ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

1905. December 18.

SHAW WALLACE & CO. *v.* GORDHANDAS KHATAO.*

Letters Patent, Cl. 12—Leave of the Court—Jurisdiction of the Court to entertain suit—Rules and Forms of the Bombay High Court, Rule 361—Suit against a firm—Addition of the names of partners constituting the firm—Practice and Procedure.

The plaintiffs sued, on the 19th November 1904 on the Original Side of the Bombay High Court, "the firm of Shaw, Wallace & Co. as it was constituted on the 13th September 1898 and the partners in the said firm on that date." The action was for breach of an agreement dated the 13th of September 1898 executed by the defendant firm in favour of plaintiffs at Calcutta. The plaint alleged "the defendants carry on business in Bombay: part of the cause of action arose in Bombay." Prior to the service of summons and pursuant to a chamber order of 22nd December 1904, the plaint was on the 7th January 1905 amended by the addition of the names of Messrs. Wallace, Ashton, Greenway, Hue and Meakin. The first four were at the date of plaint and even afterwards carrying on business: and Secherau, one of the partners, having died in the meanwhile, his executor Meakin was also added as a party defendant. Before the death of Secherau, the partnership took in a new partner: and this new partnership opened a branch office in Bombay. Prior, however, to the presentation of the plaint, leave was granted under cl. 12 of the Letters Patent. It was objected on behalf of the firm that leave under cl. 12 should not have been granted: that the order allowing the amendment was wrong and that the Court had no jurisdiction to receive the suit:—

Held, (1) that Messrs. Wallace, Ashton, Greenway and Hue, according to the allegations in the plaint, were liable as co-partners to the plaintiffs and none the less because the estate of the deceased co-partner might also be liable together with them. It was also stated that they were carrying on business within the jurisdiction and this would be so though there might be associated with them a partner which was not a member of the firm when Shaw Wallace & Co. entered into the agreement on which the suit was based.

(2) That the case fell within Rule 361 of the Rules and Forms of the Bombay High Court.

(3) That the suit as originally framed was rightly received irrespective of leave under cl. 12 of Letters Patent and the defendants' contention that the Court had no jurisdiction failed.

(4) That Meakin, as the executor of Secherau, was wrongly added as a defendant.

* Appeal No. 1405, Suit No. 795 of 1905.

As to the other four defendants the amendment was useless if they were already parties: if they were not then the amendment should not have been made except by an order of a judge seeing that leave had been obtained under cl. 12 of the Letters Patent.

Rule 361 of the Rules and Forms of the Bombay High Court does not extend the jurisdiction of the Court: it merely sanctions the use of the firm's name as a convenient description of its several members and exempts a plaintiff from the obligation of setting forth their names at length.

APPEAL from Judgment of Tyabji, J., in Chambers on a summons to rescind the leave given under cl. 12 of the amended Letters Patent, 1865. Gordhandas Khatao and two others brought this suit on 19th November 1904, on the Original Side of the Bombay High Court for breach of an agreement dated 13th September 1898, against the defendants described as "the firm of Shaw, Wallace and Co. as it was constituted on the 13th September 1898, and the partners in the said firm on that date."

The agreement sued upon was executed by Messrs. Visram Ebrahim & Co. (represented in the suit by Mr. N. C. Macleod, Official Assignee, as plaintiff No. 3) and by the defendants in Calcutta on the 22nd August 1898; and by Gordhandas Khatao and Mulraj Khatao (plaintiffs 1 and 2), Messrs. Visram Ebrahim and Co., and the defendants, in Bombay on the 13th September 1898. The second agreement was executed by the same parties for the purpose of giving effect to the said (first) agreement and guarantee of the defendants.

The plaint stated:—"The defendants carry on business in Bombay and part of the cause of action arose in Bombay." Leave was therefore obtained, prior to the institution of the suit, to file the suit under cl. 12 of the Letters Patent inasmuch as a material portion of the cause of action had arisen in Bombay, and as a safeguard in case some or any of such partners might at the time of filing the said plaint have ceased to be member or members of the said firm as constituted in 1898 and therefore might not then be carrying on business in Bombay.

On the 13th December 1904, the defendants' Solicitors supplied the plaintiffs with the names of those who were partners in the firm of Shaw, Wallace and Co. on the 1st September 1898. On the 7th January 1905, after leave obtained from the Protho-

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notary, the plaint was amended by inserting the names of Messrs. C. W. Wallace, H. S. Ashton, C. Greenway, A. C. Hue and George Meakin (the last named being the Executor of Edmund von Schmidt Secherau), as defendants.

According to the affidavit of Mr. C. Greenway one of the partners, the firm of Shaw, Wallace and Co. as constituted on the 13th September 1898, never carried on business within the jurisdiction of the Court and did not carry on business within such jurisdiction when the suit was filed. The firm as it was constituted on 13th September 1898 ceased to exist on the 1st January 1902 before the plaintiffs' alleged cause of action arose. On 1st January 1902 Mr. E. A. Chettle was admitted as a partner in the said firm. In March 1902 this new firm opened a branch office in Bombay and carried on business there until the 27th August 1903 when E. von Schmidt Secherau died and from that date the remaining partners carried on business at the said branch office in Bombay under the style of Shaw, Wallace and Co. Mr. George Meakin, the Executor of the said Edmund von Schmidt Secherau, did not become a member of the firm and neither resided nor carried on business within the jurisdiction of the High Court of Bombay.

On the 14th April 1905 at the instance of the defendants, the following summons was issued:—

I do order that the plaintiffs or their attorneys do appear before me within four days after service of this summons and show cause why the leave granted under clause 12 of the Letters Patent by the Hon'ble Mr. Justice Tyabji on the 21st of November 1904, to the plaintiffs to file this suit should not be rescinded and why the plaint in this suit should not be taken off the file of this Honourable Court and returned to the plaintiffs and why the plaintiffs should not be ordered to pay the defendants' costs of this suit and of and incidental to this summons and the order thereon or why the suit should not be set down on the board for the hearing of the following preliminary issues:—(1) Whether this Court has jurisdiction to try this suit, (2) whether the leave granted under clause 12 of the Letters Patent should not be rescinded or why in the alternative the Chamber Order, dated the 22nd of December 1904, should not be set aside and the amendments in the plaint purporting to have been made in pursuance thereof should not be struck out and why the plaintiffs should not be ordered to pay the costs thereof and of and incidental to this summons and the order thereon and why in any event the time for filing the defendants' written statement should not be extended until the disposal of this summons.

