[ORIGINAL CIVIL JURISDICTION.]

Suit No. 580 *of* 1872.

Appeal No. 285.

1875.
Oct. 15.

MULCHAND JOHARIMAL (DEFENDANT) *v.* SUGANCHAND SHIVDAS (PLAINTIFF).

Jurisdiction—Letters Patent, 1865, *Clause XII.—Cause of Action—Hundi—Consideration—Usage of Shroffs.*

Where a *hundi* had been drawn out of the jurisdiction, upon a person within the jurisdiction, indorsed and delivered out of the jurisdiction, to one who, out of the jurisdiction, indorsed the same and sent it to a person who, within the jurisdiction, received it, got it accepted, and presented it for payment to the drawee, by whom it was dishonoured within the jurisdiction:

Held that the dishonour of the *hundi* by the drawee within the jurisdiction was a material part of the cause of action by the holder against the first indorser and, consequently, that such material part of the cause of action having arisen within the jurisdiction, and the holder having obtained leave to bring his suit under Clause XII. of the Letters Patent, 1865, the court had jurisdiction to entertain the suit.

The plaintiff, as agent and banker of an Ajmir constituent, received a hundi for collection, and, on its acceptance by the drawee, credited the Ajmir constituent with the amount as of the date when the *hundi* would become payable.

Held, that as between the plaintiff and the Ajmir constituent, the plaintiff upon such credit in account being given, became a holder for value.

Held also that, on the hundi being dishonoured at due date by the drawee, the plaintiff was justified, by the usage of *shroffs*, in treating the Ajmir constituent as still entitled to credit for the amount, and himself as a holder for value.

Held also that, as between the Ajmir constituent and the first indorser (the defendant and appellant), the giving by the Ajmir constituent to the defendant of another *hundi*, which was never presented in Bombay for acceptance or payment was a consideration for the indorsement by the defendant to the Ajmir constituent of the *hundi* sent by the latter to the plaintiff and sued on by him.

THIS was an appeal argued before WESTROPP, C.J., and SARGENT J., from the decision of Green, J. The facts are fully set forth in the following judgment of the court of first instance (1) delivered on 30th March 1875 by

(1) 12 Bom. H. C. Rep. 113.

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GREEN, J. :—This is a suit on a *hundi*, dated the 26th April 1871, drawn by Kássidás Vanaráidás at Mandusar on the firm of Bháichand Zumachhrám of Bombay for Rs. 2,500 payable to *Sháh* 45 days after date. The *hundi*, which we will refer to as *Hundi* A, bears on it the following enfacements :—"(This) *hundi* has been sold by Rájrup Hansráj to Bhái Johárimal Gambhirmal (which is the name of the defendant's firm). It was sent from Kotá by Johárimal Gambhirmal to Bhái Johárimal Gambhirmal at Ajmir in order to (the amount) being recovered on my account. (This) *hundi* has been sold by Johárimal Gambhirmal to Bhái Popsangji Hardardás. (This) *hundi* is sent to Bhái Lachhmandás Shivdás (the name of the plaintiff's firm) by Popsang Hardarbaksh from Nasirabad in order to (the amount) being recovered on my account."

The *hundi*, it appears by the evidence, was received by the plaintiff's firm in Bombay on the 2nd June 1871, and was presented for acceptance on the following day, namely, the 3rd June 1871, to the drawees, the firm of Bháichand Zumachrám. It was, on such presentment, accepted, according to usage, by the drawees, On the same day, namely, the 3rd June 1871, according to the evidence of Gambhirchand Ranchhordás (now cashier, then a *Gumastá*, in the plaintiff's firm,) an entry was made in the journal of the firm, which entry was transferred to the ledger, and, as appearing in the ledger, is as follows (Exhibit B). The heading of the account is "An account of Bhái Popsang Hardarbhájas, of the cantonment of Nasirabad, being an account relative to transactions effected on behalf of your house," and the entry, which is a credit one, is as follows:—"Journal, p. 186. The 11th of Asad Vad [13th June] 1 *hundi* [drawn] on Bombay was [received] from Ajmir, payable to your account. It was drawn on Bháichand Zumachhrám on the 6th of Baisuk Sud [26th April] payable after 45 days." The effect of this was to give credit, as of the 13th June 1871, to the person sending the *hundi*, viz., Popsang Hardarbaksh in his account with the plaintiffs, for the amount of the *hundi*, the entry itself being made on the 3rd June 1871.

According to the evidence, it is the usage of native *shroffs* that where a *hundi* has been accepted, the drawee, on the due date,

sends a man with the money to the person who had presented the bill for acceptance. If the money is not sent on the due date, the holder sends a man to remind the drawee. In the present case, Gambhirchand Ranchhordás (the cashier of the plaintiff's firm) states that as the amount was not received on the due date (viz., the 13th June 1871), he sent a man to demand it, who came back without any money, and he, thereupon, put the matter into the hands of a solicitor. On the next day (the 14th idem) the *hundi* was protested for non-payment by a notary of Bombay, and the notarial certificate, Exhibit C, of such protest has been put in evidence.

