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doubtful are summarised. The only two which can have any application here are numbers 1 and 4. These are:—

(1) That there is a reasonable decent probability of litigation; and

(4) Where the title depends on the construction and legal operation of some ill-expressed and inartificial instrument, and the Court holds the conclusion it arrives at to be open to reasonable doubt in some other Court.

I do not see that there is any reasonable probability of litigation. No one seems to have disputed the mortgage or to have asserted any claim on behalf of the idol. I do not think that any Court could have a reasonable doubt as to the construction of this document. There is in it no trace of a gift or charge in favor of the idol.

In the result I must hold the title to be a good one. As the state of the title has only been disclosed by the enquiry, the purchaser must have his costs up to and including the Registrar's report.

These will be paid by the plaintiff and added to his claim. The purchaser must pay the plaintiff's costs of the exceptions and of the hearing before me. The rest of the plaintiff's costs must be added to his claim.

Application dismissed.

Attorneys for plaintiff: Messrs. *Ghose & Ghose.*

Attorney for purchaser: Mr. *Carruthers.*

T. A. P.

Before Mr. Justice Trevelyan.

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June 2.

IN THE MATTER OF THE PROPOSED SUIT OF COLLETT AND ANOTHER *v.* ARMSTRONG.

Leave to sue—Small Cause Court Presidency Towns Act, (XV of 1882) *s.* 18—*Discretion, Exercise of—Refusal of leave to sue—Jurisdiction—Defendant residing outside jurisdiction.*

A tradesman in business in Calcutta sued his debtor, a resident at Lucknow, to recover a sum of Rs. 23 for goods sold in Calcutta and forwarded by the E. I. Ry. Co. for delivery at Lucknow.

The plaintiff applied under s. 18 of Act XV of 1882 for leave to sue the defendant in the Calcutta Court of Small Causes. The Court refused to grant such leave, apparently on the ground that the defendant was living

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at a long distance from Calcutta and that the suit was one for a small amount.

Held, that, in refusing to grant such leave, the Judge of the Small Cause Court had not exercised the discretion vested in him under s 18, and that the case was one in which the leave applied for should have been granted.

IN this case the Chief Judge of the Small Cause Court was directed to send up the records of a certain proposed suit, in which leave to sue under s. 18 of the Small Cause Court Act had been refused.

On the 6th May, 1887, an application was made on behalf of Messrs. Collett and Bridge, partners in the firm of Kellner & Co., for leave to sue one C M. Armstrong, a Sub-Deputy Opium Agent residing at Lucknow, for goods sold and delivered, amounting in value to Rs. 23-7. The goods were ordered by Armstrong in Calcutta by a letter addressed to Messrs. Kellner & Co. in Calcutta, and the same were forwarded at his request by rail to Lucknow. The application, as usual, set out the fact that the defendant was then residing at Lucknow, that the plaintiffs were in Calcutta, and that it would be difficult and expensive for the plaintiffs to procure the attendance of their witnesses in the Court, within the jurisdiction of which the defendant was then residing. The learned Judge of the Small Cause Court refused the application without recording his reasons in writing, but orally made the following statement: "That, since the case of *Wallis* v. *Taylor* (1), and having regard to the great caution enjoined on this Court by the High Court in the case of granting leave (not refusing it), I have thought it proper not to give leave to sue defendants long distances off for comparatively small sums of money."

The plaintiff thereupon moved the High Court and obtained an order that the records be sent for.

Mr. *Woodroffe* in support of the rule contended that the Judge of the Small Cause Court had in reality exercised no discretion at all, or, if he had, he had exercised it wrongfully; that the points that he had considered were those of distance and the smallness of the amount in suit, both of which were considerations foreign to the Small Cause Court Act; that he had misconstrued the case of *Wallis*

(1) I. L. R., 13 Calc., 37.

