plaintiffs born after the institution of the suit are joint with the plaintiff in the family property. It does not follow from that, however, that the defendants can insist upon those sons being joined.

We are of opinion that the allegations introduced in the plaint by amendment are mere developments of the plaintiff's position and they do not introduce any new cause of action which can be defeated by applying the law of limitation. The amendments only develop the original cause of action.

We set aside the decree of the lower Court and remand the case for trial to a conclusion. Costs costs in the cause.

Attorneys for the plaintiff: *Messrs. Ardeshir, Hormusji, Dinsha & Co.*

Attorneys for the defendants: *Messrs. Wadia, Gandhi & Co.*

Decree set aside.

H. S. C.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

BHAGWANDAS PARASHRAM, A FIRM, PLAINTIFFS, *v.* BURJORJI RUTTONJI BOMONJI, DEFENDANT.*

1912. *April* 1.

Interrogatories—Admissibility of interrogatories—Inadmissibility of certain questions as interrogatories though admissible in cross-examination—Interrogatories obviously designed to assist in fishing up a case—Defence of wagering—Inadmissibility of interrogatories by the party raising defence of wagering as to the general business transactions of his opponent apart from the particular transactions in suit.

The mere fact that questions would be admissible in cross-examination of a witness does not make them good as interrogatories. Interrogatories must not

* Suit No. 272 of 1911.

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be exhibited unreasonably or vexatiously, nor be prolix, oppressive, unnecessary or scandalous. Nor should interrogatories be allowed which are sought to be administered obviously for the purpose of fishing out a case.

The Court will, in cases where the defence of wagering is set up, refuse to allow the party setting up this defence to interrogate his opponent generally as to his business transactions apart from the particular transactions in suit, on the ground that it is manifestly unfair to compel a man to disclose his general dealings on the chance that thereby his opponent may discover something that will support his case.

THE facts of this case are set forth in the judgment of the Court.

Robertson for the plaintiffs.

Jardine, with him *Davar*, for the defendant.

MACLEOD, J. :—The plaintiffs filed this suit against the defendant in April 1911 alleging that in June 1910 defendant requested them to act as his *pakka adatias* and that in consequence of such instructions they entered into contracts for the sale of large quantities of cotton and linseed which resulted in heavy losses. These they seek to recover from the defendant after giving him credit for a large sum which, it is alleged, he deposited with them as margin money.

The defendant pleads that he entered into cotton and linseed contracts with the plaintiffs as principals and that the common understanding between the parties was that no delivery was to be given or taken but that differences alone should be dealt in. He denies that the plaintiffs acted as his *pakka adatias*.

On the 19th January 1911 the defendant obtained leave to administer interrogatories to the plaintiffs. The affidavit of the managing clerk of the defendant's solicitors supporting the application states that in order to answer the questions the plaintiffs would have to refer to their books and if those questions were put to them in cross-examination a good deal of the Court's time would be wasted.

The following five interrogatories were administered in pursuance of the leave so obtained :—

1. What were the daily cash balances from 1st September 1910 to 1st October 1910 of the plaintiffs' firm as appearing in their daily cash book ?

2. What were the daily bank balances during the same period ?

3. (*a*) How many contracts did the plaintiffs' firm enter into for the sale and purchase of linseed in Samvat year 1964, Samvat year 1965, and Samvat year 1966, and what quantity was agreed to be sold or purchased in each case as per the said contracts ?

3. (*b*) Which of the said contracts were performed by you by actually weighing out and giving delivery and which by actually taking delivery on weighment ?

4. In all these years from 1964 to 1966 what was the amount of linseed for April-May delivery and what for Bhadarwa delivery ?

5. How many contracts for April and May delivery were performed by actual weighment of ready linseed and how many contracts for Bhadarwa delivery were so performed ?

The plaintiffs filed their answer on the 29th February 1912.

They objected to answering interrogatories 1 and 2 on the ground that they had no possible reference to the defences raised in the suit.

They objected to answering interrogatories 3, 4 and 5 on the following grounds, that they were administered solely with the object of fishing out a case for the defendant and getting information of the plaintiffs' general dealings and transactions and their general business, that they were irrelevant to the issues to be tried and, in any event, could only be asked in cross-examination, that as the defendant admitted that his application was made expressly for the purpose of saving the time of the Court at the hearing, the plaintiffs now knew what questions the defendant wished to ask, and would be ready with the answers from their books if the Judge at the hearing allowed the questions.

The defendant thereupon obtained a summons on the 13th March calling upon the plaintiffs to shew cause why they should not forthwith fully answer the interro-

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gatories on the ground that they were relevant and material to his defence, and were neither fishing nor made to annoy the plaintiffs.

The first issue on these pleadings will be whether the plaintiffs acted as *pakka adatias* for the defendant. A *pakka adatia* has been held by this Court to be a person who enters into a contract of employment with his constituent for reward. The *pakka adatia* obtains instructions from his client what contracts to enter into, but generally speaking the constituent is not concerned with the method in which his instructions are carried out. It would appear, however, that in the Bombay Presidency it is open to the constituent to prove that the contracts made by the *pakka adatia* were wagering contracts. So the issue of wager will arise whether the plaintiffs contracted direct with the defendant or acted as his *pakka adatias*.