According to the evidence of Lálchand Harichand, a *mehtá* of the firm of Bháichand Zumachhrám, the drawees, (speaking from entries in books of the firm made, not by himself, but by another *mehtá*, at present absent from Bombay and at Wadnagar, but which books, the witness was able to state, had been kept in the ordinary course of business), on the 19th June 1871, a *peth* or duplicate of the same *hundi* was presented to the firm of Bháichand Zumachhrám, and was paid on the 22nd June 1871.

Under a commission directed to Ajmir in this suit, certain evidence was taken there, and, according to the evidence of the defendant, called by the plaintiffs as one of their witnesses, the original *hundi*, or *Hundi* A, was sold by the defendant's agent at Ajmir, one Suratrám, and indorsed at Ajmir to Popsang Hardarbaksh, whose name appears on the *hundi* as an indorsee, and who indorsed the *hundi* to the plaintiffs, the consideration for such indorsement by the defendant's agent of *Hundi* A, being another *hundi* (hereafter referred to as *Hundi* B), dated the 25th May 1871, for Rs. 2,500, drawn by Popsang Hardarbaksh at Ajmir on the plaintiff's firm of Lachhmandás Shivdás at Bombay, payable to *Sháh* 51 days after date, that is to say, on the 18th July 1871. Besides *Hundi* B, a certain sum in cash appears to have been paid to the defendant by Popsang Hardarbaksh as the consideration of the indorsement by the defendant of *Hundi* A, and this in respect of interest at 8 annas per cent. on Rs. 2,500, for the period which would elapse between the due date of *Hundi* A (viz., the 13th June,) and that of *Hundi* B (viz., the 18th July).

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The firm of Popsang Hardarbaksh, however, shortly after the drawing of *Hundi* B, stopped payment (the date of such stoppage being stated to have been on the 3rd June 1871), and the defendant, being apprehensive, as he says, that *Hundi* B would not be honoured on presentation, filed a suit in the Court of the Deputy Commissioner at Ajmir, on the 7th June 1871, against Popsang Hardarbaksh, to recover Rs. 2,500 on account of the *Hundi* B. Not, however, content with having filed this suit, the defendant, as he states, four or five days after Popsang Hardarbaksh's failure, procured to be applied for and sent from Mandusar (where *Hundi* A had been drawn) to Bombay a *peṭh* or duplicate of *Hundi* A, and by means of his agents at Bombay had the same presented to the firm of Bháichand Zumachhrám, and this *peṭh* was, as before mentioned, paid by the last mentioned firm on the 22nd June 1871.

The defendant in his evidence admits, so also do his witnesses, that no express condition was made between his firm and Popsang Hardarbaksh, that if the *hundi* of the latter (*Hundi* B) was not honoured, or the firm of Popsang Hardarbaksh failed, he (the defendant) was to realise the *hundi* he sold them (*i.e.*, *Hundi* A).

On the 22nd June 1871, a written statement appears to have been filed on behalf of Popsang Hardarbaksh in answer to the suit of the defendant against him in the Ajmir Court, relying on what would appear to be a good enough ground of defence, that as the due date of the *hundi* sued upon had not arrived, the suit was premature. The defendant states further, that having heard from Bombay of the realization of the *peṭh*, he applied for leave to withdraw his suit, and the order allowing this, but giving leave to institute a fresh suit, on the plaintiff paying the costs, seems to have been made on the 29th June 1871.

I do not find in the evidence any explanation of the reason why the firm of Bháichand Zumachhrám refused payment on the 14th June 1871 of the original *Hundi* A, as at that time the *peṭh* had not been presented. The practice appears to be for the drawee to pay the original or the *peṭh*, whichever is first presented for payment, and that the drawees had no intention to dishonour the *hundi* altogether, is shown by their having paid the *peṭh* a few

days after the original was presented for payment. It may reasonably be presumed therefrom that in the period between 3rd June 1871 (when Popsang Hardarbaksh stopped payment) and the 14th June 1871 (when the original *Hundi* A was refused payment) some communication took place at the instance of the defendant with the drawees, in pursuance of which such refusal took place. Whether the anticipation of the defendant that *Hundi* B would not be honoured by the plaintiffs on presentation was well founded or not, it appears from the defendant's evidence that he never sent it to Bombay for acceptance or payment on the plaintiffs as the drawees—at any rate, it never was presented to the plaintiffs in Bombay, and this is an important point with regard to the question whether the consideration for the indorsement to Popsang Hardarbaksh of *Hundi* A can be said to have failed.

A good deal of evidence has been given by several of the witnesses, as to the cases in which, according to the usage of *shroffs*, payment of the amount of a *hundi* may be obtained on a *peth* or duplicate. The witnesses all seem to agree in this that when a *hundi* has been lost or stolen, the rightful holder may, according to such usage, obtain from the drawer a *peth* or duplicate, and, on presentation of this to the drawee, has a right to payment of the amount, the original not having already been presented and paid, which, of course, in the case of a *hundi* payable to *Sháh*, may occur. In the present case, however, the defendants, on hearing of the failure of Popsang Hardarbaksh, to whom they had indorsed *Hundi* A, and without any such occurrence as the loss or theft of the *hundi*, procured, as has been mentioned, a *peth*, and, through their agents in Bombay, got the same paid by the drawee, though the original had been already, some days before, presented by the plaintiffs for payment. They set up the case that, according to the usage of *shroffs*, *peths* may also be properly obtained, not only in the cases of loss and theft, but also that when a person to whom a *hundi* has been sold and indorsed has failed, being indebted to the person from whom he had obtained such *hundi*, the latter may obtain a *peth* from the drawer and get payment from the drawee. I do not consider that the evidence clearly establishes such a usage,