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v. *Taylor* (1) in considering that he was to take great caution in granting leave to sue, but not so in refusing leave; that in s. 18 of the Act the words "and leave of the Court has for reasons to be recorded in writing" ought to be construed as a statement whether or no the cause of action arose either wholly or in part within the jurisdiction; that it was never intended to give the Court power to refuse leave, if the cause of action has arisen either wholly or in part within the jurisdiction; that the words "giving jurisdiction" in the Charter were similar, omitting the words "for reasons to be recorded by him in writing." [TREVELYAN, J.—Is there any doubt that the High Court has discretionary powers in granting leave under the Charter?] The only cases on the subject are *Radha Bibee* v. *Mucksoodun Doss* (2) and *Hadjee Ismail Hadjee Hubbeeb* v. *Hadjee Mahomed Hadjee Joosub* (3); that, if there was a discretion, it was clear that it had not been exercised; and when discretion has not been exercised at all, that this Court would have power under s. 622 to supervise the order refusing leave—see *Shivu Nathaji* v. *Joma Kashinath* (4) as to the revisional powers of the High Court; that under the Specific Relief Act it was discretionary to grant relief, and that such discretion had under s. 22 of that Act to be exercised on legal principles; that as to the kind of discretion which ought to be used, the case of *Kalikissen Tagore* v. *Golam Ali* (5) was an example; that as a further example of the meaning of the word "discretion" as applied to a question whether an appeal lay as to costs—see *Jones* v. *Curling* (6) in which case *Cooper* v. *Whittingham* (7) is cited, which lays down that in such cases where there is no omission or neglect the Court has no discretion in disallowing costs; that, therefore, if a Judge finds that the cause of action has arisen either wholly or in part within the jurisdiction, he is bound to grant leave to sue, unless there are other reasons to the contrary, and, if so, such reasons must be recorded; that under the old Small Cause Court Act of 1864 a suitor had a right to have his case tried if the cause of action arose

(1) I. L. R., 13 Calc., 37.
(2) 21 W. R., 204.
(3) 13 B. L. R., 91 (101).
(4) I. L. R., 7 Bom., 341.
(5) I. L. R., 3 Calc., 13.
(6) L. R., 13 Q. B. D., 262.
(7) L. R., 15 Ch. D., 501.

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within the jurisdiction ; that, although the wording of the present Act was slightly different and somewhat against me if read according to the punctuation placed in the section, yet there is no good reason for supposing that the Legislature intended to deprive suitors of a right they had under the old Act ; that, however, the case of *Burdwan, Maharani of,* v. *Krishna Kamini Dasi* (1) lays down that Courts are not to rely on punctuation in construing Statutes. [TREVELYAN, J.—Where a Judge refuses on account of the smallness of amount you could file your suit in the High Court, but that could never have been intended, as the Small Cause Court was established for the purpose of the recovery of small debts; that I think shows that the amount in suit has nothing to do with the question ; what do you consider is the meaning of the word "cognizable" in s. 18 ?] Mr. Woodroffe contended that it meant any suit other than a suit mentioned in s. 19, and that the word had been discussed in *Wallis* v. *Taylor* (2) although with reference to another Act, and further submitted that the form in which the order passed under the rule should run would be to direct that the order refusing leave be rescinded and for the Court to pass an order admitting the suit.

No one appeared on the other side.

TREVELYAN, J.—In this case I am asked to exercise the power given to this Court by s. 622 of the Civil Procedure Code and to set aside an order made by Mr. *Millett*, the Chief Judge of the Calcutta Small Cause Court, refusing to permit the plaintiffs to institute this suit in the Calcutta Small Cause Court.

The suit which the plaintiffs sought to institute was for the purpose of recovering the sum of Rs. 23-7, the price of goods sold and delivered to the defendant in Calcutta. The defendant is residing at Lucknow. The goods were sold to the defendant in Calcutta, and were delivered to the East Indian Railway in Calcutta for transport to the defendant.

The 18th section of the Presidency Small Cause Court Act of 1882 provides that, subject to certain exceptions (which do not apply to this case), "the Small Cause Court shall have jurisdiction to try all suits of a civil nature, when the amount

(1) I. L. R., 14 Calc., 372 ; L. R., 14 I. A., 35.

