which bill was taxed on the 8th February 1867, and was paid to Messrs. Hore and Langley some time before the 14th day of May 1868.

"The plaintiffs sought to recover the amount from the defendants under the following circumstances :—

"The defendants, in the year 1865, acted as the plaintiffs' brokers, guaranteeing the plaintiffs against any losses that might arise in the transactions entered into with native firms by the plaintiffs through the defendants as brokers.

"Several transactions so entered into resulted in loss to the plaintiffs; and on the 20th February 1865 the defendants wrote to the plaintiffs a letter as follows :—

'DEAR SIRS.—In reply to your letter of the 17th February requiring explanations of a subject contained in ours of the 16th instant, we beg to state that as soon as any party refuses acceptance or payment of redraft on him, we advise you to take legal measures against such party as soon as possible; and notwithstanding our such advice to you, if you delay to do so, and in the course of such delay if the party is bankrupt or runs away, the risk is not to be suffered by us, but by yourselves. In case if your order your lawyers to proceed against such party, and if they delay to proceed, of course the risk as above-mentioned in the course of the delay is not to be suffered by us. But for all delays in laws (neither occasioned by yourselves nor by the lawyers) our guarantee is to continue in full force as per agreement.'

"The defendants also, when requested by the plaintiffs to give a list of the names of the persons against whom the defendants desired that the plaintiffs should proceed at law, wrote to the plaintiffs a letter, dated 2nd October 1865, containing the names of six firms that they were to proceed against.

"In pursuance of the defendant's request the plaintiffs took certain legal proceedings against the firm of Vussonjee Narron and Co.

"About May 26th, 1866, the defendants compromised the claim in the case then pending in the names of the plaintiffs v. Vussonjee Narron.

"On the 20th April 1868 the plaintiffs wrote a letter to the defendants, claiming from the defendants the sum of Rupees 7,553-10-6, which sum, it was admitted before me, included the sum of Rs. 433 now sued for, togther with the amount of several other bills of costs incurred by plaintiffs under similar circumstances to those in the present case.

"On the above state of facts the only defences raised by Mr. Macfarlane for the defendants were:

"1. The Statute of Limitation.

"2. That the plaintiffs having, in the letter of 20th April 1868, consolidated their present claim with others, and demanded the entire sum therein alleged to be due to them,

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in suing for this amount separately were splitting their cause of action.

"I held that there was nothing in the facts as admitted to show either an abandonment or a splitting of the cause of action.

"I disallowed the item of Rs. 20 claimed by the plaintiffs.

"I was of opinion that the plaintiffs were entitled to recover the sum of Rs. 433, together with interest at 9 per cent. from the 14th May 1868, the plaintiffs not being able to prove that they had paid the amount of the taxed bill of costs to their solicitors before that date.

"I found a verdict for the plaintiffs for the sum of Rs. 433 and Rs. 29-4-4, interest and costs, subject to the opinion of the High Court, on the question above stated, namely, does the 2nd plea afford a good defence to the action."

The case was argued before COUCH, C.J., and SARGENT, J.

Scoble and *Ferguson* for the plaintiffs:—Sec. 34 of the Small Cause Court Act for the Presidency Towns (IX. of 1850) says that "A plaintiff shall not be allowed to divide any cause of action for the sake of bringing two or more suits in any of the said Courts;" the words used in the English County Court, Act 9 and 10 Vict., c. 95 s. 63 are almost indentiele, so the decisions under the latter Act are applicable here. The words of Sec. 63 are: "That it shall not be lawful for any plaintiff to divide any cause of action for the purpose of bringing two or more suits in any of the said Courts." This Section was considered in the case of *Grimbly* v. *Aykroyd* (*a*), where Pollock, C.B., delivered the judgment of the Court. He expressly refrained from deciding whether all debts that could be comprised in one description in one count must be considered one cause of action within the meaning of the section, and confined his judgment to the case of tradesmen's bills, in which one item *is connected* with another in this sense that the dealing is not intended to terminate with one contract but to be continuous. That is not the case here; the items in the solicitor's bills in each suit brought are connected in this sense, but not the

(*a*) 1 Exch. 479.

solicitor's bills in separate suits, which bills, when paid, give rise to distinct causes of action. The same question was considered in *Wickham v. Lee* (*b*), where it was held that rent in arrear, and a demand of double value for holding over after notice to quit, were separate causes of action ; and Erle, J., laid down the general rule that a plaintiff was not splitting his cause of action if he brought separate plaints for causes of action which in a Superior Court would render two distinct counts indispensable. If this claim were brought under the Common Law Procedure Act, it would be the more correct course to have a separate count for each separate bill of costs. The fact that the plaintiffs have made a joint claim for all these bills does not convert into one several causes of action: *Brunskill v. Powell* (*c*) *Kimpton v. Willey* (*d*). The items here not more connected than in *Neale v. Ellis* (*e*), or in the *King v. the Sheriff of Herefordshire* (*f*). The objection taken in the Small Cause Court was premature, as the plaintiffs might never have sued for the remaining items.

Marriott for the defendant :—The plaintiffs having, in their letter of the 20th April, treated the liability of the defendant in respect of the bills the plaintiffs had paid as a single cause of action, should not now be allowed to divide : but even if they had not done so, the test laid down in *Wickam v Lee* applies, as the claim might all be inserted in the same count.

Couch, C. J. (after stating the facts), proceeded:—The letter of the 26th of February 1865, which authorised the plaintiffs to commence actions against the native firms is a very informal document ; but, acting upon it, the plaintiffs have taken proceedings against several native firms, and incurred costs. Of the costs incurred under it, and of their amount, it was necessary that the defendant should have notice; for until then there was no complete cause of action. From the facts appearing in the case, as stated, we gather

(*b*) 18 L. J. Q. B. 21. (*c*) 19 L. J. Exch. 362. (*d*) Ibid C. P. 264.
(*e*) 1 Dowl. & L. 163. (*f*) L B, & Ad. 672.

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that the demand for payment of those costs, with an account annexed, was first made on the 20th of April 1868; no payment was then made by the defendant, and the present cause of action thereupon arose.

It is clear that all the items in the account might then have been included in one count of a declaration under the Common Law Procedure Act of 1852, and so they fall within the rule laid down by Erle, J., in *Wickham v. Lee (upi supra)*. By selecting only one item of that account, the plaintiffs have, in my opinion, split their cause of action within the meaning of Sec. 34 of the Small Cause Court Act. The objection now taken by the defendant is not premature, because there was no abandonment of the excess as required by the Act. All the cases cited for the plaintiffs are distinguishable from the present one. The Judge of the Small Cause Court was, therefore, wrong in giving judgment for the plaintiffs, and his judgment must be reversed. The plaintiffs must pay the costs of reserving this case and consequent thereon; but as the Court below acted without jurisdiction, there can be no order as to the costs there incurred.

SARGENT, J.:—I concur in the remarks that have fallen from the Chief Justice, and am quite of the same opinion. The claim arose out of a series of breaches of one continuous contract, and I consider that the case falls within the decision in *Grimbly v. Aykroyd*, as also within the test laid down in *Wickham* v. *Lee*. I think that at this moment there is but one cause of action; and, on these grounds, I have come to the conclusion that the Judge of the Small Cause Court was wrong in his decision.

Attorneys for the plaintiffs—*Rimington, Hore, & Langley*.

Attorneys for the defendant—*Macfarlane* and *Green*.