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which would, it appears to me, have a very serious effect in respect to the negotiability of *hundis*. A subsequent *bonâ fide* indorsee might find, on presentation of the original *hundi*, that, by reason of the insolvency of some preceding indorsee, and of the state of the accounts between such indorsee and his indorser—facts of which he might be wholly ignorant—a *peṭh* had been obtained and paid by the drawee. I do not, however, consider it necessary to decide on the existence or validity of such an alleged usage. The evidence seems rather to have been given by way of meeting any observations, which might have been made on the defendant's conduct in procuring the *peṭh* and getting it paid than by way of affording an answer to this suit. Had the suit been against the drawees, the question of the payment of a *peṭh* might have been very material, but I do not see that it is in the present case, which is a suit by holder against former indorser.

The first issue raised is, whether this Court has jurisdiction to entertain this suit. A suit for the same matter was filed in this Court by the present plaintiffs against the present defendant in 1871, without having obtained the leave of the Court under Clause XII. of the Letters Patent. On the hearing before myself in July 1872, the suit was dismissed for want of jurisdiction. I think the suit was then rightly dismissed. When the present suit was instituted in November 1872, the leave of the Court to institute the suit was first obtained, and the question is not, as in July 1872, whether the cause of action arose, but whether any part of it arose, within the jurisdiction of this Court. It is contended when a *hundi* has been drawn out of Bombay upon a person in Bombay, indorsed and delivered out of Bombay to one who, out of Bombay, indorses the same and sends it to a person who, in Bombay, receives it, gets it accepted, and presents it for payment to the drawee, by whom it is dishonoured, that no part of the cause of action by the Bombay holder against the first indorser has arisen within the jurisdiction.

A certain number of cases were cited in the course of the hearing, being decisions chiefly of English Courts, as to the meaning of the words "cause of action." In three classes of cases, chiefly in England, has the meaning of these words been considered. (1)

In cases of applications to change the venue of a transitory action to another county on an affidavit that the plaintiff's cause of action arose in the county of B, and not in the county of A (where the action was brought), or elsewhere out of the said county of B. (2) With reference to the words of the Act establishing County Courts in England (9 and 10 Vic., Ch. 95, Section 128,) giving an election to proceed in the superior courts, where (among other cases) "the cause of action did not arise wholly or in some material point within the jurisdiction of the court where the defendant dwells or carries on his business at the time of the action brought." And (3) with reference to the provision of Sections 18 and 19 of the Common Law Procedure Act, 1852 (15 and 16 Vic., Ch. 76,) regulating the mode of proceeding in the superior courts against defendants, whether British subjects or not, residing out of the jurisdiction of such Courts, when a satisfactory affidavit has been made "that there is a cause of action which arose within the jurisdiction or in respect of a contract made within the jurisdiction," and when certain other formal steps have been taken.

Then we have of cases arising in India a certain number reported, where a judicial interpretation or application has been given, viz. (1) to the words, in Bengal Regulation II. of 1803, Sections 3 and 4, "where the cause of action shall have arisen," or to the words, in Section 5 of Act VIII. of 1859 "if the cause of action shall have arisen," and (2) to the words, in Clause XII. of the High Court Charters of 1865, "if the cause of action shall have arisen either wholly, or, in case the leave of the court shall have been first obtained, in part within the local limits of the ordinary original civil jurisdiction," &c.

Of the first class of the English cases, of which a great many are to be found, it will be sufficient to remark generally that they all treat a cause of action as something divisible and consisting of parts having possibly a local origin in different places. I shall content myself with referring to three of them: *Clissold* v. *Clissold* (1 Term. Rep. 647), which was an action for libel, and the libel having been written in Berkshire and directed into Surrey, and the venue being laid in London, an application to

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change the venue to Berkshire was refused, because the defendant could not truly make the usual affidavit that the cause of action arose wholly in Berkshire and not elsewhere: *Cailland* v. *Champion* (7 Term. Rep. 205), an action on a policy of life insurance, where it was held that the whole cause of action could not have arisen in London, as the person, whose life was insured, had died in Scotland; and *Butler* v. *Fox* (18 L. J. C. P. 304) an action on a policy of marine insurance made in London, the breach alleged being non-payment of the value of the goods insured. An application to change the venue to London was refused, as it could not be truly said that the whole cause of action arose in London, the goods, the subject of the policy, having been lost on a foreign voyage by perils of the sea.

The second class of English authorities, those, namely, on the jurisdiction of the local county courts, it is not necessary to enumerate, as they are all, or almost all, to be found cited and commented upon in the judgments of Sir Adam Bittleston or of Mr. Justice Holloway in the case of *DeSouza* v. *Coles* (3 Mad. H. C. Rep. 384). I cannot understand why these cases should not be treated as authorities, so far as applicable, on the interpretation of the language of Clause XII. of the Letters Patent. The High Courts are not courts of ordinary original civil jurisdiction over the whole territories of the presidencies to which they belong. Though, in some respects, their original civil jurisdiction is wider than that of the District Courts, yet it is limited, and there is no presumption in favour of jurisdiction beyond what is to be found expressly conferred by the Charters of constitution. And the County Courts Act and Letters Patent agree in this that they both expressly treat a cause of action as consisting of parts which may have different localities.