According to the decisions of this Court a party relying on the defence of wagering must prove that, at the time the contract was entered into, it was the common intention of both parties neither to give nor to receive delivery, but merely to pay or to receive differences according to the market rate at the due date. The Court in determining the question what was the common intention of the parties at the time of the contract, can look to the surrounding circumstances, as it hardly ever occurs that there is direct evidence of a common intention to wager. Each party hopes to win, and it is only when the due date has arrived and it is apparent which party has lost, that the loser sets up the defence of wagering. He is always ready to swear he was wagering: he has to prove that his opponent was likewise wagering.

Now 'surrounding circumstances' is a very loose expression and it is quite impossible to foresee what questions will be allowed by the Judge at the hearing to be put to the plaintiffs in cross-examination. The

party seeking discovery by interrogatories is entitled to put questions for the purpose of extracting from his opponent information as to the facts material to the questions between them, which he has to prove on any issue raised between them, or for the purpose of securing admissions as to such facts in order that expense and delay may be saved, or to destroy his opponent's case or to support his own case.

The mere fact that the questions would be admissible in cross-examination of a witness does not make them good as interrogatories. Interrogatories must not be exhibited unreasonably or vexatiously, nor be prolix, oppressive, unnecessary or scandalous. Nor should interrogatories be allowed which are sought to be administered obviously for the purpose of fishing out a case.

It may be difficult to decide where the line is to be drawn between interrogatories which should be allowed to be administered, and those which are prolix, vexatious or fishing, but in cases of doubt it is advisable to leave the questions to be put at the hearing. I have hitherto, in cases where the defence of wagering has been set up, refused to allow the party setting up this defence to interrogate his opponent generally as to his business transactions apart from the particular transactions in suit, on the ground that it is manifestly unfair to compel a man to disclose his general dealings on the chance that thereby his opponent may discover something which will support his case, and I am not disposed to decide differently on this summons.

The plaintiffs are asked to disclose their daily cash balances and daily bank balances from the 1st September 1910 till the 1st October 1910, to disclose the whole of their contracts for the sale and purchase of linseed during these specified years with the particulars of each contract, the quantity agreed to be sold or purchased in each contract and how each contract was performed.

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Further, they are asked what was the total amount of their linseed contracts for April-May and Bhadarwa deliveries and how many contracts were performed by actual weighment.

I presume that the defendant hopes to discover that the plaintiffs' cash and bank balances in September to October 1910 were so small, and that the contracts for linseed during the years 1965 to 1966 which were performed by actual weighment, if any, were so few, that the Judge at the hearing will find those are surrounding circumstances which prove the intention of the plaintiffs in the contracts in question was merely to pay or receive differences.

In the *General Stock Exchange* v. *Bethell*[1], the plaintiffs sued on the balance of account on stock exchange transactions. The defendant pleaded that the plaintiffs had not bought and sold stocks as authorized by him and sought to obtain particulars of the dates of the purchases and sales and the names of the persons to or from whom the shares had been sold or bought and of the amounts paid by the plaintiffs on his behalf and the mode of payment of such money.

The Judge in Chambers refused to order the plaintiffs to give further and better answers to interrogatories administered to them. In appeal Manisty J. said that the appeal must be dismissed as the order asked for by the defendant was a mere attempt to get hold of some technical defence to the action. Mathew J., concurring, said that the only effect of allowing the appeal would be to delay the trial and to make an order oppressive to the plaintiffs.

In *Petre* v. *Sutherland*[2], the plaintiff, a stock-broker, sued the defendant, his client, for the balance of an account. The defendant, who had had dealings with

(1) (1886) 2 T. L. R. 683. (2) (1887) 3 T. L. R. 275.

the plaintiff for fifteen years, claimed to have the accounts re-opened for the whole of that period, and with that view to be allowed to examine the plaintiff's books for that period. It was held by the Court of Appeal that the discovery would be useless, unnecessary and oppressive. The defendant was dealing for differences and had taken moneys, but when he was sued for losses he sought to set up a technical defence and to obtain that discovery to assist him. Bowen L. J. observed that the power of discovery was too often abused and its exercise was a matter of discretion. On the other hand in the *The Universal Stock Exchange Company* v. *Crowther*[1], the defendant who was disputing a claim by his stock-brokers on the balance of an account for dealing in shares, was allowed to interrogate the plaintiffs as to whether they had, if they acted as brokers, at any time in their possession, or were the owners of, and were entitled to, the various stocks which they claimed to have bought on behalf of the defendant. In the account the same shares appeared to have been bought on one side and sold on the other, and for that reason the interrogatory was allowed.

In this case, however, the interrogatories relate not to the particular transactions on which the plaintiffs sue but to their general dealings and the decision in *Petre* v. *Sutherland*[2] seems directly in point.

In my opinion, therefore, the summons should be dismissed. Costs reserved to the hearing.*

Attorneys for the plaintiffs : *Messrs. Tyebji & Co.*

Attorneys for the defendant : *Messrs. Mulla & Mulla.*

H. S. C.

[1] (1892) 8 T. L. R. 650. [2] (1887) 3 T. L. R. 275.

* THE defendant appealed.

On the 20th August 1912, the Appeal Court (Scott, C. J., and Chandavarkar, J.) confirmed the order with costs. [Ed.]