(2) I. L. R., 13, Calc., 37.

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or value of the subject-matter does not exceed two thousand rupees; and the cause of action has arisen, either wholly or in part, within the local limits of the jurisdiction of the Small Cause Court, and the leave of the Court has, for reasons to be recorded by it in writing, been given before the institution of this suit."

Mr. *Woodroffe*, who appears for the plaintiffs, contends that this section gives no discretion to the Judge of the Small Cause Court, but I do not agree with this contention. The provision in this Act is similar to the provision in s. 12 of the High Court Charter, and the word "leave" in that section of the Charter has always been construed as giving a discretion to the Court. It is true that in very rare instances has the High Court, when leave to sue has been applied for, refused such leave; but although I know of no instance in my own experience, I believe that occasionally leave has been refused, and it has always been assumed that the High Court has this discretion. In the case of *Wallis* v. *Taylor* (1) Mr. Justice *Pigot* refers to the Small Cause Court having a discretion under s. 18. This case is, I think, an authority on this point.

The question here is, has Mr. *Millett* exercised his discretion, or has he not? In consequence of statements made by Mr. *Adkin* in the affidavit, which formed the grounds of this application, Mr. *Millett* has very properly sent up an explanation of what occurred. In that explanation he does not say expressly why in this particular case he refused leave to sue, but he denies the suggestion that he always refuses leave in cases under Rs. 100, and furthermore says that what he told Mr. *Adkin* was that, "since the case of *Wallis* v. *Taylor* (1), and having regard to the great caution enjoined on the Small Cause Court by the High Court in the case of granting leave (not of refusing it), he had thought it proper not to give leave to sue defendants long distances off for comparatively small sums of money." As I understand it, Mr. *Millett* applied to this case a rule which he seems to have framed from *Wallis* v. *Taylor*, *viz.*, that leave should not be given to sue defendants long distances off for

(1) I. L. R., 13 Calc., 37.

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comparatively small sums of money. It appears that Mr. *Millett* has not acted upon the rule suggested by Mr. *Adkin*, namely, never to give leave in cases under Rs. 100; but Mr. *Millett* himself shows that he has made a rule never to give leave to sue defendants long distances off for small sums of money.

I do not think that there is anything in the judgment in the case of *Wallis* v. *Taylor* to justify Mr. *Millett* in framing such a rule. All that Mr. Justice *Pigot* said was: "We think it desirable to add that the discretion of the Small Cause Courts in giving leave to sue under s. 18 of Act XV of 1882 is one that ought to be only very cautiously exercised in cases such as the one before us." These expressions suggest no such rule as that which Mr. *Millett* has framed for himself. All that Mr. Justice *Pigot* seems to have meant by those observations is to repeat what was said by Mr. Justice *Wilson* in his judgment in the same case, where he says: "I wish to add that, in my judgment, when an application is made for leave to sue a military officer or other person compelled by his duty to be in a distant place, the discretion entrusted to the Court ought to be exercised with great care and discrimination"(1). In the case of *Wallis* v. *Taylor* the defendant was an officer doing duty with his regiment at Quetta. I was one of the Judges who sat with Mr. Justice Pigot in the trial of that case, and I certainly understood his judgment to be simply repeating the warning which was given by Mr. Justice *Wilson*. If Mr. *Millett* had had the opportunity of seeing Mr. Justice *Wilson's* judgment he would probably have taken a different view of Mr. Justice *Pigot's* observations.

I think that where, in a case of this kind, discretion is given to a Court, it is necessary that the Court should look into the circumstances of each case and should not frame for itself any rules. If a hard rule is to be made, it is for the Legislature to make it and not for the Court. The fact that the Legislature has not

(1) The case of *Wallis* v. *Taylor* originally came before GARTH, C.J., and WILSON, J., who disagreed and no final opinion was given, the case being then referred to a Bench of three Judges by whom the case was eventually decided. The above quotation is from the recorded opinion of Wilson, J., when the case came before himself and the late Chief Justice.—*Ed.*

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made any rule shows that no general rule is to be made. The Court should look into each case by itself, take the circumstances of such case into consideration, and see that the section is not made a means of oppression.