On the 18th May 1905 the plaintiffs' Solicitors wrote to the defendants' Solicitors that they intended to proceed only against the surviving members of the defendants' firm as constituted in 1898, who were now carrying on business in Bombay, and offering that the name of George Meakin should be struck out and offering to pay the costs of the said summons down to the time of this offer and of the consent order to be taken thereon.

On the 27th May 1905 the defendants' Solicitors replied refusing to accept this offer on the ground that as the estate which Meakin represented would be liable to contribute if any decree was to be passed against the other defendants he would naturally desire for his own protection to remain a defendant to satisfy himself that the suit was being properly defended.

The summons came on for argument before Tyabji, J., in Chambers on 15th July 1905.

Davar and *F. S. Talyarkhan* for plaintiffs.

The present summons has been taken out for rescinding leave granted by this Court under cl. 12 of the amended Letters Patent, 1865. The defendants suggest that the suit should be tried in Calcutta. The plaint, as it originally stood, was against "the partnership of Shaw, Wallace & Co. as constituted on the 13th September 1898."

There are five defendants now on record. So far as defendants 1—4 are concerned this summons is hopeless as they are carrying on business in Bombay.

The fifth defendant is the executor of a deceased partner, and is not carrying on business in Bombay. We are willing to strike his name off from the plaint. The order for adding the names of the parties in the defendants' firm was within jurisdiction. (Reads affidavit of Gordhandas Khatao). The plaint as originally filed was against "the Firm of Shaw, Wallace & Co., as constituted on the 13th September 1898." Then for greater caution, and in order to avoid any question that might arise from defendants ceasing to carry on business in Bombay, we put into the plaint the names of the members who constituted the firm on the 13th September 1898. It is wrong to say that there was any amendment of the plaint after leave had been obtained. From the Letters Patent it is clear that no leave is necessary against

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those defendants that were carrying on business in Bombay. See cl. 12 (Rules and Forms of Bombay High Court, pp. 100-101; 123). This Court has ample jurisdiction to try this suit, and no question of leave arises.

In case the question does arise as to what entitles the Court to try the case, reference should be made to the words of cl. 12. If any portion of the cause of action has arisen in Bombay, the Court has power to grant leave and thus to assume jurisdiction. There are no doubt expressions in judgments that a "*material part* of the cause of action must have arisen within the local limits." But cl. 12 in no way refers to a "material" part of the cause of action. See *Kessowji Damodar* v. *Luckmidas Ladha*[1].

[TYABJI, J.—Do you argue that it would be right for the Court to give leave even if a very immaterial part of the cause of action has arisen in Bombay?]

Davar.—No, but see *Musa Yakub* v. *Manilal*[2] which defines "cause of action" as that which plaintiff must prove before he can succeed in the case. In the *Deccan Bank's* case (appeal from Russell, J.) *Deccan Bank* v. *G. S. Athavale and others* (March 1905, Cor. Jenkins C. J. and Batty J.) the Chief Justice is said to have asked "where do you get 'material' from. The word is not in the clause."

[TYABJI, J.—The word 'material' is supplied by Judges in order to guide themselves when they are considering the advisability of granting leave or not.]

Davar.—The part of cause of action arising in Bombay in the present case is much more material and important than in *Musa Yakub* v. *Manilal*[2]: see also *Motilal* v. *Surajmal*[3].

The plaint clearly shows how this Court has jurisdiction: see paragraphs 3 and 6; and these paragraphs are not traversed in the written statement. In the first place the agreement was executed in Bombay; we also say that it was signed on behalf of Visram Ibrahim & Co. in Bombay.

(1) (1889) 13 Bom. 404.
(2) (1904) 29 Bom. 368: 7 Bom. L. R. 20.
(3) (1904) 30 Bom. 167: 6 Bom. L. R. 1038.

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Raikes.—That is stated on information without giving the source of information in the affidavit and so the affidavit cannot be used.

Davar.—There are four parties to the agreement. Gordhandas and Moolraj Khatao are partners in some concerns, not in others. In this agreement they did not join as partners. There are three parties interested on the one side (who signed in Bombay) and one on the other (who signed at Calcutta). The convenience of both sides must be considered. The question in the present case is merely one of construction of agreement. Only one witness possibly will be necessary from Calcutta. The plaint is already filed and so are the written statements.

[TYABJI, J.—The defendants are carrying on business in Bombay—why do you want leave?]

Davar.—We took leave *ex majore cautela* and we took leave probably against the fifth defendant—also probably because we were not aware at that time who were the partners of the firm, and we were not sure whether they would all be residing in Bombay or not.

This suit has been on the file since November 1904, and this summons has only been taken out now.

Raikes (*Strangman* with him) for defendants:—We concede that as against defendants 1—4 individually the suit may lie in Bombay.

Delay is not a material matter and it is, I submit, quite immaterial how long the suit has been on the file.

Two points must be kept distinct: When has the Court jurisdiction absolutely without leave, and when is leave necessary for giving jurisdiction? It is also necessary to see the plaint as it was originally filed. Before the new rules, a suit filed against a firm would not have been accepted, unless the names of the members of the firm had been specified and this style of suing would not now be accepted outside the Ordinary Original Civil Jurisdiction of the High Court (see Rule 361, Rules and Forms of Bombay High Court, and Civil Procedure Code, section 50 (*c*)).

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[TYABJI, J.—Previous to this rule in the Mofussal Courts firms used to be sued in the firm name till Westropp, C. J., upset that practice. So the Mofussal was in advance of the High Court.]

Raikes.—The rules especially provide that the names of the partners should never be on record : Rules and Forms of Bombay High Court, Rules 361, 362. Then why did they have individual names of the partners on the plaint? See Rules 361-364 and 368 of the Rules and Forms of Bombay High Court. Those are the provisions under which alone the suit could be filed. The debentures in respect of which the suit is filed became due in 1904 and it was then that the cause of action arose. The firm of Shaw Wallace & Co., as constituted on the 13th September 1898, was not in existence, and, consequently, it was not carrying on business in Bombay, at the date of the arising of the cause of action. If there be any dispute as to this a preliminary issue may be raised on the point. There is no rule or any other authority for suing both the firm collectively and the partners individually.