The third class of English cases, those, namely, which have reference to Sections 18 and 19 of the Common Law Procedure Act, 1852, are *Sichel* v. *Borch* (2 H. & C. 954; 33 L. J. Ex. 179); *Allhusen* v. *Malgarejo* (L. R. 3 Q. B. 340); *Jackson* v. *Spittal* (L. R. 5 C. P. 542); *Durham* v. *Spence* (L. R. 6 Ex. 46); *Cherry* v. *Thompson* (L. R. 7 Q. B. 573), and *Vaughan* v. *Weldon* (L. R. 10 C. P. 47). The first mentioned case (which was in the Exche-

quer) was a suit by indorsee against drawer and indorser of a bill of exchange. The defendant was a merchant residing in Norway, where he drew the bill on an English house, and made it payable in London. He indorsed it in Norway, and sent it by post to a firm in England, who indorsed it to the plaintiff. It was held that the cause of action did not arise within the jurisdiction, on the ground that the contract was not wholly made in England, Martin, B., one of the members of the Court, expressly stating that the cause of action included the drawing and indorsement on the bill of the name of the drawer, both of which took place in Norway. This case of *Sichel* v. *Borch*, in its circumstances, has great similarity to the present one, viz., a bill drawn or indorsed, out of the jurisdiction, by one not subject personally to it, on a person within the jurisdiction, and there dishonoured. Both in the argument and judgment it seems to have been assumed that *part* of the cause of action arose within the jurisdiction, the question being considered to be, did the *whole* of it so arise? In the second case (which was in the Queen's Bench), it was held where a contract was made out of the jurisdiction, to be performed within the jurisdiction that the breach within the jurisdiction did not constitute a cause of action arising within the jurisdiction. In the third case, however (which was in the Common Pleas), it was held, in the case of a contract made out of the jurisdiction not to do a certain thing, which contract was broken by doing that thing within the jurisdiction, that a cause of action did arise within the jurisdiction. In the fourth case (which was in the Exchequer again), it was held (Chief Baron Kelly, however, dissenting) that in the case of a contract made out of the jurisdiction but broken within the jurisdiction, a cause of action *did* arise within the jurisdiction, thus following *Jackson* v. *Spittal*. In the fifth case (which was of the Queen's Bench), the case of *Jackson* v. *Spittal* was dissented from and *Sichel* v. *Borch* and *Allhusen* v. *Malgarejo* expressly adhered to, by holding that in the case of a contract made in Germany, but broken in England, no cause of action arose within the jurisdiction. The decision, however, went also on another ground, viz., that the breach also took place in Germany. It will be seen, therefore, that, so far as concerns the words in question occurring in the Common Law

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Procedure Act, 1852, there had been a conflict of decisions between Courts in England of co-ordinate jurisdiction, and that the law on the point must be said to have been in an uncertain state. A diversity, it is further to be observed, seems to exist among the Judges who took part in the foregoing decisions, not only in respect to the interpretation to be put upon the words of the section taken in conjunction with other words connected with them, but also in the legal definition to be given in general of the phrase "cause of action." The point again arose in the last mentioned case, viz., *Vaughan* v. *Weldon*, and the Judges of all the three courts appear to have conferred together, and a majority having expressed themselves in favour of following the decision in *Jackson* v. *Spittal*, the Judges of the Queen's Bench, though retaining their opinion, for the sake of conformity agreed to be bound by the opinion of the majority. Though uniformity of practice on this point was thus secured, the divergence of opinion as to the elements of a cause of action has still remained. It is to be borne in mind also that the provisions of the Common Law Procedure Act, which have given rise to this diversity of decision, concern matters of procedure and not jurisdiction, that is to say, they furnish a less cumbrous and simpler means of exercising a jurisdiction the Courts already had, and are not, as the provisions in the English County Court Act and the Letters Patent of the High Court, directed to the marking out and limiting of the jurisdiction of a Court. For this reason it seems to me that the English decisions on the County Court Act are more in point with regard to the interpretation of the Letters Patent than those on the matter of venue or of the Common Law Procedure Act, 1852.

Of the first class of Indian cases, those, namely, relating to the effect to be given to the words "if" or "when the cause of action shall have arisen," the case of *Luckmichund* v. *Zarawurmull* (8 Moore I. A. 291), is of course as an authority, and, so far as it goes, of the highest importance. Mr. Justice Holloway, in his judgment in *DeSouza* v. *Coles* (3 Mad. H. C. Rep. 413), lays it down that this decision "involves implicitly the following propositions:—(1) The making of the contract is a matter perfectly indifferent and is no part of the cause of action. (2) The place at