The inappropriateness of the rule which Mr. *Millett* seems to have framed for himself is, I think, apparent. One of the objects of the existence of the Small Cause Court is to collect small debts for Calcutta tradesmen; yet according to Mr. *Millett's* rule the smallness of the debt is a reason for excluding the jurisdiction where the defendant lives afar off. Apart from the inconvenience which a tradesman must undergo in having to follow his debtor to a distant place, the costs which he must necessarily incur in doing so, and which are irrecoverable even in case of success, will frequently far exceed the amount of the debt. Thus there would be a denial of justice even in cases where the whole cause of action arose in Calcutta, and the defendant was at the time he purchased the goods residing in Calcutta.

I should have thought—I do not put it as a proposition of law, but as a principle of fairness and as a circumstance to be taken into consideration by a Judge in exercising his discretion—that where goods are ordered of a Calcutta tradesman it is more reasonable that he should be allowed the use of a Calcutta tribunal than that he should be sent at great expense and inconvenience in pursuit of his debtor. Comparatively speaking the inconvenience to the debtor is small, and though there may be some inconvenience to a few alleged debtors who dispute the claims against them, this inconvenience is of trifling importance when compared with the evil of closing the doors of the Small Cause Court to Calcutta tradesmen.

Before the passing of the present Act a tradesman who sought to recover a debt under Rs. 500, and whose debtor did not reside in Calcutta, could not proceed in the Small Cause Court, but if the cause of action or a part thereof arose in Calcutta, he might sue in the High Court. Between the passing of the Act of 1864 and the passing of the present Act, if the cause of action were in Calcutta, a creditor for over Rs. 500 and less than Rs. 1,000 could sue in the Small Cause Court; thus the

creditor for the lesser debt was compelled to come to the higher and more expensive tribunal (compare s. 28 of Act IX of 1850 and s. 2 of Act XXVI of 1864). For, amongst other purposes, that of remedying this hardship the new Act was passed; yet Mr. *Millett's* rule entirely negatives this remedial effect of the new Act.

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I do not think that in this case Mr. *Millett* has exercised any discretion at all. He has simply applied to this case the rule that I have referred to, and has not considered the circumstances of this case.

I must set aside his order refusing leave to sue.

Under the circumstances I think it better that I should also, under the powers given to me by s. 622 of the Civil Procedure Code, give leave to sue in the Small Cause Court. I accordingly give such leave.

T. A. P. *Order reversed.*

Before Mr. Justice Trevelyan.

KHAJAH ASSENOOLLAJOO *v.* SOLOMON AND ANOTHER.*

Security for Costs—Poverty—Speculative Suit.

1887
May 9.

The mere fact that a plaintiff is a poor man, and has parted with a portion of his interest in the subject-matter of the suit for the purpose of obtaining funds to carry on the suit, is no sufficient ground to ask that security for the costs of the suit may be required of him; it is otherwise where he is not the real litigant, but a mere puppet in the hands of others.

THIS was an application on notice made on behalf of Bibee Solomon for an order that the plaintiff be directed to give security for the payment of all costs incurred and to be incurred in the suit of *Khajah Assenoollajoo* v. *Bibee Solomon*, and that all proceedings should be stayed until such security be given.

The affidavit supporting the application alleged (*a*) that the plaintiff was a permanent resident of Cashmere, and was merely a temporary resident in Calcutta for the purpose of bringing this suit; (*b*) that the plaintiff did not carry on any business in British India nor was he possessed of any property, moveable or immoveable, in British India; (*c*) that the suit was a speculative one carried on for the benefit, amongst others, of Rohim Bux, Aga Hossein Ally, Aga Ekram Ally and Gobind

* Original Civil Suit No. 107 of 1886.