Davar.—Does not the title of every suit run in this way—"A. B. & C. carrying on business in name of the firm of....."? We have merely put the name of the firm first and given the names of the partners afterwards.

Raikes.—The suit against the partners is very different from suit against the firm.

Leave under clause 12 of Letters Patent was obtained apparently on the statement in the plaint that a part of the cause of action arose in Bombay. Besides paragraphs 3 and 6 of the plaint which say that the agreements were executed in Bombay, there is nothing to show what part of cause of action arose in Bombay. No leave will save the action unless the firm was carrying on business at the time of filing the suit.

The amendment was made *ex parte* (see Rule 138 of Rules and Forms of Bombay High Court).

[TYABJI, J.—To whom could notice of the application for amendment have been served? Defendants had not been served till then. If a plaint is filed on the record, and no summons

nor any other process is served upon the defendants, the matter rests entirely between the plaintiff and the Court. To whom could the notice in the present instance be served? If it had been an ordinary suit I should not hesitate to give leave to amend, as was done here. But of course when leave is obtained, that might affect the question—for leave was granted only for the suit as originally filed. It is of course very perilous to obtain any amendment after the leave is once obtained under clause 12 of the Letters Patent.]

Raikes.—See also Rule 80 (*a*), (*j*), Rules and Forms of Bombay High Court, page 175. Here, by the amendment a new party altogether is brought before the Court. It was absolutely *ultra vires* of the Prothonotary to add another defendant. The Prothonotary was led to think that it was merely a formal amendment. The Prothonotary has no such power as he unconsciously assumed here: section 32 of the Civil Procedure Code.

How could the firm of Shaw Wallace & Co., as constituted in 1898, include George Meakin, the fifth defendant? If it could not, then a new party was added by the amendment. How can it be argued that Meakin was included in the firm?

I also object that this order is against Rule 365 which says that the proceedings shall continue in the name of the firm. When leave is obtained, it applies only to the plaint as filed and not as amended subsequently: *Rampurtab Samruthroy* v. *Premsukh Chandamal*[1]. In that case it was suggested that the plaint should be amended at the hearing.

The case of *Hadjee Ismail Hadjee Hubbeeb* v. *Hadjee Mahomed Hadjee Joosub*[2] is very similar to our case. Here they have sued the firm first of all. Then they sue the partners. Of course there are cases to show that some of partners may be sued. But there is nothing to show that other partners may not come in, and ask that they should also be joined as parties.

[TYABJI, J.—But if they do ask to be made parties they could not object to jurisdiction.]

(1) (1890) 15 Bom. 93. (2) (1874) 13 Beng. L. R. 91.

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Raikes.—But then, in this case, the nature of suit is altered by such an addition. Originally the suit is on a joint cause of action against the firm—now it is altered to a suit against each partner individually. The only issue you have to try now is: did the defendants Shaw Wallace & Co. carry on business in Bombay when the payment of debentures became due in 1904? On this we submit that there should be a preliminary issue.

It is not necessary to consider whether a material part of the cause of action arose in Bombay. Our argument is that this suit is bad unless the firm carried on business in Bombay in 1904. If your Lordship is with us that leave should be withdrawn then we ask that a preliminary issue be raised first as to whether the Court has jurisdiction.

[TYABJI, J.—I may point it out to Mr. Davar that the existence of the leave embarrasses the plaintiffs. So long as the fifth defendant was on record no doubt it may have been necessary for the plaintiffs to obtain leave, but once the fifth defendant goes out, the leave will merely embarrass the plaintiffs, and give rise to various questions.]

Raikes.—The suggestion made by your Lordship that leave should be rescinded and that the fifth defendant should be struck off must, we submit, be followed. But if so, we say that the suit should be dismissed.

[TYABJI, J.—You do not ask for that in your summons.]

Raikes.—But that does not matter, for if the leave is rescinded it is open to the defendant to object to jurisdiction even before the case comes on for hearing. If the leave is rescinded then the suit will be against the firm as such ("Shaw Wallace & Co. as constituted on 13th September 1898") and a suit can be filed as against a firm only under Rule 361. Now that rule says that a firm can be sued as such only if it is carrying on its business in Bombay, and so if it is admitted that the firm was not carrying on business in Bombay, it is clear that there is no jurisdiction in this Court.

[TYABJI, J.—Yes, but under your hypothesis the suit will not be against the firm but against certain individual members.]

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Raikes.—But that was not how the suit was filed. If the suit could not have been filed at all, if there was no jurisdiction to accept the plaint, the Prothonotary could have had no power to allow the amendment. If the Prothonotary had no power to allow the amendment, then the defendants individually are not on the record: see *Kessowji Damodar* v. *Luckmidas Ladha*[1].

[TYABJI, J.—As at present advised I must hold that if the leave stands the amendments must go; if the amendments stand leave must go. As to whether the suit is good or not apart from leave, there must be a preliminary issue.

I want to hear you on the question whether such a material part of cause of action arose here as to make it right to grant leave to sue here.]

Raikes.—There is no dispute as to facts. As to the agreements I admit that the Khataoos signed the agreement in Bombay. As to Visram Ibrahim & Co. there is no evidence to show where they signed the agreement. We do not know, and their affidavit on the point saying that they signed in Bombay is merely on information and belief without stating source of information, which of course is no evidence.

There is no allegation that as to Mr. Macleod the cause of action arose in Bombay. He steps in the shoes of Visram Ibrahim & Co. and it is not alleged in the plaint that Visram Ibrahim & Co. signed in Bombay.

[TYABJI, J.—Can you split up the agreement in this manner into two portions—one affecting the Khataoos and the other Visram Ibrahim & Co.? Is it not one whole agreement?]

Raikes.—I submit that it can be so split up. Their cause of action is briefly this: "Defendants promised to pay off the debentures on a certain date. The date has arrived and we ask them to pay off. They refuse." Now I say no part of this cause of action arose in Bombay. [Reads agreement.] They have to prove that this agreement was signed and delivered by Shaw Wallace & Co. and nothing more.

(1) (1889) 13 Bom. 401.

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[TYABJI, J.—There cannot be contract except by both sides agreeing. They must prove their own signatures.]