which an obligation is to be performed is its seat, and the place of jurisdiction. That place of expected performance may be determined by the circumstances of the case, and in a contract of partnership, its main seat is the place at which each of the partners is bound to pay what may be due." With all respect for the opinion of Mr. Justice Holloway, it does not appear to me that the case, when considered, *does* involve the propositions mentioned, or, at any rate, the first of them. The suit was brought in the Zillah Court at Agra to recover Rs. 10,75,156-1-0, being the alleged share, with interest, of the defendants of the loss, viz., Rs. 22,67,962, incurred in respect of certain opium speculations which had been carried on on the joint account of the plaintiffs and defendants. The plaintiffs had firms at Muthra (within the jurisdiction of the Agra Court) and at Rutlam (which was without it), and the defendants carried on business at Rutlam. An agreement was made between the two firms in contemplation of making opium speculations on joint account, and, in considering the effect of the judgment, it is to be taken as a fact to be assumed that this agreement was concluded, in respect of place, at Rutlam. So far as the terms of the agreement appear in the report, no place can be said to have been fixed for the performance of it. The agreement provides for the opening of a separate set of books for the joint transactions of the parties, fixes their shares, and provides that the business was to be conducted by one Saligram, and the only reference to place is in these words: "In these transactions your (*i.e.*, the plaintiffs') capital at Muthra shall be embarked." Larger transactions in opium were thereupon entered into in various places, the seat of the partnership being at Muthra, where the moneys were supplied by the plaintiffs, where the partnership books were opened and kept, and to which place the account sales of opium sold elsewhere and the proceeds themselves of such sales were sent. It appears further that at Muthra also the co-partnership dealings and accounts were closed and a balance struck against the co-partnership amounting to the aforesaid sum of Rs. 22,67,962, and it was to recover the sum of Rs. 10,75,156-1-0, being the defendants' share of such loss, that the suit was brought. The Judicial Committee held that the cause of action arose at Muthra. There is

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certainly nothing in the course of the judgment which can be said to involve this, that in the particular case the original contract of partnership formed any part of the cause of action at all. The decision, however, in my opinion, by no means involves the sweeping proposition stated by Mr. Justice Holloway, "that the making of the contract is a matter perfectly indifferent, and is no part of the cause of action" in any case. The decision may rather, it seems to me, be treated as one involving this, that in such circumstances as there existed, the contract of partnership, on the footing of which transactions were engaged in, was not a part of the cause of action, and that not being a part of the cause of action, the Court considered the place, where it was made, to be a matter perfectly indifferent. The suit was not one for a breach of any term of the partnership contract, but rather as appears what in English pleading would be called an action on an account stated, the statement of such account having taken place within the jurisdiction of the court where the suit was brought. The only other form the suit can have assumed would be for a partnership account, and where else could the cause of such action be said to arise, except where by consent of the parties, the head-quarters of the partnership had been established, the moneys advanced, the accounts kept, and the final accounts of the partnership dealings closed? The language of the judgment is, to say the least, consistent with the existence of the opinion, on the part of the Judicial Committee, that the making of the contract not being a part of the cause of action, the fact that it was made out of the jurisdiction was immaterial, and did not preclude the court from entertaining the suit which was either on an account stated within the jurisdiction in respect of partnership transactions the head-quarters of which were within the jurisdiction, or for an account of such partnership transactions.

The cases in which, in the courts of British India, the question as to the meaning of the words "cause of action" in the Letters Patent has arisen, are, besides *DeSouza* v. *Coles*, the following: *Harjivandás* v. *Bhagvandás* (7 Beng. L. R. 102 and 535) and *Mothoormohun Roy* v. *Jadoomoney Dossee* (10 Beng. L. R. 122).

In these two cases, the leave of the court had not been previously obtained to the institution of the suit, but I think, from what appears in the reports, that both Mr. Justice Phear and Mr. Justice McPherson would have held, in a case like the present, that a part of the cause of action had arisen in Bombay, and that if leave had been first obtained to institute the suit, the court would have had jurisdiction. In the case of *Huth* v. *Long* (19 L. J. Q. B. 325), however, in an action on a bill of exchange by the indorsee against drawer, the fact that notice of dishonour was given to the defendant within the jurisdiction of a particular County Court, where also the defendant resided, was held sufficient, under the County Court Act, to deprive the plaintiff of his costs, the suit having been brought in a superior court. The decision involved this that notice of dishonour was a part, and a material part, of the cause of action against the drawer of a dishonoured bill of exchange, and that such notice having been given within the jurisdiction of a certain County Court, where the defendant resided, the cause of action in some material point arose within such jurisdiction. In the present case, the dishonour of the bill itself by the drawee took place in Bombay, and was, I think, beyond all doubt, a part, and a material part, of the cause of action against a prior indorser, and this being so, and the leave of the court to institute the suit having been obtained, I am of opinion that this court has jurisdiction to entertain this suit.

With regard to the other questions in the case, it appears from the evidence that the plaintiffs (who are a considerable firm of shroffs and bankers in Bombay and other places) had, for some time, acted as bankers and agents of a firm of Popsang Hardarbaksh who carried on business at Ajmir and elsewhere, but not in Bombay. The course of the ordinary business was that the firm of Popsang Hardarbaksh, if they had *hundis* drawn on Bombay, used to send them down to the plaintiffs for collection, and used themselves to draw *hundis* on the plaintiffs' firm in Bombay against any funds of their's in the plaintiffs' hands, or, if there were no such funds, the plaintiffs used to honour such *hundis* on the credit of their correspondent. In the present case, it appears that, on receipt by the plaintiffs of *Hundi* A, and on its acceptance by the drawees, the plaintiffs gave credit to Popsang

