

ORIGINAL CIVIL.

—
Before Mr. Justice Wilson.

1878
 Jan'y. 30.

BOLYE CHUND SING *v.* MOULARD.

Practice—Amendment of Issues at Hearing—Tender—Cheque in payment of Debt—Costs.

Although under certain circumstances a Judge at a trial may allow amendments or raise issues other than those settled, yet, when a Judge at the settlement of issues has refused to raise a certain issue, that question ought not to be re-opened at the trial, and the Judge at the trial ought not to modify the issues so as to re-open any question which the Judge settling the issues has decided.

The landlord of a house through his agent sent in rent-bills to his lessee. The lessee gave the agent a cheque payable to her attorney for the amount demanded. The attorney realized the amount of the cheque and gave the money to the agent, who tendered it to the landlord's attorney, who refused to accept, and the money was returned to the lessee's attorney.

Held, in a suit for the rent, that, under the circumstances, the tender amounted to payment.

Held further, that although as a general rule the amount of a tender not accepted ought to be paid into Court in order to entitle the defendant to costs, yet, that as the tender in this case amounted to payment, the defendant was entitled to have the suit dismissed with costs.

THIS was a suit to recover the sum of Rs. 1,813-5-4 for rent of a certain house, No. 4, Park Street, Calcutta. It appeared that, on the 20th of September 1877, the defendant, through her substituted attorney, a Mr. Hanhart, executed a lease of the house, agreeing to pay a monthly rent of Rs. 400, and that she was at the date of the institution of the suit living in the house. The lease was registered on the 27th December 1877. On the 8th October 1877, the defendant paid one month's rent to the plaintiff through Mr. Hanhart, and the plaintiff was sued for rent from that date. The defendant, by her written statement, contended that there had been a sufficient tender of the amount due, under the following circumstances:—She stated that, in March 1878, bills for rent were presented to her by a Mr. Baxter,

acting for, and as the agent of, the plaintiff; that she gave a cheque in favour of Mr. Hanhart for the amount demanded, namely, Rs. 1,813-5-4, to Mr. Baxter, and obtained a receipt from him; that Mr. Baxter took the cheque to Mr. Hanhart, who cashed it and handed the amount to Mr. Baxter, and requested him to get the rent-bills receipted and returned to him; but that the plaintiff's solicitor, to whom the money was taken, refused to accept it, and the money was then returned to Mr. Hanhart. The following issues were raised by Mr. Justice Pontifex:— (1) Was the money tendered in the manner stated in the defendant's written statement; (2) Did anything which subsequently took place between the plaintiff and defendant in any way affect that tender. The plaintiff wished to raise an issue as to whether the tender was good in law, but his Lordship decided that point in the defendant's favour, and refused to allow the issue to be raised.

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Mr. *Phillips* and Mr. *Evans* for the plaintiff.

Mr. *Jackson* and Mr. *Apcar* for the defendant.

WILSON, J.—In deciding this case it seems to me important to see what questions are open and what not. With regard to a large part of the case there is no dispute. The plaint on one side, and the written statement on the other, concur in regard to a large portion of the matter out of which the suit arises. The written statement raises specific ground of defence. It alleges that money for the rent was tendered under certain circumstances stated in the written statement, and sets this out as a defence to the action. The matter came before Mr. Justice Pontifex for settlement of issues, and he raised certain specific issues, and decided certain other points.

I do not say that, under certain circumstances, the Judge at the trial is precluded from allowing amendments, or from raising issues other than those settled. But what the Judge has decided at the settlement of issues by refusing to raise an issue, is a question which ought not to be re-opened by the Judge at the trial, and the Judge at the trial ought not to modify the

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issues so as to re-open any questions which the Judge settling the issues has decided. As it is the opinion of the learned Judge who settled the issues that the statements if true in fact are ground for a defence in law, I am tied down to this one issue,—are the statements in the written statement true or not?

Another issue was raised as to what took place subsequently; but no evidence was tendered on it. The only question is, whether the money was tendered in the manner stated in the written statement? I think it was. The first point raised was as to Mr. Baxter's authority. His evidence is really what must govern the matter. His evidence is that, being told about the difficulty regarding the rent, and not knowing the actual nature of the difficulty between Mr. Hanhart and the defendant, he undertook to settle the matter and received the rent. It would be contrary to all common sense to say, that he was not the agent of the plaintiff for the purpose of receiving the rent. He first goes to Mr. Hanhart, then goes to the defendant and applies for the rent, and the next day goes to the Attorney's office by appointment, and there gets a cheque payable to Mr. Hanhart. Mr. Phillips was right in saying that a person, who is employed to receive money, is not bound to receive a cheque, and, therefore, if Mr. Baxter had brought back the cheque to the plaintiff, I think the plaintiff would have been justified in declining to take it. I do not think Mr. Baxter was bound to put himself to the trouble when he asked for the rent, and got a cheque to get the money. But he chose to put himself to the trouble. He took the cheque to Mr. Hanhart, got the money the amount of the cheque, and took the money and went away. He was authorized to receive the rent. He did in fact receive money under the circumstances stated in the defendant's written statement. But I am not sure that it is not necessary to look a step further. The question of costs arises. Looking at the pleadings and the issues as settled, I am not bound to go out of my way as to the costs. Each side seems to be playing a sort of a game of chess with a delicacy and finesse which one would hardly expect in a business transaction like this. I am not inclined to go out of my way the least in the matter of

costs. The costs must follow the strict legal result of the case. Having found the only issue I am bound to try in favor of the defendant, it is necessary to look to the nature of the tender. If it were only a mere tender, Mr. Phillips would be right in saying that, if the tender were not followed by payment into Court, the defendant would not be entitled to costs, and if I thought that, I would not be inclined to give the defendants costs. But I think the tender was made in such a way as to amount to payment. Mr. Baxter was empowered to receive the money. The defendant gave a cheque on another person, that is, a cheque on her banker to go and receive the money, and a receipt was given by Mr. Baxter. It seems to me as much a payment as if I gave a creditor of mine a cheque on my banker. It is a payment when he takes it and cashes it. Or, if I say, I am short of money, my friend, Mr. so and so, will give you the money, and I give him a letter. My creditor is not bound to take that trouble, but if he does and gets the money, it is a payment. Mr. Baxter having gone and got money in the way stated, the money was clearly on behalf of the defendant, and I think it was received in such a way as to amount to a payment. Mr. Justice Pontifex has decided that these allegations amount to a defence, and I think they amount to a defence of payment. I think the tender was made under circumstances amounting to payment. The defendant is entitled to have the suit dismissed with costs on scale No. 2.

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Attorney for the plaintiff: Baboo *Promothonath Bose*.

Attorney for the defendant: Mr. *Carruthers*.