Raikes.—Take a promissory note. It is a contract, but signed by only one party. This is a promissory note, only a complicated one. They need not in this case prove that Gordhandas and Mulraj signed the agreement at all. Supposing by some oversight they forgot to prove their signing it, could it be possible to take that point before a Court of Appeal that they had not proved their own signatures? Is their signing it a "material part of the cause of action"? Suppose in this case this contract, when produced, turned out to be signed only by Shaw Wallace & Co., and Shaw Wallace & Co. took the point that this was signed only by themselves and not by plaintiffs.

[TYABJI, J.—The assent of both sides to the contract is required—of course there may be documents which would show on the face of them the assent of one of the parties—of the plaintiffs.]

Raikes.—Yes, here the filing of the suit by plaintiffs sufficiently shows their assent. Supposing there were a lease signed only by the lessor, that would be enough for the lessee to sue upon.

[TYABJI, J.—Would that not depend upon the covenants? If there are covenants by the lessee, would not his assent have to be proved?]

Raikes.—Supposing the allegations in the plaint were denied only in this one respect, *viz.* that plaintiff signed this agreement, would that be enough to prevent plaintiff's suits?

[TYABJI, J.—No; they would have to allege that there was no agreement,—that the plaintiffs did not assent to the proposal—and the defendants would use the fact that the plaintiffs did not sign the document as evidence of absence of assent on the part of the plaintiffs.]

Raikes.—As to the balance of convenience that is immeasurably in favour of the suit being tried at Calcutta, see *Hadjee*

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Ismail Hadjee Hubbeeb v. *Hadjee Mahomed Hadjee Joosub* (1), which is one of the very few cases that considers when leave should be granted,—in other words in what cases the discretion should be exercised. There they held that the whole cause of action did not arise in Calcutta. It was not suggested that a material part did not arise in Calcutta. They simply held that as the balance of convenience was for trial at Bombay, leave should not be given for trial in Calcutta. There they said that the only difficulty against plaintiff was that, if they sued in Bombay, they would have to give security. The defendants then undertook not to ask for security, and on that the leave was rescinded.

Now, here the only inconvenience to plaintiffs might be that they should have to go to Calcutta to give evidence. We are willing that they should be examined in Bombay.

Davar.—The case of *Hadjee Ismail Hadjee Hubbeeb* v. *Hadjee Mahomed Hadjee Joosub* (1) is not of the slightest help. The clause of the Letters Patent which is discussed here does not come into prominence there at all: *Dobson and Barlow* v. *The Bengal Spinning and Weaving Co.* (2); *Rivett-Carnac* v. *Goculdas Sobhanmull* (3); *Ram Ravji Jambhekar* v. *Pralhaddas Subkarn* (4); *Rampartab Samrathrai* v. *Foolibai* (5).

Raikes.—The decision in *Dobson* v. *The Bengal Spinning and Weaving Co.* (2) was confirmed on appeal. There was no argument there at all that there was any hardship on the defendants. The judgment of Fulton, J., was never approved by the Court of Appeal.

TYABJI, J.—This is a summons calling upon the plaintiffs to show cause why the leave granted by me on the 21st of November 1904 under clause 12 of the Letters Patent should not be rescinded and why the plaint should not be taken off the file and returned to the plaintiffs and why the plaintiffs should

(1) (1874) 13 Beng. L. R. 91.
(2) (1896) 21 Bom. 126.
(3) (1895) 20 Bom. 15.
(4) (1895) 20 Bom. 133.
(5) (1896) 20 Bom. 767.

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not be ordered to pay the defendants' costs of the suit and of and incidental to this summons, and in the alternative it prays for certain other relief.

I need not go into the alternative case till I have decided the first question as to whether the leave granted by me should be rescinded or not.

Now, a good deal of time has been taken up in discussing the question as to what constitutes "cause of action" or "material cause of action" and as to the circumstances under which leave should or should not be granted. But it seems to me that these points have been discussed and decided *ad nauseam* in the various cases cited before me and which leave no ground for any doubt as to what constituted "cause of action." So far as I am concerned, the point came before me several times within a very short period of time and I have now no doubt as to the true meaning of "cause of action". It means "that bundle of facts which it is essential for the plaintiff to prove before he can succeed in a suit," or, as Mr. Justice Fry puts it in one of the cases cited, "that bundle of necessary facts in the absence of which the plaintiffs must necessarily fail." The one is putting it in the affirmative form and the other in the negative. But in every case "cause of action" means and includes everything without which the plaintiff must necessarily fail.

Now, let us apply this principle to the case before me. The case of the plaintiffs is based upon two agreements dated, respectively, the 22nd of August 1898 and the 13th of September 1898. In order to entitle the plaintiffs to succeed they must prove the agreements between themselves and the defendants. They must prove either the performance or readiness to perform on their part. They must prove the breach of contract on the part of the defendants and they must prove the consequences and the damages resulting from the non-performance by the defendants. These, therefore, are the four necessary ingredients for the plaintiffs to prove. Every one of them is an essential part of the "cause of action."

Now, in order to prove the two agreements it is necessary for the plaintiffs to establish that they themselves were not

merely parties to the agreement but that they assented to the provisions of the agreements. When I look at the form of the agreements I see they are framed in such a way as to necessitate or require the execution of these agreements by the plaintiffs. As a matter of fact they have been executed by the two plaintiffs and I think that, without proving their signatures on these documents, there would be a great difficulty for the plaintiffs to succeed in the suit. The existence of the contract depends upon the assent of the plaintiffs, and it is admitted that two of the plaintiffs at least have executed the contract in Bombay. It is also alleged that Visram Ebrahim & Co. also executed them in Bombay, but that is a point upon which there is a dispute. Taking it as an admitted fact that these two agreements were executed in Bombay by the two plaintiffs, I am unable to entertain even a doubt that a very material part of the cause of action accrued in Bombay—in fact, a part without which the plaintiffs must necessarily have failed. Therefore that being my opinion, it follows that under clause 12 of the Letters Patent it is within the power of this Court to grant permission if it considered it fit under the circumstances of the case to grant such permission. The existence of a part of the cause of action within the jurisdiction is absolutely necessary for a Court to give permission. That is the foundation of the jurisdiction; without this, no matter how convenient it may be to try the suit here, the Court has no power. The mere fact that a material part of the cause of action has accrued within the jurisdiction, although it gives the Court the power to grant leave, does not make it incumbent upon the Court to grant it.