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in their account with the plaintiffs' firm for the amount as of the date when the *hundi* would become payable, the drawees being at the same time debited. At the time when such credit was given and after allowing such credit, the balance against Popsang in account with the plaintiffs was Rs. 13,221-8-0. That such credit in account is a consideration in the case of an indorsee of a bill of exchange is illustrated by the case of *Percival* v. *Frampton* (2 Cr. M. and R. 180), and the plaintiffs, though agents of Popsang in receiving the *hundi* for collection, became, upon such credit being given, holders for value. The evidence of the practice followed by *shroffs* when a hundi has been sent down to Bombay for collection and when payment is refused, the amount having been already credited to the sender, is that in general the *hundi* is returned to the sender, a debit entry against him being at the same time made. In the present case, however, on the refusal by the drawee to pay the *hundi*, no debit entry was made to the sender Popsang, but the amount remained credited to him, the cashier of the plaintiffs' firm in Bombay stating, as the reason for not so debiting the sender, that they wished to sue the defendant. The plaintiffs' conduct in treating Popsang as entitled to credit for this *hundi*, though dishonoured by the drawee, has been consistent, as it appears, from the evidence taken at Ajmir, that in the suit filed some months after at Ajmir by the plaintiffs against Popsang to recover the balance due to them, they still allowed credit for the amount of this *hundi*. Having regard to the evidence of usage, I am of opinion that the plaintiffs were entitled to take the course they did in treating Popsang as still entitled to credit for the *hundi*, though dishonoured by the drawees, and in treating themselves as holders of the same for value. With regard to the question of consideration given by Popsang to defendants for *Hundi* A, the *Hundi* B was of course in itself a consideration besides the payment of a sum in cash or the difference in interest. The *Hundi* B was, as has been seen, never presented in Bombay for acceptance or payment, and was, therefore, never dishonoured. How, then, can it be said that there has been any failure of consideration for the indorsement to Popsang of *Hundi* A? There is no ground for any certain conclusion or presumption that *Hundi* B, if at once presented (as it might

have been) for acceptance by the plaintiffs before Popsang's failure was known in Bombay, would not have been accepted by the plaintiffs, and as the defendant had given consideration for it, he might have sued the plaintiffs upon it, if accepted by them, and recovered the amount. I am of opinion, therefore, that there was consideration for *Hundi* A both as between Popsang and the defendant and as between Popsang and the plaintiffs, and that of the former consideration no failure has been shown. On the 2nd, 3rd, and 4th issues, therefore, the finding is that, besides the *hundi* in para. 3 of the written statement mentioned, there was payment of a sum of cash, the amount of which does not appear, in respect of interest on Rs. 2,500 for the period between the due dates of that *hundi* and the *hundi* sued upon in this suit. That further the plaintiffs received the *hundi* sued upon as agents of Popsang Hardarbaksh, but that before and at the time of the same becoming payable and at the time of the institution of this suit, they became and were holders of the same for value, and so far did not hold the same as agents only of the said Popsang. This being so, the finding on the 5th issue is that the plaintiffs are entitled to recover the moneys claimed in the plaint. Decree for the plaintiffs for Rs. 2,500 with simple interest at 9 per cent. per annum from the 15th June 1871 till this day, and Rs. 10 for notarial charges; costs. Interest on decree at 6 per cent.

Pigot and *Inverarity* for the appellant.—The first question is whether this Court has jurisdiction to entertain the suit. Leave has been obtained by the plaintiffs to institute this suit under Clause 12 of the Letters Patent, on the ground that a part of the cause of action arose within the jurisdiction of this Court, but it is admitted that the only part of the so-called cause of action that arose within this jurisdiction was the dishonour of the *hundi*. Dishonour alone within the jurisdiction is not such a part of the cause of action as to entitle the plaintiff to sue an indorser without the jurisdiction, for the indorser does not contract to pay the money in the place on which the bill is drawn, but in default of payment there, after due notice, to reimburse the holder at the place where the indorsement was made. Story, Conflict of Laws, Section 315. The cause of action against the

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indorser is his contract, or indorsement, and his breach of the contract, or failure to pay after notice of the dishonour. In this case the indorser's contract and its breach both took place at Ajmir. The dishonour in Bombay was only a collateral circumstance which threw on the indorser his liability to perform his contract at Ajmir. The cause of action is not to include everything which it is necessary for the plaintiff to establish, but only the contract and the breach: *Allhusen* v. *Malgarejo* (1).

[SARGENT, J.—Is not the dishonour in itself the cause of action, being the very gist of the plaintiff's claim?]

It is submitted not in an action against the indorser. The indorser's contract in this case, made at Ajmir, was to pay at Ajmir and on breach, at Ajmir, of that contract, he became liable at Ajmir. The dishonour in Bombay was no breach of the indorser's contract, but only an event in the absence of which the indorser's liability would not arise. Even after the dishonour at Bombay the indorser might have paid at Ajmir, in which case there would have been no cause of action against him at all. The cases relating to jurisdiction decided by the English Courts on the construction of the Common Law Procedure Act do not properly apply to the present case, because in them the question was whether or not the English Courts should refuse to extend their jurisdiction, whereas here the question is whether the Court will seek to extend its jurisdiction. The remarks of Bittleston, J., in *DeSouza* v. *Coles* (2) are an authority for the proposition that in a suit against an indorser the cause of action arises where his contract is made, and not elsewhere, and Holloway, J., in the same case (p. 413) distinctly holds that the place where an obligation is to be performed (Ajmir in the present instance) is the place of jurisdiction over it. In *Hernaman* v. *Smith* (3) Parke, B., in the course of the argument, remarked (4):—"Everything which the plaintiff was bound to do, in order to recover the reward, was done by him within the jurisdiction of the County Court; but the event depended on a contingency, over which he had no control; there-

