Appellate Jurisdiction. (*a*)

Regular Appeal No. 116 *of* 1869.

PATTARAVY MUDALI.....*Appellant.*

AUDIMULA MUDALI and 3 others.....*Respondents.*

The plaintiff brought a suit in 1860 against the defendants to recover his share in the joint family property. The present claim, which was for a share in the rents of certain Inam lands, also joint family property, was not included in the suit of 1860. At the date of the former suit, the land in respect to which the present suit was brought was subject to the provisions of Regulation IV of 1831, and the Civil Courts had no jurisdiction to try the suit in respect to such land without the permission of the Government. It did not appear that the plaintiff had applied to the Government for permission to sue.

Held:—That the plaintiff was not precluded by Section 7 of the Civil Procedure Code from maintaining the present suit.

Meaning of the words 'cause of action' discussed.

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THIS was a Regular Appeal against the decision of E. B. Foord, the Civil Judge of Chingleput, in Original Suit No. 4 of 1867.

This was a suit to recover a moiety of the landlord's share of certain Inam lands on the ground that those lands were joint family property. It was admitted in the plaint that when plaintiff sued the present defendants in Suit No. 15 of 1860, in the late Munsif Sadr Amin's Court, for a share in the joint property of the family, the present claim was excluded.

The defendants denied the plaintiff's claim, and pleaded that the suit was barred by Sections 7 and 8 of the Code of Civil Procedure.

The judgment of the Civil Judge was as follows:—

I think that this suit should be disposed of at the first hearing, as being barred by Section 7 of the Code of Civil Procedure, in which it is laid down that "every suit shall include the whole of the claim arising out of the cause of action," and that "if a plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained."

The plaintiff's pleader admits that when the above suit was brought, the present cause of action had accrued to plaintiff. He was therefore bound to have included this claim in that suit, and as he omitted to do so, I am of opinion

(*a*) Present: Holloway and Innes, JJ.

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that this suit is clearly barred by Section 7 of the Civil Procedure Code. Nothing therefore remains but to dismiss this suit with costs.

The plaintiff appealed to the High Court.

Sanjiva Row, for the appellant, the plaintiff.

Rama Row, for the 2nd, 3rd and 4th respondents, the 2nd, 3rd and 4th defendants.

The Court delivered the following judgments:—

HOLLOWAY, J.—The suit was dismissed under Section 7 of the Civil Procedure Code, because the matter of it was part of a claim arising out of a cause of action on which the plaintiff had already sued and recovered. That cause was his legal relation to the defendant as member of an undivided family, and his right to the property at present claimed sprang from that relation just as much as his right to that claimed in the former suit. There can be no doubt, therefore, that the present suit is barred by the provision, unless the fact that the nature of the property which rendered the permission of the Government necessary for the maintenance of his suit alters the case. According to some English dicta, without that permission he had no cause of action. This however is not scientifically correct. There are many pieces of evidence and other things even more remote which are essential to the successful maintenance of an action which are no part of its cause. The action is neither an independent right nor an excresence from the right, but the right itself in its quality of judicial enforceability. The mistaking of this point has led to most pernicious practical consequences, to great errors of view upon the prescription of actions, and very recently to the very great difficulties felt by the Court of Queen's Bench in determining the effect of the statute of indemnity in Governor Eyre's case. The judgment of the Court, different from their original impression, was not put upon the sound principle that the right in action can have no existence after the right has been validly restricted so as to be non-existent as to its actionable side in the case of the infraction complained of, but upon the distinction between actions of a local and so-called ambulatory character. Both in the argument and the judgment rights of action were treated as per-

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fectly independent rights. The error, now entertained by scarcely any jurist of distinction, that the basis of the right of action is the injury, disfigures Mr. Austin's observations upon this subject (Volume I, 485, 2nd Ed.) It is no reproach to this distinguished writer that his views founded on the jurisprudence of 40 years ago are erroneous, but it is a reproach to England that these views are still published as the last and best expression of scientific opinion upon the matters to which they refer.

The question here is whether the matter of this claim requiring permission to make it available justifies our departing from the rule. That the right of action existed and always existed is in my view unquestionable. It could not however have been prosecuted with success without a permission which was never applied for.

There is a case at III, H. C. 376 in which it was decided that where there were parcels of property within the jurisdictions of different Munsifs, all recoverable in the same right, the plaintiff was not barred because he had sued before one Munsif and recovered a part. Without saying that I should have arrived at that decision, it seems to me precisely to meet the present case. There, as here, to enable the plaintiff to comply with the provision of the Civil Procedure Code, something more than the bare existence of the cause of action was required, and it may as well be said here as there that he was not bound to take such a step unless he chose. In deference to that decision, I therefore think that in this case the suit should be restored to the file. The costs of this appeal should be dealt with in the final decree.

INNES, J.—There had been a suit between the same parties (15 of 1860) for the recovery of the plaintiff's share in the joint family property of the plaintiff and defendants. The present claim, which is for a share in the rents and emoluments of certain Inam lands (also joint family property), was then not included in the suit, and the question is whether under Section 7 of the Civil Procedure Code the plaintiff is shut out from now putting it forward. Section 7 is (so far as it is applicable) as follows :—"Every suit shall "include the whole of the claim arising out of the cause of

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"action." "If a plaintiff relinquish or omit to sue for any "portion of his claim, a suit for the portion so relinquished "or omitted shall not afterwards be entertained."