The second branch of the question resolves itself into the discretion of the Court, that is the discretion which is to be exercised not arbitrarily but judicially, taking into consideration all the circumstances of the case and looking at the case not merely from the point of view of the convenience of the plaintiffs but also taking into consideration the convenience or otherwise of the defendants. In other words, the question which a Court sets itself to ask is "I have the power to permit the plaintiff if I like to sue in this Court but would that be the right procedure? Should I be inflicting such a hardship upon the defendants by giving permission to

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the plaintiffs as to make it improper for me to exercise that jurisdiction in favour of the plaintiffs?" That is the point of view from which I must consider the question as to whether the discretion which I exercised at the time of granting the leave was properly exercised or whether circumstances have been brought to my notice now which ought to make me think that it was not properly exercised and which ought to make me withdraw the permission which I originally granted.

Now what are the facts? The contract which is the basis of the plaintiffs' suit was partly executed in Bombay and partly in Calcutta. All the prior negotiations apparently took place in Calcutta. Subsequent payment of the interest, the tender of the shares and the breach of the contract, if any, all took place in Calcutta. In fact I may say that beyond the execution of the documents by the two plaintiffs the rest of the transactions which are involved in this suit all took place in Calcutta. It follows from this that although in my opinion a very essential part of the cause of action accrued within the jurisdiction yet the other portions of the cause of action, that is, the performance or non-performance, the breach, the damages and the consequences arising from the non-performance, accrued in Calcutta. Therefore the greater part of the cause of action accrued in Calcutta.

Then as regards the parties all the plaintiffs live in Bombay. They carry on their business in Bombay. Out of the five defendants four carry on business in Bombay though they do not live in Bombay. One of the defendants, namely, the fifth defendant, who is the executor of one of the deceased defendants, lives neither in Bombay nor in Calcutta but lives in England. I have been told by Mr. Davar, the plaintiffs' Counsel, that it is the intention of the plaintiffs not to continue the suit as regards the fifth defendant but to prosecute it in regard to the first four defendants only. Now seeing that the first four defendants actually carry on business in Bombay and that that fact *per se* gives jurisdiction to the Court without going into the question of the cause of action and that there is no need to obtain leave of the Court in regard to them it does seem to me rather extraordinary that the plaintiffs should still insist upon leave being granted, and Mr. Davar has failed to make it clear to me why the leave is

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necessary otherwise than perhaps as a matter of precaution. However the fact remains that all the plaintiffs live in Bombay and carry on business in Bombay and that all the four defendants against whom it is intended to prosecute this suit actually carry on business in Bombay although they do not live in Bombay.

Then, as regards the evidence, so far as the plaintiffs' case is concerned it rests on facts which are entirely admitted, that is to say, it rests on documents on which the suit is filed and it rests upon the construction of these documents read in the way in which they at present stand. It does not seem to me that so far as the plaintiffs are concerned they require any further evidence in Bombay or in Calcutta beyond the fact of proving the tender of the shares. But the evidence (a greater portion of it, I should say) on the part of the defendants undoubtedly is entirely in Calcutta. If any witnesses have to be examined they will be from Calcutta. But it seems to me that a greater portion of the evidence of the defendants themselves would rest upon documentary and not upon oral evidence so far as I can judge at present.

Balancing, therefore, the conveniences on the one hand and the inconveniences on the other and remembering that the leave has already been granted and considering the question whether it has been improperly granted and whether it should be rescinded I have now come to the conclusion that the case for rescission is not made out. I think the Court had power to grant the leave. An essential part of the cause of action accrued within the jurisdiction. And I think I am able to say after having weighed the *pros* and *cons* of this case that the permission was not improperly granted and that being so having exercised my discretion I am not satisfied that I was wrong in giving permission to the plaintiffs to sue.

Now having said that as regards the second portion of the summons I must hear the parties in so far as they desire to be heard further. I will hear them either in Chambers or in Court, but I am entirely in the hands of the Counsel in the case. If the matter rests on affidavits, I will hear them now on this summons otherwise I will hear the matter in Court. But I must again tell Mr. Davar that as at present advised I am inclined to

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think that the amendments were improperly introduced into the plaint and if after this intimation he chooses to run the risk it is his business and it is for him to say what course he will adopt.

[TYABJI, J.—I will again point out to Mr. Davar that I think the leave places his client in great difficulty as regards the amendments, and that he should consider whether he has to gain anything by proceeding under the leave. But if he insists on proceeding in the suit under the leave, then I will not rescind it.]

Raikes.—We would like to consider your Lordship's decision and would be thankful for an adjournment of a week.

[*PER CURIAM.*—I will in that case adjourn the summons for further argument to next Saturday, 22nd July 1905.]

The plaintiffs having elected to proceed under the leave the summons came on for further argument on July 22nd, 1905.

Davar for plaintiff:—The second part of the summons is why the suit should not be put down for the trial of a preliminary issue and why amendments should not be struck out.

As to the amendments the Prothonotary has power to make the order. See Rule 80 (*a*) of the Rules and Forms of the Bombay High Court. One of the sub-clauses of this rule refers to formal amendments. The amendment in this instance was formal and made before service of summons and it is absolutely unconnected with the cause of action. The addition consists of "*viz.*" and then five names follow. The suit originally was against not merely the firm, but the members of the firm. The amendment was purely a formality.

[TYABJI, J.—Supposing you had not amended then there would have been a suit against the firm.]

Davar.—Then possibly Rule 361 of Rules and Forms of the Bombay High Court would have given us trouble as the firm did not carry on business in Bombay. Accordingly we sued the "firm and the partners of the firm on 13th September 1898." Then later on we filled in the blanks, as regards the names of the partners. We took the precaution in the first instance of filing

the suit not only against the firm, but also in so many words against the partners of the firm. No doubt *Rampurtab Samruthroy* v. *Premsukh Chandamal*[1] lays down that the grant of leave under cl. 12 relates to the plaint as it stood when leave was granted. Our cause of action is not changed by the addition. We sued at the start the partners of the firm, and now we sue no one else. The only point made by Mr. Raikes is that we sued only the partners and not the representatives of the partners. I concede that, and consent to have the fifth defendant taken out. The question whether there is jurisdiction or not is for the plaintiff and not for the defendant. We do not want any preliminary issue.