(1) L. R. 3 Q. B. 340.
(2) 3 Mad. H. C. Rep. 384, see p. 397.
(3) 10 Exch. 659.
(4) *Id. ib.* 661.

fore, does not the case resemble that of a promise, founded on good consideration, to pay a sum of money if J.S. shall go to Rome? In such case would not the County Court of that district where the contract was made have jurisdiction, inasmuch as the contract was performed so far as depended on the parties themselves?" It is true that subsequently in his judgment the learned Baron retreated from this position. But it is submitted that the principle enunciated in that remark is the one which ought to govern this case, otherwise, if the judgment in the case last cited is to be followed here, this Court will assume to itself jurisdiction over the whole world if only a single circumstance on which the plaintiff bases his claim arises in Bombay. That is to say, the indorser of a bill of exchange in America might be sued in this Court if one of many subsequent indorsements were made in Bombay. In the case of *Potter* v. *Brown* (1) which arose on the dishonour in England of a bill drawn and delivered in America, the effect of the dishonour in England is discussed, and the implied promise to pay was held to have arisen in America.

[SARGENT, J.—That cannot be denied, but the implied promise to pay rests on the dishonour in England.]

[WESTROPP, C.J.—The Court did not hold that the dishonour was no part of the cause of action, which is your contention now.]

But it is very nearly to be inferred from Lord Ellenborough's words, "the bill was drawn in America upon a person in England, but not having been accepted, the parties stood on their original rights, upon a contract made in America, for which a security was there agreed to be taken, upon the faith indeed that it would be accepted and paid in England; but of which there has been no performance: no English act has been done to alter the situation of the parties, even the notice of the non-performance must have been given in America" (2). The English Courts have been in conflict as to the meaning of the words "cause of action," but *Jackson* v. *Spittall* (3) is the case now to be followed in the English Courts: *Vaughan* v. *Weldon* (4).

(1) 5 East. 124.
(2) *Id. ib.* 130.
(3) L. R. 5 C. P. 542.
(4) L. R. 10 C. P. 47.

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For the Court to assume jurisdiction in this case would be to put into the hands of the plaintiff a dangerous power, which he might employ to the inconvenience of defendants at a great distance, and it is easy to imagine instances in which this inconvenience would be so great that the exercise of such a power by the plaintiff would amount to a positive injustice. It is true that it is in the discretion of the Judge to whom the plaint is brought for acceptance to grant or refuse leave to proceed under the 12th clause of the Letters Patent, but it is very improbable that he would refuse leave, unless it appeared on the face of the plaint that leave ought not to be granted, and in most cases it would be no difficult matter so to frame the plaint, for instance, on the common money counts, that that fact should not be apparent. To put such a power into the hands of the plaintiff would amount to an injustice, because the drawer or indorser of a *hundi* at Ajmir cannot prevent it being indorsed to a holder in Bombay, but the converse of this objection cannot apply in behalf of the holder in Bombay, because he need not purchase a *hundi* with the names of foreign indorsers on it: *Borthwick* v. *Walton* (1).

The second point for consideration is whether the plaintiff is entitled to sue as holder of the *hundi*. Our contention is that he is not a holder at all, but merely an agent for collection as shown by the terms of the indorsement. Even if the evidence is sufficient to establish the usage found by the Court below, which we deny, we say that in this particular instance the effect of the indorsement is to constitute the plaintiff only an agent for collection, and therefore he is not entitled to treat himself as a holder for value: Chitty on Bills, 10th Edn., p. 271; Story on Bills, section 209; *Dehers* v. *Harriot* (2); *Bank of Utica* v. *Smith* (3); *Cassill* v. *Dowes* (4). *Percival* v. *Frampton* (5) was relied on by the learned Judge in the Court below, but that case is distinguished from this, because there in the inception of the transaction credit was given by the banker to the sender of the bill on the faith of the bill, and that is the principle of all the cases on the point: Story on Bills, section 192.

(1) 15 C. B. O. S. 501. (2) 1 Shower 163.
(3) 18 Johnstone 230, cited in Story on Bills.
(4) Bletchford 335, cited in Story on Bills. (5) 2 Cr. M. and R. 180.

[SARGENT, J.—Suppose the case of a bill sent by a customer to his banker for collection without any express directions. If the customer is indebted to the banker, the latter may treat himself as a holder for value. In this case the sender merely states on the hundi that he sends it for collection.]

The test is whether the credit is given on the faith of the bill at the time of receiving it, whether the bill was taken either as payment or security for a pre-existing liability. In the present instance the indorsement is conclusive evidence that the plaintiff held the *hundi* only in the character of agent for collection, and as such could not have indorsed it to any one else: *Sigourney* v. *Lloyd* (1). The credit to Popsang in the plaintiff's books is not a genuine transaction but a mere practice of book-keeping, and cannot become a genuine credit till the *hundi* is paid. Popsang is credited on the due date of the *hundi*, not because the plaintiff is content to receive the note as payment or security for Popsang's balance due to him, but because he expected on the due date to get the money. Popsang was insolvent on the date of the credit. If the plaintiff is to be treated as a banker, he has no right to sue in the present action: Story on Agency, p. 228, *note* 3: *Treuttel* v. *Barandon* (2); *Sigourney* v. *Lloyd* (3); *Lopez* v. *Maddan Thakoor* (4). Byles on Bills of Exchange, p. 157, 10th Edn.