At the date of the former suit the land in respect to which the present suit is brought was subject to the provisions of Act IV of 1831, which deprived the Courts of the jurisdiction they had hitherto had in claims for such lands or their emoluments, and vested it solely in the Governor in Council, who could however give authority to the Courts by a writing signed by the Chief Secretary to entertain any particular suit. It is possible therefore that if the plaintiff had applied to the Governor in Council, permission would have been accorded to the Court to entertain the claim. Experience also in similar cases renders it a matter of little doubt that such permission would sooner or later have been accorded. Was it then obligatory on plaintiff to use diligence to obtain this permission? I am of opinion that it was not. The plaintiff had a right to bring his Suit 15 of 1860 on the arising of the cause of action, and if at the time of a cause of action so arising to a plaintiff, or in the interval between that and a subsequent date, any part of his claims is not cognizable by the Court in which the remainder of it is cognizable, it cannot, I think, be intended that he must postpone his suit for the cognizable portion of his claim until the Court acquires jurisdiction over the portion at present uncognizable or be barred of all future remedy for the recovery of that portion. The Governor in Council was not bound to give the Courts jurisdiction on an application of a party interested and might possibly refuse it; or might give it after such a lapse of time as would be a bar to his proceeding with the rest of his claim. A reasonable construction must be put upon Section 7, and I think that the words "whole" claim must be understood with the qualification "in so far as it is cognizable by the Court in which the suit can be lawfully entertained."

I am therefore of opinion that Section 7 of the Civil Procedure Code is no bar to this suit, and concur therefore in reversing the decree of the Civil Judge and remanding the suit for disposal on the merits. The costs of this appeal to be costs in the cause.

Appeal allowed.

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Note by Mr. Justice Holloway.

Lens quoted Forster Preuss Privat-recht I, 227, note 4 (2nd Ed. 1869) says

"The right of suit is just as little an independent right "as an annexum or appendage to it. "The right does not "through the infraction become converted into a right of "action; the action thus is no new right which is generated "by the lesion; finally, it is also not the right itself in so far as "to become perfectly available and complete, it must put "itself in motion for its establishment. All these forms of "expression of our Civilians do not hit the mark and have their "root partly in the inordinate thrusting upon the field of Law "of those views of an organism so dear to the historical school, "and partly in the stand-point of the much despised Law of "nature, despite of that school, not overcome. The actio is "without doubt the right itself, but only in so far as it re-acts "with elastic recoil against a foreign and accidental invasion. "The right of action is the legal potentiality whereby the "person entitled is able to invoke the established organs of "legal protection when he is accidentally provoked thereto "by the lesion of another. It is the power of the right "enabling it to force the injurer, by means of the organs of the "collective body, to a recognition of itself." This criticism puts by implication all the views now entertained and is itself a masterly exposition.

Arndts who had in his former editions treated the action "as an appendage of the right" has in his 5th and 6th Editions in deference to the criticisms of Unger Böcking, Demelius and Lens withdrawn that expression and now § 96 defines the action in its material (other than processual) sense "a power indwelling in the right of asserting itself against the wills of others striving against it."

Unger, after shortly refuting the antiquated opinion that actions formed a distinct class of rights, says II, page 353:—"The right of action as the legal potentiality of "the right making itself available by means of a complaint "is not a self-subsisting right distinct from the actionable "right, nor is it .....an external appendage a special "addition to the right: the complaint is rather identical "with the right itself; the actio is the right itself as judi-

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"cially pursuable, the right as right of battle (the right in "sago in distinction from the right in togâ) a part essen- "tially appertaining to the contents of the right, not an "independent right existing beside it, or a mere addition "entering into connection with it."

Again, as to the cause of action he says, 114. "The ground of complaint in the material sense (causa actionis, causa pretendi) is the legal relation from which the complaint emanates, the right of which it is an essential part, the right which in it brings itself to recognition and efficacy. In so far as the right itself springs from certain matters of fact, these *right-engendering* matters of fact are the remoter ground of origin of the complaint, the cause causae actionis (causa remota actionis) while the right itself forms its closest ground (causa proxima actionis 627, D. de. e. r. i. 44. 2); in this sense it is customary to distinguish the material ground of complaint into the immediate (based on the right) and the mediate (based on fact.")

"Wrongly does Bekker regard the injury as the causa proxima actionis as the ground of plaint, and in this manner confuses the ground and occasion of the plaint, against which Puchta had already warned us." Note 1 §. 114.

It would be easy to add numerous authorities not in all points accordant with themselves, but all accordant in rejecting the old doctrine as to the action. No part of the scientific theory of Law has been subjected to more searching critism and even reconstruction than this. Induced by Savigny's great work and a celebrated work of Kierulff, criticism has carefully tested all their results, and it is no disrespect to Savigny to say that even some of his views must be abandoned.

It was Mr. Austin's misfortune that he wrote in a time at which the science of Law was indeed reviving, but before its progress during the last 40 years which is greater than any made since the great Frenchmen of the 16th century. English books still seem to know only the very respectable but quite subordinate names of Pothier and Domat.

Cajas and Doneau and many other stars bright but paled by these.