Raikes for defendants :—Several questions arise in this case which are new. The question of substance that remains is—granting that a material part of the cause of action has arisen in Bombay, has the Prothonotary power to amend the plaint in the way it is amended. Now it is admitted that the firm did not carry on business in Bombay (see Rule 361 of the Rules and Forms of Bombay High Court). So the suit could not lie against the firm. But Mr. Davar relies on the remaining words in the title to the plaint. Suppose the words now added are struck out, then the title would be "against partners of a firm." Would your Lordship accept such a plaint? Your Lordship would say "ascertain the names of the partners before presenting the plaint for acceptance." Test the statement in this way. Suppose there is a suit for defamation filed against "the person who libelled the plaintiff in such and such a newspaper on such and such a date" filed the day before the term of limitation expired. Then subsequently if the name of the defendant were found out and sought to be put in, could that be done? The addition by the Prothonotary was not merely formal and not such as can be made under Rule 180 of the Rules and Forms of Bombay High Court.

I submit that until the amendment the suit was not properly constituted at all. Under the Civil Procedure Code every plaint must contain certain particulars, and unless it does contain them,

(1) (1890) 15 Bom. 93.

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it cannot be accepted. The plaint as filed gave no jurisdiction to the Court. The suit was originally only against the firm. The words "and the partners of the firm" is mere surplusage. What is the meaning of suing a firm but suing partners of the firm? See Rule 361 of Rules and Forms of the Bombay High Court. There is no suggestion in any of the rules that you can join and sue the same persons twice over. Of course there is this distinction that if you sue the firm your cause of action is joint; if you sue the partners individually, it is several. They could not have sued "the partners of the firm" severally at all without naming them. I submit it is a perfectly good suit against the firm, but not against the partners.

The Prothonotary could not add the fifth defendant at all. That is an addition of a party which can only be done by the Court. Again the amendment changed the cause of action from joint liability to separate liability. The fifth defendant represents a person that was dead at the time the cause of action arose. The addition of a party can be only made under s. 32 of the Civil Procedure Code.

Davar.—A reference to s. 43 of the Indian Contract Act will show that though we sued the firm we could execute the decree separately against each of the partners of the firm sued.

Raikes.—Rule 68 of the Rules and Forms of Bombay High Court shows how the decree against a firm can be executed.

The fifth defendant objects to be struck out. He is sued with his partners and he contends that the suit should be dismissed against all the partners or that his name should be kept on the record.

TYABJI, J.—This summons which was taken out on the 14th of April 1905 calls upon the plaintiffs to show cause against several things. The first is—"Why the leave granted, under clause 12 of the Letters Patent, on the 21st November 1904 to the plaintiffs to file this suit should not be rescinded." With that part of the summons I have already dealt and I held that no substantial ground to my satisfaction had been made out as to why the leave should be rescinded. The next thing is—"Why

the plaint in this suit should not be taken off the file and returned to the plaintiffs." This depends on the question as to whether the Court has any jurisdiction at all against the parties as appearing in the plaint and if the Court has jurisdiction of course the plaint cannot be taken off the file of the Court. The next is—"Why the plaintiffs should not be ordered to pay the defendants' costs of this suit and of and incidental to this summons and the order thereon." This is a different matter and depends on the result of the summons.

The next is—"Why the suit should not be set down on the board for the hearing of the following preliminary issues:—(1) Whether the Court has jurisdiction to try this suit. (2) Whether the leave granted under clause 12 of the Letters Patent should not be rescinded." This portion of the summons has been already dealt with and it has been found convenient for all parties that the matter should be dealt with by me in Chambers.

Then comes the important part—"or why in the alternative the Chamber order dated the 22nd December 1904 should not be set aside and the amendments in the plaint purporting to have been made in pursuance thereof should not be struck out and why the plaintiffs should not be ordered to pay the costs thereof and of and incidental to this summons." The order of the 22nd December 1904 which this summons asks to be set aside was an order made by the Prothonotary under the Rules of the High Court which authorise the Prothonotary to permit certain formal amendments to be made in the pleadings. The question therefore turns upon the point whether or not the amendments authorised by the Prothonotary by his order of the 22nd December 1904 were or not of a formal character. It is admitted that if they were of a formal character they would be within the authority of the Prothonotary. If they were not of a formal character but really affected the substantial portion of the suit itself, that is if they affected the cause of action or substantially affected the parties by adding new parties, or by substantially changing the liabilities of the parties, then I think it must equally follow that the amendments would not be of a formal character and could not be authorised by the Prothonotary inasmuch as the permis-

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sion to allow such amendments to be made necessarily involved the exercise of judicial functions.

That compels me to look carefully into the order actually made by the Prothonotary to see whether it was of a formal character or not. The order runs thus:—"Upon reading the affidavit of A. V. F. Monteiro sworn on the 21st day of December 1904 and the exhibits annexed thereto and upon hearing Messrs. Craigie, Lynch & Owen, attorneys for the above named plaintiffs: It is ordered that the plaintiffs' attorneys be at liberty to amend the title of the defendants to this suit by adding the names of the following persons as defendants thereto in the plaint and proceedings filed herein *viz.*" Then follow the names of five persons and then there is the consequential order to which it is not necessary for me to refer.