Latham and *Farran* for the respondent.—No stronger arguments can be adduced on behalf of the respondents than those which are contained in the well-considered judgment of the court below. As to the argument of the appellant on the question of jurisdiction, in the first place it is opposed to what has long been considered the policy of the Court, viz., to extend its jurisdiction; in the second place it is submitted that this Court will put on the words "cause of action" the same construction that has been put on them by the Courts in England, and it is assisted in so doing by the words of the Charter, which in expressly mentioning "a part of the cause of action" clearly contemplates the divisibility of a cause of action into all its essential and material parts, the existence of any one of which within the jurisdiction of this Court entitles the plain-

(1) 8 B. and Cr. 622.
(2) 8 Taunt 100.
(3) 8 B. and Cr. 622.
(4) 5 Beng. L. R. 521, see p. 525.

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tiff to sue here, and dishonour is such a part of the cause of action, because it is a material circumstance without which the plaintiff could not sue the indorser; moreover, if notice of dishonour is a material part of the cause of action, *a fortiori* must the dishonour itself be so: in the third place, with regard to the argument *ab inconvenienti*, it must be borne in mind that not only is the power of the Court to grant leave to sue under clause 12 of the Letters Patent a discretionary one, which a Judge will refuse to exercise if the defendant show sufficient cause for his so doing, but the discretion is appealable: *Hadjee Ismail Hadjee Hubbeeb* v. *Hadjee Mahomed Hadjee Joosub* (1). Next as to the question whether the plaintiff is a holder for consideration and entitled to sue, Popsang might have maintained this suit against the defendant, nor could the latter have pleaded a set off, as he has never presented the other *hundi*, and the defendant having indorsed this *hundi* to Popsang for value cannot have any equity against Popsang, nor can the defendant say that it is any hardship on him that this *hundi* has got into our hands. The plaintiff is a holder for value. According to the general custom of Bombay credit is given to the customer when the *hundi* is received. The plaintiff is banker to Popsang, whose pre-existing debt is a good consideration: Byles on Bills of Exchange, 9th Edn., p. 121; *Percival* v. *Frampton* (2); *Bosanquet* v. *Dudman* (3); *Atwood* v. *Crowdie* (4); *Bolland* v. *Bygrave* (5); *Giles* v. *Perkins* (6). The cases cited on behalf of the appellant show that in cases of restricted indorsement the person with whom the bill is negotiated takes with notice of the equity attaching.

Pigot in reply.—The cases cited show that the bills received were received and given credit for simultaneously, but in this case the *hundi* was held from 3rd to 13th June by the plaintiff as a mere agent, the property remaining in Popsang. How then can the plaintiff turn himself into a holder for value? Exact justice would be done by leaving the parties in their present position. The plaintiff is not a party to the instrument, or if he is, he takes

(1) 13 Beng. L. R. 91.
(2) 2 Cr. M. and R. 180.
(3) 1 Stark 1.
(4) *Id.* 483.
(5) 1 Ry. and M. 271.
(6) 9 East. 12.

it liable to the equity to which it is subject. According to the English doctrine the judgment appealed against is correct, but it is the doctrine of this country that ought to be applied to the case, and, according to that, no consideration has been given for the *hundi* but the difference of interest only.

WESTROPP, C.J.—The facts of this case are very clearly stated in the judgment of the Court below by GREEN, J., and we agree with him in his decision on those facts. We must consider that several matters combine to make up a cause of action, and that, in such a case as the present, the dishonour of a bill or *hundi* by the drawee is a part of the cause of action of the holder against the indorser. It has been held that notice of dishonour is a material part of the cause of action against an indorser, and that being so it seems to us to follow as a matter of course that the dishonour itself must also be a material part of the cause of action.

We also consider that the custom sworn to by the plaintiff's witnesses is a reasonable one, and in accordance with the law merchant. We must regard the plaintiff as holder for value of the *hundi* sued on. It appears that there was a large balance due to him from Popsang, and on receipt of the *hundi*, viz., on the 3rd June, he entered the amount to the credit of Popsang, and subsequently left this entry undisturbed. The evidence shows that he was by the custom warranted in so doing, and we consider that custom a good one.

With regard to the contention of the appellant that the effect of the indorsement on the *hundi* was to render the plaintiff an agent only for collection, we are of opinion that the indorsement is no more restrictive than if it had been the direction usually given by English merchants "do the best for me."

As to consideration, we think that had Popsang been the plaintiff, the defendant could not have resisted his claim. The consideration for *Hundi A* was *Hundi B*. Now the latter *hundi* was never presented, but that was the defendant's own affair, and he must take the consequences. He may have thought that the plaintiff would not pay it, or he may have thought that there was

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a balance in favour of Popsang; but, however that may have been, the defendant did not present *Hundi B*, and there seems to have been no excuse for his not doing so.

The decree of the court below must be affirmed with costs.

SARGENT, J.—Concurred.