It will be observed that what the Prothonotary directed was that the plaintiffs' attorneys be at liberty to amend the title of the defendants to this suit by adding the names of certain individuals. Now the plaint as it originally stood as regards the defendants ran as follows:—"The firm or partnership of Shaw Wallace & Co. as it was constituted on the 13th September 1898 and the partners in the said firm on that date." And it stopped there. What has now been done under the order of the Prothonotary is that the names of five persons have been added, *viz.* of the four surviving partners and of the executor of a deceased partner. It is argued on behalf of the defendants that the addition of the names of these defendants materially alters the suit and that it adds new parties to the suit and that it changes the character and the liabilities of the defendants. Now, Mr. Raikes, Counsel for the defendants, argued that the plaint as it originally stood must be construed to have meant that only the firm was sued and not the individual partners; in other words, that the words "and the partners in the said firm on that date" were a mere surplusage and must be taken to mean nothing at all. Now, considering that this plaint was drawn by Counsel of very great experience, Mr. Inverarity, as I see from his name on the plaint, I am loath to assume that he used these words without having in his mind some meaning which he intended to attach to these words and it seems to me after having considered care-

fully the point that I must give some meaning to these words, and the conclusion I have come to is that what Mr. Inverarity intended by the words he uses is to make two sets of defendants, that is to say, to sue the firm of Shaw Wallace & Co. as it stood on the 13th September 1898 in the *quasi* corporate capacity and secondly to sue the individual members of the firm as it was then constituted. But probably not being aware of the names of the partners of that time he was not able to insert the names. I have not seen the draft of the plaint but I should not be surprised if there was something in it which might indicate that the names were to be put in after they were discovered. However the plaint as it was drafted was submitted to me in Chambers on the 21st of November 1904 and on that day I granted leave to the plaintiffs under clause 12 of the Letters Patent to sue the defendants. As I said before the question of the rescission of the leave has been already disposed of and I may say here that I held that the leave was properly granted and should not be rescinded on two main grounds—(1) because a material part of the cause of action had accrued within the jurisdiction of this Court and (2) because it was admitted that four of the individual partners who have been made defendants were carrying on business within the jurisdiction at the time the suit was filed. The plaint having been accepted on the 21st November 1904 an order was made by the Prothonotary on the 22nd of December 1904 and the amendments were then inserted on the 7th of January 1905 as appears from the plaint itself. And it appears that the service of the summons upon some of the defendants was effected in Calcutta somewhere about the 17th of January 1905. The other defendants who were in England were no doubt served later. This summons was not taken out till the 14th of April 1905. The amendments were therefore made before the summons was served on the defendants.

Now as regards the question as to whether the Prothonotary should have made the order without giving notice to the defendants and without hearing them, it is to be observed, as I have just pointed out, that the summons had not been served on any of the defendants before he made the order. It was apparently a matter for the discretion of the Prothonotary or the Judge

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whoever was the authority whether the amendments should be allowed or not but no grievance can be made that the defendants were not consulted on the words because the suit as against them had not been launched to the extent of the service of the summons having been effected upon them.

Taking the view that I do of the real meaning of the title of the plaint before the amendment it of course follows that the plaint was defective in the sense that although the partners, *i. e.*, the individual partners, were intended to be sued yet their names and their descriptions and the places of their residence as required by section 50 of the Code of Civil Procedure had not been properly inserted. Section 50 of the Code requires that the plaint must contain *inter alia* the name, description and place of residence of the defendant so far as they can be ascertained. Well, I suppose the names of these defendants were not inserted in the plaint at the time because as is quite clear to me the plaintiffs were not aware of the names of the defendants. They only ascertained them later on and they put them on record. But undoubtedly under section 50 of the Code the plaint was defective in not giving the particulars required by that section. The question is—Was the filling in of the particulars required by section 50 an alteration of the suit to such an extent as to affect the merits of the case? If the leave under clause 12 of the Letters Patent had not been obtained, and if the suit had been filed as an ordinary suit without any leave, no question as to the propriety of the amendments could possibly have arisen. But the difficulties have arisen only by reason of the fact that the amendments were introduced into a plaint which had been accepted under clause 12 of the Letters Patent. For the decisions show that very careful consideration is required before any amendments can be permitted in a suit accepted under clause 12 of the Letters Patent, and if the amendments are material or go to alter in any way the character of the suit or the liabilities of the parties I think they would be open to very serious objection and may not be covered by the leave originally granted.

But after having given the best consideration to the case I am of opinion that the amendments introduced into the plaint here

were formal amendments, and what the Prothonotary ordered to be done was simply to fill in or to supply the blanks without which the suit was defective according to the real intention of the plaintiffs but which did not affect the liabilities of the defendants. Further, as at the time the defendants were served the amendments were already in the plaint I must say they have not been damnified by what has been done.

The result is that in my opinion the defendants have failed in making out that there is any ground either for setting this suit down on the board for hearing preliminary issue or taking the plaint off the file or for removing the amendments from the plaint. I therefore think the summons must be dismissed now in its entirety and the defendants must pay the costs.

Summons dismissed with costs.

Against this order the defendants preferred an appeal. The grounds of objection urged were, among others, the following:—(1) The learned Judge erred in holding that the plaintiffs' cause of action had arisen in part within the local limits of the Original Civil Jurisdiction of the Bombay High Court; (2) he should have held that no part or at all events no material part of the cause of action had arisen within these limits; (3) even if a material part of the cause of action arose within the limits mentioned, yet the Judge in his discretion and having regard to the great inconvenience which it was shown would result to the defendants from this suit being tried in this Court ought to have refused leave to the plaintiffs to sue; (4) the learned Judge ought to have rescinded the leave granted by him under clause 12 of the Letters Patent; and (5) he erred in holding that the amendment of the plaint by the Prothonotary on the 22nd December 1904 was merely a formal amendment.

Raikes (with *Strangman*) for the appellants:—The Court had no power to grant leave under clause 12 of the Letters Patent, and, if it had, the power was not properly exercised by Mr. Justice Tyabji. The only fact alleged in the plaint as forming a part of the cause of action is the putting of the signatures to the agreement in Bombay, and that fact even is denied by us, so that at any rate your Lordships will direct that issue of fact to be tried as a preliminary issue. It is desirable

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that this suit may be brought in Calcutta, because all our witnesses and all our advisers are there. [*Lowndes*:—But ours are here.] Moreover, the suit could not have been entertained with or without leave on the plaint as originally presented in the name of the firm, because it offends against Rule 361. The suit was brought in the name of the firm, and subsequently it was amended by an *ex parte* Chamber order from the Prothonotary, the amendment being the addition of the names of the defendants constituting the firm. The fifth defendant, who is sued also in the firm name, was not a partner of the firm at the time of the accruing of the cause of action, and was not carrying on business within the jurisdiction either at the time of the cause of action or at the date of the suit.

Lowndes:—We have given notice that we shall not proceed against the fifth defendant and we are willing to pay his costs.

Raikes:—We do not wish him to be left out.

The 'defendant' in clause 12 means all the defendants and the plaintiffs cannot sue some defendants and leave out others: *Hadjee Ismail Hadjee Hubbeeb* v. *Hadjee Mahomed Hadjee Joosub*[1]. We also contend that the Prothonotary had no power to amend the plaint as he did, and that the Court has no jurisdiction to determine the suit whether leave was granted or not. The leave of the Court must be obtained before the institution of the suit: *Shaikh Abdool Hamed* v. *Promothonauth Bose*[2] and the plaint cannot be amended after the leave: *Rampurtab Samruthroy* v. *Premsukh Chandamal*[3].

Lowndes for the respondents.

JENKINS, C. J.:—The principal question in this appeal is as to the power of the Court to receive this suit. The plaintiffs are Messrs. Gordhandas Khatao and Mulraj Khatao and Mr. N. C. Macleod the Official Assignee and Assignee of the estate and effects of certain traders, who until recently carried on business under the name and style of Vishram Ebrahim & Co.

(1) (1874) 13 Beng. L. R. 91. (2) (1866) 1 Ind. Jur. (N. S.) 218.
(3) (1890) 15 Bom. 93.

The defendants are described in the heading to the plaint as "The firm or partnership of Shaw Wallace & Co. as it was constituted on the 13th September 1898 and the partners in the said firm on that date."

According to the allegations in the plaint the first and second plaintiffs and Vishram Ebrahim & Co. on the 22nd August 1898 entered into an agreement with the defendants Shaw Wallace & Co., who committed a breach of the agreement entitling the plaintiffs to sue them in respect thereof. In the 16th para. of the plaint it is alleged, the defendants carry on business in Bombay. Part of the cause of action arose in Bombay.

The plaint was admitted on the 21st November 1904, the leave of the Court having first been obtained under clause 12 of the Letters Patent.

Prior to the service of summons and pursuant to a Chamber order of the 22nd December 1904 the plaint was on the 7th of January 1905 amended by the addition of the names of Messrs. Wallace, Ashton, Greenway, Hue and Meakin. The first four are described in the amendment as formerly carrying on business with Edmund von Schmidt Secherau (now deceased) under the style or firm of Shaw Wallace & Co. and Mr. Meakin is described as the executor of Mr. Secherau. It is common ground before us that the partners at that date were the first four of these persons and Mr. Secherau, who has since died leaving as his executor the defendant Mr. Meakin, and that at the institution of the suit the first four named together with another person were carrying on business as co-partners within the Original Jurisdiction of this Court under the name of Shaw Wallace & Co.

In these circumstances it is urged that leave should not have been granted under clause 12 of the Letters Patent, that the order allowing the amendment was wrong and that the Court had no jurisdiction to receive the suit.

The propriety of the leave need not be considered, if it was unnecessary, and, apart from it, the Court had jurisdiction to receive the suit.

Until the recent rules of this Court came into operation a plaintiff was not allowed to sue partners in their firm name on the Original Side of the Court.

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It is, however, now provided by Rule 361 that—

> Any two or more persons claiming or being liable as co-partners and carrying on business within the jurisdiction may sue or be sued in the name of the respective firm, if any, of which such persons were co-partners at the time of the accruing of the cause of action; and any party to a suit may in such case apply by summons to a Judge for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, co-partners in any such firm, to be furnished in such manner, and verified on oath or otherwise, as the Judge may direct.

But Messrs. Wallace, Ashton, Greenway and Hue are, according to the allegations in the plaint, liable as co-partners to the plaintiffs, and none the less would they be so because the estate of their deceased co-partner may also be liable together with them. It is also stated that they are carrying on business within the jurisdiction, and this would be so though there may be associated with them a partner who was not a member of the firm when Shaw Wallace & Co. entered into the agreement on which the suit is based. The case, therefore, in my opinion falls within Rule 361. This rule, however, does not extend the jurisdiction of the Court: it merely sanctions the use of the firm name as a convenient description of its several members and exempts a plaintiff from the obligation of setting forth their names at length.

For the purpose therefore of determining the Court's jurisdiction the suit must be treated as though the names of the partners had been set forth in the heading to the plaint.

Now, had Messrs. Wallace, Ashton, Greenway and Hue been actually named as defendants in the first instance, then as against them the plaint could have been admitted without leave under clause 12 of the Letters Patent, having regard to the first allegation in para. 16 of the plaint. And these four persons are the only members of the old firm who could be sued under the firm name, seeing that their other partner, Mr. Secherau, was dead and so was not carrying on business at the date of the suit. Therefore, the suit as originally framed was, in my opinion, rightly received, irrespective of leave under clause 12 of the Letters Patent, and the appellants' contention that the Court had no jurisdiction fails.

This brings me to the exception taken to the order of the 22nd December 1904. So far as it sanctioned the addition of Mr. Meakin's name it was, I think, beyond the powers of the Prothonotary. Mr. Meakin was not a party to the suit at its admission, and even if leave subsequent to the admission of a plaint can be given under clause 12 of the Letters Patent—as to which I say nothing—I am clearly of opinion that leave could not be given by the Prothonotary. Mr. Meakin, therefore, as the executor of Mr. Secherau has wrongly been added as a defendant. Mr. Davar at the close of the judgment under appeal stated that he was willing to have him dismissed from the suit, and a similar statement has been made before us. Mr. Meakin's name, therefore, must be struck out unless the defendants desire that it be retained. As to the other defendants the amendment was useless if they already were parties: if they were not, then the amendment should not have been made except by an order of a Judge, seeing that leave had been obtained under clause 12 of the Letters Patent.

The last part of the Rule 361 shows the proper procedure to be followed.

The order under appeal must therefore be varied by directing that the amendment consequent on the order of the 22nd December 1904 be struck out, but in other respects it will be confirmed. The plaintiffs' costs of this appeal must be borne by the first four defendants, but at the defendants' Counsel's request this will be without prejudice to any claim by those defendants to recover from the fifth defendant or the estate of Mr. Secherau. The plaintiffs undertake that they will not oppose any application made within two months of this date to add Mr. Meakin as a party. In case he is not added as a party to this suit the plaintiffs must pay his costs up to this date. If he is added then those costs will be reserved.

Order varied.

Attorneys for appellants: *Messrs. Little & Co.*

Attorneys for respondents: *Messrs. Craigie, Lynch & Owen.*

B. N. L.